

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7633/21

(1)	<u>REPORTABLE</u> YES/NO
(2)	<u>OF INTEREST TO THE JUDGES</u> : YES/NO
(3)	<u>REVISED</u> .
DATE: 11/03/21 SIGNATURE: [REDACTED]	

In the matter between:

FLORANCE MATSHELANA SELOANA

Applicant

And

THE GOVERNMENT ADMINISTRATION AGENCY

First Respondent

GOVERNMENT EMPLOYEE'S PENSION FUND

Second Respondent

MINISTER OF FINANCE

Third Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Fourth Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 06 March 2024.

JUDGMENT

Makoti AJ

Introduction

- [1] The applicant is **Ms Florence Matshelana Seloana** (Ms Seloana), who was a participant in a polygamous marriage with the late **Mr Malesela Frans Seloana** (Malesela or the deceased). She comes to court as a widow to challenge the validity of certain pension fund rules. The basis for the challenge is that rule 14.6 of the Rules of the Government Employees Pension Fund (the rules) unfairly discriminates against women who are in polygamous marriages. The other spouse who, together with Ms Seloana, survived the deceased was the late **Ms Johanna Manyatja Seloana** (Johanna).
- [2] The application is opposed by both the **Government Pensions Administration Agency** (GPAA) and the **Government Employees Pension Fund** (GEPF), the first and second respondents in this application. The other respondents including the Minister of Finance and the Minister of Justice and Correctional Services are not opposing the application. For purposes of convenience, I shall refer to GPAA and GEPF collectively as the respondents.

The issues for consideration

- [3] There are a number of issues for consideration, central to which lies the question whether rule 14.6.2 of the rules discriminates against women in polygamous marriages. This involves two considerations, the first being whether the rules cause different treatment for women who are in polygamy as opposed to those who are in

a monogamous marriage of two spouses. The second consideration is whether, if the rules do discriminate on the basis suggested, they are invalid and should be struck down.

- [4] Prior to dealing with the question above I need to describe the nature of the right which is the subject of this litigation, and engage with the question of this court's jurisdiction to adjudicate this application. Then, there are ancillary orders that the applicant has prayed for, but which can only be entertained if the court has jurisdiction. The last issue is a consideration of costs.

Background facts

- [5] The record shows that Malesela died on 01 December 2003. In his working years Malesela was employed in the public service, becoming a member of the GEPP, as a police officer. He served in the force from 10 June 1955 until he retired on 31 March 1991. Upon his retirement Malesela received his pension until the date of his passing on 01 December 2003.
- [6] The customary marriage between Malesela and Ms Seloana was concluded on 23 May 1987. By then he was already married, also in terms of customary law, to Johanna. The validity of the marriage between Ms Seloana and Malesela is not at issue. The polygamous marriage lasted until the deceased met his death.
- [7] When Malesela passed on Ms Seloana and Johanna became entitled to be paid a pension from the GEPP, in equal amounts. The determination of what each was entitled to was made in accordance with the impugned rule 14.6 of the rules. Thus, both received a half portion of a spousal pension, based on fifty percent (50%) of the deceased's pension during his life.

- [8] In the course of time Johanna also passed on, on 30 September 2017, bringing an end to the payment of her portion of the spousal pension. This was about fourteen years after the deceased's death. Thereafter Ms Seloana continued receiving her spousal pension on the basis of the calculation mentioned earlier, and still does. There is no controversy with regard to that and the parties are *ad idem* that she continues to receive her determined spousal pension.
- [9] Having become the remaining surviving spouse, Ms Seloana requested the GPAA and GEPPF to recalculate her spousal pension with the view that she would start receiving the full benefit. It is common cause that her request was declined. The explanation that was given to her was that it was not possible to recalculate the benefit. She is aggrieved by the refusal to recalculate her spousal pension and the explanation provided. This application was instituted to challenge the rule on which the decision taken by the GPAA and the GEPPF was based, the substratum of which challenge is that the rule unlawfully discriminates against women in polygamous marriages.

The nature of the pension benefit

- [10] The benefits under the pension scheme in order to accrue to a surviving spouse are triggered only by the death of a member, which in this case is the deceased Mr Seloana. A surviving spouse benefits from 50% of the annuity that was paid to the member. The benefit paid to a surviving spouse upon the death of a pensioner does not devolve and may not be passed from the surviving spouse to further beneficiaries. The benefit terminates upon the death of a surviving spouse.
- [11] Surviving spouses are dependents¹ who were involved with a deceased pensioner in a polygamous union receive, and who receive equal divisions from 50% of the annuity which was payable to that pensioner. There is no controversy that has been

¹ Section 1 of the Government Employees Pensions Fund Law No. 21 of 1996 (Pension Law).

raised in this application concerning the equal division, that is, when vesting occurs at the date of the death of the pensioner.

- [12] Ms Seloane and Johanna, as dependents, were paid benefits as prescribed by the Board² in terms of the rule. The impugned rule 14.6.2 was prescribed by the Board in accordance with the empowering provisions of our pension fund laws. This is common cause.
- [13] There seems to be common acceptance that the equal division, which occurs at the death of a pensioner, serves a legitimate purpose. The purpose is to ensure that people married to the same person are benefitted equally out of his or her pension. In other words, the vesting of a right to the pension benefit at the time of the death of the deceased. The date on which the beneficiaries of the deceased, as well as their rights, are determined then. Before then, none of the potential beneficiaries of the deceased acquire any right, including the right to pension benefits.³ I now turn to consider the issues in dispute.

Whether the court has jurisdiction to adjudicate this application

- [14] Both GPAA and the GEPF contend that this court is the incorrect forum to adjudicate the application. They base their contention on the concession by Ms Seloana that the application is governed by the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000, hereafter PEPUDA). The contention is that the principle of subsidiarity does not permit that an application of this nature be based directly on the provisions of the Constitution.

² Section 29 of the Pension Law.

³ Van der Merwe and Rowland *Erfreg* 12.

- [15] These respondents did not upfront raise an objection to the high court's jurisdiction. They took the point in their heads of argument and, despite the passage of time since the exchange of the affidavits *inter partes*, they did not attempt to file a further affidavit to bring the point to the fore. As this was raised in heads of argument, it is difficult for me to deny Ms Seloana an opportunity to be heard by dismissing the application when the respondents have not afforded her the opportunity to address the question in an affidavit. This is an ambush which should not be permitted.⁴ I do not stop here but proceed to deal with the substance of the jurisdictional challenge.
- [16] It cannot be disputed that section 8 of PEPUDA prohibits unfair gender discrimination and on the grounds listed in it. The specific provisions of sub-paragraph (g) deal with prevention of unfair discrimination on gender basis, including by:
- “... limiting women's access to social services or benefits, such as health, education and social security,” (Emphasis added)
- [17] The Applicant engages the jurisdiction for this Court from the provisions of section 172(1)(a) of the Constitution, which enjoins the Court to declare any law or conduct that is inconsistent with it to be invalid to the extent of the inconsistency. It is the case for both the GPAA and GEPP that because this application should have been lodged at the Equality Court, sitting in the High Court or Magistrates Court, as it is about to the alleged denial or limitation of social security benefits to Ms Seloana.
- [18] In bolstering their opposition grounds, the respondents referred to a specific paragraph of the founding affidavit which reads as follows:

⁴ S v Basson 2007 (3) SA 528 (CC).

“... it must be shown that the law in question serves a constitutionally acceptable purpose, and that there is sufficient proportionality between the harm done by the law and the benefits it is designed to achieve.”

- [19] The GPAA and GEPP did not raise the issue of jurisdiction in their answering affidavit and merely noted the allegation in the founding affidavit which alleged the jurisdiction of the Court. When responding to the allegation of jurisdiction the respondents merely said: “*The First and Second Respondent notes the contents of these paragraphs.*” The constitutional provision which is relied on by Ms Seloana, section 172(1)(a), reads as follows:

“When deciding a constitutional matter within its power, a court -

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;”

- [20] It is important that the Constitution uses the phrase ‘*a court*’ - which must be interpreted as including any court which is empowered to determine the issue. I would assume without making a finding that a court includes the Equality Court when sitting as a High Court. I am not oblivious of the fact that the Equality Court is a creature of statute and can exercise only the powers that are conferred by an empowering provision. I will elaborate on this later.

- [21] The principle of subsidiarity has been part of our law for some time now and has been discussed in a number of authorities. In *Solidariteit v Minister of Basic Education*⁵ the court dealt with a claim of unfair discrimination against a state bursary scheme which was incorrectly brought and defended under the Constitution. Despite this development, our courts have routinely overlooked the principle, much to the displeasure of the Constitutional Court. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another*⁶ that court

⁵ *Solidariteit v Minister of Basic Education* Case No. 58189/2015 High Court (Gd), 8 November 2017.

⁶ 2016 (2) SA 1 (CC) paras 51 – 52.

rejected a challenge on appeal on the basis that the case was not instituted in the High Court sitting as an Equality Court.

- [22] It is so that PEPUDA empowers the Equality Court to issue declaratory orders, to declare conduct to be discriminatory and to order corrective steps. Then, section 172(2)(a) of the Constitution provides that the Supreme Court of Appeal, the High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- [23] The Equality Court in *Dean of the North West University v Masisi*⁷ (*Masisi*) had struck down the provisions of certain legislative or policy instruments of the university. On appeal to the SCA the Equality Court judgment was overturned on a different basis and without the appeal court answering the question whether the Equality Court could declare legislative prescripts constitutionally invalid.
- [24] Before *Masisi* the SCA had dealt with the jurisdiction of the Equality Court in *Manong*⁸ where it was explained that the latter court is a special court - a creature of statute. It was held that the Equality Court is a separate and distinct court with powers specified in its empowering statute. That is not a High Court with all its trappings and powers. High Courts have inherent powers to protect and regulate their own process, while Equality Courts do not, so it was expounded by the SCA. The Court also said that:
- “[53] It is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court

⁷ *Dean of the Law Faculty of the University of North West and Others v Masisi* 2014 (6) SA 61 (SCA).

⁸ *Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport and others* [2009] 3 All SA 528 (SCA) at para 60.

to seek speedy redress against unfair discrimination, through less formal procedures.

And

[65] High courts have inherent power to protect and regulate their own process. Equality courts do not. The provisions of the Supreme Court Act and the Uniform Rules do not provide for this inherent power and can therefore not be sourced through the Equality Act. The Equality Court has only those powers and functions set out in the Equality Act."

[25] Recently, in *Qwelane*,⁹ when attacking the constitutional validity of the Equality Act, the applicants took that battle to the High Court and it saw no difficulty in entertaining the application. This was despite the fact that an equality case had been lodged against the applicants. The Constitutional Court took no issue with the fact that the constitutional attack of the legislation was taken to the High Court and not the Equality Court, perhaps because *Qwelani* had not raised an issue of discrimination.

[26] What I take out of this is that the Equality Court does not have jurisdiction to strike out legislation on the basis of constitutional invalidity. The Act which created it has not given it such powers and, as a result, it is not allowed to determine the constitutional validity of any legislative instrument, including the rules which have been published in terms of legislation regulating pensions in the public service.¹⁰ Section 1 of the statute states that the law "... includes the rules" and, accordingly, striking out the rules would impact the statute.

[27] I am not oblivious of the fact that where a court has jurisdiction to deal with one cause of action, including as assigned in terms of statute, it shall also have the capacity to adjudicate any ancillary issue that may arise out of the same case. This accords with the provisions of the Superior Courts Act,¹¹ which, based on the authority in *Manong*

⁹ *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC).

¹⁰ Act No. 21 of 1996.

¹¹ Act No. 10 of 2013.

does not apply to the Equality Court. In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another*¹² the court said the following:

"[112] The denouement of the above is that the hate speech provisions of the Equality Act are clearly designed to give scope to section 16 of the Constitution, which at section 16(2)(c) carves out hate speech from constitutional protection. In this regard, this fits within the second line of cases identified above, where the legislation attempts to codify a right in the Bill of Rights. Thus, the principle of subsidiarity must apply so that, unless there is a direct frontal challenge to the hate speech provision of the Equality Act (section 10(1)), a court must adjudicate the dispute with regard to that provision, and not with direct reliance on section 16(2) of the Constitution." (Emphasis added)

[28] The use of the word *unless* signifies that a departure from the norm of subsidiarity could be allowed in appropriate circumstance. Not ignorance of the subsidiarity principle, but a departure when the peculiar circumstances of the case so warrant. I also understand this authority to imply that where there is a frontal attack on the provisions of the law, including the Equality Act, a High Court may be approached to adjudicate the case.

[29] I am of the view that this application involves more than just the question unfair discrimination, but an attack of legislation which the high court can adjudicate. On that basis and in view that there was no proper challenge raised in *limine* by the respondents, and in line with the authorities that I have traversed above, the technical point is dismissed.

¹² 2022 (4) SA 1 (CC).

Whether the impugned rule is discriminatory

- [30] I risk repetition by mentioning that the rule is said to be discriminatory as it breeds fertile ground for different treatment as between women who are in polygamous marriages and those who are not. The impugned rule 14.6.2 reads thus:

"If a pensioner dies and he is survived by a spouse, there shall be paid to such spouse a spouse's pension which is equal to one half of the annuity which the pensioner received on the date of his or her death, ... Provided further that where there is more than one spouse, the spouse's pension will be divided equally among the spouses. ...,"

- [31] This rule is challenged on the basis that it does not cater for recalculation of pension benefits when one of the surviving spouses dies, that is after the death of the pensioner. On that score, it is averred, it discriminates on a listed ground of gender because, self-evidently, polygamous unions are commonly between one man and a number of women. Further, that other women who are not in polygamy are not affected by the rule.
- [32] There can be no gainsaying that unfair discrimination is constitutionally repugnant, and may not be perpetuated by anyone whether doing so as part of the state or as a private individual.¹³ This is so serious that the Constitution required an enactment of legislation to specifically deal with and prevent unfair discrimination.¹⁴
- [33] A two stage inquiry is required to determine whether conduct, law or policy discriminates unfairly. That was dealt with in *Harksen v Lane NO* in the following manner:

¹³ Section 9(1) to (4) of the Constitution.

¹⁴ Section 9(4).

“At the cost of repetition, 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:
 - (b)(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 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.
 - (b)(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 section 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 (section 33 of the interim Constitution).” (Emphasis added)

[34] On the contentions by Ms Seloana, the rules create differentiation between people who are married in and those who are not in polygamy. The respondents, on the other hand, argue that the differentiation, if there, is not directly on a listed ground such as race or gender. Central to this issue, as I pointed out, is that the rules do not cater for the recalculation when one of the spouses subsequently passes on and,

according to Ms Seloana, she is indirectly discriminated against on the basis of gender and marital status. She contends that the refusal to recalculate the benefit puts her in a less favourable position than those persons who are married in non-polygamous marriages.

- [35] The benefits that are payable to a surviving spouse who was married to a deceased pensioner in which polygamy is not involved do not devolve at the death of that surviving spouse. Such benefits cease when the spouse dies. This was raised by the respondents and not disputed by Ms Seloane. To that extent, there is no differentiation between parties married in polygamous marriages as opposed to those who are not in such union.
- [36] The differentiation, on the version of Ms Seloana, arises at the point of death of one of the surviving spouses. That means, as I can see it, the recalculation is not based on the death of the pensioner but on the death of one of the surviving spouses. Our constitutional jurisprudence accepts that there will be differentiation between categories of persons, but that the differentiation, where it occurs, must not be unfair. Mere differentiation is not sufficient to lead to a ruling that conduct or law is invalid. It is when the differentiation lacks a legitimate purpose and where there is no rational connection between the differentiation and the purpose.¹⁵
- [37] In *Jooste v Score Supermarkets Trading (Pty) Ltd*¹⁶ the court dealt with the differentiation of employees who were injured in the course of their employment and other common law personal injury claimants and found that the differentiation did not offend section 9(1) right and it held *inter alia* that:

“It is clear that the only purpose of rationality review is an enquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this enquiry whether the scheme chosen by the legislature could be

¹⁵ Prinsloo v van der Linde 1997 (3) SA 1012 (CC) at para 25.

¹⁶ 1999 (2) SA 1 CC at para 17.

improved in one respect or another. Whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not the court must make. The contention [of the applicant] represents an invitation to this court to make a policy choice under the guise of an review; and invitation which is family declined. ...”

- [38] The question that comes to mind is whether the court can direct the Executive or Parliament to introduce new law or policy and require them to include a provision for the recalculation of pension benefits upon the death of one of the surviving spouses. I don't think so, lest it be understood that the Court may introduce a policy. That would be offensive to our constitutional order.
- [39] In *Harksen*¹⁷ the court held that where the discriminating law or action is designed to achieve a worthy and important societal goal it renders fair what would otherwise have been unfair discrimination. No doubt, the Court understood in making this determination that it was not always going to be possible to cater for all categories of people in exactly the same way. There are always going to be some areas where people or categories of people will experience different treatments out of the same law or policy, but which may not equal unfair discrimination.
- [40] My understanding of the rule is that it seeks to provide for an equal share of benefits upon the eventuality of death of a pensioner who is married to more than one person. It actually goes further to cater for orphaned children by enlarging the definition of spouse. The impugned rule makes it clear that all the people who are married to a pensioner in terms of the practice of polygamy be catered for when that pensioner dies. It requires equal distribution of the payable benefit to the surviving spouse. The

¹⁷ Harksen at para 52.

purpose of the rule, to that extent, is congruent with that of the Recognition of Customary Marriages Act,¹⁸ about which Moseneke DCJ said in *Gumede*¹⁹ that:

"Without a doubt, the chief purpose of the [Recognition Act] is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses."

- [41] Similar sentiments were voiced in *Ramuhovhi*²⁰ in which the court held in relation to section 7(1) of the Recognition of Customary Marriages Act that:

"This perpetuation of inequality is analogous to that which section 7(1), read with section 7(2), perpetuated in the case of pre-Act monogamous customary marriages. In respect of pre-Act monogamous customary marriages, *Gumede* held this to be "self-evidently discriminatory on at least one listed ground: gender". This and the Court's reasoning apply equally to the continued disparate treatment of pre Act polygamous customary marriages. The Court reasoned that "[o]nly women in a customary marriage are subject to these unequal proprietary consequences. This discrimination is on a listed ground and is therefore unfair unless it is established that it is fair." It is section 9(5) of the Constitution that decrees that discrimination on any of the grounds listed in section 9(3) is unfair unless shown to be fair. In the instant matter, the government respondents did not enter the fray and thus made no attempt to prove fairness. Likewise, the third and fourth respondents' resistance to the application before the High Court and of the confirmation proceedings before us does not relate to the question of fairness."

- [42] The respondents contended that there is nothing about the impugned rules that constitutes discrimination as nothing in them is directed at women but at persons married in terms of customary law. That, to them, includes men, which accords with the definition of spouse in terms of legislation. They further argued that the rules cannot be discriminatory because they do not mention race. I accept, as the court

¹⁸ Act No. 120 of 1998.

¹⁹ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) para 23.

²⁰ *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC) at para 36.

did in *Ramuhovhi*,²¹ that this rule affects overwhelmingly women who are in polygamist marriages. I have indicated the rule achieves a legitimate purpose by protecting the interest of both or all of the women in such marriage.

Analysis

- [43] Marital regime or status is a factor in this case. I take it further to say that it cannot be denied that in the context of our country polygamous marriages are invariably between a single man and a number of women. I do not, as a result, accept the contestation mounted by the respondents on this point. I find that even though the rules do not mention gender, that the provisions of the impugned rule 14.6.2 affects women and not men in the circumstances of polygamous marriages. It is different where polygamy is not involved.
- [44] As I see it, the categories to be spoken about, and which are treated differently are women in polygamous marriages and those who are not. I am prepared to accept that to the extent that the impugned rule treats women in these categories differently that amounts to differentiation as envisaged in the Equality Act and section 9 of the Constitution. The first stage of the test set out in *Harksen* has in my view been satisfied.
- [45] What remains is the question whether the differentiation constitutes unfair discrimination - what makes the differentiation unfair? The respondents contend that nothing has been explained on why the differentiation is unfair. Ms Seloane's argument, as I understood it, is that it is unfair that she is treated less favourably as compared to women who are not in polygamous unions in that she is receiving a lesser benefit than those other women in monogamous relationships from the

²¹ *Ibid.*

pension fund. Marital status therefore informs my further understanding of the issues in this case. The question, then, is whether the rule serves a legitimate purpose.

- [46] I have earlier foreshadowed that the rules attempt to strike a balance between women in polygamous marriages and those in monogamous marriages to ensure that they derive equal benefit in terms of the Pension Funds Act and the rules. This, in my view, is a legitimate purpose that the rules serve and which avoids a situation where one or more of the persons who are involved in polygamy to the same person are treated differently on the occasion of death.
- [47] There is yet another consideration here, and that is that the less favourable conditions preceded the death of the pensioner. During his lifetime the deceased would have been responsible for looking after both Ms Seloane and Johanna. That is in the nature of the union under polygamy. The rules attempt to extend such care by ensuring an equal division of the pension benefits to the surviving spouses. I do not see this to be creating an unfair discrimination which is repugnant under the present constitutional dispensation.
- [48] At the risk of repetition, both Ms Seloane and Johanna received equal benefits upon the death of the deceased which accrued consequent to Malisela's death. Ms Seloane's issue is that there must be a fresh calculation of the pension benefits now that Johanna has passed on. Ms Seloane is not a dependent of Johanna. The recalculation that she propagates for is dependent on a new and separate occurrence, being the death of Johanna as one of the surviving spouses. It is the subsequent death of the surviving spouse that becomes the trigger for the recalculation of pension benefits that she is calling for. I find this difficult to accept. This is because the benefits accrued, fully, when their husband pensioner died.
- [49] It should also be noted that Johanna died some 14 years after the death of the deceased. During the entire period of her life post the death of the deceased both

she and Ms Seloane, as surviving spouses, received their share of the pension and there was no question of unfair discrimination. They both understood it to be inherent in the nature of their marriage to the deceased and that they were each entitled to receive equal portions of what was left of the pension benefits.

- [50] The situation in this case differs from *Mahlangu*²² in which the Court found that the limitation served no government purpose, stating inter alia that:

“[118] On the other hand, the limitation serves no governmental purpose whatsoever. That much has been conceded by the state. All the state has said is that the continued exclusion of domestic workers from the enjoyment of benefits under COIDA was simply a matter of timing. It explained that it needed to prepare itself for handling the increased numbers of beneficiaries that would result from an extension of the benefits. Without suggesting that this was an acceptable reason, the state contends that it is now prepared to handle the numbers.”

- [51] The governmental purpose in this case, as I see it, is the protection of the interests of women in polygamous marriages. It is common cause that the rules do not cater for recalculation of pension benefits upon the subsequent death of one of the surviving spouses in polygamous marriages. The payment of lesser benefit starts at the death of a pensioner and continues until the surviving spouse(s) also pass on. I am not satisfied that the rules discriminate unfairly against women in polygamous marriages and that they ought to be declared invalid. The result is that the application should fail.

Consideration of costs

- [52] The application is in the nature of bringing to the fore a constitutional attack to the existing rules of the government pension scheme. The attack was neither frivolous nor was it an abuse of the court's processes. It is so that she is presently receiving

²² *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).

the benefit equivalent to 25% of the annuity that her husband used to receive in his lifetime and, but for the nature of the marriage, she would have been receiving the entire 50%. This is different to what other persons who are married in non-polygamous marriages are receiving at the death of the pensioned spouses. I find that this was a genuine attempt by Ms Seloane to challenge and to correct the pension fund rules which she found objectionable.

- [53] It is therefore my considered view that the application was a genuine attempt to change the status *quo*. Although it has not succeeded, I do not find it just to impose a cost order against Ms Seloane. It is my view that the application falls within the scope of the principles set out in *Biowatch*²³ and, as a result, I decline to order Ms Seloane to pay the costs of this application.

Order

- [54] I make the following order:

- [a] The application is dismissed with no order as to costs.



MOKGERWA MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

DATE OF HEARING	:	31 JULY 2023
DATE OF JUDGMENT	:	06 MARCH 2024

²³ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

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POLOKWANE HIGH COURT