CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 83/08
[2009] ZACC 19

FATIMA GABIE HASSAM	Applicant
versus	
JOHAN HERMANUS JACOBS NO	First Respondent
MASTER OF THE HIGH COURT	Second Respondent
MARIAM HASSAM	Third Respondent
MARIAM HASSAM NO	Fourth Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
with	
MUSLIM YOUTH MOVEMENT OF SOUTH AFRICA	First Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Second Amicus Curiae

Heard on : 19 February 2009

Decided on : 15 July 2009

JUDGMENT

NKABINDE J:

Introduction

[1] Before us is an application for confirmation of a declaration of constitutional invalidity of section 1(4)(f) of the Intestate Succession Act[1] (the Act) made by Van Reenen J in the Western Cape High Court, Cape Town.[2] The declaration has been referred to this Court pursuant to section 172(2)(a) of the Constitution.[3] The impugned provisions were found to exclude widows of polygynous[4] marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Act. In essence, this case concerns the proprietary consequences of a polygynous Muslim marriage within the context of intestate succession.

[2] The pertinent parts of the order of the High Court read:

> "23.2 It is declared that section 1(4)(f) of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution, to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.
>
> 23.3 Section 1(4)(f) of the Intestate Succession Act 81 of 1987 is to be read as though the whole of it was substituted by the following:
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> 'In the application of sections 1(1)(c)(i) to the estate of a deceased person who is survived by more than one spouse:

[1] 81 of 1987.

[2] Reported as *Hassam v Jacobs NO and Others* [2008] 4 All SA 350 (C).

[3] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a 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."

[4] "Polygyny" means having more than one wife whereas "polygamy" means having more than one wife or husband see *Concise Oxford English Dictionary* 7ed (Oxford University Press 2005). According to the tenets of Muslim personal law, only men may have more than one spouse, so it is more accurate to speak of polygyny than polygamy. See the helpful discussion of these terms in Bennett *Customary Law in South Africa* (Juta, Cape Town 2004) at 243.

(a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) Each surviving 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 for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) Notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.'"

Brief facts

[3] The facts relating to this case have been set out in the judgment of the High Court and need not be restated in detail.[5] It suffices, for the purpose of this judgment, to state that the applicant was married to Mr Ebrahim Hassam (the deceased) in accordance with Muslim rites. The deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites without the applicant's knowledge or consent. The deceased died intestate in August 2001. His death certificate shows that he was "never married". The first respondent refused to regard the applicant as a spouse for the purposes of the Act.

[5] Above n 2 at paras 2-4.

[4] The first respondent is cited in his official capacity as the executor of the deceased's estate. He abides by the decision of this Court. The Master of the High Court is the second respondent, while the deceased's second wife is cited as the third and fourth respondent; she is cited both in her personal capacity and in her capacity as the mother and natural guardian of the three minor children born of her marriage with the deceased. Neither opposes the application. The fifth respondent, the Minister for Justice and Constitutional Development (the Minister), filed written submissions and supported the application for confirmation of the order of the High Court. The Muslim Youth Movement of South Africa (the MYM)[6] and the Women's Legal Centre Trust (the Trust),[7] which were admitted as amici curiae, filed helpful submissions and supported the confirmation of the declaration of constitutional invalidity.

Proceedings in the High Court

[5] The applicant approached the High Court and initially sought an order, among other things, entitling her to be recognised as a spouse and surviving spouse of the deceased for the purposes of the Act and the Maintenance of Surviving Spouses Act (Maintenance Act),[8] respectively, and directing the executor of the deceased's estate

[6] The MYM is a registered non-profit organisation involved in welfare and education programmes centred on the mobilisation of the Muslim youth and the greater Muslim community. In particular it has as one of its objectives the protection of women's rights within the Muslim community.

[7] The Trust is a non-governmental organisation which has as its core objective the advancement and protection of human rights of all women in South Africa through litigation. It was admitted as amicus curiae in the proceedings before the High Court.

[8] 27 of 1990.

to give effect to that recognition. She also sought costs in the event the application was opposed.

[6] The executor questioned the validity of the applicant's marriage to the deceased. In particular, he questioned whether their marriage was still extant at the time of the deceased's death. If it was, it was contended that the deceased would have been involved in a "polygamous relationship" with the applicant and Mrs Mariam Hassam. Save for the executor, none of the respondents had placed the validity of the deceased's marriage to the applicant in dispute. The High Court, relying on the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[9] found that the marriage was extant at the time of the deceased's death.[10] No one has challenged this finding and we proceed on the basis that the marriage subsisted at the time of the deceased's death. The applicant also challenged the constitutional validity of section 1(4) of the Act.[11] She maintained that the word "spouse" in that section should include a husband or wife married in terms of Muslim rites regardless of whether the marriage is monogamous or polygynous. By excluding her from the definition of "spouse" because she was party to a polygynous union, the applicant contended that the Act unfairly limits her right to religious freedom and equality before the law.

[9] 1984 (3) SA 623 (A). See also *Van der Merwe and Another v Taylor and Others* [2007] ZACC 16; 2007 (11) BCLR 1167 (CC); 2008 (1) SA 1 (CC) at fn 39 where the rule was formulated as follows:

> "According to this rule a court in motion proceedings, in determining whether a case is made out, must examine the undisputed averments of the applicant together with the averments of the respondent."

[10] Above n 2 at para 8.

[11] In a notice in terms of Rule 16A of the Uniform Rules of Court in which she had also challenged the constitutional validity of certain provisions of the Maintenance Act. She contended that the term "survivor" in this Act should be read to include a surviving spouse or spouses of a polygynous Muslim union. The High Court did not declare the impugned provisions of the Maintenance Act unconstitutional and little therefore need be said further about it.

[7] The High Court then considered the constitutionality of the impugned provision against the factual backdrop that the applicant was a party to a polygynous Muslim marriage who sought to inherit intestate following the death of her husband. Having had regard to *Daniels v Campbell NO and Others*,[12] the High Court considered whether an interpretation which fails to accord widows in polygynous Muslim marriages the benefits provided for in the Act passes constitutional muster. The High Court held:

> "Marriages concluded under Muslim private law are potentially polygynous as the male in such a union, subject to compliance with the onerous prescripts of the Qur'an, is permitted to marry more than one woman. Unless the concept 'spouse' . . . [is] construed to encompass also widows of polygynous Muslim marriages *the practical effect would be that the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the right accorded them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law) and culture but would also infringe their right to dignity* . . . [D]iscrimination of that kind is presumptively unfair unless valid grounds exist under Section 36 of the Constitution for limiting their rights as regards equality and human dignity."[13] (Emphasis added.)

[8] In concluding, the High Court held that the exclusion of widows of polygynous Muslim marriages from the benefits of the Act would be unfairly discriminatory and in conflict with the equality provisions in the Constitution. The provisions of the Act, the High Court remarked, "save for section 1(4)(f), are readily capable of being

[12] [2004] ZACC 14; 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC). In this case the right to benefit intestate was extended to women in *de facto* monogamous Muslim marriages.

[13] Above n 2 at para 16. The High Court also found that "no governmental purpose that could be advanced by such a differentiation has been raised or appears to be self-evident."

applied to spouses in polygynous marriages in that each spouse would be entitled to a child's portion of the estate, if there are descendants and an equal share if there are none."[14]

In this Court

[9] The applicant's argument was largely devoted to the equality provisions in the Constitution. It was submitted that the facts clearly demonstrate unfair discrimination in respect of widows of polygynous Muslim marriages because a failure to include such widows within the ambit of the Act differentiates in three ways, between—

1. widows married in terms of the Marriage Act[15] and those in polygynous Muslim marriages;
2. widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and
3. widows in polygynous customary marriages[16] and those in polygynous Muslim marriages.

The applicant argued that widows in her position are unfairly discriminated against on the listed grounds of gender, marital status and religion.

[10] Relying on *S v Jordan and Others (Sex Worker Education & Advocacy Task Force and Others as Amici Curiae)*[17] the applicant contended that the failure to

[14] Id at para 20.

[15] 25 of 1961.

[16] In terms of the Recognition of Customary Marriages Act 120 of 1998. See also *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of RSA and Another* [2004] ZACC 17; 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC).

include spouses of polygynous Muslim marriages within the ambit of the Act indirectly discriminates against women in those marriages on the ground of gender. This discrimination stems from the reality that women constitute a particularly vulnerable segment of the population and that, in practice, the Act benefits mainly widows rather than widowers. They submitted further that the Act operates to the detriment of Muslim women but not Muslim men because only Muslim men may have multiple spouses under Islamic Law.

[11] Relying on *Daniels*, the applicant submitted that discrimination occurs on the ground of marital status in instances where legislative protection is withheld from certain relationships. In withholding certain protections provided for in the Act from persons in polygynous Muslim marriages, the applicant submitted that she is being discriminated against on the ground of marital status.

[12] In relation to the ground of religion, the applicant submitted that the exclusion of persons in polygynous Muslim marriages from the ambit of the Act will result in an infringement of sections 15, 30 and 31 of the Constitution. The conclusion of a polygynous Muslim marriage is an element of the right and freedom associated with religious and cultural choices. The failure of the Act to recognise such marriages thus also constitutes discrimination on the ground of religion.

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[17] [2002] ZACC 22; 2002 (11) BCLR 1117 (CC); 2002 (6) SA 642 (CC). In that case the Court dealt with the criminal sanction which imposed differential liability on prostitutes as compared to their clients. The majority per Ngcobo J held that the impugned provision was not unconstitutional. The minority, per O'Regan and Sachs JJ, linked this differentiation to a pattern of gender disadvantage and thereby found it to constitute unfair discrimination.

[13] The applicant contended that there is no rational relationship between the differentiation in question and a legitimate governmental purpose proffered to validate it because the scheme in the Act confers benefits and imposes burdens unevenly. These submissions were supported by the Minister, the Trust and the MYM. The applicant further contended that the failure to interpret the word "spouse" so as to include widows whose marriages are celebrated in accordance with Muslim rites infringes the rights to freedom of religion, conscience, belief and opinion, and to the enjoyment of culture under sections 15(1)[18] and 31(1)[19] of the Constitution, respectively.

[14] The MYM's contentions were largely devoted to freedom of religion and culture. It was contended that women in polygynous Muslim marriages still suffer the serious effects of non-recognition. It was argued that this unequal treatment constitutes unfair discrimination on the grounds of religion. The MYM argued further that their non-recognition prejudices widows of polygynous Muslim marriages in that it fails to have regard to their lived reality and to accommodate diversity within a heterogeneous society.

[18] Section 15(1) reads:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

[19] Section 31(1) reads:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[15] As to remedy, the parties contended that an order similar to that made in *Bhe*,[20] which would cater for the recognition of women in polygynous Muslim marriages as spouses for the purposes of intestate succession, would be appropriate.

[16] Before I identify the issues for determination in this matter, it is important to stress what this case is not about.

[17] This case, properly understood, is not concerned with the constitutional validity of polygynous marriages entered into in accordance with Muslim rites. The applicant advanced argument on sections 15, 30 and 31 of the Constitution. In the view I hold

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[20] Above n 16 at para 136. The Court made the following order in relation to the Intestate Succession Act:

> "5. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is declared to be inconsistent with the Constitution and invalid.
>
> 6. Subject to paragraph 7 of this order, section 1 of the Intestate Succession Act 81 of 1987 applies to the intestate deceased estates that would formerly have been governed by section 23 of the Black Administration Act 38 of 1927.
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> 7. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:
>
> (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
>
> (b) Each surviving 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 for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and
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> (c) Notwithstanding the provisions of sub-paragraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.
>
> . . . .
>
> 10. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced."

of the matter, it is not necessary to become entangled in the religious and cultural debates in this matter. It should also be emphasised that this judgment does not purport to incorporate any aspect of Sharia law into South African law.

[18] This Court in *Daniels* dealt with monogamous Muslim marriages for the purposes of the Act, but left open the issue regarding the inclusion of polygynous Muslim marriages. This judgment deals with the latter.

[19] I now turn to deal with the issues raised.

Issues

[20] The following issues arise for consideration:

a) Does the exclusion of spouses in polygynous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution? In particular:

   i. Does the exclusion constitute discrimination?

   ii. If so, does it constitute unfair discrimination?

   iii. If so, is this unfair discrimination justifiable under section 36 of the Constitution?

b) If this exclusion violates section 9(3) of the Constitution, can the word "spouse" in the Act be read to include spouses in polygynous Muslim marriages?

c) If such an interpretation is not possible, what is the appropriate relief?

[21] It is convenient to now deal with the equality analysis and jurisprudence that has developed over the years through the pronouncements of this Court.

Equality jurisprudence

[22] This Court has on numerous occasions dealt with challenges to legislative enactments that were said to infringe the right to equality under section 9 of the Constitution. The resultant jurisprudence has developed into a comprehensive set of principles, which have been applied on numerous occasions and within a variety of contexts.[21] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital

[21] See in this regard *Van der Merwe v Road Accident Fund and Others* [2006] ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC); *Hoffmann v South African Airways* [2000] ZACC 17; 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC); *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); and *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC). See also *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 27, Moseneke J, as he then was, eloquently described the duty on every court when embarking on an analysis in terms of section 9. He stated that it is—

> "incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution." (Footnote omitted.)

status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[23] The equality analysis was summarised in *Harksen*[22] as follows:

"(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 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 section 8(2).

[22] *Harksen* above n 21.

(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)."[23]

The approach to legislative interpretation

[24] Section 39(2)[24] of the Constitution enjoins every court to promote the spirit, purport and objects of the Bill of Rights when, inter alia, interpreting any legislation.[25] South African history, as this Court has stated in *Brink*,[26] is of particular relevance to the concept of equality. In *Daniels,* this Court held that "[d]iscriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution."[27] (Footnote omitted.)

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[23] Id at para 53. Although the Court in *Harksen* was concerned with section 8 of the interim Constitution, that section is the equivalent of section 9 of the Constitution albeit with some difference in wording. In *National Coalition for Gay and Lesbian Equality*, this Court stated that the postulated enquiry does not mean that—

> "in all cases the rational connection inquiry of stage (a) must inevitably precede stage (b). The stage (a) rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable." (Above n 21 at para 18.)

This approach was also adopted in *Hoffmann* where this Court, per Ngcobo J, proceeded directly to a section 9(3) analysis because it was clear that the law in question was discriminatory. (Above n 21 at para 20.)

[24] Section 39(1) and (2) provide:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) 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."

[25] See also in this regard the majority decision in *Daniels* above n 12 at para 43.

[26] *Brink* above n 21 at para 40.

[27] Above n 12 at para 20.

[25] The approach adopted in *Daniels* has been reaffirmed by this Court in a number of its subsequent decisions.[28] Ngcobo J in *Daniels*, correctly observed that apartheid legislation was—

> "construed in the context of a legal order that did not respect human dignity, equality and freedom for all people. Discrimination fuelled by prejudice was the norm. Black people were denied respect and dignity. They were regarded as inferior to other races."[29] (Footnote omitted.)

The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*.[30] The Court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of our society. Recognition of polygynous unions was seen as a retrograde step and entirely immoral. The Court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to "cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances."[31] That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.

[28] See for example, *Van der Merwe* above n 21 at para 66 where this Court held, among other things, that "when the constitutional validity of a law is challenged by invoking one or more guarantees in the Bill of Rights contextual analysis is often all important." (Footnote omitted.)

[29] Above n 12 at para 48.

[30] 1983 (1) SA 1006 (AD).

[31] Id at 1024H-1025A.

[26] Contrasting the ethos which informed the boni mores before the new constitutional order with that which informs the current constitutional dispensation, the question remains whether affording protection to spouses in polygynous Muslim marriages under the Act can be regarded as a retrograde step and entirely immoral? The answer is a resounding No. I emphasise that the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidenced by the remarks in *Ismail*.[32]

[27] In assessing the constitutional validity of the impugned legislative provisions in this case, regard must also be had to the diversity of our society which provides a blue print for our constitutional order and influences the interpretation of our supreme law – the Constitution – which in turn shapes ordinary law. Our diversity is also affirmed in the preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act,[33] the aim of which is to facilitate our transition into "a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."[34]

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[32] Id at 1024D-H contrasted with *Bhe* above n 16 at para 116 and *Khan v Khan* 2005 (2) SA 272 (TPD) at para 11.

[33] 4 of 2000.

[34] The importance of diversity was acknowledged by this Court in *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at para 60.

[28] The interpretive approach enunciated by this Court will ensure the achievement of the progressive realisation of our "transformative constitutionalism".[35] This approach resonates with the founding values now informing the assessment of the prevailing boni mores of our society and thus affords the necessary protection to those adversely affected by the exclusion under the Act. Those values have been aptly described by Mahomed CJ in *Amod v Multilateral Vehicle Accident Fund (Commisision for Gender Equality Intervening)*[36] as the "new ethos of tolerance, pluralism and religious freedom".[37]

[29] Having delineated the approach according to which the impugned provision should operate and be understood, I now turn to the determination of the issues.

a) Does the exclusion of spouses in polygynous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution?

[30] The High Court found that the exclusion of spouses in polygynous Muslim marriages does not pass constitutional muster. I agree. The rights to equality before the law and to equal protection of the law are foundational. The Constitution, as the

[35] See Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146. Our Constitution has been characterised among other things, as a transformative document. The concept of "transformative constitutionalism" has over the past decade found considerable resonance in our jurisprudence. See in this regard *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC) at para 232; *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 9 and 301-2. See in particular *Minister of Finance* above n 21 at para 142, where Sachs J discussed transformative constitutionalism in the context of equality.

[36] 1999 (4) SA 1319 (SCA).

[37] Id at para 20.

jurisprudence of this Court demonstrates, prohibits the breach of equality not by mere fact of difference but rather by that of discrimination.[38] This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.

[31] The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.

[32] I am satisfied that the Act differentiates between the groups outlined above.

[33] Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed

[38] See *Prinsloo* above n 21 at paras 25-33.

contextually and in the light of our history. It is clear that in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation.[39] The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's Executors v The Master (Natal),*[40] where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".[41]

[34] The effect of the failure to afford the benefits of the Act to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid.[42] Moreover, because the denial of benefits affects only widows in polygynous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect. The grounds of discrimination can thus be understood to be overlapping on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect;

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[39] See *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at para 65.

[40] 1917 AD 302.

[41] Id at 307. See also *Ismail* above n 30 at 1026. See also the similar reasoning to be found in *Daniels* above n 12 per Ngcobo J at paras 52-3; and per Moseneke J, as he was then, in the same judgment at para 108.

[42] See *Brink* above n 21 at para 42.

marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affect by the Act's exclusion.

[35] This conclusion does not mean that the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly.

[36] I hasten to mention that the position of widows in monogamous Muslim marriages has, however, since *Daniels*, been somewhat ameliorated by their recognition as spouses under the Act. However, women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.

[37] By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of

stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.

[38] The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion. These women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife.[43]

[39] It follows therefore that the exclusion of widows in polygynous Muslim marriages from the protection of the Act is constitutionally unacceptable because it excludes them simply on the prohibited grounds. In any event, it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to a widow or widows of a polygynous Muslim

[43] It is not insignificant that South Africa ratified on 17 December 2004 the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which came into operation on 25 November 2005. Article 6 provides for the promotion and protection of the rights of women in polygynous marriages. Available at http://www.african-union.org; http://www.dfa.gov.za/foreign/index.html, accessed on 25 May 2009. This serves to highlight the vulnerability of women in polygynous marriages and their plight will only be ameliorated if they fall within the ambit of the law, which in many instances excludes women in polygynous marriages.

marriage. Discrimination on each of the listed grounds in section 9(3) is presumed to be unfair unless justified.[44]

[40] The question now arises as to whether this unfair discrimination can be justified under section 36 of the Constitution.

[41] In deciding this question regard must be had to the nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves, as well as the impact of the discrimination on those who are adversely affected. In this case, the group discriminated against are women who are a particularly vulnerable group in Muslim communities. These women are severely prejudiced by their exclusion from the protection under the Act. Cachalia[45] generally describes the consequences of non-recognition for those spouses:

> "The consequences of non-recognition are serious, particularly for the wife. Although a couple may regard themselves as married according to the tenets of their religion, the law treats them as strangers. There is therefore no legal nexus between them: there is no joint estate and any nuptial agreement is void; there are no financial obligations between the spouses *inter se* and no claim for loss of support accrues to the dependent spouse on the death of her 'husband'; she has no claim for maintenance on divorce or against her husband's deceased estate; she is effectively disinherited if her husband dies intestate".[46]

[44] Section 9(5) of the Constitution.

[45] Firoz Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" (1993) 56 *THRHR* 392.

[46] Id at 399.

[42] The exclusion of the applicant, and others similarly positioned, from the protection of the Act limits their rights under section 9 of the Constitution. The limitation of their equality rights in the circumstances is unjustifiable. It should be noted that the Minister advanced no justification for the limitation of the right to equality in this instance.

[43] Having found that the exclusion of widows in polygynous Muslim marriages constitutes unfair discrimination, the next question is whether the word "spouse" in the Act is capable of being interpreted as including spouses in such marriages. Logically speaking, if, as the High Court found, the word "spouse" is capable of being so interpreted, that would be the end of the matter. Because of the view I take of the matter, however, it is necessary to consider the issue before dealing with the remedy.

b) Can the word "spouse" in the Act be read to include spouses in polygynous Muslim marriages?

[44] It is convenient to set out the provisions of section 1(1)(a) – (f) in full. It provides:

> "(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) is not survived by *a spouse* or descendant, but is survived—

(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or

(ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or

(e) is not survived by *a spouse* or a descendant or parent, but is survived—

(i) by—

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or

(bb) descendants of his deceased parents who are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (*aa*), as well as by any of the descendants mentioned in subparagraph (*bb*),

the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by *a spouse*, descendant, parent, or a

> descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."
> (Emphasis added.)

[45] In considering the question above, we cannot turn the clock back to 1987 when the Act was enacted or even to 1917 and 1983 when *Seedat's* and *Ismail* were decided, respectively. At the time of the enactment of the above provisions, the only marriages to which the legislature sought to afford protection were civil marriages recognised under the Marriage Act. We must now consider the meaning of the word "spouse" in the Act in light of its current place and effect in South Africa and particularly its effect on Muslim communities. Although the word "spouse" is not defined in the Act, it ought to be read through the prism of the Constitution.

[46] Marriage, as a social institution, is important to all members of South African society, irrespective of skin colour or religious background. Marriages concluded under Muslim rites are potentially polygynous as a man is permitted, subject to the Qur'anic prescripts, to marry more than one woman.[47] The significance attached to polygynous unions solemnised in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous

[47] See in this regard 'Abdur Rahman I. Doi, *Sharia: The Islamic Law* (Ta Ha Publications, London 1984) at 146, where the author quotes the following Qur'anic verse:

> "If you fear you shall not be able to deal justly with the orphans, *marry the women of your choice, two, or three or four*. But if you fear that you shall not be able to deal justly with them, then only one." (Emphasis added.)

Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.

[47] The shift in legislative policy, as clearly pointed out by the majority in *Daniels*,[48] and judicial policy as is evident in *Bhe*[49] and *Khan*,[50] are also indicative of trends consistent with the constitutional values. The majority in *Daniels* remarked that the existence of such provisions in other statutes does not imply that their absence in the Act and the Maintenance Act has special significance. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by those Acts, the Court held, cannot be interpreted so as to exclude them, contrary to the spirit, purport and objects of the Constitution.

[48] On the approach delineated above, the majority in *Daniels*, per Sachs J, held that the ordinary meaning of the word "spouse" in the Act also encompasses surviving

[48] Above n 12 at fn 40. Examples of this shift include:

> "Civil Proceedings Evidence Act 25 of 1965 (s 10A recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (s 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Pension Funds Act 24 of 1956 (s 1(b)(ii): definition of 'dependent'); Special Pensions Act 69 of 1996 (s 31(b)(ii): definition of 'dependent'); Government Employees Pension Law Proclamation 21 of 1996 (s 1(b)(ii): definition of 'dependent' and Schedule 1 item 1.19, definition of 'spouse'); Demobilisation Act 99 of 1996 (s 1 (vi)(c): definition of 'dependent'); Value Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognises religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); 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); 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)."

See also section 2(3) of the Recognition of Customary Marriages Act 120 of 1998. It provides that, "[i]f a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages."

[49] Above n 16 at paras 116 and 136.

[50] *Khan* above n 32 at 283C-D where the court stated that, "partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance".

spouses of marriages contracted according to Muslim rites.[51] The Court opted for a broad and inclusive construction of the concept which extended the application of the Act to include the surviving spouse of a monogamous Muslim marriage entered into in accordance with Muslim rites. The Court held that the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad and inclusive construction. It remarked that any other interpretation would result in a violation of the widow's rights to equality in relation to marital status, religion and culture and would therefore violate their right to dignity. In my view, the circumstances of that case, allowed for such an interpretation for it was only due to the religion of the parties that their marriage was without recognition, thus there was no undue strain on the language. On the facts of the present case, to read the word "spouse" so as to include multiple spouses would be a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the Act. Therefore, the word "spouse" as it is used in the Act is not capable of being understood to include more than one partner to a marriage. In consequence, we must read in words to cure the defects.

c) Appropriate remedy

[49] Having concluded that section 1 of the Act constitutes an unjustifiable infringement of section 9(3) of the Constitution, I must now consider an appropriate remedy. The constitutional defect in the impugned provision is manifest. It exists because the word "spouse" in the Act excludes widows to polygynous Muslim

[51] Above n 12 at para 40.

marriages, thus denying them the protection intended for vulnerable women in our society. The dictates of justice and equity require this Court to grant an effective remedy which shall vindicate their rights.

[50] Section 172(1) of the Constitution requires a court, when deciding a constitutional matter within its power, to declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. It further provides that a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

[51] In *S v Bhulwana; S v Gwadiso*[52] this Court stressed that litigants should be granted effective relief and that it is undesirable to restrict the relief to the litigants before a court. It said:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. . . . In principle too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants".[53] (Citations omitted.)

[52] People in the position of the applicant cannot be made to wait to be afforded the protection they are entitled to. The failure to regulate their affairs upon intestacy, as

[52] [1995] ZACC 11; 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC).

[53] Id at para 32.

we have seen in this case, does and will continue to have a profoundly detrimental effect on them. This cannot be allowed.

[53] As the text stands now, the word "spouse" is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. The omission of the words "spouses" is therefore inconsistent with the Constitution and those words thus need to be added to the Act so as to cure the defect. Accordingly, I would add the words "or spouses" after each use of the word "spouse" in the Act.

[54] Whilst the declaration of invalidity must be confirmed, albeit in a slightly different manner, the order of the High Court does not entirely remedy the defects in the Act so as to ensure that just and equitable relief is finally granted to those affected and those who might potentially be affected. The extent of the defect appears in the draft order proposed by the parties.[54] The draft requires reading words into the Act to give immediate relief, which has a degree of retrospective effect.

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[54] The draft order reads:

> "1. Paragraphs 23.1.4, 23.2 and 23.3 of the High Court's order are set aside.
>
> 2. It is declared that s 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include the surviving partner in a polygynous Muslim marriage in the protection it affords to a '*spouse*'.
>
> 3. This defect is remedied as follows:
>
> 3.1 The word '*spouse*' in s 1 of the Intestate Succession Act must be read to include the surviving partner in a polygynous Muslim marriage.
>
> 3.2 In the application of ss 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act to the estate of a deceased person who is survived by more than one spouse,
>
> (a) a child's share in relation to the intestate estate of the deceased, shall be calculated by dividing

[55] The question is whether it is just and equitable to make an order of invalidity that should date back to 1994 when the interim Constitution became operative. As the Court stated in *Bhe*,[55] the declaration of constitutional invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice. The appropriate remedy is to grant an order, the retrospective effect of which should be limited to estates that have not yet been finally wound up.

Costs

[56] The High Court ordered that the costs of the application should be paid out of the estate of the deceased. In this Court, the applicant seeks costs of the application. The issue in this matter must be seen against the background of the decisions of this

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the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) subject to paragraph (c), each surviving 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 for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

3.3 This order operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order, of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

4. If serious administrative or practical problems are experienced, any interested person may approach this court for a variation of this order."

[55] Above n 16 at para 128.

Court and its judicial policy in *Bhe* and *Daniel*s. Although the Minister stressed that his Ministry had started a process that will lead to law reform in the area that has resulted in this litigation, he did not come to Court to oppose the confirmation of the declaration of invalidity of the impugned provisions. The Minister should, in my view, pay the applicant's costs, including those costs occasioned by the employment of two counsel as well as the applicant's costs in the High Court. This is so because the applicant launched these proceedings to vindicate her constitutional rights. Moreover, she has been wholly successful.

Order

[57] In the result, I make the following order:

1. The application for confirmation is granted.
2. The order made by the Western Cape High Court, Cape Town, on 18 July 2008 is confirmed to the extent set out below.
3. Paragraphs 23.1.4, 23.2 and 23.3 of the order of the Western Cape High Court, Cape Town, are set aside and substituted as follows:

    3.1. It is declared that section 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygynous Muslim marriage in the protection it affords to "a spouse".

    3.2. Section 1 of the Intestate Succession Act 81 of 1987 must be read as though the words "or spouses" appear after the word

"spouse" wherever it appears in section 1 of the Intestate Succession Act.

3.3. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

b) subject to paragraph (c), each surviving 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 for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses.

3.4. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

4. If serious administrative or practical problems arise in implementation of this order, any interested person may approach this Court for a variation of this order.

5. The fifth respondent is ordered to pay the applicant's costs of this application and of the application in the Western Cape High Court, Cape Town, including costs occasioned by the employment of two counsel.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Nkabinde J.

For the Applicant:	Advocate W Trengove SC and Advocate K Pillay instructed by de Klerk and van Gend.
For the Fifth Respondent:	Advocate SL Shangisa and Advocate P Matshelo instructed by the State Attorney.
For the First Amicus Curiae:	Advocate K Pillay instructed by the Legal Resources Centre.
For the Second Amicus Curiae:	Advocate G Budlender SC and Advocate S Cowen instructed by the Women’s Legal Centre Trust.