IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT251/2017

WESTERN CAPE HIGH COURT CASE NUMBER: 400/2017

In the matter between:-

FAREED MOOSA N.O.	First Applicant
AMINA HARNAKER	Second Applicant
FARIEDA HARNEKER	Third Applicant

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES (formerly Minister of Justice and Constitutional Development)	First Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	Second Respondent
THE REGISTRAR OF DEEDS, Cape Town	Third Respondent
TRUSTEES FOR THE WOMEN'S LEGAL CENTRE TRUST	Amicus Curia

APPLICANTS' HEADS OF ARGUMENT

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BACKGROUND FACTS TO THE LITIGATION

1. The facts which gives rise to the application in the court below and which forms the basis for this application under Constitutional Court rule 16 are summarised in the reported judgment per le Grange J *sub nom* **Moosa NO and Others v Harnaker and Others** (2017) 6 SA 425 (WCC) at paras 3-13. These facts are common cause as evidenced by paras 5 – 6 of the heads of argument filed by Counsel for First and Second Respondent. For present purposes, the pertinent facts are set forth in the succeeding paragraphs.

2. Mr Osman Harnaker married Second Applicant by Muslim rites on 10 March 1957 and did likewise with Third Applicant on 31 May 1964. Mr Osman Harnaker as well as Second and Third Applicants were, at all material times to their marriages, members of Islam who practised its teachings.

3. Both marriages was solemnised by way of a marriage ceremony and took place in accordance with the tenets of Shari'ah (Islamic law). The marriage certificates evidencing their solemnisation under Shari'ah were annexed to the Founding Affidavit in the court below and marked **FM2** and **FM3** respectively.[4]

4. Both marriages subsisted until Mr Harnekar died testate on 9 June 2014. Thus, at the time of his death, and in accordance with Shari'ah, Mr Harnekar was party to two lawful polygamous Muslim marriages. As required by Shari'ah, Second Applicant consented to the deceased's marriage to Third Applicant.

5. Both marriages in question were filled with mutual love, care, support and compassion. From both marriages, an aggregate of nine children were born.[5]

6. On 5 August 1982, the deceased and Second Applicant formalised their marriage under South African law. A copy of their marriage certificate was

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4 See para 25 of the Founding Affidavit (FA).

5 See paras 29, 30 and 32 of the FA.

annexed to the Founding Affidavit marked **FM4**. The circumstances leading to the formalisation of that marriage is outlined in the Founding Affidavit.[6]

7. The deceased and Third Applicant chose not to formalise their religious marriage under either the Civil Union Act 17 of 2006 or any other law of SA.

8. From 1988 until his death in 2014, the deceased lived with both Second and Third Applicant and some of their children in the dwelling at No. 61 Fortesque Road, Crawford (that is, Erf 107088 Cape Town, held by the deceased and Second Applicant under Deed of Transfer T10603/88).[7] This was the common marital home with the deceased in which Second and Third Applicants occupied different rooms.[8]

9. Throughout their married life, the deceased regarded both Second and Third Applicants as his wives. This may be gleaned from the fact that, *inter alia*, the deceased lived with both wives in polygamous marriages under Islamic law, the deceased supported both wives financially and emotionally, and he expressly referred to his marriages to both women in his Last Will and Testament dated 23 January 2011, a copy whereof is annexed to the FA marked **FM5**.[9] This Will was accepted by the Master of the Western Cape High Court which was cited as the Eleventh Respondent in the court a quo. The said Master appointed the First Applicant as Executor of the deceased's estate pursuant to the provisions of the Will dated 23 January 2011.

10. In clause 2 of the Will, the deceased's estate devolves upon those persons who are, in terms of Shari'ah, his heirs. For this purpose, the deceased's Will provides that a Distribution Certificate issued by the Muslim Judicial Council and which sets forth his heirs under Shari'ah shall be binding on his Executor for purposes of the administration of the deceased's estate. Such a certificate was procured and annexed to the Founding Affidavit as **FM6**.

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6 See paras 33 to 37 of the FA.

7 A copy of the title deed was annexed to the FA and marked **FM7A**.

8 See paras 26 and 31 of the FA.

9 See para 38 of the FA.

11. In terms of the Distribution Certificate, both Second and Third Applicant were testamentary heirs of the deceased and entitled to inherit an equal 1/16th share of the deceased's estate.[10]

12. In terms of clause 2 of the deceased's Will as read with the Distribution Certificate, the residue of his estate devolves on the children born of the deceased's marriages to Second and Third Applicants respectively.

13. Each residuary heir signed a document, a copy of which is annexed to the Founding Affidavit in the court below as **FM8** and which was accepted by the Master of the Western Cape High Court, in terms whereof they renounced the benefits due to him/her under the deceased's Will. The residuary heirs indicated an express intention that the benefits renounced are to be inherited in equal shares by their respective mothers (ie Second and Third Applicants).[11]

14. The renunciation triggered the operation of section 2C(1) of the Wills Act. The First Applicant, as Executor, applied this sub-section to the renounced benefits. First Applicant considered both Second and Third Applicant to be a 'surviving spouse' thereunder. Thus, the Liquidation and Distribution Account filed with the Master of the High Court, a copy whereof was annexed to the Founding Affidavit as **FM7**, records Second and Third Applicants will each receive an equal share of the benefits renounced. This Account was accepted by the Master of the High Court who recognised both Second and Third Applicants as 'surviving spouse' for purposes of section 2C(1).[12]

15. First Applicant advertised the Liquidation and Distribution Account in terms of section 35 of the Administration of Estates Act, 1965. No objection was lodged thereto by anyone. Consequently, First Applicant sought to distribute the deceased's estate to Second and Third Applicants in terms of that Account.

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10 See para 41 of the FA.

11 See clauses 1, 2 of **FM8** (Repudiation of Testamentary Benefits).

12 It bears noting that section 2C(1) of the Wills Act does not prescribe any particular method or formula for apportionment of benefits in circumstances where there is two or more persons who qualify as a 'surviving spouse' entitled to receive the renounced benefits. It is submitted that in such instances, as in the present case, an equal splitting of the benefits is just, fair and equitable.

16. First Applicant sought to transfer to Second and Third Applicants the deceased's one half share of Erf 107088 Cape Town. This includes the 1/6th share that they are entitled to inherit in their own right as testamentary heirs of the deceased, as well as an equal portion of the residue renounced by their respective children as descendants of the deceased. First Applicant considers the latter portions as vesting in Second and Third Applicant respectively by virtue of section 2C(1) of the Wills Act. The Third Respondent disagreed in so far as concerns Third Applicant.

17. Third Respondent recognised Second Applicant as a 'surviving spouse' under section 2C(1) of the Wills Act. The rationale underpinning this decision is that Second Applicant and the deceased were formally married to each other under South African law. Consequently, Third Respondent decided that, under section 2C(1), all benefits renounced by the children (descendants) of the deceased born of his marriage to Second Applicant, vests in the latter so that the relevant property rights may be registered in her name under the Deeds Registries Act 47 of 1937.[13]

18. Third Respondent took a completely different view as regards Third Applicant. Third Respondent decided Third Applicant was not a surviving spouse under section 2C(1) of the Wills Act because this provision was enacted in South Africa's pre-constitutional era at a time when the concept 'spouse' meant only persons whose marriage was formalised under South African law. It excluded (i) persons married by Muslim rites and (ii) persons in polygynous unions. On this basis, Third Respondent decided that Third Applicant is not a 'surviving spouse' under section 2C(1) of the Wills Act. Hence, it decided that all benefits renounced by the children (descendants) of the deceased born of his marriage to the Third Applicant vests in the children of those descendants under section 2C(2) of the Wills Act. On this basis, Third Respondent decided that those proprietary benefits cannot be registered in the name of Third Applicant.[14] Third Respondent did not oppose the application nor deny these facts.

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13 See para 60 of the FA.

14 See paras 61 to 62 of the FA.

NATURE OF APPLICATION IN COURT BELOW AND RELIEF SOUGHT THERE

19. Applicants launched the application in the court below for the relief it was ultimately granted by le Grange J and which relief they seek to have confirmed by this Honourable Court. In their Notice of Motion filed in the court a quo, Applicants sought various declaratory orders, including the following:

(a) an Order that, in terms of section 172(1)(a) of the Constitution, section 2C(1) of the Wills Act is inconsistent with the Constitution and invalid to the extent that, for the purposes of the operation of section 2C(1), the term 'surviving spouse' therein does not include (i) a husband or wife in a marriage that was solemnised under the tenets of Islam and (ii) more than one spouse as a 'surviving spouse' in any form of marriage to which section 2C(1) applies;

(b) an Order that 'surviving spouse' in section 2C(1) of the Wills Act encompasses in its meaning not only a surviving spouse in the legal sense but also every 'surviving' husband or wife (that is 'spouse') who was married by Muslim rites to a deceased testator contemplated by section 2C(1), irrespective whether such marriage was *de facto* monogamous or polygamous;

(c) an Order that, in terms of section 172(1)(b) of the Constitution, it is just and equitable to read s 2C(1) of the Wills Act to include the underlined words:
'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. <u>For purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a *de facto* monogamous and polygamous union that is solemnised in accordance with Muslim rites.'</u>

(d) An Order declaring Third Applicant a 'surviving spouse' of the late Osman Harnekar for purposes of receiving benefits under section 2C (1) of the Wills Act;

(e) An order directing and obliging the Third Respondent to register transfer of the share of estate late Osman Harnekar in Erf 107088 Cape Town (also known as No. 61 Fortesque Road, Crawford, Cape Town) into the joint names of Second Applicant and Third Applicant in accordance with the provisions of section 2C(1) of the Wills Act as read with the provisions of the deceased's Last Will and Testament; and

(f) That the Orders granted shall not affect the validity of any acts performed in respect of the administration of a testate estate that has been finally wound up under the Administration of Estates Act 66 of 1965 or any other similar statute by the date of the court order granted.

LEGAL ISSUES ARISING FOR DETERMINATION

20. This application requires this Honourable Court to interpret section 2C(1) of the Wills Act with a view to determining whether the term 'surviving spouse' as utilised therein, first, encompasses a wife (and, by extension, a husband) in a marriage that was solemnised under the tenets of Islam and, if so then, secondly, whether 'surviving spouse', despite being couched in the singular form (that is, 'spouse'), includes multiple female spouses who, at a testator's death, were married to him under de facto polygynous Muslim marriages. The Court a quo, correctly so, decided both issues in the affirmative and held section 2C(1) of the Wills Act to be unconstitutional to the extent that the term 'surviving spouse' therein is incompatible with this constitutional construction.

21. If the second of the interpretational questions crystallised in the preceding paragraph is decided in Third Applicant's favour, then this Honourable Court is also called upon to decide how section 2C(1) of the Wills Act applies on a practical level so that a fair distribution of benefits can take place between multiple female spouses. The Wills Act provides no guidance. Le Grange J in the court below made no express finding in this regard. It is, however, submitted that the learned Judge's orders favours, correctly so, an equal splitting of benefits among female spouses. Such a construction of section 2C(1) ought to be supported as it promotes equal treatment among surviving spouses which advances the value of equality embraced by the Constitution.

22. If this Honourable Court confirms the declaration of invalidity of section 2C(1) of the Wills Act as contended by Applicants, and conceded by First and Second Respondent, then a determination must be made whether the relief granted by the Court a quo is just and equitable as contemplated by section 172(1)(b) of the Constitution. Applicants submit that the relief granted by le Grange J passes constitutional muster and ought to be confirmed.

23. The ensuing discussion is divided into two parts: First, the interpretational issues identified above with reference to section 2C(1) of the Wills Act will be discussed in the light of section 39(2) of the Constitution; secondly, the constitutional issues highlighted above are discussed and submissions will be made to show that excluding Third Applicant from the ambit of section 2C(1) of the Wills Act is unconstitutional and that the appropriate remedy is that granted by le Grange J in the court below.

THE INTEPRETATIONAL ISSUE

24. It is common cause that section 2C(1) of the Wills Act was triggered when the deceased's children born of his marriages with Second and Third Applicants respectively renounced (repudiated) their testamentary benefits. This application raises a novel constitutional issue, namely, whether the term 'surviving spouse' in the context of section 2C(1) of the Wills Act is to be interpreted narrowly so that it only encompasses husbands and wives married in a legal sense, or whether it is to be interpreted more broadly (liberally) so as to encompass also, inter alia, persons whose marriage, whether *de facto* monogamous or polygamous, is not formalised under South African law (such as, Third Applicant who was married to the deceased by Islamic Law).

25. Whilst marriages by Muslim rites may be *de facto* monogamous, they are, by nature, all potentially polygamous.[15] It is common cause that the deceased exercised his privilege of polygamy by concluding a marriage by Muslim rites

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15 See the authorities cited per Rogers J at para 74 in ***Khan v Minister of Home Affairs and Others*** (unreported) [2014] ZAWCHC (27 June 2014). See also ***Rylands v Edros*** 1997 (2) SA 690 (C).

with Third Applicant whilst married to Second Applicant by Muslim rites. In conducting his personal affairs as such, the deceased was exercising his freedoms of, *inter alia*, religion and culture. The same applies equally to Second and Third Applicants. These fundamental rights are now entrenched in sections 15(1) and 31(1) of the Bill of Rights respectively.

26. Although the question of whether polygamous marriages are consistent with the Constitution was left open in ***Hassam v Jacobs NO and Others*** 2009 (5) SA 572 (CC) para 34, our Courts have recognised the right of persons to engage in polygamous marriages as part of a religion or culture, including the right of a man to have more than one wife at any given time. See ***Hassam*** *supra* para 45; ***Khan v Minister of Home Affairs and Others*** (unreported) [2014] ZAWCHC (27 June 2014) paras 78, 83.

27. Accordingly, there is no justifiable reason in law or principle which precludes legal recognition being given to Second and Third Applicants as the deceased's lawful wives so that both qualify as the deceased's 'spouse' at the time of his death.

28. This gives rise to the question: Is Third Applicant a 'surviving spouse' within the meaning and contemplation of this term in section 2C(1) of the Wills Act? The answer hereto requires statutory interpretation. However, the question raised must be answered with reference to the following two further questions:

(a) First, when properly construed, does the term 'surviving spouse' in section 2C(1) incorporate within its scope and ambit the surviving spouses of marriages contracted according to Shari'ah? If not, then it is submitted that the term 'surviving spouse' is, in its context, unfairly discriminatory and unconstitutional.

(b) If the answer to (a) is in the affirmative, then the question arises whether the term 'surviving spouse' in section 2C(1) can sustain an interpretation that would include multiple spouses within its ambit? If not, then the

appropriate remedy to cure the defect is, as was done in ***Hassam*** *supra* paras 48-53, to read appropriate words into the Wills Act.

29. The approach to interpreting statutes is trite. See ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) para 18. Thus, the starting point is section 2C(1) and the Wills Act read holistically.

30. The Wills Act does not define 'survivor' or any variation thereof when used in relation to 'spouse'.[16] The Wills Act uses the term 'spouse' in sections 2B, 2C(1), 4A(1), and 4A(2)(a), (b), (c); it uses the terms 'marriage' in section 2B and 'out of wedlock' in section 2D(1)(b). These terms are all undefined.

31. Consequently, the Wills Act gives no express indication that its references to 'spouse' are intended to refer only to husbands and wives in a 'marriage' or 'wedlock' formalised under either the Marriage Act 25 of 1961, Recognition of Customary Marriages Act 120 of 1998, or Civil Union Act 17 of 2006.[17]

32. However, it is submitted that, having regard to the undermentioned historical factors, it is clear that Parliament intended 'surviving spouse' in section 2C(1) to apply only to a surviving husband/wife of a marriage solemnised under the Marriage Act. Parliament did not intend to encompass within the radar of this term either a surviving husband/wife of a marriage concluded under Shari'ah, nor multiple surviving spouses under any marriage concluded according to the tenets of any religion or custom.

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16 The word 'survivor' is defined in s 1 of the Maintenance of Surviving Spouses Act as amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. For present purposes, the relevant part of the definition of 'survivor' is 'the surviving spouse in a marriage dissolved by death'. In ***Volks NO v Robinson and Others*** 2005 (5) BCLR 446 (CC), the majority of the Court held that the Respondent was not a 'surviving spouse' because she and the deceased were never married and only cohabited with each other as heterosexual life partners. The correctness of the majority decision in *Volks NO* was recently questioned per Froneman J (minority) in ***Laubscher NO v Du Plan and Another*** 2017 (2) SA 264 (CC) paras 60, 82-84. In ***Laubscher NO*** *supra*, the majority reiterated that same sex permanent life partners were entitled to inherit from each other under the Intestate Succession Act. See also ***Daniels v Campbell NO and Others v Campbell*** 2004 (5) SA 331 (CC).

17 For a summary of the process to formalise a marriage under the Marriage Act, see ***Volks NO*** *supra* para 111; ***Minister of Homes Affairs v Fourie*** 2006 (1) SA 524 (CC) para 64.

33. The Wills Act commenced operating on 1 January 1954. Section 2C thereof was enacted, with effect from 1 October 1992, by the Law of Succession Amendment Act 43 of 1992. Thus, section 2C harks back to the dark days under apartheid which was marred by, inter alia, intolerance, injustice, inequality and discrimination on the grounds of, *inter alia*, religion, gender, culture, and sexual orientation. During that pre-constitutional era, the concept marriage, and by extension 'spouse', was informed by the common law definition that was based on monogamy. See ***Seedat's Executors v The Master (Natal)*** 1917 AD 302; ***Ismail v Ismail*** 1983 (1) SA 1006 (A); ***Minister of Homes Affairs v Fourie*** *supra* para 3; ***Hassam v Jacobs NO*** *supra* para 45.

34. The Recognition of Customary Marriages Act and Civil Union Act were not in existence when section 2C(1) of the Wills Act was enacted. Accordingly, at that time, the only 'surviving spouse' to whom the Legislature sought to afford any benefit under section 2C(1) was, as contended by Third Respondent in its decision-making process, a husband/wife in a monogamous civil marriage solemnised under the Marriage Act. No provision was made for the inclusion therein of, *inter alia*, persons married in a monogamous or polygamous union under customary law or religion (save for Christianity).

35. The meaning of 'surviving spouse' apparent from the historical factors is reinforced by a grammatical interpretation of this term. Since the Wills Act does not define its components, namely, 'survivor' and 'spouse', consideration must be given to their ordinary, linguistic meaning. See ***Satchwell v President of South Africa and Another*** 2002 (6) SA 1 (CC) para 9 where the Court held that the ordinary meaning of 'spouse' refers to 'a party to a marriage that is recognised as valid in law and not beyond that'.

36. Since, as explained above, South African law at the time when section 2C of the Wills Act was enacted only recognised as valid marriages formalised under the Marriage Act, the ordinary, linguistic meaning of 'surviving spouse' as used in section 2C(1) of the Wills Act does not extend to spouses married by Muslim rites, both *de facto* monogamous and polygamous unions under Shari'ah.

37. The Legislature deliberately used the singular 'surviving spouse' because, at the time of the enactment of section 2C(1), the law of marriage recognised only monogamous civil marriages.[18] Thus, the term 'surviving spouse' in the context of section 2C(1) was not intended to embrace multiple spouses.

38. The Constitutional Court, in ***Hassam v Jacobs NO*** *supra* para 24, emphasised that the non-protection of Muslim marriages under apartheid is constitutionally offensive and untenable in a universalistic, caring, diverse, egalitarian, pluralistic, compassionate, democratic society operating under a supreme Constitution.

39. The term 'surviving spouse' in section 2C(1) of the Wills Act must be interpreted through the prism of section 39(2) of the Constitution which enjoins that every interpretation of a statutory provision must promote 'the spirit, purport and objects of the Bill of Rights'. This necessitates, *inter alia*, an interpretation that best conforms to the Constitution, least infringes any fundamental rights of affected persons, and reflects the constitutional values and norms of an enlightened, democratic SA and not the conviction of apartheid South Africa which prevailed when section 2C(1) was enacted.

40. By virtue that, for the reasons given above, the term 'surviving spouse' as used in section 2C(1) of the Wills Act excludes from its ambit marriages concluded under the rules of Shari'ah, and excludes multiple spouses of any polygamous marriages, it is inimical to the Constitution and its declaration of invalidity falls to be upheld by this Court.

THIRD APPLICANT'S CONSTITUTIONAL CHALLENGES

41. In terms of section 7(2) of the Constitution, the State is obliged to respect, protect, promote, and fulfil the rights entrenched in the Bill of Rights.

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[18] It bears noting, however, that section 6 of the Interpretation Act 33 of 1957 states that 'in every law, unless the contrary intention appears .... words in the singular include the plural'.

42. Accordingly, the Legislature cannot enact provisions in the Wills Act which violates its positive obligations arising from section 7(2) of the Constitution.

43. Third Applicant is a beneficiary of the Bill of Rights. As pointed out by le Grange J at para 17 of his reported judgment, Third Applicant challenged the constitutionality of the narrow interpretation of 'surviving spouse' applied by Third Respondent. This she did in the pleadings on the basis that it violates her rights to, *inter alia*, equality (s 9) and human dignity (s 10).[19]

44. It is common cause with First and Second Respondent that the narrow interpretation of the term 'surviving spouse' offends the equality clause in the Constitution. The submissions below will deal with constitutional challenge with reference to both equality and human dignity.

45. Each constitutional challenge will now be dealt with in turn hereunder.

EQUALITY CHALLENGE

46. The relevant extracts of section 9 reads as follows:

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

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[19] See paras 64 to71 of the FA.

47. As shown above, the term 'surviving spouse' in section 2C(1) of the Wills Act differentiates between widows / widowers married in terms of the Marriage Act and those married in terms of Shari'ah. Whereas section 2C(1) confers benefits on the former group, it does not for the latter. Section 2C(1) also differentiates between widows in monogamous civil marriages and those in polygamous Muslim marriages. The former group falls in the net of section 2C(1), the latter not. To the extent that section 2C(1) confers benefits on widows in polygamous customary marriages by reason of the Recognition of Customary Marriages Act, section 2C(1) then differentiates between widows in polygamous customary unions and those in polygamous Muslim marriages. Whereas the former group is covered by section 2C(1), the latter is not.

48. Not every instance of differentiation is discriminatory. See ***Hassam v Jacobs NO*** *supra* para 32. However, it is submitted that, for the reasons outlined below, the differentiation identified above amounts to unfair discrimination outlawed under section 9(3) of the Constitution. The First and Second Respondent concede this in the heads of argument filed on their behalf.

49. In ***Harksen v Lane*** 1998 (1) SA 300 (CC) paras 41-69, a two-stage enquiry was set when dealing with violations of equality. See also ***President of SA v Hugo*** 1997 (4) SA 1 (CC) paras 32-50. The first stage is to establish whether differentiation has taken place. As shown above, the answer to this is: Yes.

50. The second requires determination of whether or not the differentiation bears a rational connection to a legitimate government purpose. It is submitted that no such connection exists and none has been proferred. This is because the differentiation exists simply because the apartheid Parliament, at the time it enacted section 2C(1) of the Wills Act, adhered to the strict common law definition of 'marriage' which excludes polygamy in favour of a marriage that is monogamous for life. It adhered to this concept of 'marriage' and, by extension, 'spouse' despite the fact that it caused injustice and permitted marginalisation of communities and individuals whose customs and/or religions, unlike our common law, did not frown upon polygamy. This is aptly

epitomised in ***Daniels v Campbell NO*** *supra* para 48 where Ngcobo J, as he then was, 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.'

51. The facts *in casu* demonstrate that the concept 'surviving spouse' in the context of section 2C(1) of the Wills Act, as applied by Third Respondent, is unfairly discriminatory in nature and/or effect for one or more of the following reasons:

(a) The narrow interpretation includes spouses (such as Second Applicant) by reason only that he/she is married in a civil union and it excludes other married persons (such as Third Applicant) by reason only that he/she is married by Shari'ah;

(b) The narrow interpretation includes within its ambit widows and widowers in a monogamous civil marriage and excludes a surviving spouse from a monogamous and polygymous Muslim marriage (such as Third Applicant); and

(c) Section 2C(1) <u>may</u> be interpreted to include within its ambit spouses in a lawful and legally recognised polygamous customary marriage, but excludes women in a polygamous Muslim marriage.

52. The discrimination against Third Applicant is direct and/or indirect, and is, for the reasons given below, premised on the grounds of gender, religion, and/or marital status.

53. As a woman, she is a member of a vulnerable group in our society for whom section 2C(1) of the Wills Act is beneficial since women are 'economically dependent on men and are left destitute and suffer hardships on the

death of their male partners'.[20] Accordingly, a liberal (broad) interpretation of surviving spouse in section 2C(1) is to be preferred.

54. If the term 'surviving spouse' in section 2C(1) of the Wills Act is interpreted narrowly then it would deny benefits to certain groups, namely, spouses in polygamous Muslim marriages. Such a result is tantamount to discrimination on the grounds of marital status. See ***Daniels v Campbell NO*** *supra*.

55. A narrow construction of 'spouse' in the context of section 2C(1) of the Wills Act would render all Muslim marriages, whether monogamous or polygamous, to be excluded from its ambit. Such a result would be discrimination on the grounds of religion.

56. The exclusion of Muslim marriages, whether monogamous or polygynous, from the ambit of the Wills Act infringes the rights to equality, and freedom of religion and culture of the persons involved in such unions (such as Third Applicant), each of which right is entrenched in the Bill of Rights.

HUMAN DIGNITY CHALLENGE

57. Although there is no hierarchy of fundamental rights in the Constitution, human dignity plays a critical role therein. This is evidenced by the fact that human dignity is both a founding value in s 1(a) thereof, a democratic value in ss 7(1) and 36(1), and a fundamental right in s 10. Its critical place in the ethos and culture of our democracy is exemplified at para 329 in ***S v Makwanyane*** 1995 (3) SA 391 (CC) where O' Regan J stated:

'Recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.'

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20 See ***Volks NO v Robinson*** *supra* para 63. See ***S v Jordan and Others*** 2002 (6) SA 642 (CC) paras 63-66 where the minority judgment of Sachs and O' Regan JJ dealt with the vulnerability of women as prostitutes.

58. Human dignity must be interpreted to afford protection to the institutions of marriage and family life. See ***Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others*** 2000 (3) SA 936 (CC) at para 35. In ***Volks NO v Robinson*** *supra* para 78, Ngcobo J held:

'Dignity is an underlying consideration in the determination of unfairness. Thus in the *Harksen* case, this Court held that "[t]he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner." While legislation may make distinctions, those "distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity" cannot be tolerated. In the final analysis, it is the impact of discrimination on the survivors of permanent life partnerships that is the determining factor regarding the unfairness of the discrimination in this case.'

59. Human dignity is a right worthy of respect and protection. The narrow interpretation of 'surviving spouse' in section 2C(1) of the Wills Act and the decision to exclude Third Applicant from its ambit is an unjustifiable infringement of her human dignity because:

- it undermines her fifty year marriage to the deceased;
- it unjustifiably discriminates against her purely for the by reason that she was married to the deceased by Muslim rites only;[21]
- it diminishes Third Applicant's sense of self-worth;
- it conveys to Third Applicant that her marriage not worthy of legal recognition; and
- it conveys to Third Applicant that she as a human being is not of equal worth in the eyes of the law.

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21 The important role played by marriage as an institution in our society is well recognised. See **Volks NO v Robinson** *supra* paras 52-53 58; ***Minister of Homes Affairs v Fourie*** *supra* paras 51-53 56 64-70.

60. The infringement of the Third Applicant's human dignity is not reasonable nor justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated by section 36(1) of the Constitution.

61. None of the State parties have attempted to justify the infringement on any of Third Applicant's fundamental rights as they are required to do by law. Indeed, First and Second Respondents concede that no justification exists. See paras 11 – 12 of the heads of argument filed on their behalf.

GENERAL LEGAL SUBMISSIONS

62. The following general, legal considerations favour the adoption of the broader interpretation of 'surviving spouse' in section 2C(1) of the Wills Act:

(a) The broader interpretation would have the effect that recognition is given to 'spouses' in Muslim marriages for purposes of testate succession in the Wills Act. This is in line with the increased legislative recognition and/or protection accorded to spouses in Muslim marriages. For a list of applicable legislation, see footnote 173 in ***Volks NO v Robinson*** *supra*. Thus, applying the broad interpretation would uphold a fundamental tenet of the rule of law, namely, promoting consistency and certain in the law.

(b) The broader interpretation would bring about parity and equal treatment of polygamous marriages solemnised under the tenets of Shari'ah, on the one hand, and under South African customary law, on the other. Under the Recognition of Customary Marriages Act, our law recognises polygamous customary law marriages to which an adult male is a party at the same time if it is concluded in accordance with the relevant prescriptions. Thus, each customary law wife will, on the husband's death, be recognised as a 'surviving spouse' for purposes of section 2C(1) of the Wills Act. The broader interpretation of section 2C(1) of the Wills Act contended for by the Applicants will ensure that the same benefit and protection is accorded to those women married to the same husband in polygynous unions under Shari'ah;

(c) The adoption of the broader interpretation would promote the constitutional value of diversity. This is so because it would ensure that the concept 'spouse' in the Wills Act, and by extension also 'marriage' and 'wedlock', reflects the cultural and religious diversity of South African society;[22]

(d) The adoption of the broader interpretation would promote parity and equal treatment in the realm of testate succession under section 2C(1) of the Wills Act between, on the one hand, spouses in civil marriages and, on the other, spouses in Muslim marriages;

(e) The broader interpretation would minimise the vulnerability of those women who are married in polygamous religious marriages under Islam and, concomitantly, the vulnerability of any child(ren) in their care; and

(f) The adoption of the broader interpretation does not involve undue straining of the language of section 2C(1) of the Wills Act, and would be manifestly consistent with the context and structure of the text under consideration.

63. The following general, legal considerations favour the rejection of the narrower interpretation of 'surviving spouse' in section 2C(1) of the Wills Act:

(g) As stated above, a widow and widower in a marriage solemnised under the Shari'ah is recognised as a 'spouse' for purposes of the Intestate Succession Act and Maintenance of Surviving Spouses Act. Hence, they are entitled to inherit intestate from a deceased spouse, or claim maintenance from his/her estate. The adoption of the narrow construction, as applied by the Third Respondent, would have the undesirable legal effect that the same class of widows and widowers (such as Third Applicant), would not be classified as a 'spouse' for purposes of the Wills Act under section 2C(1) thereof but would be a 'spouse' for other legal purposes referred to here;

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22 Section 15(3)(a)(i) of the Constitution provides for the recognition of 'marriages concluded under any tradition, or a system of religious, personal or family law'. Thus, the Constitution 'acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation'. See ***Minister of Home Affiars v Fourie supra*** para 60.

(h) The adoption of the narrow interpretation of 'spouse' would have the untenable legal effect that the terms 'marriage' and 'wedlock', as used in the Wills Act, does not encompass any marriage/wedlock that is not formalised under either the Marriage Act, Recognition of Customary Marriages Act, or Civil Union Act. Consequently, for purposes of testate succession under the Wills Act, all children born of a marriage not formalised under any of these statutes would, as a matter of law, be regarded as 'born out of wedlock'. Such a result would be offensive to the dignity of the children and their parents, and an affront to their respective religious and/or cultural convictions. On the other hand, the adoption of the broader interpretation would promote and ensure respect for the dignity of all such persons;

(i) The adoption of the narrower interpretation of 'surviving spouse' would result in uneven rights and duties for 'spouses' under the Wills Act. This is so because it would result in unfair disparity in the treatment of 'spouses' who sign a Will as, for example, a witness. Whereas persons married by civil law would be disqualified from receiving any 'benefit' under a Will that is witnessed by his/her 'spouse',[23] such disqualification would not apply to spouses married exclusively by Shari'ah. Such a state of affairs is undesirable and would create fertile opportunity for manipulation of vulnerable or unsuspecting testators by unscrupulous persons abusing their position of trust or power over a testator. This is the mischief sought to be avoided by the Legislature.

(j) The adoption of the narrower interpretation would be incongruent with the Constitution because it would have the effect that section 2C(1) of the Wills Act unfairly distinguishes between, on the one hand, survivors of heterosexual civil marriages or unions formalised under our law and, on the other, survivors of heterosexual polygamous religious unions. Such

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[23] Section 4A(1) of the Wills Act reads: 'Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.'

distinction by the State violates section 9(3) of the Constitution because it is unfair discrimination against persons on the grounds of their marital status, and/or religion, and/or culture;

64. Accordingly, it is submitted that Applicants have made out a proper case for relief sought under sections 172(1) of the Constitution. A decision in their favour would 'affirm the very character of our society as one based on tolerance and mutual respect'[24] across difference.

APPROPRIATE RELIEF

65. 'Surviving spouse' in section 2C(1) of the Wills Act is incapable of being interpreted in a way that would encompass spouses who are survivors in a Muslim marriage and situations where there are multiple surviving spouses of polygamous Muslim marriages. A construction of this term to such effect in order to render it constitutional would involve undue straining[25] of the term 'surviving spouse' as it is used in the context of section 2C(1), having regard also to the purpose and structure of the Wills Act. Accordingly, the defect in section 2C(1) can only be cured by a reading-in of the words as found by le Grange J. This approach was also adopted by the Constitutional Court in ***Hassam v Jacobs NO*** *supra* para 57 and ***Satchwell v President of South Africa*** *supra* para 44.

66. In the event that this Court recognises that more than one spouse may be a 'surviving spouse' under section 2C(1) of the Wills Act, then this Court ought also to hold that in such instances the benefits under section 2C(1) vest in them equally, alternatively on such fair and reasonable basis as determined by the Executor of the testator's estate acting in accordance with the provisions of the Administration of Estates Act, 1965.

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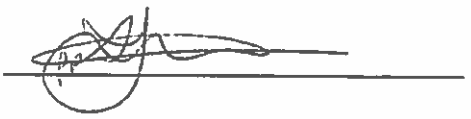
24 ***Minister of Home Affairs v Fourie*** *supra* para 60.

25 ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*** 2001 (1) SA 545 (CC) para 24.

67. In the premises, Applicants have made out a proper case for confirmation of the declaration of invalidity of section 2C(1) of the Wills Act to the extent held by le Grange J at para 39 of his judgment, including confirmation of the reading in of certain words read into section 2C(1) as done by le Grange J. Moreover, Applicants seek an order confirming the remaining relief granted by le Grange J, referred to above at paras 19(d), (e) and (f).

DATED AT RONDEBOSCH ON THIS THE 07th DAY OF MAY 2018.

FAREED MOOSA & ASSOCIATES INC.



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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT251/2017

WESTERN CAPE HIGH COURT CASE NUMBER: 400/2017

In the matter between:-

FAREED MOOSA N.O.	First Applicant
AMINA HARNAKER	Second Applicant
FARIEDA HARNEKER	Third Applicant

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES (formerly Minister of Justice and Constitutional Development)	First Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	Second Respondent
THE REGISTRAR OF DEEDS, Cape Town	Third Respondent
TRUSTEES FOR THE WOMEN'S LEGAL CENTRE TRUST Amicus Curia	

APPLICANTS' LIST OF AUTHORITIES

Statutes

Administration of Estates Act 66 of 1965

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa, 1996

Deeds Registries Act 47 of 1937
Domestic Violence Act 16 of 1998
Insolvency Act 24 of 1936
Interpretation Act 33 of 1957
Intestate Succession Act 81 of 1987
Law of Succession Amendment Act 43 of 1992
Maintenance Act 99 of 1998
Maintenance of Surviving Spouses Act 27 of 1990
Marriage Act 25 of 1961
Recognition of Customary Marriages Act 120 of 1998
Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
Wills Act 7 of 1953

Cases

Daniels v Campbell NO and Others v Campbell 2004 (5) SA 331 (CC)
Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)
Harksen v Lane 1998 (1) SA 300 (CC)
Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC)
Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)
Ismail v Ismail 1983 (1) SA 1006 (A)
Khan v Khan 2005 (2) SA 272 (T)
Khan v Minister of Home Affairs and Others [2014] ZAWCHC (27 June 2014)
Laubscher NO v Du Plan and Another 2017 (2) SA 264 (CC)
Minister of Homes Affairs v Fourie 2006 (1) SA 524 (CC)
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
President of SA v Hugo 1997 (4) SA 1 (CC)
Rose v Rose (unreported case, WCHC case no. 14770/2011; 13 August 2014)
Rylands v Edros 1997 (2) SA 690 (C)
S v Jordan and Others 2002 (6) SA 642 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Satchwell v President of South Africa and Another 2002 (6) SA 1 (CC)

Seedat's Executors v The Master (Natal) 1917 AD 302

Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC)

CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No.251/2017

WC Case No: 400/2017

In the matter between:

FARRED MOOSA N.O	First Applicant
AMINA HARNEKER	Second Applicant
FARIEDA HARNEKER	Third Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	Second Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent

HEADS OF ARGUMENT ON BEHALF OF THE FIRST RESPONDENT

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INTRODUCTION

1. The Western Cape High Court granted an Order in this matter on 14 September 2017, arising from an unopposed application before it.

2. Although the first respondent ("**the Minister**") was cited as a respondent in the application, the Minister neither opposed the application nor made submissions at the hearing of the matter before the Western Cape High Court.

3. In the proceedings before this Court, the Minister filed a notice of intention to abide. These brief Submissions are filed pursuant to this Court's recognition that the contentions and evidence, if any, advanced by the State functionary charged with the administration of legislation under scrutiny "are vital, if not indispensable, for proper ventilation and ultimate adjudication of the constitutional challenge to the validity of legislation."[1]

4. In what follows, we shall:

   4.1. First, set out, in brief, the facts giving rise to the application.

   4.2. Second, address the applicable law.

   4.3. Third, address the question of remedy.

[1] Van der Merwe v RAF (Women's Legal Centre Trust as Amicus Curiae) 2006 (4) SA 230 (CC) at par 7 and 8.

We emphasise at the outset that these Submissions are limited to the alleged unconstitutionality of the Wills Act No 7 of 1953 ("**the Wills Act**"); we make no submissions in respect of the consequent relief that the applicants seek. Furthermore, these Submissions are filed in the absence of having received: (a) the Record; and (b) the applicants' Written Submissions. Shortly prior to these Submissions having been finalised, the State Attorney received correspondence from the applicants' attorneys explaining why the Directions issued by this Court were not complied with and requesting that the matter be removed from the roll for 3 May 2018 and that a new date be allocated for the hearing thereof. The Minister does not oppose the request; we do however reserve the right to supplement these Submissions on receipt of the applicants' submissions and the record.

THE FACTS GIVING RISE TO THE APPLICATION

5. The undisputed evidence giving rise to this application may be summarised as follows:

5.1. On 10 March 1957, the now late Mr Osman Harneker ("**the Deceased**") married the second applicant by Muslim rites.[2] There

[2] FA; par 25.

were four children born from that marriage, all of whom are majors.[3]

5.2. On 31 May 1964, the Deceased married the third applicant also by Muslim rites.[4] There were four children born from that marriage, all of whom are majors.[5]

5.3. From 31 May 1964 until his death in June 2014 and in accordance with the tenets of Islamic Law, the Deceased lived in a polygynous Muslim marriage(s) with the second and third applicants.[6]

5.4. At all material times after the Deceased's respective marriages to the second and third applicants, he lived with each of them respectively as their husband and carried out the financial and other duties of support required of a husband.[7]

5.5. During the course of the Deceased's marriage to the second and third applicants: (a) the Deceased was by and large the sole breadwinner of the joint household[8]; and (b) the Deceased treated the second and third applicants the same in the sense that he

[3] FA; par 29.
[4] FA; par 25.
[5] FA; par 30.
[6] FA; par 26.
[7] FA; par 27.
[8] FA; par 32.

provided them with the same, or substantially the same, proprietary benefits.[9]

5.6. The second and third applicants in turn, performed their reciprocal duties and responsibilities of a wife to the Deceased, which included being homemakers and taking care of the Deceased's emotional and physical needs.[10]

5.7. On 5 August 1982, the Deceased entered into a civil marriage in community of property with the second applicant[11]; this was done "purely for the sake of financial convenience", namely, "to qualify for a home loan".[12]

5.8. In December 1987, the Deceased signed an offer to purchase certain residential property in Crawford ("**the property**"); since the Deceased and the second applicant are married in terms of civil law, the property was registered in their names jointly.[13]

5.9. Since at least 1988, the Deceased, the second applicant, the third applicant and certain of their children occupied the property as a

[9] FA; par 39.
[10] FA; par 27.
[11] FA; par 33.
[12] FA; par 37. See too: FA; par 35 and 36.
[13] FA; par 43.

single, joint household in Crawford, Cape Town; and although there were two marriage units, they lived as a single family.[14]

5.10. On 9 June 2014, the Deceased died testate, leaving a Last Will and Testament dated 23 January 2011.[15]

5.11. On 30 March 2015, all the Deceased's children ("**the Heirs**"), by agreement renounced their testamentary benefits.[16] The agreement that they signed in this regard states, *inter alia*, as follows[17]:

> *"1. The heirs do hereby repudiate their respective benefits conferred on them by the deceased's Last Will and Testament read with the Islamic distribution certificate.*
>
> *2. The heirs confirm that by reason of their repudiation FARIEDA HARNEKER and AMINA HARNAKER shall inherit the following assets in equal shares:*
>
> *(a) One half (1/2) share of Erf 107088 CAPE TOWN, IN THE CITY OF CAPE TOWN, CAPE DIVISION, PROVINCE OF THE WESTERN CAPE;*
>
> *(b) A Mazda Motor Vehicle bearing registration number CA 204 931; and*
>
> *(c) Cash at Bank held at Standard Bank under account number 27 033 5005.*

[14] FA; par 31 and 44.
[15] FA; par 46.
[16] FA; par 49 read with FA8.
[17] FA8.

3. *The heirs do hereby, jointly and severally, irrevocably undertake to pay the administration costs as well as the claims of the creditors of the estate of the deceased.*

4. *The heirs do hereby, jointly and severally, irrevocably undertake to pay all transfer and others costs, charges and disbursements incurred in relation to the administration of the deceased's estate including, but in no way limited to, transfer of the above mentioned property into the name of FARIEDA HARNEKER and AMINA HARNAKER."*

5.12. In terms of the First and Final Liquidation and Distribution Account ("**the L&D account**")[18]:

5.12.1. The immovable property is divided between the first and second applicants on the following basis:

5.12.1.1. To Amina Harnaker: (a) one half by virtue of marriage in community of property; and (b) one quarter share by virtue of the Deceased's last Will and Testament dated 23 January 2011 read with the Distribution Certificate issued by the Muslim Judicial Council and the Repudiation of Testamentary Benefits dated 20 March 2015.

[18] FA 7.

5.12.1.2. To Farieda Harneker: one quarter share by virtue of the Deceased's last Will and Testament dated 23 January 2011 read with the Distribution Certificate issued by the Muslim Judicial Council and the Repudiation of Testamentary Benefits dated 20 March 2015.

5.12.2. The Mazda motor vehicle is divided between the first and second applicants on the following basis:

5.12.2.1. To Amina Harnaker: (a) one half by virtue of marriage in community of property; and (b) one quarter share by virtue of the Deceased's last Will and Testament dated 23 January 2011 read with the Distribution Certificate issued by the Muslim Judicial Council and the Repudiation of Testamentary Benefits dated 20 March 2015.

5.12.2.2. To Farieda Harneker: one quarter share by virtue of the Deceased's last Will and

Testament dated 23 January 2011 read with the Distribution Certificate issued by the Muslim Judicial Council and the Repudiation of Testamentary Benefits dated 20 March 2015.

5.13. The second respondent ("**the Master**") was satisfied that there was compliance with his obligations and informed the first applicant ("**the Executor**") that he may effect transfer of the property in terms of the L & D account and provide the Master with proof thereof.[19]

5.14. The Executor proceeded to take legal steps to effect registration of the property in accordance with the Distribution Account.[20]

5.15. On 11 March 2016, transfer of the property was lodged with the third respondent ("**the Registrar**"); it was however rejected.[21]

5.16. It is alleged that the Registrar, examined the transfer documentation in relation to the property and decided, in the

[19] FA; par 55.
[20] FA; par 56.
[21] FA; par 58.

exercise of the discretion conferred on him, not to grant approval for the registration of the property.[22]

6. It is alleged that the Registrar's reasons for his decision are:

6.1. That he was satisfied that the second applicant was for the purposes of section 2C(1) of the Wills Act, a "surviving spouse" of the Deceased by reason of having concluded a civil marriage with him in community of property, which marriage was recognised by South African law. On this basis, the Registrar had no objection to transferring the property to the second applicant.[23]

6.2. That the position was different in respect of the third applicant in that she was married to the Deceased by Muslim rites and that Muslim marriages have not been recognised for all purposes in law and that in particular, no South African Court has as yet recognised Muslim marriages for purposes arising from section 2C(1) of the Wills Act.

6.3. The result of the aforegoing is that when the third applicants' children renounced their inheritance, all of the benefits (as renounced) fell to be inherited by the children of those

[22] FA; par 59.
[23] FA; par 60.

descendants; and that section 2C(1) of the Wills Act was not thereby triggered.[24]

THE LAW

7. Section 2C of the Wills Act (in relevant part) provides as follows:

> *"Surviving spouse and descendants of certain persons entitled to benefits in terms of will*
>
> *(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.*
>
> *(2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates."*

8. At the heart of this matter, lies the definition of "surviving spouse", which term is not defined in the Wills Act.

9. In making the submissions that follow, it must be emphasised that the Minister[25]:

[24] FA; par 62 and 63.

9.1. Does not approach this matter on the basis that it concerns the constitutional validity of marriages entered into in accordance with Muslim rites.

9.2. Does not approach this case on the basis that it concerns the constitutional validity of polygynous marriages entered into in accordance with Muslim rites.

9.3. Does not seek to incorporate any aspect of *Sharia* law into South African law.

10. We submit that based on this Court's jurisprudence to date, this matter falls to be approached on the following basis:

10.1. The word "spouse" in its ordinary meaning includes parties to a Muslim marriage. As this Court has previously held, such a reading is not linguistically strained; on the contrary, it corresponds to the way the word is generally understood and used. It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word "spouse" than to include them. As previously recognised by this Court, such exclusion as was effected in the past did not flow from courts giving the word "spouse" its

[25] We point out that there is separate litigation pending in the Western Cape High Court in respect of which the Applicants in those matters are seeking relief in respect of the overall recognition of Muslim marriages. The Minister is opposing those applications.

ordinary meaning; rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it.[26]

10.2. In the present matter (as was the case in previous litigation subsequent to the Constitution) the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad and inclusive construction, the more so when it corresponds with the ordinary meaning of the word. As was held by this Court in similar cases, the issue is not whether to impose some degree of strain on the language in order to achieve a constitutionally acceptable result; it is whether to remove the strain imposed by past discriminatory interpretations in favour of its ordinary meaning.[27]

11. In line with the constitutional analysis undertaken by this Court in **Hassam v Jacobs NO** 2009 (5) SA 572 (CC), we make the following further submissions in respect of the present matter:

11.1. The effect of section 2C(1) of the Wills Act is that it excludes spouses in polygynous Muslim marriages. In so doing, it prefers (to the exclusion of other wives in a polygynous Muslim marriage),

[26] **Daniels v Campbell NO** 2004 (5) SA 331 (CC) at par 19.
[27] **Daniels v Campbell NO** 2004 (5) SA 331 (CC) at par 21.

only the person who had been married to the Deceased in terms of civil law. It does so notwithstanding rights to equality before the law and to equal protection of the law being foundational.[28]

11.2. The Wills Act differentiates between spouses married in terms of the Marriage Act and those married in terms of Muslim rites; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. In so doing, it works to the detriment of Muslim women and men.[29]

11.3. The differentiation, we submit, plainly amounts to discrimination; it occurs on a listed ground in terms of section 9 of the Constitution. 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; and marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive for the purposes of section 2C of the Wills Act.[30]

11.4. The next step in the analysis is whether this unfair discrimination can be justified under section 36 of the Constitution.[31] In the

[28] **Hassam v Jacobs NO** 2009 (5) SA 572 (CC) at par 30.
[29] **Hassam v Jacobs NO** 2009 (5) SA 572 (CC) at par 31.
[30] **Hassam** at par 34.
[31] **Hassam** at par 40.

present instance, the Minister has not sought to justify the impugned provision in terms of section 36 of the Constitution.

11.5. In any event, in having regard 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, there can, we submit, be no justification for the impugned provision.

12. The result of the aforegoing is that section 2C(1) of the Wills Act is unfairly discriminatory; that unfair discrimination cannot be reasonably and justifiably limited in terms of section 36 of the Constitution. It follows, that section 2C(1) of the Wills Act is unconstitutional, to the extent that the term "surviving spouse" therein does not include a husband or wife in a marriage that was solemnised under the tenets of Islam (Shari'ah).

REMEDY

13. Given that section 2C(1) of the Wills Act is unconstitutional for reasons addressed, this Court must grant an appropriate remedy.

14. 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.

15. The Court of first instance ordered *inter alia*, as follows:

> *"(a) In terms of s 172(1)(a) of the Constitution, s 2C(1) of the Wills Act is declared inconsistent with the Constitution and invalid only:*
>
> *(i) to the extent that, for the purposes of the operation of s 2C(1), the term 'surviving spouse' therein does not include a husband or wife in a marriage that was solemnised under the tenets of Islam (Shari'ah); and*
>
> *(ii) to the extent that, for the purposes of the operation of s 2C(1), the term 'surviving spouse' therein does not include multiple female spouses who were married to a deceased testator under polygynous Muslim marriages.*
>
> *(b) In terms of s 172(1)(b) of the Constitution, it is just and equitable to read s 2C(1) of the Wills Act as including the italicised words:*
>
> *'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. For purposes of this sub-section, a surviving spouse includes every husband and wife of a de facto monogamous and polygynous Muslim marriage solemnised under the religion of Islam."*

16. The Minister has no objection to the Order as granted. In accordance with the prescripts of section 172 of the Constitution, the Order declares the Wills Act to be unconstitutional to the extent necessary and has read in the necessary words in order to remedy the unconstitutionality.

17. However, the Order does not expressly address the question of the retrospective application of its Order and nor does the judgment address this issue, save for the Order providing as follows:

> *"(f) None of the orders granted herein shall affect the validity of any act performed in respect of the administration of a testate estate that has been finally wound up under the Administration of Estates Act 66 of 1965 or any other similar statute by the date of this order."*

18. We submit that the question of retrospectivity falls to be dealt with in line with this Court's approach:

18.1. First, in **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 the Republic of South Africa and Another** 2005 (1) SA 580 (CC), and in particular, this Court's findings that:

18.1.1. It would be neither just nor equitable for affected women and extra-marital children to benefit from a declaration of invalidity only if the deceased had died after 4 February 1997, but not if the deceased had died after the interim Constitution had come into force but before the final Constitution was operative. For that reason, this Court found that the declaration of invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice.[32]

18.1.2. This notwithstanding, the declaration of invalidity must not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary-law rule in question.[33]

18.2. Second, in **Hassam**, this Court recognised that the implementation of its Order could result in serious administrative or practical difficulties. Accordingly, as part of its order, it afforded any interested person the right to approach this court for a variation of its order in such circumstances. Likewise, more recently, in **Ramuhovhi and Others v President of the Republic of South Africa and Others** (CCT194/16)

[32] At par 128.
[33] At par 129. This is similar to paragraph 3.4. of the order in **Hassam**.

[2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (30 November 2017), this Court, as part of its Order provided as follows: "Any interested person may approach this Court for a variation of this order in the event that she or he suffers harm not foreseen in this judgment."[34] The Minister would support a similar Order in the present case.

19. We accordingly propose that in addition to the order as granted by the Court of first instance (save for subparagraph (f) which is to be substituted in the terms set out hereunder), that this Court expressly order as follows:

> *"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 application of section 2C(1) of the Wills Act No 7 of 1953, 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.*
>
> *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."*

KARRISHA PILLAY

Counsel for the First Respondent

[34] At par 9.

5 April 2018

Chambers

Cape Town

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 251 / 2017

HC CASE NO: 400/17

In the matter between:

FAREED MOOSA N.O	First Applicant
AMINA HARNAKER	Second Applicant
FARIEDA HARNEKER	Third Applicant

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
THE WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae

AMICUS CURIAE'S HEADS OF ARGUMENT

CONTENTS

INTRODUCTION

1 Pursuant to the directions of this Honourable Court dated 26 April 2018, the Women's Legal Centre Trust ("WLC") makes the following submissions for admission as an *amicus curiae* in this matter and on the merits of the confirmation application brought before this Court.

2 This is an application in terms of Rule 16(4) of this Court's Rules in which the applicant seeks confirmation of the judgment and order of LeGrange J in the Cape Town High Court dated 14 September 2017, under case number 400 / 2017,[1] in which the Court held *inter alia*:

2.1 Section 2C(1) of the Wills Act 7 of 1953 (the Wills Act) is declared inconsistent with the Constitution and invalid only to the extent that the terms "surviving spouse" does not include a husband or wife in a marriage solemnised according to Shari'ah law, and does not include female spouses married to a deceased testator under polgynous Muslim marriages;

2.2 The following underlined words are read into section 2C(1) of the Wills Act:

> "If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. For purposes

[1] Moosa NO and Others v Harnaker and Others 2017 (6) SA 425 (WCC) (Judgment)

of this sub-section, a 'surviving spouse' includes every husband and wife of a *de facto* monogamous and polygynous Muslim marriage solemnised under the religion of Islam."[2]

3 The factual background of this application is common cause and is set out in the judgment of the court a quo, per LeGrange J in paragraphs 3 to 12.

4 The application was unopposed in the high court and the WLC was admitted as *amicus curiae* in those proceedings.

5 The WLC supports the confirmation proceedings. These submissions are structured in the following manner:

5.1 The basis for the admission of the Women's Legal Centre (WLC) as *amicus curiae*;

5.2 The challenges faced by Muslim women in South Africa;

5.3 The extent to which section 2C(1) of the Wills Act discriminates against Muslim women in polygamous marriages; and

5.4 South Africa's international and regional law obligations in respect of Muslim women; and

5.5 The appropriate relief.

[2] Judgment par [39]

THE ADMISSION OF THE WLC AS *AMICUS CURIAE*

6 The core objective of the WLC is to advance and protect the human rights of all women and girls in South Africa, particularly women who suffer many intersecting forms of disadvantage and discrimination, and in so doing to contribute to a substantively equal society.

7 The Trust fulfils its main object by giving legal assistance to women litigants free of charge, and by making *amicus curiae* submissions in order to assist courts in constitutional and public interest matters that concern women's rights and gender equality. To this end the Trust established the Women's Legal Centre, a law centre through which public interest litigation is conducted, including constitutional litigation to advance the human rights of women.

8 The WLC has over the years often been approached by women and organisations for legal advice about the impact of Muslim personal law on women and children. In some instances, it has litigated on behalf of clients. These cases have highlighted the vulnerability of women married under Muslim personal law, and their children, in circumstances when those marriages are dissolved upon death or divorce.

9 The equal protection of women and families living under religious law is a matter of important public interest. It is the position of this broader class of women and their families that the Trust asks the Court to take into account. This is a particularly vulnerable class of women, who have

limited access to resources to refer matters to the Courts to decide matters, let alone on constitutional issues. There are Muslim women who live in polygynous marriages and cannot assert their rights because there is no legal framework to govern their religious marriages.

10 The present case fits squarely within the WLC mandate as it concerns the public consequences to the private, personal law relationship established between the testator and the second and third applicants, married to the testator in accordance with Muslim personal law (Shari'ah law).

11 The WLC seeks to make submissions before this Court on the vulnerability of women married in accordance with Muslim personal law, the impact of the discrimination experienced by these women in regulating their affairs in the public sphere and the obligations assumed by the State under the Constitution and under international and regional law instruments to ameliorate the discrimination experienced by these women.

THE CHALLENGES FACED BY MUSLIM WOMEN IN SOUTH AFRICA

12 The women affected by the non-recognition of Muslim marriages are especially vulnerable and marginalised compared those married civilly or according to customary law because they must approach religious leaders to adjudicate on their marital issues, which is usually resolved in favour of the men in the relationship. In the absence of control over

rights to property and assets accumulated during the marriage, these women suffer hardship in a multiplicity of ways.

13 There is currently no legislation in place which recognises Muslim marriages and regulates its consequences. We are aware that the Legislature has in the past released the Muslim Marriages Bill for comments. Following input from a wide range of interested parties, the Bill was not taken forward.

14 Given the delays in finalising legislation to recognise Muslim marriages, the WLC instituted litigation in the Western Cape High Court, in the public interest, against the President, the Minister of Justice and Constitutional Development, the Minister of Home Affairs and Parliament of South Africa under case number 22841/2014 (the WLC application).[3] The primary relief sought in that application is a declarator that the State has failed in its constitutional obligations under section 7(2) of the Constitution to prepare and initiate, diligently and without delay, as required by section 237 of the Constitution, a Bill to provide for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition. The hearing of the application was completed in April 2018 and the judgment in the matter is pending.

15 Pending the judgment in the WLC application and in the absence of legislation, parties to Muslim marriages, particularly Muslim women,

[3] Amicus curiae affidavit at 9, par 13

continue to be marginalised and on the fringes of legal and constitutional protection.

16 The WLC sets out, in its affidavit in support of its application for admission[4] that it has provided legal advice to many Muslim since its establishment. The experience of the WLC is confirmed in the report done by the South African Law Reform Commission ("SALRC") which identifies similar issues experienced by women in Muslim marriages.[5] According to the SALRC, the issues requiring legislative attention include: the status of a spouse or spouses in a Muslim marriage or marriages; the status of children born of a Muslim marriage; the regulation of the termination of a Muslim marriage; the difficulties in enforcing maintenance and other obligations arising from a Muslim marriage; the difficulties in enforcing custody of, and access to, minor children; and the proprietary consequences which arise automatically from a Muslim marriage or its termination, which are not recognised in law, and therefore not enforceable.

17 The vulnerability and marginalisation of Muslim women has been recognised in a number of this Court's judgments, including **Daniels**[6] and **Hassam**.[7]

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[4] Amicus Curiae's Affidavit in support of application for admission, par 11

[5] South African Law Reform Commission, Project 59, Islamic Marriages and Related Matters Report, July 2003

[6] Daniels v Campbell NO and others 2004 (5) SA 331 CC) par [22]

[7] Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC) par [9]

18 Past pronouncements of the High Courts,[8] the Supreme Court of Appeal[9] and the Constitutional Court[10] have all recognised that the continuing non-recognition of the validity of Muslim marriages is discriminatory and deeply injurious to those negatively affected. In many instances, the State deponents have conceded this unconstitutional state of affairs. The courts have made it clear that legislation is required to regulate Muslim marriages and their consequences in a manner that protects the rights of women and have called on Parliament to intervene.

19 The Constitutional Court in **Volks NO v Robinson**[11] accepted that at the termination of a marriage, whether by death or divorce, women were often more materially vulnerable than men, an inequality that the legislature had sought to remedy through various pieces of legislation over many years.

20 The courts have removed a number of the unconstitutional consequences experienced by Muslim women on a piecemeal and limited basis, however, the default position remains one of exclusion and marginalisation.

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[8] Ryland v Edros 1997 (2) SA 690 (C); Daniels v Campbell NO and Others 2003 (9) BCLR 969 (C); Khan v Khan 2005 (2) SA 272 (T); Hassam v Jacobs NO and Others [2008] 4 All SA 350 (C)

[9] Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA)

[10] Women's Legal Centre Trust v President of the Republic of South Africa & Others 2009 (6) 94 (CC) at para [26]; Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC) at paras [21] - [23]; Daniels v Campbell at paras [19] - [23] (per Sachs J), paras [51] to [52], paras [54] - [55] (per Ngcobo J) and paras [74] - [75] and para [106] to [108] (per Moseneke J)

[11] 2005 (5) BCLR 446 (CC) par [68], see also the minority judgment at par [110] – [111]

21 This has far-reaching implications, in particular for women because in effect what the law sanctions is the unregulated dissolution of Muslim marriages, resulting in a host of negative consequences for women without the requisite safeguards offered to women in civil marriages.

22 The cases that have come before the courts confirm that in the Muslim community, which like the majority of South African communities remains markedly patriarchal, it is far harder for women than men to receive an income, acquire property and thereby ensure that they and their children are not dependent or homeless if their marriages are dissolved by death or divorce.

23 The vulnerability of Muslim women is compounded by the unavailability of legal enforcement mechanisms to which the Muslim community can turn. This in turns forces the Muslim community to turn to religious and cultural tribunals or decision making bodies, which lack enforcement powers to ensure rulings are enforced were they to attempt to assist women.

24 This case is a typical example of the hardship and vulnerability that continues to be experienced by women, married according to Muslim personal law, on the death of the husband.

THE EXTENT TO WHICH SECTION 2C(1) OF THE WILLS ACT DISCRIMINATES AGAINST MUSLIM WOMEN IN POLYGYNOUS MARRIAGES

25 The State bears constitutional obligations under section 7(2) and section 237 of the Constitution to respect, protect, promote and fulfil the rights of Muslim women under sections 9(1), (2), (3) and (5), 10, and 31(1)(a) of the Constitution.

Section 2C(1) of the Wills Act

26 Section 2C of the Wills Act provides:

> "*(1) If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.*
>
> *(2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates.*"
>
> [underlining added]

27 The Wills Act does not define the term "surviving spouse" and the Master's office has given a meaning to the term that reflects a spouse as whose marriage was solemnised by a marriage officer in terms of the

Marriage Act, the Recognition of Customary Marriages Act 120 of 1998 or the Civil Union Act 17 of 2006.

28 Accordingly, the third applicant, married to the testator according to Shari'ah law, was not recognised by the Master as a "surviving spouse" of the testator. The Master declined to apply the provisions of section 2C(1) of the Wills Act, and sought to implement section 2C(2) of the Act.

29 The approach of the Master must be compared to that of this Court as set in its jurisprudence, in which the term "spouse" includes parties to a Muslim marriage.[12]

30 In considering the purpose of section 2C of the Wills Act, the reasoning adopted by the Court in **Daniels** is useful. In that case the Court considered the Intestate Succession Act 81 of 1987, and recognised the vulnerability that the patriarchal society imposes on women on the death of their husband:[13]

> "An important purpose of the statutes is to provide relief to a particularly vulnerable section of the population, namely, widows. Although the Acts are linguistically gender-neutral, it is clear that in substantive terms they benefit mainly widows rather than widowers. The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed

[12] *Daniels v Campbell* (above) par [19]

[13] *Daniels v Campbell* (above) par [22]

> social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property. Moreover, social and institutional practice has been to register homes in the name of the male 'heads of households', as was done by the Council in the present matter. Widows for whom no provision had been made by will or other settlement were not protected by the common law. The result was that their bereavement was compounded by dependence and potential homelessness ..." [footnotes omitted]

31 The vulnerability and social inequity described by the Court operates in a nuanced manner in the present context. Whereas the deceased's spouses and descendants are *ad item* on the devolution of the estate, it is the Master's office that has constrained the language of the section to deny the third applicant, the spouse in a polygynous Muslim marriage, the benefit under section 2C(1). A benefit she would otherwise be entitled to but for the polygynous nature of her marriage and the fact that the marriage was concluded in accordance with of Shari'ah law.

31 It is also useful to consider the approach to statutory interpretation adopted by this Court in **Hassam**. In that judgment the Constitutional Court considered the extension of legislative benefits of the Intestate Succession Act to a Muslim woman in a polygynous Muslim marriage. The Court noted:

"In *Daniels* this Court held that "[d]iscriminatory interpretations deeply injurious to those negatively affected were in the conditions of time widely accepted in the Courts. They are no longer sustainable in the light of our Constitution."[14]

32 The Court stated the issue as:

"*whether affording protection to spouses in polygynous Muslim marriages under the (Intestate Succession) 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.*"[15]

33 The reasoning contained in **Hassam** is equally applicable to the present circumstance.

34 The Master's failure to take cognisance of the ordinary meaning of spouse (as set out in **Daniels**) and to consider whether this could include a spouse in a polygynous union, married according to Shari'ah law, has resulted in the violation of the constitutional rights to equality and dignity.

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[14] *Hassam v Jacobs* (above) par [23]

[15] Ibid, par [25]

The right to equality and to be free from unfair discrimination

35 The Constitutional Court has frequently emphasised that the guarantee of equality *"lies at the very heart of the Constitution"* and *"permeates and defines the very ethos upon which the Constitution is premised".*[16] In the context of this case, the right to equality before the law and to equal protection of the law is salient.

36 In **Minister of Finance and Another v van Heerden**[17] our courts have confirmed that a substantive approach is adopted in relation to the equality clause:

> *"It is therefore incumbent on Courts to scrutinize 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. In the assessment of fairness or otherwise a flexible but "situation sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society"*

[16] *Fraser* (above) par [20]

[17] *Minister of Finance and Another v van Heerden* 2004 (6) SA 121 (CC) par [27], see also *Daniels v Campbell* (above) par [22]

37 We submit that the failure to recognise the spouse in a Muslim marriage as a surviving spouse for purposes of section 2C(1) of the Wills Act results in a differentiation between the following categories of persons:

37.1 Persons married in terms of the Marriage Act as compared to those in polygynous Muslim marriages; and

37.2 Persons in polygynous customary marriages as compared to those in polygynous Muslim marriages.

38 We submit that the differentiation which emanates from such conduct is apparent when comparing marriages concluded in terms of the Marriage Act, the Civil Union Act and under customary law, including those married under the Recognition Act, on the one hand, with marriages of women married solely in accordance with Islamic law.

39 The differentiation is also found on a number of listed grounds in section 9(3) of the Constitution, namely religion, conscience, belief, culture and marital status.

40 This Court has emphasised the deep patterns of discrimination against women evident in our society, in **Brink v Kitshoff**[18] the Court held that the gender discrimination in our society has *"resulted in deep patterns of disadvantage" which are "particularly acute in the case of black women,* as *race and gender discrimination overlap" and added that it was* 'a *key*

[18] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par [44]

message of the Constitution' that *"all such discrimination needs to be eradicated from our society".*

41 In **Hassam**[19] the Constitutional Court declared a section of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it made provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.

42 The Court emphasised that the nature of discrimination must be analysed contextually and that it is an express purpose of our equality provision to avoid significant and material disadvantage. Because the denial of benefits affected only widows the discrimination was found to have a gendered aspect and to constitute unfair discrimination on the listed ground of gender.[20]

Dignity

43 The right to dignity requires us to acknowledge the value and worth of all members of our society.[21] Our Courts have frequently emphasised the importance of dignity as both a founding value and an enforceable right under the Constitution.[22]

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[19] *Hassam v Jacobs* (above)

[20] *Hassam v Jacobs* (above) par [34]

[21] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC) at par [28]

[22] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para [35]. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para [26]

44 We submit that it devalues spouses in Muslim marriages to treat them as unworthy of the protection of the law and serves to stigmatise an already vulnerable group of persons who have historically been marginalised from the mainstream of the law and who are still awaiting formal recognition of their marriages.

45 In **Hassam** the Constitutional Court affirmed that "the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.[23]

46 In order to promote the right to dignity, the Constitution demands that the protections of the law be afforded to spouses in Muslim marriages through the enactment of statutory measures for the administration of such marriages and for the administration of estates following the death of a spouse married in terms of Muslim personal law.

Right to practice religious beliefs

47 The applicants' have sought to practice their religious beliefs in the conclusion of a polygynous marriage and the testator's later decision to divest of his estate in accordance with Islamic principles in his testamentary will.

48 The existence of the polygynous marriage has affected the ability of the Master's office to give effect to the distribution of the estate in

[23] *Hassam v Jacobs* (above) par [46]

accordance with section 2C(1) of the Wills Act. This has placed the third applicant in an untenable position: but for the practice of her faith in concluding a polygynous marriage, she would be in a position to inherit as the surviving spouse of the testator under the Wills Act.

49 This Court has expressed itself on the invidious nature of such position.[24] In **Pillay**[25] this Court advanced the issue with reference to the interlinking nature of the rights at stake:

> "*There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.*"[26]

50 In its conduct, the State is not only failing to give effect to the observance and practice of the applicants' religious beliefs but is infringing on the observance of those beliefs in denying the social consequences thereof.

51 The infringement of the third applicant's right under section 31(1) thus extends to the State's failure to recognise and give effect to the consequences of an individual's choice when practicing their religious beliefs.

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[24] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [35]

[25] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC)

[26] *Pillay* (above) par [62]

52 The application was unopposed in the court *a quo* and is unopposed before this Court. The State, therefore, has not sought to justify the alleged infringement of rights as reasonable and justifiable in an open and democratic society, in accordance with section 36 of the Constitution.[27]

53 The violation of constitutional rights may thus be confirmed.

INTERNATIONAL LAW OBLIGATIONS

54 South Africa's international obligations co-exist with the regional obligations that South Africa has accepted.[28] Together these provide the international context that a court may bring to bear when considering a violation of the rights contained in the Bill of Rights. Indeed, if a duty is imposed by an international instrument for it not to be rendered nugatory, content must be given to it.[29]

55 In **Glenister** Ngcobo CJ enunciated the significance of international law to the Constitution[30] and, Moseneke DCJ enunciated the importance of international instruments, even when they are not introduced into domestic law under section 231(4), as follows:

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[27] See also first respondent's heads of argument at 15, par 12

[28] *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC) *('Gumede')* at par [55]

[29] *DE v RH* 2015 (5) SA 83 (CC) at par [49]

[30] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) *('Glenister II')* at par [97]

> *"That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection.' Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective."*[31] [footnotes omitted]

56 In terms of section 39 of the Constitution a Court is enjoined, when interpreting the Bill of Rights, to: (a) promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and (b) to consider international law.

57 The South African government has ratified numerous international and regional human rights treaties relevant to the protection and promotion of women's fundamental human rights, which oblige it to comply with the resulting obligations.

58 The Constitutional Court has recognised South Africa's international law duty to prohibit all gender-based discrimination that has the effect or

[31] *Glenister II* (above) par [189]

purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.[32]

International instruments

59 The Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW")[33] is the definitive international legal instrument requiring respect for and observance of the human rights of women and imposes a positive obligation on States to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination.[34]

60 Article 2(f) of CEDAW sets out one of the primary obligations of state parties to condemn discrimination against women and to:

> "*pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*"[35]

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[32] *S v Baloyi* (above) at par [13]; *Carmichele* (above) par [62]; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at par [15]

[33] United Nations in General Assembly Resolution 34/180, dated 18 December 1979 (signed on 29 January 1993 and ratified by South Africa on 15 December 1995).

[34] *Baloyi* (above) at par [13]

[35] "Discrimination" is defined in Article 1 as "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.*"

61 UN General Recommendation No. 21[36] recognises the cultural and structural differences that exist across nations and provides that:

> *"[t]he form and concept of the family can vary from State to State, and even between regions within a State ... whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people,* as *article 2 of the Convention requires."*

62 Although CEDAW envisages the long-term eradication of polygyny, the CEDAW Committee has taken into account the reality that such marriages continue to exist and that women in such marriages continue to experience discrimination. General Recommendation 27 provides guidance on how states may recognise the practice while ameliorating any hardship that may result as a consequence of women being a party to a polygynous marriages.[37]

63 To this end, General Recommendation 29 imposes the following obligations on state parties:[38]

> *"28. States parties should take all legislative and policy measures needed to abolish polygamous marriages.*

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[36] UN General Recommendation No. 21 (13th session, 1994)

[37] CEDAW General Recommendation 27 dated 19 October 2010

[38] CEDAW General Recommendation No. 29 *General recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution),* 30 October 2013

Nevertheless, as stated by the Committee in its General Recommendation No. 28, 'polygamy continues in many States Parties, and there are many women in existing polygamous unions'. Accordingly, with regard to women in existing polygamous marriages. States parties should take the necessary measures to ensure the protection of their economic rights."

64 Finally, in General Recommendation 33, dated 23 July 2015, the CEDAW committee recommends that state parties:

> "*In settings in which there is no unified family code and in which there exist multiple family law systems, such* as *civil, indigenous, religious and customary law systems, ensure that personal status laws provide for individual choice* as *to the applicable family law at any stage of the relationship. State courts should review the decisions taken by all other bodies in that regard."*

65 Consequently, in terms of its obligations under CEDAW, the State is obliged to:

65.1 *"take all appropriate measures"* to ensure the equality of women in Muslim marriages including in respect of the proprietary consequences of such marriages and the guardianship, care and contact of the children born of such marriages;

65.2 *"take necessary measures"* to ensure the economic rights of women in existing polygynous marriages; and

65.3 ensure that family status laws provide for individual choice as to the applicable family law at any stage of the relationship.

Regional instruments

66 The African Charter on Human and Peoples' Rights, June 1981 ("the African Charter") obliges signatory States to ensure the elimination of discrimination against women.[39]

67 The African Charter also ensures the "free practice of religion" and obliges a member state *"to assist the family which is [regarded as] the custodian of morals and traditional values recognised by the community".*[40] It further obliges individuals *"to preserve the harmonious development of the family" and "to preserve and strengthen positive African cultural values*".[41]

68 Article 6 of the African Charter deals with polygynous marriages and obliges State parties to enact:

> *"appropriate national legislative measures to guarantee that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygynous marital relationships are promoted and protected."*

[39] Articles 18 and 19. South Africa ratified the African Charter on 9 July 1996 but has not domesticated the Chater in accordance with section 231(4) of the Constitution.

[40] Article 8 and 18

[41] Article 29(1)

69 This injunction to protect the rights of women has been recognised by this Court in **Hassam**:

> *"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. 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."*

70 The SADC Protocol on Gender and Development ("the SADC Protocol") was adopted by the Southern African Development Community on 17 August 2008 and came into force on 22 February 2013. In terms thereof, member states, including South Africa, must *"endeavor by 2015* to *enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices".*[42]

71 The SADC protocol creates obligations upon the member State in relation to all marriages (including polygynous marriages). Article 7(b) provides that:

[42] Article 4

> *"State parties shall (adopt legislative and other measures) to ensure ... equal legal status and capacity in civil law, including, amongst other things, full contractual rights; the rights to acquire and hold rights in property, the rights to equal inheritance, succession and the rights to secure credit."*

72 The international and regional instruments thus provide additional grounds, under section 7(2) and 39(1)(b) of the Constitution, upon which the third applicant's rights have been violated.

THE APPROPRIATE RELIEF

73 Until such time that the State has recognised religious systems of law for the purposes of solemnising marriages, it is necessary for the courts, on a piecemeal basis, to develop the common law and to recognise in existing statutes the rights of spouses married in accordance with Shari'ah law, whether such marriage is of a monogamous or polygynous nature.

74 Having submitted that section 2C(1) of the Wills Act is unconstitutional on the grounds set out above, it is for the Court to confirm the order of invalidity[43] and to grant a just and equitable remedy.[44]

75 In doing so, the Court must declare section 2C(1) of the Wills Act invalid to the extent that it is inconsistent with the Constitution.[45]

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[43] Section 167(5) of the Constitution

[44] Section 172(1)(b) of the Constitution

76 The court *a quo* favoured a just and equitable remedy in the form of reading in the words, "*[F]or purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a de facto monogamous and polygynous Muslim marriage solemnised under the religion of Islam*".

77 The retrospectivity of the court a quo's remedy was limited so as not to affect, "*the administration of those estates that have been finally wound up under the Administration of Estates Act 60 of 1965 or any other similar statute*" by the date of that court's order.

78 The *amicus* has considered the submission of the first respondent in relation to retrospectivity of the order and, in accordance with this Court's judgment in **Ramuhovhi**,[46] supports the relief as proposed by the first respondent as such an approach will predominantly serve as protection to widows, whose marriage was concluded in accordance with Shari'ah law.

CONCLUSION

79 The WLC supports the relief sought by the applicant to develop the law to be in line with the Constitution and order that the term "surviving spouse" in section 2C(1) of the Wills Act 7 of 1953 be interpreted to extend to spouses who were married in terms of religious laws and/or

[45] Section 172(1)(a) of the Constitution

[46] *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC) par [9]

custom, and as further proposed by the first respondent in its heads of argument.

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14 May 2018

LIST OF AUTHORITIES

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2 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC)

3 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2000 (1) SA 938 (CC)

4 *Daniels v Campbell NO and others* 2004 (5) SA 331 (CC)

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7 *DE v RH* 2015 (5) SA 83 (CC)

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9 *Hassam v Jacobs NO and Others* [2008] 4 All SA 350 (C)

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12 *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC)

13 *Khan v Khan* 2005 (2) SA 272 (T)

14 *Khumalo v Holomisa* 2002 (5) SA 401 (CC)

15 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC)

16 *Minister of Finance and Another v van Heerden* 2004 (6) SA 121 (CC)

17 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

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20 *Ryland v Edros* 1997 (2) SA 690 (C)

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