CONSTITUTIONAL COURT OF SOUTH AFRICA

Fareed Moosa N.O. and Others v Minister of Justice and Correctional Services and Others

CCT 251/17

Date of judgment: 29 June 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 June 2018 at 10h00, the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court declared section 2C(1) of the Wills Act 7 of 1953 to be inconsistent with the Constitution and invalid. This section provides that if a descendant of a testator renounces a benefit in terms of a will, that benefit will vest in the surviving spouse of the testator. The High Court declared it to be unconstitutional for its omission to recognise the right of a surviving spouse in a polygamous Muslim marriage to the benefits of her deceased husband's will.

Osman Harneker (the deceased) married Ms Amina Harneker (second applicant) and Ms Farieda Harneker (third applicant) under the tenets of Islamic law. The family had nine children together. For the purpose of securing a bank loan, and with the consent of the third applicant, the deed of transfer for the family home reflected only the names of the deceased and the second applicant, with whom his marriage was legally formalised. The family lived together in the property from that time until the deceased passed away in 2014. The deceased's will referred to both wives and his children. All of the children renounced the benefits due to them under the will. Dr Fareed Moosa (first applicant), as executor of the deceased estate, therefore specified that the children's shares be distributed equally between the second and third applicants, as the deceased's "surviving spouses" in accordance with section 2C(1) of the Wills Act. When he sought to register the deceased's half share in the family property, however, the Deeds Registrar

(second respondent) approved registration for the second applicant, but declined to do so for the third applicant on the basis that the term "surviving spouse" in section 2C(1) only covers spouses recognised formally under South African Law.

Consequently, the applicants applied to the High Court for an order declaring that section 2C(1) of the Wills Act is inconsistent with the Constitution and invalid for its failure to apply to surviving spouses in polygamous marriages in terms of the tenets of Islamic laws. The applicants submitted that this interpretation of the section adopted by the second respondent violated the third applicant's rights to equality and dignity.

The High Court held that the impugned provision violates the third applicant's right to equality by excluding her from the ambit of the phrase "surviving spouse" purely because she was married under the tenets of Islamic Law. The High Court held that the section differentiates between surviving spouses in Muslim polygamous marriages and those in marriages in terms of the Marriage Act 25 of 1961 and the Civil Union Act 17 of 2006; as well as those in polygamous African customary law marriages, as the latter are legally recognised as "spouses" under South African law in the Recognition of Customary Marriages Act 130 of 1998. The High Court held that this differentiation constitutes unfair discrimination in breach of section 9(3) of the Constitution, as there is no rational governmental purpose for the differentiation.

The High Court accordingly declared section 2C(1) of the Wills Act to be inconsistent with the Constitution and invalid. To cure the defect, the High Court ordered that the phrase "surviving spouse" should be read to encompass "every surviving husband or wife who was married by Muslim rites to a deceased testator . . . irrespective whether such marriage was de facto monogamous or polygamous".

The applicants applied to the Constitutional Court to confirm the order of the High Court. The application was unopposed. The Women's Legal Centre Trust was admitted as amicus curiae.

In a unanimous judgment, written by Cachalia AJ (Mogoeng CJ, Zondo DCJ, Khampepe J, Froneman J, Jafta J, Madlanga J, Theron J and Petse AJ concurring) the Constitutional Court confirmed the High Court's declaration of constitutional validity and its order. The Court endorsed the reasoning of the High Court on the equality challenge fully, and also held that the impugned provision also fundamentally violates the third applicant's right to dignity. Its effect is to stigmatise her marriage, diminish her self-worth and exacerbate her feeling of vulnerability as a Muslim woman. The Court held that this vulnerability is compounded because there is at present no legislation that recognises or regulates the consequences of Muslim marriage.

For these reasons the Constitutional Court confirmed the order of the High Court declaring that section 2C(1) of the Wills Act is unconstitutional and invalid, and ordered that the words "[f]or the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam" should be read into the subsection in order to cure the defect. The

Constitutional Court also endorsed the High Court's limitation of the declaration's retrospective effect so as not to affect the validity of any estates that have been finally wound up.