COLD COMFORT FOR THE PARTIES TO A MUSLIM MARRIAGE - THE SAGA CONTINUES

Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Trust as *Amici Curiae* [2009] ZACC 19

1 Introduction

In *Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Trust as Amici Curiae)* ([2009] ZACC 19), the Constitutional Court was faced with an application for the confirmation of constitutional invalidity of section 1(4)(f) of the Intestate Succession Act 81 of 1987 (hereinafter "the ISA"). The application was made pursuant to the decision of the Western Cape High Court, Cape Town in *Hassam v Jacobs NO* ([2008] 4 All SA 350 (C)), where it was held that the word "spouse" as utilized in the ISA could be extended to include parties in a *de facto* polygynous Muslim marriage. The impugned provisions of the ISA were held to exclude widows of polygynous Muslim marriages in a discriminatory manner from the protection offered by the ISA. The Western Cape High Court therefore declared section 1(4)(f) of the ISA to be inconsistent with the Constitution as it makes provision for only one spouse in a marriage entered into in accordance with the tenets Muslim rites to be an heir. The decision of Western Cape High Court was referred to the Constitutional Court in terms of section 172(2)(a) of the Constitution of the Republic of South Africa Act, Act 108 of 1996.

2 Facts

The facts in *Hassam v Jacobs NO* as it transpired in the Western Cape High Court were as follows: the applicant and the deceased entered into a marriage according to Muslim rites on 3 December 1972. The applicant attempted to terminate this marriage by means of a "faskh". This proved ineffectual as it was rejected by the deceased. The parties reconciled and continued to live together as husband and wife up until the deceased's death on 22 August 2001. The deceased entered into a second marriage with the third respondent in terms of Muslim rites prior to his death. Three minor children were fathered by the deceased from this marriage. The second marriage was concluded without the knowledge or consent of the applicant. A dispute arose between the applicant and the third respondent as regards the devolution of the deceased's estate.

Pursuant to the appointment of an executor to administer the deceased estate, the applicant lodged two claims with the executor of the deceased's estate in terms of the Maintenance of Surviving Spouses Act (hereinafter "MSSA") and the ISA. The executor rejected the applicant's claims, firstly on the ground that it was disputed whether the marriage was still extant at the time of the deceased's death and, secondly, as the applicant was a party to a *de facto* polygynous marriage she did not qualify as a "surviving spouse" in terms of the ISA and MSSA (Denson and Van der Walt "Cold Comfort for Parties to a Muslim Marriage Hassam v Jacobs No [2008] 4 All SA 350 (C)" 2009 Obiter 188).

The matter was heard by Van Reenen J who held that the exclusion of widows of polygynous marriages c*elebrated in accordance with tenets of Muslim religious rites* from the provisions of ISA and MSSA unfairly discriminated against the applicant and was contrary to the provisions of the equality clause of the Constitution. The matter refers.

3 Issues to be decided by the Constitutional Court

In the confirmation proceedings before the Constitutional Court the following issues were identified for consideration, namely:

> "(a) Does the exclusion of the spouses in polygynous Muslim marriages from the intestate succession regime as established by the Intestate Succession Act violate section 9(3) of the Constitution? In particular:
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> (i) Does the exclusion constitute discrimination?
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> (ii) If so, does it constitute unfair discrimination?
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> (iii) If so, is this unfair discrimination justifiable under section 36 of the Constitution?
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> (b) If this exclusion violates section 9(3) of the Constitution, can the word "spouse" in the Intestate Succession Act be read to include spouses in polygynous Muslim marriages?
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> (c) If such an interpretation is not possible, what is the appropriate relief" (Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Trust as *Amici Curiae*) *supra* par 20)?"

4 Decision of the Constitutional Court

In addressing the first issue, Nkabinde J found that the Intestate Succession Act does differentiate between widows married in terms of the Marriage Act 25 of 1961 and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between polygynous customary marriages and those in polygynous Muslim marriages. The differentiation and exclusion of spouses in polygynous Muslim marriages were found not to pass constitutional muster as the rights to equality before the law and equal protection of the law are regarded as the founding principles upon which the Constitution is based. Furthermore the court held that this differentiation amounts to discrimination as the failure to grant widows of polygynous Muslim marriages the benefits

provided for by the ISA will result in these widows being caused significant and material disadvantages. The equality provision expressly seeks to avoid such a situation from arising. In addressing the question as to whether an interpretation which fails to accord widows in polygynous Muslim marriages the benefits provided for in Act passes constitutional muster the CC referred to the decision in *Daniels v Campbell NO* ([2004] ZACC 14; 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC)), where the High Court held:

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

The plight of widows in a monogamous Muslim marriage has since the decision in the *Daniels v Campbell NO* been improved as they are now recognized as spouses under the Act. Widows in polygynous Muslim marriages, however, still suffer the effects of non-recognition and as such the differentiation between the spouses in a monogamous Muslim marriage and those in a polygynous Muslim marriage amounts to unfair discrimination. Furthermore, the effect of the failure to grant the benefits of the ISA to widows to polygynous Muslim marriages will cause these widows significant and material disadvantage of the sort which section 9 of the Constitution expressly seeks to avoid (par 34). The ISA therefore clearly reinforces a pattern of stereotyping and patriarchal practices which reduces women in polygynous Muslim marriages to being unworthy of protection as the ISA discriminates against these women on the grounds of religion, gender and marital status (par 37). When considering discrimination on the ground of against gender women in polygamous Muslim marriages, the applicant in Hassam v Jacobs referred to the decision of the court in *S v Jordan (Sex Worker Education and Advocacy Task Force and others as Amici Curia* ((2002) ZACC 22; 2002 11 BCUR 117 (CC); 2002 6 SA 642 (CC)). The court in this matter considered the fact that discrimination stems from the fact that women constitute a particularly vulnerable segment of society, and that, in practice, results in a situation where the act benefits widows rather than widowers. Furthermore, the court submitted that Muslim women are placed in a further detrimental position as opposed to Muslim men, because only Muslim men may have multiple spouses under Islamic law (par 10). Nkabinde J held that it would be constitutionally unacceptable and unjust to grant a widow of a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to widows of a polgynous Muslim marriage. The exclusion of women in the position of the applicant from the protection on the Act therefore unfairly discriminates against them on the

grounds of religion, marital status and gender. The purpose of the Constitution would be frustrated if widows to polygynous Muslim marriages were to be excluded from the benefits of the ISA purely on the basis that their marriage was entered into in terms of Muslim rites. This would in effect defeat the constitutional goal of achieving substantive equality (par 38). The exclusion and unfair discrimination could not be justified under section 36 of the Constitution. In reaching this decision the court stated that regard must be had to the nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves, and the impact of the discrimination on the sector of society who are adversely affected (par 41). It was common cause that women within Muslim communities are a particularly vulnerable group and that they are severely prejudiced by the exclusion of the protection afforded by the ISA. In other words, this exclusion could not be justified in a society which is guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

With regard to the second issue, namely, whether the word "spouse" in the ISA could be read to include spouses in polygynous Muslim marriages Nkabinde J stated that despite the fact that meaning of the word "spouse" is not defined in terms of the ISA, it was imperative that it be defined through the prism of the Constitution (par 46). Furthermore, cognizance was given to the fact that marriage, as a social institution, is important to all members of South African society, and that Muslim marriages which are potentially polygynous should not be regarded as being less significant than those concluded in terms of the Marriage Act 25 of 1961 or indeed a customary marriage concluded in terms of the Recognition of Customary Marriages Act 129 of 1998. In the same vein the dignity of parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages (par 47). The shift in legislative and judicial policy as evidenced by the decisions in *Daniels v Campbell NO, Khan v Khan* (2005 2 SA 272 (TPD)); *Bhe v Magistrate Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; and *Shibi v Sithole; South African Human Rights Commission v The President of RSA* ([2004] ZAAC 17; 2005 1 BCLR 1 (CC)) can be regarded as being indicative of trends consistent with the constitutional values of equality and the right to dignity amongst others, and the mere fact that the legislature has not expressly included Muslim marriages within the protection afforded by the ISA cannot be interpreted so as to exclude them. This would be contrary to the spirit, purport and objectives of the Constitution (par 47). In fact, the constitutional values of equality, tolerance and respect for diversity strongly promote that the word "spouse" be given a broad and inclusive construction. To do otherwise would result in the violation of a widow's right to equality with regard to religion, culture and marital status and would ultimately violate her right to dignity.

Therefore, the court held that the word "spouse" as it appears in the Act does not include more than one partner to a marriage and consequently section 1 of the Act must be read as though the words "or spouses" appear after the word "spouse" wherever it appears in section 1 of the Act. In the formulation of the appropriate remedy Nkabinde referred to section 172(1) of

the Constitution which 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. Section 172(1) furthermore requires the court to make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of validity for any period and on any conditions to allow the competent authority to correct the defect. It was therefore held that as the word “spouse” in the Act is not reasonably capable of being understood to include more than one spouse in the context of a polygynous union, in order to remedy the defect, the words “or spouses” are to be read-in after each use of the word “spouse” in the Act. It was held that the declaration of invalidity should operate retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when the 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.

The Constitutional Court confirmed the decision of the Western Cape High Court that women who are party to a polygynous Muslim marriage concluded under Muslim personal law are spouses for the purpose of inheriting in terms of the Intestate Succession Act or claiming from estates of the deceased in terms of the Maintenance of Surviving Spouses Act.

In regard to what the appropriate remedy would be Nkabinde J noted that the dictates of justice and equality require the Constitutional Court to grant an effective remedy in order to vindicate the parties married in terms of Muslim rites. Furthermore, it was stated that the applicant and others in the same position of the applicant could not be called upon to wait for legislation in the form of the promulgation of the long-awaited Muslim Marriages Act to offer them the protection they are entitled to. With regard to intestate succession, absence of any legislation to regulate the affairs of parties married according to Muslim rites does, and continues to have, a profoundly detrimental effect on them.

For this reason the omission of the words “spouses” in the ISA was therefore found to be inconsistent with the Constitution.

The constitutional court remedied this position by adding the words “or spouses” after each use of the word “spouse” in the above Act.

5 Discussion

On the numerous occasions when the Constitutional Court was called upon to deal with the challenges to the legislative enactments which possibly infringe the right to equality under section 9 of the Constitution, the court aligned itself to an interpretation of equality in the substantive sense, that is, an understanding of equality that seeks to address and remedy material inequalities. Therefore, in terms of substantive equality, the actual social and economic conditions of individuals and groups are examined so as to

determine whether the Constitution's commitment to equality is being upheld.

This is evident from the equality test formulated in *Harksen v Lane* (1997 11 BCLR 1489 (CC)) which seeks to develop the interpretation approach to equality in a substantive and contextual manner. The test as set out in the Harksen case reads as follows:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to unfair discrimination under section 9(3). To determine whether the differentiation amounts to unfair discrimination, a two-stage analysis needs to be made.
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> (b) (i) Where the differentiation complained of is based on one or more of the sixteen grounds specified in section 9(3), for example race, sexual orientation and marital status, it will be presumed for the purposes of section 9(5) that 'unfair discrimination' has been sufficiently proved until the contrary is established. If not based on a specific ground, the differentiation must not still amount to discrimination if objectively viewed it is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them.
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> (ii) If the differentiation does amount to 'discrimination', the question which needs to be asked is whether such discrimination is unfair. If it has been found to have been on a specified ground, then unfairness will be presumed.
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> If it occurs on an unspecified ground, then unfairness will have to be established by the complainant. The test for unfairness focuses mainly on what impact the discrimination had had on the complainant and others in his or her situation.
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> (c) If the discrimination is found to be unfair, then one has to determine whether such discrimination can be justified under the limitation clause in terms of section 36. This entails showing that the criteria as set out in section 36 are satisfied, namely: the right has been limited by law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (37 par 53).

Incumbent on the courts in terms of section 39 of the Constitution is the duty to promote the spirit, purport, and objectives as set out in the Bill of Rights. Therefore, bearing the South African history in mind when interpreting legislation any interpretation which has a discriminatory effect on any individual, or group of persons would not pass constitutional muster.

In *Ismail v Ismail* (1983 1 SA 1006 (A)) it was held that the recognition of polygynous Muslim unions was contrary to public policy and entirely immoral. This no longer is true as the content of public policy must now be determined with respect to the founding values underlying the Constitution which include dignity and equality. Cognizance should be taken of diversity of the South African society which in term influences the interpretation of the Constitution which ultimately shapes ordinary law. Therefore, the prejudice directed at the Muslim community as evidenced in the decision in the Ismail case is no longer sustainable within South African society which is based on

the principles of democratic values, social justice and fundamental human rights.

The diversity of the South African society is also affirmed in the preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the purpose of which is to promote equality and the prevent unfair discrimination.

It is submitted that for the above reasons, the Constitutional Court decision is correct because a failure to grant recognition would worsen the plight of partners who are married in terms of Muslim rites, where the husband has opted to marry with more than one partner.

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