COLD COMFORT FOR PARTIES TO A MUSLIM MARRIAGE

Hassan v Jacobs NO [2008] 4 All SA 350 (C)

1 Introduction

In *Hassan v Jacobs NO* ([2008] 4 All SA 350 (C)) the High Court of South Africa (Cape of Good Hope Provincial Division) was faced with the question of whether the applicant, a spouse to a *de facto* polygamous Muslim marriage, was entitled to the benefits as provided to a surviving spouse in terms of Intestate Succession Act (81 of 1987 (hereinafter "the ISA")) as well as the Maintenance of Surviving Spouses Act (27 of 1990 (hereinafter "the MSSA")). In other words, the court had to decide whether the decision in the case *Daniels v Campbell NO* (2004 5 SA 331 (CC), where it was held that the word "spouse" as utilised in the ISA and MSSA should be interpreted to include a husband and wife married in terms of Islamic rites in a *de facto* monogamous marriage, could be extended to parties in a *de facto* polygamous Muslim marriage.

2 Facts

The facts of the case were that the applicant and the deceased entered into a marriage according to Muslim rites on 3 December 1972. In an attempt to bring about the termination of this marriage the applicant obtained a "faskh" on 16 June 1998. A "faskh" is the only method whereby the wife can obtain a divorce or terminate the marriage without the husband's consent. Where the wife wishes to obtain a "faskh" this may be done on one of the following grounds:

- injury or discord;
- failure to maintain;
- defect on the part of the husband; or
- husband's absence *sine causa* or imprisonment (Moodley "The Islamic Laws of Divorce, Polygamy and Succession" 2001 *Codicillus* 8 9).

However, this "faskh" was ineffectual in terminating the marriage as the deceased rejected it, and the parties became reconciled. The parties continued to live together as husband and wife until the deceased's death on 22 August 2001.

Prior to his death, the deceased entered into a second marriage with one Miriam Hassan, the third respondent, in terms of Muslim rites. The deceased

fathered three children with the third respondent. As the applicant and the third respondent could not reach an agreement regarding the division of the deceased's estate, the third respondent, with the assistance of the Women's Legal Centre Trust, was admitted as an *amicus curiae* to the proceedings.

Mr Jacobs, the first respondent, was appointed as the executor of the deceased estate. On the basis of the ISA and the MSSA the applicant submitted two claims to the executor of the deceased estate.

The executor refused to recognise these claims for two reasons:

(a) he disputed the existence and the marriage between the applicant and the deceased; and,

(b) owing to the fact that it was a *de facto* polygamous marriage the applicant did not qualify as a "surviving spouse" in terms of the ISA and MSSA.

As a result of the executor's decision, the applicant instituted proceedings in the Cape Provincial Division of the High Court for an order declaring that she was a spouse of the deceased at the time of his death, and furthermore that the provisions of the ISA and MSSA be interpreted to include spouses of a *de facto* polygamous marriage. Alternatively the applicant asked the court to declare these provisions of the ISA and MSSA unconstitutional, and to remedy the situation.

3 Issues to be decided

The first issue before the court was to determine the existence of a valid marriage between the applicant and the deceased.

Secondly, the issue was whether widows of polygamous Muslim marriages are included in the definition of "survivor" in terms of ISA and MSSA.

Lastly, the issue was whether such exclusion from the definition of the term "survivor" constitutes unfair discrimination on the grounds of marital status, religion, culture, as well as the right to dignity.

4 Decision of the court

With regard to the first issue, the first respondent failed to provide evidence to refute any of the facts on which the applicant based her claim that she was still married to the deceased at the time of his death.

In considering the evidence placed before it, the court came to the conclusion that the applicant had, due to the fact that her evidence had been free from internal contradictions and inconsistencies, proved on a balance of probabilities that the marriage had not been terminated by the "faskh".

In so far as the second issue was concerned, the court held that the term "survivor" as used in the MSSA and "spouse" as used in the ISA included a "surviving spouse" to a polygamous Muslim marriage. Accordingly, the

applicant as well as the third respondent was deemed to be "survivors" and "spouses" of the deceased.

Moreover, the court held that the relevant section (s 1(4)(f)) of the ISA was inconsistent with the Constitution as it only made provision for a spouse in a *de facto* monogamous Muslim marriage to be an heir in the intestate estate of the deceased husband.

5 Discussion

5 1 Polygamy

Muslim marriages are not granted legal recognition for the following reasons:

(a) Firstly, Muslim marriages, according to Islamic rites, are viewed as *contra bonos mores* because they are polygamous in nature. From the common-law definition of marriage being "the voluntary union for life in common of one man and one women to the exclusion of all others while it lasts", it can be deduced that only civil marriages which are monogamous in nature have been recognised in South African law because they possess the element of exclusiveness. From its inception Muslim marriages have allowed for the plurality of spouses.

(b) Secondly, Muslim marriages are not solemnised by a marriage officer as required by the Marriage Act (25 of 1961). Instead, the marriage ceremony is performed by an Iman, that is, a person who teaches about the Quran, and leads them through their prayers in a mosque, and who in most cases is not a designated marriage officer.

5 2 Ad hoc recognition of Muslim marriages by the judiciary

Before the introduction of the interim Constitution, the interpretation of public policy in cases like *Seedats's Executor v The Master (Natal)* (1971 1 SA 302 (AD)) and *Ismail v Ismail* (1983 1 SA 1006 (A)) afforded no legitimacy to marriages concluded under Islamic rites.

The decision that finally broke the long established pattern of non-recognition of potentially polygamous marriages that are *de facto* monogamous, was that of *Ryland v Edros* (1997 2 SA 690 (C)). The importance of this case lies in the fact that it redefines the meaning that has been attributed to the term "public policy" as it was understood in the South African legal system before 27 April 1994. The case also shows that certain consequences of the marital relationship that were not granted legal recognition because of the potential polygamous nature, can be enforced. It is important to note that the court was not called upon to determine the validity of the marriage or to grant legal recognition to the marriage, but was rather required to decide whether the claims were based on a contractual agreement between the parties married under Islamic law.

The court held that the *ratio* in the *Ismail* case was in conflict with the true spirit, purport and objectives of the Constitution. Furthermore, that if such a conflict occurs, the values underlying Chapter 3 of the Constitution must prevail. Consequently the *Ismail v Ismail* (*supra*) decision no longer operated to preclude the court from claims based on a contractual agreement where the parties are married under Islamic law. The court held that public policy is essentially a question of fact and that public opinion can alter from time to time. The *Ryland v Edros* (*supra*) case opened the door for resolving the need to balance multicultural and religious pluralism in South Africa. The decision is to be welcomed as it stated that public policy is no longer a vague and arbitrary concept, but that public policy now operates within definitive parameters and is guided by the interpretation of the provisions of section 35(3) of the Constitution of the Republic of South Africa, 200 of 1993. Mention must, however, be made of the fact that the above decision only applied to unions which are *de facto* monogamous.

The decision of the Cape Provincial Division in *Daniels v Campbell NO* (*supra*) regarding the intestate succession rights of a spouse in a monogamous Muslim marriage further extends to *ad hoc* legal recognition granted to religious unions. In terms of the Intestate Succession Act (81 of 1987), provision is made for the surviving spouse to claim maintenance against the estate of the deceased spouse where the marriage is dissolved by death. However, neither this Act nor the ISA contains a definition of the word “spouse”. The meaning to be attributed to the word “spouse” in each of these Acts, was what lay at the heart of the case. The court held that the premise of the ISA and MSSA included a spouse in a monogamous Muslim marriage. The court in this case specifically refrained from extending the operation of ISA and MSSA to polygamous Muslim marriages. This landmark decision should form the basis to alleviate the plight of Muslim women in the same position as the applicant, as the majority decision held that, despite the gender neutrality of the ISA and MSSA, the purpose of these two Acts was to ensure that widows received at least “a child’s share instead of their being precariously dependant on family benevolence”.

6 Freedom of religion, conscience, thought, belief and opinion

In terms of section 15(1) of the Constitution everyone has the right to freedom of conscience, religion, thought, belief and opinion. Included in the right to religious freedom is the right to hold religious belief, to propagate religious doctrine and to manifest religious belief in worship and practice. Section 15(1) appears to grant to those who wish to be married under Customary, Hindu, Jewish or Muslim law the freedom to do so because it involves a decision based on conscience, thought, belief and opinion, and in the case of Muslim, Hindu and Jewish law, it also involves a decision based on religion.

Despite the fact that marriages can lawfully be entered into in accordance with Muslim rites, such marriages and the consequences flowing from such

marriages do not enjoy the same protection which is accorded to civil marriages. This seems to be contrary to the provisions of section 15, as, although section 15 does not deny the state from recognising or supporting religion, it does require the state to treat all religions equally. The state is required to act fairly and equitable in its dealings with the various religions in South Africa. Although the Constitution allows the state to support religious observances, it is not permitted to act inequitably. The Constitution does not allow the explicit endorsement of one religion over others, as this would amount to a threat to the free exercise of religion, and when governmental prestige, power and financial support are placed behind a particular religious belief, the result is that religious minorities are indirectly forced to conform to the religion officially approved by the government. The Constitution requires the legislature to refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions are necessary component to freedom of religion.

Furthermore, in section 15(3)(a) it is stated that the section does not prevent legislation recognizing (i) marriages concluded under any tradition or a system of religion, personal belief or family; or (ii) systems of personal and family law under any tradition, or adhered to by any persons professing a particular religion; and secondly, recognition in terms of paragraph (a) must be consistent with section 15 and provisions of the Constitution.

Section 15(3) indicates that while recognition of religious legal systems or polygamous marriages concluded according to religious rites would be granted legal recognition, such recognition must be consistent with the Bill of Rights and other provisions of the Constitution. The provision that section 15(3)(a) must be consistent with the other provisions of the Constitution, is bound to create conflict. Goolam states the following with regard to this conflict:

> "The reason for this is that the Bill of Rights is individual-centred, based on Western ideas while Islamic law, like African law, has as its underlying principle the idea of communitarians. The fundamental question which needs to be answered, therefore is: Why should Western ideas and philosophy serve as the yardstick, particularly in South Africa, an African country? A further crucial question is: Why should a legal system such as Islam, based as it is on divine revelation, play second fiddle to a secular, human legal system?" (Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* (2002) 120).

Religious-based marriages, giving effect to personal and family law, are often considered to discriminate against women on the grounds of gender and sexual orientation. This discrimination should be permissible in so far as it is required by the tenets of the religion. Furthermore, it should be pointed out that women who enter into potentially polygamous unions are not forced to do so, as consent on the part of both parties to the marriage is required.

It is also submitted that polygamy should not be singled out as the predominate characteristic of religious marriages currently not enjoying legal recognition. The institution of marriages performed under religious rites should rather be looked at holistically so as to determine whether indeed there is discrimination against women and whether such marriages do in fact

violate gender equality. It is further submitted that if marriages performed under religious rites are not granted legal recognition, this will merely compound the inequalities presently experienced by women in a polygamous marriage and those who are not in such a relationship, as well as between the various women married to the same man.

6 1 The right to culture

Section 30 of the final Constitution and 31(1)(a) of the interim Constitution state that "everyone has the right to participate in cultural life of their choice" and "to enjoy their culture, practice their religion and use their language." The deduction which can be drawn from both these sections is that potentially polygamous marriages should be granted legal recognition and protection if they involve marrying according to one's culture. Culture plays a very important role in the lives of Muslims, and to be a practising Muslim, one would enter into a marriage by Muslim rites, according to the tenets of Islam which would necessarily involve the cultural practice of the Muslim community. Islam does not differentiate between religion, law and morals.

6 2 The right to human dignity

Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected". The protection of human dignity is inherent in the protection of virtually all other rights, to the extent that it can be regarded as a pre-eminent value in the Constitution, even more so than the right to life. The right to human dignity is a core constitutional right. All rights contained in the Bill of Rights must be interpreted to promote the Constitution's ambition of creating an "open and democratic society based on human dignity, equality and freedom." In describing the right to human dignity and the right to life as the most important human rights, the Constitutional Court in *S v Makwanyane* (1995 3 SA 391 (CC)) stated the following:

> "Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chap 3 (par 328).
>
> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others" (par 144).

Human dignity is not only an enforceable right which must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central importance in the limitation enquiry in terms of section 36 of the Constitution. In respect of marriage and family life, Van Heerden J held in *Dawood, Shalabi, Thomas v Minister of Home Affairs* (2000 1 SA 997 (C)) that the right to dignity must be interpreted to afford legal protection to the institutions of marriage and family life, such protection extending at the very least to the core elements of these

institutions, namely, the right and duty of spouses to live together as spouses in community of life.

The approach as expounded by Van Heerden J above was confirmed by the Constitutional Court, where O'Regan J held that the Constitutional Court indeed protected the rights of persons to marry freely and to raise a family.

In this respect, the Constitutional Court elaborated as follows:

> "The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. It is not only legislation that prohibits the rights to form a marriage relationship that will constitute an infringement of the right of dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity" (*Dawood, Shalabi, Thomas v Minister of Home Affairs supra* par 37).

From the discussion above it could be taken to indicate that potentially polygamous marriages should be recognized so as to uphold the dignity of persons who marry outside of the civil law. However, if it could be shown that such marriages are prejudicial to women and therefore violate their dignity, it may not be afforded recognition.

The two positions as set out above necessarily warrant a discussion on equality as set out in section 9 of the final Constitution, in order to determine whether or not the dignity of women is indeed violated by polygamous unions.

6 3 The right to equality

Equality is relevant for the discussion *in casu* in the following ways:

- Persons who enter into Muslim marriages should be treated equally in comparison with those who enter into marriage according to South African civil law.
- In contrast, however, potentially polygamous marriages can be regarded as being discriminatory against women on the grounds of sex and gender. In other words, potentially polygamous marriages may offer against the principle of gender and the prohibition of discrimination based on sex.

As discussed previously, Muslim marriages have been denied recognition on the ground that they are potentially polygamous. In *Ismail v Ismail* (*supra*) Muslim marriages were denied recognition on the ground that they violated the principle of equality in two respects: firstly, the bride is not present at the ceremony; and secondly, it is more difficult for women than men to obtain a divorce.

Despite the fact that customary law can similarly be shown to be in conflict with section 9 of the Constitution in terms of its patriarchal structure, recognition was granted to customary marriages in terms of the Recognition of Customary Marriages Act (120 of 1998). The South African Law Commission (hereinafter "SALC") in its report on customary marriages (The South African Law Commission Project 90: Harmonization of the Common Law and the Indigenous Law – Report on Customary Marriages (1998)) stated that the principles of equality and non-discrimination are of particular relevance as traditionally the issue of the constitutionality of the recognition of customary marriages boils down to a conflict between the constitutional values of culture and gender equality. An argument advanced for the recognition of customary marriages was that section 9(3) and (4) of the final Constitution enshrine the right not to be unfairly discriminated against on the basis of culture. Furthermore, section 30 affords everyone the right to participate in the cultural life of his/her choice, and section 31(1) provides that persons belonging to a cultural community may not be denied the right to enjoy their culture.

Clearly, customary law is part of the South African culture. As such, it was argued that customary marriages should be recognized as they formed part of the culture of the indigenous population of South Africa.

In deciding whether the recognition of a customary marriage is inconsistent with the Constitution, the SALC stated that the decision whether a legal rule or institution constitutes an infringement of the constitutional right to equality, often leads to a balancing of interests which necessarily entails a consideration of broader social, political and economic issues. In this regard, the argument that polygamy prejudices women had to be weighed against the claim that it performed valuable social functions (The South African Law Commission Project 90: Harmonization of the Common Law and the Indigenous Law – Report on Customary Marriages (1998) 87). The SALC submitted that, while the Constitution upholds non-discrimination, it also provides for the recognition of culture rights and that the customary marriage forms part of the African culture, to which black people have a right. The SALC also submitted that if recognition of customary law is to be something more than a empty gesture towards the African cultural tradition, the Bill of Rights must be construed in a manner that a set of western values does not become dominant, merely due to the fact that customary law is different (The South African Law Commission Project 90: Harmonization of the Common Law and the Indigenous Law – Report on Customary Marriages (1998) 24). Despite the fact the present constitutional dispensation is largely based on Western values, it was submitted that this did not mean that African values should be completely discarded. The final Constitution should be regarded as an honest attempt to merge both Western and African values. The SALC also commented that judging from the emerging constitutional jurisprudence on issues of culture, customary law and religion, the courts are not prepared to strike down a customary practice merely because it is controversial or is under attack from various interest groups (The South African Law Commission Project 90: Harmonization of the Common Law and the Indigenous Law – Report on Customary Marriages (1998) 91).

Based on its findings, the SALC made the recommendation that customary marriages should be granted legal recognition and that customary marriages should continue to be potentially polygamous. The most important reasons for making this recommendation, were that it would be difficult to enforce a prohibition of polygamy, and that polygamy appears to be obsolescent.

The recommendation of the SALC culminated in the enactment of the Recognition of Customary Marriages Act, which granted legal recognition to customary marriages which would continue to be potentially polygamous.

Before the Recognition of Customary Marriages Act, customary marriages were also regarded as being invalid because they permit polygamy. As in Muslim marriages, this rule applied irrespective of whether or not the husband had in fact taken more than one wife or envisaged taking more than one wife. Despite the fact that customary marriages are custom-based, and not religion-based, and that there exist larger numbers of customary marriages than Muslim marriages, granting recognition to customary marriages and not to Muslim marriages, is tantamount to discrimination.

7 Conclusion

The judgment in *Hassan v Jacobs NO* (*supra*) is in the authors' view correct and gives effect to fundamental principles of the Constitution. It is in the authors' view necessary, however, for the legislature to intervene and promulgate legislation similar to the Recognition of Customary Marriages Act in order to establish certainty in this regard. It is therefore submitted that the draft Muslim Marriages Bill which was proposed in 2003 and has been unattended since then, should be enacted as legislation as the South African legal approach to potentially polygamous Muslim marriages is in urgent need of reform. The *ad hoc* recognition of certain consequences flowing from Muslim marriages has alleviated the plight of parties to Muslim marriages to a certain extent. This, however, is not wholly satisfactory, as, if parties married according to Islamic rites wish to get divorced, they would have to argue in court whether the divorce can be effected under the Divorce Act or whether a solution must be sought under religious laws. This would necessarily involve a high court application which is costly and time-consuming. Clear legislative provision similar to the Recognition of Customary Marriages Act will lead to a fair and non-discriminatory dispensation in all Muslim divorces and not only those where the spouses have means to embark on litigation.

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