CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/03

JULEIGA DANIELS	Applicant
versus	
ROBIN GRIEVE CAMPBELL NO	First Respondent
MELISSA FOURIE NO	Second Respondent
SORAYA DANIELS	Third Respondent
ADELAH JAKOET	Fourth Respondent
SHAHIEDA MANUEL	Fifth Respondent
MOGAMAT SHARIEF MANUEL	Sixth Respondent
SARAH DANIELS	Seventh Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Eighth Respondent
REGISTRAR OF DEEDS	Ninth Respondent
MASTER OF THE HIGH COURT	Tenth Respondent

Heard on : 6 November 2003

Decided on : 11 March 2004

JUDGMENT

SACHS J:

[1] This case concerns an application for confirmation of an order,[1] and, in the alternative, an appeal against the order[2] made by the High Court in Cape Town (the High Court) declaring certain provisions of the Intestate Succession Act[3] and the Maintenance of Surviving Spouses Act[4] unconstitutional and invalid for failing to include persons married according to Muslim rites as spouses for the purposes of these Acts.

[2] Section 1 of the Intestate Succession Act states:

> "1. **Intestate succession** — (1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and —
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> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
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> (c) is survived by a spouse as well as a descendant —
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> (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
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> (ii) such descendant shall inherit the residue (if any) of the intestate estate;
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> (d) . . . . "

[1] In terms of rule 15 of the Rules of the Constitutional Court, read with section 167(5) read with section 172(2) of the Constitution.

[2] In terms of rule 18 of the Rules of this Court read with section 172(2)(d) of the Constitution.

[3] Act 81 of 1987.

[4] Act 27 of 1990.

Section 2(1) of the Maintenance of Surviving Spouses Act states:

> "2. **Claim for maintenance against estate of deceased spouse** — (1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

In terms of section 1 of the Maintenance of Surviving Spouses Act "survivor" is defined as "the surviving spouse in a marriage dissolved by death". Although both Acts confer rights on spouses who are predeceased by their husbands or wives, in neither is the word "spouse" defined.

[3] The applicant married her now deceased husband by Muslim rites in 1977. The marriage, which was at all times monogamous, was not solemnised by a marriage officer appointed in terms of the Marriage Act.[5] No children were born of this marriage, though the applicant and her deceased husband had children from previous marriages. The deceased died intestate in 1994.

[4] The main asset in the deceased estate is a modest house in a low-income suburb of Cape Town.[6] The applicant is a domestic worker who has supplemented her income by selling goods from in front of her house. She resides on the property, having lived there for nearly thirty years. In July 1969 her first husband, to whom she was also married by Muslim rites, submitted a written application to the City of Cape

[5] Act 25 of 1961.

[6] The house was valued for estate purposes at less than R50 000.

Town to rent a council dwelling. In 1976, after she and her first husband were divorced, the City of Cape Town allocated the dwelling to her in her own name. The applicant and her children were in occupation of the property when she married the deceased by Muslim rites in 1977. She informed the City of Cape Town of her remarriage and furnished it with a copy of her marriage certificate. In accordance with its then policy of registering the principal breadwinner of the family as the tenant, the City of Cape Town transferred the tenancy of the property to the deceased.

[5] Tenants of council houses were later given the opportunity to purchase such houses, and in 1990 the deceased entered into an instalment-sale agreement to purchase the house from the City of Cape Town. The applicant, who had contributed substantially towards the household expenses, including the rent and the service charges, as well as towards the purchase price of the property, also signed the deed of sale.[7] When the deceased died the outstanding balance owing on the purchase price of the property was written off in terms of state policy, and the property was transferred to the estate of the deceased in 1998.

[6] The second respondent and first respondent were thereafter respectively appointed in 2000 and 2001 by the tenth respondent, the Master of the High Court (the Master) as the executors,[8] the second respondent as executor of the estate of the

[7] *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) at 973F-G.

[8] The Master made the appointments in terms of section 18(3) of the Administration of Estates Act 66 of 1965.

deceased, and the first respondent as executor of the estate of a deceased son of the latter from his previous marriage. I will refer to them as the executors.

[7] The third to seventh respondents are interested family members. The eighth respondent is the Minister of Justice and Constitutional Development (the Minister). The ninth respondent is the Registrar of Deeds and the tenth respondent is the Master. None of these respondents oppose the application.

[8] The applicant was told by the Master that she could not inherit from the estate of the deceased because she had been married in terms of Muslim rites, and therefore was not a "surviving spouse". A claim for maintenance against the estate was rejected on the same basis. With the support of the Women's Legal Centre, the applicant approached the High Court for an order declaring that she was a spouse of the deceased and his survivor. In the alternative, she asked for the Acts to be declared unconstitutional to the extent that they discriminated unfairly against Muslim marriages.

Proceedings in the High Court

[9] The High Court reluctantly came to the conclusion that the applicant was not a "spouse" or "survivor" for the purposes of the Acts. This was because her marriage to the deceased was not recognised as a valid marriage in terms of South African law. Van Heerden J held that:

> "[M]arriages by Muslim rites have . . . not been recognised by South African courts as valid . . . marriages, firstly, because such marriages are potentially polygamous and

> hence contrary to public policy (whether or not the actual union is in fact monogamous) and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961".[9]

[10] In reaching her conclusion, van Heerden J considered herself bound by the decisions of this Court on the interpretation of the word "spouse" in the *National Coalition* (2)[10] case and in *Satchwell*.[11] She was of the view that these cases made it clear that the term "spouse" only applied to parties to a marriage recognised as valid in terms of South African law.[12] A second consideration was the existence of a number of statutes where express provision for the inclusion of the parties to a Muslim union had been made, for example – the Estate Duty Act[13] as amended. By explicitly creating exceptions to the general rule that the only marriages to which legal consequences are attached are those solemnised in accordance with the provisions of the Marriage Act, these statutes supported the view that in the absence of any such deeming or interpretative provision, the word "spouse" must be given its "traditional, limited meaning". In her view, accordingly, the statutes as they stand could not be interpreted to include parties to Muslim marriages under the term "spouses". Amendments to provide the broader meaning lay in the hands of the legislature.[14]

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[9] Above n 7 at 980C-D.

[10] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[11] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[12] Above n 7 at 988C-9E.

[13] Act 45 of 1955.

[14] Above n 7 at 1000A.

[11] The learned judge went on to consider the constitutional consequences of such an interpretation. After a comprehensive contextual analysis of the impact of the Acts, she concluded that the interplay between the applicant's religious beliefs and the cultural practices in her community – and the failure of South African law properly to accommodate such beliefs and practices – resulted in the applicant being denied relief.[15] As a result, the omission of people such as the applicant from the protection provided by the statutes, violated their rights to equality and was unconstitutional and invalid. The learned judge held that until such time as Muslim personal law of succession was recognised by the legislature and regulated in a manner consistent with the values underlying the South African Constitution, there was no justification for the limitation of the equality rights.[16] Following the approach adopted by this Court in *National Coalition* (2),[17] she accordingly "read-in" words to remedy the defect.

[12] The order of the High Court that is before us for confirmation reads as follows:

> "1. The omission from section 1(4) of the Intestate Succession Act 81 of 1987 of the following definition is declared to be unconstitutional and invalid: "'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union".
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> 2. Section 1(4) of the Intestate Succession Act 81 of 1987 is to be read as though it included the following paragraph after paragraph (f):

[15] Id at 993H-I.

[16] Id at 1002D-E.

[17] Above n 10.

> "(g) 'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union."
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> 3. The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of this order.
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> 4. The omission from the definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites' at the end of the existing definition, is declared to be unconstitutional and invalid.
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> 5. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites.'"[18]

[13] The applicant was concerned that this Court might refuse to confirm the declaration of invalidity,[19] and that she might end up without the relief she desired. She accordingly applied in the High Court for leave to appeal against the interpretation given to the word "spouse", should the application for confirmation fail.[20] Binns-Ward AJ, who heard the application, indicated that a contextual and purposive reading of the Acts could well lead to this Court deciding to refuse to confirm the orders of constitutional invalidity, on the grounds that the proper

[18] Above n 7 at 1005A-E.

[19] Section 167(5) of the Constitution states:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[20] Case No 1646/01 unreported.

construction of the statutes allows for the applicant to be recognised as a "spouse" or "survivor". In such a case there might not be a need for an appeal because the reasoning of the Court would itself indicate that parties to Muslim marriages were covered by the Acts.[21] He nevertheless granted conditional leave to appeal as requested by the applicant.

[14] To avoid uncertainty it should be made clear that an appeal to this Court against a declaration of constitutional invalidity made by a competent court under section 172(2)(a) of the Constitution lies as of right in terms of section 172(2)(d) and does not require leave of the court making the declaration or this Court.[22]

[15] The applicant's appeal was lodged nine days late. Condonation for this delay which caused no prejudice has been requested, has not been opposed, and is granted.

Argument in this Court

[16] Counsel for the applicant relied primarily on the appeal rather than on the application for confirmation. His principal argument was that the word "spouse" should be interpreted so as to include persons married according to Muslim rites; not only did the literal meaning of the word "spouse" include people in the position of the applicant, but also a purposive interpretation of the Acts pointed in that direction.

[21] Id at para 19.

[22] Section 172(2)(d) provides the following:

> "Any person or organ of state with sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

Any interpretation which gave a narrow meaning to the word "spouse" so as to exclude parties to a Muslim marriage resulted in unfair discrimination on grounds of marital status, religious practices and culture and violated the right to dignity. An interpretation consistent with the Constitution should be preferred to one which led to invalidity.

[17] The Minister supported confirmation of the High Court order, and was not in favour of interpreting the word "spouse" so as to include a party to a Muslim marriage.

[18] The executors, on the other hand, contended that the word "spouse" did not cover parties to a Muslim marriage, and further, that what they regarded as the correct interpretation of the Acts did not render the provisions unconstitutional. In their view no violation of the right to equality was involved. They argued that Imams are not barred from being registered as marriage officers under the Marriage Act and therefore are able to conclude a valid marriage.[23] They contended further that the Marriage Act constituted legislation envisaged in the interim Constitution[24]

[23] In this regard, the respondents made reference to section 3 of the Marriage Act which states:

> "Designation of ministers of religion and other persons attached to churches as marriage officers. —
> (1) The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.
> (2) A designation under subsection (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages —
> (a) within a specified area;
> (b) for a specified period;
> (c) . . ."

recognising the validity of marriages concluded under systems of religious law. Muslim couples therefore have the choice to conclude marriages that are recognised in terms of South African law. The executors acknowledged that if their argument was upheld, the applicant in the present matter would end up with no relief at all. She would not be entitled to the protection offered by the Acts because she was not lawfully married and therefore not a spouse. Nor could she secure any benefits conferred under Muslim personal law, because such law was not recognised and enforceable in the courts. They argued, however, that this unfortunate consequence was a result of her failure to avail herself of her rights under the Marriage Act, and not because of any defects in the Acts under consideration. In their view this Court should refuse to confirm the order of the Cape High Court and dismiss the appeal. Any change to be made concerning the status of persons in the situation of the applicant lay with the legislature.

The meaning of "spouse"

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[24] Section 14(3) of the interim Constitution stated that:

> "Nothing in this Chapter shall preclude legislation recognising —
> (a) a system of personal and family law adhered to by persons professing a particular religion; and
> (b) the validity of marriages concluded under a system of religious law subject to specified procedures."

The Constitution in this regard states at section 15(3):

> "(a) This section does not prevent legislation recognising —
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[19] The word "spouse" in its ordinary meaning includes parties to a Muslim marriage. 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. Such exclusion as was effected in the past did not flow from courts giving the word "spouse" its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice[25] than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting.

[20] Discriminatory interpretations deeply injurious to those negatively affected[26] were in the conditions of the time widely accepted in the courts. They are no longer

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[25] See *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 (4) SA 1319 (SCA); 1999 (4) All SA 421 (SCA), and *Ryland v Edros* 1997 (2) SA 690 (C); 1997 (1) BCLR 77 (C).

[26] The historic hurt caused is captured in S Narayan (ed) *The Selected Works of Mahatma Gandhi: Satyagraha in South Africa* vol 3 (Navajivan Publishing House, India 1928) at 377–8, M K Gandhi refers to "the terrible judgment" in the Cape Supreme Court setting aside the practice of forty years, which

> ". . . thus nullified in South Africa at a stroke of the pen all marriages celebrated according to the Hindu, Musalman and Zoroastrian rites. The many married Indian women in South Africa in terms of this judgement ceased to rank as the wives of their husbands and were degraded to the rank of concubines, while their progeny were deprived of their right to inherit the parents' property. This was an insufferable situation for women no less than men, and the Indians in South Africa were deeply agitated".

The shock to Indian women was so great that for the first time they joined in the Satyagraha campaign. Gandhi continued at 388:

> "It was an absolute pure sacrifice that was offered by these sisters, who were innocent of legal technicalities, and many of whom had no idea of country, their patriotism being based only

sustainable in the light of our Constitution. In *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*[27] Langa DP stated that:

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.
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> . . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[28]

[21] In the present matter 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

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> upon faith. Some of them were illiterate and could not read the papers. But they knew that a mortal blow was being aimed at the Indians' honour, and their going to jail was a cry of agony and prayer offered from the bottom of their heart, and was in fact the purest of all sacrifices."

The "terrible judgment" is reported as *Esop v Union Government (Minister of the Interior)* 1913 CPD 133. Counsel for the government argued that "Mariam is in law the concubine and not the wife of the applicant." At 134. And Searle J said that "[t]he courts of this country have always set their faces against recognition of these so-called Mahommedan marriages as legal unions . . ." at 135. See also Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" (1993) 56 *THRHR* 392 at 398–9. It should be remembered that religious marginalisation coincided strongly with racial discrimination, social exclusion and political disempowerment.

[27] 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

[28] Id at paras 21-2.

the word. 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.[29]

[22] A contextual analysis of the manner in which the word "spouse" is used in the two Acts reinforces the justification for this approach. 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[30] and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women.[31] 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

[29] The situation is comparable to the "Persons" cases where for sixty years courts in Britain and the former British Empire held that statutes granting franchise and other rights to all persons with certain qualifications did not include women because they were not covered by the word "person". See Sachs and Wilson *Sexism and the Law*: *A Study of Male Beliefs and Judicial Bias* (Free Press, New York 1979) p 22–40. See *Schlesin v Incorporated Law Society* 1909 TS 363 (Miss Schlesin wished to be articled to M K Gandhi); *Incorporated Law Society v Wookey* 1912 AD 623.

[30] Section 1(b).

[31] The importance of looking at patterns of systematic disadvantage was referred to in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); and *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

provision had been made by will or other settlement were not protected by the common law.[32] The result was that their bereavement was compounded by dependence and potential homelessness – hence the statutes.

[23] The present case illustrates well why statutory protection was deemed necessary. A long-standing dispute between the applicant and some of the descendants of the deceased has resulted in her facing eviction from the home that was originally hers, and in which she has lived for three decades. The applicant signed her affidavit with a cross. She does not belong to that section of society that has lawyers at hand to draft wills and arrange property settlements. In any event, it did not lie in her hands to compel the deceased to make provision for her. The Acts were introduced to guarantee what was in effect a widow's portion on intestacy as well as a claim against the estate for maintenance. The objective of the Acts was to ensure that widows would receive at least a child's share instead of their being precariously dependent on family benevolence. There seems to be no reason why the equitable principles underlying the statutes should not apply as tellingly in the case of Muslim widows as they do to widows whose marriages have been formally solemnised under the Marriage Act. The manifest purpose of the Acts would be frustrated rather than furthered if widows were to be excluded from the protection the Acts offer, just

[32] In *Glazer v Glazer NO* 1963 (4) SA 694 (A) after a lengthy consideration of the Roman-Dutch law authorities, the Appellate Division concluded that under Roman-Dutch law the widow had no claim for maintenance out of the estate of her deceased husband and that it would not be appropriate or necessary to develop the law in this respect. At 707B-C, Steyn CJ reasoned as follows: "However close the relationship between husband and wife, it is terminable, and not the same as the immutable natural relationship between parent and child. It is by no means self-evident that denial of a widow's claim would be an inconsistency or anomaly in a legal system which recognises the claim of a child, or that acceptance of the one must of necessity or logically embrace the other." An important purpose of the Acts under consideration in this case was to fill the consequent gap in our law. See Keyser "Law of Persons and Family Law" 1990 *Annual Survey of South African Law* 1 at 3; Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (1999) at 272–4.

because the legal form of their marriage happened to accord with Muslim tradition and not the Marriage Act.

[24] This was the reasoning underlying the decision in *Amod*,[33] which concerned the rights of a Muslim widow to claim relief from the Multilateral Motor Vehicle Accidents Fund. Mahomed CJ held that the insistence that the duty of support which a serious *de facto* monogamous marriage imposed on the husband was not worthy of protection, could only be justified on the basis that the only duty of support which the law will protect in such circumstances was a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others.[34] This was inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the interim Constitution.[35] Dealing with the argument that Muslim couples suffered no special discrimination because they were free to solemnise their marriages in terms of the Marriage Act and thus acquire for their relationship the status of a civil marriage, he held that for purposes of the dependant's action the decisive issue was not whether the dependant concerned was or was not lawfully married to the deceased but whether the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law.[36] In the English case of *Din v National Assistance Board*[37] Salmon L J reasoned along similar lines, stating that:

[33] Above n 25.

[34] Id at para 20.

[35] Id

[36] Id at para 25.

> "When a question arises, of recognising a foreign marriage or of construing the word 'wife' in a statute, everything in my view depends on the purpose for which the marriage is to be recognised and the objects of the statute. I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognised as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common-sense and justice why they should be so recognised."[38]

[25] The same considerations apply in the present matter. The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers. Put another way, it is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of "common sense and justice" and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided. The answer, as in *Amod*, must be in favour of the interpretation which is consistent with the ordinary meaning of the word "spouse", aligns itself with the spirit of the Constitution and furthers the objectives of the Acts.

[26] It is important to underline the limited effect of such an inclusive interpretation. As in *Amod*, it eliminates a discriminatory application of particular statutes without implying a general recognition of the consequences of Muslim marriages for other purposes. Accordingly, the recognition which it accords to the dignity and status of

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[37] [1967] 1 All ER 750 (QB).

[38] Id at 753.

Muslim marriages for a particular statutory purpose, does not have any implications for the wider question of what legislative processes must be followed before aspects of the *shariah* may be recognised as an enforceable source under South African law.[39]

[27] The fact that many statutes adopted in recent times[40] dealing with married persons expressly include parties to Muslim unions under their provisions is indicative of a new approach consistent with constitutional values. The existence of such provisions in other statutes does not imply that their absence in the Acts before us has special significance. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both last amended before the era of constitutional democracy arrived. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by the Acts, accordingly, cannot be interpreted so as to exclude them contrary to the spirit, purport and objects of the Constitution.

[28] I turn now to the reasoning which caused van Heerden J "with considerable reluctance" to hold that Muslim husbands and wives could not for the purposes of the

[39] *Amod* above n 25.

[40] They include: Civil Proceedings Evidence Act 25 of 1965 (section 10A recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (section 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Pension Funds Act 24 of 1956 (section 1(b)(ii): definition of "dependent"); Special Pensions Act 69 of 1996 (section 31(b)(ii): definition of "dependent"); Government Employees Pension Law Proclamation 21 of 1996 (section 1(b)(ii): definition of "dependent" and schedule 1 item 1.19, definition of "spouse"); Demobilisation Act 99 of 1996 (section 1(vi)(c): definition of "dependent"); Value-Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognise religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); Transfer Duty Act 40 of 1949 (section 9(1)(f) read with the definition of "spouse" in section 1 exempts from transfer duty property inherited by the surviving spouse in a religious marriage); Estate Duty Act 45 of 1955 (section 4(q) read with the definition of "spouse" in section 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage).

Acts be considered as spouses. The issue before her was whether the Court could give an extensive interpretation to the word spouse, and so avoid discriminatory impact, or whether the word was not reasonably capable of such interpretation, with the result that the discriminatory effect of the Acts could only be cured by a declaration of invalidity coupled with a "reading-in" to include Muslim marriage partners. In this respect she felt she was bound by decisions of this Court to the effect that the undefined word "spouse" in the Aliens Control Act[41] and the Judges' Remuneration and Conditions of Employment Act[42] respectively, could not be extended to include permanent same-sex life partners. She states that in the *National Coalition case* (2):

> ". . . Ackermann J, writing for the full court, held that the word "*spouse*", as used in section 25(5) of the Aliens Control Act 96 of 1996, was not reasonably capable of a broad construction so as to include partners in permanent same-sex life partnerships. The word "spouse" was not defined in the Act, but its ordinary meaning connoted a "married person: a wife, a husband" and the context in which "spouse" was used in section 25(5) did not suggest a wider meaning. While some of these statements by Ackermann J may possibly be construed as supporting the interpretive arguments relied upon by the applicants in the present proceedings, it is important to note that Ackermann J went further by stating (at paragraph [25]) that there was no indication that the word "marriage" as used in the Aliens Control Act extended "any further than those marriages that are ordinarily recognised by our law" . . . ."[43]

She then goes on to add:

[41] Act 96 of 1991.

[42] Act 88 of 1989.

[43] Above n 7 at 988C-E.

> ". . . i.e. marriages that are solemnised in accordance with the provisions of the Marriage Act 25 of 1961."[44]

She continues by stating that the interpretive point of departure in *Satchwell* was the same, quoting the following passage from the judgment of Madala J:

> "In the circumstances the ordinary wording of the provisions [of the Judges' Remuneration and Conditions of Employment Act] must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. . . . The context in which "spouse" is used in the impugned provisions does not suggest a wider meaning, nor do I know of one. Accordingly, a number of relationships are excluded, such as same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants."[45]

[29] In my view, a proper reading of *National Coalition* (2) and *Satchwell* does not lead to the conclusion that partners to a Muslim marriage do not fall under the term "spouse".

[30] In the first place, there is no express statement in either judgment referring to solemnisation under the Marriage Act as a pre-condition for parties to be considered to be spouses. For the purposes of the statutes being construed in those cases, it was in fact not necessary to go beyond holding that permanent same-sex life partners could not reasonably be included in the term "spouse"; as Ackermann J pointed out, the ordinary meaning of the word "spouse" connoted a "married person; a wife, a husband". The difficulty confronting permanent same-sex life partners on this score,

[44] Id at 988E.

[45] Above n 11 at para 9.

then, was that they could not ordinarily be considered to be married persons, husbands and wives. The position of people married by Muslim rites in this respect is different. They fall within the ordinary meaning of the word spouse. They are married to each other, wife and husband. As Mahomed CJ pointed out in *Amod*:

> ". . . the Islamic marriage between the appellant and the deceased was a *de facto* monogamous marriage; . . . it was contracted according to the tenets of a major religion; and . . . it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'."[46]

[31] Secondly, the judgments in both cases were careful to underline that the word "spouse" had to be interpreted in the context of the particular statutes under consideration. In both cases the judgments indicated that there was nothing in the context in which the word "spouse" was used to suggest a wider meaning than married persons. In *National Coalition* (2) it was indicated that there was a significant textual pointer against the more extensive use of the word spouse. Ackermann J stated that:

> "Had the word 'spouse' been used in a more extensive sense in s 25(5) of the Act, it would have been unnecessary to provide specifically in s 1(1) that marriage 'includes a customary union'. It is significant that the definition of 'customary union' namely:
>
> > '. . . the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is party to a subsisting marriage, which is recognised by the Minister in terms of ss (2);'

[46] *Amod* above n 25 at para 20. Description of Islamic marriage and its consequences in *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 21.

> is based on an opposite-sex relationship."[47]

In the present matter, however, no such textual pointers in favour of a limited construction exist. On the contrary, both the clear wording of the Acts and their purpose point strongly in favour of an extensive interpretation of the word "spouse".

[32] Thirdly, it cannot be said that Muslim marriages lack legal recognition in the way that permanent same-sex unions have done. Statutes dealing with a great variety of social and economic questions have given express recognition to Muslim unions, treating parties to them as married persons.[48]

[33] Judgments should not be read as though they are statutes where every word is presumed to have a precise and special meaning. What matters is the reasoning that lies at the heart of the decision and that, as a matter of legal logic, leads to the order made. Central to the determinations in *National Coalition* (2) and *Satchwell*, was a legal finding that it would place an unacceptable degree of strain on the word "spouse" to include within its ambit parties to a permanent same-sex life partnership. Thus, in *Satchwell* Madala J pointed to members of such same-sex partnerships as well as to heterosexual couples who chose not to marry, as belonging to a class of persons who could not be considered to be "spouses". The crucial distinction underlying the two judgments is the one made between married and unmarried persons, not that between persons married under the Marriage Act and those not.

[47] Above n 10 at para 26.

[48] See n 40 above.

There is nothing to indicate that the attention of the Court in either case was directed to marriages such as those contracted by the applicant. I accordingly do not agree that the two cases serve as authority for denying to parties to Muslim marriages the protection offered by the Acts. Ngcobo J has come to the same conclusion. I would like to express my agreement with the supplementary reasons he has advanced.

[34] The fact that permanent same-sex life partnerships could not be included in the term "spouse" affected the manner in which the resulting discriminatory impact of the statutes under consideration was remedied in *National Coalition* (2) and *Satchwell*. Once it was established that members of permanent same-sex life partnerships, although not classifiable as married people, merited the same recognition as is accorded by the law to married persons, the indicated remedy was to declare the unconstitutionality and read-in a provision to cure the defect. Thus, recognition of the right to equality and dignity of permanent same-sex life partners was achieved not by means of imposing undue strain on the word "spouse", but by pointing to the constitutionally unacceptable manner in which the statutes fail to treat them on a par with married people. Such partners were accordingly equated with, rather than subsumed into the concept of spouses. The under-inclusiveness in their regard was cured by adding to the category of entitlement so as to avoid unconstitutionality. In the present matter the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation. It is not necessary to follow the process the High Court felt compelled to do, that is, of making a declaration of invalidity coupled with a curative remedial reading-in.

[35] Acceptance of the fact that the word "spouse" covers people married by Muslim rites makes it unnecessary to deal with the submission advanced by the executors that the law did not discriminate against the applicant because in terms of the Marriage Act she could have solemnised her marriage before an Imam recognised as a marriage officer. The question of discrimination no longer arises once Muslim husbands and wives are able to enjoy the benefits provided by the Acts.

[36] It was made clear on the papers and in argument that the effect of the declaration sought was to cover the situation of the applicant who was a party to a Muslim marriage that was monogamous. This Court is not called upon to deal with the complex range of questions concerning polygamous Muslim marriages.

[37] In the result, the Acts fall to be interpreted so as to include a party to a monogamous Muslim marriage as a spouse. So interpreted, they are not invalid and unconstitutional. The order of the High Court should accordingly not be confirmed. Instead, the appeal must be upheld and a declaration made indicating to the executors and all interested parties that the applicant is a "spouse" and a "survivor" under the Acts.

[38] The High Court declaration of invalidity coupled with a remedial reading-in was expressly declared not to affect estates already wound up. It is not necessary for the purposes of this case to deal with the possible retrospective effect of upholding the

appeal. No pronouncement is made on whether in the absence of a declaration of invalidity, this Court is empowered to limit the retrospective effect of the declaration. Should problems concerning retrospectivity arise, they stand to be dealt with on a case by case basis.

[39] No award of costs was asked for.

The Order

[40] The following order is made:

1. The order made by the High Court is set aside and replaced with the following order:

"(a) It is declared that:

(i) the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage;

(ii) the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes the surviving partner to a monogamous Muslim marriage.

(b) It is declared that:

(i) the applicant is, for the purpose of the Intestate Succession Act 81 of 1987, a "spouse";

(ii) the applicant is, for purposes of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor".

(c) No order as to costs is made."

2. No order as to the costs of the appeal or the confirmation application is made.

Chaskalson CJ, Langa DCJ, Ackermann J, Mokgoro J, Ngcobo J, O'Regan J and Yacoob J concur in the judgment of Sachs J.

NGCOBO J:

Introduction

[41] I have read the judgments prepared by my colleagues Moseneke and Sachs JJ. I agree with the order proposed in the judgment of Sachs J. However, I prefer to approach the matter differently. In particular, I wish to elaborate on my reasons for that agreement and for my not agreeing with the conclusion reached by Moseneke J.

[42] I propose to deal with two questions. First, what is the proper approach to the interpretation of legislation under our constitutional democracy; and second, do our

decisions in the *National Gay and Lesbian Coalition*[1] and *Satchwell*[2] cases preclude us from upholding the appeal?

Proper approach to legislative interpretation

[43] Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to "promote the spirit, purport and objects of the Bill of Rights." Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred.

[44] In *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*, this Court explained the meaning of this interpretive injunction as follows:[3]

> "This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of

[1] *National Coalition for Gay and Lesbian Equality and Another v Minster of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[2] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[3] 2001(1) SA 545(CC); 2000 (10) BCLR 1079 (CC) at paras 21-2.

> governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.
>
> The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[45] Courts are therefore under an obligation, where possible, to construe legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Bill of Rights is a cornerstone of our constitutional democracy. It "enshrines the rights of all people in our country" and affirms the foundational values of human dignity, equality and freedom.[4] Courts must give expression to these foundational values when construing any legislation. They must interpret legislation so as to give effect to these fundamental values and to the specific provisions of the Bill of Rights which encompass them. Legislation must now been seen through the prism of the Constitution. The Constitution provides the context within which all legislation must be understood and construed.[5]

[46] However, as this Court noted in the *Hyundai* case, there are limits to the application of this interpretive injunction. While there will be occasions when

[4] Section 7(1) of the Constitution.

[5] Above n 3.

legislation, though open to a meaning which will be unconstitutional, is reasonably capable of being read in conformity with the Constitution "[such] an interpretation should not, however be unduly strained."[6] It follows therefore that courts "must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[7]

[47] Obviously, when dealing with old order legislation, this interpretive injunction may require courts to depart from a construction previously placed on the legislation. This departure is required because the context in which legislation must now be construed is different to that which prevailed when these cases were decided. These cases must be understood in the context in which they were decided, and in particular, the values that were prevailing at the time.

[48] The context in which old order legislation was construed during the pre-constitutional era was very different from the present era. Old order legislation was previously 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

[6] Id at para 24.

[7] Id at para 23.

to other races.[8] The decision of the Appellate Division in the case of *Moller v Keimoes School Committee* is most revealing in this regard.[9]

[49] In that case the central question was whether a child born of a white and a black was a child of "European parentage or extraction" within the meaning of the Cape School Board Act of 1905.[10] The phrase "European parentage or extraction" was not defined in the relevant statute. And as one member of the court in that case accepted, it was "possible to read it in two ways, either as meaning wholly European extraction, or partly of European extraction."[11] The court construed the phrase to mean "of pure European descent" or "unmixed European parentage or extraction." In so doing the court denied black children born of mixed marriages the right to attend ordinary public schools in the Cape Province, which had superior education compared to other schools.

[50] Lord de Villiers CJ who wrote the main judgment explained the rationale for the decision as follows:[12]

> "Now, in construing a vague expression in a statute, like that of "European parentage or extraction or descent," the Court should endeavour to ascertain its popular sense and place itself as far as possible in the position of the authors of the enactment. As a matter of public

[8] *Moller v Keimoes School Committee and Another* 1911 AD 635.

[9] Id

[10] The term "European" was used in those days to refer to white people.

[11] Above n 8 per Innes J at 647.

[12] The other members of the court who wrote separately reached the same conclusion as the Chief Justice.

> history we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We know also that, while slavery existed, the slaves were blacks and that their descendants, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites."[13]

And then continued:

> "These prepossessions, or, as many might term them, these prejudices, never have died out, and are not less deeply rooted at the present day among the Europeans in South Africa, whether of Dutch or English or French descent. We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children. In consenting to the passing of a Bill requiring separate schools for children of European extraction, the average legislator would not understand the expression "children of European extraction" to include children of mixed European and non-European extraction. His objection to his child being educated in the same school with a child whose mother was coloured and whose maternal grandmother was a native would be almost as great as to his child associating at school with black children. It is certainly inconceivable that he would be a consenting party to an Act by which European parents could be compelled to send their children to a school which children of mixed origin can also be compelled to attend. It is regrettable that there should be this social chasm between the races, but it undoubtedly exists, and it has had its effects on legislation throughout South Africa."[14]

[51] On the basis of this assumption Blacks were denied most, if not all basic human rights that we now take for granted. They were discriminated against. Their cultures and laws were not recognised except when they conformed to "the boni mores" of the "civilised peoples". Their marriages were not recognised. The law reflected the

[13] Above n 8 at 643.

[14] Id at 643-4.

values of one section of society which constituted the minority. It is within this context that the old order legislation was construed in the pre-constitutional era.

[52] It is within this context that cases such as *Seedat's Executors*[15] and *Ismail*[16] must be understood. These cases reflect the values of one section of our society. In *Seedat's Executors* case, the court declined to recognise a widow of a Muslim marriage as a "surviving spouse" because a Muslim marriage was "repugnant to the policy and the legal institution both of Holland and England"[17] and "reprobated by the majority of the civilised peoples, on grounds of morality and religion."[18] On the basis of views of the "civilised peoples" the court refused to recognise a widow of a Muslim marriage as a surviving spouse for the purposes of the statute in question. The rights of the Muslim community to marry according to Muslim law were ignored.

[53] Similarly, in *Ismail's* case, and relying on the *Seedat's Executors* case, the court refused to recognise a marriage by Muslim rites. The central issue in that case was whether the proprietary consequences of such a marriage and its termination according to Muslim law were enforceable in law. The marriage in that case was de facto monogamous. The court reasoned, however, that a Muslim marriage is potentially polygamous. The court held that such marriages are "contrary to the accepted customs and usages which are regarded as morally binding upon all members

[15] *Seedat's Executors v The Master (Natal)* 1917 AD 302.

[16] *Ismail v Ismail* 1983 (1) SA 1006 (A).

[17] Above n 15 at 308.

[18] Id at 307.

of our society."[19] It found that there were no reasons for it to depart "from the long line of decisions in which our [courts] have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions."[20]

[54] The new constitutional order rejects the values upon which these decisions were based and affirms the equal worth and equality of all South Africans**.** The recognition and protection of human dignity is the touchstone of this new constitutional order. The new constitutional order is based on the recognition of our diversity and tolerance for other religious faiths. It is founded on human dignity, equality and freedom. These founding values have introduced new values in our society. The process of interpreting legislation must recognise the context in which we find ourselves and the constitutional goal of establishing a society based on democratic values, social justice and fundamental human rights.

[55] And these values are given expression in the relevant provisions of the Bill of Rights which contains the fundamental human rights. Thus our Bill of Rights guarantees, among other things, freedom of religion. In particular, it prohibits discrimination based on religion, conscience, belief or culture.[21] Section 15(3)(a) of the Constitution permits the recognition of "marriages concluded under any tradition

[19] Above n 16 at 1026B.

[20] Id at 1024 D-E.

[21] Section 9(3) of the Constitution:

> "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."

or a system of religion, personal or family law."[22] The founding values as given expression in the Bill of Rights now provide the context within which legislation must be construed. The interpretive injunction contained in section 39(2), namely, that when interpreting any legislation courts must promote the spirit, purport and objects of the Bill of Rights must be understood in this context.

[56] Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society. This change is indeed reflected in a number of statutes which now expressly recognise Muslim marriages for the purposes of the rights that they vest in spouses.[23] In my view the word "spouse" in the statutes under consideration must be construed to reflect this change. It follows therefore that the word "spouse" must now be construed in a manner that is consistent with the foundational values of human dignity, equality and freedom.

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[22] Section 15(3)(a)(i) of the Constitution does not prevent legislation recognising:

> "marriages concluded under any tradition, or a system of religious, personal or family law."

[23] See the judgment of Moseneke J at para 77.

[57] Thus the word "spouse" in the Intestate Succession Act[24] and the Maintenance of Surviving Spouses Act,[25] is not defined. It must therefore now be given its ordinary meaning unless the context suggests otherwise. I agree with Sachs J that the ordinary meaning of the word "spouse" includes parties to a Muslim marriage. I can find nothing in the word "spouse" to suggest that it excludes spouses of a marriage by Muslim rites. Nor is there anything in the object or the purpose of these statutes to suggest that. Both these statutes were intended to provide the surviving spouse with a claim for maintenance against or claim for a share in the estate of the deceased spouse. A construction of the word "spouse" to include parties to a Muslim marriage is consistent with this object.

[58] This construction of the word "spouse" recognises "marriages concluded under any tradition or a system of religion, personal or family law."[26] In so doing, it "promotes the spirit, purport and objects of the Bill of Rights."[27] It follows therefore that the word "spouse" in the two statutes must be construed to include parties to a Muslim marriage, unless the decisions in *National Gay and Lesbian Coalition* and *Satchwell* preclude us from adopting such a construction.

[24] Act 81 of 1987.

[25] Act 27 of 1990.

[26] Id

[27] Section 39(2) of the Constitution states that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Do the National Gay and Lesbian Coalition and Satchwell decisions preclude a construction giving the word spouse its ordinary meaning?

[59] The High Court took the view that these cases preclude such a construction because they held that the term "spouse" only applied to a marriage recognised as valid in terms of South African law. The High Court relied upon the statements in the two judgments to the effect that the word "spouse" as used in the statute did not suggest a wider meaning. It relied in particular, upon the statements that there was no indication that marriages or "spouse" as used in the relevant statutes extended "any further than those marriages that are ordinarily recognised by our law."[28]

[60] In my view these two cases are distinguishable from the present case. They concerned couples who did not claim to be married under any law. They were concerned with people who asserted rights to have their partners recognised in law. They did not assert such rights based on any marriage but it was based on living together in a permanent same-sex relationship. They did not therefore claim that their "partners" are "spouses". The question in each of these cases was therefore whether the parties in a same-sex relationship should be accorded the same rights as spouses in a marriage. It was in this context that the Court held that partners in same-sex relationship are not spouses within the meaning of the statutes in question.

[61] Here we are concerned with a claim that the applicant is married by Muslim rights and that she is therefore a "spouse" within the meaning of that word as used in the statutes in question. The question therefore is whether the word "spouse" as used

[28] Above n 1 at para 25; above n 2 at para 9.

in the two statutes includes parties to a Muslim marriage. The question is not whether the word "spouse" should be construed to include same-sex couples who are not married. This, in my view, distinguishes this case from the two cases relied upon by the High Court.

[62] Much was made of the statements in the two cases that the word spouses or marriage "extended no further than those marriages that are ordinarily recognised by our law."[29] As pointed out above, in the two cases the Court was concerned with the question whether the word "spouse" could be extended to include parties to a permanent same-sex life partnership. These cases must be understood to hold that the word "spouse" cannot be construed to include persons who are not married. Seen in this context, the Court probably went too far when it referred to "marriages ordinarily recognised in law." This statement was not required by the conclusion reached by the Court.

[63] In my view therefore our decisions in the *National Gay and Lesbian Coalition* and *Satchwell* do not preclude the adoption of a construction of the word "spouse" to include parties to a Muslim marriage. It follows that the word "spouse" in the statutes in issue in this case must be construed to include parties to a Muslim marriage. It is not necessary in this case to consider whether spouses to polygamous marriages would fall within the meaning of the word "spouse" as used in the statutes under

[29] Id

consideration. That question must be deferred until the occasion arises for this Court to do so. I agree with the judgment and the order proposed by Sachs J.

Chaskalson CJ, Langa DCJ, Ackermann J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Ngcobo J.

MOSENEKE J:

Introduction

[64] These are proceedings for the confirmation of an order of the Cape High Court (High Court)[1] declaring provisions of the Intestate Succession Act[2] and the Maintenance of Surviving Spouses Act[3] (the Acts) unconstitutional and invalid because they exclude persons married according to Muslim rites as spouses for the purposes of the Acts. In this Court, the applicant urged us to confirm the orders or uphold her conditional appeal against the High Court's interpretation of the word "spouse" in the Acts and its resultant orders of constitutional invalidity and remedial "reading-in". The applicant prefers a declaratory order that "spouse", as used in the Acts, includes a surviving partner to a *de facto* monogamous Muslim marriage.

[1] The judgment is reported as *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) (The High Court judgment).

[2] Act 81 of 1987.

[3] Act 27 of 1990.

[65] The first and second respondents resist the confirmation of the orders and the appeal on the ground that the impugned legislation does not offend the equality guarantee in the Constitution. On behalf of the Minister of Justice and Constitutional Development (the Minister) it was submitted that the orders of constitutional invalidity are correct and should be confirmed.

[66] The main judgment declines to confirm the orders of constitutional invalidity, but upholds the appeal. It finds that the Acts fall to be "read-down" to comport with the prescripts of the Constitution. On that interpretative approach, the main judgment opts for declarations that the word "spouse" as used in the Acts includes a surviving partner to a *de facto* monogamous Muslim marriage.

[67] I take the view that the order of constitutional invalidity should be confirmed and the appeal dismissed. Like the High Court, I am of the opinion that the word "spouse" must be given a meaning limited to a party to a marriage valid in our law and solemnised in accordance with the requirements of the Marriage Act.[4] So construed, the Acts impermissibly encroach upon the equality and dignity commitment of the Constitution the applicant is accordingly entitled to effective remedy. It is therefore just and equitable to cure the omission of Muslim spouses from the respective definitions[5] of the Acts by "reading-in" appropriate words.

[4] Act 25 of 1961.

[5] In the case of "spouse", section 1(4) of the Intestate Succession Act, and of "survivor" section 1 of the Maintenance of Surviving Spouses Act.

[68] The main judgment favours an inclusive construction of the word "spouse" because it avoids constitutional invalidity. I see the matter differently. Such a reading of the impugned legislation would be impermissible, as it is unduly strained, not reasonably available and distorts the text. This is so because *first*, I do not accept that the word "spouse" bears an "ordinary meaning" other than a partner in a legally enforceable marriage. *Second*, thus far, for all the reasons embedded in the racial, cultural and religious bigotry of our unequal and bruising past, pre-constitutional courts have not recognised Islamic marriages as valid marriages. *Third*, in its previous decisions, this Court has ascribed to the words "marriage" and "spouse", as used in statutes, a meaning at odds with the one now advanced in the main judgment. *Fourth*, a significant body of post-constitutional legislation ascribes to "marriage" and "spouse" the narrow and exclusionary meaning and overcomes the omission of Muslim wives and husbands through interpretative aids. *Lastly*, important considerations of separation of powers favour legislative rather than interpretive intervention.

Recognition of Muslim marriages

[69] Marriages that have been solemnised under the tenets of the Islamic faith remain unrecognised as valid marriages under the common law.[6] None of the parties

[6] For an extensive discussion and critique of the attitude of the courts towards Muslim marriages see Bonthuys "The South African Bill of Rights and the development of family law" (2002) 119 *SALJ* 748; Van Heerden et al *Boberg's Law of Persons and The Family Law* 2 ed (Juta & Co, Ltd, Cape Town 1999) at 164-8; Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* Part IV Chapter 3.

before us contended otherwise. With the common law as it stands, such a submission would have been devoid of any merit. A fleeting survey of the cases makes the point.

[70] This Court, in *Fraser v Children's Court, Pretoria North and Others*[7] unanimously observed that the effect of *Seedat's Executors v The Master (Natal)*[8] and *Ismail v Ismail*[9] and *Ryland v Edros*[10] is that:

> ". . . unions which have been solemnised in terms of the tenets of the Islamic faith, for example, are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is 'potentially polygamous' and for that reason, said to be against public policy."[11]

[71] In *Seedat's Executors*, Innes CJ refused to recognise a Muslim widow as a "surviving spouse" for purposes of a statute which exempted surviving spouses from estate duty because marriages solemnised under the tenets of Islam were "potentially polygamous", repugnant to "the policy and institutions of Holland and of England" and "reprobated by the majority of civilised peoples, on grounds of morality and

[7] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[8] 1917 AD 302.

[9] 1983 (1) SA 1006 (A).

[10] 1997 (2) SA 690 (C).

[11] Above n 7 at para 21.

[12] Above n 8 at 309. See also *Bronn v Fritz Bronn's Executors* (1860) 3 Searle 313; *Ebrahim v Mahomed Essop* 1905 TS 59; *Esop v Union Government* 1913 CPD 133; *R v Mboko* 1910 TS 445 at 449; *Nalana v Rex* 1907 TS 407.

religion." The court further characterised such marriages as "being fundamentally opposed to our principles and institutions".[12]

[72] Trengove JA, in *Ismail*, found such marriages to be potentially polygamous and as such contrary to "accepted custom and usages, which are regarded as morally binding upon all members of our society."[13] The court further found that although marriage is not defined in the Marriage Act, it is clear from the context of the Act as a whole that it means marriage under the common law. The court further held that the provisions of section 3 of the Marriage Act which authorise the appointment of a marriage officer for purposes of solemnising marriages according to "Mohammedan rites" relate only to the form of the ceremony and do not purge the invalidity of a Muslim marriage. That is so, it found, because the common law and not the Marriage Act, determines the essential elements and thus the consequences of marriage.[14]

[73] In *Ryland*, the Cape High Court did not find that a Muslim marriage is valid in law. It held that the contractual obligations arising from a Muslim marriage, including the duty of a husband to maintain his wife, were enforceable.[15] Mahomed CJ in *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)*,[16] emphasised that the question to be decided was not whether the

[13] Above n 9 at 1026B.

[14] Id at 1021.

[15] Above n 10. For a critical discussion of the legal rules and precedent regulating Muslim marriages see Van Heerden et al above n 6 at 168.

[16] 1999 (4) SA 1319 (SCA).

marriage was lawful at common law, but whether the deceased was under a legal duty to support the appellant during the subsistence of the marriage and, if so, whether her right was one which "deserved protection for purposes of a dependant's claim".[17]

[74] This "persisting invalidity of Muslim marriages"[18] is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is "inequality, arbitrariness, intolerance and inequity".[19]

[75] These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity[20] and equality,[21] but also freedom of religion and belief.[22]

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[17] Id at paras 19-20 and 25. For a trenchant criticism of the *Amod* judgment see Goldblatt "*Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 (4) SA 1319 (SCA)" (2000) 16 *SA Journal of Human Rights* 138. Criticism centres around the failure of the court to reject the earlier reasoning of *Ismail* and the failure to develop the law towards a broad, inclusive notion of "family". In essence, Goldblatt sees the court's approach as being too narrow.

[18] Van Heerden et al above n 6 at 168.

[19] Above n 16 at para 23.

[20] Section 10.

[21] Section 9.

What is more, section 15(3)[23] of the Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages.

[76] As matters stand, the underlying restrictive common law conception of marriage and the intertwined constitutive formalities of the Marriage Act are not the target of the present constitutional claim. This Court was not urged, nor is it appropriate, to develop the applicable common law or to scrutinise the Marriage Act for constitutional compliance in this case. In any event that was not the basis of the applicant's case.[24]

Statutory recognition of Muslim marriages

[77] Before us and in the High Court, the applicant drew attention to recent and amended statutes which expressly recognise Muslim marriages for purposes of the

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[22] Section 15.

[23] Section 15(3) states that:

> "(a) This section does not prevent legislation recognising —
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."

[24] It is not permissible to attack statutes collaterally. The constitutional challenge of a statute must be explicit and with due notice to all affected. This requirement ensures that the correct order is made, that all interested parties have an opportunity to make representations and that the requirements of the separation of powers are respected. See in this regard *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at paras 61-4. See also *Ingledew v The Financial Services Board: In Re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at paras 20 and 24; *Schabir Shaik v Minister of Justice and Constitutional Development and Others* CCT 34/03; 11 December 2003, as yet unreported at paras 23-5.

rights they vest in spouses.[25] The applicant submitted that these statutes reflect the change in norms and legal conceptions of our society towards family and marriage in general and Muslim marriages in particular. With that submission I agree. It is underscored by several judgments of this Court.[26] One such is *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*[27] in which Skweyiya AJ observed that:

> "The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."[28]

[78] In further argument, the applicant submitted that these recent and amended statutes indicate that the word "spouse" in the Acts is capable of a meaning inclusive of Muslim husbands and wives. I do not agree. In all of the statutes we were referred

[25] Civil Proceedings Evidence Act 25 of 1969 (section 10A recognises religious marriages for the purposes of the compellability of spouses as witnesses in civil proceedings); Criminal Procedure Act 51 of 1977 (s 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Taxation Laws Amendment Act 5 of 2001 (inserts a wider definition of "spouse" into Transfer Duty Act 40 of 1949, which in turn exempts from transfer duty property inherited by the surviving spouse in a religious marriage); Government Employees Pension Law 1996, Proclamation 21 of 1996 (s 1: definition of "dependent" and schedule 1 item 1.19, definition of "spouse"); Estate Duty Act 45 of 1955 (s 4(q) read with the definition of "spouse" in s 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage); Child Care Act 74 of 1983, as amended by the Child Care Amendment Act 96 of 1996 (s1(d) widens the definition of "marriage" to include any marriage concluded in accordance with a system of religious law).

[26] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 47; 2000 (1) BCLR 39 (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); 2000 (8) BCLR 837 (CC) at para 31; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at paras 12-3.

[27] *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

[28] Id at para 19.

to, Muslim spouses are included through deeming or interpretive aids. The compelling inference is that the deeming provisions or definitional extensions in the statutes restrict the meaning of "spouse" and "marriage" to common law spousal relationships. I am fortified in this conclusion by the reasoning of this Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[29] in which an identical submission was met with the finding that:

> "Had the word 'spouse' been used in a more extensive sense in section 25(5) of the Act, it would have been unnecessary to provide specifically in section 1(1) that marriage 'includes a customary union'."[30]

[79] I agree with the High Court that the increasing number of statutes that recognise wider conceptions of marriage and family, point away from widening the interpretation of the word "spouse".[31] Normal canons of statutory construction dictate that where the legislature recognises that a definition needs to be explicitly widened for a statute to apply to Muslim spouses, the opposite would also be true. The narrower common law definition would apply whenever there is no expanded definition.[32]

Applicable principles of interpretation

[29] Above n 26.

[30] Id at para 26.

[31] Above n 1 at 985F-I.

[32] A similar interpretive approach was endorsed and applied by the Canadian Supreme Court in *Miron v Trudel* (1995) 29 CRR (2d) 189 at 197-8 in an equality claim in which undefined word "spouse" had to be interpreted.

[80] The husband of the applicant died on 27 November 1994. Her claim against the deceased estate vested on that day. The High Court held that it is the interim Constitution that is applicable when determining whether the relevant statutory provisions may be properly interpreted in conformity with its Bill of Rights. However, the proceedings in the High Court were initiated on 5 March 2001, well after the commencement of the final Constitution. Thus, the proper construction to be placed on the Acts must be determined, not in accordance with section 35(2) and (3) of the interim Constitution but in the light of the provisions of section 39(2)[33] of the Constitution.[34] However, nothing significant turns on that distinction. The method of construction authorised in section 35(2) and (3) of the interim Constitution is now to be found in 39(2) of the 1996 Constitution.[35]

[81] Section 39(2) obliges a court construing legislation to promote the spirit, purport and objects of the Bill of Rights. Where possible, a statute must be read in a manner that makes it comport with the dictates of the Constitution. In *De Beer NO v North Central Local Council and South Central Local Council and Others*

[33] Section 39(2) states that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[34] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 37.

[35] There is no substantive difference between the two methods of interpretation in the interim and final Constitutions. *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA); 2001 (11) BCLR 1197 (SCA); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 23-4.

(Umhlatuzana Civic Association intervening),[36] Yacoob J articulates this duty as follows:

> ". . . where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained."[37]

[82] Implicit in this interpretive injunction found in section 39(2) is that previously binding pre-constitutional reading of legislation may now be open to reconsideration in the light of the statement of fundamental rights and freedoms in Chapter 2 of our Constitution.[38]

[83] However, this affirmative duty to "read" legislation in order to bring it within constitutional confines is not without bounds. An impugned statute may be read to survive constitutional invalidity only if it is reasonably capable of such compliant meaning. To be permissible, the interpretation must not be fanciful or far-fetched but one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language. This is so because statutes are:

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[36] 2002 (1) SA (429) (CC); 2001 (11) BCLR 1109 (CC).

[37] Id at para 24. See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59 and the authorities referred to in footnote 87 thereof; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 18; *De Lange* above n 35 at para 85; *Hyundai* above n 35 at paras 22–6.

[38] *Bernstein* above n 37 at paras 59-64; *Nel v Le Roux NO and Others* above n 37 at paras 8-9 and 18; *Shabalala and Others v Attorney-General of the Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 9; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 26-9.

> ". . . products of conscious and planned law-making by demonstrable and authorised law making authors and are therefore meant to be of effect. By replacing them as final authority, the Constitution has not deprived statutes of their worth or force, but has given them new direction."[39]

As our courts, duty bound as they are, give articulation to the fundamental values of the Constitution in reading statutes, the language of the text is not "infinitely malleable"[40] but sets limits for generous reading. Kentridge AJ, writing for the Court, warned that "if the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[41]

[84] In *De Lange v Smuts NO and Others*[42] Ackermann J cautions that limits must be placed on reading of statutes to avoid constitutional invalidity. This is so also because:

> ". . . the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[43]

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[39] Du Plessis *Re-interpretation of Statutes* (Butterworths, Durban 2002) at 135.

[40] Chaskalson et al *Constitutional Law of South Africa* (Juta and Co Ltd, Cape Town 1996) at 11-28; see also *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 78.

[41] *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

[42] *De Lange* above n 35.

[43] *Hyundai* above n 35 at para 24.

The ordinary meaning of "spouse"

[85] The main judgment finds that the ordinary meaning of the word "spouse" extends to a party to a monogamous Muslim marriage because such a meaning is not linguistically strained. It accords with the way the word is generally understood and used. The main judgment holds that by excluding others, courts in our past attributed a "discriminatory" and "strained" rather than ordinary meaning to the word "spouse".

[86] I cannot support that approach to the construction of the Acts. *First,* it fails to make the necessary distinction between the interpretation of legislation under section 39(2) and remedial measures under section 172(1)(b) of the Constitution. Of this distinction, the following is said in *Gay and Lesbian Equality*:

> "What is now being emphasised is the fundamentally different nature of the two processes. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."[44]

The meaning of "spouse" preferred in the main judgment is said to be compelled by the need to redress "past discriminatory interpretations". The main judgment explains that "the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation."[45] In this way, the main judgment conflates the meaning that the Acts can reasonably bear with the constitutional remedy the applicant and others similarly situated may be entitled to. These processes ought

[44] *Gay and Lesbian Equality* above n 26 at para 24.

[45] Judgment of Sachs J at para 34.

to be two separate enquiries; the first goes to interpretation, and the second to remedy. Otherwise the meaning of the text becomes subservient to a preferred outcome or relief.

[87] *Second*, much is made of the "*ordinary meaning*" of "spouse". I am unable to agree that in its ordinary sense the word "spouse" also signifies a man or a woman whose conjugal relationship or union is not recognised as a marriage by law. "Spouse" and "marriage" are not words of general import. When used in ordinary language, they are reserved for an intimate relationship with known and defined personal, family, social and importantly, legal obligations. In addition to love, fidelity, companionship and support, these words connote a conjugal relationship with certain and secure legal effect as between parties to it and as against all others. However, which of these societal notions of family and marriage would survive constitutional scrutiny is another matter.

[88] The "ordinary meaning" rule of interpretation is premised on the approach that "the language of the legislature should be read in its ordinary sense."[46] The ordinary sense is often glibly equated with what is believed to be the plain and literal or grammatical meaning of the language.[47] However, clarity of language does not rest on any "objective quality" of language itself, but on the reader and the context. In this

[46] *Union Government (Minister of Finance) v Mack* 1917 AD 731 at 739.

[47] Dicta to that effect are found in cases such as *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129.

regard, Schreiner JA in *Savage v Commissioner for Inland Revenue*[48] had occasion to observe that:

> ". . . what seems a clear meaning to one man may not seem clear to another. . . . The 'literal' meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges think is the literal meaning."[49]

[89] Even if the word "spouse" may bear the ordinary meaning advanced in the main judgment, there can be, and often is, a distinction between the common or colloquial understanding of a word used in a statute and its legal counterpart. It is the legal meaning of the text that should preoccupy statutory interpretation. Ultimately, it is courts which must ascertain the meaning of words and expressions in statutes. That explains why the determination of the meaning and effect of the language of a legislative text is, in the end, a question of law.[50]

Decisions of this Court

[90] The interpretation of the impugned Acts and the resultant remedy favoured in the main judgment is, in my view, at odds with precedents of this Court. Later I discuss the grounds upon which the main judgment seeks to distinguish the present matter from its precedent and why such distinction is unconvincing.

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[48] 1951 (4) SA 400 (A).

[49] Id at 410F-H.

[50] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 38; *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (A) at 660F-H.

[91] *The New Shorter OED*[51] defines the word "spouse" as "a married person; a wife; a husband." In *Gay and Lesbian Equality*,[52] this Court cited this definition with approval as a reflection of the ordinary connotation of the word.[53] In that case, it was argued that it was reasonably possible, under section 39(2) of the Constitution, to interpret the undefined word "spouse" as used in the challenged statute as including a same-sex life partner. This Court held that the word spouse cannot, in its context, be so construed because it "is used for a partner in a marriage", "does not suggest a wider meaning" and "was not reasonably capable of the construction contended for."[54] Alluding to the word "marriage" as used in a related subsection of the same statute, this Court held that "[t]here is no indication that the word 'marriage' . . . extends any further than those marriages that are recognised by our law."[55]

[92] That approach is re-affirmed in *Satchwell*.[56] Madala J, writing for the Court, held that:

> "There is no definition of the word 'spouse' in the provisions under attack. In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. . . .Accordingly, a

[51] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

[52] *Gay and Lesbian Equality* above n 26.

[53] Id at para 25.

[54] Id

[55] Id

[56] *Satchwell* above n 26.

> number of relationships are excluded, such as same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants."[57]

[93] In both decided cases, this Court found the statutes under attack to be inconsistent with the Constitution and invalid. It remedied the impermissible under-inclusiveness of the challenged legislation by making an appropriate "reading-in" order.

Judicial precedent

[94] The doctrine of precedent is an incident of the rule of law.[58] Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions.[59]

[95] *In Bloemfontein Town Council v Richter*,[60] the Appellate Division, the highest court of the time, set itself a stringent *stare decisis* standard:

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[57] Id at para 9.

[58] *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 65-71; *De Lange* above n 35 at para 46.

[59] Hahlo and Kahn *The South African Legal System and its Background* (Juta & Co Ltd, Cape Town 1968) at 214 describe the necessity for *stare decisis* as follows:

> "The maintenance of the certainty of the law and of equality before it, the satisfaction of the legitimate expectations, entail a general duty of the judges to follow legal ruling in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same."

[60] 1938 AD 195.

> "The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion. The maxim "stare decisis" should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."[61]

Of course, there are recognised exceptions to this rule. Notably, where the court is satisfied that its previous decision was wrong or where the point was not argued or where the issue is in some legitimate manner distinguishable.[62]

[96] In *Van der Walt v Metcash Trading Limited*[63] this Court re-affirmed and accepted the *stare decisis* principle emphasising the merit of legal certainty and that similarly situated litigants must be treated similarly. Unsurprisingly, similar precedent systems are followed in other jurisdictions such as Canada, USA, India and the United Kingdom.[64]

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[61] Id at 232.

[62] *Harris and others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 452-4.

[63] *Van der Walt* above n 58 at para 39.

[64] The standard of the US Supreme Court for overriding its own previous judicial decisions is high. In *Brown v Board of Education* 347 US 483 (1954), it was held that where the philosophy of the past does not reflect the development of present, the Courts will be permitted to move away from its own decisions. Similarly, in *Payne v Tennessee* 501 US 808, 828 (1991) it was held that the doctrine of precedent is not a mechanical formula of adherence but a principle of policy. In *Dickerson v United States* 530 US 428, 443 (2000) Chief Justice Rehnquist writing for the court, stipulated that:

> "While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always require a departure from precedent to be supported by some 'special justification'." (internal citations omitted)

Canada also holds a high standard in departing from its own precedent. In *R v Bernard* [1988] 2 S.C.R. 833 the Canadian Supreme Court laid down four principles in determining whether to move away from its own precedent. These are:

Is the present case distinguishable?

[97] The main judgment seeks to distinguish the present case from *Gay and Lesbian Equality* and *Satchwell* on several grounds. I find it necessary to deal with only three of these grounds. The rest have been dealt with in the course of this judgment. The first ground is that, in neither judgment, is there a statement referring to solemnisation under the Marriage Act as a pre-requisite for parties to be considered to be spouses. That may be so, but such a statement would be redundant. In our law, as it now stands, "marriage", for purposes of determining legal status, is one concluded in accordance with the Marriage Act and nothing else. Reference to "marriage recognised as valid in law" must mean one celebrated accordingly.[65]

[98] In both *Gay and Lesbian Equality* and *Satchwell* the exclusion of other intimate or conjugal relationships from the meaning of "spouse" and "marriage" is not limited to permanent same-sex partnerships, as the main judgment now suggests. Ackermann J made it clear in the judgment that the word "spouse" excludes, for example, a customary union where neither the man nor the woman is a party to a subsisting marriage "based on an opposite-sex relationship."[66] In a similar vein, Madala J

(a) whether the rule or principle under consideration must be varied in order to avoid a Charter breach;
(b) whether the rule or principle under consideration has been attenuated or undermined by other decisions of this or other appellate courts;
(c) whether the rule or principle under consideration has created uncertainty or has become unduly and unnecessarily complex and technical; and
(d) whether the proposed change in the rule or principle is one which broadens the scope of criminal liability or is otherwise unfavourable to the position of the accused.

[65] Section 11(1) of the Marriage Act above n 4.

[66] *Gay and Lesbian Equality* above n 26 at para 26.

excludes from the meaning of spouse both "same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants".[67] The suggestion that in *Gay and Lesbian Equality* and *Satchwell* same-sex partnerships *only* were excluded because they cannot be considered to be married persons, as husband and wife, is unconvincing.

[99] It is suggested that the present case is distinguishable from *Gay and Lesbian Equality* and *Satchwell* because there was nothing in the context in which the word "spouse" was used in those cases, which suggested a wider meaning than "married person". It is so that a word or expression has to be interpreted in the context of the statute under consideration. However, I find nothing in the text and purpose of the present Acts, which warrants the expanded meaning given to "spouse", or "marriage". The Intestate Succession Act does not define the word "spouse" whereas the Maintenance of Surviving Spouses Act defines "survivor" as "surviving spouse in a marriage dissolved by death". This is hardly surprising. When these Acts came into force, "spouse" and "marriage" had meanings uncontested and certain under the common law. These statutes were enacted well ahead of the advent of the present constitutional era. Both are designed to provide economically for surviving spouses in order to advance the institution of marriage and to protect widows who constitute a socially vulnerable group. The legislation constitutes a derogation from the common law rules of intestate succession that deprived a surviving spouse of any inheritance or

[67] *Satchwell* above n 26 at para 9.

a claim for support against the estate of her or his deceased spouse.[68] Both statutes carry the baggage of the narrow common law notions of marriage and family. Thus, the target beneficiaries of the Acts are limited and, by definition, exclusionary.

[100] The main judgment seeks to distinguish this case by stating that it cannot be said that Muslim marriages lack legal recognition in the way that permanent same-sex unions do because statutes have given express recognition to Muslim unions.[69] This is a distinction without much significance in the light of the finding of this Court in *Gay and Lesbian Equality*[70] that:

> "A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships. A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament's commitment to equality on the ground of sexual orientation, there is still no appropriate recognition in our law of the same-sex life partnership, *as a relationship*, to meet the legal and other needs of its partners."[71]

[101] In my view there is no proper basis for departing from the mode of analysis deployed by this Court in *Gay and Lesbian Equality* and *Satchwell.* Both decided cases posit a very specific and narrow understanding of marriage, which is compelled by the lacuna in alternative marriage regimes. What is more, the substantive

[68] Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2 ed (Juta and Co Ltd, Cape Town 2001) at 562-6; *Glazer v Glazer NO* 1963 (4) SA 694 (A).

[69] Main judgment paras 25-7.

[70] *Gay and Lesbian Equality* above n 26 at para 37.

[71] Id at para 37 (internal citations omitted). This dictum was specifically relied upon in the recent SCA decision of *Du Plessis v Road Accident Fund* 2003 (11) BCLR 1220 (CC) at para 38.

consequences of such marriage are not consistent with Islamic law. That volubly explains the dearth of Muslim marriage officers registered under the Marriage Act.[72]

[102] These exclusionary conceptions of marriage are integral to the definition laid down at common law read with the Marriage Act. It is irrelevant whether the marriage was celebrated in a ceremony or whether all the elements of the *consortium omnis vitae* were present.[73] The marriage is valid in law only if the formalities were complied with. Under this established interpretation, the case of the applicant cannot be distinguished without doing violence to the doctrine of *stare decisis*.[74]

[103] There are also reasons of principle why the judgments should not be distinguished. Both *Satchwell* and *Gay and Lesbian Equality* state that they intend to break down the stigma attached to gay and lesbian relationships and afford legal recognition to same-sex life partnerships. By creating a dichotomy between those cases and the present one, the main judgment essentially makes a claim that some legally invalid partnerships are closer to being acceptable than others, and gay couples are again differentiated from the norm. This is to undo strides made by this Court in equality jurisprudence.

[72] For example, according to the Muslim Judicial Council, Cape Town there are no Imams registered as marriage officers in the Western Cape.

[73] *Gay and Lesbian Equality* above n 26 at paras 17-8.

[74] It is worth noting that despite the fact that the main judgment relies on *Amod* for support, that judgment is in fact against recognition. It tacitly accepts that Muslim de facto monogamous marriages cannot be brought under the heading of a valid marriage at para 25: "If the marriage between the dependent and the deceased was a valid marriage in terms of civil law . . . ."

[104] Another important consideration relates to the rule of law. The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation. The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty.

Equality

[105] It is common cause that this equality claim falls to be decided in terms of section 8[75] of the interim Constitution. This Court, in several judgments, has laid

[75] Section 8 of the interim Constitution states that:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
> (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

down the centrality and importance of the equality protection in our Constitution.[76] I am in agreement with the High Court that the Acts differentiate between different types of spouses on listed grounds of religion, culture and marital status and that this discrimination is unfair.

[106] Apart from the presumption of unfairness, the discrimination displays naked preference. It has created real disadvantage and violated dignity and freedom. Its impact on the applicant and on other surviving spouses in her position is most adverse and demeaning. It treats her as undeserving of the legal recognition enjoyed by other religious and civil marriages. The Acts withhold from Muslim widows economic protection they extend to socially vulnerable widows of Christian, Jewish and secular civil marriages and, recently, customary unions.[77] Because of the Muslim character of her marriage, the applicant stands to lose a home which, but for her marriage to the deceased, would have been her property. Moreover, the applicant has no legal means of giving effect to her inheritance rights in terms of Muslim personal law.[78]

[107] The under-inclusiveness of the Acts constitutes an obvious breach of the applicant's right to equality on several specified grounds, namely marital status,

[76]Above n 7 at para 20; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 74; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 33; *Shabalala* above n 38 at para 26; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) at para 155-66; *Satchwell* above n 26 at para 18.

[77] Recognition of Customary Marriages Act 120 of 1998.

[78] The City of Cape Town allocated the property to the applicant after her first divorce. However, she later informed the City of Cape Town of her marriage to the deceased and the tenancy of the property was transferred into his name. The housing policy of the time stipulated that a married woman could not hold a lease.

religion and culture, and also implicates the right to dignity.[79] Apart from the submissions by the first and second respondents that the applicant had the choice to legalise her marriage, none of the parties contended that this breach is justifiable. Before this Court, the Minister, charged with the administration of the Acts, submitted that no such justification exists. He drew attention to the deliberations of the South African Law Commission on Islamic Marriages and to the draft Muslim Marriages Act,[80] which envisages the inclusion of Muslim spouses by expanding the definitions in the challenged Acts. There is no legitimate governmental purpose served by excluding Muslim surviving spouses from the protection of the Acts. The legislation infringes the substantive equality and dignity commitments of our Constitution and must be declared unconstitutional and invalid.

[108] I am acutely alive to the scorn and palpable injustice the Muslim community has had to endure in the past on account of the legal non-recognition of marriages celebrated in accordance with Islamic law. The tenets of our Constitution promises religious voluntarism, diversity and independence within the context of the supremacy of the Constitution. The legislature has still not redressed, as foreshadowed by the Constitution, issues of inequality in relation to Islamic marriages and succession. The report of the Commission suggests that there is considerable divergence of views on

[79] It is significant that patriarchal norms have meant that it is usually women who have been dispossessed through their non-recognition in the Acts — this must amount to indirect discrimination under the reasoning in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257(CC).

[80] The primary recommendations for the proposed Muslim Marriages Act are that couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution; that the new statute should provide for both new and existing marriages; that future marriages should be capable of registration although existing marriages should require satisfactory proof of their existence prior to registration; and that parties should be able to choose and regulate their matrimonial property regimes.

the envisaged legislation within the Muslim community.[81] A matter so complex and replete with contending policy, personal law and pluralistic considerations is better suited for legislative rather than judicial intervention. Thus, in my view, a precise and tailored "reading-in" remedy, pending appropriate and timeous legislative intervention, is more appropriate than a re-interpretation of the challenged statutes.

Appropriate relief

[109] I am in agreement with the High Court that the Acts must be declared inconsistent with the Constitution and invalid because they omit from their reach a husband or a wife married in accordance with Muslim rites in a *de facto* monogamous union.[82] Pending the legislative recognition of Islamic law of succession in a way that conforms to foundational values of the Constitution, the applicant is entitled to appropriate relief dictated by section 38 of the Constitution. An order reading in

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[81] It has been articulated that any government regulation on religion should not transgress on religious voluntarism; respect the identity of religious groups; prevent the government from improper religious involvement; and protect religion from government to maintain the autonomy of religious institutions. Some authors (notably Professor Ziyad Motala) seem to think that the draft Bill contravenes the above requirements. They argue that first, under the Bill the state would force a Muslim person to practice their religion in a particular way under threat of sanctions. Second, the Bill intrudes on the religious identity of the group affected. Third, it provides a manner in which the government may pronounce on matters of Islamic. Fourth, the Bill undermines the autonomy of religious institutions and substitutes that autonomy with state coercion. In its totality, therefore, the Bill would represent a coercive and intrusive means to control the religious beliefs and practice of people. If the Bill becomes law, this could result in unnecessary conflict between large sectors of the Muslim population and the state, which in turn may result in the weakening of the political community.

The Commission's view about the adoption of the draft Bill is, however, different from the above. According to the Commission, such an adoption will go a long way in creating legal certainty with regard to Muslim marriages, will give effect to Muslim values and will afford better protection to women in those marriages in accordance with Islamic and constitutional tenets.

[82] Section 172(1)(a) and (b) of the final Constitution provide for that. For a proper formulation of appropriate relief see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC); *Gay and Lesbian Equality* case above n 26 at paras 63-88.

appropriate words to that effect, precise and faithful to the legislative scheme of the Acts, would best vindicate the applicant's equality claim.

[110] The High Court has limited the operation of its order in respect of the Intestate Succession Act to deceased estates that have not been fully wound up by the date of its order. The court was moved to this conclusion in the interest of finality and to avoid undue disruption in winding up of deceased estates. Whilst this consideration has some merit, I do think that in practice the period within which deceased estates are finalised varies considerably. The factors that determine how speedily a deceased estate is finalised are often not within the control of heirs and other interested parties. A cut off date as proposed may, in some cases, work a hardship. Should problems related to retrospectivity arise, they may be resolved on a case-by-case basis.

[111] No costs were asked for. I propose to make no order as to costs.

Order

As this is a minority judgment, there is no need to propose an order.

Madala J concurs in the judgment of Moseneke J.

For the applicant:	M Chaskalson and R Williams instructed by Women's Legal Centre
For the first and second respondents:	AM Breitenbach and N Bawa instructed by Sonnenberg Hoffman & Galombik Attorneys
For the eighth respondent:	N Cassim SC and A Kalla instructed by the State Attorney