IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **22481/2014**

In the matter between:

WOMEN'S LEGAL CENTRE TRUST	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF HOME AFFAIRS	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
LAJNATUN NISAA-IL MUSLIMAAT (ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)	Sixth Respondent
UNITED ULAMA COUNCIL OF SOUTH AFRICA	Seventh Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Eighth Respondent
COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL RELIGIOUS AND LINGUISTIC COMMUNITIES	Ninth Respondent
and	
UNITED ULAMA COUNCIL OF SOUTH AFRICA	First Amicus Curiae
LAW SOCIETY OF SOUTH AFRICA	Second Amicus Curiae
SOUTH AFRICAN LAWYERS FOR CHANGE	Third Amicus Curiae
MUSLIM ASSEMBLY (CAPE)	Fourth Amicus Curiae

ISLAMIC UNITY CONVENTION Fifth Amicus Curiae
COMMISSION FOR GENDER EQUALITY Sixth Amicus Curiae
JAMIATUL ULAMA KWAZULU NATAL Seventh Amicus Curiae
and

Case No.: **4466/2013**

In the matter between:
TARRYN FARO Applicant
and
MARJORIE BINGHAM N.O. First Respondent
(in her capacity as the Executor of the deceased Estate of Moosa Ely – Estate No. 4190/2010)
MUJAID ELY Second Respondent
SHARIFF ELY Third Respondent
TASHRICK ELY Fourth Respondent
MUSLIM JUDICIAL COUNCIL Fifth Respondent
IMAM IB SABAN Sixth Respondent
THE MASTER OF THE HIGH COURT Seventh Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Eighth Respondent
and

Case No.: **13877/2015**

In the matter between:
RUWAYDA ESAU Plaintiff
and
MAGAMAT RIETHAW ESAU First Defendant
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA Second Defendant
THE MINISTER OF JUSTICE AND CONSITUTIONAL DEVELOPMENT Third Defendant
GOVERNMENT EMPLOYEES PENSION FUND Fourth Defendant
MUSLIM JUDICIAL COUNCIL Fifth Defendant
MUNEEBAH JACOBS Sixth Defendant

Coram: Desai, Boqwana *et* Salie-Hlophe, JJ
Date: 31 August 2018

JUDGMENT

BOQWANA J

Introduction

[1] Our Constitution[1] opens with an acknowledgement that as the people of South Africa, we recognise the injustices of our past and believe that South Africa belongs to all who live in it, united in our diversity. Human dignity, the achievement of equality and the advancement of human rights and freedoms form part of the founding provisions of our Constitution.[2] It also entrenches its supremacy by stating that "*law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*."[3]

[2] The Constitution recognises freedom of religion, belief and opinion by conferring upon everyone that right.[4] It also permits for legislation recognising "*marriages concluded under any tradition, or system of religious, personal or family law*; *or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion*."[5] Such recognition, importantly, must be consistent with provisions of the Constitution.[6]

[3] Questions of marriage, religion, law and the Constitution have occupied the courts over a period of time. Marriage is an institution that has a character that goes wider than the individuals concerned. In *Fourie,*[7] Sachs J remarked that the words "…*'I do' bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain*". Marriage is thus not only valued by the parties in marriage but by their families, society and the State. It has consequences both in the private and public sphere. Privately it offers reciprocal rights and duties of love and support between spouses; consequences and duties in relation to children and other important benefits. The law places numerous other consequences with regards to marriage such as in a case of insolvency and law of evidence as regards to spouses in civil and criminal proceedings and other areas. As an institution, marriage has also been seen as the "*source of socio-economic benefits such as the*

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

[2] Section 1 of the Constitution

[3] Section 2 of the Constitution.

[4] Section 15(1).

[5] Section 15(3)(a)(i) and (ii) of the Constitution.

[6] Section 15 (3)(b).

[7] *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at para 63.

right to inheritance, medical insurance coverage, adoption, …, spousal benefits, bereavement leave, tax advantages and post-divorce rights."[8] In *Dawood*,[9] O Regan J impressed as well that marriage is not only a relationship of great significance to the parties concerned, it is a relationship that has public significance.

[4] The issues before us concern recognition and regulation of marriages solemnised and celebrated according to the tenets of Islamic law (also referred to as 'Muslim marriages'). It is undisputed that marriages entered into in terms of the tenets of Islam have not been afforded legal recognition for all purposes. The applicants argue that non-recognition and non-regulation of these marriages violates the rights of women and children in particular, in these marriages. According to them, the State has failed in its "*duty to respect, protect, promote and fulfil the rights in the Bill of Rights*" as required in section 7(2) of the Constitution, in the face of its constitutional and international obligations and that the most effective way of dealing with this systemic violation of rights, is an enactment of statute. This approach, according to the applicants, has been postulated by the courts in a number of judgments dealing with issues concerning Muslim marriages before.[10]

[5] These issues are without a doubt vexed. They attracted interest from various groupings within the Muslim community, some of whom, together with State respondents pose different questions arising from freedom of religion, religious entanglement, separation of powers and many other issues. It is therefore worth explaining the submissions made by various parties in some detail, as will be seen below. This is more so because the matter is extensive, dealing with three consolidated matters and a myriad of relief. Before doing so, it is worth examining the historical background surrounding Muslim marriages in brief terms.

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[8] *Fourie* above at para 70.

[9] *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 (8) BLCR 837 at para 31.

[10] *Daniels v Campbell N.O. and Others* 2004 (5) SA 331 (CC) at para 108; *Moosa and Others v Minister of Justice and Correctional Services and Others* [2018] ZACC 19 at para 16; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening*) 1999 (4) SA 1319 (SCA) at para 28; and *Faro v Bingham NO and Others* [2013] ZAWCHC 159 at para 41-5.

Historical background

Judicial intervention

[6] Objectionable views of intolerance against Muslims prevailed in colonial and apartheid South Africa. These were mirrored in a number of judgments of the courts at that time. Cases such as *Brown v Fritz Bronn's Executors and Others,*[11] *Mashia Ebrahim v Mahomed Essop,*[12] *Seedat's Executors v The Master,*[13] *Kader v Kader,*[14] and *Ismail v Ismail*[15] are a reflection of those dim views held in the past. In *Ismail* in particular, the Court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of society. Recognition of polygynous unions was seen as a regressive step and entirely immoral.

[7] Over a period of time our courts have intervened and decried attitudes rooted in discrimination and prejudice meted by apartheid South Africa against Muslim communities. In *Ryland v Edros,*[16] the Court gave effect to the contractual agreement between parties who were married by Muslim rites. In *Fraser v Children's Court, Pretoria North and Others,*[17] the Constitutional Court held that the Child Care Act 74 of 1983 ('Child Care Act') was unconstitutional because it discriminated unfairly and unjustifiably against the rights of, amongst others, fathers of children born of unions solemnised in terms of the tenets of the Islamic faith. In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening*),[18] the Supreme Court of Appeal ('SCA'), held that the previous approach in relation to *boni mores* of the community adopted in *Seedat Executors* and *Ismail* was "*inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim*

[11] 1860 (3) Searle 313.

[12] 1905 TS 59.

[13] 1917 AD 302.

[14] 1972 (3) SA 203 (RA).

[15] 1983 (1) SA 1006 (AD).

[16] 1997 (2) SA 690 (C).

[17] 1997 (2) SA 261 (CC).

[18] 1999 (4) SA 1319 (SCA).

Constitution on 22 December 1993."[19] The Court recognised monogamous Muslim spousal duty of support as worthy of recognition.

[8] Then came *Daniels v Campbell N.O. and Others* ('*Daniels HC'*),[20] where the High Court, dealing with the question whether a surviving spouse in a monogamous Muslim marriage was a spouse, declared the Intestate Succession Act 81 of 1987 ('Intestate Succession Act') and the Maintenance of Surviving Spouses Act 27 of 1990 ('Maintenance of Surviving Spouses Act'), unconstitutional for excluding a spouse in a Muslim monogamous marriage for purposes of intestate succession.

[9] The matter went to the Constitutional Court where the Court in *Daniels*[21] held that "[*t*]*he 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*." The Court saw no need to find the impugned Acts unconstitutional and held that the word spouse should be given a broad and inclusive construction. In its analysis, it found there 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."*[22] Notably, the Minister of Justice had been in support of the confirmation of the High Court order.

[10] Moseneke J (as he then was), in a minority judgment in *Daniels*,[23] noted that the "*persisting invalidity of Muslim marriages is … a constitutional anachronism*" originating *"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'."*

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[19] *Ibid* at para 20.

[20] 2003 (9) BCLR 969 (C).

[21] *Daniels v Campbell N.O. and Others* 2004 (5) SA 331 (CC) at para 19.

[22] *Ibid* at para 23.

[23] *Ibid* at para 74.

[11] He held further that "[*t*]*hese 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 and equality, but also freedom of religion and belief. What is more, section 15(3) 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.*"[24]

[12] In *Khan v Khan,*[25] the Court held that a polygamous Muslim marriage gave rise to a legal duty on the part of the husband to maintain his wife as contemplated in section 2(1) of the Maintenance Act 99 of 1998 ('the Maintenance Act').

[13] Another significant judgment from the Constitutional Court came to the fore in *Hassam v Jacobs N.O. and Others.*[26] The Court held section 1 of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it did not include more than one spouse in a polygamous Muslim marriage in the protection afforded to "a spouse", and read the words "or spouses" after the word "spouse" wherever it appeared in that section. The Minister of Justice had also supported the confirmation of declaration of invalidity.

[14] Insofar as the views expressed in *Ismail* were concerned Nkabinde J, had this to say—

> *"[t]he Court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances.' That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in Ismail, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.*
>
> *Contrasting the ethos which informed the boni mores before the new constitutional order with that which informs the current constitutional dispensation, the question*

[24] *Ibid* at 75 (Footnotes omitted).

[25] 2005 (2) SA 272 (T).

[26] 2009 (5) SA 572 (CC).

> *remains whether affording protection to spouses in polygynous Muslim marriages under the Act can be regarded as a retrograde step and entirely immoral? The answer is a resounding 'No'. I emphasise that the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidenced by the remarks in Ismail."*[27]

[15] As can be seen, the Courts have on a piecemeal basis tried to ameliorate the hardships faced by women and children in Muslim marriages in a number of cases, including those not mentioned such as Rule 43 applications.[28]

[16] The most recent decision is that of the Constitutional Court in *Moosa N.O. and Others v Minister of Justice and Correctional Services and Others,*[29] where the Court confirmed the High Court order and held that section 2C(1) of the Wills Act 7 of 1953 ('the Wills Act') is to be read as including the following words "*for the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.*"

[17] Alongside, judicial intervention, changes have been effected to various pieces of legislation over the years extending the meaning of marriage to religious marriages for purposes of such legislation.[30]

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[27] *Ibid* at paras 25-6 (Footnotes omitted).

[28] In this regard see for instance, the judgment of *AM v RM* 2010 (2) SA 223 (ECP) , where it was held that the remedy afforded by Rule 43 applied in a case where validity of a Muslim marriage was in question and a husband had alleged termination of marriage under Islam law. See also *Hoosein v Dangor* 2009 JDR 1212 (WCC).

[29] [2018] ZACC 19; 2018 JDR 0915 (CC); 2018 (5) SA 13 (CC).

[30] See *Daniels* above n 21 at para 77, fn 102 wherein it was noted that: "*Civil Proceedings Evidence Act 25 of 1969 (s 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 (s 1 (d) widens the definition of 'marriage' to include any marriages concluded in accordance with a system of religious law)*"

South African Law Reform Commission Project

[18] In 1996, the South African Law Reform Commission ('the Law Reform Commission') recommended that a Project Committee, specifically tasked with investigating the legal recognition of Muslim marriages and related matters and to draft legislation to recognise and regulate Muslim marriages in accordance with the Constitution, be appointed. The Project Committee published the first issue paper in May 2000 and circulated it for public comment in July 2000. Between 2000 and 2002, a public process ensued involving various bodies within the Muslim community. In January 2002, the Project Committee issued Discussion Paper 101, including a draft Bill for the recognition of Muslim marriages. A full report of the Law Reform Commission on Islamic Marriages and Related Matters was handed to the then Minister of Justice in July 2003. In the period 2003 to 2004, various responses to the Law Reform Commission's report, including the draft Bill it had prepared, were lodged for consideration by the Minister of Justice. In October 2004, the Project Committee reconvened to discuss concerns expressed in a number of responses that had been received. In March 2005, an amendment to the proposed draft Bill was submitted by the Project Committee. According to the Minister of Justice, between 2008 and 2009 the Bill was in the final stages of preparation for submission to Cabinet. However, due to the intensity of objections, the constitutional issues raised and the sensitivities of some aspects of the Bill, the Minister was of the view that the Bill should be published for public comment before it can be finally considered by Cabinet.

Progress since 2009

[19] In response to the undertaking to provide a progress report before Rogers J in the *Faro* matter,[31] the Minister of Justice alleges that a decision was taken by Cabinet on 8 December 2010 that the Bill be published for public comment and on 21 January 2011, it was published for public comment. According to the Minister, more than 13 742 comments opposed to the Bill were received by way of short cellular phone comments. Approximately 7184 signed petitions were received expressing objections to the Bill and a further 77 substantive comments were received from individuals who objected to the promotion of the Bill on various grounds. These objections are that the provisions of the Bill are in conflict

[31] *Faro v Bingham NO and Others* [2013] ZAWCHC 159 (25 October 2013).

with "*Sharia law*", are "*unIslamic*", and that several of the provisions are unconstitutional in that they infringe on the religious freedom of Muslims and their right to equality.

[20] Some Muslim organisations indicated that any legislative intervention in Muslim personal law will lead to transmogrification of the *Sharia.*[32] They further pointed out that the Bill's attempts to strike a balance between the tenets of *Sharia* and ensuring that they conform to the Constitution, have failed dismally as the Islamic law concepts of *Talãq,*[33] *Faskh,*[34] *'Iddah,*[35] and *Khula',*[36] which have been incorporated in the Bill, can only be exercised by, or apply to, either a husband or a wife, and not both, and are therefore discriminatory on the basis of gender.

[21] Approximately 734 messages were received in support of the Bill. Support for the Bill accordingly appears to be minimal compared to the voluminous objections to the Bill. However, one of the bodies, the United Ulama of South Africa (UUCSA) assured that it represented the majority of the Muslims in the country. These bodies assured that there are more Muslims in the country that will support the Bill than those that will not. The Minister of Justice however submits that it is difficult to gauge the level of support for the Bill by the Muslim Community in light of the number of individual objections received, in contrast to those in support thereof. The *Mujlisul Ulama* of South Africa vehemently denies that UUCSA represents the majority of Muslims in South Africa and that the majority will support the Bill, and it further asserts that UUCSA does not represent certain of the

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[32] *Sharia* is defined in the Oxford English Dictionary (Online 2018) as: "*Islamic canonical law based on the teachings of the Koran and the traditions of the Prophet (Hadith and Sunna), prescribing both religious and secular duties and sometimes retributive penalties for lawbreaking. It has generally been supplemented by legislation adapted to the conditions of the day, though the manner in which it should be applied in modern states is a subject of dispute between Muslim traditionalists and reformists*".

[33] *Talãq* has been described as "*the dissolution of a Muslim marriage, immediately or at a later stage, by a husband or his agent by using the word Talãq or a synonym or derivative thereof in any language*" as suggested by the Muslim Marriages Bill, gazetted for public comment under GN 37 of 2011, No. 33946 ('Muslim Marriages Bill').

[34] *Faskh* has been suggested to mean "*a decree of dissolution of a marriage granted by a court, upon the application of a husband or wife, on any ground or basis permitted by Islamic law including, in the case of a wife, any one or more of the following grounds…"* as per the Muslim Marriages Bill, which proceeds to lists grounds such as disappearance, failure to maintain, imprisonment of a certain period, mental illness, and cruelty.

[35] *'Iddah* has been suggested to mean "*the mandatory waiting period arising from the dissolution of the marriage by Talãq, Faskh or death during which period the wife may not remarry: …*" as per the Muslim Marriages Bill.

[36] *Khula'* has been suggested to mean "*the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law*" as per the Muslim Marriages Bill.

organisations it claims to represent. The Minister of Justice submits that even if the proponents for the Bill were larger in number than the opponents, the parliamentary process for the enactment of the Bill is bound to be turbulent.

[22] The Minister of Justice points to the complex theological and constitutional issues raised by the Bill on Muslim marriages, with some holding strong views on the proposed alignment of Islamic law with the secular laws of the country. The divisions could create unnecessary tension which must be avoided at all costs. The Department of Justice has therefore elected to adopt a cautious approach. Central to the debate is what the correct interpretation of *Muslim Private Law* is and who has legitimacy and/or authority to render that interpretation. Even those in support of the Bill such as the UUCSA, have intimated that their members would insist on certain amendments in the Bill such as appointment of only Muslim judges and assessors to preside over Muslim divorces or actions in which parties thereto are Muslims. The opinions of certain scholars is that this jurisdictional precondition must be viewed within the *Qur'anic* definition of "marriage" as an act of worship and as a sacred covenant that must, of necessity, be solemnised or terminated by adherents of the Muslim faith. The Minister of Justice accordingly, is of the view that forging ahead with the promotion of the Bill, without more extensive public participation and consensus from the Muslim community, will more than likely have the result that support from the Muslim community would fall away.

The Imam Project

[23] Both the Ministers of Justice and of Home Affairs refer to the project of registering Imams as marriage officers by the Department of Home Affairs. This they see as a form of according 'recognition' to Muslim couples. The respective Ministers allege that there had been successful consultation in regard to this project. During training the Imams are encouraged to advise prospective couples to enter into antenuptial contracts in terms of their religious tenets, which can be accommodated as long as the provisions of the contract comply with the Constitution. Imams can still marry those that do not wish to enter into an antenuptial contract. As a result four *pro forma* contracts have been developed by various Muslim organisations. The Department of Home Affairs has however not been party to these agreements. The two Departments, namely of Justice and of Home Affairs are of the view that the antenuptial contracts could possibly form the basis for the division of property on dissolution of marriage, either by divorce or death but they could ensure that Muslim tenets

are taken into account, without giving preference to any particular Muslim school of jurisprudence, which the Bill is alleged to do. The Departments are in agreement that the Department of Home Affairs will continue to deal with the registration of marriages and the Department of Justice will continue to be responsible for the dissolution by divorce and the proprietary consequences (it is not explained how so).

Possible Omnibus Bill

[24] The Minister of Justice submits that the two Departments are to take the process forward by looking at the amendments to the existing legislative framework to give effect to the above approach or even exploring the possibility of drafting an entirely new Bill which regulates the registration of all religious marriages and the dissolution thereof. The Departments believe that this approach should be more acceptable to the Muslim community.

[25] Finally, the Ministers of Justice and of Home Affairs deny that their Departments have been dilatory in giving effect to a process giving effect to the recognition of Muslim marriages. They aver that the issue is complex and sensitive. They have been doing everything in their power to give effect to rights of vulnerable Muslim women, they will continue to collaborate with the Muslim community to ensure a solution is found that accords with it and possibly other religious communities who are currently not recognised, who also may have a right to have their marriages recognised by statute.

[26] Now it appears that there are investigations by the Law Reform Commission that are being undertaken with the view to developing a paper on one Marriage Act for all religions. It also appears that there had been talks regarding formal recognition of Hindu marriages as well.

Relief sought

[27] Before us are three consolidated applications brought by the Women's Legal Centre Trust ('WLC'), Tarryn Faro ('Faro matter') and Ruwayda Esau ('Esau matter'). The primary applicant is the WLC, which also represents Ms Faro.

WLC application

[28] In August 2009, the WLC launched an application for direct access to the Constitutional Court, seeking essentially the same relief as in this application.[37] In a judgment penned by Cameron J, dismissing the application for direct access, the Constitutional Court stated that "*a multi-stage litigation process has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them. This is undeniably a case in which that process would be beneficial not only to the litigants but also for the Court.*"[38]

[29] The Court pointedly observed that "[*t*]*he application elicited an intense response from a wide range of organisations concerned with the position of women in the Muslim community, the application of Islamic law and the interests of the Muslim community as a whole. Five such organisations secured amicus status, while an application by a further organisation to intervene was held in abeyance pending determination of the preliminary issues. It is clear from these applications that not only the legal issues, but also the factual issues, are much in dispute. They may require the resolution of conflicting expert and other evidence. It is not appropriate for this Court to attempt that task as a court of first and final instance.*"[39]

[30] The Constitutional Court's observations with regards to the intensity and complexity of the issues raised in debate by various parties as well as the level of interest and intervention by various bodies, ranging from women's groups, government, constitutional bodies, religious, legal and other important organisations within the Muslim community, are equally applicable in the matters before this Court.

[31] The Court emphasised that the dismissal of that application did not "*reflect on the substance of the claim that the President and Parliament are under a duty to enact the legislation in question*."[40]

[32] This Court is now seized with determining the substance of that claim, amongst others.

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[37] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC).

[38] *Ibid* at para 28.

[39] *Ibid*.

[40] *Ibid* at para 31.

[33] The WLC prays for the following relief:

33.1. Declaring that the President, in his capacity as the head of the national executive, together with National Cabinet, and the National Assembly, have failed to fulfil the obligation imposed on them by section 7(2) of the Constitution to protect, promote and fulfil the rights in sections 9 (1), (2), (3) and (5), 10, 15(1) and (3), 28(2), 31 and 34 of the Constitution, by preparing and initiating, diligently and without delay as required by section 237 of the Constitution, a Bill to provide for the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition.

33.2. Declaring that the Parliament of the Republic of South Africa and the President, in his capacity as Head of State, have failed to fulfil the obligation imposed on them by section 7(2) of the Constitution to protect, promote and fulfil the rights in sections 9 (1), (2), (3) and (5), 10, 15(1) and (3), 28(2), 31 and 34 of the Constitution by enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, an Act of Parliament providing for the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition.

33.3. Directing the President, together with the national Cabinet, and Parliament, to fulfil those obligations within twelve months by preparing, initiating, enacting and bringing into operation an Act of Parliament providing for the recognition of Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition: Provided that if the relevant legislation is referred to the Constitutional Court by the President in terms of section 79(4)(b) of the Constitution or if the Act is referred to the Constitutional Court by members of the National Assembly in terms of section 80 of the Constitution, the period of twelve months shall be extended by the period between such referral and the decision of the Constitutional Court.

[34] An order declaring that the State had breached its international obligations which was also sought has since been abandoned.

[35] In the alternative, the WLC seeks relief declaring the Marriage Act 25 of 1961 ('the Marriage Act), the Divorce Act 70 of 1979 ('the Divorce Act') and the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act'), insofar as they fail to provide for and regulate Muslim marriages as valid for all purposes in South Africa, to be inconsistent with the relevant rights listed above.

[36] Pending the promulgation of legislation, to remedy these inconsistencies, in the interim, WLC seeks a reading-in to be done in the Recognition Act to provide for the recognition and regulation of Muslim marriages.

[37] In addition to or in the alternative to the reading-in, the WLC seeks to suspend the declaration of invalidity in relation to the various impugned legislation for twelve months, for Parliament to correct the defects, failing which the declaration of invalidity will take effect and the reading-in into the Recognition Act shall occur.

[38] In the further alternative to the above prayers, the WLC would seek a declarator deeming Muslim marriages to be valid in terms of the Marriage Act and the Divorce Act, and that the common law be extended to include Muslim marriages.

[39] Lastly, the WLC seeks an order declaring the *pro forma* marriage contract, prepared by the Muslim Judicial Council ('the MJC') to be contrary to public policy and unenforceable in law.

[40] During the course of hearing of oral argument, Counsel for the WLC presented the Court with various alternative draft orders.

Faro application

[41] Faro launched an application on 23 March 2013 incorporating Part A (review application) and Part B (constitutional relief). Part A was an interim relief sought to preserve the status quo pending the determination of the relief sought in Part B. In Part B, Faro seeks an order declaring that marriages solemnised in accordance with Islamic Law are deemed to be valid marriages in terms of the Marriages Act, alternatively that the common law definition be extended to include Muslim marriages. This overlaps with the relief sought by the WLC in the alternative.

[42] Where the two matters differ is that in the Faro application, Faro further seeks an order declaring the failure by the Minister of Justice to implement policies and procedures, which accord with the Promotion of Administrative Justice Act (PAJA),[41] to regulate enquiries by the Master of the High Court ('the Master') into the validity of Muslim marriages when persons purporting to be spouses seek to claim benefits in terms of the Intestate Succession Act and Maintenance of Surviving Spouses Act, to be unconstitutional and suspending this declaration for 18 months to allow the Minister time to put in place such policies and procedures. This relief is opposed by the Master and the Minister for Justice.

[43] The WLC argues that this relief follows from the fact that decisions by the Master amount to administrative action and thus must comply with PAJA. A 'spouse', which term includes parties to Muslim marriages as held in *Daniels,*[42] may be entitled to various benefits under the Interstate Succession Act and the Maintenance of Surviving Spouses Act. The Master has wide quasi-judicial powers under the Administration of Estates Act 66 of 1965 ('Administration of Estates Act') to determine factual disputes, including the determination of beneficiaries. Such determinations must be made in a procedurally fair manner including the giving of notice of, and reasons for, the proposed action and be afforded a fair opportunity to make representations. In the absence of a procedure to enable the Master to hold enquiries into disputes regarding the status of spouses in Muslim marriages, the Master is unable to make such a determination in a procedurally fair manner. There is a duty on the State to put into place regulatory measures to give effect to the various decisions of the Courts affording recognition to the consequences of Muslim marriages. Moreover, there is a positive obligation on the Minister of Justice as the political head of the department responsible for the administration of estates, to establish the necessary policies and procedures for the holding of enquiries by Masters to resolve disputes concerning the status of persons purporting to be spouses in Muslim marriages.

[44] Part A of the Faro application was determined by Rogers J in the *Faro*[43] matter in favour of the applicant. The facts of that case appear in the judgment, and need not be repeated save to mention that Faro married the late Moosa Ely ('Ely') on 28 March 2008, in accordance with Islamic tenets. Imam Saban, who officiated their marriage, was not a

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[41] Act 3 of 2000.

[42] *Daniels* above n 21.

[43] *Faro* above n 31.

licensed marriage officer and accordingly, the union did not constitute a marriage in civil terms. Following an argument with Faro, Ely who was ill at the time, sought and obtained a *Talãq* certificate from Imam Saban. This was done without enquiring from Faro. That meant in terms of Islamic law, that the marriage was dissolved. According to Faro, the *Talãq* was revoked during the *'Iddah* period with the resumption of sexual relations. On 8 April 2010, without Faro's knowledge, Ely's adult daughter from an earlier marriage obtained a certificate from the Muslim Judicial Council ('MJC') declaring that the marriage between Faro and Ely had been annulled. Faro was appointed as executrix of the Ely's deceased estate. The dispute as to whether the marriage subsisted at the time of Ely's death arose between Ely's daughter with others against Faro, resulting in affidavits and letters written to the Master. According to Faro she was forced out of her family home where she lived with Ely and forced to live in shelters. Her minor children were taken into care. Faro was eventually removed as executrix by the Master. The Master dismissed Faro's objections, apparently relying on the MJC's views that she was not the deceased's wife.

[45] Having considered expert evidence regarding the tenets of Islam, Rogers J set aside the Master's decision and declared that the marriage between Faro and Ely subsisted at the date of the latter's death, and that she be recognised as the 'spouse' for the purposes of Intestate Succession Act and as a 'survivor' for the purposes of the Maintenance of Surviving Spouses Act.

[46] Part B, which is before this Court, was postponed by agreement between the parties for approximately ten months on the basis undertaken by the Minister of Justice to file an affidavit setting out the progress made in regard to the Bill, which was alleged to be in process.

Esau Application

[47] This application was borne out of an action in which a constitutional challenge was brought in terms of a stated case. The Plaintiff (Esau) claims that the failure on the part of the Cabinet and the Minister of Justice (Second and Third Defendants) to initiate and prepare legislation providing for the recognition of Muslim marriages as valid marriages in South Africa and regulating the consequences of such recognition, discriminates against Muslim women married in terms of Muslim rites on the grounds of their gender and/or their religion and is inconsistent with sections 9(3) and 7(2) of the Constitution. This is based primarily on

an alleged breach of the right to equality on the grounds that Muslim women are unfairly discriminated against.

[48] Esau calls for a declaration that the aforementioned failure is inconsistent with the Constitution and directing the Cabinet and the Minister of Justice to prepare and initiate the required legislation within 18 months. Further, Esau prays for a declaration that a *de facto* monogamous marriage concluded in terms of Muslim rites shall be regarded as valid for the purposes of the Matrimonial Property Act 88 of 1984 ('Matrimonial Property Act'), the Divorce Act and the common law duty of support upon divorce.

[49] This relief is opposed by Mr Esau (the first defendant), the Cabinet and the Minister of Justice.

Applicants' submissions

[50] Most of the argument in respect of the applicants' cases overlaps. The judgment mainly draws from the WLC's submissions, as the main applicant and will highlight any differences in focus between the various applicants or *amici* in support of the WLC's claim, to the extent necessary, particularly on the appropriate remedy.

[51] The applicants submit that despite judicial intervention and piecemeal litigation the law still bears the dent of historical discrimination. Intervention by the courts has, in their view, been confined to the facts and consequences that were called to be addressed in particular cases. Piecemeal litigation is undesirable both from the point of view of the individuals affected, many of whom have no resources or capacity to litigate, as well as the administration of justice.

[52] WLC alleges that it brings this application in the interest of a class of persons: women who visit their offices often in large numbers asking for legal representation in cases where their marriages have been dissolved by death or divorce. It also brings this application in the public interest in terms of section 38 of the Constitution. At the heart of the application by the WLC is the account of the hardships faced by women in Muslim marriages.

WLC – Rights Violations

[53] The WLC's argument proceeds from the premise that section 7(2) provides that "[*t*]*he state must respect, protect, promote and fulfil the rights in the Bill of Rights*." The "*State*" is

not defined in the Constitution but was held by the Constitutional Court to include "*all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, state institutions supporting constitutional democracy created by Chapter 9 of the Constitution, 'state departments and administrations' as well as bodies created by statute.*"[44]

[54] Coupled with section 7(2) is section 8(1) which provides that the Bill of Rights "*binds the legislature, the executive, the judiciary and all organs of state.*" The Constitutional Court has held that this provision in certain circumstances imposes a positive obligation on the State "*to provide appropriate protection to everyone through laws and structures designed to afford such protection.*"[45] In addition, implicit in section 7(2) is that any steps taken to fulfil this duty must be reasonable and effective.[46]

[55] Given the extensive and ongoing rights violations, the State's inaction, the insufficiency of piecemeal recognition, and the inordinate delay, the WLC argues that the only reasonable and effective means of fulfilling the duty under section 7(2) is through an Act of Parliament recognising and regulating Muslim marriages.

[56] The WLC argues that the following rights have been infringed: equality, dignity, freedom of religion, best interest of the child, and access to courts.[47]

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[44] *Women's Legal Centre Trust* above n 37 at para 19.

[45] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 44 wherein the Court was examining section 7(1) of the Interim Constitution and section 8(1) of the Constitution and held as follows:

"Under both the IC and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person. The Bill of Rights binds the State and all of its organs. Section 7(1) of the IC provided:

> *'This chapter shall bind all legislative and executive organs of State at all levels of government.'*

Section 8(1) of the Constitution provides:

> *'The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.'*

It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

[46] See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at 189.

[47] Sections 9, 10, 15 (read with 31), 28 and 34 of the Constitution, respectively.

[57] As for equality, the WLC argues that the failure to recognise Muslim marriages, alternatively the exclusion of Muslim marriages from the Marriage Act, Divorce Act and Recognition Act results in differentiation between the following categories of people: (a) persons married in terms of the Marriage Act compared to those in monogamous Muslim marriages; (b) persons married in terms of the Marriage Act compared to those in polygynous Muslim marriages; and (c) persons in polygynous customary marriages compared to those in polygynous Muslim marriages. It argues further that no legitimate government purpose has been advanced by the State respondents, nor could such a purpose be advanced in light of the dicta in *Daniels*[48] and the fact that the Recognition Act recognises polygynous customary marriages as valid. Accordingly, the State's failure to recognise Muslim marriages violates section 9(1) of the Constitution as this category of persons is denied equal protection and benefit of the law. Further, there has been a section 9(3) violation as the differentiation is on four listed grounds: directly on religion, marital status and indirectly on gender and sex. As per section 9(5), this discrimination on a listed ground is presumed to be unfair and this presumption has not been rebutted.

[58] With regards to dignity, the WLC contends that dignity is both a value and a right.[49] To treat spouses in Muslim marriages as unworthy of protection of the law devalues, stigmatises and further marginalises this vulnerable minority group. To remedy this infringement, spouses in Muslim marriages should be afforded the protection of the law through the enactment of a statute.

[59] As for access to courts, WLC contends that spouses in Muslim marriages have no access to the justice system for the purposes of regulating their marriages with regards to proprietary rights, divorce, maintenance, and custody. This leaves disputes unresolved and parties without effective remedies. Further, even when a religious tribunal makes a decision, it is unenforceable. Lastly, courts do not have 'automatic' supervision over children of Muslim marriages who also lack the benefit of Family Advocate's reports, as contrasted with children in civil or customary marriages. This violates the section 34 right to have disputes resolved by a court in a fair public hearing. The consequences of this infringement include maltreatment, evictions and economic hardships for women and children of Muslim marriages.

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[48] Above n 21 at para 19.

[49] Section 10 of the Constitution.

[60] In terms of section 28 of the Constitution, the best interests of a child are of paramount importance in every matter concerning that child. Although this duty falls primarily on the parents, the Constitutional Court has held that the State "*must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28*."[50] As stated above, upon divorce the care, contact, and maintenance of children of Muslim marriages is not subject to 'automatic' court oversight and thus, without special application to court, remain unregulated. Secondly, the Marriage Act sets a minimum age for marriage,[51] whereas such a limitation is not placed on Muslim marriages. In both these instances, the State has failed to ensure that the legal and administrative infrastructure is in place to ensure that children of Muslim marriages are afforded the protection of section 28.

[61] The rights of individuals and groups to hold religious beliefs and practise their chosen religion are enshrined in sections 15(1) and 31(1) of the Constitution. WLC does not argue that these rights have been infringed, but proceeds to reply to the State respondents' contention that legislation recognising and regulating Muslim marriages would infringe upon section 15(1), by contending that the right to freedom of religion does not trump other rights and moreover that courts will not protect religious practices that infringe other rights.[52] As such, religious practices in respect of divorce which violate the right to equality cannot be justified on the basis of the right to freedom of religion.

[62] WLC contends that no section 36 limitation analysis arises as the infringements are as a result of a lack of legislative recognition and as such there is "no law of general application".[53]

[63] Finally, the WLC argues that the *pro forma* marriage contract is contrary to public policy as it violates rights in the Bill of Rights.

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[50] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ("*Grootboom*") at para 78.

[51] See section 26 of the Marriage Act.

[52] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 26.

[53] See section 36 of the Constitution.

WLC – International Duties

[64] WLC argues that South Africa has ratified numerous international and regional human rights treaties relevant to the protection and promotion of women's fundamental rights. The four of primary consideration are: the Convention on the Elimination of all forms for Discrimination Against Women ('CEDAW');[54] the International Covenant on Civil and Political Rights ('ICCPR');[55] the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Women's Protocol');[56] and the Southern African Development Community Protocol on Gender and Development ('SADC Protocol').[57]

[65] It contends that if a duty is imposed by an international instrument, for it to not be rendered nugatory, content must be given to it as held by the Constitutional Court in *DE v RH.*[58] Section 39 of the Constitution peremptorily enjoins a court to consider international law when interpreting the Bill of Rights.

[66] When applied to Muslim marriages in South Africa, the WLC argues that CEDAW obliges the State to take all appropriate measures to ensure the equality of women in Muslim marriages, including the proprietary consequences and rights and responsibilities of the children; to ensure the economic rights of women in existing polygynous marriages; to provide a minimum age for marriage; to provide for registration of all marriages; to provide for individual choice as to the applicable family law at any stage during the relationship; and to ensure that courts review decisions of religious bodies. This, the WLC contends, can only be achieved through legislation.

[67] The ICCPR provides for the freedom of religion subject to the protection of fundamental rights; prohibits marriages entered into without free and full consent; and obliges the State to take appropriate steps to ensure the equality of rights and responsibilities of spouses during the marriage and at its dissolution.

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[54] Adopted by the United Nations General Assembly in resolution 34/180 on 18 December 1979 and which South Africa signed on 29 January 1993 and ratified on 15 December 1995.

[55] Adopted by the United Nations General Assembly under resolution 2200A (XXI) of 16 December 1966 and ratified by South Africa on 10 December 1998.

[56] Adopted by the Assembly of the African Union on 11 July 2003 and ratified by South Africa on 17 December 2004.

[57] Adopted by Southern African Development Community on 17 August 2008 and ratified by South Africa on 29 October 2012, with effect from 22 February 2013.

[58] 2015 (5) SA 83 (CC) at para 49.

[68] The Women's Protocol obliges the State to combat discrimination against women through appropriate legislative and other measures and guarantees that women are equal before the law and entitled to equal protection and benefit of the law. Article 6 provides that the State shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Article 6 further obliges the State to enact appropriate national legislative measures to guarantee that the rights of women in marriage, including polygynous marriages, are promoted and protected. Lastly, Article 7 provides that the State shall enact legislation to ensure that women and men have the same rights to seek a divorce and to an equitable share in the joint property.

[69] SADC Protocol similarly obliges the State to adopt legislative, administrative, and other measures to ensure equality before, and equal protection and benefit of, the law, as well as to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.

[70] The absence of legislation recognising and regulating Muslim marriages is in conflict with these and other international and regional conventions, argues the WLC.

[71] According to the WLC, an order directing the State to enact legislation would not infringe the separation of powers, as there is a constitutional duty on courts to ensure constitutional compliance of the executive and legislature and moreover to declare any unconstitutional conduct invalid and provide an effective remedy.[59]

[72] As for the issue of doctrinal entanglement,[60] firstly this does not arise as the Court is not being asked to adjudicate upon any religious precepts. Secondly, if it does arise it is not in the usual sense and is an appropriate case for intervention. The courts have already set precedent, becoming involving in and giving orders in apparently religious matters. This doctrine is not absolute as the courts have not been reluctant, when presented with clear rights violations, to go against religious doctrine.[61]

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[59] See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at para 45.

[60] See *Ryland* above n 16 at 703 and *Worcester Muslim Jamaa v Nazeem Valley* 2001 JDR 0733 (C).

[61] See *Christian Education* above n 52 and *Kotze v Kotze* 2003 (3) SA 628 (T).

Respondents' submissions

The President

[73] The President's primary counterarguments are that South Africa's international obligations do not create enforceable domestic rights unless and until these obligations have been incorporated into domestic law by enacting legislation, as was held by the majority of the Constitutional Court in *Glenister.*[62]

[74] There have been no rights violated by the State on the following bases: the Marriage Act is secular in nature and does not discriminate on the basis of religion as discussed in *Singh v Ramparsad.*[63] Similarly, the Civil Union Act[64] is secular. Furthermore, the primary argument of the WLC, that the unfair discrimination may be found in the Recognition Act, is without merit. That Act was enacted on the bases that customary law is a recognised part of our system of laws,[65] whereas no religious laws have been recognised. Furthermore, customary law is defined in the Recognition Act to mean "*the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples*." Thus purely religious marriages cannot be equated with customary marriages. Lastly, the Constitutional Court in *Volks N.O.*[66] held that it was justifiable to differentiate between married and unmarried people amidst the uncontested recognition of the systemic vulnerability of women in society.

[75] There has been no actionable delay on the part of the State as the State has taken steps to implement legislation recognising and regulating Muslim marriages as set out by the Ministers of Justice and of Home Affairs.

The Minister of Justice

[76] With regard to South Africa's international obligations, the Minister of Justice contends that the CEDAW committee has reaffirmed its position: polygyny should be

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[62] Above n 46 at para 92.

[63] 2007 (3) SA 445 (D) at para 45.

[64] Act 17 of 2006.

[65] See section 39(2) and Chapter 12 of the Constitution. Also see *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para 41 and *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 20-1.

[66] *Volks N.O. v Robinson and Others* [2005] ZACC 2 at para 54.

abolished and identity-based personal status laws perpetuate discrimination.[67] The executive and legislature should be allowed to investigate the possibility of an omnibus Marriage Act which would avoid creating multiple family law systems. Further, spouses in Muslim marriages are able to register a civil marriage and the Imam project seeks to enable this process.

[77] With regards to the section 7(2) arguments concerning the duties on the State to enact legislation, the Minister of Justice contends that while this duty may be positive, the State has a choice on how to fulfil this duty as long as the manner it chooses is "reasonable and effective".[68] The State has fulfilled this duty by enacting legislation which respects, protects and promotes the rights contended to have been violated. This legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'); the Children's Act 38 of 2005 ('the Children's Act'); the Domestic Violence Act 116 of 1998 ('the Domestic Violence Act'); and the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act'). In this light, the Minister of Justice contends that the principle of subsidiarity[69] renders the relief sought incompetent as legislation (PEPUDA) has been enacted to give effect to the principal right in issue: equality.

[78] Additionally, section 15(3) of the Constitution does not impose an obligation on the State to enact legislation in respect of any particular religious group. The section is not peremptory as held by the Constitutional Court in *Fourie*.[70] Moreover, the Minister contends, without more, that the relief sought is defeated by section 15(3) itself.

[79] As for the alleged rights violations, the Minister contends that section 39(2) obliges courts to develop the common law in order to promote the spirit, purport and objects of the Bill of Rights. This, the Minister contends, has been done through the relief issued by the various courts concerning maintenance, custody, abusive relationships and pensions, which "*ensure that Muslim women are not unduly prejudices whilst the State continues to pursue its investigation into*" the recognition and regulation of Muslim marriages. As for the argument

[67] General Recommendation No. 29 on Article 16, dated 30 October 2013, at para 27.

[68] *Glenister* above n 46 at para 107.

[69] See *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at paras 51-3 and 69.

[70] *Fourie* above n 7 at paras 108-9.

concerning the Recognition Act, the Minister echoes the arguments of the President in that this Act is based on customary law which is recognised in the Constitution.

[80] Given that the doctrine of entanglement is a part of our law,[71] the diverse opinions, and the importance of religious freedom, the Minister contends that it would be unconstitutional for this Court to direct the State to regulate religion.

[81] The Minister contends that the relief sought would infringe upon the principle of the separation of powers, which is central to the structural design of our constitutional democracy. The particular facts of this matter require public participation to give effect to our participatory democracy. The complementary principle of deference finds application as the executive is primarily placed to deal with the issues that arise concerning this matter such as factual enquiries, political compromises, implementation strategies, budgetary considerations and debates on doctrinal issues. While conceding that courts may interfere to ensure compliance with the Constitution, the Minister contends that the correct forum for this issue is through the parliamentary processes, which are structured to ensure public participation and proper ventilation of the issues. On a similar note, the Minister contends that this matter raises disputes of fact that cannot be resolved on the papers.

[82] Lastly, the Minister opposes the relief sought in the Faro application, concerning the implementation of procedures for the Master to resolve disputes concerning status in Muslim marriages. This, the Minister contends, is in conflict with the case law as to the Master's powers[72] and no basis has been put forward for why such enquiries should be limited to Muslim marriages, as there are infinite circumstances in which a person may be prejudiced by a decision of the Master. Further, it is unclear whether the Minister has the power to lay down such policies and procedures in terms of the Administration of Estates Act.[73]

The Minister of Home Affairs

[83] With regards to the State's international duties, the Minister contends that none of the cited conventions imposes an obligation to enact legislation and none have been domesticated into South African law as per section 231 of the Constitution.

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[71] See *Ryland* above n 16 at 703A-E; *Fourie* above n 7 at para 92 and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2015 (1) SA 106 (SCA) at para 33.

[72] See *Faro* above n 31 at para 27.

[73] See section 103(1).

[84] As for the section 7(2) arguments, the Minister contends that this section does not impose an obligation to enact legislation as contended for by the WLC. There is no express duty on the State to enact legislation of this kind, unlike sections 9(4), 32(2), and 33(3) of the Constitution. Similarly, this alleged duty cannot be equated with socio-economic duties as imposed by sections 26(2) and 27(2) of the Constitution. Furthermore, the executive is vested with a discretion, not an obligation, to prepare and initiate legislation. Similarly, the legislature is vested with legislative powers, not obligations. Section 237 concerns "constitutional obligations" which do not arise as the powers in issue are permissive.

[85] The Minister addresses each alleged violation of rights and contends that no violations have been established. On the right to equality, the Minister contends that there is no legislation recognising and regulating any religious marriages, the Marriage Act applies to all and there is no impediment to parties to Muslim marriages to register their marriage civilly. Such parties are free to regulate their affairs by contract and whichever route they choose is a matter of personal choice. Thus there is no differentiation and no infringement.

[86] As for the right to dignity, this right includes treating personal choices to be of value,[74] such as choosing to have one's marriage regulated by Islamic law or choosing a civil marriage with an antenuptial regime which mirrors Islamic law. On the right to religious freedom (sections 15 and 31), there is no duty to enact, the section is permissive not peremptory.

[87] As for right of children, the Children's Act provides that marriage includes those in accordance with religious rites and thus includes Muslim marriages that are not registered under the Marriage Act. Furthermore, the Children's Act provides for a blanket prohibition on child marriages thus setting a minimum age for marriage irrespective of religious tenets.[75] Lastly, the Minister contends that the right to access to courts does not apply in this scenario as compared with instances where the courts have been bypassed (e.g. execution of property with judicial oversight).[76] Muslims are not precluded by want of marital recognition from approaching courts to resolve disputes. The Minister contends that the principle of the separation of powers finds application as it is the legislature's role to make law and the

[74] See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 52.

[75] See section 12(2) of the Children's Act read with section 26(1) of the Marriage Act.

[76] See *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).

court's to interpret and apply that law. To direct the State to enact legislation would do violence to this carefully constructed principle. This is unprecedented relief as courts have only interfered in the past where there is a procedural irregularity in the passing of the legislation[77] or that the legislation is unconstitutional. As held by the Constitutional Court, courts may not prescribe the subject-matter of legislation .[78] To direct the State to enact this legislation would be to ignore the current process which is underway to investigate an omnibus Act which would apply to all religious marriages.

[88] Furthermore, the Minister contends that the doctrine of entanglement is invoked as the relief sought would result in legislating upon or amending key aspects of *Sharia* law. This is distinguishable from the piecemeal development of the common law.

[89] As for the *pro forma* contract, the Minister contends that to make the declaration sought would be to resolve doctrinal disputes as the contract was allegedly prepared by the Muslim Judicial Council according to *Sharia* law; such an order may infringe section 15 and 31; and the contracting parties are not before the court and thus to do so would be to make an order in the abstract.

Speaker of the National Assembly & Chairperson of the National Council of Provinces

[90] The Speaker of the National Assembly ('the Speaker') and Chairperson of the National Council of Provinces ('Chairperson') deny that Parliament has failed to fulfil any obligations as alleged by the WLC, on the grounds that Parliament has not received a draft Bill over which it could exercise its legislative authority. As such there is no conduct of Parliament that can be impugned. It is rather the existing legislation that should be examined for constitutional consistency. Parliament is not vested with the power to initiate and prepare legislation. This power is vested in the executive. This much has been conceded by the WLC. The remedies sought will infringe upon the separation of powers and potentially have retrospective effects. The Court should allow the legislative process to run its natural course as this will ensure public participation and debate around a sensitive, polycentric issue with many competing interests in play. Should the Court be minded to grant the relief sought, the

[77] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

[78] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC) at para 6.

Speaker and the Chairperson submit that a period of 24 to 36 months should be given to allow the legislative process to run its proper course.

Lajnatun Nisaa-Il Muslimaat [Association of Muslim Women of South Africa] & United Ulama Council of South Africa [UUCSA]

[91] The Association of Muslim Women of South Africa ('AMWSA') and UUCSA oppose the relief sought by the WLC. They contend that the matter raises factual disputes which cannot be resolved in motion court and that the WLC as a trust lacks legal standing to bring this matter. Further they contend that the relief sought would violate section 9(4) of the Constitution by unfairly discriminating against Muslims on the ground of religion as no other religion has been "targeted" by the WLC. Lastly, these respondents raise the principle of the separation of powers and issues of doctrinal entanglement as prohibiting the relief sought.

South African Human Rights Commission

[92] The South African Human Rights Commission ('Human Rights Commission') has limited its submissions to the issue of South Africa's international obligations and the declarator sought by WLC in Prayer 6. It provides an overview of international law, submitting that South Africa has a dualist approach: international agreements are external and binding between party States; whereas only those international agreements which have been domesticated by enacting legislation have the force of law within South Africa.[79] International agreements which have been ratified but not domesticated play an interpretive role in South African Courts: section 39(1) enjoins a court to apply international law when interpreting rights in the Bill of Rights; and section 233 provides that courts should prefer any reasonable interpretation of domestic legislation that is consistent with international law. The four international agreements presented by the WLC have been ratified but not domesticated and thus play an interpretive role but "cannot be [sources] of rights and obligations" as held by the Constitutional Court.[80]

[93] The Human Rights Commission submits that CEDAW and ICCPR require the State to regulate the consequences of all marriages. Regulation requires recognition and the Human Rights Commission submits that legislation is necessary for compliance with South Africa's

[79] Section 231(4) of the Constitution.

[80] See *Glenister* above n 46 at paras 92 (minority) and 191 (majority).

international obligations. As no legislation has been enacted, it submits that South Africa is not in compliance with its international obligations.

[94] Although concluding as such, the Human Rights Commission is of the view that a declaratory order seeking an international law remedy is not warranted in the circumstances, given the principle that courts should not give merely advisory orders that lack practical effect and the fact that the State has shown an intention of enacting, and to have taken steps to enact such legislation. It, however, expounded its stance during oral argument submitting that WLC is entitled to an order declaring that the State is required to pass legislation that recognises and regulates Muslim marriages. It has been unreasonable for the State to leave the obligation to the judiciary via piecemeal litigation. There is a need for legislation. Furthermore, failure to legislate is unreasonable because South Africa willingly signed on to various international instruments that impose an obligation on the international plane to adopt legislation that recognises all marriages and regulates them. It would be unreasonable conduct for it to decide that the rights of women should be fulfilled only by means of piecemeal development of the common law.

[95] The Human Rights Commission further contends that no religious marriages are automatically recognised: religious marriages are only recognised if they are solemnised by a registered marriage officer. The position adopted by the State respondents is at odds with *Glenister* and thus incorrect. The State does not have a free choice whether or not to legislate; it is constitutionally obliged to do so. This Court should at the very least make an order declaring a domestic law obligation in terms of section 7(2) to enact legislation within a reasonable time, even if the court does not find that the State has not yet failed to fulfil that obligation. The Court should make an order declaring that the common law definition of marriage does not exclude any marriage that, while being monogamous in fact, is potentially polygamous by virtue of the tenets of the religion of the parties. The definition cannot extend to factually polygamous marriages in the absence of provisions such as those provided for in the Recognition Act.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

[96] The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (‘CRL’) initially opposed the recognition of Muslim

marriages as such recognition would be discriminatory to other religions. The CRL has subsequently amended its position, filing a supplementary affidavit and heads of argument stating that the previous position was based on a misunderstanding of its constitutional mandate by its previous legal representatives.

[97] The CRL's position is that its constitutional mandate is to promote respect and unity amongst all communities in South Africa.[81] In this light, it supports the elimination of discrimination in all religious marriages, including but not limited to Muslim marriages. The CRL recognises the vulnerable position of Muslim women in society and posits that gender equality trumps religious freedom as religious freedoms may not be exercised in a manner that is inconsistent with any other rights in the Bill of Rights.[82] Further, it agrees that there is a duty on the State in terms of section 7(2) in light of the rights violations and the international obligations, to ensure that all religious marriages comply with the values and rights in the Bill of Rights.

[98] As for the remedy, the CRL does not support the WLC's main relief but does support the alternative relief of reading into the Recognition Act, with one caveat: the reading-in should ensure the recognition and regulation of all religious marriages.

[99] Lastly, the CRL counters the argument that the Recognition Act is based on customary law which is recognised in the Constitution and thus distinct from religious law. The CRL contends that custom and religion overlap in many material respects as noted in *Pillay*[83] and there are many similarities between African customary law and the practice of Islam. The Recognition Act however differentiates between such groups without any rational explanation and which differentiation is unjustifiable in an open and democratic society.

Amici's Submissions

United Ulama Council of South Africa

[100] The United Ulama Council of South Africa ('UUC') is a national religious body purportedly responsible for protecting and safeguarding religious affairs of Muslims in South

[81] Section 185(1) of the Constitution.

[82] See *Christian Education* above n 52 at para 26.

[83] *MEC for Education, Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 47.

Africa and has given input into and consented to the draft Muslim Marriages Bill. Although bearing the same name, this is a different grouping to the Seventh Respondent.

[101] The UUC supports the application brought by the WLC. It agrees that there have been rights violations, especially the right to dignity and that the State has a duty in terms of section 7(2) to protect, promote, respect and fulfil these rights, which it has failed to do.

[102] In counterargument to the Respondents, it alleges that piecemeal litigation is undesirable as it may lead to uncertainty and fragmented jurisprudence which is contrary to the rule of law. It contends that the issue of entanglement does not arise as the Bill has already been settled by mainstream Muslims. Lastly, the UUC contends that separation of powers issues do not arise as the Court is mandated by the Constitution to make an order to ensure effective relief, even when this may have policy implications.

Law Society of South Africa ('LSSA')

[103] The LSSA submissions deal extensively with the historical background and social structures of the Muslim community, finding these to be particular oppressive to women and that, given the rights violations, there is a need for legislative recognition and regulation. The LSSA supports the arguments and relief sought by the WLC. Lastly, the LSSA contends that neither the doctrine of entanglement nor the principle of the separation of powers prohibits this Court from granting the relief sought.

SA Lawyers 4 Change

[104] The SA Lawyers 4 Change, a voluntary association with a stated mission of the advancement of women's rights, supports the argument and relief sought by the WLC. This *amicus* does not, in its heads, further the argument presented by the WLC.

Muslim Assembly

[105] The Muslim Assembly describes itself as an "establishment" within the Muslim Community whose role is to facilitate aspects of the Muslim Community, including the issuing of marriage and divorce certificates. The Muslim Assembly operates under the auspices of the Islamic Council of South Africa ('ICSA'). The Muslim Assembly provides marital counselling services in the Western Cape and basis its recommendations on the

experiences it has encountered by providing these services. The Muslim Assembly supports the arguments and relief sought by the WLC.

[106] It submits that recognition and regulation in the form of legislation is necessary to protect women and children. It details Islamic divorce procedures and consequences, noting that it has no powers of enforcement. Furthermore, the Muslim Assembly sets out the applicable provisions of the Children's Act and Divorce Act which ensure that the best interest of the child are of paramount importance in civil divorces but which are not automatically applied in Muslim divorces. This can only be rectified by legislative intervention. Lastly, the Muslim Assembly contends that women may suffer in polygamous marriages, where one marriage is in terms of Islamic tenets and the other is civil. Where the civil marriage ends in divorce there is no protection afforded to the wife married in terms of Islamic tenets. This too is a problem with the Imam Project.

Islamic Unity Convention

[107] The Islamic Unity Convention ('IUC') is a voluntary umbrella organisation consisting of 102 Muslim organisations, with an interest in the welfare of Muslim communities. While the IUC acknowledges the hardships faced by Muslim women and children and commends the WLC for attempting to solve these issues, it does not support the main relief sought. The IUC's main contention is that enacting legislation will infringe the rights to freedom of religion (sections 15 and 31) by forcing Muslims to choose between civil law and the prescripts of Islamic law. These prescripts cannot be codified and to do so would result in the same problems faced with the codification of customary law during apartheid. The true mischief that has been unearthed is the non-recognition of Muslim Personal Law. The IUC briefly examines foreign jurisdictions' approach to this issue, alleging that India recognises Muslim Personal Law and the United Kingdom has set up Muslim Arbitration Tribunals, which ensure that disputes are resolved according to *Sharia* law.

[108] That being noted, the IUC nevertheless supports the interim relief sought, which would alleviate some of the hardship experienced by Muslim women, pending the enactment of legislation which recognises and allows for the enforcement of relevant Muslim Personal Law. Lastly, the IUC also support the submission by the Commission on Gender Equality for the establishment of procedures in the Master's Office for the dissolution of deceased estates where it is alleged that the deceased was a spouse in a Muslim marriage.

Commission on Gender Equality

[109] The Commission on Gender Equality ('the Gender Commission') supports the WLC's arguments and relief, but only partly and with modification. The Gender Commission agrees that the State has failed to fulfil its section 7(2) duty, towards Muslim women in particular. There is no obstacle to bringing this form of a challenge as the principle of subsidiarity does not apply as there is no Act giving effect to these rights; the State has shown its inability to fulfil this duty; and no parallel system of law will develop if this form of argument is allowed.[84] Further, this section 7(2) challenge is preferable to a frontal challenge to existing legislation as the rights violations are historic and systemic, the under-inclusiveness persists across a wide range of laws and thus new legislation is preferable to effectively address the issue. The failure and delay by the State to enact legislation recognising Muslim marriage is unreasonable and clearly ineffective.

[110] As for the dissenting arguments, the Gender Commission contends that recognising Muslim marriages (cf. registering, regulating and codifying) does not infringe religious freedoms. Similarly, "dissent" amongst Muslims is not sufficient reason to allow the violation of rights to persist. As for international duties, CEDAW does not prohibit polygamy and moreover South Africa recognises polygamy, albeit in customary marriages. Lastly, the Imam project is insufficient to remedy the systemic rights violations and moreover does not permit polygamous marriages.

[111] With regards to remedy, the Gender Commission supports a declarator that the State has failed in terms of section 7(2) and directing the executive to prepare and initiate legislation recognising Muslim marriages. This much is well within the Court's constitutional powers in terms of section 172. But the Gender Commission does not support the ordering of Parliament to enact such legislation. This would not be constitutionally permissible, for many reasons, including that the Members of Parliament must be allowed to vote in terms of their mandate and their conscience. Thus the Gender Commission submits that the order should be limited to the preparation and initiation by the executive of this legislation, which is to be considered by Parliament.

[84] See *My Vote Counts* above n 69 at paras 61-3 and 160.

[112] The Gender Commission contends that a timeframe should be set within which the preparation and initiation of legislation, and its introduction and tabling in Parliament, should be complete. This coupled with periodic progress reports to the Court.

[113] In the interim, the Divorce Act should be declared to apply to Muslim marriages, specifically section 7(3) thereof, which provides for the transfer of assets from one spouse to another. Standard operating procedures for how the Master is to deal with the dissolution of an estate where the deceased was allegedly a spouse in a Muslim marriage, should be prepared by the Department of Justice and the Department of Home Affairs. Lastly, these interim remedies should be widely publicised.

[114] Should the Court be unwilling to grant the primary relief in terms of section 7(2) of the Constitution, then the Gender Commission contends that the Marriage Act discriminates against Muslim women, directly and indirectly, on listed grounds of sex, marital status, gender and religion and thus is presumed to be unfair. The unfairness is further demonstrated by the impact this has on a vulnerable group and that it serves no legitimate government purpose. Therefore, the Marriage Act is unconstitutional. Similarly, the Divorce Act, if not read to include Muslim marriages, is unconstitutional. And so is the common law definition of marriage which does not permit polygamy. These should be declared unconstitutional.

[115] However, contrary to the contentions of the WLC, the Gender Commission submits that the Recognition Act is not unfairly discriminatory and thus not unconstitutional, as it complies with the three-part test set out by the Constitutional Court in *Van Heerden*:[85] the Act targets a historically disadvantaged group, seeks to protect and advance that group, and promotes the achievement of equality. Furthermore, this Act acknowledges the special status of customary law afforded by the Constitution, which is not afforded to religious law.

Jamiatul Ulama KwaZulu Natal

[116] The Jamiatul Ulama KZN ('JU') is a body of Muslim theologians and Imams in KwaZulu Natal, which amongst other things, issues decrees concerning Islamic law. The JU opposes the arguments and relief sought by the WLC, contending that the Constitution is incompatible with *Sharia* law, and detailing the divergent underpinnings of each. The JU examines aspects of the Bill to show that it too is inconsistent with the Constitution,

[85] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 37.

particularly the right to equality. However, on grounds of the avoidance of doctrinal entanglement and deference to the other spheres of government, the executive and legislature should be permitted to explore a whole range of options and not be compelled by the Court to initiate, prepare or enact legislation.

Evaluation

[117] Perhaps the most convenient place from where to start is to understand the rights underpinning the applicants' claim and whether there is any violation of those rights, and thereafter what obligations are imposed on the State by the Constitution, if any, as regards the fulfilment, protection and promotion of those rights.

Equality

[118] The right to equality underlies the applicants' case as the right that continues to be violated. This right has been found to be one which "*permeates and defines the very ethos upon which the Constitution is premised.*"[86] The Constitutional Court in *Van Heerden*[87] emphasized the need for courts–

> "*to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature, and purpose of discriminatory practise and whether it ameliorates or adds to group disadvantages in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving society.*"

[119] Since the dawn of our constitutional democracy our jurisprudence is laden with decisions underlying deep patterns of disadvantages suffered by women, particularly black women, which call for eradication; these need not be repeated. Women continue to occupy a vulnerable position in our society in relation to family structures.[88]

[120] Section 9(1) provides that "*[e]veryone is equal before the law and has the right to equal protection and benefit of the law.*" Section 9(3) provides that "[*t*]*he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including*

[86] *Fraser* above n 17 at para 20.

[87] Above n 85 at para 27.

[88] See *Bhe* above n 65 at para 91; *Daniels* above n 21 at para 22; and *Volks* above n 66 at 225.

race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Equality lies at the heart of the Constitution and is both an underlying value and a justiciable right.

[121] Discrimination may be direct or indirect. The Constitutional Court set out a test to determine whether there has been a violation of the right to equality in the matter of *Harksen v Lane N.O and Others.*[89]

[122] WLC contends that Muslim women are unfairly discriminated against on the basis of religion, marital status, gender and sex. It alleges that the State's omission to recognise Muslim marriages or to amend legislation to regulate Muslim marriages is in direct conflict with section 9(3) of the Constitution on grounds of religion and marital status and indirect discrimination on the ground of gender and sex.

[123] The debate should not be located on whether there is differential treatment between Muslim women and women of other religions because this analysis may lead to a skewed conclusion that if it is found that women in other religions are in the same boat as women in Muslim marriages owing to the fact that no religious marriages are recognised *per se*, no discrimination has been established and hence no violation of rights. That view may be parochial as it may lose the historical context of systemic violation of the rights of Muslim women. It can also not be suggested that just because no recognition is afforded to marriages concluded in terms of religion *per se* as contemplated in section 15(3), Muslim marriages are not entitled to protection. The better approach is that which was adopted by Nkabinde J in *Hassam* when she said:[90]

> "*The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.*"

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[89] 1998 (1) SA 300 (CC) at para 54.

[90] Above n 26 at para 31.

[124] In this connection the WLC is correct and the Court has identified it to be appropriate to compare women in Muslim marriages with those in civil and customary marriages and as well as to compare Muslim women and Muslim men. Whilst marriage itself is not asserted as a right constitutionally, it has been given "*a seal of constitutional significance*" by the Constitutional Court.[91]

[125] Having found that there was differentiation as outlined above, the Court in *Hassam* enquired whether that amounted to discrimination on any of the listed ground and the answer was yes. It considered the jurisprudence of that Court which obliged the Court to analyse the nature of the discrimination contextually. It took into account that "*in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today.*"[92] These caused Muslim widows significant and material disadvantage of the sort the equality provision seeks to avoid. The denial of benefits also affected Muslim women, particularly in polygynous marriages, "*(because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect.*"[93]

[126] The Court therefore found that "*grounds of discrimination can thus be understood to be overlapping on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affected by the Act's exclusion.*"[94]

[127] The Court hastened to emphasise that its conclusion did not mean that "*the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing*

[91] *DE v RH* above n 58 at para 39.

[92] *Hassam* above n 26 at para 33.

[93] *Ibid* at para 34.

[94] *Ibid*.

appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly."[95]

[128] The reasoning in *Hassam* is still applicable in South Africa today. Whilst the disadvantageous position of Muslim women, particularly those in monogamous marriages, has been ameliorated in many respects, there is still a gap with regards to non-recognition that affects women, not only in polygynous marriages.

[129] The defence that Muslim women can choose to register their marriages in terms of the Marriage Act has been found not to be an adequate answer in many judgments, including *Daniels.*[96] Furthermore, spouses in existing or prospective polygynous Muslim marriages are excluded from entering into civil marriages and are denied the legal benefits and protection attached to these marriages.

[130] The choice argument may also ignore disparities in bargaining power between men and women in marriages. In *Volks N.O.*,[97] Sachs J (albeit in a minority judgment), held that "*while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only*."

[131] It cannot entirely be concluded that in all respects the majority of women in Muslim marriages have freely chosen to avoid protections offered in civil marriages. Before the Imam Project came about, there were few Imams who were registered as marriage officers. Also, some women may not be aware that their marriages do not carry any legal protection, and even those who do realise the need for a civil marriage may lack the bargain of power to convince their husbands to register civilly.

[132] Furthermore, choice cannot have a bearing on the question of breach. The existence of a choice has not prevented the Constitutional Court in finding that the State had acted

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[95] *Ibid* at para 35.

[96] Above n 21 at paras 25 and 107.

[97] Above n 66 at para 225.

unconstitutionally in various statutes excluding spouses in Muslim marriages despite the choice they had to register.[98]

[133] In addition to that, the fact that a woman elected a Muslim marriage has no bearing on whether she will experience social economic disadvantage. Breaches of constitutional rights may arise despite these choices. In *Van der Merwe v Road Accident Fund (Women's Legal Centre as Amicus Curiae),*[99] the Constitutional Court held the following:

> "*This line of reasoning falters on two grounds. First, the constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid. Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional state. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, section 172(1) makes plain that when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confer validity to a law that otherwise lacks a legitimate purpose, has no merit.*"

[134] Equally, in the present circumstances, the assessment of the constitutional obligation cannot be negated by the women's choice not to register their marriages. The applicants have, therefore, been able to show discrimination.

[135] Because the discrimination is on the listed ground, it is presumed to be unfair in terms of section 9(5). The State respondents have not sought to suggest that any legitimate governmental purpose is served by this unfair discrimination. It is doubtful that they can.

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[98] For example see *Daniels* above n 21 at paras 25; 107 and 108.

[99] 2006 (4) SA 230 (CC) at para 61.

Dignity

[136] Lack of recognition of Muslim marriages has been held to infringe upon the dignity of a Muslim woman, the most recent decision being *Moosa N.O.*[100] The Constitutional Court there, dealing with an applicant's right to be treated as a "surviving spouse" for the purpose of the Wills Act, found that the—

> *"concomitant denial of her right to inherit from her deceased husband's will, strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman. Furthermore, as the WLC correctly submitted, this vulnerability is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences. In short, the non-recognition of the third applicant's right to be treated as a 'surviving spouse' infringes her right to dignity in a most fundamental way, and is a further ground for declaring section 2C(1) constitutionally invalid."*[101]

Access to court on dissolution of marriage and children's rights

[137] Whilst there has been intervention through a number of judgments, vulnerability of women in Muslim marriages on dissolution of their marriage is still an area where very limited, if any, legal protection is afforded. The facts in the *Faro* case demonstrate this vulnerability quite powerfully. A husband has the power to obtain unilateral divorce through the *Talãq.* The result is that a woman in that situation has no adequate safeguards to obtain relief consequent to a divorce in a court, including division of marital property; she relies on religious bodies to grant orders which are not legally enforceable.

[138] Guardianship, maintenance, custody of, and access to children after divorce are important aspects. The argument regarding remedies available in civil and customary marriages, including benefits that come with Mediation in Certain Divorce Matters Act 24 of 1987 and the "automatic" oversight role of the Court in this regard is compelling. These

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[100] *Moosa N.O.* above n 29. (Own emphasis)

[101] *Ibid* at para 16.

remedies are important enough to have been afforded to civil and customary marriages. Whilst there is regulation in some instances, it seems to be inadequate. Muslim women are not able to access the system for purposes of dissolving their marriages and regulating consequences thereof. The WLC alleges that it is regularly approached by women who experience hardships and are left with no remedies. Vulnerabilities still exist, despite the protections that have been availed by the courts by extending consequences of different statutes to spouses in Muslim marriages.

[139] Pegged with the section 34 rights is section 28(2) which states that the child's best interests are of paramount importance in every matter concerning a child. Children in Muslim marriages are therefore not provided with adequate protection as those in civil and customary marriages enjoy, upon dissolution of the marriage of their parents by way of divorce. In terms of section 6 of the Divorce Act, a decree of divorce shall not be granted until the court is satisfied as to the welfare of the minor or dependent children and it may call for an investigation to be undertaken and for any relevant person to appear before it.

[140] This all serves to indicate that there has been, and is, an ongoing infringement of the section 34 rights of persons in Muslim marriages, as well as the children thereof whose rights are stated in section 28 of the Constitution, to have any dispute that can be resolved by the application of law decided in a fair public hearing.

Has the State failed to fulfil its obligations?

[141] The State respondents submit that by the enactment of marriage legislation, PEPUDA, the Children's Act and other legislation, the State has given effect to its section 7(2) obligations. However, the various pieces of legislation were not designed to address the discrimination against Muslim women and children. If that were the case, there would not have been a need for courts to intervene over a period of time. The principle of subsidiarity as regards PEPUDA, being the available subsidiary legislation, does not apply either. Whilst PEPUDA is legislation enacted to prevent or prohibit unfair discrimination, it does not deal with other rights that the applicants rely on coupled with the section 7(2) obligations read with section 237 upon which their case is founded. Subsidiarity does not apply when the enabling legislation, in this case PEPUDA, does not adequately cover the constitutional rights in need of protection.

[142] Whilst the courts have helped to remediate the situation through piecemeal litigation, there remains a gap, namely divorces. It is correct that nothing prevents a Muslim woman from approaching courts for a remedy; some relief may not be competent for the courts to grant without an empowering basis to do so.

[143] There is evidently a systemic violation of rights to equality, human dignity, access to courts, and children's rights that has been shown over the years. Corrosion of rights triggers duties imposed upon the State under section 7(2).[102] The question is whether the State has an obligation to intervene beyond the piece-meal litigation that has been adopted by the courts over a period of time. If so, what kind of intervention should that be?

[144] According to the applicants, given the problems highlighted by different courts in various judgments over a period of time, the reasons for those decisions and the complexities of Islamic law, cultural and religious practices, the most reasonable and effective way of ensuring the obligations that the State has are fulfilled is to grant relief that would ensure that Muslim marriages are recognised for all purposes.

Section 7(2) obligations

[145] According to the applicants, the obligation for the State to recognise Muslim marriages and their consequences flows directly from the Bill of Rights. In this regard, they rely on section 7(2) of the Constitution which provides that "*the state must respect, protect, promote and fulfil the rights in the Bill of Rights"* and section 237 which requires all constitutional obligations to be performed diligently and without delay.

[146] In *Glenister,* the Constitutional Court confirmed that:

> "*Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection.' Implicit in section*

[102] *Glenister* above n 46 at para 200.

7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective."[103]

[147] It is clear from what is stated above that section 7(2) imposes an obligation on the State, which obligation may in some circumstances be a positive one, and may require protection through laws and structures, and whatever steps are taken must be reasonable and effective.

[148] In *Minister of Safety and Security v Van Duivenboden,*[104] it was held that:

"*[t]he state is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to 'protect, promote and fulfill the rights in the Bill of Rights' and s 2 demands that the obligations imposed by the Constitution must be fulfilled. As pointed out in Carmichele, our Constitution points in the opposite direction to the due process clause of the United States Constitution, which was held … not to impose affirmative duties upon the state. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.*"

[149] There are a number of ways that the State can adopt to respect, protect, promote and fulfil the rights in the Bill of Rights:

"*The Constitution leaves the choice of the means to the state. How this obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in sections 26 and 27, the obligation of the state is to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'*." [105]

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[103] *Glenister* above n 46 at para 189 (Footnotes omitted). See also *Carmichele* above n 45 at para 44.

[104] 2002 (6) SA 431 (SCA) at para 20.

[105] *Glenister* above n 46 at para 107.

What kind of State intervention is required, if any?

[150] It goes without saying that the Court ought to show due deference to the other arms of the government as to how measures falling within their spheres are to be fulfilled with due regard to the doctrine of separation of powers. "*The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.*"[106]

[151] The State respondents deny that section 7(2) imposes the duty to enact legislation. According to them, the executive is vested with a discretion and not an obligation to prepare and initiate legislation. So is the legislature conferred with legislative powers and not obligations.

Is the State obliged to enact legislation?

[152] Section 7(2) does not define steps the State should take in affording the protection, promotion and fulfilment of rights in section 7(2). This is unlike certain provisions which have been highlighted by the State respondents where there is an express obligation imposed upon the State to introduce legislation. What is implied, however, in section 7(2) is that the steps taken must be reasonable and effective. Clearly an obligation is imposed on the State to give effect to the rights contained in Chapter 2 of the Constitution.

[153] The applicants argue that it is permissible and preferable to decide this case based on the State's breach of its positive duties rather than the frontal challenge to the various marriage statutes. This approach is supported by the Gender Commission, the Human Rights Commission (with certain additional orders) and various *amici*.

[154] The Gender Commission takes this point further by submitting that the lack of protection for women in Muslim marriages cannot be traced to a particular statute. It stems from a historical pattern of unfair discrimination against the Muslim community which resulted in their interests being ignored by the law.

[155] Furthermore, any attack on the under-inclusiveness of the existing law would need to encompass a host of provisions across a range of laws and such a task would distract from the

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[106] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 45.

primary constitutional breach, which is the State's failure to take reasonable and effective steps to protect Muslim women in law. The undesirability of piecemeal relief was highlighted in a number of judgments including, *Bhe and Others v Khayelitsha Magistrate and Others,* where the Court held *"[t]he problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems*".[107]

[156] The applicants contend that there has been inaction by the State respondents which has resulted in ongoing violations. This can never be reasonable if one has regard to the delays.

[157] In interpreting what obligations are imposed by section 7(2) and whether this section necessarily appropriates the obligations contended for by the applicants, i.e. to enact statute, the Court must draw from section 39 of the Constitution which deals with how the Bill of Rights should be interpreted. Key to this section is that when interpreting the Bill of Rights the Court "*(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law*."[108]

[158] The applicants have referred to the international agreements which South Africa has committed itself to. There seemed to be some concession from the applicants that those agreements have not been domesticated and therefore are not law in South Africa. Section 231 which deals with '*International agreements*' provides:

> "*(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*
>
> *(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*

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[107] Above n 66 at para 112. See also *Fourie* above n 7 at para 16; *J and Another v Director General, Home Affairs and Others* 2003 (5) SA 621 (CC); and *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) at paras 26-37 where the Court discussed the difficulties of imposing strict liability for defective consumer products through courts, rather than through legislation.

[108] Section 39(1) of the Constitution.

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[159] Section 232 provides that "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."* Lastly, section 233 deals with the application of international law and provides that:

"*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"

[160] In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another,*[109] Majiedt AJ having examined the relevant constitutional provisions, summed up the place of international law in the Constitution as follows:

"*The Constitution provides that: (a) customary international law is part of our domestic law insofar as it is not inconsistent with the Constitution or an Act of Parliament; (b) international treaty law only becomes law in the Republic once enacted into domestic legislation; and (c) national legislation should, in turn, be interpreted in the light of international law that has not been domesticated into South African law by national legislation but that is nonetheless binding upon it."*

[161] The nature of international agreements was also examined in *Glenister* by Ngcobo J as follows:[110]

[109] 2015 (1) SA 315 (CC) at para 24.

[110] *Glenister* above n 46 at para 92.

> "*An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.*"

[162] In *Glenister*, the Court was called upon to determine, amongst other issues, whether the State had fulfilled its duty under section 7(2) to protect, respect, promote and fulfil the rights in the Bill of Rights, in the context of fighting corruption. It was held that corruption undermines the rights in the Bill of Rights and must be combated. An anti-corruption unit had been established under the National Prosecuting Authority (NPA). An Act of Parliament moved this unit from the NPA to under the auspices of the South African Police Services. As mentioned above, the majority of the Court held that "*[i]mplicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.*"[111]

[163] Certain international agreements, which had been ratified but not domesticated, called on the party states to establish anti-corruption units that had the necessary independence to function effectively. The majority noted that undomesticated international agreements do not create binding rights and obligations within South Africa. But section 39(1)(b) placed an interpretive injunction on the courts to take such agreements into account when interpreting any rights in the Bill of Rights. This was bolstered by section 233 which enjoins courts to prefer any reasonable interpretation of the legislation that is consistent with international law. The majority stated that:

> "*It is possible to determine the content of the obligation s 7(2) imposes on the State without taking international law into account. But s 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the main judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates*

[111] *Ibid* at para 189.

concordance and unity between the Republic's external obligations under international law, and their domestic legal impact."[112]

[164] The majority went on to find that the Constitution, interpreted in accordance with South Africa's international obligations, requires independence as a necessary condition of a reasonable anti-corruption unit. The majority was careful to emphasise that *"[t]his is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions".*[113]

[165] Thus in sum, international agreements are external and create binding obligations between party States. Only those international agreements which have been domesticated, by enacting legislation under section 231(4) of the Constitution, have the force of law within South Africa. International agreements which have been ratified but not domesticated play an interpretive role in South African courts: section 39(1) enjoins a court to apply international law when interpreting rights in the Bill of Rights and section 233 provides that courts should prefer any reasonable interpretation of domestic legislation that is consistent with international law. As held by the majority in *Glenister*, the Constitution calls for concordance between the rights and obligations it enshrines and those rights and obligations that South Africa has bound itself to by international agreement.

[166] The four international agreements, CEDAW, ICCPR, Women's Protocol and the SADC Protocol, have been duly signed, approved by the South African Parliament and ratified[114] and are therefore binding as a matter of international law (as was held in *Glenister*). None of the agreements, however, have been transposed into domestic law through an enactment under section 231.

[167] Article 16(1) of CEDAW requires State parties to "*take all reasonable measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

(a) The same right to enter into marriage;

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[112] *Ibid* at para 201.

[113] *Ibid* at para 195.

[114] CEDAW was ratified on 15 December 1995; ICCPR was ratified on 10 December 1998, Women Protocol was ratified on 17 December 2004 and the SADC Protocol was ratified on 29 October 2012.

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."[115]

[168] Article 23(4) of the ICCPR provides that:

"*State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of children.*"[116]

[169] Article 6 of the Women Protocol states as follows:

"*States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:*

(a) no marriage shall take place without the free and full consent of both parties;

(b) the minimum age of marriage for women shall be 18 years;

[115] See also CEDAW's General Recommendation 21, (1994) remarks follows in respect of Article 16(1)(c) at paras 17-8; General Recommendations 29, (30 October 2013) at para 15; and General Recommendation 33, (23 July 2015) at paras 45-6.

[116] See also General Comment 19, (27 July 1990) adopted by the UN Human Rights Committee, at para 9.

(c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

(d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

(e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;

(f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;

(g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

(h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;

(i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;

(j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely."

[170] South Africa recorded its reservations that it did not consider itself bound by Articles 6(d) and 6(h).[117] Article 7 provides that:

"*States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:*

(a) separation, divorce or annulment of a marriage shall be effected by judicial order;

(b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;

(c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

[117] Recorded upon ratification on 17 December 2004. This was done to protect women in customary marriages of which many are not registered.

(d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage."

[171] In terms of Article 8(a):

"Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

(a) effective access by women to judicial and legal services, including legal aid;"

[172] Finally, Articles 8 (1) , (2) and (3) of the SADC Protocol provide:

"*1. State Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.*

2. Legislation on marriage shall ensure that:

(a) no person under the age of 18 shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child;

(b) every marriage takes place with the free and full consent of both parties;

(c) every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws; and

(d) during the subsistence of their marriage the parties shall have reciprocal rights and duties towards their children with the best interests of the children always being paramount.

3. States Parties shall enact and adopt appropriate legislative and other measures to ensure that where spouses separate, divorce or have their marriage annulled:

(a) they shall have reciprocal rights and duties towards their children with the best interest of the children always being paramount; and

(b) they shall, subject to the choice of any marriage regime or marriage contract, have equitable share of property acquired during their relationship."

[173] Therefore, South Africa has committed itself to take appropriate and reasonable measures to eradicate discrimination against women in marriage and family relations. Some of these conventions require enactment of legislation by member States to give effect to equality rights of women and children. Even though the provisions of the international agreements have not been transported into South African law, South Africa has undertaken when it ratified these agreements and protocols to take reasonable and appropriate steps to eradicate discrimination against women and children in marital relationships. In both the Women's Protocol and the SADC Protocol, State parties, of which South Africa is one, agreed to enact and adopt appropriate legislation. South Africa therefore has obligations that became binding on it in the international sphere. As the Court stated in *Glenister*, this is not to incorporate international agreements into our Constitution, but it is "*to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions*."[118]

[174] The obligation to consider international law when interpreting the Bill of Rights was considered in a number of decisions following *Glenister.* In *Singh*[119] for instance, the Equality Court examined the employment policy of magistrates in the context of persons with disabilities. It found that section 9(2) of the Constitution and section 4(2)(a) of PEPUDA placed a complementary duty on the state to take active measures to promote the equality of people with disabilities.[120] To this, the Court noted the interpretive injunction of section 39(1) as expressed in *Glenister* (at paras 201-2), and considered international law, which reinforced the finding that the state has a duty to promote the employment of people with disabilities.[121]

[175] In *Fick,*[122] the Constitutional Court considered whether, in terms of the common law, South African courts have the jurisdiction to register and thus facilitate the enforcement of a costs order made against Zimbabwe by the Tribunal created in terms of the Treaty of the South African Development Community, which South Africa had ratified. Article 32 of the Tribunal Protocol, an offshoot of the Treaty, called upon member parties to 'ensure execution

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[118] *Glenister* above n 46 at para 195.

[119] *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC).

[120] *Ibid* at para 24.

[121] *Ibid* at paras 40-7.

[122] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC).

of decisions of the Tribunal'. The Court reasoned that the development of the common law was necessary in light of sections 34, 8 and 39 and that such development is "*to be informed by international law, as set out in the Amended Treaty, which obliges South Africa to facilitate the enforcement of decisions of the Tribunal.*"[123] The Court went on to hold that:

> "*Analogous to the reasoning in Glenister, based on partial reliance on the SADC Protocol on Corruption which flows from the Treaty, South Africa's obligation to develop the common law as a measure necessary to execute the Tribunal's decision—*
>
> > *'is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them.'*"[124]

[176] In *My Vote Counts NPC*,[125] the High Court considered whether political parties had a duty to disclose private funding, in light of section 32 and 19 of the Constitution. It was further argued that the constitutional requirement for disclosure of private funding information is reinforced by sections 7(2) and 1(d) of the Constitution, as well as a number of international agreements which have been ratified by South Africa. The Court examined each of the sections of the Constitution as well as the ratified international agreements, which instructed each State party to incorporate the principle of transparency into the funding of political parties and went on to hold:

> "*In view of all of the above I accept that s 32(1), read with s 19 of the Constitution, and also ss 7(2) and 1(d) thereof, requires disclosure of information on political parties' private funding for the exercise and protection of the right to vote.*"[126]

[177] Although not expressly mentioned in this concluding paragraph, it would appear that the Court embraced the interpretive injunction of section 39 and considered international agreements, which had been ratified, when interpreting rights in the Bill of Rights, to find that the principle of transparency required disclosure of private funding of political parties.

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[123] *Ibid* at 66.

[124] *Ibid* at para 67.

[125] *My Vote Counts NPC v President of the Republic of South Africa and Others* 2017 (6) SA 501 (WCC).

[126] *Ibid* at para 42. (Own emphasis)

[178] Thus, as the State is under a section 7(2) duty "*to respect, protect, promote and fulfil the rights in the Bill of Rights*", this duty may be invoked where there is an alleged violation of rights in the Bill of Rights by the State. This in turn may trigger the courts' powers to determine whether the State has fulfilled its obligations under section 7(2). How the State fulfils the duty is within its own power to determine. However, what steps it takes must be 'reasonable and effective'. The question of what is reasonable and effective might be answered in part by examining the nature of the rights violations and in part by international law, which courts are enjoined to consider when interpreting the Bill of Rights.

[179] Continued non-recognition of marriages solemnised according to Islamic tenets infringes on the rights to equality and dignity. As has already been found, the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, as well as a child's right to have their interest treated as of paramount importance in every matter concerning the child, are also infringed by non-recognition.

[180] As seen through the cases, the non-recognition of Muslim marriages is historic, persistent and unfulfilled since the beginning of democracy. This is not a single instance, but rather a systemic failure by the State to provide recognition and regulation, potentially effecting millions of people around the country. Marriage concerns a plethora of issues, from status to property, involving a wide range of laws, which are complex and fundamentally important.

[181] While the State has the authority to determine how it fulfils its section 7(2) duty, this must necessarily be in line with the Constitution. In this instance, given the nature of the rights violations, in the context of the complexity and importance of marriage, the only reasonable means of fulfilling the section 7(2) duty is through the enactment of legislation.

[182] This interpretation of section 7(2) is aligned with the international obligations that South Africa has taken on. That is to say, as was held in *Glenister*, the conclusion that in the specific context of this matter the only reasonable means of fulfilling the section 7(2) duty is through the enactment of legislation, may be found without resort to South Africa's international obligations. But to do so would be to disregard section 39(1). Moreover, these

international obligations whilst not creating binding and enforceable rights within South Africa, lend much interpretive weight to what is reasonable under section 7(2). As the Court in *Glenister* held:

> "*That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the State has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as s 7(2) requires. Section 7(2) implicitly demands that the steps the State takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that s 231(2) provides that an international agreement that Parliament ratifies 'binds the Republic' is of prime significance. It makes it unreasonable for the State, in fulfilling its obligations under s 7(2), to create an anti-corruption entity that lacks sufficient independence.*"[127]

[183] In analogous reasoning, it is of foremost interpretive significance that South Africa is bound under international law to enact legislation to give effect to a plethora of rights in the context of marriage. It would be unreasonable for South Africa not to enact legislation, when faced with systemic rights violations which can only be cured by legislation, and whilst bound by international agreements to enact legislation.

[184] The permissive nature of section 15(3) of the Constitution insofar as it allows for the introduction of legislation that recognises marriages concluded under a system of religious or personal and family law does not forbid such a conclusion. The reasoning adopted does not trench upon powers conferred on other arms of the State in this regard. What it postulates is that absence of legislation to protect the rights of women and children in Muslim marriages amounts to a breach of a constitutional duty by the relevant arms of the State. Case-by-case and incremental development of the law is not entirely effective for reasons already canvassed. Comprehensive legislation is required because it would provide effective protection of marriages concluded in terms of the tenets of Islamic law, whilst giving expression to Muslim persons' rights to freedom of religion.

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[127] *Glenister* above n 46 at para 194.

[185] This approach takes care of the concerns raised by the respondents and some of the *amici* that incorporating Muslim marriages into common law or within the marriage legislation would effectively amount to contamination of a religious marriage with a secular system. By doing so, it was argued that the Court would be disregarding the choice Muslims have to practise and get married in terms of their own religious tenets. It would be subjugating Islamic law or marriages concluded in terms of *Sharia* law to the provisions of common law and various applicable matrimonial legislation which are profoundly at odds with each other. This approach recognises that whilst courts have the power to develop common law incrementally, it is the legislature that is tasked with a major responsibility for law reform.[128] This is the kind of case where the Court should defer to Parliament to develop or introduce a law in accordance with a particular policy. Thus, it remains open to Parliament to alter the common law through legislative reform or introduce legislation which would recognise marriages concluded under a system of religious or personal and family law as contemplated in section 15(3) of the Constitution.

[186] A number of decisions, whilst not pronouncing on the issue *per se*, have in fact foreshadowed that legislation is best suited to deal with the consequences of recognition of Muslim marriages for all purposes.[129] In *Daniels*, Moseneke J said thus:

> *"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 the envisaged legislation within the Muslim community. 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."*[130]

[128] *Masiya v Director of Public Prosecution, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at para 31.

[129] *Amod* above n 18 at para 26.

[130] *Daniels* above n 21 at para 108. (Footnote omitted, own emphasis).

[187] In *Moosa N.O.*, Cachalia AJ noted that the vulnerability of Muslim women "*is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences*."[131]

[188] The steps taken by the executive respondents by introducing the Bill or contemplating an omnibus Bill seem to be an acknowledgement that legislation is the most reasonable and effective way of protecting the rights implicated. This remedy does not dictate to the other arms what options to take. The Court is not involved in what form the legislation should take. Whether or not the relevant parties decide to vary or revive the Bill that has been in discussion for many years, introduce new legislation, vary current marriage legislation, or adopt omnibus legislation remains a choice for the executive and the legislature.

Remedy

[189] In terms of section 38, which provides for legal standing in matters concerning rights violations, "*the court may grant appropriate relief, including a declaration of rights*."

[190] In *Fose v Minister of Safety and Security*,[132] decided under the Interim Constitution, Ackermann J held:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."*

[131] *Moosa N.O.* above n 29 at para 16. See also *Faro* above n 31 at para 44.

[132] 1997 (3) SA 786 (CC) at para 69.

[191] This was quoted with approval and was held to apply equally to an understanding of "appropriate relief" under section 38 of the Final Constitution in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*.[133]

[192] Section 38 must be read with section 172(1) of the Constitution which provides for the powers of courts in constitutional matters as follows:

> *"When deciding a constitutional matter within its power, a court-*
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
> *(b) may make any order that is just and equitable, including-*
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*
> *(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."*

[193] If the Court is minded to find that the Cabinet and Parliament have failed in their section 7(2) duties, then this Court must declare such conduct to be invalid. The Court may suspend this declaration of invalidity to allow for the defects to be cured by Cabinet and Parliament.

[194] A declarator stating the constitutional obligations of the State in terms of section 7(2) is appropriate. So is a declarator that the State has failed to fulfil its constitutional obligations. In *Treatment Action Campaign*[134] the Court remarked that the declaration must be in the form that identifies the constitutional infringement.

[195] For the order to be effective, in these circumstances, it is also necessary for a mandatory order to be made. As was stated in *Treatment Action Campaign*:

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[133] 2000 (2) SA 1 (CC) at para 65. See also *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others Amici Curiae)* 2005 (5) SA 3 (CC) at para 58 and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) at para 42.

[134] *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* 2002 (5) SA 721 (CC) at para 121.

> *"Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction."*[135]

[196] In *My Vote Counts NPC,*[136] the Constitutional Court recently held that whilst suspension normally accompanied a declaration of invalidity, it is not automatic and should not be done if it served no purpose. What was needed to be done in that case, however, was to make an order that directed Parliament to cure the deficiency within the period the Court deemed fit. The Court then proceeded to direct Parliament to amend legislation and take any other measure it deemed appropriate within a period of 18 months.[137]

[197] According to the applicants, given the history of delay in introducing a relevant statute and pointedly the finalisation of the Bill, there is a possibility that the preparation and initiation of the legislation may be slow or not take off at all, leaving the women and children in Muslim marriages without a remedy. Even if the delay is justified, as the State respondents concerned have sought to demonstrate, prejudice to women and children in Muslim marriages would still continue, so setting a reasonable time-line within which to comply is important.

[198] Draft legislation has never been placed before Parliament for consideration. It has stalled at the executive level, which is entrusted with preparing and initiating legislation in terms of section 85(2)(d) of the Constitution. Unlike Parliament, the executive is not confronted with multiple political positions in order to adopt policy and present it to Parliament in a form of a draft. Directing the executive to draft legislation does not pre-empt a democratic process in Parliament, it simply requires the executive to remedy an unconstitutional position, whilst acknowledging that the members of Parliament may exercise their democratic mandate. The order this Court grants should reflect these considerations.

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[135] *Ibid* at para 106.

[136] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (8) BCLR 893 (CC) at paras 84-90.

[137] *Ibid* at para 91

[199] Whilst the National Assembly as part of Parliament can also initiate or prepare legislation in terms of section 55(1)(b) of the Constitution, it is not unreasonable to accept the position that it may have been counter-productive and unreasonable to introduce legislation parallel to the process that was already ensuing at the executive level. And that this is possibly the kind of matter that requires policy choices to be initiated at the level of the executive. Therefore, Parliament's contention that the complaint against it may be premature is not without foundation.

[200] Although, it may not be appropriate to find that Parliament has failed to fulfil its duty, at this stage, it is, however, just and equitable to make an order that requires both the executive and the legislature, as part of the State to work in collaboration, within their constitutionally defined roles, by rectifying the failure identified and by fulfilling the duty placed on the State by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.

[201] Finally on this issue of the remedy, the Gender Commission also proposes supervision of the implementation of the Order so as to ensure that it is effective as in *AllPay*[138] where a structural interdict was imposed requiring SASSA to report back to Court at each of the crucial stages of the new tender process. This was further extended in *Black Sash.*[139] Whilst supervision has its advantages, this is not the kind of case that warrants such a remedy. It certainly is distinguishable from cases where the Court had to adopt that approach. The Court in those cases had to ensure that given the unlawful conduct that prevailed, which if continued unchecked would place the social security of millions of South Africans in jeopardy, it had to supervise the progress. The case we are dealing with here is not at those levels and furthermore it deals with sensitive and complex issues of religion, policy and law, in an area which has not been traversed before. Whilst there is an infringement of constitutional rights, the courts have not before required the relevant State respondents to fulfil their constitutional obligations in the manner it would in this judgment. Anticipation of or countering of non-compliance that has not occurred is, therefore, inappropriate. Supervision in this context would amount to a breach of the separation of powers.

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[138] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at para 71.

[139] *Black Sash Trust v Minister of Social Development and Others (Freedom Under law NPC Intervening*) 2017 (3) SA 335 (CC).

Should there be interim relief?

[202] The WLC is asking that, pending the finalisation of legislation, there is an interim remedy of reading-in marriages concluded according to the tenets of Islamic law temporarily into the Recognition Act. This Act, it was submitted is the most suited and practical as it already caters for and regulates, amongst others, proprietary consequences of spouses in polygynous marriages. Concerns raised by the respondents and the Gender Commission in regard to this proposed interim remedy have merit.

[203] In *National Coalition,* the Constitutional Court formulated guidelines for determining when a 'reading in' remedy would be appropriate. In summary, a court considering 'reading in' should:

(i) "*ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values*";
(ii) "*interfere with the laws adopted by the Legislature as little as possible*";
(iii) be able to "*define with sufficient precision how the statute ought to be extended in order to comply with the Constitution*";
(iv) strive to be "*as faithful as possible to the legislative scheme within the constraints of the Constitution*";
(v) the 'reading in' remedy should not result in an "*unsupportable budgetary intrusion*"; and
(vi) where "*reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely*".[140]

[204] In *Sarrahwitz v Maritz N.O.*,[141] the Constitutional Court held that this remedy does not necessarily infringe the separation of powers:

> *"[Severance and reading in] would not undermine separation of powers for at least two reasons. The remedy of severance or reading-in has been part of our constitutional jurisprudence for many years now. It was developed with due regard to the separation of powers principle. And this continues to be so because a resort to*

[140] *National Coalition* above n 133 at paras 74-5.

[141] 2015 (4) SA 491 (CC) at paras 71-2.

these remedies has never precluded Parliament from amending the invalidated provisions whichever way it pleases, provided it does so mindful of the need to cure the constitutional defect(s) identified by this court. It is therefore open to Parliament to even enact an altogether new piece of legislation in response to this judgment.

Severance and reading-in were resorted to by this court in several cases where it was considered eminently suited to address a constitutional defect. And this is one of those cases where this remedy is appropriate."

Is an interim remedy suitable and if so what form should it take?

[205] If the Recognition Act is made applicable to Muslim marriages, the entire statute will apply. In terms of section 7(2) of the Recognition Act a "*customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property, unless such consequences are specifically excluded by the spouses in an antenuptial contract.*" The Matrimonial Property Act applies in that regard.[142] In *MN v MM and Another,*[143] it was stated that a second customary marriage, entered into without compliance with section 7(6), which required court approval over the antenuptial agreement, would be a marriage out of community property. Section 7(1) was found in *Gumede* to be unconstitutional insofar as it did not apply to customary monogamous marriages entered into before the commencement of the Recognition Act.[144] The order, however, applied to marriages that were in existence at the time of that Court Order. *Ramuhovhi*[145] extended the finding in *Gumede* to polygynous marriages. For marriages concluded before the Recognition Act, it made an order that wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, during the period of suspension and whilst affording Parliament time to cure the defect. If Parliament fails to cure the defect, this regime would continue to apply after the period of suspension. The Court further held that its order would not "*invalidate ... any transfer of marital property*" that had already occurred.[146]

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[142] Section 7(3) of the Recognition Act,

[143] 2012 (4) 527 (SCA) at para 38.

[144] *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

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

[146] *Ibid* at para 71.7.

[206] If the Recognition Act is made to apply to Muslim marriages, this set of rules adopted in *Gumede* and *Ramuhovhi* would also be transposed to Muslim marriages. As to retrospectivity, it can be safely assumed that since the Recognition Act had been in place for many years before *Gumede* was decided in 2008 and *Ramuhovhi* in 2017, spouses in customary marriages would have been aware of the Recognition Act. The same cannot be said of spouses in Muslim marriages.

[207] Furthermore, applying the Recognition Act as an interim measure may not only lead to confusion of spouses in Muslim marriages as to the applicable regime, it arguably will not be reflective of Muslim beliefs. It will impose either common law notions of 'in' or 'out of community of property' or the customary law approach developed in *Ramuhovhi* for polygynous marriages that were concluded before the Recognition Act came into force.

[208] An argument that an order that deems all Muslim marriages to be in community of property would not be just and equitable is compelling; such an order could be viewed as intruding on religious freedom. It would convert marriages that are currently 'out of community of property' in terms of *Sharia* law to marriages 'in community of property'. This will apply to both existing and future marriages. It is one thing to make available the existing ordinary civil remedies for spouses in Islamic marriages to enforce their rights and quite another to drastically alter the matrimonial regime that applies to Islamic marriages. The legislature may, ultimately decide to make such an inroad into religious freedom, but that is a decision that should be left with Parliament.

[209] A declarator by this Court that marriages concluded in terms of Islamic law are 'out of community of property' would not change that position as the law and regime in regard to the Recognition Act has been stated in the Act and by the Constitutional Court in *Gumede* and *Ramuhovhi*. Islamic marriages have their own marital regime and that should be respected as far as possible pending the decisions of the legislature. Most importantly, this is an interim measure. The Court cannot predict what Parliament will decide. It may decide that by default, the 'out of community' position should remain, or prescribe a regime that is unique to Muslim marriages. Altering of the current regime by the Court could cause disruption to spouses in Muslim marriages' marital status and affairs, only for that position to be changed again by the legislature in a few years when it passes legislation.

[210] Converting marriages out of community of property to those in community of property does not only have benefits for women but may also carry obligations in that spouses married in community of property not only share the assets equally, the same applies with liabilities of each spouse.

[211] Since the Recognition Act makes provision for the registration of customary marriages by spouses, the Department of Home Affairs may be required to develop a registration system for only an interim period which may have negative budgetary significance. All these issues make the Recognition Act an unsuitable option for the interim.

[212] The Gender Commission proposed changes to the Divorce Act by making marriages concluded in terms of Islamic law subject to the Divorce Act in the interim, as the area of vulnerability currently not taken care of by piecemeal court intervention has been that of divorce, fair distribution of assets and custody orders.

[213] The Gender Commission proposes that the Divorce Act should be declared to apply to all Muslim marriages that still subsist at the time of the granting of the order, in the interim. In addition that there should be a reading-in of words similar to section 8(4)(b) and (c) of the Recognition Act, to accommodate dissolution of a marriage in a polygynous situation, to the Divorce Act. This will entail introducing a new section 7 (3A) which would require a court granting a decree of divorce for the dissolution of a Muslim marriage in the case of a husband who is a spouse in more than one Muslim marriage to take into consideration all relevant factors including any contract, or agreement and must make any equitable order that it deems just. It may also order any person who in its opinion has sufficient interest to be joined in the proceedings.

[214] The State respondents, particularly the Minister of Home Affairs, is of the view that the proposed application of the Divorce Act to all Muslim marriages presents the Court with the same challenges applicable in the transposition of Muslim marriages into the Recognition Act. In this regard, it is argued that the underlying effect would be the replacement of the prescripts of the *Sharia* with the Divorce Act. It is submitted that the reading-in of the word ‘spouse’ to be inclusive of a spouse in a Muslim marriage by the Courts in previous instances, did not do violence to the *Sharia* canons, because those were narrow, limited and

minor; they did not disturb the institution of a Muslim marriage, arrangements and choices of the parties involved or the marital regime of a Muslim marriage in terms of the *Sharia*.

[215] In terms of section 3 of the Divorce Act, a marriage may be dissolved by a Court only when it is irretrievably broken down or as a result of mental illness or continuous unconsciousness of a party to a marriage. According to the respondents opposing this relief, this is making inroads into the concepts of *Talãq* and *Faskh* which parties to a Muslim marriage are entitled to exercise so long as they comply with the tenets of *Sharia*.

[216] This means marriage entered into in terms of *Sharia* would not simply be dissolved by way of *Talãq* or *Faskh* as by law (i.e. the Divorce Act) these are not recognised grounds for dissolution of a marriage. Evidence would have to be given to the satisfaction of the Court that there was irretrievable breakdown of a marriage as required by section 4 of the Divorce Act before a decree of divorce can be granted despite or over and above the *Talãq* and *Faskh*.

[217] Counsel for Esau suggested far more radical wording to be introduced into the Divorce Act such as that the *Talãq* and *Faskh* or a Marriage Annulment Certificate by a responsible authority in Muslim law shall be considered a decree of divorce to overcome the seeming inconsistency between the provisions of the Divorce Act and *Sharia* law.

[218] Section 7(3) of the Divorce Act which was suggested as a measure to apply to Muslim marriages on the interim basis, by the Gender Commission and Esau currently reads as follows:

> *"A court granting a decree of divorce in respect of a marriage out of community of property-*
>
> *(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or*
>
> *(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,*

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

[219] In terms of section 7(4) such an order shall not be granted unless the Court is satisfied that it is equitable and just to do so "*by reason of the fact that the party in whose favour the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of marriage, either by rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.*"

[220] Section 7(3) was discussed in *Bezuidenhout*[147] by the Supreme Court of Appeal, wherein it was noted that—

"…it is a well-known fact that our common law provides for marriages in community of property as the norm while the English system does not. The result is that, unlike in England, a marriage can in our law be concluded out of community of property only if the parties consciously elect to do so in terms of an antenuptial agreement executed before a notary public. Of course we know that these contracts often led to great inequity and unfairness, particularly towards wives who performed their traditional role. This, after all, was the raison d'être for the enactment of s 7(3). Nevertheless, its formulation reflects a deliberate choice on the part of the Legislature to limit the courts' discretion in interfering with the contractual election - good or bad - made by the parties when they entered into their marriage. For instance, the section applies only to marriages that were entered into prior to the commencement of the Matrimonial Property Act 88 of 1984 on the basis of an antenuptial contract. With regard to marriages entered into subsequently, in terms of an antenuptial contract, the section finds no application at all. (They are governed by ch 1 of the Matrimonial Property Act 88 of 1984.) Women whose marriages were entered into later and with the exclusion of the accrual system may therefore be in the same disadvantaged position as before. Some suggest that the Legislature was too conservative and the reasons for its choice difficult to understand (see eg June Sinclair An Introduction to the Matrimonial Property Act 1984 at 49 - 52). One can sympathise with these views. The fact remains, however, that the Courts cannot go further than the Legislature

[147] *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 21.

allows them to go and that the Legislature does not allow them to treat all marriages upon divorce as if they were in community of property and without an antenuptial contract."

[221] Section 7(3) refers to marriages out of community of property entered into before the commencement of the Matrimonial Property Act, in terms an antenuptial contract by which community of profit and loss and accrual sharing are excluded. It also refers to marriages entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 and the Black Administration Act 38 of 1927. In these instances, the Court may, in the absence of an agreement between the parties regarding division of their assets and on application by one of the parties to the marriage, order that such assets, or such part of the assets of the other party as may be just be transferred to the other party.

[222] The question arises as to those Muslim marriages entered into after the commencement of the Matrimonial Property Act (and other legislation mentioned in section 7 (3)), where there is no agreement between the parties. It seems to be common cause that Islamic law does not recognise the concept of communal property, and division of property. Clearly, the reading into the Divorce Act along the lines suggested by the Gender Commission may not be sufficient. It may be that insertions would have to be made either to the Divorce Act or Matrimonial Property Act in respect of those marriages.

[223] These difficulties all point to complications as they require a wholesale of changes in matters that may require comprehensive legislative reform. This is one of the reasons why the Court in *Fourie* refrained from granting an interim order. Sachs J expressed the complexities as follows:

> *"...I have come to the conclusion, however, that such an arrangement would not be appropriate in the present matter. It is necessary to remember at all times that what is in issue is a question of status. Interim arrangements that would be replaced by subsequent legislative determinations by Parliament would give to any union established in terms of such a provisional scheme a twilight and impermanent character out of keeping with the stability normally associated with marriage. The dignity of the applicants and others in like situation would not be enhanced by the furnishing of what would come to be regarded as a stop-gap mechanism."*[148]

[148] *Fourie* above n 7 at para 154. (Own emphasis)

[224] Whilst the issue here is not about the ability to get married, as it was in *Fourie* but proprietary consequences, the concerns remain which affect questions of status, which are quite significant and in which Parliament should be given a free hand to establish a comprehensive framework having regard to a particular policy position.

What should happen if legislation is not enacted?

[225] Notwithstanding what is stated above, the state of inertia that has beset the executive for the last 20 years which has, without a doubt been brought about by the controversial policy choices to be made, may simply continue despite the order to rectify the failure, leaving women and children in Muslim marriages that currently enjoy no protection, vulnerable. It cannot be disputed that the realm of divorce remains the main lacuna currently giving rise to potential injustice. It seems just and equitable for some form of default regime, if legislation envisaged as the main remedy is not passed within the time stipulated, to operate on a temporary basis until the coming to force of the legislation on some future date. There seems to be no escaping that some form of judicial intervention may be necessary, if no legislation is passed after the period stipulated in the order.

[226] A temporary provision making the Divorce Act applicable may be the most suitable under the circumstances. This would only be applicable if legislation is not passed within the contemplation of the main relief. They would have had been given an opportunity to correct the defect and failed to do so.

[227] The application of the Divorce Act would mean that from the religious point of view, whilst it may be that the Muslim marriage can be terminated by any method recognised under *Sharia* law; in its civil aspect, the union would be terminable under the Divorce Act.

[228] In regard to proprietary consequences in terms of section 7(3) of the Divorce Act, a court exercises a "just and equitable" jurisdiction. Therefore, the fact that the union is a Muslim marriage rather than a civil marriage can still be taken into account. This may allow some religious sensitivities to be accommodated by the divorce court. This order would not only take care of the complaint that children born of Muslim marriage do not enjoy "automatic supervision" upon divorce that children in other marriages do but would also

allow for redistribution of assets among the divorcing spouses based on what the court considers just and equitable.

[229] As to the grounds of divorce, in view of a concern that the requirement of "irretrievable breakdown" may be too intrusive, and may displace the requirements under *Sharia law,* a court would grant a decree of divorce once satisfied that termination had occurred under *Sharia* law. It seems this can be accommodated under section 5A of the Divorce Act. This would mean that the court hearing divorce proceedings in this regard would need to be sensitive to the requirements of Islamic law.

[230] It must be emphasised that the temporary order would not seek to prohibit spouses in Muslim marriages from conforming to *Sharia* prescripts if they so elect.

[231] Lastly, it is worth emphasising that the order would only be applicable to Muslim marriages that subsist at the time of the coming into operation of the order. It will not apply to any marriage that has been validly terminated in accordance with *Sharia* law prior to the order becoming operative.

[232] This relief does not hinge on the finding of constitutional invalidity of the Divorce Act. Even without an order of constitutional invalidity in this regard under section 172(1)(a), the Court may grant an order that is just and equitable under 172(1)(b) to ameliorate the hardships pending finalisation of legislation by Parliament.[149]

[233] It is imperative that once this relief kicks in, it be publicised to ensure certainty and guidance. The Department of Justice and the Department of Home Affairs should be ordered to make publications widely in newspapers and on radio stations, whatever is feasible, to make sure that the public is aware of the new dispensation involving Muslim marriages.

[234] It is important to stress that this would be a temporary measure, pending enactment of legislation. This measure would be triggered only upon a failure to enact legislation within the contemplated period, and would place no constraints on the legislative choices available

[149] See *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) 415 (CC) at para 97.

to the State.[150] It should neither be regarded nor become a permanent feature; such an occurrence would be undesirable.[151]

Interim Master's remedy

[235] Faro is asking for an order directing the Minister of Justice to put in place policies to regulate the holding of enquiries by the Master into the validity of marriages solemnised according to the tenets of Islamic law in cases where benefits are claimed in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. Rogers J in *Faro*, whilst not deciding this issue expressed some reservations about the relief sought noted that:

> "*It is unclear to me whether the Minister would have powers to lay down policies and procedures for the Master other than by making regulations as contemplated in s 103 (1) of the Administration Act of Estates Act, in particular para (c) of that sub-section*".[152]

[236] The concern expressed by Rogers J was justified. There is no statutory obligation that we were made aware of, upon the Minister of Justice to put in place administrative policies and procedures which govern the manner in which interstate succession in respect of Muslim marriages is conducted. That said, nothing prevents the Ministers of Justice together with other relevant Minister including the Minister of Home Affairs to prepare non-binding guidelines to assist the Master's office to act consistently in these matters. The Minister may also consider issuing regulations in this regard in terms of section 103(1) of the Administration of Estates Act.

Pro forma contract

[237] It is not necessary for the Court to deal with the *pro forma* contracts at this stage, outside any statutory or regulatory framework. These contracts are prepared by a religious body, and it is alleged that its terms are in accordance with the prescripts of *Sharia* law. Whether that is the case is not an issue for the court to entangle itself in. More so, because parties to these contracts are not before court, it would be inappropriate for the Court to suddenly invalidate their contracts. This relief should accordingly fail.

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[150] *Sarrahwitz* above n 141.

[151] *Bhe* above n 65 at para 116.

[152] *Faro* above n 31 at para 40.

Esau matter

[238] The Esau action has not been concluded. The matter should be postponed for hearing on trial for the determination of Esau's claim, to the extent there is one. It would be premature to grant leave to amend particulars of claim as contented for on behalf of Esau. That should be the function of the Court hearing the trial.

Costs

The WLC asks for costs including costs of four counsel, on the basis, amongst others, that the WLC was against nine State counsel. In the first instance it was appropriate that the legislature be represented by a set of counsel different to the executive. Furthermore, one may criticise the fact that the President and each of the Ministers chose to be represented by different sets of counsel. At first blush, it may appear that there was no value to having individual teams as issues are the same. To their credit, argument presented was particularly focused and repetition was very limited, at least during oral argument. The issues are quite complex and do challenge constitutional conduct and the role played by each of the members of the executive concerned as well as the President as the head of the executive.

[239] Be that as it may, the key question is whether the cost order asked for is justified. WLC's counsel relied on the judgment of *Nkala and Others v Harmony Gold Mining Company Limited and Others*[153] to support the prayer for costs. Demonstrably, the work between WLC counsel was shared. This is a case that raises a host of diverse and complex issues. In *Nkala* the parties advised that the costs of nine counsel would not exceed that of three. In the circumstances, it seems just to order costs to include those of three counsel. Costs should only be ordered against the relevant State respondents.

[240] As regards the Esau action, costs should be paid by the second and third defendants, and such should include costs of two counsel. The suggestion by Esau's counsel that the first defendant's costs (Mr Esau's) should also be borne by the State cannot hold. The first defendant is not making common cause with the plaintiff nor abides by the decision of the Court, he opposes the relief vehemently. He wishes for the status *quo* to remain. In any event, he has not asked for costs. Esau's (plaintiff's) counsel took it upon himself to do so.

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[153] 2016 (5) SA 240 (GJ).

Concluding remarks

[241] A thought occurred as to whether the order made by this Court should not be referred to the Constitutional Court as envisaged by section 172(2)(a) of the Constitution for the reason that, the order declaring a failure to fulfil constitutional obligations by the State respondents, includes the President. Section 172(2)(a) provides that a High Court may make an order "*concerning the constitutional validity of ... any conduct of the President*" but that such an order is of no force unless confirmed by the Constitutional Court.

[242] The term "any conduct of the President" was discussed by the Constitutional Court in *Pharmaceutical Manufacturers*[154] where it held that this section "*is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State.*"

[243] However, the width of this section is not all encompassing as held in a later decision by the Constitutional Court in *Van Obo*.[155] There, the Court discussed *Pharmaceutical Manufacturers*, noting that—

> "*in that case this court was called upon to decide whether to confirm an order of the High Court that had declared invalid a proclamation by the President to bring into force an Act of Parliament. The Act concerned had provided that it would come into operation on a date to be determined by the President. The national legislation concerned required the President to take the positive step of issuing a proclamation. Clearly, only the President could exercise the power specially conferred on him by legislation. In other words, the President did not exercise executive authority together with other members of the Cabinet. It is that conduct which the court considered to be susceptible to confirmation. It must be said that whilst Pharmaceutical Manufacturers considered the conduct of the President to be a proper subject for confirmation in that case, it does not furnish the answer to the crisp question of which conduct of the President, if any, is not susceptible to confirmation under s 172(2)(a).*"[156]

[154] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) at para 56.
[155] *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).
[156] *Ibid* at para 30. (Own emphasis)

[244] The Court in *Van Obo*, distinguished the matter before it from *Pharmaceutical Manufacturers* and limited the breadth of section 172(2)(a) when it held that—

> *"to categorise all national executive functions at Cabinet level as 'conduct of the President' for the purposes of ss 167(5) and 172(2)(a), by mere virtue of the fact that the President is head of the national executive, is to misconstrue the true nature of the national executive function envisaged by Ch 5 of the Constitution. It may well be that the President has some residual authority as head of the national executive, but the primary responsibility lies with the government, and with the Ministers to whom a specific task has been assigned in accordance with ss 91 and 92 of the Constitution."*[157]

[245] Cases in which the validity of "conduct of the President" was referred to the Constitutional Court include instances where the President issued a proclamation to bring into force an Act of Parliament;[158] decided to appoint a commission of enquiry;[159] and decided to set aside death sentences.[160] All of these cases are instances of the President's *positive* conduct and where *only* the President's had the power to perform the conduct that was declared invalid.

[246] In *Van Obo*, the Court struck the matter that was referred to it in terms of section 172(2)(a) from the roll as it held that the conduct in question did not amount to "conduct of the President" and thus did not fall within section 172(2)(a). In that matter, the impugned conduct concerned a request for diplomatic intervention by government in terms of section 85(2) read together with section 92(1) of the Constitution, which made it clear that the Minister concerned bore the constitutional responsibility to execute the assigned powers and functions. As the President only had residual powers in that instance, it did not fall within section 172(2)(a) for the purposes of referral for confirmation.

[247] In the present matter, the President exercises executive authority, "*together with the other members of the Cabinet, by ... preparing and initiating legislation*" as per section

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[157] *Ibid* at para 41.
[158] *Pharmaceutical Manufacturers* (above n 154).
[159] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) (1999 (2) BCLR 175) in para 28.
[160] *Sibiya and Others v Director of Public Prosecutions, Johannesburg and Others* 2005 (5) SA 315 (CC).

85(2)(d) of the Constitution. This was confirmed in the *Women's Legal Centre Trust*,[161] where the Court, whilst examining whether it had exclusive jurisdiction over the subject-matter of the present case, held that "[*t]he responsibility for preparing and initiating legislation falls on the national executive as a whole, and not exclusively on the President acting as Head of State.*"

[248] Therefore, this case would appear to fall within the purview of the *Van Obo* limitation and not amount to 'any conduct of the President' for the purposes of referral for confirmation. Thus section 172(2)(a) would not apply and the matter would not be referred to the Constitutional Court.

[249] It is worth reminding the relevant branches of the State of the constitutional sanction to perform all their constitutional obligations diligently and without delay as required by section 237 of the Constitution. The issue of recognition and regulation of Muslim marriages has been outstanding for many years. It is accepted that the issues are of a complex and controversial nature. That, however, does not diminish the obligation imposed on the State by section 7(2) of the Constitution to, *inter alia*, fulfil the rights in Chapter 2 of the Constitution. Courts are required "*to ensure that this injunction is followed. An order issued to achieve this purpose therefore cannot be described as trenching upon the separation of powers*."[162]As Rogers J, in *Faro* predicted, "*there may come a time when, owing to continued lethargy or paralysis on the part of the executive promoters of legislation in this field, a court will need to intervene*"[163] referring to the slow pace at which the process of introducing legislation recognising and regulating Muslim marriages was moving.

[250] It is hoped that the executive and the legislature would act without delay in bringing about legislation so as to eradicate the continuous hardships faced by women and children in Muslim marriages highlighted in this judgment.

[251] Finally, appreciation is extended to each of the parties including *amici* for their well-prepared and helpful argument and for assiduously co-operating to limit the amount of

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[161] Above n 37 at para 23.
[162] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 217.

[163] *Faro* above n 31 at para 44

argument when such was called for. This is not an uncomplicated matter. The Court is also grateful for having been provided with a copy of the record and written argument in electronic format on tablet devices. This presented us with very useful logistical assistance.

Order

[252] In the result, the following orders are proposed:

1. It is declared that the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law ('Muslim marriages') as valid marriages and to regulate the consequences of such recognition.

2. It is declared that the President and the Cabinet have failed to fulfil their respective constitutional obligations as stipulated in paragraph 1 above and such conduct is invalid.

3. The President and Cabinet together with Parliament are directed to rectify the failure within 24 months of the date of this order as contemplated in paragraph 1 above.

4. In the event that the contemplated legislation is referred to the Constitutional Court by the President in terms of section 79(4)(b) of the Constitution, or is referred by members of the National Assembly in terms of section 80 of the Constitution, the relevant deadline will be suspended pending the final determination of the matter by the Constitutional Court;

5. In the event that legislation as contemplated in paragraph 1 above is not enacted within 24 months from the date of this order or such later date as contemplated in paragraph 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect:

   5.1 It is declared that a union, validly concluded as a marriage in terms of *Sharia* law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of *Sharia* law) be dissolved in accordance with

the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of section 7(3) shall apply to such a union regardless of when it was concluded; and

5.2 In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

(a) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just; and

(b) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

5.3 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.

5.4 The Department of Home Affairs and the Department of Justice shall publish a summary of the orders in paragraphs 5.1 to 5.2 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.

6. An order directing the Minister of Justice to put in place policies and procedures regulating the holding of enquiries by the Master of the High Court into the validity of marriages solemnised in accordance with the tenets of Islamic law is refused.

7. An order declaring the *pro forma* marriage contract attached as annexure "A" to the Women's Legal Centre Trust's founding affidavit, to be contrary to public policy is refused.

8. In respect of matters under case numbers 22481/2014 and 4466/2013, the President, the Minister of Justice and the Minister of Home Affairs are to pay the costs of the Women's Legal Centre Trust respectively, such costs to include costs of three counsel to the extent of their employment.

9. In respect of the matter under case number 13877/2015:

9.1 Ruwayda Esau's claim to a part of the Magamat Riethaw Esau's estate, if any, is postponed for hearing at trial along with Parts B and E of the particulars of claim.

9.2 The Cabinet and the Minister of Justice shall pay Ruwayda Esau's costs in respect of Claim A, such costs to include costs of two counsel to the extent of their employment.

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NP BOQWANA

Judge of the High Court

I agree and it is so ordered.

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S DESAI

Judge of the High Court

I agree.

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G SALIE-HLOPHE

Judge of the High Court

APPEARANCES

WLC v The President and Others

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For the Third Respondent:	Adv. MA Albertus SC and Adv. K Pillay
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For the Amicus for Muslim	
Assembly:	Adv. S Mahomed
Instructed by:	Webber Wentzel, Cape Town
For the Amicus for Islamic	
Unity Convention:	Adv. Nagia-Luddy and Mr M S Omar
Instructed by:	Z Omar Attorneys
For the Amicus for	
Commission for	
Gender Equality:	Adv. M Bishop, Adv. A Christians and

	Adv. C McConnachie
Instructed by:	Legal Resources Centre
For the Amicus for	
Jamiat (KZN):	Adv. E Vawda
Instructed by:	Kazi Attorney and Halday Attorneys, KZN

Faro v Marjorie Bingham N.O. and Others

For the Applicant:	Adv. N Bawa SC, Adv. O'Sullivan,
	Adv. M Adhikari and Adv. J Williams
Instructed by:	Women's Legal Centre Trust, Cape Town
For the Seventh and	
Eighth Respondents:	Adv. N Cassim SC, Adv. G Papier and
	Adv. M Davis
Instructed by:	State Attorney, Cape Town

R Esau v M R Esau and Others

For the Plaintiff:	Adv. J de Waal SC, Adv. A Newton and
	Adv. B C Wharton
Instructed by:	Parker and Khan Inc. Attorneys, Cape Town
For the First Defendant:	Adv. A Lawrence
Instructed by:	S Morgan & Associates, Cape Town
For the Second Defendant:	Adv. N Cassim SC, Adv. G Papier and

	Adv. M Davis
Instructed by:	State Attorney, Cape Town
For the Third Defendant:	Adv. A Gabriel SC and Adv. S Humphrey
Instructed by:	State Attorney, Cape Town
For the Amicus for Women's	
Legal Centre Trust:	Adv. N Bawa SC and Adv. J Williams
Instructed by:	Women's Legal Centre Trust, Cape Town