Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 400/17

In the matter between:-

FAREED MOOSA N.O.	**First Applicant**
AMINA HARNAKER	**Second Applicant**
FARIEDA HARNEKER	**Third Applicant**

and

NAZEER HARNAKER	**First Respondent**
ZAHRAA HARNAKER	**Second Respondent**
NAZIA LUDDY	**Third Respondent**
SAFAA LUDDY N.O.	**Fourth Respondent**
IKHLAAS BACHOOA	**Fifth Respondent**
FATIMA-ZAHRA BACHOOA	**Sixth Respondent**
SIHAM NADEEM N.O.	**Seventh Respondent**
SIHAM NADEEM N.O.	**Eighth Respondent**
SIHAM NADEEM N.O.	**Ninth Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Tenth Respondent**
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	**Eleventh Respondent**
THE REGISTRAR OF DEEDS, CAPE TOWN	**Twelfth Respondent**

and

THE WOMEN'S LEGAL CENTRE TRUST Amicus Curiae

JUDGMENT DELIVERED 14 SEPTEMBER 2017

LE GRANGE, J:

Introduction:

[1] In this unopposed application, the crisp legal issue for consideration is whether in view of the equality provisions in terms of s 9 of our Constitution, the provisions of s 2C(1) of the Wills Act, 7 of 1953 ("the Wills Act"), can be extended to protect surviving spouses in polygynous Muslim marriages.

[2] The Applicants are challenging the decision taken by the Twelfth Respondent refusing to register a portion of Erf 107088 Cape Town into the name of the Third Applicant. The Twelfth Respondent's refusal is premised on the meaning of the term 'surviving spouse' as contemplated in terms of s 2C(1) of the Wills Act. According to the Twelfth Respondent the only recognised surviving spouse of the deceased is the Second Applicant as they entered into a civil marriage in terms of the Marriages Act 25 of 1961. The Twelfth Respondent expressed the view that the meaning of a 'surviving spouse' in the Wills Act must be interpreted strictly and despite being married to the deceased by Muslim rites and lived in a polygamous relationship, the Third Applicant cannot be regarded as 'surviving spouse' as contemplated in the Wills Act.

The Background:

[3] The salient background facts underpinning this matter are uncontroversial. The deceased married the Second Applicant by Muslim rites on 10 March 1957. The deceased thereafter married the Third Applicant on 31 May 1964. Both marriages was solemnised by way of a marriage ceremony and took place in accordance with the tenets of Islamic Law. The marriage certificates evidencing their solemnisation of the marriages under Islamic Law were annexed to the papers filed of record.

[4] There is no dispute that the deceased, Second and Third Applicants' at all material times, practised the Islamic faith religiously and at the time of the deceased's death on 9 June 2014, were party to polygynous Muslim marriages. It needs to be mentioned that the Second Applicant also consented to the deceased's marriage to the Third Applicant. Nine children were born from both marriages.

[5] According to the undisputed facts, the deceased in 1982 applied for a home loan from a bank in order to purchase the current family home, Erf 107088 Cape Town. According to the papers filed of record, in order to qualify for such a loan the deceased needed to be married lawfully, as at the time under our legal system polygynous Muslim marriages were not recognised and were still treated as a common law crime.

[6] In August 1982, the deceased and the Second Applicant with the consent of the Third Applicant formalised their marriage under South African law. The said property was purchased and held in the names of the deceased and Second Applicant under Deed of Transfer T10603/88. Since then and until his death in 2014, the deceased lived with both wives and some of their children in the family home. The deceased's religious marriage to the Third Applicant was not formalised under the Civil Union Act 17 of 2006. Upon the deceased's death it followed that both marriages were terminated.

[7] The deceased in his Last Will and Testament ("the Will") dated 23 January 2011, expressly referred to his marriages to both women. In terms of the Will the deceased directed that his estate should devolve in terms of Islamic Law and that a certificate from the Muslim Judicial Council or any other recognised Muslim Judicial Authority shall be final and binding on his executors. To this end, the Muslim Judicial Council of South Africa did issue a certificate regarding the distribution of the estate. In terms of the Islamic distribution certificate, the deceased's estate was to be divided in $1/16^{th}$ shares to each of the Second and Third Applicant, 7/52 to each of the four surviving sons and 7/104 to the five surviving daughters.

[8] According to the First Applicant ("the Executor"), all the surviving children renounced their benefits due to them under the Will. In this regard all heirs of the deceased agreed and expressed their intention in writing to renounce all their benefits accruing to them in terms of the Will read with the

Islamic distribution certificate and stipulated that it be inherited in equal shares by the Second and Third Applicants. As a result of the renunciation, the Executor relied upon the provisions of s 2C(1) of the Wills Act. The Executor opted not to follow the Islamic Law with regard to renunciation.

[9] The Executor, then for the purposes of applying s 2C(1), considered both the Second and Third Applicant to be a 'surviving spouse'. According to the Executor, the First and Final Liquidation and Distribution Account ("L & D account") of the deceased's estate recorded that the Second and Third Applicant will each receive an equal share of the benefits renounced (namely, R273 347,30 per person). This calculation in the L & D account was accepted by the Eleventh Respondent ("the Master").

[10] The Executor then sought to effect registration of transfer, of the deceased's one half share of Erf 107088 Cape Town, which included that portion thereof which was renounced by the deceased's children.

[11] The Twelfth Respondent approved the registration of that portion of the benefits renounced by the deceased's descendants to the Second Applicant. According to the Twelfth Respondent the Second Applicant's marriage to the deceased was protected in terms of their civil marriage and as such was recognised as a 'surviving spouse' under s 2C(1).

[12] The Twelfth Respondent had however a different view on the Third Applicant. The Twelfth Respondent was of the view that all benefits renounced by the descendants of the deceased born of his marriage to the Third Applicant, should vest in the children of those descendants under s 2C(2). On this basis, the Twelfth Respondent decided that those proprietary benefits cannot be registered in the name of the Third Applicant under the Deeds Registries Act.

[13] The rationale underpinning the Twelfth Respondent's view, seems to be that the term 'surviving spouse' under s 2C(1) should be strictly interpreted to encompass spouses recognised under the Marriages Act and or the Civil Union Act. Despite these views, the Twelfth Respondent including the Tenth Respondent elected to abide the decision of this court.

[14] In the absence of any evidence or argument by the Twelfth Respondent or those in government qualified to do so, it is only the evidence and argument of the Applicants and that of the Amicus that can be considered.

<u>The relief:</u>

[15] The relief sought by the Applicants are wide in form and substance, and are the following:

(a) 'An Order that, in terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), section 2C(1) of the

Wills Act 7 of 1953 ('the Wills Act') is inconsistent with the Constitution and invalid to the extent that, for the purposes of the operation of section 2C(1), the term 'surviving spouse' therein does not include a husband or wife in a marriage that was solemnised under the tenets of Islamic Law (Shari'ah);

(b) An Order that, in terms of section 172(1)(a) of the Constitution, section 2C(1) of the Wills Act is inconsistent with the Constitution and invalid to the extent that, for the purposes of the operation of section 2C(1), the term 'surviving spouse' therein does not include more than one spouse as a 'surviving spouse' in any form of marriage to which section 2C(1) applies;

(c) An Order that 'surviving spouse' in section 2C(1) of the Wills Act encompasses in its meaning not only a surviving spouse in the legal sense but also every 'surviving' husband or wife ('spouse') who was married by Muslim rites to the deceased testator contemplated by section 2C(1), irrespective whether such marriage was de facto monogamous or polygamous;

(d) An Order that, in terms of section 172(1)(b) of the Constitution, it is just and equitable to read s 2C(1) of the Wills Act as including the underlined words:

'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. <u>For purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a de facto monogamous and polygamous union that is solemnised in accordance with Muslim rites.'</u>

(e) An Order setting aside as invalid the Twelfth Respondent's decision that the Third Applicant is not a 'surviving spouse' of the late Osman Harnekar ('the deceased') for purposes of receiving benefits under s 2C (1) of the Wills Act;

(f) An order directing and obliging the Twelfth Respondent to register the transfer of ERF 107088 Cape Town from estate of the deceased into the joint names of Second and Third Applicant as per Annexures FM7 read with FM8;

(g) That the Orders granted herein shall have no effect on the validity of any acts performed in respect of the administration of a testate estate that has been finally wound up under the Administration of Estates Act 66 of 1965 or any other similar statute by the date of this order.'

Argument:

[16] The Attorney, Dr Fareed Moosa appeared for the Applicants. He is also the Executor of the deceased's estate. The Attorney Ms. S Samaai appeared on behalf of the Amicus. I would like to express my gratitude to both for their extensive heads of argument. It was of great assistance in preparing this judgment.

[17] Dr Moosa's argument concentrated inter alia on the equality provision of the Constitution. He argued that the undisputed facts in this matter clearly demonstrate unfair discrimination in respect of widows as 'surviving spouses' in polygynous Muslim marriages. It was further contended that the deceased marriage to the Third Applicant was fully recognised under Islamic Law and in terms of the equality provision of s 9 of the Constitution, there could be no legal impediment against their union that was properly solemnised in accordance with the Muslim religious faith. Furthermore, the Third Applicant's marriage to the deceased could not be less significant than that of a civil marriage under the Marriages Act or an African customary marriage. Similarly,

the dignity of parties to a Muslim polygynous marriage cannot be less than that of parties to civil marriages and African customary marriages. It was also argued that the concept of 'surviving spouse' as currently understood and given effect to by the Twelfth Respondent in terms of s 2C(1) unfairly discriminates against the Third Applicant on the grounds of religion and marital status.

[18] Ms Samaai, on behalf of the Amicus argued that the core objective of the Women Legal Centre Trust ("WLC") is to advance and protect the human rights of all women in South Africa, particularly women who suffer many intersecting forms of disadvantage and discrimination, and in so doing wish to contribute and help with the redress of systematic discrimination and disadvantage against them.

[19] It was further contended that women affected by the non-recognition of Muslim marriages are especially vulnerable and marginalised compared to those married according to civil or customary law, as the Muslim women have to turn to religious leaders to adjudicate on their marital issues which, according to Ms Samaai, normally favours the men. In the absence of proper legislation to recognise Muslim marriages and its proprietary consequences, the women falling in this category ordinarily suffer hardship in a multiplicity of ways. Reference was also made to other reported matters where WLC was involved to advance and protect the rights of women in monogamous and polygynous Muslim marriages. To this end, reliance was placed on decided cases where the definition of 'surviving spouse' was extended to include women in monogamous and polygynous Muslim marriages to be entitled to maintenance under the Maintenance of Surviving Spouses Act 27 of 1990 (Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)) or to inherit in terms of the Intestate Succession Act 81 of 1987 (see Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC)).

[20] The WLC, in short, supported the relief sought by the Applicants.

The Wills Act:

[21] The starting point in this matter must be the relevant parts of s 2C of the Wills Act which provides as follows:

> *"2C Surviving spouse and descendants of certain persons entitled to benefits in terms of will*
>
> *(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.*
>
> *(2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates."*

[22] The Wills Act is silent with regard to the definition of 'survivor' or any variation thereof when used in relation to 'spouse'. Consequently, the Wills Act gives no express indication that its references to 'spouse' are intended to refer only to husbands and wives in a marriage formalised by the Marriage Act 25 of 1961, Recognition of Customary Marriages Act 120 of 1998, or Civil Union Act 17 of 2006.

[23] In fact, the Wills Act commenced on 1 January 1954. Section 2C thereof was enacted, with effect from 1 October 1992, by the Law of Succession Amendment Act, 43 of 1992. Thus, section 2C dates back to the pre-constitutional era, whereby the concept marriage, and by extension 'spouse', could only have been informed by the common law definition that was based on monogamy. In this regard see Seedat's Executors v The Master (Natal) 1917 AD 302; Ismail v Ismail 1983 (1) SA 1006 (A). The Recognition of Customary Marriages Act and Civil Union Act were clearly not in existence when s 2C(1) was enacted. It is therefore evident that Parliament did not intend to encompass within the radar of this term either a surviving husband and or wife of a marriage concluded under Islamic Law, where there are multiple surviving spouses.

[24] Accordingly, the view expressed by the Twelfth Respondent that the term 'surviving spouse' to whom the Legislature sought to afford any benefit under section 2C(1) refers to a husband and or wife in a monogamous civil marriage as no provision was made for the inclusion therein for persons married in a Muslim polygynous marriage, cannot entirely be disregarded.

The issues:

[25] The question now is whether the exclusion of spouses in polygynous marriages as envisage by s 2C(1) and enforced by the Twelfth Respondent, violates the equality provision as contemplated in s 9 of the Constitution.

[26] Our Constitutional Court has in the past on numerous occasions dealt with the challenges to legislative enactments that said to have infringed the right to equality under s 9 of the Constitution. The result is a body of jurisprudence that has developed into a comprehensive set of principles. In this regard see Hassam *supra* at para [22] and the cases referred to therein. In Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC) at

para 27, Moseneke J as he then was, detailed the duty on every court when embarking on analysis in terms of s 9 of the Constitution. He stated that it is-

'incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution'.

[27] The Third Applicant challenges the constitutionality of the narrow interpretation of 'surviving spouse' applied by the Twelfth Respondent on the basis that it violates her fundamental rights to inter alia equality and dignity in the Constitution. The relevant provisions of section 9 read as follows:

> '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). […]
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[28] The term 'surviving spouse' in s 2C(1) in no uncertain terms differentiates between a surviving spouse married in terms of the Marriage Act and those surviving spouse(s) married in terms of Islamic Law. Whereas

s 2C(1) confers benefits on the former group, it does not for the latter. Section 2C(1) also differentiates between a surviving spouse in monogamous civil marriages and those in polygynous Muslim marriages. The former group falls in the net of s 2C(1), the latter not. To the extent that s 2C(1) confers benefits on surviving spouses in polygamous customary marriages by reason of the Recognition of Customary Marriages Act, s 2C(1) also differentiates between surviving spouses in polygamous customary unions and those in polygynous Muslim marriages. Whereas the former group is covered by s 2C(1), the latter is not.

[29] It is now accepted in our constitutional dispensation that not every instance of differentiation is tantamount to discrimination. In this regard see Hassam *supra* para [23]. However, in casu there can be no doubt that the differentiation mentioned above amounts to unfair discrimination that is in breached of s 9(3) of the Constitution.

[30] The issue now is whether the differentiation mentioned above bears a rational connection to a legitimate government purpose or not. In the present instance no such connection exists. The differentiation exists simply because at the time s 2C(1) was enacted, polygynous unions solemnised under the tenets of the Muslim faith was void on the grounds of it being contrary to accepted norms and customs prevailing at the time. This approached is no longer accepted and sustainable in our society that is based on democratic values, social justice and fundamental human rights as enshrined in our Constitution. In this regard see Daniels *supra* at para [54].

[31] The facts *in casu* in no uncertain terms demonstrate that s 2C(1) is unfairly discriminatory in nature and or effect. It includes the Second Applicant by reason only that she is married in a civil union and excludes the Third Applicant because she is married by Islamic Law. Moreover, it includes within its ambit widows and widowers in a monogamous civil marriage and excludes any surviving spouse from a polygynous Muslim marriage (such as the Third

Applicant) and it may also be interpreted to include within its ambit spouses in a lawful and legally recognised polygamous customary marriage, but excludes women in a polygynous Muslim marriage.

[32] In my view there is no doubt that the Third Applicant is directly discriminated against, premised upon her religion and marital status and in the present context s 2C(1) is withholding benefits from a certain group of persons, namely, those woman in polygynous Muslim marriages.

[33] It follows that the exclusion of widows in polygynous Muslim marriages from the protection of s 2C(1) is constitutionally unacceptable and unjust as the provision affords a widow in a civil monogamous marriage some benefits but deny the same to a widow in a Muslim polygynous marriage.

[34] In Hassam *supra* at para [48], the court held that '*the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word 'spouse' a broad and inclusive construction'*. This dictum is apposite in the present instance. To read the words 'surviving spouse' so as to include multiple spouses in a polygynous marriage would be a significant departure from the ordinary common meaning of the words as used in the Wills Act and understood by the Twelfth Respondent. Moreover, it would bring about parity and equal treatment of polygynous marriages under our law and will ensure that the same benefit and protection is accorded to women married to the same husband in polygynous marriages under Islamic Law.

[35] The words 'surviving spouse' as it is currently used in the Wills Act is not capable of being understood to include more than one spouse to a Muslim marriage and it follows that words needs to be read in order to cure the defect. The constitutional defect in s 2C(1) is manifest and constitutes an unjustifiable infringement of s 9(3) of the Constitution.

Appropriate Remedy:

[36] Section 172 of the Constitution requires a court, when deciding a constitutional matter within its power, to declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. It further provides that a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity for any period and on any conditions to allow a competent authority to correct the defect. It follows that litigants in these matters be granted effective relief and that it is undesirable to restrict the relief to the litigants before a court. (See Hassam *supra* at para [51] and the cases referred to therein.)

[37] The defect, in my view, can only be cured by a reading-in of words that the term 'surviving spouse' in section 2C(1) of the Wills Act encompasses in its meaning not only a surviving spouse in the legal sense but also every 'surviving' husband or wife who was married by Muslim rites to a deceased testator contemplated by section 2C(1), irrespective whether such marriage was *de facto* monogamous or polygynous. This approach was also adopted in Hassam *supra* para [57]. It follows that the Applicants are entitled to the relief sought in their Notice of Motion.

[38] The Application succeeds with no order as to costs.

[39] In the result the following order is made:

(a) In terms of section 172(1)(a) of the Constitution, section 2C(1) of the Wills Act is declared inconsistent with the Constitution and invalid only:

(i) to the extent that, for the purposes of the operation of section 2C(1), the term 'surviving spouse' therein does not include a husband or wife in a marriage that was solemnised under the tenets of Islam (Shari'ah); and

(ii) to the extent that, for the purposes of the operation of section 2C(1), the term 'surviving spouse' therein does not include multiple female spouses who were married to a deceased testator under polygynous Muslim marriages.

(b) In terms of section 172(1)(b) of the Constitution, it is just and equitable to read section 2C(1) of the Wills Act as including the underlined (words):

'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. <u>For purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a *de facto* monogamous and polygynous Muslim marriage solemnised under the religion of Islam.'</u>

(c) The Twelfth Respondent's decision that the Third Applicant is not a 'surviving spouse' of the late Osman Harnekar for purposes of receiving benefits under section 2C (1) of the Wills Act falls to be reviewed and set aside.

(d) The Third Applicant is declared a 'surviving spouse' of the late Osman Harnekar in whom benefits vest under section 2C(1) of the Wills Act.

(e) The Registrar of Deeds, Cape Town is directed to register transfer of ERF 107088 Cape Town from estate of the late Osman Harnekar into the joint names of Second Applicant and Third Applicant.

(f) None of the Orders granted herein shall affect the validity of any act performed in respect of the administration of a testate estate that has been finally wound up under the Administration of Estates Act 66 of 1965 or any other similar statute by the date of this order.

(g) The orders in paragraphs (a) – (f) are suspended pending the confirmation thereof by the Constitutional Court in terms of s 15(1)(a) of the Superior Courts Act, 10 of 2013.

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LE GRANGE, J