THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER VS WOMEN'S LEGAL CENTRE TRUST AND OTHERS

The neutral citation is:
President of the RSA and Another v Women's Legal Centre Trust and Others; *Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (Case no 612/19) [2020] ZASCA 177 (18 December 2020)

Judgement of the Supreme Court of Appeal delivered on 18 December 2020.

In this matter the Law Society of South Africa (LSSA) made submissions as amicus curiae. The President of the LSSA, Mvuzo Notyesi commented as follows:

This is a judgement to be welcomed by thousands of women and children in the country. Many women and minor children did not benefit from the protections provided in the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979. This legislation did not recognise marriages solemnised in accordance with Muslim marriages as valid marriages for all purposes in South Africa.

It was submitted that the legislation also offended the following sections of the Constitution: s 9 (the right to equality); s 10 (the right to human dignity); s 28 (Children's rights) and s 34 (the right to have access to courts).

It was pointed out that the Divorce Act failed to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of a Muslim marriage in the same manner as the Act provides to safeguard the welfare of children of other marriages that are being dissolved.

Muslim marriages have never been recognised nor regulated by South African law as valid marriages despite 26 years under a democratic constitutional dispensation that is founded, *inter alia*, on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. The historical disadvantages, hardships and prejudice for parties to Muslim marriages, especially Muslim women and children, continued to prevail.

The SCA approved of the following judgements:

- *Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)*
- *Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC)*

The SCA quoted from the judgement of Moseneke J in the Daniels case as follows:

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

This then set the tone for the whole judgement and the proper application of our constitutional values.

An issue raised in this matter is that the state had failed to recognise and regulate marriages solemnised in accordance with the tenets of *Sharia* law and was consequently in breach of ss 7(2), 9(1), 9(2), 9(3), 9(5), 10, 15(1), 15(3), 28(2), 31 and 34 of the Constitution. The first respondent argued that s 7(2) of the Constitution obliged the state to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages, and that the President and Cabinet had failed to fulfil this obligation.

An important development in the matter happened when, during argument, the appellants made concessions that had a profound impact on the determination of the appeal. After having had the opportunity to take specific instructions, counsel for the appellants placed on record that they conceded that the Marriage Act and the Divorce Act infringed the constitutional rights to equality, dignity and access to justice of women in Muslim marriages in that they failed to recognise Muslim marriages as valid marriages for all purposes. The appellants conceded too that the rights of children born in Muslim marriages were, under s 28 of the Constitution, similarly infringed.

The court found that 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. The question arises whether the differentiation amounts to discrimination on any of the listed grounds in s 9 of the Constitution. The court found that there was discrimination.

As for the rights of children; the court found that the rights to the protection of children from Muslim marriages are infringed in that on the dissolution of the marriage they are not afforded the ‘automatic’ court oversight of s 6 of the Divorce Act in relation to their care and maintenance. In addition, they are not protected by a statutory minimum age for consent to marriage. Neither s 24 of the Marriage Act nor s 12(2)*(a)* of the Children’s Act 38 of 2005 are applicable. The court found that it goes without saying that the non-recognition of Muslim marriages for women infringes the right to access to courts under s 34 of the Constitution.

In light of the concessions made by the applicants, the following issues were left for decision:

(a) Whether the Constitution places an obligation on the state to prepare, initiate, introduce and bring into operation legislation to recognise Muslim marriages as valid marriages and to regulate the consequences of such recognition;

(b) whether the provisions in question are inconsistent with s 15 of the Constitution; and

(c) whether the interim measure should have retrospective operation as contended for.

The first question was answered in the affirmative in the High Court. The SCA disagreed on the basis of the principle of separation of powers. Accordingly, the order of the High Court was set aside.

As for the second question: The court found that the declarations of unconstitutionality should not contain any reference to s 15 of the Constitution.

The third question, regarding retrospectivity was not answered in favour of the first respondent. The court found that it was the prerogative of Parliament to determine if and to what extent the legislation it enacts regarding Muslim marriages, should apply retrospectively.

The SCA found that the non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children in particular, including, their right to dignity, to be free from unfair discrimination, their right to equality and to access to court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children.

In the result, the court made the following order. We do not set out the whole order but only the most critical part thereof, the full text of the order is available in the judgement.

1 The appeal and the cross-appeals succeed in part and the order of the court a quo is set aside and replaced with the following order:

‘1.1 The Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

1.2 It is declared that s 6 of the Divorce Act is inconsistent with ss 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.

1.3 It is declared that s 7(3) of the Divorce Act is inconsistent with ss 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.

1.4 It is declared that s 9(1) of the Divorce Act is inconsistent with ss 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the

patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages.

1.5 The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation.

1.6 The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.

1.7 The declarations of invalidity in paras 1.1 to 1.4 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in para 1.7, it is declared that a union, validly concluded as a marriage in terms of Sharia law and subsisting at the date of this order, or, which has been terminated in terms of Sharia law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

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

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

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

1.9 It is declared that, from the date of this order, s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.

1.10 For the purpose of applying paragraph 1.9 above, the provisions of ss 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis, to Muslim marriages.'