CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 251/17

In the matter between:

FAREED MOOSA N.O.	First Applicant
AMINA HARNEKER	Second Applicant
FARIEDA HARNEKER	Third Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE	Second Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent
TRUSTEES OF THE WOMEN'S LEGAL CENTRE TRUST	Amicus curiae

Neutral citation:	*Moosa and Others v Minister of Justice and Correctional Services and Others* [2018] ZACC 19
Coram:	Mogoeng CJ, Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J
Judgment:	Cachalia AJ (unanimous)
Decided on:	29 June 2018

Summary: Wills Act 7 of 1953 — constitutionality of section 2C(1) — definition of "surviving spouse" — spouses in polygamous Muslim marriages excluded — unconstitutional

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ORDER

On application for confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town:

1. The declaration of constitutional invalidity of section 2C(1) of the Wills Act 7 of 1953 by the High Court of South Africa, Western Cape Division, Cape Town, is confirmed.
2. Section 2C(1) of the Wills Act 7 of 1953 is to be read as including the following 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 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.</u>"
3. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of section 2C(1) of the Wills Act 7 of 1953 unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.
4. The Women's Legal Centre Trust is admitted as amicus curiae.

5. There is no order as to costs.

JUDGMENT

CACHALIA AJ (Mogoeng CJ, Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

Introduction

[1] On 14 September 2017, the High Court of South Africa, Western Cape Division, Cape Town (High Court) delivered a judgment (per Le Grange J) in which it declared section 2C(1) of the Wills Act[1] constitutionally invalid for its omission to recognise the right of a "surviving spouse", married by Muslim rites in a polygamous relationship, to the benefits of her deceased husband's will.[2] Section 2C reads as follows:

> "**Surviving spouse and descendants of certain persons entitled to benefits in terms of will**
>
> (1) 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.
>
> (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

[1] 7 of 1953.

[2] *Moosa N.O. v Harneker* [2017] ZAWCHC 97; 2017 (6) SA 425 (WCC) (High Court judgment).

> provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates."

Parties

[2] The first applicant is Dr Fareed Moosa, an attorney and the executor of the estate of Mr Osman Harneker (the deceased). He and the surviving spouses of the deceased, Ms Amina Harneker (second applicant) and Ms Farieda Harneker (third applicant), ask this Court, in terms of rule 16(4) of its Rules, to confirm the order of the High Court, which was granted without opposition. The first and second respondents – the Master of the High Court, Western Cape and the Registrar of Deeds, Cape Town – do not oppose the confirmation application before this Court. In the circumstances, and after consultation with the parties, this Court considered it unnecessary to hold an oral hearing.[3]

[3] The applicants made full written argument supporting the confirmation application. Written submissions were also filed by the first and second respondents to support the confirmation. The Women's Legal Centre Trust (WLC), the amicus curiae in the High Court proceedings, also applied to this Court for admission as amicus curiae. Its submissions provided valuable context regarding the experiences of Muslim women in South Africa and drew attention to South Africa's international law obligations. These submissions were useful and different to those of the parties. The WLC should therefore be admitted as amicus curiae. I am grateful for the assistance of all of the parties.

The Background

[4] The facts giving rise to the litigation in this matter are recited accurately in the judgment of the High Court.[4] They make compelling reading. The deceased married

[3] Rule 13(2) of the Rules of the Constitutional Court, GN R1675 *GG* 25726 (31 October 2003) provides that "[o]ral argument shall not be allowed if directions to that effect are given by the Chief Justice".

[4] High Court judgment above n 2 at paras 3-14.

the second applicant in 1957 and the third applicant in 1964. Both marriages were solemnised in ceremonies conducted under the tenets of Islamic law. Nine children were born of these unions.

[5] In 1982, the deceased applied for a bank loan to fund the purchase of the current family home. But, because Muslim marriages were not legally recognised, he was advised to formalise his marriage to the second applicant under South African law in order for the bank loan to be approved. He did so, with the consent of the third applicant, and then bought the property with the loan he obtained. The deed of transfer therefore reflected the names of the deceased and the second applicant.

[6] Since then the deceased lived with both his wives and some of their children in their family home until his death in 2014. He prepared a will three years earlier in which he referred to both marriages. Its terms direct his estate to be distributed under Islamic law. The Muslim Judicial Council certified that this required the estate to be divided in 1/16 shares to each of his wives, 7/52 to each of his sons and 7/104 to his daughters.

[7] The first applicant confirms, in his capacity as executor of the deceased estate, that all the children renounced the benefits due to them under the will. He specified that their shares must be distributed equally to the second and third applicants. In this regard section 2C(1) of the Wills Act entitles a "surviving spouse" to the benefit of a will if the testator's descendants renounce their rights to it.[5]

[8] Thus, acting purportedly in terms of this provision, the executor regarded both wives as surviving spouses entitled to benefit equally after their children renounced their benefits. He lodged a liquidation and distribution account with the second respondent. It recorded that both spouses would receive an equal share of the

[5] See full text of section 2C above at [1].

benefits renounced, which amounted to R273 347.30 for each. The Master accepted the calculation.

[9] The executor then sought to register the deceased's half share in the family property, which included the portion renounced by his descendants born of the marriage to the second applicant. The third respondent approved the registration for the second applicant. But he declined to do so for the third applicant because he believed that the benefits renounced by the deceased's descendants born of his marriage to the third applicant vest in the children of those descendants, and not the third applicant, as section 2C(2) envisages. The rationale underpinning his view was that the term "surviving spouse" in section 2C(1) should be interpreted strictly to cover spouses recognised formally under this country's laws.[6]

The High Court

[10] The applicants took issue with the interpretation that the Registrar of Deeds placed on the words "surviving spouse" in section 2C(1) of the Wills Act. They contended that it violated the third applicant's rights to equality and dignity in sections 9 and 10 of the Constitution, respectively.[7] The High Court upheld their

[6] High Court judgment above n 2 at para 13. Spouses are only recognised formally under South African law when legislation makes provision for the official registration of their union. The Marriage Act 25 of 1961, the Civil Union Act 17 of 2006, and the Recognition of Customary Marriages Act 130 of 1998 all provide for the formal registration of unions in terms of these statutes. In contrast, there is no legislation that provides for the registration of Muslim marriages.

[7] The relevant provisions of section 9 of the Constitution 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)."

Section 10 of the Constitution reads as follows:

contention. Relying on this Court's equality jurisprudence concerning, among others, the proprietary consequences of Muslim marriage in the context of intestate succession and maintenance for surviving spouses,[8] the High Court reasoned – correctly in my view – as follows:

(a) The phrase "surviving spouse" in the section dates back to the pre-constitutional era when it plainly contemplated a partner in a common law monogamous union. It therefore cannot be interpreted to include multiple surviving spouses within its ambit.

(b) Section 2C(1) thus differentiates between surviving spouses married in terms of the Marriage Act[9] upon whom benefits are conferred and those married under Islamic Law, who are not recognised as spouses.[10]

(c) The section also discriminates between surviving spouses in monogamous civil marriages and those in Muslim polygamous marriages; only the former fall within its ambit.[11]

(d) To the extent that section 2C(1) applies to surviving spouses in polygamous customary marriages in terms of the Recognition of Customary Marriages Act, the section also differentiates between surviving spouses in customary unions and those in polygamous Muslim marriages. African Customary Law marriages fall within the section's remit, but Muslim marriages do not.[12]

"Everyone has inherent dignity and the right to have their dignity respected and protected."

[8] See *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC) at para 48; *Daniels v Campbell N.O.* [2004] ZACC 14; 2004 (5) SA 572 (CC); 2004 (7) BCLR 735 (CC) at para 54 and *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 27.

[9] 25 of 1961.

[10] High Court judgment above n 2 at para 28.

[11] Id.

[12] Id. As stated in n 6 above, the Recognition of Customary Marriages Act now legally recognises polygamous customary marriages concluded under African Customary Law by providing a statutory mechanism for the formal registration of these marriages. The effect of this is that registered customary law polygamous marriages fall within the section's ambit since partners in an African Customary Law marriage are "spouses" in a legally

(e) The differentiation referred to in the preceding paragraphs bears no rational connection to a legitimate governmental purpose and therefore constitutes unfair discrimination in breach of section 9(3) of the Constitution.

(f) In this case, section 2C(1) unfairly discriminates against the third applicant by recognising the second applicant as a "surviving spouse" by virtue of her civil union with the deceased, but excludes the third applicant only because hers is an Islamic marriage. It also denies her the protection afforded to polygamous customary marriages. It is thus a clear case of direct discrimination on the grounds of her religion and her marital status.

Equality challenge

[11] As mentioned at the outset, the first respondent does not oppose the confirmation of the order and has not attempted to justify the infringement of the third applicant's right to equality under section 36 of the Constitution. And I can think of no justification. The High Court accordingly declared section 2C(1) of the Wills Act to be inconsistent with the Constitution and invalid, but limited the declaration's retrospective effect so as not to affect the validity of any estates that have been finally wound up. It also considered it appropriate not to restrict the relief only to the litigants before the Court.[13]

[12] As regards the defect in section 2C(1), the High Court concluded that it could only be cured by reading into the phrase "surviving spouse" a meaning that encompasses "every surviving husband or wife who was married by Muslim rites to a deceased testator . . . irrespective whether such marriage was de facto monogamous or

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recognised marriage. No similar legislative provision has been made for the formal registration of Muslim marriages to date. They are therefore excluded from the scope of section 2C(1) of the Wills Act.

[13] *Hassam* above n 8 at para 51.

[polygamous]".[14] In summary, the High Court concluded that the meaning of the phrase "surviving spouse" as applying only to monogamous unions violated the third applicant's right to equality. I endorse its reasoning in this regard fully. As submitted by the WLC, this accords with South Africa's obligation to eliminate discrimination against women as set out in the Convention on the Elimination of All Forms of Discrimination against Women, which enjoins state parties to—

> "pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake . . . [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[15]

Dignity challenge

[13] However, the High Court did not deal pertinently with the third applicant's dignity challenge, perhaps because it usually and self-evidently underlies any equality complaint. As this Court has stated in *Robinson*:

> "Dignity is an underlying consideration in the determination of unfairness. Thus in the *Harksen* case, this Court held that '[t]he prohibition of unfair discrimination in the [equality clause of the] Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner'."[16]

[14] So I shall deal with the right to dignity briefly.

[15] At the heart of the third applicant's dignity argument is the recognition of the importance of marriage and family as social institutions in our society. In *Dawood*, this Court recognised that:

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[14] High Court judgment above n 2 at para 37.

[15] UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p 13 at Article 2(f).

[16] See *Volks N.O. v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) (*Robinson*) at para 79.

> "The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance."[17]

[16] The non-recognition of her right to be treated as a "surviving spouse" for the purposes of the Wills Act, and its 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.

Relief sought

[17] The High Court made the following order:

> "(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

[17] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 37.

(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 [polygamous] 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 [polygamous] 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 Harneker 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 Harneker 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 . . . Cape Town from estate of the late Osman Harneker 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 section 15(1)(a) of the Superior Courts Act, 10 of 2013."

[18] In addition to the confirmation of the High Court's order, the applicants also called upon this Court to rule on how section 2C(1) should apply practically so that a fair distribution of assets may occur between spouses. The applicants suggest that a finding that assets should always be divided equally among surviving spouses would

advance the value of equality. But a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to testate succession. It would therefore be ill-advised for this Court to make any such pronouncement. If the division of assets in a particular will offends public policy, which is now rooted in our Constitution and its enshrined values, then an affected individual is entitled to apply to the High Court for relief.[18]

[19] The respondents and the amicus also submitted that an addition should be made to the order to the effect that, should any serious administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order, as was done in *Ramuhovhi*.[19] I do not think this addition is warranted in this Court's order in the present case because the retrospectivity of the order is appropriately limited, and the applicants have not requested that it should be included.

[20] I would accordingly confirm the order of the High Court.

Order

[21] The following order is made:

1. The declaration of constitutional invalidity of section 2C(1) of the Wills Act 7 of 1953 by the High Court of South Africa, Western Cape Division, Cape Town, is confirmed.
2. Section 2C(1) of the Wills Act 7 of 1953 is to be read as including the following underlined words:

[18] See *Harper v Crawford N.O.* [2017] ZAWCHC 78; 2018 (1) SA 589 (WCC) at para 14 and *Minister of Education and Another v Syfrets Trust Ltd N.O.* [2006] ZAWCHC 65; 2006 (4) SA 205 (C); 2006 (10) BCLR 1214 (C) at para 24.

[19] *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC) at para 65.

"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. 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."

3. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of section 2C(1) of the Wills Act 7 of 1953 unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.
4. The Women's Legal Centre Trust is admitted as amicus curiae.
5. There is no order as to costs.

For the Applicants:	F Moosa of Fareed Moosa & Associates Inc
For the First and Second Respondents:	K Pillay instructed by the State Attorney
For the Amicus Curiae:	S Kazee instructed by the Women's Legal Centre