CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/21

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
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Sixth Respondent
COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	Seventh Respondent
LAJNATUN NISAA-IL MUSLIMAAT (ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)	Eighth Respondent
and	
COMMISSION FOR GENDER EQUALITY	Intervening Party
and	
MUSLIM ASSEMBLY CAPE	First Amicus Curiae

UNITED ULAMA COUNCIL OF SOUTH AFRICA Second Amicus Curiae

Neutral citation: *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Tlaletsi AJ (unanimous)

Heard on: 5 August 2021

Decided on: 28 June 2022

Summary: Muslim marriages — non recognition — infringement of rights to dignity, equality, access to courts and principle of best interests of the child

Constitutional invalidity — Divorce Act 70 of 1979 — Marriage Act 25 of 1961 — retrospectivity

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the Supreme Court of Appeal:

1. The Supreme Court of Appeal's order of constitutional invalidity is confirmed:
    1.1. The Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) which have not been registered as civil

marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.

1.2. It is declared that section 6 of the Divorce Act is inconsistent with sections 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 born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provides for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved.

1.3. It is declared that section 7(3) of the Divorce Act is inconsistent with sections 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 section 9(1) of the Divorce Act is inconsistent with sections 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 that are dissolved.

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

1.6. The declarations of invalidity in paragraphs 1.1 to 1.5 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 initiating and 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.

1.7. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, 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 section 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:

(i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, 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.

1.8. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that, from the date of this order, section 12(2) of the Children's Act 38 of 2005 applies to a prospective spouse in a Muslim marriage concluded after the date of this order.

1.9. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, for the purpose of

paragraph 1.8 above, the provisions of sections 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.

1.10. 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.

1.11. The Department of Home Affairs and the Department of Justice and Constitutional Development shall publish a summary of the orders in paragraphs 1.1 to 1.10 above widely in newspapers and on radio stations, whichever is feasible, without delay.

2. The conditional cross appeal by the Women's Legal Centre Trust, and the appeals by the South African Human Rights Commission and Commission for Gender Equality are dismissed.

3. The President and the Minister of Justice and Constitutional Development must pay the Women's Legal Centre Trust's costs of this application, including the costs of two counsel.

JUDGMENT

TLALETSI AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Theron J, and Tshiqi J concurring):

Introduction

[1] This application concerns the persisting non-recognition of marriages solemnised in accordance with the tenets of *Sharia* law (Muslim marriages), which has resulted in the infringement of fundamental rights of parties to Muslim marriages, and Muslim women and children in particular, for far too long. The Women's Legal Centre

Trust (WLCT) has asked this Court to confirm an order of the Supreme Court of Appeal that declared certain provisions of the Marriage Act[1] and the Divorce Act[2] unconstitutional. The WLCT has asked that in confirming such declaration, this Court grants relief as extensively as possible, noting that if the order for the declaration of invalidity only applies prospectively, a number of Muslim women will continue to experience grave injustice.

[2] As a separate conditional cross-appeal, the WLCT has asked that in the event that this Court declines to confirm the order of constitutional invalidity, the earlier order of the High Court of South Africa, Western Cape Division, Cape Town, which effectively declared that the state is obligated in terms of section 7(2) of the Constitution to enact legislation to recognise Muslim marriages and to regulate the consequences of such recognition, be reinstated.

Parties

[3] The applicant in this matter is the WLCT, which brought this application in the public interest.

[4] The first and second respondents are the President of the Republic of South Africa and the Minister of Justice and Constitutional Development, respectively (state parties). The third to fifth respondents, the Minister of Home Affairs, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, respectively, are not participating in these proceedings.

[5] The sixth respondent is the South African Human Rights Commission (SAHRC). The seventh respondent, which did not participate in the proceedings, is the Commission for the Promotion and Protection of the Rights of Cultural, Religious and

[1] 25 of 1961.

[2] 70 of 1979.

Linguistic Communities. Lajnatun Nisaa-il Muslimaat (Association of Muslim Women of South Africa) is the eighth respondent.

[6] The Commission for Gender Equality[3] (CGE) has been admitted as an intervening party and the Muslim Assembly Cape[4] (MAC) and the United Ulama Council of South Africa[5] (UUCSA) have been admitted as amici curiae (friends of the court).

Background

[7] This application has its genesis in three applications brought in the High Court of South Africa (Western Cape Division) by the WLCT (WLCT matter), Ms Tarryn Faro (Faro matter) and Ms Ruwayda Esau (Esau matter). The matters were consolidated for hearing before a Full Court.[6] It is the judgment of that Court that was taken on appeal to the Supreme Court of Appeal. A brief background of the three matters is apposite.

WLCT matter

[8] In December 2014, the WLCT brought an application in the High Court to declare that Parliament, the President and Cabinet failed to protect, promote, and fulfil the rights in section 9(1), (2), (3) and (5), section 10, section 15(1) and (3), section 28(2), section 31 and section 34 of the Constitution by not enacting legislation that recognises and regulates Muslim marriages.[7] It asked the High Court to order the

[3] CGE is a Chapter 9 institution with the mandate to promote respect for gender equality as well as the protection, development and attainment of gender equality in South Africa.

[4] MAC is a community-based organisation for Muslims and the wider community in Cape Town. The purpose of the organisation is to consolidate and strengthen families through education, undertake community development for disadvantaged people, implement anti-poverty initiatives and provide guidance in all spheres of social, religious, educational and cultural life.

[5] The UUCSA is a national religious body that is responsible for protecting and safeguarding the religious affairs of Muslims in South Africa.

[6] *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham N.O.; Esau v Esau*; 2018 (6) SA 598 (WCC) (High Court judgment).

[7] In 2009, the WLCT brought an application for direct access to this Court seeking substantially the same orders it now seeks. The application for direct access was dismissed. This Court was in favour of a multistage litigation

President and Parliament to fulfil their obligations within 12 months, alternatively to declare the Marriage Act, Divorce Act and the Recognition of Customary Marriages Act[8] inconsistent with the Constitution for failing to recognise the validity of Muslim marriages.

Faro matter

[9] In 2013, Ms Faro, represented by the WLCT, brought an application in the High Court against the executrix of the estate of her late husband, Mr Moosa Ely, who was married to her on 28 March 2008 in terms of *Sharia* law. During 2009 Mr Ely was diagnosed with lung cancer. Ms Faro cared for him during his illness. On 24 August 2009, the two had an argument about Mr Ely's alleged failure to give her money for food. After the argument Mr Ely took Ms Faro to a home of an Imam[9]. Mr Ely told the Imam that he was sick and tired of Ms Faro and requested the Imam to pronounce a *Talãq*[10]. Without talking to Ms Faro, the Imam gave Mr Ely a *Talãq* certificate. Ms Faro was at the time seven months pregnant with their second child.

[10] The *Talãq* was subsequently revoked during the "*Iddah*"[11] period when Mr Ely and Ms Faro resumed intimate marital relations. Mr Ely passed away on 4 March 2010, while they were living together as husband and wife. On 21 April 2010, Ms Faro was appointed as the executrix of her late husband's deceased estate. Notwithstanding this, Ms Naziema Bardien, Mr Ely's stepdaughter of his previous wife, unbeknown to

process and concluded that the ventilation of the difficult issues before the High Court and the Supreme Court of Appeal would be beneficial. This Court was also of the view that multistage litigation would ensure that the views of the interested organisations, and the evidence that may be germane to their contentions, would be properly considered. See *Women's Legal Centre Trust v President of RSA* [2009] ZACC 20; 2009 (6) SA 94 (CC).

[8] 120 of 1998.

[9] Imam in a general sense refers to a person who leads Muslim worshippers in prayer. It also refers to the head of the Muslim community. (Definition, Concept, History, and Meaning- Encyclopaedia Britannica).

[10] *Talãq* is an Islamic divorce effected by the husband's enunciation of the word "*Talãq*" constituting a formal repudiation of his wife. (Oxford Dictionary of English).

[11] *Iddah* is the waiting period before the divorce is finalised. According to Sharia law *Iddah* is intended to give the husband time to reconsider his decision. Since Ms Faro was pregnant, the *Iddah* period would have expired when she gave birth to the child she was carrying.

Ms Faro, approached the Muslim Judicial Council[12] (MJC) which at her behest issued a certificate of annulment of the marriage between Mr Ely and Ms Faro. Ms Bardien took the certificate to the office of the Master of the High Court. The Master then informed Ms Faro that the estate could not be wound-up until the dispute with regard to her marital status had been resolved. Ms Faro deposed to an affidavit alleging her reconciliation with Mr Ely after the *Talãq* certificate was issued by the Imam. She obtained corroborating affidavits from the social worker and Tashrick Ely, a 21 year old son of the deceased from a previous marriage. On the basis of this information, the MJC issued a letter stating that Ms Faro and the deceased were married at the time of his death.

[11] Following this development, Ms Bardien approached Tashrick to file a further contradictory affidavit denying that Mr Ely and Ms Faro had reconciled. The affidavit was presented to the MJC which then issued a letter withdrawing its previous letter and confirming that the *Talãq* was valid. On 7 December 2011, following a meeting with the MJC, the Master resolved that the marriage had been validly terminated. On 10 April 2012, one Ms Bingham was appointed as the executrix of the deceased estate and she proceeded to wind-up the estate. Ms Faro was excluded from inheriting from the deceased's estate. Ms Faro objected to the liquidation and distribution account, but her objection was dismissed.

[12] Ms Faro sought an order in the High Court to set aside the Master's failure to uphold her objection to the liquidation and distribution account of the estate. Upholding her objection would have resulted in her being recognised as the deceased's spouse for purposes of the Intestate Succession Act,[13] and also as a surviving spouse for purposes of the Maintenance of Surviving Spouses Act.[14] She also sought an order declaring

[12] The Muslim Judicial Council is a non-profit umbrella body of Sunni Islamic clerics in South Africa with headquarters based in Cape Town. Its main functions relate to religious guidance, education, Fatawa, Da'wah, Halaal certification and social development including marriage counselling. The MJC has no statutory or religious authority to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam. See *Faro v Bingham N.O.* [2013] ZAWCHC 159.

[13] 81 of 1987.

[14] 27 of 1990.

Muslim marriages valid for purposes of the Marriage Act or alternatively, an order declaring that the common law definition of marriage be broadened to include Muslim marriages. As a further alternative, Ms Faro sought an order directing the Minister of Justice and Constitutional Development to put in place policies and procedures, in accordance with the Promotion of Administrative Justice Act[15] (PAJA), to regulate the holding of enquiries by the Master into the validity of a Muslim marriage, where persons purporting to be spouses of a Muslim marriage seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. Ms Faro also asked the High Court to declare the failure by the Minister of Justice and Constitutional Development to develop and implement these policies and procedures unconstitutional.

[13] The matter served before Rogers J, who upheld the relief relating to the recognition of Ms Faro as a surviving spouse for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.[16] Rogers J granted Ms Faro leave to approach the Court for determination of the balance of the issues. Her constitutional challenge is part of the consolidated application.

Esau matter

[14] Ms Esau was married to Mr Esau in terms of *Sharia* law. In 2015, she approached the High Court on an urgent basis asking for an order to interdict the Government Employees Pension Fund and the Minister of Justice from paying out 50% of her husband, Mr Esau's, pension interest, pending an action to be instituted by Ms Esau for payment of that portion of the pension interest to her. She also sought an order declaring that the failure by the state to initiate and prepare legislation providing for the recognition and regulation of Muslim marriages, discriminated against Muslim women and is inconsistent with the Constitution. The High Court granted the interdict

[15] 3 of 2000.

[16] *Faro* above n 12.

in her favour. The remainder of her constitutional challenge became part of the consolidated application.

Litigation history

High Court

[15] In the High Court, the WLCT was the primary applicant in the consolidated matter. The main relief sought was for the Full Court of the High Court to order the President, Cabinet and Parliament to prepare, initiate, enact and bring into operation legislation providing for the recognition and regulation of Muslim marriages within 12 months.[17] In the alternative, the WLCT asked the Court to declare the Marriage Act and the Divorce Act unconstitutional, to the extent that they fail to recognise Muslim marriages. The SAHRC, CGE and MAC supported the WLCT's application.

[16] The state parties opposed the application. They disputed that the impugned provisions of the legislation were unconstitutional and denied that any of the implicated rights are violated. They argued that there is no obligation on the state to initiate and pass legislation to recognise Muslim marriages. They contended that the state could not be ordered to do so. The Speaker of the National Assembly denied that Parliament had failed to fulfil its obligations as alleged by the WLCT. She submitted that Parliament had not received a draft Bill over which it could exercise its legislative authority and as such, Parliament's conduct could not be impugned. The Speaker contended that the power to initiate legislation is vested in the executive and not in Parliament.

[17] In a detailed judgment, the High Court analysed some of the difficulties faced by women married according to *Sharia* law, as well as the children born in such marriages. The High Court held that compared to women in civil and customary marriages,[18]

[17] In their papers, the WLCT framed this relief as the "composite relief".

[18] Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines a customary marriage as a marriage concluded in accordance with customary law. Customary law is defined in the same section as "the

women in Muslim marriages are unfairly discriminated against on the listed grounds. The High Court held further that the fact that women in Muslim marriages have the option in law to register their marriages and still choose not to, does not absolve the President and Cabinet of their constitutional duty to protect their rights. The High Court reasoned that the lack of recognition infringes on the dignity of Muslim women. When a husband in a Muslim marriage obtains a unilateral divorce through the *Talãq*, this leaves most women in Muslim marriages without adequate safeguards to obtain the kind of relief granted upon divorce in a civil court.

[18] The High Court held further that children born of Muslim marriages do not enjoy the same protections and privileges as children born in civil or customary marriages. In the case of a divorce where children born in civil or customary marriages are involved, the courts assume an automatic judicial oversight role and are obliged to take into account the best interests of the child.[19] This is different for children born of Muslim marriages, who are not provided with the same automatic court supervision. Therefore, the Court concluded, the non-recognition of Muslim marriages infringes the best interests of the child.

[19] The High Court found that there is systemic violation of the rights to equality, human dignity, access to courts, and children's rights. Furthermore, the erosion of these rights triggers duties imposed upon the state under section 7(2), which require the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The question it had to consider was whether the state has an obligation to regulate Muslim marriages comprehensively rather than it happening in a piece-meal fashion in the courts.

[20] In answering whether there is an obligation on the state to enact legislation to address the hardships faced by women in and children born of Muslim marriages, the

customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".

[19] This is particularly so in the case of High Courts, which assume the role of upper guardian of all minor children in their area of jurisdiction.

High Court considered South Africa's obligations under international law. It analysed the United Nations Convention on the Elimination of All Forms of Discrimination against Women[20] (CEDAW), the International Covenant on Civil and Political Rights[21] (ICCPR), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[22] (Maputo Protocol) and the SADC Gender and Development Protocol[23] (SADC Protocol), which have been signed and approved by Parliament and ratified, but not domesticated, through an enactment under section 231 of the Constitution. Having found that there is an obligation on the state to enact legislation to address the hardships faced by women in and children born of Muslim marriages, the High Court concluded:

> "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 the importance of marriage, the only reasonable means of fulfilling the section 7(2) duty is through the enactment of legislation.
>
> This interpretation of section 7(2) is aligned with the international obligations that South Africa has taken. 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)."[24]

[21] The High Court ordered, in relevant part:

[20] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

[21] International Covenant on Civil and Political Rights, 16 December 1966.

[22] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

[23] SADC Gender and Development Protocol, 17 August 2008.

[24] High Court judgment above n 6 at paras 181-2.

"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."

The balance of the order related to Ms Faro and Ms Esau's special circumstances.[25]

Supreme Court of Appeal

[22] Aggrieved by the order of the High Court, the respondents obtained leave from the High Court to appeal to the Supreme Court of Appeal. The WLCT was granted leave to cross-appeal against paragraphs 5 and 6 of the order. The WLCT also obtained conditional leave to cross-appeal in the event of the appeal succeeding in respect of the substantive relief. In this case, it would ask for the relief it had been granted in the High Court (alternative relief). Ms Esau was granted leave to cross-appeal with a view to obtaining effective interim relief pending the legislation envisaged in the order. The

[25] The order provided, among other things:

"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."

SAHRC and Ms Faro opposed the appeal. The CGE and the UUCSA presented arguments as amici curiae.

[23] Things took a dramatic turn during the hearing at the Supreme Court of Appeal. The first and the second respondents conceded that the Marriage Act and the Divorce Act did infringe the constitutional rights to equality, dignity and access to courts of women in Muslim marriages. They further conceded that the rights of children under section 28 of the Constitution, born in Muslim marriages, were similarly infringed. These concessions, which the Supreme Court of Appeal found to have been fairly and correctly made, effectively meant that the respondents acceded to the alternative relief that was part of the relief sought in the High Court and not the main relief that was granted.[26]

[24] The issues before the Supreme Court of Appeal were then reduced to three. First, whether section 7(2) of 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. Second, whether such relief would be inconsistent with section 15 of the Constitution. The third issue related to interim relief. That is, whether the interim relief should be limited to existing Muslim marriages, or should apply to all Muslim marriages which subsisted on or before 27 April 1994, regardless of when the marriage was concluded, when and whether the marriage was dissolved and the applicable matrimonial property regime.

[25] On the first issue, the Court held that Parliament has the responsibility to make laws; the President and Cabinet merely have a discretionary power to prepare and initiate legislation. Therefore, ordering the state to enact legislation on the basis of section 7(2) alone would be an infringement of the separation of powers doctrine. The Supreme Court of Appeal held that section 85 of the Constitution vests the executive

[26] *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* [2020] ZASCA 177; 2021 (2) SA 381 (SCA) at para 15.

authority with the power to prepare and initiate legislation. Sections 43 and 44 make it plain that the national legislative authority is exclusively in the hands of Parliament. Regarding the international instruments referred to by the High Court, the Court held that their purpose and import are to advance equality between men and women and require state parties to enact legislation and take measures to this end. The Supreme Court of Appeal concluded that paragraph 1 of the High Court order should be set aside and replaced with the declaratory orders that the WLCT had sought in the alternative.

[26] The Supreme Court of Appeal confirmed that the non-recognition of Muslim marriages is a violation of the constitutional rights of women in and children born of Muslim marriages. The appropriate recognition and regulation of Muslim marriages will afford protection to the aforementioned groups. The Supreme Court of Appeal held that the Marriage Act and the Divorce Act are inconsistent with sections 9, 10, 28 and 34 of the Constitution insofar as they do not recognise Muslim marriages. It also declared sections 6, 7(3) and 9(1) of the Divorce Act unconstitutional for being inconsistent with the same sections of the Constitution.

[27] The WLCT prayed that the Supreme Court of Appeal should backdate the interim relief to 27 April 1994 and apply it to all Muslim marriages that had been dissolved under *Sharia* law as far back as 26 years ago. The Supreme Court of Appeal held that retrospective relief backdated to 27 April 1994 would have profound unforeseen circumstances. Further, that the prayer went far beyond what the WLCT had sought in the High Court and in the cross-appeal. The Supreme Court of Appeal held further that it is the prerogative of Parliament to determine if and to what extent any legislation that it enacts regarding Muslim marriages should apply retrospectively. In the result the Supreme Court of Appeal, inter alia, made an order in the following terms:

> "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 sections 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 section 6 of the Divorce Act is inconsistent with sections 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 section 7(3) of the Divorce Act is inconsistent with sections 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 section 9(1) of the Divorce Act is inconsistent with sections 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, section 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 sections 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.

1.11 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.

1.12 The Department of Home Affairs and the Department of Justice and Constitutional Development shall publish a summary of the orders in paragraphs 1.1 to 1.9 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.'

2. In the matter of *Faro v The Minister of Justice and Constitutional Development and Others* (Case no 4466/2013), no order is made in relation to the cross-appeal. It is recorded that:

2.1 In recognition of the fact that there currently are no policies and procedures in place for purposes of determining disputes arising in relation to the validity of Muslim marriages and the validity of divorces granted by any person or association according to the tenets of *Sharia* law (Muslim divorces) in circumstances where persons purport to be spouses of deceased persons in accordance with the tenets of *Sharia* law and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990, the Minister of Justice undertakes within 18 months of the granting of this order to put in place the necessary mechanisms to ensure that there is a procedure by which the Master may resolve disputes arising in relation to the validity of Muslim marriages and Muslim divorces, in all cases where a dispute arises as to whether or not the persons purport to be married in accordance with the tenets of *Sharia* law to the deceased persons and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990;

2.2 In the event that the Minister of Justice fails to comply with the undertaking in para 2.1, the appellants may enrol the appeal in this Court on the same papers, duly supplemented, in order to seek further relief."

[28] In granting the order, the Supreme Court of Appeal exercised the power granted to it by section 172[27] of the Constitution. However, the order of constitutional invalidity does not have any force unless this Court confirms it. To set the confirmation process in motion, the WLCT launched these proceedings. In addition, the WLCT has lodged a conditional cross-appeal in which it seeks leave to cross-appeal in the event that this Court declines to confirm paragraphs 1.1 to 1.4 and 1.7 of the order of the Supreme Court of Appeal. In that event, the WLCT prays that the substantive relief granted by the High Court (composite relief), which was set aside by the Supreme Court of Appeal, be reinstated. The WLCT further seeks leave to appeal against paragraph 1.8 of the Supreme Court of Appeal order on the basis that it should not to be limited to certain marriages.

[27] Section 172 of the Constitution provides:

> "172. Powers of courts in constitutional matters.
>
> (1) 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.
>
> (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

Confirmation proceedings

Preliminary issue

[29] It is appropriate at this stage to dispose of an issue that arose during the process of ripening the matter for hearing. The Lajnatun Nisaal-il Muslimaat filed an urgent application for the rescission of the order of this Court admitting the UUCSA as the second amicus curiae. After considering the application and the answering affidavit by the UUCSA, we dismissed the application as it lacked prospects of success. Lajnatun Nisaal-il Muslimaat's contention in the application for rescission was that the UUCSA has no locus standi (standing) in these proceedings and that one of its constituent members, Jamait Ulama KZN, was not present at the meeting when a resolution for the UUCSA's participation in these proceedings was taken. The UUCSA denied the allegation and stated that Lajnatun Nisaal-il Muslimaat is not one of their members and does not have any knowledge of their internal operations. It stated that, because of the divergent opinions between Jamait Ulama KZN and the rest of the members, they had come to an arrangement that Jamait Ulama KZN would not be part of their meetings and that it should instead participate in the legal proceedings regarding this matter independently to pursue its differing views. The UUCSA contended that the rescission application is only a stratagem intended to prevent it from making submissions that contradict theirs to this Court. Put differently, the application for rescission was intended to weaken support for the relief sought by the WLCT and those in support of the WLCT's application. Lajnatun Nisaal-il Muslimaat did not file an affidavit from any of the representatives of Jamait Ulama KZN to confirm its allegations. These allegations therefore remain unsubstantiated in the face of direct evidence by the UUCSA. The affected party, Jamait Ulama KZN, has no complaint that it has been excluded from participating in the meetings of the UUCSA. The only reasonable inference is that the arrangement to exclude them is plausible. The rescission application was without merit and was accordingly dismissed.

[30] It bears mentioning that Lajnatun Nisaal-il Muslimaat was the fifth respondent in the High Court and it opposed the relief sought in that court. It did not obtain leave

to appeal against that order. It, however, filed written submissions in the Supreme Court of Appeal to oppose the relief sought. The Supreme Court of Appeal declined to permit its participation in the proceedings, although it was permitted to remain on the virtual platform as an observer. In this Court, Lajnatun Nisaal-il Muslimaat has not filed any application for leave to appeal against the Supreme Court of Appeal's order. It has instead filed written submissions contesting the confirmation of the declaration of invalidity. None of the main parties, namely the state parties, is opposing confirmation of the order of invalidity. In fact, Lajnatun Nisaal-il Muslimaat's participation in these proceedings can be ascribed to the inadvertent citation by the WLCT of Lajnatum Nisaal-il Muslimaat as a respondent. More will be said about this later. I proceed to consider the parties' submissions. Most of the submissions overlap. I shall therefore try not to burden this judgment with the repetition of the submissions that are common to the parties.

Parties' submissions

[31] As regards confirmation of the Supreme Court of Appeal's order of invalidity, the WLCT submitted that the state's omission to recognise and regulate Muslim marriages conflicts with section 9(3) of the Constitution, because it discriminates directly on the grounds of religion and marital status and indirectly on the grounds of race, gender, and sex.[28] The WLCT further contended that dignity is impaired when women in Muslim marriages cannot influence the decisions of religious bodies which change their marital status. The right to dignity, they argued, as guaranteed in section 10 of our Constitution,[29] requires that the protection of the law be afforded to spouses in Muslim marriages. Finally, the WLCT submitted that the High Court was correct in

[28] Section 9(3) of the Constitution provides:

> "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."

[29] Section 10 provides:

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

finding that the non-recognition of Muslim marriages is an ongoing infringement of the rights in section 34 of the Constitution.[30]

[32] In relation to the conditional cross-appeal, the WLCT argued that section 7(2),[31] read with section 8(1) of the Constitution,[32] imposes a positive obligation on the state to provide appropriate protection and requires that the steps taken to fulfil this duty must be reasonable and effective. The WLCT submitted that legislation is the only reasonable and effective manner for the state to fulfil this duty. The Supreme Court of Appeal, it contended, ought to have found that the interlocking grid of international and regional conventions and protocols informed the content of reasonable measures required to fulfil the obligation in section 7(2).

[33] In light of the egregious infringements of fundamental rights and the vulnerability of women in Muslim marriages, the WLCT submitted that it's application warrants urgent and effective interim relief retrospective to all marriages subsisting on 27 April 1994. The WLCT asserts that retrospectivity in cases involving the validity of marriages is not complex or novel: it has been dealt with in *Gumede*,[33] *Ramuhovhi*[34] and *AS.*[35] The WLCT argued that it is unlikely that retrospective relief would open the floodgates of litigation given the size of the Muslim community, and that, in any event, only the most egregious of injustices will come to court.

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[30] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[31] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[32] 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."

[33] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).

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

[35] *AS v GS* 2020 (3) SA 365 (KZD).

[34] In this Court, the state parties once again conceded that the Marriage Act and certain provisions of the Divorce Act, are inconsistent with sections 9, 10, 28 and 34 of the Constitution. However, they submitted that leave to appeal on the question of retrospectivity should be dismissed. They submitted that the order for retrospectivity should be limited and should not affect Muslim marriages that have been terminated by death or divorce before the date of this order, as these marriages have ceased to exist under both religious and civil law. The state parties submitted that there are no international instruments that expressly obligate the state to enact legislation relevant to this matter.

[35] The SAHRC submitted that the state is obligated to recognise and regulate Muslim marriages by means of legislation. The SAHRC contended that these obligations arise under both international law and domestic law. In relation to South Africa's obligations under international law, the SAHRC submitted that South Africa is under an obligation to recognise all *de facto* marriages, including Muslim marriages, and to regulate them by means of legislation. This obligation, they argued, arises from articles 6 and 7 of the Maputo Protocol, article 8.2 and 8.3 of the SADC Protocol, article 16 of CEDAW, and article 23(4) of the ICCPR.[36] In relation to South Africa's domestic obligations, the SAHRC submitted that these international instruments play a critical role in determining the substance of the state's domestic legal obligations. In this regard, the SAHRC relied on *Glenister II* to argue that in considering what measures the state should take into account to give effect to fundamental rights, international

[36] See General Recommendations 21 and 29 of the CEDAW Committee, CEDAW General Comment 33 and the CEDAW Committee's response to South Africa's periodic report in September 2010. The SAHRC contend that the obligation in section 39(1)(b) extends to reports and guidance by treaty bodies. In support of this, they rely on the remark made by Chaskalson P, as he then was in *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) at para 53 which was later confirmed in *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 at para 45. See also *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) at para 17 where the Court said that general comments have authoritative status under international law.

instruments play a critical role in determining the substance of the state's domestic obligations.[37]

[36] Lajnatun Nisaa-il Muslimaat is against the confirmation application and submitted that the Marriage Act and Divorce Act do not discriminate against Muslim women and are not unconstitutional. It contended that there is no inconsistency with section 9 and other provisions of the Constitution, because most Muslims do not consider the non-recognition of their religious marriages to be discriminatory. On the contrary, Lajnatun Nisaa-il Muslimaat submitted that Muslims regard secular recognition to be discriminatory, because their religion is to be singled out for such recognition while Jewish, Hindu and other religious marriages are exempted from such recognition. Lajnatun Nisaa-il Muslimaat contended that the simple solution is for those who seek recognition to conclude their marriages in terms of Islamic law and thereafter in terms of the Marriage Act.

[37] The CGE submitted that even if this Court upholds the declaration of invalidity, it must still determine the section 7(2) issue. The CGE submitted that women in Muslim marriages suffer a double burden of unfair discrimination, on the basis of their gender and religion. It further contended that the lack of legislative and statutory protection has a disproportionate effect on women in Muslim marriages and merely declaring the Marriage Act and Divorce Act invalid would not solve the aforementioned problem. The enactment of legislation is necessary to resolve systemic discrimination and section 7(2) of the Constitution requires the state to take reasonable and effective measures.

[38] The MAC submitted that Muslim marriages, like African customary marriages, deserve to be recognised in their own right; that if relief is not granted retrospectively, women in Muslim marriages will be left without recourse in relation to the patrimonial consequences of divorce; and that it is not possible to regulate the consequences of

[37] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 189.

Muslim marriages contractually. It further submitted that while *Sharia* law addresses and encourages marriage contracts, they are not the norm, either because women do not have the means to conclude them, or because they lack the requisite bargaining power to get their prospective spouses to conclude a contract.

[39] In addition to their substantive submissions, the MAC outlined the substantial harm and prejudice caused by the non-recognition of Muslim marriages, especially to women and children. As an institution that deals with these issues daily, it stated that it is often powerless to compel forfeiture or maintenance for wives and children, and that often the most it can do is to advise the husband to do what is right for his wife and children. Most worryingly, however, it notes that it is also powerless as regards overseeing the visitation of children in circumstances where it has been made aware that a husband has in the past been physically violent. This evidence, it contended, demonstrates why it is important for this Court to grant relief with retrospective effect.

[40] The UUCSA submitted that the state is positively obliged to enact comprehensive and stand-alone legislation in terms of section 7(2), read with section 15(3) of the Constitution, to recognise Muslim marriages and their consequences.

The issues

[41] The core issue for determination is whether the Supreme Court of Appeal's order of constitutional invalidity should be confirmed. If this Court does confirm the order of constitutional invalidity, the second issue is whether the retrospective effect of this order should be limited. The final issue is whether the state is obligated in terms of section 7(2) to enact legislation recognising and regulating Muslim marriages.

Confirmation of the order of constitutional invalidity

[42] In order to confirm the constitutional invalidity, this Court must be satisfied that the impugned provisions of the Marriage Act and the Divorce Act do indeed

unjustifiably discriminate unfairly against spouses in Muslim marriages and children born of such marriages, and infringe the right to dignity, access to court and the principle of the best interests of the child. This may sound obvious in light of the findings of the High Court and Supreme Court of Appeal and most of the submissions of the parties. However, such an order is not there for the taking. We have to evaluate and conduct a thorough investigation and be satisfied that the impugned provisions are inconsistent with the Constitution, even if such confirmation proceedings are not opposed.[38] This Court is therefore obliged to make that call itself. As to whether the impugned provisions infringe the right to equality, if a finding is made that unfair discrimination exists, the next enquiry is whether there is any justification for such discrimination, which would render it constitutional. If the unfair discrimination cannot be justified, an order of constitutional invalidity must be made and a remedy that is just and equitable in the circumstances must be granted. I will address each of these issues in turn. I will then consider whether the impugned provisions infringe the rights to dignity, access to courts and the principle of the best interests of the child, and if they do, whether that is justified.

Equality

Does the differentiation amount to discrimination?

[43] It is a well-known fact that marriages concluded in accordance with the tenets of the Islamic faith have never been accorded recognition as valid marriages in South Africa. The views expressed by the courts historically were that Muslim marriages did not accord with so-called "civilised" religious practices, were potentially polygamous, were regarded as immoral and not consonant with religion and were thus contrary to public policy.[39] Because some customary marriages permit polygamy, they were also treated as contrary to public policy prior to 1998.[40] This treatment forced

[38] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[39] See the early cases of *Seedat's Executors v The Master* 1917 AD 302; *Kader v Kader* 1972 (3) SA 203 (RAD) and *Ismail v Ismail* 1983 (1) SA 1006 (AD).

[40] African customary marriages are now accorded recognition and validity, after the passing of the Recognition of Customary Marriages Act.

some of the adherents of Islam to dilute or abandon their faith by, among other things, electing to marry monogamously according to civil law in order for their marriages to be regarded as valid.[41] This non-recognition of Muslim marriages continues to date, 28 years into our democratic constitutional dispensation.

[44] In *Daniels* this Court remarked:

> "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'.
>
> These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity 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."[42] (Footnotes omitted.)

[45] To emphasise the condemnation of past judicial pronouncements on their prejudiced attitude towards Muslim marriages, this Court had the following to say in *Hassam*:

> "The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*. 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 our society. Recognition of polygynous unions was seen

[41] Schafer "Family Law Service" LexisNexis, Issue 45 at 8-8(1).

[42] *Daniels v Campbell N.O.* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR (CC) at paras 74-5.

as a retrograde step and entirely immoral. The 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 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*."[43]

[46] This Court in *Hassam* went on to hold that:

"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.

I am satisfied that the Act differentiates between the groups outlined above.

Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of

[43] *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC) at paras 25-6.

> the Constitution. The answer is yes. As I have indicated above our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history. It is clear that in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation. The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's* where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be 'reprobated by the majority of civilised peoples, on grounds of morality and religion'."[44]

[47] The fact that the Marriage Act does not recognise Muslim marriages as valid marriages continues to deprive women in and children born of Muslim marriages the remedies and protection that they would be afforded if the marriage had been concluded in terms of that Act. While it is in theory open to women to solemnise a Muslim marriage and, thereafter, marry in terms of the Marriage Act, this is commonly not a meaningful choice, because evidence presented by the MAC has shown that women in Muslim marriages are often unable to persuade their partners to conclude civil marriages, oftentimes due to the disparity in their respective bargaining powers.[45]

[48] The exclusion of women married according to *Sharia* law from the protection provided by the Marriage Act and the Divorce Act is discriminatory. The only reason why they are deprived of the benefits provided by the Marriage Act and the Divorce Act is because they are not married under civil law but in terms of *Sharia* law. The discrimination is on the grounds of religion, marital status and gender. The fact that people married in terms of *Sharia* law do not enjoy the same status, benefits or protections, as people married in terms of the Marriage Act constitutes, in my view, a form of direct discrimination on the basis of religion. It also gives rise to direct differentiation on the basis of marital status. On this score, and as the High Court

[44] Id at paras 31-3.

[45] The evidence submitted by MAC was that Muslim women lack the requisite bargaining power to get their prospective spouses to marry in terms of the Marriage Act after marrying in terms of *Sharia* law.

correctly noted, it is no answer to say that women in Muslim marriages are situated no differently to women in other religions as no religious marriages are recognised *per se*.[46] It may be so that women married by other religious rites are similarly situated as women married under *Sharia* law. That does not bar scrutiny of this Court when it is called upon to adjudicate the particular disadvantage suffered by women who marry in terms of *Sharia* law, in part as a result of the "historical context of systemic violation of the rights of Muslim women".[47]

[49] A final point to note, and it is one that this Court recognised in *Hassam*, is that the differentiation caused by the Marriage Act strikes particularly at women, and "works to the detriment of Muslim women and not Muslim men".[48] Muslim women are deprived of the proprietary remedies the Divorce Act is designed to guarantee. This often leaves them destitute, or with very small estates, upon *Talãq*. This is exacerbated by the fact that they are often left with the responsibility of caring for children. The WLCT submitted that it is often the case that assets acquired during the subsistence of a Muslim marriage are acquired in the husband's name and accumulate in the husband's estate. The WLCT referred to instances where in the past, municipalities insisted that housing provided by the state be registered in the name of the husband, thus giving him preferential rights over the family abode.

[50] The state parties have correctly conceded, as they did in the Supreme Court of Appeal, that the failure to accord Muslim marriages recognition unfairly discriminates against women in such marriages. This concession means that the state parties have abandoned the evidence they presented in the High Court to demonstrate that there is no discrimination, or alternatively, that if it is found to exist, it is constitutionally justifiable.

[46] High Court judgment above n 6 at para 123.

[47] Id.

[48] *Hassam* above n 43 at para 31.

[51] I have already mentioned that Lajnatun Nisaa-il Muslimaat did not file a notice of appeal against the order of the Supreme Court of Appeal and that it was cited as a respondent in the proceedings. It filed written submissions and was permitted to address the Court. For the purposes of this matter and given the complex issues involved and the interest the matter has generated among the affected communities, I will deal with its submissions. That, despite its irregular intervention in this application.

[52] Unsurprisingly, the Lajnatun Nisaa-il Muslimaat is unhappy that the state parties (which, according to it, had mounted a compelling case against the declaration of invalidity in the High Court) conceded the invalidity of the impugned provisions in the Supreme Court of Appeal. It is important to make the point that whether discrimination exists does not depend on the subjective feelings of various members of the affected group.[49] Equally, what the constitutional position should be with regard to other religious marriages is something to be decided if and when that issue comes before this Court. I am therefore satisfied that, for the reasons set out above, the non-recognition of Muslim marriages has the effect of discriminating against women in such marriages as contended for.

Is the discrimination unfair?

[53] The grounds of religion, marital status and gender are among the prohibited grounds listed in section 9(3) of the Constitution. The discrimination is therefore presumed, in terms of section 9(5) of the Constitution, to be unfair. The main respondents, the President and the Minister, in fact conceded that the discrimination is unfair. What was put up by Lajnatun Nisaa-il Muslimaat was not enough to rebut the presumption of unfairness. I therefore proceed to consider justification.

[49] See *Van der Merwe v Road Accident Fund (Women's Legal Centre as Amicus Curiae)* [2006] ZACC 4; 2006(4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 61.

Is the unfair discrimination justifiable?

[54] Having found that the impugned legislation is unfairly discriminatory, the next question to be considered is whether the discrimination is justifiable. This Court has already had occasion to consider this issue, in materially similar circumstances, and the conclusion it reached remains valid. It is therefore not necessary to reinvent the wheel. In *Moosa*,[50] this Court considered how the non-recognition of Muslim marriages impacted on the right of a Muslim woman to inherit. This Court concluded thus:

> "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) [of the Wills Act] constitutionally invalid."[51]

[55] Although the above analysis related to the Wills Act,[52] it has clear application to the case before us. Not recognising Muslim marriages as valid marriages sends a message that Muslim marriages are not worthy of legal recognition or protection. There is no justification for the continuing non-recognition of Muslim marriages. This is especially so having regard to the historical context of systemic violation of the rights of Muslim women. The fact that it is the woman's choice to conclude a Muslim marriage, and not register her marriage, does not mean that she should not be protected from the economic and social hardships she suffers in such a marriage. Her

[50] *Moosa N.O. v Minister of Justice* [2018] ZACC 19; 2018 (5) SA 13 (CC); 2018 (10) BCLR 1280 (CC).

[51] Id at para 16.

[52] 7 of 1953.

constitutional rights would still be breached.[53] It is also a fact that the Marriage Act is inapplicable to polygynous marriages. In respect of such marriages, therefore, Muslim women are entirely unable to avail themselves of the existing legislative protections.

[56] Lajnatun Nisaa-il Muslimaat contended that those who feel discriminated against are modernists. It submitted that the simple solution for those who appear to be "disgruntled Muslims" or modernists who are averse to *Sharia* marriages and its consequences, is to avail themselves of secular law and marry in terms of such laws, which afford them recognition. As pointed out already, this argument ignores the disparate bargaining power between men and women in Muslim communities. The perceived choice should not have a bearing on the question of a breach of constitutional rights. Of course, it is reasonable to find divergent views on this sensitive matter. But the question is – what is constitutionally valid? Those who find the system beneficial are likely to defend it. However, from a constitutional point of view, it is only reasonable that rights and benefits must be made readily available to all, and the choice must be left to those who do not want to pursue those rights and benefits, not to pursue them. Moreover, for many women in polygynous marriages, this choice is not available. It is clear that the retention of the status quo advocated by the Lajnatun Nisaa-il Muslimaat would support the deep-rooted prejudices referred to above. The views of those willing to live under the status quo cannot prevail over the extension and protection of constitutional rights to others. Women in Muslim marriages must be fully included in the South African community so that they can all enjoy the fruits of the struggle for human dignity, equality and democracy. No cogent reasons have been advanced to justify the unfair discrimination. Accordingly, I find that the unfair discrimination against women married under *Sharia* law is also unjustified.

[53] *Van der Merwe* above n 49 at para 61.

Do the impugned provisions infringe the rights to dignity, access to courts and the principle of the best interests of the child?

[57] It can reasonably be assumed that human dignity is impaired where there is unfair discrimination, unless the opposite is proved.[54] In this case, the discrimination, which is unfair, has been found to be unjustifiable and this leads me to conclude that it also infringes the right to dignity. The *Faro* matter shows clearly how the consequences of non-recognition of Muslim marriages can give rise to indignity: Muslim husbands have the power to obtain unilateral divorce through the *Talãq*, and this leaves women without adequate safeguards as regards marital property. Moreover, oftentimes, women in Muslim marriages are not sufficiently empowered to exert their rights and negotiate the terms of their marriage at its inception.[55] This, no doubt, impairs the dignity of Muslim women who have little say at the inception of their marriage, or upon its dissolution when they may be left without any say or power as to their marital status or the consequence of the marriage upon a divorce.

[58] In *Modderklip*, this Court held that section 34 requires the state to provide mechanisms for the resolution of disputes.[56] As regards Muslim marriages, the state has failed to provide mechanisms for the resolution of disputes in anticipation of and consequent upon the dissolution of the marriage. In the case of *Faro*, the MJC confirmed her divorce without affording her a hearing. This, as has been shown, has particularly deleterious effects on women and children and unjustifiably limits the right in section 34 to have disputes resolved by the application of law decided in a fair public hearing. Disputes regarding the consequences of the dissolution of a Muslim marriage, particularly as regards the equitable distribution of assets and the protection of children, are capable of resolution by the application of the law.

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[54] Rautenbach and Malherbe *Constitutional Law* 5 ed (Lexis Nexis, Durban 2009) at 361.

[55] The evidence submitted by MAC was that Muslim women generally do not have the means to conclude marriage contracts at the inception of a marriage and lack the requisite bargaining power to get their prospective spouses to conclude such a contract.

[56] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 40.

[59] Because the dissolution of Muslim marriages is not regulated by the Divorce Act, sections 7 and 9 of the Divorce Act,[57] which regulate the division of assets and the provision for maintenance of parties, as well as the forfeiture of patrimonial benefits of marriage, are not applicable. Similarly, section 6, which safeguards the interests of dependent and minor children during a divorce, is not applicable and this deprives children of recourse to courts and automatic judicial oversight and fails to take into account the best interests of the child. Children's rights in terms of section 28 of the Constitution are not accorded paramountcy when Muslim marriages are dissolved. In addition, children born of Muslim marriages are also unfairly deprived of the statutory protection regarding minimum age of consent, as section 24 of the Marriage Act is not applicable to them.

[60] There has been no suggestion that extending the benefits to be derived from the Marriage Act and the Divorce Act to women in Muslim marriages and children born of such marriages will limit the right to freedom of religion guaranteed in the

[57] Section 7(3) of the Divorce Act provides:

> "(3) 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;
>
> (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 38 of 1927, as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; or
>
> (c) entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law, 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."

Section 9 of the Divorce Act provides:

> "(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.
>
> (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant."

Bill of Rights. To the contrary, failing to extend such benefits infringes the rights of women in and children born of Muslim marriages. It should be made clear that the constitutionality of *Sharia* marital law is not under consideration. We are not required to determine whether *Sharia* marital law passes constitutional muster. We are concerned about the hardships faced by women in Muslim marriages as a consequence of being excluded from the benefits derived from the Marriage Act and the Divorce Act. We note the submissions on behalf of the WLCT, the UUCSA and the MAC that *Sharia* marital law is not inconsistent with the Constitution.

[61] There has been judicial intervention in several judgments to extend certain benefits derived from other statutes to women who are or have been parties to Muslim marriages. These piecemeal interventions are not adequate. Non-recognition of Muslim marriages remains a problem and a source of great hardship.

[62] Having found that the impugned provisions unfairly infringe the rights to dignity, access to courts and the principle of the best interests of the child, the next enquiry is whether such infringement is justifiable. The state parties have not disputed that the unfair discrimination against Muslim women as demonstrated above impairs their dignity and is not justifiable. They have conceded that if Muslim marriages are not recognised as valid marriages, the children born of such marriages do not receive the same protection as children born of marriages registered under the Marriage Act, and that parties to Muslim marriages do not have the benefit of access to courts upon the dissolution of their marriages.

[63] There is no justification offered as to why children born of Muslim marriages should not enjoy the automatic court oversight of section 6 of the Divorce Act in relation to their care and maintenance. Nor there is any justification why these children should not be protected by a statutory minimum age for consent to marriage or receive the further protections provided in section 12 of the Children's Act[58] and section 24 of the

[58] 38 of 2005.

Marriage Act. I doubt that any justification can be found in any free and democratic society where human rights are entrenched in a Constitution such as ours.

The common law

[64] In the High Court, the WLCT sought an order that the common law definition of marriage be extended to include Muslim marriages. This was sought as an alternative to the main relief. Since the Supreme Court of Appeal granted the alternative relief and not the main relief that was granted by the High Court, it also declared the common law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages. However, that Court does not seem to have conducted an analysis of its declaration of invalidity. As indicated above, once the state parties conceded that the Marriage Act and the Divorce Act infringed the rights to equality, dignity and access to courts, the Supreme Court of Appeal requested the parties to formulate a draft order by agreement or at least to find substantial common cause. In the draft order provided by the state parties a proposal to declare the common law unconstitutional and invalid was provided. The WLCT accepted the proposal and it became common cause and was as a result incorporated in the order of the Supreme Court of Appeal.

[65] The common law definition of marriage emphasises the union of two persons to the exclusion of all others.[59] Since Islamic law allows for polygynous marriages, such marriages do not meet the common law definition of marriage. Widows in polygynous customary marriages are protected, in that such marriages are recognised in terms of the Recognition of Customary Marriages Act.[60] This legislation was enacted specifically to provide for the recognition of customary marriages. However, widows in Muslim marriages do not enjoy such protection. There is therefore differentiation between widows married in terms of the Marriage Act and those married in terms of *Sharia* law.

[59] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 3.

[60] Section 2(2) of the Recognition of Customary Marriages Act 120 of 1998 provides that "[a] customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

Similarly, there is differentiation between widows in monogamous and polygynous Muslim marriages and those in monogamous and polygynous customary marriages.[61]

[66] The differentiation referred to amounts to discrimination on the grounds of equality, human dignity and freedom of religion. Since these are listed grounds in the Bill of Rights, the discrimination is presumed unfair. The state parties conceded the discrimination and its unfairness. Section 8(3)(a) of the Constitution provides that a court must apply or if necessary develop the common law in order that effect be given to a right in the Bill of Rights to the extent that legislation does not give effect to a right.[62] Furthermore, section 39(2)[63] provides that a court when interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights.

[67] Section 2 of the Constitution[64] renders the Constitution the supreme law of the land and renders law or conduct that is inconsistent with it invalid. This was affirmed in *Carmichele*, where this Court said:

> "The Constitution is the supreme law. The Bill of Rights, under the Interim Constitution, applied to all law. Item 2 of schedule 6 to the Constitution provides that 'all law' that was in force when the Constitution took effect, 'continues in force subject to. . . consistency with the Constitution.' Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice. In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect,

[61] *Hassam* above n 43 at paras 30-2.

[62] Section 8(3) of the Constitution provides:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right."

[63] Section 39(2) of the Constitution provides:

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

[64] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

> promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."[65]

[68] The common law definition of marriage as it stands is unconstitutional and invalid insofar as it fails to recognise Muslim marriages as valid. The reason for not recognising Muslim marriages as valid is simply that they are potentially polygynous. The order of the Supreme Court of Appeal extending the definition of the common law to be interpreted as including Muslim marriages should therefore be confirmed.

[69] In conclusion, the Supreme Court of Appeal was correct to find that the Marriage Act and the Divorce Act are inconsistent with sections 9, 10, 28 and 34 of the Constitution insofar as they do not afford Muslim marriages recognition. Sections 6, 7(3) and 9(1) of the Divorce Act are also unconstitutional for being inconsistent with sections 9, 10, 28 and 34 of the Constitution insofar as they fail to—

(a) provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages as is provided for those of other marriages that are dissolved;

(b) provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just;

(c) 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 that are dissolved.

[70] For the above reasons, the order of constitutional invalidity must be confirmed.

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[65] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33.

Should retrospectivity be limited?

[71] The WLCT seeks leave to appeal against paragraph 1.8 of the order of the Supreme Court of Appeal and asks for an order to reflect that any union, validly concluded as a marriage in terms of *Sharia* law, and which subsisted on or after 27 April 1994, should be regulated by the Divorce Act and, in particular, section 7(3) of the Divorce Act. The WLCT wants section 7(3) of the Divorce Act to apply to Muslim marriages regardless of when the marriage was concluded, when and whether the marriage was dissolved and the applicable matrimonial property regime. The order the WLCT seeks would apply to a husband who is a spouse in more than one marriage and to deceased estates.

[72] The WLCT contended that in granting its order, the Supreme Court of Appeal was unduly deferential, particularly given that it was dealing with interim relief.

[73] It bears mention that upon the state parties conceding unfair discrimination, the Supreme Court of Appeal invited the parties to discuss the order that would be appropriate in the circumstances. Although the parties could not agree on all the terms of the proposed order, paragraph 1.8 is one of the terms that the state parties agreed to, to ameliorate the historic hardship. It was within the Supreme Court of Appeal's power in terms of section 172(1) of the Constitution, upon the declaration of invalidity, to make any order that it considers just and equitable. Such power includes limiting the retrospective application of the order.

[74] This Court has been reluctant to make orders that have a disruptive effect. In *Ramuhovhi,* this Court, although recognising that the discrimination at issue was odious, and that it warranted retrospective application of constitutional invalidity, acknowledged that limiting retrospectivity helps to avoid the dislocation and inconvenience of undoing transactions. To that end, this Court made an order that did not invalidate a winding up of a deceased estate that had been finalised or the transfer of marital property that had been affected. The application of the order was further

excluded from any transfer of marital property where, at the time of transfer, the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the applicants brought the challenge. The same approach was adopted by this Court in *Gumede*, where the order was not to affect the legal consequences of any act or omission or fact existing in relation to a customary marriage before the order was made.[66]

[75] What the WLCT is seeking is an order that should apply to Muslim marriages that no longer exist or have already been dissolved, either in terms of *Sharia* or civil law, and in respect of which dissolution and settlements have occurred. As this Court noted in *Cross-Border Road Transport Agency*,[67] the default approach to the retrospective effect of declarations of invalidity in the context of legislation is the full might of retrospectivity.

[76] The CGE argued that the effect of a retrospective order would simply mean that women who were married under *Sharia* law, but whose marriages no longer subsist, could make use of section 7(3) of the Divorce Act. That section requires a court to determine a just distribution of assets in the event of a divorce. This case is, therefore, different from *Ramuhovhi*, where a retrospective order would have immediately altered the rights and obligations of parties to a terminated marriage – without judicial oversight – because in that case all customary marriages were, in effect, declared marriages in community of property. By contrast, in this case, a retrospective interim order will not immediately alter the rights and obligations of parties to terminated marriages. Instead, such parties will have to approach a court for just and equitable relief. That Court will then consider the lapse of time in determining whether a division of assets is just. In this way, any disruptive effect of the interim retrospective relief is ameliorated.

[66] *Gumede* above n 33 at para 54.

[67] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 20.

[77] Moreover, because the relief is interim, any disruptive effects can be ameliorated by the state passing appropriate legislation. As this Court held in *Ramuhovhi* "[i]n the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible". For this reason, too, the suggestion that this Court should defer to Parliament on the issue of retrospectivity is unwarranted.

[78] However, given that the rights of third parties could be implicated by the relief, I deem it necessary to strike a balance. That balance is this: the order ought to apply to all unions validly concluded as a marriage in terms of *Sharia* law and subsisting at the date when the WLCT instituted its application in the High Court (15 December 2014). It will also apply in respect of marriages that are no longer in existence, but in respect of which proceedings had (i) been instituted and which had (ii) not been finally determined as at the date of this Court's order. The interests of women who prompted and supported this litigation but whose marriages terminated before the order of this Court will therefore be catered for. However, this approach will also ensure that third parties will have effectively been placed on notice that relief was being sought on behalf of the class of persons to whom relief will be made available.

Is the state obliged to enact legislation in terms of section 7(2)?

[79] The WLCT's cross-appeal is conditional upon this Court not confirming the order granted by the Supreme Court of Appeal. However, the CGE was on 1 July 2021 admitted as an intervening party. Prior to this, the CGE's role was one of amicus curiae and, ordinarily, the role of amicus curiae is simply to provide "contentions which may be useful to the Court".[68] In this case, given that the CGE have formally been admitted as an intervening party, and in light of the fact that the section 7(2) issue has been properly considered and ventilated by the High Court and the Supreme Court of Appeal, I find that the CGE should be permitted to appeal the Supreme Court of Appeal's findings on the section 7(2) issue.

[68] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 256 (CC); 2021 (4) BCLR 349 (CC) at para 110.

[80] I shall therefore proceed to consider whether the state should be ordered to pass legislation in terms of section 7(2) of the Constitution, which places an obligation on the state to respect, promote and fulfil the rights in the Bill of Rights. To recap, the applicant, together with the SAHRC, CGE and MAC, urged this Court to reinstate the order of the High Court that was not upheld by the Supreme Court of Appeal. The High Court had ordered the President, Cabinet and Parliament to prepare, initiate and enact legislation to recognise Muslim marriages as valid marriages and to regulate the consequences of such recognition. In my view, the applicants have failed to establish that in the circumstances of this matter, section 7(2) places an obligation on the state to enact legislation.

[81] In *Glenister II*, this Court held that "implicit 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".[69] As to what constitutes "reasonable measures" this Court in *Rail Commuters* held that it will depend on the circumstances of each case.[70] The Court held further that factors that would ordinarily be relevant to the inquiry as to what "reasonable measures" encompass include:

> "[T]he nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer."[71]

[69] *Glenister II* above n 37 at para 189.

[70] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 88.

[71] Id.

[82] Whether section 7(2), read with section 8, and other relevant constitutional provisions impose a duty to legislate is therefore determined with reference to the particular facts of the case, and whether legislation constitutes "reasonable and effective" means of ensuring that the state fulfils its constitutional obligations. However, with reference to the particular facts of this case, the state has in fact already enacted legislation which is intended to govern and regulate matters of marriage and divorce: the Marriage Act and the Divorce Act. Albeit that, as I have found, this legislation is defective, under inclusive and has given rise to various rights violations, the point stands that the state has legislated and, as such, it is not appropriate to make a finding in this case that the state is obliged by section 7(2) to enact standalone legislation on Muslim marriages. Instead, the appropriate course is to challenge the legislation, rather than allege that the state has failed to fulfil a duty to legislate. If, in the face of legislation alleged to violate constitutional rights, litigants could seek to compel the state to legislate on the basis of section 7(2) directly, without challenging the legislation itself, this would permit litigants to by-pass the relevant legislation, and rely directly on the Constitution. Such a course is exactly what the principle of subsidiarity cautions against. Accordingly, given that the state has, albeit deficiently, enacted legislation with regards to matters of marriage and divorce, the litigants are not permitted to compel the legislature to pass legislation purely by virtue of section 7(2).

Conclusion

[83] I therefore confirm the Supreme Court of Appeal's order of constitutional invalidity, subject to the limitations referred to above on the interim relief. The President and Cabinet, together with Parliament, are directed to remedy the defects within 24 months so as to render the law constitutionally compliant.

[84] Having confirmed the declaration of invalidity, the WLCT's conditional application for leave to cross-appeal (which it sought in the event that the confirmation of declaration of invalidity is not granted) does not arise, because the order of the Supreme Court of Appeal is confirmed. The applications for leave to appeal, brought by the SAHRC and the CGE for additional relief which would have reinstated the order

of the High Court ordering the President, Cabinet and Parliament to enact legislation, are dismissed.

Costs

[85] The applicant has been successful and costs must follow the result.

Order

[86] The following order is made:

1. The Supreme Court of Appeal's order of constitutional invalidity is confirmed:
    1.1. The Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.
    1.2. It is declared that section 6 of the Divorce Act is inconsistent with sections 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 born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provides for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved.
    1.3. It is declared that section 7(3) of the Divorce Act is inconsistent with sections 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 section 9(1) of the Divorce Act is inconsistent with sections 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 that are dissolved.

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

1.6. The declarations of invalidity in paragraphs 1.1 to 1.5 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 initiating and 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.

1.7. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, 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 section 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:

(i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, 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.

1.8. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that, from the date of this order, section 12(2) of the Children's Act 38 of 2005 applies to a prospective spouse in a Muslim marriage concluded after the date of this order.

1.9. Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, for the purpose of paragraph 1.8 above, the provisions of sections 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.

1.10. 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.

1.11. The Department of Home Affairs and the Department of Justice and Constitutional Development shall publish a summary of the orders in paragraphs 1.1 to 1.10 above widely in newspapers and on radio stations, whichever is feasible, without delay.

2. The conditional cross appeal by the Women's Legal Centre Trust, and the appeals by the South African Human Rights Commission and Commission for Gender Equality are dismissed.

3. The President and the Minister of Justice and Constitutional Development must pay the Women's Legal Centre Trust's costs of this application, including the costs of two counsel.

For the Applicant:	N Bawa SC, M O'Sullivan SC instructed by the Women's Legal Centre Trust
For the First and Second Respondents:	A Gabriel SC and K Pillay SC and S Humphrey instructed by the State Attorney, Cape Town
For the Sixth Respondent:	R Moultrie SC and S Kazee instructed by Bowman Gilfillan Incorporated
For the Eighth Respondent:	R Willis and A B Omar instructed by Zehir Omar Attorneys
For the Intervening Party:	M Bishop, A Christians and C McConnachie instructed by the Legal Resources Centre
For the First Amicus Curiae:	S Mahomed instructed by Webber Wentzel
For the Second Amicus Curiae:	M S Omar instructed by M S Omar and Associates