IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 5704/2004

In the matter between:

FATIMA GABIE HASSAM	Applicant
And	
JOHAN HERMANUS JACOBS N.O.	1st Respondent
MASTER OF THE HIGH COURT	2nd Respondent
MIRIAM HASSAM	3rd Respondent
MIRIAM HASSAM N.O.	4th Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	5th Respondent
WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae

JUDGMENT: 18/07/008

VAN REENEN, J:

1] The primary issue in this matter is whether upon the

death of their husband the surviving spouses of a polygynous marriage contracted in accordance with Muslim private law are entitled to the benefits envisioned by the Intestate Succession Act 81 of 1987 (the ISA) namely, what in effect is a widow's portion on intestacy and the Maintenance of Surviving Spouses Act 27 of 1990 (the MSSA) namely, a claim for reasonable maintenance.

2] That issue arose in the circumstances that are briefly set out hereunder. The applicant and Ebrahim Hassan (the deceased) entered into a marriage in accordance with Muslim private law on 3 December 1972. On 13 February 1990 the deceased acquired an immovable property situate at 2 Heron Street, Pelican Park, Cape Town (the property). The property served as the

matrimonial home of the applicant and the deceased, as well as their children, all of whom have by now reached the age of majority. The applicant on or about 16 June 1998 obtained a “faskh” which would have brought about a termination of the marriage upon completion of “Iddah” i.e. a separation period of three months. The applicant avers that the “faskh” became ineffectual because the deceased rejected it by tearing up the document evidencing it when presented to him and that she and the deceased became reconciled when he, during the waiting period, took her on a trip to India. The applicant and the deceased continued to live together as husband and wife until his death on 22 August 2001 save for a period after his marriage during 2000 to Miriam Hassan (the third respondent), also in accordance with Muslim private law. Three minor

children fathered by the deceased were born to the third respondent: two prior to and one subsequent to their marriage.

3] As the deceased's family refused to give effect to an agreement relating to the division of the deceased's estate, the third respondent with the help of the Women's Legal Centre Trust, which was admitted as an amicus curiae to these proceedings on 12 April 2005, procured the appointment of Mr Johan Jacobs (the first respondent herein) as executor to the deceased's estate. Subsequent to his appointment the applicant submitted two claims to the first respondent in terms of the ISA and the MSSA. The first respondent refused to recognise such claims on the basis, inter alia, that even if it is accepted that the applicant's marriage to the

deceased continued until his death, it was polygynous and that she for that reason could not be treated as a "survivor" or a "spouse" for the purposes of the ISA or the MSSA (hereinafter collectively referred to as "the two acts"). A subsequently submitted claim for the value of physical improvements the applicant allegedly made to the property was rejected on the ground of prescription. That claim has not been pursued in these proceedings.

4] The applicant instituted proceedings in this court and in terms of an amended notice of motion claims an order declaring that she is the spouse of the deceased as well as an order that the provisions of the ISA and the MSSA fall to be so interpreted that surviving spouses of polygynous Muslim marriages are accorded the same benefits as those enjoyed by surviving spouses of de

facto monogamous Muslim marriages alternatively, an order that the provisions of the said acts be declared unconstitutional and be remedied.

5] The first respondent, who abides the decision of the court, has filed an affidavit in which he questions whether the marriage between the applicant and the deceased was extant at the time of the latter's death. He however, failed to provide any evidence in refutation of any of the facts on which the applicant based her contention that the marriage had not come to an end. The veracity of such factual averments have not been placed in issue by any of the other respondents. The failure to have done so is unsurprising as it is unlikely that the circumstances surrounding the deceased's rejection of the "faskh" would have manifested

themselves publicly.

6] In the circumstances both Ms Carter - who represented the applicant - and Mr Budlender - who represented the amicus - were in agreement that as regards the factual averments made by the applicant concerning her marriage to the deceased, no material disputes of fact of the nature enumerated by Murray AJP in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949(3) SA 1155 (T) at 1163 and would necessitate invoking the rule enunciated in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 H – I (if appropriate (see: **Bhe and Others v Magistrate, Khayelitsha & Others (Commission for Gender Equality** (as amicus curiae) 2005(1) SA 580 (CC) at

paragraph 13)) or the provisions of Rule 6(5)(g), were present on the papers.

7] Due to the inaccessibility of the facts which could have served as a basis for challenging the applicant's said factual averments and because one is furthermore dealing with claims against a deceased estate there, in my view, is a need to subject the applicant's averments to "cautious scrutiny" (See: **Borcherds v Estate Naidoo** 1955(3) SA 78 (A) at 79 A – B; 79 F; **Cassel and Benedick NNO and Another v Rheeder and Cohen NNO and Cohen NNO and Another** 1991(2) SA 846 (A) at 851 E – I) but always bearing in mind that the unavailability of evidential material in respect of a particular issue does not affect the burden or standard of proof but only the quantum of evidence

required to be adduced in order to satisfy it (See: **CWH Schmidt & H. Rademeyer: Law of Evidence** at 3 – 28). The applicant's version as regards the non-adherence to the waiting period and its consequences is not only free of internal contradictions and inconsistencies but there furthermore, is nothing to even suggest that it is improbable. Caution, if required, is generally met by the presence of features that engender confidence in the trustworthiness of evidence (See: **Lawsa,** 2nd Edition, Volume 9 paragraph 829). The applicants' concerns about possibly jeopardising the interests of the third respondent and her minor children by having tailored the relief originally sought by her so as to obviate doing so, in my view, goes a long way towards engendering belief in the trustworthiness of her evidence.

8] In view of the above, I incline to the view that the applicant has succeeded in proving, on a balance of probabilities, that her marriage to the deceased was extant as at the time of his death. That conclusion coupled with the fact that it is common cause that also the third respondent was married to the deceased, has as an ineluctable consequence that the applicant's marriage to him was polygynous and distinguishes this matter from **Daniels v Campbell NO and Others** 2004(5) SA 331 (CC) in which the provisions of the ISA and the MSSA were so interpreted as to include a spouse to a de facto monogamous Muslim marriage within their ambit. The court in that case specifically refrained from extending the operation of the two acts to polygynous Muslim marriages: not because of any

principial considerations but merely because the issues for decision had been so delineated on the papers and in counsels' argument.

9] Prior to the advent of the present constitutional era, South African courts, apart from certain statutory exceptions, consistently refused to recognise and give effect to polygynous marriages because they, on public policy grounds, were considered to be contra bonos mores (See eg: **Ismail v Ismail** 1983(1) SA 1006 (A) at 1024 E). That approach was attributable to the fact that the institution of polygyny was viewed through the prism of the common law and the mores of a politically dominant but a minority section of our society. As the founding values of the Constitution take precedence (Cf: **Ryland v Edros** 1997(2) SA 690

(C) at 705 C – D) the earlier pronouncements of the then highest court of the land regarding the validity of marriages contracted in accordance with Muslim private law, do not preclude this court from considering the narrower issue that features in this application namely whether, on a proper construction thereof, the benefits provided for by the ISA and the MSSA accrue also to the surving spouses of polygynous Muslim marriages.

10] Section 1(1)(c) of the ISA provides that if a deceased is survived by a spouse and any descendants, such a spouse is entitled to inherit a child's share of the intestate estate or an amount of R125 000 whichever is the greater. Section 1(4)(f) provides that a child's portion shall be calculated "by dividing the monetary value of the estate by a number equal to the number of

children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one". Section 1(5) provides that if any descendant other than a mentally ill minor, renounces the right to such benefit it shall accrue to the surviving spouse.

11] Section 2(1) of the MSSA provides that a surviving spouse in a marriage dissolved by death has a claim against the estate of the deceased spouse for reasonable maintenance until death or remarriage in so far as such a spouse is not able to provide therefor from his or her own means. In terms of the provisions of section 2(3)(b), such a claim enjoys the same order of preference in respect of other claims against the deceased spouse's estate as the maintenance claim of

a dependant child and that where such claims compete with each other, they stand to be reduced proportionately.

12] The majority judgment in the **Daniels** case (at paragraphs 22 and 23), held that as men in our predominantly patriarchial society find it easier to earn a living and acquire assets and widows for whom no provision have been made by will or other settlements do not enjoy protection under the common law, the purpose of the ISA and the MSSA - despite the gender neutrality of their provisions - is to provide relief to a particularly vulnerable section of our society namely, widows with a view to obviating "their bereavement being compounded by dependence and potential homelessness". Sachs J, writing for the majority,

articulated the purpose and objective of the two Acts as follows:

> "The acts were introduced to guarantee what was in effect a widow's portion on intestacy as well as a claim against the estate for maintenance. The objective of the acts was to ensure that widows would receive at least a child's share instead of their being precariously dependent of family benevolence".

The court, construing the concept "spouse" in a manner consistent with the foundational constitutional values of human dignity, equality and freedom, held that there was no reason for declining to apply the equitable principles underlying the ISA and the MSSA as tellingly in the case of Muslim widows as they would to widows of marriages solemnised under the Marriage Act 25 of 1961 because if they were not, their manifest purpose would be frustrated rather than furthered. In the context of a de facto monogamous marriage

contracted under Muslim private law, the court came to the conclusion that the concepts "spouse" in the ISA and "survivor" in MSSA included a surviving partner but deliberately declined to deal with "the complex range of questions concerning polygamous Muslim Marriages".

13] Does an interpretation which fails to accord widows in polygynous Muslim marriages the benefits provided for in the ISA and the MSSA by excluding them from the concepts "spouse" and "survivor" respectively pass constitutional muster? Despite the fact that the matter has not been crisply decided as yet, it in my view does not. I say so for the reasons which are set out hereunder.

14] In terms of section 39(2) of the Constitution a court,

when interpreting legislation and developing the common- or customary law, is obliged to promote the spirit, purport and objects of the Bill of Rights as constituting the corner-stone of our constitutional democracy and, where possible, in a manner that gives effect to the fundamental values therein contained (See: **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others** 2001(1) SA 545 (CC) at 558 G – H). It furthermore is a recognised principle of constitutional interpretation that if it is reasonably possible to construe a statute in such a manner that an inconsistency with the Constitution is avoided preference should be given thereto rather than another reasonable construction that

would result in an inconsistency. In that context a construction lacks reasonableness if it can be arrived at only by straining the meaning of the words of the particular enactment (See: **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2006(2) SA 1 (CC) at paragraph 23). In a nutshell: legislation now falls be construed in a manner consistent with the foundational values of human dignity, equality and freedom as encapsulated in the Bill of Rights.

15] As has been already observed, the majority of the court in the **Daniels** case came to the conclusion that the ordinary meaning of the concepts "spouse" in the ISA and "survivor" the MSSA are sufficiently wide to encompass also surving spouses of marriages

contracted according to Muslim private law. It opted for a wide and inclusive construction which extended the application of the provisions of the said acts to also the surviving spouse of a monogamous Muslim marriage as their object and purpose are fully inconsistent therewith and any other interpretation would result in a violation of such widows' rights to equality as regards marital status, religion and culture and would furthermore compromise their right to dignity.

16] The applicant in this matter would be entitled to the relief claimed only if it could be found that the concepts "spouse" in the ISA and "survivor" in the MSSA encompass also the widows of polygynous Muslim marriages and not only a widow of such a de facto monogamous marriage.

Marriages concluded under Muslim private law are potentially polygynous as the male in such a union, subject to compliance with the onerous prescripts of the Qur'an, is permitted to marry more than one woman. Unless the concept "spouse" and "survivor" are construed to encompass also widows of polygynous Muslim marriages the practical effect would be that the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the right accorded them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law) and culture but would also infringe their right to dignity. In terms of section 9(5) of the

Constitution discrimination of that kind is presumptively unfair unless valid grounds exist under Section 36 of the Constitution for limiting their rights as regards equality and human dignity. It is not insignificant that the Minister of Justice and Constitutional Development (the fifth respondent) has not even suggested that any such grounds exist: neither has any of the other parties to these proceedings. Furthermore, no governmental purpose that could be advanced by such a differentiation has been raised or appears to be self-evident.

17] There in my view, does not appear to be any justification for excluding the widows of polygynous Muslim marriages from the provisions of the ISA or the MSSA. Not only do the considerations which in the

context of de facto monogamous Muslim marriages prompted the Constitutional Court in the **Daniels** case to opt for an extensive interpretation of the concepts "spouse" and "survivor" apply with equal force to widows in polygynous Muslim marriages, but polygyny as practiced in African customary law as well as in Muslim personal law, has received increasing legislative and judicial recognition in our constitutional democracy. It is unsurprising that it has come about as - unlike in our pre-constitutional past - the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy including human dignity and equality (See: **Barkhuizen v Napier** 2007(5) SA 323 (CC) at paragraphs 28 and 29). Such values have been described by Sach J in the **Daniels** case (at 344 G) as

the source of a "new ethos of tolerance, pluralism and religious freedom" that presently informs the assessment of the prevailing boni mores of society in contrast to the rigidly exclusive approach, of the pre-constitutional era which was based on the values and beliefs of a limited sector of society as was manifested in the **Ismail** case.

18] In the context of polygynous marriages the shift in legislative and judicial policy, as a reflection of public policy, has manifested itself in a number of ways. Firstly, the legislature has given explicit recognition thereto by the enactment of the Recognition of Customary Marriages Act 120 of 1998. Secondly, the legislature has implicitly recognised it in a number of statutes which define, without any qualification,

marriage to include Muslim marriages (See: the **Daniels** case at paragraph 27 footnote 40). Thirdly, the South African Law Commission has given recognition to polygynous Muslim marriages in its report on Islamic Marriages and Related Matters. Fourthly, African customary law, which recognises polygamy, is now given its rightful recognition as an integral part of South-African law to the extent that its rules and principles are compatible with the Constitution and the Bill of Rights (See: the **Bhe** (case) at paragraphs 43 to 46). Finally, as appears from a number of decided cases, it is now judicial policy to give recognition to polygynous marriages and their legal consequences (See: **Kahn v Kahn** 2005(2) SA 272 (T) where it was held that parties to a Muslim marriage, irrespective of whether it is polygynous or monogamous, are entitled to claim

maintenance in terms of section 2(1) of Act 99 of 1998;

Wormald N.O. and Others v Kambule 2006(3) SA 562 (SCA) in which the right of the surviving spouse of a polygynous customary union to be maintained and provided with residential and agricultural land (but without any right to title therein) was recognised; and

Gaza v Road Accident Fund (unreported Supreme Court of Appeal Case No 579/2001) in which, by consent, an order was made the effect whereof is to recognise an actionable duty of support by a customary law wife despite the existence of a prior valid civil law marriage).

(The above examples do not purport to constitute a closed list).

19] I, in view of the aforegoing incline to the view that the

continued exclusion of the widows of polygynous Muslim marriages from the benefits of the ISA and the MSSA would be unfairly discriminatory against them and be in conflict with the provisions of section 9 of the constitution.

20] The provisions of the ISA, save for section 1(4)(f), are readily capable of being applied to spouses in polygynous marriages in that each spouse would be entitled to a child's portion of the estate, if there are descendants and an equal share if there are none. It is for that reason that the Constitutional Court in **Bhe's** case could, in the context of a polygynous customary law union, use it as the basic mechanism for determining the content of an interim regime. Section 1(4)(f) which provides that a child's portion is to be

arrived at by dividing the monetary value of the estate by a number equal to the number of surviving children of the deceased as well as children that have predeceased him and have left descendants, from a linguistic perspective, presents interpretive difficulties. The submission that such difficulties could be overcome by interpreting the words "plus one" as conveying 'plus one for each spouse", in my view, places an intolerable strain on the language used with the consequence that it, to that extent, is inconsistent with the constitution and warrants the reading in of words in order to remedy its unconstitutionality.

21] The concept "survivor" is in the MSSA defined as meaning the surviving spouse in a marriage dissolved by death and every reference to it is preceded by the

definite article "the" which lends support to an inference that the singular was envisaged. However, if regard is had thereto, firstly, that section 6 of the Interpretation Act 33 of 1957 provides that in every law, unless the contrary intention appears, words in the singular number include the plural; and secondly, that the mechanisms created in sections 2(3)(b) and 3 of the MSSA in order to determine how the competing claims of spouses and minor children are to be dealt with as well as the factors to be considered in the determination of the reasonable maintenance needs of a spouse, the concept "survivor", irrespective of the number of surviving spouses, is capable of being applied without unduly straining the language of the act. In fact, the provisions of the MSSA have already been held to be capable of being applied to multiple surviving spouses,

albeit in the context of polygynous customary law marriages (See: **Kambule v The Master and Others** 2007(3) SA 403 (E) at 414 B – F).

22] In view of the aforegoing, I incline to the view that the applicant has succeeded in making out a case for the relief in the amended notice of motion. In arriving at that conclusion I have not lost sight of the fact that, although the constitutional validity of polygamy has not been subjected to judicial scrutiny as yet (See: the **Bhe** case at paragraph 124), it is in conflict with certain international human rights instruments (See: Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women) but that Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, whilst

contemplating the encouragement of monogamy, provides for the promotion and protection of the rights of women in polygynous marital relationships.

23] In the premises the following order is made:

23.1] It is declared that –

23.1.1] the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes a surviving partner to a polygamous Muslim marriage;

23.1.2] Fatima Gabrie Hassam is, for the purpose of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor" of the late Ebrahim Hassam;

23.1.3] Miriam Hassasm is, for the purpose of the Maintenance of Surviving Spouses

Act 27 of 1990, a “survivor” of the late Ebrahim Hassam;

23.1.4] the word “spouse” as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygamous Muslim marriage;

23.1.5] Fatima Gabrie Hassam is, for the purpose of the Intestate Succession Act 81 of 1987, a “spouse” of the late Ebrahim Hassam;

23.1.6] Miriam Hassam is, for the purpose of the Intestate Succession Act 81 of 1987, a “spouse” of the late Ebrahim Hassam.

23.2] It is declared that section 1(4)(f) of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution, to the extent

that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.

23.3] Section 1(4)(f) of the Intestate Succession Act 81 of 1987 is to be read as though the whole of it was substituted by the following:

> "In the application of sections 1(1)(c)(i) to the estate of a deceased person who is survived by more than one spouse:
>
> a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
> b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as

does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

c) Notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses."

23.4] The orders in paragraphs 23.2 and 23.3 hereof are referred to the Constitutional Court for confirmation.

23.5] The Estate of the late Ebrahim Hassam is to pay the cost of this application.

24] The amicus is thanked for the helpful contribution it has made to the resolution of this matter.

D. VAN REENEN