THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 4466/2013

In the matter between: Not reportable

TARRYN FARO **APPLICANT**

And

MARJORIE BINGHAM N.O. **FIRST RESPONDENT**
(in her capacity as executrix of the deceased estate of Moosa Ely – Estate No 4190/2010)

MUJAID ELY **SECOND RESPONDENT**

SHARIEF ELY **THIRD RESPONDENT**

TASHRICK ELY **FOURTH RESPONDENT**

MUSLIM JUDICIAL COUNCIL **FIFTH RESPONDENT**

IMAM IB SABAN **SIXTH RESPONDENT**

THE MASTER OF THE HIGH COURT **SEVENTH RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **EIGHTH RESPONDENT**

Coram: ROGERS J

Heard: **10 OCTOBER 2013**

Delivered: **25 OCTOBER 2013**

JUDGMENT

ROGERS J:

Introduction and factual overview

[1] This case highlights the vulnerability of women in Muslim marriages. The decision of the Constitutional Court in *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) determined that the word 'spouse' as used in the Intestate Succession Act 81 of 1987 and the word 'survivor' as used in Maintenance of Surviving Spouses Act 27 of 1990 were to be interpreted as including the surviving partner to a monogamous Muslim marriage, even though such a marriage may not have been solemnised by a marriage officer and thus not constitute a marriage for purposes of civil law. The contrary view was said to be a discriminatory interpretation out of step with 'the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the interim Constitution' (para 24). In *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) s 1(4)(f) of the Intestate Succession Act was found to be unconstitutional, resulting in an order which afforded protection to multiple spouses in a polygamous Muslim marriage. At present, however, there is no statute which deals comprehensively with the legal position of persons married by Islamic rites. Importantly for purposes of the present matter, there is no legislation regulating the dissolution of such unions. Because such a union is not regarded as a 'marriage' for purposes of the Divorce Act 70 of 1979, the latter Act does not regulate the dissolution of Islamic marriages (except where they were solemnised by a marriage officer in accordance with our law). The evidence in this case shows that a husband in an Islamic union may throw off his wife with relative ease and informality. In accordance with current law, a dissolution of an Islamic marriage in a manner recognised by the Islamic faith results in the woman no longer being a surviving spouse for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

[2] The circumstances of this case afford an illustration of the woman's vulnerability. The facts may be briefly stated though the summary will not convey the

human drama and emotions at play. The applicant began living with the late Moosa Ely during November 2006. Because Moosa Ely shares a surname with the second, third and fourth respondents I shall refer to him as Moosa and shall refer to the second, third and fourth respondents by their first names (Mujaid, Sharief and Tashrick). Moosa had an adult son, Tashrick, from a prior marriage. The applicant and Moosa had their first child, Sharief, during November 2007. On 28 March 2008 Moosa and the applicant got married in accordance with Islamic rites. Imam Saban officiated. Because Imam Saban was not a licensed marriage officer, the union did not constitute a marriage for purposes of civil law.

[3] During 2009 Moosa was diagnosed with lung cancer. According to the applicant, she cared for him during his illness. On the morning of 24 August 2009 the applicant and Moosa had an argument about his alleged failure to give her money for food. After the argument she accompanied him for chemotherapy. On their way home Moosa stopped their car at the home of Imam Saban. He told the Imam that he was sick and tired of the applicant and wanted the Imam to pronounce a *Talāq*. Without talking to the applicant Imam Saban gave Moosa a *Talāq* certificate. In accordance with Islamic rites, this dissolved the marriage. The applicant was seven months pregnant with their second child, Mujaid, who was born on 26 October 2009.

[4] It is common cause on the evidence before me, including expert evidence regarding the tenets of Islam, that the form of *Talāq* pronounced by Imam Saban was revocable during the so-called *'Iddah* period. In the applicant's case, because she was pregnant the *'Iddah* period expired when she gave birth to the child she was carrying. The predominant view in the Islamic religion is that the *Talāq* may be revoked not only by express words but by the resumption of sexual relations between the parties. The applicant avers that she and Moosa resumed intimacy shortly after 24 August 2009 and that no further *Talāq* was pronounced before Moosa died on 4 March 2010.

[5] The fifth respondent in the present application is the Muslim Judicial Council ('the MJC'). The MJC is a private religious body. Its activities are not regulated by legislation. There is no evidence that it is vested with any special authority or

jurisdiction under the tenets of Islam. It is nevertheless a body which among other things considers whether Islamic unions have been dissolved in accordance with Islamic rites. Naziema Bardien ('Bardien') is Moosa's adult daughter from an earlier marriage. She considered herself to have an interest in Moosa's estate. On 8 April 2010, and without the applicant's knowledge, Bardien obtained from the MJC a certificate declaring that the marriage between Moosa and the applicant had been annulled. This was presumably based on the *Talāq* pronounced by Imam Saban.

[6] The applicant was appointed as executrix of Moosa's estate on 21 April 2010. She considered that she was Moosa's surviving spouse. In the light of the annulment certificate issued by the MJC, the Master (who is the seventh respondent) told the applicant that it would not be possible to wind up the estate until the dispute as to her marital status was resolved. During June 2010 the applicant made an affidavit concerning the post-*Talāq* reconciliation and also obtained corroborating affidavits from Tashrick and from a social worker, Esther Julius ('Julius'). These affidavits were presented to the MJC which on 29 July 2010 issued a letter stating that from new evidence it appeared that Moosa and the applicant were husband and wife at the time of his death.

[7] After this development Bardien approached an attorney, Marjorie Bingham ('Bingham'), the first respondent in the present application. She wrote to the Master on 19 August 2010 attaching the annulment certificate of 8 April 2010 and asking for the removal of the applicant as executrix. Bingham was presumably unaware of the further letter issued by the MJC on 29 July 2010. Upon learning of this later development, Bingham approached Tashrick who made two further affidavits in which, among other things, he denied that there had been a reconciliation and stated that his previous 'affidavit' had been blank when he signed it and that he had been told it was needed to prove that Mujaid and Sharief were Moosa's children. Bingham presented Tashrick's further affidavits to the MJC which on 2 September 2010 issued a further letter withdrawing the letter of 8 April 2010 and confirming that the *Talāq* stood. Bingham forwarded the latest MJC letter to the Master.

[8] The applicant's attorney, Mr YM Patel ('Patel'), responded on 21 September 2010 by forwarding to the Master the affidavits which the applicant had made and

procured during June 2010. The Master replied by stating that Patel would have to act in accordance with the MJC's certificate of 2 September 2010.

[9] The applicant claims that during October 2010 Tashrick and Bardien forced her out of the family home where she had lived with Moosa and that her belongings were thrown into the yard. The applicant was thereafter obliged to live in shelters or on the street. The two minor children were taken into care.

[10] Because the Master was of the view that the applicant was not Moosa's surviving spouse, she required the applicant during November 2010 to furnish security for her administration of the estate. (In terms of s 25(1) of the Administration of Estates Act 66 of 1965 a surviving spouse is not required to furnish security.) Patel advised the Master that a hearing of the MJC would be convened to sort out the confusion. Patel also asked to be furnished with a copy of Tashrick's retracting affidavits. On 15 June 2011 Patel wrote to the Master stating that he was still awaiting a proposed hearing date from the MJC. The Master notified Patel on 5 July 2011 that the applicant was required to return her letters of executorship because she had failed to provide security. On 3 August 2011 Patel replied that owing to his difficulty in contacting the applicant he was obliged to withdraw as her attorney. (The applicant was during this period living in shelters or on the street.) The Master wrote to Bingham on 26 August 2011 enquiring whether she was arranging a meeting with the MJC. She replied on 10 November 2011 that the hearing would take place in the near future.

[11] There was apparently a meeting of the MJC on 7 December 2011 attended by Bingham. The applicant was not aware of the meeting and was not present. There are no minutes or recording of the meeting. On the same day the MJC issued a certificate confirming that there had not been a reconciliation between Moosa and the applicant and that the *Talāq* issued on 24 August 2009 was thus valid. It appears that this decision must have been based on Tashrick's retracting affidavits. Bingham immediately notified the Master of this development and on the same day the latter addressed a registered letter to the applicant informing her that she had been removed as executrix in terms of s 54(1)(v) of the Administration of Estates Act.

[12] On 10 April 2012 Bingham was appointed as executrix of Moosa's estate. It seems that shortly thereafter the applicant acquired the assistance of her current attorneys, the Women's Legal Centre ('the WLC'). During May 2012 the WLC notified Bingham that they were formally lodging a claim on behalf of the applicant on the basis that there had been a reconciliation during the *'Iddah* period and that the applicant should thus be recognised in the liquidation and distribution account as a surviving spouse. Bingham evidently rejected the claim because on 1 October 2012 she lodged an account which accorded no recognition to the applicant as a surviving spouse. The account also did not recognise a claim on the estate which Bardien had made.

[13] On 22 October 2012 the WLC, acting on behalf of the applicant, lodged an objection to the account on several grounds. Although not expressly so stated in the WLC's letter, the objections were submitted in terms of s 35(7) of the Administration of Estates Act. The only objection of relevance for present purposes is the third one, which was in the following terms:

'5. Our client further instructs that you have failed to include our client as a beneficiary of the estate.

6. Our client was married to the deceased in accordance with Islamic law at the time of his death and as such she is entitled to be treated as a beneficiary of the deceased estate in terms of the Maintenance of Surviving Spouses Act… and the Intestate Succession Act….'

[14] As provided for in s 35(8) of the Act, Bingham as executrix responded to the objections on 23 November 2012, stating that she was in possession of a certificate from the MJC confirming that the marriage had been dissolved and stating that the relevant documents were on file with the Master.

[15] On 13 February 2013 the WLC wrote to Bingham, with a copy to the Master, denying that the applicant was not a surviving spouse and repeating that there had been a reconciliation during the *'Iddah* period.

[16] In a letter dated 25 February 2013 (which the WLC only received on 6 March 2013) the Master dismissed the applicant's objections. Regarding her alleged status

as a surviving spouse, the Master said in her letter that according to the MJC's letter dated 2 September 2010 the applicant was not the wife of the deceased.

The relief sought

[17] The present application was launched on 25 March 2013. Because the application incorporated relief as contemplated in s 35(10) of the Administration of Estates Act (ie an order setting aside the Master's disallowance of the objection regarding the applicant's marital status), it had to be made within 30 days of the Master's disallowance of the objection.

[18] In Part A of the notice of motion interim relief was sought to preserve the status quo in the estate pending the determination of the relief sought in Part B. Part A also sought the appointment of a curator *ad litem* for the two minor children (Mujaid and Sharief). Interim relief was granted on 18 April 2013 and Adv F Jakoet of the Cape Bar was appointed as the curator *ad litem* for the minor children.

[19] The notice of motion was framed as a review in accordance with rule 53 and thus called upon the Master to furnish the record of the proceedings sought to be set aside. The Master furnished her record on 12 June 2013. The applicant thereafter filed an amended notice of motion and supplementary founding affidavit. The relief claimed in Part B of the amended notice of motion is in the following terms:

'B1. Declaring that the marriage concluded in terms of Islamic law between the applicant and one Moosa Ely subsisted at the time of his death on 3 March 2010;

B2. Declaring that the applicant was the "spouse" of Moosa Ely for purposes of the Intestate Succession Act… and a "survivor" for purposes of the Maintenance of Surviving Spouses Act…;

B3. Reviewing and setting aside the decision/s of the [Master], taken on or about 28 September 2010 and 25 February 2013 respectively, declaring that the applicant was not the spouse or survivor of Moosa Ely at the time of his death;

B4. Declaring that the [Master's] reliance on the letter of the [MJC] dated 2 September 2010 is unlawful and unconstitutional;

B5. Declaring that the [Master's] failure to hold an enquiry in accordance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 into the validity of the applicant's marriage to Moosa Ely prior to making the decisions referred to in paragraph B3 to be unlawful and unconstitutional;

B6. Directing the [Master] to take all steps necessary including but not limited to ensuring that the applicant and [the two minor children] are provided with their respective portions of the deceased estate of Moosa Ely in accordance with the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act;

B7. Declaring that marriages solemnised according to the tenets of Islamic law be deemed to be a valid marriage in terms of the Marriage Act 25 of 1961;

B8. In the alternative to paragraph B7 above, an order declaring that the common law definition of marriage be extended to include Muslim marriages;

B9. In the alternative to paragraphs B7 and B8 above, an order directing the eighth respondent [the Minister of Justice and Constitutional Development], within 18 (eighteen) months of the granting of this order, to put in place policies and procedures which accord with the provisions of the Promotion of Administrative Justice Act 3 of 2000, and which regulate the holding of enquiries by the [Master] into the validity of marriages solemnised according to the tenets of Islamic law and the validity of divorces granted by any person or association according to the tenets of Islamic law, and that such enquiries be necessary in all cases where persons purporting to be spouses in accordance with the tenets of Islamic law of deceased persons 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;

B10. Declaring that the [Minister's] failure to implement policies and procedures … *[as contemplated in B9]* to be unlawful and unconstitutional;

B11. Removing [Bingham] as executor of the deceased estate of Moosa Ely;

B12. Declaring that [Bingham] is not entitled to any remuneration in her capacity as executor of the deceased estate of Moosa Ely;

B13. Directing that the costs of the application in Part B be paid by the [Master and Minister] jointly and severally, the one paying the other to be absolved and any other respondents who oppose the relief sought.'

Removal of executor

[20] The notice of motion in its original form did not seek the removal of Bingham as executrix. Bingham filed an affidavit on 18 July 2013. Although her affidavit was filed after the delivery of the supplementary founding papers and the supplementary notice of motion (which introduced the prayer for her removal), she did not traverse the allegations in the supplementary founding papers. She stated in her affidavit that she did not oppose the relief sought by the applicant. She nevertheless dealt with the aspersions cast on her in the founding affidavit.

[21] Despite Bingham's statement that she did not oppose the application, heads of argument were filed on her behalf and she was represented at the hearing by counsel, Mr Banderker. The latter stated at the commencement of proceedings that Bingham did now oppose the application but only in regard to the prayers relating to her removal and remuneration. Ms Bawa SC, who appeared for the applicant (leading Ms Adhikari), did not object to this stance.

[22] On completion of Ms Bawa's submissions in support of the application as a whole, I was informed by Mr Banderker that his client was willing to resign as executrix and to waive her right to remuneration. The legal representatives for the applicant and Bingham agreed upon the terms of an order which has rendered it unnecessary for this court to pronounce on the relief sought in paragraphs B11 and 12 of the amended notice of motion. This did not involve a concession by either side regarding the merits of the criticisms levelled at Bingham.

Applicant's claim against the estate

[23] The relief sought in prayers B1 to B6 of the amended notice of motion relates to the applicant's claim against the estate and to facts peculiar to her position. Those prayers are all directed, in one way or another, at setting aside the Master's failure to uphold an objection which would have resulted in the applicant being recognised as Moosa's surviving spouse for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

[24] Section 35(7) of the Administration of Estates Act entitles a person interested in an estate to lodge with the Master an objection to the executor's liquidation and distribution account. The objection must be accompanied by the reasons for the objection. In terms of s 35(8) the executor is entitled to comment to the Master regarding the objection. Section 35(9) reads thus:

'If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well-founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.'

Section 35(10) then provides as follows:

'Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.'

[25] Mr Papier, who appeared for the Master and Minister, indicated that his clients abided the court's decision on the merits of the applicant's objection. He offered the view that on the evidence now before the court the applicant's claim to be Moosa's surviving spouse might well have been established. He argued, however, that the Master had not failed properly to perform her duties in her consideration of the objection.

[26] It is common ground between the applicant on the one hand and the Master and Minister on the other that the application contemplated by s 35(10) is neither a review in the strict sense nor an ordinary appeal in which the appellant is confined to the record which served before the original decision-maker but is an appeal in the wide sense described in *Tikly & Others v Johannes NO & Others* 1963 (2) SA 588 (T) at 590G-591A, ie 'a complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information'. This view of the nature of the similar remedy conferred by s 407(4)(a) of the Companies Act 61 of 1973 was approved by a full bench of the then Transvaal Provincial Division in *South African Bank of Athens Ltd v Sfier (also known as Josef) & Others* 1991 (3)

SA 534 (T) at 536H-I where De Klerk J said that in such proceedings new facts can be adduced and oral evidence allowed (see also *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in Liquidation) & Others* 1991 (4) SA 515 (N) at 524D-525G). In *Ferreira v Die Meester* 2001 (3) SA 364 (O) Van Coller J expressed his agreement with a submission that an application in terms of s 35(10) was an appeal of the second kind mentioned in *Tickly*. The second category of *Tikly* appeal is an appeal in the ordinary strict sense, namely a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given. If that is what the learned judge intended to hold, I must respectfully disagree.

[27] That an application in terms of s 35(10) of the Administration of Estates Act (and similar procedural remedies relating to the liquidation and distribution accounts in respect of insolvent estates and companies in liquidation) is a wide appeal in which new evidence can be adduced is consistent with the view which has often been expressed that the Master cannot, when an objection requires a resolution of factual disputes, ordinarily be expected to determine such disputes. In such cases an application in terms of s 35(10) might well necessitate a referral to oral evidence, and this would constitute evidence which was not before the Master. For example, in *CP Smaller (Pty) Ltd & Others* 1977 (3) SA 159 (T) King AJ said, with reference to s 111(2) of the Insolvency Act 24 of 1936, that there was no provision in the Act for the Master to hear evidence as a result of an objection to an account and that he could not decide questions of fact upon which the rights of creditors *inter se* depended (163D-E). This view of s 111(2) of the Insolvency Act, which appears to me to be equally applicable to s 35(10) of the Administration of Estates Act, was approved by Conradie J (as he then was) in *Broodryk v Die Meester en 'n Ander* 1991 (4) SA 825 (C) at 830H-831C where the learned judge remarked that there were no appropriate procedures or structures for the Master to resolve factual disputes between creditors. In *Jewaskewitz v The Master of the High Court Polekwane & Others* [2013] ZAGPPHC 118 this approach was pertinently held to apply to s 35(9) of the Administration of Estates Act (see paras 8-9). In a different context a similar point was made by Hoexter JA (who delivered the majority judgment) in *Fey NO & Whiteford NO v Serfontein & Others* 1993 (2) SA 605 (A) in support of a conclusion that the common law power of a court to remove the trustee of an insolvent estate had not been taken away by the statutory power conferred on

the Master to remove a trustee on the grounds stated in s 60 of the Insolvency Act. The learned Judge of Appeal said the following in that regard (at 614F-H, my underlining):

'It may be that by entrusting the statutory removal of a trustee to the Master the Legislature sought to provide a remedy which is cheaper and more expeditious. In my judgment, however, it is not an exclusive remedy; and the Court's common-law power of removal remains. The possibility of review proceedings under s 151 of the Act would represent cold comfort to litigants in the position of the plaintiffs in the present case. All the allegations against the defendants have been strenuously denied by the latter in their opposing affidavits. The Master's office, from the nature of things, is ill-equipped to determine disputed facts. The recognised procedure for settling disputed facts is by trial action. A Court is the obvious tribunal for the determination of such disputed matters. Grave injustice may be done to a litigant who is denied the ordinary procedure adopted in investigating the truth of conflicting allegations.'

[28] It must be remembered that the primary duty to assess disputed claims lies with the executor (ss 29-32 of the Administration of Estates Act). If an executor disputes a claim he may by notice in writing require the claimant to lodge an affidavit setting forth details of the claim and, with the consent of the Master, require the claimant and others to appear before the Master or a magistrate to be examined under oath in connection with the claim (s 32). An executor is, among other things, required to make due and proper enquiries and to obtain as much information as possible in identifying the beneficiaries (*Rubinow & Another v Friedlander NO & Others* 1953 (1) SA 1 (C) at 15C-D). If the executor rejects a claim and frames the liquidation and distribution account accordingly, the dismissal by the Master of an objection by the claimant because of factual disputes which the Master thinks he cannot resolve means that the executor's primary determination stands but that the aggrieved claimant is at liberty to approach a court for relief in terms of s 35(10).

[29] Given the nature of an application in terms of s 35(10), it is unnecessary – in order to reach a finding in the applicant's favour – to conclude that the Master did not properly consider the applicant's objection or that his decision was wrong on the information placed before him. I am satisfied that on the evidence placed before me, the applicant is entitled to be recognised as Moosa's surviving spouse. The

evidence to this effect includes the affidavits the applicant has made in the current proceedings, the affidavit which Julies has made in the current proceedings, as well as affidavits by Imam Saban and by Hamiedah Ganiem ('Ganiem'), who is the chief executive director of Azaad Youth Services. The applicant has averred in her affidavits in the present matter that sexual relations were resumed between her and Moosa during the *'Iddah* period. Julies by her confirmatory affidavit in the current proceedings has confirmed the affidavit she made in June 2010 and has also confirmed the circumstances under which Tashrick signed his first affidavit (an affidavit which corroborated the applicant's version of a reconciliation). Although Imam Saban's affidavit does not state that there was in fact a reconciliation (this would not have been within his personal knowledge), he confirms that while Moosa was still alive the applicant approached him and informed him that she had reconciled with Moosa. Saban told her that she should tell Moosa to approach him. Saban had no further communication with them.

[30] The strongest evidence, apart from the applicant's own averments, is provided by the affidavit of Ganiem, who heads up the NGO for which Julies was working as an agent. Ganiem says that she met the applicant in 2007 while conducting a youth project in the Kensington area. The applicant approached her from time to time for assistance and guidance in relation to the problems she was experiencing in her life. Ganiem states that during August 2009 the applicant approached her at her office without an appointment. This was shortly after the *Talāq* had been issued. The applicant was pregnant and was accompanied by her son Sharief. The applicant complained that Moosa was not financially maintaining her or the minor child. The applicant also told Ganiem about the *Talāq* which had been pronounced. Ganiem asked the applicant whether she and Moosa were still living together. The applicant replied in the affirmative and added that they were sharing a bed and having sexual intercourse. Ganiem told the applicant that in terms of Sharia law the resumption of marital relations had the effect of invalidating the *Talāq*. Ganiem thereafter decided to contact Moosa to discuss his responsibilities towards his family. She saw him about a week after seeing the applicant. She asked him if he still loved his wife and he responded that he did. She asked him about the *Talāq* and whether he and the applicant were still sexually active. Moosa replied in the affirmative and said that as far as he was concerned he was still married to the

applicant. Throughout his consultation with Ganiem, Moosa referred to the applicant as his wife.

[31] Tashrick, who was cited as the fourth respondent, did not file a notice of opposition and has not filed any affidavit in the current proceedings. (Although he did not file a notice of opposition, the applicant's attorneys have continued to serve all subsequent papers on him, including a copy of the order of 29 August 2013 in terms of which the application was postponed to 10 October 2013.) There is thus no evidence before me to contradict the evidence adduced on behalf of the applicant. Tashrick has not responded to the allegations in the founding papers (confirmed by Julies) regarding the manner in which his first affidavit was made and which refute his later version as to having been tricked into signing a blank page. Even if Tashrick's affidavit of June 2010 were disregarded because of his later recantation, the other evidence in the present proceedings is sufficient to establish that there was a reconciliation with the resumption of sexual relations during the *'Iddah* period. There is expert evidence from an Islamic scholar, Yaaseen Abass, that in the circumstances averred by the applicant the *Talāq* fell away and that the applicant remained married to Moosa by Islamic rites. That this is the correct position in Islamic law does not ever seem to have been in dispute during the history of this matter. In particular, the MJC apparently reached its decision of 7 December 2011 on the strength of a factual finding that there had been no reconciliation and not on a differing view as to the tenets of Islam applicable to the matter.

[32] The applicant is thus entitled to an order in terms of s 35(10) setting aside the Master's decision not to uphold her objection and to an order declaring that the marriage concluded in terms of Islamic law between the applicant and Moosa subsisted at the date of the latter's death and that she is thus to be recognised as the 'spouse' of Moosa for purposes of the Intestate Succession Act and as a 'survivor' for purposes of the Maintenance of Surviving Spouses Act. This is in essence the relief sought in prayers B1, B2, B3 and B6 of the amended notice of motion. I do not think it is necessary to grant declaratory orders in the precise form sought in those paragraphs. In particular, the upholding of the applicant's objection in the terms of the order I propose to make will necessarily entail that the liquidation and distribution account will have to be amended to make provision for her and the

two minor children to receive their respective portions of the deceased estate in accordance with the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

[33] I do not consider it necessary or appropriate to grant the declaratory order sought in prayers B4, ie that the Master's reliance on the MJC's letter of 2 September 2010 was unlawful and unconstitutional. The granting of that declaratory order would not affect the substantive relief to be granted to the applicant. It is sufficient that her claim to be recognised as Moosa's surviving spouse has been established on its merits in the proceedings before me.

[34] I should record, however, that Mr Papier unequivocally accepted that it was not the Master's contention that she was entitled, in matters concerning Islamic marriages and their dissolution, to rely on decisions of the MJC without regard to the evidence. I have no doubt that the Master's position, as conveyed through counsel, is correct. The MJC has no statutory or religious authority finally to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam. If, for example, the evidence which served before me had been placed before the Master as part of the objection, and if no contrary evidence raising a material factual dispute had been put before him through the executrix, the Master would have been bound, I think, to reach the same conclusion I have done. She could not properly have dismissed the objection merely because at some stage in the past the MJC had issued a letter that the marriage had been dissolved. The Master is obliged properly to assess the factual material before her in order to determine whether the objection should be allowed or disallowed. She cannot abdicate her function to a body such as the MJC. It is important that the Master's adjudicative function should be properly and diligently performed so that an objector is not put to unnecessary expense by having to approach a court.

[35] Whether in this particular case the Master failed to consider evidence other than the MJC's letter is unnecessary to decide. The Master's letter of 25 February 2013, in which she disallowed the applicant's objections, is formulated in a way which suggests that she might have relied solely on the MJC's letter of 2 September

2010. On the other hand, in the answering papers the Master says that she does not rely merely on letters by the MJC but that she cannot decide disputed questions of fact. She refers to the factual dispute that existed in the present case by virtue of the retracting affidavits of Tashrick. Those affidavits were part of the material she had on file at the time she disallowed the applicant's objections. I have quoted the very terse terms of the objection filed on the applicant's behalf by the WLC. No reference was made to the affidavits which the various parties had made nor were any submissions advanced as to what factual findings could properly be made in the light of the various affidavits. The more detailed material contained in the founding papers and in the affidavits of Saban and Ganiem was not available to the Master. It is possible, having regard to what has been said in the cases, that the Master could legitimately have concluded, at the time the objection served before her, that Tashrick's recanting affidavits created a real dispute which could not be resolved without oral evidence and that the objection should thus be disallowed, leaving it to the applicant to pursue her judicial remedy in terms of s 35(10).

[36] The relief sought in prayer B5, namely that the Master should have held an enquiry in terms of Promotion of Administrative Justice Act ('PAJA'), seems to me to be in conflict with existing case law as to the Master's duties when faced with conflicting factual versions. Section 35(9) does not contemplate the leading of oral evidence before the Master, which is what the applicant envisages by way of prayer B5. Whether s 35(9) should, in the light of constitutional principles, be interpreted so as to require oral hearings in certain circumstances is a question best left, in my view, to the later hearing which (as will appear hereunder) may yet take place in regard to the relief sought in prayers B7 to B10. I nevertheless observe that it may not be conducive to the fair and expeditious resolution of disputes in deceased estates to require the Master to hold *viva voce* hearings (assuming there is capacity in the Master's office for such hearings). An aggrieved party would still have a right to approach the court after the objection had been allowed or disallowed by the Master, and oral evidence might then have to be adduced afresh. The wide appeal remedy afforded by s 35(10) seems to me to militate against a requirement that an oral hearing should take place at the objection stage.

[37] Ms Bawa and Mr Papier were in agreement that the Master's determination of an objection in terms of s 35(9) constituted 'administrative action' for purposes of PAJA. This does not necessarily mean that an oral hearing is required by s 4 of PAJA before the Master may properly determine an objection. Section 35 of the Administration of Estates Act sets out a procedure which enables an aggrieved party to object to the Master against an account; for the executor to comment to the Master on the objection; and for the Master to call for further information. In that process the Master does hear from both sides, though in written form. The adequacy of this procedure (and there is at the moment no challenge to the constitutional validity of s 35(9)) must be assessed with reference to the statutory scheme as a whole. This scheme entitles the executor, before framing the liquidation and distribution account, to call for an affidavit in support of a disputed claim and to request the Master to authorise the examination of the claimant and other witnesses; and the statutory scheme further grants an aggrieved objector the right to approach a court for a decision on the merits and to adduce further evidence in support of the disputed claim.

[38] It is also not apparent to me on what basis oral hearings by the Master, if required at all, could rationally be confined to cases relating to Islamic marriages. There is an infinite variety of circumstances in which a person may be prejudicially affected by a decision of the Master to allow or disallow an objection. If oral hearings have to be held to determine whether an Islamic marriage has been dissolved, I do not see why oral hearings would not then be required in all cases where there are material factual disputes (and this would apply not only to deceased estates but also to insolvent estates and companies in liquidation). The vulnerability of women in Islamic marriages does not arise from evidential problems peculiar to their situation. In the present case, for example, the question whether the Islamic union had been dissolved depended on whether there was a resumption of sexual relations between the parties during the *'Iddah* period. That is a sensitive but not particularly difficult evidential question. Far more difficult and complex matters of proof may arise in relation to more mundane disputed claims which are nevertheless of vital importance to the claimants. The vulnerability of women in Islamic marriages arises primarily from the ease and relative informality with which an Islamic union may be dissolved at the instance of the husband. The mandatory holding of hearings by the

Master when the dissolution of an Islamic marriage is in dispute would not address this source of vulnerability, which is a matter of substantive Islamic law.

The broader constitutional relief

[39] Prayers B7 to B10 seek broader relief unrelated to the particular facts of the applicant's case. Ms Bawa confirmed that the essential purpose of prayers B7 and B8 (which are expressed in the alternative) is to achieve an outcome in which a marriage solemnised in accordance with Islamic rites can be dissolved only by a decree of divorce in terms of the Divorce Act.

[40] Prayers B9 and B10, which are in the alternative to prayers B7 and B8, are aimed at requiring the Minister to establish policies and procedures for the holding of enquiries by the Master whenever the validity of the solemnisation or dissolution of an Islamic marriage is in issue. It is unclear to me whether the Minister would have a power to lay down policies and procedures for the Master other than by making regulations as contemplated in s 103(1) of the Administration of Estates Act, in particular para (c) of that sub-section.

[41] There is evidence before me that the national executive is aware of the desirability of enacting legislation to regulate the solemnisation and dissolution of Islamic marriages in a manner consistent with the Constitution. As early as July 2000 the South African Law Reform Commission circulated an issue paper on the subject. There have been various interactions with stakeholders. The history up to the period March 2009, at least from the perspective of the Department of Justice and Constitutional Development, appears from the affidavit made by the then Director-General in the Department, Mr Simelane, in the proceedings brought by the Women's Legal Centre Trust which gave rise to the judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa & Others* 2009 (6) 94 (CC). (Mr Simelane's affidavit was attached to the answering papers in the present matter.) Further information is provided in the affidavit by Ms JL Williams, an attorney and the director of the WLC. In the current proceedings the Master has annexed a copy of the Muslims Marriages Bill and has said that it is on the legislative programme for 2013.

[42] From the applicant's replying papers it seems that the Bill is not in truth on the legislative calendar for this year. There is no evidence from the Master or Minister as to what has happened since 2009. Ms Williams points out that in the *Hassam* matter (see para 1 above) the Minister's deponent said (in 2007) that the likelihood was that the legislative process for the promulgation of the Bill would start that year. Given the absence of progress after 2007, the WLC sought relief by way of direct access to the Constitutional Court in the *Women's Legal Centre Trust* case *supra* but the Constitutional Court ruled that direct access was not permissible (that was the case in which Mr Simelane made the affidavit previously mentioned). In January 2010 the Department informed the WLC that the Bill was on the legislative timetable for 2010. In the event, the Bill was only published in December 2010, with comments to be submitted by 15 March 2011. During July 2011 the Department informed the WLC that comments were being evaluated and that the intention was to obtain Cabinet's approval by October/November 2011. About a year later, on 6 November 2012, the WLC asked the Department to furnish it with the revised version of the Bill. The Department's response was that a revised draft of the Bill did not yet exist and that the Department was still in the process of evaluating comments.

[43] The Master says, and I have no reason to doubt, that the topic is a sensitive one and that some Islamic stakeholders consider that the proposed legislation will trench upon their fundamental right to freedom of religion as guaranteed by s 15(1) of the Constitution. Nevertheless, the nettle will need to be grasped sooner or later. There is no explanation from the Master or Minister in the present case as to why there has been such a delay since 2009.

[44] For obvious reasons a court would be most reluctant to make orders affecting the substantive law in this area. It is a sensitive subject requiring widespread consultation. The appropriate regulation of Islamic marriages requires more detailed provisions than a court could appropriately incorporate in a judicial order (as is apparent from the content of the Bill published in December 2010). Ms Bawa acknowledged that the orders sought in prayers B7 and B8 would be very blunt instruments. They may give considerable offence to sectors of the Islamic community. There may come a time when, owing to continued lethargy or paralysis

on the part of the executive promoters of legislation in this field, a court will need to intervene. However, given the evidence that the current Bill has been placed or will shortly be placed on the legislative program, it seems to be desirable that some further opportunity should be allowed for this process to follow its course. I made a suggestion along these lines to Ms Bawa and Mr Papier, and this gave rise to an agreement that the application for the relief sought in prayers B7 and B8 be postponed to 20 August 2014 (a period of about ten months) on the basis that the Minister would undertake to file an affidavit by 15 July 2014 setting out the progress which has been made in regard to the Bill. Although Ms Bawa did not concede that the relief sought in prayers B9 and B10 should similarly be postponed, I think those prayers too should stand over for later determination. They are expressed as being in the alternative to prayers B7 and B8. Furthermore, if the proposed Bill is enacted into law, the need for prayers B9 and B10 may well fall away.

[45] I express no opinion as to whether, in the absence of satisfactory progress in the enactment of legislation by the time of the next hearing, a court should grant relief and if so as to what form the relief should take. I venture to suggest, though, that if significant progress in the legislative process has not been made by August 2014 the one point that is unlikely to be received with judicial sympathy is that the national executive has not had enough time to bring appropriate legislation before Parliament.

Conclusion

[46] The costs in general of the application must stand over for later determination. As to the costs of the hearing on 10 October 2013, the applicant has succeeded in having her objection to the liquidation and distribution account upheld and in being recognised as Moosa's surviving spouse. However, none of the respondents who filed notices of opposition opposed this particular relief. Although submissions were made on matters which will now stand over for later determination, those matters will need to be argued afresh on the postponed date in the light of intervening developments. In my view, the costs of the hearing on 10 October 2014 should be determined with reference to the relief which the applicant has succeeded at this stage in obtaining. Since that relief was not opposed by any

of the participating respondents, I think it appropriate that the parties should bear their own costs in relation to the hearing of 10 October 2013.

[47] I thus make the following orders (which incorporate the orders to which the parties have consented):

[a] The seventh respondent's decision, taken on or about 25 February 2013, disallowing the third objection lodged by the applicant against the liquidation and distribution account in the estate of the late Moosa Ely (Estate No 4190/2010), namely an objection against the failure of the account to recognise the applicant as the deceased's surviving 'spouse' for purposes of the Intestate Succession Act 81 of 1987 and as a 'survivor' for purposes of the Maintenance of Surviving Spouses Act 27 of 1990, is set aside in terms of s 35(10) of the Administration of Estates Act 66 of 1965, and the executor of the deceased's estate is directed to amend the account so as to recognise the applicant's status as aforesaid. No further orders are made in respect of the relief sought in prayers B1 to B6 of the amended notice of motion.

[b] In respect of the relief sought in prayers B11 and B12 of the amended notice of motion, and by agreement between the parties, the following orders are made:

(i) The first respondent is removed as the executor in the said deceased estate with immediate effect.

(ii) It is directed that the first respondent shall not be entitled to any remuneration in her capacity as the executor of the deceased estate.

(iii) The first respondent shall, by no later than 30 October 2013, account to the seventh respondent for her administration of the deceased estate, including for any income earned from any estate assets during the period of her executorship.

(iv) The applicant and the *curatrix ad litem* on behalf of the third and fourth respondents shall, within 5 (five) days of this order, submit duly completed nomination forms nominating Ms Yvette Cloete of Yvette Cloete & Associates as executor of the deceased estate in place of the first respondent.

(v) It is recorded that Ms Cloete has agreed to accept such nomination as executor of the deceased estate on a *pro bono* basis and has agreed to file a bond of security in terms of s 23 of the Administration of Estates Act 66 of 1965 within 5 (five) days of the date of this order.

(vi) The seventh respondent shall, on receipt of the nomination forms and the bond of security referred to in (iv) and (v), take all necessary steps to appoint Ms Cloete as executor of the deceased estate by no later than 1 November 2013.

[c] By agreement between the applicant and the seventh and eighth respondents:

(i) the application for the relief sought by the applicant in prayers B7 and B8 of the amended notice of motion dated 28 June 2013 is postponed for hearing in the fourth division on 20 August 2014;

(ii) the eighth respondent shall, by no later than 15 July 2014, file a supplementary affidavit in which he sets out the progress made in respect of the enactment of the Muslim Marriages Bill of 2011 and/or any similar legislation;

(iii) the applicant shall be entitled, by no later than 31 July 2014, to file an affidavit in reply to any such affidavit delivered by the eighth respondent;

(iv) the applicant and the seventh and eighth respondents shall file supplementary heads of argument on 6 and 13 August 2014 respectively.

[d] The application for the relief sought by the applicant in prayers B9 and B10 of the amended notice of motion is likewise postponed for hearing on 20 August 2014.

[e] The parties shall bear their own costs in relation to the proceedings for the removal of the first respondent as executor.

[f] The parties shall bear their own costs in relation to the proceedings for the relief sought in prayers B1 to B6 (which relief has been disposed of by way of the order made in [a] above), including the costs of the appearance on 10 October 2013.

[g] All other questions of costs as between the applicant and the seventh and eighth respondents shall stand over for determination at the hearing on 20 August 2014.

ROGERS J

APPEARANCES

For First Applicant:	Adv N Bawa & Adv M Adhikari Instructed by: Women's Legal Centre Cape Town (Ref: J Williams)
For First Respondent:	Adv S Banderker Instructed by: Marjorie Bingham Attorneys (Ref. M Bingham)
For Second & Third Respondents:	Adv F Jakoet (*as curatrix ad litem)*
For Seventh & Eighth Respondents:	Adv G Papier

Instructed by:

The State Attorney

Cape Town

(Ref. M Faure)