IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

**CASE NO. 1646/01**

In the matter between:

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| **JULEIGA DANIELS** | Applicant |
| and | |
| **ROBIN GRIEVE CAMPBELL N.O.** | First Respondent |
| **MELISSA FOURIE N.O.** | Second Respondent |
| **SORAYA DANIELS** | Third Respondent |
| **ADELAH JAKOET** | Fourth Respondent |
| **SHAHIEDA MANUEL** | Fifth Respondent |
| **MOGAMAT SHARIEF MANUEL** | Sixth Respondent |
| **SARAH DANIELS** | Seventh Respondent |
| **MINISTER OF JUSTICE** | Eighth Respondent |
| **REGISTRAR OF DEEDS** | Ninth Respondent |
| **MASTER OF THE HIGH COURT** | Tenth Respondent |

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JUDGMENT DELIVERED : 24 JUNE 2003

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**VAN HEERDEN J:**

## *Introduction*

In terms of the Intestate Succession Act 81 of 1987, the surviving '*spouse*' of a deceased person has the right to inherit from the intestate deceased estate, in accordance with certain rules governing the order of intestate succession set out

in some detail in section 1 of the Act. The Maintenance of Surviving Spouses Act 27 of 1990, in turn, provides that when a '*marriage*' is dissolved by death after the commencement of the Act (on 1 July 1990), the '*survivor*' (ie the surviving '*spouse*' has a claim for maintenance against the estate of the deceased '*spouse*' in certain circumstances. Neither Act contains a definition of the word '*spouse*' – in essence, the meaning to be given to the word '*spouse*' in each of these Acts is what lies at the heart of this case.

On 27 November 1994, Mogamat Amien Daniels ('*the deceased*') died intestate. The main asset in his deceased estate is a house situate at 2A Athon Walk, Lucerne Place, Hanover Park, Western Cape ('*the property*'). The applicant and the deceased were married in accordance with Muslim rites on 2 March 1977. The marriage, which was at all times monogamous, was not solemnized by a marriage officer appointed in terms of the Marriage Act 25 of 1961. No children were born of this marriage. Throughout his marriage to the applicant (and indeed until his death), the deceased lived with the applicant in the property, and the applicant still lives there.

The property was transferred to the estate of the deceased on 29 July 1998 under Title Deed No. T 70953/98. On 25 January 2001, the first respondent was appointed by the Master of the High Court (the tenth respondent) as the executor of the estate of the deceased and, in these proceedings, the first respondent is cited in his official capacity as such.

The deceased was survived by four children, namely two daughters, Shahieda Manuel and Sarah Daniels (the fifth and seventh respondents, respectively), and two sons, Mogamat Sharief Manuel (the sixth respondent) and Mogamat Cassiem Daniels ('*M C Daniels*'). M C Daniels died intestate on 12 June 1999, leaving four children, who are all still minors. Soraya Daniels (the third respondent) is the mother and natural guardian of two of these children, while Adelah Jakoet (the fourth respondent) is the mother and natural guardian of the other two minor children.

On 15 December 2000, the second respondent was appointed by the tenth respondent, in terms of section 18(3) of the Administration of Estates Act 66 of 1965, to take control of the assets in the deceased estate of M C Daniels, to pay the debts, and to transfer the residue of the estate to his heirs. The second respondent is cited in these proceedings in her official capacity as the section 18(3) respresentative of the estate of the late M C Daniels.

The eighth respondent is the Minister of Justice, who is cited in these proceedings in his official capacity as the member of the National Executive responsible for the administration of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. The ninth respondent, also cited in his official capacity, is the Registrar of Deeds.

The applicant now seeks an order in the following terms:

'*1. Declaring that the Applicant was, for the purposes of the Intestate Succession Act, 81 of 1987, the spouse of Mogamat Amien Daniels at the time of his death and is an heir in the Estate of the Late Mogamat Amien Daniels.*

*2.* ***In the alternative to paragraph 1 above***

*2.1 Declaring that the omission in Section 1(4) of the Intestate Succession Act, 81 of 1987, of the following definition is unconstitutional and invalid:*

"'*spouse*'" shall include a husband or wife married in terms of Muslim rites in a *de facto* monogamous union".

*2.2 Declaring that Section 1(4) of the Intestate Succession Act, 81 of 1987, shall be read as though it included the following paragraph after paragraph (f):*

"(g) '*spouse*' shall include a husband or wife married in terms of Muslim rites in a *de facto* monogamous union".

*2.3 Declaring that the orders in paragraphs 2.1 and 2.2 above shall have no effect on the validity of any acts performed in*

*respect of the administration of an Intestate Estate that had been finally wound up by the date of this order.*

3. *Declaring that the Applicant is, for purposes of the Maintenance of Surviving Spouses Act, 27 of 1990, the survivor of Mogamat Amien Daniels and is entitled to lodge a claim for maintenance in the Estate of the Late Mogamat Amien Daniels and to have such claim determined by the First Respondent.*

4. ***In the alternative to paragraph 3 above***

4.1 *Declaring that the omission from the definition of* "survivor" *in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the words* "and includes the surviving husband or wife of a *de facto* monogamous union solemnized in accordance with Muslim rites" *at the end of the existing definition is unconstitutional and invalid.*

4.2 *Declaring that the definition of* "survivor" *in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, is to be read as if it included the following words after the words* "dissolved by death":

> "and includes the surviving husband or wife of a *de facto* monogamous union solemnized in accordance with Muslim rites".

The first and second respondents are the only respondents opposing this application.

## *Factual background*

As indicated above, the applicant presently resides at the property and has done so for a very long time. She married one Mogamat Amien Wilson ('*Wilson*') on 2 February 1969 and, on 7 July 1969, the said Wilson submitted a written application to the City of Cape Town to rent a council dwelling. On 15 October 1976, the City of Cape Town allocated a council dwelling (the abovementioned property) to the applicant. By that time, the applicant and Wilson had been divorced from each other, the City of Cape Town had been apprised of this fact, and the property was according allocated to the applicant in her own name. The applicant and her children took occupation of the property during October 1976 and she has occupied the property continuously since that time.

When she married the deceased by Muslim rites on 2 March 1977, the applicant informed the City of Cape Town of this marriage and furnished it with a copy of her marriage certificate. In accordance with its then applicable housing policy, the City of Cape Town subsequently transferred the tenancy of the property to

the deceased, who was the principal breadwinner of the family at that time. The transfer of tenancy was effected on 17 July 1978.

It would appear that, under the so-called '*National Sales Campaign*', tenants of council houses were later given the opportunity to purchase such houses and, on 24 September 1990, a written instalment sale agreement was entered into between the City of Cape Town (as seller) and the deceased (as purchaser), in terms whereof the deceased purchased the property from the City of Cape Town for a purchase price of R3 915.00, less a 10% discount. The applicant also signed the Deed of Sale, ostensibly thereby consenting to the deceased purchasing the property. The Deed of Sale, however, incorrectly reflects that the applicant was married to the deceased in community of property.

Although it is not possible, on the papers before this Court, to ascertain any details in this regard, it would appear that the applicant was employed for lengthy periods during her marriage to the deceased and that she contributed substantially towards the household expenses, including the rental and later the purchase price of the property and the service charges levied in respect of the property. The deceased died on 27 November 1994 without leaving a will and, on 29 July 1998, the property was transferred to the '*Estate of the late MOGAMAT AMIEN DANIELS*'. The outstanding balance owing on the purchase price of the property was written off in terms of '*the State discount*' when such transfer was registered in the Deeds Registry.

Some years prior to the death of the deceased, the late M C Daniels and the third respondent had erected a shack on the property. After the death of the deceased, the applicant's continued occupancy of the property was threatened by the late M C Daniels and the third, fifth, sixth and seventh respondents. This threat to the applicant's continued occupancy of the property and her belief that she was entitled to the property, led to the applicant instituting proceedings in this Court in July 1998 under Case No. 9787/98 ('*the 1998 application*'), wherein she sought an order, *inter alia* declaring that she was '*entitled to all right, title and interest in and to*' the property. In the 1998 application, the late M C Daniels was cited in his personal capacity as the first respondent and the Master of High Court (the present tenth respondent) was cited as the second respondent. While the Master indicated that he would abide by the decision of the Court, the 1998 application was opposed by the late M C Daniels. On 10 May 1998, the said application was dismissed with costs by Steyn AJ. A full copy of the papers in the 1998 application, as also a copy of the judgment and order of court, are attached to the founding affidavit deposed to by the applicant in the present application.

Subsequent to the dismissal of the 1998 application, the tenth respondent indicated in writing that, as the applicant was married to the deceased in terms of Muslim rites only, she is not a surviving spouse for the purposes of the Intestate Succession Act and therefore '*does not stand to inherit*' from the intestate estate

of the deceased. The tenth respondent stated further that, '*in terms of the Intestate Succession Act the estate devolves upon the descendants of the deceased* ***per stirpes***'. Furthermore, a claim for maintenance against the estate of the deceased, lodged with the first respondent on the applicant's behalf by her attorneys of record, was rejected by the first respondent on the grounds that –

> '*In terms of the present legal system, your client, who was married to the deceased in terms of Muslim rites, is not a surviving spouse as contemplated in the Maintenance of Surviving Spouses Act 27 of 1990 and thus is not entitled to maintenance. In terms of this Act* "the survivor" *means the surviving spouse in a marriage dissolved by death. Currently, marriages in accordance with Muslim rites are not considered valid legal marriages.*'

Having regard to the answering affidavit filed on behalf of the first and second respondents in these proceedings, and to the arguments advanced by Mr **Breitenbach** and Ms **Bawa**, who appeared for the respondents before me, the issues which arise for determination may be summarised as follows:

(i) Is the question whether the applicant can, on constitutional grounds, inherit from the deceased in terms of the Intestate Succession Act *res judicata* or, alternatively, is the applicant estopped from raising this issue again?

(ii) Can the word '*spouse*', as utilised in the Intestate Succession Act and in the Maintenance of Surviving Spouses Act, be interpreted to include a person in the position of the applicant, i.e., a husband or wife married in terms of Muslim rites in a *de facto* monogamous union?

(iii) If, on a proper construction of these Acts, a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union cannot be regarded as a '*spouse*' for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, is the failure to provide for such persons in such Acts unconstitutional and invalid and, if so, can such invalidity be '*cured*' by '*reading in*' the provisions proposed by the applicant?

## *Res judicata and issue estoppel*

Counsel for the respondents argued that, on a proper application of the rule of *res judicata* or, alternatively, of the '*doctrine of issue estoppel*', the question whether the applicant can, '*on constitutional grounds*', inherit from the deceased in terms of the Intestate Succession Act cannot be raised in the present proceedings. According to counsel, in the 1998 application, the applicant unsuccessfully sought '*essentially the same relief*' on a number of grounds, one of which was '*essentially the same as that now advanced*'.

In accordance with the rule of *res judicata*, '*where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the* ***exceptio rei judicatae vel litis finitae****. The object of this principle is to prevent the repetition of law suits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions*' (per Corbett JA (as he then was) in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F-G).

The requirements for the common law defence of *res judicata* and the (English-inspired) doctrine of issue estoppel were discussed by Thring J in the recent case of *Holtzhausen & Another v Gore NO & Others* 2002 (2) SA 141 (C) at 148E-150G. The court set out the requirements for the defence of *res judicata*, as stated by the Supreme Court of Appeal in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 235I, namely –

> '*(i) dat die twee aksies tussen dieselfde partye aanhangig gemaak is;*
>
> *(ii) dat die skuldoorsaak in beide gedinge dieselfde was, en (iii) dat dieselfde regshulp in beide aksies gevorder is.'*

(See further in this regard Rabie 'Estoppel' in *LAWSA* Volume 9 (first reissue, 1996) paras 421-443 and the cases there cited.)

The learned judge pointed that, under the influence of the English doctrine of issue estoppel, it had been held in several cases - amongst them *Horowitz v Brock & Others* 1988 (2) SA 160 (A), *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 635 (A) and *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (B) - that the second and third requirements mentioned above are not immutable and can be relaxed in order to ensure overall fairness.

As regards the doctrine of issue estoppel, Thring J agreed with the description by Friedman JP in the *Bafokeng Tribe* case (*supra*) of the requirements of this doctrine and its application in the South African case law. The relevant passage in the *Bafokeng Tribe* case (at 566F-J) reads as follows:

> '*The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action.*
>
> *Issue estoppel is a rule of* ***res judicata*** *but is distinguished from the Roman-Dutch Law exception in that in issue estoppel the requirement that*

*the same subject-matter or thing must be claimed in the subsequent action is not required. Issue estoppel has a twofold requirement.*

*Issue estoppel has been applied in our law in decisions of Provincial and Local Divisions. However, in the* ***Kommissaris*** *case* ***supra*** *the Court accepted that the expression* "issue estoppel" *had been in use in our law for a long time, and is a useful description of these cases which do not strictly conform to the threefold requirements of* ***res judicata****, because the same relief is not claimed on the same cause of action, but nothwithstanding that the defence may be successful.*

*Issue estoppel is also founded on public policy to avoid a multiplicity of actions in order* "***inter alia*** to conserve the resources of the courts and litigants". *There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity*.'

(See also *Signature Design Workshop CC v Eskom Pension and Provident Fund & Others* 2002 (2) SA 488 (C) at 492H-493I, 497J-498F; Rabie *op cit* para 444 – 447 and the other authorities there cited.)

A perusal of the papers before the court in the 1998 application makes it clear that the applicant's present cause of action in respect of the Intestate Succession Act was not raised **in any way** in the affidavits filed. On the contrary, in seeking an order declaring that she was '*entitled to all right, title and interest in and to*' the property, the applicant relied on an oral agreement between her and the deceased in terms of which '*indien hy voor my sou sterwe, … die betrokke onroerende eiendom uitsluitlik myne sou wees,*' as well as acknowledgements by the deceased during his lifetime that '*die onroerende eiendom nie syne is nie omdat hy my en die kinders daarin kom kry het*'. It appears from the judgment of Steyn AJ that the possibility of an alternative cause of action, based on constitutional grounds, was only raised by applicant's counsel during the hearing of the application, and that applicant's counsel requested that the matter be postponed so that, *inter alia*, the notice of motion could be amended and affidavits supplemented to provide for the applicant's proposed alternative cause of action ('*beweerde beoogde alternatiewe eisoorsaak*'). This application for a postponement was opposed by counsel representing M C Daniels, the then first respondent, and was ultimately refused by Steyn AJ. The relevant parts of the judgment delivered in the 1998 application read as follows:

> '*Mogamat het intestaat gesterf op 27 November 1994. Volgens Intestate Erfreg erf sy boedel op sy kinders. (Sien in hierdie verband die Wet op Intestate Erfreg, Wet 81 van 1978* [sic – 1987] *en wel artikel 1(1)(b).) Applikant kan nie van Mogamat erf nie, aangesien daar nie 'n wettige huwelik bestaan het, soos bepaal deur Suid-Afrikaanse*

*Huwelikswetgewing nie. Daar was nie aanvanklik namens applikant aangevoer of in haar beëdigde verklaring beweer dat sy geregtig is om te erf van Mogamat nie, maar ek sal later weer na hierdie aspek verwys.*'

Dealing with the applicant's cause of action based on an oral agreement between her and the deceased in terms of which the applicant would, upon the deceased's death, be the owner of the property, Steyn AJ held that any such agreement would be null and void for failure to comply with the formalities prescribed by section 2 of the Alienation of Land Act 68 of 1981, and then continued:

'… *Die applikant kan derhalwe nie steun op hierdie eisoorsaak nie.*

*Tydens die aanhoor van die aansoek het die advokaat vir die applikant, mnr Jethro, te kenne gegee dat hy ook op grond van 'n alternatiewe eisoorsaak namens applikant* ***wil voortgaan*** *en dit is naamlik dat sy weens konstitutionele gronde behoort te erf, soos wat 'n wettige vrou sal erf. In die saak van DAVIDS v THE MASTER 193* [sic – 1983] *(1) SA 458 (C) is bepaal dat 'n eggenoot, soos bedoel in artikel 49(1) van die Boedelwet, 1965 van 1966, nie insluit 'n vrou getroud volgens Moslemreg of –gebruik nie. JUNE SINCLAIRE* [sic – Sinclair] *in haar boek* THE LAW OF MARRIAGE IN SOUTH AFRICA*, Volume 1, op 158, 176 en 177 wys daarop dat 'n huwelik wat gesluit word ingevolge die bepalings van die Huwelikswet, Wet 25 van 1961, aan wettige eggenote sekere beskerming*

*en ondersteunende regsmaatreëls verleen. Moslemhuwelike is 'n intieme verhouding waarna die volledige reeks van beskermende huwelikswette nog nie uitgebrei is nie. Sy wys ook daarop dat vroue wat die beskerming geniet van die Egskeidingswet en ander huwelikswetgewing ook soms ernstige finansiële probleme ondervind by beëindiging van hul huwelike. Daar word deur mnr Hack, namens die eerste respondent, aangevoer dat vir applikant om te kan slaag op hierdie grond die Hof revolusionêre nuwe reg sal moet skep. Daar is geen gesag dat die Hof al ooit voorheen 'n soortgelyke bevel gemaak het nie.*

*Die sake waarna mnr Jethro verwys het, is nie direk van toepassing in die aangeleentheid nie. Ek meld terloops dat ek verneem dat volgens die bepalings van Moslemreg, sou die applikant geregtig gewees het op een-agtste van die oorledene se boedel …*

*Indien mnr Jethro se argument ontleed word, blyk dat applikant die Hof vra om te beveel dat sy ingevolge die bepalings van artikel 1(1)(c) van die Intestate Erfreg, Wet 81 van 1978* [sic 1987]*, kan erf wat in effek dan sal behels dat sy die hele boedel van die oorledene kan erf. Applikant voer dus aan dat dit konstitusioneel sal wees dat haar Moslemhuwelik wettig beskou word en dat sy erf nie volgens Moslemgebruik en wette nie, maar volgens die bepalings van Suid-Afrikaanse Reg.*

*Ek is van mening dat hierdie Hof nie 'n bevel kan maak, soos wat mnr Jethro beweer* ***applikant sal vra*** *nie. Nuwe wetgewing sal deur Parlement uitgereik moet word om voorsiening te maak vir die wettigheid van huwelike wat nie gesluit word volgens die streng vereistes wat tans gestel word deur Suid-Afrikaanse huwelikswetgewing nie. Ek haal ook aan 'n opmerking van KENTRIDGE, WnR in DU PLESSIS & OTHERS v DE KLERK & ANOTHER 1996 (3) SA 850 (Konstitusionele Hof) bladsy 881C waar hy sê:*

> "The radical amelioration of the common law has hitherto been a function of Parliament; there is no reason to believe that Parliament will not continue to exercise that function."

*Hierdie opmerking verskyn in die saak waarna mnr Jethro my verwys het, naamlik MTEMBO* [sic Mthembu] *v LETSALA & ANOTHER 1988* [sic 1998] *(2) SA 675 (TPD) op 687A.*

*Applikant het haar aansoek aan die Hof gerig by wyse van mosieprosedure. Soos te wagte moes gewees het, het daar 'n groot feitedispuut tussen die partye ontstaan. Ingevolge die bepalings van artikel* [sic] *6(5)(g) van die Hooggeregshofreëls het die Hof 'n diskresie om die aansoek te weier of te verwys vir die lei van mondelinge getuienis of 'n ander bevel te maak. Mnr Hack vra dat die aansoek van applikant van die hand gewys word met koste en mnr Jethro, wat aanvanklik 'n finale bevel wou hê,* ***vra tans dat die aangeleentheid uitgestel moet word sodat hy***

***in die interim*** *kan voldoen aan sekere prosedurele vereistes,* ***sy Kennisgewing van Mosie kan wysig en beëdigde verklarings kan aanvul om voorsiening te maak vir applikant se beweerde beoogde alternatiewe eisoorsaak*** *…*

*Die vraag wat die Hof moet beoordeel is of die applikant hoegenaamd prima facie 'n saak uitgemaak het wat tans voor die Hof geliasseer is sodat die Hof aan haar die vergunning kan gee dat die saak wel verder uitgestel word sodat aan prosedurele vereistes voldoen kan word en beëdigde verklarings aangevul kan word. Applikant het geen prima facie saak uitgemaak dat sy geregtig is op die aangevraagde regshulp gebaseer op 'n eisoorsaak van 'n ooreenkoms dat sy die eienaar was van die onroerende eiendom nie.*

***Soos die aansoek tans voor die Hof staan*** *het sy ook nie 'n prima facie saak uitgemaak dat sy geregtig is op die regshulp wat sy vra dat sy geregtig is om intestaat van Mogamat te erf nie. Soos gemeld, is daar in elk geval 'n feitedispuut op wesentlike aspekte van applikant se saak wat sy moes voorsien het en het sy ook nie sekere verpligte prosedurele stappe geneem om haar saak behoorlik voor die Hof te plaas nie. Die Hof het 'n diskresie met betrekking tot die verdere verloop van die saak. Dit is my mening dat dit onbillik sal wees teenoor die respondent en teenoor die regbank dat die saak verder uitgestel word om applikant 'n geleentheid te*

> *bied om 'n saak behoorlik voor die Hof te plaas, soos wat sy aanvanklik moes gedoen het. As die applikant, na behoorlike oorweging en regsadvies, van mening is dat sy wil voortgaan met 'n eis gebaseer op haar sogenaamde konstitusionele punt of moontlik 'n ander eisoorsaak, soos universele vennootskap waarna die Meester verwys het, dan staan dit haar steeds vry, maar op hierdie stadium* <u>*WORD DIE AANSOEK VAN DIE HAND GEWYS MET KOSTE*</u>.' (Emphasis – in bold - added.)

To my mind, a analysis of the affidavits filed and of the judgment delivered in the 1998 application makes it abundantly clear that the applicant's cause of action in the present proceedings, based on the meaning of the word '*spouse*' in the Intestate Succession Act, was neither properly raised as a cause of action in the 1998 application, nor finally adjudicated upon between the parties at that stage. I will assume, in favour of the first and second respondents, that the fact that this issue was not explicitly raised on the affidavits filed in the 1998 application is not **necessarily** decisive of the question of *res judicata* or *issue estoppel*. Thus, in *Horowitz v Brock & Others* 1988 (2) SA 160 (A) at 180J-181A, the Appellate Division (as it then was) held that -

> '*while a Court in motion proceedings may decide a dispute on an issue which has not been raised on the affidavits or in the relief sought provided it has been fully canvassed* "it must be fully canvassed by both sides in the sense the Court is expected to pronounce upon it as an issue".'

(See too, in this regard, Rabie *op cit* para 442; *South Peninsula Municipality v Evans & Others* 2001 (1) SA 271 (C) at 280I-283H; and cf. *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714F-G.)

By no stretch of the imagination, however, can it be said that the interpretative and/or the constitutional issue in respect of the Intestate Succession Act, raised by the applicant in these proceedings, **was** fully canvassed by both sides in the 1998 application, nor that the Court in that application finally pronounced upon such issue. At the most, Steyn AJ expressed certain views in regard to a **potential** alternative cause of action which the applicant **wished to raise**, and in order to provide for which the applicant's counsel applied for a postponement of the hearing. This application for a postponement was refused by Steyn AJ and it is clear from her judgment that the views expressed by her on the applicant's '*beweerde beoogde alternatiewe eisoorsaak*' were preliminary only, and did not form part of the basis upon which she dismissed the 1998 application. I disagree with the argument advanced by counsel for the first and second respondents in the proceedings before me to the effect that the part of the judgment of Steyn AJ dealing with the applicant's so-called '*konstitutionele punt*' was a final judgment on the merits of that cause of action. This being so, one of the requirements for a successful defence of *res judicata*, namely that the previous judgment was based on the same cause of action as that presently relied upon (or, to put it differently, that '*the cause of action has been finally litigated between the parties*'

– see *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B), has not been satisfied.

This conclusion renders it unnecessary for me to consider whether the other two requirements for the defence of *res judicata* (namely, that the previous judgment was given in proceedings between the same parties, and with respect to the same relief) have been met. Suffice it to say that, despite the strenuous arguments to the contrary advanced by counsel for the first and second respondents, I am inclined to the view that this question should be answered in the negative. I do not, however, express any definite conclusion one way or the other in this regard.

This is also not a case in which, in order to ensure overall fairness and equity, a relaxation of any of the requirements for the defence of *res judicata* would be appropriate. As indicated, the interpretative and/or the constitutional issue in respect of the Intestate Succession Act was neither properly canvassed, nor finally adjudicated upon, in the 1998 application. There can thus be no question of the application of the doctrine of issue estoppel, as it is understood by the South African courts, in the present case. Indeed, were I to allow the first and second respondents to shelter behind the defence of *res judicata* or of *issue estoppel* in the present proceedings, I would, in effect, be blocking the determination of an important issue which has not previously been determined in a court of law, and I may well thereby be doing an injustice to **both** parties, not

only to the applicant. In my view, therefore, the reliance of the first and second respondents on *res judicata* and *issue estoppel* must fail.

## *Interpretation of the word 'spouse' as utilised in the relevant Act*

Section 1 of the Intestate Succession Act provides that:

> '*(1) If after the commencement of this Act a person (hereinafter referred to as the* "deceased"*) dies intestate, either wholly or in part, and –*
>
> *(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;*
>
> *(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;*
>
> *(c) is survived by a spouse as well as a descendant –*
>
> *(i) such 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 of Justice by notice in the* ***Gazette*** [fixed at present at R125 000.00 – see GN 483 in *Government Gazette* 11188 of 18 March 1988], *whichever is the greater; and*
>
> *(ii) such descendant shall inherit the residue (if any) of the intestate estate;*
>
> (d) *…*'.

Section 2 of the Maintenance of Surviving Spouses Act, in turn, provides the following:

> '*(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefor from his own means and earnings.*'

In terms of Section 1 of the Maintenance of Surviving Spouses Act, the word '*survivor*' is defined as meaning '*the surviving spouse in a marriage dissolved by death*'.

As indicated above, however, there is no definition of the word '*spouse*' in either of the two Acts.

Mr **Chaskalson** and Ms **Williams**, who represented the applicant in the proceedings before this Court, contended that the '*ordinary*' meaning of the word '*spouse*' – namely, '*married person; a wife, a husband*' (see *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993)) – is clearly capable of including a person in the position of the applicant (ie, a person who was the wife or husband of the deceased in a *de facto* monogamous marriage by Muslim rites). Thus, on the ordinary literal interpretation of the two Act, the applicant is entitled to those rights which the Acts vest in surviving '*spouses*'.

As was pointed out by counsel for both sides, marriages by Muslim rites have thus far not been recognised by South African courts as valid ('*legal*') marriages, firstly, because such marriages are potentially polygynous and hence contrary to public policy (whether or not the actual union is in fact monogamous) and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961 (see, for example, *Bronn v Fritz Bronn's Executors & Others* (1860) 3 Searle 313; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Davids v The Master* 1983 (1) SA 458 (C); *Ismail v Ismail* 1983 (1) SA 1006 (A), and *S v Johardien* 1990 (1) SA 1026 (C)). Applicant's counsel submitted, however, that the '*cultural chauvinism*' of the line of cases refusing to recognise marriages by Muslim rites as valid marriages, or parties married by Muslim rites as '*spouses*', for the purposes of common law and statutory rights is incompatible with the *boni mores* of contemporary South Africa. As evidence of the changing approach of South African courts to marriages by Muslim rites, applicant's counsel relied, *inter alia*, on the judgment of Farlam J (as he then was) in *Ryland v Edros* 1997 (2) SA 690 (C) and the judgment of Mahomed CJ in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 (4) SA 1319 (SCA).

*Ryland v Edros* concerned an attempt by the defendant, a woman previously married by Muslim rites in a *de facto* monogamous union which had been

terminated by her husband in accordance with Islamic law, to enforce (by way of a claim in reconvention) certain incidents of '*the contractual agreement*' constituted by the marriage by Muslim rites between the parties. It is important to note that, as was emphasised by counsel for the defendant in that case, the Court was **not** asked to recognise the marriage by Muslim rites as a valid marriage, '*but merely to enforce certain terms of a contract made between the parties which are in a sense collateral thereto*' (at 709F). Farlam J formulated the relevant question for determination by the court as follows (at 701I-702A):

> '*Is the Court precluded from enforcing the terms of the "*contractual agreement" *between the parties because of the decision of the Appellate Division in* ***Ismail v Ismail*** *1983 (1) SA 1006 (A), in which it was held that claims for maintenance and deferred dowry brought by a woman against a man to whom she had been married by Muslim rites were not enforceable because they were intrinsic to a conjugal union between the parties which, being potentially polygamous (although in fact monogamous) was void on the grounds of public policy?*'

Applying section 35(3) of the interim Constitution (Constitution of the Republic of South Africa Act, 200 of 1993), the learned judge considered whether the spirit, purport and objects of Chapter 3 of the interim Constitution and the values underlying such Chapter were in conflict with the views as to public policy expressed and applied in the *Ismail* case, holding that, if this question were to be answered in the affirmative, then the values underlying Chapter 3 of the interim

Constitution should prevail. Relying upon the values of equality, tolerance of diversity and the recognition of the plural nature of South African society as being among the values underlying the interim Constitution, Farlam J ultimately came to the conclusion there was nothing offensive to public policy or good morals in the contract which the defendant was seeking to enforce in those proceedings – '*a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with the rites of their religion and which as a fact is monogamous*' (at 707E-F read together with 710D-711C). The Court in the *Ismail* case had taken into account the views (or presumed views) of only one group in the heterogeneous South African society and, in the light of the interim Constitution:

> '*… It is quite inimical to all the values of the new South Africa for one group to impose its values on another and … the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it*' (at 707G).

Farlam J emphasised that his views were confined to contractual terms agreed to in the context of a *de facto* monogamous Muslim marriage and would not necessarily apply to contractual terms flowing from a polygamous Muslim marriage (at 709D).

While the judgment of Farlam J is enlightened, progressive and constitutionally sensitive, and has correctly been applauded as such (see, in this regard, Van Heerden *et al Boberg's Law of Persons and the Family* (2 ed, 1999) 165 note 13 and authorities there cited), it cannot be construed as authority for the proposition that a marriage by Muslim rites (albeit a *de facto* monogamous marriage) is a '*valid marriage*' for purposes of the South African law, nor that the parties to such a marriage are to be recognised as '*spouses*' in the interpretation of South African legislation.

Exactly the same can be said of the judgment of the Supreme Court of Appeal in the *Amod* case (*supra*). In this case, a dependant's action was brought against the insurer of a driver who had negligently killed the husband of a woman (the appellant) married according to Muslim rites in a *de facto* monogamous marriage, which marriage had not been registered as a civil marriage in terms of the Marriage Act 25 of 1961. Counsel for the respondent in that case contended that the appellant's claim should fail because the marriage between her and the deceased did not enjoy the status of a '*marriage*' in the civil law; that any legal duty which the deceased had to support the appellant was therefore a contractual consequence of the union between them and not an *ex lege* consequence of the marriage *per se*; and that the dependant's action for loss of support should not be extended to cover claims for loss of support undertaken contractually, but not flowing from the common-law consequences of a valid marriage (at para [16]).

As in *Ryland v Edros* (*supra*), Mahomed CJ did not consider it necessary to grapple with the question whether or not the marriage between the appellant and the deceased was a '*valid marriage*' in terms of the South African law. According to the learned Chief Justice:

> ' [20] *The crucial question which therefore needs to be applied is whether or not the legal right which appellant had to support from the deceased during the subsistance of the marriage is a right which, in the circumstances disclosed by the present case, deserves recognition and protection by the law for the purposes of the dependant's action. In my view, it does, if regard is had to the fact that at the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a* ***de facto*** *monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved* "a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable". *The insistence that the duty of support which such a serious* ***de facto*** *monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable*

*basis for the determination of the **boni mores** of the society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993…*

[23] *I have no doubt that the **boni mores** of the community at the time when the cause of action arose in the present proceedings would not support a conclusion which denies a duty of support arising from a **de facto** monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which affords to the same duty of support arising from a similarly solemnised marriage in accordance with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnised in accordance with African customary law exactly the same protection for the same purpose (by virtue of the provisions of s 31 of the Black Law Amendment Act 76 of 1963, which reverses the consequences of the **Fondo** judgment* [*Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A)] *in respect of customary marriages). The inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be*

*inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced...*

[25] …*For the purposes of the dependent's action the decisive issue is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law. If the marriage between the dependant and the deceased was a valid marriage in terms of the civil law, she would of course have the right to pursue a dependant's claim based on the duty of the deceased to support her, but it does not follow that, if she were not so married, she should have no such right. On the analysis I have previously made she would indeed have such a right even if she was not validly married to the deceased in the civil law if the deceased was under a legally enforceable contractual duty to support her following upon a* ***de facto*** *monogamous marriage in accordance with a recognised and accepted faith such as Islam.*'

(For critical discussion of the judgment of Mahomed CJ in the *Amod* case, see *inter alia* Goldblatt '*Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)*'* (2000) 16 *SAJHR* 138; Bonthuys 'The South African Bill of Rights and the Development

of Family Law' (2002) 119 *SALJ* 748 at 762-763; Sinclair 'Embracing New Family Forms, Entrenching Outmoded Stereotypes: Building the Rainbow Nation', unpublished paper presented at the International Society of Family Law 11th World Conference *Family Law and Human Rights* August 2002, Copenhagen/Oslo at pages 22-24.)

While the articulation, in the *Ryland* and *Amod* cases, of the changes in the *boni mores* of South African society in a post-constitutional era in respect of marriages by Muslim rites may well be relevant in the determination of the applicant's (alternative) reliance on the unconstitutionality of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, neither case '*address*[ed] *the persistent invalidity of Muslim… marriages (*see Van Heerden *et al op cit* 167-168), or dealt in any way with the meaning to be given to the word '*spouse*' in South African legislation. Indeed, in the *Amod* case, the Supreme Court of Appeal emphasised (at para [27]) that its recognition of a legal duty of support as a contractual incident of a Muslim marriage for the purposes of the dependant's action would not lead '*to a recognition of possibly other incidents of such a marriage which have neither been articulated or properly analysed in the present appeal … It is perfectly possible to recognise one incident of such a marriage for a special purpose without necessarily recognising any other incident of such marriage for that purpose or any other purpose*'.

In support of the proposition that, on an ordinary interpretation, the word '*spouse*' in the Intestate Succession Act and in the Maintenance of Surviving Spouses Act would include a person in the position of the applicant, applicant's counsel also relied on various recently enacted or amended statutes which expressly recognise Muslim marriages and other religious marriages for the purposes of conferring certain rights on the parties to such marriages. In this regard, reference was made to, *inter alia*, the following statutory provisions:

- In terms of section 10(1) of the Civil Proceedings Evidence Act 35 of 1965, neither a husband nor a wife may be compelled, in civil proceedings, to disclose any communication made to him or her by the other spouse during the existence of the marriage. Section 10A of the Act, which was inserted by section 4 of the Justice Laws Rationalisation Act 18 of 1996 (with effect from 1 April 1997), provides that '*any customary marriage or customary union, concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or* ***any marriage concluded under any system of religious law, shall be regarded as a valid marriage for the purposes of the law of evidence***'.

- In terms of section 195(2) of the Criminal Procedure Act 51 of 1977, as substituted by section 4 of Act 18 of 1996 (with effect from 1 April 1997), the word ' *marriage*', for the purposes for the law of evidence in criminal proceedings (and in particular, in the context of section 195, for the purposes of the compellability of one spouse as a witness for

the prosecution in criminal proceedings against the other spouse) is expressly defined to include ' *a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or* ***any marriage concluded under any system of religious law*****'.**

- In terms of section 1 of the Government Employees Pension Law 1996 (Proclamation No. 21 of 1996) (date of commencement 1 May 1996), the word '*dependant*' is defined, in relation to a member or a pensioner, as including '*(b) any person in respect of whom the member or pensioner is not legally liable for maintenance, if such a person – (i) … ; (ii) is the spouse of a member of pensioner, including a party to a customary union according to indigenous law and custom, or to a* ***union recognised as a marriage under the tenets of any religion****'.* Similarly, item 1.19 of Schedule 1 to the Government Employees Pension Law defines '*spouse*' as meaning '*a person who can provide proof to the satisfaction of the Board of Trustees that he or she was the lawful husband or wife of a member or pensioner at the time of that member's or pensioner's death, or, if he or she was* ***not the lawful husband or wife of that member or pensioner****, that he or she was the* ***spouse*** *of that member of pensioner according to indigenous law or custom or* ***the tenets of any Asiatic religion***'.
- In terms of section 1(d) of the Taxation Laws Amendment Act 5 of 2001 (date of commencement 20 June 2001), the following definition of

'*spouse*' was inserted into section 1 of the Transfer Duty Act 40 of 1949:

'"Spouse" *in relation to any person, means the partner of such person*

*(a)* *in a marriage or customary union recognised in terms of the laws of the Republic;*

*(b)* ***in a union recognised as a marriage in accordance with the tenets of any religion****; or*

*(c)* *in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent;*

*provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property.*'

One of the consequences of this new definition is that the exemption from transfer duty of property acquired by '*a surviving spouse … in any manner from the estate of the deceased spouse*' (section 9(1)(f)) now also applies to property inherited by the surviving spouse from a deceased spouse to whom he or she was married by Muslim rites. Similarly, with effect from 27 April 1994, a definition of '*spouse*' was inserted into section 1 of the Estate Duty Act 45 of 1955 by section 1(1) of the Revenue Laws Amendment Act 59 of 2000. The definition of '*spouse*' included, in relation to any deceased person, '*a person who at*

*the time of death of such deceased person was the partner of such a person – (a) in a marriage recognised in terms of the Laws of the Republic; (b) in a marriage entered into in accordance with any system of religious law which is recognised in the Republic; or (c) in a permanent same-sex life relationship*'.

This definition of '*spouse*' was subsequently amended by sections 1(a) and (b) of the Taxation Laws Amendment Act 5 of 2001 (with effect from 20 June 2001) so that it is now, in all material respects, virtually identical to the definition of '*spouse*' inserted into the Transfer Duty Act by section 1(d) of Act 5 of 2001 (as cited in full above). One of the consequences of these amendments to the Estate Duty Act is that, with effect from 27 April 1994 (when the interim Constitution came into operation), property included in a deceased estate which accrues to the surviving spouse who was married to the deceased by Muslim rites is exempted from the payment of estate duty (see section 4(ii)).

Mention could also be made of the definition of '*marriage*' inserted into section 1 of the Child Care Act 74 of 1983 by section 1(d) of the Child Care Amendment Act 96 of 1996 (with effect from 1 April 1998). For the purposes of the Child Care Act, '*marriage*' is now defined as meaning '*any marriage which is recognised in terms of South African law or customary law, or* ***which was concluded in***

***accordance with a system of religious law subject to specified procedures****, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly*'. (The emphasis in all of the statutory provisions cited above is my own.)

There are other examples of statutes or amendments to statutes in terms of which words such as '*marriage*', '*spouse*' and '*dependant*' are expressly defined so as to include, *inter alia*, marriages by Muslim rites and other religious marriages for specified purposes. Some of these were referred to by the applicant's counsel, others not.

The argument advanced by counsel for the applicant in this regard was that these legislative enactments and amendments, seen together with the shift in South African public policy in respect of the recognition of certain incidents of Muslim marriages (as articulated in cases such as *Ryland* and *Amod* (*supra*)), indicate that there is no longer any legal basis upon which to '*strain*' the '*ordinary*' meaning of '*spouse*' in the Intestate Succession Act and the Maintenance of Surviving Spouses Act so as to interpret '*spouse*' as excluding Muslim husbands and wives.

In my view, however, counsel's reliance upon these legislative enactments and amendments in support of this proposition is misplaced. Neither the Intestate Succession Act, nor the Maintenance of Surviving Spouses Act, contains any interpretative provisions along the lines of those discussed above. Far from supporting the argument that, on ordinary principles of statutory interpretation, the word '*spouse*' in either of these two Acts includes any person other than a party to a marriage recognised as valid in South African law, the deeming and interpretative provisions referred to in fact point in the opposite direction. By explicitly creating exceptions to the general rule that the only marriages to which legal consequences are attached in South African law are marriages solemnised in accordance with the provisions of the Marriage Act 25 of 1961 and, as such, recognised as valid marriages in this country, the said statutory provisions provide support for the view that, **in the absence of any such deeming or interpretative provision**, the word '*spouse*' in a statute must be given its '*traditional, limited meaning.*'

There is another important component to that part of the applicant's case which is based upon the interpretation of the word '*spouse*' in the relevant Acts. It relies upon the '*new*' method of interpreting statutory provisions ushered in by the enactment of first the interim Constitution and, later, of the Constitution of the Republic of South Africa Act 108 of 1996. Counsel for both sides were in agreement that, because any rights which the applicant may have in respect of the estate of the deceased vested upon his death on 27 November 1994, at a

time when the interim Constitution was in operation, it is the interim Constitution which is applicable when determining whether the relevant statutory provisions may legitimately be interpreted in such a way as to conform to the Bill of Rights in that Constitution (ie Chapter 3 of Act 200 of 1993).

Section 35(3) of the interim Constitution provides that '*in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter*'. Moreover, section 35(2) expressly provides for a process of interpretation of legislative provisions sometimes called '*reading-down*', ie that '*no law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used* ***prima facie*** *exceeds the limits imposed in this chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation*' (see also section 232(3)).

Section 35(2) of the interim Constitution was not repeated explicitly in the final Constitution, but the method of statutory interpretation mandated (and indeed required) by this section, read in conjunction with section 35(3), is now to be found in section 39(2) of the 1996 Constitution. Section 39(2) states that: '*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.*'

In the recent case of *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), in which the interim Constitution was the applicable one, the Supreme Court of Appeal (per Olivier JA) drew no distinction between the method of statutory interpretation mandated by sections 35(2) and (3) of the interim Constitution with that followed by, *inter alia*, the Constitutional Court in applying section 39(2) of the final Constitution. As regards the latter section, a clear statement of the approach to be followed is to be found in the judgment of Langa DP in the Constitutional Court case of *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others : In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC). According to Langa DP, section 39(2) of the Constitution means –

> '[21] … *That all statutes must be interpreted through the prism of the Bill of Rights. All law-making atuhority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the*

*Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.*

[22] *The purport and objects of the Constitution find expression in s 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and the purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*

[23] *In* ***De Lange v Smuts NO & Others*** [1998 (3) SA 785 (CC)], *Ackermann J stated that the principle or reading in conformity does*

> "no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In

> my view, the same interpretative approach should be adopted under the 1996 Constitution."
>
> *Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*

[24] *Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Lgislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read* "in conformity with the Constitution". *Such an interpretation should not, however, be unduly strained.*'

(On the application of this principle of '*reading in conformity*', sometimes referred to as the indirect application of the Bill of Rights to legislation, see further De

Waal *et al The Bill of Rights Handbook* (4 ed 2001) 70-75 and the other authorities there cited.)

Relying upon sections 35(2) and (3) of the interim Constitution (and, by analogy, on section 39(2) of the final Constitution), counsel for the applicant argued that an interpretation of '*spouse*' which would have the effect of excluding persons in the position of the applicant from the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, would result in a violation of the applicant's fundamental rights (enshrined in section 8(2) of the interim Constitution) not to be discriminated against unfairly and unjustifiably on the grounds of, *inter alia*, religion and culture. This being so, such an interpretation would render both statutes unconstitutional and hence invalid. However, because the inclusion of Muslim husbands and wives within the meaning of the word '*spouse*', as utilised in these statutes, is a '*plausible*' interpretation which can reasonably be ascribed to the relevant provisions, such an interpretation, which would be in conformity with the Constitution, must be adopted by this Court.

This argument is, at least superficially, an attractive one. However, where it falls down, in my view, is in the proposition that the interpretation of the word '*spouse*', in the context of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, is a '*plausible*' one. I have already indicated that, seen against the

background of recent statutory enactments and amendments which, by way of express deeming or interpretative provisions, recognise (*inter alia*) marriages by Muslim rites for specific purposes, as also in the light of the approach to the '*recognition*' of Muslim marriages adopted in the *Ryland* and *Amod* cases (*supra*), an interpretation of the word '*spouse*' in the Intestate Succession Act and the Maintenance of Surviving Spouses Act to include any person other than a party to a marriage currently recognised as valid in South African law would **not** be a reasonably possible interpretation.

I have reached this conclusion with considerable reluctance. It is, however, borne out by the approach adopted by the Constitutional Court in recent cases, particularly *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) and *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC). In the former case, Ackermann J, writing for the full Court, held that the word '*spouse*', as used in section 25(5) of the Aliens Control Act 96 of 1991, was not reasonably capable of a broad construction so as to include partners in permanent same-sex life partnerships. The word '*spouse*' was not defined in the Act, but its ordinary meaning connoted a '*married person: a wife, a husband*' and the context in which '*spouse*' was used in section 25(5) did not suggest a wider meaning. While some of these statements by Ackermann J may possibly be construed as **supporting** the interpretative arguments relied upon by the applicants in the present proceedings, it is important to note that Ackermann J went further by

stating (at para [25]) that there was no indication that the word '*marriage*' as used in the Aliens Control Act extended '*any further than those marriages that are ordinarily recognised by our law*', ie marriages that are solemnised in accordance with the provisions of the Marriage Act 25 of 1961. In coming to these conclusions, the learned judge made the following salient comments:

'[23] *… There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency. Such a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered.*

[24] *There is a clear distinction between interpreting legislation in a way which* "promote[s] the spirit, purports and objects of the Bill of Rights" *as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under section 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a))… What is now being emphasised is the fundamentally different nature of the two processes. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory*

> *provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.*'

In a similar vein, Madala J (writing for the full Court) in the *Satchwell* case (*supra*) considered the meaning of the word '*spouse*' in sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (which Act was subsequently replaced by the Judges' Remuneration and Conditions of Employment Act 47 of 2001), both of which sections provided for the payment of certain financial benefits to the '*surviving spouse*' of a deceased judge. Despite the previous finding by Ackermann J in the *National Coalition for Gay and Lesbian Equality* case (*supra*), to the effect that the omission from section 25(5) of the Aliens Control Act after the word '*spouse*' of the words '*or partner*, *in a permanent same-sex life partnership*' **was** unconstitutional, the interpretative point of departure taken by Madala J was precisely the same as that previously adopted by Ackermann J. Pointing out that the Judges' Remuneration and Conditions of Employment Act 88 of 1989 restricted the provision of certain benefits to '*spouses*' only and that there was no definition of the word '*spouse*' in the provisions under attack, Madala J continued as follows (at para [9]):

> '*In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that … The context in which '**spouse**' is used in the impugned provisions does not suggest a wider meaning, nor do I know of one.*

*Accordingly, a number of relationships are excluded, such as same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants.*'

In the light of what I have said above, it follows that I am of the view that the word '*spouse*', as utilised in the Intestate Succession Act and the Maintenance of Surviving Spouses Act, cannot be interpreted so as to extend to a husband or wife in a *de facto* monogamous marriage by Muslim rites. Prayers 1 and 3 of the relief sought by the applicant therefore cannot be granted.

## *The Constitutional issues*

As indicated above, counsel for the applicant contended that if this Court were to decide that, on a proper construction of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, a person such as the applicant married in accordance with Muslim rites in a *de facto* monogamous union is not a '*spouse*' for the purposes of such Acts, the failure to provide for such persons in these Acts is unconstitutional and invalid. Counsel based their submissions in this regard on an alleged violation of the equality clause (section 8) contained within the Bill of Rights (Chapter 3) of the interim Constitution. The relevant provisions of section 8 read as follows:

'*(1) Every person shall have the right to equality before the law and to equal protection of the law.*

*(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.*

*(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.*

*(b) …*

*(4) **Prima facie** proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, unless the contrary is established.*'

According to applicant's counsel, the interpretation of the word '*spouse*' as utilised in the two Acts so as to exclude a person in the position of the applicant results in a differentiation between *de facto* monogamous marriages entered into

in accordance with the procedures of religions (like Islam) which permit polygynous marriages, and *de facto* monogamous marriages entered into in accordance with the procedures of religions which do not permit polygynous marriages or in accordance with the procedures performed by a civil marriage officer - as such differentiation between different types of spouses is on the listed grounds of religion and culture, it is presumed to be unfair discrimination.

I have interpreted the word '*spouse*', as utilised in the relevant Acts, to mean a party to a '*marriage*' celebrated in accordance with the provisions of the Marriage Act 25 of 1961. This Act requires that, to be valid, a marriage must be solemnised by an authorised marriage officer. Certain public officials (such as magistrates) are *ex officio* marriage officers, while other officers or employees of the public service or the diplomatic or consular service of the Republic may be designated as marriage officers by the Minister of Home Affairs or any officer in the public service authorised thereto by him (see section 2 of Act 25 of 1961). As regards what may be called '*religious marriage officers*', section 3(1) of Act 25 of 1961 provides that the Minister of Home Affairs and any officer in the public service authorised thereto by him '*may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnising marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.*' Theoretically, therefore, Muslim couples are free to solemnise their marriage in terms of the

Marriage Act and thus acquire for their relationship the status of a valid civil marriage.

The matter is not, however, as simple as it may seem. As was held by Trengove JA in the *Ismail* case (*supra*) at 1021D-E, the words '*marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion*' in section 3(1) of the Marriage Act relate only to the **form** of the marriage ceremony, and not to the **essentials** of the marriage as such. Section 3(1) does not accord any recognition whatsoever to polygynous unions and, while it (theoretically) enables a Muslim couple to have their marriage solemnised - according to Muslim rites - by a Muslim priest who has been designated a marriage officer, if the marriage is intended to be a monogamous one, such Muslim priest would have to comply with all the prescribed formalities pertaining to the solemnisation of marriages under the Act. It would appear that very few Muslim priests have in fact been appointed as marriage officers in terms of section 3 of the Marriage Act and, accordingly, the great majority of marriages contracted in South Africa in accordance with Muslim rites are **not** solemnised in terms of the Marriage Act (see, in this regard, Cachalia 'Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry' (1993) 56 *THRHR* 392 at 398-399 note 44; Sinclair (assisted by Heaton) *The Law of Marriage* Volume 1 (1996) 265; and Joubert 'Law of Marriage' in Clark (ed) *Family Law Service* (1987, with looseleaf updates) para A7).

In terms of section 2 of the Indians Relief Act 22 of 1914, it was possible to transform a '*marriage*' entered into in South Africa between Indian persons according to Muslim or Hindu custom into a '*legal marriage*' by registration, provided the marriage by Muslim or Hindu rites was recognised as a marriage under the tenets of the relevant religion and was, in fact, monogamous. When section 2 of Act 22 of 1914 was repealed by section 2 of the General Law Amendment Act 80 of 1981, this possibility ceased to exist.

By contrast with marriages by Muslim rites, it would appear that the vast majority of marriages by Christian or Jewish rites, which marriages are monogamous marriages, **are** solemnised in accordance with the provisions of the Marriage Act and are hence regarded as valid marriages (see, for example, Sinclair (assisted by Heaton) *op cit* 158 and Van Heerden *et al op cit* 164-168; cf also South African Law Commission Discussion Paper 88 '*The Review of the Marriage Act, 25 of 1961*' Project 109 (September 1999) paras 2.1.2.24 *et seq*). I am therefore not unduly impressed by the argument seemingly advanced on behalf of the first and second respondents to the effect that, when the applicant married the deceased by Muslim rites only, she exercised '*an election*' not to enter into a marriage in accordance with the provisions of the Marriage Act. To my mind, the reality of the situation in which the applicant – and other persons in her position –

find themselves is cogently illustrated by the following statement made by the applicant in the replying affidavit deposed to by her:

> '*I deny that I exercised any* "election" *when I married in terms of Islamic Law. My late husband and I married under Islamic Law because that is how marriages are concluded in our community. Neither my husband, nor I intended by our mode of marriage to choose not to be married in the eyes of the law.*'

The fundamental importance of equality in the South African constitutional endeavour has repeatedly been emphasised by South African courts. In the words of Mohamed DP (as he then was) in *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC) at para [20]:

> '*There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised*.'

It is also clear from several judgments of, *inter alia*, the Constitutional Court that the concept of equality must be understood in a **substantive**, rather than in a **formal** sense. Promoting substantive equality requires an acute awareness of the lived reality of people's lives and an understanding of how the real life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm.

In the first case in which the Constitutional Court had to grapple with the equality clause in the interim Constitution, namely *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), O'Regan J pointed out that –

'[40] *As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chap 3, its interpretation must be based on the specific language of s 8, as well as our own constitutional context …*

[41] *Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. For this reason, s 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.*

[42] *Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair. It builds and entrenches inequality amongst different groups in our society … The need to prohibit such patterns of*

*discrimination and remedy their results are the primary purposes of section 8 …*'

(See further in this regard Albertyn & Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; Kentridge 'Equality' in Chaskalson *et al* (eds) *op cit* para 14.2; Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 55-59, and the other authorities discussed by these writers.)

In *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), the Constitutional Court, drawing on its previous judgments in the cases of *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) and *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), set out the stages of enquiry to be followed in any case involving an alleged violation of the fundamental right to equality, as follows (at para [54]):

'*… it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:*

*(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a*

*rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*

*(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*

*(i) Firstly, does the differentiation amount to* "discrimination"*? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

*(ii) If the differentiation amounts to* "discrimination"*, does it amount to* "unfair discrimination"*? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily*

*on the impact of the discrimination on the complainant and others in his or her situation.*

*If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).*

(c) *If the differentiation is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).*'

This approach to the stages of equality analysis has been repeated and confirmed by the Constitutional Court in several other cases and is now well-established in South African jurisprudence. (See, for example, *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC) at para [17]; *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others (supra)* at para [32]; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para [16]; *Satchwell v The President of the Republic of South Africa & Another (supra)* at para [20]; *Du Toit & Another v Minister for Welfare and Population Development & Others* 2002 (10) BCLR 1006 (CC) at para [24].)

As I have tried to illustrate above, the interpretation of the word '*spouse*' in the relevant Acts as meaning only a party to a marriage recognised as valid in South African law by virtue of its compliance with the provisions of the Marriage Act 25 of 1961 **does**, because of the practical, cultural and historical realities surrounding the solemnisation of marriages in this country, differentiate between *de facto* monogamous marriages celebrated in accordance with Muslim rites, on the one hand, and marriages celebrated in accordance with Christian and Jewish rites, as also non-religious (civil) marriages, on the other. To my mind, this differentiation flows from, and is linked to, the religion, belief and cultural background of persons in the position of the applicant: it is because the applicant is a practising Muslim that she entered into a marriage by Muslim rites; according to the tenets of her religion, this marriage was a potentially polygynous one and, as such, not in line with the meaning of '*marriage*' underlying the provisions of the Marriage Act 25 of 1961; because of the cultural practices of her community, the applicant and her husband failed to have their marriage – although *de facto* a monogamous one – also solemnised by a marriage officer in terms of the provisions of the Marriage Act. The net result of all these factors is that the applicant's marriage – and the marriages of persons in a like position – are not recognised as '*valid*' marriages in South African law and the parties thereto do not enjoy the protection afforded to '*spouses*' by virtue of, *inter alia*, the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

It is the interplay between her religious beliefs and the cultural practices in her community – and the failure of the South African law properly to accommodate such beliefs and practices - which have resulted in the applicant being in her present position. Religion, belief and culture are all prohibited grounds of discrimination expressly listed in section 8(2) and thus, in terms of section 8(4) of the interim Constitution, it is presumed that such differentiation constitutes unfair discrimination, '*until the contrary is established*'. In view of this conclusion, it is to my mind not necessary to embark upon the '*rational connection enquiry*' postulated by the Constitutional Court in the *Harksen* case (*supra*) as the first stage of an enquiry into an alleged violation of the equality clause, nor to attempt to ascertain what government purpose (if any) may be said to be furthered or achieved by the differentiation in question. (See, in this regard, *National Coalition of Gay and Lesbian Equality & Another v Minister of Justice & Others* (*supra*) at para [18]; *Hoffmann v South African Airways* (*supra*) at para [26]; and cf De Waal *et al op cit* 203-204 and 206-210, and the other authorities there cited.)

The facts of this case highlight a cruel irony. As mentioned above, the main asset in the deceased estate of the applicant's late husband is the house situate at 2 Athon Walk, Lucerne Place, Hanover Park, which house was previously a council dwelling belonging to the City of Cape Town. On 15 October 1976 – prior to her marriage to the deceased – the tenancy of this council dwelling was allocated by the City of Cape Town to the applicant. The applicant had by that

time been divorced from her previous husband (Wilson) and it would appear that, in terms of the then applicable council housing policy, the applicant was regarded as '*a single person with dependants residing permanently with him/her*'. As such, the applicant was entitled to have the tenancy allocated to her in her own name. The applicant and her children took occupation of the council dwelling during October 1976 and she has lived there continuously ever since.

The applicant subsequently married the deceased by Muslim rites on 2 March 1977. She informed the City of Cape Town of this marriage, furnishing it with a copy of her marriage certificate. Although this marriage by Muslim rites was not then (nor is now) recognised as a '*valid*' marriage under South African law, it was nevertheless recognised by the Council of the City of Cape Town, in accordance with the housing policy prevailing at that time, as a '*marriage*' for the purposes of effecting a transfer of the tenancy of the council dwelling from the applicant's name into the name of her husband (the deceased). The extracts from the '*Department of Community Development Housing Code*' annexed to the applicant's founding affidavit make it clear that a '*married female*' could at that time only be the tenant or the purchaser of a council dwelling if she was '*the breadwinner of her family and who has dependants residing permanently with her*', although no such restrictions were imposed upon the sale or letting of a council dwelling to '*a married male*'. The transfer of tenancy was effected on 17 July 1978, at the time when the deceased was apparently the principal breadwinner of the family.

The transfer of tenancy form (a copy of which is also annexed to the applicant's founding affidavit) reflects the marital status of the deceased as '*Married (Moslem Rites)*', while the reason for the transfer of the tenancy is stated to be '*Transfer of Tenancy – New Husband*'. The '*recognition*' by the Council of the City of Cape Town of the applicant's marriage by Muslim rites as a '*marriage*' for the purposes of its housing policy therefore had the result that the tenancy of a council dwelling (recognised as a '*patrimonial benefit*' in *Persad v Persad & Another* 1989 (4) SA 685 (D) at 688B-F) ceased to be an asset in the estate of the applicant and became an asset in the estate of her husband, the deceased. As community of property is not recognised under Islamic law, each spouse retaining sole ownership and control of his or her property (whether movable or immovable and whether acquired before or during the marriage), the transfer of the tenancy was also not in accordance with the matrimonial property regime '*governing*' the marriage by Muslim rites (see, in this regard, South African Law Commission Discussion Paper 101 '*Islamic Marriages and Related Matters*' Project 59 (December 2001) para 5.26; Cachalia *op cit* 401, and Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa: Part II – Religious Legal Systems* (2002) para 3.3.2.1). This in itself is not surprising in view of the approach adopted by the South African courts, until fairly recently, that no custom or contract flowing from a marriage by Muslim rites could be enforced because the marriage was potentially polygynous and hence contrary to public

policy (see, for example, the cases of *Seedat's Executors v The Master (Natal) (supra)* and *Ismail v Ismail (supra).*

The anomalous situation created by the application of the then prevailing council housing policy was compounded by the subsequent application of the conditions of the so-called '*National Sales Campaign*', in terms of which only the tenants of council houses were given the opportunity to purchase such houses on what appeared to have been extremely favourable terms. Thus, when the opportunity to purchase the applicant's home arose, the written instalment sale agreement was entered into (on 24 September 1990) between the City of Cape Town (as seller) and the then tenant, the deceased (as purchaser). As indicated above, the applicant also signed the Deed of Sale, ostensibly thereby consenting to the deceased purchasing the property, but the Deed incorrectly reflects that the applicant was '*married*' to the deceased '*in community of property*'.

In *Ryland v Edros (supra)*, Farlam J departed from the previous South African jurisprudence by recognising and enforcing certain terms of the '*contractual agreement*' arising from the conclusion of a *de facto* monogamous marriage by Muslim rites. Similarly, in the *Amod* case (*supra*), Mahomed CJ recognised, for the purposes of the dependant's action, the contractually enforceable right of a Muslim wife to be maintained by her husband in the context of a *de facto* monogamous Muslim marriage. In view of these developments, it might have been open to the applicant to argue that recognition should be given to the fact

that, in terms of the marriage '*contract*' between her and her deceased husband, the tenancy of the property was an asset which she acquired prior to her marriage to the deceased and that, despite the subsequent transfer of the tenancy – and indeed the subsequent sale and transfer of the property itself – into the name of the deceased/the deceased's estate, the value of the tenancy must be regarded as an asset in her estate to which she is presently entitled. In a rather vague way, this does appear to have been one of the bases upon which the applicant's claim to the property in the 1998 application was based. Steyn AJ did not, however, in the course of her judgment make any mention of this possible cause of action, dealing only with the applicant's cause of action based on an alleged oral agreement between her and the deceased in terms of which the applicant would, upon the deceased's death, be the owner of the property.

This possible cause of action was certainly not one upon which the applicant relied in the proceedings before me, and it was not canvassed in any way in the arguments advanced by counsel for either side. It is also not possible, on the papers before this Court, to even make an attempt to ascertain the value of the tenancy brought by the applicant into the marriage (or possibly, the value of the rights which the applicant may have acquired by virtue of the tenancy) – although it would appear that both the applicant and the deceased were employed for relatively lengthy periods during their marriage and that they both contributed towards the household's expenses, including the rental and later the purchase price of the property and the service charges levied in respect of the property, the

proportion in which these contributions were made is simply impossible to determine. This whole saga illustrates vividly the anomalous – and prejudicial – consequences of the apparently arbitrary manner in which the State recognised the applicant's Muslim marriage for the purposes of transferring the tenancy of the property to her husband, on the one hand, but now fails to recognise her Muslim marriage for the purposes of affording her the protection given to surviving '*spouses*' in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, on the other.

Counsel for the first and second respondents submitted that a ruling by this Court based on the constitutionality of possible interpretations of the relevant Acts or the Acts themselves was not '*feasible*'. The submissions made by counsel in this regard may be construed as an attempt to show that any discrimination caused by the '*narrow*' interpretation of the word '*spouse*' in the two Acts is fair discrimination or, alternatively, that such discrimination may be justified under the limitations clause (section 33) of the interim Constitution. Counsel rely, in the main, on the provisions of section 14 of the interim Constitution, subsection (1) of which provides for the right to freedom of, *inter alia*, religion and belief. Section 14(3) expressly permits the enactment of legislation recognising (a) a system of personal and family law adhered to by persons professing a particular religion, and (b) the validity of marriages concluded under a system of religious law subject to specified procedures. Furthermore, section 31 of the interim

Constitution entrenches the fundamental rights of every person to participate in the cultural life of his or her choice.

It is common cause on the papers before me that, in terms of the Islamic law of intestate succession, as governed by the Holy Qur'an, read together with the complilations of the practices and traditions of the Prophet Mohammed, which form a body of commandments ('*Shari'ah*'), the applicant is '*entitled*' to inherit one-eighth of the deceased's estate. This is confirmed by various authors on the subject (see, for example, Cachalia *op cit* 402-403 and Rautenbach & Goolam (eds) *op cit* 104). Moreover, it appears from the papers before me (including the confirmatory affidavit deposed to on behalf of the first and second respondents by one Shouket Allie, an expert on Islamic personal law) that, in terms of Islamic law, the applicant is not entitled to claim maintenance from the deceased estate of her husband. Counsel for the first and second respondents thus contended that the constitutional relief sought by the applicant would have the effect of negating the system of inheritance law practised by those who adhere to the system of Islamic personal law in South Africa, and that such a result would be contrary to '*the new ethos of tolerance, pluralism and religious freedom which has consolidated itself in the new South African society*'.

Counsel attempted to draw a parallel between the present case and the recent decision of the Supreme Court of Appeal in *Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA). In that case, the appellant (applicant) was the mother and

guardian of a minor girl who was the illegitimate child of the deceased father. The father had died leaving no will and, according to the African customary law of succession, the father of the deceased, as the oldest surviving male relative, became the deceased's heir. The applicant applied for an order declaring, *inter alia,* that the customary law rule of male primogeniture, as well as regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (made in terms of section 23(10) of the Black Administration Act 38 of 1927 and promulgated under *Government Notice* R200 of 6 February 1987) which gives legislative recognition to the customary law of succession, including the rule of male primogeniture), were invalid on the ground that they were inconsistent with the interim Constitution. The applicant failed (twice) in the Transvaal Provincial Division and, ultimately, the Supreme Court of Appeal (like the court *a quo*) refused the invitation to develop the customary law of succession, in terms of section 35(3) of the interim Constitution, so as to bring it into line with the principle of equality enshrined in section 8 by allowing all descendants, whether male or female, legitimate or illegitimate, to inherit.

In his judgment, Mpati AJA held that the interim Constitution was not applicable, because the deceased had died prior to the date upon which that Constitution had come into operation, and that the case before him was not one where, in a phrase taken from a *dictum* in *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC) at para [20], '*the recognition and respecting of previously acquired rights would be so grossly unjust and abhorrent, in the light of the*

*present constitutional order, that they cannot be countenanced*' (see the *Mthembu* case at para [36] - [40]). The Supreme Court of Appeal also stated (at para [40]) that it '*would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the Legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission*.'

In rejecting the appellant's argument that the abovementioned regulation 2(e), which gives legislative effect to the application of customary rules of succession on intestacy, is *ultra vires* at common law in that, by discriminating gratuitously against women and girls, children who are not eldest children, and illegitimate children, it is partial and unequal in its operation, the Supreme Court of Appeal stated the following:

'*[23] What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to black persons … It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades. It is not inconceivable that many blacks, even to this day, would wish their estates to devolve in terms of black law and custom. Section 23(3) of the Act* [the Black Administration Act 38 of 1927] *provides that:*

"all other property of whatsoever kind [excluding property referred to in ss (1) and (2)] belonging to a black shall be capable of being devised by will." *The existing law therefore enables blacks to avoid*

> *the consequences of the application of the customary law of succession if they so wish. It is therefore within the power of blacks to choose how they wish their estates to devolve. If they take no steps to alter the devolution of their estates (as is their right), the resulting consequences cannot be assumed to be contrary to their wishes*.'

The validity of this reasoning has been subjected to criticism by, *inter alia* Keightley 2000 *Annual Survey of South African Law* 462 at 473-474. This writer rejects the assumption that black South Africans choose to die intestate because they intend the customary law of succession (which enjoys legislative recognition) to apply, pointing out that:

> '*If one considers the circumstances of the majority of persons in respect of whom African customary law applies, it is equally likely that such factors as lack of education, lack of access to legal advice and general ignorance about legal matters have as much, if not more, of a role to play in their dying intestate as the role played by the free choice or intent assumed by the court.*
>
> *It is submitted that the issue before the court is not one of free choice in the application of a discriminatory rule, but rather one of the application of a discriminatory rule* ***in the absence*** *of an indication of free choice. Thus the real question was whether the default position of the law, ie the rule*

*that applies in the case of a failure by a deceased person to indicate what his or her intention is with regard to his or her estate, should be allowed to stand even though it is discriminatory in its nature and effect.*'

(For further incisive discussion of the judgment of the Supreme Court of Appeal in the *Mthembu* case (*supra*) see Himonga 'Implementing the rights of the child in African legal systems: the *Mthembu* journey in search of justice' 2002 (9) *International Journal of Children's Rights* 89 at 97-103.)

As was ultimately conceded by counsel for the first and second respondents, however, there is a very significant difference between the situation with which the Court was faced in the *Mthembu* case (*supra*) and the present proceedings. It is this: while the African customary law of intestate succession **is** recognised by legislation, and hence enforceable, in South African law, the Islamic law of intestate succession is **not** yet recognised by South African law and any '*rights'* which the applicant may have under the Islamic law of succession are not legally enforceable in a South African court. Thus, when a Muslim person dies intestate, his or her estate devolves in accordance with the order of intestate succession set out in the Intestate Succession Act. The Islamic rules of succession can only be applied to the estate of a deceased Muslim if they are contained in the will of such a person (see Rautenbach & Goolam *op cit* 107-108). The effect of the non-recognition of the applicant as a '*spouse*' in terms of the Intestate Succession Act and of the Maintenance of Surviving Spouses Act is **not** to vest

in her any enforceable rights to claim an inheritance in terms of the Islamic law of intestate succession. On the contrary, as was conceded by respondents' counsel, the deceased estate will devolve upon the descendants of the deceased *per stirpes* in terms of the Intestate Succession Act – a result which itself bears no relation to the position under the Islamic law of intestate succession (in terms of which a widow in the position of the applicant would inherit a one-eighth share of the deceased estate, with the balance to be distributed among the male and female defendants in the ration of 2:1). For this reason, it was (correctly, in my view) submitted by applicant's counsel that the present case is **not** in fact about '*weighing*' the equality clause in the Constitution against the constitutional imperatives of recognising cultural and religious pluralism, promoting religious and cultural freedom, or applying an '*ethos of tolerance*'. Nor is it about the recognition of Muslim personal law or the compatibility of such law with the Bill of Rights in the South African Constitution. On the '*narrow*' interpretation of the word '*spouse*' in the relevant Acts, coupled with the non-recognition of the Islamic law of succession, inheritance '*rights*' in Muslim families are **not** left to be regulated by Muslim personal law – rather, by not recognising the applicant as a '*spouse*' in terms of the relevant Act, the estate of the deceased will be distributed in a manner which is **both** inconsistent with Muslim personal law **and** which unfairly discriminates against the applicant by ignoring the reality of her (*de facto*) monogamous marriage to her late husband. To coin a phrase, should the applicant not succeed in the present proceedings, she will be in the most

unfortunate position of '*falling between two stools*'. To my mind, this is clearly unfair and cannot be tolerated in the new South African constitutional order.

A further argument relied upon by counsel for the respondents was based upon the idea of judicial deference to the role of the Legislature in bringing about law reform. Counsel pointed out that, commencing in 1999, the South African Law Commission has undertaken a review of '*Islamic Marriages and Related Matters*' (Project 59) The Law Commission has, in the process, published an Issue Paper (Issue Paper 15, May 2000) and, after receiving comment from a wide range of interested and affected parties, a Discussion Paper (Discussion Paper 101, December 2001). The Discussion Paper includes a draft Islamic Marriages Bill which specifically amends section 1 of the Intestate Succession Act and section 1 of the Maintenance of Surviving Spouses Act so as to include '*the spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act*', as well as '*the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion*' (clauses 16(3) and (4) of the draft Bill).

While the Discussion Paper contains detailed discussion of, and proposals with regard to the statutory recognition and regulation of Muslim marriages and the various incidents of such marriages, it is clear that the Law Commission does not deal comprehensively with the Islamic law of succession, but proposes the abovementioned amendments to the Intestate Succession Act and the

Maintenance of Surviving Spouses Act as an **interim measure**, so as to alleviate the hardships endured by Muslim spouses who in the past have not enjoyed recognition as '*spouses*'.

The Report and final draft Bill in this investigation have yet to be approved by the Law Commission. However, from a paper presented by the Chairperson of the Project Committee responsible for the investigation (Navsa JA) at a recent conference (the Miller Du Toit/Law Faculty of the University of the Western Cape Family Law Conference on '*Equality, Family Law and Family Law Processes*', April 2003), it would seem that no change is envisaged to the proposed broadening of the definition of '*spouse*' in the Intestate Succession Act and in the Maintenance of Surviving Spouses Act so as to cover, *inter alia*, the spouse of an Islamic marriage recognised in terms of the draft legislation. Once again, it would appear that this will be proposed as an interim measure, pending a full investigation into the possible statutory recognition and regulation of the Islamic law of succession.

It is indeed heartening that so much progress has been made by the Law Commission in this important project. However, until such time as any proposed legislation has received the *imprimatur* of Parliament, persons in the position of the applicant will continue to suffer the unfair discrimination which I have set out above. While it is clearly entirely appropriate that the recognition and regulation

of Islamic personal and family law be dealt with by the Legislature, rather than by the courts – indeed, such legislation is expressly prefigured in both the interim Constitution (section 14(3)) and the final Constitution (section 15(3)) – it does not follow that the courts should, in the meantime, adopt a supine attitude towards the interpretation and application of existing statutes which have the effect of violating the constitutional rights of persons in the position of the applicant.

In view of my conclusion that the impugned provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, as interpreted above, are in breach of the equality clause (section 8) in the interim Constitution, the question remains as to whether the provisions may be justified in terms of section 33. The relevant part of section 33 reads as follows:

> '*(1) The rights entrenched in this chapter may be limited by law of general application, provided that such limitation –*
>
> *(a) shall be permissible only to the extent that it is –*
>
> *(i) reasonable; and*
>
> *(ii) justifiable in an open and democratic society based on freedom and equality; and*
>
> (b) *shall not negate the essential content of the right in question …*'

It is well established in our constitutional jurisprudence that the section 33 enquiry involves a proportionality assessment, in which the purpose, effects and

importance of the infringing provisions are weighed against the nature and extent of the infringement caused. The greater the infringement of the fundamental rights in question, the more persuasive the grounds of justification will have to be. (See, for example, *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at para [104]; *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC) at paras [17] – [18]; *Brink v Kitshoff NO* (*supra*) 1996 (4) SA 197 (CC) at para [46]; and *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (*supra*) at paras [33] – [35]).

Apart from the abovementioned submissions based, in the main, on section 14 of the interim Constitution and on the idea of judicial deference to the role of the Legislature in bringing about law reform, the first and second respondents did not specifically address the question of whether the impugned provisions of the relevant Acts are justifiable in terms of section 33 of the interim Constitution. As indicated above, this application was not opposed by any of the other respondents, including the Minister of Justice (the eighth respondent), who is the Member of the National Executive responsible for the administration of the two Acts. This attitude adopted by the various respondents is not, however, necessarily decisive of the matter. As was pointed out by Heher J in *National Coalition for Gay and Lesbian Equality & Others v Minister of Justice & Others* 1998 (6) BCLR 726 (W) at 741A-B:

> '*A court faced with a matter of great public interest and importance in which many potentially interested groups … have received no notice of the*

*application, should do its best to place itself in the position of the legislature and the law-enforcing arms of the State in order to determine, as best it can, what there is to be said in favour of the legislation … The alternative is to allow laws to fall by default.*'

This is also the approach that has been adopted by the Constitutional Court (see, for example, the judgment of Ackermann J in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others (supra)* at paras [5] – [6] and [33] – [57]; the judgment of O'Regan J in *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) at paras [12] – [18] and [40] – [58]; and the judgment of Skweyiya AJ in *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC) at para [31]).

I have found that the impugned statutory provisions, as I have interpreted them, do unfairly discriminate against persons in the position of the applicant on the grounds of religion, belief and culture. The centrality and foundational nature of the right to equality, in the context of both the interim and the final Constitutions, have repeatedly been emphasised by South African courts. So, for example, in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 1999 (3) SA 173 (C), Davis J, quoting the remark of the Constitutional Court in *Fraser v Children's Court, Pretoria North (supra)* at para [20] to the effect that equality '*lies at the very heart of the Constitution*', stated

that, in the case of a breach of a '*foundational value*' such as equality, the *onus* of justification would be very difficult to discharge (at 186J-187A). This is, in my view, particularly so in a case such as the present where, as a result of our past history of failing to afford recognition and respect to the religious beliefs and practices of, *inter alia*, members of the South African Muslim community, persons in the position of the applicant have undeniably been the victims of '*deep patterns of disadvantage*' (see, for example, Cachalia *op cit* 399 and Rautenbach & Goolam *op cit* 113-115). It certainly cannot be gainsaid that the non-recognition of marriages by Muslim rites has, in the past, impaired the fundamental human dignity of many such persons (see *Harksen v Lane NO & Others (supra)* at para [50]).

By recognising the right of a surviving spouse to inherit from the intestate estate of the deceased spouse, the Intestate Succession Act and its predecessor, the Succession Act 13 of 1934, departed from the South African common law. The common law rules of intestate succession deprived surviving spouses of any inheritance whatsoever (see Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* (2 ed, 2001) at 562-566). By recognising the surviving spouse as an intestate heir, the Legislature acknowledged the reality of the contributions made by both spouses, during the existence of the marriage, to each other's estate and, at the same time, created a mechanism for providing economically for the surviving spouse (and in particular, it would seem, for surviving widows who constitute a socially vulnerable group) after the death of the deceased. The

promulgation of the Maintenance of Surviving Spouses Act 27 of 1990 appears to have been designed to serve the same purposes (see, in this regard, Sinclair (assisted by Heaton) *op cit* 178-179). These are obviously important state objectives. However, restricting the benefits afforded by such Acts only to the surviving spouses of marriages recognised as valid in South African law, coupled with the non-recognition of marriages by Muslim rites and all the ramifications of such non-recognition, creates a situation where the Muslim character of the applicant's marriage to the deceased, despite its *de facto* monogamous character, withholds from that marriage the status accorded by South African law to most Christian and Jewish marriages, and to all civil marriages, for the purpose of the economic protection afforded by the law to surviving spouses. Herein lies the critical issue of discrimination in this case: the situation in which the applicant and others in a like position find themselves results in their being economically impoverished in an unfair way and, as discussed above, there does **not** presently appear to be any justification for such unfair discrimination.

I have already dealt in detail with, and rejected, the respondents' attempt to '*justify*' the '*narrow*' interpretation of the word '*spouse*' in the Intestate Succession Act and the Maintenance of Surviving Spouses Act with reference to section 14 of the interim Constitution, on the one hand and the idea of judicial deference to the Legislature, on the other. I reiterate that, until such time as Muslim personal law, particularly the Muslim law of succession, **has** been recognised by the Legislature and regulated in a manner consistent with the values underlying the

South African Constitution, there is in my view no justification for the limitation of the equality rights of persons in the position of the applicant, which limitation flows from the impugned provisions of the relevant Acts – such provisions are therefore, to the extent alleged by the applicant, inconsistent with the Constitution and accordingly invalid.

I am fully aware that, by reaching this conclusion, I am unfortunately contributing to what has been called the '*fractured landscape*' of South African family law. In the words of June Sinclair (*op cit* page 28) –

> '*The tension between nation-building through unifying legal rules to conform as far as possible to one standard, whilst simultaneously respecting and celebrating the plural nature of our multi-cultural society … manifests itself frequently in undue complexity, testified to by the myriad of rules that regulate the intimate relationships of people of different races, different cultures, different religions, different sexual proclivities, different marital statuses and different conceptions of* "family", *often merely and arbitrarily according to the date upon which they entered into these relationships. The result is a frighteningly fractured family-law landscape, a canvas showing sunshine and blue sky, but a fragmented rainbow composed of starkly separated shades.*'

It may well be that the ultimate solution to this tension and resulting fragmentation will be the promulgation of a comprehensive '*Family Code*', as is

suggested by Sinclair. However, in the interim, the kind of violation of constitutional rights thrown into relief by the facts of the present case cannot be tolerated and incremental remedies must be found.

## *The appropriate remedy*

As was correctly submitted by counsel for the applicant, the remedial jurisdiction of this court in this case is determined by the provisions of the final Constitution, being the Constitution in force at the time of the hearing (see, in this regard, *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Metropolitan Council & Others* 1991 (1) SA 374 (CC) at para [113], and *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service & Another* 2001 (3) SA 310 (C) at 315C-G).

Section 172 of the final Constitution provides that when deciding a constitutional matter within its power, a court:

> '*(a) must declare that any law or conduct that is inconsistent to 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 condition, to allow the competent authority to correct the defect.*'

Section 172(2)(a) provides that:

'[t]*he Supreme Court of Appeal, a High Court 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 by the President, but an order of Constitutional invalidity has no force unless it is confirmed by the Constitutional Court*'.

In terms of section 38 of the final Constitution, a court which has found that a right in the Bill of Rights has been infringed or threatened and that this '*limitation*' does not meet the test for justification, '*may grant appropriate relief, including a declaration of rights*'. Section 7(4)(a) of the interim Constitution was the predecessor to section 38, and is in all material respects identical thereto.

A detailed discussion of the formulation of appropriate remedies in respect of an infringement of constitutional rights is contained in, *inter alia*, the judgment of Ackermann J in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others (supra)* at paras [63] – [88]. I do not propose to repeat this discussion. Suffice it to say that, as held by the Constitutional Court in *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC):

'*[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a* ***mandamus*** *or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights …*

*[69] … In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to* "forge new tools" *and shape innovative remedies, if needs be, to achieve this goal*.'

I am in agreement with the submissions made by applicant's counsel to the effect that, in the present case, appropriate relief demands not merely a declaration that the challenged provisions are unconstitutional, but also the ancillary relief of

'*reading into*' the challenged provisions wording that will cure the constitutional defect and provide the applicant with meaningful relief. This type of relief was recognised as permissible by the Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others (supra),* where Ackermann J made the following salient comments:

'*[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from the severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.*

*[75] In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should*

*endeavour to be as faithful as possible to the legislature scheme within the constraints of the Constitution …*

*[76] It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them,* "fine-tuning" *them, or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.*'

To my mind, pending the statutory recognition and application of the Islamic law of succession in a manner which is consistent with the fundamental values underpinning the South African constitutional order, the only appropriate way in which the applicant and others in a like position can be afforded effective relief is by a suitable reading-in order. The relief sought by the applicant in prayers 2.2 and 4.2 of the Notice of Motion does define with sufficient clarity and precision how the relevant statutes must be extended in order to comply with the Constitution and is, to the greatest extent possible, faithful to the legislative scheme of these statutes.

Finally, in order to preserve the interests of finality in respect of the winding up of deceased estates and thus avoid undue disruption, the retrospective effect of the

order which I propose to make in respect of the Intestate Succession Act must be limited to deceased intestate estates which have not been finally would up, as foreshadowed by prayer 2.3 in the Notice of Motion (cf. in this regard, the order of the Constitutional Court in *Brink v Kitshoff NO (supra)* at para [60]).

The applicant did not ask for costs in the Notice of Motion or at any other stage of these proceedings. No order as to costs will therefore be made.

## *The order*

For the reasons set out above, I make the following orders:

1. ***The omission from section 1(4) of the Intestate Succession Act 81 of 1987 of the following definition is declared to be unconstitutional and invalid:*** **" '*spouse*' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union".**

2. ***Section 1(4) of the Intestate Succession Act 81 of 1987 is to be read as though it included the following paragraph after paragraph (f):***

   **"(g) '*spouse*' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union."**

3. ***The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of this order.***

4. ***The omission from the definition of*** **"survivor"** ***in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words*** **"and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites"** ***at the end of the existing definition, is declared to be unconstitutional and invalid.***

5. ***The definition of*** **"survivor"** ***in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words*** **"dissolved by death":**

> **"and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites."**

.....
**B J VAN HEERDEN**