REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO.: 6715/08

In the matter between

SALOSHINIE GOVENDER	**APPLICANT**
and	
NARAINSAMY RAGAVAYAH N O	**FIRST RESPONDENT**
NARAINSAMY RAGAVAYAH	**SECOND RESPONDENT**
KANAMBAL RAGAVAYAH	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT : DURBAN	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS : KWAZULU-NATAL	**FIFTH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**SIXTH RESPONDENT**
WOMEN'S LEGAL CENTRE TRUST	**AMICUS CURIAE**

J U D G M E N T
DELIVERED ON : 06 NOVEMBER 2008

M.F. MOOSA AJ:

Order sought by Applicant :

[1] (a) The applicant seeks in terms of her Notice of Motion a declarator as follows and other relief :

"The word spouse as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a monogamous Hindu marriage;

(b) **Alternatively, together with other consequential relief :**

"An order declaring that a universal partnership existed between the Applicant and the Deceased".

(c) At the hearing at Court, the Applicant did not persist in seeking an order for the alternative relief.

HEADS OF ARGUMENT:

[2] There were useful heads of argument filed by the Applicant's counsel, Mr D. Naidoo, in support of the relief sought by the Plaintiff. There were also very comprehensive and helpful heads of argument (56 pages) filed by two Counsel who sought to be admitted as *amicus curiae* (duly representing the Women's Legal Centre Trust) and in essence they supported the main relief sought by the Applicant.

[3] Advocate S Naidu appeared on behalf of the 1st, 2nd and 3rd Respondents (hereinafter referred to as the "opposing respondents") who opposed the relief sought.

[4] There was a notice by the 4th Respondent (Master of the High Court) that he would abide the decision of the court and that it was not his intention to oppose the relief sought by the Applicant. There was no notice, affidavit or heads of argument filed by the 5th Respondent, namely the Registrar of Deeds. The Sixth Respondent filed a notice to abide the decision of the Court.

PRELIMINARY OBSERVATIONS :

[5] At the outset it needs to be noted that a similar issue was decided upon by his Lordship Mr Justice C Patel in the case of **Singh v Rampersad 2007 (3) SA 445D** in which an order was sought that a monogamous marriage in terms of Hindu rites should be recognised as a "marriage" in South African law in the light of the rights afforded to persons in the Constitution and that there should be such recognition despite the fact that such marriage is not recognised and acknowledged to be a marriage in terms of South African law.

[6] His Lordship Mr Justice Patel came to the conclusion that such marriage could not be so recognised for the reasons set out in his well reasoned judgment.

[7] However, in the present application before court the Applicant seeks somewhat different relief in that she seeks a declaration that for the purposes of the Intestate Succession Act No. 81 of 1987, a widow married by "Hindu rites" should be regarded as a "spouse".

[8] It was submitted by the *amicus curiae* that the application primarily concerns the interpretation and constitutionality of certain provisions of the Intestate Succession Act (hereinafter referred to as the Act).

[9] It is common cause that on 1st January 2007 Balasundran Narainsamy (the husband of the Applicant) died intestate (he will hereinafter be referred to as "the deceased").

[10] The opposing respondents were the 1st Respondent who is the executor of the deceased's estate as well as the deceased's father; the 2nd Respondent who is the deceased's father and the 3rd Respondent who is the deceased's mother.

[11] The effect of the opposition by the opposing Respondents is that if they are successful, the second and third respondents will stand to inherit the deceased's estate in its entirety in equal shares to the exclusion of the Applicant; on the other hand, if the Applicant is successful in the relief that she seeks, she will inherit the deceased's entire estate.

[12] It is common cause that the Applicant and the deceased were married to each other on the 22nd August 2004 according to the rites and customs of the Hindu religion. The opposing respondents themselves admit inter alia, that a Hindu marriage ceremony was conducted in public; the first respondent who is the father of the deceased had, in terms of Hindu rites and customs represented the deceased in obtaining the applicant's parents consent to marry and further performed all functions required of him in terms of Hindu rites and customs at the marriage ceremony; that the Applicant and deceased had a monogamous marriage in accordance with the rites, customs and traditions of the Hindu religion; that the Applicant and deceased respected the vows that they took at the Hindu marriage ceremony to

be faithful and committed to each other in a monogamous union they considered binding and duly respected; the said marriage was not registered in terms of the Marriage Act No.25 of 1961.

[13] There were no children born of the marriage.

[14] The deceased died on 1st January 2007, under three years after the marriage in terms of Hindu rites. The first respondent was appointed an executor in the deceased's estate.

[15] There appears to be a dispute on the papers in that it is alleged by the opposing respondents that the deceased's estate may be insolvent, a fact which is denied by the Applicant. However, in my view, this is not an issue which affects the relief sought by the applicant in her application.

[16] The Applicant disputes the correctness of the liquidation and distribution account prepared by the 1st Respondent.

[17] The Applicant placed reliance on the case of **Daniels v Campbell & Others 2004 (5) SA 331 CC** and alleges that the facts of that case fall squarely within the circumstances in which she finds herself.

[18] The opposing respondents disagree and rely on the judgment in **Singh v Rampersad 2007(3) SA 445D**.

POINTS OF OPPOSITION

[19] There appear to be five points of opposition:

(a) that the Daniels's case is totally different and should not have any persuasive value particularly as the deceased's relationship with the Applicant was of short duration;

(b) that as the marriage was not registered the Marriage Act ought not to apply;

(c) that the Applicant was at all material times "a housewife" and had no business acumen and did not contribute constructively to the deceased's estate; (the applicant has alleged that she assisted the deceased in the operation of his business by attending to the administration and bookkeeping work in respect thereof and that she contributed to the acquisition of assets in the deceased's estate and she had supported and cared for him during the existence of their union).

(d) that because the Applicant had broken all ties with the deceased's family she deserves nothing;

(e) that the deceased was not too happy in his relationship with the Applicant more especially because the Applicant could not conceive.

UNWORTHY BENEFICIARY :

[20] It was submitted by the *amicus curiae* that under the common law a person is "unworthy" to inherit both in terms of a testamentary trust as well as an intestate situation when for example he intentionally or recklessly caused the testator's death or when he seeks to prevent an act of testation by fraud or duress; no such case has been made out by

the opposing Respondents to suggest that the Applicant is unworthy. Neither did the opposing respondents seek such a declaration. The only requirement for the Applicant to succeed is that she persuade the Court that she be regarded for the purposes of the Intestate Succession Act to be the "spouse" of the deceased.

[21] It was argued by the *amicus curiae* that "it would be generally correct to say that most systems of intestate succession do not find their rationale in trying to establish the hypothetical intentions of the deceased, but in the legal conviction that the surviving spouse and family members are, in a sense, the deceased's natural heirs (see Bill of Rights Compendium : Service Issue No.22, May 2008).

[22] In terms of the present Intestate Succession Act, for present purposes, where the deceased leaves a surviving spouse and no descendants, he or she is the sole heir.

[23] In the light of the objectives sought to be fulfilled by the Intestate Succession Act, and *inter alia*, the fundamental right to equality, the Constitutional Court has in recent years extended the ambit of the Intestate Succession Act to :

(a) partners in a permanent same-sex life partnership in which the partners have undertaken the reciprocal duties of support (Gory v Colver NO (Stark Intervening) 2007(4) SA 97 CC);

(b) intestate deceased estates that would formerly have been covered by section 23 of the Black Administration Act No.38 of 1927;

(c) the surviving partner to a monogamous Muslim marriage (Daniels v Campbell NO & Others 2004 (5) SA331 CC).

[24] It was submitted that to date no challenge has been brought in respect of persons married under Hindu rites, with the result that this category of persons continue to be excluded from the provisions of the Intestate Succession Act.

[25] The Constitutional Court has in at least three leading cases, recognised the significance of the institution of marriage

[26] The applicant has tendered an explanation in her affidavit to explain why the marriage had not been registered.

COMMENTS ON THE OPPOSITION :

[27] It was argued by the *amicus curiae* that the allegations made by the opposing respondents had no bearing on the determination of the present matter.

[28] It is apparent from section 15(3) of the Constitution that legislation may recognise certain religious marriages. It was argued and in my view correctly so, that the legal recognition of a marriage is not a prerequisite in order for a person to qualify as a "spouse" under the Intestate Succession Act.

[29] The precise tenets of the Hindu religion do not require registration as a prerequisite for the validity of such marriage nor was there any suggestion to that effect in the papers. The Constitutional Court did not require registration of a Muslim marriage in the Daniels's case in

order that the Applicant could be recognised as the spouse for the purposes of the Intestate Succession Act.

[30] Section 4(9) of the Recognition of Customary Marriages Act No.120 of 1998 (the Recognition Act) provides that a failure to register a customary marriage does not affect the validity of that marriage.

[31] It was argued by the *amicus curiae* that if non-registration were to result in the exclusion of partners to Hindu marriages from the purview of the Intestate Succession Act, that that would cause undue hardship to an innocent spouse and, in the light of the approach adopted by the Constitutional Court in respect of Muslim marriages and other customary marriages, this would be discriminatory to those in Hindu marriages. It is to be noted that it has not been suggested in the opposing papers of the opposing respondents that there had not been compliance with the requirements of a valid Hindu marriage.

THE RIGHT TO EQUALITY AND TO BE FREE FROM UNFAIR DISCRIMINATION :

[32] The well-established test for unfair discrimination was set out by the Constitutional Court in Harksen v Lane NO and Others 1998(1) SA 300 (CC):

> "At the cost of repetition, 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-state 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 discrimination 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 (section 33 of the interim Constitution)."

[33] Although the above test dealt with section 8 of the Interim Constitution, the Constitutional Court has recognised that its jurisprudence in interpreting section 8 of the Interim Constitution applied equally to section 9 of the 1996 Constitution "notwithstanding certain differences in the wording of these provisions".

[34] It was submitted that there was no rational objective to be advanced for the exclusion of persons married in accordance with Hindu rites and custom particularly when considered in the light of the Constitutional Court judgment in Daniels where the following was emphasised :

> "That the word 'spouse' in its ordinary meaning includes parties to a Muslim marriage, which reading is not linguistically strained. On the contrary, according to the Court, it corresponds to the way the word is generally understood and used. It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse' than to include them. The Court recognised that such exclusion as was effected in the past did not flow from courts giving the word 'spouse' its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. The Court

> commented that such interpretation owed more to the artifice of prejudice than to the dictates of the English language. According to the Court both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting."

[35] It was argued by the *amicus curiae* as follows :

> "We further submit that a failure to interpret 'spouse' in the Act so as to include persons in Hindu marriages will result in an infringement of sections 15, 30 and 31 of the Constitution.
>
> Section 15(1) of the Constitution recognises that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Section 15(3) does not prevent legislation recognising: (a) marriages concluded under any tradition, or a system of religious, personal or family law; or (b) systems of personal or family law under any tradition or adhered to by persons professing a particular religion.
>
> Section 30 provides that everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Section 31(1) recognises that persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community; (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> The *amicus curiae* made the following submissions in this regard :
>
> The conclusion of a marriage in terms of Hindu rites and custom is an inherent element of the right and freedom associated with religious and cultural choices."

[36] In Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999(4) SA 1319 (SCA) in considering a claim for loss of support by the widow married to the deceased in terms of Islamic law, which marriage was not registered in terms of the Marriage Act, his Lordship **Mr Justice Mohamed, the Chief Justice** said the following :

> "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 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. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights; it accelerated with the speech of the former State President on 2 February 1990 and the unbanning and the visibility of the previously prohibited political movements and it finally became irreversible with the commencement and conclusion of negotiations at CODESA from 1991 until 1993. The new ethos was firmly in place when the cause of action in the present matter arose on 25 July 1993."

[37] My attention has been directed to the case of **State vs Venketsamy 1972 (4) SA DCLD 351**, where in a murder trial the prosecution sought to lead the evidence of the accused spouse who was married to him in accordance with Hindu rites by a priest although the marriage had never been registered in terms of Act 22 of 1914 and was not valid. The defence objected. It appeared from the spouse's evidence that she was a practising Christian and had accepted the accused as

her sole husband. The accused evidence was also that the marriage was a monogamous union and this was confirmed by the evidence of a Hindu priest. The objection to the leading of the evidence of the accused spouse was taken by Mr A Findlay who appeared for the accused at the request of the court. It was held by His Lordship Mr Justice Muller that as the evidence established that the marriage had all the attributes of a Christian marriage, that the common law rule that the spouse of an accused is not a compellable witness for the prosecution should be observed, and that the accused was entitled to object to the evidence. Mr Findlay was at pains to refer the court to **AUGUST vs RENS, 1 MENZ 203 and certain old authorities**. Mr Findlay further argued that the court must have regard to the status of the parties and not to the ceremony of the marriage in order to determine whether the parties are "married" within the meaning of sub-section 3 of Section 226 of Act 56 of 1955. It was submitted that as in the present case before court, that the parties regarded their union as a union between themselves "incompatible with a continued association of the man in a conjugal relationship with another woman".

[38] It is a basic tenet of the Hindu relgion that a "Thali" must be placed around the neck of the wife as a symbol or token that she now belongs to her husband. In their nuptial vows, a wife would take an oath and promise to remain devoted to her husband to the exclusion of all other men. She accepted her husband as her "sole husband, obviously for life, …". A "Mangal Sutra" is also placed around a wife's neck in a "marriage" in terms of the Hindu religion, as a declaration before God that the marriage is solemn, that it is concluded between one man and one woman and to confirm that there can be no divorce.

[39] In the case of **S vs Johardien 1991 SA 1026 CPD (C)** his Lordship **Mr Justice Farlan AJ** (as he then was) did not approve the decision in the **Venketsamy** case and did not follow that case; however, the learned Judge said at 1037F : "*…I am in any event of the view that Venketsamy's case is distinguishable because, as Muslim marriages are potentially polygamous, I cannot hold that they have all the attributes of registered marriage".* (Johardien was an accused who was Muslim)

[40] In the course of argument when I heard this matter on 29 October 2008, a copy of a recent judgment (not yet reported) in the Cape Provincial Division by His Lordship Mr Justice Van Reenen in the case of **FATIMA GABIE HASSAM vs JOHAN HERMANUS JACOBS N.O. & OTHERS**, Case No. 5704/2004, was handed to me. In this case the learned Judge made a declaration that Fatima Gabie Hassam (a surviving partner in a polygamous Muslim marriage) is for the purpose of the Intestate Succession Act 81 of 1987, a "spouse" of the late Ebrahim Hassam; that declaration has been referred to the Constitutional Court for confirmation.

[41] In the light of what has been stated in all the cases, referred to above, I am of the view that there is judicial support for the proposition that a spouse of a "marriage" by Hindu rites may well have the religious "marriage contract" given some recognition by South African law for certain purposes.

[42] It is not difficult to conclude on the evidence in the present case before court, that the union had all the essential attributes of a South

African marriage, which is fundamentally a voluntary union for life of one man and one woman to the exclusion of all others, while it lasts. It is trite law that presently in terms of our law a Hindu marriage which has not been registered in terms of South African law is invalid; but that does not settle the question to be decided in this case. In my view, the validity of the marriage is not required for the relief that the applicant seeks in her Notice of Motion.

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

[44] In the end result, in the light of all the above judgments in the light of the circumstances in this case, this Court comes to the conclusion that the relief sought by the Applicant in her Notice of Motion should be granted and I make an order as follows :

ORDER GRANTED :

1. The word spouse as used in Section 1 of the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Hindu marriage;

2. The applicant be and is hereby declared for the purposes of Section 1 of the Intestate Succession Act 81 of 1987, to be a 'spouse'.

3. The applicant is declared to be the "spouse" of the late BALASUNDRAN NARAINSAMY (hereinafter referred to as "the deceased") and is entitled to inherit from the estate of the deceased (Master's reference number: 1638/2007/DBN) who died on 1

January 2007, in accordance with Section 1 (1) (a) of the Intestate Succession Act 81 of 1987.

4. The liquidation and distribution account dated 1 March 2008 in respect of the estate of the deceased who died on 1 January 2007, prepared by the First Respondent be and is hereby set aside.

5. The first respondent is ordered to prepare the liquidation and distribution account in respect of the estate the deceased who died on 1 January 2007 in accordance with Prayer 3 supra within thirty (30) days from the date of the grant of this order.

6. In the event of the first respondent failing to comply with Prayer 5 supra, the Sheriff of this Honourable Court , duly assisted by an attorney nominated by the Fourth Respondent (the Master of the High Court, Durban), be and is hereby ordered to give effect to Prayer 5 supra.

7. The costs of the applicant in this application are to be paid by the estate of the deceased.

M F MOOSA AJ

DATE OF JUDGMENT	**:**	**06 NOVEMBER 2008**
DATE OF HEARING	**:**	**29 OCTOBER 2008**
COUNSEL FOR APPLICANT	**:**	**MR D NAIDOO**
INSTRUCTED BY	**:**	**MESSRS CKMG ATTORNEYS c/o MESSRS VINAY YETWARU ATTORNEYS**
COUNSEL FOR lst to 3rd RESPONDENTS	**:**	**MR S NAIDU**
INSTRUCTED BY	**:**	**MESSRS D. RAMDAYAL & CO. c/o MESSRS ANESH MAHARAJ ATTORNEYS**
***AMICUS CURIAE* REPRESENTING THE WOMEN'S LEGAL CENTRE TRUST**		**Ms K PILLAY & Ms M IOANNOU**