MVIPLW-A

RYLAND v EDROS 1997 (2) SA 690 (C)

Citation	1997 (2) SA 690 (C)
Case No	16993/92
Court	Cape Provincial Division
Judge	Farlam J
Heard	February 12, 1996; February 15, 1996; February 19, 1996
Judgment	August 13, 1996
Counsel	K H Warner for the plaintiff W H Trengove (with him H Kotze) for the defendant
Annotations	☐

Flynote : Sleutelwoorde

Constitutional law - Human rights - Right to freedom of conscience, religion, thought, belief and opinion in terms of s 14 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Doctrine of 'doctrinal entanglement' - Prior to Constitution Courts not adjudicating upon doctrinal dispute between two schisms of sect unless some proprietary or other legally recognised right involved - Section 14 may have changed position - Doctrine of doctrinal entanglement may now be part of our law.

Husband and wife - Marriage - Validity of - Marriage in terms of Muslim rites - Constitution of the Republic of South Africa Act 200 of 1993 - Effect of - Since coming into operation of new Constitution contract concluded by parties arising from marriage relationship entered into by them in accordance with rites of their religion and which as fact is monogamous not 'contrary to accepted customs and usages which are regarded as morally binding upon all members of our society' or is 'fundamentally opposed to our principles and institutions' - Courts only to brand contracts as offensive to public policy if offensive to values shared by community at large, by all right-thinking people in community and not only by one section - Values of equality and tolerance of diversity and recognition of plural nature of our society among values underlying Constitution - Such values 'irradiating' concepts of public policy and boni mores Court has to apply - Muslim union and customs related thereto not contra bonos mores.

Prescription - Extinctive prescription - Renunciation of - Agreement concluded according to Islamic law in terms of which debt in respect of unpaid maintenance will not prescribe - Validity of - Person can renounce right introduced for his benefit unless such right also introduced in interest of public - Extinctive prescription introduced for benefit of public - Agreement to renounce prescription in advance invalid because contrary to public policy.

Husband and wife - Divorce - Proprietary rights - Marriage in terms of Muslim rites - Whether wife entitled to equitable share of tangible and

intangible contributions to growth of husband's estate at divorce - Malay adat (custom) relating to harta sepencarian (jointly acquired property and property acquired by sole efforts

of one spouse but improved by efforts of other spouse) providing for wife to share husband's assets on divorce - Evidence falling short of proving custom similar to Malay adat prevailing among Islamic community in Western Cape - In absence of such custom no basis for holding provisions of Islamic personal law incorporated into contract by parties, including term to effect that on divorce wife entitled to equitable share of growth of husband's estate during marriage.

Headnote : Kopnota

During 1976 and at Cape Town the parties had been married to each other by Muslim rites. The plaintiff terminated the marriage by issuing a first *talaq* during September 1991, a second one on 9 September 1992 and the final one on 14 October 1992. The plaintiff had instituted an action against the defendant claiming her eviction from the home where they had lived together as man and wife for some years after their marriage. The action was defended and the defendant based her defence on an alleged *precarium* and the plaintiff's failure to give her reasonable notice of termination. The defendant also filed a claim in reconvention based on what she alleged had been terms of what was called 'the contractual agreement' constituted by the marriage by Muslim rites between the parties and claimed arrear maintenance from January 1977 to 14 January 1993 (being the date three months after the marriage by Muslim rites between the parties had been terminated by the plaintiff); a consolatory gift because the plaintiff had allegedly divorced her without just cause; and transfer, alternatively payment, of an equitable share of the growth of the plaintiff's estate as at 14 October 1992 since she had contributed labour, effort and money, both directly and indirectly, to the plaintiff's estate, as a result of which it had benefited. The plaintiff had filed a plea in reconvention in which he disputed the claims of the defendant but admitted that in terms of Islamic law the marriage between the parties constituted a contractual agreement and in terms thereof their marriage and all matters flowing therefrom were, *inter alia*, to be governed by Islamic law but not solely by it. It was common cause between the parties that there were four orthodox schools of jurists in the Muslim world of which the rules of the Shafi'i school were to be applied in the present case. The parties had reached an agreement as to the plaintiff's claim in convention and in respect of the defendant's claim in reconvention the Court was asked to make rulings on the following issues: *(a)* was the defendant entitled to claim for arrear maintenance as a debt that did not prescribe, *(b)* was the defendant entitled to a consolatory gift when dissolution of the marriage was at the behest of her husband, the plaintiff, and *(c) was the defendant entitled to an equitable share of her tangible and intangible contributions to her husband's estate even if, as had to be assumed in the present case, there had been no express agreement between the parties that she would be remunerated by her husband for labour. Before the issues in respect of which the parties had desired rulings could be considered the Court found it necessary for two preliminary matters to be dealt with: (1) whether it was inappropriate for the Court to pronounce upon matters of religious law, or stated differently, should the Court follow the example of the United States Supreme Court and, so as to avoid entanglement in doctrinal issues, decline to make determinations that called for investigation into matters of religious belief, even if such determinations were required in order that issues involving proprietary or other legally recognised legal interests arising for decision be determined;*

(2) whether the Court was 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 had been 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 parties which, being potentially polygamous (although in fact monogamous), was void because of public policy.

Held, as to the first preliminary matter, that prior to the coming into force of the Constitution of the Republic of South Africa Act 200 of 1993 our Courts `would not adjudicate upon a doctrinal dispute between two schisms of a sect unless some proprietary or other legally recognised right had been involved, and that it seemed that s 14 of the Constitution might well have changed the position and that the doctrine of entanglement might now be part of our law. (At 703D/E--E/F.)

Held, further, that both sides had agreed that the particular issues arising for decision in the case did not require any religious doctrines to be interpreted, ie there would be no question of any `doctrinal entanglement' in the case. (At 703G--H.)

Held, further, that the Court was satisfied that there was nothing in s 14 of the Constitution which would preclude the Court from deciding the issues arising in the matter. (At 703I.)

Held, further, as to the second preliminary matter, that it would be difficult to find that there had been such a change in the general sense of justice of the community to justify a refusal to follow the *Ismail* decision if it had not been for the new Constitution. In the circumstances the Court preferred to base its decision on the fundamental alteration in regard to the basic values on which our public policy was based which had been brought about by the enactment and coming into operation of the new Constitution. (At 704C/D--D/E.)

Held, further, that, if the spirit, purport and objects of chap 3 of the Constitution and the basic values underlying it were in conflict with the view as to public policy expressed and applied in the *Ismail* case, then the values underlying chap 3 of the Constitution had to prevail. (At 705C.)

Held, further, that it could not be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arose from a marriage relationship entered into by them in accordance with the rites of their religion and which as a fact was monogamous was `contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society' or was `fundamentally opposed to our principles and institutions'. It was 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 was offensive to those values which were shared by the community at large, by all right-thinking people in the community and not only by one section of it. It was clear that in the *Ismail* case the views (or presumed views) of only one group in our plural society had been taken into account. (At 707E/F--H.)

Held, further, that there were two closely related values underlying chap 3 of the new Constitution which were particularly important to the case, namely the principle of equality and the principle of tolerance and accommodation: the values of equality and tolerance of diversity and the recognition of the plural nature of our society were among the values that underlie our Constitution and those values `irradiate' the concepts of public policy and *boni mores* that our Courts had to apply. (At 707H--I, read with 708J--709A/B.)

Held, further, that in the *Ismail* case the view had been expressed that the customs

and contracts there in issue had been contrary to public policy and also contra bonos mores: however, the `radiating' effect of the values underlying the new Constitution was such that neither of those grounds for holding the contractual terms under consideration in the present case to be unlawful could be supported. (At 709B/C--C/D.)

Held, further, that what had been said did not necessarily apply to contractual terms such as those under discussion which were agreed to in the context of a marriage that was actually, as opposed to merely potentially, polygamous. No question of actual polygamy arose in the present case and nothing said, or going to be said, would necessarily be applicable in such a case. (At 709C/D--D/E.)

Held, further, that it was not necessary to decide on the correctness of the defendant's submission that a contract (or part thereof) which was unlawful because it was contrary to public policy or *contra bonos mores* before 27 April 1994 might now be enforced if, as a result of the `irradiating' effect of the values underlying chap 3 of the Constitution, it was not now contrary to public policy or *contra bonos mores*: the fact was that the plaintiff had not contended that the contract was illegal and a Court's duty to invoke *mero motu* the illegality of the contract only existed in cases where the enforcement of a contract presently unenforceable because it was contrary to public policy or *contra bonos mores* was sought. (At 709I--710B.)

Held, further, as to the defendant's contention that the Court could enforce a contract in part and decline to enforce another part if only part of the contract was offensive to public policy and the other not, that there was nothing offensive to public policy or good morals in the terms of the contract which the defendant was seeking to enforce in the proceedings. It was true that the contract was posited on the premise that the parties were going to live together as man and wife despite the fact that their marriage was not valid under the Marriage Act 25 of 1961, but they had agreed to live together as man and wife after a marriage ceremony conducted according to the rites of their religion. (At 710C/D--E/F.)

Held, further, that even in the wider sense of the phrase *contra bonos mores* (ie contrary to the accepted customs and usages which were regarded as morally binding on all members of our society or `as being fundamentally opposed to our principles and institutions') it could not be said since the new Constitution came into operation that a Muslim union and the customs related thereto were *contra bonos mores*. (At 710I--711A/B, paraphrased.)

Held, further, that it had to be accepted that the enforcement by the Court of the contractual promises made by the plaintiff in the present case, particularly in the light of the acceptance by our society of the values underlying chap 3 of the new Constitution, would not detrimentally affect the interests of the community. (At 711B--C.)

Held, accordingly, that the Court was satisfied that the *Ismail* decision no longer operated to preclude a Court from enforcing claims such as those brought by the defendant in the present case. (At 711C.)

The Court proceeded to consider the following issues on which the parties sought rulings from the Court: *(a)* was the defendant entitled to claim for arrear maintenance as a debt that did not prescribe; *(b)* was the defendant entitled to a consolatory gift when dissolution of the marriage was at the behest of her husband, the plaintiff, and *(c)* was the defendant entitled to an equitable share of her tangible and intangible contributions to her husband's estate

even if, as had to be assumed in the present case, there had been no express agreement between the parties that she would be remunerated by her husband for labour.

Held, as to *(a)*, that among the points on which the parties' experts were in

agreement had been that according to Islamic law `(a) wife is entitled to be maintained by her husband according to his means during the subsistence of the marriage (and) for three months' (after repudiation (*talaq*) of the marriage) and that `(u)nder the Shafi'i school . . . unpaid maintenance dues accumulate as a debt and (do) not prescribe': it followed that the parties had agreed, as terms of their agreement, that the plaintiff would maintain the defendant during the subsistence of the marriage and for three months after repudiation (*talaq*) thereof and that a debt in respect of unpaid maintenance would not prescribe. (At 711F--H.)

Held, further, as to the defendant's proposition that a person was free to renounce a benefit which had been introduced primarily for his own benefit, that a person could renounce a right introduced for his benefit unless the right had been introduced not only for his benefit but also in the interests of the public. (At 711J--712A/B, read with 712B.)

The *dictum* in *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734--5 applied.

Held, further, as to the defendant's proposition that, as prescription had been introduced primarily for the benefit of debtors and not for society at large, prescription could be validly renounced in advance, that it had to be accepted that extinctive prescription had been introduced, at least in part, for the benefit of the public. (At 711J--712A/B, read with 712H/I--I.)

The *dictum* in Wessels *The Law of Contract in South Africa* 2nd ed para 2837 applied.

Held, further, that an agreement to renounce prescription in advance was invalid not because it was *contra bonos mores*, but because it was contrary to public policy. (At 713H--I.)

Held, further, as to the defendant's contention that she should be regarded for the purposes of the Prescription Act 68 of 1969 as having been married to the plaintiff so that the completion of the prescription would be delayed until the lapse of a year after the marriage came to an end (s 13(1)*(c)* of the Prescription Act 68 of 1969), that that would not assist the defendant because more than a year had elapsed from the date the third *talaq* had been pronounced and the Islamic law marriage relationship terminated (ie 14 October 1992) and 24 October 1994, the date when the defendant's claim in reconvention had been served on the plaintiff's attorneys. In the circumstances it was unnecessary to decide whether the defendant had to be regarded for the purposes of Act 68 of 1969 as having been married to the plaintiff. (At 714A/B--C/D, read with 714E.)

Held, accordingly, that the plaintiff was only liable to the defendant in respect of arrear maintenance for the period from 25 October 1991 (ie, three years before the defendant's claim in reconvention had been served on his attorneys) to 14 January 1993 (ie, three months after the marriage had been terminated by the third *talaq*). (At 714F.)

Held, further, as to *(b)*, that there was no real dispute between the parties as the experts on

both sides had been in agreement that the defendant would be entitled to a consolatory gift if the dissolution of the marriage had been at the unjustified behest of the plaintiff. (At 714G.)

Held, further, as to *(c)* and the defendant's reliance on the Malaysian Islamic Family Law (Federal Territory) Act of 1984 in terms of which a wife's right to share her husband's assets on divorce was based on Malay *adat* (custom) relating to *harta sepencarian* (jointly acquired property and also property acquired by the sole efforts of one spouse but improved by the efforts of the other spouse), that in view of the fact that no other Islamic country adopted such approach the Court could not see on what basis it could regard the Malaysian rules as being part of the provisions of Islamic personal law

incorporated by the parties into their contract unless a custom similar to the Malay *adat* relating to *harta sepencarian* prevailed among the Islamic community, to which the parties belonged, in the Western Cape. (At 715D/E, read with 716F--G and 717B/C--C/D.)

Held, further, that the evidence fell far short of proving that a custom similar to the Malay *adat* relating to *harta sepencarian* prevailed among the Islamic community in the Western Cape and that in the absence of such a custom there was no basis for holding that the provisions of the Islamic personal law which the parties had incorporated into their contract included a term to the effect that on divorce the defendant would be entitled to an equitable share of the growth of the plaintiff's estate during the marriage. (At 717G--H/I.)

Held, accordingly, that the defendant was not entitled to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate. (At 717I/J--J.)

Cases Considered

The following decided cases were cited in the judgment of the Court:

Allen and Others NNO v Gibbs and Others 1977 (3) SA 212 (SEC)

Boto v Jaqar (1985) 2 MLJ 98

Bronn v Fritz Bronn's Executors and Others (1860) 3 Searle 313

33 *BVerfGE* (1972) 23

Docrat v Bhayat 1932 TPD 125

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC)

Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers 1995 (4) SA 966 (C)

Ismail v Ismail 1983 (1) SA 1006 (A)

Jones v Wolf 443 US 595 (1979)

Kaba v Ntela 1910 TS 964

Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990 (2) SA 906

(A)

Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant 1981 (3) SA 1129 (T)

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

Nedfin Bank Bpk v Meisenheimer en Andere 1989 (4) SA 701 (T)

Ngqobela v Sihele (1893) 10 SC 346

Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719

S v Acheson 1991 (2) SA 805 (Nm) (1991 NR 1 (HC))

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665)

S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793)

SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A)

Seaville v Colley (1891) 9 SC 39

Seedat's Executors v The Master (Natal) 1917 AD 302

United States v Ballard 322 US 78 (1944).

Statutes Considered

The following statutes were considered by the Court:

The Constitution of the Republic of South Africa Act 200 of 1993, ss 14(1), 35(3): see *Juta's Statutes of South Africa 1995* vol 5 at 1 - 212, 1 - 214

The Malaysian Islamic Family Law (Federal Territory) Act 1984, s 58

The Marriage Act 25 of 1961: see *Juta's Statutes of South Africa 1995* vol 5 at 2-108

The Prescription Act 68 of 1969, s 13(1)*(c)*: see *Juta's Statutes of South Africa 1995* vol 1 at 2-509.

FARLAM J

Civil trial in an action for eviction. The facts appear from the reasons for judgment.

K H Warner for the plaintiff.

W H Trengove SC (with him *H Kotze*) for the defendant.

Cur adv vult.

Postea (August 13).

Judgment

Farlam J: In this matter the plaintiff, who was married to the defendant by Muslim rites, instituted an action against her claiming her eviction from the home where they had lived together as man and wife for some years after their marriage by Muslim rites.

The action was defended and in her plea the defendant denied that plaintiff was entitled to an eviction order against her, averring that she was in possession of the property concerned pursuant to a universal partnership concluded between the parties following upon their marriage by Muslim rites, alternatively (and in the event of a finding that a universal partnership was not concluded) that a *precarium* existed in her favour in regard to the property entitling her to reasonable notice of termination thereof and that the plaintiff had failed to give her reasonable notice.

Subsequently she amended her plea by deleting therefrom all references to the alleged universal partnership and relied solely on the defence based on alleged *precarium* and the plaintiff's failure to give her reasonable notice of termination. Simultaneously with the amendment of her plea she filed a claim in reconvention in which, founding on what she alleged were terms of what was called `the contractual agreement' constituted by the marriage by Muslim rites between the parties, she claimed the following:

(a) R102 000 in respect of arrear maintenance at the rate of R500 per month from January 1977 to 14 January 1993 (being the date three months after the marriage by Muslim rites between the parties was terminated by the plaintiff's having given the defendant a third notice of termination (*talaq*) on 14 October 1992);

(b) R15 000, being the consolatory gift to which she was entitled because the plaintiff had, so she alleged, divorced her without just cause; and

(c) transfer, alternatively payment, of an equitable share of the growth of the plaintiff's estate as at 14 October 1992, `such equitable share in the present circumstances being one half of such growth and representing one third of the plaintiff's entire estate at the said date'; in support of this claim the defendant alleged that she contributed labour, effort and money, both directly and indirectly, to the plaintiff's estate, as a result of which it benefited.

In his plea in reconvention the plaintiff pleaded that the defendant was not entitled to arrear maintenance, a compensatory gift or an equitable share of the growth of his estate. He admitted the defendant's allegation that in terms of Islamic law the marriage between the parties constituted a contractual agreement but denied, insofar as it might be implied in the

FARLAM J

defendant's claim in reconvention `that it was agreed that the union between the parties and all matters flowing therefrom were to be governed *solely* by Islamic law'.

In response to a request for particulars for trial the plaintiff agreed that he admitted that in terms of the contract between the parties their marriage and all matters flowing t herefrom were, *inter alia*, to be governed by Islamic law but not solely by it.

He admitted further that he was, in terms of Islamic law, obliged during the subsistence of

the marriage to support the defendant and any children born of the marriage in accordance with his means but denied that he had failed to maintain the defendant and the children born of the marriage: he pleaded in the alternative that that portion of the defendant's claim for arrear maintenance which accrued more than three years prior to the delivery of the claim in reconvention is prescribed.

In regard to the defendant's claim for a compensatory gift, he denied that the marriage was terminated without just cause, averring in this regard that the marriage was terminated as a result, *inter alia*, of the defendant's adulterous, alternatively unduly intimate, relationships with three other men and the fact that she absented herself from the erstwhile common home.

In regard to the defendant's claim for an equitable share of the growth of his estate, the plaintiff averred that in Islamic law a wife will be entitled to a share in the growth of her husband's estate but only where her contribution has been direct (and not indirect) and must have been 'translated' into specific material assets. He averred further in this regard that the share to which a wife who has so contributed to the growth of her husband's estate will be entitled 'is equal to or is in direct proportion to her contribution': he denied that in terms of Islamic law such share as the defendant may be entitled to is an 'equitable' share.

He denied further that the defendant contributed labour, effort and money, both directly and indirectly, to his estate as a result of which his estate benefited and pleaded in the alternative that, in the event of a finding that the defendant did contribute as stated in her plea, such contributions as she did make did not fall 'within the relevant concept of contributions in the Islamic law'.

(Further denials were not persisted in at the hearing, with the result that it is unnecessary for me to say anything further about them in this judgment.)

At the pre-trial conference the parties agreed to seek an order in terms of Rule 33(4) that the issues raised in paras 5 and 6 of the defendant's claim in reconvention as well as those raised in paras 3.2, 11, 12 and 13 of the plaintiff's plea in reconvention should be held over for later determination.

The issues raised in the paragraphs referred to are as follows:

(a) whether the plaintiff failed to support the defendant and the children born of the marriage according to his means or at all (para 5.1 of the defendant's claim in reconvention and para 11 of the plaintiff's plea in reconvention);

(b) whether the plaintiff is indebted to the defendant for

(i) arrear maintenance in the amount of R102 000;

(ii) transfer, alternatively payment of an equitable share of the growth of the plaintiff's estate as at 14 October 1992, being one half of such growth;

(iii) a consolatory gift in the amount of R15 000;

(paragraph 6 of defendant's claim in reconvention);

(c) whether the marriage was terminated with just cause, such cause being the defendant's alleged adulterous, alternatively unduly intimate, relationships with three named men and her absenting herself from the erstwhile common home (para 3.2 of the plaintiff's plea in reconvention);

(d) whether the defendant contributed labour, effort and money, both directly and indirectly, to the plaintiff's estate, as a result of which his estate benefited, alternatively, if she did, whether contributions she made fell within the relevant concept of contributions in the Islamic law (para 12 of the plaintiff's plea in reconvention and para 5.2 of the defendant's claim in reconvention);

(e) whether in terms of Islamic law the defendant has, in consequence of her alleged adultery, forfeited her claims (para 13.2 of the plaintiff's plea in reconvention); and

(f) whether defendant has waived, in terms of Islamic law, her rights in respect of arrear maintenance (para 13.3 of the plaintiff's plea in reconvention).

(For reasons that are set out below, I refrain from summarising para 13.4 of the plaintiff's plea in reconvention.)

It was also agreed at the pre-trial conference that the parties' experts would meet before the trial and after the filing of expert summaries.

The parties' experts did meet before the trial and they were able to agree on a number of points. Before I quote from the minutes of their meeting, in order to make the minutes easier to understand it is necessary to mention that it was common cause between the parties at the trial that in the Muslim world there are four orthodox schools of jurists: the Hanafi school, founded by Imam Abu Hanafi, the Maliki school, founded by Imam Malik, the Shafi'i school, founded by Imam al-Shafi'i, and the Hanbali school, founded by Imam Ibn Hanbal.

The Shafi'i school prevails, according to the evidence, *inter alia*, in Malaysia and Indonesia, from where slaves were imported into the Cape during the time of the Dutch East India Company. The descendants of these slaves make up the bulk of the Muslim community of the Western Cape, which explains why most Muslims in the Western Cape, including the parties to the present case, may be regarded as adherents of the Shafi'i school. At the trial it was agreed by the parties' experts that the Shafi'i rules are the rules to be applied in the present case.

Paragraph 3 of the minutes of the experts' meeting sets out the points on which they were able to agree. It reads as follows:

'3. The experts were able to agree on the following points:

***(a)* An Islamic marriage is not a sacrament, but a contract, which creates rights and duties between the two parties entering into that contract. An Islamic marriage is based upon a contract which generates specific obligations and confers certain rights upon the contracting parties. In terms of this contract:**

(b) A wife is entitled to be maintained by her husband according to his means, during the subsistence of her marriage. The husband is obliged to provide the wife with *nafqah*. In terms of Islamic law *nafqah* primarily refers to the three basic essentials, accommodation, food and clothing. Some scholars have also included provisions for a domestic servant and cleaning materials. If the husband provides the above essentials, he is not obliged to further provide cash or money.

(c) Failure to provide money will therefore not be considered as a failure to provide maintenance (*nafqah*), and consequently will not constitute a breach of contract. "Unpaid maintenance" must therefore be construed as failing to provide one or all of the three essentials and is not failure to provide money.

(d) The exact quantity and quality of the basic essentials are not fixed by the dictates of law, but are determined by either mutual agreement or by popular custom among like couples. Islamic law has nevertheless laid down certain basic guidelines to secure that a minimum standard of *nafqah* is maintained. For example, it is incumbent upon the husband to provide his spouse with at least two sets of clothing annually. If during the marriage the wife is not satisfied with either the quality or the quantity of the *nafqah* she may take legal action to correct the situation (defendant specifically denies that failure to take such action amounts to a waiver).

(e) A wife remains entitled to such maintenance after repudiation (*talaq*) of the marriage, for the duration of the waiting period, which is three months.

(f) If, after a complete divorce the wife claims that her husband failed to *nafqah* her, she must satisfy the rules relating to *istihqaq* (right to claim a debt) and will be required to provide tangible evidence in support of such a claim. In the latter case the wife is considered to be the creditor to prove the claim under the Islamic legal principle of "presumption of original freedom from liability" (*baraah al-dhimmah al-al-asliyyah*). (The parties have not fully canvassed what "tangible evidence" implies, and reserve their rights in this regard.)

(g) If the husband wilfully fails to *nafqah* his wife without any valid justification, his wife is entitled to claim the cost of such essentials.

(h) Under the Shafi'i school unpaid maintenance dues accumulate as a debt, and do not prescribe.

(i) Exactly what constitutes a valid justification for the retention of *nafqah*, has been dealt with extensively in the classical works of Islamic law. Charges of adultery (do) not terminate the duty of maintenance, nor do they lead to the forfeiture of any accrued debt.

(j) Under the Shafi'i school a repudiated wife is entitled to a consolatory gift when the dissolution of the marriage is at the unjustified behest of the husband.

(k) Children are entitled to maintenance during the subsistence of their mother's marriage to their father.'

Paragraph 4 of the minutes deals with what were seen at the meeting as the main areas of dispute between the parties. It reads as follows:

`4. It appears that the main areas of dispute between the parties are the following:

(a) whether or not the wife's standing has any bearing on the *nafqah* that she is entitled to;

(b) whether the defendant is entitled to claim unpaid maintenance dues as a debt that does not prescribe;

(c) whether or not the defendant is entitled to a consolatory gift when the dissolution of the marriage is at the behest of the husband;

FARLAM J

(d) exactly which contributions to the marital estate is the wife entitled to claim upon a termination of the marriage. In this regard:

(i) defendant avers that the wife is entitled to an equitable share of her tangible and intangible contributions;

(ii) plaintiff avers that to seek remuneration after the divorce for labour willingly and freely performed (without an explicit agreement) during the marriage is not entertained in Islamic law. In terms of Islamic law, remuneration for labour must be explicitly agreed to by both parties, prior to commencement of such labour.'

At the hearing I was informed by counsel that the parties had reached an agreement as to the order that should be made in respect of the plaintiff's claim in convention and the following order was accordingly made by agreement:

`By agreement between the parties it is ordered that:

(1) defendant is to vacate the premises at 22 Olifants Road, Primrose Park, Athlone on or before 28 February 1996;

(2) defendant is ordered to pay one half of plaintiff's taxed and agreed costs in respect of the claim in convention.'

That left the defendant's claim in reconvention. At the request of the parties I made an order in terms of the pre-trial conference agreement on separation of issues.

(At this point I must point out that though the order I made provided, *inter alia*, that the issues raised in para 13 of the plaintiff's plea in reconvention should stand over for later determination, the parties' counsel and their advisers were not alive to the fact that this included the plea of prescription because that is contained in para 13.4 of the plaintiff's plea in reconvention. I was not alive to it either. As appears from para 4*(b)*, however, this was one of the areas of dispute between the experts. Counsel argued it before me - all of us being unaware that this issue is covered by the Rule 33(4) order I made. In the circumstances I shall in what follows assume that the order I made does not apply to the issue raised by para 13.4 of the plaintiff's plea in reconvention.)

When Mr *Trengove*, who appeared with Mr *Kotze* for the defendant, addressed me at the beginning of the trial he stated that the issues to be decided were even narrower than they appear from the minutes of the experts' meeting. This was because the defendant now conceded that in Islamic law the wife's standing does not determine the level of maintenance: that is determined by the husband's means.

It followed that the issues on which I was asked to make rulings are the following:

Copyright Juta & Company Limited

(a) Is the defendant entitled to claim for arrear maintenance as a debt that does not prescribe?

(b) Is the defendant entitled to a consolatory gift when dissolution of the marriage is at the behest of her husband, the plaintiff? (For the purposes of deciding this issue it has to be accepted, at this stage, that the marriage was terminated without just cause.)

(c) Is the defendant entitled to an equitable share of her tangible and intangible contributions to her husband's estate even if, as must

FARLAM J

be assumed in this case, there was no express agreement between the parties that she would be remunerated by her husband for her labour?

Before the trial commenced a document (miscalled `Stated case in terms of Rule 33: claim in reconvention') was filed. It sets out facts which are common cause between the parties and in respect of which no evidence needed to be led. (As Mr *Trengove* conceded, it is not a stated case properly so called under Rule 33 because both the parties were desirous of supplementing those facts by expert evidence.)

The following are the common cause facts set out in the document to which I have referred:

1. **On or about 1976, and at Cape Town, the plaintiff and defendant concluded a marriage agreement.**
2. **The formalities of the marriage complied with the requirements of Islamic personal law, and were concluded by plaintiff offering to marry the defendant, in the presence of at least two witnesses, and by defendant accepting the said offer.**
3. **When they were married the parties entered into a contract orally and by conduct in terms of which they agreed that their marriage and all matters following therefrom would be governed, *inter alia*, by Islamic personal law.**
4. **The dispute between the parties relates to the applicable provisions of Islamic personal law, so incorporated into their contract.**
5. **The extent to which these matters are common cause and in dispute appears from the pleadings, the expert summaries and the minutes of the meeting between the parties' experts.**
6. **From the marriage was born three minor children, namely Faigah (born on 23 November 1977), Ibtisaam (born 6 January 1981) and Ruqayah (born 13 January 1984).**
7. **Plaintiff terminated the parties' marriage as follows:**

    7.1 Plaintiff issued out a first *talaq* during or about September 1991.

    7.2 Plaintiff issued out a second *talaq* on or about 9 September 1992.

    7.3 Plaintiff issued out a third *talaq* on or about 14 October 1992.'

Before the issues in respect of which the parties desire rulings can be considered, it is

necessary in my view for two preliminary matters to be dealt with. They are:

(1) Is it inappropriate for this Court to pronounce upon matters of religious law? To put the same issue in different terms, should the Court follow the example of the United States Supreme Court and, so as to avoid entanglement in doctrinal issues, decline to make determinations that call for investigation into matters of religious belief, even if such determinations are required in order for issues involving proprietary or other legally recognised legal interests arising for decision to be determined?

(2) 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

FARLAM J

potentially polygamous (although in fact monogamous), was void on the grounds of public policy?

Although an affirmative answer to either question would lead to a decision adverse to the defendant on all three of her claims, Mr *Warner*, who appeared for the plaintiff, specifically refrained from seeking to take advantage from either of the points I have mentioned. Indeed on the first point (the doctrinal entanglement point) he submitted heads of argument in which he contended that the Court should give a decision on the three issues raised, while on the second point (whether the *Ismail* decision precludes the enforcement of the terms of the contractual agreement relied on) he said that the plaintiff abided the Court's decision on the point and he made no submissions on the point to the Court.

In regard to the latter point, Mr *Trengove* very properly drew my attention to the *Ismail* decision and conceded that it is the Court's duty *mero motu* to take notice of the illegality of the contract, if it is illegal. He then proceeded to argue that the *Ismail* case should no longer be followed because public policy, being `the general sense of justice of the community, the *boni mores*, manifested in public opinion' (see *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152--3, cited with approval in *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 913G--H) can alter from time to time and has indeed altered on this particular point since the *Ismail* decision was handed down by the Appellate Division in November 1982. In the alternative he submitted that the *ratio* in the *Ismail* decision is in conflict with the spirit, purport and objects of chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993 to which this Court, in applying and developing the common law, is enjoined by s 35(3) of the Constitution to have due regard.

I myself raised the doctrinal entanglement point after reading the instructive article by Mr F Cachalia `Citizenship, Muslim family law and a future South African Constitution: a preliminary enquiry' published in (1993) 56 *THRHR* 392, in which the following statement appears (at 400):

`Thus Islam is a "revelational culture", which does not differentiate between law and religion, positive legal rules and moral prescripts, the religious and the profane, and the public and the private. This religious world-view guides the individual through the life-cycle of birth, life and death; and it gives meaning to existence. Islamic culture provides the Muslim *umma* (community), in the words of Ali Mazrui, with *criteria for evaluation, lenses of perception and cognition and a basis for identity*. It is crucial, therefore, in any discussion of the possible accommodation of Muslim personal laws in a future non-racial legal order, to grasp this continuity of Muslim law, religion, culture and identity.'

Mr Cachalia also states, as did the witnesses who testified at the trial, that the

`Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constituted the *ipsissima verba* of Almighty God. The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed form a body of commandments (*sharia*) which govern all aspects of

a Muslim's life, including marriage, divorce and devolution of property on death.'

That being so, it seemed to me that there was a distinct danger that by making rulings on the issues before the Court I might unwittingly become entangled in doctrinal matters which it is inappropriate and indeed undesirable, for the reasons given in the American decisions (see, for example, *Jones v Wolf* 443 US 595 (1979)), for a Judge in a secular Court to do in a country which has a constitution which entrenches every person's `right to freedom of conscience, religion, thought, belief and opinion . . .' (as ours does in s 14(1)).

It is true that our Constitution, unlike the Constitution of the United States, does not have an establishment clause but it seems clear that, although the American rule against doctrinal entanglement is to some extent prompted by establishment concerns, the rule also rests on independent free exercise clause grounds as was explained in *United States v Ballard* 322 US 78 (1944): *cf* also the approach of the majority in the German Constitutional Court in the Religious Oath Case (33 BVerfGE (1972) 23), a decision on Art 4 of the Basic Law, which deals with freedom of faith, conscience and creed.

Prior to the coming into force of the Constitution our Courts `would not adjudicate upon a doctrinal dispute between two schisms of a sect *unless some proprietary or other legally recognised right was involved*' (*Allen and Others NNO v Gibbs and Others* 1977 (3) SA 212 (SE) at 218A--B). It seemed to me that s 14 of the Constitution might well have changed the position and that the doctrine of doctrinal entanglement may now be part of our law.

It follows that if that is so and a decision on the points in issue between the parties in the present case will, regard being had to the fact that Islam is a `revelational culture', involve the Court in deciding points of doctrine, then it would be inappropriate for the Court to endeavour to find the answer to the questions posed for decision in this case.

In the circumstances I asked counsel on both sides to submit heads of argument to me on the point. I am indebted to them for the full and helpful arguments with which they furnished

me.

Both sides agree that the particular issues arising for decision in this case do not - despite the fact that there is a continuity of Muslim law, religion, culture and identity and no clear barrier between the religious and secular spheres - require any religious doctrines to be interpreted: in short there will, they both say, be no question of any `doctrinal entanglement' in this case. (It is only fair to say that the parties did not entirely accept the statement by Mr Cachalia to which I have referred, but, in view of the assurance I have been given that there is no possibility of doctrinal entanglement in relation to the particular issues arising in this case it is not necessary to deal further with this aspect.)

I am accordingly satisfied that there is nothing in s 14 of the Constitution which would preclude me from deciding the issues arising in this matter. I want to make it clear, however, that the position may be different in cases where issues arise which do involve matters of doctrine, even when proprietary or other legally recognised rights are involved. It is unnecessary for me, however, to discuss the point further.

I now proceed to consider whether I should follow the *Ismail* decision and hold that because the conjugal union between the parties was potentially polygamous and accordingly void the defendant's claims, which are closely connected to it and by their very nature intrinsic to it, should be held to be enforceable.

It is true that public policy is essentially a question of fact (see the statement by *Aquilius* (the late Mr Justice F P van den Heever) in his article `Immorality and Illegality in Contract' (1941) 58 *SALJ* 337 at 346: `what is immoral is a factual not a legal problem', on which Mr *Trengove* strongly relied). This is so even though in most cases the factual finding in question is not based on evidence before the Court but on facts regarded as so notorious that the Court takes judicial notice of them.

In the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail decision if it were not for the new Constitution. In the circumstances I prefer to base my decision on the fundamental alteration in regard to the basic values on which our civil policy is based which has been brought about by the enactment and coming into operation of the new Constitution.*

In summarising Mr *Trengove's* argument I have already referred to s 35(3) of the Constitution. In his judgment in *Du Plessis and Others v De Klerk and Another* (case No CCT 8/95), a decision of the Constitutional Court delivered on 15 May 1996, Ackermann J referred (in para [106] of his judgment) to `the marked similarity between the provisions of s 35(3) . . . and the indirect horizontal application of the basic rights in the (German Basic Law) in German jurisprudence'.* (1)

In paras [103] and [104] of his judgment Ackermann J said:

`[103] Any attempt at a detailed discussion on the operation of *mittelbare Drittwirkung* (indirect horizontality) in German constitutional law would be out of place here. There are some features, however, which bear on the construction of our own Constitution.

The Federal Constitutional Court refers to the *radiating effect* (*Ausstrahlungswirkung*) of the basic rights on private law. In the *Lüth* case the Federal Constitutional Court held as follows:

> **"The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* - in the broad sense of the term - that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from the domination of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like art 826 of the Civil Code, refer to standards outside private law. `Good morals' is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its**

> **intellectual history and laid down in its constitution. That is why the general clauses have rightly been called the points where basic rights have breached the (domain of) private law. . . ."**

[104] Thus, in private litigation, the German courts are obliged to consider the basic rights in interpreting concepts such as "justified", "wrongful" "*contra bonos mores*" *et cetera*. The basic rights therefore have a radiating effect on the common law through provisions such as, for example, s 138 of the Civil Code, which provides that "legal acts which are contrary to public policy are void".'

In a footnote giving the reference to the *Lüth* case, Ackermann J said: `The word "radiating" seems preferable to the somewhat pejorative term "seepage".'

In my view it is clear that if the spirit, purport and objects of chap 3 of the Constitution and the basic values underlying it are in conflict with the view as to public policy expressed and applied in the *Ismail* case then the values underlying chap 3 of the Constitution must prevail.

Further support for this view may be found in the *dictum* of Mahomed AJ (as he then was) in *S v Acheson* 1991 (2) SA 805 (Nm) at 813A--B (1991 NR 1 at 10A--B):

`The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.'

It is accordingly necessary to consider whether the values underlying chap 3 of the Constitution are in conflict with the views as to public policy expounded and applied in the *Ismail* case.

The judgment delivered in the *Ismail* case by Trengove JA was concurred in by the other

members of the Court. At 1024D--E the learned Judge of appeal stated the conclusion to which he had come as follows:

`. . . we would not be justified in deviating from the long line of decisions in which our Courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart'.

He continued (at 1024E--1025B):

`The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it; and from a purely practical point of view it would, in my view, also be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws - and to some extent also our law of succession - are primarily designed for monogamous relationships. . . . Furthermore, in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnised under the tenets of the Muslim faith may even be regarded as a retrograde step; *ex facie* the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate their marriage unilaterally by simply issuing three "*talaaqi*", without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana that her husband has been

guilty of misconduct. While this may be consistent with the tenets of the Muslim faith, it is entirely foreign to our notion of a conjugal relationship. I also mention, in passing, that it seems unlikely that the non-recognition of polygamous unions will cause any real hardship to the members of the Muslim community, except, perhaps, in isolated instances. According to the pleadings, only about 2 per cent of all Muslim males in South Africa have more than one wife. This means that approximately 98 per cent of all Muslim males have either contracted valid civil marriages or *de facto* monogamous unions. And, in the case of the latter, the parties have for many years had the right to convert their *de facto* monogamous unions into *de jure* monogamous unions. They had the option of doing so under the Indians' Relief Act 22 of 1914 (which was repealed by the General Law Amendment Act 57 of 1975) and they can still do so by entering into valid civil marriages under Act 25 of 1961. In the result, I have come to the conclusion that the polygamous union between the parties in the instant case must be regarded as void on the grounds of public policy.'

Earlier in the judgment (at 1020B and G) reference was made to a line of decisions in which our Courts have stressed that in South Africa the monogamous concept of marriage is fundamental and where it has been held that under our law

`a marriage is regarded as polygamous if it is celebrated under tenets which allow the husband to take another wife during its subsistence, *whether he does so or not*. A

potentially polygamous union is equated with a *de facto* polygamous union (see *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 308).'

In addition to the *Seedat* decision reference was also made to the following decisions in which `our Courts have persistently refused to give recognition and effect to polygamous unions on the grounds of public policy or as being *contra bonos mores*': *Bronn v Fritz Bronn's Executors and Others* (1860) 3 Searle 313 at 318; *Ngqobela v Sihele* (1893) 10 SC 346 at 352; *Kaba v Ntela* 1910 TS 964 at 969 and *Docrat v Bhayat* 1932 TPD 125 at 127.

It will be recalled that the *Ismail* case concerned claims by a former wife married by Muslim rites for recovery of maintenance (as here) and deferred dowry. The Muslim marriage had already been terminated (also as here). The ex-wife's contention that her claims were enforceable at law because they and the grounds on which they were based were *per se* innocuous was rejected for reasons which appear from the following extract from the judgment (at 1025C--1026B):

`(I)t is . . . quite clear from the pleadings . . . that the claims . . . are based on a custom or a contract which arises directly from, and is intimately connected with, the polygamous relationship entered into by the parties. It follows from this that, if the polygamous relationship is regarded as void on the grounds of public policy, the custom or the contract which flows from this relationship is also vitiated. See *Ngqobela v Sihele* (*supra* at 352) and *Kaba v Ntela* (*supra* at 269) - in each instance the Court held that no action could be brought for the recovery of "lobola" cattle because they had been paid in respect of a Black customary union, ie a polygamous union. I should mention that the Courts have since been precluded, by s 11 of Act 38 of 1927, from declaring that the custom of "lobola" or "bogadi" is repugnant to the principles of public policy. The principle enunciated in the aforementioned cases, nevertheless, still holds good as far as the consequences of polygamous unions between other members of our community are concerned.

In my judgment, the customs and the contract in question are contrary to

public policy and are, consequently, unenforceable. They may equally well be regarded as being *contra bonos mores*, as was alleged by defendant in his notice of exception. Although the phrase *contra bonos mores* is ordinarily used with reference to conduct which is regarded as immoral or sexually reprehensible, it really has a far wider meaning (cf *Grotius* 3.1.42--43, Van der Linden *Koopmans Handboek* 1.14.2; *Aquilius* "Immorality and Illegality in Contract" 1941 *SALJ* vol 58 at 337). *Mores* or *boni mores* (Dutch: "zeden" or "goede zeden"; English: "morals" or "morality" and Afrikaans: "sedes" or "goeie sedes") can be defined as meaning

> **"the accepted customs and usages of a particular social group that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation"**

(see Lewis and Short *Latin Dictionary sv "mos"*; Webster's *Third New International Dictionary* and *The American Heritage Dictionary of the English Language sv "mores"*; *Oxford English Dictionary sv* "moral and morality"; Van Dale *Groot Woordeboek der Nederlandse Taal sv* "zede"; Kritzinger and Labuschagne *Verklarende Afrikaanse Woordeboek sv* "sede"; and *Seedat's* case *supra* at 309 where Innes CJ refers to the "principles and institutions" of our society). I would not regard a polygamous union solemnised under the tenets of the Muslim faith, and the customs related thereto, as being *contra bonos mores*, in the narrower sense in which the expression is ordinarily used, ie as immoral (see *Ngqobela v Sihele* (*supra* at 352) and *Docrat v Bhayat* (*supra* at 127)), but such a union can be regarded as being *contra bonos mores* in the wider sense of the phrase, ie as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of society or, as Innes CJ said in *Seedat's* case at 309

> **"as being fundamentally opposed to our principles and institutions".'**

Can it be said, since the coming into operation of the new Constitution, that 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 is `contrary to the accepted customs and usages which are regarded as morally binding upon *all* members of our society' or is `fundamentally opposed to *our* principles and institutions'? (In each case the emphasis is mine.)

I think not. I agree with Mr *Trengove's* submission that it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that 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.

It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account.

Mr *Trengove* submitted, in my view correctly, that there are two closely related values underlying chap 3 of the new Constitution which are particularly important in this case.

The two values to which he referred are the principles of equality and the principle of tolerance and accommodation. He cited a series of provisions in the Constitution which he submitted are a manifestation of these two values.

Among the provisions he cited were the following:

(i) the preamble, which speaks of `equality between men and women and people of all races';

(ii) s 8(1) and, in particular, 8(2) which in terms provides that no

person shall be unfairly discriminated against, directly or indirectly on the ground, *inter alia*, of his or her `religion, conscience, belief or culture';

(iii) s 10, which gives every person the right to respect for and protection of his or her dignity, so that a legal provision or rule which denies recognition to an aspect of

someone's religion, particularly an important part of the religion that is bound up with his or her family life, would be regarded as being an affront to dignity;

(iv) s 14(1), which entrenches everyone's right to freedom of conscience, religion, thought, belief and opinion, and s 14(3), which foreshadows legislation recognising a system of personal and family law adhered to by persons professing a particular religion and indicates, as Mr *Trengove* submitted, that the Constitution is tolerant of legislation of that kind;

(v) s 31, which entrenches everyone's right to use the language and participate in the cultural life of his or her choice, another provision indicative of an accommodation of cultural diversity;

(vi) s 32*(a)* and *(c)*, dealing with the right to basic education and the right to establish educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the grounds of race - again an accommodation of diversity, provided there is no discrimination on grounds of race;

(vii) ss 33(1)*(a)*(ii) and 35(1), with their references to `an open and democratic society based on freedom and equality' - an emphasis again on, *inter alia*, the value of equality;

(viii) Constitutional Principle 3, which speaks of the promotion of `racial and gender *equality* and national unity';

(ix) Constitutional Principle 11, which provides that the `diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged' - again the value of the accommodation of diversity and the recognition of the essential plural nature of our society; and

(x) the postamble which speaks of `a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, *belief* or sex' and of `a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation'; reference was also made to Langa J's exposition (in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at para [224]) where *ubuntu* was described as `a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of'.

I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are

among the values that underlie our Constitution. In my view those values `irradiate', to use the expression of the German Federal Constitutional Court cited earlier, the concepts of public policy and *boni mores* that our Courts have to apply.

Contrary to public policy (as opposed to those that are *contra bonos mores*) are contracts which might redound to the public injury; see *Voet* 1.14.16. The distinction is clearly put by *Aquilius* in the article to which I have already referred ((1941) 58 *SALJ* 335 at 346).

In the *Ismail* case, Trengove JA expressed the view that the customs and contracts there in issue were contrary to public policy. He also said that they were *contra bonos mores*. In my opinion the `radiating' effect of the values underlying the new Constitution is such that neither of these grounds for holding the contractual terms under consideration in this case to be unlawful can be supported.

I wish to stress at this point that what I have said does not necessarily apply to contractual terms such as those under discussion which are agreed to in the context of a marriage that is actually, as opposed to merely potentially, polygamous. No question of actual polygamy arises in this case and nothing I have said, or am going to say, will necessarily be applicable in such a case.

Mr *Trengove* also stressed in his argument that the claims the defendant is seeking to enforce in this case are `twice removed', as he put it, from the mischief against which the rules relating to the non-recognition of polygamous marriages are aimed. This is because the marriage in the present case was not actually polygamous (having been terminated when the plaintiff had no other wife so that its polygamous potential was never realised) and because the Court is not asked to recognise the marriage but merely to enforce certain terms of a contract made between the parties which are in a sense collateral thereto.

Mr *Trengove* referred to the decision of the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) for two propositions which are of importance in this case. The first is the principle (stated at 895D--G) that, in general, the time to consider whether a contract (or part thereof) is enforceable is not when it was concluded but when the Court is asked to make the order. This is important because, as appears from what has been stated above, the defendant's counterclaim was only instituted in October 1994, ie after the new Constitution came into force. The Constitutional Court has held that, `(i)n the true sense of the words', the Constitution is not retroactive nor retrospective (see *S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) at para [99], *per* Kriegler J) so that conduct, for example a defamatory publication published before 27 April 1994, does not become lawful on or after 27 April 1994 by reason of chap 3: see *Du Plessis and Others v De Klerk and Another* (*supra* at para [14]), *per* Kentridge AJ.

As I see the matter it is not necessary for me to decide on the correctness of Mr *Trengove's* submission on this point that a contract (or part thereof) which was unlawful because it was contrary to public policy or *contra bonos mores* before 27 April 1994 may now be enforced if, as a result of the `irradiating' effect of the values underlying chap 3 of the

Constitution, it is not now contrary to public policy or *contra bonos mores*. I say this because of the fact that the plaintiff has not contended that the contract was illegal and a Court's duty to invoke *mero motu* the illegality of the contract only exists in my view in cases where the enforcement of a contract presently unenforceable because it is contrary to public policy or *contra bonos mores* is sought. I do not think that that duty extends to cases where the

enforcement of a contract is no longer regarded as contrary to public policy or *contra bonos mores* (so that an order for its enforcement cannot redound to the public injury or be offensive to the morals of the community). In other words it is not necessary for me to decide whether the plaintiff could defeat the defendant's claim because of the fact that the contract was illegal at all times prior to the coming into force of the new Constitution: it is enough that the plaintiff does not raise the point.

The second principle derived from the *Magna Alloys* judgment which is of importance here is that stated at 896A--E, namely that the Court may enforce a contract in part and decline to enforce another part if only part of the contract is offensive to public policy and the other not. In my view there is nothing offensive to public policy or good morals in the terms of the contract which the defendant is seeking to enforce in the proceedings. It is true that the contract was posited on the premise that the parties were going to live together as man and wife despite the fact that their marriage was not valid under the Marriage Act 25 of 1961. But they agreed to live together as man and wife after a marriage ceremony conducted according to the rites of their religion. I do not think that any right-thinking person would say that two Christians who were married in a church by a priest or minister of the denomination to which they belonged in accordance with the rites or formularies used by that denomination would be acting immorally if they lived together thereafter as man and wife despite the fact that the priest or minister who married them was not a recognised marriage officer in terms of Act 25 of 1961 so that their marriage was not legally valid. I am also of the view that, if the partners to such a union were to agree to support each other and that, if their union were terminated by one of them without just cause, that he or she would compensate the other, such agreement would not be rendered unenforceable because it was linked to an agreement to live together as man and wife after they were married in the church to which they belonged according to its rites and formularies.

If what I have said in the preceding paragraph about two Christians married in their church by a priest or minister who is not a marriage officer is correct, then it is not possible, in my view, to distinguish such a case from a case of two Muslims who are married in accordance with Muslim rites in circumstances where the marriage is not legal in terms of Act 25 of 1961.

As is apparent from the passage from his judgment quoted above, Trengove JA was not prepared to say that a Muslim union and the customs related thereto were '*contra bonos mores* in the narrower sense of the phrase, ie as immoral', but he held

'such a union can be regarded as being *contra bonos mores* in the wider sense of the phrase, ie as being contrary to the accepted customs and usages which are

regarded as morally binding upon all members of society or . . . "as being fundamentally opposed to our principles and institutions"'.

In my view, even in the wider sense of the phrase, it cannot be said since the new Constitution came into operation that that is so.

So much for the view that the contractual terms relied on here are *contra bonos mores*. I think it must be accepted that the enforcement by this Court of the contractual promises

made by the plaintiff in this case, particularly in the light of the acceptance by our society of the values underlying chap 3 of the new Constitution, will not detrimentally affect the interests of the community.

In the circumstances I am satisfied that the *Ismail* decision no longer operates to preclude a Court from enforcing claims such as those brought by the defendant in this case.

Consideration of issues

I now proceed to consider the issues on which the parties seek rulings from the Court.

(1) The defendant's entitlement to claim for arrear maintenance as a debt that does not prescribe.

The first such issue was whether the defendant is entitled to claim for arrear maintenance as a debt that does not prescribe.

It is common cause between the parties that when they were married they concluded a contract in terms of which they agreed that their marriage and all matters flowing therefrom would be governed, *inter alia*, by Islamic personal law ('stated case', para 3).

It is also common cause that the rules of the Shafi'i school should, at least in the areas of settled law, be regarded as the applicable rules which the parties must be taken to have incorporated in their contract.

Among the points on which the parties' experts were in agreement were that according to Islamic law '(a) wife is entitled to be maintained by her husband according to his means during the subsistence of the marriage (and) for three months' (after repudiation (*talaq*) of the marriage) and that '(u)nder the Shafi'i school . . . unpaid maintenance dues accumulate as a debt and (do) not prescribe' (paras 3*(b)*, *(e)* and *(h)* of the minutes of the experts' meeting).

It follows that the parties agreed, as terms of their agreement, that the plaintiff would maintain the defendant during the subsistence of the marriage and for three months after repudiation (*talaq*) thereof and that a debt in respect of unpaid maintenance would not prescribe.

Mr *Warner* contended that the term that this debt would not prescribe is not enforceable in our law because, so he submitted, a party to a contract cannot validly agree in advance, before a debt has been incurred, not to invoke prescription.

Mr *Kotze*, who argued this part of the case on behalf of the defendant, argued, relying on the case of *Nedfin Bank Bpk v Meisenheimer en Andere* 1989 (4) SA 701 (T) , followed in this Division in the case of *Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) , that (1) as a person is free to renounce a benefit which was introduced primarily for

his own benefit, and (2) as prescription was introduced (so he contended) primarily for the benefit of debtors and not for society at large, prescription may validly be renounced in advance. In this regard, so he contended, the public interest in freedom of contract weighs

more heavily than the public interest in finality of actions.

As far as Mr *Kotze's* first proposition is concerned the true position, as I understand it, is that a person may renounce a right introduced for his benefit unless the right was introduced not only for his benefit but also in the interests of the public.

The law on the point was expounded by Innes ACJ in *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734--5 as follows:

`The maxim of the Civil Law (C.2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to a law, or a right introduced not only for his own benefit, but in the interests of the public as well. (*Grot* 3, 24, 6, n 16; *Schorer* n 423; *Schrassert* 1, c 1, n 3, etc). And the English law on this point is precisely to the same effect. In *Hunt v Hunt* (31 LJ Ch 175), Lord Westbury expressed himself as follows: "The general maxim applies *quilibet potest renuntiare juri pro se introducto*. I beg attention to the words *pro se*, because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of." And Alderson B in *Graham vs Ingleby* (1 Exch 657) remarked that "an individual cannot waive a matter in which the public have an interest".'

See also *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G, where it was stated that `a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved'.

The passage in De Groot's *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (3.24.6 n 16) cited by Innes ACJ in *Ritch and Bhyat v Union Government* (*supra*), was in fact written by Groenewegen, who published an edition in 1644 with footnotes (De Groot wrote the *Inleidinge* while imprisoned at Loevenstein Castle and he did not quote any authorities. Groenewegen's edition was the first to supply the authorities De Groot had been unable to supply: it also included additional notes of his own - see Beinart `Simon van Groenewegen van der Made' (1988) 56 *Tydschrift voor Rechtsgeschiedenis* 333 at 337--8.) It contains the following (Maasdorp's translation at 285):

'(T)he advantages which, *without any regard to the public good,* are conferred upon one or the other may be dispensed with by agreement (c.2: 3: 29 . . .).'

I do not agree with Mr *Kotze's* second proposition. In my view it must be accepted that extinctive prescription was introduced, at least in part for the benefit of the public. See Wessels *The Law of Contract in South Africa* 2nd ed para 2837, which is in the following terms:

'2837. A more difficult question is whether a party to a contract can make a valid agreement that even if his debt is prescribed, he will not avail himself of his right to plead prescription. In other words, can prescription be renounced in advance?

It was a matter of dispute amongst the old commentators whether this could or could not be done. Bartolus based his view that prescription could not be

renounced in advance upon the principle that it would be contrary to public policy to allow it - "*quod usucapio est introducta propter bonum publicum principaliter: ergo per pactum remitti non potest*" (*ad De Legat lex* 58; arg *D*.2.14.38; *D*.50.17.27); also because prescription was introduced "*non favore praescribentis sed in odio negligentis*" (Bartolus *ad D*.41.3.1). This view prevailed amongst the later commentators and was adopted as law by the Code Civil (Art 2220. See Merlin *Répertoire sv Prescription* vol 24 p 75). It may be said that if it is contrary to public policy to renounce in advance your right to avail yourself of prescription, why is it not against public policy to renounce it after its course has run out, by acknowledging the debt during its course? The answer usually given is that when you have acquired a right you can consult your own interests and refuse to exercise it, but you cannot foresee what your interests will be in the future, and therefore it would be contrary to public policy that you should be allowed to bind yourself in advance (Troplong *Prescriptions* ss 41 *et sqq*). This is the classical view of the Civil Law and there seems to be no valid reason why our law should differ from it.'

In Asser *Nederlands Burgerlijk Recht* Derde Deel Eerste Stuk 3e druk *bewerkt door* L E H Rutten, the following is stated (at 477--8):

'De bestaansredenen van het instituut der verjaring zijn hoofdzakelijk gelegen in de wens, de schuldenaar te beschermen *en de belangen der gemeenschap te bevorderen.*

De verjaring strekt tot bescherming van de schuldenaar, doordat zij hem beveiligt tegen verouderde aanspraken, . . .

Het instituut der verjaring strekt echter tevens in het belang van de gemeenschap en misschien moet dit motief in de eerste plaats worden genoemd. De verjaring bevordert de rechtszekerheid en daarmede het algemeen welzijn.'

Later, at 484, the learned author gives reasons for the rule in Dutch law that prescription cannot be renounced in advance as follows:

'wanneer afstand zou kunnen worden gedaan van de verjaring voor afloop van de verjaringstermijn, zou ongetwijfeld in de meeste contracten de gelijkte clausule worden opgenomen, dat de debiteur afstand doet van de verjaring. Daardoor zou het doel van de wet worden verijdeld.'

See further De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed vol 1 at 307, where the late Professor J C de Wet expressed the view that if extinctive prescription could be renounced when the debt is created

'sou die hele instelling van verjaring effektief verydel kon word, altans by skulde wat uit ooreenkoms ontstaan. 'n Ooreenkoms van die aard kan as *contra bonos mores* beskou word en daarom ongeldig.'

In a footnote he refers to the *Meisenheimer* decision which he describes as `allermins

oortuigend'.

I agree with the views of the late Professor *De Wet*, save that I prefer, with *Wessels*, to hold that an agreement to renounce prescription in advance is invalid not because it is *contra bonos mores*, but because it is contrary to public policy.

It follows from what I have said that I am of the view that the *Meisenheimer* decision was wrongly decided and should not be followed.

The decision of this Court in *Friederich Kling GmbH v Continental Jewellery Manufacturers* is distinguishable because there the renunciation was effected not when the debt was created, but when prescription had already begun to run (a situation which does not exist here

and in respect of which the legal position may be different), but, insofar as agreement was expressed with the *Meisenheimer* decision, I am in respectful disagreement.

Mr *Kotze* also argued that the defendant should be regarded as having been married to the plaintiff so that the completion of prescription would be delayed until the lapse of a year after the marriage came to an end: see s 13(1)*(c)* of the Prescription Act 68 of 1969.

Even if I were to hold that the defendant is to be regarded for the purposes of Act 68 of 1969 as having been married to the plaintiff, this will not assist the defendant because more than a year elapsed from the date the third *talaq* was pronounced and the Islamic law marriage relationship terminated (ie 14 October 1992) and 24 October 1994, the date when the defendant's claim in reconvention was served on the plaintiff's attorneys.

Section 13(1) of Act 68 of 1969 provides, as far as it is material:

> '**13(1) If . . .**
>
> ***(c)* the creditor and debtor are married to each other; . . . and**
>
> **(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in para . . . *(c)* . . . has ceased to exist,**
>
> **the period of prescription shall not be completed before a year has elapsed after the day referred to in para (i).**'

In the circumstances it is unnecessary to decide whether the defendant should be regarded for the purposes of Act 68 of 1969 as having been married to the plaintiff.

It follows that I am of the view, on the first issue on which a ruling is sought, that the plaintiff is only liable to the defendant in respect of arrear maintenance for the period from 25 October 1991 (ie three years before the defendant's claim in reconvention was served on his attorneys) to 14 January 1993 (ie, three months after the marriage was terminated by the third *talaq*).

(2) The defendant's entitlement to a consolatory gift.

During the course of the evidence it became clear that there is no real dispute between the parties on the second issue summarised above; the experts on both sides were in agreement that the defendant would be entitled to a consolatory gift if the dissolution of the marriage was at the unjustified behest of the plaintiff (a question which stands over for later determination).

(3) The defendant's entitlement to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate.

On this issue the parties' experts, both of whom hold degrees in Islamic theology and law, expressed diametrically opposed views, a summary of which, as it appears in the minutes of the meeting of experts, has already been quoted. Both of them are involved not only in teaching Islamic law, but also in applying it in practice.

The plaintiff's expert witness, Mr Mowlana Mohamed Allie Moosajee, in addition to being the head of the department of Islamic Law at the Islamic College of Southern Africa, and head of the Masjid al-Quds Islamic Centre, is also a senior member of the Fatwa Committee of

the Muslim Judicial Council; among the major tasks of this committee is the preparation of legal opinions on matters confronting Muslims in the Western Cape.

The defendant's expert witness, Dr Ebrahim Moosa, is a senior lecturer in the Department of Religious Studies at the University of Cape Town. He is also a member of the Judicial Committee of the Islamic Council of South Africa as well as being involved with that Council's matrimonial court.

He testified that he considered himself a progressive jurist, in the best sense of that term. He stated that, in relation to the question as to whether a divorced wife is entitled to an equitable distribution of her husband's estate, particularly where her efforts had contributed to the building up of the estate, there was no clear view on the point to be found in the writings of jurists of the Shafi'i school, with the result that it would be necessary for an Islamic court to seek to find the best view, using the traditional methods of Islamic jurists. He testified further that the view he held, which he expounded to the Court in great detail, was in accord with legislation passed in Malaysia which, it will be recalled, is a Shafi'i jurisdiction. The legislation on which he relied is the Malaysian Islamic Family Law (Federal Territory) Act 1984, s 58 of which provides as follows:

> '**(1) The court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.**
>
> **(2) In exercising the power conferred by ss (1), the court shall have regard to**
>
> ***(a)* the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;**

(b) any debts owing by either party that were contracted for their joint benefit;

(c) the needs of the minor children of the marriage, if any, and, subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by ss (3), the court shall have regard to -

(a) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;

(b) the needs of the minor children of the marriage, if any, and, subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.'

He explained that legislation on a topic such as this would only be adopted in Malaysia after careful consultation with experts on Islamic

FARLAM J

law. Indeed, he described the Act in question as a codification of Islamic law. He stated earlier in his evidence that in Malaysia the Legislature had acknowledged what he called 'the new role of women in society' and had given effect to it through codification.

He contrasted the position in Malaysia with what happens in the Middle East, where, so he said, 'for some time now, particularly in Saudi Arabia, wives would demand sizeable deferred dowries with a small amount being promptly paid and the remainder to be paid on dissolution of marriage . . . , (The) amount of money that is promised or owed to the wife, in the event of dissolution, . . . serves as a compensation for a contribution towards a joint household in the function that she performed. . . . (T)hese normally are sizeable amounts . . .'.

He explained that in the Middle East what he called 'the traditional mechanisms' were used to protect the wife, while legislation was used for the same purpose in Malaysia.

He conceded that what one might call the Malaysian response to the new rôle of women in society has not been adopted in any other Islamic country but he pointed out that Malaysia is a State with many millions of Islamic inhabitants. He said that Indonesia, the largest Islamic State, had not to his knowledge followed the Malaysian trend.

In dealing further with the legal position in Malaysia he referred to two publications in which the Malaysian Act as well as Court decisions given in Malaysia both before and since the enactment of the Act are considered, viz an article by Ahmad Ibrahim entitled 'Ancillary Orders on Divorce in the Shari'ah Courts of Malaysia' published in 7 (1987) *Islamic and*

Comparative Law Quarterly at 185 *et seq* and an extract from a book by Nik Noriani Nik Badli Shah, entitled *Family Law, Maintenance and Other Financial Rights*, published in Kuala Lumpur in 1993.

According to the article the wife's right under the 1984 Act to share her husband's assets on divorce is based on Malay *adat* (custom) relating to *harta sepencarian* (jointly acquired property), a term which is apparently applied not only to property acquired by the joint efforts of the spouses but also, where property has been acquired by the sole efforts of one spouse only, to such property where it has been improved by the efforts of the other spouse.

Ibrahim refers (at 198) to the case of *Boto v Jaqar* (1985) 2 MLJ 98, where Salah Abas CJ said:

'*Harta sepencarian* is not so much based on Islamic jurisprudence as on customs practised by Malays.'

Ibrahim also says (at 199) that when *harta sepencarian* cases come before the Shari'ah Court (ie the court applying Islamic law) 'the kadis (Islamic Judges) have difficulty in finding a basis for the claim under Islamic law'.

In the book by *Badli Shah* reference is made (at 40) to an article in which it is said that

'a synthesis between the *adat* and Islamic law is possible if, on the one hand, the principles of the Muslim law as contained in the Quran and *Sunnah* are subjected, as they were in the early days of Islam, to the free activity of interpretation through *ijtihad* and *ijma* to meet ever changing social and economic conditions and if, on the other hand, the *adat* itself is modified to meet the needs of such social and economic conditions'.

FARLAM J

Reference is also made to passages in leading Islamic juristic texts dealing with cases where the properties of husband and wife have been mixed up (*musha*) and where they have worked together in partnership (*syarikatul abdan*) and to the recognition by the Muslim system of the force of customs and usages in establishing rules of law.

It is clear, in my view, that the Malaysian rules are based, in part at least, on Malay custom which, not being in conflict with the essential principles of Islamic law, is capable of being synthesised therewith.

In view of the fact that no other Islamic country, on Dr Moosa's own evidence, adopts this approach, I cannot see on what basis I can regard the Malaysian rules as being part of the provisions of Islamic personal law incorporated by the parties into their contract unless a custom similar to the Malay *adat* relating to *harta sepencarian* prevails among the Islamic community, to which the parties belong, in the Western Cape.

Dr Moosa expressed the opinion that there is such a custom, a view which Dr Moosajee contested.

Dr Moosa's evidence did not, in my view, establish the custom on which he relied. He conceded in his evidence that there was what he called a 'widely held misnomer' among the

Muslim community in the Western Cape that Islamic law says that when people are married in terms of Islamic law their estates must be separated. He said that if 100 people of the Muslim faith were stopped in the street and asked `Does Islamic law require that when you are married in terms of Islamic law there is a separation of estates?' 40% would answer in the affirmative, another 40% would not be sure and the remaining 20% would not know. He conceded that that means that no one holds the correct view, adding:

`I will tell you why . . . because patriarchy is so rife in our society that people do not know what the correct view of the law is.'

He said also that when young Muslim couples are told before marriage that there is nothing in Islamic law preventing them from having a joint estate, they are relieved and say `well, that's exactly what we wanted'.

This evidence falls far short of proving that a custom similar to the Malay *adat* relating to *harta sepencarian* prevails among the Islamic community in the Western Cape.

In the absence of such a custom, there is, in my view, as I have said, no basis for holding that the provisions of the Islamic personal law which the parties incorporated into their contract included a term to the effect that on divorce the defendant would be entitled to an equitable share of the growth of the plaintiff's estate during the marriage.

In any event the Islamic basis used in Malaysia to justify the synthesis of *adat* rules and Islamic law (`mixing' of properties and partnership) are not present here. Indeed, as far as partnership is concerned the allegations relating to a partnership between the parties which the defendant originally made are, as already stated, no longer being persisted in.

On the third issue on which a ruling is sought I rule that the defendant is not entitled to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate.

FARLAM J

Before concluding this judgment there is one further matter to which I wish to refer.

During the course of the trial Mr *Trengove* provided me with an extract from the *Nederlandsch-Indisch Plakaat-Boek* (edited by J A van der Chijs) vol IX at 417--31, in which is printed a placaat codifying the

`civile wetten en gewoontens, waar na de Mahometanen zig reguleeren in het decideeren der onder hen opkomende verschillen, in zo verre de successiën, erf- en besterffenissen, item hunne huwelyken en egtscheydingen, enz, betreffen, sodanig als uyt het Mahometaanse wetboek by een versameit en in Rade van India geapprobeert zyn'.

According to the copy of the *Statuten van Indien* in the Supreme Court library, this code was adopted by the Council of India by a resolution passed on 25 March 1760. Although some writers have suggested that only the 1642 edition of the Statutes of Batavia (and not the new Statutes of Batavia promulgated by Governor van der Parra in 1766, in which is included the Code of Muslim Law approved by the Council of India in 1760) was applied at the Cape before 1795, the archival researches of Professor G G Visagie have proved that

the new Statutes (of which there is still a manuscript copy in the library of the Supreme Court) were applied in practice by the Raad van Justitie: see G G Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* at 67.

It is not clear to what extent, if any, the Code of Muslim Law approved by the Council of India in 1760 could have applied to Muslim slaves at the Cape (cf C R De Beer *Aspekte van die Regsposisie van die Slawe aan die Kaap*, unpublished LLM dissertation, University of the Western Cape, 1992); it is clear, however, that there were Muslims at the Cape who were not slaves and to whom the Code would have been applied by the Raad in disputes arising among them: see Elphick and Shell `Intergroup Relations . . . 1652--1795' in Elphick and Giliomee (eds) *The Shaping of South African Society 1652--1840* at 191--4.

The existence of this Code appears to have been overlooked when *Bronn's* case *supra* was decided in 1860.

It is unnecessary to decide whether any part of the Code (which has not been repealed and whose provisions appear still to be in accord with the usages of the Muslim community at the Cape, so that no question of inconsistency may arise; cf *Seaville v Colley* (1891) 9 SC 39) is still in force. Counsel did not rely on it, its provisions are not relevant to the first issue referred to above, the experts were agreed on the second and, while the absence of provisions bearing on the third issue may have relevance, I have reached a conclusion on that issue without referring to it: a conclusion which would not be altered if I had referred to it.

The following order is accordingly made:

`The following rulings are made:

(a) the plaintiff is liable to the defendant in respect of arrear maintenance (if any) for the period from 25 October 1991 to 14 January 1993;

(b) the defendant is entitled to a consolatory gift from the plaintiff if the dissolution of the marriage was at the unjustified behest of the plaintiff;

(c) the defendant is not entitled to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate; and

(d) costs to stand over for later determination.'

Plaintiff's Attorneys: *Farouk Mowzer & Associates*, Mitchells Plain. Defendant's Attorneys: *Legal Resources Centre*, Cape Town.

Endnotes

1 (Popup - Popup)

Reported as *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) .