***Hassam v Jacobs* NO 2009 (5) SA 572 (CC)**

We have referred you to this important decision in Tutorial Letter 101. The following explanatory note was posted by the Constitutional Court:

In this case the Constitutional Court decided that women who are party to a polygynous Muslim marriage concluded under Muslim personal law are spouses for the purpose of inheriting or claiming from estates where the deceased died without leaving a will.

The judgment arises from an application for confirmation of a declaration of constitutional invalidity made by the Western Cape High Court, Cape Town (High Court).

The case concerns the proprietary consequences of a polygynous Muslim marriage within the context of intestate succession.

The applicant, Mrs Fatima Gabie Hassam, was a party to a polygynous Muslim marriage. Her husband (the deceased) died intestate. She unsuccessfully lodged claims with the executor of the deceased's estate. **The executor refused her claims on the basis that polygynous Muslim marriages are not legally recognised**. She applied to the High Court challenging the validity of certain provisions of the Intestate Succession Act 81 of 1987 (the Act) and the Maintenance of Surviving Spouses Act 27 of 1990 (the MSSA) on the grounds that they unfairly exclude widows in polygynous Muslim marriages from protections provided for in those statutes by excluding them from the concepts of "spouse" and "survivor".

The High Court declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir. It held that the term "spouse" in that Act should be interpreted to include spouses in polygynous Muslim marriages. The High Court further declared that the word "survivor" in the Maintenance of Surviving Spouses Act (MSSA) should be read to include surviving partners of polygynous Muslim marriages. The declaration of invalidity was referred to this Court for confirmation in terms of the Constitution.

In the confirmation proceedings before this Court **the applicant contended that the exclusion of widows in polygynous Muslim marriages from the benefits provided for in the Intestate Succession Act infringes their constitutional rights to equality, religion and culture.**

None of the respondents opposed the application. The Muslim Youth Movement and the Women's Legal Centre Trust were admitted as *amici curiae* and generally aligned themselves with the submissions of the applicant.

Nkabinde J writing for a unanimous **Court confirmed the declaration of constitutional invalidity** made by the High Court albeit in a slightly different manner. She **held that the objective of the MSS Act, which is to lessen the dependence of widows on family benevolence, would be frustrated if the continued exclusion of widows in polygynous Muslim marriages were to persist.** Nkabinde J held further that **the Act violates the applicant's right to equality.** The exclusion of women in the position of applicant from the protection of the Act **unfairly discriminates against them on the grounds of religion, martial status and gender.** This exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom. In concluding, Nkabinde J

held that the word “spouse” in the Act is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. To remedy the defect, the words “or spouses” are to be read-in after each use of the word “spouse” in the Act."

As to the application of the provisions of the **Intestate Succession Act,** the Court held:

1. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:
2. a child’s share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, **plus the number of spouses who have survived such deceased;**
3. subject to paragraph (c), **each surviving spouse shall inherit** a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and
4. where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses.
5.

The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.