SACHS J ABRIDGED JUDGMENT

Daniels v Campbell and Others

[1] This case concerns an application for confirmation of an order, and, in the alternative, an appeal against the order made by the High Court in Cape Town (the High Court) declaring certain provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act unconstitutional and invalid for failing to include persons married according to Muslim rites as spouses for the purposes of these Acts.

[2] Section 1 of the Intestate Succession Act states:

"1. **Intestate succession** — (1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and —

> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
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> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
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> (c) is survived by a spouse as well as a descendant —
>
> > (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and

(ii) such descendant shall inherit the residue (if any) of the intestate estate;

(d) . . . . ”

Section 2(1) of the Maintenance of Surviving Spouses Act states:

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

In terms of section 1 of the Maintenance of Surviving Spouses Act “survivor” is defined as “the surviving spouse in a marriage dissolved by death”. Although both Acts confer rights on spouses who are predeceased by their husbands or wives, in neither is the word “spouse” defined.

[3] The applicant married her now deceased husband by Muslim rites in 1977. The marriage, which was at all times monogamous, was not solemnised by a marriage officer appointed in terms of the Marriage Act. No children were born of this marriage, though the applicant and her deceased husband had children from previous marriages. The deceased died intestate in 1994.

[4] The main asset in the deceased estate is a modest house in a low-income suburb of Cape Town. The applicant is a domestic worker who has supplemented her income by selling goods from in front of her house. She resides on the property, having lived there for nearly thirty years. In July 1969 her first husband, to whom she was also married by Muslim rites,

submitted a written application to the City of Cape Town to rent a council dwelling. In 1976, after she and her first husband were divorced, the City of Cape Town allocated the dwelling to her in her own name. The applicant and her children were in occupation of the property when she married the deceased by Muslim rites in 1977. She informed the City of Cape Town of her remarriage and furnished it with a copy of her marriage certificate. In accordance with its then policy of registering the principal breadwinner of the family as the tenant, the City of Cape Town transferred the tenancy of the property to the deceased.

[5] Tenants of council houses were later given the opportunity to purchase such houses, and in 1990 the deceased entered into an instalment-sale agreement to purchase the house from the City of Cape Town. The applicant, who had contributed substantially towards the household expenses, including the rent and the service charges, as well as towards the purchase price of the property, also signed the deed of sale. When the deceased died the outstanding balance owing on the purchase price of the property was written off in terms of state policy, and the property was transferred to the estate of the deceased in 1998.

[6] The second respondent and first respondent were thereafter respectively appointed in 2000 and 2001 by the tenth respondent, the Master of the High Court (the Master) as the executors, the second respondent as executor of the estate of the deceased, and the first respondent as executor of the estate of a deceased son of the latter from his previous marriage. I will refer to them as the executors.

[7] The third to seventh respondents are interested family members. The eighth respondent is the Minister of Justice and Constitutional Development (the Minister). The ninth respondent is the Registrar of Deeds and the tenth respondent is the Master. None of these respondents oppose the application.

[8] The applicant was told by the Master that she could not inherit from the estate of the deceased because she had been married in terms of Muslim rites, and therefore was not a

"surviving spouse". A claim for maintenance against the estate was rejected on the same basis. With the support of the Women's Legal Centre, the applicant approached the High Court for an order declaring that she was a spouse of the deceased and his survivor. In the alternative, she asked for the Acts to be declared unconstitutional to the extent that they discriminated unfairly against Muslim marriages.

Proceedings in the High Court

[9] The High Court reluctantly came to the conclusion that the applicant was not a "spouse" or "survivor" for the purposes of the Acts. This was because her marriage to the deceased was not recognised as a valid marriage in terms of South African law. Van Heerden J held that:

"[M]arriages by Muslim rites have . . . not been recognised by South African courts as valid . . . marriages, firstly, because such marriages are potentially polygamous and hence contrary to public policy (whether or not the actual union is in fact monogamous) and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961".

[10] In reaching her conclusion, van Heerden J considered herself bound by the decisions of this Court on the interpretation of the word "spouse" in the *National Coalition* (2) case and in *Satchwell*. She was of the view that these cases made it clear that the term "spouse" only applied to parties to a marriage recognised as valid in terms of South African law. A second consideration was the existence of a number of statutes where express provision for the inclusion of the parties to a Muslim union had been made, for example – the Estate Duty Act as amended. By explicitly creating exceptions to the general rule that the only marriages to which legal consequences are attached are those solemnised in accordance with the provisions of the Marriage Act, these statutes supported the view that in the absence of any such deeming or interpretative provision, the word "spouse" must be given its "traditional, limited meaning". In her view, accordingly, the statutes as they stand could not be

interpreted to include parties to Muslim marriages under the term "spouses". Amendments to provide the broader meaning lay in the hands of the legislature.

[11] The learned judge went on to consider the constitutional consequences of such an interpretation. After a comprehensive contextual analysis of the impact of the Acts, she concluded that the interplay between the applicant's religious beliefs and the cultural practices in her community – and the failure of South African law properly to accommodate such beliefs and practices – resulted in the applicant being denied relief. As a result, the omission of people such as the applicant from the protection provided by the statutes, violated their rights to equality and was unconstitutional and invalid. The learned judge held that until such time as Muslim personal law of succession was recognised by the legislature and regulated in a manner consistent with the values underlying the South African Constitution, there was no justification for the limitation of the equality rights. Following the approach adopted by this Court in *National Coalition* (2), she accordingly "read-in" words to remedy the defect.

[12] The order of the High Court that is before us for confirmation reads as follows:

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

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

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

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

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

5. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites.'"

[13] The applicant was concerned that this Court might refuse to confirm the declaration of invalidity, and that she might end up without the relief she desired. She accordingly applied in the High Court for leave to appeal against the interpretation given to the word "spouse", should the application for confirmation fail. Binns-Ward AJ, who heard the application, indicated that a contextual and purposive reading of the Acts could well lead to this Court deciding to refuse to confirm the orders of constitutional invalidity, on the grounds that the proper construction of the statutes allows for the applicant to be recognised as a "spouse" or "survivor". In such a case there might not be a need for an appeal because the reasoning of the Court would itself indicate that parties to Muslim marriages were covered by the Acts. He nevertheless granted conditional leave to appeal as requested by the applicant.

[14] To avoid uncertainty it should be made clear that an appeal to this Court against a declaration of constitutional invalidity made by a competent court under section 172(2)(a) of the Constitution lies as of right in terms of section 172(2)(d) and does not require leave of the court making the declaration or this Court.

[15] The applicant's appeal was lodged nine days late. Condonation for this delay which caused no prejudice has been requested, has not been opposed, and is granted.

Argument in this Court

[16] Counsel for the applicant relied primarily on the appeal rather than on the application for confirmation. His principal argument was that the word "spouse" should be interpreted so as to include persons married according to Muslim rites; not only did the literal meaning of the word "spouse" include people in the position of the applicant, but also a purposive interpretation of the Acts pointed in that direction. Any interpretation which gave a narrow meaning to the word "spouse" so as to exclude parties to a Muslim marriage resulted in unfair discrimination on grounds of marital status, religious practices and culture and violated the right to dignity. An interpretation consistent with the Constitution should be preferred to one which led to invalidity.

[17] The Minister supported confirmation of the High Court order, and was not in favour of interpreting the word "spouse" so as to include a party to a Muslim marriage.

[18] The executors, on the other hand, contended that the word "spouse" did not cover parties to a Muslim marriage, and further, that what they regarded as the correct interpretation of the Acts did not render the provisions unconstitutional. In their view no violation of the right to equality was involved. They argued that Imams are not barred from being registered as marriage officers under the Marriage Act and therefore are able to conclude a valid marriage. They contended further that the Marriage Act constituted legislation envisaged in the interim Constitution recognising the validity of marriages concluded under systems of religious law. Muslim couples therefore have the choice to conclude marriages that are recognised in terms of South African law. The executors acknowledged that if their argument was upheld, the applicant in the present matter would end up with no relief at all. She would not be entitled to the protection offered by the Acts

because she was not lawfully married and therefore not a spouse. Nor could she secure any benefits conferred under Muslim personal law, because such law was not recognised and enforceable in the courts. They argued, however, that this unfortunate consequence was a result of her failure to avail herself of her rights under the Marriage Act, and not because of any defects in the Acts under consideration. In their view this Court should refuse to confirm the order of the Cape High Court and dismiss the appeal. Any change to be made concerning the status of persons in the situation of the applicant lay with the legislature.

The meaning of "spouse"

[19] The word "spouse" in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word "spouse" than to include them. Such exclusion as was effected in the past did not flow from courts giving the word "spouse" its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting.

[20] Discriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* Langa DP stated that:

"The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of

interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

. . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[21] In the present matter the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad and inclusive construction, the more so when it corresponds with the ordinary meaning of the word. The issue is not whether to impose some degree of strain on the language in order to achieve a constitutionally acceptable result. It is whether to remove the strain imposed by past discriminatory interpretations in favour of its ordinary meaning.

[22] A contextual analysis of the manner in which the word "spouse" is used in the two Acts reinforces the justification for this approach. An important purpose of the statutes is to provide relief to a particularly vulnerable section of the population, namely, widows. Although the Acts are linguistically gender-neutral, it is clear that in substantive terms they benefit mainly widows rather than widowers. The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property. Moreover, social and institutional practice has been to register homes in the name of the male "heads of households", as was done by the Council in the present matter. Widows for whom no provision had been made by will or other settlement were not

protected by the common law. The result was that their bereavement was compounded by dependence and potential homelessness – hence the statutes.

[23] The present case illustrates well why statutory protection was deemed necessary. A long-standing dispute between the applicant and some of the descendants of the deceased has resulted in her facing eviction from the home that was originally hers, and in which she has lived for three decades. The applicant signed her affidavit with a cross. She does not belong to that section of society that has lawyers at hand to draft wills and arrange property settlements. In any event, it did not lie in her hands to compel the deceased to make provision for her. The Acts were introduced to guarantee what was in effect a widow's portion on intestacy as well as a claim against the estate for maintenance. The objective of the Acts was to ensure that widows would receive at least a child's share instead of their being precariously dependent on family benevolence. There seems to be no reason why the equitable principles underlying the statutes should not apply as tellingly in the case of Muslim widows as they do to widows whose marriages have been formally solemnised under the Marriage Act. The manifest purpose of the Acts would be frustrated rather than furthered if widows were to be excluded from the protection the Acts offer, just because the legal form of their marriage happened to accord with Muslim tradition and not the Marriage Act.

[24] This was the reasoning underlying the decision in *Amod*, which concerned the rights of a Muslim widow to claim relief from the Multilateral Motor Vehicle Accidents Fund. Mahomed CJ held that the insistence that the duty of support which a serious *de facto* monogamous marriage imposed on the husband was not worthy of protection, could only be justified on the basis that the only duty of support which the law will protect in such circumstances was a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This was inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the interim Constitution. Dealing with the argument that Muslim couples suffered no special discrimination because they were free to solemnise their marriages in terms of the Marriage Act and thus acquire for their relationship the status of a civil marriage, he held that for purposes of the dependant's action the decisive issue was not whether the dependant concerned was or was not lawfully married to the deceased but whether the deceased was

under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law. In the English case of *Din v National Assistance Board* Salmon L J reasoned along similar lines, stating that:

"When a question arises, of recognising a foreign marriage or of construing the word 'wife' in a statute, everything in my view depends on the purpose for which the marriage is to be recognised and the objects of the statute. I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognised as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common-sense and justice why they should be so recognised."

[25] The same considerations apply in the present matter. The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers. Put another way, it is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of "common sense and justice" and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided. The answer, as in *Amod*, must be in favour of the interpretation which is consistent with the ordinary meaning of the word "spouse", aligns itself with the spirit of the Constitution and furthers the objectives of the Acts.

[26] It is important to underline the limited effect of such an inclusive interpretation. As in *Amod*, it eliminates a discriminatory application of particular statutes without implying a general recognition of the consequences of Muslim marriages for other purposes. Accordingly, the recognition which it accords to the dignity and status of Muslim marriages for a particular statutory purpose, does not have any implications for the wider question of what legislative processes must be followed before aspects of the *shariah* may be recognised as an enforceable source under South African law.

[27] The fact that many statutes adopted in recent times dealing with married persons expressly include parties to Muslim unions under their provisions is indicative of a new approach consistent with constitutional values. The existence of such provisions in other statutes does not imply that their absence in the Acts before us has special significance. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both last amended before the era of constitutional democracy arrived. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by the Acts, accordingly, cannot be interpreted so as to exclude them contrary to the spirit, purport and objects of the Constitution.

[28] I turn now to the reasoning which caused van Heerden J "with considerable reluctance" to hold that Muslim husbands and wives could not for the purposes of the Acts be considered as spouses. The issue before her was whether the Court could give an extensive interpretation to the word spouse, and so avoid discriminatory impact, or whether the word was not reasonably capable of such interpretation, with the result that the discriminatory effect of the Acts could only be cured by a declaration of invalidity coupled with a "reading-in" to include Muslim marriage partners. In this respect she felt she was bound by decisions of this Court to the effect that the undefined word "spouse" in the Aliens Control Act and the Judges' Remuneration and Conditions of Employment Act respectively, could not be extended to include permanent same-sex life partners. She states that in the *National Coalition case* (2):

". . . Ackermann J, writing for the full court, held that the word "*spouse*", as used in section 25(5) of the Aliens Control Act 96 of 1996, was not reasonably capable of a broad construction so as to include partners in permanent same-sex life partnerships. The word "spouse" was not defined in the Act, but its ordinary meaning connoted a "married person: a wife, a husband" and the context in which "spouse" was used in section 25(5) did not suggest a wider meaning. While some of these statements by Ackermann J may possibly be construed as supporting the interpretive arguments relied upon by the applicants in the present proceedings, it is important to note that Ackermann J went further by stating (at paragraph [25]) that there was no indication that the word "marriage" as used in the Aliens

Control Act extended "any further than those marriages that are ordinarily recognised by our law" . . . ."

She then goes on to add:

". . . i.e. marriages that are solemnised in accordance with the provisions of the Marriage Act 25 of 1961."

She continues by stating that the interpretive point of departure in *Satchwell* was the same, quoting the following passage from the judgment of Madala J:

"In the circumstances the ordinary wording of the provisions [of the Judges' Remuneration and Conditions of Employment Act] must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. . . . The context in which "spouse" is used in the impugned provisions does not suggest a wider meaning, nor do I know of one. Accordingly, a number of relationships are excluded, such as same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants."

[29] In my view, a proper reading of *National Coalition* (2) and *Satchwell* does not lead to the conclusion that partners to a Muslim marriage do not fall under the term "spouse".

[30] In the first place, there is no express statement in either judgment referring to solemnisation under the Marriage Act as a pre-condition for parties to be considered to be spouses. For the purposes of the statutes being construed in those cases, it was in fact not necessary to go beyond holding that permanent same-sex life partners could not reasonably be included in the term "spouse"; as Ackermann J pointed out, the ordinary meaning of the word "spouse" connoted a "married person; a wife, a husband". The difficulty confronting

permanent same-sex life partners on this score, then, was that they could not ordinarily be considered to be married persons, husbands and wives. The position of people married by Muslim rites in this respect is different. They fall within the ordinary meaning of the word spouse. They are married to each other, wife and husband. As Mahomed CJ pointed out in *Amod*:

". . . the Islamic marriage between the appellant and the deceased was a *de facto* monogamous marriage; . . . it was contracted according to the tenets of a major religion; and . . . it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'."

[31] Secondly, the judgments in both cases were careful to underline that the word "spouse" had to be interpreted in the context of the particular statutes under consideration. In both cases the judgments indicated that there was nothing in the context in which the word "spouse" was used to suggest a wider meaning than married persons. In *National Coalition* (2) it was indicated that there was a significant textual pointer against the more extensive use of the word spouse. Ackermann J stated that:

"Had the word 'spouse' been used in a more extensive sense in s 25(5) of the Act, it would have been unnecessary to provide specifically in s 1(1) that marriage 'includes a customary union'. It is significant that the definition of 'customary union' namely:

> '. . . the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is party to a subsisting marriage, which is recognised by the Minister in terms of ss (2);'

is based on an opposite-sex relationship."

In the present matter, however, no such textual pointers in favour of a limited construction exist. On the contrary, both the clear wording of the Acts and their purpose point strongly in favour of an extensive interpretation of the word "spouse".

[32] Thirdly, it cannot be said that Muslim marriages lack legal recognition in the way that permanent same-sex unions have done. Statutes dealing with a great variety of social and economic questions have given express recognition to Muslim unions, treating parties to them as married persons.

[33] Judgments should not be read as though they are statutes where every word is presumed to have a precise and special meaning. What matters is the reasoning that lies at the heart of the decision and that, as a matter of legal logic, leads to the order made. Central to the determinations in *National Coalition* (2) and *Satchwell*, was a legal finding that it would place an unacceptable degree of strain on the word "spouse" to include within its ambit parties to a permanent same-sex life partnership. Thus, in *Satchwell* Madala J pointed to members of such same-sex partnerships as well as to heterosexual couples who chose not to marry, as belonging to a class of persons who could not be considered to be "spouses". The crucial distinction underlying the two judgments is the one made between married and unmarried persons, not that between persons married under the Marriage Act and those not. There is nothing to indicate that the attention of the Court in either case was directed to marriages such as those contracted by the applicant. I accordingly do not agree that the two cases serve as authority for denying to parties to Muslim marriages the protection offered by the Acts. Ngcobo J has come to the same conclusion. I would like to express my agreement with the supplementary reasons he has advanced.

[34] The fact that permanent same-sex life partnerships could not be included in the term "spouse" affected the manner in which the resulting discriminatory impact of the statutes under consideration was remedied in *National Coalition* (2) and *Satchwell*. Once it was established that members of permanent same-sex life partnerships, although not classifiable

as married people, merited the same recognition as is accorded by the law to married persons, the indicated remedy was to declare the unconstitutionality and read-in a provision to cure the defect. Thus, recognition of the right to equality and dignity of permanent same-sex life partners was achieved not by means of imposing undue strain on the word "spouse", but by pointing to the constitutionally unacceptable manner in which the statutes fail to treat them on a par with married people. Such partners were accordingly equated with, rather than subsumed into the concept of spouses. The under-inclusiveness in their regard was cured by adding to the category of entitlement so as to avoid unconstitutionality. In the present matter the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation. It is not necessary to follow the process the High Court felt compelled to do, that is, of making a declaration of invalidity coupled with a curative remedial reading-in.

[35] Acceptance of the fact that the word "spouse" covers people married by Muslim rites makes it unnecessary to deal with the submission advanced by the executors that the law did not discriminate against the applicant because in terms of the Marriage Act she could have solemnised her marriage before an Imam recognised as a marriage officer. The question of discrimination no longer arises once Muslim husbands and wives are able to enjoy the benefits provided by the Acts.

[36] It was made clear on the papers and in argument that the effect of the declaration sought was to cover the situation of the applicant who was a party to a Muslim marriage that was monogamous. This Court is not called upon to deal with the complex range of questions concerning polygamous Muslim marriages.

[37] In the result, the Acts fall to be interpreted so as to include a party to a monogamous Muslim marriage as a spouse. So interpreted, they are not invalid and unconstitutional. The order of the High Court should accordingly not be confirmed. Instead, the appeal must be upheld and a declaration made indicating to the executors and all interested parties that the applicant is a "spouse" and a "survivor" under the Acts.

[38] The High Court declaration of invalidity coupled with a remedial reading-in was expressly declared not to affect estates already wound up. It is not necessary for the purposes of this case to deal with the possible retrospective effect of upholding the appeal. No pronouncement is made on whether in the absence of a declaration of invalidity, this Court is empowered to limit the retrospective effect of the declaration. Should problems concerning retrospectivity arise, they stand to be dealt with on a case by case basis.

[39] No award of costs was asked for.

The Order

[40] The following order is made:

1. The order made by the High Court is set aside and replaced with the following order:

"(a) It is declared that:

(i) the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage;

(ii) the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes the surviving partner to a monogamous Muslim marriage.

(b) It is declared that:

(i) the applicant is, for the purpose of the Intestate Succession Act 81 of 1987, a "spouse";

(ii) the applicant is, for purposes of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor".

(c) No order as to costs is made."

2. No order as to the costs of the appeal or the confirmation application is made.