REPORTABLE

Case No: 444/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

HAFIZA ISMAIL AMOD (born PEER) APPELLANT
(Plaintiff in the court *a quo*)

COMMISSION FOR GENDER EQUALITY AMICUS CURIAE

and

MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND RESPONDENT
(Defendant in the court *a quo*)

CORAM: MAHOMED CJ, OLIVIER, ZULMAN JJA, FARLAM and MADLANGA AJJA

HEARING DATE: 13 SEPTEMBER 1999

JUDGMENT DATE: 29 SEPTEMBER 1999

SUMMARY: Dependant's action - widow and deceased husband married in terms of Islamic law - *de facto* monogamous marriage - right of spouse to support in such a union worthy of public recognition and protection by the law - Multilateral Motor Vehicle Accidents Fund legally liable to compensate widow for loss of support of her husband.

JUDGMENT

MAHOMED CJ/

MAHOMED CJ

[1] The appellant instituted an action against the respondent in the court *a quo* for the payment of damages suffered by her as a result of the death of the deceased in a motor car accident. From the pleadings and the agreed statement in terms of Rule 33(1) the following appear as common cause between the parties:

(a) The deceased died in a motor collision on 25 July 1993 between a Toyota "bakkie" driven by one M Biyela and an Opel Monza driven by the deceased.

(b) The sole cause of this collision was the negligent driving of Biyela.

(c) The deceased and the appellant were married according to Islamic Law on 18 April 1987.

(d) "In terms of their Islamic marriage, which is a contract, the deceased as husband was obliged to maintain and support the [appellant] during the course of the marriage and until termination thereof by death or divorce and in fact did so."

(e) The Islamic marriage between the appellant and the deceased was not registered as a civil marriage in terms of the provisions of the Marriage Act of 1961.

(f) The appellant duly lodged a claim against the respondent for compensation for loss of support by reason of the death of the deceased pursuant to the provisions of Article 62 of the Agreement establishing the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

(g) The respondent did not object to the procedural validity of this claim or to the claim made on behalf of the children of the marriage but it nevertheless repudiated the appellant's own claim for loss of support.

[2] On these facts the court *a quo* was required to resolve the following issue:

> "Is the [respondent] legally liable to compensate [the appellant] for loss of support of her deceased husband to whom she was married by Islamic Rites?"

[3] The court *a quo* (per Meskin J) answered that question in the negative, but Counsel appearing before us on appeal were agreed that if it was wrong in that conclusion, the appellant was entitled to judgment in the sum of R 250 000 which was the agreed sum of damages suffered by her in consequence of the loss of her husband's support.

[4] Before the present appeal was heard, the Commission for Gender Equality applied to be and was admitted as an *amicus curiae*. It was represented at the hearing by Mr M Chaskalson (with him Miss A Kalla) both acting *pro amico* and the Court wishes to express its appreciation to Counsel for the full and competent arguments which they advanced in support of their submissions.

[5] Both Mr Omar who appeared for the appellant and Mr Chaskalson contended that on a proper analysis of the existing relevant common law rules of application, a claim for loss of support made on behalf of a Muslim widow in the position of the appellant, is sound in law. In the alternative it was submitted that, if the existing state of the common law did not support such a claim, the common law should properly be developed to accommodate the claim in terms of section 35(3) of the interim Constitution, Act 200 of 1993 (which was of application when the action in the court *a quo* commenced).

The Historical Origins and Evolution of the Dependant's Action in the Common Law

[6] The death of a breadwinner who has a duty to support the dependants of the breadwinner undoubtedly causes loss to such dependants. These dependants should in equity therefore be able to recover such loss from a party who has unlawfully caused the death of the breadwinner by any act of negligence or other wrongful conduct. This is the rationale for the dependant's action. That remedy was unknown in Roman Law. It came however to be recognised and firmly entrenched in Roman Dutch Law, under the influence of the Germanic custom concerning the institution of the *zoengeld* and the philosophy of natural law as developed by medieval and sixteenth century

theologians.[1] It constitutes the juristic basis for any claim which the appellant might have against Biyela and therefore against the respondent which is only obliged to compensate the dependants of a deceased for losses suffered by them in consequence of a motor accident caused by the negligent or other unlawful conduct of the driver of the relevant motor vehicle, if such a driver would have been liable for such losses at common law.[2]

[7] The precise scope of the dependant's action is unclear from the writings of the old Roman Dutch Jurists. De Groot extends it to "those whom the deceased was accustomed to aliment *ex officio*, for example his parents, his widow, his children . . . ."[3] This and other passages in De Groot's writings perhaps support his suggestion that the action was competent at the instance of any dependant within his broad family whom he in fact supported whether he was obliged to do so or not but this is unclear.[4] The same uncertainty but tendency to extend the dependant's action to any dependant enjoying a *de facto* close familial relationship with the breadwinner is also manifest in Voet 9.2.11

1 LAWSA (1st revision) Vol 8 para 11 referred to in *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 425H-426A.

2 *Mlisane v South African Eagle Insurance Co Ltd* 1996 (3) SA 36 (C) at 40 I-J.

3 *De Jure Belli ac Pacis* 2.17.13 translated by Feenstra in 1972 *Acta Juridica* 234. The phrase "*ex officio*" is not translated or explained by Feenstra but it is translated by Francis W Kelsey as describing the obligation which the deceased had towards those whom he "was accustomed to support from a sense of duty ...." Hugo Grotius *The Law of War and Peace* translated by FW Kelsey at p 434.

4 See the judgment of Nienaber JA in *Santam Bpk v Henery* (above note 1) at 426. De Groot: *Inleidinge* 3.33.2 and 3.33.3.

who seeks to accord the dependant's action to the breadwinner's, "wife, children and the like" ("*uxori, liberis, similibusque*").[5]

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[8] What the old writers appear anxious to recognise is that members of the family of the deceased had a right to enforce a claim for the loss of such support resulting from the death of the deceased (or injury to him) caused by the unlawful acts of the defendant. This was a right worthy of public recognition and protection by the law.

[9] For this reason the Court in *Union Government (Minister of Railways and Harbours) v Warneke*[6] was able to recognise the dependant's claim of a husband for the loss of support of his wife. The Court recognised that no dependant's action at the instance of the husband was mentioned in the old authorities, but this was because "it never occurred to the jurists of the seventeenth century to extend this remedy to a husband." It was held that there was no reason why our courts should not adapt the *Lex Aquilia* to the conditions of modern life, in this respect "as far as that can be done without doing violence to its principles."[7]

5 See also *Matthaeus II* 48, 5, 7, 11; Davel *Skadevergoeding aan Afhanklikes* p 38 et seq.

6 1911 AD 657.

7 Innes J in *Union Government v Warneke* above note 6 at 664-5.

[10] Two important propositions appear clearly from the case of *Union Government v Warneke*. The first is that the dependant's action was a flexible remedy, which needed to be adapted to modern conditions. The second is that in determining the process of adaptation regard had to be had to the rationale for the remedy, which was to afford relief to dependants whom the deceased had a legal duty to support, even if the duty arose out of natural law. Considerations of equity and decency informed the duty of support in Roman Dutch Law.[8]

[11] The flexibility of the dependant's action has since the case of *Union Government v Warneke*, repeatedly been utilized to afford the benefit of the remedy to classes not expressly mentioned in the old authorities. In *Abbot v Bergman*[9] it was extended to accommodate the claim of a husband for the loss of support of his injured wife. In *Santam Bpk v Henery*[10] it was used to uphold the claim of a divorcee who was not even married to the deceased at the time of the death of the deceased but was receiving maintenance payments from him pursuant to an order of maintenance made in Court and in *Zimnat Insurance Co*

8 *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T) at 316 E-F.
9 1922 AD 53.
10 Above note 1.

Ltd v Chawanda[11] the Supreme Court of Zimbabwe held that a widow married to the deceased by African Customary law was also entitled to the protection of the dependant's action.

[12] *Santam Bpk v Henery* is the most recent reported decision of this Court relevant to the proper approach to be adopted in assessing the validity of a dependant's claim for loss of support. The judgment of Nienaber JA who wrote on behalf of a unanimous Court manifests the following:[12]

> (a) The claimant for loss of support resulting from the unlawful killing of the deceased must establish that the deceased had a duty to support the dependant.
> (b) It had to be a legally enforceable duty.
> (c) The right of the dependant to such support had to be worthy of protection by the law.
> (d) The preceding element had to be determined by the criterion of *boni mores*.
> (e) Thus approached, the claim of a widow who had been divorced at the date of the death of the deceased but who had been entitled to support from him, by virtue of an order of maintenance made by a

[11] 1991 (2) SA 825 (ZS).
[12] *Henery* above note 1 at 427 H-J; 429 C-D; 430 D-I.

Court, could be accommodated within the legitimate parameters of the dependant's action in the common law because:

i the deceased had a duty to support the claimant who was his former wife;

ii. that duty was legally enforceable;

iii. the right of the former wife to such support was a right which was worthy of protection by the law, for the purposes of the dependant's action; and

iv. the last assessment was justified by the criterion of *boni mores*.

[13] On the approach adopted above, it accordingly becomes necessary to determine whether the claim of the appellant in the present matter satisfies the relevant tests which have to be applied in assessing its legal legitimacy.

[14] The first requirement in paragraph [12] appears clearly to be satisfied, because the agreed statement between the parties records that the deceased had a duty to support the appellant "in terms of the Islamic marriage which is a contract."

[15] Moreover, it was, in my view, a duty which was legally enforceable and therefore satisfies the second requirement. In his fair and able argument, Mr Pammenter SC who appeared for the respondent properly conceded that a claim for support made by the appellant against the deceased during the subsistence of the marriage would not be excipiable in law. This concession carries the necessary implication that it was legally enforceable.

[16] It was nevertheless contended that the appellant's claim against the respondent should fail because:

(a) the marriage between her and the deceased did not enjoy the status of a marriage in the civil law;

(b) any legal duty which the deceased had to support the appellant was therefore a contractual consequence of the union between them and not an *ex lege* consequence of the marriage *per se*;

(c) the dependant's action for loss of support was an "anomalous" remedy which should not be extended to accommodate claims for loss of support undertaken contractually but not flowing from the common law consequences of a valid marriage.

[17] In support of this attack on the appellant's claim, we were referred to the case of *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*[13] in which it was held that a claim for loss of support brought against the appellant insurer by a widow of a customary marriage between her and the deceased was bad in law. We were also referred to cases such as *Seedat's Executors v The Master (Natal)*[14] and *Ismail v Ismail*[15] in which it was held that marriages solemnized in accordance with Islamic law only did not enjoy the

[13] 1960 (2) SA 467 (A); also followed in *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 (1) SA 302 (N).
[14] 1917 AD 302.
[15] 1983 (1) SA 1006 (A).

status of marriage in the civil law, because they were "potentially polygamous." I have a number of difficulties with the approach which was adopted in *Fondo's* case. 11

[18] My main difficulty is with the test the Court applied in assessing whether the claim for loss of support made by the widow in a customary marriage was good in law. It was held[16] that it was not sufficient for her to establish that the deceased had a legal duty to support her during the subsistence of the marriage and that he in fact did so. She had to go further and show that she was the lawful wife of the deceased in terms of a marriage which was recognised by the common law as a lawful marriage. It was held that[17] the widow had to fail in her claim, because the relevant system of customary law in terms of which she was married permitted polygamy and that fact, it was said, made her marriage invalid in the common law.

[19] In my view, the correct approach is not to ask whether the customary marriage was lawful at common law or not but to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence

[16] *Fondo* above note 13 at 473 C-D.
[17] *Fondo* above note 13 at 473 E-H.

of the marriage and, if so, whether the right of the widow was, in the circumstances, a right which deserved protection for the purposes of the dependant's action. This is the test adopted by this Court in *Santam Bpk v Henery*.[18]

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[20] The crucial question which therefore needs to be applied is whether or not the legal right which the appellant had to support from the deceased during the subsistence of the marriage, is a right which in the circumstances disclosed by the present case, deserves recognition and protection by the law for the purposes of the dependant's action. In my view it does, if regard is had to the fact that at the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a *de facto* monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved "a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable."[19] The insistence that the duty of support which such a serious *de facto* monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in

[18] Above note 1.

[19] Description of Islamic marriage and its consequences in *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) at para 21.

such circumstances is a duty flowing from a marriage solemnized and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights;[20] it accelerated with the speech of the former State President on 2 February 1990 and the unbanning and the visibility of the previously prohibited political movements and it finally became irreversible with the commencement and conclusion of negotiations at CODESA from 1991 until 1993. The new ethos was firmly in place when the cause of action in the present matter arose on 25 July 1993.

[21] This new ethos is substantially different from the ethos which informed the determination of the *boni mores* of the community when the cases which decided that "potentially polygamous" marriages which did not accord with the

[20] Project 58.

assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant's action. This is evident from the form and the language in which those assumptions were sometimes articulated during those times. In holding that the child of a marriage according to Muslim law could not enjoy the status of legitimacy the Cape Supreme Court[21] in 1860 had said:

> "Now marriage is a condition Divine in its institution, originating with our first parents; therefore older than the Jewish Dispensation, and it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements, and one of the first of these requirements is, amongst all Christian nations, that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman."

> ". . . I trust that in a short time . . . the sacred institution of marriage will be brought by some well devised law within the reach of the people of this Colony who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course marriage to one wife, which, among the heathen ought to be sanctioned and encouraged by law. It is, even amongst them, an institution of a divine character - a glimmer of

[21] *Bronn v Fritz Bronn's Executors* (1860) 3 Searle 313 at 318; 320-1; and 333. See also *Seedat's* case (above note 14) at 307-8.

the light once shining in Paradise, which is still vouchsafed to them."

"Equally so with the Mohammedans. If what they call marriage is not what we call marriage, in its essential requirements, but what the jurisprudence of even Christian Rome under the Emperors, up to the time of Leo the Philosopher, would call a recognised concubinage - we cannot, because of the ambiguity of the expression, make that marriage which is a wholly different relation."

[22] The contrast between the ethos which informed the assessment of *boni mores* in this kind of approach and the ethos which had come to inform the same assessment in more recent times is evident from the judgment of Farlam J in *Ryland v Edros*[22] where the following is stated:

"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 <u>all</u> members of our society' or is `fundamentally opposed to <u>our</u> principles and institutions'? (In each case the emphasis is mine.)

[22] 1997 (2) SA 690 (C) at 707 E-H.

> 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."

[23] I have no doubt that the *boni mores* of the community at the time when the cause of action arose in the present proceedings would not support a conclusion which denies to a duty of support arising from a *de facto* monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which affords to the same duty of support arising from a similarly solemnized marriage in accordance with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnized in accordance with African customary law exactly the same protection for the same purpose, (by virtue of the provisions of section 31 of the Black Laws Amendment Act 76 of 1963 which reverses the

consequences of the *Fondo*[23] judgment in respect of customary marriages). The inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced. The *boni mores* of the community would at that time support the approach which gave to the duty of support following on a *de facto* monogamous marriage in terms of the Islamic faith the same protection of the common law for the purposes of the dependant's action, as would be accorded to a monogamous marriage solemnized in terms of the Christian faith.

This important shift in the identifiable *boni mores* of the community must also manifest itself in a corresponding evolution in the relevant parameters of application in this area. "The common law is not to be trapped within the limitations of its past."[24] If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.[25]

[23] Above note 13.

[24] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658) at para [86].

[25] See for example *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) and *Administrateur, Natal v Trust Bank*

[24] I have deliberately emphasised in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open. Arguments arising from the relationship between the values of equality and religious freedom - now articulated in the Constitution but consolidated in the immediate period preceding the interim Constitution - might influence the proper resolution of that issue.

[25] Mr Pammenter, on behalf of the respondent, quite properly and frankly conceded that a view of the common law which discriminated between marriages in terms of the Muslim religion and marriages in terms of any other religion or faith was quite indefensible. He argued nevertheless that Muslim couples, like any other couples are free to solemnize their marriage in terms of the Marriage Act, and thus acquire for their relationship the status of a civil marriage. They therefore suffered no special discrimination on the grounds of their faith.

Although this may not be entirely clear I shall assume that such Muslim couples would be entitled to the solemnisation of their marriage in terms of the

van Afrika Bpk 1979 (3) SA 824 (A).

Marriage Act even if the husband were to declare to the Marriage Officer that in terms of his faith he retained the right to contract a further marriage during the existence of the marriage which was about to be solemnized and even if the wife was to be represented as she was in this case by proxy.[26]

The assumption I have made, however, does not assist my main difficulty with the case sought to be made on behalf of the respondent. It is simply this: For the purposes of the dependant's action the decisive issue is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law. If the marriage between the dependant and the deceased was a valid marriage in terms of the civil law, she would of course have the right to pursue a dependant's claim based on the duty of the deceased to support her but it does not follow that if she was not so married, she should have no such right. On the analysis I have previously made she would indeed have such a right even if she was not validly married to the deceased in the civil law if the deceased was under a legally enforceable contractual duty to support her following upon a *de*

[26] Section 29(2) of the Marriage Act 25 of 1961 provides that a marriage officer shall solemnize any marriage in the presence of the parties themselves and at least two competent witnesses.

facto monogamous marriage in accordance with a recognised and accepted faith such as Islam.

[26] It was suggested in argument that the recognition of a dependant's claim which is premised on a contractual duty might unacceptably widen the scope of the dependant's action in the common law. It might indeed do so if the loss of support resulting from a contractually enforceable duty alone was sufficient to sustain the dependant's claim. But this is not what I have held. What I have held is that the dependant must show that:

(a) the deceased had a legally enforceable duty to support the dependant and

(b) that it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith and

(c) it was a duty which deserved recognition and protection for the purposes of the dependant's action.

The dependant concerned would not succeed by establishing (a) alone. The requirement in (a) is a necessary condition in terms of *Warneke*'s case[27] but it is not a sufficient condition.

[27] It was also suggested that if a legal duty of support arising from a contractual incident of a Muslim marriage was to be afforded recognition for the

[27] *Union Government v Warneke* above note 6.

purposes of the dependant's action, it would also lead to a recognition of possibly other incidents of such a marriage which have neither been articulated or properly analysed in the present appeal. That suggestion is unsound. It is perfectly possible to recognise one incident of such a marriage for a special purpose, without necessarily recognising any other incident of such marriage for that purpose or any other purpose. This is made clear in several cases in South Africa and abroad.[28]

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[28] It was also contended that if the approach adopted in *Fondo's* case[29] does indeed operate harshly and inequitably on Muslim widows in the position of the appellant as I have found, the proper remedy is for the Legislature to effect statutory redress as it in fact did in the case of widows who had been married by African customary law. I have no doubt that it would be perfectly proper for the Legislature to enact such legislation if it considered it necessary, but it does not follow that the Courts should not interpret and develop the common law to accommodate this need if it was consistent with the relevant common law principles which regulate the objectives and the proper ambit of the dependant's

[28] *Ryland v Edros* above note 22 at 710D; *Fondo's* case above note 13 at 710D; *Baindail v Baindail* [1946] 1 All ER 342 (CA) at 346, [1946] P 122 at 128; *Sinha Peerage* case [1946] 1 All ER 348n (Committee of Privileges); *Chaudhry v Chaudhry* [1975] 3 All ER 687 (Fam) at 690, [1976] Fam. 148 at 153; *Imam Din v National Assistance Board* [1967] 1 All ER 750 (QB) at 753, [1967] 2 QB 213 at 219; *Re Sehota (deceased) Surjit Kaur v Gian Kaur and another* [1978] 3 All ER 385 (Ch).

[29] Above note 13.

action in Roman Dutch law. For the reasons I have indicated it is legitimate and necessary to do so in the present matter. The appellant has after all waited for some six years to obtain proper compensation. She has acted with vigour in seeking relief in the High Court and in the Constitutional Court (which held that she should first pursue her common law remedies before this Court before invoking the constitutional jurisdiction of that Court).[30] I do not see any reason why this Court should deny to her the relief in common law to which she is entitled. I think Mr Chaskalson is correct in contending that this is not a case which involves difficult policy and political choices which should appropriately be left to the Legislature. Nor is there any danger that by upholding the appellant's claim the Court might become "entangled" in religiously controversial doctrines. The legal legitimacy of the claim can be assessed purely on the proper application of common law principles of application to the dependant's action without any reference to any religious doctrine or policy.

[29] Counsel for the respondent also relied on various dicta in the case of *Ismail v Ismail*[31] which was decided in this Court in 1983. *Ismail's* case is distinguishable from the present appeal because it was not concerned with a

[30] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) at 761 para 14.
[31] Above note 15.

dependant's claim at all and was in any event decided long before the consolidation of the new ethos to which I have referred earlier. The Court refused to enforce certain customs which were said to flow from a *de facto* monogamous Islamic marriage on the grounds that potentially polygamous marriages were *contra bonos mores* and that the customs relied on were intrinsic to the potentially polygamous union between the parties. To the extent to which these dicta are inconsistent with the approach I have articulated in this judgment, I must express my respectful disagreement with them. 23

The alternative argument

[30] The conclusion to which I have come is that the appellant has a good cause of action. I have reached that conclusion without any reliance on either section 35(3) of the interim Constitution or section 39(2) of the 1996 Constitution. It is therefore unnecessary for me to consider the submission of Counsel for the appellant based on these constitutional provisions or to consider whether either of these sections can properly be applied in respect of a cause of action which arose before the commencement of the interim Constitution.[32]

Costs

[32] Cf *Du Plessis and Others v De Klerk and Another* above note 24 at paras 65 and 66.

[31] No grounds have been advanced to deny the successful party the costs that she has incurred in pursuing her claim in this Court.

Order

[32] In the result I make the following order:

1) The order made by Meskin J in the court *a quo* on 1 December 1997 is substituted by the following:

"(a) the defendant is ordered to pay to the plaintiff the sum of R 250 000 as damages for the loss of support suffered by her in consequence of the death of her husband Umar Sheik Amod in a motor car accident on 25 July 1993;

(b) the defendant is to pay the costs of the action."

2) The respondent is ordered to pay the costs of the appellant in:

(a) all proceedings to obtain leave to appeal against the said order of Meskin J;

(b) the proceedings on appeal to the Supreme Court of Appeal.

I MAHOMED

CHIEF JUSTICE

Concur:

OLIVIER JA
ZULMAN JA
FARLAM AJA

MADLANGA AJA