**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 612/19

In the matters between:

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| **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** | **FIRST APPELLANT** |
| **THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | **SECOND APPELLANT** |
| **and** | |
| **WOMEN'S LEGAL CENTRE TRUST** | **FIRST RESPONDENT** |
| **THE MINISTER OF HOME AFFAIRS** | **SECOND RESPONDENT** |
| **SPEAKER OF THE NATIONAL ASSEMBLY** | **THIRD RESPONDENT** |
| **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES** | **FOURTH RESPONDENT** |
| **LAJNATUN NISAA-IL MUSLIMAAT (ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)** | **FIFTH RESPONDENT** |
| **UNITED ULAMA COUNCIL OF SOUTH AFRICA** | **SIXTH RESPONDENT** |
| **SOUTH AFRICAN HUMAN RIGHTS COMMISSION** | **SEVENTH RESPONDENT** |
| **COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES** | **EIGHTH RESPONDENT** |

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| **UNITED ULAMA COUNCIL OF SOUTH AFRICA** | **FIRST AMICUS CURIAE** |
| **LAW SOCIETY OF SOUTH AFRICA** | **SECOND AMICUS CURIAE** |
| **SOUTH AFRICAN LAWYERS FOR CHANGE** | **THIRD AMICUS CURIAE** |
| **MUSLIM ASSEMBLY (CAPE)** | **FOURTH AMICUS CURIAE** |
| **ISLAMIC UNITY CONVENTION** | **FIFTH AMICUS CURIAE** |
| **COMMISSION FOR GENDER EQUALITY** | **SIXTH AMICUS CURIAE** |
| **JAMIATUL ULAMA KWAZULU-NATAL** | **SEVENTH AMICUS CURIAE** |

**and**

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| **THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | **APPELLANT** |

**and**

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| **TARRYN FARO** | **FIRST RESPONDENT** |
| **MARJORIE BINGHAM NO (IN HER CAPACITY AS THE EXECUTOR OF THE DECEASED ESTATE OF MOOSA ELY – ESTATE NO 4190/2010)** | **SECOND RESPONDENT** |
| **MUJAID ELY** | **THIRD RESPONDENT** |
| **SHARIFF ELY** | **FOURTH RESPONDENT** |
| **TASHRICK ELY** | **FIFTH RESPONDENT** |
| **MUSLIM JUDICIAL COUNCIL** | **SIXTH RESPONDENT** |
| **IMAM IB SABAN** | **SEVENTH RESPONDENT** |
| **THE MASTER OF THE HIGH COURT** | **EIGHTH RESPONDENT** |

**and**

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** **APPELLANT**

**and**

**RUWAYDA ESAU** **FIRST RESPONDENT**

**MAGAMAT RIETHAW ESAU** **SECOND RESPONDENT**

**THE CABINET OF THE REPUBLIC OF SOUTH AFRICA** **THIRD RESPONDENT**

**GOVERNMENT EMPLOYEES PENSION FUND** **FOURTH RESPONDENT**

**MUSLIM JUDICIAL COUNCIL** **FIFTH RESPONDENT**

**MUNEEBAH JACOB** **SIXTH RESPONDENT**

**Neutral citation:** *President of the RSA and Another v Women's Legal Centre Trust and Others*; *Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (Case no 612/19) [2020] ZASCA 177 (18 December 2020)

**Coram:** MAYA P, SALDULKER, VAN DER MERWE and PLASKET JJA AND WEINER AJA

**Heard:** 25 and 26 August 2020 and 30 September 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 14h00 on 18 December 2020.

**Summary:** Constitutional law – Muslim marriages – whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages – in the event that a breach of a constitutional obligation has been established, the appropriate remedy to be awarded.

## ORDER

**On appeal from:** Western Cape Division of the High Court, Cape Town (Boqwana, Desai and Salie-Hlophe JJ sitting as court of first instance): judgment reported *sub nom Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham NO and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015; 2018 (6) SA 598 (WCC).

1 The appeal and the cross-appeals succeed in part and the order of the court a quo is set aside and replaced with the following order:

'1.1 The Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

1.2 It is declared that s 6 of the Divorce Act is inconsistent with ss 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.

1.3 It is declared that s 7(3) of the Divorce Act is inconsistent with ss 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.

1.4 It is declared that s 9(1) of the Divorce Act is inconsistent with ss 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages.

1.5 The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation.

1.6 The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.

1.7 The declarations of invalidity in paras 1.1 to 1.4 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in para 1.7, it is declared that a union, validly concluded as a marriage in terms of *Sharia* law and subsisting at the date of this order, or, which has been terminated in terms of *Sharia* law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

(c) In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

(i) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and;

(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

1.9 It is declared that, from the date of this order, s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.

1.10 For the purpose of applying paragraph 1.9 above, the provisions of ss 3(1)*(a)*, 3(3)*(a)* and 3(3)*(b)*, 3(4)*(a)* and 3(4)*(b)*, and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis, to Muslim marriages.

1.11 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.

1.12 The Department of Home Affairs and the Department of Justice & Constitutional Development shall publish a summary of the orders in paragraphs 1.1 to 1.9 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.'

2 In the matter of *Faro v The Minister of Justice and Constitutional Development and Others* (Case no 4466/2013), no order is made in relation to the cross-appeal. It is recorded that:

2.1 In recognition of the fact that there currently are no policies and procedures in place for purposes of determining disputes arising in relation to the validity of Muslim marriages and the validity of divorces granted by any person or association according to the tenets of *Sharia* law (Muslim divorces) in circumstances where persons purport to be spouses of deceased persons in accordance with the tenets of *Sharia* law and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990, the Minister of Justice undertakes within 18 months of the granting of this order to put in place the necessary mechanisms to ensure that there is a procedure by which the Master may resolve disputes arising in relation to the validity of Muslim marriages and Muslim divorces, in all cases where a dispute arises as to whether or not the persons purport to be married in accordance with the tenets of *Sharia* law to the deceased persons and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990;

2.2 In the event that the Minister of Justice fails to comply with the undertaking in para 2.1, the appellants may enrol the appeal in this Court on the same papers, duly supplemented, in order to seek further relief.

3 The Appellants (the President and the Minister of Justice) shall in respect of the matter under case no 13877/2015 (*Esau*) pay Ruwayda Esau's costs in respect of claim A (including the costs of the appeal and cross-appeal) such costs to include the costs of three counsel to the extent of their employment.

4 In respect of the matters under Case nos 22481/2014 and 4466/2013:

4.1 Paragraph 8 of the order of the Western Cape Division of the High Court shall stand, in terms whereof the President, the Minister of Justice and the Minister of Home Affairs are to pay the costs of the Women's Legal Centre Trust respectively, such costs to include the costs of three counsel to the extent of their employment.

4.2 The President and the Minister of Justice shall pay the Women's Legal Centre's costs of the appeal and the cross-appeal, such costs to include the costs of three counsel to the extent of their employment.

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**JUDGMENT**

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**Saldulker and Van der Merwe JJA (Maya P, Plasket JA and Weiner AJA concurring):**

**Introduction**

[1] The recognition of marriages solemnised according to the tenets of the Islamic faith (Muslim marriages) lies at the heart of this appeal. Muslim marriages have never been recognised nor regulated by South African law as valid marriages despite 26 years under a democratic constitutional dispensation that is founded, inter alia, on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'.[1] This is, understandably, both an emotive and contentious issue. South Africa has come a long way since the judgments in *Ismail v Ismail*,[2] and other cases such as *Kader v Kader*,[3] *Bronn v Fritz Bronn's Executors and Others* and *Seedat's Executors v The Master (Natal)*,[4] which withheld legal recognition from Muslim marriages. Although

[1] Section 1*(a)* of the Constitution of the Republic of South Africa 108 of 1996.
[2] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[3] *Kader v Kader* 1972 (3) SA 203 (RA).
[4] *Bronn v Fritz Bronn's Executors and Others* (1860) 3 Searle 313; *Seedat's Executors v The Master (Natal)* 1917 AD 302.

we have had the benefit of judgments that have emerged from the Constitutional Court, this Court and high courts, expressing trenchant criticism of the failure on the part of the State to take steps to afford legal recognition to Muslim marriages, the historical disadvantages, hardships and prejudice for parties to Muslim marriages, especially Muslim women and children, continues to prevail.

[2] The views held in the pre-constitutional era by the South African courts reflect a refusal to recognise Muslim marriages, mainly because these marriages were viewed as potentially polygynous, and thus contra bonos mores. A scornful and offensive attitude towards persons married in terms of *Sharia* law prevailed.

[3] The plight of Muslim women and children and the injustices suffered by them as a result of the absence of legal recognition of Muslim marriages are particularly highlighted in the judgments that we refer to below.[5]

[4] In *Daniels v Campbell NO and Others,*[6] Moseneke J succinctly stated:

'This "persisting invalidity of Muslim marriages" is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is "inequality, arbitrariness, intolerance and inequity".

These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality but also freedom of religion and belief. What is more, s 15(3) of the Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages.'

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[5] *Ryland v Edros* 1997 (2) SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* NO *and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735(CC) paras 74-75; *Khan v Khan* 2005 (2) SA 272 (T).

[6] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) paras 74-75.

[5] In a similar vein, in *Hassam v Jacobs NO and Others*,[7] Nkabinde J espoused the following:

'The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*. The court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of our society. Recognition of polygynous unions was seen as a retrograde step and entirely immoral. The court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to "cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances". That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.'

**The WLC application**

[6] In 2009, the Women's Legal Centre Trust (the WLC), an organisation established to advance women's rights by conducting constitutional litigation and advocacy on gender issues, approached the Constitutional Court for direct access in terms of s 167 of the Constitution, in an application concerning the same substantive issues raised in this matter. The application was dismissed on the basis that no proper case had been made out for direct access and so the matter was not properly before the court.[8]

[7] During November 2015, the WLC launched a semi-urgent application in the high court against the President of the Republic of South Africa (the President), the Minister of Justice and Constitutional Development (Minister of Justice), the Minister of Home Affairs, the Speaker of the National Assembly, and the Chairperson of the National Council of Provinces, being the first to the fifth respondents.

[8] The WLC contended that the State had failed to recognise and regulate marriages solemnised in accordance with the tenets of *Sharia* law and was consequently in breach

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[7] *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC); [2009] ZACC 19 para 25.

[8] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC); [2009] ZACC 20.

of ss 7(2), 9(1), 9(2), 9(3), 9(5), 10, 15(1), 15(3), 28(2), 31 and 34 of the Constitution. The WLC argued that s 7(2) of the Constitution obliged the State to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages, and that the President and Cabinet had failed to fulfil this obligation. In the alternative, it essentially sought orders declaring the Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act), as well as specified provisions thereof, unconstitutional insofar as they fail to recognise and provide for Muslim marriages.

**The Faro application**

[9] In this application, Mrs Tarryn Faro, represented by the WLC, launched an application against Ms Marjorie Bingham in her capacity as executrix of the estate of the late Mr Moosa Ely, (to whom Mrs Faro had been married according to Islamic rites), the Muslim Judicial Council (MJC), the Master of the High Court, Western Cape and the Minister of Justice. The facts were as follows. On 28 March 2008, Mrs Faro and Mr Ely concluded a Muslim marriage, which was terminated on 24 August 2009, when Mr Ely issued a *Talaq* (an Islamic divorce). However, the *Talaq* was subsequently revoked when Mr Ely and Mrs Faro resumed intimate marital relations. No further *Talaq* was pronounced before Mr Ely died on 4 March 2010.

[10] On 8 April 2010, however, Mr Ely's daughter from an earlier marriage, Ms Naziema Bardien, obtained a certificate from the MJC, without Mrs Faro's knowledge, declaring that the marriage between Mrs Faro and Mr Ely had been annulled. On 21 April 2010, Mrs Faro was appointed as the executrix of Mr Ely's estate. The Master then informed her that Mr Ely's estate could not be wound-up until the dispute with regard to her marital status had been resolved. After meeting with Ms Bardien and the MJC, the Master, on 7 December 2011, resolved that the Muslim marriage had been validly terminated. On 10 April 2012, Ms Bingham was appointed as the executrix of Mr Ely's estate and she then proceeded to wind-up the estate.

[11] The WLC assisted Mrs Faro to lodge an objection to Mr Ely's liquidation and distribution account, but to no avail. In 2013, Mrs Faro launched an application in the high court for relief that included: (a) the setting aside of the Master's failure to uphold an objection that would have resulted in the recognition of Mrs Faro as Mr Ely's spouse for the purposes of the Intestate Succession Act 81 of 1987 (Intestate Succession Act) and

the Maintenance of Surviving Spouses Act 27 of 1990 (the Maintenance of Surviving Spouses Act); (b) for a declaration that Muslim marriages are deemed to be valid marriages in terms of the Marriage Act; in the alternative, for a declaration that the common law definition of marriage be extended to include Muslim marriages; and further in the alternative, an order directing the Minister of Justice to put in place policies and procedures in accordance with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), to regulate the holding of enquiries by the Master into the validity of a Muslim marriage, where persons purporting to be spouses of a Muslim marriage seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act; and (c) declaring that the Minister's failure to implement such policies and procedures to be unlawful and unconstitutional. The matter came before Rogers J, who upheld the relief claimed in (a), declaring that the marriage between Mrs Faro and Mr Ely subsisted at the date of the latter's death, and that she be recognised as a 'spouse' for the purposes of the Intestate Succession Act, and as a 'survivor' for purposes of the Maintenance of Surviving Spouses Act. Mrs Faro thereafter approached the high court in respect of the remaining issues.

**The Esau application**

[12] In this application, Mrs Ruwayda Esau launched an urgent application for an interdict against Mr Esau, (with whom she had concluded a Muslim marriage in October 1999), the Government Employees Pension Fund (GEPF), the Minister of Justice, the Cabinet of the Republic of South Africa and the MJC. The interdict was to prevent the GEPF from paying out to Mr Esau 50% of his pension interest, pending an action to be instituted by Mrs Esau for payment of the pension interest to her. The interdict was granted. Mrs Esau's claim in the action proceedings was premised on the State's failure to enact legislation recognising and regulating Muslim marriages, based on constitutional principles and on the existence of a universal partnership. The issue of the constitutional claim was separated from the other issues and it was heard in the high court in a consolidated hearing.

**Judgment of the high court.**

[13] The three aforegoing applications, that of the WLC, Mrs Faro and Ms Esau, were consolidated and came before the full bench of the Western Cape Division of the High

Court (the high court). Boqwana J (with whom Desai and Salie-Hlope JJ concurred) issued the following order:

'1. It is declared that the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law ("Muslim marriages") as valid marriages and to regulate the consequences of such recognition.

2. It is declared that the President and the Cabinet have failed to fulfil their respective constitutional obligations as stipulated in paragraph 1 above and such conduct is invalid.

3. The President and Cabinet together with Parliament are directed to rectify the failure within 24 months of the date of this order as contemplated in paragraph 1 above.

4. In the event that the contemplated legislation is referred to the Constitutional Court by the President in terms of section 79(4)(b) of the Constitution, or is referred by members of the National Assembly in terms of section 80 of the Constitution, the relevant deadline will be suspended pending the final determination of the matter by the Constitutional Court;

5. In the event that legislation as contemplated in paragraph 1 above is not enacted within 24 months from the date of this order or such later date as contemplated in paragraph 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect:

5.1 It is declared that a union, validly concluded as a marriage in terms of *Sharia* law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of *Sharia* law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of section 7(3) shall apply to such a union regardless of when it was concluded; and

5.2 In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

(a) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just; and

(b) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

5.3 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.

5.4 The Department of Home Affairs and the Department of Justice shall publish a summary of the orders in paragraphs 5.1 to 5.2 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.

6. An order directing the Minister of Justice to put in place policies and procedures regulating the holding of enquiries by the Master of the High Court into the validity of marriages solemnised in accordance with the tenets of Islamic law is refused.

7. An order declaring the *pro forma* marriage contract attached as annexure "A" to the Women's Legal Centre Trust's founding affidavit, to be contrary to public policy is refused.

8. In respect of matters under case numbers 22481/2014 and 4466/2013, the President, the Minister of Justice and the Minister of Home Affairs are to pay the costs of the Women's Legal Centre Trust respectively, such costs to include costs of three counsel to the extent of their employment.

9. In respect of the matter under case number 13877/2015:

9.1 Ruwayda Esau's claim to a part of the Magamat Riethaw Esau's estate, if any, is postponed for hearing at trial along with Parts B and E of the particulars of claim.

9.2 The Cabinet and the Minister of Justice shall pay Ruwayda Esau's costs in respect of Claim A, such costs to include costs of two counsel to the extent of their employment.'

[14] The high court granted the President and the Minister of Justice leave to appeal to this Court. It also granted the WLC and Mrs Esau leave to cross-appeal. The cross-appeal of the WLC was directed at paras 5 and 6 of the order of the high court. Mrs Esau cross-appealed to obtain effective interim relief pending the legislation envisaged in the order of the high court. The WLC also obtained leave to conditionally cross-appeal: in the event of the appeal succeeding in respect of the main relief, it would seek the granting of the alternative relief that it had sought in the high court. The South African Human Rights Commission (SAHRC) and Mrs Faro also opposed the appeal. The Commission for Gender Equality and the United Ulama Council of South Africa (UUCSA) presented argument to this Court as amici curiae.

[15] During argument in this Court the appellants made concessions that had a profound impact on the determination of the appeal. After having had the opportunity to take specific instructions, counsel for the appellants placed on record that they conceded that the Marriage Act and the Divorce Act infringed the constitutional rights to equality, dignity and access to justice of women in Muslim marriages in that they failed to recognise Muslim marriages as valid marriages for all purposes. The appellants conceded too that the rights of children born in Muslim marriages were, under s 28 of the Constitution, similarly infringed. Thus the appellants, in essence, acceded to the alternative relief. These concessions were made fairly and correctly, for the reasons

elaborated upon in the high court judgment. For present purposes it suffices to emphasise the following.

[16] The considerations that led Nkabinde J to conclude in *Hassam*[9] that the differentiation in respect of Muslim women amounted to discrimination on a ground listed in s 9(3), are of equal application in this instance:

'The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.

I am satisfied that the Act differentiates between the groups outlined above.

Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant's on the one hand, and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages, on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history. It is clear that in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation. The celebration of that diversity constitutes a rejection of reasoning such as that to be found in ***Seedat's*** *Executors v The Master (Natal)*,-where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".'

[17] In *Moosa NO and Others v Minister of Justice and Correctional Services and Others*[10] the Constitutional Court accurately described how the persistent non-recognition of Muslim marriages infringed the right to dignity of Muslim women:

'The non-recognition of her right to be treated as a "surviving spouse" for the purposes of the Wills Act, and its concomitant denial of her right to inherit from her deceased husband's will,

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[9] *Hassam* fn 7 paras 30-32.

[10] *Moosa NO and Others v Minister of Justice and Correctional Services and Others* [2018] ZACC 19; 2018 (5) SA 13 (CC) para 16.

strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman. Furthermore, as the WLC correctly submitted, this vulnerability is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences.'

[18] The rights to protection of children from Muslim marriages are infringed in that upon the dissolution of the marriage they are not afforded the 'automatic' court oversight of s 6 of the Divorce Act in relation to their care and maintenance. In addition, they are not protected by a statutory minimum age for consent to marriage. Neither s 24 of the Marriage Act[11] nor s 12(2)*(a)* of the Children's Act 38 of 2005[12] are applicable. It goes without saying that the non-recognition of Muslim marriages for women infringes the right to access to courts under s 34 of the Constitution.

[19] In the light of the concessions made by the appellants, we requested the parties to formulate a draft order by agreement or, at least, to find substantial common ground. For this purpose the matter stood down from 26 August 2020 until 30 September 2020. Nevertheless, the parties were unable to agree to a draft order. The appellants and the WLC (supported by the SAHRC) each placed their own draft order before us. However, a perusal of the draft orders indicated that a lot of common ground had indeed been found, and that the issues for determination were reduced markedly. We appreciate the efforts and inputs of the parties and the amici in this regard.

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[11] Section 24 provides :
'**24 Marriage of minors:**
(1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.
(2) For the purposes of subsection (1) a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.'

[12] Section 12 provides:
'**12 Social, cultural and religious practices:**
(1) . . .
(2) A child- *(a)* below the minimum age set by law for a valid marriage may not be given out in marriage or engagement.'

[20] In order to demonstrate the areas of agreement and the issues that remain for decision, it is expedient to set out the draft order presented by the appellants, as amplified in argument:

'1. The appeal and the cross-appeals succeed in part and the order of the court a quo is set aside and replaced with the following order:

2. The Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with sections 9,10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

3. It is declared that s 6 of the Divorce Act is inconsistent with sections 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manners as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.

4. It is declared that s 7(3) of the Divorce Act is inconsistent with sections 9,10, and 34 of the Constitution insofar as it fails to provide that at the dissolution of a Muslim marriage for the transfer of assets of a spouse in a Muslim marriage where such spouse contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the Muslim marriage either by the rendering of services or the saving of expenses, which would otherwise have been incurred or in any other manner.

5. It is declared that s 9(1) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as is provided for in s 9(1) of the Divorce Act in respect of other marriages.

6. The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation.

7. The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.

8. The declarations of invalidity in paras 2 to 5 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

9. Pending the coming into force of legislation or amendments to existing legislation referred to in para 8:

9.1. It is declared that a union, validly concluded as a marriage in terms of *Sharia* law and subsisting at the date of this Order, or, which has been terminated in terms of *Sharia* law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

9.1.1 all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property "unless agreed otherwise", and

9.1.2 the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

9.2. In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

9.2.1 take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and;

9.2.2 may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

9.3 It is declared that from the date of this order s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.

9.4 For the purpose of applying paragraph 9.3 above, the provisions of ss 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis to Muslim marriages.

9.5 If serious administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.

9.6 The Department of Home Affairs and the Department of Justice shall publish a summary of the orders in paragraphs 9.1 to 9.3 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.

10. In the matter of *Faro v The Minister of Justice and Constitutional Development and Others* (Case no 4466/2013), no order is made in relation to the cross-appeal. It is recorded that:

10.1 In recognition of the fact that there currently are no policies and procedures in place for purposes of determining disputes arising in relation to the validity of Muslim marriages and the validity of divorces granted by any person or association according to the tenets of *Sharia* law (Muslim divorces) in circumstances where persons purport to be spouses in accordance with the tenets of *Sharia* law of deceased persons and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act and/or the Maintenance of Surviving Spouses Act, the Minister of Justice undertakes within 18 months of the granting of this order to put in place the necessary mechanisms to ensure that there is a procedure by which the Master

may resolve disputes arising in relation to the validity of Muslim marriages and Muslim divorces, in all cases where a dispute arises as to whether or not the persons purport to be married in accordance with the tenets of *Sharia* law to the deceased persons and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act and/or the Maintenance of Surviving Spouses Act ;

10.2 In the event that the Minister of Justice fails to comply with the undertaking in para 10.1, the appellants may enrol the appeal in this Court on the same papers, duly supplemented with this recordal, in order to seek further relief.

11. The Appellants (the President and the Minister of Justice) shall in respect of the matter under case no 13877/2015 (*Esau*) pay Ruwayda Esau's costs in respect of claim A (including the costs of the appeal and cross-appeal) such costs to include the costs of three counsel to the extent of their employment.

12. In respect of matters under Case nos 22481/2014 and 4466/2013:

12.1 Paragraph 8 of the order of the Western Cape High Court shall stand, in terms whereof the President, the Minister of Justice and the Minister of Home Affairs are to pay the costs of the Women's Legal Centre Trust respectively, such costs to include the costs of three counsel to the extent of their employment.

12.2 The President and the Minister of Justice shall pay the Women's Legal Centre's costs of the appeal and the cross-appeal, such costs to include the costs of three counsel to the extent of their employment.'

[21] The WLC and the SAHRC contended that the appeal against para 1 of the order of the high court should be dismissed. This raised the question whether the Constitution obliged the State to enact legislation. The WLC agreed that in the event of this question being answered in the negative, orders should be made in terms of paras 1, 2, 3, 4 and 5 of the appellants' draft, save that paras 2 to 5 should include a reference to s 15 of the Constitution. It was submitted that the relevant provisions are also inconsistent with s 15. The WLC agreed that paras 6, 7, 8, 9.2, 9.3, 9.4, 9.5 and 9.6 should, in any event, be granted. In respect of the regime to be put in place pending the coming into force of the envisaged legislation, it proposed that the application of para 9.1 should not be limited to existing Muslim marriages. Its stance was that the interim position as set out in para 9.1 should apply to all Muslim marriages which subsisted on or after 27 April 1994, regardless of: when they were concluded; when they were dissolved (in terms of *Sharia* law); whether litigation in respect of such dissolution and/or its consequences is pending; and irrespective of the matrimonial property regime that applied. It suggested, however,

that this order should not invalidate a winding-up of a deceased estate that has been finalised or the transfer of property by a party to the marriage that has been affected, unless: the property is transferred to a person or legal entity connected to a party to the divorce action; the transferee was aware at the time of transfer that the property formed part of assets in a divorce action; or the transferee was married or had concluded a civil union with a party to the divorce action. The draft orders reflected agreements that had been reached in the Esau and Faro matters, and nothing more needs to be said about the issues in those matters.

[22] It follows that the following issues remained for decision:
(a) Whether the Constitution places an obligation on the State to prepare, initiate, introduce and bring into operation legislation to recognise Muslim marriages as valid marriages and to regulate the consequences of such recognition;
(b) whether the provisions in question are inconsistent with s 15 of the Constitution; and
(c) whether the interim measure should have retrospective operation as contended for.
We address these issues in turn.

**Is the State under an obligation to enact legislation under the Constitution**

[23] The SAHRC contended that the State is bound by international instruments to which it is a party, to enact legislation recognising and regulating Muslim marriages. Its argument was based on four instruments that had been ratified by Parliament under s 231(2) of the Constitution but not domesticated under s 231(4). They are:
(a) The United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW);
(b) the International Covenant on Civil and Political Rights (the ICCPR);
(c) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the AC Women's Protocol); and
(d) the SADC Protocol on Gender and Development (the SADC Gender Protocol).

[24] However, a perusal of the provisions relied upon, indicate that their purpose and import are to advance equality between men and women or spouses. They require State parties to enact legislation and take measures to this end. By way of example, we refer to

Article 16(1) of CEDAW;[13] Article 23(4) of the ICCPR;[14] Article 7 of the AC Women's Protocol[15] and Article 8(1) of the SADC Gender Protocol.[16] We were not referred to any provision that requires legislation to establish equality between women that are married under different marital regimes. In the result we find that these instruments do not oblige the State to enact the legislation relevant to this matter.

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[13] Article 16(1) of CEDAW requires State parties to: 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

[14] Article 23(4) of the ICCPR provide that:
'State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of children.'

[15] Article 7 provides that:
'States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:
*(a)* separation, divorce or annulment of a marriage shall be effected by judicial order;
*(b)* women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
*(c)* in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
*(d)* in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.'

[16] Articles 8 (1), (2) and (3) of the SADC Protocol provide:
'1. State Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.
2. Legislation on marriage shall ensure that:
*(a)* no person under the age of 18 shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child;
*(b)* every marriage takes place with the free and full consent of both parties;
*(c)* every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws; and
*(d)* during the subsistence of their marriage the parties shall have reciprocal rights and duties towards their children with the best interests of the children always being paramount.
3. States Parties shall enact and adopt appropriate legislative and other measures to ensure that where spouses separate, divorce or have their marriage annulled:
*(a)* they shall have reciprocal rights and duties towards their children with the best interest of the children always being paramount; and
*(b)* they shall, subject to the choice of any marriage regime or marriage contract, have equitable share of property acquired during their relationship.'

[25] As we have indicated, the WLC's case was that s 7(2) of the Constitution placed an enforceable obligation on the State to enact the legislation that it advocates for. Section 7 of the Constitution reads:

**'7 Rights**

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

[26] In arriving at its conclusion, on the issues relevant before this Court, the high court, reasoned,[17] inter alia:

'Thus, as the State is under a section 7(2) duty "*to respect, protect, promote and fulfil the rights in the Bill of Rights*", this duty may be invoked where there is an alleged violation of rights in the Bill of Rights by the State. This in turn may trigger the courts' powers to determine whether the State has fulfilled its obligations under section 7(2). How the State fulfils the duty is within its own power to determine. However, what steps it takes must be "reasonable and effective". The question of what is reasonable and effective might be answered in part by examining the nature of the rights violations and in part by international law, which courts are enjoined to consider when interpreting the Bill of Rights.'

[27] The high court placed much reliance on *Glenister v President of the Republic of South Africa and Others*[18] where Moseneke DCJ and Cameron J, for the majority, said:[19]

'The obligations in these [international] conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere. In understanding how it does so, the starting point is s 7(2), which requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This court has held that in some circumstances this provision imposes a positive obligation on the State and its organs "to provide appropriate protection to everyone

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[17] *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham NO and Others, Esau v Esau and Others* [2018] 4 All SA 551 (WCC); 2018 (6) SA 598 (WCC) para 178.

[18] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); [2011] ZACC 6.

[19] *Glenister* fn 18 para 189.

through laws and structures designed to afford such protection". Implicit in s 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.'

And:[20]

'And since in terms of s 8(1), the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations s 7(2) imposes on the State.'

[28] In *Glenister,* the majority held that international law which was ratified had become part of our law and part of our Constitution and this, therefore, imposed an obligation on the State to legislate for an anti-corruption unit. The *Glenister* judgment was primarily concerned with ss 39(1)*(b)* and 231 of the Constitution, two provisions in the Constitution that regulate the impact of international law on the Republic. Both sections were concerned with the State's legal obligation in the international sphere. Section 39(1)*(b)* provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Section 231(2) is directed at the Republic's obligations under international law.

[29] It is important to look briefly to what transpired in *Glenister*. The applications concerned the constitutional validity of two statutes (the two impugned laws), the National Prosecuting Authority Amendment Act 56 of 2008 (NPAA Act) and the South African Police Service Amendment Act 57 of 2008 (SAPSA Act). The gravamen of the complaint related to the disbanding of the Directorate of Special Operations (DSO), a specialised crime-fighting unit that was located within the National Prosecuting Authority (NPA), and its replacement with the Directorate of Priority Crime Investigation (DPCI) which is located within the South African Police Service (SAPS). It was the effect of these two statutes that was at the centre of the challenge in *Glenister*.

[30] The majority judgment stressed that the Constitution did not, in express terms, command that a corruption-fighting unit should be established, but espoused that s 7(2)

[20] *Glenister* fn 18 para 190.

cast an especial duty upon the State to create efficient anti-corruption mechanisms.[21] Moseneke DCJ and Cameron J said that '[i]n order to understand the content of the constitutionally imposed requirement of independence we have to resort to international agreements that bind the Republic' and that 'our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights'.[22]

[31] Moseneke DCJ and Cameron J held that the court's obligation to consider international law when interpreting the Bill of Rights was of pivotal importance, due to the direct impact of s 39(1)*(b)*. Thus, the Constitutional Court concluded in *Glenister* that the fact that the Republic was bound under international law to create an anti-corruption unit, with appropriate independence, was of the foremost interpretive significance in determining whether the State had fulfilled its duty as required by s 7(2). In reaching this conclusion the court said that 'the fact that s 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance' because it 'makes it unreasonable for the State, in fulfilling its obligations under s 7(2), to create an anti-corruption entity that lacks sufficient independence'.[23] Notably the court pointed out that '[i]t is possible to determine the content of the obligation s 7(2) imposes on the State without taking international law into account' but that 's 39(1)*(b)* makes it constitutionally obligatory that we should'.[24] In our view, it is thus clear that the Constitutional Court in *Glenister* sourced the obligations imposed on the State from two provisions of the Constitution which made it obligatory to do so.

[32] Thus, the true role that s 7(2) played in specific circumstances of *Glenister*,[25] appears from the following:

'That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the State has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as s 7(2) requires. Section 7(2) implicitly demands that the steps the State takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a

[21] *Glenister* fn 18 para 175.
[22] *Glenister* fn 18 para 178.
[23] *Glenister* fn 18 para 194.
[24] *Glenister* fn 18 para 201.
[25] *Glenister* fn 18 para 194.

reasonable step. In reaching this conclusion, the fact that s 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the State, in fulfilling its obligations under s 7(2), to create an anti-corruption entity that lacks sufficient independence.'

[33] It is so that in *Glenister* it was stated that in some circumstances s 7(2) imposes a positive obligation on the State.[26] It relied on a dictum in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 44[27] where the court said:

'Under both the IC [Interim Constitution] and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person. The Bill of Rights binds the State and all of its organs. Section 7(1) of the IC [Interim Constitution] provided:

"This chapter shall bind all legislative and executive organs of State at all levels of government."

Section 8(1) of the Constitution provides:

"The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.''

It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.'

[34] These dicta do not prescribe that s 7(2) could oblige the State to enact legislation on a specific subject, nor that a court may order it to do so. They state that there may be a positive obligation on the State 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. What the appropriate protection should be, is for the State to determine. This was put as follows in *Glenister*:[28]

'Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.'

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[26] *Glenister* fn 18 para 189.
[27] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 44.
[28] *Glenister* fn 18 para 191.

[35] Section 7(2) is a broad general provision that must be read in the context of the Constitution and specifically in the context of the carefully constructed separation of powers entrenched in the Constitution. The principle of separation of powers is crucial to our democracy. The Constitutional Court has endorsed the principle of separation of powers in various judgments. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*[29] it was said:

'The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.'[30]

[36] In *Doctors for Life International*, the Constitutional Court said:[31]

'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised". Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.'

[37] Further, in *Doctors for Life International* the following was said:[32]

'But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament "must act in accordance with, and within the limits of, the Constitution", and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled".

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[29] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[30] *Ex Parte Chairperson* fn 29 para 109. See also *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC) para 35.
[31] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 37.
[32] *Doctors for Life* fn 31 para 38.

Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligation.'

And later:[33]

'Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and in particular, out of respect for the principle of separation of powers. But at the same time they have claimed their right to intervene in order to prevent any violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand and the need to respect the other branches of government, on the other, courts have developed a settled practice or general rule of jurisdiction that governs judicial intervention in the legislative process.'

And later still:[34]

'The primary duty of the courts in this country is to uphold the Constitution and the law ''which they must apply impartially and without fear, favour or prejudice". And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the Rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.'

[38] Similarly, in *My Vote Counts NPC v Speaker of the National Assembly and Others*,[35] s 32 of the Constitution was directly and expressly implicated. The issue was whether Parliament had failed to fulfil an obligation the Constitution imposed on it in terms of s 32 of the Constitution. Section 32 provides:

'(1) Everyone has the right of access to-

*(a)* any information held by the state, and

*(b)* any information that is held by another person and that is required for the exercise of or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures, to alleviate the administrative and financial burden on the State.'

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[33] *Doctors for Life* fn 31 para 68.

[34] *Doctors for Life* fn 31 para 70.

[35] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC); [2015] ZACC 31.

[39] As is clear from s 32, the State, in plain language, is specifically and expressly obliged to enact legislation contemplated in s 32(2). The specific question raised in *My Vote Counts NPC* was whether information on private funding of political parties was information that was required to exercise the right to vote. In essence, what the applicant required was information on the private funding of political parties to be made available in a manner that required disclosure by way of legislation, as a matter of continuous course rather than a once-off request. The State, the applicant contended, had failed to enact national legislation by failing to comply with its obligations in terms of s 32 of the Constitution. The respondents recognised the obligation that s 32(2) imposed but contended that Parliament had fulfilled it by enacting the Promotion of Access to Information Act 2 of 2000 (PAIA). The minority judgment concluded that Parliament had failed to fulfil its constitutional obligation to enact the legislation in s 32(2) of the Constitution.

[40] The majority in *My Vote Counts* held that PAIA was passed in compliance with s 32(2) of the Constitution, and focused on providing information in terms of s 32(1) of the Constitution. It was for Parliament to make legislative choices as long as they were rational and constitutionally compliant. The majority held:[36]

'Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers.'

And:[37]

'Also, we have demonstrated that the other basis of distinction, which is that the applicant is seeking relief of a special kind, cannot succeed for the simple reason that what the applicant is asking for flouts the separation of powers doctrine.'

The majority further said:[38]

'According to the minority judgment, what South Africa must have is systematic disclosure. It may well be that this is ideal; who knows? But that is not the issue. It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant.'

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[36] *My Vote Counts NPC* fn 35 para 156.
[37] *My Vote Counts NPC* fn 35 para 172.
[38] *My Vote Counts NPC* fn 35 para 155.

[41] Section 85 of the Constitution circumscribes that the power (not obligation) to prepare and initiate legislation vests in the President and Cabinet. It provides that:

'(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

*(a)* implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

*(b)* developing and implementing national policy;

*(c)* co-ordinating the functions of state departments and administrations;

*(d)* preparing and initiating legislation; and

*(e)* performing any other executive function provided for in the Constitution or in national legislation.'

[42] Sections 43[39] and 44[40] of the Constitution stipulate that the legislative authority in the national sphere of government is exclusively vested in Parliament. In terms of s 42(1)

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[39] Section 43 provides:

**'Legislative authority of the Republic**

In the Republic, the legislative authority-

*(a)* of the national sphere of government is vested in Parliament, as set out in section 44;

*(b)* of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

*(c)* of the local sphere of government is vested in the Municipal Councils, as set out in section 156.'

[40] Section 44 provides:

**'National legislative authority**

(1) The national legislative authority as vested in Parliament-

*(a)* confers on the National Assembly the power-

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

*(b)* confers on the National Council of Provinces the power-

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

*(a)* to maintain national security;

*(b)* to maintain economic unity;

*(c)* to maintain essential national standards;

*(d)* to establish minimum standards required for the rendering of services; or

*(e)* to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

of the Constitution, Parliament consists of the National Assembly[41] and the National Council of Provinces.[42] This legislative authority confers on the National Assembly and the National Council of Provinces the power to pass legislation. It is the responsibility of Parliament to make laws. The President and Cabinet are given a discretion as to the nature and content of the legislation that it prepares and initiates. It must follow that the obligation to enact legislation must be found outside of s 7(2) of the Constitution.

[43] We know of no authority, and we were not referred to any, where the court directed the enactment of legislation outside of the parameters that we have mentioned, namely, international law and specific constitutional obligations, and solely under s 7(2) of the Constitution. In our view, for a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution. As we have said, these sections vest the power to initiate legislation in the President and Cabinet, and to adopt legislation in Parliament. This is not to say that this Court is insulating itself from constitutional responsibility. It is for Parliament to make legislative choices provided that they are rational and constitutionally compliant. And if they are not, the court must act in terms of s 172 of the Constitution.[43]

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(4) When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.'

[41] Section 55(1) of the Constitution provides:

**'55 Powers of National Assembly**

(1) In exercising its legislative power, the National Assembly may-

*(a)* consider, pass, amend or reject any legislation before the Assembly; and

*(b)* initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms-

*(a)* to ensure that all executive organs of state in the national sphere of government are accountable to it; and

*(b)* to maintain oversight of-

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state.'

[42] Section 68 of the Constitution provides:

**'Powers of National Council**

In exercising its legislative power, the National Council of Provinces may-

*(a)* consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and

*(b)* initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money.'

[43] Section 172(1) provides:

'(1) When deciding a constitutional matter within its power, a court-

(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(*b*) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

[44] As stated above, s 85(2) invests the executive authority with the power to prepare and initiate legislation. Sections 43 and 44 make it clear that the National Legislative authority is exclusively in the hands of Parliament. In our view, therefore, para 1 of the order of the high court should be set aside and replaced with the declaratory orders that the WLC had sought in the alternative, as encapsulated in the order set out below.

**Section 15 of the Constitution**

[45] Section 15 provides as follows:

'**Freedom of religion, belief and opinion**

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

*(a)* those observances follow rules made by the appropriate public authorities;

*(b)* they are conducted on an equitable basis; and

*(c)* attendance at them is free and voluntary.

(3) (*a*) This section does not prevent legislation recognising-

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(*b*) Recognition in terms of paragraph *(a)* must be consistent with this section and the other provisions of the Constitution.'

[46] The Constitutional Court observed as follows in *Minister of Home Affairs and Another v Fourie and Another*:[44]

'The special provisions of s 15(3) are anchored in a section of the Constitution dedicated to protecting freedom of religion, belief and opinion. In this sense they acknowledge the right to be different in terms of the principles governing family life. The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character from, but equal in status to general marriage law. Furthermore, subject to the important qualification of being consistent with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as

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(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[44] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) para 108.

part of the law of the land. The section "does not prevent" legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive. It certainly does not give automatic recognition to systems of personal or family law not accorded legal status by the common law, customary law or statute.' (Our emphasis.)

[47] Although the high court included a reference to s 15 of the Constitution in para 1 of its order, it did not make a finding that any provisions of the Marriage Act or the Divorce Act are inconsistent with the rights under s 15. This was also not the argument of the WLC. The crux of its argument, quite correctly, was that the permissive powers in s 15(3) do not prevent the legislation that it proposes. In the circumstances the aforesaid declarations of unconstitutionality should not contain a reference to s 15.

**Retrospectivity**

[48] As we have said, the WLC requested that this Court's order, granting interim relief, be backdated to April 1994 and apply to Muslim marriages that had been dissolved under *Sharia* law as far back as 26 years ago. This is a far-reaching proposal that goes a long way beyond what it had sought in the high court and in the cross-appeal. This is a complex subject and the proposed retrospectivity may have profound unforeseen circumstances. Section 172(1) of the Constitution empowers this Court, upon a declaration of invalidity to make any order that is just and equitable. But there is a fundamental reason why the request should not be acceded to. It is the prerogative of Parliament to determine if and to what extent the legislation that it enacts regarding Muslim marriages, should apply retrospectively. The legislature is best placed to deal with the issue of retrospectivity. Only when the court makes a final declaration of constitutional invalidity, without suspension thereof, should it consider the consequences of the declaration and whether its retrospective effect should be ameliorated on just and equitable grounds. In the result we find that the interim measure proposed by the appellants is appropriate, fair and just.

**Conclusion**

[49] What this Court has done is craft an effective and comprehensive order in an endeavour to cure the hardship suffered by parties to Muslim marriages, especially vulnerable women and children, that will operate until appropriate legislation is put in

place. In the circumstances, for the reasons advanced, the orders granted by the high court must be replaced and the interim relief in para 5 of the high court order cannot stand.

[50] The importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children in particular, including, their right to dignity, to be free from unfair discrimination, their right to equality and to access to court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children. The following words of Moseneke J in *Daniels*[45] resonate:

'I am acutely alive to the scorn and palpable injustice the Muslim community has had to endure in the past on account of the legal non-recognition of marriages celebrated in accordance with Islamic law. The tenets of our Constitution promises religious voluntarism, diversity and independence within the context of the supremacy of the Constitution. The legislature has still not redressed, as foreshadowed by the Constitution, issues of inequality in relation to Islamic marriages and succession.'

[51] In the result the following order is made:

1 The appeal and the cross-appeals succeed in part and the order of the court a quo is set aside and replaced with the following order:

'1.1 The Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

1.2 It is declared that s 6 of the Divorce Act is inconsistent with ss 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare

[45] *Daniels* fn 6 para 108.

of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.

1.3 It is declared that s 7(3) of the Divorce Act is inconsistent with ss 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.

1.4 It is declared that s 9(1) of the Divorce Act is inconsistent with ss 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages.

1.5 The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation.

1.6 The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.

1.7 The declarations of invalidity in paras 1.1 to 1.4 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in para 1.7, it is declared that a union, validly concluded as a marriage in terms of *Sharia* law and subsisting at the date of this order, or, which has been terminated in terms of *Sharia* law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

(c) In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

(i) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and;

(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

1.9 It is declared that, from the date of this order, s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.

1.10 For the purpose of applying paragraph 1.9 above, the provisions of ss 3(1)*(a)*, 3(3)*(a)* and 3(3)*(b)*, 3(4)*(a)* and 3(4)*(b)*, and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis, to Muslim marriages.

1.11 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.

1.12 The Department of Home Affairs and the Department of Justice & Constitutional Development shall publish a summary of the orders in paragraphs 1.1 to 1.9 above widely in newspapers and on radio stations, whatever is feasible, without unreasonable delay.'

2. In the matter of *Faro v The Minister of Justice and Constitutional Development and Others* (Case no 4466/2013), no order is made in relation to the cross-appeal. It is recorded that:

2.1 In recognition of the fact that there currently are no policies and procedures in place for purposes of determining disputes arising in relation to the validity of Muslim marriages and the validity of divorces granted by any person or association according to the tenets of *Sharia* law (Muslim divorces) in circumstances where persons purport to be spouses of deceased persons in accordance with the tenets of *Sharia* law and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990, the Minister of Justice undertakes within 18 months of the granting of this order to put in place the necessary mechanisms to ensure that there is a procedure by which the Master may resolve disputes arising in relation to the validity of Muslim marriages and Muslim divorces, in all cases where a dispute arises as to whether or not the persons purport to be married in accordance with the tenets of *Sharia* law to the deceased

persons and seek to claim benefits from a deceased estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990;

2.2 In the event that the Minister of Justice fails to comply with the undertaking in para 2.1, the appellants may enrol the appeal in this Court on the same papers, duly supplemented, in order to seek further relief.

3. The Appellants (the President and the Minister of Justice) shall in respect of the matter under case no 13877/2015 (*Esau*) pay Ruwayda Esau's costs in respect of claim A (including the costs of the appeal and cross-appeal) such costs to include the costs of three counsel to the extent of their employment.

4. In respect of the matters under Case nos 22481/2014 and 4466/2013:

4.1 Paragraph 8 of the order of the Western Cape Division of the High Court shall stand, in terms whereof the President, the Minister of Justice and the Minister of Home Affairs are to pay the costs of the Women's Legal Centre Trust respectively, such costs to include the costs of three counsel to the extent of their employment.

4.2 The President and the Minister of Justice shall pay the Women's Legal Centre's costs of the appeal and the cross-appeal, such costs to include the costs of three counsel to the extent of their employment.

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**H K SALDULKER**
**JUDGE OF APPEAL**

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**C H G VAN DER MERWE**
**JUDGE OF APPEAL**

**Appearances:**

*President of the RSA & Another v Women's Legal Centre Trust and Others*

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| For appellants: | A A Gabriel SC, with her K Pillay SC and S Humphrey |
| Instructed by: | State Attorney, Cape Town<br>State Attorney, Bloemfontein |
| For 1st respondent: | N Bawa, with her M O' Sullivan and J L Williams |
| Instructed by: | WLC, Cape Town<br>Maduba Attorneys, Bloemfontein |
| For 2nd to 4th respondents: | A A Gabriel SC, with her K Pillay SC and S Humphrey |
| Instructed by: | State Attorney, Cape Town<br>State Attorney, Bloemfontein |
| For 5th respondent: | R Willis, with him A B Omar |
| Instructed by: | Z Omar Attorneys, Johannesburg<br>c/o C & A Friedlander, Cape Town |
| For 6th respondent: | M S Omar & Associates |
| Instructed by: | M S Omar Attorneys, Durban<br>Webbers Attorneys, Bloemfontein |
| For 7th respondent: | R Moultrie, with him S Kazee |
| Instructed by: | Bowman Gilfillan Inc, Sandton<br>c/o Bowman Gilfillan Inc, Cape Town<br>Matsepes Inc., Bloemfontein |
| For 1st *amicus curiae*: | M S Omar |

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| Instructed by: | M S Omar & Associates, Durban |
| | Webbers Attorneys, Bloemfontein |

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| For 6th *amicus curiae*: | M Bishop, with him A Christians and |
| | C McConnachie |
| Instructed by: | Legal Resources Centre, Cape Town |
| | Legal Aid, Bloemfontein |

*Minister of Justice and Constitutional Development v Faro and Others*

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|---|---|
| For appellant: | A A Gabriel SC, with her K Pillay SC and |
| | S Humphrey |
| Instructed by: | State Attorney, Cape Town |
| | State Attorney, Bloemfontein |

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|---|---|
| For 1st respondent: | N Bawa, with her M O' Sullivan and J L Williams |
| Instructed by: | WLC, Cape Town |
| | Maduba Attorneys, Bloemfontein |

*Minister of Justice and Constitutional Development v Esau and Others*

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|---|---|
| For appellant: | A A Gabriel SC, with her K Pillay SC and |
| | S Humphrey |
| Instructed by: | State Attorney, Cape Town |
| | State Attorney, Bloemfontein |

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|---|---|
| For 1st respondent: | J de Waal SC, with him A Newton, P Olivier and |
| | B Wharton |
| | N Rawoot Attorney at Law, Cape Town |
| | E G Cooper Majiedt Inc., Bloemfontein |