




Chapter 7

The Protection of Spouses in Muslim Marriages in South Africa

*Hassam v Jacobs*¹

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“The effect of the failure to afford the benefits... to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid” (*Hassam* par 34).

ABSTRACT

The case of *Hassam v Jacobs* represents a watershed moment in South African constitutional jurisprudence concerning equality, dignity and religious freedom in post-apartheid South Africa. This landmark judgment, decided by the Constitutional Court in 2009, significantly advanced the protection of Muslim women in polygynous marriages by declaring that section 1 of the Intestate Succession Act constituted an unjustifiable infringement of section 9(3) of the Constitution. The court’s decision remedied the discriminatory exclusion of widows in polygynous Muslim marriages from intestate succession

benefits, a protection previously denied through the restrictive interpretation of the word “spouse” in the Act. The judgment’s constitutional significance lies in its decisive rejection of historical prejudices against Muslim marriages, which had been dismissed as “retrograde” and “immoral” in previous cases like *Ismail v Ismail*. By ordering the addition of “or spouses” after each use of “spouse” in the Act, the court affirmed that discrimination based on religion, gender and marital status reinforced patriarchal practices and violated the constitutional guarantee of equality. The court emphasised that such discrimination caused “significant and material disadvantage” to Muslim women, particularly detrimental because it affected women, not men, thereby adding a gendered dimension to the discrimination. This judgment represents a critical step in South Africa’s evolution towards legal pluralism and the recognition of diverse family forms, advancing the constitutional values supporting South Africa’s democratic transition. While *Hassam* focused specifically on intestate succession rather than fully recognising polygynous Muslim marriages, it established an important precedent that contributed to subsequent judicial and legislative developments, including the *Women’s Legal Centre Trust* case and ultimately the Divorce Amendment Act of 2024, which finally provided statutory recognition of Muslim marriages. This incremental judicial recognition, though criticised for its piecemeal approach, demonstrates the court’s commitment to transformative constitutionalism and reflects South Africa’s societal values of human dignity, equality and social justice. The judgment thus stands as a cornerstone in the protection of vulnerable groups in South African society and the accommodation of religious and cultural diversity within a constitutional democracy.

7.1 Introduction

The case of *Hassam v Jacobs* was heard on 19 February 2009 and decided on 15 July 2009. In this case, the court decided that marriage is important to everyone in South African society, no matter their skin colour or religion.² The court declared that section 1 of the Intestate Succession Act³ is an “unjustifiable

infringement of section 9(3) of the Constitution”.⁴ The reasons given for this conclusion by the Constitutional Court were that the defect is present because the word “spouse”, as found in the Intestate Succession Act excludes widows who were married in polygynous Muslim marriages, and, therefore, such women are denied the protection that vulnerable women in our society are entitled to.⁵ The court ordered that the words “or spouses” should be added after each use of the word “spouse” in the Intestate Succession Act.⁶ Additionally, the court provided provisions applicable when applying sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act where the deceased person was married in a polygynous marriage.⁷

The matter came before the Constitutional Court as an application to confirm the declaration of invalidity of section 1(4)(f) of the Intestate Succession Act that was made by Van Reenen J in the Western Cape High Court.⁸ Van Reenen J had found that the exclusion of widows of Muslim polygynous marriages from the provisions of the Intestate Succession Act were discriminatory.⁹ The facts¹⁰ were that the applicant was married to the deceased, Mr Hassam, according to Muslim rites and that the deceased married a second wife without the knowledge of the applicant, such marriage also being according to Muslim rites.¹¹ On the deceased’s death certificate it was stated that the deceased was “never married”. The first respondent, the executor of the deceased’s estate, did not regard the applicant as a spouse for purposes of the Intestate Succession Act.

The applicant had originally approached the High Court in Cape Town and wanted an order that recognised her as a spouse and as a surviving spouse for the purposes of the Intestate Succession Act as well as the Maintenance of Surviving Spouses Act¹² and to order the executor of the estate to recognise her as such. The executor had questioned the validity of the applicant’s marriage although none of the respondents, including the second wife, had disputed the validity of such marriage. The court *a quo* declared the marriage to be valid.¹³ The applicant stated that the word “spouse”, as found in section 1(4) of the Intestate Succession Act, should include a husband or wife

married in terms of Muslim rites, and that it should not matter whether the marriage was monogamous or polygynous, and that by excluding her from the definition of “spouse”, the Act limited her right to equality and religious freedom.

The High Court had considered whether widows of polygynous Muslim marriages, not having the benefits provided for by the Act, was unconstitutional and the High Court concluded that this resulted in such spouses being discriminated against, as their rights to equality and dignity were infringed.¹⁴ The consideration of these rights by the Constitutional Court are discussed below.

7.2 Significant aspects of the judgment

7.2.1 The interpretation, content and limitation of the rights to equality and dignity

7.2.1.1 The interpretation and contents of the rights to equality and dignity in relation to intestate succession of spouses in polygynous Muslim marriages

The argument that was brought before the Constitutional Court was predominantly based on the equality provision in the South African Constitution and the submissions made to the court were that it would clearly amount to unfair discrimination if the widows of polygynous Muslim marriages were not included in the provisions of the Act.¹⁵ The applicant argued that widows in polygynous Muslim marriages are unfairly discriminated against on the grounds of gender, religion and marital status.¹⁶ The applicant referred to *S v Jordan*¹⁷ when submitting that women in polygynous marriages are discriminated against and contended that women are a “particularly vulnerable segment of the population” and the Act predominantly benefits widows rather than widowers and that the Act thus is detrimental towards Muslim women.¹⁸ The case of *Daniels v Campbell*¹⁹ was used to illustrate that discrimination can occur based on marital status in instances where there is not legislative protection for some types of relationships and that withholding such protection amounts to discrimination on the ground of marital status.²⁰

The submission was also made that excluding spouses in polygynous Muslim marriages from the Act was infringing sections 15, 30 as well as 31 of the Constitution and that the ability to conclude a polygynous Muslim marriage forms part of the right and freedoms related to religious and cultural choices, and not recognising such marriages discriminates on the ground of religion.²¹ The argument before the Constitutional Court was that there was no relationship between a legitimate governmental purpose and the differentiation in question and that widows who were married in polygynous Muslim marriages thus have their rights to freedom of religion, conscience, belief and opinion as well as culture infringed.²²

The court made it clear here that this matter did not deal with the constitutional validity of polygynous Muslim marriages but with whether the Act discriminated against widows of such marriages and thus the judgment did not deal with incorporating any aspects of Sharia law into South African law.²³ The court also reminded us that the *Daniels* case did not deal with polygynous Muslim marriages but with monogamous Muslim marriages.²⁴ The court then dealt with the issue of whether excluding spouses in polygynous Muslim marriages from the ambit of the Act was in violation of section 9(3) of the Constitution, and in particular, whether the exclusion was discriminatory; if so, whether the discrimination was unfair or not, and lastly, if it was unfair, then whether the unfair discrimination was justifiable under section 36 of the Constitution.²⁵ The court also considered if the word “spouse” as found in the Act can be seen as including spouse in polygynous marriage, and that if such an interpretation cannot be made, then what relief should be granted instead.²⁶ In order to answer these questions, the court explored equality jurisprudence.

Nkabinde J referred to the principles developed by the Constitutional Court that are used when dealing with the question of equality and referred firstly to section 9 of the Constitution that stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law and cited the entire section.²⁷ Thereafter, the court referred to the case of *Harksen v Lane*²⁸ where the equality analysis

was summarised, thus setting out the questions that must be asked by the court in order to determine whether a provision is discriminatory.²⁹

Nkabinde J further made it clear that section 39(2) of the Constitution prompts the court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and that, referring to the *Daniels* case, discriminatory interpretation that previously negatively affected people are not sustainable anymore, thanks to our Constitution.³⁰ When exploring the approach that was taken in the *Daniels* matter, Nkabinde J referred to the case of *Ismail v Ismail*³¹ where the court's decision was prejudicial against the Muslim community as the "[r]ecognition of polygynous unions was seen as a retrograde step and entirely immoral" by the court at that time.³²

The court made it clear that the belief demonstrated in the *Ismail* case "displays ignorance and total disregard for the lived realities prevailing in Muslim communities is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another".³³ The court further made it clear that it cannot be regarded as a retrograde step to afford protection to spouses in Muslim polygynous marriages, as the previous approach taken by the court in the *Ismail* case discriminated against such spouses on the grounds of human dignity and equality and were based on beliefs held by a very limited part of society at that time.³⁴ The Constitutional Court made it clear that, when determining whether a provision is constitutionally valid or not, the court must look at the diversity of South African society as this is also made clear in the Promotion of Equality and Prevention of Unfair Discrimination Act³⁵ and must ensure the "achievement of the progressive realisation of our 'transformative constitutionalism'".³⁶

In order to achieve transformation, the court then determined the issues that must be dealt with and specified that they were whether the word "spouse" in the Act can be read in such a way that it includes spouses in polygynous Muslim marriages³⁷ and whether the excluding of spouses who are in polygynous Muslim marriages from intestate succession as provided for by the Act is in contradiction to section 9(3) of the

South African Constitution.³⁸ The court's consideration of these aspects is discussed below.

7.2.1.2 Application of the rights to equality and dignity to intestate succession in polygynous Muslim marriages

The Constitutional Court agreed with the view of the High Court that not allowing spouses of Muslim polygynous marriages to benefit from intestate succession does not pass constitutional scrutiny.³⁹ Nkabinde J made it clear that the foundations of our law include the right to equal protection before the law as well as the right to equality and that our Constitutional Court case law shows clearly that equality is breached by discrimination and that equality is not simply “a matter of difference”.⁴⁰ The differentiation was clear in the facts as hand, as there was a difference in the application of intestate succession in instances of women who were married in terms of the Marriage Act, widows who were in Muslim monogamous marriages, and women who were in Muslim polygynous marriages, and that additionally, the Act discriminated against Muslim women, not men.⁴¹

The court then considered the application of the question whether the differentiation between these groups of women actually is discrimination and concluded that it was as the discrimination must not be examined in isolation but also in light of South Africa's history as well as contextually.⁴² Nkabinde J, furthermore, explored the result of the Act failing to provide for widows in Muslim polygynous marriages and concluded that, in practice, this causes widows “significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid”.⁴³ The court additionally reiterated that the discrimination only affects women and not men so it has a gendered aspect⁴⁴ to be considered as well as the grounds of religion.⁴⁵ Nkabinde J made it clear that the questions asked in this matter were not to determine whether polygynous marriages were consistent with the South African Constitution but rather to determine whether women in Muslim polygynous marriages were adequately protected and to enforce the provisos of the Constitution that every person is of equal worth and should be treated accordingly.⁴⁶ The court additionally made

it clear that the discrimination based on religion, gender and marital status was reinforcing the practices of patriarchy and relegating women in Muslim polygynous marriages to be seen as not being worthy of protection and that the Act thus conflicted with gender equality as laid out in the Constitution.⁴⁷

The court concluded that discrimination had been proven but that the question of whether such discrimination could be justified under section 36 of the Constitution now had to be answered,⁴⁸ and that in order to answer the question the court needs to consider “the nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves as well as the impact of the discrimination on those who are adversely affected”.⁴⁹ The court here determined that Muslim women in polygynous marriages were severely prejudiced by not being included in the provisions of the Act⁵⁰ and that this exclusion limits their rights and is unjustifiable.⁵¹

7.2.2 The role of society

Throughout this judgment the Constitutional Court made it clear that we cannot discriminate against women in Muslim polygynous marriages, and not provide them adequate protection upon the death of their husbands, in a society that has as its foundation fundamental human rights, democratic values and social justice.⁵² South Africa is a heterogenous society and diversity must be accommodated within it and the “lived reality” of women in Muslim polygynous marriages need to be taken into account.⁵³ The court additionally made it clear that we cannot turn back time to when the Act was enacted in 1987 or even to when the cases of *Ismail* or *Seedat* were decided as the only marriages that the legislature was aiming to protect at the time of the enactment of the legislation were civil marriages that had been concluded in terms of the Marriage Act, but that we do now have to look at the “current place and effect in South Africa” of not recognising such polygynous Muslim marriages.⁵⁴

This ties in with the equality provision of the Constitution and the right to dignity, as was discussed above. The court went so far as to stipulate that the assumptions made in the *Ismail* case displayed ignorance and were not acceptable as they were

demonstrative of one group within the pluralistic society of South Africa imposing their views onto another group within that same society.⁵⁵ Importantly, the court also referred to the transition of South Africa into a “democratic society” and that we need to be guided by principles of justice human dignity, equality and fairness and “human relations that are caring and compassionate” and that “the diversity of our society... provides a blue print for our constitutional order”.⁵⁶ The *boni mores* of South African society offers the protection of persons excluded by the provisions of the Act. Families are found in many forms in South Africa, and we can no longer only recognise one form of family, and this judgment supports this view.⁵⁷

In order to remedy the defect in the Act, the Constitutional Court concluded that we cannot read the word “spouse” as meaning more than one spouse and, therefore, the court held that words have to be read in order to cure such defect⁵⁸ and held that the words “or spouses” must be seen as being included in Section 1 of the Intestate Succession Act.⁵⁹

7.3 Impact of the judgment

7.3.1 Impact on the interpretation of the rights to equality and dignity

Although the *Hassam* case did demonstrate that women married in Muslim polygynous marriages were entitled to the rights of equality and dignity at the death of their spouses, in that they were entitled to be protected in terms of intestate succession, it did not go far enough and missed the opportunity to give full recognition to Muslim polygynous marriages. Instead, the court opted to recognise the consequences of such marriage without deciding about the validity of the marriage itself,⁶⁰ although the court was aware that, despite the decision in the *Daniel's* case – since it was only applicable to monogamous Muslim marriages – women were suffering in Muslim polygynous marriages.⁶¹

The court even refers⁶² to Cachalia,⁶³ who made it clear that the consequences of non-recognition of Muslim marriages are grave for the women in such marriages, as they are not married in community of property and have no claim to a

joint estate, and that even if they entered into an antenuptial agreement, such agreement is seen as being void and that there is no claim allowed for loss of support or maintenance upon the death of the women's husband, and that if such women's husband die intestate they have no claim to inheritance. Despite being aware of the extremely prejudicial consequences of the non-recognition of Muslim marriages on the women in such marriages, the court here still chose to lessen one of the consequences, by allowing for legislation change for intestate succession for such spouses yet did not use the opportunity to recognise the cause of such discrimination and ameliorate it by fully recognising Muslim polygynous marriages. Nkabinde J also specified that as marriage is a social institution it is of importance to all members of society, no matter their religious background or the colour of their skin and thus the significance that is attached to Muslim polygynous marriages should not be less than that attached to marriages concluded in terms of the Marriage Act or African customary marriages.⁶⁴ The court also reiterated that the dignity of parties who are in Muslim marriages must be respected just as much as the dignity of parties in African customary marriages.⁶⁵

Although *Women's Legal Centre Trust v President of the Republic of South African*⁶⁶ did not deal with intestate succession like the *Hassam* case did, it was particularly important as it also explored the protection of rights to dignity and equality of spouses in Muslim marriages.⁶⁷ This judgment is discussed further below.

6.3.2 Impact on judicial development

In the *Hassam* case, the court stipulated that legislative policy has already shifted, as was evident in the decision made in the case of *Daniels* and that Muslim marriages could not be excluded from the protection provided by the Act and the Maintenance Act, since this would be against the spirit, purport and objects of the Constitution. Despite this acknowledgment, the Constitutional Court in the *Hassam* case restricted its judgment to the inclusion of spouses, in Muslim polygynous marriages, in the Act in order to protect them in cases of intestate succession but did not go

as far as to fully recognise Muslim marriages.⁶⁸ The *Hassam* case, however, did open the door a bit further for the future full recognition of Muslim marriages, taking the recognition a step further than what the case of *Daniels* had but women in Muslim polygynous marriages were still left in a vulnerable position. This was evident in the case of *Faro v Bingham*,⁶⁹ where the surviving wife of a Muslim marriage brought an action against the deceased estate to claim maintenance and the court was requested to regard Muslim marriages as valid marriages. However, the court did not provide full recognition of Muslim marriages but did give relief to the widow.

In the matter of *Benjamin v FNB Trust Services (Pty) (Ltd)*,⁷⁰ it was held that the applicant, who was the widow of the deceased with whom she had been in a Muslim marriage, was a spouse in accordance with section 1 of the Maintenance of Surviving Spouses Act.⁷¹ Abduroaf and Moosa⁷² submit that in terms of Islamic law, a Muslim widow would not be entitled to such maintenance but would be able to inherit because of her being a beneficiary of her deceased husband's estate. The authors also refer to the *Hassam* case⁷³ and conclude that it is better that assets be distributed according to Islamic law in such instances and that a valid will could obtain this outcome.⁷⁴ The authors also make it clear that a maintenance claim against deceased estates are "foreign to Islamic law" and that widows from Muslim marriages should be able to use the claim to maintenance to claim their inheritance in terms of Islamic law.⁷⁵ Of course, not all persons married in Muslim marriages make wills, so it remains important that in order to safeguard their rights that legislative provisions protect them both for the claim of maintenance and intestate succession claims.

The Muslim Marriages Bill⁷⁶ set out a framework for the recognition of Muslim marriages and the regulation of the proprietary consequences of such marriages, however, the Bill was contentious and never became law.⁷⁷

In the *Women's Legal Centre Trust*⁷⁸ matter, an application was brought to the Constitutional Court to confirm the constitutional invalidity of sections of the Marriage Act⁷⁹ and the Divorce Act.⁸⁰ The Constitutional Court found that sections

9, 10, 28 and 34 of the Constitution are applicable here and that the sections⁸¹ of the Acts are unconstitutional because Muslim marriages are not recognised by the Acts. The court considered that if an order were not made to declare sections of the Acts invalid, that Muslim women would “continue to experience grave injustice”⁸² and agreed that women in Muslim marriages, as well as children born from such marriages, would be unfairly discriminated against and their right to dignity infringed if the constitutional invalidity of the sections of the Act were not confirmed. In its judgment, the Constitutional Court referred both to the case of *Daniels* as well as *Hassam*.

It was clear that “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”.⁸³ The court referred to the considerations made in *Hassam* in some detail,⁸⁴ and in particular, explored the “stereotypical and stunted notions of marriage and family” and the fact that “[t]hey must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships”.⁸⁵ The importance of rights of equality and dignity as well as the freedom of religion were referred to here as well.⁸⁶ When referring to the *Hassam* case, the court focused on the past “prejudiced attitude” that was demonstrated towards Muslim marriages and that a society based on democratic values and human rights cannot follow that approach, and additionally, the “lived realities prevailing in Muslim communities” needs to be taken into account.⁸⁷ The court here also made it clear that women in Muslim marriages do not have equal bargaining power as they are often not able to convince their partners to enter into civil marriages⁸⁸ and that, as pointed out in the *Hassam* case, the “differentiation caused by the Marriage Act strikes particularly at women, and ‘works to the detriment of Muslim women and not Muslim men’”.⁸⁹

The court, in the *Women’s Legal Centre Trust* case, concluded that this results in women having very small estates or being destitute and that this situation is worsened by having to care for children as well.⁹⁰ The conclusion was made that there is not a ground or reason to justify not recognising Muslim marriages

and that women in Muslim marriages need to be protected from economic and social hardships.⁹¹ This case, like the *Hassam* case, referred to the right to human dignity and found that it was infringed in this instance.⁹² The court here suspended the invalidity of the sections of the abovementioned Acts, in order to provide the legislature with time to amend the relevant sections. The Registration of Muslim Marriages Bill⁹³ came into being but has not been made into law. Recent legislation, the Divorce Amendment Act,⁹⁴ now provides for a definition of Muslim marriages; for the protection of the interests of minor and dependent children of such marriages; provides for the redistribution of assets when a Muslim marriage is dissolved as well as for the forfeiture of patrimonial benefits in Muslim marriages. The Amendment Act defines a Muslim marriage as “a marriage entered into or concluded in accordance with the tenets of Islam”⁹⁵ and now makes provision for spouses in Muslim marriages to be included in the Divorce Act.

6.4 Conclusion

The *Hassam* case opened the door wider for the future recognition of Muslim marriages than the judgment in the *Daniels* case did, allowing for spouses in Muslim polygynous marriages to be protected where a spouse died. There was a clear evolution of the protection of the rights of Muslim spouses that occurred after the decision in the *Hassam* case. The *Hassam* case built on the previous case of *Daniels*, as it extended the protection of spouses to polygynous Muslim marriages. However, this gradual approach left gaps as there was still not full recognition of Muslim marriages and these gaps had to be addressed by the courts in later cases, such as in the *Women’s Legal Centre Trust* case.

The *Women’s Legal Centre Trust* case reiterated the right to dignity and equality of spouses in Muslim marriages and the development of the legal recognition of women’s rights in Muslim polygynous marriages has now developed to such an extent that Muslim marriages are included in the Divorce Act.

The judgment in the *Hassam* case advanced the constitutional values of dignity, equality and religious freedom

in South Africa. The decision also recognised the diversity of the forms of family found in South Africa and the rejection of historical prejudices against Muslim marriages was demonstrated in this case. The *Hassam* case addressed gender injustice because mainly women in Muslim marriages were affected by the exclusions. There has been clear progression from the limited focus on intestate succession in Muslim marriages in the *Hassam* case to the broader legislative reform found in the Divorce Amendment Act of 2024, that provides for the registration of Muslim marriages. The recent case of *HA v NA*,⁹⁶ decided on 13 February 2025, provides that a spouse in a Muslim marriage who has been issued with *Talaaq* may still make use of Rule 43 proceedings to claim a contribution towards costs of the civil divorce and claim for interim maintenance while the divorce is still pending. The *HA* case increased the protection of vulnerable spouses in Muslim marriages in South Africa.

Families are found in a variety of forms in South Africa, and the *Hassam* case recognised the dignity of spouses in Muslim marriages. The judgment in *Hassam* clearly reflects South Africa's societal values and the transition of South Africa to embracing legal pluralism; however, challenges remain, as South Africa still needs to fully protect Muslim spouses' marriages, families and rights during divorce. The door that the *Hassam* case opened has led to the decision that women in Muslim marriages have the right to be protected by the South African law in cases of divorce and led to changes in legislation, but this has unfortunately occurred in a piecemeal fashion.

Endnotes

- 1 *Hassam v Jacobs* 2009 5 SA 572 (CC).
- 2 *Hassam* (n 1) par 46.
- 3 81 of 1987.
- 4 *Hassam* (n 1) par 49.
- 5 *Hassam* (n 1) par 49.
- 6 *Hassam* (n 1) par 53 and par 57.
- 7 *Hassam* (n 1) par 57: “(a) a child’s share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such person but are survived by their descendants; plus the number of spouses who have survived such deceased; b) subject to paragraph (c), each surviving spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses”.
- 8 *Hassam* (n 1) par 1. The judgment was *Hassam v Jacobs* 2008 4 All SA 350 (C).
- 9 *Hassam* (n 1) par 1.
- 10 As summarised in *Hassam* (n 1) par 3–6.
- 11 See further Moosa “*Faskh* (divorce) and intestate succession in Islamic and South African law: Impact of the watershed judgment in *Hassam v Jacobs* and the Muslim Marriages Bill” 2024 *Acta Juridica* 1 for an explanation of the differing views held by Islamic scholars and the applicable aspects of Islamic Law.
- 12 27 of 1990.
- 13 Relying on the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) (Ltd)* 1984 3 SA 623 (A), the court examined the undisputed averments of the applicant and the averments of the respondent to determine whether a case was made out.
- 14 *Hassam* (n 1) par 7–8.
- 15 *Hassam* (n 1) par 9.
- 16 *Hassam* (n 1) par 9.
- 17 2002 6 SA 642 (CC).
- 18 *Jordan* (n 17) *Hassam* (n 1) par 10.
- 19 2004 5 SA 331 (CC). Here women in monogamous Muslim marriages were allowed to benefit in intestate succession.
- 20 *Hassam* (n 1) par 11.
- 21 *Hassam* (n 1) par 12.
- 22 *Hassam* (n 1) par 13: ss 15(1) and 31(1) of the Constitution.
- 23 *Hassam* (n 1) par 17.
- 24 *Hassam* (n 1) par 18.
- 25 *Hassam* (n 1) par 20.
- 26 *Hassam* (n 1) par 20.
- 27 s 9(1): “(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance

- persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.
- 28 1998 1 SA 300 (CC). See also Van Staden “The right to equality and the adoption of a concrete test for unfair discrimination—*Harksen v Lane*” in Laubscher and Van Staden (eds) *Landmark Constitutional Cases that Changed South Africa* (2023) 185–215.
- 29 *Harksen* (n 28) par 53, quoted at Hassam (n 1) par 23 in the Case at hand and included here for ease of reference: “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis: (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)”.
- 30 *Hassam* (n 1) par 24.
- 31 1983 1 SA 1006 (AD).
- 32 *Hassam* (n 1) par 25.
- 33 *Hassam* (n 1) par 25.
- 34 *Hassam* (n 1) par 26.
- 35 4 of 2000.
- 36 *Hassam* (n 1) par 28, referring to Klare “Legal culture and transformative constitutionalism” 1998 SAJHR 146.
- 37 *Hassam* (n 1) discussed from par 44.
- 38 *Hassam* (n 1) discussed from par 30.

Endnotes

- 39 *Hassam* (n 1) par 30.
- 40 *Hassam* (n 1) par 30.
- 41 *Hassam* (n 1) par 31.
- 42 *Hassam* (n 1) par 33.
- 43 *Hassam* (n 1) par 34.
- 44 As Muslim personal law allows only men to have more than one wife and not women to have more than one husband: par 34. The women also do not have a say in their husband's decision to marry another wife: *Hassam* (n 1) par 38.
- 45 In the past other religions were not "deemed worthy of respect" by our courts: *Hassam* (n 1) par 34.
- 46 *Hassam* (n 1) par 20.
- 47 *Hassam* (n 1) par 37.
- 48 *Hassam* (n 1) par 40.
- 49 *Hassam* (n 1) par 41.
- 50 *Hassam* (n 1) par 41.
- 51 *Hassam* (n 1) par 42.
- 52 *Hassam* (n 1) par 37.
- 53 *Hassam* (n 1) par 14.
- 54 *Hassam* (n 1) par 45.
- 55 *Hassam* (n 1) par 25. See also *Hassam* (n 1) par 26: "the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidenced by the remarks in *Ismail*".
- 56 *Hassam* (n 1) par 27.
- 57 Jamneck "The problematic practical application of section 1(6) and 1(7) of the Intestate Succession Act under a new Dispensation" 2014 *PELJ* 867 stresses that one form of family cannot be found at the cost of other forms of families in South Africa. See also Rautenbach "Celebration of difference: Judicial accommodation of cultural and religious diversity in South Africa" 2010 *The International Journal of Diversity in Organisations, Communities and Nations* 117 for a discussion of the judicial accommodation of legal pluralism in South Africa at that time.
- 58 *Hassam* (n 1) par 48.
- 59 *Hassam* (n 1) par 57. As well as the amendment of ss 1(1)(c)(i) and 1(4)(f) to include interlaid include the word spouses and to provide them with the right to inherit a child's share from the deceased estate.
- 60 For example, see *Hassam* (n 1) par 35.
- 61 In the case at hand particularly after the death of their spouses: *Hassam* (n 1) par 36.
- 62 *Hassam* (n 1) par 41.
- 63 "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 392.
- 64 *Hassam* (n 1) par 46.
- 65 *Hassam* (n 1) par 46.
- 66 2022 5 SA 323 (CC).
- 67 The case is discussed below, at impact on judicial development.

- 68 Osman-Hyder “The impact and consequences of *Hassam v Jacobs NO* on polygynous Muslim marriages [a discussion of *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)]” 2011 *Stellenbosch Law Review* 233 discusses whether this case could have been used to fully recognise Muslim marriages in South Africa.
- 69 [2013] ZAWCHC 159.
- 70 [2022] ZAWCHC 190.
- 71 27 of 1990.
- 72 “An analysis of the rights of a Muslim widow to claim maintenance” 2023 TSAR 302.
- 73 Abdurooaf and Moosa (n 72) 305.
- 74 Abdurooaf and Moosa (n 72) 311.
- 75 Abdurooaf and Moosa (n 72) 315.
- 76 Muslim marriages draft bill of 2010.
- 77 For a discussion of the contents of the bill and the differing views see further Amien and Leatt “Legislating religious freedom: An example of Muslim marriages in South Africa” 2014 *Maryland Journal of International Law* 505, particularly from 521–536.
- 78 *Women’s Legal Centre Trust* (n 66).
- 79 25 of 1961.
- 80 70 of 1979.
- 81 s 6 of the Divorce Act; s 7(3) of the Divorce Act; s 9(1) of the Divorce Act as well as the common law definition of marriage.
- 82 *Hassam* (n 1) par 1
- 83 *Hassam* (n 1) par 44.
- 84 *Hassam* (n 1) par 45 and 46.
- 85 *Hassam* (n 1) par 44, referring to the *Daniels* case.
- 86 *Hassam* (n 1) par 44.
- 87 *Hassam* (n 1) par 45.
- 88 *Hassam* (n 1) par 47.
- 89 *Hassam* (n 1) par 49.
- 90 *Hassam* (n 1) par 49.
- 91 *Hassam* (n 1) par 55 and Moosa “A brief analysis of the judgment in *Women’s Legal Centre Trust v President of the Republic of South Africa* 2022 5 SA 323 (CC)” 2023 *PELJ* 2 explored problems related to enforcing the interim order and recommended that parties obtain advice from a qualified Islamic scholar before finalising their divorce and made it clear that Muslim marriages are recognised for purposes of the Divorce Act and are still not registered in terms of the Marriage Act.
- 92 *Hassam* (n 1) par 57.
- 93 30 of 2022.
- 94 1 of 2024. Signed into law on 9 May 2024.
- 95 s 1.
- 96 [2025] ZAGPPHC 121.