



**SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA STATEMENT – JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL**

FROM The Registrar, Supreme Court of Appeal

DATE 18 December 2020

STATUS Immediate

***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)***

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today upheld the appeal and cross-appeals in part; setting aside and replacing the order of the Western Cape Division of the High Court (high court). The issue before the SCA was whether the Constitution placed 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.

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. 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. 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. 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 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 failed to recognise and provide for Muslim marriages.

Three applications which were consolidated came before the high court, that of the WLC, Mrs Faro and Mrs Esau. The high court declared that the State was obliged by s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in ss 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law as valid marriages and to regulate the consequences of such recognition. Further the high court declared that the President and Cabinet had failed to fulfil their respective constitutional obligations and such conduct was invalid. The high court granted the President and the Minister

of Justice (the appellants) leave to appeal to the SCA and also granted the WLC and Mrs Esau leave to cross-appeal.

During argument in the SCA 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.

The SCA held that the importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children were a vulnerable group in a pluralistic society such as ours. The SCA held further that the non-recognition of Muslim marriages was 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.

The SCA, inter alia, made the following order: 1. The appeal and the cross-appeals succeed in part and the order of the high court 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'.

The SCA made other ancillary orders in respect of Mrs Faro and Mrs Esau.