



Collaboration Space / UCT Equality Law Database / 2009

HASSAM v JACOBS NO AND OTHERS

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YEAR: 2009

PLAINTIFF / APPLICANT / APPELLANT: HASSAM

DEFENDANT / RESPONDENT: JACOBS NO AND OTHERS

COURT: CONSTITUTIONAL COURT

CITATION: (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC)

POST / PRIOR ACTION: HASSAM v JACOBS NO AND OTHERS (2008) 4 ALL SA 350 (C)

JUDGE(S): NKABINDE J

GROUND(S) OF DISCRIMINATION: MARITAL STATUS, RELIGION

STATEMENT OF FACTS:

The applicant was married to Mr Hassam (the deceased) in accordance with Muslim rites. The deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites without the applicant's knowledge or consent. The deceased died intestate in August 2001. His death certificate shows that he was never married. The first respondent refused to regard the applicant as a spouse for the purposes of the Intestate Succession Act 81 of 1987. The executor questioned the validity of the applicant's marriage to the deceased.

ISSUE OF LAW:

The following issues were considered:

- a) Does the exclusion of spouses in polygamous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution? In particular:
 - i. Does the exclusion constitute discrimination?
 - ii. If so, does it constitute unfair discrimination?
 - iii. If so, is this unfair discrimination justifiable under section 36 of the Constitution?
- b) If this exclusion violates section 9(3) of the Constitution, can the word "spouse" in the Act be read to include spouses in polygamous Muslim marriages?
- c) If such an interpretation is not possible, what is the appropriate relief?

DECISION, RATIO AND OUTCOME (including minority judgment where applicable):

The Constitutional Court held that s 1 of the Intestate Succession Act unjustifiably infringed s 9(3) of the Constitution. The word 'spouse' in the Intestate Succession Act excluded widows to polygamous Muslim marriages which denied such group the protection intended for vulnerable woman in society. The Constitutional Court made the following determinations:

- a) Does the exclusion of spouses in polygamous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution?

The exclusion of spouses in polygamous marriages did not pass Constitutional muster. The Constitutional Court held that Intestate Succession Act differentiated '...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 polygamous Muslim marriages; and between widows

in polygamous customary marriages and those in polygamous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.'

The differentiation amounted to discrimination on the following listed grounds, in terms of s 9 of the Constitution, namely:

1. Religion - the particular religion concerned was in the past not one deemed to be worthy of respect;
2. Marital status - polygamous Muslim marriages are not afforded the protection other marriages receive;
3. Gender - only the wives in polygamous Muslim marriage are affected by the Intestate Succession Act's exclusion.

The unfair discrimination was unjustifiable under s 36 of the Constitution. It held that women are a vulnerable group in Muslim Communities and are prejudiced by the exclusion from the Intestate Succession Act.

b) If this exclusion violates section 9(3) of the Constitution, can the word "spouse" in the Act be read to include spouses in polygamous Muslim marriages?

The Constitutional Court considered the meaning of the word 'spouse' in the context of present South Africa. As it was not defined in the Intestate Succession Act, its meaning was informed by the Constitution. It stated that the significance and dignity attached to polygamous marriages has not lesser meaning than those of civil and African customary marriages. The Constitutional Court held that to read the word "spouse" so as to include multiple spouses would be a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the Act. Therefore, the word "spouse" as it is used in the Act could not be capable of being understood to include more than one partner to a marriage.

c) If such an interpretation is not possible, what is the appropriate relief?

The word, 'or spouses' was inserted after each word, 'spouse'. The insertion was of immediate effect, retrospective to estates that had not yet been wound up at the time of the judgment.

LINK TO FULL DECISION:

<http://www.saflii.org.za/za/cases/ZACC/2009/19.pdf>

LABELS: