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Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This case involved an application to appeal directly to the Constitutional Court against a judgment handed down in the Durban and Coast High Court. The application was refused by the Constitutional Court on the basis that it was premature: the issues raised in the matter were such that the appeal should first have been heard by the Supreme Court of Appeal.

Mrs Amod had been married in accordance with Islamic law. Her husband was killed in a motor vehicle collision caused by the negligent driving of another person. When she claimed damages for loss of the support of her deceased husband, the High Court was asked to decide whether the Multilateral Motor Vehicle Accidents Fund was legally liable to pay compensation.

Our courts have held in the past that a claim for loss of support will only succeed if the couple concerned were lawfully married in terms of the common law; and that Islamic marriages are not lawful at common law since they may allow a husband to have more than one wife. Mrs Amod argued that this rule should no longer be applied because society's views and values had changed in recent years and because the rule was inconsistent with the interim and final Constitutions.

The High Court found that, notwithstanding the provisions of the interim and final Constitutions, it did not have the power to strike down an established rule of common law. It could at most amplify existing legal principles in circumstances where our law did not give effect to a constitutional right. Hence it held that the Fund was not liable to compensate Mrs Amod.

The application for leave to appeal the decision directly to the Constitutional Court raised complex issues relating to the jurisdiction of this Court and of the Supreme Court of Appeal. In a unanimous judgment, the President of the Constitutional Court, Justice Chaskalson, expressed the view that the question whether the common law should be developed to allow a party to an Islamic marriage to claim damages for loss of support was of great importance and clearly deserved the attention of a higher court. The central question was *which* higher court.

Justice Chaskalson noted that, irrespective of which Constitution is said to govern the present case, the appeal falls within the jurisdiction of the Supreme Court of Appeal. That court enjoys the power and the expertise to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. It is thus desirable, in constitutional matters which depend on the development of the common law, for the Constitutional Court to have the benefit of the views of the Supreme Court of Appeal before being called upon to finally dispose of such a matter.