REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO. 1646/01

In the matter between:

JULEIGA DANIELS	**APPLICANT**
and	
ROBIN GRIEVE CAMPBELL N.O.	**FIRST RESPONDENT**
MELISSA FOURIE N.O.	**SECOND RESPONDENT**
SORAYA DANIELS	**THIRD RESPONDENT**
ADIELAH JAKOET	**FOURTH RESPONDENT**
SHAHIEDA MANUEL	**FIFTH RESPONDENT**
MOGAMAT SHARIEF MANUEL	**SIXTH RESPONDENT**
SARAH DANIELS	**SEVENTH RESPONDENT**
MINISTER OF JUSTICE	**EIGHTH RESPONDENT**
REGISTRAR OF DEEDS	**NINTH RESPONDENT**
MASTER OF THE HIGH COURT	**TENTH RESPONDENT**

JUDGMENT DELIVERED ON 1 SEPTEMBER 2003

BINNS-WARD AJ:

Introduction

[1] In the principal application, the applicant sought the following relief (I quote from the notice of motion):

1. Declaring that the Applicant was, for the purposes of the Intestate Succession Act, 81 of 1987, the spouse of Mogamat Amien Daniels at the time of his death and is an heir in the Estate of the Late Mogamat Amien Daniels

2. **In the alternative to paragraph 1 above**
   2.1 Declaring that the omission in Section 1(4) of the Intestate Succession Act, 81 of 1987, of the following definition is unconstitutional and invalid:
   " *'spouse' shall include a husband or wife married in terms of Muslim rites in a* ***de facto*** *monogamous union*"
   2.2 Declaring that Section 1(4) of the Intestate Succession Act, 81 of 1987, shall be read as though it included the following paragraph after paragraph (f):
   "(g) "'*spouse' shall include a husband or wife married in terms of Muslim rites in a* ***de facto*** *monogamous union*".
   2.3 Declaring that the orders in paragraphs 2.1 and 2.2 above shall have no effect on the validity of any acts performed in respect of the administration of an Intestate Estate that had been finally wound up by the date of this order

3. Declaring that the Applicant is for the purposes of the Maintenance of Surviving Spouses Act, 27 of 1990, the survivor of Mogamat Amien Daniels and is entitled to lodge a claim for maintenance in the Estate of the Late Mogamat Amien Daniels and to have such claim determined by the First Respondent.

4. **In the alternative to paragraph 3 above**
   4.1 Declaring that the omission from the definition of '*survivor*' in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, of the words "*and includes the surviving husband or wife of a* ***de facto*** *monogamous union solemnized in accordance with Muslim rites*" at the end of the existing definition is unconstitutional and invalid.
   4.2 Declaring that the definition of 'survivor' in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, is to be read as if it included the following words after the words "*dissolved by death*":
   "*and includes the surviving husband or wife of a* ***de facto*** *monogamous union solemnized in accordance with Muslim rites*".

[2] The applicant had been married to the late Mogamat Amien Daniels according to Muslim rites in a monogamous union until the latter's death in November 1994. The applicant's husband died intestate. The first and second respondents, who were the only parties to actively oppose

the application[1], are respectively the executors of the estates of the applicant's late husband and a deceased son of the latter by a previous marriage. They have refused to recognise the applicant for inheritance and maintenance purposes as the surviving spouse of the late M.A. Daniels within the meaning of the relevant provisions of the Intestate Succession Act, 1987 and the Maintenance of Surviving Spouses Act, 1990.

[3] The circumstances which led to the institution of the principal application have been described extensively in the detailed and closely reasoned judgment handed down on 24 June 2003 by van Heerden J. It is unnecessary to retraverse them. Suffice it to say that the facts provide a vivid illustration of the serious hardships and gravely unjust consequences which have arisen and continue to occur as result of an historically entrenched approach against the recognition for legal purposes of Muslim marriages. The creative and progressive approach manifested in the judgments in *Ryland v Edros 1997 (2) SA 690 (C)* and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening) 1999 (4) SA 1319 (SCA)*, both of which are discussed in some

[1] The eighth respondent, being the member of the national Cabinet responsible for the Administration of the Intestate Succession Act, 81 of 1987, and the Maintenance of Surviving Spouses Act, 27 of 1990, initially indicated an intention to oppose the application, but subsequently decided to abide the decision of the court.

detail in van Heerden J's judgment in the principal case, go to show how some of the hardship and injustice could have been avoided had a more intuitively just approach informed some earlier decisions of the superior courts. With the advantage of a current perspective, one realises that some of the earlier decisions were unfortunately the product of the ethos which prevailed at the time they were made; during a period when the diversity of South African society and the need for our legal system to develop in a manner to cater for it to went effectively unacknowledged.

[4] Van Heerden J made an order in terms of paragraphs 2 and 4 of the notice of motion. Although no order was made refusing the relief sought in terms of paragraphs 1 and 3 of the notice of motion, it is clear from the learned judge's reasons for judgment that she concluded, albeit 'with considerable reluctance', that the applicant was not entitled in law to the declaratory relief sought in those paragraphs.

[5] In terms of s 172(2)(a) of the Constitution, this court's orders concerning the constitutional invalidity of the statutory provisions in issue have no force unless they are confirmed by the Constitutional Court.

[6] The applicant has indicated that she intends to apply in terms of s 172(2)(d) of the Constitution for the

necessary confirmation. The applicant will also seek leave from the Constitutional Court to appeal directly to that court against the refusal of the relief sought by her in terms of paragraphs 1 and 3 of her notice of motion. The appeal, if it is permitted, will be prosecuted only if the Constitutional Court refuses to make the confirmatory orders. It makes no practical difference to the applicant whether she obtains final relief in terms of paragraphs 1 and 3, or paragraphs 2 and 4 of her notice of motion. Her concern is, however, that the Constitutional Court might refuse to confirm the constitutional invalidity orders on the grounds that upon a proper construction of the statutory provisions the applicant is a *spouse* and a *survivor* within the contemplation of the two statutes. The applicant fears that in that eventuality, she may be left with no relief at all. Whether the applicant's concern gives rise to a valid basis for this application is a question I shall address shortly.

[7] In terms of rule 18(2) of the Rules of the Constitutional Court, the applicant requires a certificate from this court certifying that it is in the interests of justice that her conditional appeal be brought directly to the Constitutional Court and that there is reason to believe

that the Constitutional Court may give leave to the applicant to note the appeal.

[8] The applicant was required in terms of the provisions of Constitutional Court rule 18(2) to make application on notice of motion to this court for the necessary certificate in terms of rule 18(6). In the absence of van Heerden J, consequent upon her appointment as an acting judge of appeal in the Supreme Court of Appeal ('SCA'), the application was heard by me.

Condonation for non-compliance with the Rule

[9] Rule 18(2) provides that any application for a certificate in respect of a direct appeal must be made within 15 days of the decision sought to be taken on appeal. The application in this matter was filed on 28 July 2003, some 24 days after the date of the judgment in the principal application. Until I raised the point with applicant's counsel during argument, the applicant's legal representatives were unaware that the application was out of time. The explanation I received from the bar was that the applicant's attorney had overlooked the time limit. Mr *Chaskalson,* who appeared for the applicant, requested condonation of the non-compliance with the prescribed time limit

[10] There is no express power afforded to this court in terms of the Constitutional Court rules to condone non-compliance with the rules. The existence of the power is, however, a question that has been considered before. In *Minister of Home Affairs and Others v Dawood and Another, Minister of Home Affairs and Others v Shalabi and Another, Minister of Home Affairs and Others v Thomas and Another 2000 (1) SA 1074 (C)* at 1081B-1082E, van Heerden AJ (as she then was) held that a High Court hearing an application in terms of rule 18(2) has the inherent power to condone non-compliance with the prescribed time limit. I concur in that opinion, but I would, with respect, formulate the reason for and the extent of the power somewhat differently.

[11] An application in terms of rule 18(2) is analogous in material respects to an application for leave to appeal from a decision of the High Court either to a Full Bench or to the SCA. The similarity in the procedures should, however, not obscure the critical differences that distinguish them. In the conventional application for leave to appeal, the High Court's decision to grant leave is finally determinative of the applicant's right to appeal. A positive certificate in terms of rule 18(2) on the other hand does not determine the applicant's right to appeal. It is merely

advisory in nature. The certificate is intended to assist the Constitutional Court in deciding the application for permission to appeal to it directly[2]. This application is merely the first part of a two-stage integral process in terms of the Rules of the Constitutional Court. The application to this court required in terms of Constitutional Court rule 18(2) is therefore a procedural requirement of the Constitutional Court rather than of this court.

[12] The characterisation of the procedure may be demonstrated by posing the question what would happen if this court were to refuse the application for condonation. Would that put an end to the applicant's application in terms of rule 18? I think not. The applicant in that situation could apply to the Constitutional Court for relief in terms of Constitutional Court rule 31. In doing so she would be applying for procedural relief in terms of the Rules of the Constitutional Court; she would not be appealing against this court's refusal of her application for condonation.

[13] I find further support for my view that rule 18 procedures are not properly characterised as procedures of this court in the exercise by the Constitutional Court of a power in terms of Constitutional Court rule 31 to dispose

[2] Mistry v Interim Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC) at paras [4]-[7].

altogether, in appropriate circumstances, with the necessity for an intending appellant to apply for a certificate in terms of rule 18(6). See *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC)* at paragraph [6], footnote 9.

[14] The somewhat unusual occurrence of a procedural provision in the rules of one court providing for a process in another is explained in this particular instance by the provisions of s 167(6) of the Constitution[3].

[15] It would be impractical and contrary to the efficient administration of justice to require condonation applications such as the one required in this case to be heard, at least initially, by the Constitutional Court. The implication of a power in this court to grant condonation provisionally and subject to the confirmation of the Constitutional Court in the context of any subsequent application in terms of rule 18(7) would seem to be the appropriate way to reconcile the practical exigencies with the fact that it is the procedures of the Constitutional Court

[3] '*National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court-*
(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.'

rather than this court that are being regulated. It seems to me therefore that any condonation granted by a High Court for non-compliance with sub-rule (2) probably requires the endorsement of the Constitutional Court itself as part of the application in terms of sub-rule (7).

[16] In provisionally granting condonation this court would be assuming a power necessarily incidental in the interests of justice, rather than regulating its own process[4]. I therefore consider that it would be proper for a party which has obtained condonation from a High Court for its non-compliance with any requirement of rule 18(2) to apply in any application in terms of rule 18(7) to the Constitutional Court for an endorsement or confirmation of such condonation.

[17] . No prejudice was caused by the 9 day delay and Ms *Bawa*, who appeared for first and second respondents' did not oppose condonation of the late filing of the application[5]. In the circumstances, the applicant's non-compliance with the prescribed time limit was condoned. The provisional nature of such condonation follows on what has been said in the preceding paragraphs.

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[4] Cf. s 173 of the Constitution.
[5] The first and second respondents abided the decision of this court in respect of the rule 18(2) application.

The necessity, in the circumstances postulated by the applicant, for any appeal, at all

[18] As pointed out, the applicant makes this application because she is concerned that the Constitutional Court might refuse to grant a confirmatory order in terms of s 172(2) of the Constitution on the grounds that the applicant is a *spouse* or a *survivor* within the meaning of the two statutes, as currently worded. That narrow basis is the only ground upon which it is alleged that the applicant needs to have available to her the alternative remedy of an appeal.

[19] I doubt whether a right of appeal is necessary in the circumstances postulated by the applicant. In my view, should the Constitutional Court decide to refuse to confirm the orders of constitutional invalidity made by this court on the grounds that the proper construction of the statutes allows for the applicant to be recognized as a *spouse* or a *survivor* for their respective purposes, the reasoning of the Court in support of any such conclusion would constitute a definitive interpretation of the statutes. By ‘definitive’, I mean to express the notion of a final and binding determination. I consider the description appropriate for two reasons. Firstly, having regard to the status of the Court, jointly with the SCA, as the highest court in the land; and secondly, on the basis that the situation

postulated by the applicant's application would necessarily entail the Court's finding being the *ratio decidendi* for the Court's negative decision of the s 172 application.

[20] The Court's *ratio decidendi* in any judgment of the nature postulated by the applicant's application for conditional leave to appeal would have the force of law. Cf. *Fellner v Minister of the Interior 1954 (4) SA 523 (A)* at 533A, 537A - E, 542E–G. As such, even if not reflected in an order of the Court, the reasons would bind not only the parties to the principal application, but also anybody else in respect of whom the provisions of the statutes might apply currently, or in the future.

[21] The applicant did not seek consequential mandatory interdictory relief in the principal application. In the event of any of the respondents failing or refusing to administer the deceased estates consistently with the *ratio decidendi* of any judgment of the Constitutional Court determining that a person in the applicant's situation is a *spouse* or *survivor* for the purposes of the two statutes in issue, any court subsequently approached by the applicant for appropriate mandatory relief would be bound to grant it to her. There is therefore no valid basis for the applicant's concern that, in the circumstances postulated for the purposes of her application for leave to appeal, absent

declaratory orders made on appeal in terms of paragraphs 1 and 3 of her notice of motion, she would forfeit any right to have the estates administered consonantly with the *ratio decidendi* of a judgment by the Constitutional Court refusing her application in terms of s 172(2) of the Constitution.

[22] In the result, had the decision to grant leave to appeal been within my province, I would have refused it as being unnecessary in the interests of justice in this case. However, as the function of this court is only to give a certificate (which can be positive or negative, or partly positive and partly negative), and therefore essentially advisory in nature, it seems appropriate nevertheless to address the criteria to be dealt with in terms of rule 18(2), in case the Constitutional Court does not agree with my view that an appeal on the basis postulated by the applicant is unnecessary.

Can it be said that this Court made a decision that is appealable?

[23] As remarked in paragraph 4, above, van Heerden J did not make an order refusing relief in terms of paragraphs 1 and 3 of the notice of motion. Nevertheless, as I remarked earlier, it is clear from the reasons for judgment that the

learned judge decided against the applicant's entitlement to the relief sought in terms of those paragraphs. It is now firmly established that, for the purpose of Constitutional Court rule 18, 'decision' has a wider meaning than 'order'[6]. On that basis, I am therefore satisfied that this court made a 'decision' declining to grant relief in terms of paragraphs 1 and 3 of the notice of motion and that such decision is appealable, subject to the Constitutional Court being satisfied that it is in the interests of justice to entertain the appeal.

Would the intended appeal raise a constitutional matter of substance?

[24] Mr *Chaskalson* submitted that the issues raised by the relief sought in terms of paragraphs 1 and 3 of the notice of motion in the principal application were 'constitutional matters' because the determination of the disputed construction of the statutory provisions in issue entails the application of the principles of interpretation enjoined in

[6] See Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at para [8] and the authority cited in fn 7

terms of s 35(2) and/or s 35(3) of the Interim Constitution[7]. It was the applicant's case that a restrictive construction would result in unfair discrimination against the surviving spouses of Muslim marriages on grounds of religion, culture and marital status. In the circumstances, I accept that the characterisation of the interpretation question as a 'constitutional matter' is correct[8].

[25] The matter is one of 'substance' because a determination of the interpretation of the statutory provisions potentially will affect, in a very material way, the position of a significant number of persons in a community which is an important constituent in our diverse society.

[26] Accordingly, if the Constitutional Court could be persuaded that the words *spouse* and *survivor* in the two statutes do include parties to marriages in terms of Muslim

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[7] Section 35(2) and (3) provided:

> (2)*No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.*
> (3) *In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.*

[8] Cf Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others 2001 (1) SA 545 (CC) at paras [21]-[26]. (The dicta of Langa DP were uttered in respect of the effect of s 39(2) of the 1996 Constitution, but they apply equally in the context of s 35 of the Interim Constitution; cf. Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA) at para [10].)

rites in *de facto* monogamous marital relationships a ruling to that effect would appear to be desirable.

Is the evidence sufficient to enable the Constitutional Court to deal with and dispose of the matter without the need to refer the case back to this court for further evidence?

[27] The connotation of the word 'spouse', if *generally* extended beyond a partner in a marriage solemnised in accordance with the provisions of the Marriage Act, 25 of 1961, may have very wide repercussions. In *Fourie and Another v Minister of Home Affairs and Another* (CCT 25/03 -judgment dated 31 July 2003), the applicants, who are partners in a permanent same sex relationship, sought an order directing the first respondent to register their union as a marriage in terms of the Act. The Transvaal High Court refused the application and thereafter gave a negative certificate in terms of rule 18(6) in the subsequent application for leave to appeal directly to the Constitutional Court. The latter Court dismissed the application for leave to appeal directly to it. In its reasons, the Court pointed out[9] that there are at least 44 Acts of Parliament on the statute book in which reference is made

[9] In para [12], at fn 19

to 'husband' and/or 'wife', either in the body of the Act or in the regulations to the Act, and held:

> 'This appeal is likely to raise complex and important questions of the legal conformity of our common law and statutory rules of marriage in the light of our Constitution and its resultant jurisprudence. Marriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover marriage touches on many other aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large. While considerations of saving costs, and of "an early and definitive decision of the disputed issues" are in themselves weighty, they should not oust the important need for the common law, read in the light of the applicable statutes, to develop coherently and harmoniously within our constitutional context. The views of the SCA on matters that arise in the appeal are of considerable importance. The nature of the dispute raised by the appeal is, as the High Court correctly held in issuing a negative rule 18(2) certificate, pre-eminently suited to be considered first by the SCA.'[10]

[28] Of even more immediate pertinence in the present matter, in its recent report on Islamic Marriages and Related Matters, the South African Law Reform Commission ('SALRC'), having proposed the following amendments to the statutes in issue in the present case:

> 'Section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987) is hereby amended by the addition to subsection (4) of the following paragraph:
> "spouse" shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply -
> (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;
> (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section."
>
> Section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the insertion after the definition of "survivor" of the following definition:

[10] At para [12]

> "Marriage" shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion." ',

went on to note a measure of opposition to the proposed amendments from parts of the Muslim community. The opposition was based on the inconsistency between the proposals and the Islamic law of succession, which, as appears from the evidence in the present case, provides that a widow inherits one eighth of her husband's estate on intestate succession. At paragraph 3.304 of the report, the SALRC '*noted and agree*[d] *with the submission to the effect that the Islamic law of succession should apply, in the case of Muslim persons dying intestate. For the time being, the Commission decided to provide interim relief by broadening the definition of "spouse" in the Intestate Succession Act, to ameliorate the plight of spouses in Muslim marriages. The Commission, however, agrees that there should be a proper but separate investigation into the recognition and application of the Islamic law of succession within the existing Constitutional framework, thereby providing substantive relief in this regard. Parties are free to leave a will in terms of which their estates will devolve according to Islamic law.*'

[29] When I put these considerations to Mr *Chaskalson*, in particular the further investigation proposed by the

SALRC, and questioned whether a wider investigation involving further evidence might not be indicated, he submitted that the position in the present matter was distinguishable. The question here does not involve developing the common law as would be necessary to hold that persons of the same sex can validly be married to each other. Counsel pointed out that men and women married in accordance with Muslim rights are generally accepted in South Africa as spouses, at least in the colloquial, if not always in the statutorily ordained senses of the word. This is undoubtedly so. Nor do the issues raised by paragraphs 1 and 3 of the notice of motion entail deciding whether as a matter of policy the Islamic law of intestate succession should apply to persons who elect to have that system govern the consequences of their marriage (the apparent object of the further investigation recommended by the SALRC). They go rather to whether the words *spouse* and *survivor* in the Intestate Succession Act and the Maintenance of Surviving Spouses Act, respectively, are capable of being read in conformity with the Constitution to carry the meanings for which the applicant contends.

[30] I agree that the issue is properly amenable to being defined in the manner contended by applicant's counsel. I am of the opinion that if the issue is so defined the

necessary determination of the interpretation questions will not require a general extension of the notion of who may be a ‘spouse’ in common law, nor will it involve deciding the meaning of the relevant words in the context of other statutes. On that basis, the evidence is sufficient, in my view, for the Constitutional Court to dispose of the intended appeal, should it agree to hear it. In such circumstances, it would also be interests of justice having regard to time and costs considerations (the winding up of the applicant’s husband’s apparently simple deceased estate has been delayed for nigh on ten years already) for the matter to be disposed of in the manner sought by the applicant.

Is there a reasonable prospect that the Constitutional Court will reverse or materially alter the judgment if permission to grant the appeal is given?

[31] This court concluded that the word ‘spouse’ in the context of the two statutes in issue could not properly be construed to include persons party to marriages according to Muslim rites which had not been registered in terms of the Marriage Act. Van Heerden J was mindful of the limits of the principle of reading in conformity. The principle does not permit an unduly strained interpretation of the language used by the legislature. However, inherent in the

nature of the limit to the application of the principle is the exercise of determining just where the bounds of linguistic flexibility fall to be drawn. In that context the scope for legitimate difference of judicial opinion will often be very real.

[32] The considerations which weighed particularly with this court in reaching the conclusion that, in the absence of an appropriate deeming or interpretative provision, 'spouse' had to be given 'its traditional limited meaning' were the history of recent amendments to a variety of statutes introducing provisions which expressly accommodated Muslim marriages as marriages for the purposes of the individual statutes concerned, and also the approach manifested in two judgments of the Constitutional Court in which the interpretation of 'spouse' arose for consideration. (These judgments were *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others 2000 (2) SA 1 (CC)* and *Satchwell v President of the Republic of South Africa & Another 2002 (6) SA 1 (CC)*. In those matters the question was the extension of the meaning of the word 'spouse' to include parties in permanent same sex partnerships. The context was the provisions of two different statutes, both unrelated to those in issue in this case.)

[33] Van Heerden J's reasoning in these respects would find support in the subsequent judgment in *Fourie's* case, mentioned earlier, and in the amendments, described above, proposed by the SALRC to the Intestate Succession Act and the Maintenance of Surviving Spouses Act as 'a measure of interim relief'.

[34] The question in this application is not whether this court's approach on the proper interpretation of the words in issue was right or wrong, but rather whether there is a reasonable prospect[11] that another court might be persuaded on appeal that the word 'spouse' could be construed contextually as contended on behalf of the applicant. Accordingly, it should be clearly understood that in what follows I should not be mistaken to be in any way signifying disagreement with the relevant part of van Heerden J's judgment. The reasoning set out hereafter is merely intended to show why I have concluded that there is a reasonable prospect that another court *might* in an appeal come to a different conclusion to that reached by this court in respect of the applicant's right to declaratory relief in terms of paragraphs 1 and 3 of the notice of motion.

[11] In the sense of that expression as defined in Rex v Ngubane and Others 1945 AD 185 at 187.

[35] Context is a critical criterion in statutory interpretation[12]. Therefore, it does not necessarily follow that because the legislature has deemed it necessary or desirable in certain statutes to make express provision for the recognition of Muslim marriages for the purposes of those enactments the same considerations necessarily apply in the context of the statutes in issue in this case. I have little doubt, for example, that there could be no valid basis to construe the word 'spouse' in s 35(2)(f) of the Constitution as not including a party to a Muslim marriage, even if the words 'or partner' were not conjoined thereto. It would be subversive of the policy rationale for the provision to interpret it more restrictively. The apparent policy underlying the relevant provisions of the two statutes under consideration in this case is to promote the welfare and economic self-sufficiency of surviving spouses. The policy arguably also has attendant objectives bearing on more centrally personal rights like the right to human dignity. These considerations *might* reasonably be considered by the Constitutional Court sufficient to warrant a less restrictive construction of the words than this court considered could properly be accorded.

[36] It is arguable that the recently enacted deeming or interpretative provisions introduced in a number of statutes

[12] See e.g. Jaga v Dönges NO and Another; Bhana v Dönges NO 1950 (4) SA 653 (A) at 662G-664H

should be characterised as merely expositionary in character. The purpose of expositionary legislation is not to alter the effect of an existing statutory, but merely to express it more clearly and to put its meaning and effect beyond debate[13]. That *might* be held to explain some of the recent statutory amendments to which reference was made in the judgment in the principal application.

[37] I have referred above to the distinction Mr *Chaskalson* drew between the question posed in the present matter and the issue of whether same sex partners can properly or feasibly be characterised as spouses. His argument does not lack cogency.

[38] In the circumstances, if the Constitutional Court were persuaded to entertain it, I consider that it would be fair to allow that the intended appeal would enjoy a reasonable prospect of success.

[39] For these reasons a certificate (which is partly negative and partly positive) will issue in the terms set out below.

[13] Cf. e.g. National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC) at para [66]; Patel v Minister of the Interior and Another 1955 (2) SA 485 (A) at 493A-F.

Conditional Leave to appeal to the Supreme Court of Appeal

[40] I raised with Mr *Chaskalson* whether the applicant would want leave to appeal to the Supreme Court of Appeal in the event that the Constitutional Court refused the application in terms of s 172(2) of the Constitution on grounds other that postulated in this application. Mr *Chaskalson* said that such an application had not been made because the applicant did not want at this stage to incur the costs of complying with the requirements of the SCA after leave to appeal to that court had been granted. When I pointed out that this court could grant leave to appeal to the SCA conditionally together with a direction that the effectiveness of the order be suspended until after the completion of the intended proceedings before the Constitutional Court[14], applicant's counsel applied orally for such leave on the contingent basis postulated by me. This application was not opposed by Ms *Bawa*.

[41] Having regard to the narrow basis on which the application for leave to appeal has been brought and the considerations discussed at paragraphs [18]-[22], above, I do not think that it would be appropriate on the papers

[14] That course was followed in Dawood's case (cited in para [10], above); see paragraph 3 of the order made in that matter and the reasons for judgment at 1086H-1087A and the other cases referred to there.

before me to grant conditional leave to appeal to the SCA at this stage. Dependent on the outcome of the proceedings in the Constitutional Court the applicant may desire leave to appeal to the Full Bench or to the SCA on grounds other than those relied on the present application. To allow for that contingency, I shall give a direction that the applicant shall be permitted, if so advised, to make application to this court for such leave within 15 days of the completion of proceedings in the Constitutional Court.

Orders

[42] Accordingly, the following orders are made:

1. The applicant's non-compliance with the time limit prescribed in terms of rule 18(2) of the Rules of the Constitutional Court is provisionally condoned;

2. A certificate is issued in terms of rule 18(6) of the Rules of the Constitutional Court in the following terms:

    1. Subject to the (negative) opinion expressed in paragraphs [18]-[22] of the accompanying reasons, and if permission to bring the appeal

is given, it is certified to be the opinion of this court that it would be in the interests of justice for the intended appeal to be brought directly to the Constitutional Court conditionally on the dismissal by that Court of the application for relevant confirmatory orders in terms of s 172(2) of the Constitution.

2. Subject to the (negative) opinion expressed in paragraphs [18]-[22] of the accompanying reasons, there is reason to believe that the Constitutional Court may give the applicant leave to appeal conditionally, directly to that Court.

3. The constitutional matters which are the subject of the intended conditional appeal are matters of substance in respect of which, in the circumstances postulated by the application for this certificate, a ruling by the Constitutional Court is desirable.

4. The evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and dispose of the matter without having to

refer the matter back to this court for further evidence.

5. There is a reasonable prospect, if permission to bring the appeal is given and the condition upon which it is sought to appeal is satisfied, that the Constitutional Court may reverse this court's decision that the applicant was not entitled to relief in terms of paragraphs 1 and 3 of her notice of motion.

3. The applicant is given leave to apply to this court for leave to appeal to the Supreme Court of Appeal or to the Full Bench, if necessary, and if so advised, within 15 days of the completion of the intended proceedings in the Constitutional Court

4. There will be no order as to costs.

A.G. BINNS-WARD