

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 40/03

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

ADELAH 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

**SUBMISSIONS ON BEHALF OF EIGHTH RESPONDENT IN REGARD
TO THE DECLARATION OF INVALIDITY OF SECTION 1(4) OF THE
INTESTATE SUCCESSION ACT 81 OF 1987 AND SECTION 1 OF THE
MAINTENANCE OF SURVIVING SPOUSES ACT 27 OF 1990**

1.

On 24 June 2003, the Cape Provincial Division of the High Court granted an order in the following terms:-

- 1.1 The omission from Section 1(4) of the Intestate Succession Act 81 of 1987 of the following definition is declared to be unconstitutional and invalid:- "*spouse' shall include a husband or wife married in accordance with Muslim rites in a **de facto** monogamous union*"
- 1.2 Section 1(4) of the Intestate Succession Act 81 of 1987 is to be read as though it included the following paragraph after paragraph (f):- "*(g) 'spouse' shall include a husband or wife married in accordance with Muslim rites in a **de facto** monogamous union*".
- 1.3 The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of this order.

1.4 The omission from the definition of "*survivor*" in Section I 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 solemnised in accordance with Muslim rites*" at the end of the existing definition, is declared to be unconstitutional and invalid.

1.5 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 solemnised in accordance with Muslim rites*".

2.

ORDER BEFORE CONSTITUTIONAL COURT

2.1 The declaration of invalidity as set out in paragraph 1.1 and 1.4 above comes before this Court in terms of Rule 15 of the Constitutional Court Rules (Rules) for confirmation in terms

of Section 167(5)¹ and 172(2)(a)² of the Constitution.

3.

PRESENCE OF EIGHTH RESPONDENT AT HEARING

The Eighth Respondent is requested in terms of Section 8(2) of the Constitutional Court Complementary Act of 1995 to be represented at the hearing of the confirmation proceedings on 6 November 2003 to present argument on the Government's position in regard to the declaration of invalidity and its attitude to the terms of the order made by the Cape Provincial Division in this matter.

4.

1. It reads:-

"The Constitutional Court makes the final decision whether an Act of Parliament, a Provincial Act or conduct of the President is constitutional, and must confirm an order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

2. This section reads:

"The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

FACTS OF THE CASE IN THE COURT A QUO

The Applicant, an adult Muslim female, sought an order, *inter alia*, in the Cape Provincial Division (Court *a quo*) declaring that she was for the purposes of the Intestate Succession Act, 81 of 1987, the spouse of a certain Mogamat Amien Daniels (to whom she was married by Islamic rites) at the time of his death and is an heir in the estate of the Late Mogamat Amien Daniels. The Applicant was initially married to a certain Mogamat Amien Wilson in 1969. The parties subsequently divorced. In October 1976, the City of Cape Town allocated a certain immovable property to the Applicant, and the latter took occupation on 15 October 1976 up until the date of the Application. On 2 March 1977, the Applicant married the late Daniels by Islamic rites. The City of Cape Town transferred the tenancy of the property to the deceased on 17 July 1978. On 21 May 1990, the deceased purchased the property from the City of Cape Town. The deceased died on 27 November 1994, leaving no will. The immovable property is the main asset in his deceased estate. Applicant and deceased have no children between them. The deceased has four children from a previous marriage who are party to the proceedings.

5.

THE CONSTITUTIONALITY OF SECTION 1(4) OF THE INTESTATE SUCCESSION ACT 81 OF 1987 AND SECTION 1 OF THE MAINTENANCE OF SURVIVING SPOUSE ACT 27 OF 1990

5.1 The Court *a quo* held that in neither the Intestate Succession Act 81 of 1987 nor the Maintenance of Surviving Spouse Act 27 of 1990 (the Acts), was the word “*spouse*” defined. The word “*spouse*” must refer to a party in a marriage concluded in accordance with the marriage laws recognised in South Africa. As such, it excludes a marriage entered into between parties in accordance with the tenets of the Islamic law. Such marriages were not recognised by the South African Courts as valid (legal) marriages, firstly because such marriages are potentially polygamous and hence contrary to public policy and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961.

5.2 After an in depth analysis of the case law and the *bona*

mores of the community at the time when the cause of action arose in the proceedings before the Court *a quo*, Van Heerden J held that the inequality, arbitrariness and intolerance inherent in supporting a conclusion which denies a duty of support arising from a *de facto* monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action, but which affords to the same duty of support arising from a similarly solemnised marriage in accordance with the Christian faith full recognition in the same common law for the same purpose, and whichever affords to polygamous marriages solemnised in accordance with African customary law exactly the same protection for the same purpose, "*would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced*".

- 5.3 Van Heerden J accepted that the provisions of Section 35(3) of the Interim Constitution and Section 39(2) of the Constitution allowed for the new method of interpreting statutory provisions. Such interpretation was but, in Her Ladyship's view, one of two processes. The process under

39(2) was an interpretative one and was limited to what the text is reasonably capable of meaning. In Her Ladyship's view, the word "*spouse*" was not capable of being reasonably interpreted to extend to a husband or wife in a *de facto* monogamous Muslim marriage³.

5.4 On the other hand, the second process was that of reading words into or severing them from a statutory provision which is a remedial measure under Section 172(1)(b), which follows upon a declaration of constitutional invalidity under Section 172(1)(a).

5.5 In investigating whether the definitions in the Acts impugned the provisions of the Constitution and in determining the Constitutional validity of the definition of spouses, Van Heerden J, tested the definition against Section 8 of the Interim Constitution. Reliance was placed upon the decision of **Harksen**⁴, in respect of the stages of inquiry to be undertaken. On the basis of the first stage of the inquiry, as

3. See Judgement: par [E-F] page 989.

4. **Harksen V Lane NO & Others 1998(1) SA 300 (CC)**; Judgement par [42] page 994.

postulated in **Harksen**, Van Heerden J found that religion, beliefs and culture are all prohibited grounds of discrimination expressly listed in Section 8(2) and the failure to accommodate those beliefs by the Acts, constituted unfair discrimination. In the light of this conclusion, Van Heerden J found it unnecessary to embark upon the rational connection enquiry. Having found that the impugned provisions of the Acts were in breach of Section 8 of the Interim Constitution, the question which arose, was whether the provisions of the Acts were justified in terms of Section 33. Van Heerden J found that *“until such time as Muslim personal law, particularly the Muslim law of succession has been recognised by the legislature and regulated in a manner consistent with the values underlying the South African Constitution, there is no justification for the limitation of the equality rights of persons in the position of the Applicant”*.

5.6 On the basis of these conclusions, and by virtue of the provisions of Section 38 of the Final Constitution, Van Heerden J was enabled to grant appropriate relief including a declaration of rights. In the present case, the Court a quo

found that the provisions were constitutionally invalid but that further ancillary relief to include a “*reading into*” the invalid provisions was justifiable⁵.

6.

We submit that the declaration of invalidity as concluded by Van Heerden J, is justified and correct.

7.

REPORT BY SOUTH AFRICAN LAW COMMISSION

7.1 The South African Law Commission under Project 59 has published its report in July 2003 on Islamic marriages and related matters and has recommended as follows viz:-

7.1.1 The amendment to the Intestate Succession Act 81 of 1987 by broadening the definition of a

5. Judgement: par [D-E] page 1002.

“*spouse*” to cover the spouse/s of a Muslim marriage;

7.1.2 A corresponding amendment was made to the Maintenance of Surviving Spouses Act 27 of 1990.

7.2 In the view of the Commission, such amendment would alleviate the hardships endured by Muslim spouses who, in the past, have not enjoyed such recognition. This however, did not prevent any Muslim person from ensuring, by making a will that his or her estate would devolve in terms of Islam Law.

7.3 The Commission proposed a draft Bill and summarised its effect as follows viz:-

- (a) The Bill seeks to offer an elective option to persons who have either already contracted Muslim marriages, or wish to do so.
- (b) The purpose of the option is to present an opportunity

for persons in the Muslim faith who wish to have a matrimonial regime which balances an allegiance to their personal law with a matrimonial framework within the protection of a post-constitutional statute.

(c) The policy approach is to allow those already married under Islamic law to opt out of the new regime if they wish; those henceforth marrying under Islamic law may however opt in.

(d) If parties in either category decline or omit to register their Muslim marriage, it is not rendered invalid. The option afforded by the Bill will simply not be taken up.

7.4 A copy of the recommendations is annexed hereto marked "A".

7.5 In the proposed draft Bill, amendments similar to the relief granted by the Court *a quo* have been proposed at Section 21 of the said Bill.

7.6 A copy of Section 21 together with Schedule A thereto of the proposed draft Bill is annexed hereto marked "B".

8.

The Eighth Respondent submits as is evident from the Commissions recommendations and more particularly the draft Bill that it has always been the view of the Commission and the Eighth Respondent that the failure by the Acts to incorporate persons married according to Islamic Rites would not be constitutionally valid and that the need to redress the situation has been dealt with by the Eighth Respondent.

We thus submit that the Order of the Court *a quo*, as set out in paragraphs 1.1 and 1.4 above are subject to confirmation by this Court and should be confirmed in terms of Section 167(5) and 172(2)(a) of the Constitution.

DATED AT PRETORIA THIS 24th DAY OF OCTOBER 2003

ADVOCATE NELLY CASSIM SC

ADVOCATE A KALLA

LIST OF AUTHORITIES

1. Harksen v Lane 1998 (1) SA 300 (CC)
2. Daniels v Campbell NO and Others 2003 (9) BCLR 969 (C)

Reports

1. Report of the South African Law Commission on Islamic Marriages and Related Matters (Project 59, June 2003)

3.354 The **Society of Advocates of KwaZulu-Natal** compliments the Commission on presenting a fairly balanced Bill, stating that contentious issues have been dealt with a degree of sensitivity, sound logic and argument. Regarding contamination of Muslim Personal law within the context of a dominant system of secular law, the respondent holds the view that as the proposed legislation is to be interpreted with the objectives that are consistent with Islamic law, the fear that MPL would be subsumed by a dominant system is misplaced.

3.355 The **Commission on Gender Equality** commends the Commission on the work that it has done. In their view the draft Bill will go a long way towards alleviating the problems that existed as a result of non-recognition of Muslim marriages and will assist many women who have been suffering as a result of the manner in which Islamic law has been practised.

3.356 The joint submission by **F Noormohamed, H Rawat and F Mall** acknowledges that a great deal of effort has been put in to ensure compatibility and consistency between the proposed draft Bill and Islamic law.

Recommendation

3.357 The Commission considered representations calling for a comprehensive overview of the Islamic law of succession. In the Commission's view, the issues that were raised in respect of succession are complex and manifold - to the extent that they cannot be dealt with satisfactorily within the scope of the current investigation. However, provision was made to amend the Intestate Succession Act 81 of 1987 by broadening the definition of a "spouse" to cover the spouse/s of a Muslim marriage (see the Schedule to the proposed draft Bill). A corresponding amendment was made to the Maintenance of Surviving Spouses Act 27 of 1990. This would alleviate the hardships endured by Muslim spouses who in the past have not enjoyed such recognition. Of course this does not prevent any Muslim person from ensuring, by making a will, that his or her estate will devolve in terms of Islamic law.

3.358 The mood at the three workshops conducted in October 2002 was good.

Enthusiasm was high and there was a genuine appreciation that all views were considered. In the Commission's view, the vast majority of participants countrywide were in favour of the draft Bill. Earlier reservations on the part of some have given way to enthusiastic support

3.359 Further to the discussion in paragraphs 3.67 to 3.69 regarding clause 2 (application of the Act) and paragraphs 3.137 to 3.139 regarding clause 6 (registration of Muslim marriages), the Commission wishes to draw attention to and amplify the practical realities resulting from those proposals. The basis of the proposals is that the Act – that is the proposed draft Bill – will apply in respect of future marriages (ie marriages concluded after commencement of the Act), where the parties elect to be bound by the Act. This may be referred to as an opting in scenario, where the parties are able to choose upfront which marital regime should apply to them. In respect of existing marriages the Act will apply automatically, unless the parties jointly elect, within 12 months after commencement of the Act, not to be bound by it – in other words an opting out scenario. Clause 2(3) provides that parties who have exercised an option not to be bound by the provisions of the draft Bill, will be governed by the law as it was before the Act came into operation.

3.360 It may be said that there is an apparent inconsistency between the opting in scenario, for future marriages, and the opting out one, for existing marriages. In the first instance, there is no default system namely that the Act applies unless parties opt out. In the second instance, a default system applies, namely that the Act applies unless the parties opt out. The Commission considered that it is logical and consistent that parties who chose in the past to marry by Muslim rites, should have their values in terms of the provisions of the Act enforced and applied. However, those who voice the view that they would rather have the law as it was before the Act came into operation apply to them, than what they consider to be a distorted form of Islamic law in the form of the draft Bill, should be afforded an opportunity to opt out of the provisions of the Act and consequently have the provisions of clause 2(3) apply to them. As stated earlier, women's groups, because of the proprietary and other benefits flowing from the draft Bill, urged the Commission, firstly not to allow for choice, but submitted that if the Commission was inclined to afford a choice, the provision should be as is presently contained in clause 2(2).

3.361 It should be pointed out that the scenarios sketched differ from the regime introduced by the Matrimonial Property Act 88 of 1984. Section 2 of that Act provides that every marriage which is entered into after the commencement of the Act (future marriages), is subject to the accrual system – except in so far as that system is excluded by the provisions of an antenuptial contract. Section 21 of that Act provides for an *opting in* period for existing marriages. Again, the Commission’s rationale for recommending an opting out scenario in respect of existing Muslim marriages, which requires a positive act by the parties, is aimed at the protection of women in such marriages, has been called for by Muslim women themselves, keeps pace with Government’s commitment of enhancing the position of vulnerable groups and gives effect to the constitutional requirement of equality. It is accepted that requiring a positive act to do something, in this case, opting out, is more cumbersome than not being required to do anything. Thus it is envisaged that the serious disadvantages suffered by Muslim women whose marriages are not recognised as amply demonstrated by recent court decisions,¹ will be contained.

3.362 Clause 6 requires the registration of both future and existing marriages, but also states that the failure to register existing marriages will not invalidate such marriages. This effectively means that registration is strictly speaking not required and that parties who fail to register existing marriages without an election to opt out of the provisions of the Act, will still enjoy the protections afforded by the Act. The rationale is that there are sections of the Muslim community who because of illiteracy, lack of means or infirmity are unable to comply with the prescribed formalities. It was felt that these persons should not be deprived of the benefits of the Act. Registration, however, will promote legal certainty and is encouraged.

3.363 To summarise the effect of the proposed Bill:

- (a) The Bill seeks to offer an elective option to persons who have either already contracted Muslim marriages, or wish to do so.
- (b) The purpose of the option is to present an opportunity for persons in the Muslim faith who wish to have a matrimonial regime which balances an allegiance to their personal law with a matrimonial framework within the protection of a post-constitutional statute.

¹ Cf *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) and *Daniels v Campbell NO and Others* Case No 1646/01 (CPD), judgement delivered on 24 June 2003.

- (c) The policy approach is to allow those already married under Islamic law to opt out of the new regime if they wish; those henceforth marrying under Islamic law may however opt in.
- (d) If parties in either category decline or omit to register their Muslim marriage, it is not rendered invalid. The option afforded by the Bill will simply not be taken up.

3.364 There will be critics of this approach on either side: those who would wish to make the Bill compulsory, and those who oppose even the elective chance offered. The Commission however notes that the consultative process of the project committee has been one of the most difficult, extensive and strenuous in the history of the Commission. An attempt at legislation which does not seek to balance matters in a way which offers a unique post-constitutional option to follow a personal law within a statutory framework in a manner compliant with the Bill of Rights, but which does not force this course, is, in the Commission's view, the only course.

3.365 The Commission recommends the enactment of the draft Bill as contained in **Annexure A** to this Report. The Bill is based on the proposals made in Discussion Paper 101, but has been amended in the light of the comments received on that Paper as well as inputs made at the workshops referred to. In order to facilitate a distinction between the Bill as originally proposed and the amended version, the draft Bill as proposed in Discussion Paper 101 has been included in this Report as **Annexure B**.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Costs in a divorce action

19. The *court* shall not be bound to make an order of costs in favour of the successful party in a divorce action, but the *court* may, having regard to the means of the parties and their relevant conduct, make such an order as it considers just, and the *court* may order that the costs of the proceedings be apportioned between the parties.

Recognition of foreign *Muslim marriages*

20. In the event of a *dispute* relating to whether or not a *Muslim marriage* celebrated in a foreign country is recognised as a valid *Muslim marriage* under *this Act*, such *dispute* shall be determined by the *court* having regard to all relevant factors, including the principles of conflict of laws.

Amendment of laws

21. The Acts specified in the Schedule are hereby amended to the extent set out in the third column of the Schedule.

Short title and commencement

22. *This Act* is called the Muslim Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule

Note: [] Words in **bold** type in square brackets indicate omissions from existing enactments.

— Words underlined with a solid line indicate insertions in existing enactments.

LAWS AMENDED BY SECTION 21

No. and year of law	Short title	Extent of repeal or amendment
Act 47 of 1937	Deeds Registries Act	<p>1. The amendment of section 17–</p> <p>(a) by the substitution for paragraph (b) of subsection (2) of the following paragraph:</p> <p style="padding-left: 40px;">(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998, <u>or is governed in terms of section .. of the Muslim Marriages Act, 20..;</u></p> <p>(b) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">(4) Where immovable property, a real right in immovable property, a bond or a notarial bond–</p> <p style="padding-left: 80px;">(a) is registered in the name of a person who has married since the registration took place;</p> <p style="padding-left: 80px;">(b) is registered in the name of a person who on the date of registration was married out of community of property or whose marriage was on that date governed by the law of another country, and whose marriage was subsequently dissolved by death or divorce;</p> <p style="padding-left: 80px;">(c) forms an asset in a joint estate and was registered in the name of the husband only; or</p> <p style="padding-left: 80px;">(d) is registered in the name of a person who on the date of the registration was a party to a marriage governed by the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) <u>or a marriage governed by the Muslim Marriages Act, 20..,</u></p> <p>the registrar shall on the written application by the person concerned and on the submission of the deed in question and of proof of the relevant facts, endorse the change in status or make a note to the effect that the said person is a party to a marriage in</p>
Act 47 of 1937	Deeds Registries Act	

No. and year of law	Short title	Extent of repeal or amendment
		<p>community of property, as the case may be: Provided that where there are two or more mutually dependent deeds, all such deeds must be submitted for endorsement: Provided further that in the case of an order of court envisaged in section 7(9) of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998) or in section .. of the Muslim Marriages Act, 20.., the registrar shall, on submission of the relevant deed and court order and without the necessity for a written application, make the endorsement or note.</p> <p>2. The amendment of section 45<i>bis</i> –</p> <p>(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections .. or .. of the Muslim Marriages Act, 20.., as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,</p> <p>(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:</p> <p>(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorization under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections .. or .. of the Muslim Marriages Act, 20.., as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares,</p>
Act 81 of 1987	Intestate Succession Act	<p>3. The amendment of section 1 by the insertion after paragraph (f) of subsection (4) of the following paragraph:</p> <p>(g) “spouse” shall include a spouse of a Muslim marriage recognised in terms of the Muslim 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 -</p> <p>(i) for the purposes of subsection (1)(a), such surviving spouse or spouses shall inherit the intestate estate in equal shares;</p> <p>(ii) for the purposes of subsection (1)(c), such surviving spouse or spouses shall each inherit a child’s share of the intestate estate or so much of the intestate estate in equal</p>
Act 81 of 1987	Intestate Succession Act	

No. and year of law	Short title	Extent of repeal or amendment
Act 27 of 1990	Maintenance of Surviving Spouses Act	<p><u>shares as does not exceed in value the amount so fixed as contemplated in this section.</u></p> <p>4. The amendment of section 1 by the insertion after the definition of "executor" of the following definition:</p> <p><u>"Marriage" shall include a Muslim marriage recognised in terms of the Muslim Marriages Act, 20., and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion.</u></p>