On the roll: 6 November 2003

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 40/2003
CPD 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
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

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. On 27 November 1994 Mogamat Amien Daniels ("the deceased") died intestate. The main asset in his estate is the house at 2A Lucerne Place, Hanover Park, in which he lived with the applicant from 2 March 1977 until his death.[1]

2. The applicant and the deceased were married on 2 March 1977 in accordance with Muslim rites. The marriage, which was monogamous, was not solemnized by a marriage officer appointed in terms of the Marriage Act, 25 of 1961 ("the Marriage Act"). The applicant and the deceased did not have any children together.[2]

3. The deceased was however survived by four children, namely the fifth, sixth and seventh respondents[3] and the late Mogamat Cassiem Daniels ("M C Daniels"). M C Daniels died intestate[4] on 12 June 1999.[5] He had four children, who were minors when these proceedings were instituted. Their mothers and natural guardians are the third and fourth respondents.[6]

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[1] Founding Affidavit 3:157:3-4 read with 3:162:21. Where we refer to the record we use the following method of citation. We describe the document. The number before the first colon is the volume number. The number(s) between the first and second colons is(are) the page number(s). The number(s) after the second colon is(are) the paragraph number(s), if applicable.

[2] Founding Affidavit 3:157:4

[3] Founding Affidavit 3:159:9-11

[4] Founding Affidavit 3:160:16

[5] Annexure B 3:173

[6] Founding Affidavit 3:158-159:7-8

4. On 10 December 1999, in a letter to the applicant's attorneys, the tenth respondent ("the Master") said: "In terms of the present legal system, your client, Mrs Juleiga Daniels married to the deceased in terms of Muslim Rites, is not a surviving spouse and thus does not stand to inherit. In terms of the Intestate Succession Act the estate devolves upon the descendants of the deceased per stirpes".[7]

5. On 15 December 2000 the second respondent was appointed by the Master in terms of section 18(3) of the Administration of Estates Act, 66 of 1965, to take control of the assets in M C Daniels' estate, pay the debts and transfer the residue to his heirs.[8]

6. On 25 January 2001 the first respondent was appointed by the Master in terms of sections 13 and 14 of the Administration of Estates Act as the executor of the deceased's estate and as such to liquidate and distribute the estate.[9]

7. On 23 February 2001, in a letter to the applicant's attorneys, the first respondent said: "I advise that I am not able to accept your client, Mrs Juleiga Daniels', claim for maintenance against the … deceased estate. In terms of the present legal system, your client, who was married to the deceased in terms of Muslim Rites, is not a surviving spouse as contemplated in the Maintenance of Surviving Spouses Act 27 of 1990 and thus is not entitled to maintenance. In terms of the Intestate

[7] Annexure M 4:306

[8] Note 5 above

[9] Founding Affidavit 3:157:5; Annexure A 3:172

Succession Act 81 0f 1987 'the survivor' means the surviving spouse in a marriage dissolved by death. Currently, marriages in accordance with Muslim rites are not considered valid legal marriages".[10]

8. On 5 March 2001 the applicant launched proceedings in the Cape High Court in which she sought the following relief in the first instance:

8.1 an order declaring that she was, for the purposes of the Intestate Succession Act, 81 of 1987 ("the ISA"), the spouse of the deceased at the time of his death, and accordingly that she is an heir in his deceased estate;[11] and

8.2 an order declaring she is, for the purposes of the Maintenance of Surviving Spouses Act, 27 of 1990 ("the MSSA"), the survivor of the deceased, and accordingly that she has a claim for maintenance against the estate until her death or remarriage in so far as she is not able to provide for herself from her own means and earnings.[12]

9. To cater for the possibility that, properly construed, a person such as the applicant married in accordance with Muslim rites in a monogamous union is not a spouse for the purposes of the ISA and/or a survivor for the purposes of the MSSA, the applicant sought orders in the alternative to those described above. The alternative orders were:

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[10] Annexure T 4:316

[11] Notice of Motion 3:151:1, read with section 1(c) of the ISA

[12] Notice of Motion 3:151:3, read with sections 2(1) and (3) of the MSSA

9.1 first, orders declaring in effect that the failure to provide for such persons in the ISA and the MSSA is unconstitutional and invalid;[13] and

9.2 secondly, orders reading in[14] provisions to cure such invalidity, namely:

9.2.1 in section 1(4) of the ISA, the following definition of "spouse": "'spouse' shall include a husband or wife married in terms of Muslim rites in a *de facto* monogamous union";[15] and

9.2.2 in section 1 of the MSSA, the following words at the end of the definition of "survivor": "… and includes the

[13] Notice of Motion 3:151:2

[14] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) par 61-88 and 98

[15] Notice of Motion 3:151:2 and 3:152:4

surviving husband or wife of a *de facto* monogamous union solemnized in accordance with Muslim rites".[16]

10. The Cape High Court, in a judgment handed down on 24 June 2003 and now reported as *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) (the "Judgment"), pointed out that monogamous marriages by Muslim rites have not been recognised by the South African courts as valid marriages[17] and went on to hold that:

10.1 it was not reasonably possible to interpret the word "spouse" in the ISA and the MSSA to include "a husband or wife in a *de facto* monogamous marriage by Muslim rites" and, consequently, the declarators described in 8 above could not be granted;[18]

10.2 the failure of the ISA and the MSSA to provide for persons married in accordance with Muslim rites in *de facto* monogamous unions infringed such persons' rights not to be unfairly discriminated against on the grounds of religion, belief and culture listed in section 8(2) of the interim Constitution;[19]

10.3

[16] Notice of Motion 3:152:4.2

[17] Judgment 980C-983D

[18] Judgment 983E-989E

[19] Judgment 989F-994A

the unfair discrimination was not capable of justification in terms of section 33 of the interim Constitution, with the result that the ISA and the MSSA were inconsistent with the Constitution and invalid;[20] and

10.4 the appropriate remedy would be the alternative orders sought by the applicant, coupled with an order[21] excluding the operation of the order relating to the ISA in respect of intestate estates that had been finally wound up by 24 June 2003.[22]

11. The Cape High Court accordingly made the following orders:

"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".

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,"

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 would up by the date of this order.

4. The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words "'and

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[20] Judgment 1000C-1002

[21] Based on *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par 60

[22] Judgment 1002I-1004I

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 declared to be unconstitutional and invalid.

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 solemnized in accordance with Muslim rites."

B. THE RELIEF NOW SOUGHT

12. The applicant has now applied to this Court in terms of section 172(2) of the Constitution for confirmation of the orders made by the Cape High Court.[23] In the alternative, the applicant applies for leave to appeal against the Cape High Court's refusal to grant the declarators described in paragraph 8 above.[24]

13. We submit that the Applicant's intended reversal in this Court of the sequence of the initially relief sought is impermissible both in principle and from a procedural point of view.

13.1 The question of unconstitutionality of the ISA and the MSSA arises only if they cannot be interpreted in the way the applicant suggests. As this Court explained in *Hyundai Motor Distributors*:[25] "The Constitution

[23] Notice of Motion 1:2-3:1

[24] Notice of Motion 1:3-4:1

[25] *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)

requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution".

13.2 The procedural point is that in the Cape High Court the Applicant sought the declarators in the first instance and the declarations of unconstitutionality in the alternative. The fact that the Court refused the former and granted the latter, with the

result that the orders of constitutionality must now come before this Court, does not alter the sequence of the relief sought by the applicant on the papers as they stand. An amendment to the notice of motion will be required if she wishes to reverse the sequence, but that amendment cannot be granted because the intended sequence conflicts with the principle described earlier.

14. Before dealing with the proper interpretation of the ISA and the MSSA and the applicant's constitutional attacks on them (in that order), we consider the legal status in South Africa of monogamous marriages solemnised according to Muslim rights.

C. MUSLIM MARRIAGES IN SOUTH AFRICA

15. This Court stated in *Fraser*[26] that the effect of *Seedat's Executors v The Master (Natal)*[27] and *Ismail v Ismail*[28] is that unions "which have been solemnised in terms of the tenets of the Islamic faith … are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is 'potentially polygamous' and for that reason, said to be against public policy."

16. *Seedat's Executors* and *Ismail* were qualified, not overruled in *Amod's*

[26] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) par 21

[27] 1917 AD 302

[28] 1983 (1) SA 1006 (A)

case,[29] nor did ***Ryland v Edros***[30] address what has been described as "the persisting invalidity of Muslim … marriages".[31]

17. In ***Ryland*** the Cape High Court held that contractual obligations flowing from a Muslim marriage, including a duty of the husband to maintain his wife, could be enforced, but did not find that such a marriage was valid in our law.[32]

18. In ***Amod*** the Supreme Court of Appeal held that a *de facto* monogamous Muslim marriage gave rise to a duty of support which deserved recognition and protection by the law for the purposes of the common law dependant's action.[33] As explained, the Court did not overrule ***Seedat's Executors*** or ***Ismail***, and emphasized that its recognition of a legal duty of support arising from a contractual incident of a Muslim marriage would not lead "to a recognition of possibly other incidents of such a marriage which have neither been articulated or properly analysed in the present appeal".[34] Indeed, at several points in its judgment the Court emphasised that the question to be decided was

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[29] *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)

[30] 1997 (2) SA 690 (C)

[31] Van Heerden *et al* *Boberg's Law of Persons and the Family* (2ed 1999) 168

[32] Van Heerden *et al op cit* 168 n 21

[33] ***Amod*** *supra* par 20

[34] ***Amod*** supra par 27

not whether the marriage was lawful at common law or not, but whether the deceased was under a legal duty to support the appellant during the subsistence of the marriage and, if so, whether the right of the appellant was, in the circumstances, one which deserved protection for the purposes of the dependant's action".[35]

19. We however respectfully submit, for the reasons that follow, that the statement by this Court quoted in paragraph 15 above, as well as certain of the statements concerning Muslim marriages in ***Ryland***[36] and ***Amod***,[37] are overbroad because a monogamous marriage solemnised according to Muslim rites by a "marriage officer" authorised to do so in terms of the Marriage Act, is legally valid.

20. In our legal system a "marriage", for the purposes of determining legal status, is a marriage concluded in accordance with the provisions of the Marriage Act. That Act requires that, to be valid, a marriage must be solemnized by an authorised marriage officer.[38]

21. Section 3(1) of the Marriage Act, which has remained unchanged since the Act was enacted in 1961, provides: "The Minister [of Home Affairs] and any officer in the public service authorised thereto by him may

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[35] *Amod supra* par 19-20 and 25

[36] *Ryland supra* 710E-I and 707E-G

[37] *Amod supra* par 15 and 22-23

[38] Section 11(1) of the Marriage Act

designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion."[39]

22. The Cape High Court accepted,[40] correctly we respectfully submit,[41] that section 3(1) of the Marriage Act theoretically "enables a Muslim couple to have their marriage solemnised – according to Muslim rites – by a Muslim priest who has been designated a marriage officer, if the marriage is intended to be a monogamous one".[42]

23. The parties to such a marriage can regulate its proprietary consequences by concluding an ante-nuptial contract. They could regulate the devolution of their property upon the dissolution of the marriage by the death of the one of them by executing a mutual will. Both of these could incorporate Muslim personal law.

24. According to the authorities cited by the Cape High Court some (albeit

[39] Emphasis added

[40] Judgment 990H

[41] See *Ismail supra* 1021A-E. Cf. *Amod supra* par 25

[42] See also Judgment 990F. Cf. the definitions of "existing civil marriage" and "civil marriage" in the draft Bill proposed by the South African Law Reform Commission in annexure A to its July 2003 Report on "Islamic Marriages and Related Matters", Project 106, 110 and 112

"very few") "Muslim priests have in fact been appointed as marriage officers in terms of section 3 of the Marriage Act", although "the great majority of marriages contracted in South Africa in accordance with Muslim rites are not solemnised in terms of the Marriage Act".[43] There is no evidence in this case dealing with those issues.

25. The applicant states in her founding affidavit that her marriage to the deceased was not solemnized by an authorised marriage officer.[44] She adds in her replying affidavit: "My late husband and I married under Islamic Law because that is how marriages are concluded in our community. Neither my husband, nor I intended by our mode of marriage to choose not to be married in the eyes of the law".[45] The difficulty with this explanation is of course that the applicant and the deceased could have been married by "Mohammedan rites" by an authorised marriage officer.

26. The applicant's situation is therefore analogous to that of the survivor of a co-habiting opposite sex couple who could have concluded a legally valid marriage, but did not do so.[46]

27. It is accordingly not correct to say, as the applicant's counsel do, that "[b]ecause of the Muslim character of her marriage she stands to be

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[43] Judgment 990I-991A, citing Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" (1993) 56 *THRHR* 392 at 398-399 note 44, Sinclair *The Law of Marriage* Vol 1 (1996) 265 and Joubert "Law of Marriage" in Clark (ed) *Family Law Service* (1987, with loose-leaf updates) par A7

[44] Founding Affidavit 3:157:4

[45] Replying Affidavit 5:388:7.2

[46] Cf. *Attorney General of Nova Scotia v Susan Walsh and Wayne Bona*, 2002 SCC 8

thrown out of her own home"[47] and "the Muslim character of her marriage to the deceased renders that marriage undeserving of the status which the law accords to Christian, Jewish, and civil marriages for the purposes of intestate succession and that her status as a socially vulnerable Muslim widow renders her undeserving of the protection which the law accords to socially vulnerable widows of Christian, Jewish and secular civil marriages".[48]

28. The correct position is that the applicant's marriage is not a valid marriage because it was not solemnized by a Muslim priest who was an authorised marriage officer.

29. It follows that the questions to be determined in this case are whether:

29.1 the words "spouse" in the ISA and "survivor" in the MSSA can be interpreted as including a husband or wife married in terms of Muslim rites in a *de facto* monogamous union by a Muslim priest who was not an authorised marriage officer;

29.2 if not, whether on that account the ISA and the MSSA unconstitutionally infringe the right not to be discriminated against on the grounds of religion, belief or culture in section 8(2) of the interim Constitution.[49]

D. THE INTERPRETATION OF "SPOUSE" IN THE INTESTATE

[47] Applicant's Heads 26:40.3.2

[48] Applicant's Heads 25-26:40.3.1

[49] The deceased died on 7 November 1994, at a time when the interim Constitution was in force.

SUCCESSION ACT AND OF "SURVIVOR" IN THE MAINTENANCE OF SURVIVING SPOUSES ACT

30. The applicant contends for four reasons that she should be regarded as a "spouse" for the purposes of the ISA and a "survivor" for the purposes of the MSSA. We address each of her reasons in turn.

31. First, the applicant contends that the ordinary meaning of "spouse" – namely a "married person; a wife, a husband" – is reasonably capable of covering persons in her position.[50] We however submit that when "spouse" is used in laws regulating the proprietary consequences of the dissolution of marriages by the death of one of the parties, the spouses referred to are persons legally married to one another.[51]

32. Secondly, the applicant contends that the narrower meaning of "spouse" will perpetuate the "cultural chauvinism" expressed in cases such as *Seedat's Executors*,[52] which is inconsistent with the *boni mores* of contemporary South Africa as reflected in *Amod* and a wide range of recently enacted or amended statutes.[53]

33. The cultural chauvinism argument founders when it is appreciated that what is really at issue in this case is the status, for the purposes of the ISA and the MSSA, of Muslims who could have concluded legally valid

[50] Applicant's Heads 34:48

[51] Cf. *National Coalition for Gay and Lesbian Equality* *supra* par 25; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) par 9

[52] Applicant's Heads 35-37:49-51

[53] Applicant's Heads 37-41:52-55

marriages, but did not do so. The applicant does not contend for the validity of marriages by Muslims who could not have concluded legally valid marriages because those marriages were, or were intended to be, polygamous.

34. The recent statutes on which the applicant relies are against her. They are in fact, and are often expressed to be, exceptions to the general proposition that Muslim marriages concluded otherwise than in accordance with the Marriage Act are not valid in our law. Neither the ISA nor the MSSA contain provisions to that effect.

35. Thirdly, the applicant contends that the recognition she seeks is not unprecedented and is limited. She refers to English and Zimbabwean cases in which women married by Muslim rites have been recognised as "wives" for the purposes of certain statutes without their marriages being recognised as such for all purposes.[54] But the English case of ***Din***[55] on which particular reliance is placed, like many of the others, concerned foreign polygamous or potentially marriages which were valid under the *lex loci celebrationis* or the law of the parties' domicile. A marriage celebrated in England in accordance with the provisions of the Marriage Act 1949 is monogamous, wherever the parties may be domiciled; a marriage celebrated in England in polygamous form without a preceding civil ceremony is a nullity.[56]

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[54] Applicant's Heads 41-43:56-57

[55] *Din v National Assistance Board* [1967] 1 All ER 750 (QBD)

[56] *Halsbury's Laws of England* Vol 8(3): Conflict of Laws par 236

36. Fourthly, the applicant relies on section 39(2) of the Constitution[57] and, citing *Govender*,[58] contends that it is "reasonably possible" to interpret "spouse" in the ISA and "survivor" in the MSSA as extending to her. The applicant argues that an interpretation which would result in the exclusion of persons in her position from the provisions of the ISA and the MSSA would render those statutes inconsistent with the fundamental right not to be discriminated against unfairly and unjustifiably on the grounds of religion, culture and marital status. For the reasons outlined above, we disagree that the interpretation of the ISA and the MSSA on which the applicant relies is plausible. Moreover, for the reasons set out below, we submit that the alternative

[57] The application was instituted on 5 March 2001, i.e. after the commencement of the Constitution

[58] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) par 10-11. Cf. Applicant's Heads 19:30

to the interpretation contended for by the applicant does not unconstitutionally infringe the right to equality.

37. We accordingly submit that the words "spouse" in the ISA and "survivor" in the MSSA cannot be interpreted as including a husband or wife married in terms of Muslim rites in a *de facto* monogamous union by a Muslim priest who was not an authorised marriage officer.

E. CONSTITUTIONALITY

38. We submit at the outset that the constitutional relief sought by the applicant[59] and granted by the Cape High Court[60] cannot be confirmed by this Court because Muslims may conclude legally valid monogamous marriages.

39. A number of rights in the Bill of Rights in the interim Constitution are relevant to the constitutional issues in this case.

39.1 Section 8(1) of the interim Constitution provides that every person shall have the right to equality before the law and to equal protection of the law. Section 8(2) adds that no person shall be unfairly discriminated against, directly or indirectly, on,

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[59] See 9 and 12 above

[60] See 11 above

inter alia, the grounds of gender, sex, religion, belief or culture.

39.2 Section 10 provides that every person shall have the right to respect for and protection of his or her dignity.

39.3 Section 14(1) provides that every person shall have the right to freedom of religion. Section 14(3) adds that nothing contained in the Bill of Rights shall preclude legislation recognising a system of personal and family law adhered to by persons professing a particular religion and recognising the validity of marriages concluded under a system of religious law subject to specified procedures.

39.4 Section 31 provides that every person shall have the right to use the language and to participate in the cultural life of his or her choice.[61]

40. We submit that section 3(1) of the Marriages Act is legislation of the sort contemplated by section 14(3) of the interim Constitution.

41. We note that the applicant has not attacked the provisions in the Marriage Act[62] which, together, provide that a monogamous union

[61] See also the provisions described in ***Ryland***, *supra*, 707I-708I

[62] Sections 3 and 11(1)

solemnised in accordance with Muslim rites otherwise than by an authorised marriage officer, is invalid.

42. We submit, for the reasons that follow, that the exclusion from the words "spouse" in the ISA and "survivor" in the MSSA of a husband or wife married in terms of Muslim rites in a *de facto* monogamous union by a Muslim priest who was not an authorised marriage officer does not unconstitutionally infringe the right not to be discriminated against on the grounds of religion, belief or culture in section 8(2) of the interim Constitution.

43. Persons in that position maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. If they so choose, however, they are free to marry and, in so doing, to access all the benefits applicable to married couples under the ISA and MSSA upon the dissolution of their marriage by the death of one of them. There is no discriminatory denial of benefits in this case because those who do not marry are free to take steps during their relationship to lay the foundation for access.[63]

44. It would also be wrong to assume that persons who choose to enter into a monogamous marriage in terms of Muslim rites solemnised by a Muslim priest who was not an authorised marriage officer, thereby agree to the application of South African "civil" law, and in particular the ISA and the MSSA. Doubtless, if asked, many such persons would say that their

[63] Cf. *Attorney General of Nova Scotia supra*, par 42-43 and 48-49

> affairs are governed by Muslim law. It is common cause that the provisions of the ISA and the MSSA are not consistent with the Islamic laws of succession as governed by the Holy Qur'an, read together with compilations of the practices and traditions of the Prophet Mohammed, which form a body of commandments ("*Shari'ah"*).[64]

It is clear from the evidence tendered by the first respondent, and confirmed by Shouket Allie, an expert on Islamic personal law, that if Muslim law applied the applicant would have an entitlement to one-eighth of the deceased's estate. This is not disputed by the applicant, and is confirmed by the authors on the subject.[65] An unusual feature of the Applicant's case is that, in effect, she wants her Muslim marriage recognised for the purpose of the South African law of succession, not the Muslim law of succession. It is doubtful whether, viewed from the perspective of Muslim law, that result is sustainable. Muslim law is a facet of the Muslim way of life, which is comprehensive and inextricably entwined with the belief system of Islam.[66]

45. In this regard, we point out that the relief sought by the applicant in

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[64] Campbell Affidavit 5:343:6; Replying Affidavit 5:387:7.1. See generally Rautenbach & Goolam (eds) <u>*Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems*</u> (2002) 14-20, 64-65, 100-109

[65] Notably *Cachalia loc cit* and Rautenbach & Goolam (eds) *op cit* 104. See Campbell Affidavit 5:343:7 and 5:352:21.5; Allie Affidavit 5:367-368; Replying Affidavit 5:389:7.4.1 and 5:395:23

[66] Rautenbach & Goolam *op cit* 20

relation to the MSSA would have the effect of negating or materially altering the system of personal law practiced by those who adhere to the system of Muslim personal law in South Africa. The reason for this is that Muslim personal law does not know a claim for maintenance by a surviving spouse against the estate of his or her deceased spouse. The deceased's property is distributed in accordance with his or her will (up to one third) and the Islamic law of succession. Muslims may ensure the application of the Islamic law of succession to their deceased estates by making a will to that effect.[67] In many cases however the claims of the survivor under the MSSA will substantially reduce the quantum of property available for distribution in that way.

46. In this case, and others like it, maintenance and succession are closely linked. Thus although the relief sought by the applicant in relation to the ISA will not directly have the effect described in the preceding paragraph – the Islamic law of succession, including its detailed rules of intestate succession, is not recognised in South Africa – it will impact indirectly on the complex interactions between the Muslim and South African laws of maintenance and succession.

47. This case, and others like it, also implicate values underlying the Bill of Rights, namely the values of equality and tolerance of diversity and

[67] Rautenbach & Goolam *op cit* 107-108

the recognition of the plural nature of our society.[68]

48. Over the past several years, the South African Law Reform Commission ("SALRC")[69] has undertaken a review of "Islamic Marriages and Related Matters" and, in the process, has published an Issue Paper,[70] a Discussion Paper[71] and, recently, a Report.[72] The latter includes a draft "Muslim Marriages Act"[73] which, if enacted, will, as a temporary measure,[74] amend section 1 of the ISA and section 1 of the MSSA to include the spouse of a Muslim marriage.

49. In this regard it is significant that when dealing with a challenge to the laws governing the administration and distribution of the estates of black people, this Court adverted to the difficulties which arise when trying to reconcile the principle of equality and the principle of tolerance and accommodation in cases such as the present:[75]

"Some of the difficulties have been referred to by the South African Law Commission. It notes that:

'The question of succession in customary law has been a burning issue for some time, reaching its climax in June with the decisions of the Supreme Court of Appeal in the case of *Mthembu v Letsela* [2000 (3) SA 867 (SCA)]. The contested positions involve, on the one side, the need to honour the

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[68] Cf. *Ryland*, *supra*, 108J-709A

[69] In terms of the Judicial Matters Amendment Act, 55 of 2002, the South African Law Commission Act, 1973, was amended to change the Commission's name to the South African Law Reform Commission

[70] May 2000

[71] 31 January 2002

[72] July 2003

[73] Annexure A p. 110

[74] *Op cit* 89:3.304, read with 132-133

[75] *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC) par 16 n 11

> Bill of Rights by removing laws that discriminate against women in matters of inheritance, and, on the other, the recognition of customary law in the same Constitution as part of the law of the land. The difficult task of trying to reconcile these provisions is complicated in any case by the need to be alive to practical realities and to intervene in ways which do not worsen the situation of people in their daily lives.
>
> These complexities have already seen a draft Bill introduced in Parliament and then withdrawn (1998), and three court case[s] culminating in the Supreme Court decision. It is worth noting that both the High Court and the Supreme Court of Appeal endorsed the Law Commission's process of consultation as the best guarantee of the participation of all stakeholders in this sensitive legislative experiment. . . .'
>
> Summary of the Law Commission Discussion Paper ('Customary Law' Discussion Paper 93, Project 90 August 2000)."

50. It is submitted that difficulties similar to those attendant on making laws regulating customary law of succession and the administration of estates also arise in relation to the dissolution by death of Muslim marriages. These difficulties are undoubtedly best addressed by Parliament.

F. CONCLUSION

51. The first and second respondents do not seek an order as to costs.

52. We accordingly submit that this application should be dismissed.

A M BREITENBACH

N BAWA
Counsel for the First and Second Respondents

Chambers, Cape Town
27 October 2003

FIRST AND SECOND RESPONDENTS' AUTHORITIES

1. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)

2. *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C)

3. *Brink v Kitshoff NO* 1996 (4) SA 197 (CC)

4. *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) par 22

5. *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC)

6. *Seedat's Executors v The Master (Natal)* 1917 AD 302

7. *Ismail v Ismail* 1983 (1) SA 1006 (A)

8. *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)

9. *Ryland v Edros* 1997 (2) SA 690 (C)

10. Van Heerden *et al* *Boberg's Law of Persons and the Family* (2ed 1999) 168 and 274

11. South African Law Reform Commission in annexure A to its July 2003 Report on "Islamic Marriages and Related Matters", Project 106, 110 and 112

12. Cachalia F "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" (1993) 56 *THRHR* 392

13. Sinclair J *The Law of Marriage* Vol 1 (1996) 178-179

14. Joubert “Law of Marriage” in Clark (ed) *Family Law Service* (1987, with loose-leaf updates) par A7.

15. *Attorney General of Nova Scotia v Susan Walsh and Wayne Bona*, 2002 SCC 83

16. Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC)

17. Din v National Assistance Board [1967] 1 All ER 750 (QBD)

18. *Halsbury’s Laws of England* Vol 8(3): Conflict of Laws par 236

19. *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) par 10-11

20. Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* (2002) 14-20, 64-65, 100-109 and 118-126

21. *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC)

22. *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)