

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

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

A F F I D A V I T

I, the undersigned,

MICHELLE ANNE O’SULLIVAN,

do hereby make oath and state that:

1. I am an adult attorney and the Director of the Women's Legal Centre, Cape Town. I am duly authorised by the Applicant to depose to this affidavit and to bring this application on her behalf.
2. The facts contained herein are, unless otherwise indicated, within my own personal knowledge and are, to the best of my knowledge, true and correct.
3. On 5 March 2001, the Applicant applied to this Court for an order in the following terms:

“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 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”.”

4. On 24 June 2003, her Ladyship Mrs Justice Van Heerden made the following order “the order”:

“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 wound 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 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.*

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.””*

A copy of the order is attached as Annexure “MOS2”

4. In the course of her judgment, Her Ladyship Mrs Justice Van Heerden held that :

“... the word “spouse”, as utilised in the Intestate Succession Act and the Maintenance of Surviving Spouses Act, cannot be interpreted so as to extend to a husband or wife in a de facto monogamous marriage by Muslim rites. Prayers 1 and 3 of the relief sought by the Applicant therefore cannot be granted.”

Her Ladyship Mrs Justice Van Heerden accordingly declined to grant the Applicant the principal relief sought in Prayers 1 and 3 of the Notice of Motion.

5. A copy of the judgment of Her Ladyship Mrs Justice Van Heerden is attached as annexure “MOS3”.
6. The Applicant has decided to apply to the Constitutional Court to confirm the order of her Ladyship Mrs Justice Van Heerden. However, there is a possibility that the Constitutional Court will decline to confirm the order on the grounds that the relevant provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act are consistent with the Constitution because the terms “spouse” and

“survivor” used by the respective Acts are capable of including a person in the position of the Applicant, namely a surviving husband or wife married in accordance with Muslim rites in a *de facto* monogamous union. In order to cater for this eventuality, the Applicant has accordingly decided, in the alternative to her application for confirmation, to apply for leave to appeal to the Constitutional Court against the failure of her Ladyship Mrs Justice Van Heerden to grant the relief sought by the Applicant in prayers 1 and 3 of the Notice of Motion. The grounds upon which the Applicant shall seek leave to appeal are attached as annexure “MOS4” hereto.

7. This application is brought for a certificate in terms of Rule 18 of the Constitutional Court Rules in advance of launching an application to the Constitutional Court for confirmation of the order, alternatively leave to appeal directly to that Court against the failure of her Ladyship Mrs Justice Van Heerden to grant the relief sought by the Applicant in prayers 1 and 3 of the Notice of Motion.

The elements of the certificate

8. As is set out in the draft certificate attached to the notice of this application the Applicant requests this Honourable to certify that:

- 8.1 The constitutional matters raised in this application are matters of substance on which a ruling by the Constitutional Court is desirable,
- 8.2 The evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and to dispose of the matter without referring the matter back to this Court for further evidence.
- 8.3 There is reason to believe that the Constitutional Court may give the Applicant leave to appeal directly to that Court.
- 8.4 There is a reasonable prospect that the Constitutional Court may reverse or materially alter the judgment of this Court, and
- 8.5 In the opinion of this Court, it is in the interest of justice for the appeal to be made directly to the Constitutional Court

Paragraph 1 of the Certificate:

- 9 The constitutional matter raised in the application brought by the Applicant concerns whether the word “spouse” as utilised in the

Intestate Succession Act and the Maintenance of Surviving Spouses Act can be interpreted so as to extend to a husband or wife in a *de facto* monogamous marriage by Muslim rites.

- 10 I respectfully submit that this is a constitutional matter in the contemplation of section 167 (7) of the Constitution because it implicates issues relating to the interpretation and application of section 39(2) of the Constitution and the protection and enforcement of section 9 of the Constitution, alternatively
- 11 I respectfully submit that the constitutional matter raised in this application has not pertinently been considered by the Constitutional Court and is a matter of substance because it has significant implications for the class of persons represented by the Applicant, namely a husband or wife in a *de facto* monogamous union concluded in accordance with Muslim rites.

Paragraph 2 of the Certificate:

- 12 The constitutional issues in this matter do not involve questions of evidence, but rather interpretation. There can accordingly be no possibility of the Constitutional Court having to refer the matter to this Court for additional evidence before it can dispose of the matter.

Paragraph 3 to 5 of the Certificate:

13 I refer to the grounds of appeal as set out in annexure “MOS 4” and respectfully submit that there is at least a reasonable possibility that the Constitutional Court may materially alter the order of her Ladyship Mrs Justice Van Heerden refusing to grant prayers 1 and 3 of the Order sought by the Applicant.

14 I note that :

14.1 Ordinarily it is appropriate, if an appeal is warranted, to appeal from the High Court to a full bench of the High Court or to the the Constitutional Court,

14.2 However, the Applicant is seeking confirmation of the Ladyship Mrs Justice Van Heerden’s order and only in the alternative in the event that the Constitutional Court declines to confirm such an order, is appealing against the order.

15. In the circumstances I respectfully submit that while the order is appealable to the Supreme Court of Appeal, for practical purposes any appeal that may be necessary, should be heard by the Constitutional

Court because it will, in the course of deciding the principal application for confirmation, have to decide the only issue in the appeal, namely the interpretive issue relating to the meaning of “spouse” and “survivor” in the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

16. In the absence of an appeal, I respectfully submit that there is a possibility that in the event that the Constitutional Court declines to confirm her Ladyship Mrs Justice Van Heerden’s order, on the basis that it accepts the interpretive argument advanced by the applicant in support of prayers 1 and 3 of the relief sought in the application to this Honourable Court, the Applicant will be left with no practical relief in her case as the relief sought by the Applicant in prayers 1 and 3 of the Notice of Motion will have been finally decided against the Applicant by the order of Her Ladyship Mrs Justice van Heerden. The practical effect of this is that Applicant may be precluded from taking transfer of the property in the deceased estate of her late husband when she ought legally to be entitled to do so.
17. Having regard to the matters set out above, I respectfully submit that there is a reasonable prospect that the Constitutional Court will grant the Applicant’s leave to appeal directly to it and this Court should certify

that it is in the interests of justice for the appeal to be brought directly to the Constitutional Court.

18. I accordingly respectfully ask for an Order in the terms set out in the Notice of Application.

DEPONENT

1. The Deponent acknowledged to me that:
 - 1.1 she knows and understands the contents of this declaration;
 - 1.2 she has no objection to taking the prescribed oath;
 - 1.3 she considers the prescribed oath to be binding on her conscience.

2. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".

3. The Deponent signed this declaration in my presence at **CAPE TOWN** on this day of **JULY 2003**.

COMMISSIONER OF OATHS