

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

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:

**MICHELLE O’SULLIVAN
WOMEN’S LEGAL CENTRE
PH: 021-4240870**

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 the Cape High 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 “MAO1”

5. In the course of her Judgment, Her Ladyship Mrs Justice Van Heerden decided 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.

6. A copy of the Judgment of Her Ladyship Mrs Justice Van Heerden is attached as part of Annexure "MAO2", which is a copy of the Application in terms of Rule 18 referred to below.

APPLICATION FOR CONFIRMATION

7. The Applicant is a person entitled in terms of Section 172(2)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 to apply to the above Honourable Court for confirmation of the Order and is desirous of making such Application.
8. Accordingly the Applicant hereby applies for the confirmation of the said Order.

APPLICATION FOR CONDITIONAL LEAVE TO APPEAL

9. The Applicant brought her application in order to obtain the benefits which are extended to spouses under the Intestate Succession Act and the Maintenance of Surviving Spouses Act. If she is able to obtain relief which entitles her to these benefits, she has no interest in whether such relief is formulated in the terms contemplated in prayers

1 and 3 of the Notice of Motion or in those contemplated in prayers 2 and 4 of the Notice of Motion. The Applicant accordingly has no interest in appealing the Order of Her Ladyship Ms Justice van Heerden unless that Order is not confirmed by this Honourable Court.

10. However, I respectfully submit that there is a reasonable possibility that this Honourable 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 such an event, there is a risk that unless the Applicant preserves a right of appeal against the Order of Her Ladyship Ms Justice van Heerden, the question of her status as a “spouse” for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act will have been determined finally against her by the refusal of Her Ladyship Ms Justice van Heerden to grant her the declaratory relief she sought in prayers 1 and 3 of the Notice of Motion.
11. In order to cater for this eventuality, the Applicant accordingly applied on 28 July 2003 in terms of Constitutional Rule 18 to the Cape High Court for conditional 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.

12. A copy of the Application in terms of Rule 18 is attached as Annexure "MAO3".
13. On Monday, 1 September 2003, Acting Judge Binns Ward handed down judgment and gave a partly positive and partly negative certificate, a copy of the judgment is attached as Annexure "MAO4". We undertake to furnish this Honourable Court with a copy of the certificate once it is obtained from the Cape High Court.
14. The Applicant now applies in terms of Rule 18 to this Honourable Court for conditional leave to appeal in the event that this Honourable Court declines 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.

CONDONATION

15. The Applicant has not complied with the time limits in respect of Constitutional Court Rule 15(4) as the Applicant wished to concurrently launch the application for confirmation and application for conditional leave to appeal.
16. The Applicant is employed as a domestic worker and is represented by the Women's Legal Centre, a public interest non profit law centre based in Cape Town. For practical and cost considerations, the Applicant was not in a position to bring two separate applications to this Court, one for confirmation and a second for leave to appeal.
17. The Applicant hereby requests condonation for the late filing of the application for confirmation.
18. The Applicant also notes that Constitutional Court Rule 15(5) provides that in the event that no application is lodged within the time prescribed in subrule (4), the President shall give directions for the disposal of the matter of the confirmation of the Order of invalidity. In the event that the Court declines to condone the late filing of the Application in terms of Rule 15, the Applicant humbly requests the President to give directions for the disposal of the matter of confirmation of the Order.
19. I accordingly respectfully ask for an Order in the terms set out in the Notice of Application.

MICHELLE ANNE O'SULLIVAN

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 **SEPTEMBER 2003**.

COMMISSIONER OF OATHS