IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 12/04

In the matter between:

RICHARD GORDON VOLKS N.O.	Appellant
and	
ETHEL ROBINSON	First Respondent
WOMEN'S LEGAL CENTRE TRUST	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE MASTER OF THE HIGH COURT	Fourth Respondent

AFFIDAVIT

I, the undersigned,

ANTONIUS BERNARDUS GEORGE HOOGENDIJK

do hereby make oath and state that:

1. I am the an adult male Deputy Master of the High Court of South Africa (Cape of Good Hope Provincial Division) and am duly authorized to depose to this affidavit, the facts contained herein are within my personal knowledge unless the context indicates to the contrary, in which event I verily believe same to be true and correct.

2. I have read the affidavit now filed by Ms Galgut on behalf of First and Second Respondent and wish to respond to certain of the allegations made therein. Before doing so, I wish to summarise Third and Fourth Respondents' position in the first few paragraphs, as I believe that First and Second Respondents' vehement opposition to the evidence presented by the state has more to do with a misunderstanding of the state's position than the contents of the affidavit.

3. Ms Bezuidenhoudt made two points her affidavit. I will not dwell on the first one, it is simply that the present government has not formulated a policy or legislation concerning the issues raised by First and Second Respondent, and it frankly cannot responsibly do so as it is awaiting the outcome of the Law Commission investigation. It is further suggested that this Court take cognisance of the law reform process when it formulates its reasons for the judgment and any order it makes and, in particular, that it ensures that law reform process is not unduly stifled.

4. The second point is that it is not clear what the words a "deceased estate that has been finally wound up by the date of this order" used in paragraph 5 of the order of his Lordship Mr Justice Davis mean. More certainty is required. The extent to which the order operates retrospectively should be defined in no uncertain terms. It is accordingly suggested that, if this Court were to hold that the challenged provisions are unconstitutional, and that the order of invalidity should not be suspended, that the question of retrospectivity be dealt with as follows:

4.1 The reading-in of words into the challenged statutes should be declared to take effect on 4 February 1997, provided that:

4.1.1 The reading-in shall not apply to any estates falling within the ambit of section 18(3) of the Administration of Estates Act 66 in respect of which the Master's Office has already issued a letter of authority.

4.1.2 The reading-in shall not apply to any estate or part thereof, in respect of which the executor has paid any creditor or distributed the estate or part thereof amongst the heirs in terms of section 35(12) of the Administration of Estates Act 66 of 1995.

5. These limits on the retrospectivity of the order will avoid creating the possibility of litigation concerning payments to judgment creditors or heirs which have already been made, while, on the other hand, not depriving women and other life partners of the rights conferred upon them by the Constitution. Also, and for the reasons mentioned below, this order will avoid disruption of the administration of estates in the Master's office and the concomitant delays and prejudice to other beneficiaries (including women) of a deceased's estate.

6. I now turn to deal with the affidavit of **HAYLEY LYN GALGUT** in greater detail.

6.1 Ad Paragraphs 3 to 11

Government departments responsible for implementing the laws, and the Master's Office have, in previous

judgments by the above Honourable Court been criticized for not providing the above Honourable Court with evidence and argument in respect of the impact of orders of invalidity.

6.2 In an effort to deal with these criticisms and in alignment with the attitude of the state to try and engage meaningfully in any constitutional debate before the above Honourable Court and other courts henceforth, the Third and Fourth Respondent, on analysis of the order of Davis J in the court *a quo* and specifically prayer 5 of that order, deemed it imperative that the attitude and concerns of Third and Fourth Respondents regarding same be made clear to this above Honourable Court.

6.3 Whilst it is correct that the state did not oppose the relief sought in the court *a quo*, the First and Second Respondent appear to be asserting that despite Third and Fourth Respondents' material interest in the outcome of this hearing, they are now precluded from providing this Court with submissions regarding the effect of Davis J's judgment in the court *a quo*. This cannot be correct nor is it conducive to a proper debate of the merits of the appropriateness of the relief sought in this application. Indeed it is submitted that in effect First and Second Respondent wish to preclude the state from placing its attitude before the Court as this does not suit their purposes.

6.4 Insofar as it is alleged that there are "no circumstances justifying the State's intervention" in this matter, this is denied. Indeed the Respondents have misconstrued the state's intention in this matter. For the reason previously stated, (the Law Commission process) the state has not

chosen sides in this matter. However, the state is entitled, indeed obliged, to place its attitude towards the appropriateness of the relief sought before this Honourable Court, especially where the terms of such relief will significantly impact on the finalisation of estates. The purported "intervention" of the state is nothing more than a clarification of its attitude to the order which is being sought before this Honourable Court. It is in the public's interest, and in the interests of the class represented by Second Respondent, that any order made by this Court be implemented without causing significant disruption to the administration of estates.

7. Ad Paragraph 12

7.1 The allegations made by the State and specifically which have been confirmed by me are indeed peculiarly within my knowledge, as are the conclusions drawn regarding the administrative problems which prayer 5 of Davis J's judgment in the court *a quo* will occasion. I fail to understand how First or Second Respondent can dispute the said allegations made by me without placing good and proper evidence before the above Honourable Court disputing those allegations. This they fail to do and yet in paragraphs 12, 14, 15 and 16 of Ms Galgut's affidavit, they proceed to baldly dismiss the assertions made by the state.

7.2 First and Second Respondent have never asserted that the effect of paragraph 5 of the court's order will be to extend it beyond the class in whose name the application has been brought, but the real point is as I have stated above, that the class of beneficiaries has not been

properly defined by Davis J or First and Second Respondents.

8. Ad Paragraph 14

The contents of this paragraph are denied and I confirm that in the event of this Court granting an order in terms of prayer 5 of the court *a quo,* serious administrative difficulties will be experienced by the Master's office.

9. Ad Paragraphs 15 and 16

9.1 I point out that First and Second Respondent appear to be attempting to utilize an extrapolation of figures obtained from a national census to assert the proposal that there will not be serious administrative difficulties experienced by the Master's office if an order is granted in terms of prayer 5. This evidence should not be accepted to contradict personal evidence based on my knowledge of the Master's office which is to the contrary.

9.2 In this respect I confirm that once letters of authority have been issued in respect of a section 18(3) estate, that estate is effectively "wound up" from a Master's office procedural point of view and there is no reliable way for the Master’s Office to determine whether the creditors have been paid and whether the estate has been distributed among the heirs. The executor has carte blanche to attend to the payments. Any attempt to issue instructions that such estates must be dealt with in terms of a new dispensation will produce tremendous uncertainty and haphazard results. The reading-in should accordingly only be effective in respect of section 18(3)

estates where the letters of authority have not yet been issued.

9.3 In respect of other estates, creditors are paid and the estate is distributed to heirs and beneficiaries by the executor in terms of section 35(12) of the Administration of Estates Act. It is obviously not in the interests of justice to revisit the distribution of an estate after it has been distributed. I should also explain that, in many instances more than one liquidation and distribution account is lodged. It is common for the first account to deal with cash, it to lie for inspection and be paid out in terms of section 35(12). Thereafter a second liquidation and distribution account is lodged dealing with, for example, immovable property which follows the same process thus in many instances, cash amounts are distributed by an executor before fixed assets and more than one account may lie for inspection. For this reason Third and Fourth Respondent suggest that it be ordered that the reading-in does not apply to any estate, or part thereof, in respect of which the executor has paid any creditor or distributed the estate or part thereof in terms of section 35(12) of the Act.

9.4 It is accordingly not the number of estates, but the impact on creditors and heirs, which should be the overriding consideration. It is the administrative difficulties created by an order which obliges the Master to revisit every estate referred to above which are substantial as it will have to be determined, in each instance, whether part of the estate has been incorrectly distributed.

10. Ad Paragraph 17

10.1 I point out that no confirmatory affidavit by Mr Jacobs is attached to Ms Galgut's affidavit and the assertions made by Ms Galgut are accordingly hearsay without corroboration. In any event, the statements are indicative of the misapprehension of the state's position under which First and Second Respondent operate. Third and Fourth Respondents have no objection to the application of the reading-in, to estates in respect of which the period referred to in section 29 of the Act has expired or where the account has been submitted in terms of section 35(1) of the Act. Third and Fourth Respondents' attitude, and the reasons therefore, were described above.

10.2 I submit that the wording of prayer 5 as granted by the court *a quo*, is, to any person seeped in the administration of estates, fraught with difficulty and it was after thorough consideration of the practical effect of that order on the Master's office and the administration of estates that the State placed its attitude on the prayer sought before this court.

11. Ad Paragraphs 18 - 26

I confirm that it has now been confirmed to Third and Fourth Respondents that the submissions advanced by the State will not have the effect of depriving First Respondent of the relief she seeks. She will not suffer any prejudice and I point out that, in the opinion of Third and Fourth Respondents, the limits on the retrospectivity of the order suggested above would strike a fair balance between the interests of the persons in the position of the Applicant, creditors, heirs and the public interest in the proper administration of estates. In contrast, the (undefined) degree of

retrospectivity demanded by the Applicants would prejudice the beneficiaries of those people whose estates are delayed in their winding up as a result of the order.

12. Ad Paragraph 27

It is cannot possibly be contended that it is in the interests of justice for a Court to turn a blind eye to evidence and argument concerning the impact of its order because it will inconvenience a party in the presentation of their case. If this is the contention, I respectfully say that it should be rejected. As I stated above, Third and Fourth Respondent are merely presenting evidence and argument to this Court in order to assist it to strike a proper balance between the interests of the various parties. I do not understand why First and Second Respondent are opposed to achieving this result, especially in light of the fact that their own submissions (which led to the order of Davis J) fall so far short of describing the realities faced by Fourth Respondent.

13. Ad Paragraph 28

13.1 Third and Fourth Respondents have no objection to the filing of further affidavits and evidence concerning the issue of retrospectivity, although it must be stated that their efforts to assist the courts thus far on this particular issue have not been particularly impressive. I accordingly suggest that, unless this Honourable Court reaches the conclusion that the evidence submitted by Third and Fourth Respondent is inadequate or cannot be trusted (as seems to be suggested by First and Second

Respondent), it should not allow any further evidence to be submitted.

13.2 Further, and in any event, even if this Court were to rule that it will receive more evidence on the point of retrospectivity it will have minimal impact on the “on-going harm occasioned by women in domestic partnerships”. The only women affected will be those whose life partners’ estates become distributable in terms of section 35(12) during the time it will take Third and Fourth Respondent to prepare the necessary affidavits if any.

14. Ad paragraphs 29 to 32

14.1 As far as cost is concerned, I submit that the most of the costs incurred by First and Second in respect of the state’s intervention is the result of an over-reaction and a fundamental misunderstanding of the state’s position. This is coupled with a seemingly distrustful attitude toward the state’s intentions in making the submissions it has. I point out that the First and Second Respondents’ attitude stands in sharp contrast to the Appellant’s approach, who, I am informed has no objection to the state’s participation, which is solely aimed to assist the Court in the event that it finds that the challenged law is inconsistent with the Constitution. Third and Fourth Respondents have a duty to provide this information to the Court and it is entirely inappropriate to punish them with a punitive costs order because they have fulfilled their duties to this Court in this regard. I submit there is no reason to order costs against Third and Fourth Respondent in this regard either at all or on an attorney and client scale as is submitted by First and Second Respondent.

ANTONIUS BERNARDUS GEORGE HOOGENDIJK

Thus signed and sworn to before me at **CAPE TOWN** this day of **May 2004**, the Deponent having acknowledged that he knows and understands the contents of this affidavit, that same are all true and correct, that he has no objection to taking the prescribed oath, and that he considers the prescribed oath to be binding on his conscience.

COMMISSIONER OF OATHS

Full Name:
Designation:
Address: