IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No CCT 60/04

In the matter between:

MINISTER FOR HOME AFFAIRS (FIRST APPLICANT)

AND

DIRECTOR GENERAL OF HOME AFFAIRS (SECOND APPLICANT)

AND

MARIE ADRIAANA FOURIE (FIRST RESPONDENT)

AND

CECELIA JOHANNA BONTHUYS (SECOND RESPONDENT)

In the Application of John Jackson Smyth to be admitted as amicus curiae

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FOUNDING AFFIDAVIT

I, the undersigned,

JOHN JACKSON SMYTH

MAKE OATH, and say as follows:

1. I am a retired member of the Bar of England and Wales, and was appointed Queen's Counsel in 1979. I now reside in South Africa and work as a voluntary legal adviser to Doctors for Life International (hereinafter called 'DFL'), a section 21 company. The company are also making an application to intervene in this suit but only to present written submissions and in respect of entirely different matters. I respectfully ask the Court to grant me leave to present oral arguments also in respect of this, my application in person.

2 Since the SCA judgement in this matter was handed down on November 30 2004, I have been in touch with counsel and attorneys for the parties. I wrote, on behalf of DFL, to the Minister of Home Affairs, on 3 December 2004, asking her to lodge an appeal in this case and informing her that we wished to intervene as amicus curiae. I went on leave on December 16th and returned on January 17th 2005. I discovered immediately that an appeal had been lodged on December 23 2004.

3. On 24 January I faxed a letter to both the State Attorney (acting on behalf of the Applicants) and to the Respondents' attorney, Mr van den Berg, asking for their consent to the intervention of myself and DFL as amici curiae. Both have indicated on the telephone that they are happy to consent but no written consents have been forthcoming. Hence this application under Rule 10(4).

4. MY INTEREST IN THE PROCEEDINGS:

4.1 I approach the Court first, as a married person who regards his marriage vows as sacred, pursuant to section 38(a) of the Constitution.

4.2 I approach the Court secondly, as a member of and in the interest of a group comprising those married persons in South Africa who regard their marriage vows as sacred and of divine origin, (and I include in that group those persons of the same convictions who intend to enter into marriage in the future), pursuant to section 38(c) of the Constitution.

4.3 Thirdly, I approach the Court as someone acting in the public interest pursuant to section 38(d) of the Constitution. The press and media tell us that a majority of persons in South Africa, whether they have religious beliefs about the issue or not, are opposed to a change in the definition of marriage.

5. MY POSTION IN THE PROCEEDINGS will be to ask the Court to allow me to speak to my written submissions in so far as they differ from submissions advanced by the Applicants.

6. THE SUBMISSIONS I WILL ADVANCE:

My written argument is at present in its first draft and will amount to only some 13 double-spaced pages. The Headings are as follows:

- Introductory Submissions relating to the theological and historical origin of the concept of marriage.
- **A change in the definition of marriage would amount both to unfair discrimination against persons who regard their marriage vows as sacred and of divine origin, on the grounds of religion, conscience and belief, pursuant to section 9(3) of the Constitution, *and* a failure to respect and protect the dignity of such persons contrary to section 10.**
- A Discussion of the 5 factors in section 36 of the Constitution which would come into play particularly should the Court hold that the Respondents suffer unfair discrimination if the definition of marriage *is not* changed, and the group which I represent would suffer unfair discrimination if the definition *is* changed.
- Comments on the SCA judgements particularly those parts which seek to separate secular and religious marriage. I submit that something that has its origins in religion cannot be treated as purely secular.
- Why the present definition of marriage does not discriminate against homosexuals.
- Alternatively, why the present definition does not *unfairly* discriminate against homosexuals.

- Some relevant dicta and quotations from previous decisions of this Honourable Court, from International Law and from Foreign Law.

7. From a careful reading of the judgements of Cameron JA and Farlam JA in the SCA it seems that none of these matters was really argued at the Bar in the SCA, and accordingly I believe they will be useful to the Court and different from the submissions of other parties. This assertion may be a little sweeping but it is certainly true of the second and third 'bullet' headings in the previous paragraph which are my key points.

8. Accordingly I ask this Honourable Court for leave to intervene as amicus curiae and for the particular privilege of presenting oral argument in person.

…….JOHN JACKSON SMYTH

THUS SIGNED AND SWORN BEFORE ME AT UMHLANGA ROCKS ON THIS DAY OF FEBRUARY 2005, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF HIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS IT BINDING ON HIS CONSCIENCE.

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COMMISSIONER OF OATHS