



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 22013/2015

In the matter between:

LA-EEQAH BENJAMIN

First Plaintiff

LA-EEQAH BENJAMIN N.O.

Second Plaintiff

and

FNB TRUST SERVICES (Pty) Ltd N.O.

First Defendant

NADIA JACOBS N.O.

Second

Defendant

MASTER OF THE HIGH COURT,

WESTERN CAPE

Third Defendant

Date of hearing: 19 days between 27 October 2021 and 29 August 2022

Date of judgment: 27 September 2022

JUDGMENT

MEER J:

Introduction

[1] The central issue of this judgment falls within the realm of the Islamic Personal law of Marriage and Divorce/Talaq. The judgment considers whether the Plaintiff, La-eeqah Benjamin was married according to Islamic Sharia law to Mogammat Nazeem Benjamin (“the Deceased”) at the time of his death in July 2012, and is accordingly a surviving spouse in terms of s 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (“the MSSA”). Given that the judgment concerns an Islamic marriage/talaq, it traverses the interplay between Islamic Sharia law and our civil law. The judgment emanates from a trial which spanned 19 days during 27 October 2021 and 29 August 2022, at which some 13 witnesses testified.

[2] In a summons issued on 13 November 2015 La-eeqah Benjamin, as First Plaintiff in her personal capacity, sought a declaration that she was the wife of the Deceased at the time of his death. As such, she sought judgment in the amount of R19 439 631, plus interest, against the First Defendant, the executor of the Deceased’s estate, in respect of her maintenance. By agreement between the parties, the merits of the First Plaintiff’s claim for an order declaring her to be a surviving spouse of the Deceased, and the quantum of her claim, were separated. I am required therefore to determine at this stage only whether the First Plaintiff was the wife of the Deceased at the time of his death.

[3] As Second Plaintiff, in her capacity as mother of Mogammad Yaseen Benjamin, who is the biological child of herself and the Deceased, La-eeqah Benjamin claimed maintenance for her son in the sum of R3 018 183 from the Deceased’s death up until the child’s 25th birthday. That claim has since been settled. This judgment hereinafter refers to La-eeqah Benjamin as the Plaintiff.

The Parties

[4] The First Defendant is the executor of the Deceased's estate, appointed in August 2012. As aforementioned, the Plaintiff's claim for maintenance is against the First Defendant as Executor.

[5] Initially the Second Defendant was Nadeema Benjamin, described in the plea filed by her on 7 May 2021, as the third wife of the Deceased, and who is his testamentary heir. Ms Nadeema Benjamin passed away on 7 May 2021, whereafter her daughter, and the step-daughter of the Deceased, Ms Nadia Jacobs, also the executrix of her late mother's estate, was substituted as Second Defendant. No relief is sought against the Second Defendant, save for a cost order arising from her opposition to the action. She is cited as having a direct and substantial interest in the matter. The Plaintiff's claim that she was married to the Deceased at the time of his death, is opposed by the Second Defendant.

[6] The Third Defendant, the Master of the High Court, Western Cape ("the Master") is cited in his/her official capacity as the party charged with the overall responsibility for the administration of deceased estates in terms of the Administration of Estates Act 66 of 1965.

Background Common Cause Facts

[7] On 19 November 1992 the Plaintiff and the Deceased were married to one another. The marriage was solemnised in accordance with Islamic Shariah law. There were two children born of the marriage, namely: Tashreeqah Benjamin, born on 3 June 1994; and Mogammad Yaseen Benjamin, born on 5 July 1999. From the date of their marriage until about 1997 the Plaintiff and the Deceased lived together as man and wife in a monogamous marriage relationship. The Deceased took another wife in 1997, the late Nadeema Benjamin whom he also married according to Islamic Shariah law, and

informed the Plaintiff of his marriage to her. Thereafter the Plaintiff and the Deceased lived together as husband and wife in an Islamic polygamous marriage relationship. The Deceased appears to have been married prior to his marriage to the Plaintiff. Nadeema Benjamin in her plea, as aforementioned, states she is the third wife of the Deceased.

[8] The Deceased passed away on 25 July 2012. The Plaintiff filed a claim against his estate on 26 March 2014, for maintenance as a surviving spouse. The executrix of the estate informed the Plaintiff that her claim would not be entertained. In this regard reliance was placed on a Marriage Annulment Certificate issued by the Paarl Muslim Jama'ah, which stated that the Deceased issued the Plaintiff with a final talaq/divorce on 7 August 2000. The claim was not included in the first and final liquidation and distribution account. The Plaintiff filed an objection to the Master, the Third Defendant, which objection was dismissed on 14 October 2015. The Master ruled that she could bring this action within 30 days, failing which the executor would be advised to pay out as per the liquidation and distribution account.

[9] The Plaintiff simultaneously approached the Muslim Judicial Council ("the MJC") for a ruling on the status of her marriage. The Fatwa Committee of the MJC, upon investigation, issued a fatwa, or religious edict, on 23 November 2015, to the effect that the marriage of the Plaintiff to the Deceased still subsisted at the time of his death. The basis for the decision was, given that the husband was no longer alive, proof by two male witnesses of the issuing of a final talaq/divorce was required in accordance with Islamic Sharia law, and in the absence thereof the presumption of the subsistence of the marriage prevailed.

[10] It is common cause that the requisite proof according to Islamic Sharia law, of two male witnesses to the alleged final talaq between the Plaintiff and the Deceased, contended for by the Second Defendant in this matter, is absent.

The Second Defendant, however, contends that the Islamic Sharia evidentiary requirements do not apply in this court and the issue stands to be determined on the application of our secular civil laws of evidence. She contends moreover that this court is not precluded by the doctrine of entanglement, which is discussed below, from pronouncing on the status of an Islamic Sharia marriage. This is so, notwithstanding the pronouncement of the Fatwa Committee.

Pleadings

[11] In paragraphs 10 to 14 of her particulars of claim, as amended, the Plaintiff pleads that her marriage to the Deceased continued until his death.

‘10. This marriage continued and subsisted for the duration of the life of the parties for the following reasons:

11. On or about 2001 during an argument between the deceased and the First Plaintiff, the deceased threatened the First Plaintiff with “Talaq” (divorce) but never uttered the words of Talaq. The First Plaintiff avers that a threat of Talaq does not constitute a Talaq in terms of Islamic law.

12. During the same year the First Plaintiff was approached by Hafith Omar Cook, who was the resident religious officer in the area [hereinafter “Imaam”], who informed the First Plaintiff that the deceased is intending to issue a “Talaq” divorce. The Imaam left without stating anything further and when the First Plaintiff approached the deceased about his intentions, First Plaintiff was told that she should not take note of what was said by the Imaam to the First Plaintiff.

13. On or about 2003 the First Plaintiff was again approached by the Imaam who came to the house of the First Plaintiff to inform the First Plaintiff that the deceased wanted to issue a Talaq against the First Plaintiff. The Imaam also stated that he was not actually there on the instructions of the deceased but on the instructions of the Second Defendant as the Second Defendant was not satisfied with being a second wife.

14. The next day when the First Plaintiff enquired from the deceased as to the purpose of the Imaam’s visit and whether the deceased wants to divorce the First Plaintiff, the deceased just shrugged it off and told the First Plaintiff not to take note of it. The First Plaintiff and the deceased had since then shared a marital home and a bed until the death of the deceased.’

[12] The particulars go on to aver that no talaq occurred because Imaam Cook never conveyed the words of talaq, and the agency of Imaam Cook on behalf of the Second Defendant would have been invalid. At paragraph 20 A of the particulars of claim it is stated:

‘The Fatwa Committee of the Muslim Judicial Council, after having considered the evidence of inter alia the First Plaintiff and Imaam Omar Cook, on 23 November 2015 issued a fatwa (religious edict) which authoritatively concluded that the marriage of the First Plaintiff to the deceased still subsisted at the time of the death of the deceased. Find attached a copy of the fatwa marked “LB2”.’

[13] Paragraphs 1 to 3 of the Fatwa annexed as “LB2” states:

- ‘1. There is no dispute as to the original existence of the marriage.
2. Thus far the claim of its termination by talaq rests solely upon the word of one solitary male, Imaam Omar Cook.
3. With the husband now deceased, termination becomes a matter of shahadah (testimony) in which the word of a single male falls short of the required quorum.’

The Second Defendant’s Plea

[14] In her plea the Second Defendant (who at the time of the plea was the late Nadeema Benjamin) states that she was the third wife of the Deceased. She admits that the Deceased married the Plaintiff in 1997, but denies that they lived together as husband and wife until his death in 2012. At paragraphs 13.2 to 13.8, the Second Defendant recounts the following incidents during August 2000:

‘13.2 Cook visited the parties at their erstwhile former common home between 17h30 and 18h00 on 7 August 2000;

13.3 The deceased in the presence of First Plaintiff advised Cook that he intended to issue First Plaintiff with a divorce;

13.4 Cook thereafter attempted to reconcile the deceased and the First Plaintiff, however the deceased was adamant that he wished to get divorced;

13.5 The deceased proceeded to issue the First Plaintiff with a Talaq and advised Cook that this was the third talaq issued by him and the First Plaintiff did not contest this;

13.6 First Plaintiff admitted that two previous talaqs had been issued and she did not contest the third and final irrevocable talaq;

13.7 Cook proceeded to attend at the Paarl Mosque the following day and prepared and issued the marriage annulment certificate dated 7 August 2000, a copy of which is annexed hereto as annexure “B1”.’

The Second defendant goes on to deny that she ever gave Imaam Cook instructions to approach the Plaintiff for a talaq.

The Testimony

[15] The Plaintiff called two expert witnesses, Sheikh Faaik Gamieldien and Moulana Abdul Fattaag Carr, and four factual witnesses. The Defendants called 5 factual witnesses. No expert evidence was led by the Defendant.

Testimony of Sheikh Faaik Gamieldien

[16] Sheikh Gamieldien is a recognised, experienced and qualified scholar of Islamic personal law, who serves on the Committee of the South African Law Commission, tasked with drafting the Muslim Marriage Legislation. He holds a Master’s Degree in Comparative Law and Jurisprudence (cum laude) from the International University of Malaysia; an LLB from the International Islamic University, Islamabad; and a Diploma in Arabic from the University of Al-Azhar, Cairo, and is currently registered as a doctoral student for the degree D Litt. et Phil (Islamic studies) at UNISA. He is also an Advocate of the High Court of South Africa and a Justice of the Peace. Sheikh Gamieldien has lectured in Muslim Personal Law at the University of the Western Cape and in Islamic Economics at the International University of Malaysia. In addition, Sheikh Gamieldien has been an Imaam in a number of mosques in Cape Town and Pretoria.

[17] Sheikh Gamieldien's opinion was based on information obtained from the Plaintiff and her attorney. His evidence about the relevant Islamic Shariah law principles and the institution of talaq was as follows:

17.1 Talaq or divorce is the dissolution of the marriage tie by the husband or his agent, duly authorised by him to do so, by using the word talaq or any expression, written or oral, which clearly indicates the husband's intention to divorce his wife. The presence of witnesses is highly approved, but not essential, when the husband pronounces a divorce.

17.2 A husband has a unilateral right to divorce his wife. The prerogative of talaq is his alone. A wife cannot dissolve a marriage by the mere issue of a talaq. She must resort instead to the process of applying to an Islamic Tribunal for an annulment or fasakh.

17.3 A Muslim husband has the facility of the pronouncement of three divorces during the subsistence of a valid marriage. The first two divorces are revocable and may be revoked by the husband during a waiting period, known as the Idah. The waiting period is three menstrual cycles for menstruating women, and a period of 90 days for non-menstruating women. If a third talaq is given by the husband it is irrevocable. The result is that the marriage dissolves immediately in the case of the pronouncement of a third talaq.

17.4 A husband may remarry his wife to whom he has given a third talaq, only after she enters into marriage with a third party and that third party subsequently divorces her. Should a husband have sexual relations with his divorced wife after a third talaq before her marrying a third party, adultery is committed.

17.5 Where a marriage has been shown to exist, there is a presumption in favour of its continuance and the burden of proving that the husband and

wife are divorced rests upon the person who alleges it. Where there is uncertainty concerning the existence of a marriage, Islamic law will err on the side of the marriage continuing and will require very substantial evidence to displace the presumption.

17.6 In the circumstances of this case, where the husband has died and the Plaintiff contests that a third and irrevocable talaq was issued, for the talaq to be proved, the following evidence is required:

17.6.1 Confirmation in writing signed by the deceased that the talaq has taken place.

17.6.2 Two male witnesses would have to swear under oath that the talaq was issued.

17.7 The evidence of a single witness, in this case Imaam Cook, was insufficient to prove a talaq and the presumption in favour of the continuation of the marriage applies. This was acknowledged in the fatwa issued by the MJC which pronounced that the marriage subsisted and recorded:

‘2. Thus far, the claim of its termination by *talaq* rests solely upon the word of one solitary male, Imam Omar Cook.’

[18] Applying the Islamic Sharia principles to the pleadings and facts, Sheikh Gamiieldien testified as follows:

18.1 The first incident described at paragraph 11 of the amended particulars of claim, to the effect that on or about 2001 the Deceased threatened the Plaintiff with a talaq, but never uttered the word talaq, did not constitute a talaq, as a threat of talaq did not suffice. Nor did the words ‘Ek lus en talaq jou sommer’, recorded in the Plaintiff’s affidavit dated 26 November 2014, submitted to the MJC to pronounce on the state of her marital affairs, constitute a talaq.

18.2 The second incident referred to at paragraph 12 of the particulars of claim, and recorded at paragraphs 14 to 18 of the Plaintiff's affidavit to the MJC, also did not constitute a talaq, as it merely records Imaam Cook stating that the Deceased intended to issue a talaq. The requisite words were not uttered by Imaam Cook. In her affidavit to the MJC, the Plaintiff notes that Imaam Cook came alone and informed her that the Deceased sent him for a talaq. Imaam Cook did not tell her whether the Deceased had pronounced a talaq and whether he came as a proxy/agent for the Deceased. As Imaam Cook did not have two witnesses, the incident was not a talaq.

18.3 The third incident, in or about 2003¹, when, according to the Plaintiff, Imaam Cook sought a talaq on the instructions of the Deceased's second wife, Nadeema, also did not constitute a talaq. Nadeema had no *locus standi* to initiate the talaq as it was impermissible for the Imaam to issue a talaq on behalf of a co-wife rather than a husband. Imaam Cook was also unaccompanied by witnesses.

18.4 With reference to paragraphs 13.2-13.8 of the plea, to the effect that the Deceased issued a talaq in the presence of Imaam Cook, Sheikh Gamieldien conceded that if this version was correct, then the pronouncement of the talaq would have been valid.

18.5 Apropos the annulment certificate, it is settled law that an annulment is granted by a properly constituted religious tribunal upon the request of the wife, if she has grounds for a divorce and the husband refuses to issue a talaq. This is referred to as a fasakh. There is no evidence that the Plaintiff applied for an annulment. All the alleged facts provided revolve around the alleged issuance of a talaq by the Deceased. The signature of the head of the tribunal must be on the annulment certificate. The annulment certificate here is signed by Imaam Cook.

¹ As recorded at paragraph 13 in the particulars of claim and paragraphs 20-22 of the Plaintiff's affidavit to the MJC.

18.6 A husband does not issue an annulment certificate when there is a talaq. After a husband verbally gives a talaq the tribunal issues a talaq certificate, which he signs. A talaq certificate would have recorded the Deceased's ID number, the fact that he had given a talaq, and would have been signed by the Deceased. In the instant case, the annulment certificate is signed by Imam Cook. The wife gets an annulment certificate after a fasakh.

18.7 The annulment certificate is not valid, as it is not signed by the head of the tribunal. If it were valid the tribunal would have informed the Plaintiff that the marriage had been annulled. By whose authority Imaam Cook issued the annulment certificate on behalf of the Paarl Muslim Jama'ah, and whether he in fact had the authority to do so, are questions which require clarification by the latter body. Imaam Cook had failed in his duty if he did not provide the Plaintiff with the annulment certificate.

18.8 A Liberty Life Assurance Certificate in the name of the Deceased, which lists the Plaintiff as beneficiary and describes her as ex-wife, has no bearing on whether or not a talaq was issued. Nor did the Deceased's will, which makes over his estate to his wife Nadeema on condition that she survives him by seven days, and if not he leaves his estate equally to his four children. The will was not consistent with Islamic law, in terms of which the wife gets a Qur'anic eighth share, and if there are two wives this must be divided between them. As the other wife is Deceased the Plaintiff is entitled to an eighth of the estate.

18.9 On the proceedings before the MJC, and the fatwa that the marriage subsisted, the MJC is the highest body that pronounces on divorces and annulments. Moulana Carr, who issued the fatwa certificate, is very knowledgeable. The late Moulana Karaan, who signed the fatwa certificate on behalf of the Fatwa Committee, was one of the top three Islamic scholars

in the Western Cape. Imaam Cook, in comparison, does not have training in Islamic law and is not an Islamic scholar.

18.10 It can rightly be inferred that if the Deceased continued his marital relationship with the Plaintiff until his death in 2012, that a talaq complying with the requirements of Islamic law was not issued by him, or if he did issue a first or second talaq, then such talaq was subsequently revoked by his continued marital relationship with the Plaintiff.

[19] The report concludes that on a conspectus of all the facts as provided to him, Sheikh Gamieldien is of the opinion, based on his knowledge, experience and qualifications, that the Plaintiff is a surviving spouse of the Deceased in terms of Islamic law.

[20] Sheikh Gamieldien was a competent and credible witness, whose evidence withstood lengthy and vigorous cross examination. Whilst his conclusion that the marriage subsisted continued to be disputed, his opinion on the principles of Islamic Sharia law and the evidentiary requirements, was not disputed and was accepted by the Second Defendant, Imaam Cook and Moulana Carr, as appears below. As aforementioned, the principles of Islamic law as espoused by him were common cause.

Testimony of Moulana Abdul Fattaag Carr

[21] Moulana Carr was on the Fatwa Committee of the MJC which issued the fatwa, or official ruling, that the Plaintiff was married to the Deceased at the time of his death. Moulana Carr is a traditionally trained scholar in Islamic law, holding a six year Alim Fadhil qualification from the Darul Uloom Zakariyya University in Gauteng. His studies incorporated Islamic Jurisprudence and the Arabic and Urdu languages. He has also committed the Holy Quran to memory. Moulana Carr is currently the Imaam of the Nurul Islam Mosque in Salt River, a position he has held since 2004. He has been a member of the MJC since 2005.

Moulana Carr agreed with and corroborated the evidence of Sheikh Gamieldien pertaining to the principles of Islamic law, and agreed unequivocally with his opinion. Much of Moulana Carr's testimony pertained to the proceedings before the MJC.

[22] Moulana Carr's evidence about the MJC, the Fatwa Committee and the proceedings, investigation and ruling on the Plaintiff's marriage, was as follows:

22.1 The MJC is the oldest judicial body in respect of Islamic law in the Western Cape. Most of the leading Muslim scholars in the Western Cape have been members of the MJC. The MJC is a founding member of the United Ulama Council of South Africa. It has a Sharia Court and deals, *inter alia*, with the issuing of marriage certificates and marriage annulments.

22.2 Moulana Carr's co members on the Fatwa Committee which presided over the Plaintiff's case, were the late Moulana Taha Karaan, an acknowledged outstanding international Islamic scholar and Shafi jurist, who had served on several financial institutions as a Sharia Supervisory member, and Sheikh Amien Fakier, a leading Islamic scholar and author, who has served as Chief Judge of the Sharia Court. The Fatwa Committee has approximately seven members, comprising the most learned Islamic scholars in the Western Cape. Rulings are given almost exclusively on annulments of marriages. The Fatwa Department consists of a full time administrator or Mufti and the Fatwa panel. Where an issue pertains to the interpretation of Islamic law, all members of the MJC, including its executive body, are bound by rulings of the Fatwa Committee.

22.3 The Fatwa Committee interviewed the Plaintiff, Imaam Cook and Nadeema Benjamin, for the purposes of investigating and ruling on the status of the Plaintiff's marriage. An affidavit by the Plaintiff, submitted by her attorney, and a statement from Imaam Cook, obtained by the Fatwa

Committee, served before it. Ms Nadeema Benjamin was called in on two instances, one of which was for a meeting with the president of the MJC.

22.4 The proceedings before the MJC commenced with a request from the Plaintiff, in October 2013, for a ruling on the status of her marriage. Initially there was a meeting between the Plaintiff and the late Moulana Hendricks, whereafter the Plaintiff submitted her affidavit, dated 26 November 2014, which in essence set out her version as contained in her particulars of claim.

22.5 The head of the Committee called upon Imaam Cook to provide both documentary and oral evidence. Imaam Cook initially met with Moulana Karaan and Moulana Carr. The consultation was to ascertain the circumstances of the alleged talaqs, *inter alia* whether there were witnesses. The meeting lasted about 30 minutes. Imaam Cook signed a short statement, dated 3 March 2014, which stated that he had issued a talaq in 1999 and a final talaq on 7 August 2000.

22.6 Imaam Cook was called to a further meeting on 24 August 2015, concerning the validity of the alleged talaqs. At that meeting the Fatwa Committee asked him to sign a document, styled as an affidavit, recording that both the 1999 and 2000 talaqs occurred at the 'couple's residence' and that there were no witnesses at each of these talaqs.

22.7 Imaam Cook was specifically questioned about the circumstances and manner in which he issued the talaqs, and whether a declaration of divorce had been signed. Imaam Cook had not been very clear in explaining how he had officiated over the talaqs. After discussion with Moulana Karaan the Committee was not satisfied with Imaam Cook's responses to the questions posed. It was unclear whether he had acted as a representative of the Deceased, as well as what words were uttered to the Plaintiff. Nor was there clear articulation, so as to leave no doubt that he had in fact issued a talaq.

22.8 The normal practice when a talaq is issued, is that a declaration of divorce is signed by both parties, alternatively that two witnesses are present. Here there was neither a signed declaration nor were there witnesses to the facilitation or utterance of the talaq.

22.9 Imaam Cook was also questioned about the annulment certificate, and the Plaintiff's version that she and the Deceased continued to live as husband and wife until his death, a clear violation of Islamic law in the circumstances of an irrevocable talaq.

22.10 Apropos the annulment certificate, the procedure followed by Imaam Cook was different to that followed by the MJC. The annulment certificate ought to have had the stamp of the Paarl Muslim Jama'ah on it, and a copy should have been given to the wife. The fatwa certificate took preference over the annulment certificate. Furthermore, the impression was given that the annulment certificate was not issued at the time, nor was any other document issued.

22.11 The Fatwa Committee thereafter applied its mind to the issue, and taking into consideration the evidence as well as the principles of Islamic law, issued a fatwa that the marriage between the Plaintiff and the Deceased still subsisted at the time of his death.

22.12 In relation to paragraph 3 of the fatwa certificate, pertaining to shahadah (testimony), he confirmed the requisite quorum of two male witnesses to prove a disputed talaq, as testified by Sheikh Gamieldien. The fact that in the present case the evidence of the talaq rested solely on one male witness, namely Imaam Cook, and with the husband deceased, the testimony of Imaam Cook fell short of the required quorum.

22.13 The core of the reasoning underlying the fatwa, is that where the Deceased has passed away and there is a claim of an irrevocable divorce, for

such a claim to be upheld it needs to be substantiated by two male witnesses, and as this was not complied with, the claim cannot be entertained. Also considered was the fact that the spouse, the Plaintiff, had testified on oath that a talaq had not taken place. It was on this basis that the fatwa was issued.

22.14 The decision of the Fatwa Committee was a fairly straightforward application of the principles of Islamic law. All three members of the Committee were involved in making the decision and there was no dissension amongst them. The fatwa was binding on all members of the MJC. The annulment certificate would not stand in the light of the fatwa.

[23] During cross examination Moulana Carr testified:

23.1 The Plaintiff and Deceased's sleeping arrangements had no bearing on whether the marriage continued. Intimacy was irrelevant to the ruling about a talaq. The fatwa hinged on the fact that there was no quorum of witnesses to prove a talaq.

23.2 When it was contended that Ms Nadeema Benjamin was not sufficiently interviewed before the fatwa was issued, he emphasised that she was consulted on two occasions. On one of these she had a meeting with the president of the MJC, in which she had an opportunity to say whatever she wanted to. He explained it was not normal for a person outside the marital relationship to comment. The matter before the MJC concerned the marriage between La-eeqah Benjamin and the Deceased; Nadeema Benjamin was not present at any of the alleged talaqs.

23.3 The process that was followed in issuing the fatwa certificate was thorough and adequate. None of the alleged shortcomings that were raised with him in cross examination would warrant a reconsideration of the fatwa. In terms of Islamic Sharia principles there were no procedural shortcomings

in the handling of the matter. The Fatwa Committee ruling has never been appealed.

23.4 The Liberty Life document, by its mere articulation of the Plaintiff as ex-wife, does not prove her status as such. The document is not a declaration of divorce and does not prove a divorce.

23.5 The Deceased's will, which named Nadeema Benjamin primarily as the heir, was inconsistent with Sharia law of inheritance. The reference to his being married to Nadeema Benjamin according to Muslim law did not prove that he was not also married to the Plaintiff, and did not exclude her from also being a wife in terms of Islamic law.

23.6 With regard to the possibility of further evidence being brought before the Fatwa Committee, if there was evidence about male witnesses or if the Plaintiff recanted her evidence, this would be relevant.

[24] Moulana Carr's testimony withstood lengthy and rigorous cross examination and his evidence was credible. The Second Defendant objected to Moulana Carr testifying as an expert, contending that he did not provide independent assistance by way of objective unbiased opinion, but advocated for the decision of the Fatwa Committee to be followed.

[25] Whilst Moulana Carr explained the process and finding of the Fatwa Committee, he did not advocate for this court to follow that decision. It is however so, that the bulk of his evidence was factual and concentrated on the proceedings before the MJC. Given his unequivocal acceptance of the expert evidence of Sheik Gamieldien, his testimony pertaining to matters of expertise in Islamic Sharia law was limited.

[26] Moulana Carr assisted the Court in understanding the proceedings and finding of the Fatwa Committee, and in so doing his evidence as a member of the Fatwa Committee was of a factual nature, rather than the opinion evidence

of an expert. As such his testimony is accepted as that of a factual witness, as opposed to the evidence of an expert. I note that the evidence of Moulana Carr as an expert is in no way indispensable to the Plaintiff's case.

Testimony of La-eeqah Benjamin, the Plaintiff

[27] The Plaintiff testified as follows:

27.1 She was married to the Deceased on 19 November 1992 according to Islamic law and they had two children: Tashreeqah, born on 3 June 1994; and Yaseen, born on 5 July 1999. The marriage was monogamous until 1997, when the Deceased married Nadeema Benjamin. The Deceased and Nadeema did not have any children.

27.2 She had accepted the polygamous nature of her marriage, and came to an arrangement with the Deceased whereby he would spend alternate nights at her and Nadeema's households. He would, however, always come to her house in the morning to see the children and take them to school. Later on, from about 2001, he spent more time at Nadeema Benjamin's house. This was to appease Nadeema, because of the business and because they had more arguments.

27.3 The Deceased however continued to sleep openly at her house, in their shared room, and she continued to have marital relations with him until his death. The Deceased kept clothes, personal possessions and documents at her home, as well as cash and a gun in their bedroom safe. She and the Deceased went on regular family holidays (sharing a common bedroom), with their children and other family members, until his death. They had holidayed at Camps Bay, Goudini Spa, George, Knysna and Wilderness. The holidays would sometimes coincide with her wedding anniversary on 19 December. The Deceased gave her anniversary and birthday gifts, jewellery and even a car.

[28] I pause here to mention that the Plaintiff's evidence about the Deceased continuing to sleep at her house, holidays, anniversaries and gifts, was corroborated by her daughter Tashreeqah, albeit the latter's evidence was at variance with that of the Plaintiff in respect of how long the Deceased stayed on holiday and whether the holidays were planned impulsively by the Deceased, or planned deliberately as testified by Tashreeqah.

[29] Likewise her testimony about the Deceased continuing to sleep at her house and joint holidays was corroborated by the Deceased's brother, Shaheed Benjamin, who stayed at the house doing building work at intervals between 2007 and 2010. The last family holiday he testified about was at Club Mykonos two years before the deceased passed away. The Deceased and the Plaintiff shared a room. His brother was a devout Muslim, he said, and would never have slept with the Plaintiff had their marriage been dissolved, as this would have been a major sin. His brother had never informed him that he had divorced the Plaintiff, and he denied the Second Defendant's version of a divorce.

[30] The Plaintiff's testimony continued as follows:

30.1 The Deceased operated a transport business, Benjamin's Transport, which thrived in the last 10 years of his life. She had played a role in the business in the early stages of her marriage. The transport business had government school contracts to transport children to schools in the Paarl, Wellington area. She recalled that when her daughter was a couple of months old, she would drive a vehicle transporting school children for the business, accompanied by a guard. Before the business thrived, she helped financially and at one stage cashed in a policy for the business. She had stopped working three months before her daughter's birth, and the Deceased did not want her to go back to work. She described her husband as a very

generous man, sometimes irresponsible. She enjoyed a very high standard of living and he died a wealthy man.

30.2 After her husband's death in 2012, his father and brother initially operated the business, whereafter Nadeema Benjamin took over until her death. Nadia Jacobs, Nadeema's daughter from a previous marriage, has since taken over the business.

30.3 Imaam Cook was known to the Plaintiff and the Deceased before they married. The Deceased and Imaam Cook had pursued religious studies together, and Imaam Cook would lead prayers if they had a religious function. The Deceased would always reward Imaam Cook. Sometimes he would instruct the Plaintiff to give Imaam Cook sums of money to help him. At one stage he had said: 'Die man soek nou rent geld'. The Plaintiff conceded she could not say if the money was used for Imaam Cook personally, or for mosque projects as alleged by Imaam Cook.

[31] The Plaintiff testified about the three incidents referred to in her particulars of claim above, as follows:

31.1 In 2001 towards the end of the year she and the Deceased had quarrelled at a party at her cousin's house. The Deceased was apparently unhappy about the time that the Plaintiff and her children were leaving the party to come home. On this occasion he walked out and said: 'Ek lus en talaq jou sommer'. That night it was his turn to sleep at Nadeema Benjamin's home. He came to the Plaintiff's house the next morning and they just went on as normal. This incident had no impact on their sleeping and living arrangements.

31.2 The second incident occurred when Imaam Cook came to her home in 2001 and said: 'I do not know how to put this, but the deceased sent me here for a talaq.' Cook had no paperwork with him. He was alone and no

witnesses were present. She was emotional and worried. When the Deceased came home the next morning she asked him why he had sent Imaam Cook the previous night. He replied: 'Los daai goed. It's nothing.' This incident too had no impact on their sleeping arrangements.

31.3 With regard to the third incident, in or about 2002/2003, early in the year she and the Deceased had another of several arguments. It was clear to her that Nadeema was not happy to be the other wife. She would find ways for the Deceased not to be with his children. Though the Deceased came to her house everyday he slept over less. This was to appease Nadeema. Plaintiff had come to be at peace with the arrangement. Imaam Cook came to her home one night in 2003, alone. He said he was there on 'Nazeem's instructions'. Nadeema had phoned him to come to her house. Nazeem and Nadeema had been alone. 'Nazeem had sent me for a talaq but it is Nadeema talking. She wants Nazeem to divorce you. Nazeem is just sitting there saying nothing. Nadeema requested me to come.' From what he said it was clear to the Plaintiff that Nadeema had sent him for a divorce.

31.4 The next morning the Plaintiff confronted the Deceased and informed him that Imaam Cook said Nadeema wanted the divorce. The deceased's response was: 'Ag man los af daai goed. Die vrou is mal.'

31.5 The Plaintiff was upset, but decided that the Deceased looked after her and her children well, she did not work and she decided it was good for her to stay married. She did not have any more issues. The Deceased spent more time at the other house. For her everything was good enough.

[32] The Plaintiff testified further as follows:

32.1 She did not go into an idah period for divorce at any stage. She went through an idah period as a widow after her husband's death in 2012. Her idah period came to an end in the first week of December 2012. During her

idah period, Nadeema Benjamin sent drivers to take the children to school and paid maintenance for her and the children. (This was confirmed by the evidence of the Plaintiff's daughter, Tashreeqah). Nadeema stopped paying for the Plaintiff's maintenance when she lodged a maintenance claim against the Deceased's estate.

32.2 She disputed the alleged talaqs referred to in the plea. With regard to the alleged final talaq, on 7 August 2000, she could not remember anything significant happening on 7 August 2000. She denied the averment in the plea that Imaam Cook visited her house and that the Deceased, in the presence of herself and Imaam Cook, said he intended to issue her with a divorce. She was adamant that the Deceased was never present at Imaam Cook's two visits to her house. She moreover denied, as averred in her plea, that her husband had issued her with a third irrevocable talaq.

32.3 She had not received the annulment certificate, but had seen it for the first time a month or two after consulting with her attorney. She was told about its existence by a worker at her late husband's transport company, who brought it to her in 2013 between September and October. Plaintiff accepted that a copy of the annulment certificate was certified in 2013, as per the date stamp on the copy, and that the stamp does not reflect the date on which the document was completed. She alleged, however, that the annulment certificate was completed by Imaam Cook in respect of an event that did not take place.

[33] I pause here to mention that Shahied Benjamin testified that he saw the annulment certificate for the first time when consulting with Plaintiff's legal team in preparation for trial.

[34] The Plaintiff's testimony continued as follows:

34.1 Imaam Cook was aware that her husband stayed with her, as Imaam Cook would come to the house. At no stage did Imaam Cook say this was a problem.

34.2 About the Liberty Life policy, the Deceased had informed her he had taken out a policy for her, one for Nadeema and another for the business. He assured her that she and her children would be looked after upon his death. She suggested the only reason she could think of for the description of her as an ex-wife on the policy, was because Nadeema was present on the day and one could not leave two policies for two wives. However, in cross examination, when asked why she thought her husband would refer to her as an ex-wife and whether he was known to lie, she said she could not answer the question even though he was her husband and on her version a religious man.

34.3 With regard to the will, she learnt a few months after his death that everything had been left to Nadeema. She found this unreal because the Deceased always said she and the children would be looked after. She found it surprising that the Deceased's father was not included in the will.

[35] The Plaintiff's evidence withstood rigorous cross examination and her demeanour was that of an honest and credible witness.

Witnesses for the Defendant

Testimony of Imaam Omar Cook

[36] Imaam Omar Cook testified under subpoena. Ms McCurdie, for the Second Defendant, explained this was so because he felt intimidated after being urged by a past president of the MJC 'to stand down' from the matter.

[37] Imaam Cook is currently an Imaam at the Paarl Mosque. He grew up in Paarl, and after completing his Islamic studies and working elsewhere he returned to the area. His qualifications are as follows: In 1978 he completed a

secondary Islamic course at Darul Uloom in Newcastle, KZN. In 1979 he completed the memorisation of the Quran in Cape Town, whereafter he taught at a Muslim orphanage at La Mercy in Kwa-Zulu Natal until 1995, when he was appointed as one of several Imaams at the Paarl Mosque. He is an executive member of the Paarl Mosque Board and serves on the Imaam Committee in Paarl. Imaam Cook is also employed full-time by the MJC as a Halaal compliance auditor, a post he has held for 15 years.

[38] Imaam Cook was for a time temporarily suspended by the Paarl Mosque Board, due to a complaint pertaining to an alleged 'sinful' relationship with a woman. He was however cleared after an investigation, and resumed his duties as an Imaam.

[39] Imaam Cook testified as follows on his relationships with the parties:

39.1 He had a long and close relationship with the Deceased, dating back to the 70's when they were both enrolled to memorise the Quran. Their relationship became closer after 1995, when he returned to Paarl. He co-opted the Deceased as a sponsor of the Paarl Mosque. The Deceased, as a member of the business community, became involved in mosque projects and in maintaining the mosque. He would regularly visit the Deceased at his office. He denied, however, as testified by the Plaintiff and her daughter Tashreeqah, that he would receive cash payments from the Deceased via the Plaintiff or her daughter for his personal use. He recalled only one instance when he had collected money from the Plaintiff on the instruction of the Deceased. This pertained to a motor vehicle for the Deceased's business.

39.2 His relationship with Nadeema Benjamin became stronger after the Deceased died. She told him that she wanted to continue the Deceased's legacy to care for the poor, and would be involved in donations for the mosque. Nadeema Benjamin had never discussed this litigation with him, but he was aware that the Plaintiff was disputing the final talaq.

39.3 He knows the Plaintiff well, both of them having grown up in Paarl. He also knows her children and the Second Defendant.

[40] Imaam Cook testified as follows about the talaqs which, on the Second Defendant's version, he administered. In respect of the first incident he said:

40.1 He was contacted by the Deceased in 1999 and went to the Deceased's office. He recalled the year, as it was the first year of the Boland Summer Festival. The Deceased said that he wanted to issue a talaq to the Plaintiff. He went with the Deceased to the Plaintiff's house. In his presence the Deceased stated 'I Nazeem Benjamin with Imaam as my witness issue one talaq to La-eeqah', or words to that effect. Thereafter he explained to the Plaintiff the idah, or waiting period, and the period of reconciliation. He gave no annulment certificate of the first talaq because, he explained, there could have been a reconciliation.

40.2 During cross examination on the first alleged talaq Imaam Cook stated:

40.2.1 With reference to Moulana Carr's note, in the MJC's file, that the Deceased gave the 1999 talaq in his office whereafter he informed the Plaintiff thereof as an agent, he could not recall saying this. Moulana Carr misunderstood. It was put to Imaam Cook that the accuracy of the note, concerning the first talaq, had not been disputed.

40.2.2 He could not comment when confronted with the fact that the Plaintiff would have either been heavily pregnant or just have given birth when he administered the 1999 talaq, yet he had referred to the talaq as 'run of the mill', even though a talaq is discouraged under those circumstances. It was put to him that his evidence concerning the first talaq in 1999 was incorrect, and had been made up due to his inability to recall that the Plaintiff was either heavily pregnant or had just given birth to her son Yaseen, born on 5 July 1999. It was further put to him that if

the Plaintiff was about to give birth or had just given birth, surely he would caution against a talaq in those circumstances, as front and center would have been either the baby or pregnancy. He had no comment.

40.2.3 He did not know how long after the 1999 talaq the couple had reconciled, or if the Plaintiff had gone into idah after the 1999 talaq.

[41] With regard to the second incident, on 7 August 2000, Imaam Cook testified as follows:

41.1 The Deceased asked him telephonically to come to the Plaintiff's house in Gotham Street, which he did between 17h30 and 18h00. Both the Deceased and the Plaintiff were in the lounge. The Deceased said he wanted to issue another talaq. Imaam Cook tried to reconcile the couple, but the Deceased said he had made up his mind to give a talaq. The Deceased informed him that a second talaq had also been issued. Imaam Cook said he did not know about this, but the Plaintiff did not contest that a second talaq had been issued. Although the Plaintiff gave no verbal response regarding the Deceased's announcement about a second talaq, he could see she was emotional. The Deceased then uttered the words for a talaq in the presence of both himself and the Plaintiff. He accepted that this was the third and final talaq that he had administered. He explained the consequences of a third talaq, the idah period, and that there could be no reconciliation. The Deceased was in a 'normal state'. He displayed no anger or great emotion. This was a matter of significance and the events remained clear in the memory of Imaam Cook. He could remember both incidents well as the couple were friends of his. There was no need for him to counsel the parties further, and he left.

41.2 When he gave the final talaq he had not enquired when the couple had reconciled after the first talaq. He acknowledged that had they reconciled after the idah period a new marriage contract would have had to be drawn

up, and the nikah/marriage ceremony performed again, but he had not asked about this. He had also not enquired what the difficulties in the marriage were.

41.3 Whilst during evidence in chief Imam Cook made no mention that he had interrogated or questioned the circumstances of the second talaq, it was only during cross examination, when he was reminded of all the instances when he did not say that he had interrogated whether there had been a proper second talaq, that he said he had done so. He explained that this omission was because he was not questioned on this aspect during evidence in chief. He acknowledged that his statement to the Fatwa Committee also did not mention that he had questioned the circumstances of the second talaq, to ensure that it was proper.

[42] Imaam Cook's evidence about the marriage annulment certificate was as follows:

42.1 On the day after issuing the final talaq, 8 August 2000, he completed the marriage annulment certificate at his office. His handwriting appears on the document. This was the certificate in use at the time when issuing a talaq. The document was updated in 2005 so as to comply with a legal process for the husband and wife and two witnesses to sign, relevant especially if the talaq is contested. Although headed 'Annulment Certificate' the document records the type of divorce as 'talaq ba'inah' which is a final talaq. When questioned about the absence of a stamp on the document, he said he considered the letterhead on the top of the document to be a stamp. Furthermore, apropos Moulana Car's testimony that he would have expected the stamp of the Mosque on the certificate, Imaam Cook said there was no stamp at the time.

42.2 During cross examination, Imaam Cook agreed with the testimony of Sheikh Gamiendien, as was put to him, that an annulment or fasakh was

granted on application by a wife. He personally knows Sheikh Gamieldien, holds him in high regard, and consults with him on questions of Islamic law. He accepted that the heading on the annulment certificate was inaccurate and that he had used an annulment certificate as proof of a talaq.

[43] He agreed moreover with the following evidence of Moulana Carr, as put to him:

43.1 The MJC practice was to issue a certificate of divorce/talaq and there should have been a talaq certificate signed by both the husband and wife. He could not explain why, when giving the annulment certificate to the Deceased, he had not asked him to sign it.

43.2 The contact details of the person issuing the document, should have been on the certificate. He could give no reason why this information was not on the certificate.

43.3 The normal paperwork, and signatures of witnesses, was absent in the process he had followed. He agreed with Moulana Carr's stressing the importance of this, especially where there are children and if the wife wishes to remarry. He agreed that if he had followed the procedures of the MJC, neither the proceedings before that body or before this court would have been necessary.

43.4 He conceded, with reference to Moulana Carr's notes, that the certificate was not proper according to Sharia Law.

43.5 After completing the annulment certificate he went to the Deceased's office, gave him the certificate, and asked him to give a copy to the Plaintiff. During cross examination he said that what was stated in the plea, that he, Imaam Cook, gave the certificate to both the Deceased and the Plaintiff, was incorrect. He was the source of the information in the plea. He was unable to comment on the discrepancy between the plea and his oral evidence. He

had kept a copy of the annulment certificate at the mosque under lock and key. Only he and the other Imaams would have had access to the certificate.

43.6 He was further pointed to the affidavit signed by Nadeema Benjamin, as Nadeema Jacobs, on 28 April 2021, which, at odds with his evidence that he issued the certificate on 8 August 2000, states that on the evening of 7 August 2000, the Deceased gave her a copy of the annulment certificate and asked her to keep it in a safe place. He disputed that she could have had the certificate on that date.

[44] Imaam Cook had no comment on the evidence of the Plaintiff, her attorney and Shaheed Benjamin, that they saw the annulment certificate for the first time in 2013 when preparing for trial; the evidence of Captain Solomons that she certified the certificate in 2013, when Nadeema Benjamin brought it to her; and the fact that Nadia Jacobs made no mention of being aware of the annulment certificate. It was further put to him that it was quite remarkable that an annulment certificate was neither seen nor heard of for 12 to 13 years, but only surfaced after the Plaintiff submitted a claim for maintenance in January 2013. During re-examination he denied that he had forged the annulment certificate.

[45] Imaam Cook's evidence on the proceedings before the MJC, and the finding of the Fatwa Committee, was as follows:

45.1 He took no issue with the proceedings before the MJC. He agreed with the verdict of the MJC and fully accepted the fatwa issued. He accepted that the testimony of a single male witness, like himself, was short of the required quorum of two male witnesses when there was a disputed talaq. Likewise, he accepted the reasoning of Sheik Gamieldien and that of Moulana Carr. He accepted the expert opinion that there was insufficient evidence to establish a talaq, and that the default position was therefore that the marriage still subsisted. He conceded that neither he nor Nadeema

Benjamin had challenged the findings of the Fatwa Committee, even though they had ample opportunity and were entitled to do so. He would not challenge the finding.

45.2 He accepted, as stated by Moulana Carr, that the fatwa certificate would supersede the annulment certificate that he had issued in August 2000. However, he added that in the lifetime of the Deceased the third talaq that he had administered was binding.

45.3 He confirmed the documents attested to by him. He gave the fatwa committee a copy of the Liberty Life Document, which he had obtained from Nadeema Benjamin, and told the committee that she was a 50 per cent partner in the Deceased's business, which information he similarly got from her.

[46] Imaam Cook had no knowledge about the Plaintiff and the Deceased continuing with a marital relationship until the Deceased's death. He could not dispute the evidence of the Plaintiff, Tashreeqah and Shahied Benjamin in this regard. He commented that if they had done so it would have been a sinful act.

[47] Imaam Cook's discomfort was apparent during cross examination on the talaqs and about the contradictions in his evidence, the plea and the affidavit of Nadeema Benjamin, concerning the annulment certificate.

Defendant's Other Factual witnesses

Testimony of Mr Cornelius Van Zyl

[48] Mr Van Zyl is a financial advisor at First National Bank, based in Paarl. He testified about the Liberty Life Policy of 2011, which describes the Plaintiff as the Deceased's ex-wife. Mr van Zyl's secretary had written the name of La-eeqah Benjamin on the policy and he himself had written the words 'ex-vrou' to the Plaintiff's name. Nadeema Benjamin was probably present at the meeting.

He was unable to say if the Deceased gave instructions to him to write ‘ex-wife’ to appease Nadeema. He however only took instructions from the life assured.

Testimony of Captain Joan Solomons

[49] Captain Joan Solomons has been a member of the South African Police Service for 35 years, and has been stationed in Paarl since 2006. On 26 September 2013 she had certified the annulment certificate brought to her by Ms Nadeema Benjamin.

[50] Captain Solomons has lived in Paarl all her life and described the Deceased as a familiar person in the neighbourhood, with whom her relationship grew. The Deceased had told her that he was divorced from the Plaintiff whom he would refer to as his ‘ex’ or ‘ma van my kinders’.

Testimony of Liam Meyer

[51] Liam Meyer, born on 3 August 1991, is the son of the Deceased and Jennifer Smith (nee Meyer). He has an older brother, born also to the Deceased and Jennifer Smith. Liam commenced employment at his father’s transport business after he matriculated in 2010, and is currently employed by Nadia Jacobs, the Second Defendant’s daughter, who runs the business. Liam testified that his father cautioned him against having 2 wives, as this caused too much trouble and that that was why he was divorced from the Plaintiff.

[52] He conceded that as he was working for Nadia Jacobs he would not say anything to jeopardise his work relationship, but clarified that he was telling the truth in court and that nobody had put a gun to his head. He could not comment on the versions of the Plaintiff, Shaheed and Tashreeqah Benjamin.

Testimony of Nadia Jacobs

[53] Nadia Jacobs, born on 24 July 1982, is the daughter and sole heir of the late Nadeema Benjamin. She currently runs the business of Benjamin Star Transport. She testified that:

53.1 She was 14 years old when her mother married the Deceased in 1997. Her mother knowingly went into the marriage as a co-wife and was satisfied. Her mother informed her that the Deceased had divorced the Plaintiff in 2000. After the divorce he referred to her as his ex-wife, or the mother of his children.

53.2 Her mother was shocked that she was the Deceased's sole heir, but she knew the reason for this. Her mother also knew how the Deceased wanted her to distribute his things. Her mother had paid the sum of R4 million from the estate to the Deceased's father. Her mother intended to give the Deceased's children what was due to them. She could not comment on why, then, they had to issue summons for their share of the estate.

53.3 The value of the Deceased's estate was in the region of R29 million. The business currently has 60 employees.

Finding

[54] In argument, submissions by Mr Hathorn, on behalf of the Plaintiff, as to why she should succeed, were threefold:

54.1 Firstly, he submitted that the Doctrine of Entanglement applied. The question whether the Plaintiff and her husband were married at the time of his death, has been authoritatively determined by a respected religious body, and no exceptional circumstances are present which justify this court interfering with that determination. This was in keeping with the doctrine.

54.2 Secondly, if this court were inclined to decide whether the Plaintiff and her husband were married in terms of Islamic Sharia law at the time of his death, the undisputed expert evidence is clear: the testimony of Imaam Cook alone (unsupported by another male witness) is insufficient to displace the presumption of the continuation of the marriage, given the Plaintiff's evidence concerning such continuation.

54.3 Thirdly, if one were to evaluate the evidence in terms of the civil law standard, the outcome would also lead to the conclusion that the Plaintiff was married at the time of her husband's death.

[55] Ms McCurdie, for the Second Defendant, countered, firstly, that the Doctrine of Entanglement is simply not implicated in this case. This court, she submitted, is not being called upon to interpret the text or the teachings of the Prophet (peace be upon him), or to make any pronouncements as to the nature or content of the principles of Sharia law. Whether the talaqs were indeed issued is a dispute of fact that this court must resolve on the evidence before it. Secondly, she contended that this court cannot apply the Islamic law of evidence in order to resolve the factual disputes between the parties in the absence of legislation recognising marriages concluded under Islamic law, and, moreover, because the Plaintiff had not pleaded the applicability of Islamic law of evidence. The matter fell to be determined on the application of the rules of evidence of South African civil law, an application of which made apparent that the Deceased, as a matter of fact, terminated his marriage to the Plaintiff by way of a final and irrevocable talaq.

[56] I consider the respective stances of the Plaintiff and the Second Defendant, on each of these aspects, below.

The Doctrine of Entanglement

[57] The doctrine of entanglement was expounded as follows in *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another*²:

‘This doctrine entails a reluctance of the courts to become involved in doctrinal disputes of a religious character (*Taylor v Kurtstag* para 39). The reason underlying the rule has been expressed by Woolman and Zeffert as follows:

“[I]n a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety

² 2015 (1) SA 106 (SCA), para 33.

of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding the content or the truth of particular beliefs.”

This approach is consistent with that taken in comparative foreign jurisdictions.’

[58] At paragraphs 34–38, after discussing the similar approach adopted in the jurisdictions of the United States of America, United Kingdom, Australia and Canada, significantly, at paragraphs 39-40, Ponnann JA goes on to say:

‘[39] As the main dispute in the instant matter concerns the internal rules adopted by the church, such a dispute, as far as is possible, should be left to the church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which falls within the exclusive realm of the church.

[40] High Court judgments such as *Taylor v Kurtstag* and *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T) (1999 (1) BCLR 92) appear to accept that individuals who voluntarily commit themselves to a religious association’s rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies. Here, on discovering that the CDC had found against her, the appellant invoked the arbitration provision of the L&D and referred the matter to the convener so that he could take the necessary steps to convene the arbitration. The appellant has never challenged the relevant provisions of the L&D. What is more is that, having initiated the arbitration process and having participated in it for almost a year, the appellant thereafter seeks to avoid the arbitration by having the matter determined by a court.’

[59] The approach adopted in *De Lange* is in accordance with s 15(1) of the Constitution, which states: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.’ It is also echoed in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*³, where it was stated:

³ 2006 (1) SA 524 (CC), para 94.

‘In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other.’

[60] In *Worcester Muslim Jamaa v Valley and Others*⁴, this court extended the application of the doctrine to, *inter alia*, the laws of a particular religion:

- ‘(a) Unless absolutely necessary, the State speaking through the mouths of its courts, should never attempt to impose its own legal, secular rules and, particularly, its own interpretation of the doctrine, laws and tenets of a particular religion, upon any particular religious group or grouping;
- (b) Those religious groups or groupings should be allowed to sort out their differences regarding those aspects of the religions to which they adhere amongst themselves;
- (c) Only if the solutions to their problems which are arrived at by the religious groups or groupings themselves are utterly unacceptable to the established rules and laws of the State should those solutions be ignored. Otherwise, for fear of interfering with the right of freedom of religious expression, those solutions should be respected;
- (d) It is only in an extremely limited field that the secular courts should impose their rulings upon religious groups or groupings; and
- (e) A secular court should rarely, if ever, hand down a ruling relating to religious doctrine.’

[61] In short, as submitted by Mr Hathorn, the Doctrine of Entanglement provides:

61.1 That a proper respect for freedom of religion, precludes our courts from pronouncing on matters of religious doctrine which fall within the exclusive realm of the religious institution concerned;

61.2 The internal rules adopted by a religious institution should, as far as possible, be left to the institution to determine domestically; and

61.3 A court should only become involved in a dispute concerning such internal rules when it is strictly necessary for it to do so.

⁴ 2002 (6) BCLR 591 (C), para 109.

[62] The central issue before me is a dispute concerning the Islamic law of marriage and divorce, and the internal rules adopted by the MJC. The dispute encompasses applicable principles of Islamic Shariah law pertaining to the issuing of a talaq, the presumption concerning the continuing of a marriage, and the principles of shahadah/testimony applicable, namely that of two male witnesses in these particular circumstances. It is also a dispute which has been determined according to the internal rules of the MJC. It is so that there are factual disputes; but these do not detract from the fact that in determining whether the Plaintiff and the Deceased were married in terms of Islamic Sharia law at the time of the latter's death, I am required to consider and interpret the nature, content and principles of Islamic Sharia law, about which the MJC, applying its internal rules and jurisprudence, has issued a fatwa. These circumstances, in my view, render the Doctrine of Entanglement applicable.

[63] In keeping with the *Worcester Muslim Jamaa* and *De Lange* cases (supra), this court should thus only impose its own ruling where absolutely necessary, or where the conclusions reached by the MJC Fatwa Committee are utterly unacceptable. In considering this test, I am mindful of the following:

63.1 Moulana Carr's evidence about the standing of the MJC, and the expertise of the members of the Fatwa Committee, was unchallenged, as were the principles of religious doctrine upon which the Fatwa Committee based its decision. The testimony of Moulana Carr, that the decision of the Fatwa Committee was a fairly straightforward application of principles of Islamic law and that there was no dissent among the three learned members of the Fatwa Committee, was also not challenged. The expert opinion of Sheik Gamieldien, on Islamic Sharia law and the principles applicable to the dispute, were accepted by the Second Defendant and endorsed by Imaam Cook. These principles were mirrored in the decision of the Fatwa Committee. The core of the reasoning underlying the decision of the Fatwa Committee, namely, that

where the Deceased has passed away and there is a claim of an irrevocable divorce, for such a claim to be upheld it needs to be substantiated by two male witnesses, and as this did not occur, the claim could not be entertained, was accepted. The presumption that the marriage continued in the circumstances was also accepted. The substance of the decision and the standing of the MJC was therefore accepted, notwithstanding the Second Defendant's contention that Islamic law of evidence should be disregarded by this court.

63.2 With regard to the processes of the MJC, the two main protagonists were interviewed on the relevant aspects, and written evidence in the form of an affidavit by the Plaintiff, a statement, and a further document styled as an affidavit by Imaam Cook, were considered. Nadeema Benjamin was engaged on two occasions. Given that she was not a witness to any of the talaqs, an affidavit by her would not have assisted on this aspect. The Fatwa Committee also had the Liberty Life document. On the basis of the undisputed evidence of Imaam Cook to the effect that the requisite number of witnesses were not present, the Fatwa Committee made its finding.

[64] From the above it would seem to be that there was nothing utterly unacceptable in the conclusion reached by the MJC, or the processes employed, which makes it strictly necessary for this court to become involved in the dispute before it. The circumstances of this case are distinguishable from that in *Faro v Bingham N.O. and Others*⁵, where the decision of the MJC was overridden where, on 8 April 2010, the MJC issued a marriage annulment certificate, on 29 July 2010 revoked its decision of 8 April 2010, and then on 2 September 2010 withdrew its decision of 29 July 2010 and confirmed that the talaq stood. In the instant matter, there was no toing and froing in the decision of the Fatwa Committee, which was taken after engaging adequately with all relevant persons.

⁵ (4466/2013) [2013] ZAWCHC 159 (25 October 2013).

[65] Mr Hathorn referred me to a line of cases which adhere to the principle that where a tribunal has acted consonant with the rules of natural justice, and where there is no infringement of its own rules, our Courts will not interfere. See *Marlin v Durban Turf Club and Others*⁶. See also *Taylor v Kurtstag NO and Others*⁷ where, at para 42, the following passage from *Long v Bishop of Cape Town* (1863) 4 Searle 162 at 176, was quoted:

‘[I]t may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the Association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.’ (See also para 43.)

[66] The essence of these cases, namely, that if the rules of a tribunal have been complied with, only in the event of very substantial failure of justice or *mala fides* will a court intervene, is apposite. The fatwa was issued in accordance with the rules of the relevant tribunal. Moulana Carr testified that there were no procedural shortcomings in terms of Islamic law or the internal rules of the MJC. Neither a very fundamental failure of justice nor *mala fides* on the part of the MJC and the Fatwa Committee has been shown. The shortcomings alluded to by the Second Defendant, namely, lack of evidence that Nadeema Benjamin was furnished with the Plaintiff’s affidavit, or those interviewed were provided with the views of other witnesses, or the manner of participation of members of the Fatwa Committee, or the absence of a hearing, in my view, fall far short of this standard. Moulana Carr’s evidence that the process followed was thorough and adequate, and that none of the alleged procedural shortcomings in the process that had been raised with him in cross examination would warrant reconsideration of the fatwa certificate, was

⁶ 1942 AD 112, at pages 126–130.

⁷ 2005 (1) SA 362 (W).

confirmed by Imaam Cook. Neither he nor the Second Defendant contested the findings of the Fatwa Committee on appeal. The submissions in argument that the process before the MJC Fatwa Committee was fatally flawed from the commencement until the fatwa certificate was issued, is simply not borne out by the evidence.

[67] In view of all of the above, no basis has been established for this court to interfere with the Fatwa Committee's conclusion that the Plaintiff was still married at the time that the Deceased died.

Are Islamic rules of evidence applicable?

[68] Ms McCurdie contended that this court can rely on the Islamic substantive law, but not on the Islamic law of evidence, which provides for the testimony of two male witnesses to prove a talaq in a case such as this. Firstly, she contended that the requirements of Sharia law of evidence were not pleaded. This is not so. Paragraph 20A of the Plaintiff's particulars of claim, quoted above, refers to the authoritative conclusion of the Fatwa Committee, which is not disputed, and a copy of the fatwa certificate is annexed to the particulars of claim. Paragraph 3 thereof refers to the shahadah/testimony and the fact that the word of one male falls short of the quorum of witnesses.

[69] This evidentiary requirement of Islamic Sharia law was also referred to in the expert notice of Sheikh Gamiieldien⁸. It was further referred to in the report of Moulana Carr⁹. The application of the Sharia law of evidence was therefore pleaded, referred to in expert notices, and the Second Defendant can accordingly not claim to have been taken by surprise on this aspect.

[70] In *Sentrachem BPK v Wenhold*¹⁰, in circumstances where the plaintiff's particulars were not clear on the nature of the claim, but the issue was thoroughly canvassed at trial, the following passage from De Villiers AR in

⁸ At para 36, pages 14 and 15 of his report.

⁹ At para 31, page 25 of his report.

¹⁰ 1995 (4) SA 312 (A) at 319 F-H.

*Shill v Milner*¹¹ was quoted:

‘The importance of pleadings should not be unduly magnified. The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.’

[71] These words resonate in the instant case, albeit that the Islamic Sharia law of evidence was, as I found above, pleaded. I note, moreover, that at no stage during the leading of evidence was any objection raised by the Second Defendant that the Islamic law of evidence was not pleaded.

[72] With regard to a distinction between reliance on Islamic substantive law and law of evidence, Ms McCurdie referred to no authority in support of her contention that the latter was not applicable. I was able to discern no rationale as to why this distinction should be made. The Plaintiff’s contention in this regard, that the only reason for the distinction is that as soon as you apply the Islamic Sharia law of evidence there is no prospect of the Second Defendant succeeding, is understandable.

[73] A further reason proffered by Ms McCurdie as to why the Islamic law of evidence should not apply was that, unlike customary law which is expressly incorporated into our common law by s 211 of the Constitution, secular courts only apply religious law in terms of statutory recognition. In the absence of legislation being passed in recognition of Islamic law, this court cannot apply the Islamic law of evidence in order to resolve a factual dispute between the parties, she submitted. In this regard she referred to s 15(3) (a) (i) of the Constitution, which states:

¹¹ 1937 AD 101 at 105.

‘This section does not prevent legislation recognising-

(i) marriages concluded under any tradition, or a system of religious, personal or family law; .
..’

As no such law had been promulgated recognising Islamic law, so her argument continued, the Islamic law of evidence does not apply. In my view, on a purely linguistic reading of the section, Islamic Sharia law of evidence is not excluded.

[74] Whilst Parliament is yet to pass legislation as contemplated in s 15 (3) of the Constitution, it is so that a great many South African Muslims have practiced Islamic Sharia law and been guided by its tenets for many years. In *Ryland v Edros*¹² Farlam J acknowledged that the code of Muslim law approved by the Council of India in 1760 was applied at the Cape before 1795.

[75] Mr Hathorn submitted, moreover, that the laws of the Muslim community in the Western Cape fall under the broad umbrella of customary law and that s 211 (3) of the Constitution has resonance. The section states: ‘The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’

[76] In developing this argument he referred to *Gongqose and others v Minister of Agriculture, Forestry and Fisheries and others; Gongqose and others v State and others*¹³, where it was stated that the recognition of customary law as an independent source of law is entrenched *inter alia* in s 31 of the Constitution, which recognises the right of persons belonging to a cultural community to enjoy their culture. He referred also to the Constitutional Court decision of *Shilubana and others v Nwamitwa and others*¹⁴ where, at para 52, it was stated:

‘The classical test for the existence of custom as a source of law is that set out in *Van Breda v Jacobs*, in which it was held that to be recognised as law, a practice must be certain,

¹² 1997 (2) SA 690 (C) at 718 A–G.

¹³ [2018] 3 All SA 307 (SCA), para 24.

¹⁴ 2008 (9) BCLR 914 (CC).

uniformly observed for a long period of time and reasonable.’

[77] The three requirements as referred to above in *Van Breda*, can certainly be said to apply in respect of both the substantive and evidentiary Islamic law applicable to this case. This, and the acknowledgment in *Gongqose* about customary law, and in that regard referencing cultural communities, in my view places Islamic law under the rubric of customary law. To find otherwise, simply because Parliament has not yet passed the requisite legislation, would be contrary to the right to freedom of religion enshrined in the Constitution. This is especially so given the practice of Islamic law by South African Muslims since at least the 1790’s, as referred to in *Ryland* supra.

[78] I note that even were Islamic Sharia law to be regarded as akin to foreign law, there is authority for its laws of evidence to be recognised. In *Laurens NO v Von Höhne*¹⁵, a case in which German law was applicable, it was held that the onus of proof (for the share capital) rests on the defendant, because the applicable German law places the onus on the defendant. The court went on to state, referring to *Tregea and Another v Godart and another*¹⁶, that South African law regards onus as being part of the substantive law. Similarly, in *Eden and Another v Pienaar*¹⁷, Cloete J quoted the following extract from *Forsyth Private International Law*, 3rd Ed (1996) at 102:

‘In general our legal system reflects in its private law Western tolerance for the values of others and their legal institutions. Consequently, when our conflict rules direct that a particular case is to be governed by some foreign law, that law will generally be applied even although it may involve the recognition of a foreign institution or rule unknown to our legal system and quite foreign to it.’

[79] In view of all the above, I conclude that the Islamic Sharia law of evidence is applicable. On the facts of the present dispute, this requires the evidence of two male witnesses to overcome the presumption that the marriage

¹⁵ 1993 [3] All SA 322 (W) at page 330-331.

¹⁶ 1939 AD 16.

¹⁷ 2001 (1) SA 158 (W) at page 168 A–B.

continued. Imaam Cook's evidence alone is insufficient for this purpose, where the Plaintiff has stated under oath that the marriage continued. The conclusion that there is insufficient evidence to rebut the presumption of the continuation of the marriage is even supported by the evidence of Imaam Cook, who conceded that when the husband has died two witnesses were required. As he was a single witness, there was insufficient evidence to establish a talaq, and the default position is therefore that the marriage subsisted.

[80] I accordingly conclude that, on the basis of the applicable Islamic Sharia law of evidence, the Plaintiff was still married at the time her husband's death.

The Civil Law test

[81] The Plaintiff and Imaam Cook are the only two witnesses who gave direct factual evidence on whether a third and final talaq was given by the Deceased. I concentrate on their evidence.

[82] The Plaintiff's evidence was consistent both with the case pleaded in her particulars of claim, and her affidavit to the MJC, and withstood rigorous cross examination. Her testimony that she and the Deceased continued as a married couple until his death, was corroborated, as aforementioned, by her daughter and brother-in-law. The former also corroborated her observance of an idah period after the Deceased's death. The Plaintiff did not falter in the telling of her version, and whilst there were minor inconsistencies, these were no more than can be expected in a witness recounting events of some time ago. The Plaintiff, as aforementioned, struck me as an honest and credible witness.

[83] Imaam Cook was a single witness on the all-important talaqs he alleged he administered, and in his general testimony. His version of the talaqs was in my view clouded by the following factors:

83.1 Whilst he referred to the first talaq in July 1999 as normal and straight forward, it could have been anything but, given that the Plaintiff was either

heavily pregnant or had just given birth at the time and talaqs, as he confirmed, are discouraged under those circumstances. He was able to testify in unlikely detail about events that took place over two decades earlier, yet he was unable to comment on why he had made no mention of, or remembered, that the plaintiff would either have been pregnant or had a newborn at the time and this had not factored into his deliberations with the couple.

83.2 His evidence, as aforementioned, was that he was present at the first and third talaqs. He omitted to testify in chief, as aforementioned, that before administering the talaq in 2000, he had interrogated the second talaq at which he had not been present, to make sure it was a proper talaq. Nor does he state he had done so, in his statement of March 2014 to the Fatwa Committee. This interrogation would have been crucial to establish that the talaq he administered in 2000 was indeed a third and irrevocable one. It was only belatedly, under cross examination, as also aforementioned, after he was probed on this omission, that he claimed to have made the interrogation. This, in my view, not only casts aspersions on his version but could suggest that even on that version a final irrevocable talaq had not been administered. So too, the undisputed evidence that an annulment certificate is not issued at a talaq, a factor which, in my view, could also call into question the validity of the final talaq. Imaam Cook's own version casts aspersions on the validity of the annulment certificate, given his concession that it deviated from the requirements of a document issued for a talaq, and was not proper according to Sharia law.

83.4 Then there is the contradiction between the plea, Imaam Cook's oral evidence, and the affidavit of Nadeema Benjamin, as to when and to whom the annulment certificate was given. To recap, the plea states that Imaam Cook handed the annulment certificate to the Plaintiff on 8 August 2000.

This is contradicted by Imaam Cook's oral evidence to the effect that he handed the Deceased a copy of the certificate and asked him to give a copy to the Plaintiff. Imaam Cook, as aforementioned, was unable to explain these contradictions.

[84] These discrepancies and inconsistencies were not minor and impugned Imaam Cook's reliability and credibility as a witness. He was not assisted by any of the other witnesses for the defence, who were unable to give direct evidence as to whether the Deceased gave the Plaintiff a final talaq. Neither the testimony of Joan Solomons, Liam Meyer and Nadia Jacobs as to what the Deceased informed them about the status of his marriage to the Plaintiff, nor that of Mr Van Zyl concerning the contents of the policy document, took the matter any further.

[85] Given the contradictions and discrepancies in Imaam Cook's evidence as compared to that of the Plaintiff, the calibre of his evidence cannot stand up to hers. A consideration of the credibility of the Plaintiff and Imaam Cook, their reliability and the probabilities, in my view, supports the conclusion that the Plaintiff was still married to the Deceased at the time of his death, and that Imaam Cook's evidence is to be rejected to the extent that it is inconsistent with that of the Plaintiff.

[86] In view of all of the above, the Doctrine of Entanglement, the Islamic Sharia law of evidence (the requirement that the unsupported evidence of Imaam Cook is insufficient to rebut the presumption that the Plaintiff's marriage continued until the death of her husband), and the civil law test for resolving factual disputes, all lead, as contended on behalf of the Plaintiff, to the same conclusion, namely, that the Plaintiff was married to the Deceased at the time of his death in July 2012. The Plaintiff's action could of course have succeeded on the basis of any one of these claims, and it was strictly not necessary for me to go beyond my finding on the Doctrine of Entanglement. I

did so, however, as a courtesy to the parties and in acknowledgment of the comprehensive arguments submitted.

[87] In view of all of the above, the Plaintiff is entitled to the declaratory order she seeks, that she was the wife of the Deceased at the time of his death and is a surviving spouse in terms of s 1 of the MSSA.

Costs

[88] As the Plaintiff is the successful party she is in law entitled to her costs. Separate cost determinations were however sought in respect of the following specific dates.

Costs for 15 to 17 October 2019

[89] The matter was first set down for trial from 15 to 17 October 2019, but could not proceed on the allocated days as no judges were allocated. As this was due to circumstances beyond the control of the parties, each party should pay their own costs occasioned by the postponement of the matter on 15 to 17 October 2019.

Costs for the postponement of the 9 – 12 March 2020 hearing

[90] After the October 2019 postponement the matter was set down for trial from 9 to 12 March 2020. On 8 March 2020, a day before the trial, the Second Defendant filed a notice to amend her plea to aver that the MSSA does not make provision for a surviving spouse of a polygamous Muslim marriage. The Plaintiff required time to consider the notice of amendment and the trial could not proceed. Based on the notice of intention to amend the Plaintiff thereafter issued an application to the Equality Court. The Equality Court proceedings were case managed and ultimately agreement was reached that the Second Defendant would withdraw the notice of amendment and that the Plaintiff would withdraw the Equality Court application. As it was the filing of the

notice of amendment, a day before the trial was due to commence, which resulted in the trial not continuing on the following day, the Second Defendant ought to bear the wasted costs for 9 – 12 March 2020, such to include the costs of 2 counsel

Costs for 25 – 27 May 2021

[91] The trial was thereafter set to proceed between 25 – 27 May 2021. Ms Nadeema Benjamin passed away on 7 May 2021 and there was no appointed executor until two days before 25 May 2021. On that date the Second Defendant's legal representatives filed a notice of substitution, after having been informed by the Plaintiff's legal representatives that the Plaintiff was unable to prepare for trial in the absence of an appointed executor and notice of substitution. Given that the postponement during 25 to 27 May 2021 due to the death of Nadeema Benjamin on 7 May 2021, was an event over which neither party had control, and that the appointment of the executor only on 21 May 2021 flowed from that event, I am of the view that each party should pay their own costs for 25 – 27 May 2021.

Costs of 12 August 2021

[92] The Plaintiff withdrew her opposition to an application by the Second Defendant, on 12 August 2021, to admit affidavit evidence of the late Nadeema Benjamin. The Plaintiff should accordingly pay the costs in respect of that application, including the costs of two counsel.

Costs of postponement on 16 – 18 August 2021

[93] The matter was not allocated on the above dates, due to an allegation that a practice note had not been filed. The Plaintiff's legal representative claimed to have filed a practice note timeously, which was initially confirmed by the Second Defendant's legal representative but thereafter the confirmation was retracted. These circumstances warrant each party bearing their own costs for

these dates.

Costs of 22 March 2022

[94] The Plaintiff withdrew her application to recall Imaam Cook on this date. The Plaintiff should bear the costs occasioned by the withdrawal.

Costs of 21 April 2022

[95] On 21 April 2022 the Second Defendant brought an application for leave to use certain documents and recordings. Three items were disallowed and two items were allowed pursuant to that application. In the circumstances I am of the view that each party should bear their own costs in respect of 21 April 2022.

[96] For all the other days during which the trial ran, the Second Defendant should be held liable for the costs, such to include the costs of two counsel. In addition, the Second Defendant should bear the costs, qualifying fees and expenses of the Plaintiff's expert witness, Sheikh Gamieldien.

[97] I order as follows:

97.1 It is declared that the Plaintiff was the wife of the Deceased, Naziem Benjamin, at the time of his death and is accordingly a surviving spouse in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990;

97.2 The parties shall pay their own costs in respect of 15 to 17 October 2019; 25 to 27 May 2021, 16 to 18 August 2021 and 21 April 2022;

97.3 The Second Defendant shall bear the costs for the period 9 to 12 March 2020, such to include the costs of two counsel;

97.4 The Plaintiff shall bear the costs of the applications on 22 March 2022 and 12 August 2021, such to include the costs of two counsel;

97.5 The Second Defendant shall bear the costs for all the other days during which the trial ran, such costs to include the costs of two counsel;

97.6 The Second Defendant shall pay the qualifying fees and expenses of the

expert, Sheikh Gamieldien.

Judge Y S Meer

Appearances: For the Plaintiff, Mr Hathorn SC and Mr Y Abbas, instructed by
Rahin Joseph Attorneys, Salt River, Cape Town

For the Second Defendant, Ms J McCurdie SC and Ms M Bartman, instructed
by Tim du Toit Attorneys, Per C Lang, De Waterkant, Cape Town.