

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 18/06

NAZEEMA DU TOIT

Applicant

versus

NAZEER AHMED SERIA

Respondent

Delivered on: 23 May 2006

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JUDGMENT

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THE COURT:

[1] This is an application for leave to appeal against a judgment and order of the Cape High Court made on 5 February 2004. On 20 July 2004 the Supreme Court of Appeal refused without reasons an application for leave to appeal against the decision of the Cape High Court. On 5 April 2006, twenty months later, the applicant lodged her request for leave to appeal to this Court. She also applied for an order condoning her non-compliance with the time periods for noting an appeal prescribed by the Rules of this Court.

[2] The applicant and the respondent were married to each other in 1974 in terms of Muslim personal law. At no stage was a civil marriage recognised by the common law of South Africa concluded. The marriage subsisted until 2002, when the respondent

issued the applicant with what is termed an “irrevocable talaq”, an act or deed that confirms divorce in Muslim personal law.

[3] Later that year the applicant instituted action proceedings in the Cape High Court for an order declaring that at common law a universal partnership had existed between herself and the respondent during the subsistence of their Muslim marriage, and that accordingly she was entitled to a half share of property held by him. She also claimed rehabilitative maintenance for twelve months. The High Court held that she had not established that a tacit universal partnership had existed during the marriage, and noted that the claim for rehabilitative maintenance had not been pursued.

[4] The applicant acknowledges that in the High Court the constitutional issues concerning the recognition of Muslim marriages were not pleaded and that the issue of the consequences of the termination of a Muslim marriage was therefore also not raised in the pleadings. The applicant contends, however, that the High Court should on its own initiative have given consideration to these questions and developed the common law in the light of the equality and dignity provisions of the Constitution. Had it done so, she avers, it would have enlarged the concept of tacit universal partnership to embrace her situation as a divorced Muslim wife.

[5] The issues underlying the application, and in particular questions concerning the recognition of Muslim marriages and the consequences of divorce, are important and complex, and touch on a great range of diverse interests. As indicated above, they

were not raised on the pleadings or argued in this case. The High Court correctly dealt with the matter according to the pleadings, the evidence before it and the argument presented. The result is that there are no prospects of the appeal from the High Court judgment being successful.

[6] Nor is it a matter in which direct access to this Court on the broader issues should be granted. This Court had frequently stated that save for exceptional circumstances it should not be the court of first instance in dealing with a matter of this kind. A large number of interested persons and bodies, such as the relevant government Minister, religious organisations and the Commission for Gender Equality, should be given an opportunity to be heard if the broader issues are to be canvassed.

[7] The above considerations are compounded by the extremely lengthy delay in noting the application. Accordingly we are of the opinion that it would not be in the interests of justice for the application for leave to appeal to be granted.

[8] This is not an appropriate matter for costs to be awarded.

*Order:*

The application for leave to appeal is refused.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.