

Short notes on:

THE CLOCK IS TICKING FOR THE MUSLIM MARRIAGES BILL TO BE PASSED

Introduction

The judgment in *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others 2018 (6) SA 598 (WCC)* echoes the decades long frustration of Parties to Muslim Marriages.

Women married in terms of Muslim rites and children born of these marriages have had little protection of their rights especially when navigating divorce and inheritance. While the Shariah Law¹ includes procedures and prescripts relating to the rights of women and children and the protection of their patrimonial interests, the application of these laws are not possible under current South African legislation.

The South African legislation has never granted Muslim marriages legal recognition as they are potentially polygamous and under the current democratic dispensation the need to protect vulnerable Parties to a Muslim Marriage has moved at a glacial pace.

While the Muslim Marriages Bill has not been enacted yet, the Courts have been actively giving effect to the rights of women and children ascribing to Islam.

Judicial protection

In 1983, the then Appellate Division considered provisions of the Marriages Act² in *Ismail v Ismail*³. The Parties were divorced in terms of Islamic rites and the *Moulana*⁴ presiding over the divorce ordered that the husband provide his wife with spousal maintenance for a certain period, pay her the deferred dowry as well as payment of certain jewellery in his possession. When the husband failed to perform the wife instituted action in the Transvaal Provincial Division. Her now ex-husband raised an exception to the effect that the customs relied on by the plaintiff were *contra bonos mores*.

¹ The body of law which forms part of Islamic tradition as derived from the Holy Quran and narrations of Prophet Muhammad (PBUH).

² 25 of 1961

³ 1983 1 SA 1006 (A)

⁴ A learned Islamic Scholar

The exception was upheld and the Court found that the marriage was polygamous and therefore void on the grounds of public policy.

The plaintiff took the matter on appeal where the Appellate Division concluded that there was no justification to deviate from a long line of cases which have refused to give Muslim marriages recognition and further that the polygamous marriage was against public policy.

This non recognition has been unfair especially to women party to Muslim Marriages who up until 2002 had no claim for loss of support if her husband was unlawfully killed.

However, there have been a number of developments by our Courts when applying the Constitution of the Republic of South Africa, 108 of 1996, to Muslim Marriages.

According to prevailing South African case law, persons married in terms of Muslim rites should be regarded as spouses for purposes of intestate succession and are entitled to inherit from their deceased partner in terms of the Intestate Succession Act, No 81 of 1987, as amended (hereafter referred to as the “Intestate Succession Act”), despite the fact that their “marriage” is not recognised as a valid marriage in terms of our current law.

In *Daniels v Campbell NO & Others*⁵, Mrs. Daniels married her husband by Muslim rites in 1977. The marriage, which was at all times monogamous, was not solemnised by a marriage officer appointed in terms of the Marriage Act, No 25 of 1961, as amended (hereinafter referred to as the “Marriage Act”). Mr. Daniels passed away in 1994 without a will. The Master held that she could not inherit from his estate because she was not recognized as a surviving spouse.

This meant that Mrs. Daniels was going to lose a house she owned which was registered in her deceased husband’s name.

The High Court upheld the Master’s decision but also held that certain provisions of the [Maintenance Act](#)⁶ and the [Intestate Succession Act](#)⁷ were unconstitutional for their failure to recognise as “spouses” persons married according to Muslim rites. An application was made to the Constitutional Court for confirmation of the order and therefore to allow partners in Muslim Marriages to benefit

⁵ 2004 (5) SA 331 (CC)

⁶ 99 of 1998

⁷ 81 of 1987

from their protections, which include the provision of relief to widows to ensure that they receive at least a child's share of their husbands' estates.

The Constitutional Court held that the word "spouse," in its ordinary meaning, should include Parties to a Muslim Marriage, because this corresponds to the way the word is generally understood and used, and because it would be far more awkward from a linguistic point of view to exclude Muslim partners than to include them.

In *Hassam v Jacobs N.O. & others*⁸, Mrs. Hassam could also not inherit from her late husband's estate. She was married to him in accordance with Muslim rites. However, without her knowledge, he had married a second wife, Mrs. Mariam Hassam, also according to Muslim rites. Mr. Hassam died intestate in August 2001. His death certificate indicated that he was never married.

The Executor of his estate refused to regard Mrs. Hassam as a spouse for the purposes of the Intestate Succession Act. He questioned the validity of her marriage to the deceased. She took the matter to Court and was also eventually successful in the Constitutional Court⁹. The Court held that she was discriminated against on grounds of religion, marital status and gender and that her right to equality had been violated and that this was inconsistent with section 9 of the Constitution. Accordingly, it was held that she could inherit from her late husband's estate.

The Women's Legal Centre case

The Applicant's requested the Court to order that the South African government has failed to protect, promote and fulfil various constitutional obligations toward Parties to a Muslim Marriage and that the South African government be ordered to recognise Muslim Marriages as valid within 12 months.

Due to the South African government's continuous failure, it had prejudiced constitutional rights to dignity, freedom of religion, equality, and the best interests of the child to access Courts.

A full bench decided that the State is obliged to respect, protect, promote the rights to equality, dignity, freedom of religion and the best interests of the child to access the courts and ordered the State to enact legislation within 24 months to recognise marriages concluded in terms of Muslim rites.

⁸ (2008) JOL 22098 (C)

⁹ Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC)

Importantly, the Court as part of its order included that should such legislation not be enacted within 24 months that marriages validly concluded under Shariah Law will then be dissolved in accordance with the provisions of the Divorce Act¹⁰.

Conclusion

At present, Muslim couples are able to conclude a religious marriage as well as a civil marriage. The civil marriage will however automatically be governed by the provisions of the Marriage Act with the result that the marriage will be in community of property.

As this is not generally aligned to the patrimonial consequences of marriages concluded in terms of Islamic Law, Muslim couples are able to conclude an Antenuptial Contract wherein they are able to set out how the marriage is to be governed. This allow couples to have the joys of concluding their religious ceremony and a legally recognised civil marriage.

We therefore recommend that advice is sought from a practicing Attorney. Contact SchoemanLaw today for expert assistance in the drafting of Antenuptial Contracts, Muslim rites and Shariah Law.

¹⁰ 70 of 1979