

REPUBLIC OF SOUTH AFRICA

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# REGISTRATION OF MUSLIM MARRIAGES BILL

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*(As introduced in the National Assembly (proposed section 76); explanatory summary of  
Bill and prior notice of its introduction published in Government Gazette No 45275 of 8  
October 2021)*  
*(The English text is the official text of the Bill)*

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(MR M G E HENDRICKS, MP)

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# BILL

**To regulate the recognition, requirements, solemnisation, registration, proprietary and other consequences, dissolution and consequences of dissolution of Muslim marriages; and to provide for matters connected therewith.**

## PREAMBLE

**WHEREAS** it is an imperative that the constitutional rights of parties to, and children born of, a marriage governed by Islamic Law that cannot be registered with the Department of Home Affairs, are protected;

**AND WHEREAS** there is an urgent need to prevent the indignity suffered by all those that enter into a marriage governed by Islamic Law that cannot be registered with the Department of Home Affairs;

**AND WHEREAS** section 2 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), provides that the Constitution is the supreme law of the Republic and that all law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled, and furthermore specifically—

- in section 7(2), places a responsibility on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;
- in section 8(1), provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state;
- in section 9(1), provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
- in section 9(2), provides that legislative and other measures designed to protect or advance persons that were previously disadvantaged by unfair discrimination may be taken in order to promote the achievement of equality;
- in section 9(3), provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
- in section 10, acknowledges that everyone has inherent dignity and provides that everyone has the right to have their dignity respected and protected;
- in section 15(1), provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;
- in section 15(3)(a), provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law that is consistent with the Constitution;
- in section 28(2), provides that a child’s best interests are of paramount importance in respect of all matters concerning the child; and
- in section 36, provides that the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking all relevant factors into account;

**AND WHEREAS** the Republic of South Africa has international law obligations to take appropriate and reasonable measures to eradicate discrimination against, and abuse of, all women, and to protect children;

**AND WHEREAS** it is necessary to provide a process to register marriages governed by Islamic Law; to recognise these marriages as lawful; to provide protection to the parties involved; and to regulate the consequences of these marriages,

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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### **Definitions**

- 1.** In this Act, unless the context otherwise indicates—
- “**competent witness**” means a person who is 14 years and above, and competent to give evidence in a court of law; 20
- “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
- “**court**” means any division of the High Court of the Republic contemplated in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or any court for a regional division contemplated in section 29(1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944); 25
- “**Deeds Registries Act**” means the Deeds Registries Act, 1937 (Act No. 47 of 1937);
- “**Department**” means the Department of Home Affairs;
- “**Divorce Act**” means the Divorce Act, 1979 (Act No. 70 of 1979);
- “**Identification Act**” means the Identification Act, 1997 (Act No. 68 of 1997); 30
- “**Islamic Law**” (*Sharia*), which regulates all public and private behaviour, means the law as derived from traditional customs (*Al-Urf*), the two primary sources, namely, the *Quran* and the *Sunnah* (Prophetic model) and that uses juristic tools such as *ijma* (the consensus) of Muslim Jurists or the individual jurist’s *qiyas* (analogical deductions) to issue legal edicts; 35
- “**Marriage Act**” means the Marriage Act, 1961 (Act No. 25 of 1961);
- “**marriage officer**” means any person that is an *Imaam* or member of the Islamic *Ulama* that has been appointed as a marriage officer in terms of the Marriage Act;
- “**Minister**” means the Cabinet member responsible for the administration of the Department; 40
- “**Muslim marriage**”, subject to section 2, is a legal contract of marriage that regulates the consequences of the parties’ intended marital relationship, concluded during a ceremony referred to as a *nikah* in accordance with Islamic Law;
- “**Muslim person**” means any person who professes the religion of Islam by acknowledging that there is no God but One and that Muhammad is His last Messenger and does not believe in any kind of prophethood after him in any sense of the term: Provided that peculiarities in belief, orthodoxy or heterodoxy does not preclude or include a person to be a Muslim person; 45
- “**prescribed**” means prescribed by regulation made under section 10; and
- “**this Act**” includes any regulation made under this Act. 50

## Application of Act

2. (1) This Act applies to a Muslim marriage concluded after the commencement of this Act.

(2) This Act, insofar as it can be made applicable, applies to a Muslim marriage concluded before the commencement of this Act, if the parties to that Muslim marriage elect to have their marriage registered with the Department as contemplated in section 6. 5

## Recognition of Muslim marriage

3. A Muslim person, or such other person who is permitted in terms of Islamic Law to enter into a Muslim marriage, may conclude a Muslim marriage in accordance with the requirements contemplated in sections 4, 5 and 6, and such Muslim marriage is deemed a valid and binding contract of marriage with all the patrimonial consequences, obligations and rights that accrue to such Muslim marriage in accordance with this Act and any other applicable law. 10

## Requirements for Muslim marriage 15

4. (1) The parties contemplating entering into a Muslim marriage must—

(a) be 18 years or older and must provide the necessary proof of identification as contemplated in section 12 of the Marriage Act: Provided that where one or both of the parties are younger than 18 years, parties must comply with Islamic Law regarding the required age as well as with the prescripts set out in sections 24 to 27 of the Marriage Act and any other applicable law; 20

(b) be of sound mind and must be able to confirm that—  
 (i) they have been apprised of, and understand, the patrimonial consequences, obligations and rights that accrue to such Muslim marriage in accordance with this Act and Islamic Law; and 25  
 (ii) that they are not aware of any lawful impediment to the contemplated Muslim marriage; and

(c) freely and voluntarily, in writing, consent to be married to each other in terms of this Act and Islamic Law.

(2) A prospective wife intending to enter into a Muslim marriage must determine and record in writing the dowry that she expects from her prospective husband, which— 30

(a) may include the performance of any obligation prior to or after the Muslim marriage has been confirmed; and

(b) upon acceptance by the prospective husband creates a binding and enforceable obligation, which endures even in the event that the marriage is dissolved, until the obligation is fulfilled. 35

(3) (a) A prospective wife or husband contemplated in subsection (2) may each, in writing, mandate another person to negotiate such dowry on her or his behalf.

(b) The mandate contemplated in paragraph (a) must be given freely and voluntarily.

(c) The person mandated in paragraph (a) must negotiate in accordance with the parties' wishes and intention. 40

(d) The dowry negotiation is only finalised by acceptance of the negotiated dowry by the prospective wife and husband.

(4) The terms of the dowry negotiated in accordance with subsection (2) must be recorded in writing and noted with the marriage certificate issued by the marriage officer. 45

(5) The parties to a Muslim marriage—

(a) may enter into further Muslim marriages under this Act; and

(b) may not, during the subsistence of a Muslim marriage, enter into any other marriage, civil union, or customary marriage as contemplated in the Marriage Act, the Civil Union Act, 2006 (Act No. 17 of 2006), or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998). 50

## Solemnisation of Muslim marriage

5. (1) A Muslim marriage is solemnised by a marriage officer—

(a) in the presence of the parties to the Muslim marriage themselves; and

(b) at least two competent witnesses. 55

(2) A marriage officer may solemnise a Muslim marriage at any time on any day of the week.

(3) In solemnising a Muslim marriage, the marriage officer must follow the ceremonial traditions usually observed in Islamic Law, after which the marriage officer must declare the marriage solemnised by stating:

“I declare that A.B. and C.D. here present have been lawfully married”

    (“A.B.” referring to the name and surname of the husband, reflected in an identity card contemplated in the Identification Act; and

    “C.D.” referring to the name and surname of the wife, reflected in an identity card contemplated in the Identification Act).

(4) The competent witnesses contemplated in subsection (1) must confirm that they witnessed the Muslim marriage ceremony by signing the prescribed documentation.

(5) No person is capable of contracting a valid Muslim marriage in terms of this Act through any other person acting as their representative.

(6) If the provisions of this section have not been strictly complied with owing to—

(a) an error, omission or oversight committed in good faith by the marriage officer, or by one or both of the parties; or

(b) a physical disability of either or both parties to the Muslim marriage, but such Muslim marriage has in every other respect been solemnised in accordance with the provisions of this Act, and there is no other lawful impediment to the solemnisation thereof, that Muslim marriage is as valid and binding as it would have been if the said provisions had been strictly complied with.

### Registration of Muslim marriage

6. (1) The marriage officer solemnising a Muslim marriage, the parties thereto and two competent witnesses must sign the prescribed marriage register immediately after such Muslim marriage has been solemnised.

(2) The marriage officer must complete a certificate on the prescribed form in which he must—

(a) state that at the time of the solemnisation of the marriage he was in terms of this Act entitled to solemnise that marriage;

(b) record the details of the parties to the Muslim marriage, the date, time and place of the solemnisation thereof;

(c) note the terms of the dowry as contemplated in section 4(4); and

(d) indicate the chosen matrimonial property regime that applies, as contemplated in section 7.

(3) (a) The marriage officer must, within six months after the conclusion of the Muslim marriage, transmit the marriage register, certificate and any other prescribed documents, to an authorised officer contemplated in the Identification Act.

(b) The marriage officer must maintain a record of the marriage, including a copy of the certificate contemplated in subsection (2), until such time that the marriage officer has received the prescribed confirmation of registration of that Muslim marriage with the Department.

(4) (a) Either spouse to a Muslim marriage concluded prior to the commencement of this Act may, within 24 months of the commencement of this Act, apply to an authorised officer contemplated in the Identification Act in the prescribed manner and form for the registration of their Muslim marriage in terms of this Act.

(b) Whether a Muslim marriage concluded prior to the commencement of this Act is registered with the Department or not, does not affect the validity of an otherwise valid Muslim marriage.

(5) Either party to a Muslim marriage may request the prescribed marriage certificate, or a copy thereof, to be issued by the Department.

(6) The marriage certificate contemplated in subsection (5) is *prima facie* proof that a valid Muslim marriage exists between the spouses referred to in the marriage certificate, and has been registered with the Department.

### Proprietary consequences

7. (1) The parties to a Muslim marriage must voluntarily choose the matrimonial property system that will apply to their marriage.

(2) This election contemplated in subsection (1) must be indicated on the marriage certificate contemplated in section 6(2).

(3) If the chosen matrimonial property regime is that of out of community of property, an antenuptial contract must be entered into and must comply with Chapter VII of the Deeds Registries Act.

(4) Notwithstanding subsection (3), a court may on application by either or both of the parties to the Muslim marriage, subject to such conditions as it may deem desirable, 5  
authorise the postnuptial execution of the notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the Muslim marriage, and may order the registration, within a specified period, of any contract so executed, in accordance with section 88 of the Deeds Registries Act.

(5) The provisions of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), 10  
applies to the matrimonial property regime chosen by the parties.

### **Equal status and legal capacity of spouses**

8. Each party to a Muslim marriage has full status and capacity, including the capacity to acquire assets and to dispose of them, and to enter into contracts and to litigate in their own name without the need for consent or knowledge of the other party to that Muslim 15  
marriage.

### **Dissolution of Muslim marriage**

9. (1) Save for the exclusion of section 3 of the Divorce Act, the dissolution of a Muslim marriage may be regulated in accordance with the provisions of the Divorce Act, subject to the peremptory conditions and formalities having been completed, as 20  
required by Islamic Law.

(2) To safeguard the interests of minor and dependent children born of a Muslim marriage, a court must consider the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and the Children's Act, 2005 (Act No. 38 of 2005), in addition to the Divorce Act. 25

(3) A court granting a decree for the dissolution of a Muslim marriage may, in addition to any order provided for in the Acts referred to in subsections (1) and (2)—

- (a) order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings; and
- (b) when making an order for the payment of maintenance, take into account any 30  
provision or arrangement made in accordance with any contract concluded between the parties and Islamic Law at the time.

(4) Nothing in this section should be construed as limiting the role, recognised in Islamic Law, of any person, including any established Muslim judicial body, in the mediation, in accordance with Islamic Law, of any dispute or matter arising prior to the 35  
dissolution of a Muslim marriage by a court.

### **Regulations**

10. (1) The Minister—

- (a) may make regulations regarding the processes and forms to request a marriage certificate, or copy thereof, to be issued by the Department; and 40
- (b) must make regulations—
  - (i) regarding the form and format of documents to be signed by competent witnesses at the solemnisation of a Muslim marriage;
  - (ii) regarding the form and format of a certificate contemplated in section 6(2); 45
  - (iii) setting out the necessary processes and procedures to be followed and documents to be submitted when registering a Muslim marriage with an authorised officer at the Department, including processes and procedures related to confirmation of such registration; and
  - (iv) regarding the process to register a Muslim marriage concluded prior to 50  
the commencement of this Act, with the Department.

(2) The Minister must publish any regulation made under this section in the *Gazette*.

**Limited duration of application of Act**

**11.** (1) This Act will be automatically repealed upon the commencement of an Act of Parliament regulating the registration, recognition, solemnisation, proprietary consequences and dissolution, and consequences of dissolution of, Muslim marriages.

(2) Where Parliament opted to legislate on the subject matter referred to in subsection (1) in more than one Act of Parliament— 5

(a) a relevant section in this Act will be deemed to be repealed upon commencement of an Act of Parliament that regulates the subject matter dealt with in that section; and

(b) this Act is automatically repealed as a whole upon the commencement of the last Act of Parliament dealing with the subject matters referred to in subsection (1). 10

**Short title and commencement**

**12.** This Act is called the Registration of Muslim Marriages Act, 2022, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 15



## MEMORANDUM ON THE OBJECTS OF THE REGISTRATION OF MUSLIM MARRIAGES BILL, 2022

### 1. INTRODUCTION

- 1.1. In the Republic of South Africa, Muslim marriages that have only been solemnised in terms of the tenets of Islamic law have never been recognised as valid marriages in law capable of being registered with the Department of Home Affairs (DHA). Even in the current constitutional dispensation, the state has failed to enact any legislation recognising and regulating any aspect in relation to Muslim marriages. The failure to recognise and regulate valid Muslim marriages has created a great deal of legal uncertainty resulting in an inability even on the part of legal practitioners to advise their Muslim clients with any reasonable degree of certainty what their rights and obligations are or what remedies are available to them in the circumstances. This causes many Muslim women and men to not pursue any legal action enforcing their rights. The failure to recognise Muslim marriages is an indignity by the State to the entire Muslim faith, and the failure to regulate and provide for the registration of Muslim marriages undermines and insults the very foundations on which Islam is built. Not recognising the existence of a Muslim marriage is tantamount to not recognising the existence of Muslim people, their religion, customs, traditions and culture. The effect of this continuous gross human right violation by the state is significant. It is essentially impossible for a person to attend to his or her affairs if one lives in a society where you are not even able to establish the proprietary consequences of a person's marriage upon the conclusion or at the dissolution thereof. There are no mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the now informal dissolution of these marriages.

#### **The Recognition of Muslim Marriages in Statute and Law Reform aimed at the Recognition of Muslim Marriages**

- 1.2. Despite the state's abject failure to legally include and grant legal protection to spouses in Muslim marriages, Muslim Family / Personal Law (MPL) has been practised within the South African Muslim community from or around the 17th century. To this day, and *ad infinitum*, *Sharia*, upon which MPL is based, plays, and will continue to play, a significant role in the lives of South African Muslims at individual and communal level.
- 1.3. During or about 1987, during the apartheid era, the South African Law Commission (SALC) already started thinking about whether or not Muslim marriages should be afforded legal recognition. The SALC circulated a questionnaire within the South African Muslim community to gauge its opinion regarding the incorporation of MPL within the secular legal system. The questionnaire received a mixed response: Some members of the *Ulama* welcomed the initiative because they wanted legal enforceability for their MPL related decisions. However, progressive organisations such as the Muslim Youth Movement, Call of Islam, *Qibla* Mass Movement and the Muslim Student's Association (MSA), which were actively involved in the struggle against apartheid, perceived the initiative as a state-based attempt to divide Muslims and assimilate them into apartheid structures, legitimising these structures. Resultantly, the aforementioned progressive organisations rejected the SALC's proposal and indicated that they would only consider dialoguing with a democratic South African government.
- 1.4. In 1994, the African National Congress ("ANC") government established the Muslim Personal Law Board (MPLB), which was mandated to draft legislation to recognise MPL. Many viewed the establishment of the MPLB to be the result of an electoral promise to afford recognition to MPL that the ANC had made to the South African Muslim community during the negotiations process leading up to South Africa's first democratic elections.



The MPLB's mandate was based on the freedom of religion clause in the interim Constitution, which enabled the enactment of legislation to recognise *inter alia* MPL and Muslim marriages. The MPLB was comprised of members of the *Ulama*, and progressive Muslim organisations, namely the Muslim Youth Movement and the Call of Islam.

- 1.5. Within a year of its establishment, the MPLB was disbanded. The main points of contention centred on the manner in which MPL ought to be recognised, which courts should interpret and apply MPL and whether or not Muslims should have a choice regarding their marital system.
- 1.6. In 1999, the process to legally recognise Muslim marriages gained traction and further impetus with the establishment of a Project Committee of the South African Law Reform Commission (SALRC). The Project Committee was founded through a democratic process of nominations by the South African public, which resulted in the appointment of nine Muslims as members of the Project Committee, three of whom were women. The Project Committee was headed by Justice Mohammed Navsa, who was a judge at the Supreme Court of Appeal and the remaining members consisted of three members of the *Ulama*, two members of the South African Parliament, an advocate, a Professor of Law and a member of the SALRC.
- 1.7. The Project Committee was mandated to draft legislation to recognise only Muslim marriages, as opposed to drafting legislation to recognise a system of Muslim Personal Law. This mandate accorded with the freedom of religion clause in the final Constitution, which enables the legislature to recognise *inter alia* Muslim Personal Law or Muslim marriages.
- 1.8. From 1999 until 2002, the Project Committee conducted extensive consultations with different sections of the South African Muslim community as well as secular human rights organisations.
- 1.9. In January 2002, the Project Committee issued Discussion Paper 101, including a draft Bill for the recognition of Muslim marriages. A full report of the Law Reform Commission on Islamic Marriages and Related Matters was handed to the then Minister of Justice in July 2003. In the period 2003 to 2004, various responses to the Law Reform Commission's report, including the draft Bill, were lodged for consideration by the Minister of Justice. In October 2004, the Project Committee reconvened to discuss concerns expressed in a number of responses that had been received.
- 1.10. In March 2005, an amendment to the proposed draft Bill was submitted by the Project Committee. According to the Minister of Justice, between 2008 and 2009 the Bill was in the final stages of preparation for submission to Cabinet. However, due to the intensity of objections, the constitutional issues raised and the sensitivities of some aspects of the Bill, the Minister was of the view that the Bill should be published for public comment before it can be finally considered by Cabinet. The Report and Draft Bill were subsequently submitted to the Ministry of Justice and Constitutional Development for consideration in the parliamentary process.
- 1.11. However, by 2010, the Muslim Marriages Bill still had not been enacted. This saw the matter and the state's failure to recognise Muslim marriages, the failure of which has far reaching consequences for Muslim women and children as constituting of the most vulnerable groups in communities, challenged before our courts. During the hearing of the matter of *Faro v Bingham NO and Others [2013] ZAWCHC 159* (25 October 2013), before Rogers, J, the Minister of Justice alleged that a decision was taken by Cabinet on 8 December 2010 that the Bill be published for public comment and that, on 21 January 2011, it was published for public comment.

- 1.12. Notwithstanding the court’s decision in 2013, in response to an invitation for suggestions of areas of research for consideration by the South African Law Reform Commission (SALRC) issued by the Minister of Justice and Constitutional Development at the time, the Ministry of Home Affairs proposed the investigation into the development of a single marriage Act for South Africa. However, it was only in October 2017 that the SALRC recommended to the Minister of Justice and Correctional Services that he approves the inclusion of an investigation into the possible adoption of a single marriage statute, including measures against sham marriages, in the SALRC law reform programme and that an ‘A’ priority rating be allocated to this investigation. On 1 November 2017 the Minister of Justice and Correctional Services approved the inclusion into the Commission’s research programme of an investigation into the possible adoption of a single marriage statute including measures against sham marriages. The Minister of Justice and Correctional Services approved the appointment of the Advisory Committee on 24 January 2018. The Advisory Committee’s efforts culminated in Issue Paper 35, which was published for general information and comment on 8 April 2019. The closing date for comment was initially 31 July 2019. The closing date was subsequently extended to 31 August 2019.
- 1.13. The DHA, on the other hand, embarked on a separate parallel process of developing a marriage policy White Paper. In June 2019 officials from the DHA communicated with the Secretariat of the SALRC, advising that the DHA “was in the process of developing a marriage policy White Paper which will inform the review of the marriage legislation”. The DHA stated that this process was driven by their identification that “there are elements of the marriage legislation that are outdated and non-compliant to the Constitution”. The DHA informed the SALRC that they were “undertaking a comprehensive study that will guide the development of the marriage policy”. It is noted here that since this envisaged single marriage statute encompasses “South Africans and residents of all sexual orientations, religions and cultural persuasions”, it will not be specific to regulating Muslim marriages.
- 1.14. In 2020, a parliamentary question interrogated what the obstacles were which prevented the Government from—
- (a) affording legal recognition to Muslim marriages by using the same procedure that provides for the recognition of African customary marriages through the registration process at the Department of Home Affairs, while permitting for the *nikah* certificate to be issued by an officiating *Imam* in the same way as the *lobola* certificate is issued by an African customary official such as an *Induna*; and
  - (b) attributing the status of “married” on death certificates of such Muslims in instances of a *de facto* marriage(-s) having been in existence as opposed to the current “not married” status attributed to all Muslims who were exclusively married according to Muslim rites, made particularly obvious during the Covid-19 pandemic and the dramatic rise in the deaths of spouses.
- 1.15. The legislative *lacuna* was made glaringly clear in the Minister’s reply, where he stated that:
- “Customary marriages are regulated by the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) which provides for requirements for a valid customary marriage and registration thereof. In this regard, there is no power vested on Government to extend the provision of the Act to other types of marriages, as doing so will be acting ultra vires. A marriage entered into in terms of Muslim rites is thus far not recognised in the South Africa . . .”.*

### **Judicial Constitutional Intervention: Court Rulings on the Recognition of Muslim Marriages**

- 1.16. As is evidenced above, the rights of parties to a Muslim marriage have recently begun to be recognised by our courts, however, this recognition has taken place in a piecemeal manner. Statutory developments are further unfolding at glacial pace while the Muslim community, and the most vulnerable of this population, continue to be left out in the legal cold.
- 1.17. In highlighting key judicial decisions which have agitated for the required legal reforms, in 2013 the Western Cape High Court granted the recognition of the Applicant as a surviving spouse for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.
- 1.18. In 2015, the Applicant approached the High Court on an urgent basis asking for an order to interdict the Government Employees Pension Fund and the Minister responsible for Justice from paying out 50% of her husband's pension interest, pending an action to be instituted for payment of that portion of the pension interest to her. This order was granted.
- 1.19. In 2018 the Western Cape High Court declared that "the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law ('Muslim marriages') as valid marriages and to regulate the consequences of such recognition". The court declared that should the legislation mentioned above not be enacted within 24 months from the date of the order, and until such time as the coming into force thereafter of such contemplated legislation, the following orders, inter alia, would come into effect:
  - 1.19.1. The Application of the Divorce Act to the dissolution of Muslim marriages; and
  - 1.19.2. An order directing the Minister of Justice to put in place policies and procedures regulating the holding of enquiries by the Master of the High Court into the validity of marriages solemnised in accordance with the tenets of Islamic law is refused.
- 1.20. In 2020, on Appeal from the Western Cape High Court case, the Supreme Court of Appeal declared that:
  - 1.20.1. The Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) is inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.
  - 1.20.2. Section 6 of the Divorce Act is inconsistent with sections 9, 10, 28(2) and 34 of the Constitution, insofar as it failed to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provided for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved.

- 1.20.3. Section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution, insofar as it failed to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.
- 1.20.4. Section 9(1) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution, insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages that are dissolved.
- 1.20.5. The common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.
- 1.21. The declarations of invalidity were suspended for a period of 24 months to enable the President and Cabinet, together with Parliament, to remedy the foregoing defects by either amending existing legislation, or initiating and passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.
- 1.22. Pending the coming into force of legislation or amendments to existing legislation, it was declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:
- 1.22.1. All the provisions of the Divorce Act shall be applicable, save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary; and
- 1.22.2. The provisions of section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.
- 1.23. In the case of a husband who is a spouse in more than one Muslim marriage, it was ordered that the court:
- 1.23.1. Shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, and must make any equitable order that it deems just; and
- 1.23.2. May order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.
- 1.24. Pending the coming into force of legislation or amendments to existing legislation it was declared that:
- 1.24.1. From the date of the order, section 12(2) of the Children's Act 38 of 2005 applies to a prospective spouse in a Muslim marriage concluded after the date of this order; and
- 1.24.2. The provisions of sections 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b) and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, *mutatis mutandis*, to Muslim marriages.
- 1.25. The above order was confirmed by the Constitutional Court on 28 June 2022, in *Women's Legal Centre Trust v President of the Republic of South Africa and Others [2022] ZACC 23*, where the court held that the

non-recognition of Muslim marriages infringes upon the rights of Muslim women and their children to dignity, equality, access to courts and the best interests of the children. The court noted that the application centred around “the persisting non-recognition of marriages solemnised in accordance with the tenets of *Sharia* law (Muslim marriages), which has resulted in the infringement of fundamental rights of parties to Muslim marriages, and Muslim women and children in particular, for far too long.”

- 1.26. The court confirmed that the Marriage Act and the Divorce Act are inconsistent with the Constitution because they fail to recognise marriages solemnised in accordance with *Sharia* law and have not registered these as valid civil marriages.
- 1.27. The common law definition of marriage was also declared to be inconsistent with the Constitution and invalid because it excluded Muslim marriages. The common law definition of marriage now includes Muslim marriages. Muslim marriages are therefore deemed to be valid and legitimate.
- 1.28. The following sections of the Divorce Act were declared unconstitutional:
  - 1.28.1. Sections 6 and 7(3), because they failed to provide mechanisms to safeguard the welfare of minor or dependent children born in Muslim marriages and failed to provide for the redistribution of assets on the dissolution of a Muslim marriage when such redistribution would be just; and
  - 1.28.2. Section 9(1), because it is inconsistent with the Constitution for failing to make provision for the forfeiture of patrimonial benefits of a Muslim marriage at the time of its dissolution, in the same or similar terms as it does in respect of other marriages that are dissolved.
- 1.29. The Constitutional Court suspended the declaration of invalidity for a period of 24 months to enable the legislature to remedy defects by either amending existing legislation or initiating new legislation by 27 June 2024. The new or amended legislation must recognise Muslim marriages for all purposes in South Africa and regulate the consequences arising from such recognition.
- 1.30. Pending the coming into force of new legislation or the amendment of existing legislation, the Constitutional Court declared that Muslim marriages subsisting as at 15 December 2014 may be dissolved in accordance with the Divorce Act, as follows:
  - 1.30.1. All provisions of the Divorce Act would be applicable, save that all Muslim marriages would be treated as if they are out of community of property, except where there are agreements to the contrary.
- 1.31. Now that the Divorce Act applies to Muslim marriages, minor and dependent children of Muslim marriages will enjoy the same protections as minor and dependent children in civil marriages.
- 1.32. The Constitutional Court also held that pending the coming into force of new or amended legislation, from 28 June 2022, section 12(2) of the Children’s Act, 2005, applies to a prospective spouse in a Muslim marriage concluded after 28 June 2022 and sections 3(1)(a), 3(3)(a) and 3(3)(b) and 3(4)(a) and (b) of the Recognition of Customary Marriages Act, 1998, shall apply, with necessary changes being made, to Muslim marriages.

- 1.33. Prior to this case, women in Muslim marriages had to register their marriages in order to have their marriages recognised under South African law. The Supreme Court of Appeal and the Constitutional Court confirmed that the non-recognition of Muslim marriages that were not registered violated the Constitutional rights of women in and children born of Muslim marriages.
- 1.34. The court remarked that the non-recognition of Muslim marriages was a source of great hardship. There was no justification offered as to why children born of Muslim marriages should not enjoy the automatic oversight of a court, as set out in the Divorce Act, in relation to their care and maintenance and why they should not be protected by a statutory minimum age for consent to marriage.
- 1.35. The previous non-recognition of Muslim marriages forced some Muslims to dilute their religious beliefs by electing to marry monogamously according to civil law in order for their marriages to be regarded as valid. An additional challenge was that women in Muslim marriages were often unable to convince their husbands to conclude civil marriages.
- 1.36. If a Muslim couple enters into a community of property marriage by concluding a pre-nuptial agreement and if the husband in that marriage marries a second wife under *Sharia* Law, the first wife, on the husband's death, will get half of the joint estate by virtue of the in-community-of-property matrimonial regime and a specified share from the other half of the joint estate. The second wife will only receive a specified share in half of the estate because her marriage will be deemed to be an out-of-community-of-property marriage.
- 1.37. The Constitutional Court judgment applies to all Muslim marriages entered into after 15 December 2014. Muslim marriages have been brought on par and in line with other civil marriages, but they will be treated as out of community marriages unless the spouses agreed otherwise.
- 1.38. It is patent that a single marriage statute will not achieve the objects which the court declared necessary. It is also clear that the legislative reform towards a Muslim marriages Act is no where near completion, and will in all likelihood take another two to five years, if not longer.
- 1.39. Not recognising the existence of a Muslim marriage is tantamount to not recognising the existence of Muslim people, their religion, customs, traditions and culture. The effect of this continuous gross human right violation by the state is significant. It is essentially impossible for a person to attend to his or her affairs if one lives in a society where you are not even able to establish the proprietary consequences of a person's marriage upon the conclusion or at the dissolution thereof. There are no mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the now informal dissolution of these marriages.
- 1.40. The Bill provides an effective medium to address the mischief identified by the courts and provides an interim but effective remedy which immediately responds to the court's injunctions.
- 1.41. In anticipation of there being different schools of thought regarding various aspects in respect of the religion of Islam and Islamic private and family law, this draft Bill is designed to identify the minimum elements of a Muslim marriage, referred to as a *nikah*, and to, at the very least, provide an interim and purely temporary so-called bare bones minimalist Bill to at the very least serve as a resolution to the great indignity caused by the inability to register a Muslim marriage with the DHA, pending the finalisation of a more comprehensive and detailed Act of Parliament to be promulgated (or substantive amendments to existing legislation). This Bill is therefore an interim and minimalist Bill designed to only provide for the registration of



valid Muslim marriages and to regulate some ancillary aspects associated with the registration of these marriages and the dissolution thereof. The provision of this bare bones Bill dealing only with the actual registration of Muslim marriages at the DHA is by no means an attempt to codify a religion. It is also not an attempt to resolve any dispute between the different schools of thought or interpretations. The Bill will automatically be repealed upon a more comprehensive Act coming into operation. The Bill for instance does not deal with divorces separate to that of any other divorce action. The reason for this is because history has now taught us that these topics are the contentious issues that will delay the enactment of this crucial Bill – this is something that should be avoided, as any delay in the enactment of this “interim and minimalist Bill” would defeat its entire objective.

## **2. OBJECTS OF THE BILL**

The purpose of this Bill is to provide for

- 2.1. the recognition of Muslim marriages;
- 2.2. the requirements for the conclusion of a valid Muslim marriage;
- 2.3. the solemnisation of Muslim marriages;
- 2.4. the registration of Muslim marriages;
- 2.5. the proprietary and other consequences of Muslim marriages; and
- 2.6. the dissolution and consequences of dissolution of Muslim marriages.

## **3. CONTENTS OF THE BILL**

- 3.1. Clause 1 provides for the definition of words used in the Bill.
- 3.2. Clause 2 provides for the application of the proposed legislation, determining that the Act applies to all Muslim marriages concluded after the commencement of the Act, as well as to Muslim marriages concluded before the commencement of this Act, if the parties to that Muslim marriage elect to have their marriage registered with the Department as contemplated in section 5.
- 3.3. Clause 3 provides for the recognition of Muslim marriages by providing that a Muslim person or any other person who is permitted to conclude a marriage with a Muslim person, may conclude a Muslim marriage in accordance with the requirements proposed in this Bill and any other applicable law.
- 3.4. Clause 4 deals with the requirements that the parties must comply with in order to conclude a valid Muslim marriage under this Bill. Where one or both of the parties is younger than 18 years, they can get married in terms of Islamic Law but can only apply for a South African marriage certificate when they reach the age of 18 years.
- 3.5. Clause 5 provides for the solemnisation of a Muslim marriage. It, inter alia, sets out the formula that the marriage officer may follow when solemnising the marriage.
- 3.6. Clause 6 deals with the registration of Muslim marriages.
- 3.7. Clause 7 deals with the proprietary consequences of Muslim marriages and provides that parties to a Muslim marriage must voluntarily choose the matrimonial property system that will apply to their marriage.



- 3.8. Clause 8 provides that each party to a Muslim marriage has full and equal status and legal capacity.
- 3.9. Clause 9 deals with the dissolution of Muslim marriages.
- 3.10. Clause 10 empowers the Cabinet member responsible for the administration of Home Affairs to make regulations on various matters required under the Act. It also provides that the regulations must be published in the *Gazette*.
- 3.11. Clause 11 provides for the limited duration of the application of the Act.
- 3.12. Clause 12 provides for the short title and the commencement of the Act.

#### **4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

This Act will be administered by the Department of Home Affairs and is unlikely to have any significant implications or additional staff to deal with the registration of Muslim marriages, to issue marriage certificates and certificates confirming the dissolution of such marriages.

#### **5. FINANCIAL IMPLICATIONS FOR THE STATE**

There will be financial implications with regard to the solemnisation (i.e. the designation and training of registration officers) and registration (development of registration forms) for Muslim marriages.

#### **6. DEPARTMENTS, BODIES OR PERSONS CONSULTED**

- The Department of Home Affairs: Mr Thulani Mavuso – Deputy Director General: Institutional Planning & Support, Mr Thomas Sigama – Deputy Director General: Civic Services, Mr Tsietsi Sebelemetja – Acting Chief General: Legal Services, Mr Moses Malakate – Acting Director: Drafting, Ms Kelebogile Makgabo – Director: Policy Development, Ms Rittah Monama: Deputy Director: Policy Coordination, Mr Richard Skhakhane – Acting Director: Birth, Marriages & Deaths.
- Advocate van Loggerenberg, Legal counsel as the current chairman of High Court Chambers Cape Town, an affiliated group of Advocates of the South African Bar Association, practising as an Advocate of the High Court of South Africa.
- Advocate Yusuf Khan Dalwai at the High Court Chambers of South Africa.
- Advocate Saleem Khan – Senior Counsel.
- Advocate Shameemah Salie, former Family Advocate.
- Professor Muhammed Haron—Al Jama-ah Party’s Senior Researcher, former Professor at Botswana University and visiting Professor at the University of Stellenbosch.
- Hazrat Peer Khalid Soofie Habeebi – Peer (Spiritual Guide) of 20 000 soofies nationally.
- Public participation process by publishing an explanatory note in the *Government Gazette* inviting interested parties to comment at a very early stage.
- June 16th Programme with youth in the rural area of Paarl East.
- Consultation with Muslim women from 8 townships from Atteridgeville, Mamelodi, Hebron, Brits, Hammanskraal, Mabopane, Soshanguve and Winterveldt.
- 60 women attended a Women’s Day Event in Sandvlei, Ammaanul Islam Hafiz Academy, the first settlement of Muslims for South Africa where the founder of Islam lived while in exile from Indonesia.
- Presentations to IPSA – International Peace College of South Africa—30 June 2022 and 30 July 2022.
- Presentation to AMAL – Association of Muslim Accountants and Lawyers – 15 August 2022.
- Presentation to UUCSA – United *Ulama* Council of South Africa which includes the Muslim Judicial Council (MJC)—22 August 2022.

- Hilaal TV, Radio 786, VOC, Channel Islam, Radio Ansaar, Al Jeem radio interviews.
- Participation in an info session at Radio 786 Expo in Newlands Cricket Stadium.
- Amir Mohammed Gadimang of Gauteng Muslim *Shura* Council.
- Amir Abdul haqq Lekabe and Mukkadam Berend of Pheli Muslim *Shura*.
- Amir Mohammed Gomba of Tshwane Muslim *Shura*.
- Amir Rauphala of Pheli *Shura*.
- Moulana Ali Mlangeni of Pheli *Shura*.
- Issah Chirwa of Hebron Muslim *Shura*.
- Moulana Asad Msiza of Pheli *Shura* Executive Committee.
- Hassan Kajaja of Pheli *Shura*.
- Imaraan Mashishi of Baitul Salaam.
- Yaseen Moema of Pheli *Shura*.
- Mohamadou kgomosotho of Pheli *Shura*.
- Bilal Moagi of Pheli *Shura* Advisory.
- Sunni Jamiatul *Ulama* of South Africa.
- Seminar: Doors of *Jannah* – 16 October 2022.
- Fatima Hendricks – Senior Social Worker.
- Al Jama-ah Law Makers: Galil Brinkhuis MPL in WCPP, Achmad Hendricks—PR Councillor: City of Cape Town, Faried Achmat – PR Councillor: City of Cape Town and Al Jama-ah Secretary General, Shameemah Salie – PR Councillor: City of Cape Town and Al Jama-ah Spokesperson, Ahmed Stulweni – PR Councillor: Drakenstein, Thapelo Amad – PR Councillor for City of Johannesburg, Imraan Moosa – Ward Councillor: Lenasia, Kabelo Gwamanda – PR Councillor: City of Johannesburg, Kabelo Nthekiso – Ward Councillor: Madibeng North West, Muhammad Asghar Khan—Chairperson Municipal Public Accounts Committee: Umdoni KZN and Al Jama-ah Chairperson for Communications Committee, Moulana Hoosen Khan – PR Councillor: eThekweni KZN, Goodwill Cele – PR Councillor: uMuziwabantu KZN.

## 7. PARLIAMENTARY PROCEDURE

- 7.1. The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution, as its provisions in a substantial manner deal with a functional area of concurrent national and provincial legislative competence listed under Schedule 4 to the Constitution, namely “cultural matters”.
- 7.2. The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions directly affecting traditional or Khoi-San communities and does not contain provisions pertaining to customary law or customs of traditional or Khoi-San communities.





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