

ENFORCEMENT OF THE MAINTENANCE RIGHTS OF A SPOUSE, MARRIED IN TERMS OF ISLAMIC LAW, IN THE SOUTH AFRICAN COURTS

1 Introduction

Legal pluralism is a reality in the South African multicultural society. Apart from the South African legal system with its Roman-Dutch roots, various other legal systems are observed by groupings within the broader society – including the laws of the Islamic religious community. These legal systems mostly operated independently from one another with little interaction and overlap, although the courts have lately shown some recognition and integration of Islamic personal laws since the advent of the Constitution of the Republic of South Africa, 1996 (Van Niekerk “Legal Pluralism” in Bekker (ed) *Introduction to Legal Pluralism* 2ed (2006) 5; and Goolam “(Islamic) Law of Succession” in Bekker (ed) *Introduction to Legal Pluralism* 2ed (2006) 306).

What is certain is that both the courts and the legislature do not legally recognise an Islamic marriage as “a marriage” in terms of the Marriage Act 25 of 1961 (hereinafter “the Marriage Act”) (Cronje and Heaton *South African Family Law* 2ed (2004) 215-217 and the sources quoted therein). As the focus in this note is on spousal maintenance, it is expedient to mention the main differences between a marriage in terms of South African civil law and a marriage (nikkah) in terms of Islamic law. The differences are stark and include the following: firstly, a civil marriage is not a contract (*Holland v Holland* 1973 1 SA 897 (T)), whilst a nikkah is a contract (Goolam, Badat and Moosa “(Islamic) Law of Marriage” in Bekker (ed) *Introduction to Legal Pluralism* 2ed (2006) 252); secondly, although both types of marriages are based on consensus, a civil marriage must be solemnised by a marriage officer (s 11(1) of the Marriage Act), whilst a nikkah is solemnised by declaring vows of marriage in the presence of two adult male witnesses (Goolam, Badat and Moosa 253); thirdly, a civil marriage is *per se* monogamous (Cronje and Heaton 30), whilst a nikkah permits a man to marry up to four wives (Goolam, Badat and Moosa 266); fourthly, during the subsistence of a civil marriage there is a reciprocal duty of support on both the spouses, whilst in a nikkah it is the responsibility of the husband to maintain his wife/wives (Rautenbach *Introduction to Legal Pluralism in South Africa: Religious Legal Systems* Part II (2002) 64; and Mahomed CJ in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1323b-c); and the last difference deals with maintenance after the dissolution of the marriage. In a

civil marriage the spousal maintenance duty continues until the date of death of one of the spouses, or divorce, unless the court directs otherwise (either in terms of s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 or s 7 of the Divorce Act 70 of 1979) or by agreement, whilst in a nikkah the spousal maintenance duty of the husband continues for the three months *'iddah* period after the divorce unless the wife is either pregnant or breastfeeding (*Qur'an* 65:6 as quoted by Rautenbach 64; and *Ryland v Edros* 1997 1 BCLR 77 (C)). Where a Muslim husband passes away, his spouse is entitled to a percentage of his estate but not to maintenance from his estate. According to Goolam, this lack of a post-deceased maintenance claim should be seen in light of the fact that the duty to maintain the widow rests squarely on the shoulders of either her father or another male relative (Goolam 306).

For centuries Muslims chose the legal system applicable to their marriage and it was presumed that the consequences of that chosen legal system were accordingly the couple's intended consequences: where the parties married in terms of Islamic law only, the religious system would regulate all aspects of the marriage and divorce. Spouses then found their remedies with the unofficial religious institutions such as the Ulama bodies located around the country: the Jamiat of KwaZulu-Natal, the Muslim Judicial Council and the Magjilisul Ulama in Port Elizabeth (Moosa "Muslim Personal Law – To Be or Not To Be" 1995 6(3) *Stell LR* 417; Moosa "Muslim Personal Law – To Be or Not To Be" 1995 6(2) *African Law Review* 15; and see also Rautenbach, Goolam and Moosa "Constitutional Analysis" in Bekker (ed) *Introduction to Legal Pluralism* 2ed (2006) 151). However, over the years, the South African legislature has made certain legal aspects of the South African law, such as Civil Proceedings Evidence Act 25 of 1965, the Domestic Violence Act 116 of 1998 and the Child Care Act 74 of 1983, also applicable to Muslim and other religious marriages. The courts followed by applying the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to Muslim spouses (*Daniels v Campbell* 2004 7 BCLR 735 (CC)). This selective legal recognition and the overlap between the systems, in haphazard and piecemeal fashion, are unfortunate and create uncertainty as to the rights, duties and obligations between Muslim spouses. The draft Muslim Marriage Bill, published by the South African Law Reform Commission in *Project 59 Islamic Marriages and Related Matters Report* (July 2003) ("draft bill"), aimed at legal recognition of Islamic marriages and other general regulation of Muslim marital issues, seems to have stalled indefinitely. It seems as if no general legislative intervention should be expected soon in light of the criticisms within the Islamic circles (Rautenbach *et al* 165).

As mentioned above, neither the courts nor the legislature recognises an Islamic marriage as "a marriage" in terms of the Marriage Act 25 of 1961. The underlying reasons for this non-recognition are due to the non-adherence to the Act and, the public policy reasons expressed by the courts vis-à-vis Muslim marriages based on the fact that these marriages are potentially polygamous. However, this public policy seems to be changing

and the South African civil courts are prepared to determine issues relating to Muslim marriages, although this approach in itself is debatable. The acceptance by the courts of jurisdiction over Muslim legal issues is problematic and inconsistent: some courts apply Muslim law, whilst other courts apply South African legal rules with total disregard for the Islamic personal laws. The South African courts do have the discretion to recognise foreign laws in terms of section 1(1) of the Law of Evidence Amendment Act 45 of 1988 in instances where these laws are not opposed to the principles of public policy and natural justice. The problem with applying foreign (*in casu* Muslim) law is apparent in that the foreign system is generally unfamiliar to the legal scholars and the court; moreover, the sources of the foreign law often inaccessible (Rautenbach *et al* 152). Added hereto is the uncertainty as to whether the courts can apply the Bill of Rights to religious family laws (see discussion by Rautenbach *et al* 152 onwards). Rautenbach *et al* argue that although the Muslim marriage rules might *prima facie* be discriminatory, it would be impossible to reconcile the values between the supreme constitutional principles and the deep-rooted cultural and sacrosanct religious values (Rautenbach *et al* 153; and see also Moosa "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women" 1998 9(2) *Stell LR* 196). Rautenbach *et al* suggest that the uncertainty of the status of the unofficial religious family laws would be alleviated if certain aspects thereof are recognised, as recognition would constitutionally protect the vulnerable groups such as women and children (Rautenbach *et al* 155). The problem is that the courts do not have the power to develop these unofficial religious laws as they have with the common law and customary law (s 39(2) of the Constitution). Here solution lies with the argument used by the Constitutional Court in *Daniels v Campbell*, namely that the court has to interpret all issues in light of the founding values of the Constitution – in keeping with its spirit, purport and object (par 55 of the judgment), with specific reference to the preamble, the prohibition on unfair discrimination (s 9(3) of the Constitution); the rights to dignity (s 10 of the Constitution); and the freedom of religion (s 31 of the Constitution; Rautenbach *et al* 156-157; and see in general also Moosa "Human Rights in Islam" 1998 14(4) *SAJHR* 508).

The purpose of this discussion is to note the application of the maintenance statutes vis-à-vis Muslim couples in the South African courts. Firstly, the important judgments are referred to in chronological order; secondly, the maintenance rights of a Muslim spouse are set out for the following periods: during the marriage, after death of her husband and post-divorce; and lastly, the jurisdiction of the courts are discussed in light of the changing *mores* of society. In short, the question is how far the South African courts have gone in making the South African legal maintenance legislation accessible to Muslim wives. The issues are discussed in light of the Islamic family law as interpreted by the South African courts and with reference to the draft bill.

2 Islamic Family Law in the South African courts

The courts have had to deal with the consequences of Muslim marriages on numerous occasions. Since the 1940s some courts have declared Muslim marriages to be putative marriages in terms of the South African law, so as to include the consequences of a legally valid marriage to those marriages - generally for the benefit of the wife and the children (*Ex parte L (also known as A)* 1947 3 SA 50 (C); *Bam v Bhabha* 1947 4 SA 798 (A); *Ex parte Soobhia: In re estate Pillay* 1948 1 SA 873 (N); *Desai v Engar & Engar* 1966 4 SA 647 (A); *Ramayee v Vandiyar* 1977 3 SA 77 (D); and *Moola v Aulsebrook* NO 1983 1 SA 687 (N)). This practice, however, ended with *Solomons v Abrams* (1991 4 SA 437 (W)) when the court decided that only unions duly solemnised in terms of the Marriage Act could be regarded as putative marriages.

In *Ismail v Ismail* (1983 1 SA 1006 (A)) the Appellate Division confirmed a long line of judicial precedent that Muslim marriages were *contra bonos mores* on policy grounds, legally void and unenforceable, mainly because these marriages are potentially polygamous. (See also *Seedat's Executors v The Master (Natal)* 1917 AD 302 308-9 where the court refused to recognise a Muslim widow as a "surviving spouse" for purposes of a statute which exempted surviving spouses from estate duty. The reason given was that such marriages were potentially polygamous and repugnant to the policy and institutions of Holland and England and "...reprobated by the majority of civilised peoples on grounds of morality and religion". In addition, see *Davids v The Master* 1983 1 SA 458 (C); and *Kalla v The Master* 1995 1 SA 261 (T)).

In *Ryland v Edros* (1997 2 SA 690 (C)) the court, although it was not prepared to recognise the marriage under civil law, was prepared to enforce the spouse's contractual obligations in terms of the Islamic faith. As the parties agreed that no religious doctrines had to be interpreted, Farlam J concluded that enforcement of these contractual obligations were not contrary to the accepted custom and usages which are regarded as morally binding on all members of society. In light of the principles of equity and diversity and the recognition of the South African society as a multicultural society these contracts were not *contra bonos mores*. The court found that the *Ismail* judgment could no longer operate to preclude a court from enforcing such claims. As the spirit, purport and objects of Chapter 3 of the Constitution and the basic values underlying it are in conflict with the public policy viewpoint expressed and applied in the *Ismail* case, the constitutional values had to prevail (705C). For purposes of this note this judgment is important as it effectively enforced the Muslim wife's right to maintenance during her marriage, as well as for the three months *'iddah* post-divorce period. (For a discussion of this case see Jacobs "Enforcement of Contractual Obligations: Muslim Marriages" 1998 34(1) *Codicillus* 68).

The Supreme Court of Appeal in *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* (1999 4 SA 1319 (SCA) par 19-21), recognised the Muslim wife's claim for loss of

support against the Fund. The court based its decision on the *de facto* legal duty of the deceased husband to maintain his wife during their marriage in terms of Muslim law. The court held that the insistence that the duty of support, which a serious *de facto* monogamous marriage imposed on the husband, was not worthy of protection. This could only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy, to the exclusion of others. This is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the Constitution of the Republic of South Africa Act 200 of 1993 (par 20). The SCA further held that the *boni mores* of the community would support an approach which gives the duty of support flowing from the Muslim marriage the same protection as that accorded to the duty flowing from a Christian marriage (par 23). (See in general the discussion by Rautenbach "The Extension of the Dependant's Action for Loss of Support and the Recognition of Muslim Marriages: The Saga Continues" 2000 63(2) *THRHR* 312).

In *Daniels v Campbell* (2004 7 BCLR 735 (CC)) the Constitutional Court interpreted the concepts "spouse" and "survivor" in the Intestate Succession Act, 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 respectively to include spouses married in terms of Muslim law. Prior to this decision a spouse was thus not entitled, in terms of Islamic law, to claim maintenance from the estate of her husband (*Kalla v The Master*). The Constitutional Court interpreted the statute in light of the constitutional values of equality, tolerance and respect for diversity. The court noted that there was no reason why the equitable principles underlying the statutes should not apply in the case of Muslim widows, as they apply in the case of widows whose marriages had been solemnised in terms of the Marriage Act. The purpose of these statutes would be frustrated should widows be excluded from protection merely because the legal form of their marriage happened to accord with Muslim tradition rather than the Marriage Act (par 20-23). (For a discussion of the court *a quo* decision, see Rautenbach and Goolam "Muslim Law: Constitutionality" 2004 25(1) *Codicillus* 89; and Rautenbach and Goolam "The Legal Status of a Muslim Wife Under the Law of Succession: Is She Still a Whore in Terms of the South African Law?" 2004 15(2) *StellLR* 369).

In the cases above the court restricted its interpretation of the law to *de facto* monogamous Muslim marriages. The matter of *Khan v Khan* (2005 2 SA 272 (T)), however, dealt with a *de facto* polygamous marriage. The court in this matter, Goodey JA, held that a wife in a Muslim marriage, married in accordance with Islamic rites, whether monogamous or polygamous, was entitled to maintenance during their marriage and as such fell within the ambit of the Maintenance Act (par 11.13). The court, for the first time, enforced the maintenance rights of a polygamous spouse in a South African court using a South African statute.

In 2006, two High court judges had to decide on maintenance *pendente lite* for the wife and ex-wife in *Cassim v Cassim* (Part A) ((TPD) 2006-12-15

unreported case number 39543/06) and *Jamalodeen v Moola* ((NPD) unreported case number 1835/06) respectively. It is reiterated that this note is restricted in both cases to the decision dealing with the maintenance of Muslim spouses as further constitutional challenges are pending.

In *Cassim v Cassim* Patel J found that the union between the spouses is a marriage under Islamic Law which is not recognised as a marriage in terms of the Marriage Act. Moreover it was held that there is a duty on the husband to maintain his spouse, to whom he is married in terms of Muslim law, at a general standard of living by providing for her reasonable needs in terms of the Maintenance Act. This judgment is unique as the court made the order knowing that the husband was about to take a second wife in terms of Muslim law (see full discussion below).

In *Jamalodeen v Moola* Levinson J of the Natal Provincial Division had to decide whether a woman who had been married in terms of Muslim law, but divorced in terms of Muslim law, was entitled to maintenance in terms of Rule 43 of the Uniform Rules of Court - pending the final determination of her constitutional challenge. He ordered the maintenance payable, but added certain conditions. The first condition was that in the event that the trial court held that the ex-husband was not under any obligation to pay maintenance to the applicant, she had to repay to him all the amounts received by her; and secondly, she had to enter into good and sufficient security *de restituendo*, to the satisfaction of the Registrar of the Court, with regard to any obligation which may arise from the above. Furthermore, it was stipulated that, if she did not comply with the setting of security, the obligation to pay maintenance would *ipso facto* cease to be of any force and effect. This decision is not particularly helpful as the security requirement defeats the purpose of the application for maintenance. Although it appears *prima facie* as if the court is granting maintenance to an ex-wife for a longer period than the *'iddah* period, pending litigation, the conditions in effect render the order impractical.

The question remains: which (South African) legal instruments can a Muslim wife or ex-wife use in the South African courts to ensure that her maintenance rights are adequately enforced?

3 Maintenance legislation and its applicability vis-à-vis Muslim spouses

The South African legislature has enacted three statutory documents to assist with the issue of maintenance and maintenance enforcement: the Maintenance Act 99 of 1998; Rule 43 of the Uniform Rules of Court; and the Maintenance of Surviving Spouses Act 27 of 1990. Each of these statutes is applicable to different scenarios discussed below.

3 1 Maintenance during marriage

Section 2(1) of the Maintenance Act 99 of 1998 provides, under the heading "Application of Act", that the

“provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty”.

The Act does not determine whether a legal duty exists between the parties, but merely, once such a duty has been established, to provide for a cheap and easy procedure that could be followed to enforce such a maintenance duty through the maintenance courts system.

It is accepted that there is a duty on a Muslim husband to support his wife/wives during the subsistence of the marriage equally (*Qur'an* Ch 65, verse 7 as quoted by Goolam 256; *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening* 1999 4 SA 1319 (SCA) par 1; *Ryland v Edros* 1997 2 SA 690 (C) 711F-H; *Cassim v Cassim* (order dated 2006-12-15); and *Khan v Khan* (par 11.13)).

In answering the question whether the Maintenance Act can be used to enforce this maintenance duty during the marriage, the courts have answered in the affirmative for both monogamous and polygamous Muslim marriages. See *inter alia Cassim v Cassim* (order dated 2006-12-15) and *Khan v Khan* (par 11.13). In *Ryland v Edros* these contractual maintenance rights were also enforced by the High Court, although not in terms of the maintenance legislation and subject to the Prescription Act 68 of 1969 (714A-E). As there is no duty on the wife to support her husband in Muslim law, he would not be able to make use of this statute in the courts.

In the unreported matter of *Cassim v Cassim* the applicant requested the court to direct her husband to maintain her at a standard of living that she was accustomed to in terms of s 2(1) as read with s 2(2) of the Maintenance Act 99 of 1998, pending further constitutional challenges not relevant here. The court granted this request. It is common cause that the Cassims are married in terms of the Islamic law and that the parties did not conclude a civil marriage in terms of the Marriage Act. No children were born from the marriage. Since her marriage the applicant, a retired acting school principal, assumed the role of homemaker, with her husband being the breadwinner. According to the pleadings, the parties agreed that the proprietary result of the marriage in terms of Islamic law was that the marriage was similar to a marriage “out of community of property” with each of the parties having separate or individual estates. The husband intended to marry a second wife and the main dispute between the parties related to the extent of the maintenance of the husband. He argued that his duty extends as far as required by Islam, and that he never gave her his undertaking to support her until she dies. However, his wife argued that she was entitled to maintenance until she dies. This section of the dispute is yet to be decided upon. The court found that, although the union between the spouses is a marriage under Islamic Law which is not recognised as a marriage in terms of the Marriage Act, there is a duty on the husband to maintain his spouse at a general standard of living by providing for her reasonable needs in terms of the Maintenance Act – by implication even after he enters into a second polygamous marriage. Whether this duty continues after divorce or death

was, however, not specifically addressed by the court. It could be argued that if the husband divorces this wife, his maintenance duty would cease three months after the date of the divorce. He would then be entitled to approach the court, in terms of the Maintenance Act, for a discontinuation order as there would no longer be a duty on him to maintain his ex-wife.

With regard to polygamous marriages, the court in *Khan v Khan* found that it would be blatant discrimination to grant a Muslim wife in a monogamous Muslim marriage a right to maintenance in terms of the Maintenance Act; but, to deny a polygamous Muslim wife, married in terms of the same Islamic rites and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance (par 11.11). The court noted further that the purpose of the Maintenance Act would be frustrated, rather than furthered, if partners to a polygamous marriage were to be excluded from the protection of the Act – merely because the legal form of their relationship is not consistent with the Marriage Act (par 11.12).

3 2 *Maintenance pendente lite*

Rule 43(1)(a) of the Uniform Rules of Court applies whenever a spouse requests, *inter alia*, relief in the form of maintenance *pendente lite*, while a divorce or other matrimonial action is pending. In *Jamalodeen v Moola* the Natal High Court did in theory, in a rule 43 application, grant an interim maintenance order to a Muslim ex-wife. Practically, however, it meant very little as she would have to re-pay any received amounts if her pending litigation was unsuccessful. The impression is created that the court knew that the spouse was not entitled to maintenance in terms of Islamic law, as the Muslim divorce had already been concluded.

Patel J in *Cassim v Cassim* seemingly excluded the relevance of Rule 43 by finding that a Muslim union is not a marriage in terms of the Marriage Act but rather a “marriage” in terms of Islamic law.

3 3 *Maintenance after dissolution of the Muslim marriage*

3 3 1 Dissolution by death – Maintenance of Surviving Act 27 of 1990

The aim of this statute is to provide the surviving spouse with a possible claim for reasonable maintenance needs against the estate of the deceased spouse until death or remarriage – in so far as the surviving spouse is not able to provide therefore from his own means and earnings (s 2(1)).

Until the case of *Daniels v Campbell* (2004 7 BCLR 735 (CC)) a Muslim spouse was not entitled to claim from the estate of her deceased spouse as the statute was interpreted to be applicable only to a spouse from a legally recognised marriage which excluded Muslim spouses. By interpreting the statute generously, a Muslim spouse is now included in the word “spouse”

and falls within the ambit and application of the Maintenance of Surviving Spouses Act. Ironically there is nothing in the wording of the statute that would prevent a Muslim husband from using this statute to claim maintenance from the estate of his late wife.

In *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* (1999 4 SA 1319 (SCA)), the court also awarded the wife a claim for her support, after the death of her husband in a motor vehicle accident, against the Accident Fund. Mohamed CJ stated that “the insistence that the duty of support which such a serious *de facto* monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution ...” (par 20). As the claim is based on an existing duty of support, a Muslim husband would not be able to claim from the Fund as there was no duty on his wife to maintain him during the marriage.

3 3 2 Dissolution by divorce

As mentioned above, there is a duty on the Muslim husband to maintain his wife for three months after a final divorce. After that period a Muslim wife has no maintenance claim against her husband (*Ismail v Ismail*). In light of *Ryland v Edros* there is no reason why the Maintenance Act cannot be used for the enforcement of these three months’ maintenance.

The question to be asked is whether a maintenance order can continue after the post-divorce three months ‘*iddah*’ period. Can the courts use the Maintenance Act, 1998 to extend the maintenance period? It is submitted that, in light of the wording of the Maintenance Act that only provides for application of a legal duty and as there is no such legal duty on the husband that extends beyond that three months, the courts would not be able to use the Act to extend the maintenance for an indefinite period or a period longer than three months.

In the *Khan* matter the husband, at the end of the proceedings, gave his wife a notification of an Islamic divorce (*talaq*) (par 3). It is unclear which of the three required notifications this was, or whether all three notifications were given in one sitting. A divorce, in terms of Muslim law, is only irrevocable after the issuing of the third *Talaq* (Cronje and Heaton 219; and it should be noted that Islamic scholars are not *ad idem* about whether uttering three *talaqs* in one sitting is equal to one *talaq* or three *talaqs* <http://www.jamiat.org.za/isinfo/ttalaqs.html>, the website of the *Islamic Jamiat*). Be that as it may, the court in *Khan* avoided the issue as it did not base its judgment on the duty to support post-divorce. The matter had already been heard long before notification of the *Talaq* was given.

Moosa and Karbanee (“An Exploration of Mata’a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)Opening a Veritable Pandora’s Box?” 2004 8(2) *Law, Democracy and Development* 267) argued that there is scope in Islamic jurisprudence to assert a post-divorce maintenance right, but concluded that Islamic law itself offers sufficient mechanisms to remedy the inequalities suffered by Muslim women in this regard.

In the draft bill on Muslim marriages by the South African Law Reform Commission, Muslim spouses may elect for the proposed legislation to be applicable to their marriage, or not. If they elect the provisions in the statute, one of the possibilities dealing with the consequences of divorce relates to maintenance. Clause 9(7)(f) of the draft bill requires the court to take into account all relevant factors when dealing with the issue of spousal maintenance. It expressly provides that, if the maintenance court makes a maintenance order in terms of the Maintenance Act 99 of 1998, the court must *inter alia* take into consideration that in respect of a Muslim marriage, a husband must maintain his wife during the *‘iddah* (a period of three months). It seems as if the draft bill does not intend that the courts extend the maintenance period of spousal maintenance past the three months’ *‘iddah* period although it is left to the discretion of the court. As mentioned earlier, the future of the draft bill is uncertain.

4 Jurisdiction by the South African courts

The courts generally avoided asserting jurisdiction over Muslim marriages and the consequences thereof for reasons of public policy and potential polygamy. It appears as if there has been a change in public policy regarding Muslim marriages and the arguments surrounding “potential polygamy”. In *Ryland v Edros*, the court concluded that Islamic marital contracts were not *contra bonos mores* and that the court could no longer be precluded from enforcing such claims. In this matter the court, in an attempt to assert jurisdiction, found that, as the case itself did not require the court to interpret the religious doctrines, it was appropriate for the court to pronounce on the matter – even though it pertained to religious law. The parties in this matter were in agreement as to the Islamic principles. In *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* the SCA held that the *boni mores* of the community would support protection of a duty of support flowing from both a Muslim and Christian marriage.

In light of *Daniels v Campbell* and the recognition by the Constitutional Court that the founding principles of the Constitution are applicable to the unofficial religious family laws, one could expect, rightly or wrongly, that the courts would be approached more regularly to deal with issues relating to Muslim marriages, divorces and their consequences.

As mentioned above several courts, including the Supreme Court of Appeal and the Constitutional Court, still emphasise the *de facto* monogamous union; consequently Rautenbach and Goolam rightly asked

what the necessity of this emphasis is if the ethos of the new South African constitutional order is one of shared values, diversity and pluralism. (Rautenbach and Goolam 2004 *Stell LR* 369 379). However, there seems to be a change in the courts regarding the arguments relating to the potential (or actual) polygamy of a Muslim marriage. In *Khan*, the duty of support of a wife in a polygamous marriage was recognised; moreover, it was in line with the aim of family law in general which is to protect vulnerable family members and to ensure fairness in disputes that arise at the end of relationships (par 10.4-10.5). The court confirmed that the polygamous marriage was a type of family and had to be protected by the family law as such marriages were accepted and concluded by the tenets of the faith of Islam (par 10.5). The court concluded that the public policy considerations in the interpretation of the Maintenance Act had been changed by the Constitution, and the purpose of the statute would be frustrated if partners to a polygamous marriage were excluded from the protection offered, just because the legal form of their relationship was not consistent with the 1961 Marriage Act (par 11.1 & 11.12). Added hereto, polygamy is no longer foreign to the legislation. The Recognition of Customary Marriages Act 120 of 1998 makes provision for the recognition of polygamous customary marriages (s 2) as does the draft bill for the registration of more than one Muslim marriage (clause 8).

However, the South African courts should be careful in accepting jurisdiction in matters pertaining to Muslim marriages and merely making the South African laws applicable thereto as it has lead to peculiar results. One example in this regard is the ruling of the court *a quo* in the *Khan* matter. In this case the maintenance court in Nelspruit found that, although the parties were married according to Islamic rites, the union should be regarded as a legal marriage (276D). This court further found that the parties entered into a marriage "in community of property" and had accumulated a joint estate for the benefit of both parties. The High Court, on appeal, rightly found that the magistrate had erred in that she neither had the jurisdiction to come to such a conclusion nor was it justified upon the facts. The court set this decision aside (278e-f). Although not discussed in the judgment, it should be noted that Islamic law does not recognise the concept of merger of the assets of the parties on marriage or community of property. Spouses maintain their separate assets, similar to the South African system of marriages out of community of property, excluding the accrual (Goolam, Badat and Moosa 255; and see also discussion of *Cassim* in par 3 1 above). One way of avoiding these absurd results would be to select Muslim judges, trained in Islamic legal principles, to hear matters relating to Muslim marriages and divorces – until the legislature rectifies the uncertainties.

5 Conclusion

The enforcement of the maintenance duty of a Muslim husband towards his wife or wives in the South African courts reiterates the difficulties within this multicultural, pluralistic society. Although there has been some exposure in the courts with regard to the recognition of religious laws post-Constitution,

the issues are far from being resolved. As Muslim spouses have remedies with the unofficial religious institutions, the role of the courts in practice remains limited. The South African Law Reform Commission's work in harmonising the South African marriage laws and the Islamic marriage laws has not been particularly helpful in that the draft bill has not progressed to legislation.

In summary, the courts apply the Muslim legal rules in certain instances, South African law in other instances and a combination in others. The following can be extracted from the cases: firstly, a wife is entitled to maintenance while she is married and this includes a period of three months after her divorce in terms of Muslim law, although she can also use the Maintenance Act to enforce this maintenance duty. This also extends to a wife of a polygamous marriage. Secondly, after the death of her husband, the Muslim spouse is entitled to maintenance from the estate of her husband, if she so requires, in terms of the Maintenance of Surviving Spouses Act. Thirdly, where her husband dies in a motor vehicle accident, she is entitled to claim for loss of support from the Road Accident Fund. The last two instances indicate a change from the Muslim legal principles.

However, two issues remain uncertain: the right to maintenance post-divorce for a period longer than the three months (*'iddah*); and the right of an ex-wife to maintenance in terms of rule 43 *pendente lite*. It is uncertain whether the courts would apply South African law or Muslim law to these issues. This uncertainty highlights the problems of the South African courts when dealing with Muslim marital issues as there are no clear policy guidelines. After the Constitutional Court accepted jurisdiction in the *Daniels v Campbell* matter and applied the underlying constitutional principles to Muslim marriages, there is no reason why other courts would not be requested to do the same in other Muslim marital issues. However, it should be reiterated that the solution should come from the legislature and not be left to the court to address selected issues on a piecemeal basis.

To conclude, the words of Moseneke J in the minority decision in the *Daniels* judgment are sufficiently succinct (par 108):

"I am acutely alive to the scorn and palpable injustice the Muslim community has had to endure in the past on account of the legal non-recognition of marriages celebrated in accordance with Islamic law. The tenets of our Constitution promises religious voluntarism, diversity and independence within the context of the supremacy of the Constitution. The legislature has still not redressed, as foreshadowed by the Constitution, issues of inequality in relation to Islamic marriages and succession. The report of the Commission suggests that there is considerable divergence of views on the envisaged legislation within the Muslim community. A matter so complex and replete with contending policy, personal law and pluralistic considerations is better suited for legislative rather than juridical intervention ..."

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