A STEP IN THE RIGHT DIRECTION OR ADDITIONAL BURDEN FOR WOMEN MARRIED IN TERMS OF ISLAMIC LAW?

Women's Legal Centre Trust v President of the Republic of South Africa [2022] ZACC 23

1 Introduction

Marriages concluded in terms of Islamic rites have until recently not enjoyed the same legal recognition that is accorded to civil and customary marriages. The non-recognition of Muslim marriages meant that there was no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage. Furthermore, parties to a Muslim marriage were left without adequate legal protection when the marriage was dissolved either by death or divorce. In the absence of legal recognition and regulation of their marriages, Muslims (particularly Muslim women) endured many hardships and challenges. The consequence of non-recognition and non-regulation of Muslim marriages was that the married lives of Muslims remained unpredictable and outside their control. Non-recognition has also effectively meant that although parties to a Muslim marriage regard themselves as married, there has been no legal connection between them. The confirmation judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa* ([2022] ZACC 23) sought to remedy the dire situation in which parties found themselves when they were married in terms of Islamic law; it provides interim relief for Muslim marriages until such time as the State either enacts legislation or amends existing legislation to grant legal recognition and regulation of Muslim marriages.

Historically, the South African courts and the legislature have adopted a piecemeal, *ad hoc* approach to issues arising from disputes where spouses are married by Muslim rites (Moosa "The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce" in Heaton (ed) *The Law of Divorce and Dissolution of Partnerships in South Africa* (2014) 287). In essence, the courts and the legislature were prepared to grant legal recognition to some of the consequences flowing from Muslim marriages, but not to Muslim marriages *per se* (for e.g., *Rylands v Edros* 1997 (2) SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (4) SA 753 (CC)).

The non-recognition and regulation of Muslim marriages have had a severe impact on the parties to these marriages, particularly women and children, who are vulnerable groups, as they are disadvantaged both on a social and economic level. Non-recognition of Muslim marriages in essence meant that there was no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage, or any orders made by

the *Ulama* (learned male religious scholars (theologians)) at the dissolution of the marriage. This created a perilous situation as the *Ulama* could not compel compliance with their orders as they lacked the force of law (Shabodien "Making Haste Slowly: Legislating Muslim Marriages in South Africa" Muslim Marriages in South Africa Workshop 14 December 2010).

As Muslim marriages were not granted legal recognition, parties who were financially vulnerable were left without much legal protection.

Taking cognisance of the hardship experienced by parties married in terms of Islamic law, especially the plight of Muslim women and children, the Women's Legal Centre (WLC) brought an application in the Western Cape High Court (WCC) on 17 December 2014 (*Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces* Case No: 22481/14), seeking an order to force the President and Parliament to enact a law recognising Muslim marriages. This application culminated in the judgment of the WCC in *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham NO; Esau v Esau* (2018 (6) SA 598 (WCC)). The President and the Minister of Justice were granted leave to appeal by the WCC to the Supreme Court of Appeal (SCA). Similarly, the WCC also granted the WLC, Mrs Faro and Mrs Esau leave to cross-appeal.

The Constitutional Court confirmation judgment, which was delivered on 28 June 2022 in *Women's Legal Centre Trust v President of the Republic of South Africa* (*supra*), arose as a result of the decision of the SCA in *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* ([2020] ZASCA 177). A discussion of these pertinent cases leading to the Constitutional Court confirmation is, therefore, essential.

2 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces* Case No: 22481/14

In an application to the WCC, the WLC Trust challenged the government's failure to pass legislation granting recognition to Muslim marriages, despite it having been on the cards since the SA Law Reform Commission completed a draft Bill in 2003.

In the application, the WLC averred that the President, as head of the national executive, together with the National Cabinet and National Assembly, had failed to fulfil the obligation imposed on them in terms of section 7(2) of the Constitution to promote and fulfil the rights in sections 9(1), (2), (3) and (5), 10, 15(10) and (3), 28 (2), 31 and 34 of the Constitution (*WLC Trust v President of the RSA; Minister of Justice and*

Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra par 4). The WLC further called for the enactment of legislation providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa, as well as for regulation of the consequences flowing from the recognition of Muslim marriages (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 7). Without being prescriptive as to what the legislation should entail, the WLC asked the court to compel government to pass legislation that would give Muslim marriages legal status.

In the alternative, the WLC sought a declaration that the Marriage Act (25 of 1961) and the Divorce Act (70 of 1979) were inconsistent with sections 7(2), 9(1), (2), (3) and (5), 10, 15(10) and (3), 28(2), 31 and 34 of the Constitution (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 8). In a further alternative, the WLC sought a declaration: first, that the Divorce Act should apply to Muslim marriages; secondly, that Muslim marriages be deemed valid in terms of the Marriage Act; and lastly, that the common-law definition of marriage be extended to include Muslim marriages (*WLC Trust v President of the RSA; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the NCOP supra* par 9).

On 2 December 2015, Judge Desai heard arguments from the WLC, the State and other interested parties, including South African Lawyers for Change, the Commission for Gender Equality, United Ulama Council of South Africa (UCSA) (which has the same name as UUCSA) and Lajnatun Nisaa-ll Muslimaat (Association of Muslim Women of South Africa), whose membership comprises approximately 1 000 members, on whether the law's failure to recognise Muslim marriages discriminated against women. The application by Lajnatun Nisaa-ll Muslimaat and UCSA was heard on 5 February 2016. In this matter, the court ruled that Lajnatun Nisaa-ll Muslimaat and UCSA would be admitted as intervening parties.

The main application, initially set down for May 2016, was then postponed to 28 August 2017.

3 *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham NO; Esau v Esau* 2018 (6) SA 598 (WCC)

In 2018, the WCC heard three consolidated applications brought by the WLC, Tarryn Faro (who was also represented by the WLC) and Ruwayda Esau. The primary applicant in this matter was the WLC.

The relief claimed in the 2014 application (discussed above) was reiterated in 2018. The WLC sought a reading-in in terms of the Recognition of Customary Marriages Act (120 of 1998) so as to make provision for the recognition and regulation of Muslim marriages, pending the enactment of

legislation granting such recognition and regulation (*WLC Trust v President; Faro v Bingham; Esau v Esau* (WCC) *supra* par 36). Furthermore, in addition to or in the alternative to a reading-in, the WLC sought to suspend the declaration of invalidity in relation to the various impugned pieces of legislation for a period of 12 months, during which time Parliament was required to correct the defects of the impugned legislation (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 37), failing which the declaration of invalidity would take effect, and the reading-in into the Recognition Act would occur (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 37).

In the alternative to the relief sought above, the WLC sought a declarator deeming Muslim marriages to be valid in terms of the Marriage Act and the Divorce Act, and extending the common law to include Muslim marriages (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 38).

The relief sought by Faro was an order declaring that marriages concluded in terms of Islamic law be deemed to be valid marriages in terms of the Marriage Act, and alternatively that the common-law definition of marriage be extended to include Muslim marriages. This overlaps with the relief sought by the WLC in the alternative (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 41).

Esau sought a declaration that the failure on the part of the Cabinet and the Minister of Justice (second and third defendants) to initiate and prepare legislation providing for the recognition of Muslim marriages as valid marriages in South Africa, and regulating the consequences of such recognition, discriminates against Muslim women married in terms of Islamic law on the grounds of their gender and/or their religion and is inconsistent with sections 9(3) and 7(2) of the Constitution. The declaration sought by Esau was based primarily on an alleged breach of the right to equality on the grounds that Muslim women are unfairly discriminated against. On this basis, Esau sought an order directing the Cabinet and the Minister of Justice to prepare and initiate, within 18 months, legislation recognising and regulating Muslim marriages (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 48). Esau also sought a declaration that a *de facto* monogamous marriage concluded in terms of Islamic law should be regarded as valid for the purposes of the Matrimonial Property Act (88 of 1984), the Divorce Act and the common-law duty of support upon divorce (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 48).

For the purposes of this case note, the relevant sections of the order by the WCC are summarised as follows (*WLC Trust v President; Faro v Bingham; Esau v Esau supra* par 252):

1. The court declared that in terms of section 7(2) of the Constitution, the State is under an obligation to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution. The State is, therefore, under an obligation to prepare, initiate, introduce, enact and bring into operation, diligently and without delay (s 237 of the Constitution) legislation that grants legal recognition to Muslim marriages and to regulate the consequences of such recognition.

2. The court held that the President and the Cabinet had failed to fulfil their respective constitutional obligations as stipulated in paragraph 1 above and that such conduct was invalid.
3. The court ordered the President and Cabinet, together with Parliament, to rectify the failure within 24 months of the date of this order as contemplated in paragraph 1 above. (In terms of this judgment, the State was given the deadline of 31 August 2020 to provide a remedy that would grant recognition to and provide for the regulation of Muslim marriages).
4. Furthermore, if the contemplated legislation were referred to the Constitutional Court by the President in terms of section 79(4)(*b*) of the Constitution, or referred by members of the National Assembly in terms of section 80 of the Constitution, the relevant deadline would be suspended pending the final determination of the matter by the Constitutional Court.
5. Failing the enactment of legislation granting legal recognition and regulation of Muslim marriages within 24 months from the date of the order or such later date as contemplated in paragraph 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order would come into effect:

    5.1 Valid Muslim marriages subsisting at the time of this order becoming operative may (even after their dissolution in terms of *Sharia* law) be terminated in accordance with the Divorce Act. Furthermore, all the provisions of the Divorce Act shall be applicable, provided that the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded; and

    5.2 In the case of a polygynous Muslim marriage, the court shall:

        (a) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just; and

        (b) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

While the decision of the WCC was welcomed as it made provision for the recognition and regulation of Muslim marriage, it is important to note the following concerns in respect of the judgment of the WCC:

1. The order of the WCC makes provision for Muslim marriages to be dissolved in terms of the Divorce Act even after their dissolution in terms of Islamic law. The question that arises is what exactly is dissolved in accordance with the Divorce Act, as there is no marriage once it is dissolved in terms of Islamic law. The order of the WCC appears to imply that a Muslim marriage remains intact even after its dissolution in terms of Islamic law.
2. The order also makes provision for a secular court to dissolve the Muslim marriage in terms of the Divorce Act. This may be problematic, as Islamic law states that a Muslim marriage can only be dissolved in terms of Islamic law by a Muslim judge (Ibn Farhoon *Tabsiratul Ahkaamfil Usoolil Aqthiyawa Minhajil Ahkaam* vol 1 (1986) 49).

3. Furthermore, the order makes all the provisions of the Divorce Act applicable, and the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded. Cognisance must be taken of the fact that Islamic law does not recognise "in community of property" as a matrimonial property regime. Spouses in an Islamic marriage maintain separate estates and each spouse retains sole ownership and control of his or her property, whether movable or immovable, and whether acquired before or after the marriage (Rautenbach and Bekker *Introduction to Legal Pluralism* (2014) 368). According to authentic narrations from Islamic jurists (Ibn Katheer *Tafseer al-Quran al-Adheem* vol 1 (2003) 93), a person is only allowed to receive benefits and wealth that has been earned through lawful means, and if the parties are married in terms of a shared matrimonial property system (*Qur'an Surah Al-Nisa* verse 33), they become entitled to receive benefits to which they are not Islamically entitled. The *Ulama* in South Africa are unanimous that the only matrimonial property regime that is *Shari'ah* compliant is the standard antenuptial contract where there is no sharing of assets and liabilities during the subsistence of the marriage (*Surah Al-Nisa* verse 33.) The following injunction from the *Quran* can be cited in this respect:

> "To men is allotted what they earn and to women what they earn." (*Surah Al-Nisa* verse 33)

In other words, the spouses retain sole rights of ownership and control over their individual property, as a marriage concluded in terms of Islamic law is a non-sharing system unless the parties have entered into a marriage contract. Where a marriage contract has been entered into prior to the conclusion of the marriage, the matrimonial property will be divided according to the terms of the marriage contract. Before the parties conclude the marriage, they may enter into a prenuptial agreement, or *taqliq,* in terms of which they can agree upon any legal condition or conditions that will apply to their marriage, provided that these conditions are not contrary to the meaning of marriage. For example, the parties cannot agree to live separately. In essence, the parties can also enter into a marriage contract to regulate their marital assets (see Alkhuli *The Light of Islam* (1981) 72–73). Islamic law does not make provision for the sharing of assets at the termination of a marriage by divorce. In particular, a claim for the forfeiture of patrimonial benefits and a redistribution order, which is allowed in terms of South African divorce law, is foreign to Islamic law.

4 *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* [2020] ZASCA 177

The WCC granted the President and the Minister of Justice leave to appeal to the SCA. Similarly, the court also granted the WLC, Mrs Faro, and Mrs Esau leave to cross appeal. The appeal by the President of the RSA and the

cross-appeal by the WLC was argued before the SCA on 25 and 26 August and 30 September 2020. The judgment of the SCA was handed down electronically on 18 December 2020.

The concessions made by the appellants had a profound impact on the determination of the appeal. (The appellants conceded that the Marriage Act and the Divorce Act infringed the constitutional rights to equality, dignity and access to justice of women in Muslim marriages in that they failed to recognise Muslim marriages as valid marriages for all purposes. Furthermore, the appellants conceded that the rights of children born in Muslim marriages were, under s 28 of the Constitution, similarly infringed.) As a result, the main issues that the SCA was required to consider were: first, whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages; secondly, whether the provisions of the Marriage Act and Divorce Act are inconsistent with section 15 of the Constitution; and thirdly, whether the interim measure provided by the High Court should be retrospective.

In its judgment, the SCA took cognisance of the fact that the appeal centred on the non-regulation and non-recognition of Muslim marriages (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 1). Notwithstanding that South Africa became a constitutional democracy with the enactment of the Constitution in 1996, and despite prior judgments from both the Constitutional Court and High Court that criticised Parliament's failure to enact legislation granting legal recognition to and regulation of Muslim marriages, the historical disadvantages, hardships, prejudice and offensive attitude displayed towards parties married in terms of Islamic law continue to prevail (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 1).

The SCA also approved of the judgments of *Daniels v Campbell NO* (2004 (5) SA 331 (CC)) and *Hassam v Jacobs NO* (2009 (5) SA 572 (CC), as the decisions in these two cases alleviated the plight of Muslim women in relation to inheriting in terms of the Intestate Succession Act (81 of 1987), or claiming from the estates of the deceased in terms of the Maintenance of Surviving Spouses Act (27 of 1990).

The SCA (par 4) cited the following passages from the *Daniel's* case:

> "This "persisting invalidity of Muslim marriages" is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is "inequality, arbitrariness, intolerance and inequity." (*Daniels v Campbell supra* par 74)

and

> "These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality but also freedom of religion and belief. What is more, s 15(3) of the

> Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages." (*Daniels v Campbell supra* par 75)

Furthermore, the SCA (par 5) cited the following by Nkabinde J in the *Hassam* case:

> "The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*. The court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of our society. Recognition of polygynous unions was seen as a retrograde step and entirely immoral. The court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to 'cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances'. That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another." (*Hassam v Jacobs NO supra* par 25)

In approving and citing the above cases, the SCA was setting the tone for the manner in which it would approach the appeal and cross-appeal. The issues for determination by the SCA as set out above are discussed below.

4 1 Whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages

The WCC found that section 7(2) of the Constitution placed an enforceable duty on the State to enact legislation that granted legal recognition to Muslim marriages. In dealing with this issue, the SCA stated:

> "Section 7(2) is a broad general provision that must be read in the context of the Constitution and specifically in the context of the carefully constructed separation of powers entrenched in the Constitution. The principle of separation of powers is crucial to our democracy." (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 35)

The SCA referred to section 85 (which vests the power to prepare and initiate legislation in the President and Cabinet), section 43 (which vests the legislative authority of the national sphere of the Republic exclusively in Parliament) and section 44 (which vests the national legislative authority also exclusively in Parliament) of the Constitution to lend weight to the fact that it is the responsibility of Parliament to enact legislation. The SCA elaborated on this responsibility but referred to the discretionary nature of the President and Cabinet's power in respect of the nature and content of the legislation that it prepares and initiates (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 42). The SCA, therefore, concluded that section 7(2) of the Constitution cannot be the premise for the argument that a duty is placed on Parliament to enact legislation granting legal recognition

to Muslim marriages (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 42).

In fact, the SCA stated that to order the State to enact legislation granting recognition of Muslim marriages on the basis on section 7(2) would be in conflict with the doctrine of the separation of powers in light of sections 85, 43 and 44 of the Constitution (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 43). In the reasoning of the SCA in respect of the first issue, it disagreed with the finding of the WCC on the basis of the doctrine of the separation of powers. As a result, this aspect of the order of the WCC was set aside.

4 2 Whether the provisions of the Marriage Act and Divorce Act are inconsistent with section 15 of the Constitution

The SCA quoted section 15 of the Constitution, which makes provision for freedom of religion, belief and opinion. It was noted by the SCA that while the WCC made reference to section 15 of the Constitution in paragraph 1 of its order, it did not rule that the provisions of the Marriage Act and the Divorce Act were in conflict with the rights contained in section 15 (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 47). The SCA, furthermore, noted that this was also not the basis of the argument of the WLC; rather, it was that the permissive powers in terms of section 15(3) do not prevent the enactment of legislation that is sought by the WLC (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 47). The SCA, therefore, concluded that the declarations of unconstitutionality in respect of the Marriage Act and the Divorce Act should not contain a reference to section 15 of the Constitution.

4 3 Whether the interim measure provided by the High Court should be retrospective

In respect of the third issue – namely, retrospectivity – the SCA took cognisance of the WLC's request that the order granting interim relief should be retrospective and be applicable to all Muslim marriages that were terminated under Islamic law as far back as April 1994.

The SCA regarded the matter of retrospectivity as a complex one that could have profound unforeseen consequences (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 48). While the SCA made reference to section 172(1) of the Constitution (which empowers the SCA to make any order that is just and equitable where a declaration of invalidity is made), it stated that the matter of retrospectivity is the prerogative of Parliament, and that the legislature was best placed to deal with this matter (*President of the RSA v Women's Legal Centre Trust* (SCA) *supra* par 48). The SCA, therefore, did not accede to the request of the WLC.

Having considered these three pertinent issues, the SCA concluded with the following remarks: it had crafted an effective and comprehensive order so as to alleviate the hardships experienced by parties to Muslim marriages;

the order would be operational until such time as the necessary legislation was enacted by Parliament giving legal recognition to and regulating Muslim marriages; the non-recognition constituted both a travesty and a violation of the constitutional rights of adherents to the religion of Islam, especially, in respect of women and children; and lastly, the legal recognition and regulation of Muslim marriages "will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children" (***President of the RSA v Women's Legal Centre Trust*** (SCA) *supra* par 50).

The relevant sections of the SCA judgment for the purposes of this case note are summarised as follows:

> The appeal and the cross-appeals succeed in part, and the order of the Western Cape High Court as the court *a quo* is set aside and replaced with the following order:
>
> 1. Both the Marriage Act and the Divorce Act are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution, in that these Acts fail to recognise marriages that are not registered in terms of civil law, but which are concluded in terms of Islamic law, as valid marriages for all intents and purposes in South Africa, and these Acts also fail to regulate the consequences of such recognition.
> 2. Section 6 of the Divorce Act is declared to be inconsistent with sections 9, 10, 28(2) and 34 of the Constitution insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of dissolution of the Muslim marriage in the same or similar manner as it provides mechanisms to safeguard the welfare of minor or dependent children of other marriages that are being dissolved.
> 3. Similarly, section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets on the dissolution of a Muslim marriage, when such redistribution would be just.
> 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.
> 5. The court ordered that the declarations of constitutional invalidity be referred to the Constitutional Court for confirmation.
> 6. The court declared the common-law definition of marriage to be inconsistent with the Constitution as it excludes Muslim marriages and is, therefore, invalid.
> 7. The declarations of invalidity in paragraphs 1.1 to 1.4 above are 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 by passing new legislation within 24 months, 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.

8. Pending the enactment legislation or amendments to existing legislation referred to in paragraph 1.7, it is declared that a union, validly concluded as a marriage in terms of *Sharia* law and subsisting at the date of this order, or, which has been terminated in terms of *Sharia* law, 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:
   (a) 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
   (b) the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded.
   (c) In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:
      (i) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and
      (ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.
9. It is declared that, from the date of this order, section 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order.
10. For the purpose of applying paragraph 1.9 above, the provisions of section 3(1)(*a*), (3)(*a*) and (*b*), (4)(*a*) and (*b*), and (5) of the Recognition of Customary Marriages Act shall apply, *mutatis mutandis*, to Muslim marriages. (***President of the RSA v Women's Legal Centre Trust*** (SCA) *supra* par 51)

The importance of the SCA judgment can be summarised as follows:

1. Some measure of protection was now offered to parties to a Muslim marriage, especially women and children born of these unions, who were previously left to their own peril as they were not offered the same protection as partners to a civil marriage (as stated above, the Marriage Act and the Divorce Act did not grant legal recognition to marriages concluded in accordance with Islamic law).
2. The judgment confirmed that the Marriage Act and Divorce Act infringed the following sections of the Constitution, namely, section 9 (the right to equality); section 10 (the right to human dignity); section 28 (children's rights) and section 34 (the right to have access to courts).
3. Furthermore, the SCA held that the Divorce Act failed to provide mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the dissolution of a Muslim marriage in the same manner as section 6 of the Divorce Act provides safeguards for the welfare of children when civil marriages are being terminated.

4. In addition to the above breach of rights, the SCA held that the Divorce Act differentiates: between widows married in terms of the Marriage Act and those married in terms of Islamic law (s 7(3) and s 9(1) of the Divorce Act provide for redistribution orders and forfeiture of benefits orders respectively, but did not apply to Muslim marriages at the dissolution of marriage); between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Divorce Act works to the detriment of Muslim women and not Muslim men.

The following concerns in respect of the SCA judgment should be noted:

1. The same concern expressed above in relation to the WCC judgment in respect of sections 7(3) and 9(1) of the Divorce Act should be noted with regard to the SCA judgment.
2. The SCA held that children are not protected by a statutory minimum age for consent to marriage insofar as the conclusion of a marriage in terms of Islamic law is concerned as neither section 24 of the Marriage Act nor section 12(2)(*a*) of the Children's Act (38 of 2005) are applicable to a minor who wishes to conclude a marriage in terms of Islamic law. In terms of Islamic law, no particular age has been stipulated for marriage (Siddiqi *The Family Laws of Islam* (1984) 68). *Shari'ah* allows for the conclusion of a marriage when the age of puberty (*mukallaf* or *bulugh*) is reached (Ibn Rushd *The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid* (1996) 4; Esposito with DeLong-Bas *Women in Muslim Family Law* (2001) 15; Ahmed *Muslim Law of Divorce* (1978) 913; Pearl *A Textbook on Muslim Law* (1987) 43). Puberty is determined by signs of physical maturation or, where there is no declaration of puberty, there is a presumption that puberty has been reached, in the case of girl, when she has reached the age of nine years and, in the case of a boy, when he has reached the age of 12 years. (In the past, marriages at a young age were common but in recent times countries like Sudan and Tunisia have a legislated age when parties are deemed to have the necessary capacity to conclude a marriage. For example, in Sudan, the marriageable age of a girl is deemed to be 16 years, and in Tunisia, it is 22 years.) It is submitted that differing climatic, hereditary, physical and social conditions existing in different countries affect the age at which a person is deemed to be marriageable. As a result, no particular age is stipulated, as there would be a difference as to the marriageable age in the different countries (Siddiqi *Family Laws of Islam* 68). Islamic law, therefore, without stipulating a specific age, requires parties to have reached the age of puberty. Where one or both of the parties is below the age of puberty, the marriage is deemed to be void. However, in Islamic law, a presumption arises that the age of puberty for girls is nine years old and twelve years old for boys. The fact that there is no specific age requirement Islamic law may cause conflict with the South African law position where there is a move towards changing the age requirement for marriage to 18 years with no exceptions for parental consent (South African Law Reform Commission *Single Marriage Statute* Issue paper 35 (Project 144) (2019)).

The SCA order of constitutional invalidity was confirmed by the Constitutional Court on 28 June 2022 in *Women's Legal Centre Trust v President of the Republic of South Africa* ([2022] ZACC 23).

5 *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23

In the confirmation judgment, the Constitutional Court confirmed the SCA decision that the Marriage Act, Divorce Act and the common-law definition of marriage were in conflict with sections 9, 10, 28 and 34 of the Constitution (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). However, the court suspended the declarations of invalidity for a period of 24 months so as to provide the President, Cabinet and Parliament an opportunity to formulate a suitable remedy that grants legal recognition to and regulation of Muslim marriages.

Furthermore, the Constitutional Court held that, pending the enactment or amendment of existing legislation granting the recognition and regulation of Muslim marriages, the provisions of the Divorce Act are applicable where parties to Muslim marriages seek to have their marriage dissolved. This interim relief was, however, limited to: Muslim marriages in existence on 15 December 2014 (15 December 2014 is the date on which the WLC instituted action in the WCC); or which were dissolved in terms of Islamic law as at 15 December 2014; and those in respect of which legal proceedings were instituted but not finalised at the date of this order (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). In other words, the interim relief provided by the Constitutional Court could now be used by parties married in terms of Islamic Law while an appropriate remedy is being formulated by the State, but the cut-off date for the application of the interim relief for Muslim parties was 15 December 2014.

The Constitutional Court held that the matrimonial property system applicable to Muslim marriages would be out of community of property (without accrual) (although the latter is not explicitly stated in the judgment) unless there are agreements to the contrary (*Women's Legal Centre v President of the Republic of South Africa* (CC) *supra* par 86). The reason is that a marriage in terms of Islamic Law is deemed to be out of community of property – that is, the standard antenuptial contract. Community of property is not recognised under Islamic law. (See discussion of concerns with the WCC judgment under heading 3 above.) This may be problematic as a wife may be left destitute where all or most of the assets accrued during the subsistence of the marriage are registered in the husband's name.

The judgment also makes provision for the application of section 12(2) of the Children's Act to a prospective spouse in a Muslim marriage that is entered into after the date of the Constitutional Court order. Section 12(2) of the Children's Act makes provision for the age and consent requirements of a marriage as it relates to minor children. To enter into a valid marriage in terms of the Marriage Act or the Recognition of Customary Marriages Act, minors require the consent of their parents or guardians (s 18(3)(*c*)(i) read with s 18(5) of the Children's Act; s 3(3)(*a*) of the Recognition of Customary Marriages Act; children under the age of 18 years may not enter into a civil

union in terms of the Civil Union Act). With regard to age and consent requirements when concluding a Muslim marriage, the Constitutional Court declared:

> "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 [(Recognition Act)] shall apply, *mutatis mutandis,* to ... [Muslim] marriages." (***Women's Legal Centre v President of the Republic of South Africa*** (CC) *supra* par 86)

This means that both prospective spouses must be 18 years old to conclude a marriage in terms of Islamic law. The age requirement is in direct conflict with Islamic law, as the latter does not require prospective spouses to be 18 years of age.

The Constitutional Court judgment also brought relief for women in polygamous Muslim marriages and children born from these unions.

The following concerns in respect of the SCA judgment should be noted:

1. Cognisance must again be taken of the concerns raised with regard to the age requirement as discussed in respect of the SCA decision. Notwithstanding these concerns, these requirements will be applicable and will require adherence where a minor concludes a marriage in terms of Islamic law. It is, therefore, important that Muslim theologians who officiate at a Muslim marriage familiarise themselves with the requirements relating to age and consent.
2. See the discussion above in respect of the dissolution of a Muslim marriage by the secular courts, as opposed to by a Muslim judge as required by Islamic law.
3. See also the discussion above in relation to the application of sections 7(3) and 9(1) of the Divorce Act to Muslim marriages.
4. The Constitutional Court makes provision for the legal recognition and regulation of Muslim marriages, but the question arises as to how Muslim marriages are going to be legally recognised while still being in conformity with the rules and principles of Islamic law.
5. The Constitutional Court judgment makes provision for Muslims married in terms of Muslim law to terminate their marriage in terms of the Divorce Act. Cognisance must be taken of the fact that while the Divorce Act does now apply to Muslim marriages, Muslims face a dual process as they are still required to terminate their marriage by means of a *talaq* or a *faskh* in terms of Islamic Law. This seems to imply that parties married in terms of Islamic law now have to undergo additional processes in order to realise their rights as confirmed by the Constitutional Court judgment.
6. It must also be noted that the judgment does not deal with Islamic law *per se* but is based on the fact that Muslim women, and children born of Muslim marriages, have been the victims of discriminatory practices and abuse within South African law (***Women's Legal Centre v President of the Republic of South Africa*** (CC) *supra* par 63). The fact that the Marriage Act and Divorce Act were not applicable to Muslim marriages further reinforced these discriminatory practices.

While acknowledging that the judgment is long overdue and a step in the right direction, it must nevertheless be welcomed with caution for the reasons stated above.

6 Conclusion

From the above discussion, it is evident that the fundamental values of the Constitution took precedence, and that the courts applied the constitutional values as they were meant to be applied. The courts all took cognisance of the need to recognise and regulate Muslim marriages, as well as of the harsh and discriminatory consequences that arose as a result of the non-recognition and non-regulation of Muslim marriages.

It is submitted that the Constitutional Court judgment is to be welcomed and is without doubt a move in the right direction insofar as the recognition of Muslim marriages is concerned, and also insofar as the judgment addresses issues of parity and social justice, which are now enforceable in a court of law. Furthermore, the judgment is also welcomed because it has brought relief for women in Muslim marriages and children born from these unions as the judgment recognised that it is women and children who are the victims of discrimination owing to the fact that Muslim marriages are not recognised by the common law, the Marriage Act and the Divorce Act.

It is, however, submitted that the judgment must be welcomed with caution as the Constitutional Court did not go far enough in recognising the Islamic system associated with Muslim marriages.

If South African society is to overcome past discrimination and achieve the vision of equality that is fundamental to a constitutional democracy, the courts and the State must recognise and promote the full range of diversity prevalent in South Africa, which includes recognising Muslim marriages in South Africa without breaching fundamental principles and rules of Islamic personal law. There should be no delay in either enacting or rectifying legislation in order to grant legal recognition to Muslim marriages. It is imperative that Parliament be held accountable to ensure that this is done within 24 months as per the judgment and that there is a broad legislative process to remedy that which was held to be unconstitutional by the Constitutional Court.

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