30 Rabiuth Thaani 1432 – 5 April 2011

THE MMB DEBACLE

“THE ONLY SOLUTION IS TO SCUTTLE THE BILL…” SAY THE LAWYERS

oooooooooooooooooooooooooooooooooooooooooooooooooooooooooooooooooooooo oooooo

RASHID PATEL & COMPANY

Rashid Amod Sadeck Patel B. Proc (SA)

Attorneys - Administrator of Estates - Commissioner of Oaths -Constitutional Litigation Certificate (Unisa) Local and Provincial Government Certificate (Unisa) - Immigration Agent - Land Claims and Environmental Law - Trade Marks and Competition Law - Insolvency and Labour Law Practitioner, Mediation/Arbitration (Accredited) –Certificate in Islamic Law(KZN)

P.O. Box 849 Tel:27+036+ 3523827 Cel:0827483434

19 Drummond Road A/H 036-3523802/Fax:036-3523830(Answering Machine)

ESTCOURT ,3310 (Admitted as an Attorney in Lesotho)

Email: patel@lantic.net Fax: 0866005228 /0866168887

Our Ref: Mr Patel Your Ref: Date : 31ST March 2011

Mr TN Mathibe
Private Bag X81

Pretoria

0001

Dear Sir

Re: ***Muslim Marriages Bill***

We are concerned at the division and disharmony created by this Bill in our Country amongst Muslims and we trust that this was not an indication of an extension of the International trend of displacing and denigrating Islam and Muslims , by presenting a generic religion for Muslims to follow. Our view is that our Government has never interfered with our religion and Muslims have enjoyed a cordial relationship in this Country and we would prefer that the status quo remains.

Whilst the Bill as it stands has serious and fundamental flaws in general, a problem that needs to be resolved even before any other challenge is lodged against it , is to establish the extent to which the SA Constitution will impact upon the MMB. If the MMB is subservient to the Constitution (as the law prescribes) then the MMB is doomed to failure as a legitimate remnant of the Shariah. That compromise cannot be sustained because this would have the effect of re-inventing the Deen (Islam).

These submissions only address one limitation of the MMB, namely, its subservience to the Constitution and the irreconcilable consequences thereof.

If Government is serious about recognizing the rights of Muslims to regulate their Personal law in accordance with the Shariah, then do so by granting Muslims complete rights and not some religious beliefs conjured up by the project committee to appease those in our country, who are not adherents of Islam. Chaskalson P stated that religious practices if made dependent on the permission of the state is “inconsistent with the freedom of religion. [i] There should also not be any coercion in religion but rather autonomy and freedom based on voluntarism.

To grant rights in terms of Sections 31(a) and (b) , Section 15(3)(a); Section 15 of the Constitution but to limit those rights , based on the Supremacy of the Constitution (as rights are constrained by the Limitation clause of the Constitution (Section 36)), amounts to granting no religious rights to the Muslims in this country. This is so because the existence of the Shariah is not contingent upon assessment against a standard established by Man *(vis a vis* the Constitution). It exists in its own right and gains acceptance and total submission without compromise or fluctuation in interpretation. The Law has as its major flaw or fundamental difference, being its fluidity in interpretation-laws are interpreted within the context of the morality, standards and value system applicable in a particular time and era. It is susceptible to being altered also by the Courts for a simple example, where the word “shall” is used, it has the potential to being interpreted as peremptory and directive and conversely, as ‘may’ and not imperative injunction. Shariah is for over 1400 years, remained unaltered and because of the way in which legislation in our Country has been attacked by the constitutional order, it is inevitable and unavoidable, that the Shariah cannot be saved from this attack. The precedent has already been set and the constitutional course in a democratic State as ours, cannot be deviated from, to save the shariah from such scrutiny (constitutional).

Whilst South Africa enjoins the right to religious freedom, it seeks to limit the right –this is in itself inappropriate and unacceptable, briefly for the following reasons:-

1. The Supremacy of the constitution for general application has its place in this Country however, Muslims regard the Quran and the sunnah (traditions of the Prophet Muhammad PBUH) as the supreme law and any limitations must be determined against these primary sources of the Shariah, which are the basis of Supremacy.

1. Judges take an oath of allegiance to the Constitution in terms of Section 174(8) which requires them to uphold the constitutional ethos and principles. The Shariah is in conflict with the Constitution –what guarantee does the Muslims have that the Shariah will not be eroded with an interpretation which is inconsistent with Islam simply to pass muster to the Constitution? Can Judges then deviate from their constitutional mandate when applying an interpretation of the tenets of the Shariah?

1. Inevitably, there arises a conflict of law because the interpretation of the laws are based

on different foundations and principles. Where the State imposes how the faith has to be interpreted, this creates an affront to the Muslims and when the State adopts and aligns itself to a particular viewpoint because it is ‘digestible’ to them, this results in “hatred, disrespect and even contempt of those who hold contrary beliefs” which would result in the slackening “of the bands of society” [ii] .

2. In the *Prince* case (supra), both Mokgoro J and Sachs J adopted the view, in a dissenting Judgment, that both the state and religious groups should make sacrifices in a bid to accommodate one another with Sachs J stating that:”religious groups must give up some of their practices “the fact that they cannot be given all that they ask for is not a reason for giving them nothing at all.”

1. For true empowerment of Muslims, they require control over their affairs that affect them directly. The public at large do not have an interest in the subject matter of Muslim Personal Law and therefore, should not be allowed to dictate to Muslims as to how they should practice their religious beliefs in accordance with the Shariah, because the practice of the Shariah is unique and applicable to those who profess allegiance to Islam. It is absurd that the State or anyone else, who has no allegiance to or interest in a religious practice, to dictate how Muslims must practice their religion-if the State elects to do this then they are creating a fictitious or generic religion for Muslims to follow-the State must either respect religious rights and be tolerant thereof, or simply not legislate something they accord with Islam.

Muslims cannot and will not accept a distorted or compromised religion and that claim is based on the right to religious freedom-we shall not be a party to an oppressive and coercive religion for to do so is reminiscent of apartheid. [iii]

Furthermore, this religious right is alien to “an open and democratic society” for general application as prescribed by the Constitution. Unfortunately, those in the Muslim community who support the Bill in its present form , are sincere but do not appreciate the serious ramifications thereof.

1. The following extracts from the cases which were decided by the Constitutional Court ,

in this Country, have cast in stone, the ethos and the interpretative mandate of the Court :-

6.1 It was stated:” Whilst it may not be easy to avoid the influence of one’s personal intellectual and moral preconceptions, this Court has from its very inception stressed the fact that ‘the Constitution does not mean whatever we might wish it to mean’. Cases fall to be decided on a principled basis. Each case that is decided adds to the body of South African Constitutional law, and establishes principles relevant to the decision of cases which may arise in future.” [iv]

6.2 In this case [v] the following compelling arguments were made in support of the sanctity and Supremacy of the Constitution which will pervade religious rights:-

(a) Minorities rights are overlooked in favour of the general feelings of the general public interests;

(b) “Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights.” (***page 20)***

(c) “The first is to prevent protected associational rights of members of communities from being used to “privatize” constitutionally offensive group practices and thereby minimize them from external legislative regulation or judicial control.”

(d) The courts have not determined the principle of ‘open and democratic society” as determined in the context of the Muslim society and the risks involved in this is that, the constitutional matters are adjudicated upon a fictional democratic society, divorced from the Muslim society against whom the existence of the shariah must be adjudicated for as this is the society whose interests the MMB seeks to desecrate and erode and that guarantee has not been included in the Bill.

(e) In the ***Manamela*** case [vi] the court stated that” There can accordingly be no absolute standard for determining reasonableness.” We do not accept and will not allow the courts to subject the shariah to a process of establishing its reasonableness-this determination has already been made Divinely.

(f) “To sum up: limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.”

(g) Religion is not just a question of belief or doctrine it is part of a way of life entwined with the secular and public, therefore, there has to be a balancing so that there is a distangle from a conceptual point of view as they “are to separate in day to day practice.” “It is in this area that balancing becomes doubly difficult , first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.”

(h) The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding.

“***Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”***

We submit that, imposing an adulterated religion purporting to be Islam to Muslims, is hurtful and calculated to undermine the integrity of Muslims and purity of our religion . It the State is sincere about granting Muslims the right to regulate the Muslim Personal Law, there is a simple solution to that, which will be explored later in this letter.

(i) Religion must be viewed in an open and democratic society contemplated by the Constitution, according to the decisions surveyed.

(j) “As the court has reiterated many times, freedom of religion, like any freedom, **is not absolute.** It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child’s best interests, without thereby infringing the parents’ freedom of religion.”

(k) The Supreme Court in Zimbabwe took a robust and sensible view , which is much liberal than the approach adopted in our country. We contend that, in a difficult matter, it was a correct view. [vii] In deciding whether the dreadlocks infringed his beliefs or that which dictates his conscience, the court rightfully came to the conclusion that , a refusal to allow Chweche to practice as a legal Practitioner, amounted to an infringement to freedom of religion. The court made the following remarks:-

(i) The essence of the concept of freedom of religion was a right to entertain

such religious beliefs as a person chose. Our view is that, if that religious

belief is altered in any way to give effect to a standard, morality or dictate

of some other belief system, denigrates and cannot be conceived as an

absolute right. Those who submit to a religion submit to its principles and

tenets as they are. By submitting to Islam, a Muslim freely and voluntarily

accepts its norms , standards and morality as he/she finds the religion. It

would be loathe in the community if the Court declares an injunction of the

Quran or practice (Sunnah) as unconstitutional or repugnant to the same

and declared invalid. In the way the law operates, the Shariah is not

protected against such a declaration of invalidity .

(ii) We would also bring to your attention that the manner in which the right to

conscience, beliefs and religious rights are assessed, cannot be strictly

interpreted and applied the way the general rights in the constitution are

interpreted. Clearly, the rights of Muslims , if it does not affect the rights of

other religious group or persons in a pluralistic society cannot be

tampered with. It must be noted that religious beliefs are entrenched

systems which adherents stick firmly to as it is a fundamental belief that

the practice emanates directly from the Creator. Muslims throughout

history have been very firm and unflinching in protecting their beliefs.

Therefore, erosion of this belief system must not be treated lightly.

(iii) The Court quoted the words of Justice Douglas [viii] who said:” ***Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others . yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law.”***

(iv) The court also quoted with approval what Dickson J had to say: [ix] ”The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance of reprisal….” And at 105 “……Every individual (is) free to hold whatever religious beliefs his or her conscience dictates, provided,
inter alia
, only that such
manifestations
do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.”

1. If the purpose of the MMB was to legislate the Muslim Personal Law, then the law of inheritance is also part of Personal Law. It is odd that the paper excludes this aspect from the Bill. Does the State intend to recognize only half and incomplete generic religion to Muslims? Our view is that , the Bill must also include inheritance but in terms of the Shariah.

1. Some suggested solutions to the impasse which prevails are:-

8.1 That the Muslim Personal Law should be allowed to operate parallel and

autonomously or independently to the secular laws of this country.

8.2 That in the event of any conflict arising regarding any aspect of the law or

conduct, which is subject to determination in terms of the MMB, must be

subjected to the Shariah Court for adjudicating upon on the basis of the

Supremacy of the Quran and Sunnah.

8.3 The Shariah shall not be subject to adjudication , assessed or interpreted as

against the Constitution of this Country but shall be determined as against the

established principles of interpretation sanctioned by the Shariah.

8.4 Should the matter not be resolved before the first Court of instance, the

decision ought to be subject to an appeal to a Shariah Court of Appeal.

8.5 The matters pertaining to the Shariah should not be subjected to the

Constitutional Court as the matter will not involve a determination as against

the Constitution for the reasons explained.

8.6 The law of inheritance should be included in the Bill.

8.7 Should the Government be averse to this approach, the alternative would be

to allow the bodies of theologians to be conferred with powers of sanction and

where matters do come before them, the rulings should be that of a court of

law, with the institutions having rights of sanction, subpoena and enforcement

of its orders, that the usual courts possess.

8.8 If a Shariah Court is required and a Shariah appeal Court, this must be

included in the Bill. The State has a duty to take reasonable measures to give

effect to realize the religious rights of Muslims. The Muslim community have

not imposed burdens or unreasonable demands on our Government and as

far as possible, established their religious institutions from benevolent

contribution of the community.

8.9 The State should take reasonable measures to give effect to realize the

religious rights of Muslims. It is within the ambit of the right to religious

tolerance and freedom, that a Shariah Court be established with a Shariah

appeal Court, being the highest court of appeal. The Muslim community have

not burdened the State and have always established religious institutions

through the benevolence of members of the community. The institutions have

been financed , maintained and run by the Muslim community . Unfortunately,

Courts of law need to be under the jurisdiction of the state. Government has

to realize and accept that , whilst Muslim Personal Law would need to be

regulated, this cannot be done under the auspices of the traditional courts.

Shariah can only be interpreted by an Aalim (theologian). Interpreting the

Shariah requires knowledge and Imaan (faith). We therefore, reject the idea

that the Judges , whilst Muslims, would be allowed to sit without assessors.

Our view is that at least two assessors need to sit depending on the nature of

a dispute. Generally, one assessor would suffice. The assessor must be an

Aalim and if more than one is required, the other should at least have some

training in the Shariah. In regard to the Judge in the Shariah Court, the

Islamic requirement is that the person has to be qualified as a Qadi and these

requirements need to be read into the Bill. In regard to the assessor, two

comments are made in this regard:-

(a) That the assessor needs to be knowledged in the Shariah.

(b) If the assessor is a theologian then in regard to any dispute or

determination of the Shariah, the two assessors ruling should supercede

that of the Judge, if the Judge is not an aalim or trained in the Shariah.

(c) These safeguards are suggested because if the Judge is not a

Theologian,

8.10 The Bill does not stipulate the minimum requirement of training for Judges-that

needs to be defined.

8.11 The Arbitration Act could be revised to allow for disputes regarding certain

aspects with a Family Advocate present also, to prepare an interim Award for

determination and enforcement by the shariah Court. Reference to the divorce

Act in the Bill ought to be more specific as to which aspects thereof, shall

predominate over the MMB.

1. Generally, Customary law in this Country has not been legislated or subjected to

Constitutional scrutiny (personal law of Blacks despite their many traditions,

Jewish Personal Law, Budhists Personal law, Satanism,) we cannot see the

reason for regulating the Shariah with changes that distort the Shariah. Even if

there is legislation established to regulate their personal affairs, it is not as

intrusive as the MMB. If the legislation was effected without tainting the Shariah,

that would be acceptable to Muslims. We trust that there is nothing sinister

aligned to this decision to interfere with the Shariah . The MMB has created a

division in the Muslim community and this alone is unacceptable to allow the

implementation of this Bill. Our Government professes to unite our Country and to

restore peace and stability . the only solution to this problem is to scuttle the Bill

and to allow Muslims to present a Bill which is Shariah compliant.

10. The MMB does not specifically deal with the child born out of wedlock. How will

the issue of custody and access be dealt with where Muslim natural parents are

involved? Will the Natural Fathers of Children Born Out of Wedlock Act of 1977

have application or not and if so to what extent?

11. In regard to the Interpretation Act 33 of 1957 provides as follows:-

Would the MMB be subject to this act and any other legislation and will the

MMB be subordinate to the Maintenance Act and if so, to what extent? We

point out that the extent of the application of that legislation has not been

defined. Will the MMB be interpreted in the same manner that current

legislation will be interpreted? In the absence of certainty, it would be risky

and unacceptable to Muslims to dive into legislation which has the potential of

altering the Shariah at the whim and fancy of a Court of law-especially if taken

to the Appellate Division or the Constitutional court.

We require a provision to be included in the MMB to the effect that:” The

Shariah will not be declared unconstitutional or repugnant if it is inconsistent

with the values enshrined in the Constitution and declared invalid .Our view is

that the laws of the Quran or Sunnah (Traditions of the Prophet PBUH)

cannot be declared invalid and this certainty has to be read into the MMB.

The Shariah has its own prescription regarding the issue of custody, access

and maintenance and the Bill does not define the extent to which these

Shari principles will be eroded (or not) and the extent to which the

Maintenance Act no 99 of 1998) will have application to it.

1. 12. In regard to mediation, there is no clarity as to the qualifications prescribed for a

mediator. We submit that the qualifications need to be established after

concurrence with the theologians. This aspect needs to be investigated more

thoroughly. To push through a legislation which is defective, you could rest

assured will not be acceptable to or applied by Muslims.

Please acknowledge receipt and our submissions in this regard.

Yours faithfully

Rashid Patel (Mr)

---

[i] Prince v President of the Law Society of the Cape of Good Hope and Others 2002(3) BCLR

231; 2002(2)SA 794 (CC) .See for instance the coercive provisions attracting criminal sanctions in section 6(8),Section 8(11) and (12) and Section 9(4)(a)

[ii] Lynch v Donelly 465 US 668, 688 (1984) and also Engel v Vitale 370 US 421, 431 (1962) .

[iii] See for instance the Universal Declaration of Human Rights article 18 1948 111 UNGAR 217 where States are asked not to coerce and prescribe appropriate religious behaviour. Sections 6(8), 8(11) ,(12), 9(4)(a) amounts to coercive behaviour because of the threats of criminal sanction-the autonomy is taken away from Muslims to define and interpret their religion. See also article 18(1) of the International Covenant on Civil and Political rights (ICCPR) see also article 27 thereof.

[iv] Mistry v Interim National Medical and Dental Council of South Africa and Others 1998 (7) BCLR 880(CC)

[v] Christian Education South Africa v Minister of Education Case Number CCT 4/00

[vi] S v Manamela and Another(Director-General of Justice Intervening) 2000 (5) BCLR 491 (CC) at paras 32 and 33

[vii] In re Chikweche 1995(4) BCLR 533(ZS)

[viii] United States v Ballard 322 US 78 (1944) at 86-7

[ix] R v big M Drug Mart Ltd (1985) 13 CRR 64 at 97