



BASHEER PARUK  
MEDIATORS &  
ATTORNEYS

OUR REF	Divorce Bill
YOUR REF	N/A
DATE	11/05/2024

TO:

THE MUSLIM UMMAH OF SOUTH AFRICA

Asalamualykum;

RE:	The implications of The Divorce Amendment Bill, 2023 on the Muslim Ummah
RE:	HOW DOES IT AFFECT ME?

**INTRODUCTION**

1. The above matter refers.
2. Due to the recent promulgation of the Divorce Amendment Bill, 2023, many people have asked the question **“how does it affect my marriage?”**.
3. The contents herein are meant to provide clarity on certain issues, whilst noting that certain issues remain unclear at this point.
4. For the sake of brevity, the discussion below will focus solely on what has already been promulgated and not on the potential future changes.
5. Should any interested reader wish to learn on certain proposed changes, our offices have written articles on: (1) A change in the default marital regime of Muslim marriages; (2) The potential criminalisation of an *Imaam* solemnizing

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marriages without being a qualified marriage officer, and thus, our offices can be contacted on the details as stated herein.

### **HISTORICAL OVERVIEW OF ISLAMIC MARRIAGES IN SOUTH AFRICA**

6. To understand the recent Amendment to the Divorce Bill (“The Amendment”), a historical understanding of Muslim Marriages in South Africa will first be explained.
7. Historically, Muslim marriages, if solemnized by way of *Nikkah* (and not according to civil rites) did not enjoy any legal recognition.
8. As a result, children born to Muslim marriages were afforded the status of illegitimacy. This was just one of many other consequences it carried.

### **THE WLCT CASE**

9. In 2022, judgement was granted in respect of the *Women’s Legal Centre Trust vs President of the Republic of South Africa & Others* case, wherein **Islamic marriages were officially afforded legal recognition.**
10. At the time, there was a divided opinion amongst the Muslim *Ummah*, as many celebrated the ‘legal recognition’ of their marriages on the one hand, while on the other, were concerned individuals who feared the potential consequences it carried.
11. The latter group’s fear proved to be correct, as their concern was based on a simple principle, that with legal recognition, would naturally come its constitutional subjection. And, problematically, with such subjection, would come the religious incongruity with same.
12. As a result of the *WLCT* case (i.e., Islamic marriages being afforded legal recognition) the Divorce Amendment Bill has been passed, which has given rise to many worrying challenges for Muslims in South Africa. Furthermore, a host of legislative proposals have been made, which are diametrically in conflict with the Shariah. As mentioned in the introduction, for the sake of brevity, we shall not discuss same herein, and focus solely on effective changes to date.

### **THE DIVORCE AMENDMENT BILL, 2023**

13. Note: The Bill (2023) is an amendment to the Divorce Act, 1979. Hence, reference to “The Act” will be to the Divorce Act, 1979, which now, by way of the Bill, will include Muslim marriages.

#### 14. MARITAL REGIME & DISTRIBUTION OF ASSETS UPON DIVORCE

- 14.1. Whilst the default marital regime of a person making Nikah, remains that of out-of-community of property regime (which is the correct *Shariah* method), the court will, according to **Section 7 & 9 of the Act**, enjoy a discretionary right to make a determination on the distribution of assets upon divorce **even if the marriage is out-of-community of property**.
- 14.2. Thus, if a Husband/Wife is involved in blameworthy conduct which results in the dissolution of a marriage, the court will be able to decide on the distribution of the assets of the man/woman, irrespective of the marital regime chosen by the couple.
- 14.3. Furthermore, whilst we shall not discuss proposed changes to the law (as mentioned in the introduction), we deem it important to mention that recent proposals made by law reform commissions, have proposed that the default marital regime being changed to being out-of-community of property, with the inclusion of an accrual system, which is in conflict with the *Shariah*.

**NOTE: THE ONLY PERMISSIBLE MARITAL REGIME IN ISLAM IS AN OUT-OF-COMMUNITY-OF-PROPERTY REGIME (EXCLUDING THE ACCRUAL)**

#### 15. SEEKING ORDER OF ANULMENT

- 15.1. **Section 3** of the Act, will now, accordingly, accommodate for Muslim marriages to be dissolved by a secular court of law.
- 15.2. Women will be entitled to make application to a secular court and show reasons why her marriage (albeit it being a *Nikkah*, and not a civil marriage), should be annulled. This is tantamount to requesting a *Fasakh*, save that it will be requested from a non-Muslim Judge instead.

**NOTE: EVEN IF SUCH A DISSOLUTION OF THE MARRIAGE IS GRANTED BY A SECULAR COURT, ACCORDING TO THE SHARIAH, THE MARRIAGE WILL REMAIN INTACT.**

**THUS, THE RIGHTS & RESPONSIBILITIES OWED TO EACH OTHER WILL CONTINUE UNABATED.**

#### 16. SUSPENDING A DECREE OF DIVORCE

- 16.1. According to **clause 6** of the Divorce Act, 1979, a decree of divorce shall not be granted until the welfare of any minor and dependent children is safeguarded.
- 16.2. The Divorce Amendment Bill now includes Muslim marriages within the purview of clause 6, thus, in effect, meaning that a court can postpone the decree of *Talaaq*, until sufficient arrangements have been made in respect of the children, including (but not limited to) a parenting plan which discusses maintenance and custody that is approved by the office of the Family Advocate.

**NOTE: UPON THE HUSBAND ISSUING A PROPER TALAAQ, OR THE WIFE OBTAINING A FASAKH CORRECTLY (AT AN ISLAMIC INSTITUTION), THE MARRIAGE, IN THE EYES OF ALLAH TA'ALA WILL BE DEEMED DISOLVED.**

**A SECULAR COURT WILL NOT BE ABLE TO POSTPONE THE ISLAMIC CONSEQUENCES OF TALAAQ.**

**A SECULAR COURT WILL ONLY BE ABLE TO RULE ON THE LEGAL CONSEQUENCES OF DIVORCE.**

**WHETHER A MAN AND WOMAN REMAIN HALAAL FOR EACH OTHER, WILL FOREVER BE ACCORDING TO THE TENETS OF SHARIAH.**

#### 17. REGULATION OF POLYGAMOUS MARRIAGES

- 17.1. The Divorce Act as well as the Muslim Marriage Bill, will regulate the rights of a husband in a polygamous marriage, including:

17.1.1. Joining other spouses to legal proceedings in the event that a husband wishes to take another wife, to make a determination on whether it is just and equitable to do so (The Muslim Marriage Bill);

17.1.2. Joining spouses to legal proceedings in the event of a redistribution of assets (Clause 7 of the Act).

## 18. CLAIM FOR ALIMONY

18.1. Previously, due to the lack of recognition afforded to Muslim marriages, in the event of divorce, widows were unable to approach a court and request that their husbands pay them maintenance as, quite frankly, the *Nikkah* certificate required to prove the existence of their marriage, was looked at as merely a scrap of paper, without any worth.

18.2. By way of the recognition afforded to Islamic marriages in South Africa, **women now have the right to approach a secular court and claim maintenance for a period longer than the obligatory Iddah period.**

**NOTE: As per the *Shariah*, a man's obligation towards his ex-wife extends to the period in which she is in *Iddah*. Should he wish to provide thereafter, this will be meritorious, but not obligatory.**

## CONCLUSION

19. The recognition afforded to Islamic marriages, was correctly predicted as the flood gate to many unislamic judicial reliefs sought by both men and women.

20. Due to current proposals being made in respect of the default marital regime applicable to Islamic marriages, **in our humble view**, we can foresee, in the near future, that the default marital regime applicable to any recent bride and bridegroom will be in conflict to the *Shariah*.

21. The available means in such instances would be registering an Antenuptial contract ("ANC"), which, in itself, carries its own legal costs. This would apply to all Muslims, whether rich, poor, old, young, white, black, Indian etc.

22. However, even the registration of an ANC does not solve all problems. As per **clause 7 of the Act**, as mentioned above, even if the marriage is deemed out-of-community of property (whether by default or by way of an ANC), the court will still be able to order on a redistribution of assets if it is satisfied that certain factors are met.

23. It is important that all Muslims acquaint themselves with the state of affairs of the Muslim Ummah, as it directly applies to one and all. When a call is made to assist in voicing one's dismay at proposed legislation, whether by way of a written petition, or online objection, do not think that "*it is just one vote/submission, and I won't make a difference*" as everyone else around you are thinking the same.
24. Furthermore, understand that anything which is legal does NOT make it *Halaal*. Whether the court of law entitles you to a certain relief sought or not, does not render the relief sought as Islamically permissible. All individuals should have the *Taqwa* to abstain from such judicial requests, whether 'lawful' (in the secular sense) or not.
25. If a court of law rules that the mother, due to her favourable financial position must contribute more than the father, to the household and children, this must immediately be **rejected by the father**, as the mother does not have any obligation to provide money towards the household or children, according to the *Shariah*.
26. We make Duaa that Allah Ta'ala gives us the ability to differentiate between right and wrong, and the ability to follow/desist from it.
27. We hope the above was helpful. Should you seek further clarity on any other issue, do not feel hesitant to contact the writer on 061-625-6070.

Was-Sallam



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**PER: Mr B. Paruk**

**[Certified Mediator in Divorce Settlement Agreements]**

**(Director)**