A Brief Analysis of the Judgment in *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 5 SA 323 (CC)

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Abstract

On 28 June 2022 the apex or Constitutional Court (CC) handed down a much-awaited judgment which impacts upon Muslim marriages concluded purely in terms of Islamic law in South Africa. Does the judgment mean that such Muslim marriages are now fully recognised for all purposes in the South African legal context? The simple answer is "no". The rationale for this conclusion is to be found in the two-pronged judgment. The first part of the judgment is wholly suspended and will only and automatically come into effect if remedial legislation is not enacted in 24 months. The second part of the judgment pertains to an interim order which takes effect immediately and applies retrospectively to all Muslim marriages that subsisted on 15 December 2014 (when the case was first launched by the Women's Legal Centre in the Western Cape High Court) and to Muslim marriages which, although terminated before that date, were still subject to ongoing legal proceedings at that date. While the case note briefly refers to the first part of the judgment, the main purpose of this case note is to highlight some of the practical problems that could be encountered by couples when effect is given to the orders pertaining to the interim relief granted in terms of the second part of the judgment. The problem areas are highlighted by looking at the CC judgment in the light of three fictitious scenarios. The case note provides a few critical comments on the judgment and ends with a few concluding remarks. Past experience leads us to expect that tangible progress will take place only by 2024, a date which coincides with South Africa's next presidential election. Until then the non-recognition of Muslim marriages will continue to prove burdensome to Muslim women and children.

Keywords

Muslim marriages; Women's Legal Centre; Islamic law.

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1 Introduction

On 28 June 2022 the apex or Constitutional Court (CC) handed down a much-awaited judgment which impacts upon Muslim marriages concluded in South Africa purely in terms of Islamic law. Does the judgment mean that such marriages are now recognised for all purposes in the South African legal context? The simple answer is "no". The rationale for this conclusion is to be found in the two-pronged judgment. The first part is wholly suspended and will only and automatically come into effect if remedial legislation is not enacted in 24 months. The second part pertains to an interim order which takes effect immediately and applies retrospectively to all Muslim marriages that subsisted on 15 December 2014 (when the case was first launched by the Women's Legal Centre in the Western Cape High Court)) and to Muslim marriages which, although terminated before that date, were still subject to ongoing legal proceedings at that date.

In the first part of the judgment the CC declared, *inter alia*, that the *Marriage Act* 25 of 1961 (*Marriage Act*) and the *Divorce Act* 70 of 1979 (*Divorce Act*) are unconstitutional insofar as they fail to recognise Muslim marriages as valid marriages for all purposes and fail to recognise the consequences that follow from such recognition.[1] The *Divorce Act* also fails to safeguard the welfare of children born from Muslim marriages in the same or similar way as that in which children from other recognised marriages are safeguarded.[2] The *Divorce Act* further fails to provide for the redistribution[3] and forfeiture[4] of assets on the dissolution of a Muslim marriage, where such redistribution and forfeiture would be just. The CC declared that the common law definition of marriage is inconsistent with the *Constitution of the Republic of South Africa* and invalid to the extent that it excludes Muslim marriages.[5] The CC suspended the declarations of invalidity for a period of 24 months in order to give the South African government an opportunity to remedy the

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1 See *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 5 SA 323 (CC) para 86 1.1 (hereafter *Women's Legal Centre Trust v President of the RSA* (CC)).

2 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.1.

3 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.3.

4 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.4.

5 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.5. For the argument that it is through legislative intervention that the common law definition of marriage is becoming more inclusive and reflective of the diverse forms of family in South Africa, see Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems" 68.

defects by either enacting new legislation or amending existing legislation that would recognise Muslim marriages as valid marriages for all purposes and that would also regulate the consequences that arise from such recognition.[6] In the second part of the judgment, the CC granted interim relief for parties in Muslim marriages during this period. The interim order also prescribes how a Muslim marriage should be concluded with regard to consent and age requirements. It further deals with the dissolution of a Muslim marriage, the rules applicable to the divorce of a monogamous Muslim marriage, and the rules applicable to the divorce of a polygynous Muslim marriage. Some of these issues are briefly examined and critically discussed in this case note by looking at three fictitious scenarios and the practical implications encountered. The case note ends with a few critical comments and concluding remarks.

It is noted that the anticipated CC interim order was needed due to the current status of the formal non-recognition of Muslim marriages in South Africa.[7] Three scenarios are looked at in this case note. The first scenario looks at a situation where Ahmad (18 years old) wants to marry Layla (17 years old) in terms of Islamic law, subject to the interim order granted by the CC, and subject to the age and consent restrictions that came about as a result thereof. The second scenario looks at a situation where Adam is married to Amina in terms of Islamic law only (and the marriage subsisted on 15 December 2014) and one of the parties to the marriage wants to dissolve it in terms of the interim order granted in the CC judgment. The third scenario that is looked at is where Moosa and Bilquis were married to each other in terms of Islamic law only, prior to the CC judgment, and subsequently dissolved their marriage post the CC judgment.

2 Requirements for concluding a Muslim marriage in terms of the interim order (scenario 1)

The CC "declared that, from the date of this order [22 June 2022], section 12(2) of the *Children's Act* 38 of 2005 (*Children's Act*) applies to Muslim marriages concluded after the date of this order."[8] Section 12 of the *Children's Act* states: "(2) A child - (a) below the minimum age set by law

6 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.6.

7 There have been several attempts to enact legislation that governs Muslim marriages and their consequences in terms of Islamic law in the South African context. The 2010 Muslim Marriages Bill (2010 MMB) is the most recent attempt at proposed legislation that has been published by the South African government that, if enacted, would recognise Muslim marriages concluded in terms of Islamic law and would regulate these marriages in terms of Islamic law. Enactment of the 2010 MMB would be a practical solution for applying the Islamic law of marriage and its consequences in the South African context. For a detailed discussion of this issue and further options that are currently being considered by the South African government, see Moosa and Abduroaf 2022 *Ahkam Jurnal Ilmu Syariah* 1-34.

8 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.8.

for a valid marriage may not be given out in marriage or engagement; and (b) above that minimum age may not be given out in marriage or engagement without his or her consent."[9] It should be noted that this case note focusses on the requirements for concluding a marriage and that the consent issue pertaining to "engagement" (*khitbah* in Arabic) is beyond its scope. This Part looks at the situation of Ahmad and Layla in the first scenario with regard to age and consent requirements.

The CC declared with regard to age and consent requirements when concluding a Muslim marriage that "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."[10] Section 3(1) of the *Recognition Act* provides that "[f]or a customary marriage entered into after the commencement of this Act to be valid - (a) the prospective spouses - (i) must both be above the age of 18 years; and (ii) must both consent to be married to each other under customary law …"[11] The CC judgment expressly refers to the phrase "*mutatis mutandis*".[12] The section of the judgment could then be interpreted to mean that for a "Muslim marriage" entered into after the commencement of this Act to be valid, the prospective spouses must be above the age of 18 years and both parties must consent to be married under "Islamic law". It could be argued that the parties to the

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9 See s 12(2) of the *Children's Act* 38 of 2005 (the *Children's Act*). The *Children's Act* recognises a marriage concluded in terms of Islamic law for the purposes of its provisions. See s 1 of the *Children's Act,* where it states that a marriage "means a marriage - (a) recognised in terms of South African law or customary law; or (b) concluded in accordance with *a system of religious* law [our emphasis] subject to specified procedures…"

10 Our emphasis in italics. See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.9.

11 See *Recognition of Customary Marriages Act* 120 of 1998 (the *Recognition Act*). The age of majority in South Africa has changed from 21 years to 18 years. S 1 of the *Age of Majority Act* 57 of 1972 states that "[a]ll persons, whether males or females, attain the age of majority when they attain the age of twenty-one years." S 17 of the *Children's Act* states: "Age of majority. - A child, whether male or female, becomes a major upon reaching the age of 18 years." It should be noted that s 17 of the *Children's Act* has repealed s 1 of the *Age of Majority Act* 57 of 1972. Further discussion of this issue is beyond the scope of this case note.

12 This term refers to "with the necessary changes". See LexisNexis date unknown https://www.lexisnexis.co.uk/legal/glossary/mutatis-mutandis#:~:text='Mutatis%20mutandis'%20translates%20to%20',main%20point%20remains%20the%20same where it states that "'*[m]utatis mutandis*' translates to all necessary changes having been made" or "with the necessary changes". The phrase "*mutatis mutandis*" indicates that whilst it may be necessary to make some changes to take account of different situations, the main point remains the same. The phrase "*mutatis mutandis*" is used in contracts to incorporate terms from one agreement into a different and separate agreement. For example, a lease renewal with similar terms to a previous agreement, save for changes as to the tenants, may incorporate terms "*mutatis mutandis*".

marriage must consent to be married under customary law. This type of argument would be problematic as the couple would want to be married under Islamic law and not customary law. The words "customary marriage" and "customary law" are essentially changed to or replaced with "Muslim marriage" and "Islamic law". It should be noted that Islamic law does not necessarily require that each party to the Muslim marriage be 18 years of age.[13] However, it is also interesting to note that some Muslim majority countries have legislated that parties to a Muslim marriage must be 18 years of age[14] and that this age is also supported by the 2010 Muslim Marriages Bill (2010 MMB) (as detailed in footnote 7 above). A further discussion on this issue is beyond the scope of this case note. The issue of marriageable age is now further looked at in the South African context with regard to the Ahmad and Layla scenario (scenario 1).

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13 See Munajjid Shaykh Muhammad Saalih date unknown https://islamqa.info/en/answers/177280/ruling-on-setting-a-particular-age-for-marriage, where it states that "[t]here is nothing in sharee'ah to stipulate a particular age of marriage for the man or woman. The scholars are unanimously agreed that marriage of a minor girl is permissible if her father gives her in marriage to someone who is compatible. With regard to an adult woman, it is not stipulated that her father should give her in marriage; rather any guardian may give her in marriage. But it is stipulated that she should give her permission and consent. A female reaches adulthood when one of four things occur: reaching the age of fifteen years, growth of pubic hair, emission of maniy (i.e., reaching climax) with desire whether awake or asleep, or menstruation. The Qur'an and Sunnah indicate that marriage of a minor [a female who has not yet reached puberty] is valid, and no particular age is stipulated for that."

14 Egypt and Morocco are examples of such countries. See Africa Child Policy Forum 2015 http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_3_en.pdf where it states under Art 31bis of the *Child Law* of 2008 that under Egyptian law "[t]he marriage contract shall not be registered for those who did not reach eighteen (18) years of age". Also see Morocco World News 2019 https://www.moroccoworldnews.com/2020/01/292105/2019-child-marriage-morocco-statistics where it states that "[i]n 2004, Morocco moved to curb child marriages by reforming the Family Code and raising the legal age of marriage from 16 to 18. However, the law still allows minors to marry with the permission of a judge." See s 5(1) of the Draft Muslim Marriages Bill, 2010, where it is stated: "(d) the prospective bride and groom must, subject to subsections (4) and (5), have been 18 years old or older; and (e) the provisions of this section and sections 6 and 7 must have been complied with." Sections 5(6) and 5(7) state: "(6) If a person under the requisite age has concluded a Muslim marriage without the written permission of the Cabinet member or person or body authorised by him or her, the Cabinet member or the person or body in question may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with the provisions of this Act, declare, in writing, that the marriage is a valid Muslim marriage for all purposes. (7) Nothing contained in this section precludes a person under the age of 18 years, assisted by the Family Advocate, from approaching a court for appropriate relief." A further discussion of this issue is beyond the scope of this case note.

Section 3(3) of the *Recognition Act* provides: "(a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage [parental consent]. (b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies."[15] Section 25 of the *Marriage Act* authorises the Commissioner of Child Welfare or a judge of the High Court to consent to the marriage in certain circumstances where it is not possible for parental consent to be obtained.[16] Ahmad is already 18 years old and would not require parental consent in order to marry Layla. However, Layla is 17 years old and does require parental consent in terms of section 3(3) of the Recognition Act.[17] It will be assumed for the purposes of this discussion that Layla has obtained parental consent.

Section 3(4) of the *Recognition Act* provides that the Minister of Home Affairs must consent to a person under the age of 18 to enter into a customary marriage if certain conditions are met. The consent would also apply to Muslim marriages based on the *mutatis mutandis* principle as provided in the judgment.[18] This would *inter alia* include parental consent in

15 See s 3(3) of the *Recognition Act*.

16 See s 25 of the *Marriage Act* 25 of 1961 (the *Marriage Act*) which states: "When consent of parents or guardian of minor cannot be obtained. - (1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage, such commissioner of child welfare may in his discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage. (2) A commissioner of child welfare shall, before granting his consent to a marriage under subsection (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract. (3) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor. (4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor."

17 See s 3(3) of the *Recognition Act,* which states: "(a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage [parental consent]. (b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies."

18 See s 3(4) of the *Recognition Act,* where it states that "(a) Despite subsection (1)(*a*)(i), the Minister [Minister of Home Affairs] or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage [Muslim marriage

the event that either of the parties to the Muslim marriage is under the age of 18. Based on this, Layla would require ministerial consent in order to conclude the Muslim marriage with Ahmad.

It is noted that Ahmad does not require ministerial consent as he is 18 years old. Layla, however, requires written ministerial consent in terms of section 3(4) of the *Recognition Act*.[19] Section 3(4) of the *Recognition Act* requires that the Minister of Home Affairs or his or her duly authorised agent should give written consent prior to the conclusion of the Muslim marriage. There is a loophole available to Layla in this regard. If Layla marries Ahmad in terms of the *Marriage Act*, she would not require ministerial consent. Section 26 of the *Marriage Act* states: "(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister … ."[20] It can clearly be seen that ministerial consent for a female who is 17 years old is required in terms of the *Recognition Act* but is not required in terms of the *Marriage Act*.[21] It will be assumed for the purposes of this scenario that Layla married Ahmad in terms of the *Marriage Act* and that the marriage was officiated by an Imam who is a registered civil Marriage Officer.[22] One of the consequences of concluding the marriage in terms of the *Marriage Act* would be that Layla would now be regarded as a major for all purposes.[23] The Muslim marriage can then be concluded in the light of the CC judgment.[24] There would then be no breach of the CC judgment, which

based on the mutatis mutandis principle] if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question [ministerial consent]. (b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law."

19 See s 3(4) of the *Recognition Act*.

20 See s 26 of the *Marriage Act,* where it states : "(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted."

21 See the *Marriage Act*. It could be argued that the provisions discriminate against persons based on sex as well as religion and culture. A further discussion on this issue is beyond the scope of this case note.

22 See Moosa and Abduroaf "Implications of the Official Designation of Muslim Clergy" 323-359, where the issue of South African Imam marriage officers is discussed.

23 See s 24(2) of the *Marriage Act,* which states: "For the purposes of subsection (1) a minor does not include a person who is under the age of eighteen years and previously contracted a valid marriage which has been dissolved by death or divorce." Also see Moosa "South Africa" 502, where this issue is discussed.

24 It is noted that the marriage would then be civil marriage and that all the normal consequences of a civil marriage would follow. If there is a nikah then this will be enforced as a contract between the parties enforceable *inter partes*.

requires both parties to be 18 years of age before concluding a Muslim marriage.[25]

The purpose of the above discussion has been to highlight the current loophole in law available to persons who are in the same situation as Layla. The scenario (as a whole) has highlighted some of the problematic aspects concerning the conclusion of a Muslim marriage after the CC judgment.

3 Dissolution of a Muslim marriage based on the interim order (scenario 2)

The CC held that:

> [p]ending the coming into force of legislation or amendments to existing legislation … it is declared that [Muslim] marriages subsisting … [on] 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of Sharia law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order [28 June 2022], may be *dissolved in accordance with the Divorce Act* …[26] (our emphasis)

This Part of the case note looks at the section of the CC judgment in the light of a scenario where Adam and Amina married each other in terms of Islamic law only, and the marriage subsisted on 15 December 2014 (scenario 2). The CC judgment authorises Adam or Amina (as an interim measure) to dissolve their marriage in terms of the *Divorce Act*.[27] It is not clear how this part of the judgment was intended to apply in practice and the major issue in this regard is the conflict of law. Two questions should be looked at in this regard. First, does the court have the jurisdiction to grant Amina a divorce that would dissolve the Muslim marriage? Second, if the

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25 It is interesting to note that s 3(5) of the *Recognition Act* provides: "Subject to subsection (4), section 24A of the Marriage Act, 1961, applies to the … marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be." Section 24A states: "(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made - (a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or (b) by the minor before he attains majority or within three months thereafter. (2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors."

26 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.7.

27 It should be noted that Muslim divorces in South African have been a topic of debate for quite some time. See Moosa 1999 *De Rebus* 33-37, where this issue *inter alia* is discussed.

divorce is granted, is it a proper dissolution of the marriage in terms of Islamic law?

With regard to the first question (jurisdiction of the court to grant the divorce) it should be noted that section 5A of the *Divorce Act* states that if the court believes that, despite the granting of a divorce, either one or both of the parties to the divorce proceedings will not be free to remarry because of religious conventions unless the marriage is also dissolved in accordance with their religion's requirements or a barrier to the remarriage of either spouse is removed, the court may refuse to grant the divorce.[28] This section of the *Divorce Act* distinguishes between a civil marriage and a religious marriage. It can therefore be confirmed that a court could generally dissolve a civil marriage in terms of the *Divorce Act,* whereas the religious marriage should be dissolved elsewhere. The CC judgment gives the impression, however, that a Muslim marriage (a religious marriage) may now be dissolved by a court based on the interim order and that the interim relief would then be applicable to that divorce.

The second question concerns whether a divorce granted by a court is a proper dissolution of the Islamic marriage in terms of Islamic law. It could be argued that the Muslim marriage would not be dissolved as a court would not generally have the jurisdiction in terms of Islamic law to dissolve a religious marriage.[29] It is therefore recommended that parties in the position

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28 See s 5A of the *Divorce Act* 70 of 1979 (the *Divorce Act*), where it states that "[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just." It should be noted that a valid ground for divorce should be present for the application to be successful. S 3 of the *Divorce Act* states: "Dissolution of marriage and grounds of divorce - A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are - (a) the irretrievable breakdown of the marriage as contemplated in section 4; (b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage." The irretrievable breakdown of the marriage as provided in the *Divorce Act* is quite similar to the ground found under "Faskh" in the Definitions section (1)(j) of the MMB 2010, which states that a marriage may be dissolved in the instance where "discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that the dissolution of the marriage is an option in the circumstances (*Shiqaq*) …"

29 See Abduroaf 2020 *De Rebus* 33-34 for a further discussion of this issue.

of Adam and Amina should first dissolve their marriages in terms of Islamic law prior to seeking relief in terms of the CC judgment.[30]

4 Patrimonial consequences applicable to the Muslim marriage in terms of the interim order (scenario 3)

The third scenario looked at in this case note is where Moosa and Bilquis were married to each other only in terms of Islamic law on 30 June 2012 (marriage concluded approximately 10 years prior to the CC judgment) and they dissolved their marriage on 30 June 2022 (2 days after the CC judgment) (scenario 3). The CC states in its judgment that "[p]ending the coming into force of legislation or amendments to existing legislation … it is declared that Muslim marriages subsisting at 15 December 2014 … may be dissolved in accordance with the Divorce Act …"[31] This issue (the dissolution of the marriage) was discussed in Part 3 of this case note. The CC further held that

> (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* [our emphasis], and (b) the provisions of section 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded.[32]

The judgment states that the marriages should be treated as out of community of property unless there is an agreement to the contrary. Section 2 of the *Matrimonial Property Act* 88 of 1984 (*Matrimonial Property Act*) states that "[e]very marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this chapter, except in so far as that system is expressly excluded by the antenuptial contract."[33]

It is not clear as why the CC included the application of the accrual system.[34] Was this maybe an oversight from the CC, and it did not intend for the accrual system to apply? It must be highlighted here that there could be a number of complications with regard to the retrospective application of the accrual system to marriages that were concluded in terms of Islamic law, especially based on the fact that the accrual system is foreign to Islamic law

30 This could be done by approaching Islamic institutions like the Muslim Judicial Council (SA) in order to assist with the dissolution of the Muslim marriage in terms of Islamic law.

31 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.7.

32 See *Women's Legal Centre Trust v President of the RSA* (CC) para 86 1.7.

33 See s 2 of the *Matrimonial Property Act* 88 of 1984 (the *Matrimonial Property Act*).

34 It is also possible that the Constitutional Court intended that the estates of parties to the marriage should remain separate. This would also be in line with the position in terms of Islamic law. For the purposes of this discussion it will be assumed that the court intended the accrual system to apply. This is done for the purposes of illustration.

and that the default position in terms of Islamic law is that the estates of each party to the marriage are kept separate.[35]

The judgment also refers to the application of section 7(3) of the *Divorce Act*. Section 7(3) of the *Divorce Act* states that a court granting a decree of divorce in respect of a marriage out of community of property may, subject to the provisions of subsections 7(4), 7(5) and 7(6),[36] in the *absence of any agreement between them regarding the division of their assets* [our emphasis] order that the assets of one party be transferred to the other party.[37] It is also not very clear as to how section 7(3) of the *Divorce Act* would apply in the instance where the accrual system is applicable, as it would normally apply in the instance where the accrual system was not applicable.

For the purposes of this scenario it will be assumed that the CC intended that the accrual system should apply and that Moosa and Bilquis each had R1 000 000 in their individual estates prior to their marriage concluded on 30 June 2012. During the marriage, which lasted for a period of 10 years, Moosa's estate grew by R1 000 000 (and is now R2 000 000) whereas Bilquis's estate remained at R1 000 000. Bilquis would be entitled to a share of Moosa's accrual based on the CC judgment that section 2 of the *Matrimonial Property Act* states that a marriage out of community of property is subject to the accrual system, unless this is expressly excluded by the antenuptial contract.[38] It is recommended that a couple who decide

35 It is interesting to note that the default position in terms of Islamic law is that the estates of both parties to the Muslim marriage remain separate. See Abduroaf *Impact of South African Law* 20 for a discussion of this issue.

36 Section 7(4) of the *Divorce Act* states that an order should not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner. S 7(5) of the *Divorce Act* states that in determining the assets or part of the assets to be transferred as contemplated in subs 7(3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subs 7(4), also take into account the existing means and obligations of the parties, any donation made by one party to the other during the subsistence of the marriage, and any other factor which should in the opinion of the court be taken into account. S 7(6) of the *Divorce Act* states that a court granting an order under subs 7(3) may order that satisfaction of the order be deferred on conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

37 See s 7(3) of the *Divorce Act*.

38 See s 2 of the *Matrimonial Property Act* that states *inter alia* that the accrual system is applicable persons who are married out of community of property, unless the application of the system is expressly excluded in an antenuptial contract. S 4 of the *Matrimonial Property Act* states that "the accrual of the estate of a spouse is the

to enforce patrimonial rights based on this judgment should consult a qualified Islamic scholar prior to finalising the divorce matters to ensure their compliance with Islamic law.[39]

5 Conclusion

This case note has briefly looked at the judgment in *Women's Legal Centre Trust v President of the Republic of South Africa* (CC) with a focus on the interim order. It highlighted some of the problematic areas surrounding the application of the interim order. The findings show that there are several practical complications that could arise when giving effect to the judgment with regard to concluding Muslim marriages, effecting divorces, and dealing with assets subsequent to divorce. It is recommended that parties to a Muslim marriage who intend to dissolve their marriage in terms of the interim order handed down by the CC should seek expert advice from a qualified Islamic scholar prior to finalising their divorce proceedings, in order to ensure their compliance with Islamic law. Whilst the overall outcome of the judgment was generally welcomed because it provides interim relief, the CC case has not led to dramatically different results from the cases prior to it. It has not afforded automatic, immediate, or even blanket recognition to Muslim marriages. The Muslim marriage is recognised for certain sections of the *Divorce Act* only. Unless, for example, one also enters into a civil marriage in terms of the *Marriage Act*, a purely Islamic or Muslim marriage cannot be registered with the Department of Home Affairs in terms of the CC judgment. This also explains why a death certificate will, or may still, state: "never been married". Past experience leads us to expect that tangible progress will take place only by 2024, since that year also coincides with South Africa's next presidential election. Until then, the non-recognition of Muslim marriages will continue to prove burdensome to Muslim women and children.

amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage".

39 This is also the position adopted by the Muslim Judicial Council (SA) with regard to the CC judgment. The Muslim Judicial Council stated in its press release on this matter that "[w]e advise the South African Muslim Community to seek advice from an Islamic Scholar prior to instituting divorce proceedings based on the interim relief granted by the Constitutional Court …". See Muslim Judicial Council (SA) 2022 https://mjc.org.za/2022/07/07/mjc-sa-welcomes-the-constitutional-court-ruling-on-the-recognition-of-muslim-marriages/. One of the authors of this case note, Dr Muneer Abduroaf, is a member of the Muslim Judicial Council (SA)'s Fatwa Department and also the Head of the Muslim Judicial Council (SA)'s Legal Desk.

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List of Abbreviations

CC	Constitutional Court