

REPUBLIC OF SOUTH AFRICA

DIVORCE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 47526 of 18 November 2022)
(The English text is the official text of the Bill)*

(MR M G E HENDRICKS, MP)

[B 32—2022]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Divorce Act, 1979, so as insert certain definitions; to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages; to provide for the redistribution of assets on the dissolution of a Muslim marriage; to provide for the forfeiture of patrimonial benefits of a Muslim marriage; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 70 of 1979, as amended by section 1 of Act 7 of 1989, section 74 of Act 120 of 1993, section 4 of Act 65 of 1997 and section 10 of Act 31 of 2008

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1. Section 1 of the Divorce Act, 1979 (Act No. 70 of 1979) (hereinafter referred to as the principal Act), is hereby amended by the insertion after the definition of “family advocate” of the following definition:

“**“Muslim marriage”** means a marriage concluded in accordance with Islamic Law that is, *Shariah*, which regulates all public and private behaviour as derived from traditional customs (*Al-Urf*), the two primary sources, namely, the *Quran* and the *Sunnah* (Prophetic model) and that uses juristic tools such as *ijma* (the consensus) of Muslim Jurists and the individual jurist’s *qiyas* (analogical deductions) to issue legal edicts;”.

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Amendment of section 6 of Act 70 of 1979, as amended by section 6 of Act 24 of 1987

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2. Section 6 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage, including a minor or dependent child of a Muslim marriage, are satisfactory or are the best that can be effected in the circumstances;” and

(b) by the substitution for subsection (3) of the following subsection:

“(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage, including a dependent child of a Muslim marriage, or the custody or guardianship of, or access to, a minor child of the marriage, including a minor child of a Muslim marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the

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minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.”.

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989, section 1 Act 44 of 1992 section 11 Act 55 of 2003 and section 1 of Act 12 of 2020 5

3. Section 7 of the principal Act is hereby amended—

- (a) by insertion after subsection (3) of the following subsection: 10
 “(3A) A court granting a decree of divorce in respect of a Muslim marriage entered into after 14 December 2014 may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets of the other party as the court may deem just, be transferred to the first-mentioned party.”; 15
- (b) by the substitution for subsection (4) of the following subsection: 20
 “(4) An order under subsection (3) or (3A) shall 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, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.”; 25
- (c) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words: 25
 “(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) or (3A), 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 subsection (4), also take into account—”; 30
- (d) by the insertion in subsection (5) after paragraph (a) of the following paragraph: 35
 “(aA) the existing means and obligations of the parties, including any obligation that a husband to a Muslim marriage as contemplated in subsection (3A) may have if he is a spouse in more than one Muslim marriage.”; and
- (e) by the substitution for subsection (6) of the following subsection: 40
 “(6) A court granting an order under subsection (3) or (3A) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including 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.”. 45

Amendment of section 9 of Act 70 of 1979 45

4. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”. 50 55

Short title

- 5. This Act is called the Divorce Amendment Act, 2022.**

MEMORANDUM ON THE OBJECTS OF THE DIVORCE AMENDMENT BILL, 2022

1. INTRODUCTION

- 1.1 Delays by Cabinet, Ministers and Departments after court judgements have for 28 years harmed the dignity of Muslim wives and children married in terms of the *Shariah* law. In **Women’s Legal Centre Trust v President of the Republic of South Africa and Others**¹ the Constitutional Court came out firmly and held “ . . . we are concerned about the hardships faced by Muslim Women in a Muslim marriage as a consequence of being excluded from the benefits derived from the Marriage Act and the Divorce Act.”² thus, the Constitutional Court declared the Marriage Act, 1961 (Act No. 25 of 1961), and the Divorce Act, 1979 (Act No.70 of 1979) (“Divorce Act”) to be inconsistent with sections 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.
- 1.2 Section 6 of the Divorce Act was declared unconstitutional in that the section fails to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provides for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved.
- 1.3 Section 7(3) of the Divorce Act was declared unconstitutional in that the section fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.
- 1.4 Section 9(1) of the Divorce Act was declared unconstitutional in that the section fails to provide 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 that are dissolved.

DIVORCE AMENDMENT BILL

- 1.5 Despite the state’s abject failure to legally include and grant legal protection to spouses in Muslim marriages, Muslim Personal Law (“MPL”) has been practised within the South African Muslim community from or around the 17th century. To this day, and *ad infinitum*, *Shariah*, upon which MPL is based, plays, and will continue to play, a significant role in the lives of South African Muslims on individual and communal levels.
- 1.6 In or around 1987, during the apartheid era, the South African Law Commission (“SALC”) considered whether or not Muslim marriages should be afforded legal recognition. The SALC circulated a questionnaire within the South African Muslim community to gauge its opinion regarding the incorporation of MPL within the secular legal system. The questionnaire received a mixed response: Some members of the *‘ulam* welcomed the initiative because they wanted legal enforceability for their MPL-related decisions. However, progressive organisations such as the Muslim Youth Movement, Call of Islam, *Qibla* Mass Movement and the Muslim Student’s Association (“MSA”), which were actively involved in the struggle against apartheid perceived the initiative as a state-based attempt to divide Muslims and assimilate them into apartheid structures, legitimising these structures. Resultantly, the aforementioned progressive organisations rejected the

1. [2022] ZACC 23.

2. Para 60.

SALC's proposal and indicated that they would only consider dialoguing with a democratic South African government.

- 1.7 In 1994, the African National Congress ("ANC") government established the Muslim Personal Law Board ("MPLB"), which was mandated to draft legislation to recognise MPL. Many viewed the establishment of the MPLB to be the result of an electoral promise to afford recognition to MPL that the ANC had made to the South African Muslim community during the negotiations process leading up to South Africa's first democratic elections. The MPLB's mandate was based on the freedom of religion clause in the interim Constitution, which enabled the enactment of legislation to recognise *inter alia* MPL and Muslim marriages.
- 1.8 Within a year of its establishment, the MPLB was disbanded. The main points of contention centred on the manner in which MPL ought to be recognised, which courts should interpret and apply MPL and whether or not Muslims should have a choice regarding their marital system. The MPLB failed because a major organisation, the Islamic Unity Convention and its chair, Sheikh Dr Abdul Kariem Toffar, was deliberately left out.
- 1.9 In 1999, the process to legally recognise Muslim marriages gained traction and further impetus with the establishment of a Project Committee of the South African Law Reform Commission ("SALRC"). The Project Committee was founded through a democratic process of nominations by the South African public, which resulted in the appointment of nine Muslims as members of the Project Committee, three of whom were women. The Project Committee was headed by Justice Mohammed Navsa, who was a judge at the Supreme Court of Appeal, and the remaining members consisted of three members of the *'ulama*, two members of the South African Parliament, an advocate, a Professor of Law and a member of the SALRC.
- 1.10 The Project Committee was mandated to draft legislation to recognise only Muslim marriages, as opposed to drafting legislation to recognise a system of Muslim Personal Law. This mandate accorded with the freedom of religion clause in the Constitution, which enables the legislature to recognise *inter alia* Muslim Personal Law or Muslim marriages.
- 1.11 From 1999 until 2002, the Project Committee conducted extensive consultations with different sections of the South African Muslim community as well as secular human rights organisations.
- 1.12 In January 2002, the Project Committee issued Discussion Paper 101, including a draft Bill for the recognition of Muslim marriages. A full report of the SALRC on Islamic Marriages and Related Matters was handed to the then Minister of Justice in July 2003. In the period 2003 to 2004, various responses to the SALRC's report, including the draft Bill, were lodged for consideration by the Minister responsible for Justice. In October 2004, the Project Committee reconvened to discuss concerns expressed in a number of responses that had been received.
- 1.13 In March 2005, an amendment to the proposed draft Bill was submitted by the Project Committee. According to the then Minister of Justice and Constitutional Development, between 2008 and 2009 the Bill was in the final stages of preparation for submission to Cabinet. However, due to the intensity of objections, the constitutional issues raised and the sensitivities of some aspects of the Bill, the Minister was of the view that the Bill should be published for public comment before it could be finally considered by Cabinet. The Report and Draft Bill were subsequently submitted to the Ministry of Justice and Constitutional Development for consideration in the parliamentary process.
- 1.14 However, by 2010, the Muslim Marriages Bill still had not been enacted. This saw the matter and the state's failure to recognise Muslim marriages, the failure of which has far-reaching consequences for Muslim women and

children as constituting of the most vulnerable groups in communities, challenged before our courts. During the hearing of the matter of **Faro v Bingham NO and Others**³ before Rogers, J, the Minister of Justice and Constitutional Development submitted that a decision was taken by Cabinet on 8 December 2010 that the Bill be published for public comment and that on 21 January 2011, it was published for public comment.

- 1.15 Notwithstanding the Court’s decision in 2013, in response to an invitation for suggestions of areas of research for consideration by the SALRC issued by the Minister of Justice and Constitutional Development at the time, the Ministry of Home Affairs proposed the investigation into the development of a single Marriage Act for South Africa. However, it was only in October 2017 that the SALRC recommended to the Minister of Justice and Correctional Services that he approves the inclusion of an investigation into the possible adoption of a single marriage statute, including measures against sham marriages, in the SALRC law reform programme and that an ‘A’ priority rating be allocated to this investigation. On 1 November 2017 the Minister of Justice and Correctional Services approved the inclusion into the SALRC’s research programme of an investigation into the possible adoption of a single marriage statute including measures against sham marriages. The Minister of Justice and Correctional Services approved the appointment of the advisory committee on 24 January 2018. The Advisory Committee’s efforts culminated in Issue Paper 35, which was published for general information and comment on 8 April 2019. The closing date for comment was initially 31 July 2019. The closing date was subsequently extended to 31 August 2019.
- 1.16 The Department of Home Affairs (“DHA”), on the other hand, embarked on a separate parallel process of developing a marriage policy White Paper. In June 2019 officials from the DHA communicated with the Secretariat of the SALRC, advising that the DHA “was in the process of developing a marriage policy White Paper which will inform the review of the marriage legislation”. The DHA stated that this process was driven by their identification that “there are elements of the marriage legislation that are outdated and non-compliant to the Constitution”. The DHA informed the SALRC that they were “undertaking a comprehensive study that will guide the development of the marriage policy”. It is noted here that since this envisaged single marriage statute encompasses “South Africans and residents of all sexual orientations, religions and cultural persuasions”, it will not be specific to regulating Muslim marriages.
- 1.17 In 2020, a parliamentary question submitted by Hon. Ganief Hendricks interrogated what the obstacles were which prevented the Government from—
- (a) affording legal recognition to Muslim marriages by using the same procedure that provides for the recognition of African customary marriages through the registration process at DHA, while permitting for the *Nikah* certificate to be issued by an officiating Imam in the same way as the *lobola* certificate is issued by an African customary official such as an *Induna*; and
 - (b) attributing the status of “married” on death certificates of such Muslims in instances of a *de facto* marriage(-s) having been in existence as opposed to the current “not married” status attributed to all Muslims who were exclusively married according to Muslim rites, made particularly obvious during the Covid-19 pandemic and the dramatic rise in the deaths of spouses.
- 1.18 The legislative lacuna was made glaringly clear in the Minister’s reply, where he stated that:

“Customary marriages are regulated by the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) which provides for

3. [2013] ZAWCHC 159 (25 October 2013)

requirements for a valid customary marriage and registration thereof. In this regard, there is no power vested on Government to extend the provision of the Act to other types of marriages, as doing so will be acting ultra vires. A marriage entered into in terms of Muslim rites is thus far not recognised in South Africa . . .”.

- 1.19 Al Jama-ah and the DHA had a meeting on 19 September 2021, and in the meeting it was agreed that matters relating to Muslim Personal Law like divorce matters should not be dealt with in the Muslim Marriage Act and that divorce matters affecting Muslims should be dealt with under the Divorce Act.

Judicial Constitutional Intervention: Court Rulings on the Recognition of Muslim Marriages

- 1.20 As it is evident above, the rights of parties to a Muslim marriage have recently begun to be recognised by our courts. However, this recognition has taken place in a piecemeal manner. Statutory developments are further unfolding at glacial pace while the Muslim community, and the most vulnerable of this population, continue to be left out of the legal system.
- 1.21 In highlighting key judicial decisions which have agitated for the required legal reforms, in 2013, The Western Cape High Court granted the recognition of the Applicant as a surviving spouse for purposes of the Intestate Succession Act, 1987 (Act No. 81 of 1987), and the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990). Furthermore, as stated above the Constitutional Court in the Women’s Legal Centre case declared certain sections of the Divorce Act unconstitutional to the extent already alluded to.
- 1.22 The proposed Bill, which focuses on one aspect of Muslim Personal Law, provides an effective medium to address the mischief identified by the courts and provides an interim but effective remedy which immediately responds to the courts’s injunctions.

2. OBJECTS OF THE BILL

- 2.1 The Divorce Amendment Bill (“the Bill”) seeks to amend the Divorce Act to address the Constitutional Court judgement by ensuring the identified gaps in respect of Muslim marriages are closed.

3. CONTENTS OF THE BILL

- 3.1 Clause 1 inserts the definition of Muslim marriage recognised by the Constitutional Court Judgement to be part of South Africa’s common law.
- 3.2 Clause 2 amends section 6 of the Divorce Act by providing mechanisms to safeguard the welfare of minor or dependent children born of a Muslim marriage when such marriage is dissolved.
- 3.3 Clause 3 amends section 7 of the Divorce Act by empowering a court granting a divorce decree on the dissolution of a Muslim marriage to make an order with regard to the redistribution of assets, when such redistribution would be just.
- 3.4 Clause 4 amends section 9 of the Divorce Act to empower a court when granting a divorce decree on the dissolution of a Muslim marriage to give an order that patrimonial benefits of a Muslim marriage be forfeited by one party in favour of the other, either wholly or in part if the court is satisfied that, after considering certain factors, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

3.5 Clause 5 provides for the short title and commencement of the Act.

4. FINANCIAL IMPLICATIONS FOR THE STATE

None.

5. DEPARTMENTS, BODIES OR PERSONS CONSULTED

A wide spectrum of stakeholders were given presentations or consulted and this does not mean that they are in full agreement with the final version of the Bill.

- The Department of Home Affairs: Chief Director: Policy and Strategic Management Sihle Mtheyene and Thulani Mavuso, Deputy Director: Institutional Planning and Support, Advocate Sebelemetja, Ms K Makgabo Mr T. Sigama.
- Legal counsel, as the current chairman of High Court Chambers Cape Town, an affiliated group of Advocates of the South African Bar Association, and practising as an Advocate of the High Court.
- Advocate Yusuf Khan Dalwai—High Court Chambers of South Africa.
- Advocate Saleem Khan—Senior Advocate.
- Advocate Shameemah Salie.
- Professor Muhammed Haron—Al Jama-ah Party's Senior Researcher.
- Various scholars and honorary academics specialising within the field of Muslim private, personal and family law.
- Public participation process by publishing an explanatory note in the Government Gazette inviting interested parties to comment at a very early stage.
- WCCP Youth in Paarl.
- Consultation with Muslim women from eight townships from Atteridgeville, Mamelodi, Hebron, Brits, Hammanskraal, Mabopane, Soshanguve and Winterveldt.
- 60 women attended a Women's Day Event in Sandvlei, the first settlement of Muslims for South Africa where the founder of Islam lived while in exile from Indonesia.
- Presentation to UUCSA—22 August 2022.
- Hilaal TV, Radio 786, VOC, Channel Islam, Radio Ansaar, Al Jeem radio interviews.
- Participation in an info session at Radio 786 in Newlands.
- Presentation to AMAL—Association of Muslim Accountants and Lawyers—15 August 2022.
- Presentations to IPSA—30 June 2022 and 30 July 2022.
- Amir Mohammed Gadimang of Gauteng Muslim Shura Council.
- Amir Abdul haqq Lekabe and Mukkadam Berend of Pheli Muslim Shura.
- Amir Mohammed Gomba of Tshwane Muslim Shura.
- Amir Rauphala of Pheli Shura.
- Moulana Ali Mlangeni of Pheli Shura.
- Issah Chirwa of Hebron Muslim Shura.
- Moulana Asad Msiza of Pheli Shura Executive Committee.
- Hassan Kajaja of Pheli Shura.
- Imaraan Mashishi of Baitul Salaam.
- Yaseen Moema of Pheli Shura.
- Mohamadou Kgomosotho of Pheli Shura.
- Bilal Moagi of Pheli Shura Advisory.
- Moulana Habeeb Milanzi.
- Fatima Hendricks—Senior Social Worker.
- Al Jama-ah Law Makers: Galil Brinkhuis MPL in WCPP, Achmad Hendricks—PR Councillor: City of Cape Town, Faried Achmat—PR Councillor: City of Cape Town and Al Jama-ah Secretary General, Shameemah Salie—PR Councillor: City of Cape Town and Al Jama-ah Spokesperson, Ahmed Stulweni—PR Councillor: Drakenstein, Thapelo Amad—PR Councillor: City of Johannesburg, Imraan Moosa—Ward Councillor: Lenasia, Kabelo Gwamanda—PR Councillor: City of Johannesburg, Kabelo Nthekeiso—Ward Councillor: Madibeng North West, Muhammad Asghar Khan—Chairperson Municipal Public Accounts Committee: Umdoni KZN and Al Jama-ah Chairper-

son for Communications Committee, Moulana Hoosen Khan—PR Councillor: eThekweni KZN, Goodwill Cele—PR Councillor: uMuziwabantu KZN.

- Sunni Ulema Council, Tshwane.
- Presentation to International Peace College South Africa (IPSA)—30 June 2022 and 30 July 2022
- Presentation to Association of Muslim Accountants and Lawyers (AMAL)—15 August 2022.
- Presentation to United Ulama Council of South Africa (UUCSA)—22 August 2022.
- Seminar: Doors of Jannah—16 October 2022.
- Majlisul Ulama of South Africa (M.U.S.A.)—1 November 2022.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution apply.
- 6.2 The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain any provisions pertaining to customary law or customs of traditional or Khoi-San communities. Furthermore, the Bill does not contain any provisions pertaining to any matter referred to in section 154(2) of the Constitution.

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