

30 July 2021

MUSLIM MARRIAGES

In the case of the President of the RSA and Another v Womens Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others an important judgement was handed down by the Supreme Court of Appeal. It was argued and held that the Constitution places an obligation on the State to prepare and bring into operation legislation to recognize Muslim marriages as valid marriages. It was acknowledged that our law's treatment of the religious marriages concluded in terms of Shariah law has many negative consequences for spouses and children in those marriages. The absence of legal recognition of Muslim marriages are problematic. For instance, those who do not have a civil marriage (in addition to the religious marriage) continue to be regarded as unmarried. The views held in the pre-constitutional era by the South African courts reflect a refusal to recognize Muslim marriages. The Court declared it to be unconstitutional.

The Court ordered Parliament to draft new legislation before the end of 2022 and institute interim provisions to assist spouses in such marriages with immediate effect. It is important to take note of these, especially where such spouses are parties to contracts or seeking a divorce. Upon divorce they have no access to provisions that exists in our divorce legislation, as these provisions only apply in respect of persons seeking a divorce in a civil law marriage. Section 7(3) of the Divorce Act is declared unconstitutional as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage. Section 9(1) is also unconstitutional as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same way as it does in respect of other marriages. As from 18 December 2020 all provisions of the Divorce Act shall be applicable to Muslim marriages and all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary.