

THE RECOGNITION OF ISLAMIC MARRIAGES

Just a few weeks ago, the Supreme Court of Appeal ruled that certain parts of the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 are unconstitutional, in that they do not recognise Muslim marriages (and by necessary inference, Hindu and customary marriages). This will result in massive changes to our common law.

For centuries, Islamic, Hindu and customary marriages (which were not also solemnised in terms of the Marriage Act or registered in terms of the Customary Marriages Act) have not been recognized as legally binding in SA, because they are potentially polygamous, i.e., the husband may have more than one wife. Our law has never recognised such marriages, due to religious, European customs, brought to our shores centuries ago.

The result is that the wives in such marriages, and children born of such marriages, had very little right, if any, to claim maintenance and/or to be entitled as of automatic right, to be able to claim any portion of the husband's estate. Typically, the wife would become be a stay-at-home mom, with no qualifications or work experience, looking after the children, whilst the husband amassed an estate. Upon separation, she then had to fight tooth and nail and, given she had no money, try find an attorney who was prepared to work on a risk basis, to claim maintenance or gain recognition for her contribution to the husband's estate. Obviously, such women would often be left destitute.

The Court has now given Government 2 years to make changes to the above legislation to address this so that Muslim (and probably Hindu/customary marriages) must be recognized as valid marriages for all purposes in South Africa, and to regulate the consequences arising from such recognition.

Pending the coming into force of legislation or amendments to the existing legislation, certain transitional rulings were made to address pending litigation between such spouses. The question this has brought forward from a conveyancing perspective, is how do we now describe persons married under Islamic law?

Such marriages are, for the sake of buying or selling land, still not deemed to be valid marriages unless the parties also conclude a "civil" marriage in terms of the Marriage Act. Until the laws are amended, one must still either describe such persons as being UNMARRIED or MARRIED ACCORDING TO ISLAMIC LAW. Either party may still buy or sell on his or her own, without the others participation.

The deeds office has not issued any directives as yet, but we also do not expect any, until government has amended the laws referred to above.

The logo consists of two lowercase 'm' characters. The first 'm' is orange and the second is white. They are set against a background of a 3D grid of black and orange cubes.

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As such and until then, for the sake of buying or selling land in SA, nothing changes. It is to be noted that this ruling only applies to divorces.

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