

Ultimate Recognition of Polygynous Muslim Marriages and the Abolition of Child Marriages in Muslim Marriages: An Appraisal of *Women Legal Center Trust v. the President of RSA*

Lecturer Nqobizwe Mvelo NGEMA¹

Abstract

Muslim communities have settled in South Africa more 300 years ago, but their religious marriages were not recognised in South Africa. Muslim marriages were denied recognition merely because they are potentially polygynous in nature. This non-recognition has created many hardships for Muslim women. These hardships has prompted the Women Legal Centre (WLC) to institute a class action compelling the government to enact legislation recognising Muslim marriages. The Supreme Court of Appeal ordered for the recognition of Muslim marriages for all purposes and for the abolition of child marriages in Muslim marriages. The SCA Judgment was later confirmed by the Constitutional Court. The decision of the SCA is appraised; however, to permit marriage of a person under the age of 18 under certain circumstance might defeat the very aim of having the minimum age for marriage in the first place. This is so because Muslim marriages are notorious for permitting child marriages.

Keywords: recognition of polygynous Muslim marriage, abolition of child marriages, Muslim personal law, South African Law Reform Commission.

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1. Introduction

Muslim communities have been in South Africa for more than 300 years ago but their Muslim marriages were not recognised in South Africa. Muslims from Malaysia first came to the Cape as servants of the Dutch East Indian Company in 1658. Eight years later, Southeast Asian Muslims first arrived in South Africa as political prisoners, convicts and slaves in 1667. One hundred and eighty three years later, Indian Muslims first arrived in the then province of Natal (now called KwaZulu-Natal) as labours imported to work on British sugar plantations in Natal. Nearly 1.5 million of the South African citizens are Muslims yet their marriages do not enjoy legal recognition and this non-recognition persisted for a period of more than 300 years and eventually led to the untold hardships experienced by Muslim spouses and children². One of the reasons raised for non-recognition of Muslim marriages in South Africa is that they are potentially polygynous.

The purpose of this paper is to examine critically the way in which the courts have attempted to harmonise Muslim marriages with the South African common law and the Bill of Rights. To this end, I seek to appraise the recent decision of the Supreme Court of Appeal in *Women's Legal Centre Trust v President of the RSA* and others on the recognition of Muslim marriages in South Africa. The decision of the Supreme Court of Appeal is commendable because it abolished child marriages under Muslim marriages and also finally recognised polygynous Muslim marriages for all purposes. In doing so, this paper will commence by discussing social ills created by the non-recognition of Muslim marriages in South Africa, the second part of this paper intend to discuss a brief historical background of some milestones reached on the legislative recognition of Muslim marriages and the other part of the paper will discuss some positive aspects of the judgment in order to provoke critical dialogue over the recent Supreme Court of Appeal judgment and thereby making a contribution to the pending legislation that is meant to recognise Muslim marriages. Some of the positive aspects of the judgment in question are that Muslim marriages are recognised for the first time in South Africa provided that such marriages are not entered into by spouses younger than the age of 18 years. This is an important legal development because Muslim personal law is notorious for permitting child brides. According

¹ Nqobizwe Mvelo Ngema - University of Zululand, South Africa, nqobizwemvelo@gmail.com.

² Hanzi R., *Sexual Abuse and Exploitation of the Girl-child through Cultural Practices in Zimbabwe: A Human Rights Perspective*, LLM –Dissertation University of Pretoria 2006, p. 75; Kerr A.J., *Liability in Delict for Wrongfully Causing the Death of a Native Men Married According to Native Law*, 1956 (73) SALJ 402-408; Moosa E., *Prospects of Muslim Law in South Africa: A History and Recent Developments*, 1996 (3) Yearbook of Islamic and Middle Eastern Law 130.

to the tenets of Muslim personal law there is no specific age for marriage and a person who has reached puberty is considered to be ripe for marriage. Boys and girls reach puberty at different ages and it varies from person to person. A boy is considered to have reached puberty when he starts to experience wet dreams and the girl is considered to have reached puberty if she has started to experience her first monthly period. Another important aspect of the judgment is that it recognises Muslim marriages for all purposes in South Africa and thereby recognising polygynous Muslim marriages as valid marriages. The following section intends to discuss social ills and injustices created by non-recognition of Muslim marriages in South African legal order.

2. Social ills created by the non-recognition of Muslim marriages in South Africa

The intolerance towards Muslim marriages and customary marriages prevailed right from colonial times and during apartheid South Africa. Customary marriages were not given full recognition because they are potentially polygynous in nature and this led to many hardships that were experienced by women married in terms of the tenets of customary law. These hardships experienced by women and children because of partial recognition of customary marriages sparked a hot debate amongst the academic writes. In the same vein, Muslim marriages were not recognised in South African legal order merely because they are potentially polygynous in nature. Hence polygyny was regarded as contrary to good morals and against public policy. These objectionable views of intolerance against Muslim community were mirrored in numerous court judgments decided before the coming into operation of the democratic Constitution in South Africa. On the contrary, the court decisions post-1994 has changed the position regarding the recognition of Muslim marriages by removing some of the unconstitutional consequences against Muslim women on a piecemeal basis. However, it is notable that the avoidance of full recognition of Muslim marriages leads to exclusion and marginalisation. The courts offered merely limited recognition of Muslim marriages on a piecemeal basis, namely:

- a. The right of a Muslim wife to take over from her deceased husband's estate;
- b. The right to claim maintenance as the remaining partner, and the right to a responsibility of upkeep;
- c. The right to claim provisional maintenance while waiting for divorce.

3. Milestones on the legislative recognition of Muslim marriages

The South African Law Reform Commission (SALRC) has been involved in the study of Muslim Personal Law (MPL) since 1990s; however, the first project Committee that was appointed to make such an investigation did not make much progress. Perhaps, this lack of progress was because the country was preparing for the transition from the apartheid era to the constitutional democracy.

In 1996 the South African Law Reform Commission (SALRC) showed a renewed interest in the study of Muslim Personal Law, appointed the project Committee under the leadership of Justice Navsa. Unlike its predecessor that did not make much progress, In March 1997 the South African Law Reform Commission conducted two workshops that were designed to involve members of the public and the interested parties. After hearing the feedback from the general public and the interested parties, the new project Committee led by Justice Navsa issued its first discussion document in the year 2000. At the end of 2001 the South African Law Reform Commission published a discussion paper 101. The discussion paper contained a proposed Draft Bill on Islamic Marriages. The Draft Bill makes provision for, among other things, recognition of Muslim marriages in South Africa, requirements of a valid Muslim marriage in South Africa, the registration, proprietary consequences and dissolution and the status and capacity of spouses in a Muslim marriage. The provisions of the South African Law Reform Commission Draft Bill are similar to the provisions of Muslim Personal Laws as codified and applied in some countries such as India, Nigeria, Uganda, Tanzania, Pakistan and Sri Lanka. The South African Law Reform Commission (SALRC) considered the responses and

realised that there were many constitutional concerns relating to the Bill and this led to an amended version of the Draft Bill on Islamic Marriages.

These Constitutional concerns also led to the drafting of an alternative Draft Bill in October 2005 by the parliamentary Office of the South African Commission for Gender Equality (CGE). The Bill was named as the Recognition of Religious Marriages Bill and was in fulfilment of the constitutional mandate of the Commission for Gender Equality. The powers and functions of the Commission for Gender Equality are outlined in the Commission on Gender Equality Act. One of the Constitutional mandates of the Commission of Gender Equality is, among other things; evaluate any proposed law affecting gender equality or the status of women and make recommendations. And also make evaluation of Acts of parliament, systems of personal law, customary practices or any other law. The Bill was handed over to the relevant executive structures (that is Gender Directorate of the department of Justice and the Ministry of Home Affairs). The latter executive structures failed to honour the numerous invitations for a meeting with the Commission of Gender Equality and also failed to undertake public consultations on the Commission of Gender Equality Bill.

As early as 2007, the women's Legal Centre (WLC) conceived a plan to bring a class action application on behalf of its clients. For more than two decades, the WLC has been trying to convince the government to enact legislation that would recognise and regulate Muslim marriages. The Muslim women were treated unfairly during divorce. WLC realised that the relevant executive structures are fiddling while Rome is burning and decided to institute a legal action to challenge unconstitutionality of non-recognition of marriages entered into in terms of Muslim personal law. In doing so, the WLC applied for a direct access to the Constitutional Court in terms of section 167 of the Constitution in 2009 and the application was dismissed on the ground that no proper case has been made for direct access. As mentioned earlier, process of investigating the prospects of recognising Muslim Personal law commenced as early as 1990 but unfortunately came to a stop in 2012 after the Bill was published for public comment. This delay in the law reform has instilled a renewed vigour to the WLC and prompted it to litigate on these matters to extend benefits such as pensions, inheritance and maintenance to religious marriages³. WLC is not a giving up type and it launched a semi urgent application in the High Court during November 2015 against the President of the Republic of South Africa (the President), Minister of Justice and Constitutional Development (Justice Minister), Minister of Home Affairs, the Speaker of the National Assembly (NA) and the Chairperson of the National Council of Provinces (NCOP). The WLC contended that state has failed to recognise and regulate marriages that are solemnised according to the tenets of Muslim Personal Law. The WLC argued further that the section 7 (2) mandates the state to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages and parliament failed in its duty. The following section intends to discuss the case of Women Legal Trust v The President of the RSA and others.

4. Women legal trust v. the president of RSA and other

4.1. Relief sought by Women Legal Centre from the Court

WLC launched an urgent application in the Western Cape High Court in the public interest seeking relief aimed at providing women in Muslim marriages and children born out of those marriages, with legal protection, more especially during the time of dissolution of such marriages. So, the WLC instituted a class action in the interest of its clients that is largely constituted by women who frequently pay a visit to their offices in large numbers requesting for legal representation in cases where their marriages have been annulled by divorce or death. It appears clearly that at the centre of the application by WLC is the hardships confronted by women in Muslim marriages. In view of the state's in action, the insufficiency of piecemeal recognition by courts and the delay in the enactment

³ Amien W., *Overcoming the Conflict between the Right to Freedom of Religion and Women's Right to Equality: A South African Case Study of Muslim Marriages*, 2006 (28) HRQ 731; Rautenbach C., *Gender Equality and Religious Family Laws in South Africa*, 2003 (3) 1 QUTLJJ 168-169; Rautenbach C., *Islamic Marriages in South Africa: Quo Vadimus?* 2003 (69:1) Koers 136-140; Heyns C and Killander M *Compendium of Key Human Rights Documents of the African Union* (PULP 2007).

of legislation recognising and regulating Muslim marriages, the WLC argues that the only reasonable and effective means of fulfilling the duty of the state under section 7(2) is through an Act of parliament recognising and regulating Muslim marriages in South Africa. The relief is sought due to the continued failure on the part of the government to recognise Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition. Non-recognition of Muslim marriages has detrimental consequences for women in Muslim marriages as they do not enjoy protections offered to women in civil marriages and customary marriages. Women Legal Centre submitted further that:

To treat spouses in Muslim marriages as unworthy of protection of the law devalues, stigmatises and further marginalise the vulnerable minority group.

WLC further submitted that the spouses in a Muslim marriage have no access to justice system for the purposes of regulating their marriages “with regard to proprietary rights, divorce, maintenance and custody” of children. It is noted that during divorce the care, contact and maintenance of children is not subject to automatic court oversight and thus without special application to the court of law, remain unregulated. Unlike the Marriage Act, the Muslim marriages are not regulated by any piece of legislation and do not have a minimum age for the consummation of a valid marriage and if the boy or a girl has reached puberty, he or she is ready for marriage. The following section of the paper intends to discuss some important aspects of the Supreme Court of Appeal (SCA) judgment of the case in question, more especially the recognition of the potentially polygynous Muslim marriages for all purposes and the prohibition of child marriages on marriages concluded in accordance with the tenets of Muslim personal law.

4.2. Some important aspects of the SCA Judgment

4.2.1. Recognition of potentially polygynous Muslim marriages for all purposes

In the Republic of South Africa a multiplicity of cultures, religions and languages coexist in diversity. This diversity, which is also recognised by the slogan, which is ornamented in the Coat of Arms, unity in diversity, has benefits as well as difficulties within a society, because there is a common trend in the direction of ethnocentrism, whereby one group regards its values and belief systems as superior to others while the other group embraces indigenous customary law practices which the former group regards as primitive rules for uncivilised barbarians. As mentioned before, the courts of the pre-constitutional era reflect a refusal to recognise marriages concluded according to the tenets of Muslim Personal Law, mainly because such marriages are potentially polygynous and *contra bonos mores*⁴. Judges of the past reflected a notable ethnocentric favouritism and arrogance at the cost of those they perceive as different. Failure to recognise Muslim marriage is ignorant of the fact that South Africa is a diverse country and this diversity appears in the preamble to the Constitution as follows: we the people of South Africa, recognise the injustices of the past...Believe that South Africa belongs to all who live in it, united in our diversity...adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

It is beyond any dispute that South Africa is a habitat to all who live in it, even to those who practice polygyny. The preamble recognises the injustices of the past; one of those injustices of the past is the failure to recognise the fact that South Africa is multi-faith, multi-cultural and multi lingual. Muslim marriages and customary marriages are potentially polygynous in nature and are practiced by many citizens of this country. Hence, preference of monogamous marriages over polygynous marriages would constitute an ethnocentric bias at the expense of those in such polygynous marriages. It has already been discussed above that, non-recognition of Muslim marriages resulted to numerous social ills that affected women and children the most. In order to address those social ills and to heal

⁴ Dlamini C.R.M., *Claim by Widow of Customary Union for Loss of Support*, 1984 SALJ 34; Stefiszyn K. and Painting K, A., *Report on Child Marriage in Africa*, PULP 2018.

the divisions of the past, full recognition of Muslim marriages for all purposes is the better path to tread on.

Section 15(3) of the Constitution foretells and approves the enactment of a legislation that recognises marriages solemnised under any tradition or a system of religious family law by permitting legislation that is meant for the recognition of marriages that are solemnised under any tradition or religious family law.

Despite the existence of the latter provision that paves the way for the recognition of religious marriages in South African legal order, non-recognition of religious marriages continued for more than 23 years in our Constitutional democracy. One of the major reasons for the non-recognition of religious marriages, Muslim marriages in particular, is the clash between some aspects of Muslim personal law and the culture of human rights⁵.

The Supreme Court of Appeal has given full recognition of Muslim marriages but left most of the issues to the hands of the legislature. The court ordered that in the case of a husband who is in a polygynous Muslim marriage, the court shall:

(i) Take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and

(ii) Any order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

The above order of the Supreme Court of Appeal regarding polygynous Muslim marriages is not saying much and do not adequately address human rights issues involved in polygyny. By the look of things, the court has left other issues relating to the regulation of polygyny in the hands of the legislature. It is therefore submitted that the provision that recognises and regulate polygyny in the Islamic Marriages Bill seem to be a bit more detailed and in a better position to alleviate some human rights problems associated with the practice of polygyny. It is submitted that section 8(6) of the Islamic Marriages Bill would be a good starting point in the process of recognising and regulating polygyny. The following section intends to discuss the impact of the judgment on the prohibition of child marriages under those marriages that are concluded under the tenets of Muslim personal law.

4.2.2. Prohibition of child marriages in Islamic marriages

The Supreme Court of Appeal held that:

It is declared that, from the date of this order, section 12 (2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order. For the purpose of applying paragraph 1.9 above, the provisions of section 3 (1) (a), 3 (3) (a) and (b), 3 (4) (a), and 3 (4) (b) and 3 (5) of the Recognition of Customary Marriages Act shall apply, mutatis mutandis, to Muslim marriages.

The above order of the Supreme Court of Appeal insinuates that the Muslim marriages will be governed by the latter mentioned provisions until the enactment of legislation aimed at regulating Muslim marriages. Section 12 (2) of the Children's Act forbids child marriage by stipulating that a teenager that is below the minimum age established by law for a valid marriage may not be given out in engagement or marriage.

Moreover, section 12 (2) also forbids forced marriage, in other words no one may be given out in marriage without his or her consent. The court appear to be so much determined in ensuring that (pending the legislation regulating Muslim marriages) no Muslim marriage is concluded by anyone below the minimum age set by law for a valid marriage. In doing so, the court ordered for the application of section 12 (2) of the Children's Act in conjunction with some sub sections of section 3 of the Recognition of Customary Marriages Act. Section 3 (a) of the Recognition Act is even more specific when comes to the legally acceptable minimum age for marriage because it clearly provides that the prospective spouses must both be above the age of 18. It also forbids forced marriages by

⁵ Pieterse M., *It's a Black thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism* 2001 SAJHR 36; Manjoo R., *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights*, 2007 Human Rights Program at Harvard Law School Working Paper, Project Report 2007.

providing that the prospective spouses must both agree to get married to each other under the tenets of customary law. In view of the latter provision in its current form, it would not be applicable to Muslim marriages unless, if necessary, alterations are made in order to accommodate Muslim marriages. It should, for example, read as providing that the prospective spouses must both consent to be married to each other in terms of Muslim personal law. It is noted that the provisions of section 3 (3) (a) & (b), 3 (4) (a) & 3 (4) (b) and 3 (5) of the Recognition Act can be easily applied to Muslim marriages with some necessary alterations. The above provisions permit a marriage of a person under the age of 18 under certain circumstances. If not applied with caution that might defeat the very purpose of setting up a minimum age for marriage. This is so because Muslim marriages are notorious for allowing marriage of persons under the age of 18. In countries dominated by Islamic religion, local traditions interpret Islamic scripture as sanctioning and encouraging child marriage. Child marriages are still widespread across the African continent but are more prevalent in Central Africa where it is estimated that four out of ten women aged 20 to 24 were married before the age of 18 years. It is not surprising that some international and regional human rights monitoring bodies have embarked on numerous campaigns aimed at ending child marriages. This is evidenced by the launch of the African Union (AU) Campaign to End Child Marriages in May 2015; the adoption of the AU Common Position on the AU Campaign to end Child Marriages in Africa in July 2015 and in July of the same year, the United Nations Human Rights Council also unanimously adopted a resolution on ending child marriages. In August 2015 the SADC countries also followed suit by drafting the SADC Model Law on Child Marriages. So, it goes without saying that the international human rights position is that child marriages constitute a violation of human rights and ought to be eliminated wherever it exists. The decision is commendable because it forbids child marriage and forced marriage and is in line with the international and regional human rights instruments that condemn early and forced marriage. In 1954, the United Nations General Assembly embraced a resolution requesting on all state parties to abolish cultural practices that are inconsistent with the Universal Declaration of Human Rights (UDHR), by ensuring complete freedom of choice of the spouses by eliminating completely child marriages and the betrothal of young girls before the age of puberty⁶. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage direct state parties to take legislative measures to specify the minimum age for marriage. Moreover, it states that no marriage should be concluded by any person below the minimum age, except where competent authority has granted a dispensation on age, in the interest of the intending spouses and for serious reasons. In the General Comment 14, the Committee on Economic, Social and Cultural Rights (ICESCR) indicated that states have a legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, including early marriage. The Convention on Elimination of all forms of Discrimination against Women (CEDAW) stipulate that the marriage of a child shall have no legal effect and appropriate legislative measures shall be taken to specify the minimum age for marriage. The Convention on the Rights of a Child (CRC) recognises that the body of the child and mind of the child is less mature than adults; consequently, roles appropriate for adults such as marriage are not suitable for a child. The international legal framework outlined above has been amplified by regional legal framework. The African Charter on the Rights and Welfare of the Child (ACRWC) obliges state parties to take all appropriate measures to eliminate harmful traditional practices affecting the welfare, dignity, normal growth and development of the child as well as child marriage through legislation and take action to specify the minimum of marriage as 18 years. The Protocol to the African Charter on Human and Peoples Rights requires state parties to take all necessary legislative and other necessary measures to eliminate all forms of harmful traditional practices which negatively affect human rights of women. The Protocol also requires state parties to adopt necessary legislative measures to guarantee that no marriage takes place without the consent of the parties and that the minimum age for marriage is 18.

⁶ Ngema N.M., *Considering the Abolition of Lobolo: Quo Vadis South Africa*, 2012 (2) *Speculum Juris* 30.

5. Conclusion

As already discussed above, Muslim marriages were not given legal recognition in South Africa, despite the fact that Muslim community has been living in South Africa for more than 300 years ago. It is estimated that Muslim community is nearly 1.5 million in South Africa today. The intolerance of Muslim marriages, more especially through non-recognition has resulted in many social ills that were experienced by women and children in particular. These social ills have prompted the courts to recognise Muslim marriages on a piece meal basis. The courts accorded limited recognition of Muslim marriages, namely: (a) the right of a Muslim wife to succeed her deceased husband's estate, (b) the right to claim upkeep as a remaining partner and the right to a duty of support, and (c) the right to claim provisional maintenance while awaiting for divorce.

The attempts to recognise Muslim marriages through legislation commenced as early as 1990 when the SALRC undertook a study on Muslim personal law but did not make much progress. In 1996 SALRC showed a renewed interest in the study of Muslim personal law and this led to the Draft Bill on Islamic Marriages in the year 2000. Due to Constitutional concerns, the latter mentioned Bill has not escalated to the level of an Act of parliament and it is still a Bill and not an Act. In view of the delays in the enactment of legislation recognising Muslim marriages, the WLC conceived a plan to bring a class action on behalf of its clients to demand the government to give legal recognition to Muslim marriages. The WLC applied for a direct access to the Constitutional Court in terms of section 167 of the Constitution and the application was dismissed on the ground that no proper case has been made for direct access. The resilience of the WLC inspired it to continue with its quest for the recognition of Muslim marriages and its consequences. In November 2015, the WLC finally made the semi urgent application to the Western Cape High Court in an attempt to force the government to recognise Muslim marriages for all purposes. The government appealed the decision to the Supreme Court of Appeal and the government lost the case because the court held that the government failed in its duty to recognise Muslim marriages. Hence the court recognised Muslim marriages for all purposes and left other complicated issues to the legislature. In its decision, the court ordered that marriages of children under the age of 18 are prohibited and also recognised polygynous Muslim marriages. It is submitted already that the prohibition of child marriages is commendable but the permission of child marriages under certain circumstances might defeat the very purpose of ending child marriages in the first place. Moreover, the decision of the court on the recognition of polygynous Muslim marriages for all purposes does not adequately address human rights concerns pertaining to polygyny. It is submitted that the provision on the Draft Bill on Islamic Marriages seem to be in a better position to address human rights concerns. More studies need to be conducted on the recognition of Muslim personal law in general and that will equip law makers to balance such recognition with the doctrine of human rights that is guaranteed in our Constitution.

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