

Publication of Constitutional Court Order:

Women's Legal Centre v The President of the Republic of South Africa and Others

On 28 June 2022, the Constitutional Court of South Africa handed down a judgment: *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23. This judgment recognises the validity of Muslim marriages and protects the rights of people who marry according to Muslim rites, especially women, and the children born of these unions. The following is a summary of the most significant points from the judgment.

The Constitutional Court found that the Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) are inconsistent with rights entrenched in the Constitution of the Republic of South Africa, 1996 (Constitution) as they fail to recognise marriages solemnised in terms of Sharia law (Muslim marriages), which have not been registered as civil marriages, as valid marriages, and to regulate the consequences of such recognition.

The upshot of the Court's finding is that the Marriage Act and Divorce Act unfairly discriminated between people who marry in terms of the Marriage Act and people who marry according to Muslim rites, because it deprives Muslim women and their children of the remedies and protections that they would be afforded if the marriage had been concluded in terms of the Marriage Act.

The President, Cabinet and Parliament were given 24 months to remedy the defective Acts by either amending existing legislation or initiating and passing new legislation.

Pending the finalisation of this legislative process, the following regime will apply in the interim to Muslim marriages:

Muslim marriages subsisting at 15 December 2014 (being the date when this action was initially 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 but not been finally determined as at 28 June 2022 (the date of the judgment), may be dissolved in accordance with the Divorce Act as follows –

1. All the provisions of the Divorce Act shall be applicable but Muslim marriages will be treated as if they are out of community of property (except where there are agreements to the contrary).
2. Section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.
3. Where a husband is a spouse in more than one Muslim marriage, the court will consider all relevant factors and make any equitable order it deems just and may, *mero motu*, order the joinder of an interested party.
4. From 28 June 2022, section 12(2) of the Children's Act 38 of 2005 applies to a prospective spouse in a Muslim marriage concluded after that date and for this purpose, 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 shall apply, *mutatis mutandis*, to Muslim marriages.

The full judgment can be accessed for free on SAFLII (www.saflii.org.za) or on the Constitutional Court's website (www.concourt.org.za) and the DOJ&CD's website (www.justice.gov.za).

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