

**ANNEXURE C**

**THE INTERIM REGISTRATION OF MUSLIM  
MARRIAGES BILL, 2021**

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*(The English text is the official text of the Bill)*

***Bill***

**In the interim and, pending the President and Cabinet, together with Parliament to adopt new legislation or amending existing legislation, as ordered by the Supreme Court of Appeal on 18 December 2020 in the judgment of *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* 2021 (2) SA 381 (SCA), in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in the Republic and to regulate the consequences arising from such recognition, providing interim processes and procedures for the registration of Muslim marriages and some of the matters incidental thereto. To make provision for the registration of validly concluded Muslim marriages; to regulate the consequences of Muslim marriages and the capacity of spouses of such marriages; to regulate certain aspects of the dissolution of Muslim Marriages in accordance with Islamic rulings; and to provide for matters connected that would regulate and provide for all these aspects in the interim and in anticipation of a comprehensive Act of Parliament to be adopted and promulgated in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in the Republic as contemplated by the Supreme Court of Appeal.**

## **Preamble**

**WHEREAS** section 8(2) of the Constitution provides that the Constitution is the supreme law of the Republic and that all law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled;

**AND WHEREAS** section 7(2) of the Constitution places a responsibility on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

**WHEREAS** section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

**AND WHEREAS** section 9(2) of the Constitution prescribes legislative measures to achieve equality for previously disadvantaged persons or categories of persons;

**AND WHEREAS** section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, including gender, sex, religion, conscience, belief, culture, language and birth;

**AND WHEREAS** section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

**AND WHEREAS** section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

**AND WHEREAS** section 15(3)(a) of the Constitution provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law consistent with section 15 and other provisions of the Constitution;

**AND WHEREAS** the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

democratic society based on human dignity, equality and freedom, as set out in section 36 of the Constitution;

**AND NOTING** that the Supreme Court of Appeal ordered Parliament and the executive branch of government to either amend existing legislation or to enact new legislation within 24 months from the granting of the court order to ensure that Muslim marriages are recognised as valid marriages for all purposes in the Republic, in so far as it complies with the provisions of this interim Act or any future Act of Parliament that regulates the consequences arising from such recognition;

**AND NOTING** that South Africa has international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships;

**BE IT ENACTED** by the PARLIAMENT of the Republic of South Africa as follows:—

### **ARRANGEMENT OF SECTIONS**

1. Definitions
2. Objects and application of this Act
3. Right to conclude a Muslim marriage
4. Requirements for a valid Muslim marriage
5. Registration of Muslim Marriages
6. Proprietary consequences in relation to parties to Muslim marriages
7. Equal status and legal capacity of spouses
8. Marriage certificates
9. Resolution of disputes in respect of Muslim marriages
10. Request for hearing
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15. Dissolution of Muslim Marriages
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## 1. Definitions

In this Act, unless the context otherwise indicates –

- (i) **“Bench of Qadis”** means a body intended to act an appeal tribunal, registered with the Department of Justice and Constitutional Development, which shall be presided over by at least one Qadi, as the Chair during any sitting, with a panel of experts, comprising of at least three members to constitute a *quorum* as provided for in this Act, and which, in arriving at a decision as an appeal tribunal in a dispute before them, is required to act in a judicial manner setting out in writing the reasons for their decisions with a clear and discernible *ratio decidendi*, observing the Constitution as the supreme law, the prevailing Islamic Rulings at time in the Republic and then only those of foreign Islamic nations, and to the extent that they are not repugnant to the injunctions of Islam, any applicable laws in the Republic, and the laws of natural justice;
- (ii) **“birth certificate”** means the birth certificate contemplated in Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);
- (iii) **“commissioner of oaths”** means any person appointed in terms of or *ex officio* the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963) as a commissioner of oaths with the power to administer an oath or affirmation to or take a solemn or attested declaration from any person;

- (iv) "**court**" means a High Court or a court for a regional division contemplated in section 29 (1B) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
- (v) "**Deeds Registries Act**" means the Deeds Registries Act, 1947 (Act No. 47 of 1937), as amended;
- (vi) "**Director-General**" means the Director-General of the Department of Home Affairs;
- (vii) "**Family Advocate**" means any Family Advocate appointed under section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987);
- (viii) "**Fatwa**" means a non-binding Islamic legal ruling or opinion in respect of a dispute or question in respect of the interpretation of the prevailing Islamic Rulings at the time to a specified set of facts;
- (ix) "**High Court**" means a High Court of South Africa referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013);
- (x) "**identity card or identity document**" means the identity card referred to in section 14 of the Identification Act, 1997 (Act No. 68 of 1997);

- (xi) **"identity number"** means the identity number referred to in section 7 of the Identification Act, 1997 (Act No. 68 of 1997);
- (xii) **"Islamic Rulings"** means that in the process of considering a matter under the law for the time being in the Republic, all express mandatory Islamic provisions contained in the *Qur'an, Islamic Sha'ari'ah* (of which the *Qur'an* is the most fundamental source) and then the *Sunnah*, and only in the absence of such provisions regarding a particular matter under consideration, then the preferred opinion of the Islamic jurists (*fuqaha*) in the Republic, in accordance with the prevailing customs and usages traditionally observed among Muslim persons residing in the Republic which form part of the religion and culture of Islam;
- (xiii) **"Minister of Home Affairs"** means the Minister of Home Affairs;
- (xiv) **"Minister of Justice"** means the Minister of Justice and Constitutional Development;
- (xv) **"Muslim"** means any person who believes in the Oneness of Allah, recognises Muhammad as His last Messenger and does not believe in any kind of prophethood after him in any sense of the term or of any description whatsoever, and avers himself to be a true Muslim, is a Muslim, appreciating that the law is not concerned with peculiarities in belief, orthodoxy or heterodoxy that may exist in attempting to define the ambit or scope of what is required for persona to be true Muslims, it is sufficient for the purposes of this Act as long as the minimum belief exists;
- (xvi) **"Muslim marriage or *nikah*"** means a religious legal marriage contracted and solemnized by a registration officer in accordance with the prevailing Islamic Rulings at the time;

- (xvii) **“registering officer”** means any person that is an *Imaam* or member of the Islamic *Ulemah* registered by the Minister or an officer acting under the Minister’s written authorisation, as a registering officer for purposes of registering Muslim marriages in terms of this Act;
- (xviii) **“Registrar of Deeds”** means the Registrar of Deeds appointed in terms of section 2 of the Deeds Registries Act, 1937 (Act 47 of 1937);
- (xix) **“this Act”** includes any regulation that may be promulgated by the Minister of Home Affairs or the Minister of Justice;

## 2. **Objects and application of this Act**

- (1) The objects of this Act are to—
  - (a) provide for the registration of Muslim marriages on an interim basis pending the adoption of the legislation contemplated by the Supreme Court of Appeal in *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* 2021 (2) SA 381 (SCA) on 18 December 2020;
  - (b) facilitate and enable the legal enforcement of the rights and obligations of all spouses within a valid Muslim marriage in accordance with the tenets of Islamic Rulings;
  - (c) provide for the registration of Muslim marriages with the Department of Home Affairs; and
  - (d) facilitate the processes and procedures to resolve disputes between



spouses within Muslim marriages by registered Islamic Judicial Councils, as first instance dispute resolution tribunals, and Benches of Qadis, as appeal tribunals, between spouses within Muslim marriages during both the subsistence of Muslim marriages, as well as, on the dissolution thereof.

- (2) This Act applies to all Muslims and to all such non-Muslim females in the Republic with whom the marriage to Muslim males are permissible, who voluntarily and in terms of the prevailing Islamic Rulings at the time conclude a Muslim marriage in terms of this Act, save to the extent that it is expressly stated otherwise.
- (3) A Muslim marriage concluded after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a valid marriage capable of being registered with the Department of Home Affairs and a necessary requirement for the application of the provisions of this Act.
- (4) If a person is a spouse in more than one Muslim marriage, all valid Muslim marriages concluded before the commencement of this Act are for all purposes recognised as valid marriages, capable of being registered with the Department of Home Affairs, the registration of which do not determine or affect the validity of those Muslim marriages.
- (5) If a person is a spouse in more than one Muslim marriage, all such marriages concluded after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as valid marriages capable of being registered with the Department of Home Affairs, the registration of which does determine and affect the validity of those Muslim marriages.
- (6) Spouses in a valid Muslim marriage shall for all intents and purposes be

recognised as spouses in a lawful marriage.

**3. Right to conclude a Muslim marriage**

- (1) All Muslims in the Republic may voluntarily conclude a *nikah*, subject to the limitation relating to the prescribed age of the parties in terms of the tenets of Islamic rulings and any other domestic law of the Republic in operation at the time of the *Nikah*.

**4. Requirements for a valid Muslim marriage**

- (1) For a Muslim marriage to be entered into after the commencement of this Act to be valid –
  - (a) the prospective spouses must both –
    - (i) be above the age prescribed in terms of both the tenets of Islamic rulings and other domestic laws of the Republic in operation at the time of the *nikah*.
    - (j) voluntarily consent to be married to each other in terms of the provisions of this Act; and
  - (b) the marriage must be celebrated and concluded in accordance with the prevailing Islamic rulings at the time.
- (2) Both parties to the Muslim marriage must have the necessary mental capacity to understand the legal consequences of entering into a contract of marriage at the time of the *nikah*.
- (3) No spouse in a Muslim marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) or a civil union under the Civil Union Act, 2006 (Act No. 17 of 2006), during the subsistence of such Muslim marriage.

**5. Registration of Muslim Marriages**

- (1) All Muslim marriages or *nikahs* duly performed in accordance with the prevailing tenets of Islamic Rulings at the time shall be registered with the Department of Home Affairs by the registering officers who performed the *nikahs* within three calendar months from the date the *nikah* was performed, in the prescribed manner.
- (2) The identity and confirmation of the person's age, if deemed necessary by the registering officer, wishing to enter into a Muslim marriage must be established with sufficient certainty to the satisfaction of the registering officer by way of a birth certificate, an identity document, passport, visa, or any temporary or permanent residential or work permit issued by the Department of Home Affairs or any recognised foreign government or its embassy, or if the party does not have any of these documents available, a sworn statement deposed to before a commissioner of oaths of a biological or adoptive parent or relative of the party or such other evidence as the registering officer deems appropriate as proof of that person's identity and, if necessary, age.
- (3) If the registering officer is not satisfied in respect of a party's age or if there is any uncertainty about the age of any of the parties intending to conclude a Muslim marriage, his or her age must be established in terms of section 48 of the Children's Act, 2005 (Act No. 38 of 2005), by the presiding officer of a Children's Court who shall first be required to issue a certificate as prescribed, as proof of the estimated age of that party before a *nikah* may be concluded.

**6. Proprietary consequences in relation to parties to Muslim marriages**

- (1) All Muslim marriages concluded after the commencement of this Act shall be out of community of property without the operation of the accrual

system, in that it is not according to Islam for the husband to be the guardian of his wife(s) property.

- (2) Notwithstanding the provisions of subsection (1) above, subject to the prevailing Islamic Rulings at the time the parties to a Muslim marriage may voluntarily elect to depart from the default position and regulate certain aspects in respect of the proprietary consequences of their marriage through a written notarial contract signed by the parties to the marriage, as they deem fit and at their own free will.

- (3) Any contract contemplated under subsection (2) above shall be signed prior to the solemnisation of the Muslim marriage and registered in accordance with the terms of sections 86 and 87 of the Deeds Registries Act, 1937 (Act No. 47 of 1937).
- (4) Notwithstanding subsection (3) above, a court may on application by either or both of the parties to the Muslim marriage, subject to such conditions as it may deem desirable, authorise the postnuptial execution of the notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses, irrespective whether it was in writing, before the *nikah* in terms of this Act, and may order the registration, within a specified period, of any contract so executed, and the registration thereof, in accordance with section 88 and 89 of the Deeds Registries Act 47 of 1937.

**7. Equal status and legal capacity of spouses**

- (1) All spouses in a Muslim marriage are equal, each with full legal capacity and unhindered status, including the full capacity, in respect of his/her separate estates, to conclude any contract, litigate and own, acquire and dispose of any property they are legally entitled to in accordance with any laws of the Republic.

**8. Marriage certificates**

- (1) Upon the conclusion of the *nikah* the parties shall be provided with a written marriage certificate issued by the registering officer. A copy of this marriage certificate shall be kept in safe custody of the registering officer until such time that the marriage is duly registered with the Department of Home Affairs. The parties shall be entitled to apply for an

unabridged marriage certificate from the Department of Home Affairs as soon as possible thereafter.

- (2) The Minister shall make regulations or issue directions to facilitate and regulate the procedure for the registration of marriages in terms of this Act.

**9. Resolution of disputes in respect of Muslim marriages**

- (1) The Minister of Justice shall establish the necessary regulatory and procedural mechanisms to accredit and register Regional Islamic Judicial Councils or any other already established and recognised Islamic Judicial body within a specified geographical area of jurisdiction to resolve any dispute in relation to any aspect arising from Muslim marriages, including any dispute in respect of the validity of Muslim marriages, as well as the proprietary consequences upon the dissolution of such marriages, including such cases where a dispute arises as to whether or not a valid marriage exists in terms of this Act (in accordance with the tenets of Islamic Rulings) between the applicant spouse and a deceased person, where such applicant spouse seeks to claim benefits from a deceased person's estate in terms of the provisions of the Intestate Succession Act 81 of 1987 and/or the Maintenance of Surviving Spouses Act 27 of 1990.
- (2) These Islamic Judicial Councils or other already established and recognised Islamic Judicial body, as contemplated in subsection (1) above, shall be presided over by an appointed Mufti who will adjudicate the dispute before whereafter a fatwa shall be issued, fatwa may be enforced if made a court order, on application, in chambers, by a Magistrate of the Regional Court for the regional Division within the same area of jurisdiction as the registered Islamic Judicial Councils or other registered Islamic Judicial body.

- (3) Section 2 of the Arbitration Act, 1965 (Act No. 42 of 1965) does not apply to the resolution of disputes in respect of Muslim marriages solemnised and concluded in accordance with this Act.



- (4) The Benches of Qadis are hereby also established and shall also be registered with the Department of Justice to settle disputes that may arise in respect of Muslim marriages as an appeal tribunal in the event that either of the parties are not satisfied with the fatwa that was issued by a Mufti. The outcome as determined by the majority of the Bench shall be binding and enforceable. The decision of the Bench of Qadi shall be final, with no further right of appeal. Nothing in this Act limits a party's right to apply for a review of any decision made to the High Court.
- (5) At least two Benches of Qadis shall be established by the Department of Justice for every province in the Republic. Each Bench of Qadis shall comprise of at least one Qadi, and two other practising legal practitioners registered with the Legal Practice Council, with no less than 5 years' experience, or retired Judges, or other suitable qualified and designated members of the Ulemah appointed by the Department of Justice. Each Bench of Qadis shall therefore comprise of at least three members, but not more than 5 members.
- (6) The Benches of Qadis should comprise of both male and female members.
- (7) The Benches of Qadis shall operate within the legal framework of the Republic and any decision reached by the Tribunal may be enforced through the existing procedures in place in the execution of any judgment of any court of law.

- (8) The parties shall be responsible for registering of any Khula through the lodgement of the certificate with the Department of Home Affairs.
- (9) In the absence of the consent and/or co-operation of the husband, the Muftis, or in the event of an appeal, the Benches of Qadis may issue a declaration that the marriage is dissolved in terms of a Faskh sought by the wife, should they be satisfied that the necessary requirements in terms of the prevailing Islamic Rulings are met.
- (10) The Regional Islamic Juristic Councils established in terms of this Act shall also provide mediation services in respect of disputes regarding:
  - (a) the Mahr;
  - (b) Maintenance during marriage;
  - (c) Maintenance after the marriage is dissolved, and
  - (d) any other family matter that results in a dispute between the parties to the marriage, or within the family household.
- (11) For the purposes of subsection (12) above, the Benches of Qadis shall instruct two qualified mediators to mediate matters they deem appropriate to refer to mediation, in accordance with their own internal procedures to be determined.

**10. Request for hearing**

- (1) The request for hearing by a registered Regional Islamic Council or other established body, or a Bench of Qadis of an appeal, of any of the contemplated disputes as provided for in section 8 above must be in writing and must -

- (a) be addressed to the registered Regional Islamic Council or Bench of Qadis closest to where either of or both parties reside;
- (b) state the name and address of the applicant and respondent;
- (c) state whether the applicant has authorised a representative to act for him or her in the case and, if so, give the representative's name and address;
- (d) set out the grounds for the case;
- (e) give reasons in support of those grounds; and

(f) so far as reasonably practicable, list any documents and the name and address of any witnesses which the applicant intends to rely upon to give evidence, either by way of oral evidence or *viva voce* evidence under oath, in support of the case.

(2) A request for the hearing of an appeal must, if applicable, be accompanied by a copy of any relevant decisions against which the applicant is aggrieved.

(3) The request for hearing must be signed and dated by the applicant or his or her representative.

(4) If a request for a hearing is signed by the applicant's representative, the representative must certify in the request for a hearing that he or she has completed it in accordance with the applicant's instructions.

#### **11. Filing of documents by the respondent**

(1) When the respondent is served with a copy of a request for hearing, it must (unless it has already done so) file with the Regional Islamic Council or Bench of Qadi a copy of any –

- (a) statement(s) of evidence in his/her possession; and
- (b) any other document relied upon by the respondent.

(2) The respondent must file the documents listed in subsection (1) -

(a) in accordance with any directions given by the Regional Islamic Council or Bench of Qadi; and

(b) if no such directions are given, as soon as reasonably practicable and in any

event not later than 12h00 on the court day before the date appointed for any hearing in relation to the case.

**12. Withdrawal of case**

- (1) An applicant may withdraw a case -
  - (a) orally, at a hearing; or
  - (b) at any time, by filing written notice thereof with the Regional Islamic Council or Bench of Qadi

**13. Procedures and regulations**

- (1) The Regional Islamic Council and Benches of Qadis shall, save for that which is provided for in this Act, or any regulations to be promulgated by the Minister of Justice under this Act, determine their own procedures regarding the further conduct of the proceedings before them.

**14. Exclusions**

- (1) An application by any spouse to a Muslim marriage in terms of section 20 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) must be adjudicated by the Division of the High Court having jurisdiction over matrimonial matters.

**15. Dissolution of Muslim Marriages**

- (1) There are three ways in which the dissolution of Muslim marriages may occur: -
  - (a) Through Talaaq, at the request of the husband;
  - (b) By Khula, effected through mutual consent of the husband and wife, whereby the wife returns the Mehr, unless she is exempted therefrom with the consent of the husband; and
  - (c) Through Faskh-e-Nikah, at the request of the wife, with the intervention by an Islamic juridical Council or Bench of Qadi, established for this purpose, on grounds which include, but which are not limited to the following:
    - (i) that the husband neglects or fails to provide for her maintenance despite having the capacity to do so;
    - (ii) that the husband has been sentenced to imprisonment for a period of

- 3 years or upwards and such sentence has become final;
- (iii) that the husband deserts his wife, absconds, or has failed to perform his marital obligations without reasonable cause, for a period of one year;
  - (iv) that the husband was impotent at the time of the marriage and continues to be so;
  - (v) that the husband is insane or is suffering from some chronic disease the cure of which would be lengthy or impossible and which is such as to make the continuance of the marriage relationship injurious to her;

- (vi) that the husband commits any form of domestic violence against his wife,
- (vii) That the husband habitually conducts himself immorally; forces, or attempts to force her to lead an immoral life; obstructs her in the observance of her religious profession or practice; lives and cohabits with another woman who is not his wife;
- (viii) if he has more wives than one and does not treat her equitably in accordance with the requirements of the prevailing Islamic Rulings at the time;
- (ix) that there is serious discord between the parties; or
- (x) that the husband induced marriage through material deception or misrepresentation regarding his condition (medical or other).

**16. Talaaq**

- (1) The Talaaq must be effected through the clear oral expression thereof by the husband.
- (2) The mere thought of a Talaaq or the tacit or implied intention thereon will not result in a Talaaq.
- (3) A written expression of a Talaaq may be submitted to the wife as the record of the fact of an oral Talaaq. The deed may be effected in the presence of –
  - (a) the Regional Islamic Council or Bench of Qadi contemplated in terms of this Act;
  - (b) any registration officer contemplated in this Act;
  - (c) the wife's father or wakeel; or
  - (d) any two witnesses.



**17. Grounds for a Talaaq**

- (1) The following shall constitute grounds for Talaaq, including, but not limited to: -
- (a) the lack of temperamental compatibility between the parties;
  - (b) mutual differences to such a nature and extent that God's limits cannot be maintained; or
  - (c) instances where keeping the marriage intact under the circumstances or compelling the parties by legal restrictions to continue in the marital bond may be more harmful to the parties.

**18. Certificate of Dissolution of Muslim marriages**

- (1) Upon the dissolution of a Muslim marriage, both parties shall be provided with a copy of the certificate of dissolution, after the completion of the Iddah period, by any registration officer or by the the Regional Islamic Council or Bench of Qadi established in terms of this Act.
- (2) The Regional Islamic Council or Bench of Qadi shall maintain its own register of marriages and dissolutions thereof, and may prescribe its own procedure for this purpose.
- (3) The registration officer shall ensure that the Regional Islamic Council or Bench of Qadi has a copy of the certificate of dissolution, should the parties not appear before these bodies when the Muslim marriage is dissolved.

**19. Short title and commencement**

This Act is called the Interim Registration of Muslim Marriages Act and comes into

operation on a date fixed by the President by proclamation in the Gazette.