

REPUBLIC OF SOUTH AFRICA

**INTERIM REGISTRATION OF MUSLIM MARRIAGES
BILL**

*(As introduced in the National Assembly (proposed section 76 Bill); Explanatory summary of the Bill
and prior notice of its introduction published in Government Gazette No of 2021)*

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

(Mr. M.G.E. Hendricks, MP)

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BILL

In the interim, pending the promulgation of other comprehensive Acts of Parliament to be promulgated eventually regulating all aspects of a Muslim marriage, as a starting point, to make provision for the registration of Muslim marriages with the Department of Home Affairs, whereby these religious Marriages may be regarded as valid marriages capable of being registered with the Department of Home Affairs, for these marriages to be recognised as valid marriages for all purposes in the Republic and to regulate the process of registration a consequences of such registration, providing interim processes and procedures for the registration of Muslim marriages and only matters that are strictly incidental thereto; 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 and protection of all the rights of the parties to a Muslim marriage, to be interpreted and applied with any other Act of Parliament that has been promulgated, that is not inconsistent with the provisions of this interim Bill and are relevant and applicable to any aspect of a Muslim marriage.

PREAMBLE

WHEREAS in the interim, and because of the urgent need to at the very least prevent the indignity suffered by all those that enter into a Muslim religious marriage and is not able to register such marriage with the Department of Home Affairs, to provide at this stage at least a process of registration of these marriages as this would have the effect of recognising these marriage as lawful and worthy of protection by the law;

WHEREAS section 2 of the Constitution of the Republic of South Africa, 1996 (“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, keeping in mind that the Constitution provides for legislation to be reasonably accommodating in respect of religious marriages;

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;

AND WHEREAS section 8(2) of the Constitution provides that Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state;

AND 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 and other measures designed for the advancement of persons that were previously disadvantaged by unfair discrimination in order to promote the equal enjoyment of all rights;

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 race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, 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 South Africa has international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships,

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

ARRANGEMENT OF SECTIONS

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. The proprietary consequences in relation to parties to a Muslim marriage
7. Equal status and legal capacity of spouses
8. Marriage certificates
9. Dissolution of Muslim marriages
10. Certificate of dissolution of Muslim marriages
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Definitions

1. In this Act, unless the context otherwise indicates—

- (i) “**court**” means any division of the High Court of the Republic of South Africa contemplated in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013) or any court for a regional division contemplated in section 29 (1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) having the requisite jurisdiction over the parties to a Muslim marriage to grant any order as contemplated in the Divorce Act, 1970 (Act 70 of 1979);
- (ii) “**Department**” means the Department of Home Affairs;
- (iii) “**Divorce Act**” means the Divorce Act, 1970 (Act 70 of 1979), as amended;
- (iv) “**Islamic Rulings**” means the Islamic law applicable at the time, as derived from the customs and usages traditionally observed among the persons professing to be part of the religious faith and live in accordance with the tenets of the *Qur’an* in the Republic of South Africa and which form part of the culture of those persons 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 Shari’ah* (of which the *Qur’an* is the most fundamental source) and then the *Sunnah*, and only in the absence of such express provisions regarding a particular matter under consideration, then the preferred opinion or school of thought that is most in line with the spirit purport and object of the Constitution of the Republic of South Africa, 1996, and then the opinion of the Islamic jurists (*fuqaha*) in the Republic
- (v) “**marriage officer**” means any person that is an *Imaam* or member of the Islamic *Ulemah* that has been appointed as a marriage officer for purposes of this Act by the Minister as a marriage officer for purposes of registering Muslim marriages in terms of this Act;
- (vi) “**Minister**” means the Cabinet member responsible for the administration of Home Affairs;
- (vii) “**a 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 a person to be a true Muslims, it is sufficient for the purposes of this Act as long as he or she has the minimum belief, for this definition is not a definition of a religion that could ever have the effect of excluding any person that truly professes to be a Muslim, and must be read to rather be inclusive as opposed to exclusive;
- (viii) “**Muslim marriage**” or “*nikah*” means a religious and administrative / formalistic legal marriage ceremony whereby the marriage is recorded in a contract and solemnized by a Marriage Officer in accordance with the prevailing Islamic Rulings at the time;
- (viii) “**this Act**” includes any regulation that may be promulgated from time to time by the Minister;

Objects and application of this Act

2. (1) The objects of this Act are to—

- (a) provide for the right of persons that have concluded a valid Muslim marriage to obtain a marriage certificate from the Department after the registration of such marriages with the Department, as well as, the right to have the fact that a valid Muslim marriage was concluded in accordance with the prevailing Islamic Rulings at the time of the marriage and that such a valid Muslim marriage remained in existence up until the time of death, to be recorded by the Department on the death certificates of such persons;
- (b) provide for the registration of the dissolution of valid Muslim marriages with the Department; and
- (c) preserve the status quo regarding the resolution of disputes during the subsistence of valid Muslim marriages, the dissolution of valid Muslim marriages and provide the additional right to any party to a Muslim marriage to dissolve such marriage in in terms of the provisions of the Divorce Act, to the extent that the provisions are is not in conflict with the prevailing Islamic Rulings at the time of the dissolution of such marriages, or resolution of such disputes.

Right to conclude a Muslim marriage

3. All Muslims in the Republic, or such non-Muslim persons that are permitted in terms of Islamic Rulings to enter into a Muslim marriage with a Muslim person, may freely and voluntarily conclude a muslim marriage a *nikah* ceremony, in accordance with the requirements prescribed in section 4 below of this Act and any other applicable regulations in operation at the time of the *nikah* as may be determined from time to time by the Minister

Requirements for a Muslim marital contract to be validly concluded during a *nikah* ceremony

4. (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*; and
- (ii) have the mental capacity and sufficient degree or level of maturity to appreciate that which she is consenting to and that such consent must be voluntarily consent to be married to each other, and to be married in accordance with the provisions of this Act and to be bound by all its provisions and the patrimonial consequences of such amarrriage and the know and predetermined consequences thereof upon the dissolution of such a marriage; 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* ceremony is performed.

(3.) No spouse in a Muslim marriage is permitted to also enter into or cause to be registered a marriage in terms of the Marriage Act, 1961 (Act No. 25 of 1961), a civil union under the Civil Union Act, 2006 (Act No. 17 of 2006), or a customary marriage in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) during the subsistence of such Muslim marriage.

Registration of Muslim marriages

5. (1.) The spouses of a Muslim marriage have a duty to ensure that their marriage is registered with the Department in the prescribed manner to be determined by the Minister by the promulgation of regulations, from time to time.

(2.) Either spouse may cause their Muslim marriage to be registered at the Department in the prescribed manner for the registration of his or her Muslim marriage and must furnish the Department with the necessary documentation and information in order to adequately identify the parties to the marriage, that they had voluntarily consented to the marriage and any additional information or documentation that may be required in order to satisfy the Minister that the parties had in fact concluded a valid Muslim marriage during a *nikah*, and that this marital relationship still exists at the time of the registration thereof, as may be prescribed in regulations the Minister may make from time to time.

The proprietary consequences in relation to parties to a Muslim marriage

6. (1.) In accordance with the tenets of Islam and current prevailing Islamic rulings, all Muslim marriages concluded after the commencement of this Act shall automatically be out of community of property without the operation of any accrual system, and in no respect shall the husband be regarded as the guardian of his wife's property and same applies *vice versa*

(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 any aspect in respect of the proprietary consequences of their marriage through a written notarial contract signed and registered by the parties to the marriage, at their own free will.

(3.) In respect of Muslim marriages already concluded prior to the coming into force of this Act, no provision in this Act affords any spouse any more rights or obligations unless the parties both parties wish to be bound by and protected by the operation of this Act and voluntarily elect and jointly cause their already existing Muslim marriage to be registered with the Department of Home Affairs within 24 months from the coming into force of this Act. Further to the foregoing, notwithstanding any provision contained in this Act, in no way does this Act prevent or prohibit a Muslim person in a Muslim marriage

(4.) Any contract contemplated under subsection (2) above shall be signed prior to the solemnisation of the Muslim marriage during the *nikah* ceremony and registered in accordance with the provisions contained in sections 86 and 87 of the Deeds Registries Act.

(5.) Notwithstanding subsection (4) 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.

Equal status and legal capacity of spouses

7. (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.

(2.) Notwithstanding anything contained in this Act, the validity of any marriage contract already entered into between persons in accordance with tenets of Islam and the prevailing Islamic rulings at the time of such marriage shall not be affected by the promulgation of this Act or by virtue of an election made by the parties not to have their marriage registered in terms of this Act.

Marriage certificates

8. (1.) Upon the conclusion of the Muslim marriage during a *nikah* the parties shall be provided with a written marriage certificate issued by the marriage officer. A copy of this marriage certificate shall be kept in safe custody of the marriage officer until such time that the Muslim marriage is duly registered with the Department of Home Affairs by the Parties to the marriage. The applicant shall be entitled, on application to the Minister, to an unabridged marriage certificate from the Minister as soon as possible thereafter.

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

Dissolution of Muslim marriages

9. (1.) A Muslim marriage, irrespective of when it was entered into, may be dissolved by a court by a decree of divorce granted in terms of the Divorce Act, 1970 (Act 70 of 1979), as amended, and to the extent that it may be applicable having regard to all relevant factors, including but not limited to any contract concluded between the parties, the prevailing Islamic rulings.

(2.) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a Muslim marriage.

(3.) A court granting a decree for the dissolution of a Muslim marriage—

(c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;

(d) may, subject to the Children's Act, 2005 (Act 38 of 2005), make any order in respect of the maintenance, custody, or guardianship of any minor child of the marriage; and

(e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with any contract concluded between the parties and then prevailing Islamic Rulings at the time.

(4.) Nothing in this section should be construed as limiting the role, recognised in Islamic rulings, of any person, including any established Muslim judicial body, in the mediation, in accordance with Islamic rulings, of any dispute or matter arising prior to the dissolution of a Muslim marriage by a court.

(5.) Nothing in this section should be construed as altering or affecting the rights of any spouse to a valid Muslim marriage or the *status quo* immediately prior to this Act coming into operation in respect of the resolution of disputes relating to Muslim marriages or the dissolution of a Muslim marriage.

(6.) Any party to a Muslim marriage that is dissolved after this Act came into force shall, irrespective of the manner how the Muslim marriage is dissolved cause the fact that the marriage has been dissolved to be recorded with the Department in the manner to be prescribed and determined by the Minister in the regulations to be adopted from time to time.

Certificate of Dissolution of Muslim marriages-

10. (1.) Upon the dissolution of a Muslim marriage, and the registration thereof with the Department,

any party to a Muslim marriage, shall be entitled, on application to the Department in the prescribed manner to be determined by the Minister to a certificate of dissolution of the Muslim marriage.

Short title and commencement

11. (1.) This Act is called the Interim Registration of Muslim Marriages Act, 2021, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.