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Ref: Marriages Section

Date: 6 January 2022

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BRIEFING

BEFORE THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

ON THIS, THE 2ND DAY OF MAY 2023

BY THE HONOURABLE MR GANIEF HENDRICKS (MP):

LEADER OF THE AL-JAMA-AH POLITICAL PARTY IN PARLIAMENT

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2. Mr Mogamad Ganief Ebrahim Hendricks (AL JAMA-AH)
3. Ms Anthea Ramolobeng (ANC)
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INTRODUCTION

1. I am both honoured and proud to stand here today, in a place that is one of the apex symbols of our vigorous and lauded Constitutional democracy. It carries the echoes of the voices of the multitudes of our diverse peoples, which breathes life into our multi-party system of democratic government. It is spaces like these which ensure accountability, responsiveness and openness of our government. I hope for a positive response.
2. It is in this space that matters of immense public interest are debated, where we hear both the theses and antitheses of the most critical problems our society is faced with, and it is here, in this manner, that important syntheses are arrived at in solving these critical issues. And it is in embracing these values and principles, that I stand before you today.
3. We stand here, reminded that the Constitution is the supreme law of the Republic, and that all law and all conduct that is inconsistent with it, is invalid. Let us remember that the obligations imposed by our Constitution must be fulfilled, by each and every one of us.
4. It was on this premise that our courts had to step in to address the state's failure to deal acceptably, lawfully and Constitutionally with Muslim marriages. So, when our Constitutional Court found fault with the Marriage Act and the Divorce Act due to their failure to meet the important constitutional principles of dignity and equality, among others,¹ because it fails to recognise Sharia marriages as valid marriages, it was Al-Jama-ah who, fuelled by the support of its constituency and Muslims affected by these deficient laws across our various provinces, took the responsibility of crafting a Bill that we, amongst ourselves, refer to as the 'bare-bones' interim Bill.

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5. The intention which has motivated Al-Jama-ah from the start, and indeed, which underpins this Bill, is to deal exclusively, and decisively with the essential aspects required to ease the plight of potential spouses to a Muslim marriage. Thus, an important provision which made its way in this “Bare-Bones” interim Bill is the establishment of a mechanism for the registration of Muslim marriages with the Department of Home Affairs.
6. It was always understood that this would be an interim measure to address the harm immediately, while the Department gets its gears into motion to ensure Constitutional compliance by it. Not a day longer must woman in a Sharia marriage be harmed. A waiting period of 2 decades is not acceptable in a democratic South Africa. So, this justifies immediate relief. For Oliver Tambo the dignity of women was of utmost importance and apply to Muslim wives. This Bill was therefore intended to have the effect of a so-called ‘sunset clause’ – meaning, it would be in place until the adoption of final legislation by Parliament, coupled with the repeal of existing statutes, or the amendment of the existing legislation to include such recognition and registration, to cure the constitutional invalidity of these two Acts of Parliament, and the failure by the state to meet its constitutional duties towards the Muslim communities in South Africa.
7. This bare-bones Interim Registration of Muslim Marriages Bill was published for public comment and several amendments were made with the assistance of the Parliamentary Drafting Team and the Constitutional Compliance Committee. I am very grateful to Parliament’s legal team; we would like to acknowledge the work of Al Jama-ah’s legal advisors Advocates Yusuf Khan Dalwai and Anton van Loggerenberg at High Court Chambers and to this Committee (Department?) for its assistance throughout the process. This ensured the delivery of a final product that is constitutionally compliant.
8. I like to add that there was strong advocacy for an opt in and opt out clause as follows:

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(i) This Act will apply only to those Muslim marriages in which the husband and the wife (“couple”) “opt in” for the application to their marriage of the laws promulgated under such Act. During the course of the registration of their marriage, the couple, which desires to “opt in”, shall specifically record this election, in writing.

(ii) Where a couple i.e., both husband and wife do not “opt in” in the prescribed manner, they will be deemed to have “opted out”, in which case the provisions of the Act will not apply to their marriage. Similarly, the provisions of the Act will also not apply to their marriage when during the course of registration of their marriage, they, in writing, “opt out” i.e. they elect that their marriage will not be governed by the provisions of this Act.

(iii) A couple who were married:

- prior to the commencement of the Act;
- in terms of Islamic Law only,
- may, should they so desire, “opt in” and register their marriage under the Act or “opt out”.

(iv) A couple whose marriage is registered under the Marriage Act 25 of 1961 and the Matrimonial Property Act 1984, may, should they so desire, convert the registration of their marriage to one under this Act, in which case the provisions of this Act from date of such registration will commence to apply to such marriage, to the exclusion of the provisions of the Marriage Act 25 of 1961 and the Matrimonial Property Act 1984 i.e. the provisions of the Marriage Act 25 of 1961 and the Matrimonial Property Act 1984 will no longer be applicable to such marriage which will be governed solely by this Act.

(v) The marriage of the couple which has specifically or otherwise “opted out” i.e. excluded the application of the provisions of this Act to their marriage will be governed strictly by the provisions of Islamic Law and the Legislature will, in due course, through legislation establish *Sha ari’ ah* (Islamic Law) Courts for the adjudication and determination of all litigation relating thereto, strictly in terms of Islamic Law.”

9. My response is that this opt in and opt out clause can be complied with all that the couple has to do is not to present their Nikkah certificate to the Department of Home Affairs and

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not apply for a valid Civil Marriage Certificate, this means the status quo will remain for them.

10. I am further very pleased that this Bill has received a certificate from the drafting and constitutional compliance committee, confirming that the Bill complies with the Constitution of the Republic of South Africa, 1996. It attests to the hard work that has been put in by my legal team, in serving both the people of this City and across our country, as well as in upholding our Constitution. Indeed, we have always taken, and will continue to take this role very seriously.
11. Our goal remains unchanged. To establish an immediate mechanism like today to provide acceptable evidence that a Muslim marriage persists, so that the parties who need to prove this can do so in a manner which is recognised by our courts and departments, is imperative for us. This was at the crux of the problem before our courts in the first place. Our Bill has posed a solution to our statutory Constitutional dilemma.
12. To have an interim measure in place will present an immediate answer to the problems we've heard of, and it will show commitment by all of us to our constitutional mandate and duty. Any further unnecessary delay will put us at risk of defying the judgement of the Constitutional Court.
13. We need to remind ourselves that the Constitutional Court has provided Parliament with 24 months to make the necessary legislative changes. We are now just about 13 months away. Only but 13 months away. Let us think seriously about that.
14. Parliament is required to put in place the legislative framework to meet the Constitutional mandate imposed by the Constitutional Court. In doing so, it will have to address not only those issues which have been met with broad consensus, but it will also have to find

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solutions to those issues of stark contention that remain unresolved, and which have been topics of vigorous debate since 1999.

15. This House will recall that in 1999, a Project Committee of the South African Law Reform Commission was established and headed by the respected Honourable Justice Mohammed Navsa, judge at the Supreme Court of Appeal at the time. The Project Committee further consisted of members of the Ulama, the South African Parliament, an advocate, a Professor of Law and a member of the Law Reform Commission. The Project Committee was mandated to draft legislation to recognise Muslim marriages. From 1999 until 2002, the Project Committee conducted extensive consultations with different sections of the South African Muslim community as well as secular human rights organisations. These attempts failed miserably. This was largely because this attempt was hinged on attempts to codify Islamic private law. As the late Chief Justice Ismail Mahomed commented, the codification of Islamic law is not the way to go to regulating the lives of Muslim people in South Africa. It is, however, necessary for our Constitutional state to afford the important and basic rights and protections to Muslim people that are married or intend to marry in terms of Islamic law in South Africa, in a manner that ensures justice, fairness, equality and parity within these relationships as well as in relation to others who enjoy such rights and protections, under the Marriage Act, Civil Union Act and the Recognition of Customary Marriages Act. This is precisely what I have done and I want this Portfolio of Home Affairs to Support.

CONTENTS OF THE BILL

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16. The Registration of Muslim Marriages Bill, 2022, also referred to as the 'bare bones' interim Bill, has had a plenary reading before all the political parties represented in the National Assembly of Parliament. I remind those present of the content of this Bill, as follows:
 17. In summary, this Bill makes provision for:
 - 17.1. the recognition of Muslim marriages;
 - 17.2. the requirements for the conclusion of a valid Muslim marriage;
 - 17.3. the solemnisation of Muslim marriages;
 - 17.4. the registration of Muslim marriages;
 - 17.5. the proprietary and other consequences of Muslim marriages;
 - 17.6. the dissolution and consequences of dissolution of Muslim marriages; and
 - 17.7. the automatic repeal upon the promulgation of any final legislation by Parliament which addresses the failures identified by our Courts.
18. The Bill is intended to regulate the recognition, requirements, solemnisation, registration, proprietary and other consequences, dissolution, and consequences of dissolution of Muslim marriages; and to provide for matters connected therewith.
19. Section 1 provides for definitions of key terms and concepts unique to Muslim marriages and required procedures and role players in the solemnisation thereof. A key term is the definition of Islamic Law (Sharia), which means the law as derived from traditional customs (Al-Urf), the two primary sources, namely, the Quran and the Sunnah (Prophetic model) and that uses juristic tools such as ijma (the consensus) of Muslim Jurists of the individual jurist's qiyas (analogical deductions) to issue legal edicts. "Muslim Marriage", subject to section 2 , is a legal contract of marriage that regulates the consequences of the parties' intended marital relationship, concluded during a ceremony referred to as nikah in accordance with Islamic Law.

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20. Section 2 provides for the application of the Bill, to a Muslim marriage concluded after commencement. The Bill would also apply to a Muslim marriage concluded before commencement, if the parties to that Muslim marriage elect to have their marriage so registered with the Department.
21. Clause 3 provides for the recognition of Muslim marriages as valid in law.
22. Clause 4 provides the requirements that the parties must comply with in order to conclude a valid Muslim marriage under the Bill. Parties must comply with the Islamic Rulings regarding required age as well as with the prescripts already set out in sections 24 to 27 of the Marriage Act. This clause therefore accords with the current statutory marriage regime and accords with International and regional Human Rights Treaties and Declarations, such as the SADC Protocol on Gender Development. Such treaties provide that while no person under 18 may marry, there may be other exceptions/specifications in law, provided that they take account of the best interests of the child. Other requirements under this clause include that the Parties must be of sound mind; They must not be aware of any lawful impediment to their proposed marriage; The marriage must be freely and voluntarily entered into; and Consent to be married to each other must be provided in writing.
23. Clause 4(2) provides that a prospective wife must determine the dowry that she expects from her prospective husband. The dowry may include the performance of any obligation prior or after the marriage has been confirmed. The acceptance of requested dowry by the prospective husband creates a binding obligation on that prospective husband, which will never prescribe.
24. Clause 4(3) provides that the parties may each mandate a person to negotiate the dowry on behalf of the parties to the marriage.

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25. Clause 4(4) provides that the agreed terms of the dowry must be recorded in writing and noted with the marriage certificate issued by the marriage officer. This provision has no equivalent in civil law and is meant to provide a measure of financial security to women in Muslim marriages. The passage of this Bill would permit the enforceability of this Shariah-law right which cannot currently be enforced.
26. Clause 5(1) provides for the solemnisation of Muslim Marriages by a marriage officer. It provides that the marriage must be conducted: in the presence of the parties to the Muslim marriage themselves; and in the presence of at least two competent witnesses. Clause 5(4) provides the marriage formula, in accordance with Islamic law tenets.
27. Clause 6 provides for the process of registration and the responsibilities of the Marriage Officers
28. in this process. Such responsibilities include to:
 - 28.1. complete a certificate on the prescribed form;
 - 28.2. state that at the time of the solemnization of the marriage he was entitled to solemnize that marriage;
 - 28.3. record the details of the parties to Muslim marriage, and the date, time and place of the solemnisation thereof;
 - 28.4. note the terms of the dowry as contemplated in Clause 4(4);
 - 28.5. indicate the matrimonial property regime contemplated selected by the Parties within a reasonable period after the conclusion of the Muslim marriage, transmit the marriage register, certificate, and any other prescribed documents, to an authorised officer contemplated in the Identification Act; and
 - 28.6. keep record of the marriage, including a copy of the certificate contemplated in sub-Clause (2) until such time that the Muslim Marriage is duly registered with the Department.

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29. Clause 6(4) allows for the retrospective effect of the right to have Muslim Marriages registered in accordance therewith, and on application by either spouse to a Muslim marriage.
30. Clause 6(5) permits either party to a Muslim marriage to request a marriage certificate, or copy thereof, which is to be issued by the Department.
31. Clause 6(6) provides that the marriage certificate is prima facie proof that a valid Muslim marriage exists between the spouses, and that it has been registered with the Department.
32. The above provides critical relief to a Muslim spouse who seeks the legal vindication of any of their rights which arise from the marriage, which have to date been unobtainable.
33. Clause 7 of the Bill is of the utmost importance. It provides for the Proprietary consequences of Muslim marriages, as follows:
 - 33.1. The parties to a Muslim marriage must voluntarily choose the matrimonial property system that will apply to their marriage.
 - 33.2. This election must be indicated on the home affairs prescribed form. This is a creative innovation proposed by the Minister of Home Affairs to reduce legal cost and notarial deed cost for indigent couples.
 - 33.3. If the chosen matrimonial property regime is that of out of community of property, an antenuptial contract must normally be entered into and must comply with Chapter VII of the Deeds Registries Act. The Ministers innovation does away with this.
 - 33.4. 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 before the Muslim

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marriage, and may order the registration, within a specified period, of any contract so executed, in accordance with section 88 of the Deeds Registries Act.

- 33.5. Provides for the applicability of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) to the matrimonial property regime chosen by the parties.
34. Clause 8 of the Bill is similarly of great importance. It provides for the equal status and legal capacity of spouses, stating that:
“Each party to a Muslim marriage has full status and capacity, including the capacity to acquire assets and to dispose of them, and to enter into contracts and to litigate in their own name.”
35. Clause 9 of the Act deals with the Dissolution of Muslim marriages. To safeguard the interests of minor and dependent children born of the Muslim marriage, it provides that a court must consider the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and the Children’s Act, 2005 (Act No. 38 of 2005), in addition to such provisions in the Divorce Act.
36. The Bill provides that a court granting a decree for the dissolution of a Muslim marriage may, in addition to any order provided for in any other relevant statute—
- 36.1. order that any person who in the court’s opinion has a sufficient interest in the matter be joined in the proceedings; and
- 36.2. 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 the prevailing Islamic Rulings at the time.
37. Nothing in this section should not 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.

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38. Clause 10 empowers the Cabinet member responsible for the administration of Home Affairs to make regulations on various matters required under the Bill. Clause 10 (2) obliges the Minister to publish any regulation made, in the Government Gazette.
39. Clause 11 provides for the limited duration of the application of the Bill. Clause 11(1) provides for the abrogation thereof, stating its limited duration, as follows:
“This Act is automatically repealed upon the commencement of an Act of Parliament regulating the recognition, solemnisation, proprietary consequences and dissolution and consequences of dissolution of, Muslim Marriages.”
40. Clause 12 provides for the short title and commencement of the Act, stating that:
“This Act is called the Registration of Muslim Marriages Act, 2022, and comes into operation on a date fixed by the President by proclamation in the Gazette.”

CURRENT POSITION - PROBLEMS PRESENTED

41. The Department of Home Affairs has made an attempt to comply with the order of court in respect of Muslim marriages. However, the department has erroneously followed the order of the Supreme Court of Appeal, and not to the Constitutional Court. The Director-General of the Department of Home Affairs, Mr L T Makhode has thus issued a circular to all its marriage officers / officials / registrars on 6 January 2022, instructing them to register all Muslim marriages in terms of the “Recognition of Customary Marriages Act, 1998 (Act 120 of 1998)”, as amended, **with the necessary modifications**”.
42. This circular is incorrect, and unsound in law, as it does not meet the order handed down by the Constitutional Court, which has replaced the order of the Supreme Court of Appeal. It is therefore outdated. It has further misinterpreted the requirements as is currently placed upon it by the Constitutional Court.

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43. It should be understood and acknowledged that Muslim marriages cannot be recognised, registered, and regulated by the Recognition of Customary Marriages Act, save to the limited extent that it finds application to regulating the consent of minors, as provided for in the Constitutional Court's judgment. In that regard, the same can be said of the Marriages Act, as the specific sections in the Recognition of Customary Marriages Act, actually invokes the applicability of the relevant sections of the Marriages Act, which delineates requirements for marriages to minors and related consent parameters. The sections that the Constitutional Court binds the state to apply to Muslim marriages in the interim, constitutes the generic but important children's rights provisions, found in all statutes that regulate marriages.
44. It must be further noted that the Recognition of Customary Marriages Act in its entirety cannot be applied to Muslim marriages in any manner that would be considered Constitutionally and legally defensible or sound. This is because "customary law" is specifically defined in the Recognition of Customary Marriages Act as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". While this definition may include many indigenous African people that are also Muslim, for generations since the founder of Islam in South Africa, Sheikh Abadin Tadia Tjoessoep also known as Muhammad Yusuf al-Maqassari came 350 years ago, it would not provide for the specific application of Shariah law to such marriages at all, and in fact, it would create a conflict of laws. One merely has to consider how vastly different the concept of Lobola is to the Mahr (Islamic dowry), then one can appreciate how in practice, this can create problems for the prospective wife within the family and may open up risk factors for practices like orchestrated Ukuthwala, domestic violence, or abandonment – this is an untenable situation! The Act patently would not be applicable to and excludes those Muslims who are not indigenous African people.

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THE PROPOSED SOLUTION

45. Al-Jama-ah has presented the Department of Home Affairs with a proposed new revised circular that is in line with the Constitutional Court judgment I mentioned at the outset of this briefing. If the Department of Home Affairs accepts this proposal, then there would be no need for the promulgation of the Registration of Muslim Marriages Bill, as the Circular would, in meeting the interim order of the Constitutional Court, also provide key administrative steps to ensure the immediate registration of Muslim marriages and the matrimonial property regimes selected by the parties.
46. The Circular would also, in meeting the interim order of the Constitutional Court, regulate the aspects concerning the consent of a minor to a Muslim marriage, in a manner that accords with the current statutory marital regimes.
47. Al-Jama-ah further had a meeting with the Minister of the Department of Home Affairs in respect of many of these issues, as well as others. This meeting was arranged by the chairman of the portfolio committee of Home Affairs Mr Mosa Steve Chabane. The Minister put forward an option that his department will present a single marriages Bill that would regulate all marriages in South Africa, including Muslim marriages the later will be inline with this bill [B30-2022] - Registration of Muslim Marriages that is before the portfolio committee today.
48. The Minister relayed his legitimate concerns that public participation on the same matter, over a relatively very short period of time, may create public confusion and outcry, in addition to potentially leading to fruitless and wasteful expenditure for public participation, through two separate processes which would essentially lead to the same outcomes.

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49. We have taken heed of the Minister's concerns and the impact this could have on members of the public and the public interest.
50. To address our immediate Interim concerns in relation to Muslim marriages and the harm that it causes to Muslim wives as I present to you as the lack of mechanisms to ensure the realisation of rights around this, however, Al-Jama-ah presented the Minister with a copy of the proposed new circular which it has developed, which meets the central aims of the Interim Bill. We advised the Minister that if the Department of Home Affairs should issue this new circular regulating the registration of Muslim marriages in the interim, then I will withdraw my Private Member's Bill to ensure that there is no wasted money from the fiscus, neither confusion nor participation fatigue by the public, who otherwise would be required to input into both Bills which, in the case of Muslim marriages, would be addressing the same thing. The public essentially may be struck into confusion by being met with the publication of two different marriages Bills, with entire sections duplicated within them.
51. This agreement also encompasses the inclusion in the Department's One -Statute Marriages Bill, of the essential contents of my Private Member's Bill. This should lighten the load of the department, as my Private Member's Bill has already passed the Constitutional Certification process successfully and has also been met with overwhelming approval by the majority of stakeholders consulted in the drafting thereof.
52. Al-Jama-ah's proposal was given to the Minister, and the proposed new circular should be considered by the Minister on a very urgent basis.
53. I can, accordingly, withdraw my Private Member's Bill on the Registration of Muslim Marriages Bill from the floor, thus removing the necessity for its publication for public comment and a vote by this House.

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54. In respect of the regulation of the consequences of the dissolution of Muslim marriages, the Cabinet has instructed the Minister of Justice and Correctional Services, and the Minister of Home Affairs to come up with a proposal on how these ministries will comply with the Constitutional Court order in respect of this issue. In the meantime, AL JAMA-AH will pursue its proposed amendments to the Divorce Act order by the Constitutional Court with a clear warning that no extension will be granted which deals exclusively and strictly with a few critical issues to resolve the problems identified by the Constitutional Court. This trajectory will be maintained. And they just have 13 months left to do so otherwise the President and the Executive will be in contempt of court and the dignity of Muslim wives will continue to be harmed. and the two primary departments focussed on getting it right in respect of affording the rights and protections to prospective spouses in Muslim marriages, the goal post may be missed when it comes to the regulation of the consequences of divorces of spouses in Muslim marriages. Should this happen, the Muslim community may find themselves in the untenable situation of court ordered divorces in a manner which may violate the tenets of Shariah Law. This would not only create confusion, but it would be self-defeating as Muslims who hold true to their practice will avoid the courts altogether, maintaining the problematic status quo. It would render moot or untenable the imposed remedy. The departments would also find themselves in contempt of court like I suggested earlier at that juncture. It is thus proposed that the best way forward is that a decision on the proposed amendments to the Divorce Act should be facilitated by the portfolio committee, and that AL JAMA-AH's second private member's bill, which deals with this matter, must proceed with due urgency.

55. Honourable Members, I thank you.