

ESTATE PLANNING, ISLAMIC MARRIAGES AND THE CONSTITUTION

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OPSOMMING

Doel van hierdie studie: die doel van hierdie studie is om die probleme wat voorkom by die boedelbeplanning van persone wat getroud is ingevolge die Islam Persone reg, te identifiseer, waar hierdie probleme ontstaan as gevolg van die nie-erkenning van Islam huwelike deur die Suid-Afrikaanse reg met inagneming van die bepalings van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 (hierna die Grondwet). Hierdie probleme is geïdentifiseer met die oog daarop om voorstelle te maak rakende die voorkoming en oplossing daarvan.

Navorsingsmetode: Hierdie studie was hoofsaaklik 'n literatuurstudie, daar is egter ook regsvergelijkend opgetree tussen die Suid-Afrikaanse en Islamreg met betrekking tot huweliks- en erfregwetgewing.

Gevolgtrekking: Die regte van elke persoon in Suid-Afrika om die godsdienst en kultuur van sy keuse na te volg word in die Grondwet verskans. 'n Huwelik tussen persone wat gesluit is volgens die Islamreg geniet egter steeds nie volle erkenning in Suid-Afrika nie. Erkenning word slegs gegee aan die huwelike wat geregistreer is en dan word daardie huwelik beskou as 'n Westerse huwelik wat onderworpe is aan die reëls soos neergelê in Suid-Afrikaanse wetgewing.

Die nie-erkenning van ongeregistreerde huwelike, asook die feit dat geregistreerde huwelike as Westerse huwelike beskou word, lei tot vele dispute wanneer die boedel van een van die gades moet vererf. Die dispuut ontstaan veral tussen dié erfgename wat steun op Islam beginsels ten opsigte van vererwing en dié in wie se guns dit sal wees indien Suid-Afrikaanse reg van toepassing sal wees.

Nadat die gevolge van die nie-erkenning van Islam huwelike in oënskoue geneem is, is daar tot die gevolgtrekking gekom dat die probleme wat ondervind word by erfopvolging op veral drie wyses voorkom kan word.

Eerstens moet oorweging geskenk word aan die stigting van familie trusts waarin die erfgename in ooreenstemming met die *Shari'ah*, as inkomste begunstigdes en later as kapitaalbegunstigdes aangewys word.

Boedelbeplanning sal verder insluit dat 'n goed deurdagte testament opgestel word waarin die testateur sy wense uitspreek dat sy boedel moet vererf volgens die Islam erfreëls. In die testament moet die testateur ook melding maak daarvan dat hy/sy getroud is volgens Islam reg, sodat sy/haar gade ook as deel van die groep van erfgename gesien kan word.

Laastens sal die probleme opgelos word indien daar volle en onvoorwaardelike erkenning verleen word aan huwelike gesluit onder die religieuse bedeling van Islam.

Introduction

Estate planning is an essential part of any person's existence. It is important for all legal practitioners to have a good grasp of estate planning as to be able to assist the public in getting their financial matters in order, drafting a will and distributing their estate in a cost effective manner. Legal practitioners should also have knowledge of their clients' culture and religion.

Islam is a religion with the largest number of followers in the world.¹ Islam is the second largest religion in South Africa and it is therefore likely that an Islamic couple will approach an attorney or estate planner to advise them in planning their estate. When assisting an Islamic couple with estate planning it becomes important not only to understand the rules of estate planning, but also to know the traditions and religious laws associated with Islam in the South African context.

Due to the lack of knowledge of many basic, but fundamental aspects in regard to the law of Islam, disputes in matters of estates and inheritance are an almost daily occurrence.² Often disputes arise from the fact that many Islamic people still marry according to Islamic law without registering their marriage according to section 29A of the *Marriage Act*.³ This leads to non-recognition of their marriage in accordance with South African law seeing that recognition is only given to marriages that are registered according to the aforementioned Act.

The recognition of Muslim Personal law in South Africa must be viewed in the light of the *Constitution of the Republic of South Africa*.⁴

The state actively intervenes in many areas of private life especially in the realm of personal and family law. This has the effect that a couple married

¹ Naidoo 2000 <http://www.recognition.html> 14 Aug.

² Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

³ 25 of 1961.

⁴ 108 of 1996, herein after referred to as the *Constitution*.

according to Muslim Personal law is subject to the parameters set by the state in South Africa. There are many statutes, which currently regulate aspects of personal law, for instance the *Matrimonial Affairs Act*,⁵ *Marriage Act*,⁶ *Divorce Act*,⁷ *Matrimonial Property Act*⁸ and the *Recognition of Customary Marriages Act*⁹ to name but a few.

The transition into democracy in 1994 and the adoption of a Constitution with an entrenched Bill of Rights vested all South Africans with rights to dignity, equality and freedom.¹⁰ The issue of greatest concern for any legislation recognising aspects of Muslim Personal law is the compatibility of such legislation with the Bill of Rights as a whole, but particularly with the guarantee of equality.¹¹

The *Constitution* allows for legislation recognising a system of personal and family law adhered to by persons professing a particular religion and the validity of marriages concluded under a system of religious law.¹² Despite the fact that the *Constitution* allows for this amendment, many marriages in the Muslim community are still not considered legally binding unions in South Africa. The only Islamic marriages considered to be legally binding are Islamic marriages registered at a magistrate's court or by a marriage officer.

If, furthermore, one chooses to have one's marriage regulated by Muslim Personal Law, the question of inheritance by way of *Shari'ah* may cause endless problems. These problems are primarily caused by disputes arising from the differences between Islamic inheritance laws and the different

⁵ Act 37 of 1953.

⁶ Act 25 of 1961.

⁷ Act 70 of 1979.

⁸ Act 88 of 1984.

⁹ Act 120 of 1998.

¹⁰ S 9, 10 and 12 of the *Constitution*.

¹¹ S 9 of the *Constitution*.

¹² S 15 and 31 of the *Constitution*.

matrimonial property systems that exist in South Africa.¹³ The family who stand to inherit from the deceased estate according to *Shari'ah* would prefer Islamic law to apply, but the parties who stand to inherit according to Western laws want South African laws to apply.¹⁴

Other problems that could arise from marriages according to Muslim Personal Law are the limitation of maintenance and custody issues.

Another matter in planning the estate of an Islamic couple that needs discussion, is the choice of a matrimonial property system if the couple decides to register their marriage.¹⁵

Thus, the purpose of this study is to identify problems encountered when planning the estate of a couple married according to Muslim Personal law, where the problems arise from the non-recognition of Muslim marriages and complying with the provisions as set out in the *Constitution*. After identifying the problem areas, possible solutions for the identified problems will be sought.

In this study the importance of estate planning will be discussed with the emphasis on the importance of estate planning in Muslim communities. Secondly the rules applying to Islamic marriages and Islamic rules of succession will be described. These laws will be compared with the laws applying to marriages and succession in South Africa. Furthermore, the problems associated with the application of Islamic law in South Africa will be identified. After identifying these problems, it will be possible to suggest solutions. Finally, an estate planning solution best suitable for an Islamic couple in South Africa will be proposed.

¹³ South African Law Commission 2000 <http://www.law.wits.html> 12 Dec.

¹⁴ Al-Haadi 2000 <http://www.alhaadi/se2p2.htm> 1 Aug.

¹⁵ South African Law Commission <http://www.law.wits.html> 12 Dec.

1 The importance of estate planning

Every person, whether in a large or in a small way, has an estate. Each estate consists of assets and debts. When a person dies only his or her assets inherit, but the debts has to be paid out of the estate before the assets can be divided between the successors. To spare successors trouble and agony, it is important consider all the possibilities to ensure that the successors (and oneself) receive the best results from the estate one has established.

Lynn¹⁶ describes estate planning as:

Applying the law of property, trusts, wills, future interests, insurance and taxation to the ordering of one's affairs, while keeping in mind the possibility of retirement and the certainty of death.

Even in these days of high taxes and living costs, many people acquire wealth or control over wealth and careful consideration should be given to the disposition of this wealth if the maximum amount is to be preserved for the beneficiaries.¹⁷

To start planning the estate one needs to assess the following:¹⁸

- The matrimonial property system chosen. This determines how a marriage affects the financial position of each marriage partner. In South Africa the nature and consequences of the matrimonial property system chosen, are not only determined by the common law, but by different customary and religious systems as well.
- The wishes of the person whose estate one is planning. An estate owner's religious beliefs and political views are most likely to influence his view on the results he expects from the estate plan.

¹⁶ Lynn *Introduction to Estate Planning* 1-2.

¹⁷ Casner *Estate Planning* 3

¹⁸ Olivier and Van den Berg *Praktiese Boedelbeplanning* 17-21.

- The personal circumstances of the person one is dealing with.
- The extent of the estate, whether it is a large or a small estate. This is important for determining taxes and estate duty.
- The existence of any trusts, policies, saving accounts, fixed deposits and previous wills.
- The means of income, whether the person has his or her own business or is an employee. This is important for the executor who has to look after the deceased's family after his death. It is also important to establish if the person has his own business, whether it is a company, a closed corporation or a one-man practice.

The following outcomes has to be kept in mind to find a complete estate planning solution:¹⁹

- tax saving
- cash flow
- estate duty
- providing for the family and
- preservation of assets.

Estate planning should be done by the estate owner, the attorney, the accountant or the insurance advisor. Estate planning does not only consist of drafting a will or the buy of insurance, but is an evaluation of the estate owner's estate assets, debts and wishes.

In theory everyone recognises the importance of estate planning, because it has to do with money and money has to do with all our life. But in the practical lives of especially Muslims, estate planning is almost totally neglected.²⁰ Not

¹⁹ Olivier and Van den Berg *Praktiese Boedelbeplanning* 17-21.

²⁰ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

only the uninformed and unwary Muslims, but good practising Muslims also do not pay any attention to this very important, fundamental and decisive aspect.

Wealth has a great amount of temptation and often spurs people to violate the laws of the *Shari'ah* in order to obtain wealth. When it comes to the winding up of an estate and distributing the inheritance, a great number of cases are marred by disputes and conflicts.²¹ Many of these problems can be sorted out in advance by doing proper estate planning.

What needs to be done is to inform Muslims of the importance and the need of getting one's financial matters sorted out according to Islam, drawing one's will and distributing one's estate according to the *Shari'ah*.

2 The Islamic marriage

To fully understand the problems an Islamic couple in South Africa faces, it is important to know the requirements for an Islamic marriage as well as the law surrounding it.

2.1 Requirements

Marriage in Islam is a contract and is concluded by the making of an offer by one party and acceptance by the other party.²² The offer and acceptance must be of immediate effect. Furthermore the offer and acceptance must take place in the same meeting.²³

In Muslim Personal law marriages are permitted from the age of puberty onwards. True consent is always necessary for a valid marriage contract.²⁴ Muslim men can marry women who are Muslim, Christian or Jewish, but

²¹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

²² Alami and Hinchcliffe *Islamic Marriage* 5.

²³ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.html> 12 Dec.

²⁴ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.html> 12 Dec.

Muslim women must marry a Muslim man or become an outsider to the community.

An Islamic marriage calls for the payment of *mahr* or dower.²⁵ This dower is a gift given by the husband to the wife in regards with the proposed marriage.

This payment is seen as an elevation of the woman from her state as object of sale to that of a contracting party in her own right. The *mahr* is not a purchase price to the woman's father, but rather a free gift given to the woman upon the making of the marriage contract and the amount is stipulated by the parties themselves in the marriage contract.²⁶

The *mahr* may be specified or unspecified.²⁷ Specified *mahr* may be paid in two parts, prompt payment immediately upon marriage and a deferred payment.

Deferred *mahr* is an unsecured debt owed by the husband to the wife. The wife may demand the deferred *mahr* anytime during the marriage.²⁸ If the husband does not pay the *mahr* on request, the wife is entitled to refuse herself to him. Usually the deferred *mahr* is not paid until the death of the husband or divorce. If the *mahr* is still due at the time of death of the husband, it must be paid before any distribution takes place.²⁹

2.2 Consequences

A customary Islamic marriage is always out of community of property.³⁰ According to the *Shari'ah*, a husband and wife is the exclusive owner of his or

²⁵ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb; Nasir *The status of women* 48-50.

²⁶ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb.

²⁷ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb; Nasir *The status of women* 49.

²⁸ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb.

²⁹ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb; Nasir *The status of women* 53.

³⁰ Schacht *An Introduction* 167.

her own property. Neither party acquires interest in the property of the other spouse by the simple fact of marriage.

The fact that marriage does not create a joint estate and the absence of a choice to share all the assets in the separate estates, does, however, not mean that a husband in an Islamic marriage does not share his property with his wife.³¹ A wife has a right to all the basic necessities like food, clothing and shelter. It is the duty of the father, husband, son or brother to provide these necessities to a woman.³²

Since the husband is responsible for the wife's and the children's maintenance, the wife's property is for her full use only. No matter how wealthy a wife is she is not obliged to contribute to the welfare of the family, unless she wants to.³³

According to Islamic law a woman is capable of earning, acquiring and owning her own property, wealth and dower.³⁴

2.3 Polygamy

Islamic law allows for a man to have more than one wife, but no more than four at one time.³⁵ Normally the ideal of an Islamic marriage is to be monogamous. The question arises that if monogamy is the ideal, why is polygamy permissible. This issue of Islam cannot be understood apart from the communities' obligations towards orphans and widows.

³¹ Alami and Hinchcliffe *Islamic Marriage* 20-21.

³² Alami and Hinchcliffe *Islamic Marriage* 20-21.

³³ Furman 2000 <http://www.furman.edu/~ateipen/womenislam.htm> 25 March.

³⁴ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.html> 12 Dec.

³⁵ Alami and Hinchcliffe *Islamic Marriage* 16.

One of the conditions for polygamy is that the husband should have the means to deal equitably with all his wives, if not, it is held by the *Qur'an* that the husband rather commits to one wife only.³⁶

In most human societies, females outnumber males. The unbalanced sex ratios become a problem at times of war or illness. It was thus accepted that polygamy is the best solution against indecent activities and the negative growth of the society.³⁷

There may be other more personal circumstances where marriage to more than one wife may be preferable, for example where the first wife is chronically sick or disabled or in cases where a wife is unable to have children, while the husband very much wants them.³⁸

It is often misunderstood in the West that women in other cultures do not necessarily look at polygamy as a sign of degradation, for example women in these societies may prefer to marry a man who has already proved himself to be a responsible husband.³⁹ To the present day, polygamy continues to be a viable solution to some of the social ills of modern societies.

It has to be added that polygamy in Islam is a matter of mutual consent. No one can force a woman to marry a married man and the wife has the right to stipulate that her husband must not marry any other woman as a second wife.⁴⁰

In modern times polygamy is decreasing. This is mainly due to economic conditions, which make it difficult for a man to support two or more households.⁴¹ Other reasons are the spread of education, which has made women unwilling to accept such a marriage and the fact that the gap between

³⁶ Alami and Hinchcliffe *Islamic Marriage* 16-17.

³⁷ Lemu 2000 http://www.ukans.edu/~msa/article/women_status.html 25 March.

³⁸ Lemu 2000 http://www.ukans.edu/~msa/article/women_status.html 25 March.

³⁹ Lemu 2000 http://www.ukans.edu/~msa/article/women_status.html 25 March.

⁴⁰ Alami and Hinchcliffe *Islamic Marriage* 16-17.

⁴¹ Alami and Hinchcliffe *Islamic Marriage* 18.

the numbers of both sexes is not huge.⁴² Therefore it can be said that men in a Muslim society today are more strictly monogamous than men in the Western world.

2.4 Divorce

Marriage in Islam is a sanctified bond that should not be broken except for compelling reasons. Couples are instructed to pursue all possible remedies when their marriage is in danger, to prevent a divorce. Divorce is not to be resorted to except when there is no other way out. Thus, Islam recognises both parties' right to end their matrimonial relationship, but discourages it by all means.⁴³

Islam gives the husband the right for *Talaq* (divorce). The wife has a similar right known as *Khula* or *Talaq-i-Tafmid*.⁴⁴

Talaq is when the husband pronounces divorce without specified reasons and could even be in the absence of the wife or without notice to the wife. After a husband has repudiated his wife three times, they are divorced and this couple can only remarry if the wife has been married to another husband and this marriage has been consummated.⁴⁵

If the husband dissolves the marriage by divorcing his wife, he cannot retrieve any of the marriage gifts he has given her. In the case of the wife choosing to end the marriage, she may return the marriage gifts to her husband.⁴⁶ Returning the marriage gifts in this case is a fair compensation for the husband who is keen to keep his wife while she chooses to leave him. The *Qur'an* has

⁴² Alami and Hinchcliffe *Islamic Marriage* 18.

⁴³ Furman 2000 <http://www.furman.edu/~ateipen/womenislam.htm> 25 March.

⁴⁴ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.htm> 12 Dec.

⁴⁵ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.htm> 12 Dec.

⁴⁶ Furman 2000 <http://www.furman.edu/~ateipen/womenislam.htm> 25 March.

instructed Muslim men not to take back any of the gifts they have given to their wives except in the case of the wife choosing to dissolve the marriage.⁴⁷

In some cases a Muslim wife might be willing to keep her marriage, but finds herself obliged to claim for a divorce on the grounds of her husband's cruelty, desertion without a reason or a husband not fulfilling his conjugal responsibilities.⁴⁸ In these cases the Muslim court dissolves the marriage.

3 Islamic rules of succession

3.1 General

Qur'anic laws of inheritance are extraordinarily specific. According to the *Qur'an* two thirds of the deceased's estate has to be distributed between family members in compliance with the fractional shares as specified in the *Qur'an*.⁴⁹ As a general rule male heirs receive twice as much as female heirs of the same degree.⁵⁰

From the remaining assets the legacies are deducted, which are restricted to one third of the total assets. The legacies can be made to any person, excluding the heirs. Any bequests to an automatic heir are seen as null and void. Furthermore, a person who professes a religion other than Islam cannot inherit anything from a Muslim and vice versa.

Before any succession can take place however, the following has to be paid out of the estate:⁵¹

⁴⁷ Furman 2000 <http://www.furman.edu/~ateipen/womenislam.htm> 25 March.

⁴⁸ Furman 2000 <http://www.furman.edu/~ateipen/womenislam.htm> 25 March.

⁴⁹ RAG 2000 <http://www.ragistan.com/ubb/forum6/HTML/000074.html> 14 Feb.

⁵⁰ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁵¹ Pruthi and Sharma *Islam and Women* 127.

(a) The funeral costs

This consists of the expenses incurred in providing a shroud, the digging of the grave and so forth. The rule in this regard is moderation. Feeding those who have come to attend the funeral is not funeral expenses.

(b) The debts of the deceased, which becomes immediately due by death.

If the debts are equal to or exceed the assets in the estate, the proceeds of the assets are divided among the creditors in proportion to their claims. The heirs are not obliged to fulfil any outstanding amounts in excess of the deceased estate.⁵²

The right of representation, the concept that a predeceased heir is represented by his descendants, does not exist in the Islamic law.⁵³ The right of a wife to inherit cannot be frustrated by repudiation. Legacies can be revoked by declaration or conduct. The legacy also becomes void if the legatee dies before the legator.

Children only have a claim for maintenance against the estate of the deceased if they are poor and then only against their father. Parents have no right to usufruct in the property of their children.⁵⁴

The grounds of exclusion from succession according to Islam has certain similarities with South African law and comes down to the following:

⁵² Pruthi and Sharma *Islam and Women* 128.

⁵³ Radford 2000 http://www.bc.edu/bc_org.htm 22 Feb.

⁵⁴ Schacht *An Introduction* 167.

- being a slave
- having caused the death of the deceased
- difference of religion
- difference of domicile (e.g. Islamic state and a non-Islamic state)⁵⁵

Islam has a purely agnatic form of succession under which only men inherit in favour mainly of the nearest female relatives, the spouse and also of the father.⁵⁶

3.2 Calculating the shares

Whatever remains of the estate after the payment of the above-mentioned expenses will be distributed among the heirs according to the pre-determined ratios as set out in the *Qur'an*.⁵⁷

The calculation of the shares is difficult and is best described by way of an example.⁵⁸

A man dies and is survived by three sons and four daughters. All the children are married, except for the youngest daughter whose husband has died.

Assuming the man left no spouse and no parents, the sons would share 60% of the estate and the daughters 40%. If the man left a spouse, but no parents the wife would receive 12.5%, each son 17.5% and each daughter 8.75%.

3.3 Wills

⁵⁵ Schacht *An Introduction* 167.

⁵⁶ Schacht *An Introduction* 167.

⁵⁷ Pruthi and Sharma *Islam and Women* 127.

⁵⁸ RAG 2000 <http://www.ragistan.com/ubb/forum6/HTML/000074.html> 14 Feb; Anderson *Islamic Law* 64-66

A will in Islamic law is used for making the legacies, to appoint an executor or guardian and to declare unfulfilled obligations, as well as declaring any trust property held for another.⁵⁹ The reason for this is that there is no appointment of an heir in Islamic law and testation is restricted to one third of the remaining assets after the fixed shares has been dealt with.⁶⁰

A will wherein the *Shari'ah* has been violated is seen as totally null and void.

Despite directives given in the void will, the heirs will still be entitled to the shares that has been pre-determined by the *Shari'ah*.⁶¹

4 Application of Islamic law in South Africa

4.1 Constitution of the Republic of South Africa

The recognition of Muslim Personal law in South Africa must be viewed against the *Constitution*.

The *Constitution* vests all South Africans with rights to dignity,⁶² equality⁶³ and freedom.⁶⁴

Section 9 of the *Constitution* provides that everyone is equal before the law and has the right to equal protection and benefit of the law. This right to equality includes the full and equal enjoyment of all rights and freedoms. Section 9 furthermore states that neither the state nor any person may unfairly discriminate against anyone on the grounds of race, gender, sex, pregnancy,

⁵⁹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁶⁰ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug; Anderson *Islamic Law* 72.

⁶¹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁶² S 7 of the *Constitution*.

⁶³ S 9 of the *Constitution*.

⁶⁴ S 7 of the *Constitution*.

marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

Section 15 of the *Constitution* contains the rights of South Africans to freedom of religion, belief and opinion. This section provides everyone with the right to conclude religious observances at institutions on the provision that the rules of the appropriate public authority are followed, that the observances are concluded on an equitable basis and that attendance is free and voluntary.

Section 15 does not prevent legislation recognising religious or traditional marriages or systems of personal and family law under any tradition or religion. This recognition must however be consistent with the other provisions of the *Constitution*.

None of the rights enshrined in the Constitution are absolute. All the rights are subject to limitation provided that there is compliance with the limitation clause. Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in the terms of the law of general application. The limitation must be reasonable and justifiable and has to take into account the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose and if any less restrictive means to achieve the purpose are available.

The application of the limitation clause involves a process of weighing up of competing values.⁶⁵ The right of Muslims in South Africa to practice their own Islamic legal system is a fundamental right and not a privilege and ought to be recognised. Muslims must, however, accept the fact that the unqualified recognition of Islamic law will lead to conflict with other legal systems. When this conflict arises there will have to be a weighing up of values to determine which right is the strongest and should be adhered to.

⁶⁵ *S v Makwanyane and Another* 1995 3 SA 391 (CC) 104.

4.2 Recognition of Muslim marriage laws in South Africa

The *Constitution* section 15(3) allows for legislation recognising a system of personal and family law adhered to by persons professing a particular religion and the validity of marriages concluded under this system of religious law.

Despite the fact that the *Constitution* allows for the implementation of new legislation, many Muslim marriages in South Africa are still not considered legally binding unions in South Africa.⁶⁶ The only Muslim marriages considered to be legally binding are those registered by a marriage officer or at a magistrate's court.⁶⁷

The problem that arises from the non-recognition of Islamic marriages is that the Muslim couple has to register their marriage for it to be a valid and legally binding marriage according to South African law. If this is not done, the spouses are effectively treated as strangers in the South African law.⁶⁸ There is no duty of support, no financial obligations exist between the spouses *inter se*, no claim for loss of support can be brought on the death of a spouse, nor can a claim for maintenance be instituted against the deceased estate if the spouse dies intestate. Spouses have to safeguard their marriage by employing the general law of the land.

Thus far, South African courts have refused to fully recognise and enforce Muslim marriages on the ground that they are potentially polygamous, because it is *contra bonos mores*.⁶⁹

In the case *Ryland v Edros*,⁷⁰ Edros was repudiated by her husband and she

⁶⁶ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁶⁷ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁶⁸ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.html> 12 Dec.

⁶⁹ *Ismail v Ismail* 1983 1 SA 1005 (A).

⁷⁰ *Ryland v Edros* 1996 4 All SA 557 (C).

sought relief from the court by claiming arrears maintenance and a consolatory gift. Edros also sought an equitable share of the estate for her indirect contributions to the growth of her husband's estate. The court awarded Edros arrears maintenance and the consolatory gift, but denied the equitable share.

The court gave limited recognition to the Islamic marriage contract in its decision. This recognition was however, linked with the provision that the Muslim marriage union was a monogamous union.⁷¹

In another matter between Amod and the MMVAF,⁷² Amod had lost her husband in a motor vehicle accident, but was refused compensation by the MMVAF on the grounds that her marriage was not legally recognised. Amod then brought her case before the Supreme Court of Appeal, after the court a quo found that the MMVAF was not legally liable to compensate Amod for the loss of support as result of the death of her husband.⁷³

The Supreme Court of Appeal invoked the conclusion that considerations of equity and decency informed the duty of support. The court found that Amod's right was worthy of public recognition and protection by the law. Accordingly, the MMVAF was held liable to compensate Amod for the loss of support of her deceased husband.⁷⁴

These two judgments have been marked as a step towards developing common law according to the spirit and values of the Constitution. It was hoped that these judgments would lay the groundwork for the recognition of the duty of support within marriages in terms of any religion as well as for the full recognition of Muslim marriages.

⁷¹ Bosch and Moosa 2000 <http://www.muslimmarriage2.htm> 14 Aug.

⁷² *Amod v MMVAF* 1997 12 BCLR 1716 (D); 1999 4 All SA 421 (A)

⁷³ Mahomed 2000 De Rebus 37.

⁷⁴ Mahomed 2000 De Rebus 37.

When a Muslim couple does decide to safeguard their marriage union by registering it according to the provisions of the Marriage Act, they have to choose between the two matrimonial systems recognised by South African law to be applicable on their marriage.⁷⁵

As said previously, in South Africa two different matrimonial property systems are recognised, namely in community of property and out of community of property.⁷⁶

For a marriage to be out of community of property, an antenuptial contract has to be registered. The antenuptial contract regulates the terms and conditions, which govern the marriage and can therefor be made completely compatible with the Islamic laws of marriage.

To be compatible the contract should exclude community of property, community of profit and loss and the accrual system.⁷⁷ The accrual refers to the growth that the estate of the parties has shown from the date of the marriage to the date of dissolution of the marriage. According to the accrual system, the party with the smaller accrual is entitled to half of the difference between the accruals of the parties, on dissolution of the marriage.⁷⁸

A marriage registered without an antenuptial contract automatically becomes a marriage in community of property. This creates a joint estate wherein all the assets and liabilities of both parties' estates are merged.⁷⁹ Both parties become equal partners to the joint estate. On the death of either of the spouses, the surviving spouse retains half of the estate and the balance is divided according to the will or according to the laws of intestate succession if there is no will.

⁷⁵ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁷⁶ *Matrimonial Property Act* 88 of 1984.

⁷⁷ South African Law Commission 2000 <http://www.law.wits.ac.za/salc.html> 12 Dec.

⁷⁸ *Matrimonial Property Act* 88 of 1984.

⁷⁹ *Matrimonial Property Act* 88 of 1984.

This form of matrimonial property system is contrary to the rules of Islamic marriages and can create many problems at the time of distribution of the inheritance.⁸⁰ Those who are conscious of the Islamic rules will opt for a *Shari'ah* distribution so that all the heirs receive their proper share. Others may insist on a non-Islamic distribution based on the non-Islamic marriage.

As far as divorce is concerned, divorce among South African Muslims is common. Though there are restraints on a woman's capacity to seek a divorce, there are avenues in the Muslim community that enable women to end unhappy marriages. In particular, the South African Law Commission frequently facilitates annulments when a woman wants to terminate a marriage but her husband refuses. The same committee has also been known to allow women to marry when they are unable to get permission from their families.⁸¹

4.3 Recognition of Islamic rules of succession in South Africa

According to South African law, freedom of testation is a very important part of succession. Islam has no freedom of testation over the whole of his/her estate, but only over one third thereof. It is mainly because of this limitation of testation that most disputes arise.

Another common problem faced in the recognition of Islamic rules of succession relates to the marriage contract. According to South African law a marriage is considered to be in community of property when registered without a proper ante nuptial contract. This means that the Muslim couple now jointly owns the whole estate. Upon the death of either of them half of the estate will go to the surviving spouse, even in reality 90% belonged to the deceased. This is contrary to the *Shari'ah*.⁸²

⁸⁰ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁸¹ Essack 2000 <http://www.law.emory.edu.html> 24 March.

⁸² Al-Haadi 2000 <http://www.alhaadi/se2p2.htm> 1 Aug.

In many occasions it happens that a deceased Muslim person has drawn a will that is not according to the *Shari'ah*, which means that the will is null and void. However, according to the South African law, the will is valid if it complies with the requirements set out in the Act on wills.⁸³ A bequest in such a will would be invalid according to Islamic law, but if the successor feels that he will gain more if the will is considered valid, he could approach the Western courts to claim his so called "right".⁸⁴ It is therefore imperative that when drawing up a will for an Islamic person or couple, the provisions of the *Shari'ah* should be followed strictly.⁸⁵

Other differences between South African Succession law and those in the Muslim law are the following:⁸⁶

- The right of representation does not exist in Muslim law
- Adopted children are not seen as natural children of the adoptive parents in Muslim law, as in South African law.

5 ESTATE PLANNING SOLUTIONS

5.1 *The use of trusts*

The forming of family trusts is becoming a common practice. Basically, a family trust is formed with a token donation and thereafter properties are transferred into the name of the trust. The donor specifies various beneficiaries who will become the eventual owners of all that the trust owns when it dissolves.⁸⁷

⁸³ Act 7 of 1953.

⁸⁴ Al-Haadi 2000 <http://www.alhaadi/se2p2.htm> 1 Aug.

⁸⁵ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁸⁶ Rautenbach *The Position of South African women* 53-54.

⁸⁷ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

As with all estate planning options, the trust is used as a tax-saving exercise and to avoid exorbitant estate duties, but furthermore the trust is used in Islamic law to specify various beneficiaries who will become the eventual owners of all that the trust owns when it is dissolved.⁸⁸

According to the *Shari'ah* the trust document is non-existent,⁸⁹ but according to South African law it is a valid legal document. Here again problems may arise among the heirs if any one party decides to take wrongful advantage of this trust.

To ensure that these possible problems do not occur, the true position of the trust must be documented and all the heirs as well as the executors of the estate must be informed of the reality of the trust. As long as the trust is regarded as part of the deceased's estate upon the donor's death, the trust can be a very useful instrument in estate planning.⁹⁰

If one intends to form a "family trust" which is valid according to the *Shari'ah*, it is imperative that guidance be taken from the *Ulama* who are experienced in this field before any deed is finalised and that the laws of the *Shari'ah* be fully adhered to.⁹¹

5.2 The use of a will

As stated previously, an Islamic will has nothing to do with stipulating the shares of one's heirs. Apart from this it could be compulsory at times to have a will and at other times totally unnecessary depending on the circumstances.⁹²

⁸⁸ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug; De Waal, Schoeman and Wiechers *The law of succession* 118

⁸⁹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹⁰ Rautenbach *The Position of South African women* 55-56.

⁹¹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹² Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

Nevertheless in this Western country, a proper Islamic will is extremely important to avoid problems that could occur when the estate is wound up. It will be compulsory to draw a will if one has unfulfilled obligations or debts to pay. If one has any trusts, this must also be written in the will. Furthermore it is important to appoint an executor in one's will.⁹³ This should be a person who understands the concepts of Islamic law and who the family trusts. The executor is responsible for the winding up of the estate, which includes the payment of debts, distribution of the inheritance and taking care of the matters relating to the family of the deceased.⁹⁴ The executor must be willing to provide his services for free, but may draw an amount from the estate for his expenses and needs if the winding up of the estate is so time consuming that he does not get time to attend to his own work.⁹⁵

The most important component of the will is the directive that the estate must be wound-up and distributed according to the *Shari'ah*.⁹⁶

5.3 Winding up the estate

Before the winding up of the estate can be discussed, it is necessary to know what forms the estate. This is very simple. The estate of the deceased consists of everything he owns.⁹⁷

The estate of the deceased should be wound up as a matter of urgency. Delaying this matter could result in serious problems. Therefore, within a few days of the demise, the executors should ascertain the total value of the estate.

⁹³ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹⁴ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug; Rautenbach *The Position of South African women* 55.

⁹⁵ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹⁶ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹⁷ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

After the value of the estate is determined, the funeral expenses, debts and obligations should be paid.⁹⁸

Whatever remains after the payment of the funeral expenses and debts, will be distributed among the heirs according to the pre-determined ratios as detailed in the *Qur'an*.⁹⁹ The calculations of the shares should however be left to an expert in the field. Very often there are fine details, which are not taken to account by non-experts, resulting in an incorrect solution.

For the purposes of determining the shares, one must draw up a detailed list of all the relatives of the deceased. All these details should be handed to the expert in the field. After receiving the solution, the estate must be divided accordingly.

6 Full recognition of Islamic marriages

The best solution for the problems discussed above, would be if full recognition is given to Islamic marriages. Denying recognition on the grounds of polygamy while accommodating African customary marriages¹⁰⁰ will cause hardship and uncertainty.

At this stage a uniform family law of all the people of South Africa does not seem possible, because there are deep differences in the legal systems and cultures of the relevant groups. Care should, however, be given to the recognition of the different marriages in a single act for the purpose of giving full recognition to all the types of marriages and treating the different marriages on an equal basis.¹⁰¹

⁹⁸ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

⁹⁹ Azaadville 2000 <http://www.alhaadi/inherit.htm> 16 Aug.

¹⁰⁰ *Recognition of Customary Marriages Act* 120 of 1998.

¹⁰¹ South African Law Commission 2000 <http://www.law.wits.html> 12 Dec.

Equal protection under the law for all forms of marriages may require the Matrimonial Property Act¹⁰² to be amended to provide that Muslim marriages are automatically out of community of property.

A separate property system, automatic under Islam and opted for in South African law, is consistent with the idea of marriage as a partnership of equals.

The amendment or new legislation will have to take into account the fact a wife's claim will decrease relative to the number of wives who may need to share in the estate.¹⁰³

It must be recognised that the taking of an additional wife can have negative consequences for the personal and proprietary rights of the existing wife and the personal and proprietary rights of the children born from such marriages. Wives and children require special protection to ensure their continual welfare upon dissolution of a marriage.¹⁰⁴

What is clear is that any statute intended to grant recognition to Islamic marriages would be vulnerable to Constitutional challenge if it unjustifiably conflicts with a right entrenched in the Bill of Rights.

7 Conclusion

Muslim marriages are not yet fully recognised in South African law, unless registered. This leads to different problems, which include the South African courts unwillingness to recognise claims based on unregistered marriages and the non-recognition of the inheritance laws according to the *Shari'ah* in some

¹⁰² Act 88 of 1984.

¹⁰³ South African Law Commission 2000 <http://www.law.wits.html> 12 Dec.

¹⁰⁴ South African Law Commission 2000 <http://www.law.wits.html> 12 Dec.

circumstances. This non-recognition is a breach of the parties' right to equality before the law and equal protection before the law.¹⁰⁵

In order to avoid problems it is important to have one's financial matters in order and to know what choices there are to be made. It is also important that the Muslim Personal law be viewed as a complete package, which includes marriage, divorce and inheritance.¹⁰⁶

When an Islamic couple faces estate planning, they have to take into account that their marriage has to be registered in order to be fully recognised in South Africa. This renders the marriage to be seen as a civil marriage and no adherence will be given to the consequences of the Islamic marriage. Although not registering the marriage has no effect of its validity, problems may arise if any of the heirs to be, attempts to do something un-Islamic.

When registering their marriage the couple must be informed that they will have to choose between the different matrimonial property systems applicable and that the only marriage contract compatible with the *Shari'ah* is the antenuptial contract with the exclusion of the accrual system.

It is furthermore imperative for the couple to draw up a proper Islamic will to ensure that adherence is given to the *Shari'ah* in all matters of the inheritance. The will is an important instrument in ensuring that the whole of the deceased's estate is distributed according to the *Shari'ah*, that an expert in the field of Muslim succession laws are asked to determine the heirs and their shares, and that his wife(s) are included in the group of heirs even if their marriage was not registered.¹⁰⁷

¹⁰⁵ Van der Schyff *Die Invloed van die Grondwet* 160.

¹⁰⁶ Bayat 2000 <http://www.direct.za.org> 30 Oct.

¹⁰⁷ Rautenbach *The Position of South African women* 55-56.

The misconception most people have regarding Islamic law must be eradicated. The time is right for the legitimate aspirations of the Muslim community in South Africa to be satisfied by the recognition of Islamic personal and family law.

It is of the utmost importance that the state realizes the pressing need for legislation, which will give recognition to Muslim Personal law and that swift action in this regard is taken. Until such recognition is given, legal practitioners will have to make do with the instruments at their disposal.

Once recognition is given many of the discussed problems may disappear, but new ones are sure to follow and new estate planning strategies will have to be developed.

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