

10 FEBRUARY 2020

# REAL ESTATE ALERT

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### How are you married? Understanding Islamic and customary marriages

It is trite law in South Africa that a marriage is recognised if it is concluded in terms of the Marriages Act 25 of 1961 (the Marriages Act) or in terms of the Civil Union Act 17 of 2006 (the Civil Union Act).

## How are you married? Understanding Islamic and customary marriages

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**It is trite law in South Africa that a marriage is recognised if it is concluded in terms of the Marriages Act 25 of 1961 (the Marriages Act) or in terms of the Civil Union Act 17 of 2006 (the Civil Union Act).**

As it currently stands, a marriage concluded according to the Islamic Religion is therefore not legally recognised and subsequently not valid as such a marriage would fall short of the statutory requirements imposed in terms of the abovementioned Acts. It's quite shocking that moving into another decade there is still no legislative framework for the governance of Islamic Marriages. The consequences are actually far-reaching in that no protection is afforded for persons married according to their religious rites, especially when it comes to a dissolution of such a marriage.

A legislative process was started in the year 1996 to start building the framework for religious marriages, and a Draft Bill called the "The Muslim Marriages Bill" was introduced in 2010 but sadly no progress was found once the Bill was published for comment in 2012.

There is, however, some light to this rather dim picture – certain areas in South African law have afforded recognition to Islamic Marriages and have granted benefits to spouses which would ordinarily only be granted to spouses of a legally recognized marriage. This can be seen in the case *R v R and Others* (14770/2011) [2015] 2 ALL SA 352 (WCC). Mr. & Mrs. R were married in

terms of Islamic Rites and they decided to get a divorce. Mrs. R turned to the courts to claim monthly maintenance from Mr. R and part of his pension interest relying on the terms found in the Divorce Act 70 of 1979 (the Divorce Act). The court found that the term "marriage" as described in the Divorce Act is not limited to civil marriages and may include a religious marriage. The court further found that although they did not have a legally recognized marriage, the law has been developed over the years to include spouses from a religious marriage to receive limited recognition, resulting in spouses being able to claim maintenance and inherit in a deceased estate.

Another more recent case, *Women's Legal Centre Trust v The President of the Republic of South Africa and Others* [2018] (6) SA 598 (WCC), has had a significant effect on the recognition of Islamic Marriages in South Africa. In this matter the Centre brought an application ordering the President and Cabinet, together with Parliament, to enact legislation governing the Islamic marriage regime within 24 months of the date of judgment. The court added that should the legislature not recognise Islamic marriages, the Divorce Act will then also apply to Islamic marriages upon dissolution of same.

This reasoning will then allow the requirements of equality and equity in divorce proceedings, as well as the requirements considered for the best interest of minor children, being applied to divorce proceedings of Islamic marriages.

## How are you married? Understanding Islamic and customary marriages...*continued*

Customary Marriages have come a long way in South Africa, and today the conclusion of such a marriage is governed by the Recognition of Customary Marriages Act 120 of 1998 which is read together with the Matrimonial Property Act 99 of 1984.

What does this mean for Muslim South Africans who wish to "tie the knot?"

The above court cases show a positive move towards allowing and providing for the full recognition of Islamic marriages in the future. However, and until such time full legal recognition is afforded, it is suggested that Muslim couples enter into a civil marriage or civil union together with their Islamic marriage to be entitled to the full protection of the law.

On the other spectrum, Customary Marriages have come a long way in South Africa, and today the conclusion of such a marriage is governed by the Recognition of Customary Marriages Act 120 of 1998 (RCMA) which is read together with the Matrimonial Property Act 99 of 1984 (MPA).

Section 3 of the RCMA provides the requirements for a valid Customary Marriage, which are:

1. The spouses must both be above the age of 18 years;
2. They must both consent to the marriage under Customary Law; and

3. The marriage must be negotiated and entered into or celebrated in accordance with Customary Law.

From the above, one can see that all the ancestral traditions and rituals are thus upheld and must in fact be complied with. Once complied with, the said marriage must be registered at the Department of Home Affairs within a period of three months after the conclusion of the marriage, by both or either spouse.

Here is the important part though: A Customary Marriage is automatically deemed to be a marriage In Community of Property and of Profit and Loss unless an Antenuptial Contract is concluded before the marriage is entered into, to specifically exclude such consequences i.e. before the spouses wish to proceed with the customary traditions and rituals. The sections in the MPA namely, Chapter III and sections 18, 19, 20 and 24 of Chapter IV, relating to proprietary consequences in community of property, will then also automatically apply, should an Antenuptial Contract not be concluded.

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## How are you married? Understanding Islamic and customary marriages...*continued*

Concluding an Antenuptial Contract is all good and well in protecting each spouse's assets, but it is not sole proof that a valid Customary Marriage exists.

In reality, most indigenous people in South Africa do not even obtain a court Divorce Order but merely informally separate which leads to the loss of any legal protection in terms of the rules governing a dissolution of a marriage. This alone indicates the importance of having an Antenuptial Contract in place to ensure that both parties enjoy the full protection of the law with regards to what is rightfully theirs should divorce become an option.

One may ask the further question: "Can spouses, already married in terms of Customary Law before the advent of the RMCA, change or convert their marital regime?"

Indeed they can: Section 7(4) of the RMCA acknowledges this choice and provides that spouses may apply to a court within their jurisdiction for leave to change their matrimonial property system if they can prove the following:

1. Sound reasons exist for the proposed change;
2. Sufficient notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500.00 or such amount as determined by the Minister of Justice; and
3. No other person will be prejudiced by the proposed change.

The relevant court will then authorise the spouses to enter into a written contract which will regulate the terms and conditions of the future matrimonial property system.

Concluding an Antenuptial Contract is all good and well in protecting each spouse's assets, but it is not sole proof that a valid Customary Marriage exists. Spouses will still need to register their customary marriage at the Department of Home Affairs as aforesaid.

An important note to take into account: Although Customary Marriages are legally recognised now, spouses can decide to marry in terms of civil law as well. The restriction here though is that they can only marry civilly, if there is no other person married to either of the spouses in terms of Customary Law.

The factual notion of Polygamy being part of Customary Marriages does still find its place in the RMCA, but protection for each spouse is accordingly afforded to avoid situations in which one spouse gains more than another spouse or gets overlooked entirely especially in terms of inheritance or a divorce. Section 7 of the RMCA elaborates on this by stating that if a husband in an existing Customary Marriage wishes or intends to betroth another wife, he may only proceed to do so in terms of an application to the court within his jurisdiction to approve a written contract that will regulate the future matrimonial property system of both the existing customary marriage and the intended marriage. The Act emphasises the importance of the existing spouse being formally joined in on this application proceedings to ensure that her interests are taken into consideration.

## How are you married? Understanding Islamic and customary marriages...*continued*

The RMCA is in most instances applied and implemented adequately in certain of its spheres pertaining to divorce, but it is still falling short in its other spaces due to the lack of knowledge of its content and protection afforded.

The RMCA is in most instances applied and implemented adequately in certain of its spheres pertaining to divorce, but it is still falling short in its other spaces due to the lack of knowledge of its content and protection afforded. It is thus important that this topic be spoken about to bring awareness of its applicability to South Africans and to implore South Africans to obtain proper legal advises before taking the plunge and marrying in terms of Customary Law to ensure that all their interests and needs are sufficiently covered.

From the above one can see that Customary Marriages has made bigger strides in our law than that of Islamic Marriages and we are hoping that moving into a new decade, our Legislature support and hear the plea of many Muslim South Africans in providing the necessary legal framework to govern their marriages.

*Lutfiyya Kara and Fatima Gattoo*

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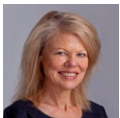
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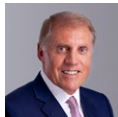
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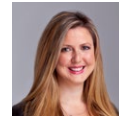
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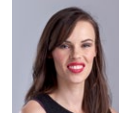
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