

**SOUTH AFRICAN LAW REFORM COMMISSION**

**Project 59**

**ISLAMIC MARRIAGES AND RELATED MATTERS**

**REPORT**

**July 2003**

## MUSLIM MARRIAGES ACT .. OF 20..

To make provision for the recognition of Muslim marriages; to specify the requirements for a valid Muslim marriage; to regulate the registration of Muslim marriages; to recognise the status and capacity of spouses in Muslim marriages; to regulate the proprietary consequences of Muslim marriages; to regulate the termination of Muslim marriages and the consequences thereof; to provide for the making of regulations; and to provide for matters connected therewith.

### Definitions and interpretation of the Act

1. In *this Act*, unless the context otherwise indicates-
- (i) “**court**” means a High Court of South Africa, or a family court established under any law, and includes a divorce court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), and constituted as set out in section 15;
  - (ii) “**Deeds Registries Act**” means the Deeds Registries Act, 1947 (Act 47 of 1937);
  - (iii) “**deferred dower**” means the dower or part thereof which is payable on an agreed future date but which in any event becomes due and payable upon dissolution of the marriage by divorce or death;
  - (iv) “**dispute**” means a dispute or an alleged dispute relating to the interpretation or application of any provision of *this Act* or any applicable law;
  - (v) “**Divorce Act**” means the Divorce Act, 1979 (Act 70 of 1979);
  - (vi) “**dower**” (*mahr*) means the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship;
  - (vii) “**existing civil marriage**” means an existing marriage contracted according to Islamic law which has also been registered and solemnized in terms of the *Marriage Act* prior to the commencement of *this Act* ;
  - (viii) “**facilitating a marriage**” as contemplated in section 6(9) means applying the marriage formula in a ceremony (*nikah*);
  - (ix) “**Family Advocate**” means any Family Advocate appointed under section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987);

- (x) **“Faskh”** means a decree of dissolution of marriage granted by a *court*, upon the application of a husband or wife, on any ground or basis permitted by Islamic law, including in the case of a wife, any one or more of the following grounds, namely where the -
- (a) husband is missing, or his whereabouts are not known, for a substantial period of time (*Mafqūd al-Khabar*);
  - (b) husband fails to maintain his wife (*‘Adam al-Infāq*);
  - (c) husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of dissolution within a period of one year as from the date of sentencing;
  - (d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the *Divorce Act*, which provisions shall apply, with the changes required by the context (*Junūn*);
  - (e) husband suffers from impotence or a serious disease which renders cohabitation intolerable (*‘Ayb*);
  - (f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable (*Dharar*);
  - (g) husband has failed, without valid reason, to perform his marital obligations for an unreasonable period (*Dharar*);
  - (h) husband is a spouse in more than one Muslim marriage, and fails to treat his wife justly in accordance with the injunctions of the *Qur’an* and *Sunnah* (*Dharar*);
  - (i) husband commits harm against his wife, as recognised by Islamic law (*Dharar*); or
  - (j) discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that dissolution is an option in the circumstances (*Shiqāq*);
- (xi) **“’Iddah”** means the mandatory waiting period, arising from the dissolution of the marriage by *Talāq*, *Faskh* or death during which period she may not remarry. The *’Iddah* of a divorced woman who -
- (a) menstruates, is three such menstrual cycles;
  - (b) does not menstruate for any reason, is three months;
  - (c) is pregnant, extends until the time of delivery.
- The *’Iddah* of a widowed woman –
- (a) if she is not pregnant, is 130 days;
  - (b) if she is pregnant, extends until the time of delivery.

- (xii) **“irrevocable Talāq”** (*Talāq Bā-in*) refers -
  - (a) to a first or second *revocable Talāq* pronounced by a husband which becomes irrevocable upon the expiry of the *'Iddah*;
  - (b) to a *Talāq* expressly pronounced as irrevocable at the time of pronouncement; and
  - (c) to the pronouncement of a third *Talāq*;
- (xiii) **“Khula’ ”** means the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law;
- (xiv) **“Marriage Act”** means the Marriage Act, 1961 (Act 25 of 1961);
- (xv) **“marriage officer”** means any Muslim person with knowledge of Islamic law appointed as marriage officer for purposes of *this Act* by the *Minister* or an officer acting under the *Minister’s* written authorisation;
- (xvi) **“Minister”** means the Minister of Home Affairs;
- (xvii) **“Muslim”** means a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam;
- (xviii) **“Muslim marriage”** means a marriage between a man and a woman contracted in accordance with Islamic law only;
- (xix) **“prescribed”** means prescribed by regulation made under section 18;
- (xx) **“prompt dower”** means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xxi) **“Registrar of Deeds”** means the Registrar of Deeds appointed in terms of section 2 of the *Deeds Registries Act*;
- (xxii) **“revocable Talāq”** means a *Talāq Raj’i* which does not terminate the marriage before the completion of the *'Iddah*, and which entitles the parties to reconcile before the expiry of the *'Iddah* only;
- (xxiii) **“Tafwīd al-Talāq”** means the delegation by the husband of his right of *Talāq* to the wife or any other person, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife or the appointed person may terminate the marriage by pronouncing a *Talāq* strictly in accordance with the terms of such delegation;
- (xxiv) **“Talāq”** means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his wife or agent, duly authorised by him or her to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and
- (xxv) **“this Act”** includes the regulations.

## Application of *this Act*<sup>21</sup>

2. (1) The provisions of *this Act* shall apply to a *Muslim marriage* contracted after the commencement of *this Act* where the parties thereto elect in the *prescribed* manner to be bound by the provisions of *this Act*.

(2) The provisions of *this Act* shall apply to a *Muslim marriage* contracted before the commencement of *this Act*: Provided that the parties shall be entitled, within a period of 12 months or such longer period as may be *prescribed*, as from the date of such commencement, jointly to elect in the *prescribed* manner not to be bound by the provisions of *this Act*, in which event the provisions of *this Act* shall not apply to such marriage.

(3) The law applying to a *Muslim marriage* in respect of which the parties have elected not to be bound by the provisions of *this Act*, shall be the law as it was before *this Act* came into operation.

(4) The provisions of *this Act* –

- (a) apply to an *existing civil marriage* insofar as the spouses thereto have elected in the *prescribed* manner to cause the provisions of *this Act* to apply, excluding sections 5, 6, 7 and 10: Provided that vested proprietary rights arising from a marriage in community of property or a marriage subject to the accrual system, or in terms of an antenuptial contract, shall remain unaffected;
- (b) do not apply to a civil marriage solemnised under the *Marriage Act* after the commencement of *this Act*; and
- (c) do not apply to a customary marriage registered under the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(5) A *Muslim marriage* to which *this Act* applies and in respect of which all the requirements of *this Act* have been complied with, shall for all purposes be recognised as a valid marriage.

## Equal status and capacity of spouses

3. A wife and a husband in a *Muslim marriage* are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence,

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<sup>21</sup> See the discussion in paragraphs 3.359 – 3.364.

including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

### ***Disputes***

4. (1) Any *dispute* arising from a *Muslim marriage* which was entered into but terminated before the commencement of *this Act*, shall be dealt with in terms of the provisions of *this Act*: Provided that the parties may by agreement in the *prescribed* manner elect to have the *dispute* dealt with outside the provisions of *this Act*.

(2) (a) Where a *dispute* arises between a husband in a polygynous marriage, and one or more of his spouses, which *dispute* is pending in a *court* of competent jurisdiction, and irrespective of whether the *dispute* is in relation to a marriage governed by the provisions of *this Act* or not, all spouses to whom the husband is married must be given notice of such *dispute*.

(b) In making an order pursuant to the provisions of paragraph (a), the *court* must take into account the rights of all affected parties.

### **Requirements for validity of *Muslim marriages***

5. (1) For a *Muslim marriage* entered into after the commencement of *this Act* to be valid -

- (a) the prospective spouses must both consent to be married to each other;
- (b) the *marriage officer* must ascertain from a proxy, if any, whether the parties to the prospective marriage have consented thereto;
- (c) witnesses must be present as required by Islamic law at the time of conclusion of the marriage;
- (d) the prospective bride and groom must, subject to subsections (4) and (6), have attained the age of 18 years; and
- (e) there must be compliance with the provisions of this section and sections 6 and 7.

(2) No spouse in a *Muslim marriage* to whom *this Act* applies may subsequently enter into a marriage under the *Marriage Act* or any other law during the subsistence of such *Muslim marriage*.

(3) In the event of a marriage having been entered into in contravention of the provisions of subsection (2), such purported marriage shall be deemed to be null and void.

(4) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her guardian, must consent to the marriage.

(5) If the consent of a parent or guardian as referred to in subsection (4) cannot be obtained, the provisions of section 25 of the *Marriage Act* apply.

(6) The *Minister* or any *Muslim* person or *Muslim* body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to enter into a *Muslim marriage* if the *Minister* or the said person or body considers such marriage desirable and in the interests of the parties in question.

(7) Permission granted in terms of subsection (6) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements *prescribed* by law.

(8) If a person under the requisite age has entered into a *Muslim marriage* without the written permission of the *Minister* or person or body authorised by him or her, the *Minister* or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with *this Act*, declare the marriage in writing to be for all purposes a valid *Muslim marriage*.

(9) Subject to the provisions of subsections (6) and (7), section 24A of the *Marriage Act* applies to the *Muslim marriage* of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(10) The prohibition of a *Muslim marriage* between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

## Registration of *Muslim marriages*<sup>22</sup>

### 6. (1) A *Muslim marriage* -

- (a) entered into before the commencement of *this Act*, unless the parties have elected not to be bound by the provisions of *this Act* as contemplated in section 2(2), must be registered in the *prescribed* manner within a period of two years after that commencement or within such longer period as the *Minister* may from time to time prescribe by notice in the *Gazette*; or
- (b) entered into after the commencement of *this Act*, where the parties have elected to be bound by the provisions of *this Act* as contemplated in section 2(1), must be registered as *prescribed* at the time of the conclusion of the marriage or within such longer period as the *Minister* may from time to time prescribe by notice in the *Gazette*.

### (2) No *marriage officer* shall register any marriage unless –

- (a) each of the parties in question produces to the *marriage officer* his or her identity document issued under the provisions of the Identification Act, 1997 (Act 68 of 1997), or his or her birth certificate issued under the provisions of the Birth and Deaths Registration Act, 1992 (Act 51 of 1992) ;
- (b) each of such parties furnishes to the *marriage officer* proof of application for either an identity document or a birth certificate referred to in paragraph (a) together with the *prescribed* affidavit sworn to before an authorised officer of the Department of Home Affairs;
- (c) one of such parties produces his or her identity document or a birth certificate referred to in paragraph (a) or furnishes proof of his or her application for any of these documents to the *marriage officer* and the other furnishes to the *marriage officer* the affidavit referred to in paragraph (b);
- (d) one of such parties, who is a foreign national, furnishes the *marriage officer* with proof of his or her lawful sojourn in the Republic together with his or her original passport or travel document and a *prescribed* affidavit sworn to before an officer of the Department of Home Affairs; or in cases of refugees, an original copy of his or her Refugee Identity Document issued in terms of the provisions of the Refugees Act, 1998 (Act 130 of 1998); or
- (e) each of such parties, who is a widow or widower, as the case may be, furnishes the marriage officer with a copy of his or her deceased spouse's death certificate issued

<sup>22</sup> See the discussion in paragraphs 3.359 – 3.364.



under the provisions of the Birth and Deaths Registration Act, 1992, or any other law applicable to a particular foreign national.

(3) The *marriage officer* must –

- (a) inform the parties that they are entitled to conclude a contract of their own choice regulating their marital regime, or that they may conclude a standard contract and must present to them examples of such a contract, as *prescribed*, in order for the parties to make an informed choice;
- (b) ensure that the spouses understand the registration procedures;
- (c) if satisfied that the spouses concluded a valid *Muslim marriage*, record the identity of the spouses, the date of the marriage, the *dower* agreed to, whether payable immediately or deferred in full or part, and any other particulars *prescribed*, and must register the marriage in accordance with *this Act* and the regulations as *prescribed*;
- (d) issue to the spouses a certificate of registration, bearing the *prescribed* particulars; and
- (e) forthwith transmit the relevant records to the nearest office of the Department of Home Affairs.

(4) A *Muslim marriage* shall be contracted in accordance with the formulae prescribed in Islamic law, including *zawwajtuka* and *ankahtuka* (“I marry you (to)...”).

(5) If the *marriage officer* is not satisfied that a valid *Muslim marriage* was entered into by the spouses, he or she must refuse to register the marriage.

(6) A *court* may, upon the application of any of the spouses made to that *court*, order -

- (a) the registration of any *Muslim marriage*; or
- (b) the cancellation or rectification of any registration of a *Muslim marriage* effected by a *marriage officer*.

(7) A certificate of registration of a *Muslim marriage* issued under this section or any other law providing for the registration of *Muslim marriages* constitutes *prima facie* proof of the existence of the *Muslim marriage* and of the particulars contained in the certificate.

(8) Any *marriage officer* who knowingly registers a marriage in contravention of the provisions of *this Act*, shall be guilty of an offence and liable on conviction to a fine not exceeding R5 000.

(9) (a) Any person facilitating the conclusion of a *Muslim marriage*, irrespective of whether such person is a *marriage officer*, must inform the prospective spouses that they have a choice whether or not to be bound by the provisions of *this Act*.

(b) If the parties to a proposed marriage elect to be bound by the provisions of *this Act* as contemplated in section 2(1), the person *facilitating the marriage* referred to in paragraph (a) must direct such parties to a *marriage officer* for purposes of registering the *Muslim marriage* so *facilitated*.

(c) The person *facilitating the marriage* referred to in paragraph (a) who fails to comply with the provisions of paragraph (b), is guilty of an offence and liable upon conviction to a fine not exceeding R5 000.

(10) Failure to register a *Muslim marriage* as contemplated in subsection (1)(a) does not affect the validity of such marriage.

### **Proof of age of parties to proposed marriage**

7. If parties appear before a *marriage officer* for the purpose of contracting a *Muslim marriage* with each other and such *marriage officer* reasonably suspects that either of them is of an age which debars him or her from contracting a valid *Muslim marriage* without the consent or permission of some other person, the *marriage officer* may refuse to register a marriage between them unless he or she is furnished with such consent or permission in writing, or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

### **Proprietary consequences of *Muslim marriages* and contractual capacity of spouses**

8. (1) A *Muslim marriage* to which this Act applies shall be deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an antenuptial contract which shall be registered in the Deeds Registry –

(a) in the case of a marriage entered into before the commencement of *this Act*, and if at the time of conclusion thereof a written agreement regulating the proprietary

consequences of the marriage existed between the spouses, within twelve months from the date of commencement of *this Act*; and

(b) in the case of a marriage entered into after the commencement of *this Act*, within three months from the date of execution of the contract

or within such extended period as the *court* may on application allow.

(2) Subject to subsection (1), the provisions of the *Deeds Registries Act* shall apply, with the changes required by the context, to the registration of an antenuptial contract contemplated in that subsection.

(3) Spouses in a *Muslim marriage* to which this Act applies may jointly apply to a *court* for leave to change the matrimonial property system, which applies to their marriage or marriages and the *court* may, if satisfied that -

(a) there are sound reasons for the proposed change;

(b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and

(c) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the *court*.

(4) In the case of a husband who is a spouse in more than one *Muslim marriage*, all persons having a sufficient interest in the matter, and in particular the husband's existing spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an *existing civil marriage*, and in a *Muslim marriage*, all his existing spouses must be joined in such proceedings.

(6) A husband in a *Muslim marriage*, to which *this Act* applies, who wishes to enter into a further *Muslim marriage* with another woman after the commencement of *this Act* must make an application to the *court* for the requisite approval in terms of subsection (7), and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the *court*-

- (a) must grant approval if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy *Qur'an*;
- (b) may, in the case of an existing marriage which is in community of property or which is subject to the accrual system or other contractual arrangement -
  - (i) terminate the matrimonial property system which is applicable to that marriage; and
  - (ii) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the *court* may deem just;
  - (iii) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act 88 of 1984), or on such other basis as the *court* may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the *court* for compelling reasons decides otherwise.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a *court* grants an application contemplated in subsections (3) or (6), the registrar or clerk of the *court*, as the case may be, must furnish each spouse with an order of the *court* including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each *Registrar of Deeds* of the area in which the *court* is situated for the purposes of recordal in terms of section 3(1)(w) of the *Deeds Registries Act*.

(10) No *marriage officer* shall register a second or subsequent *Muslim marriage*, unless the husband provides the *marriage officer* with the order of the *court* granting the requisite approval in terms of subsection (7).

(11) A husband who enters into a further *Muslim marriage*, whilst he is already married, without the permission of the *court*, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(12) Any person who intentionally prevents another from exercising any right conferred under *this Act*, shall be guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year.

### Termination of *Muslim marriages*

9. (1) The provisions of section 2 of the *Divorce Act* shall apply, with the changes required by the context, in respect of the jurisdiction of a *court* for the purposes of *this Act*.

(2) Notwithstanding the provisions of section 3(a) of the *Divorce Act* or anything to the contrary contained in any law or the common law, a *Muslim marriage* may be dissolved by a *court* on any ground permitted by Islamic law. The provisions of this section shall also apply, with the changes required by the context, to an *existing civil marriage* insofar as the parties thereto have in the *prescribed* manner elected to cause the provisions of *this Act* to apply to the consequences of their marriage.

(3) In the case of *Talāq* the following shall apply:

- (a) The husband shall be obliged to cause an *irrevocable Talāq* to be registered immediately, but in any event, by no later than 30 days after its pronouncement, with a *marriage officer* in the magisterial district closest to his wife's residence, in the presence of such wife or her duly authorised representative and two competent witnesses.
- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the *marriage officer* shall register the *irrevocable Talāq* only in the event that the husband satisfies the *marriage officer* that due notice in the *prescribed* form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talāq*, and the wife has pronounced an *irrevocable Talāq (Tafwid al-Talāq)*.
- (d) Any husband who knowingly and wilfully fails to register the *irrevocable Talāq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R5 000.
- (e) If a spouse disputes the validity of the *irrevocable Talāq*, according to Islamic Law, the *marriage officer* shall not register the same, until the *dispute* is resolved, by arbitration in terms of section 14 or the *court* or pursuant to a written settlement between the spouses.
- (f) A spouse shall, within 14 days as from the date of the registration of the *irrevocable Talāq*, institute legal proceedings in a competent *court* for a decree confirming the dissolution of the marriage by way of *Talāq*. The action so instituted shall be subject

to the procedures *prescribed* from time to time by the applicable rules of *court*. A copy of the certificate of registration of the *irrevocable Talāq* shall be annexed to the summons initiating such action. This does not preclude a spouse from seeking the following *interim* relief -

- (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance;
  - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application; or
  - (iii) an application for maintenance during the *'iddah* period.
- (g) An *irrevocable Talāq* taking effect as such prior to the commencement of *this Act* shall not be required to be registered in terms of the provisions of *this Act*.

(4) A *court* must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent *court*, and the procedure applicable thereto shall be the procedure *prescribed* from time to time by rules of *court*, including appropriate relief *pendente lite*, referred to in subsection (3)(f). The granting of a *Faskh* by a *court*, including a *Faskh* granted upon application of the husband, shall have the effect of terminating the marriage.

(5) The spouses who have effected a *Khula'* shall personally and jointly appear before a *marriage officer* and cause same to be registered in the presence of two competent witnesses. The *marriage officer* shall register the *Khula'* as one *irrevocable Talāq*, in which event the provisions of subsection (3)(f) will apply with such changes as may be required by the context.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987) and sections 6(1) and (2) of the *Divorce Act* relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of a *Muslim marriage* under *this Act*.

(7) A *court* granting or confirming a decree for the dissolution of a *Muslim marriage* -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the *Divorce Act* and section 24(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984);
- (b) must, if it deems it just and equitable, in the absence of any agreement between the parties to the marriage regarding the division of their assets, order that such assets be divided equitably between the parties, where-
  - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
  - (ii) the parties have actually contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party;
- (c) must, in the case of a husband who is a spouse in more than one *Muslim marriage*, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7);
- (d) may order that any person who in the *court's* opinion has a sufficient interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the provisions of section 11;
- (f) must, when making an order for the payment of maintenance, including past maintenance, take into account all relevant factors; and
- (g) may make an order for a conciliatory gift (*mut'ah al-Talāq*) in defined circumstances permitted by Islamic law.

(8) Upon termination of the marriage by death, the surviving spouse shall be entitled to lodge a claim against the deceased estate in respect of unpaid *dower*, or otherwise in respect of any tangible contribution recognised by Islamic law.

### **Age of majority**

**10.** For the purposes of *this Act*, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act 57 of 1972).

### **Custody of and access to minor children**

**11.** (1) In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the *court* shall, with due regard to Islamic law and the

report and recommendations of the *Family Advocate*, consider the welfare and best interests of the child.

(2) Subject to subsection (1), the non-custodian parent shall enjoy reasonable access to a child.

(3) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the *court* shall, with due regard to Islamic law, in awarding or granting custody (*al-hadānah*) or guardianship (*al-walāyah*) of minor children, award or grant custody or guardianship to such person as the *court* deems appropriate, in all the circumstances.

(4) An order in regard to the custody, guardianship or access to a child, made in terms of *this Act*, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a *court* if the *court* finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the *Family Advocate* in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987, the *court* shall consider the report and recommendations of the *Family Advocate* concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

## **Maintenance**

**12.** (1) The provisions of the Maintenance Act, 1998 (Act 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the provisions of subsections (2) to (4) shall apply.

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that-

- (a) the husband is obliged to maintain his wife during the subsistence of a *Muslim marriage* according to his means and her reasonable needs;
- (b) the father is obliged to maintain his children until they become self-supporting;
- (c) in the case of a dissolution by divorce of a *Muslim marriage* -
  - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *'Iddah*;



- (ii) where the wife has custody in terms of section 11, the husband is obliged to remunerate the wife, including providing a separate residence if the wife does not own a residence, for the period of such custody only;
- (iii) the wife shall be separately entitled to be remunerated (*ujrah al-hadānah*) in relation to a breastfeeding period of two years calculated from date of birth of an infant;
- (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of *this Act* may at any time be rescinded or varied or suspended by a *court* if the *court* finds that there is sufficient reason therefor.

(5) Unpaid arrear maintenance which is due and payable to a wife shall not be capable of being extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act 68 of 1969) or any other law.

### **Compulsory mediation**

**13.** (1) In the event of a *dispute* arising during the subsistence of a *Muslim marriage* or otherwise arising from such a marriage, any party to such marriage shall refer such *dispute*, at any time, whether before or after the institution of legal proceedings contemplated in section 9(2)(f) but prior to the adjudication thereof by a *court*, to a Mediation Council, accredited as *prescribed*.

(2) The Mediation Council shall attempt to resolve a *dispute* through mediation within 30 days from the date of the referral thereof. The parties may each be represented at such mediation by a representative of their choice.

(3) The Mediation Council, upon resolution of the *dispute*, shall submit the mediation agreement to a *court* within 30 days from resolution and such *court* shall, if satisfied that the interests of any minor children are duly protected, confirm the mediation agreement.

(4) If the Mediation Council has certified that a *dispute* remains unresolved or if a *dispute* remains unresolved after the expiry of 30 days from the date of referral thereof, such *dispute* may be adjudicated by a *court* in terms of section 15.

### **Arbitration (*Tahkīm*)**

**14.** (1) Notwithstanding anything to the contrary contained in the Arbitration Act, 1965 (Act 42 of 1965), or any other law, the parties to a *Muslim marriage* may agree to refer a *dispute* arising during the subsistence of such marriage or otherwise arising from such marriage to an arbitrator, to be resolved through arbitration.

(2) Subject to subsection (4), the provisions of the Arbitration Act, 1965, shall apply to an arbitration conducted in terms of this section.

(3) The arbitrator shall ensure that -

- (a) the consent of the parties to a *Muslim marriage* to have a *dispute* resolved through arbitration constitutes informed consent; and
- (b) any other parties who may have an interest in the outcome of the arbitration are notified of such arbitration.

(4) No arbitration award affecting the welfare of minor children or the status of any person shall come into effect unless it is confirmed by the High Court upon application to such *court* and upon notice to all parties who have an interest in the outcome of the arbitration.

(5) In considering an application for the confirmation of an arbitration award, the *court* must be satisfied that the award is in the best interests of all minor children and to this end the *court* may -

- (a) confirm the award;
- (b) declare the whole or any part of the award to be void;
- (c) substitute the award for another award which the *court* deems fit;
- (d) vary the award on appropriate terms; or
- (e) remit the matter to the Arbitrator with appropriate directions.

(6) Nothing in subsection (5) shall be construed as limiting the *court's* jurisdiction under any law to review an arbitration award insofar as it relates to a property dispute which does not affect the rights or interests of minor children.

## Courts and assessors

15. (1) If any *dispute* is referred to a *court* for adjudication, the following provisions shall apply –

- (a) the Judge President or other head of the *court* which has jurisdiction, shall appoint a *Muslim* judge from that *court* to hear such *dispute*, and if there is no *Muslim* judge, the Minister for Justice and Constitutional Development shall appoint a duly admitted practicing *Muslim* advocate or attorney of at least 10 years' standing as acting presiding officer: Provided that in urgent matters and in cases of an application under Rule 43 of the High Court Rules, the matter may be determined by a non-*Muslim* judge sitting without assessors;
- (b) the *court* shall be assisted by two *Muslim* assessors who shall have specialised knowledge of Islamic law;
- (c) the assessors shall be appointed by the Minister for Justice and Constitutional Development by proclamation in the *Gazette* and shall hold office for five years from the date of the relevant proclamation: Provided that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;
- (d) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) Assessors appointed in terms of this section shall act in an advisory capacity. In the event of the presiding judge not following the advice of an assessor, such assessor shall state his or her views in writing which, in the event of an appeal, shall be lodged with the Registrar of the Supreme Court of Appeal as part of the record for consideration by that court.

(3) Any decision of the *court* shall be subject to appeal to the Supreme Court of Appeal in accordance with the applicable Rules of Court, save that the appellant shall not be obliged to furnish security for the cost of the appeal.

(4) In the event of an appeal to the Supreme Court of Appeal, such decision shall be submitted to two *Muslim* institutions, accredited as *prescribed*, for written comment on questions of law only to be lodged with the Registrar of the Supreme Court of Appeal within a period of sixty days as from the date that the notice of appeal is delivered.

(5) The Supreme Court of Appeal, in determining an appeal referred to in subsection (4), shall have due regard to the written comment contemplated in that subsection.

(6) The Minister for Justice and Constitutional Development, in consultation with the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act 22 of 1969), shall make appropriate provision for the rendering of legal aid to indigent persons.

### **Dissolution of *existing civil marriage***

**16.** (1) In the event of a spouse to an *existing civil marriage* instituting a divorce action in terms of the *Divorce Act* after the commencement of *this Act*, the *court* shall not dissolve the civil marriage by the grant of a decree of divorce until the *court* is satisfied that the accompanying *Muslim marriage* has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an *irrevocable Talāq*, the wife to the accompanying *Muslim marriage* shall be entitled to make an application for a decree of *Faskh* in terms of *this Act* for that purpose only, in which event the provisions of *this Act* shall apply, with the changes required by the context.

(3) The matter may, in circumstances contemplated in subsection (2), be referred back to the *court* for determining the proprietary or other consequences of the marriage in terms of the *Divorce Act* and related matrimonial legislation.

(4) Where in addition to the *existing civil marriage*, the husband has concluded a further *Muslim marriage* or marriages registrable under *this Act*, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

(5) The provisions of subsection (1) shall apply, with such changes as may be required by the context, to spouses in an *existing civil marriage* who have elected to adopt the provisions of *this Act* as contemplated in section 2.

## Unopposed proceedings

17. (1) In the event of proceedings being instituted under *this Act* for the confirmation or grant of a decree of dissolution of a *Muslim marriage* or other relief, and such proceedings are not opposed, or in the event of the parties having concluded a settlement agreement, the matter shall be heard by a *Muslim* judge sitting without assessors.

(2) A decree of dissolution of a *Muslim marriage* shall not be granted or confirmed under *this Act* unless the presiding judge is satisfied that the best interests of any minor children born from such marriage have been taken into account.

## Regulations

18. (1) The Minister for Justice and Constitutional Development, after consultation with the *Minister*, may make regulations -

- (a) relating to -
  - (i) the requirements to be complied with and the information to be furnished to a *marriage officer* in respect of the registration and dissolution of a *Muslim marriage*;
  - (ii) the manner in which a *marriage officer* must satisfy himself or herself as to the existence or the validity of a *Muslim marriage*;
  - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any *Muslim marriage*;
  - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of *this Act*;
  - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of *Muslim marriages* or of any document *prescribed* in terms of the regulations;
  - (vi) any matter that is required or permitted to be *prescribed* in terms of *this Act*;
  - (vii) the appointment, registration, code of conduct and death and incapacity of the assessors including the payment of allowances to assessors;
  - (viii) any other matter which is necessary or expedient to provide for the effective registration of *Muslim marriages* or the efficient administration of *this Act*; and
- (b) prescribing the fees payable in respect of the registration of a *Muslim marriage* and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

### **Costs in a divorce action**

19. The *court* shall not be bound to make an order of costs in favour of the successful party in a divorce action, but the *court* may, having regard to the means of the parties and their relevant conduct, make such an order as it considers just, and the *court* may order that the costs of the proceedings be apportioned between the parties.

### **Recognition of foreign *Muslim marriages***

20. In the event of a *dispute* relating to whether or not a *Muslim marriage* celebrated in a foreign country is recognised as a valid *Muslim marriage* under *this Act*, such *dispute* shall be determined by the *court* having regard to all relevant factors, including the principles of conflict of laws.

### **Amendment of laws**

21. The Acts specified in the Schedule are hereby amended to the extent set out in the third column of the Schedule.

### **Short title and commencement**

22. *This Act* is called the Muslim Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.