

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

NOTICE 590 OF 2021

Mr. Mogamad Ganief Ebrahim Hendricks, MP**NOTICE OF INTENTION TO INTRODUCE A PRIVATE MEMBER'S BILL AND INVITATION FOR COMMENT ON THE DRAFT BILL, NAMELY THE INTERIM REGISTRATION OF MUSLIM MARRIAGES BILL, 2021**

Mr. Mogamad Ganief Ebrahim Hendricks, MP, acting in accordance with section 73(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution"), intends to introduce the Interim Registration of Muslim Marriages Bill, 2021 ("the draft Bill), in the National Assembly of Parliament. An explanatory summary of the member's Bill is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly of Parliament (the 9th Edition).

In the Republic of South Africa, Muslim marriages that have only been solemnised in terms of the tenets of Islamic Rulings have never been recognised as valid marriages in law capable of being registered with the Department of Home Affairs. Even in the current constitutional dispensation, the state has failed to enact any legislation recognising and regulating any aspect in relation to Muslim marriages. The failure to recognise and regulate valid Muslim marriages has created a great deal of legal uncertainty resulting in an inability even on the part of legal practitioners to advise their Muslim clients with any reasonable degree of certainty what their rights and obligations are or what remedies are available to them in the circumstances. This causes many Muslim women and men to not pursue any legal action enforcing their rights. The failure to recognise Muslim marriages is an indignity by the state to the entire Muslim faith and the failure to regulate and provide for the registration of Muslim marriages undermines and insults the very foundations on which Islam is built. The failure to recognise the existence of a Muslim marriage is tantamount to not recognising the existence of Muslim people, their religion, customs, traditions and culture. The effect of this continuous gross human rights violations by the state is significant. It is essentially impossible for a person to attend to his or her affairs if one lives in a society where you are not even able to establish the proprietary consequences of a person's marriage upon the conclusion or at the dissolution thereof. There are no mechanisms to safeguard the welfare of minor or dependent children of Muslim marriages at the time of the now informal dissolution of these marriages.

During December 2020, the Supreme Court of Appeal ("the SCA"), in *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* 2021 (2) SA 381 (SCA), declared specified sections of the Marriage Act, 1961 (Act No. 25 of

1961) and the Divorce Act, 1979 (Act No. 70 of 1979) inconsistent with the Constitution in so far as these statutes fail to recognise Muslim marriages as valid and lawful marriages capable of being registered with the Department of Home Affairs. On 18 December 2020, the SCA ordered the President and his Cabinet, together with Parliament to remedy this untenable state of affairs by either amending existing legislation, or adopting new legislation, within 24 months from the granting of the court order, in order to recognise Muslim marriages as valid marriages for all purposes in South African law and to regulate the consequences arising from such recognition in our law. This order of invalidity or unconstitutionality of certain parts of existing marital and divorce legislation in so far as it does not make provision for the recognition and registration of Muslim marriages was again argued before the Constitutional Court during August 2021.

In anticipation of there being different schools of thought regarding various aspects in Islamic family law, this draft Bill is designed to identify the minimum elements of a Muslim marriage and to, at the very least, provide an interim and purely temporary resolution to the great indignity caused by the inability to register a Muslim marriage with the Department of Home Affairs, pending the finalisation of a more comprehensive and detailed Act of Parliament to be promulgated (or substantive amendments to existing legislation). This draft Bill is therefore an interim and minimalist Bill designed to provide for the registration of valid Muslim marriages and to regulate some ancillary aspects associated with the registration of these marriages. The draft Bill will lapse upon a far more comprehensive Act coming into operation and that will be accompanied with relevant regulations to be promulgated by both the Minister of Justice and Correctional Services and Minister of Home Affairs. The draft Bill for instance does not deal with divorces separate to that of any other divorce action and does not address the question of polygamous marriages. The reason for this is because history has now taught us that these topics are the contentious issues that will delay the enactment of this crucial Bill – this is something that should be avoided, as any delay in the enactment of this “interim and minimalist Bill” would defeat its entire objective.

The draft Bill therefore, *inter alia*, seeks to provide for the following:

- (a) the registration of Muslim marriages, in the interim, as valid marriages for all purposes in the Republic of South Africa;
- (b) regulating some of the consequences arising from the recognition of Muslim marriages;
- (c) acknowledging the application of other existing domestic legislation to Muslim marriages in specified circumstances;
- (d) interim processes and procedures to be determined by the relevant Minister by promulgating relevant regulations from time to time to be complied with in order to register the conclusion and dissolution of Muslim marriages with the Department of Home Affairs;
- (e) the requirements of a valid Muslim marriage;

- (f) regulating some of the proprietary consequences of Muslim marriages by providing that all Muslim marriages concluded after the commencement of this draft Bill, shall be out of community of property without the operation of the accrual system as the default position, unless the parties agree otherwise;
- (g) the status and legal capacity of spouses in a Muslim marriage by providing that spouses in a Muslim marriage are equal, each with full legal capacity and unhindered status; and
- (h) regulating certain aspects of the dissolution of Muslim marriages in accordance with Islamic rulings.

The intentional failure to address the question of polygamous marriages in this draft Bill does not preclude provision being made for this in the contemplated final and permanent Act of Parliament recognising Muslim marriages. The draft Bill will also not have the effect of prohibiting the conclusion of such customary marriages due to the mere fact that no provision is made for such marriages in this interim draft Bill.

Interested parties and institutions are invited to submit written representations on the proposed content of the draft Bill to the Speaker of the National Assembly of Parliament within 30 calendar days of the publication of this notice. Representations can be delivered to the Speaker, New Assembly Building, Parliament Street, Cape Town; mailed to the Speaker, P O Box 15 Cape Town 8000, or emailed to speaker@parliament.gov.za and copied to mhendricks@parliament.gov.za.

Copies of the Interim Registration of Muslim Marriages Bill may, after introduction, be obtained from:

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