



The Recognition of Muslim Marriages

EQUALITY FOR ALL
#recognisereligiousmarriages

Court summary of week one

The Women's Legal Centre Trust launched an application in the Western Cape Court in the public interest seeking relief by the State aimed at providing women in Muslim marriages and the children born of such marriages with legal protections primarily on dissolution of such marriages through the enactment of legislation.

The matter was heard in the Western Cape High Court with Judge Desai, Judge Salie-Hlophe and Judge Boqwana presiding over the matter.



Day 2 of the hearing 29 August 2017

The Applicant in the WLCT matter (under case number 22481/ 2014) started off the proceedings stressing to the court that the WLCT was seeking the legal recognition of Muslim marriages and was NOT asking that the Muslim Marriages Bill be passed to legislate Muslim marriages. Nor did the WLCT seek to change the Quran (the religious text of Muslims which is a divine revelation).

They proceeded to make a presentation on the background of the suffering of Muslim women in South Africa.

The WLCT application stood down after recess, to give an opportunity for the Applicant in the Esau matter to argue.

The Esau matter (under case number 13677/2015) was consolidated with the WLCT application. The Esau matter concerns an application by a Muslim woman who is divorced according to Muslim rites after 15 years of marriage, with two children borne of the marriage. She wants her marriage to be legally recognised and deemed to be a marriage in community of property whereby she would be entitled to half of her ex-husband's pension. She contends that the failure by the state to prepare legislation discriminates against Muslim women married in terms of Muslim rites, on the grounds of their gender and/or their religion and is unconstitutional. (The WLCT is also a party to the matter where they have been admitted as a friend of the court).

The Applicant in the WLCT matter resumed their argument explaining what was meant by homogenous.

They then guided the court on the matters that came before the court where women had sought legal redress through the legal system because their marriages were not legally recognised.

The Applicant examined the constitutional framework by referring to the relevant sections of the Constitution; namely the introduction of sections 1,2,3,7,8,9,10,15,30,31,34 and 28.

The State asserts that there is no infringement of the rights with the non-recognition of Muslim marriages. Section 36 makes provision for a right to be limited in certain circumstances. Furthermore, the State does not rely on Section 36 regarding the infringements of the rights of Muslim women.



The applicant then proceeded with the legal premise for the relief, which are infringements of certain rights as contained in the Bill of Rights. They reasoned that the failure to recognise Muslim marriages and its consequences is a breach of many rights and therefore there is a positive duty upon the State to put in place reasonable and effective regulatory measures and/or policy measures affording recognition to the consequences of Muslim marriages.

When the matter resumed after lunch, the Third Respondent handed up an affidavit signed by the Deputy Minister of Home Affairs regarding the South African Law Reform Commission.

The court provisionally admitted the affidavit with the request that all the parties be provided with a copy of the affidavit by next week.

Applicant requested a copy of the report referred to in the affidavit, to which Third Respondent undertook to take instructions from client regarding confidentiality.

The Applicant proceeded to submit argument in relation to the Executive powers and the Legislature's powers under the Constitution by looking at specific provisions and case law.

The Applicant submitted that there is no impediment on the part of the court to order the fulfilment of constitutional obligations.

The Applicant proceeded to submit argument on the law-making powers of the Executive and Legislature and presented cases where the issue was raised.

The Applicants then proceeded to make submissions on the fundamental rights in the Constitution and the State's defence in response to there being no infringement of Muslim women's rights.



Day 3 of the hearing 30 August 2017

Judge Desai indicated that the matter would not be finished being heard by Thursday 7 September 2017. Adding that the matter will be further postponed until 11 December 2017, when the application would be heard for four days.

The Applicant in the WLCT matter (under case number 22481/2014) started the proceedings by arguing composite relief, explaining that the composite relief is that the complaint is one of an unmet constitutional obligation.

The Applicant explained why the relief as formulated, was being sought generally by stating that despite the infringement of rights in the context of Muslim marriages, which has been acknowledged by the State, the State failed to take meaningful steps to remedy and prevent the further and continuing infringement of such rights. There is a need for clear coherent legislation to provide for the protection of women in Muslim marriages. The Applicant sought a practical solution.

They accepted that Parliament or the President determine what is necessary to fulfil their practical obligations, but submitted that what if what they do is unreasonable, or if they do nothing where the effect is unconstitutional then it is permissible for the court to determine whether there has been a fulfilment of the obligations.

They submitted that there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights and that Court would want to refrain from being prescriptive. However, it remained the court's responsibility to ensure that the State performed its obligations while having due regard for the separation of powers. It is necessary for the court to say the State is not doing what it is supposed to do.

Day 4 of the hearing

31 August 2017

The Applicant started by addressing the objection by the Third Respondent of the Applicant's interpretation of Daniels. Applicant took the court through the relevant sections of the Hassam and Ismail judgements.

The objective of the Applicant was to address the point of choice of marriage. In Hassam, Justice Nkabinde came to the conclusion that interpretative approach is no longer sustainable.

Turning to the equality argument, the right to equality, section 9(1) and 9(3) being the relevant sections. Equality is not only a fundamental right, but also a founding value of the Constitution.

The court was taken through the rest for unfair discrimination.

It was argued that the court had to decide whether the lack of recognition of Muslim marriages and the lack of regulation of its consequences breaches the Constitution.

The failure of the State to prepare and initiate legislation that addresses the consequences of Muslim marriages – this omission differentiates between marriages in terms of Muslim rites and marriages in terms of civil law or RCMA. There is no rational basis for this differentiation. The reliance by State parties on religious freedom is not sufficient when up against unfair discrimination.

The State cannot both argue that there is no discrimination and put up defences to show how progress has been made.

Daniels paragraphs 19-21 – the word spouse includes parties to a Muslim marriage. The restricted definition of spouse was discriminatory.

One of the arguments made by the State parties that they cannot enact legislation that will recognise polygamous marriages, and yet this has been done for customary marriages.

Conclusion to the equality argument: The omission by the State is an infringement of sections 9(1) and 9(3).

Daniels v Campbell- minority judgment of Moseneke used a different approach to that of Sachs. Justice Moseneke did not agree that the

definition of spouse should be extended to include Muslim spouses. He felt that the correct approach would be a declaration of invalidity.

On the question of comparator as a defence, is really that the law does not discriminate against different persons of different religion – discriminated against equally – a formal equality approach.



The equality point is at the heart of the Applicant's argument.

The factual case by the Second and Third Respondent and in Daniels (cc page 370 paragraph 106). The lack of recognition of religious marriages, does not necessarily have the same consequences as there is a tendency to register. The judgement specifically refers page 585 paragraph 31.

That issue of attendance is raised of Mr M S Omar as to when he wants to argue. Mr M S Omar objected. The first Respondent did not object but was concerned about time. The Eighth Respondent had no objection.

Sequence:

- All amici broadly supporting Applicant
- Muslim Assembly
- SAHRC
- UUCSA, SA Lawyers for Change and LSSA,
- CGE

The court accepted the order and requested a note to be sent to the court and all the parties.

The Western Cape High Court will resume hearing the matter on Monday 04 September 2017 starting 10h00 in court room 18.