

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case No. **CCT24/21**
SCA Case No: **612/19**
WCHC Case No: **2481/2014;**
4466/2013 &
13877/2015

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Appellant

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT** Second Applicant

and

WOMEN’S LEGAL CENTRE TRUST First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES** Fourth Respondent

**LAJNATUN NISAA-IL MUSLIMAAT
(ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)** Fifth Respondent

UNITED ULAMA COUNCIL OF SOUTH AFRICA Sixth Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Seventh Respondent

**COMMISSION FOR THE PROMOTION AND
PROTECTION OF THE RIGHTS OF CULTURAL
RELIGIOUS AND LINGUISTIC COMMUNITIES** Eighth Respondent

WRITTEN SUBMISSIONS BY
UNITED ULAMA COUNCIL OF SOUTH AFRICA
AS PER PARAGRAPH 3 OF THE DIRECTIONS OF THE DEPUTY CHIEF JUSTICE DATED 1ST JULY 2021

A. INTRODUCTION

1. At the heart of this debate is the central issue of the State's ongoing, continuing proven, foundational breach of its constitutional obligation to adopt comprehensive legislation regarding Muslim marriages and their consequences. It goes without saying that marriage forms the foundation of the family and society, and is fundamental to our very existence and survival.
2. Put differently, the State is positively obliged to enact comprehensive legislation in terms of section 7(2) of the Constitution, read with section 15(3), to recognise Muslim marriages and their consequences, for all purposes. With respect, the SCA erred in this regard. Amendments to the Marriage and Divorce Acts will not provide real, reasonable and effective relief.
3. Such comprehensive stand-alone legislation, sourced in section 7(2), would address the multiple rights violations suffered in particular by vulnerable Muslim women and children, in relation to *inter alia*, regulating:
 - 3.1 talaq and its assignment by the husband to the wife, on the basis of equality;

- 3.2 regulating faskh (dissolution of the Islamic marriage obtained at the instance of the wife);
- 3.3 polygynous marriages to ensure that the mandatory Quranic prescript of equality is adhered to;
- 3.4 marriage contracts, which permit a wide flexibility of conditions, including voluntary partnership arrangements between the spouses;
- 3.5 the equitable division of property upon termination of an Islamic marriage, having regard inter alia to the co-mingled contributions of the spouses, *stante matrimonio* in the absence of agreement;
- 3.6 adequate relief and protections for children, in their best interests.

B. UUCSA’S INTEREST IN THE MATTER

4. UUCSA is the umbrella body of the major Muslim theological formations in Its organisational members enjoy the confidence and support of the vast majority of the Muslim community in South Africa and through its affiliates, represents approximately 400 Mosques and 200 educational institutes and religious seminaries.

5. UUCSA is the dominant national religious body responsible for protecting and safeguarding the religious affairs of Muslims in South Africa.
6. UUCSA has had significant involvement in, and made substantial contributions to all matters related to the enactment of legislation in respect of Muslim marriages in South Africa. UUCSA's involvement included consenting to the draft Muslim Marriages Bill ('*MMB*') in consultation with the South African Law Reform Commission ('*SALRC*').

The Lived Realities of Muslim Women and Children

7. UUCSA is confronted daily with the lived realities of particularly vulnerable Muslim women and children who remain unprotected by South African law and whose constitutional rights are merely just words on paper.
8. A major challenge is the hurdle to access courts, including the inability to enforce rights. In the absence of a viable statutory legal framework, it is almost impossible to define a cause of action in terms of a marriage that is not legally recognised for all purposes.
9. These challenges not only seriously impact vulnerable Muslim women, but also their minor children.

10. The oral submissions made by UUCSA in the court of first instance demonstrate the harsh consequences Muslim women and children suffer because there is no effective mechanism (in terms of a statutory framework) to enforce their rights.

Piecemeal Development of the Law

11. UUCSA submits that the piecemeal development of the South African law is manifestly undesirable as it leads to uncertainty and a fragmented jurisprudence, which is contrary to the rule of law, a founding principle of our Constitution.
12. The court of first instance agreed with UUCSA's submissions and stated in its judgment in paragraph 155:

'The undesirability of piecemeal relief was highlighted in a number of judgments including, Bhe and Others v Khayelitsha Magistrate and Others, where the Court held "[t]he problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems'.¹

¹ Judgment MA Vol 9 p1511 – 1512.

13. Therefore, UUCSA submits that the piecemeal attempts to develop the law incrementally are ineffective because:

13.1 the change is too slow given the seriousness of the harm and prejudice suffered by Muslim women and children;

13.2 it results in uncertainty and a fragmented jurisprudence (which is contrary to the rule of law); and

13.3 the ad hoc developments fail to address the injustices suffered in a way that assists the most vulnerable and destitute.

14. In amplification, UUCSA submits that the harm and prejudice suffered by Muslim women and children amounts to a serious ongoing infringement of their constitutional rights to equality, dignity, access to the courts and best interests of the child. Take the following example:

14.1 H & W are married in terms of Islamic Law only (not converted to a civil marriage). The marriage has irretrievably broken down. H issues a talaq which summarily terminates the marriage.

14.2 During the course of the Islamic marriage, the parties purchased a home for a price of R2 million, which was registered in the name of H.

14.3 W contributed R900 000,00 and the balance was funded by a bond.

14.4 H & W contributed financially towards paying the utilities and maintenance of the home.

14.5 Upon termination of the marriage, in the absence of agreement, W wishes to recover her tangible contributions, but is unable to formulate a valid cause of action for recovery of her tangible financial contribution, in the absence of a viable statutory framework.

14.6 The draft Muslim Marriages Bill grants the Court an overriding equitable discretion, in the absence of agreement, to order an equitable division of assets between the spouses so as to achieve justice. (Section 9 (7) (b).

C. STATE'S OBLIGATION TO RECOGNISE AND REGULATE MUSLIM MARRIAGES

15. Upon a proper purposive contextual interpretation of sections 7(2) and 15(3)(a) of the Constitution, understood in the context of the structure of the Bills of Rights as a whole, UUCSA contends that the state is obliged to enact appropriate legislation relating to Muslim marriages and their consequences.

16. Section 7(2) of the Constitution prescribes that the ‘*State must respect, protect, promote and fulfill the rights in the Bill of Rights*’. This section dictates that the State is not simply required to refrain from interfering with the enjoyment of constitutional rights, but that it must actively ensure the realisation of these rights.
17. The duty to respect implies that the State must not interfere with the enjoyment of constitutional rights.
18. The duty to protect implies that the State must protect against any interference of the enjoyment of constitutional rights.
19. The duty to promote implies that the State must use its power to assist individuals in realising their constitutional rights.
20. The duty to fulfill implies that the State must act to adopt appropriate measures (like enacting legislation) so that people who do not currently enjoy access to the rights, can gain access.
21. The Constitutional Court has recognised in several judgments that section 7(2) places both negative and positive obligations on the State to ensure the realisation of constitutional rights.²

² *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at para16

22. Therefore, in light of the fact that women and children of Muslim marriages fail to enjoy their rights to equality, dignity, access to courts and best interest of the child, UUCSA reiterates that the State has a positive obligation (a constitutional duty) to create a viable statutory framework to recognise and regulate Muslim marriages, and their consequences.

23. Section 15(3)(a) of the Constitution states that:

‘This section [the right to freedom of religion, belief and opinion] does not prevent legislation recognising –

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion’.

24. This section appears to permit – and therefore constitutionally empower the State – to introduce legislation to recognise and regulate Muslim marriages. Section 15(3) must be read with section 7(2), holistically and purposively giving rise to a mandatory obligation triggered by section 7(2).

and *Minister of Home Affairs v National Institute For Crime Prevention and The Reintegration of Offenders (Nicro) and Others* 2005 (3) SA 280 (CC) at para 28.

25. Therefore, UUCSA submits that in reading sections 7(2) and 15(3)(a) together, with due regard to the text, context and purpose, there can be no doubt that the State has a positive duty to enact appropriate legislation to recognise and regulate Muslim marriages.
26. Furthermore, UUCSA submits that the court a quo was correct in finding that the State has failed in its constitutional duty and that the only effective remedy would be the enactment of comprehensive legislation:

'[180] the non-recognition of Muslim marriages is historic, persistent and unfulfilled since the beginning of democracy. This is not a single instance, but rather a systemic failure by the State to provide recognition and regulation, potentially affecting millions of people around the country. Marriage concerns a plethora of issues, from status to property, involving a wide range of laws, which are complex and fundamentally important.

[181] While the State has the authority to determine how it fulfils its section 7(2) duty, this must necessarily be in line with the Constitution. In this instance, given the nature of the rights violations, in the context of the complexity and importance of marriage, the only reasonable means of fulfilling section 7(2) duty is through the enactment of legislation.

[184] The permissive nature of section 15(3) of the Constitution insofar as it allows for the introduction of legislation that recognises marriages concluded under a system of religious or personal and family law does not forbid such a conclusion ... Comprehensive legislation is required because it would provide effective protection of marriages concluded in terms of the tenets of Islamic law, whilst giving expression to Muslim persons' rights to freedom of religion.³

International Instruments

27. In terms of Article 16 (3) of the *Universal Declaration of Human Rights*, “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. (adopted: 10 December 1948)

28. States who are parties to the *International Covenant on Civil and Political Rights* (ICCPR), “shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children”. (article 23)

³ Judgment MA Vol 9 p1521 – 1522.

D. CONCLUSION

29. The Constitutional Court is urged to recognise that the issue at the heart of this matter, is this : the State’s failure in, and breach of, its s7(2) constitutional obligation to protect, promote and fulfil the constitutional rights of Muslim women and children.
30. The issue is not about doctrinal entanglement, nor the separation of powers:
- 30.1 it is about the continued affront to the dignity and equality of the Muslim community;
 - 30.2 it is about the lived realities of Muslim women and children not being able to enforce their rights, nor access the courts;
 - 30.3 it is about the State’s inertia and lethargy in failing to create a viable statutory framework, and
 - 30.4 it is about the duty of the Court, as the guardian of the Constitution, to hold the State to account for its continued breach of its 7(2) obligations.

31. As the legitimate and authoritative voice of the majority of the Muslim community of South Africa, we urge this Honourable Court to take into account these submissions in the determination of the issues.
32. Furthermore, we implore this Honourable Court to assist the Muslim community by redressing the failure of the State to recognise and regulate Muslim marriages, and by compelling the State to adopt appropriate legislation within a reasonable time frame. Comprehensive legislation, triggered by a section 7(2) obligation, is the only reasonable and effective measure for the State to remedy the ongoing multiple rights violations causing serious hardship and grossly unjust consequences.
33. Failing adequate, reasonable, and effective relief, the Constitution would certainly fail to serve its primary function, as the supreme overarching law, whose entrenched fundamental rights are **not** subject to be voted upon, or the vicissitudes of elections.
34. It follows that paragraphs 1 and 2 of the Order of the High Court declaring that the State is obliged by Section 7(2) of the Constitution to enact legislation recognising Islamic marriages and their consequences must be reinstated.

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