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Gratitude for the volunteer work of the legal profession

By Margaret FIsh, Communications Manager

For the first time since the COVID-19 pandemic we held our annual Pro Bono Awards ceremony on 26 January 2023 in person. Grateful thanks to Bowmans for offering to host us this year. They really made the evening a very special one.

MC for the evening was Seehaam Samaai, Director of the Women's Legal Centre in Cape Town and the keynote address was given by Prof. Joel Modiri, Head of the Department of Jurisprudence at the University of Pretoria. "Let me say congratulations in advance to all the award recipients whose hard work and diligence is being recognised tonight. As a law teacher myself, it is my hope that we cultivate in our students a spirit of public-mindedness and service; and that they use their skills towards causes that are human and just in their daily lives", he said.

Prof. Joel Modiri

Pro Bono 2022 award winners with Centre: Mohamed Randers (Chairperson) and Teresa Yates (National Director)

Teresa Yates with the Special Mention recipients

The spirit of public-mindedness was evident in the recognition being given to the legal practitioners who received acknowledgment through their awards.

Tribute was paid to the following practitioners in the various categories of law that are dealt with at ProBono.Org:

Child Law

Adv Leigh Franck and

Attorney Jonathan Stephens

The Rev Leon Forsman

Adv JP Weitz

Labour Law

RW Africa Attorneys

Family Law

Fox & Barratt Attorneys

NiSAA Clinic, Gender Based Violence, Lenasia

Fasken Attorneys

Domestic Violence

Bowmans Pro Bono Department

Represented by Fatima Laher

Housing

Sarah Goldman – Lawtons Africa

Deceased Estates

Nomusa Ndaba Attorneys

Conveyancing

Chrysi Kripotos

Refugees

Patricia Afagwu – Umennaka Attorneys Inc.

Varsity College Students – practical work experience

Group 10 from July 2022

Advocate Award

Glenda Swart

Special Mentions

Elsie Mokoena, Thulisile Buthelezi, Zola Khumalo, Elgene Roos, Mukhetwa Chauke, Chrysi Kripotos, Nthabiseng Gambushe, Phateka Maliphale, Naledi Motsiri (Werksmans) and Rita Tladi (WATLA Community Advice Office).

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BOWMANS THE VALUE OF KNOWING

Legal recognition of Muslim marriages by the Constitutional Court

By Tyler Idas, Cape Town intern 2022

Section 9 of the Bill of Rights in the Constitution provides that everyone is equal before the law and has the rights to equal protection and benefit of the law. They should also not be discriminated against, directly or indirectly, based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

On 28 June 2022, the Constitutional Court confirmed the Supreme Court of Appeal (SCA) ruling in Women's Legal Centre Trust v President of the Republic of South Africa and Others, in which it held that the non-recognition of Muslim marriages in South African law infringes on the constitutional rights of both Muslim women and their children in terms of their right to equality, dignity, access to justice as well as the best interests of the minor child as enshrined in our Constitution.

The application had initially been brought in 2014 in the Western Cape High Court by the Women's Legal Centre, in which the court held that the State had a constitutional obligation to recognise Muslim marriages and to date they had failed in this respect. This was after Muslim women, who were married in terms of Sharia Law, complained that they had been discriminated against because they had no legal protection or recourse under South African common law.

Examples of this injustice include a Muslim woman who had been excluded from inheriting from her late husband's estate and another who had been precluded from benefiting from her husband's pension fund, as well as having their children viewed as being born out of wedlock and thus being unable to access the services of the Office of the Family Advocate. The Cape Town High Court further held that the decision to enter into a Muslim marriage and not to have it registered cannot be a basis to deny women and children the rights and benefits that are available to women and children under registered marriages. This includes, for example, the right to share in the joint estate and assets when divorce takes place and the right to be listed as a co-owner of assets, as well as to have the courts act as upper guardians to the minor child during divorce proceedings.

The Constitutional Court confirmed that the Marriages Act of 1961 and the Divorce Act of 1979 were both unconstitutional in that the pieces of legislation fail to recognise Muslim marriages, which are not registered as civil marriages. The Court further declared that the common law definition of Marriage was inconsistent with the Constitution as it excluded Muslim marriages and that they should be endorsed as being legally recognised in law moving forward .

Prior to the handing down of the Constitutional Court judgment, the Supreme Court of Appeal held that the State had failed to take the necessary legislative measures to recognise and regulate Muslim marriages in South Africa, which is a subsequent breach of its duty in terms of section 7(2) of the Constitution . This section specifically provides that the State must respect, promote and fulfil the rights in the Bill of Rights.

In an analysis of the Divorce Act, the Constitutional Court in paragraph 27 of the judgment found the following sections of the Act unconstitutional:

Section 6 of the Divorce Act was declared to be inconsistent with section 9, 10 and 28(2) of the Constitution because it failed to provide structures to safeguard the welfare of minor or dependent children born of Muslim marriages at the time of the dissolution of a Muslim marriage, in contrast to the safety mechanisms put in place to safeguard the welfare and best interests of minor or dependent children born of other legal marriages that are dissolved . In terms of section 6(1) of the Act, a decree of divorce may not be granted until the Court is satisfied that the provisions made or contemplated for the welfare of any minor or dependent child(ren) of the marriage are satisfied and the Court has considered the report and recommendations of the Family Advocate.

Thus, section 6 of the Divorce Act during the dissolution of Muslim marriages currently fails to enable the Office of the Family Advocate to make the necessary enquiries into the best interests of any minor child(ren) born of the marriage. Section 6 essentially enables the Court to assess the care and contact arrangements of minor children by the Office of the Family Advocate and may order any investigation which it

" ...Muslim women going through a divorce who were not of financial means and who had no legal document regulating their marriage and assets, were unable to approach a Court to ask that it intervene to be able to make a determination in terms of the fair distribution of the other spouse's assets."

may deem necessary to be carried out to ensure the best possible living arrangements and welfare of the minor child(ren) are considered before final dissolution of the marriage is granted. This will ultimately have a knock-on effect on the internal capacity and resources of the Office of the Family Advocate's ability to conduct timeously any investigation necessary and to draft comprehensive court reports regarding the welfare and best interests of any minor child who finds themselves in the middle of a Muslim marriage divorce.

In addition, section 7(3) of the Act was declared to be inconsistent with sections 9, 10 and 34 of the Constitution as it failed to provide for the possible redistribution of assets on the dissolution of a Muslim marriage when such redistribution would be fair based on the circumstances of the marriage to be dissolved .

The practical implication of this is that prior to the Court order, Muslim women going through a divorce who were not of financial means and who had no legal document regulating their marriage and assets, were unable to approach a Court to ask that it intervene to be able to make a determination in terms of the fair distribution of the other spouse's assets. This is an important step if we are to realise women's rights in terms of equality, as the majority of Muslim marriages concluded are, by default, out of community of property and thus each spouse when entering into a marriage retains his or her assets as their own. However, this sentiment is not as straightforward should a Muslim couple choose to purchase property together or should one spouse choose to do so on their own.

Moreover, Section 9(1) was found to be inconsistent with the Constitution for failing to make provision for the forfeiture of patrimonial benefits of a Muslim marriage at the time of its dissolution, on the same or similar terms as it does in respect of other marriages that are dissolved . When a decree of divorce is granted on the grounds of the irretrievable breakdown of the marriage, the Court, under section 9(1) of the Act, may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part. This is often in relation to immovable property such as the family home, as well as movable property such as a motor vehicle.

The factors which the Courts have to take into account when deciding whether or not a forfeiture order should be made under section 9(1) of the Act are as follows:

- the duration of the marriage,
- the circumstances which gave rise to its breakdown, and
- any substantial misconduct on the part of either of the spouses.

Thus, the application of section 9 to Muslim marriages will aim to eradicate possible inequalities found within Muslim marriages by allowing Muslim women to approach the Court for an order of forfeiture; especially where they have left their jobs or studies to become a homemaker, either at the request of their spouse or a personal decision which has rendered them financially dependent on the working spouse, which arrangement may oftentimes give rise to financial and/or other forms of abuse within a marriage.

Furthermore, the Court declared that from the date of the Court order, section 12(2) of the Children's Act 38 of 2005 would be applicable to all prospective spouses in a Muslim marriage which was concluded after the date of the order. Section 12(2) of the Children's Act states that a child,

- Who is below the minimum age set by law for a valid marriage may not be given out in marriage or engagement;
- Who is above the minimum age may not be given out in marriage or engagement without his or her consent.

This formal recognition is of great importance given the various practical implications we will see as a result of working toward regulating future Muslim marriages in South Africa. Child brides remain a social ill which plagues our communities as families are desperate to make ends meet. As such, parents often enter into negotiations to have their teenage daughters married off to a potential partner who will be able to provide for and take care of their child financially. Thus, the application of section 12(2) of the Children's Act now gives the Courts the authority to step in and make a legal order to prevent a cultural or religious practice which could potentially be prejudicial and prevent young girls from pursuing possible tertiary education as well as their constitutional rights to sexual and reproductive health.

The recent Constitutional Court judgment applies to all Muslim marriages entered into after 15 December 2014 and a declaration of invalidity will be suspended for a period of 24 months to enable Parliament, together with the President and Cabinet, to remedy the defects found within the existing pieces of legislation, so as to ensure the recognition and regulation of Muslim marriages as valid for all legal purposes in South Africa.●

Welcome to our 2023 interns

Johannesburg

Masontaga Malatja has been assigned to the Refugee and Estates department. Born and raised in Katlehong, she obtained her LLB at Wits. She believes in using the law as a positive instrument for change and enjoys volunteering as it gives her a sense of fulfilment.

She feels privileged to have the opportunity to assist in the development of her professional career at ProBono.Org. She is also deeply rooted in her community, which has played a huge role in the person that she is today.

Her favourite quote: *"A journey of a thousand miles begins with a single step"* – Lao Tzu

Nomvula Sibeko is a LLB graduate from the University of Johannesburg working in the Family Law department. She aims to bring about positive change against social ills and injustices. Her passion for community and her ambition to make a positive difference has her firmly rooted in the legal justice system and what it stands for. She believes that everyone in the Republic should benefit from the rights guaranteed in the Constitution and should be afforded just, fair and transparent legal services. She plans to extend and promote the spirit of Ubuntu in her work at ProBono.Org.

Cape Town

Faith Adeniji was born in Nigeria and raised in South Africa. She is ambitious, focused and dedicated, with a passion for the legal system. Her desire to speak up for those who cannot speak for themselves and defending the rights of the poor and needy inspired her to be active in various on-campus societies such as Street Law and extracurricular activities that sought to bring the law to underserved communities. This has further motivated her to join ProBono.Org and to form part of an organisation that seeks to uphold the spirit of the Constitution and make a positive difference in the lives of the underprivileged.

Write for us

We would like to invite legal practitioners to contribute to our bi-monthly newsletters by writing an article of up to 400 words (one page) on a topical issue of law. Please indicate your interest to the editor at **margaret@probono.org.za**

The deadline for articles for the next issue will be: **1 April 2023**

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