REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **14770/2011**

In the matter between:

[F……] [R……] Plaintiff

And

[F…….] [R…….] (BORN C……. C……. R…….) First Defendant

MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT Second Defendant

TRANSNET RETIREMENT FUND Third Defendant

MINISTER OF HOME AFFAIRS Fourth Defendant

JUDGMENT DELIVERED ON 29 JANUARY 2015

BREMRIDGE, AJ

1. The Plaintiff in this matter issued summons against the First Defendant claiming certain relief in respect of the proprietary consequences of an Islamic marriage solemnised between the Plaintiff and the First Defendant on 3 March 1988.

2. After the close of pleadings the parties agreed on a written statement of facts to be considered by the Court in adjudicating certain questions of law under rules 33(1) and 33(2) of the Uniform Rules of Court, ("the Stated Case").

3. It seems to me that the adjudication of the questions of law in issue herein should have been dealt with in accordance with the procedure contemplated by rule 33(4) but given the advanced stage of the matter when it came before me for determination and delays already incurred, I considered it to be inappropriate to let such procedural issues obstruct or delay the determination of the matter.

4. The Stated Case agreed to and presented by the parties for adjudication, is as follows:

A. <u>The Parties</u>

5. The Plaintiff is [F……] [R……] (nee Jacobs) an adult female, currently unemployed, residing at [3….. F…….. Road, S……., Western Cape.]

6. The First Defendant is [F……] [R…..] (Born C….. C….. R……) an adult male armature rewinder and currently resident at [6…… S…. Street, A….. Court, P…..-E…, Western Cape.]

7. The Second Defendant is the Minister of Justice and Constitutional Development c/o the State Attorney, 4th Floor, Liberty Life Centre, 22 Long Street, Cape Town, cited in his capacity as the member of the national executive responsible for the administration of the Divorce Act 70 of 1979 and any other laws, the constitutionality of which are challenged in this matter. By virtue of Rule 10A of the Uniform Rules of Court the Plaintiff is obliged to join the Second Defendant as a party to these proceedings.

8. The Third Defendant is the Transnet Retirement Fund which was established in terms of the Transnet pension Fund Act 62 of 1990 (as amended) with its principal place of business at No. 8 Hillside Road, Park Town, Johannesburg, Gauteng. The Third Defendant is cited because the relief sought in relation to the First Defendant's pension fund with the Third Defendant in respect of such relief and any other relief emanating from this action. No costs are sought against the Third Defendant unless it seeks to oppose the relief sought.

9. The Fourth Defendant is the Minister of Home Affairs c/o the State Attorney, 4th Floor, Liberty Life Centre, 22 Long Street, Cape Town, cited in his capacity as the member of the national executive responsible for the administration of the Marriage Act 25 of 1961 ("the Marriage Act"), the constitutionality of which is challenged in this matter. By virtue of Rule 10A of the Uniform Rules of

Court the Plaintiff is obliged to join the Fourth Defendant as a party to these proceedings.

B. <u>Agreed Facts</u>

10. On or about 20 December 1975 the First Defendant and E…… A…. R…… entered into a civil marriage ("the civil marriage") solemnised in terms of the Marriage Act.

11. The civil marriage subsisted until a decree of divorce was granted by the Western Cape High Court on 19 June 1998.

12. On 3 March 1988 and at Wynberg, Cape Town, Plaintiff and First Defendant entered into a marriage which was solemnised according to Islamic law ("the Islamic marriage").

13. At the time that Plaintiff and First Defendant entered into the Islamic marriage, the First Defendant was married to E…. A…. R…. in terms of the Marriage Act.

14. Plaintiff was unable to terminate the Islamic marriage in any court of law in South Africa, in that she was married in terms of Islamic law and not in accordance with the Marriage Act.

15. The Islamic marriage was annulled on 20 July 2009 by the Muslim Judicial Council.

16. No relief is sought against the Third Defendant and it has not opposed these proceedings.

The Questions of law to be adjudicated

17. The questions of law to be adjudicated are set out in paragraphs 13 and 14 of the Stated Case and are, in summary:

    17.1 Firstly, whether the Islamic marriage entered into between the Plaintiff and the Defendant was validly contracted notwithstanding the prior marriage in terms of the provisions of the Marriage Act;

    17.2 Secondly, whether the First Defendant's prior existing civil marriage would "*act as a bar*" to the Plaintiff being entitled to claim certain relief in respect of the proprietary consequences of her Islamic marriage to the First Defendant.

18. As I understand the written argument presented by the Plaintiff[1], which was followed in the oral argument presented at the hearing, however, the Plaintiff's position is that if this Court were to find that the First Defendant's prior civil marriage did not constitute a bar to a claim by Plaintiff for the proprietary relief as set out in paragraph 14 of the Stated Case, then it is not necessary for this Court to make a pronouncement as to the Constitutional validity of polygamous unions and it is only in the alternative and in the event of the

[1] Plaintiff's Heads of Argument paragraphs 65 – 67, at p.27-28

Court finding that the Plaintiff's prior civil marriage does constitute a bar to a claim for such relief, that this Court should seek to develop the common law definition of marriage to afford recognition to a Muslim marriage and in particular in the current matter, a marriage which may be considered to be polygamous.

19. As pointed out by Sachs J. in the majority judgment of the Constitutional Court in ***Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)***, in relation to relief sought, under the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990, by a surviving spouse of an Islamic marriage:

> "*The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers*."[2]

20. Given the reasoning of the Constitutional Court in the *Daniels* case, supra, and in the subsequent decision in ***Hassam v Jacobs 2009 (5) SA 572 (CC)***, addressed below, I am of the view that in this matter also, the Plaintiff's entitlement to the relief set out in paragraph 14 of the Stated Case and the determination of the issue set out in that paragraph, is not dependant on a determination of the validity or invalidity of the Islamic marriage entered into between the Plaintiff and the First Defendant on 3 March 1998.

[2] At p. 345; para [25]

21. The Plaintiff argued that there had to date been no pronouncement on the Constitutional validity of polygamous Muslim marriages.

22. While that may be so, the Constitutional Court has proceeded, in the matters referred to above and in others, on the basis that Muslim or Islamic marriages are not recognised as legally valid in our law.

23. Indeed in *Daniels*, Moseneke J., in the minority judgement, emphasized that:

> "*Marriages that have been solemnised under the tenets of the Islamic faith remain unrecognised as valid marriages under the common law*."[3]

24. Moseneke J. further emphasized that the doctrine of precedent is an incident of the rule of law, its primary purpose being to advance justice "*by ensuring certainty of the law, equality and equal treatment and fairness before it.*"[4]

25. The learned Judge addressed the report of the South African Law Commission on Islamic marriages and the draft Muslim Marriages Act[5] and held that the matter was "…*so complex and replete with contending policy, personal law and pluralistic considerations that it was better suited for legislative rather than judicial intervention*.[6]

26. In the matter of ***Faro v Bingham NO and Others (4466/2013) [2013] ZAWCHC 159*** *(25 October 2013)* Rogers J., having dealt with certain developments in relation to the report of the Commission and the publication

[3] At p. 358; para [69]
[4] At p.366, para [94]
[5] At p.370-371, paras [107] –[109]
[6] At p.371, para [108]

of the Muslim Marriages Bill in December 2010, held that the regulation of Islamic marriages is a sensitive subject requiring widespread consultation and more detailed provisions than a Court could appropriately incorporate in judicial order and that a court would be *"..most reluctant to make orders affecting the substantive law in this area*."[7]

27. I am in respectful accord with the approach adopted by the learned Judges in this regard and in particular with the view that the issues as to the recognition and validity of Muslim marriages are "*better suited to legislative than judicial intervention.*"

28. In light of the aforegoing, my finding on the issue for determination set out in paragraph 13 of the Stated Case as to the validity or otherwise of the Plaintiff's Islamic marriage to the First Defendant, is that for the purposes of South African Law, such marriage is not considered to have been validly contracted.

29. I turn then to the second question of law to be decided, as set out in paragraph 14 of the Stated Case namely, whether the First Defendant's pre-existing civil marriage would "*act as a bar"* to a claim by the Plaintiff for relief in respect of the proprietary consequences of the Islamic marriage, as follows:

    29.1 That the First Defendant be required to pay monthly maintenance in the amount of R1 000,00 from the date of divorce and or expiration of the

[7] At p.19-20, para [44]

iddah (waiting) period until the Plaintiff's death or remarriage as contemplated in Section 7(2) of the Divorce Act;

29.2 That the First Defendant's pension interests in the Third Defendant as at 23 October 2008 be declared to be part of his assets;

29.3 That the Third Defendant be required to pay over to the Plaintiff half of the First Defendant's pension fund as valued at 23 October 2008 when any pension benefits accrue to the First Defendant in relation thereto.

30. As stated above, I am of the view that the answer to this question does not turn upon the validity or otherwise of the said Islamic marriage.

31. The Second and Fourth Defendants, with whose arguments the First Defendant associated himself, have in this regard, however, raised the issues that:

31.1 The Plaintiff's Islamic marriage to the First Defendant has already been dissolved by the Muslim Judicial Council, (the "MJC"), in consequence whereof it is argued that the Court no longer has any jurisdiction to grant a divorce in relation to that marriage; and

31.2 The polygamous marriage between Plaintiff and First Defendant is not recognised as valid in our law.

32. Having decided the issue raised under paragraph 13 of the Stated Case and in light of my view that the determination of the issue set out in paragraph 14 of the Stated Case does not turn on the issue of the validity or invalidity of the Islamic marriage, I am further of the view that these issues, as raised by Second and Fourth Defendants, do not require determination in the determination of the issue set out in the said paragraph 14 of the Stated Case.

33. I nevertheless intend to consider these issues, firstly, in that I may be found to be wrong in this regard and secondly, as my decision on the issue set out in paragraph 14 of the Stated Case may be informed by my views and reasoning on such issues, in particular in relation to the decision of the Constitutional Court in *Hassam's* case, *supra*.

34. The relief set out in paragraph 14.1 of the Stated Case is expressly stated to be under section 7(2) of the Divorce Act while the relief sought in paragraphs 14.2 and 14.3 would appear to be sought under section 7(8) of the Divorce Act.

35. Sections 2 (1), (3) and (4) of the Divorce Act provide that:

> *"(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is-*
>
> *(a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or*
>
> *(b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the*

Republic for a period of not less than one year immediately prior to that date.

(2) ……..

(3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law."

36. Section 7(9) of that Act provides that:

"*When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse."*

37. Regarding the first issue raised by the Second and Fourth Defendants as set out above, in ***AM v RM 2010 (2) SA 223 (ECP)***, the court held that the fact that a "*Muslim divorce*" had been concluded was no obstacle to a divorce action where there was, inter alia, a challenge (in that matter a constitutional challenge) to the legal effect of the *talaq*.

38. In my view, the Plaintiff, in seeking the relief set out in paragraphs 14.1 to 14.3 of the Stated Case, is thereby challenging the legal effect of the *talaq*, in

particular in seeking to have the proprietary consequences of her Islamic marriage regulated under the Divorce Act.

39. The dissolution of the Islamic marriage by the MJC is therefore and in light of the aforementioned authority, no bar to the current divorce action.

40. In ***Hoossain v Dangor [2009] JOL 24617 (WCC)***, Yekiso J, relying on the reasoning in *Daniels*, supra, held that the word "*spouse*" as referred to in Uniform Rule 43, includes a spouse to a marriage concluded under the tenets of Islamic personal law. [8]

41. In both the aforementioned decisions the Court held, albeit for different reasons, that the provisions of Uniform Rule 43 are applicable to a divorce action in relation to a marriage concluded under Islamic personal law.

42. It appears, inter alia, from Sections 3 and 4 of the Divorce Act, that that Act contemplates the dissolution of a "*marriage*".

43. The term "*marriage*" is not defined in the Act.

44. It appears from the abovementioned provisions, however, that a marriage as contemplated in the Act is not limited to one solemnised under the Marriage Act but would, for example, include a marriage solemnised under the laws of a foreign state, which may potentially be at odds with South African common law.

[8] At para [28]

45. In *Daniels* the Constitutional Court, per Sachs J., distinguished that Court's decisions in the matters of ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)*** and ***Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC)****,* on the basis of the distinction between married and unmarried persons.

46. The Court stated as follows[9]:

> "*Central to the determinations in National Coalition and Satchwell, was a legal finding that it would place an unacceptable degree of strain on the word 'spouse' to include within its ambit parties to a permanent same-sex life partnership. Thus, in Satchwell, Madala J pointed to members of such same-sex partnerships as well as to heterosexual couples who chose not to marry, as belonging to a class of persons who could not be considered to be 'spouses'. The crucial distinction underlying the two judgments is the one made between married and unmarried persons, not that between persons married under the Marriage Act and those not. There is nothing to indicate that the attention of the Court in either case was directed to marriages such as those contracted by the applicant. I accordingly do not agree that the two cases serve as authority for denying to parties to Muslim marriages the protection offered by the Acts. Ngcobo J has come to the same*

[9] At p.348, para [33] F-G

conclusion. *I would like to express my agreement with the supplementary reasons he has advanced.*"[10]

47. In essence therefore, the Constitutional Court held that parties to a Muslim "*marriage*" were to be considered spouses because they were married, albeit that their marriages were not solemnised under the Marriage Act and not recognised as valid under South African law.

48. On that basis the Constitutional Court held:

48.1 that the word "spouse" as used in the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Muslim marriage;

48.2 that the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes the surviving partner to a monogamous Muslim marriage;

48.3 that the Applicant in that matter was for the purpose of the Intestate Succession Act, a "spouse"; and

48.4 that the Applicant was for the purposes of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor".

49. It would in my view be anomalous to hold, on the one hand, that by virtue a person being party to a "*Muslim marriage*" they are to be considered a

[10] See also the judgement of Ngcobo J. at p.355 -356, paras [59] – [63].

"*spouse*" for the purposes of receiving the protections and benefits afforded under the aforementioned Acts yet, on the other hand, that the very "*marriage*" upon which their status as "*spouse*" is founded, should not be considered a marriage for the purpose of that party being able to seek a dissolution of that marriage and the related protections and benefits under the Divorce Act.

50. Indeed, the reference in the Constitutional Court's order to a Muslim union as being a "*marriage*" is significant in this regard.

51. In my view it follows from the authorities referred to above, in particular the Constitutional Court's decision in *Daniels* and the subsequent decision in *Hassam*, to which further reference will be made below, that a marriage as contemplated by the Divorce Act, must be considered or interpreted to include a Muslim marriage.

52. The issue which then arises is whether there is any distinction to be drawn in this regard between a monogamous Muslim or Islamic marriage and a polygamous Muslim or Islamic marriage and this, as I see it, is the issue which falls for determination under paragraph 14 of the Stated Case.

53. In my view, the answer to this question is to be found in the Constitutional Court's decision in the *Hassam* case, *supra*.

54. In that case the Constitutional Court, per Nkabinde J., held that whereas in the past Muslim marriages, whether polygamous or not, were deprived of legal recognition, the position of women in monogamous Muslim marriages had, since the decision in *Daniels*, been ameliorated by their recognition as "*spouses*" under the legislation addressed in that case, while women in polygamous Muslim marriages still suffer "*serious effects of non-recognition*".[11]

55. The learned Judge, (after stating[12] that, although the decision in *Daniels* dealt only with monogamous Muslim marriages, the judgement in *Hassam* dealt with polygamous Muslim marriages), held that the distinction between spouses in polygamous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups and that the exclusion of widows in polygamous Muslim marriages from the protection of the Intestate Succession Act 81 of 1987 is constitutionally unacceptable.[13]

56. The Court went on to say the following:

> "*Marriages concluded under Muslim rites are potentially polygynous as a man is permitted, subject to the Qur'anic prescripts, to marry more than one woman. The significance attached to polygynous unions solemnised in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous Muslim marriages is no less worthy of*

[11] At p.586, para [36]
[12] At p.580, para [18]
[13] At p. 587, para [39]

respect than the dignity of parties to civil marriages or African customary marriages."

57. In my view, the reasoning and findings of the Constitutional Court in the *Hassam* case are of equal application in the determination of the question of law set out in paragraph 14 of the Stated Case.

58. That being so, the fact of the First Defendant's prior civil marriage, although it may have the consequence that the Plaintiff's subsequent Islamic marriage to the First Defendant is to be considered to be polygamous, cannot be held to constitute a bar to any claim the Plaintiff may have to the relief as set out in paragraphs 14.1 to 14.3 of the Stated Case.

Costs

59. As to costs, I note that there is there was no specific provision made in the Stated Case for the determination of the issue of costs and neither the Plaintiff nor the First Defendant made any written submissions on the issue of costs. The Second and Fourth Defendants, however, submitted in their heads of argument that costs should be awarded in their favour.

60. In my view, both sides have been partially successful in the determination of the questions of law to be adjudicated by way of the Stated Case and I am thus of the view that each party should bear its own costs in relation to such proceedings.

Conclusion

61. Accordingly:

61.1. In relation to the question of law as set out in paragraph 13 of the Stated Case, my finding is that for the purposes of South African Law, such marriage is not considered to have been validly contracted;

61.2. In relation to the question of law as set out in paragraph 14 of the Stated Case, my finding is that the First Defendant's pre-existing civil marriage to Elizabeth Ann Rose does not constitute a bar to such claim as the Plaintiff may have for the relief in respect of the proprietary consequence of her Islamic marriage to the First Defendant as set out in paragraphs 14.1 to 14.3 of the Stated Case;

62.3 As to costs, my order is that each party shall bear its own costs in relation to these proceedings under Uniform Rule 33.

62. I wish to emphasise at this point, however, that my finding in respect of paragraph 14 of the Stated Case must not be read as establishing or deciding

any entitlement to relief in relation to the proprietary consequences of the Islamic marriage between the Plaintiff and the First Defendant.

63. My finding is a limited one, to the effect that the pre-existing civil marriage is not of itself a bar to the relief referred to in paragraphs 14.1 to 14.3 of the Stated Case.

64. Whether, in the absence of any bar arising from the prior civil marriage, the Plaintiff has any entitlement to relief of such nature, is a matter which I am not called upon to determine and in respect of which I make no finding.

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BREMRIDGE, AJ