

# An analysis of s 5A of the Divorce Act 70 of 1979 and its application to marriages concluded in terms of Islamic law

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## SUMMARY

There has (to date) been no legislation enacted by the South African government that fully recognises marriages concluded in terms of Islamic law (Islamic marriages) as well as the Islamic law consequences that flow from these marriages. Some South African Muslims have opted to conclude marriages in terms of South African law (civil marriages) in addition to their Islamic marriages. This could be referred to as dual marriages. The civil marriages as well as its consequences (not the Islamic law consequences) would then be fully protected in terms of South African law. It is quite interesting to note that s 5A of the Divorce Act 70 of 1979 authorises a court to refuse the granting of a civil divorce if either of the parties would not be free to remarry subsequent to the granting of the civil divorce. This article analyses how s 5A of the Divorce Act 70 of 1979 applies to dual marriages. It looks at the impact of s 5A of the Divorce Act on dissolution of dual marriages concluded by Muslims within the South African legal context. The dissolution of Islamic marriages within the South African legal context is looked at by way of introduction. The dissolution of a civil marriage within the context of a dual marriage (couple married in terms of Islamic law and civil law) is then looked at. The article concludes with an overall analysis of the findings and makes recommendations.

## 1 Introduction

There has (to date) been no legislation enacted by the South African government that fully recognises marriages concluded in terms of Islamic law (Islamic marriages) as well as the Islamic law consequences that flow from these marriages.<sup>1</sup> It should be noted that some recognition have been given to Islamic marriages, based on a piecemeal approach, where existing South African law provisions (not Islamic law provisions) were challenged on constitutional grounds for not recognising these Islamic marriages.<sup>2</sup> An example in point would be where the Intestate Succession Act 81 of 1987 was challenged on

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1 It should be noted that Muslims have been living in South Africa for over 300 years.

2 Abduroaf 'An Analysis of the Islamic Law Based Developments in the South African Law of Succession' (2020) *Manchester Journal of Transnational Islamic Law and Practice* 143.

constitutional grounds due to it not recognising a spouse married in terms of Islamic law.<sup>3</sup> The Constitutional Court then held that

the word “spouse” as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage ...<sup>4</sup>

The Intestate Succession Act now recognises the Islamic marriage based on the Constitutional Court judgment. Another example would be where the Constitutional Court held (on 28 June 2022) in the case of *Women’s Legal Centre Trust v President of the Republic of South Africa*, that sections of the Marriage Act 25 of 1961, Divorce Act 70 of 1979, and the common law definition of marriage are unconstitutional as they do not recognise Islamic marriages.<sup>5</sup> The declarations of invalidity have been suspended for 24 months in order to give the South African government time to remedy the defects.<sup>6</sup> Interim relief has however been granted during this period. The Constitutional Court held that

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3 See *Daniels v Campbell* 2004 (5) SA 331 (CC) para 40(1)(a) where it is stated that ‘[i]t is declared that: (i) the word “spouse” as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage ...’

4 See *Daniels v Campbell* at para 40(1)(a).

5 See *Women’s Legal Centre Trust v President of the Republic of South Africa* (CCT 24/21) [2022] ZACC 23 (28 June 2022) para 86 1.1.1 where it states that ‘[t]he Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with Sharia law (Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition. 1.2. It is declared that section 6 of the Divorce Act is inconsistent with sections 9, 10, 28(2) and 34 of the Constitution, insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provides for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved. 1.3. It is declared that section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution, insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just. 1.4. It is declared that section 9(1) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution, insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages that are dissolved. 1.5. The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages ...’

6 See *Women’s Legal Centre Trust v President of the Republic of South Africa* para 86 1.1.6 where it states that ‘[t]he declarations of invalidity in paragraphs 1.1 to 1.5 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament, to remedy the foregoing defects by either amending existing legislation, or initiating and passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.’

[p]ending the coming into force of legislation or amendments to existing legislation ... it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of Sharia law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act ...<sup>7</sup>

It should be noted that the interim relief essentially results in existing South African law consequences being applicable to the Islamic marriages dissolved in terms of the judgment, with some minor variations.<sup>8</sup> It should also be noted that the interim relief only applies to Islamic marriages that subsisted on 15 December 2014 or which have been dissolved before 15 December 2014 and legal proceedings have been instituted but not yet finalised. A couple who, for example, concluded an Islamic marriage after 15 December 2014 would not have recourse to the interim relief provided in the judgment. It should be highlighted here that the interim relief is applicable only to the various pieces of legislation as referred in the judgment. It would not, for example, apply to a spouse in an Islamic marriage for purposes of s 4A of the Wills Act 7 of 1953.<sup>9</sup> Another example in point would be where a widow inheriting in terms of the Intestate Succession Act based on an Islamic marriage would receive a death certificate from the Department of Home Affairs stating that her deceased husband was never married, even though she inherits from him based on the Islamic marriage.<sup>10</sup> The

7 See *Women's Legal Centre Trust v President of the Republic of South Africa* para 86 1.1.7.

8 The judgment provides that 'all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and (b) the provisions of section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.' See *Women's Legal Centre Trust v President of the Republic of South Africa* para 86 1.1.7 for the full contents in this regard.

9 S 4A of the Wills Act 7 of 1953 where it states that '[a]ny person who attests and signs a will as a witness ... and the person who is the spouse [my emphasis] of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.' It is submitted that this spouse married in terms of Islamic law only, would not be regarded as a spouse for purposes of this section. See Abduroaf 'An Analysis of the Application of s 4A of the Wills Act 7 of 1953 with regard to Muslims Married within the South African context' (2022) *Obiter Law Journal* for a discussion on this issue.

10 See Al-Jama-ah "'Never married" on death certificates of Muslims is insulting' (2021) <https://www.aljama.co.za/never-married-on-death-certificates-of-muslims-is-insulting/> (last accessed 2021-05-19) where an Islamic Political Party published on their website that '[t]he AL JAMA-AH party is disappointed that the Home Affairs Minister, Aaron Mokoalele Mokoalele's decision not to remove the insulting entry on the death certificate of Muslim women married for 40 years and more. The Party's leader in Parliament, Hon Ganief Hendricks submitted a Parliamentary written question to the Minister with the request for the Nikah, a formal binding contract according to Muslim rites, be recognised by the same legislation that recognises African customary marriages. In response to the party's question, Mokoalele stated that, 'the government has no powers to have Muslim

situation is absurd. South African Muslims, however, have the option of concluding an additional marriage in terms of civil law (civil marriage) in order to be protected by all existing laws governing marriages within the South African context.<sup>11</sup> It should be noted that the recognition would then be for South African law consequences and not Islamic law consequences.

S 5A of the Divorce 70 of 1979 authorises a court to refuse granting a civil divorce to parties in a dual marriage if either of the parties would not be free to remarry subsequent to the granting of the civil divorce.<sup>12</sup> The scenario that is looked at throughout this article is where a husband (Adam Abrahams) and wife (Sofiah Abrahams) concluded a marriage in terms of Islamic law (Islamic marriage) in 2010 and subsequently concluded a marriage in terms of South African law (civil marriage) based on the provisions found in the Marriage Act (dual marriage) in 2020.<sup>13</sup>

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marriages legalised through the Recognition of Customary Marriages Act. The Customary marriages are regulated by the Recognition of Customary Marriages Act, 1998, which provides for requirements for a valid customary marriage and registration thereof.' The Minister's reply is nothing new to how the previous apartheid government viewed Muslim marriages or the Nikah ceremony performed by an authentic Imam recognised the Muslim religious bodies. Hendricks expressed disappointment that the Minister did not show leadership in granting the Party's request. The Party views it as the most insensitive response to not only grieving Muslim women, but also women from the Jewish and Hindu faiths ...'

11 It is interesting to note that in 2015, the Department of Home Affairs together with Islamic institutions which include the Muslim Judicial Council (SA) have embarked upon a Civil Marriages Programme where Imams within the South African community were qualified as marriage officers and could conclude both the Islamic as well as the civil marriages. See Department of Home Affairs 'Deputy Minister Fatima Chohan: Civil Marriages Programme' (2018) <https://www.gov.za/speeches/speech-deputy-minister-home-affairs-ms-fatima-chohan-mp-civil-marriages-programme-masjidul> (last accessed 2021-05-19) where the Deputy Minister of Home Affairs stated in a speech that '[i]n 2015, the department of Home Affairs together with our partners -the MJC, the KZN Ulema Council and the Jamiat in Gauteng, began a process of certifying Imams as marriage officers under the Marriage Act in the hope that many Muslim marriages would come into the fold of registered civil marriages-as do other religious groups.'

12 See s 5A of the Divorce 70 of 1979 where it states that '[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.'

13 See Marriage Act.

They did not enter into antenuptial contract.<sup>14</sup> This article analyses how s 5A of the Divorce Act applies to the dual marriage in the case of a civil divorce instituted by Adam. The dissolution of Islamic marriages within the South African context is looked at by way of introduction. The dissolution of a civil marriage within the context of a dual marriage as demonstrated above is then looked at. The article concludes with an overall analysis of the findings and makes recommendations.

## 2 Dissolution of Islamic marriages within the South African context

See s 5A of the Divorce 70 of 1979 where it states that

[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.<sup>15</sup>

Adam and Sofiah Abrahams should thus dissolve their Islamic marriage in terms of s 5A before making an application to dissolve their civil marriage. An overview of Islamic divorces is now looked at.

Islamic marriages can be dissolved in one of two ways. The first way would be by way of a *talaaq* divorce (divorce by husband) whereas the second way would be by way of *tafreeq* divorce (divorce by court or judicial tribunal).<sup>16</sup> These divorces could also be referred to as Islamic

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14 The marriage would then be regarded as in community of property. The regime would only be regarded as out of community of property if an antenuptial contract was entered into. See s 2 of the Matrimonial Property Act 88 of 1984 where it states that '[e]very marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.'

15 See s 5 A of the Divorce Act.

16 A *talaaq* divorce is issued by a husband whereas a *tafreeq* divorce is issued by a court or judicial tribunal. A *talaaq* by a husband would be where he pronounces a divorce upon his wife by uttering the words, for example, 'I divorce you'. It is also possible that a wife could request a divorce by her husband in exchange for some financial compensation in favour of the husband. This is referred to as a *khul* divorce. An example of this would be where a husband divorces his wife via a *talaaq* on condition that she

divorces. An Islamic divorce could either be revocable or irrevocable.<sup>17</sup> A husband may revoke a *talaaq* divorce during the waiting period subsequent to a revocable divorce but not during the waiting period subsequent to an irrevocable divorce.<sup>18</sup> A divorced wife would be free to remarry only once the waiting period of her revocable or irrevocable divorce had lapsed.<sup>19</sup> A husband that is the subject matter to divorce may remarry during the waiting period on condition that he would in fact not be married to more than four wives at a point in time.<sup>20</sup> South African Muslims have the option of approaching Islamic institutions in order to facilitate a *talaaq* divorce by a husband or to applying to them for granting a *tafreeq* divorce in their capacities as judicial tribunals.<sup>21</sup> These institutions would then issue a certificate confirming that the divorce has

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returns the dower that he had given her at the of conclusion of the Islamic marriage. See Zuhaylee *Al Fiqh Al Islaamee Wa Adillatuhoo* (1989) 509-513 for a discussion on this issue.

- 17 An example of a revocable divorce would be where a husband divorces his wife for the first or second time. The husband may revoke the divorce during the waiting period. The couple would then be married again. If the divorce is not revoked during this period then the divorce would become irrevocable. An example of an irrevocable divorce would be where a husband divorces his wife for the third time. It is then not possible to revoke the divorce during the waiting period. See Zuhaylee *Al Fiqh Al Islaamee Wa Adillatuhoo* 509-513 for a discussion on this issue.
- 18 See Zuhaylee *Al Fiqh Al Islaamee Wa Adillatuhoo* 509-513 for a discussion on this issue.
- 19 The duration of the waiting period would differ depending on the context. It would vary from 3 months, 3 clean (non-menstruating) periods, or the duration required for the child to be born in the event where the divorced wife is pregnant. See Subaa'ee *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* (2000) 250-255 for a further discussion on this issue.
- 20 It should be noted that a marriage that is subject to a revocable divorce would be considered as one of the four marriages as the divorced husband can revoke the divorce during the waiting period. See Subaa'ee *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 250-255 for a further discussion on this issue.
- 21 See, for example, Muslim Judicial Council (SA) (2021) 'Social Development' <https://mjc.org.za/departments/social-development/> (last accessed 2021-05-20) where it states that '[t]he MJC Social Development Department provides efficient and capable service delivery to secure pristine family values to keep families together. The Council promotes the best practice and moral regeneration by nurturing an exemplar society. The MJC Mission is to assist the community to avoid social ills and immorality; to empower it through counseling and education; and to develop life skills, support and advice. Counseling Services Offered [...] Marriage Counseling, Individual Counseling, Facilitate Talaqs, Adjudication on applications for the Annulment of Marriages (Fasakhs) ...' The Muslim Judicial Council (SA) is 'a Muslim Judiciary whose main functions relate to religious guidance, education, Fatawa, Da'wah, Halaal certification and Social Development (especially marriage counseling). It is a Non-Profit Organization in a country where Muslims are a minority group. The MJC adheres to the code of belief of the Ahlus Sunnah wal Jama'ah. It is the most representative and influential Muslim religious organization in the Western Cape, recognized locally, nationally and internationally for the religious, cultural and organizational roles it plays in South Africa.' See Muslim Judicial Council (SA) (2021) 'MJC is ready to support your journey' <https://mjc.org.za/#frontpage> (last accessed 2021-05-20).

been finalised.<sup>22</sup> It should be noted there have been instances where matters were instituted in the South African courts concerning the revocability of Islamic divorce related matters.<sup>23</sup> The courts were then faced with the task of giving judgment on matters of religious doctrine.<sup>24</sup> This state of affairs highlights the need for legislation to be enacted that regulates Islamic marriages and its consequences in terms of Islamic law.<sup>25</sup> It is not clear from the *Women's Legal Centre Trust v President of the Republic of South Africa* judgment as to whether persons in a dual marriage (as in the scenario referred to in this article) is able to dissolve their Islamic marriage based on the interim relief. It is noted the Islamic marriage between Adam and Sofiah subsisted on 15 December 2014 as required in terms of the judgment. If the Islamic divorce were to be allowed in terms of the interim relief, it might lead to a situation where a couple applies to a court to dissolve their Islamic marriage without dissolving their civil marriage. It should also be noted that the consequences of the Islamic marriage would be out of community of property subject to further provisions as referred to in the judgment, whereas the consequences of the civil marriage would be in community of property. It is submitted that the interim relief as provided in the *Women's Legal Centre Trust v President of the Republic of South Africa* judgment should apply to parties in an Islamic marriage only and not to parties in both an Islamic marriage as well as a civil marriage, as no

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- 22 An example of this would be where a husband issued his wife with a revocable divorce at the Islamic institution, and the husband does not revoke the divorce during the waiting period. The divorced husband or divorced wife would then approach the Islamic institution requesting a divorce confirmation certificate and that the divorce (divorce by husband or divorce by court or divorce by judicial tribunal) has been finalised.
- 23 See, for example, *Faro v Bingham* (4466/2013) [2013] ZAWCHC 159 (25 October 2013) where revocability of an Islamic divorce was looked at. See also Abduroaaf 'An Analysis of the Consequences of an Islamic Divorce in Light of the *Faro v Bingham and Others* Judgment' (2019) *Without Prejudice* 9, 31-32.
- 24 See *Faro v Bingham* at para 4 where it states that '[i]t is common cause on the evidence before me, including expert evidence regarding the tenets of Islam, that the form of Talāq pronounced by Imam Saban was revocable during the so-called 'Iddah period. In the applicant's case, because she was pregnant the 'Iddah period expired when she gave birth to the child she was carrying. The predominant view in the Islamic religion is that the Talāq may be revoked not only by express words but by the resumption of sexual relations between the parties. The applicant avers that she and Moosa resumed intimacy shortly after 24 August 2009 and that no further Talāq was pronounced before Moosa died on 4 March 2010...' The issue before the court was inter alia whether the Islamic divorce was revoked during the waiting period. See also the case of *Hassam v Jacobs* 2009 (5) SA 572 (CC) where the court had to deal with a matter concerning the revocability of a judicial divorce. The court incorrectly applied the laws concerning the judicial divorces within the Islamic law context. See also Moosa and Abduroaaf 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' (2014) *Acta Juridica* 160 for a detailed discussion on the judicial divorce issue.
- 25 This is needed because there is currently no Islamic legal framework that the court could use in order to base its decisions on in terms of Islamic law.

mention is made to s 5A of the Divorce Act in the judgment. A further discussion on this issue is beyond the scope of this article.

### 3 Dissolution of civil marriages within the South African context

This section looks at what could be done by Adam and / or Sofiah in the event where either one or both of them would want to dissolve their civil marriage, but would want to keep their Islamic marriage intact. A possible reason for wanting to dissolve their civil marriage could be due to the fact that it is in 'in community of property' and they have not known at the time of concluding the civil marriage that a marriage in community of property is not allowed in terms of Islamic law.<sup>26</sup> It is noted that another option (instead of instituting a civil divorce) would be for the couple to change their marital regime. Changing a marital regime is, however, an expensive exercise.<sup>27</sup> A divorce would thus be a cheaper option.<sup>28</sup> It will be assumed for purposes of this article that the couple

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26 The default position in terms of Islamic law is that the estates of both parties to the marriage remain separate. See Jamiatul Ulama KwaZulu Natal South Africa 'Resolving a Community of Property estate?' <https://jamiat.org.za/resolving-a-community-of-property-estate/> (last accessed 2022-09-09) where it states that '... [t]he 'Community of Property' matrimonial regime is not recognized in Islamic Law. In the Shari'ah, ownership is established for each person individually by default. Such ownership is transferred or shared through specific juristic acts or events. Marriage is not one of them, and hence does not create a partnership or 'Community of Property'. The only recognized matrimonial regime in the Shari'ah that has been prescribed by South African Law is a marriage 'Out of Community of Property without the accrual system' by means of an Ante Nuptial Contract where each spouse retains all of his/her assets...'

27 In December 2020, it would have costed between R15 000 and R30 000 in legal fees. See Simon Dippenaar & Associates (December 2020) 'The financial implications of changing your matrimonial property regime' <https://divorceattorneycapetown.co.za/the-financial-implications-of-changing-your-marriage-contract/> (last accessed 2022-09-09) where it states that 'this process requires an application to the High Court, be aware that it can cost between R15 000 and R30 000 in legal fees, depending on the complexity of the matter, keeping in mind that when drawing up your Postnuptial Contract, you and your spouse will need to agree on a division of assets. For instance, if you and your spouse own fixed property, you will need to have the title deeds of the property endorsed in terms of Section 45bis. Further, it is important that both you and your spouse fully understand what it means to be married out of community of property and how it will affect your finances going forward, especially if your marriage were to dissolve due to death or divorce...'

28 The current rate for an undefended divorce is about R9 500. See Our Lawyer (Pty) Ltd Online Shop (2022) 'Unopposed Divorce' <https://www.ourlawyer.co.za/shop/product/unopposed-uncontested-divorce-cape-town/> (last accessed 2022-09-09) where it states that their current rate is R 9 500.

decides to dissolve the civil marriage based on the cheaper option as they cannot afford the more expensive option.<sup>29</sup>

The first question that should be looked at (with regard to the civil divorce) is whether the civil marriage between Adam and Sofiah can be dissolved while their Islamic marriage remains intact. It should firstly be noted that in order to dissolve a civil marriage, it is required that at least one of the grounds listed in sections 3, 4, and 5 of the Divorce Act must be satisfied.<sup>30</sup> These grounds include an irretrievable breakdown of the marriage, mental illness by one of the parties, or continuous unconsciousness of one of the parties.<sup>31</sup> Adam and / or Sofiah could state that there has been an irretrievable breakdown to their civil marriage and this has led to the divorce application, even though this is not the case in reality.<sup>32</sup> However, s 5A of the Divorce 70 of 1979 states that

[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.<sup>33</sup>

The above provision requires a number of factors to be taken into consideration before a civil divorce can be granted as far as dual marriages are concerned. The main factor in s 5A of the Divorce Act relevant to Adam and Sofiah is the fact that both parties to the civil divorce should be free to remarry subsequent to the divorce being granted. Adam is free to remarry if the civil divorce is granted (or even if it is not granted) as he is currently in a monogamous marriage and he is allowed to marry up to a maximum of four wives at a time in terms of his religion.<sup>34</sup> There are differences of opinion regarding the status of Sofiah in the matter at hand. It is possible that Adam and Sofiah approaches a non-Muslim lawyer with regard to the civil divorce. Adam and Sofiah could be unaware of the s 5A of the Divorce Act requirement,

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29 It should be noted that the couple could then split the assets in terms of Islamic law subsequent to the civil divorce. A further discussion on this issue is beyond the scope of this article.

30 See s 3 of the Divorce Act where it states that '... [a] marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are - (a) the irretrievable breakdown of the marriage as contemplated in section 4; (b) the mental illness or the continuous unconsciousness, as contemplated in section 5 ...'

31 See ss 3, 4, and 5 of the Divorce Act.

32 This would mean that they are not being truthful in their submission.

33 See 5A of the Divorce 70 of 1979.

34 See Part 2 above 'Dissolution of Islamic marriages within the South African context' for a discussion on this issue.

and their lawyer could be unaware that they are also married in terms of Islamic law.<sup>35</sup> The court papers could thus refer to the 2020 civil marriage and make no reference to the Islamic marriage of 2010. If the divorce is granted it would mean that the civil marriage has now come to an end albeit in contravention of s 5A of the Divorce Act. The question that would then arise is what the status of the Islamic marriage should be. It could be argued that the Islamic marriage remains intact as it has not been affected by the civil divorce. This occurred in the case of *M M v M M* in 2019.<sup>36</sup> It could also be argued that the Islamic marriage would automatically dissolve in the event where the civil marriage is dissolved by a court of law on the application of Adam.<sup>37</sup> The uncertainty in this regard would be quite problematic for example, in the event of a death, as it is not known as to whether the divorced spouse in terms of the civil

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35 See *M M v M M* (6572/2013) [2019] ZAWCHC 158 (8 February 2019) para 4 where it is stated in the common cause facts that '... 1. The parties concluded a civil marriage in community of property on 21 March 1986; 2. On 23 March 1986 they also concluded a Muslim marriage; 3. During 1989 the parties jointly purchased a residential property, Erf [...] Gaylee situated at [...] Road, Dennewer, Blackheath in the Western Cape ('the property'); 4. On 2 March 1989 the property was registered in both their names and was initially bonded to Saambou Bank in an amount of approximately R40 000; 5. During 1990 the defendant instituted civil divorce proceedings against the plaintiff pursuant to which a consent paper was signed by both parties on 7 April 1990; 6. The civil marriage was terminated by decree of divorce, incorporating the terms of the consent paper, on 15 May 1990; 7. Around May 1990 the plaintiff left the common home (the property) but returned in November/December of the same year. The parties then lived together on the property as husband and wife until their relationship finally came to an end 22 years later in August 2012, when the plaintiff again left the common home; 8. The parties never remarried civilly; 9. On 17 September 2012 the Muslim marriage entered into by the parties in 1986 was terminated by way of Talaq, at the instance of the defendant; 10. Prior to her marriage to the defendant the plaintiff bore, by another man, a son named R; 11. In addition a son, N, was born to the parties in approximately 1987; and 12. In terms of clause 3 of the consent paper the parties agreed that the property would become exclusively that of the defendant who undertook to pay the plaintiff an amount of R600 in monthly instalments of R50 in respect of her half share in the property.' The parties in this case dissolved the civil marriage and kept the Islamic marriage intact. It should also be noted that the civil divorce took place on 15 May 1990 whereas s5A of the Divorce Act only inserted six years later in 1996. It is possible that Adam and Sofiah are unaware of the change that took place in 1996.

36 See *M M v M M* para 4 where the common cause facts of the matter are discussed.

37 See European Council for Fatwa and Research 'Islamic ruling (fatwa) in Dublin on 7 May' (2000) <https://www.e-cfr.org/blog/2017/11/04/closing-statement-normal-fifth-session-european-council-fatwa-research-held-islamic/> (accessed 20 May 2021) where it states that regarding a '... divorce judged by a non-Muslim judge ... [the following was stated] Originally Muslim[s] should resort to a Muslim Judge or any acting Muslim judge. But there is no Muslim judge in the non-Muslim countries. Consequently[,] whoever enters into marriage contract according to the laws of these countries should carry out the divorce judged by a non-Muslim judge as entering into marriage contract according to non-Muslim laws means implicitly accepting the results one of which is that divorce can only be

divorce should also be regarded as a divorced spouse for purposes of Islamic law. A case in point would be where Adam and Sofiah dissolves the civil marriage and decides to remain married in terms of Islamic law, as is the case above. If Adam were to die intestate, would Sofiah be entitled to inherit in terms of the precedent set in the constitutional court, where a surviving spouse in terms of an Islamic marriage is entitled to inherit as a spouse for purposes of the Intestate Succession Act?<sup>38</sup> Would the Master of the High Court deem the divorced wife to be a spouse in terms of the Intestate Succession Act?<sup>39</sup> If the Master of the High Court does deem her to be a spouse for the purpose of the Intestate Succession Act, and the matter is taken on appeal to the High Court, would the High Court have to give a verdict based on a doctrinal issue? The answers to these questions are not certain. It is suggested that lawyers practicing divorce law within the South African context should make it a habit of checking to see if their clients in divorce proceedings are subject to s 5A of the Divorce Act and to also confirm with them that the religious divorce requirements in terms of the section have been met. This would bring about legal certainty.

Another aspect that should be looked at is the position of a spouse who is divorced in terms of Islamic law (as is required in terms of s 5A of the Divorce Act) but has not yet instituted the civil divorce, for example, if Adam divorces Sofiah in terms of Islamic law. However, prior to instituting the civil divorce, either Adam or Sofiah dies intestate (without a will). Would the survivor of them be entitled to rely on provisions in the Intestate Succession Act in order to inherit as a surviving spouse based on the civil marriage? It would seem that the survivor should be able to inherit even though the Islamic divorce has been issued. There would be no problem if either party dies during the waiting period subsequent to a revocable divorce as the parties would still be eligible to inherit from each other during this period. The problem would arise in the event where either party dies in the instance where the divorce was irrevocable. It should be noted that the share due to a surviving spouse in terms of the Intestate Succession Act is not in conformity with what is required in terms of Islamic law. It is submitted that Muslim couples who find themselves in dual marriages should ensure that they have executed Islamic wills that ensures that their estates would devolve in

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carried out by judge. According to the majority, this can be considered general authorization, even if it is not explicitly expressed. The jurisprudential sentences judged by non-Muslim judge should be carried out for the sake of public interest and to avoid chaos and disorder as some Muslim scholars like Al-Izz Ibn Abed Esalam, Ibn Taymiyah and Ash-shatibi observed it.'

38 See *Daniels v Campbell* para 40(1)(a) where it is stated that '[i]t is declared that: (i) the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage...'

39 It should be noted that the Master of the High Court of South Africa oversees the winding up of estates within the South African context.

terms of Islamic law upon their demise.<sup>40</sup> It is further submitted that Muslim couples subject to dual marriages must institute divorce proceedings as soon as their Islamic divorces have been finalised or even prior to that in the event where everything needed to finalise the divorce has been done.

## 4 Conclusion

This article has analysed s 5A of the Divorce Act and its application to marriages concluded in terms of Islamic law as well as civil law. The findings show that there are a number of problematic situations that could arise with regard to these dual marriages upon divorce. These include instances where the civil marriage is dissolved while the Islamic marriage is intact and instances where the Islamic marriage is divorce while the civil marriage is intact, but either of the parties dies in the meanwhile. It is submitted that parties to these marriages must draft Islamic wills to ensure that these estates are distributed in terms of Islamic law upon their demise. It is also submitted that this article has shown the dire need for the South African government to enact legislation that recognises the Islamic marriages and the Islamic consequences that flow therefrom, without the need for the Muslim couple to conclude a civil marriage in addition to the Islamic marriage. This is also what was held by the Constitutional Court on 28 June 2022 in the *Women's Legal Centre Trust v President of the Republic of South Africa* judgment where it ordered the South African government to amend existing legislation, or to initiate and pass new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to also regulate the consequences arising from the recognition. It is submitted that the consequences that arises from the proposed recognition must be in terms of Islamic law and not some other law.

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40 An Islamic will could be referred to as a will that ensures that the estate of the testator or testatrix devolves in terms of Islamic law upon his or her demise. See Abduroaf 'Application of the Islamic Law of Succession in South Africa' (2020) *Obiter Law Journal* 409 and Abduroaf 'The Impact of the South African Law of Succession and Administration of Estates on South African Muslims' (2019) *Journal Syariah* 321 for a further discussion on this issue.