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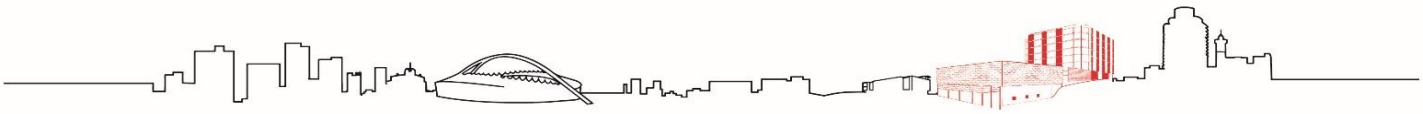

Legal Update
February 2021

Cox Yeats is committed to keeping you informed on developing legal issues.

I DO… OR I DON'T – IT DEPENDS ON WHO IS ASKING

Are you married? It is a question we are routinely asked and seems simple enough. But two judgments coming out of the Supreme Court of Appeal of South Africa late last year have added a level of complexity to the simple question.

The two cases involve marriages that took place in accordance with the customs of religious marriages, but there was no compliance with Section 29A of the Marriage Act and the marriages were not registered with Home Affairs. On the one hand, the court has said that failure to register the marriage and comply with the provisions of the Marriage Act should not jeopardise the rights of the parties on dissolution, and legislation must be amended to ensure that this is not the case. On the other hand, the same court ruled that the failure to comply with the Marriage Act is incurable, and no marriage exists.

WLCT, Faro and Esau Judgements

The first judgment, bearing the rather long citation of *President of the RSA and Another v Women's Legal Centre Trust and Others; Minster of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (Caso no 612/19) [2020] ZASCA 177 (18 December 2020) (*referred to herein as the WLCT Judgment*)*, originated from three separate applications, which were then consolidated and came before the full bench of the Western Cape Division of the High Court.

The Court *a quo* was asked to consider the constitutionality of various pieces of legislation in relation to Muslim marriages. The Court declared that the State is obliged in terms of section 7(2) of the Constitution of the Republic of South Africa 1996 (the Constitution) to promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by introducing legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law. It was held that the State had failed to fulfil its constitutional obligations and the President, together with parliament, was directed to rectify the failure within 24 months.

The President and the Minister of Justice and Constitutional Development sought and were granted leave to appeal against the judgement of the High Court and the appeal came before the Supreme Court of Appeal. The issue before the appeal court was whether there is a constitutional obligation on the State to enact legislation to recognise Muslim marriages, and if so what would be the appropriate remedy should the State fail to do so?

It was held by the Appeal Court that the Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with *Sharia* law as valid marriages unless the marriage is registered as a civil marriage.
The Court went on to declare sections 6, 7(3) and 9(1) of the Divorce Act inconsistent with the Constitution. These sections provide mechanisms to safeguard the welfare of minor or dependent children and to redistribute assets upon the dissolution of a marriage. The provisions do not apply to Muslim marriages. The court ordered the President, together with Parliament, to remedy the defects in the legislation within 24 months. The court further ruled that, pending the coming into force of such legislation, any marriage concluded in terms of *Sharia* law may with immediate effect be dissolved in accordance with the Divorce Act regardless of when the marriage was concluded.
The declarations of constitutional invalidity have been referred to the Constitutional Court for confirmation.

C B and Another v H B

The second judgement to emanate from the Supreme Court of Appeal late in 2020 was that of *C B and Another v H B (Case no 1324/2019)[2020] ZASCA 178 (18 December 2020)*.

In this case, Mr CB and Mrs HB were divorced by an order of court incorporating a settlement agreement they had concluded. In terms of the settlement agreement, Mr CB was obliged to pay maintenance to Mrs HB 'until her death or remarriage, whichever occurs first'. The decree of divorce was issued on 28 August 2017. A mere month and a half later, on 13 October 2017, Mrs HB announced on Facebook that she and Mr V, with whom she was cohabiting, were getting married on 9 December 2017. The marriage ceremony resembled a traditional Christian marriage, with a white dress, the exchange of rings and the blessing of a priest in the church in the presence of family and friends. However, no marriage register was completed, and the marriage was not registered with Home Affairs.
Upon hearing of the marriage, Mr CB, on the advice of his attorney, stopped paying maintenance. Mrs HB instituted proceedings for payment of the maintenance averring that no marriage had been concluded, as contemplated in the settlement agreement. The magistrate accepted Mr CB's argument that the maintenance obligations had lapsed upon the purported marriage of Mrs HB and Mr V. Mrs HB took the matter on appeal to the High Court, where she sought an order placing Mr CB in contempt of court for failure to pay maintenance. The High Court held Mr CB in contempt and sentenced him to three months imprisonment, suspended conditionally.
The matter taken on appeal by Mr CB. The issue before the appeal court was whether the word 'remarriage' in the settlement agreement meant marriage recognised by law, or a religious Christian ceremony. The Court held that Mr CB had the opportunity at the time of concluding the settlement agreement to add that any cohabitation by Mrs HB would result in a nullification of the maintenance payable by him but failed to do so. The ordinary meaning of the word remarriage is to enter into a further marriage recognised by South African law. In terms of section 29A of the Marriages Act the requirements for a valid marriage are that the marriage be solemnised before a marriage officer, be entered into the marriage register and be registered with Home Affairs. None of these requirements were fulfilled. It was held by the majority of the bench that the ceremony that had been performed did not constitute a remarriage within the meaning of the deed of settlement between the parties.
It is the minority judgement of Makgoka (dissenting) that appears to be in keeping with the approach adopted in the WLCT judgement. Makgoka observed that the concept of marriage has taken an elastic nature over the past decade or two, with African customary, Muslim, Hindu, Jewish and same-sex unions having become accepted as marriages. Although none of the ceremonies performed in terms of these unions comply fully with the strict prescripts of section 29A, they give rise to legal consequences of a marriage. Makgoka criticized the majority for failing to consider the context within which the word remarriage should be construed. The failure to complete the marriage register was not an oversight, but a conscious decision aimed singularly at manipulating the law and preventing the remarriage clause in the settlement agreement from kicking in. Reprehensible conduct, in the opinion of Makgoka, which leaves the Judge unable to agree with the majority judgement.

Conclusion

Juxtaposed with the progressive and wholistic approach adopted in the WLTC judgement, which devotes much attention to the plight of vulnerable women and children affected by defects in the current legislation, it is difficult to reconcile the Supreme Court's failure to take into account the context out of which the CV v HB appeal arose and the narrow manner in which the majority judgment applied itself to the question before it.

These judgements, issued on the same day, seem to raise as many questions as they answer. The law relating to marriage in South Africa is certainly far from simple.

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