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

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SUMMARY

South African Muslims constitute a religious minority group who have been living in South Africa for almost four centuries. These persons are required in terms of their religion to ensure that their estates devolve in terms of Islamic law. One of the ways of doing this would be where a testator or testatrix drafts and executes a will stating that his or her estate must devolve in terms of the Islamic law of succession upon his or her demise and that an Islamic institution should draft an Islamic Distribution Certificate stating who his or her beneficiaries are in terms of Islamic law. This type of will could be referred to as an Islamic will. The said will must however conform to the provisions found in the Wills Act 7 of 1953 (Wills Act) in order to be deemed a valid will within the South African context. Section 4A of the Wills Act states that "[a]ny person who attests and signs a will as a witness … and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will." This article looks at the application of s 4A of the Wills Act 7 of 1953 concerning Muslims married within the South African context. The scenario that is considered in this article is where Ahmad Guru (Ahmad) executes an Islamic will on 8 August 2019, with Yusuf Tuan (Yusuf) and Amina Guru (Amina) being the only witnesses thereof. Ahmad died on 9 September 2019 leaving behind a net estate of R900,000.00, a son, Omar Guru (Omar), and a daughter, Sara Guru (Sara), as his only relatives. The Islamic Distribution provides that Omar should inherit 2/3 of R900,000.00 = R600,000.00 and Sara should inherit 1/3 of R900,000.00 = R300,000.00. One of the witnesses of the Islamic will, Amina, is also the spouse of one of the beneficiaries, Omar, as provided in terms of the Islamic Distribution Certificate. This article looks at three instances of how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic Will and Islamic Distribution Certificate) in the event where he was, at the time of the execution of the will, (1) married to Amina in terms of Islamic law only; (2) married to Amina in terms of Islamic law as well as civil law; and (3) married to Amina in terms of civil law but divorced Amina in terms of Islamic law. The article concludes with an overall analysis of the findings and makes a recommendation as to the way forward.

1 INTRODUCTION

South African Muslims constitute a religious minority group who have been living in South Africa for almost four centuries.[1] These persons are required in terms of their religion to ensure that their estates devolve in terms of Islamic law.[2] One of the ways of doing this would be where a testator or testatrix drafts and executes a will stating that his or her estate must devolve in terms of the Islamic law of succession upon his or her demise and that the Muslim Judicial Council (South Africa) should draft an Islamic Distribution Certificate stating who his or her beneficiaries are in terms of Islamic law.[3] This type of will could be referred to as an Islamic will.[4] The said will must, however, conform to provisions of the Wills Act 7 of 1953 (Wills Act) in order to be deemed a valid will within the South African context.[5] Section 4A of the Wills Act states that

> "[a]ny person who attests and signs a will as a witness … and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will."[6]

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1 The first recorded Muslim arrived in South Africa in 1654. See Mahida *History of Muslims in South Africa: A Chronology* (1993) 1.

2 It should be noted that Muslims believe that the Qur'an is the word of Allah (God Almighty). See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 13, where it states that "[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad PBUH) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success"; and 4(14), where it states that "[w]hosoever disobeys Allah and His Messenger (Muhammad PBUH), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment." The number in brackets refers to the chapter number of the Qur'an. The number outside the brackets refers to the verse in the chapter.

3 See *Moosa NO v Minister of Justice and Correctional Services* 2018 (5) SA 13 (CC) par 6 where an Islamic Distribution Certificate was referred to. The court stated that "[s]ince then the deceased lived with both his wives and some of their children in their family home until his death in 2014. He prepared a will three years earlier in which he referred to both marriages. Its terms direct his estate to be distributed under Islamic law. The Muslim Judicial Council certified that this required the estate to be divided in 1/16 shares to each of his wives, 7/52 to each of his sons and 7/104 to his daughters."

4 See Abduroaf "A Constitutional Analysis of an Islamic Will within the South African Context" 2019 52(2) *De Jure Law Journal* 257 266 http://www.dejure.up.ac.za/index.php/volumes/2019/articles-vol-52/abduroaf-m for a discussion on the constitutionality of an Islamic will within the South African context.

5 See s 2 of the Wills Act 7 of 1953 (Wills Act) where it states the "[f]ormalities required in the execution of a will – (1) Subject to the provisions of s 3 *bis* - (a) no will executed on or after the first day of January, 1954, shall be valid unless - (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page …"

6 See s 4A of the Wills Act where it states that "[c]ompetency of persons involved in execution of will – (1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will …"

It should be noted there are a few exceptions in this regard.[7] This article focuses on the application of s 4A of the Wills Act concerning Muslims married within the South African context. The scenario that is looked at in this article is where Ahmad Guru (Ahmad) executes an Islamic will on 8 August 2019, with Yusuf Tuan (Yusuf) and Amina Guru (Amina) being the only witnesses thereof. Ahmad died on 9 September 2019 and left behind a net estate of R900,000.00, a son (Omar Guru (Omar)) and a daughter (Sara Guru (Sara)) as his only relatives. The Islamic Distribution provides that the Omar should inherit 2/3 of R900,000.00 = R600,000.00 and the Sara should inherit 1/3 of R900,000.00 = R300,000.00.[8] One of the witnesses of the Islamic will, Amina, is also the spouse of one of the beneficiaries, Omar, as provided in terms of the Islamic Distribution Certificate. This article looks at three instances. The first instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he was married to Amina in terms of Islamic law only at the time of the execution of the will. It is noted that the Islamic marriage was concluded on 1 January 2019. The second instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he was married to Amina in terms of Islamic law as well as civil law at the time of the execution of the will. The Islamic marriage was concluded on 1 January 2019 and the civil marriage was concluded in terms of the Marriage Act 25 of 1961, on 2 February 2019. The third instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he married Amina in terms of Islamic law as well as civil law but divorced Amina in terms

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7 The exceptions relevant to this article are looked at in sections II and III of this article. The exceptions are found in the following provisions. See s 4A of the Wills Act 7 of 1953 where it states: "(2) Notwithstanding the provisions of subsection (1) - (a) a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will; (b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession; (c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned. (3) For the purposes of subsections (1), and (2)(*a*) and (*c*), the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will."

8 The net estate refers to the estate left behind by a deceased minus liabilities. See, with regard to the distribution of the net estate in terms of Islamic law, Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females …" This raises the issue of discrimination against the daughter. A further discussion on this issue is however beyond the scope of this article. See Abduroaf 2019 *De Jure Law Journal* 257 266 for a discussion on the constitutionality of an Islamic will within the South African context. The issue of the discrimination against the daughter was specifically looked at in this article.

of Islamic law. The Islamic marriage was concluded on 1 January 2019, the civil marriage in terms of the Marriage 25 of 1961 on 2 February 2019, and the Islamic divorce took place on 3 March 2019. The article concludes with an overall analysis of the findings and makes a recommendation as to a way forward in this regard.

2 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW ONLY

This section of the article looks at the application of s 4A of the Wills Act in the instance where Omar and Amina are married in terms of Islamic law only on 1 January 2019 when Ahmad executed his will on 8 August 2019.[9] It could be argued that Omar should not inherit the R600,000.00 (based on the Islamic will and the Islamic Distribution Certificate) as he was the spouse of one of the witnesses (Amina) albeit in terms of Islamic law at the time when the will was executed, and should therefore be disqualified from inheriting the R600,000.00, based on the application of s 4A of the Wills Act. It could also be argued that s 4A of the Wills Act should not apply to Omar as his Islamic marriage should not be recognised for purposes of this section, as this section only applies to civil marriages. This type of an argument was made by one of the respondents in 2018 in the case of *Moosa NO v Minister of Justice and Correctional Services* (*Moosa*),[10] where it was argued that section 2C(1) of the Wills Act applies to civil marriages only and not to Islamic marriages.[11] It was argued in *Moosa* that a spouse married in terms of Islamic law only should not be regarded as a spouse for purposes of section 2C(1) of the Wills Act 7 of 1953.[12] The Constitutional Court, however, held

> "[t]he non-recognition of the third applicant's right [spouse married in terms of Islamic law only] to be treated as a 'surviving spouse' infringes her right to dignity in a most fundamental way, and is a further ground for declaring section 2C(1) constitutionally invalid."[13]

The Constitutional Court held

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9 See fn 6 above.

10 2018 (5) SA 13 (CC).

11 See s 2C of the Wills Act where it states that the "[s]urviving spouse and descendants of certain persons entitled to benefits in terms of will – (1) If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. (2) If a descendant of the testator …"

12 See *Moosa supra* par 9 where it is stated that "[t]he third respondent [Registrar of Deeds, Cape Town] approved the registration for the second applicant [married in terms of civil law and Islamic law]. But he declined to do so for the third applicant [married in term of Islamic law only] because he believed that the benefits renounced by the deceased's descendants born of his marriage to the third applicant vest in the children of those descendants, and not the third applicant, as section 2C(2) envisages. The rationale underpinning his view was that the term "surviving spouse" in section 2C(1) should be interpreted strictly to cover spouses recognised formally under this country's laws."

13 *Moosa supra* par 16.

> "[t]he non-recognition of her right to be treated as a 'surviving spouse' for the purposes of the Wills Act, and its concomitant denial of her right to inherit from her deceased husband's will, strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman. Furthermore, as the WLC correctly submitted, this vulnerability is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences."[14]

It could be argued that the Constitutional Court pronounced on the constitutionality of section 2C(1) of the Wills Act only, and that section 4A of the same Act thus remains unaffected. Omar could argue that the Islamic will of his father, Ahmad, is not subject to section 4A of the Wills Act and that he is thus entitled to inherit the R600,000.00 based on the will as well as the Islamic Distribution Certificate. There has been no challenge made to the constitutionality of section 4A of the Wills Act (not recognising the Islamic marriage) based on discriminatory grounds, at the time when the Islamic will was executed by Ahmad on 8 August 2019. The position, to date, remains the same.[15] It could be argued that the non-recognition of the Islamic marriage is discrimination based on marital status, which is prohibited in terms of the South African Constitution.[16] It is interesting to note that if a

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[14] *Ibid*.

[15] It should be noted that the Western Cape Division of the High Court, Cape Town, on 31 August 2018 held that "5. In the event that legislation as contemplated in par 1 [legislation recognising marriages concluded in terms of Islamic law] above is not enacted within 24 months from the date of this order [date of the order was 30 August 2018] or such later date as contemplated in par 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect: 5.1 It is declared that a union, validly concluded as a marriage in terms of Sharia law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of s 7(3) 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*, *Faro v Bignham N.O.*, *Esau v Esau* (22481/2014, 4466/2013, 13877/2015) 2018 (6) SA 598 (WCC) par 252. It should be noted that Omar concluded his will during the 2-year period and not during the period where the interim relief would have come into effect. It should also be noted that the High Court judgment was taken on appeal to the Supreme Court of Appeal (SCA). The SCA granted interim relief and held that "1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in par 1.7, it is declared that a union, validly concluded as a marriage in terms of Sharia law and subsisting at the date of this order, or, which has been terminated in terms of Sharia law, 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 as follows: (a) all the provisions of the Divorce Act shall be applicable save 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 s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded …" See *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* (612/19) 2021 (2) SA 381 (SCA) par 51. The judgment was handed down on 18 December 2020, and it does not shed much certainty as to how the Islamic marriage should be seen in the light of s 4A of the Wills Act. It is submitted that the SCA judgment does not impact s 4A of the Wills Act as far as the Islamic marriage is concerned. A further discussion on this issue is beyond the scope of this article.

[16] See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more

court of law finds that section 4A of the Wills Act should recognise marriages concluded in terms of Islamic law, spouses of these marriages should be disqualified based on the section, and this disqualification would be the first instance where the recognition of an Islamic marriage led to the limitation of rights.[17]

It should be noted that a court may however (in the above instance) declare Omar to be competent to receive the R600,000.00 if it is satisfied that he did not defraud or unduly influence Ahmad in the execution of the will, or if Omar can prove that he is entitled to inherit from Ahmad's will in terms of the South African law of intestate succession. These options are available in terms of section 4A(2) of the Wills Act. The benefit in the latter instance in terms of the will must not exceed what he would have been entitled to in terms of the South African law of intestate succession.[18] Omar would have been entitled to R450,000.00 in terms of South African law of intestate succession.[19] It would be more favourable to Omar to prove to a

grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4). No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

17 In all other cases the recognition of the Islamic marriage leads to the entitlement of some sought. See, for example, *Moosa* par 21 where it is stated: "The following order is made: 1. The declaration of constitutional invalidity of s 2C(1) of the Wills Act … by the High Court of South Africa, Western Cape Division, Cape Town, is confirmed. 2. S 2C(1) of the Wills Act … is to be read as including the following underlined words: 'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. For the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.' 3. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of s 2C(1) of the Wills Act … unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application."

18 The exceptions relevant to this article are looked at in s II and s III of this article. The exceptions are found in the following provisions. See s 4A of the Wills Act where it states that "(2) Notwithstanding the provisions of subsection (1) – (a) a court may declare a person, or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will; (b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession; (c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned. (3) For the purposes of subsections (1), and (2)(*a*) and (*c*), the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will."

19 See s 1 of the Intestate Succession Act 81 of 1987 where it states: "1. Intestate succession - (1) If after the commencement of this Act a person (deceased) dies intestate, either wholly or in part, and … (b) is survived by a descendant, but not by a spouse, such descendant

court that he did not defraud or unduly influence Ahmad in the execution of the will as the R600,000.00 is more favourable than the R450,000.00. It can clearly be seen that Omar inherits a less favourable share in terms of the South African law of intestate succession as the R600,000.00 that he would be entitled to in terms of the Islamic Distribution Certificate is more than the R450,000.00 that he would be entitled to inherit in terms of the Intestate Succession Act 81 of 1987. It can also be seen that children inherit equal shares in terms of the Intestate Succession Act whereas the son inherits a more favourable share than a daughter in terms of the Islamic law of intestate (compulsory) succession based on the Islamic Distribution Certificate. This situation raises the question of discrimination based on sex and/or gender, which is prohibited in terms of South African law.[20] A further discussion of this issue is beyond the scope of this article. It is, however, submitted that in the absence of a court ruling concerning the constitutionality of section 4A of the Wills Act (not recognising marriages concluded in terms of Islamic law) that the marriage between Omar and Amina should not be affected by section 4A of the Wills Act. This would also ensure the application of Islamic law as was the wishes of Ahmad in his last will and testament and also give effect to his right to freedom of religion and to apply the Islamic law of succession to the distribution of his estate upon his demise.[21]

3 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW AND CIVIL LAW

This section of the article looks at the application of section 4A of the Wills Act in the instance where Omar and Amina married in terms of Islamic law and civil law when the will was executed on 8 August 2019.[22] Section 4A of the Wills Act would most certainly impact Omar's right to inherit the R600,000.00 (based on the Islamic will and the Islamic Distribution Certificate) as he is the spouse of one of the witnesses (Amina) in terms of

shall inherit the intestate estate …" In this instance, it should be noted that Ahmad left behind a net estate of R900,000.00 and a son and a daughter as his only relatives. His son and daughter would thus inherit equal shares of the net estate in this instance.

20 The Islamic law of intestate succession could also be referred to as the Islamic law of compulsory succession as intestate succession beneficiaries cannot be disinherited by a testator or testatrix through a will. The issue of the son inheriting double the share of a daughter raises the question of discrimination based on sex which is prohibited in terms of South African law. See fn 16 above. For a further discussion on this issue, see Abduroaf 2019 *De Jure Law Journal* 257 266. For a discussion on the rationale behind why a son inherits double the share of a daughter in terms of the Islamic law of intestate (compulsory) succession, see Abduroaf "An Analysis of the Rationale Behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession" 2020 53 *De Jure Law Journal* 115 122 http://www.dejure.up.ac.za/index.php/ volumes/2020/volume-53-2020/abduroaf-m-2020.

21 See s 31 of the Constitution where it states that "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

22 See fn 6 above.

civil law. It is noted that the civil marriage concluded in terms of the Marriage Act 25 of 1961 on 2 February 2019 would be recognised and not the Islamic marriage concluded on 1 January 2019. The fact that Omar is also married to Amina in terms of Islamic law on 1 January 2019 should have no impact on the application of section 4A of the Wills Act. There is, however, nothing preventing Omar from invoking section 4A(2) of the Wills Act, as discussed in Part II above. Omar could then either inherit R600,000.00 if he is successful in satisfying a court that he did not defraud or unduly influence Ahmad in the execution of the will, or he could inherit R450,000.00 if he can can prove that he is entitled to inherit from Ahmad's will in terms of the South African law of intestate succession.

4 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW AND CIVIL LAW BUT DIVORCED IN TERMS OF ISLAMIC LAW

This section of the article looks at the application of section 4A of the Wills Act in the instance where Omar and Amina married in terms of Islamic law and civil law but divorced in terms of Islamic law on 3 March 2019.[23] It should be noted that section 5A of the Divorce Act 70 of 1979 requires that if a couple is subject to a religious marriage as well as a civil marriage, that the religious marriage should be dissolved before instituting proceedings to dissolve the civil marriage.[24] It should be noted that the Islamic divorce was finalised on 3 June 2019 and that Ahmad executed his will on 8 August 2019.[25] It could be argued that Omar should not inherit as even though the Islamic marriage has been finally dissolved, but that the civil marriage, concluded in terms of civil law, is still intact. This type of situation seems quite unfair to persons who are married in terms of both religious law as well as civil law. Both Omar and Amina were essentially barred from instituting proceedings to execute the civil divorce due to the religious marriage. It is not certain what the outcome of such a challenge would be based on discriminatory grounds. A further discussion on this issue is, however, beyond the scope of this article.

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23 *Ibid*.

24 See s 5 A of the Divorce Act 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."

25 It should be noted that a revocable Islamic divorce issued by a husband is finalised after three months or three cycles of clean (non-menstruating periods) by the divorced wife. In the scenario at hand three months were used for the calculation. A further discussion on this issue is beyond the scope of this article. See Abduroaf "An Analysis of the Consequences of an Islamic Divorce in Light of the *Faro v Bingham and Others* Judgment" 2019 19(9) *Without Prejudice* 31–32 https://www.withoutprejudice.co.za/free/article/6701/view for a discussion on divorce and its application.

5 CONCLUSION

This article has looked at the application of section 4A of the Wills Act concerning Muslim marriages within the South African context. The findings show that the situation is quite complicated and that several scenarios could play out. It is suggested that parties married in terms of Islamic law alone, or both Islamic law as well as civil law should not sign as testamentary witnesses of a will if they are potential beneficiaries of that will, or spouses of potential beneficiaries of that will.