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Abstract

Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the South African common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise (Islamic will). This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of an Islamic will, renounces a benefit. Should the Islamic law or South African law consequences of renunciation apply? This paper critically analyses a recent South African High Court judgment where the issue of renunciation of a benefit in terms of an Islamic will was looked at.

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I. Introduction

Muslims have been living in South Africa for over 300 years.[1] These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise.[2] This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of the above-mentioned will renounces a benefit. An example of this would be where a child of a testator renounces his or her benefits in terms of his last will and testament. The Western Cape Division of the High Court held that such benefits must be inherited by the surviving spouse or spouses in terms of s 2(C)(1) of the Wills Act 7 of 1953 (hereafter referred to as the Wills Act).[3] The High Court judgment was subsequently confirmed by the Constitutional Court on the 29 June 2018.[4] This paper aims to highlight some of the problems created as a result of the Constitutional Court judgment. It discusses the application of the Islamic law of succession within the South African context by way of introduction. It then analyses the *Moosa NO and Others v Harnaker and Others* judgment and concludes with recommendations as to a way forward.[5]

II. Application of the Islamic Law of Succession in South Africa

A South African Muslim is able to make use of the right to freedom of testation in order to apply the Islamic law of succession to his or her estate upon his or her demise. A basic clause in a will stating that the Islamic law of succession must be applied to his or her estate would suffice in this regard. This type of a will could be referred to as an Islamic will.[6] The clause would direct that an Islamic institution or an Islamic law expert should draft an Islamic distribution certificate which states who the lawful beneficiaries of the testator or testatrix are at the time of his or her demise. Islamic wills are generally accepted by the Master of the High Court for liquidation and distribution purposes.[7] It could be argued that this constitutes delegation of tes-

1 The first recorded Muslim arrived in South Africa in 1654. See MAHIDA EBRAHIM MOHAMED, History of Muslims in South Africa: A Chronology, Durban 1993, at 1.

2 South African law recognises the common law principle of freedom of testation. See JAMNECK JUANITA, Freedom of testation, in: Jamneck Juanita, et al., The Law of Succession in South Africa, Cape Town 2009, at 115, for a discussion on this issue.

3 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC), at para 39.

4 *Moosa NO and Others v Harnaker and Others* (CCT) 251/17.

5 *Moosa v Harnaker* (WCC), *supra* n. 3; and *Moosa v Harnaker* (CCT), *supra* n. 4.

6 ABDUROAF KHALID, Deceased Estates: Islamic Law Mode of Distribution, Highlands Estate 2017, at 210-215; and ABDUROAF MUNEER, The Impact of South African Law on the Islamic Law of Succession, Bellville 2018, at 205-207, for examples of Islamic wills.

7 In the *Moosa v Harnaker* judgment it was stated that "[t]he deceased in his Last Will and Testament ('the Will') dated 23 January 2011, expressly referred to his marriages to both women. In terms of the Will the deceased directed that his estate should devolve in terms of Islamic Law and that a certificate from the Muslim Judicial Council or any other recog-

tamentary powers, which is prohibited in terms of South African law.[8] It has been argued that the application of the Islamic wills has been incorporated into South African law by way of custom.[9] A further discussion on this issue is beyond the scope of this paper.

III. An Analysis of the *Moosa NO and Others v Harnaker and Others* Judgment

The facts of this case concerned a deceased Muslim (X) male who died testate on 9 June 2014. X was married to two wives when he died.[10] He married his first wife (Y) in terms of Islamic law on 10 March 1957. He subsequently married his second wife (Z) in terms of Islamic law on 31 May 1964. Y consented to the marriage between X and Z.[11] X subsequently married Y in terms of South African law during August 1982. Z consented to the civil marriage between X and Y.[12] A total of nine children were born of the two marriages. Four of these children were male and five were female. X's will was executed on 23 January 2011 and it stated that his estate must devolve in terms of Islamic law. It further stated that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or other judicial body shall be final and binding upon the executors of his will.[13] The Islamic distribution certificate was issued by the Muslim Judicial Council (SA) in terms of Al Quraan, sura 4 (11-12).[14] The Islamic distribution certificate stated

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nised Muslim Judicial Authority shall be final and binding on his executors.", see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 5.

8 An example of an invalid delegation of testamentary power would be in a situation where the grantee thereof is given unlimited discretion. This could be referred to as a general power of appointment. An example of general power of appointment would be where X states in his will that the beneficiaries of his estate shall be decided by his daughter Y, see DE WAAL M. J./SCHOEMAN-MALAN M.C., Law of Succession, 5th ed., Cape Town 2015, at 49.

9 See ABDUROAF MUNEER, *supra* n. 6, at 125, where it was argued that the common law has been developed through custom and is now part of South African law. It should also be noted that the Islamic law expert who drafts the Islamic Distribution Certificate does not have unlimited power. He can only issue a certificate in terms of Islamic law.

10 *Moosa v Harnaker* (WCC) supra n. 3, at para 4.

11 M is married to X in terms of both Islamic law and the Marriage Act 25 of 1961. See *Moosa v Harnaker* (WCC), *supra* n. 3, at para 3.

12 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 3-7.

13 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 4-8. It should be noted that a clause in an Islamic will stating that Islamic law should apply could be problematic in the event where there are differences of opinions found within Islamic law. I am of the opinion that a testator or testatrix must state in his or her will which school of law must find application in this regard. This would also bring about legal certainty and prevent abuse by executors of estates who are trusted with administering Islamic wills.

14 See KHAN MUHAMMAD MUHSIN, The Noble Qur'an - English Translation of the Meanings and Commentary, New Delhi 1404H, sura 4 (11-12), where it states: "11. Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing." These verses stipulate the inheritance of parents, children, surviving spouses, and uterine siblings.

that each widow must inherit 1/16 = 13/208, each son must inherit 7/52 = 28/208, and each daughter must inherit 7/104 = 14/208.[15]

The nine children renounced the benefits due to them in terms of the Islamic distribution certificate.[16] The nine children "[…] all agreed and expressed their intention in writing to renounce all their benefits accruing to them in terms of the Will read with the Islamic distribution certificate and stipulated that it be inherited in equal shares by the Second and Third Applicants [surviving spouses of the testator]. As a result of the renunciation, the Executor relied upon the provisions of s 2(C)(1) of the Wills Act." The executor considered both Y and Z to be surviving spouses for purposes of s 2(C)(1), and was of the opinion that the renounced benefits should vest in them equally.[17] The liquidation and distribution account recorded that Y and Z would each inherit an equal share of the renounced benefits. The liquidation and distribution account was accepted by the Master of the High Court.[18] The Registrar of Deeds was of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Y should vest in Y as she was recognised as a surviving spouse for purposes of s 2(C)(1) due to her civil marriage with the deceased. The Registrar of Deeds was, however, of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Z should vest in the descendants of the children of the repudiating descendants in terms of s 2(C)(2) as the Islamic marriage between X and Z was not recognised for purposes of s 2(C)(1).[19]

The disputed matter was referred to the Western Cape Division of the High Court where it was argued that s 2(C)(1) unfairly discriminates against Z on the grounds of religion and marital status.[20] The Court held that s 2(C)(1) is inconsistent with the Constitution as it does not include a husband or wife in a marriage that was solemnised in terms of Islamic law.[21] Section 2(C)(1) was declared invalid insofar as it does not include multiple widows married to a deceased husband in terms of Islamic law.[22] The order of invalidity was suspended subject to confirmation by the Constitutional Court as it required in terms of s 15(1) (a) of the Superior

15 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7. The fact that the daughters inherited half the shares of the sons in terms of the Islamic Distribution Certificate raises the question of discrimination based on sex or gender. This issue is beyond the scope of this case note. It should be noted that the South African Constitution prohibits discrimination based on sex or gender. See s 9 of the Constitution of the Republic of South Africa 1996, where it states that "(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more 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)."

16 The renouncement was reduced to writing. The children stated that they wanted the surviving spouses to inherit the renounced benefits in equal shares, see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 8.

17 Section 2(C)(1) of the Wills Act states that "[i]f 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."

18 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 9.

19 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 12-13. It could be argued that the renounced benefits should technically vest in Y as she was the surviving spouse in terms of s 2(C)(1) It should be noted that s 2(C)(2) is also subject to s 2(C)(1). See s 2(C)(2) of the Wills Act 7 of 1953 where it states that "[i]f a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates."

20 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 17.

21 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (i).

22 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (ii).

Courts Act 10 of 2013.[23] The order of the High Court was in essence confirmed by the Constitutional Court.[24]

The question that should be raised is whether relying on s 2(C)(1) of the Wills Act was the correct approach or whether the Islamic distribution certificate should have been referred back to the Muslim Judicial Council (SA) for an amendment in terms of Islamic law based on the renunciation.[25] Two situations must be distinguished with regard to the above. The first situation would be where the last will and testament of the testator or testatrix expressly states how his or her estate should be distributed without any reference to Islamic law. In this instance s2(C)(1) of the Wills Act would find application. This would be the case even if the consequences of the will are the same as Islamic law that would appear on the Islamic Distribution Certificate.[26] The second situation would be where the testator or testatrix states in his or her last will and testament that his or her estate must be distributed in terms of Islamic law and that an Islamic law expert or Islamic institution should draft an Islamic Distribution Certificate in this regard. This is what has transpired in the *Moosa v Harnaker* case, and is the focal question looked at in this paper.[27]

I am of the opinion that s 2(C)(1) of the Wills Act should not find application in the above instance. My argument is based on the fact that the testator stated in his last will and testament that his estate should be distributed in terms of Islamic law.[28] This would be the application of the common law right to freedom of testation. I am of the opinion that the Muslim Judicial Council (SA) should have been approached in regards to the renunciation of benefits and the Islamic Distribution Certificate should have been amended accordingly. The Islamic law doctrine of *takhaaruj* would then have found application.[29] The doctrine allows for renunciation of benefits in deceased estate. This could be done in favour of the surviving spouses. The doctrine of *takhaaruj* is broader than s 2(C)(1) as the children are not restricted in their renunciation in favour of the mother only. A child listed on the Islamic Distribution Certificate would, for example, be free to renounce his or her benefit in favour of any of the other persons listed on the Islamic Distribution Certificate. The doctrine of *takhaaruj* also allows for renunciation in favour of an asset inside or outside of the deceased estate. An example of this would be where a son

[23] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (g). Section 15 (1) (a) of the Superior Courts Act states that "[w]henever the Supreme Court of Appeal, a Division of a High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in terms of s 172 (2) (a) of the Constitution, that court, must in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation."

[24] See *Moosa v Harnaker* supra n. 4.

[25] Section 2(C)(1) of the Wills Act 7 of 1953 states that that "[i]f 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."

[26] Another question that should be looked at is whether the Islamic law consequences of renunciation should apply in the event where a testator or testatrix expressly states in his or her will that the Islamic law consequences should apply in the event where there is a renunciation by his or her child who he or she has bequeathed a testate benefit to. An example of this would be where a testator bequeaths 1/3 of his net estate in favour of his non-Muslim son. This son would not appear on the Islamic Distribution Certificate as is disqualified from inheriting in terms of the Islamic law of intestate succession. This question is beyond the scope of this paper as these are not the facts as found in the *Moosa v Harnaker* case. I am of the opinion that s 2(C)(1) would find application as the wording of the section does not allow for a difference consequence to the renunciation.

[27] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7.

[28] *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7.

[29] See AL SUBAA'EE MUSTAFAA, Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyyah, vol. 2, part 3, 3rd ed., Beirut 2000, at 177-178; and AL ZUḤAYLEE WAHBA, Al Fiqh Al Islaamee Wa Adillatuhoo, vol 8, 3rd ed., Damascus 1989, at 440-442.

renounces his right to inherit a share in estate in favour of the surviving spouse, in exchange for a car.[30] It should be noted that there would be nothing preventing the son in this example from renouncing his share in the estate in favour of the surviving spouse for no exchange at all. The children in the *Moosa v Harnaker* case could therefore have renounced their rights in the estate in favour of the surviving spouses based on the doctrine. The Islamic Distribution Certificate would then have reflected this. There would then have been no need for s 2(C) (1) of the Wills Act to apply.

It could be argued that once an Islamic Distribution Certificate is issued and lodged with the Master of the High Court, s 2(C) (1) of the Wills Act should find application (as in the instance of *Moosa v Harnaker*), whereas the Islamic law consequences should apply in the event where the certificate has not yet been lodged. This type of a situation could lead to a friction between the rules applicable in terms of Islamic law and South African law. An example of this would be where a son of the testator wishes to renounce a benefit in favour of the testator's father. This type of renunciation would be possible in terms of Islamic law in terms of the doctrine of *takhaaruj*, but it would not be possible in terms of s 2(C) (1) of the Wills Act. The renounced benefit should go to the surviving spouse in terms of s 2(C) (1) of the Wills Act, whereas it should go to the father in terms of the doctrine of *takhaaruj*. This situation could also lead to an abuse of power. If, for example, the testator of a deceased estate is aware that the son of the testator wants to renounce a benefit, he or she could then request the Islamic Distribution Certificate and lodge it prior to the renunciation. This would then ensure that the renounced benefit would be inherited by the surviving spouse in terms of s 2(C)(1) of the Wills Act. He or she could, for example, also accept the renunciation document of a son in favour of the daughter of the deceased, but not inform the Islamic law expert of the renunciation. He would then subsequently lodge the renouncement document at the Masters Office. This would mean that the renouncement would now be in terms of s 2(C)(1) of the Wills Act and not in terms of Islamic law. This creates a huge problem with legal certainty as it would not be clear as to how the estate of the deceased would devolve.

IV. Conclusion

This paper has highlighted some of the problems with the *Moosa v Harnaker* judgment with regard to s 2(C)(1) of the Wills Act. The research has shown that the consequences of renunciation by a descendant of a deceased testator in terms of South African law are not the same as those in terms of Islamic law. It has also shown that the application of s 2(C)(1) of the Wills Act could be quite problematic in the instance where a testator or testatrix states in his last will and testament that Islamic law should find application to the distribution of his estate and that an Islamic Distribution Certificate issued by an Islamic law expert would be binding in this regard. The precedent set by the *Moosa v Harnaker* judgment would lead one to believe that the Master of the High Court would most likely not accept a request to amend an Islamic Distribution Certificate in the event where a descendant who is named in such a certificate renounces the benefit subsequent to the lodging of the certificate at the Master of the High Court. My recommendation in this regard would be that executors of Islamic wills should discuss issues regarding renunciation and related matters with the Islamic law experts or institutions like the Muslim Judicial Council (SA) prior to lodging it with the Master of the High Court. This would

[30] See AL SUBAA'EE, *supra* n. 29, at 177-178; and AL ZUḤAYLEE, *supra* n. 29, at 440-442.

ensure that Islamic law consequences would find application in this regard, and it would ensure that the testator's right to freedom of testation is given effect.