



in Islamic marriages arises primarily from the ease and relative informality with which such unions may be dissolved at the instance of the husband.

Legislation to regulate the solemnisation and dissolution of Islamic marriages in a manner consistent with the Constitution has been dealt with as long ago as July 2000 in a paper issued by the SA Law Reform Commission, and later in the drafting of the Muslim Marriages Bill. Despite this bill being mentioned in a number of court cases, especially in the Constitutional Court case *Women's Legal Centre Trust vs President of the Republic of South Africa and Others* in 2009, it is unclear what progress has been made to enact the proposed legislation.

Delays since 2009 in this regard resulted in a warning by the presiding judge in the *Faro* case: "There may come a time when, owing to continued lethargy or paralysis on the part of the executive promoters of legislation in this field, a court will need to intervene." Deeming it desirable that some further opportunity should be allowed for the process to follow its course, the court ordered the Minister of Justice and Constitutional Development to file an affidavit by 15 July 2014 setting out the progress made in respect of the enactment of the Muslim Marriages Bill of 2011 and/or any similar legislation. This decision is to be welcomed.

## Failure by the Master of the High Court as *pater familias*

On the official website of the Department of Justice and Constitutional Development, the Master is acknowledged, as part of its statutory role "to protect the financial interests of heirs", to "still be the *pater familias* (father of the family) of widows and those incapable of managing their own affairs". However, as was again illustrated in the *Faro vs Bingham NO and Others* case, the Master in practice did not or could not successfully fulfil this very important protective role. In short, the

Master found the applicant not to be the spouse of the deceased and, whereas spouses are exempt from having to render security, insisted on her providing security as the appointed executrix, only to remove her as executrix on her subsequent failure to do so. The case also showed the repercussions of her being disqualified both as surviving spouse and beneficiary in the estate to be even more severe. Yet, based on the evidence before it, the court had no problem in overturning the Master's ruling but then only after the aggrieved widow had to go to all the trouble and considerable expense to seek recourse in court.

How could this have happened? What prevented the Master from acquiring and acting on the same evidence, preventing all the seemingly unnecessary hardship, delays and involvement of expensive resources that arguably, could have been put to better use? As bemused in many court cases dealing with issues not only pertaining to the Administration of Estates Act, but also the Companies Act and Insolvency Act, the Master as a creature of statute has been endowed with neither the proper legislative authority nor the means to determine disputed facts and thus deal with conflicting allegations. It *inter alia* cannot lead nor accept oral evidence. Yet, it has to and does make decisions, often resulting in adverse consequences in stark contrast to its role as *pater familias*.

In *Fey NO and Whiteford NO vs Serfontein and Others*, the Judge of Appeal said: "The Master's office, from the nature of things, is ill-equipped to determine disputed facts. The recognised procedure for settling disputed facts is by trial action. A court is the obvious tribunal for the determination of such disputed matters. Grave injustice may be done to a litigant who is denied the ordinary procedure adopted in investigating the truth of conflicting allegations."

The disconcerting reality is that although parties aggrieved by the Master's decisions may approach the court, only a small minority has the means to avail itself of such relief. It is fair to allege that those most in need of the courts' help can least afford it. Isn't it time for the legislator or our courts to address these well-known statutory limitations?