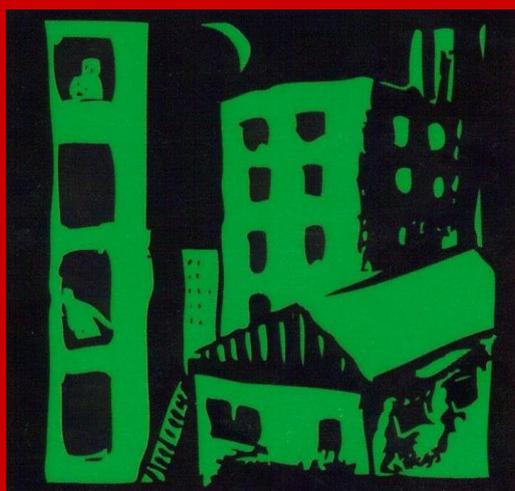


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Marriages of convenience through the immigration lens: concepts, issues, impact and policies

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ABSTRACT

This article examines the attempts made by both the Executive and Parliament to curb marriages of convenience through the revision of refugee and immigration laws. Asylum seekers or economic migrants use marriages of convenience largely to legitimise their stay in South Africa. South African authorities regard these marriages of convenience as a threat both to South African society as they violate pro-marriage policies and anti-irregular migrant policies, and to national security as they defeat the object of the institution of marriage. In this context, the article explores the complexities of combating marriages of convenience on the basis of the principle of consent on which a valid marriage is

fundamentally constructed, and also on the basis of an analysis of judicial opinions holding that a marriage of convenience must be terminated by a decree of divorce.

Keywords: Marriage of convenience; human security; national security; immigration law; and refugee law.

1 INTRODUCTION

Most countries are adopting immigration management measures that seek to restrict non-citizens with temporary resident status from gaining access to the national labour market, trade, industry and social welfare. However, one of the unintended consequences of these measures is marriages of convenience, which are increasingly being concluded between non-citizens and citizens to ensure that non-citizens' human security is guaranteed.¹ In this context, human security is guaranteed when an individual enjoys peace, safety and security, is free to participate in the socio-economic and political development of their host country, and is entitled to the same dignity and liberties enjoyed by others.² Essentially, as will be explained below, non-citizens – especially economic migrants and asylum seekers – enter into marriages of convenience to circumvent immigration regulations. They also do this to ensure they are safe and secure from threats of expulsion or arrest and deportation and to integrate into their host communities.³ As a result, they can engage in trade and business and can take up employment. Furthermore, if they cannot support themselves due to poverty, illness, disability, or advanced age, they may also be eligible for State support and assistance.

Against this background, this article will illuminate the complexities embedded in the fight against marriages of convenience through amending existing refugee and immigration laws. The need to resist this type of marriage is central to South Africa's political, judicial and legislative debate on how new refugee and immigration conditions

¹ Norwegian Directorate of Immigration "Marriages of Convenience: A Comparative Study - Rules and Practices in Norway, Sweden, Germany, Denmark and the Netherlands" Research project commissioned by the Norwegian Directorate of Immigration (UDI) of 8 November 2010 at 9. See also European Migration Network "Misuse of the Right to Family Reunification: Marriages of Convenience and False Declaration" June 2012 at 9; Messinger I "There is something about marrying ... the case of human rights vs migration regimes using the example of Austria" (2013) 2 *Laws* 383 and Tamburlini TM *Narratives and counter-narratives on "marriage of convenience" : conjugality and (il)legality in Portuguese migration policies and in couples' experiences* (unpublished doctoral thesis, Universidade de Lisboa, 2016) at 166.

² Alkire S "A Conceptual Framework of Human Security" (2003) Working Paper 2, Centre for Research on Inequality, Human Security and Ethnicity (CRISE), Queen Elizabeth House, University of Oxford at 2.

³ The following cases will be examined: *Malhekwa v Minister of Home Affairs* [2004] ZAWCHC 89; *Khan v Minister of Home Affairs* unreported case no 8231/2014 of 27 June 2014; *Zaheer v Minister of Home Affairs* unreported case no 38408/12 of 21 January 2013; *Singh v Minister of Home Affairs* unreported case no 1467/2012 of 14 June 2012; and *Houd v Minister of Home Affairs* unreported case no 1344/2006 of 25 August 2006.

could be redesigned or reengineered to prevent non-citizens from concluding such marriages. The purpose of these marriages is to evade the restrictive conditions that exclude non-citizens from integrating into society and the economy. For this reason and because South African refugee and immigration scholars have not yet engaged with this issue, a legal analysis of marriages of convenience is important.

For the discussion of the difficulties arising from legally restricting these marriages, the article will first contextualise and conceptualise a marriage of convenience and a genuine marriage and then compare and contrast the two. Within the South African framework, the article will illuminate the immigration and refugee measures employed to curb marriages of convenience as well as the complexities of achieving this goal. For the sake of clarity, the term “marriage of convenience” will be used throughout this article although some marriages are classified as bogus, fake, fraudulent, sham or irregular. No other inference or meaning should be drawn from the usage of any of these terms.

2 CONTEXTUALISATION AND CONCEPTUALISATION

2.1 Rationale behind the rise of marriages of convenience

Individuals fleeing from political persecution and war-torn countries or fleeing from destitute countries come to South Africa hoping to find human security. The human security that they seek is not only limited to peace, safety and security, but also includes the protection of their socio-economic needs.⁴ The protection of their socio-economic needs is a prerequisite since events beyond their control, such as, persecution, violence, ill health, economic hardships, chronic destitution, homelessness, and unemployment pose serious threats to them.⁵

From a transformative constitutionalism point of view, the government of South Africa is primarily mandated to protect the human security of its people.⁶ From a socio-economic perspective, this mandate is extended to include certain non-citizens with permanent residence, refugee or asylum seeker status.⁷ The viaduct through which non-citizens can be integrated into socio-economic development designs is largely grounded in refugee and immigration laws. In terms of these laws, economic migrants are, for example, excluded from those who can be admitted to and stay in the country. By its

⁴ In terms of s 1(a) of the Constitution of the Republic of South Africa, 1996, (Constitution) human dignity, equality and human rights and freedoms are among the values on which the Constitution is founded.

⁵ See Alkire (2003) at 2.

⁶ Preamble of the Constitution refers to “[improvement] of the quality of life of all citizens and free the potential of each person”.

⁷ Section 25(1) of the Immigration Act 13 of 2002 (Immigration Act) and ss 27(b) and 27A(d) of the Refugees Act 130 of 1998 (Refugees Act).

very nature, the immigration framework implicitly classifies an economic migrant as an undesirable person who should be denied an entry visa.⁸

Even if such person manages to illegally enter the country, they will still be traced, apprehended, and deported.⁹ Similarly, those non-citizens, who are legally permitted to stay in the country temporarily but who do not wish to leave the country upon expiry of their allotted time, must be arrested and deported if they have no valid reason to remain in the country.¹⁰ Except for refugees and asylum seekers, other non-citizens who are admitted into the country temporarily cannot be eligible for or beneficiaries of any State support. However, they stand a better chance to enjoy access to the labour market and business industry than refugees and asylum seekers. Nonetheless, because economic migrants are not allowed entry into the country, they use the relatively modest asylum system to enter into and stay in the country. As a result of the vast number of applications for asylum made by economic migrants, South Africa has shown reluctance to integrate asylum seekers into its economic sectors.¹¹

The reluctance to protect the human security of asylum seekers gives rise to constant uncertainty and fear which characterise their lives. This is reflected in the closure of the Refugee Reception Offices, administrative bungling in the Department of Home Affairs (DHA), refusal to document asylum seekers or to extend (or renew) their documents, xenophobic attitudes (and attacks), and the State's tendency to disregard successful judicial remedies obtained by asylum seekers.¹² South Africa justifies its reluctance on the ground of the high level of fake asylum applications. It admits that such applications distract it from its statutory, constitutional, and international obligations to integrate refugees and asylum seekers into society in such a way that they are beneficiaries of public goods and services, which they are entitled to in terms of the refugee regime.¹³ This attitude resulted in asylum seekers using marriages of convenience as a mechanism, not only to evade immigration and refugee regulations but also to ensure they have access to labour, trade and social welfare. Accordingly, a

⁸ Section 10 read together with s 30 of the Immigration Act.

⁹ Section 34 of the Immigration Act.

¹⁰ Certain temporary residents' visas or permits become invalid for the mere reason that they overstayed or their applications for extension of their stay are not approved by the Department of Home Affairs (DHA).

¹¹ Kavuro C "Existing in limbo: SA has displayed conflicted, ambivalent attitude towards protection of genuine refugees" (2020) *Weekend Argus* 7.

¹² Botha H "The rights of foreigners: dignity, citizenship, and the right to have rights" (2013) 130 *South African Law Journal* 854 and Gloppen S "Social rights litigation as transformation: South African perspective" in Jones P & Stokke K (eds) *Democratising development: the politics of socio-economic rights in South Africa* Boston: Martinus Nijhoff (2005) at 176.

¹³ Kavuro C "Refugee rights in South Africa: addressing social injustices in government financial assistance schemes" (2015) 5 *Journal of Sustainable Development Law and Policy* 176 at 182-183.

marriage of convenience is used as the viaduct through which local integration can be effectively secured to ensure human security.

It must be borne in mind that marriages of convenience are not unique to South Africa and occur everywhere. European countries have been facing this problem since the 1970s and have been seeking to address the problem through enactment (and revision) of stricter immigration policies. The need to adopt more restrictive measures is motivated by the fact that non-citizens conclude marriages of convenience merely to facilitate lawful residence and ensure access to the European labour market.¹⁴ Lawful residence guarantees, at least, human security. To understand fully what a marriage of convenience entails, it is important first to conceptualise a genuine spousal relationship.

2.2 Foundations of a genuine spousal relationship

What constitutes a genuine spousal relationship can be deduced from the definition of the institution of marriage. It is, in terms of common law, defined as “a union of one man with one woman, to the exclusion, while it lasts, of all others”.¹⁵ The Constitutional Court in *Minister of Home Affairs v Fourie* revised this definition to include same-sex spouses since the Constitution of the Republic of South Africa, 1996 (Constitution) guarantees equal protection before the law to all people regardless of their sexual orientation.¹⁶ Yet, the institution of marriage cannot be conceptually defined without including those marriages that comply with customary law or religious rites requirements for a valid marriage.¹⁷ The recognition of customary or religious marriages gives rise to the question of whether South Africa’s legal system recognises a foreign polygamous union as a valid marriage or whether the engagement of some migrants in polygamous marriages involving foreign and national spouses can be viewed as valid marriages in South Africa.

As will be demonstrated, the institution of marriage is usually abused to secure residence and to gain access to employment, business and other constitutional benefits. This is contrary to the objectives of the institution of marriage, which must be founded on a real and genuine spousal relationship, with the aim to create a family unit. In other words, marriage is centred on true love and commitment to each other. There are various factors to determine an honest and good faith spousal relationship. First, there must be an expression of real and actual consent of the parties to the marriage.¹⁸ Secondly, a spousal relationship must be characterised by affection and love. These characteristics are seen as the foundation of marriage and are “described as a

¹⁴ See Messinger (2013) at 377 and Bacci (2016) at 85.

¹⁵ *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 3.

¹⁶ See *Fourie* (2006).

¹⁷ Cronje DSP & J Heaton J *South African Family Law* Durban: LexisNexis (2007) at 191.

¹⁸ This requirement is contained in Art 16(2) of the Universal Declaration of Human Rights of 1948 and the Marriage Act 25 of 1961. Consent must be expressed freely and voluntarily.

communion of life and love – *communitas vitæ et amoris conjugalis*".¹⁹ Thirdly, the institution of marriage is believed to establish "a *consortium omnis vitæ* between spouses".²⁰ There are legal and moral obligations flowing from the concept of *consortium omnis vitæ*. In contrast, a marriage of convenience is based on consensus; however, it does not create *consortium omnis vitæ* obligations. The salient questions are therefore whether couples in a marriage of convenience can be separated by the government and have their marriage expunged if the said obligations are lacking.

The court has defined *consortium omnis vitæ* as a concept comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage, such as, intercourse.²¹ In the light of these obligations, it is arguable that any marriage – based on consent – concluded for reasons inconsistent with the concept of *consortium omnis vitæ* may give rise to, or be defined as, a marriage of convenience. This type of marriage should however not be confused with, and should be distinguished from, an *arranged marriage* and a *forced marriage*. The latter is characterised by the absence of consent by one or both of the parties, while the former is typified by the intervention of someone other than the future couple. It should further also not be confused with "a marriage entered into while a party laboured under material mistake".²²

2.3 Issues regarding validity and legal consequences

Family law can assist us in finding answers to questions of whether a marriage of convenience is legally valid and whether the State can impose a divorce on the couples and for a non-citizen to be apprehended and deported. From a family law perspective, a marriage of convenience is indeed valid as the couple have the intention of entering into a valid marriage and are aware that such marriage can only be terminated by a divorce.²³ A typical example of a marriage of convenience is where spouses enter into a marriage for the sole purpose of legitimising children born to them and that, prior to the marriage, they have agreed that they would not live together as husband and wife under one roof.²⁴ However, it does not sit well with the government if such an arrangement is made between foreign and national spouses.

From an immigration law perspective, a marriage of convenience is conceptualised to refer to marriages contracted with the primary motive of enabling a foreigner to

¹⁹ See Cronje & Heaton (2007) at 28.

²⁰ See Cronje & Heaton (2007) at 28.

²¹ See Cronje & Heaton (2007) at 28.

²² See Cronje & Heaton (2007) at 29.

²³ See Cronje & Heaton (2007) at 29.

²⁴ *Van Oosten v Van Oosten* 1923 CPD 409.

enter the country or to obtain a work or residence permit in their spouse's country.²⁵ European States have been dealing with this problem and, in order to combat marriages of convenience, have ultimately criminalised such marriages by revising immigration laws.²⁶ Accordingly, these laws established punitive measures and further established the marriage investigation unit whose mandate includes tracing, identifying or investigating allegations of marriages of convenience.

According to Messinger, this kind of marriage can be suspected if spouses are not living together; if a foreign spouse does not contribute to family responsibilities arising from marriage; if a national spouse entered into a marriage for a pecuniary advantage; or if the age difference is too great.²⁷ It becomes even more suspicious when a marriage involved an asylum seeker or an economic (or illegal) migrant.²⁸ Other determining factors include situations²⁹ where spouses have never met before their marriage; where matrimonial cohabitation is not maintained; where the spouses are inconsistent about their particulars (name, address, nationality and job); where each spouse speaks their own language, which the other spouse does not understand: or where the past history of one or both of the spouses contains evidence of previous sham or bogus marriages. Notwithstanding these problems, a marriage of convenience is legally valid and must be dissolved in terms of family law; hence, it meets in all aspects the legal requirements for the conclusion of a valid marriage.

2.4 Judicial opinions on the implication of consent

Judicial considerations of a marriage of convenience can be traced back to the case of *Washkansky v Washkansky*,³⁰ a decision handed down in 1940, in which spouses had concluded an agreement to enter into a marriage in order to evade immigration law conditions. In this case, the matter was brought before the Court claiming that the husband had committed adultery; however, it transpired that the spouses had never lived together as husband and wife after the solemnisation of their marriage.³¹ Although the decree of divorce was granted, the Court expressed its concern over the successful evasion of provisions of immigration law. In this case, the Court was not concerned with nor looked into the question of whether the husband should be

²⁵ See Norwegian Directorate of Immigration (2010) at 9. See also European Migration Network (EMN) "Misuse of the right to family reunification: marriages of convenience and false declaration of parenthood" Brussels : June 2012 at 9.

²⁶ See Norwegian Directorate of Immigration (2010) at 1–9.

²⁷ See Messinger (2013) at 383.

²⁸ See Messinger (2013) at 383.

²⁹ See Tamburlini (2016) at 166.

³⁰ *Washkansky v Washkansky* 1940 CPD 238.

³¹ *Washkansky* : (1940) 239.

classified as an illegal foreigner and apprehended and deported for circumventing immigration rules.

The question of a marriage of convenience to secure residence in the country was again dealt with in the 1952 case of *Martens v Martens*.³² Here the Court focused on consent and the legal consequences thereof from a family law perspective. First, the Court interpreted the institution of marriage as being based on three general principles: consent, living together, and affording conjugal rights to one another. These were the main grounds to determine whether a marriage was valid. In this case, the plaintiff sought relief from the conjugal rights or nullity of the marriage due to its nature of convenience. The plaintiff (a South African man) married a Greek woman (the defendant) at the request of a friend so that, as the wife of a citizen, the defendant would qualify for permanent residence. However, it was agreed that once the defendant was in the country, she would become the wife of the plaintiff's friend. The plaintiff had only to act as a husband in the marriage ceremony. After the marriage, the plaintiff's friend stayed with the defendant and had two children.

On the issue of expungement, the Court held that it could not expunge the marriage simply because the marriage could be terminated through divorce. The Court stated that

“... the facts showed that the parties did intend that the defendant should become the wife of the plaintiff; that was the very object of the ceremony, so that she should remain in the country, and that object was brought about with a realisation by both contracting parties that there would be need for divorce to end the marriage”.³³

In this case, the Court did not consider the question of whether the divorce should lead to the deportation of the respondent. Instead, the Court gave precedence to the real and actual consent of both parties to the consequences of marriage which is a cornerstone of entering into a valid marriage. Proceeding from this premise, the Court stressed that “any agreements contrary to the relationship of marriage had to be disregarded and that the action of a declaration of nullity had to be dismissed”.³⁴ The Court stressed further that in circumstances under which it was clear that there was a real and actual consent, the marriage is valid in that “it is not *in fraudem legis* because it is what it purports to be”.³⁵ The legal consequences of marriage must follow for the sole reason that the parties' agreement not to live together is irrelevant. Both parties were aware

³² *Martens v Martens* 1952 3 SA 771 (W).

³³ See *Martens* : (1952) at 775.

³⁴ See *Martens* : (1952) at 775.

³⁵ See *Martens* : (1952) at 772.

that their marriage – although one of convenience – can only be terminated through divorce.³⁶

The Court further interpreted its duty as laying down an important general principle that would guide it in matters involving marriages of convenience. The general principle is grounded on the view that the Court, in rendering justice, cannot be seen to be furthering an abuse of (or a scheme to evade) immigration rules and regulations. In the view of Clayden J, if the marriage could have been declared null and void, such declaration could have been contrary to public policy as it could have the unintended implications of promoting adultery, circumventing pro-marriage policies, and impairing the significance of the marriage status, which is significant when entering into a marriage.³⁷ Put differently, the Court must be seen as the guardian of the institution of marriage as well as of South African law. On this basis, the Court must declare an agreement not to stay together as a husband and wife to be *contra bonos mores* and an unlawful act.

What could be inferred from the decision of the Court is that the marriage cannot merely be annulled on the ground that it is one of convenience and that marriages of convenience must be maintained to protect the sanctity of the institution of marriage unless one party to the marriage files for divorce. The government cannot therefore annul a marriage of convenience for the sole purpose of withdrawing the status afforded to a non-citizen by virtue of marriage. In the two analysed cases, the Court laid down principles that would guide it in determining whether the marriage is valid or not. Consent must be balanced by *consortium omnis vitae* obligations, on the one hand, and the contravention of immigration law conditions, on the other. Mere consent can be relied on to justify the existence of a valid marriage; however, the absence of meeting the *consortium omnis vitae* obligations, coupled with the intention to circumvent immigration rules, render the marriage *contra bonos mores*. The pertinent question is therefore whether the post-apartheid government will be able to arrest and deport a non-citizen if it finds that the couple's marriage is simply based on consensus and does not meet the *consortium omnis vitae* obligations.

3 POLICY BASED DEFINITIONS FROM A COMPARATIVE PERSPECTIVE

3.1 European countries' approach

A marriage of convenience is a matter of concern to all European countries as it is viewed as an attempt to undermine pro-marriage policies and anti-illegal immigration policies.³⁸ Accordingly, the European Commission has, under the Free Movement Directives, defined the concept as a marriage as “contracted for the sole purpose of

³⁶ See *Martens* : (1952) at 773.

³⁷ See *Martens* : (1952) at 776.

³⁸ See Messinger (2013) at 379.

enjoying the right of free movement and residence under European Union (EU) law, which someone would not otherwise be entitled to”.³⁹ This definition can be viewed as guidance as it is employed by European countries to define the concept in their own context in accordance with their own lessons and experiences.

For example, the immigration law transposing the Free Movement Directives into the British legal system states that a marriage of convenience includes a marriage entered into for the purpose of using immigration regulations, or any other right conferred by the EU treaties, as a means to circumvent either immigration rules that apply to non-European Economic Area nationals or criteria that the spouse would otherwise have to meet in order to enjoy the right to reside in a EU country.⁴⁰ Under British law, the concept of a marriage of convenience is recognised as a sham marriage, and is defined under section 24 of the Immigration and Asylum Act of 1999⁴¹ as

“... one in which ... one or both parties is not a British citizen, a European Economic Area national; or Swiss national or there is no genuine relationship between the parties to the marriage; or either, or both, of the parties enter into the marriage for the purpose of circumventing UK immigration controls, including under the immigration rules or the Immigration (EEA) Regulations, 2006”.

The United Kingdom (UK) further stresses that the key determining factor in marriages of convenience is the absence of intentions on the part of the spouses to be involved in a genuine and subsisting marriage, or union or spousal relationship akin to marriage, and to create a family unit.⁴² What is apparent from these definitions is that a sham marriage is used to secure human security by gaining access to lawful residence and the rights associate with it.

These different definitions have one thing in common: a marriage of convenience is concluded to circumvent immigration law conditions that a foreigner cannot meet, with a view to secure lawful residence and the rights attached thereto. These definitions can therefore assist the respective courts and marriage of convenience investigation units to assess and determine whether a marriage is a sham and merely concluded to assist one party to regularise their stay through marriage. In what follows it will be determined whether South Africa has taken similar precautions to protect its own citizens by enforcing laws adopted to fight against marriages of convenience.

³⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁴⁰ United Kingdom’s Home Office “Marriage Investigations” published for Home Office Staff on 1 February 2017 at 11.

⁴¹ As amended by s 55 of the Immigration Act, 2014 (UK).

⁴² United Kingdom’s Home Office (2017) at 11.

3.2 South African approach

Unlike European countries, South Africa does not define the concept of a marriage of convenience in any legislation or policy. This is the current situation even though the State, since 1998, had expressed concern over the increase in the already vast number of applicants for permanent residency on the basis of a spousal or relative ground to be engaged in marriages of convenience.⁴³ Marriages of convenience are primarily used as a means to stay in the country and to conduct human smuggling or trafficking activities.⁴⁴ Nonetheless, a workable definition can be drawn from the presentation of Mangosuthu Buthelezi (the former Minister of Home Affairs) made to Parliament on 8 May 2001. Buthelezi defined a marriage of convenience as a situation “where illegal [foreigners] enter into marriages with South African partners, either by fraudulent means or by arrangement with a South African accomplice ... in their attempts to legalise their stay in the country”.⁴⁵ A general narrow definition of the concept of marriage of convenience – which can be drawn from the briefs to Parliament – is a marriage concluded for monetary gain and for obtaining a legal residence in the country.⁴⁶ This definition is implicitly retained in the 2021 Green Paper on Marriages in South Africa (Green Paper on Marriages (2021)).⁴⁷

The absence of a clear definition leads to legal complexities to address this social problem. Under the 2021 Green Paper, marriages of convenience are slightly distinguished from fraudulent marriages, simply because the latter can automatically be annulled by the State because of their invalidity, whereas the former can – because of their validity – only be dissolved through divorce.⁴⁸ Fraudulent marriages occur when foreign nationals submit fake documents to State officials, who, knowingly, solemnise these marriages and register such fictitious marriages in the National Population

⁴³ Briefing by the DHA to the Portfolio Committee on Home Affairs on implementing the White Paper on International Migration including establishing one stop border posts (OSBP) and refugee processing facilities closer to the border on 24 October 2017. See Parliamentary Monitoring Group (PMG) “White Paper on Migration: border refugee processing facilities: implementation by Home Affairs” 24 October 2017 available at <https://pmg.org.za/committee-meeting/25305/> (accessed 14 May 2018).

⁴⁴ Parliamentary Monitoring Group “Chapter 9 Institutions amalgamation; Violence Against Women & Children Programme of Action; Trafficking in Persons SAPS statistics, with Min of Social Development & Deputy Min of Labour” 31 August 2017 available at <https://pmg.org.za/committee-meeting/24912/> (accessed 16 May 2018).

⁴⁵ Parliamentary Monitoring Group “Presentation by Mangosuthu Buthelezi, MP, Minister of Home Affairs, Cape Town on 8 May 2001” available at <https://pmg.org.za/committee-meeting/470/> (accessed 13 May 2018).

⁴⁶ Parliamentary Monitoring Group “Department of Home Affairs on Identity Documents: marriages” (22 May 2003) available at <https://pmg.org.za/committee-meeting/2477/> (accessed 17 June 2018).

⁴⁷ GN 412 in GG 44557 of 11 May 2021 at 40 states that marriages of convenience occur when a citizen and a foreigner marry each other for convenience. The citizen, usually a woman, is rewarded with huge sums of money and, in return, the foreigner gains easy citizenship through this marriage.

⁴⁸ Green Paper on Marriages (2021) at 56.

Register (NPR).⁴⁹ The dissolution of a marriage of convenience through divorce means that one party to the marriage must institute divorce proceedings. The party instituting the proceedings (in other words, the citizen) can further not be forced to do so by the State in order to expel their partner, who obtained lawful residence through a marriage of convenience, as will be discussed later.

4 INTRODUCTION OF STERN IMMIGRATION POLICIES

4.1 Parliamentary discussions and amendments of laws

The marriage of convenience has become more complex and difficult to combat through a revisiting of marriage, immigration and refugee laws. The need to combat or prevent marriages of convenience is based on the fact that they pose a danger to any society. They do not only defeat the purpose of the institution of marriage but also threaten national security, as an increased number of illegal foreigners negatively impacts the State's ability to provide basic services to its citizens.⁵⁰ In fact, these marriages impair the central significance of the institution of marriage and the "ability of the individual to achieve personal fulfilment in an aspect of life".⁵¹ It is therefore a matter of public policy for the State to safeguard national security and the institution of marriage by discouraging schemes to evade the laws of the land, but, of course, without intruding on the private nature of marriage.

While discussing how to respond to the social ills relating to marriages of convenience, whether through laws and policies, the State in 2001 considered marriages of convenience as violations of fundamental human rights. To curb further increases in these marriages, which are an abuse of law, a constant review of administrative procedures is required.⁵² However, such constant review may introduce issues of xenophobia or discrimination, thereby making it difficult to strike a balance between restrictive State policies to protect citizens while simultaneously refraining from xenophobic or discriminatory practices that may greatly impact the protection of non-citizens.

For the reasons stated above, lawmakers were conscious of the impact of marriages of convenience and this was reflected in their views and comments provided during the process of drafting the first refugee law adopted in 1998 and subsequent amendments. Lawmakers were of the view that the refugee regime should be designed in such a way that, inter alia, it would reduce the incidence of marriages of convenience. The view was

⁴⁹ Green Paper on Marriages (2021) at 56.

⁵⁰ White Paper on International Migration for South Africa, July 2017 (White Paper on International Migration (2017)) at 59.

⁵¹ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 37.

⁵² Presentation by Mangosuthu Buthelezi, MP, Minister of Home Affairs, Cape Town: 8 May 2001.

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advanced that law should require that in situations where a marriage of convenience is suspected, both parties should be subjected to interrogation, either with or without legal representation.⁵³ They stressed that there was a dire need for regulations clarifying how these views could conceptually be legalised and practically enforced. The same concern was expressed during the 2002 comprehensive revision of the provisions of the Aliens Control Act 96 of 1991 that were rooted in apartheid aspirations.⁵⁴

The Immigration Act 13 of 2002 therefore introduced definitions of terms, such as, “marriage”, “immediate family”, and “spouse” as a mechanism to guard against bogus marriages. The term “marriage” was defined to mean “a legally sanctioned conjugal relationship intended to be permanent and concluded under the law of the Republic, or under the laws of a foreign country as prescribed from time to time, and includes a customary union”.⁵⁵ The term “immediate family” was defined to mean “persons within the second step of kinship, where marriage or spousal relationship is counted as one of such steps, but any common antecedent is not so counted”.⁵⁶ “Spouse” (or “spousal relationship”) was defined as “a person who is party to a marriage, or a customary union, or to a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by prescribed affidavit substantiated by a notarial contract”.⁵⁷ As an immediate family member, a spouse could automatically be granted a temporary residence permit in the form of a relative, business, or diplomatic permit.⁵⁸ Here, the State opted to define certain key terms in an attempt to fight against marriages of convenience. It is believed that these key terms can be used to identify when a marriage is genuine or one of convenience.

However, the State was of the view that the longer the marriage existed, the more it may be considered genuine. Accordingly, when the State introduced the Immigration Amendment Bill⁵⁹ in 2004 to revise and tighten the provisions of the Immigration Act, it proposed an amendment that required the marriage to be in existence for a period of three years. Nevertheless, lawmakers still considered the three-year period to be insufficient to determine whether a spousal relationship was genuine.⁶⁰ They suggested that the period should be extended to five years and should exclude any application for permanent residence on relative or spousal grounds for this period.⁶¹ Requiring a

⁵³ PMG “Refugees Bill [B135–98]: Briefing & Discussion” (27 October 1998) available at <https://pmg.org.za/committee-meeting/6168/> (accessed 17 June 2018).

⁵⁴ White Paper on International Migration (2017) at 4 & 8.

⁵⁵ Section 1(xxi) of the Immigration Act.

⁵⁶ Section 1 (xix) of the Immigration Act.

⁵⁷ Section 1(xxxvi) of the Immigration Act.

⁵⁸ Sections 12(1)(c), 15(1) & 18(1) of the Immigration Act.

⁵⁹ Immigration Amendment Bill [B11-2004].

⁶⁰ Clause 27.

⁶¹ Section 27 of the Immigration Amendment Act 19 of 2004, substituting s 26 of the Immigration Act.

couple to remain married for a period of five years before they can apply for a permanent residency was seen as a viable mechanism to stamping out marriages of convenience. Because there are no prescribed factors to determine when a marriage is one of convenience, it becomes more problematic to detect these marriages. Instead, lawmakers invoked a prolonged period of existence of a marriage or spousal relationship as a determining factor of a good faith relationship. Despite the long existence of the marriage, there were concerns over the possibilities of maintaining such marriages for the period required even if those marriages were not real, resulting in non-citizens gaining access to targeted benefits. These concerns were grounded in the fact that marriages of convenience are contractually entered into on a consensus basis and that disclosure of such marriage usually occurs only if there is dishonesty or a breach of the terms and conditions of the contract.

In 2008, the State proposed further stricter measures in the 2008 Refugees Amendment Bill.⁶² This resulted in a debate on whether a spouse, who marries the main applicant (that is, a recognised refugee) should automatically be granted refugee status. Lawmakers felt that this approach would open up further opportunities for asylum seekers to work around the refugee system and to marry recognised refugees for convenience.⁶³ These concerns were expressed even though spouses of refugees are entitled to the right to join them in what is called “family reunification”. The 1951 Convention Relating to the Status of Refugees emphasises that the unity of the family – as the natural and fundamental group unit of society – is an essential right of the refugee, which the State must take the necessary measures to protect, promote, and fulfil.⁶⁴ This implies that a dependant spouse should join a refugee to become one family, with one status.

However, lawmakers argued that if the spouse is granted refugee status in this way, such status can be expunged if the spouse gets divorced within a period of two years after having been granted asylum unless the spouse can prove the existence of a good faith spousal relationship between them. Section 14 of the Refugees Amendment Act 33 of 2008, which inserted section 21B into the Refugees Act, introduced this position. Nonetheless, many of the efforts are dedicated to curbing marriages of convenience between citizens or permanent residents and non-citizens. First, little is done, to investigate marriages of convenience between refugees and asylum seekers simply because refugees enjoy minimal rights in any event as the government is reluctant to harmonise refugee rights with socio-economic laws and policies. Secondly, the difficulties of investigating these marriages rest on the fact that refugee marriages are

⁶² Refugees Amendment Bill [B11-2008].

⁶³ Parliamentary Monitoring Group “Refugee Amendment Bill: Department of Home Affairs Briefing” 16 June 2008 available at <https://pmg.org.za/committee-meeting/8955/> (accessed 14 May 2018).

⁶⁴ Recommendation B.

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not actually recorded in the NPR.⁶⁵ Thirdly, it is not clear how the position of section 21B of the Refugees Act is reconciled with further amendments to the Refugees Act,⁶⁶ which consider or define a “spouse” as a dependant of the main applicant for asylum.⁶⁷ Within this definitional framework, it is clear that an asylum seeker must be recognised as a refugee once they marry as the marriage renders them the dependant of a refugee.

In 2011, the State revised the definition of key terms that are used to minimise incidents of marriages of convenience. This was done in terms of the Immigration Amendment Act 13 of 2011, which adopted verbatim the definitions of the concepts of “marriage” and “spouse” as they were contained in the 2008 Refugees Amendment Act. This Act defined the term “marriage” as either a marriage or a civil partnership concluded in terms of civil union law,⁶⁸ civil marriage law,⁶⁹ customary marriage laws,⁷⁰ the laws of a foreign country, or Islamic or other religious rites. The term “spouse” was redefined to mean “a person who is a party to a marriage as defined in terms of [the 2008 Refugees Amendment Act]; or a permanent same-sex or heterosexual relationship as prescribed”. Unlike immigration law, refugee law recognises various forms of marriage but emphasises that the intention should be to form a permanent relationship. The broad recognition may, perhaps, be derived from the fact that the 1951 Refugee Convention requires the host State to maintain and protect the family unit, which plays an important role in the promotion of human security.⁷¹ Members of the families have to unite to face psycho-social and economic challenges, and maintaining their family unity is key to assisting them to overcome those challenges.⁷²

Certainly, the revisiting of immigration law and refugee law for strict admission measures created a higher number of illegal foreigners. In the asylum system, it became more difficult for economic migrants to secure refugee status. According to the 2017 White Paper on International Migration, over 90 per cent of applications for asylum filed since 2010 did not qualify for refugee status simply because the applicants were economic migrants as they could not prove a well-founded fear of persecution in their home countries.⁷³ Stricter asylum application processes, which resulted in an increased number of rejections, triggered increases in marriages of convenience to secure residency. It was however in 2003 that the rise in marriages of convenience led the

⁶⁵ There is no record of refugee marriages in South Africa, and thus it becomes difficult to divorce or to re-marry.

⁶⁶ Refugees Amendment Act 11 of 2017.

⁶⁷ Section 1 of the Refugees Act, as amended by the Refugees Amendment Act 11 of 2017.

⁶⁸ The Civil Union Act 17 of 2008.

⁶⁹ The Marriage Act 25 of 1961.

⁷⁰ The Recognition of Customary Marriages Act 102 of 1998.

⁷¹ Preamble of the 1951 Refugee Convention.

⁷² Kavuro C “Family unit key in protecting refugees” *Cape Times* 29 June 2021.

⁷³ White Paper on International Migration (2017) at 59.

State to initiate amendments to the Marriage Act 25 of 1961 to provide for stricter controlling measures.⁷⁴ Lawmakers agreed with the State that marriages of convenience had become endemic, especially in certain areas of South Africa,⁷⁵ as every year the State learnt about or discovered the existence of a vast number of irregular marriages.⁷⁶ Surprisingly, the various attempts made by the State to arrest the problem by revising marriage laws were approved by Parliament but never came into force. The first attempt was made in 2003, when the Marriage Amendment Bill was tabled in Parliament, approved but never signed into law.⁷⁷ The same fate befell the 2008 and 2009 Marriage Amendment Bills.⁷⁸

Over all these years, the State believed that the solution to marriages of convenience rested on them being expunged, which would lead to the withdrawal of permits granted to a foreign spouse. The act of expunging a marriage and the withdrawal of permits will render a non-citizen an illegal in the country which will lead to their arrest, detention and deportation. Expungement should therefore only occur in situations where a couple cannot satisfy the State that their spousal relationship is genuine and founded on love and good faith. However, in practice, if the marriage is legally valid, it cannot be expunged without the necessary court processes. A decree of divorce is required to dissolve a marriage of convenience, as was noted in the 2021 Green Paper on Marriages in South Africa.⁷⁹

Difficulties to expunge marriages of convenience between asylum seekers and refugees (not between them and citizens) emanate from the need to protect the family unity of a refugee as the State cannot be seen to be destroying this family unity, as this will exacerbate their already existing anxiety, stress, uncertainties and post-traumatic disorder. It can further be argued that the interrogation approach to determine whether a spousal relationship between an asylum seeker and a refugee amounts to an unfair practice. Unfair practices are further evident in the prolongation of the period that is needed to qualify for permanent residence. Under the Refugees Amendment Act 11 of 2017, the five-year period of residence was increased to a ten-year period of residence. In fact, the lengthy period required for a refugee to be eligible for permanent residency does not work to guard against the conclusion of marriages of convenience but rather to delay their access to meaningful rights within the social, economic, labour, and business

⁷⁴ Parliamentary Monitoring Group “Public Protector Amendment Bill: Deliberations”, 10 April 2003 available at <https://pmg.org.za/committee-meeting/2381/> (accessed 12 May 2018).

⁷⁵ National Treasury “Medium Term Budget Policy Statement: Hearings on Social Security”, 19 November 2003.

⁷⁶ For example, between April 2018 and May 2019, the DHA discovered 2 132 cases of irregular marriages: see Green Paper on Marriages (2021) at 39.

⁷⁷ Parliamentary Monitoring Group “Public Protector Amendment Bill: Deliberations”, 10 April 2003, available at <https://pmg.org.za/committee-meeting/2381/> (accessed 12 May 2018).

⁷⁸ The Marriage Amendment Bill, 2008 and the Marriage Amendment Bill, 2009.

⁷⁹ White Paper on International Migration (2017) at 40.

sectors. The prolongation of the period clearly speaks to the uneasy relationship between refugee law and immigration law in South Africa (or, put plainly, points to the discrimination against refugees or asylum seekers). It marginalises them and treats them as second-class citizens. Such treatment encourages both refugees and asylum seekers to secure human security through marriages of convenience with citizens.

4.2 Compromising the dignity of the couples

Eradicating marriages of convenience through stricter rules and regulations may give rise to violations of couples' basic constitutional rights. The fight against marriages of convenience requires a balance to be struck between national interests (that is, national security, public policy, and the institution of marriage) and individual rights (that is, the rights to marry, equality, human dignity, and privacy). For example, commenting on the 2008 Refugees Amendment Bill, the United Nations High Commission for Refugees (UNHCR) argued that the introduction of section 21B, which aims to eradicate marriages of convenience in the refugee system by requiring a good faith spousal relationship to have existed for a period of two years to be considered a genuine spousal relationship, violates sections 10 and 14 of the Constitution. The UNHCR argued that investigating the existence of a true or bona fide spousal relationship would not only result in an invasion of privacy but also an infringement of human dignity. It would also be labour intensive. It further argued that the DHA's investigative unit could not be expected to enter the bedrooms of refugees and ask intimate questions to satisfy themselves that a spousal relationship between a refugee and an asylum seeker is real and faithful. Although the intention to ensure that refugees and asylum seekers did not enter into marriages of convenience was good, the proposed section 21B was inconsistent with the Constitution.⁸⁰ Despite the UNHCR's contention, section 21B was still inserted into the Refugees Act and thus is in force. It is evident that implementing section 21B will violate the right to equality in the context of marriage rights and being afforded dignified treatment. It will result in discrimination against certain couples in marriages, defeat the need to protect the family unity of refugees, and deprive them of their right to decide on their way of life.

4.3 Litigations, legal issues and judicial opinions

As noted, expunging marriages of convenience cannot take place without due court process. The question of expunging marriages of convenience in terms of immigration and refugee law must also adhere to the rule of family law which states that a valid marriage can only be dissolved through divorce. However, the Court in the 2006 case of *Houd v Minister of Home Affairs (Houd : (2006))*⁸¹ laid down factors to be considered

⁸⁰ Parliamentary Monitoring Group "United Nations High Commission for Refugees (UNHCR): oral submission dated 25 March 2008" available at <https://pmg.org.za/committee-meeting/8996/> (accessed 12 May 2018).

⁸¹ [2006] JOL 18152 (C).

when a foreign spouse challenges a deportation based on their marriage to a citizen. These factors are:

- (i) a *prima facie* right;
- (ii) well-grounded apprehension of irreparable harm if the deportation ensues;
- (iii) whether the balance of convenience favours the grant of an interim interdict; and
- (iv) whether the applicant (that is, a foreign spouse) has no other satisfactory remedy.

In balancing these factors, the Court must further consider all relevant factors, including whether:

- (i) a foreign spouse is entitled to the right to sojourn in the country;
- (ii) the right to *non-refoulement* will not be violated in situations involving a refugee or an asylum seeker;
- (iii) the deportation would lead to separation of the spouses; and
- (iv) spouses will suffer from any prejudice if the Court rules in favour of the State.

In this case, the applicant was arrested at the airport on his way to his country of origin (Egypt) on the ground of unlawful residence.⁸² He immediately approached the court in an attempt to prevent his deportation from the country to Egypt on the following grounds:

- (i) his marriage to a citizen;
- (ii) his application for asylum;
- (iii) his holding of a relative permit; and
- (iv) his pending application for permanent residence.⁸³

Although he had applied for asylum, he entered South Africa under the pretext of conducting business and was granted a business visa.⁸⁴ While in the country, he married a citizen and changed his business visa to a relative visa.⁸⁵ During his wife's interview,

⁸² See *Houd* : (2006) at para 1.

⁸³ See *Houd* : (2006) at para 1.

⁸⁴ See *Houd* : (2006) at para 2.

⁸⁵ See *Houd* : (2006) at para 4.

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conducted after his arrest, it transpired that her marriage to the applicant was just a sham marriage. The wife admitted that they never lived together as husband and wife;⁸⁶ that the marriage was concluded with the sole purpose of assisting her friend (that is, the applicant) to remain in the country lawfully; and that she was in a faithful relationship with another man, who was a citizen and who had fathered one of her three children.⁸⁷

The Court found that no good faith spousal relationship existed between the spouses to warrant the applicant applying for either temporary or permanent residence.⁸⁸ It further found that the applicant had failed to show a well-grounded apprehension of irreparable harm if the marriage is cancelled. It was clear that the marriage was not a bona fide marriage and was entered into purely to evade immigration law requirements. Recognising the marriage as valid would have the effect of the applicant benefiting from his dishonest, fraudulent and unlawful actions.⁸⁹ The Court emphasised that the applicant will, on a balance of convenience, not suffer any prejudice should he be deported.⁹⁰ The Court emphasised the meaning of the institution of marriage and noted the following with approval:

“The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.”⁹¹

Critically analysed, it can be presumed that the marriage was valid as the parties to the marriage consented to its conclusion and all parties complied with the terms and conditions thereof. The invalidity of the marriage flows from the national spouse’s admission that the marriage was concluded to circumvent immigration conditions. In other words, the marriage was used as a tool successfully to transgress immigration law. If the wife had not been interviewed, it would not have come to light that she only concluded the marriage to assist her friend to stay in the country, and not to live as wife and husband. Based on this premise, the Court emphasised *consortium omnis vitae* and public policy for the authorisation of the expungement, thereby protecting the sanctity of the institution of marriage. The sanctity of marriage is a central aspect when concluding a marriage, which the Court prescribed as “cohabitation, the right (and duty)

⁸⁶ See *Houd* : (2006) at paras 6 & 44.

⁸⁷ See *Houd* : (2006) at paras 6–7.

⁸⁸ See *Houd* : (2006) at para 49.

⁸⁹ See *Houd* : (2006) at para 50.

⁹⁰ See *Houd* : (2006) at para 51.

⁹¹ See *Houd* : (2006) at para 44.

to live together.”⁹² From this point of view, any law or conduct that significantly impairs the ability of spouses to honour the obligations flowing from *consortium omnis vitae* would inevitably constitute a limitation of the right to dignity.⁹³ In this case, a marriage of convenience is not only contrary to public policy, but also a threat to the right to human dignity, which is a cornerstone of the Constitution.

The Court further approved marriages of convenience in the 2012 and 2013 cases, respectively, of *Singh v Minister of Home Affairs (Singh: (2012))*⁹⁴ and *Zaheer v Minister of Home Affairs (Zaheer : (2013))*⁹⁵. In *Singh*, the plaintiff sought urgent relief from the Court to declare his arrest and detention for deportation arbitrary and unlawful. The plaintiff justified his claim of arbitrariness and unlawfulness on the grounds that he was an asylum seeker from India who was legally married to a citizen;⁹⁶ that he was a holder of an asylum seeker permit, granted in terms of the Refugees Act, and that he applied—on the basis of marriage – for a visiting visa in terms of the Immigration Act to reside in the country temporarily. The State officials contended that the application for a visiting visa was rejected⁹⁷ and that his asylum seeker permit was, on all accounts, a forged document,⁹⁸ which had in any event expired.⁹⁹ It followed that the plaintiff was unlawfully residing in the country and had further committed a crime of forgery. Concerning the conclusion of the marriage, the State officials argued that, when the plaintiff was arrested, he had produced a copy of a marriage register, instead of a copy of a marriage certificate, which aroused the suspicion of a bogus marriage.¹⁰⁰ After investigating whether the marriage validly existed, the State officials found that the marriage was solemnised by a marriage officer who did not require the spouses to furnish the affidavit prescribed by law and the marriage was therefore void ab initio, alternatively voidable.¹⁰¹ Despite presenting this factual evidence, the Court stated that it disagreed with the findings that the marriage was voidable simply because the investigations were conducted in one day.¹⁰²

After examining the evidence before it, the Court agreed that it was apparent from the evidence that the marriage was one of convenience as it was concluded to enable

⁹² See *Houd* : (2006) at para 44.

⁹³ See *Houd* : (2006) at para 44.

⁹⁴ Unreported case no 1467/2012 of 14 June 2012.

⁹⁵ Unreported case no 38408/12 of 21 January 2013.

⁹⁶ See *Singh* : (2012) at paras 1–3.

⁹⁷ See *Singh* : (2012) at para 5.

⁹⁸ See *Singh* : (2012) at paras 17–18.

⁹⁹ See *Singh* : (2012) at para 20.

¹⁰⁰ See *Singh* : (2012) at para 8.

¹⁰¹ See *Singh* : (2012) at para 14.

¹⁰² See *Singh* : (2012) at para 25.

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the plaintiff to apply for a relative permit in terms of the Immigration Act and to enable him to spend long periods in the country which he would not have been able to do otherwise.¹⁰³ The application for relief sought by the plaintiff was therefore dismissed. This case is an illustration of how asylum seekers are willing to abandon the protection of the refugee system and shift – through marriages of convenience – to the protection of the immigration system, which provides more meaningful rights and benefits.

The attempt to secure human security by abandoning refugee protection for immigration protection through a marriage of convenience is further reflected in *Zaheer*. In this case, the plaintiff, a Pakistani national, sought orders to declare his arrest, detention, and deportation unlawful. He contended that he was an asylum seeker;¹⁰⁴ that he was the spouse of a South African citizen with whom he had a child; that, at the time of arrest, he was living with his wife; and that the child born from the marriage bore his surname.¹⁰⁵ The plaintiff stayed as an asylum seeker for four years, protected by the refugee system, and then switched to a relative permit when he married a South African citizen to be protected by the immigration system.¹⁰⁶ During the Court hearing, it transpired that his relative permit was invalidated as a result of his wife's contention that their marriage was one of convenience,¹⁰⁷ but that he sought to justify the arbitrariness of the deportation on the basis of the South African born child. The Court found that the marriage was one of convenience on the following grounds:

- (i) The marriage was concluded in South Africa but followed the Pakistani customary practice in that the marriage was not customarily or religiously arranged as commonly understood since the spouses came from different faiths and ethnic backgrounds.¹⁰⁸
- (ii) When the marriage was arranged and concluded, the wife was pregnant with another man's child; however, they agreed that, in the spirit of building a family unit, the child would be treated as their own.¹⁰⁹ In addition, the wife had to be paid R300 per month for accepting to act as a spouse to a fake marriage. However, the plaintiff had stopped making the agreed monthly payments.¹¹⁰

¹⁰³ See *Singh* : (2012) at para 30.

¹⁰⁴ See *Zaheer* : (2013) at para 6.

¹⁰⁵ See *Zaheer* : (2013) at paras 9–10.

¹⁰⁶ See *Zaheer* : (2013) at para 11.

¹⁰⁷ See *Zaheer* : (2013) at para 12.

¹⁰⁸ See *Zaheer* : (2013) at paras 22, 23 & 25.

¹⁰⁹ See *Zaheer* : (2013) at para 23.

¹¹⁰ See *Zaheer* : (2013) at para 24.

- (iii) As a result of a breach of contract, the wife approached the State to have the marriage expunged and to have her son's name revert to her surname.¹¹¹
- (iv) The wife stated that they never lived together; that the plaintiff had never been to her residence; and that she did not know where he resided.¹¹²
- (v) Through his legal representative, the applicant filed an affidavit in which he expressed his intention to apply for asylum for the second time so that he could rely on the *non-refoulement* principle in lieu of the valid marriage to stop his deportation.¹¹³

This case illustrates the extremes to which asylum seekers will go to secure the meaningful rights of residence as the refugee system is hardly implemented by the State, thereby leaving refugees and asylum seekers unprotected. Furthermore, the complete abandonment of the refugee system is evidence enough to show that he did not leave his country for all purposes of seeking asylum in South Africa. The following two cases further reveal legal technicalities and complexities that make it difficult to annul a suspected marriage of convenience. These two cases are *Malhekwa v Minister of Home Affairs (Malhekwa : (2014))*¹¹⁴ and *Khan v Minister of Home Affairs (Khan : (2014))*,¹¹⁵ both handed down in 2014.

In *Khan*, the plaintiff was a wife of a Pakistan national (the husband) who, at the time of his arrival in South Africa, was married to a Pakistani and had two children from this marriage. This marriage was concluded following applicable Pakistan law and Muslim family law. The husband contended that, in accordance with Pakistan law, he was allowed to marry the second wife since, while in South Africa, he married a South African citizen in terms of Xhosa tradition (including the payment of lobola). This was later followed by the conclusion of a marriage following Muslim rites (after the wife had converted to the Muslim faith) and finally by the conclusion of a civil marriage. There were no children born of this marriage. Relying on their marriage, the plaintiff sought relief from the court to interdict and restrain the State officials from expunging their marriage; an expungement which could have resulted in the deportation of the husband to Pakistan. The State officials contended that, although the couple had been living together for eight years, the marriage in question could not be relied on as it was a marriage of convenience. According to them, the husband was an illegal foreigner simply because he secured temporary residence (that is, a relative visa) through a marriage of convenience, which was concluded through circumvention of the

¹¹¹ See *Zaheer* : (2013) at para 24.

¹¹² See *Zaheer* : (2013) at para 24.

¹¹³ See *Zaheer* : (2013) at para 30.

¹¹⁴ [2014] ZAWCHC 89.

¹¹⁵ [2014] ZAWCHC 99.

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immigration law and family law conditions. It was argued that because the husband's admission in the country did not comply with immigration law, and because the Marriage Act did not allow the conclusion of a second marriage, the plaintiff's marriage to a Pakistani was null and void.¹¹⁶ It was further argued that, pursuant to civil marriage law, an individual who is married under the laws of a foreign country may not conclude a valid civil marriage in South Africa.¹¹⁷

In considering whether the marriage was one of convenience, the Court reviewed the definitions of marriage and spouse in South African law. First, the Court stated that the Marriage Act does not provide a definition of the concept of marriage and thus the Act cannot be relied on to determine whether one person may lawfully marry another.¹¹⁸ Responses to these issues can be found in the common law and not in marriage law or immigration law. In terms of common law, a subsisting valid marriage precluded the conclusion of the second marriage in that the first marriage constituted an absolute impediment to the second marriage.¹¹⁹ The common law of marriage was conventionally monogamous and was against polygamous marriages concluded either in South Africa or elsewhere.¹²⁰ However, taking into consideration the recognition of customary unions and laws of a foreign country, the Court opined that South Africa should recognise polygamous marriages valid under foreign law, as valid marriages, even though the polygamous marriage was void in terms of a law governing civil marriage.¹²¹

In this context, polygamous marriages cannot impede, for example, religious and customary marriages that are consistent with the laws of foreign countries. The Court further noted that there is nothing in the Recognition of Customary Marriages Act 120 of 1998 precluding a non-citizen to a foreign polygamous marriage from concluding a customary marriage to a citizen.¹²² Based on this, the marriage between the plaintiff and her husband was valid for the purposes of South Africa's customary law.¹²³ Notwithstanding this, the Court, after considering the evidence before it, concluded that the plaintiff's husband was not a party to a marriage or union which South African law recognises as a marriage and which could be an impediment to the second marriage in terms of the Marriage Act.¹²⁴

¹¹⁶ See *Khan* : (2014) at paras 66 & 68.

¹¹⁷ See *Khan* : (20014) at para 74.

¹¹⁸ See *Khan* : (2014) at para 73.

¹¹⁹ See *Khan* : (2014) at para 73.

¹²⁰ See *Khan* : (2014) at para 74, quoting *Seedat's Executors v The Master (Natal)* 1917 AD 302.

¹²¹ See *Khan* : (2014) at para 77.

¹²² See *Khan* : (2014) at para 83.

¹²³ See *Khan* : (2014) at para 83.

¹²⁴ See *Khan* : (2014) at para 75.

The Court went on to examine what constitutes a “spouse” or how the term could be defined, and whether the marriage complied with the immigration requirements of a valid marriage. In family law, the term “spouse” was broad enough to include “the widow of a polygamous but *de facto* monogamous Muslim marriage”.¹²⁵ In a narrow sense, the term encompasses spouses to a civil marriage, a customary marriage, a civil union and a Muslim marriage. For purposes of immigration law, the term “spouse” is defined to refer to “a person who is a party to (a) a marriage; or a customary union; or (b) a permanent homosexual or heterosexual relationship as prescribed ... by [the Regulations to the Immigration Act]”.¹²⁶ Regulation 3 of the Immigration Act lays down requirements to qualify the parties to a marriage or union or relationship as spouses. It requires a foreign national seeking to be recognised as a spouse on this basis to submit an affidavit signed by the relevant authority of a non-citizen’s home country and signed by the South African partner attesting that their spousal relationship or partnership is to the exclusion of all others and that neither of them was at any relevant time a partner to a marriage.¹²⁷

It was on this basis that the State officials contended that the plaintiff and her husband were not spouses as contemplated by immigration law. In other words, the immigration law did not recognise polygamous marriages. The Court rejected the State officials’ contention that the validity and legality of a marriage were to be found in immigration law conditions.¹²⁸ Rather, the questions of whether a non-citizen was the spouse of a citizen, or whether the marriage between a non-citizen and a citizen was valid, should be considered by virtue of being a party to a marriage recognised, either by the Civil Union Act 17 of 2006, the Marriage Act, the Recognition of Customary Marriages Act, or the laws of a foreign country. The definition of the term “spouse” under immigration law was found to be misconceived because the definition was confined to monogamous marriage.¹²⁹ As noted, the immigration law is lacking in various respects as it does not recognise the various marriages in the same way as the Refugees Act. There is a need to harmonise immigration law on marriage with other laws governing marriages to protect the different categories of foreign spouses to marriages with citizens.

Despite the absence of harmonisation of laws on marriage, the Court found that the marriage was not one of convenience as the State officials contended, and that the plaintiff’s husband had a right in terms of the Immigration Act to the ministerial appeal

¹²⁵ See *Khan* : (2014) at para 76. The Court further stated that a marriage concluded in terms of Muslim rites is valid for purposes of South African law.

¹²⁶ See *Khan* : (2014) at para 67.

¹²⁷ See *Khan* : (2014) at para 69.

¹²⁸ See *Khan* : (2014) at para 70.

¹²⁹ See *Khan* : (2014) para 72.

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against the deportation.¹³⁰ In considering the appeal, the Minister must therefore take into account whether the spouses will suffer irreparable harm if the foreign spouse is deported or whether the deportation would lead to the separation of the husband and wife or other prejudices. The Court refrained from providing the relief sought, namely, stopping the deportation, as the powers to do so administratively rested with the Minister. The question of whether an illegal foreigner who contravened immigration conditions to conclude a marriage of convenience for securing residence can be deported remained open.

Similarly, in *Malhekwa* : (2014) the Court employed the *Khan* : (2014) approach in determining whether the marriage could be expunged. This was a case where the plaintiff (a South African citizen) sought an order from the court interdicting or restraining the State officials from deporting her Pakistani husband to his country of origin. Her husband, who faced the threat of deportation, was issued with temporary residence on the basis that he was the spouse of the plaintiff (as per immigration law), with whom he has been living in a spousal relationship for three years.¹³¹ However, the plaintiff's husband also had a wife and children in Pakistan. The husband was therefore classified as an illegal foreigner who should be deported because, in the view of the State officials, he contravened the relative permit conditions as he was running a business and concluded a marriage of convenience to sojourn in the country. According to the State officials, the marriage was invalid and should be expunged because the husband's marriage in his country of origin was an obstacle to the second marriage with the plaintiff.

In considering the validity of marriage, the Court looked at what the definition of the term "spouse" constitutes for purposes of immigration law. However, the Court did not fully engage with the definition to determine the legality and validity of the marriage in question as the Court had done in *Khan* : (2014). The Court was seized with determining the legality of refusing the husband entry into the country from Pakistan;¹³² his arrest, detention and removal;¹³³ and whether the husband was entitled to the ministerial appeal against the declaration that he was an illegal foreigner.¹³⁴ The Court found that the husband had the right to present his case to the Minister to decide on the issue before deportation, as required by section 8(1) of the Immigration Act. It is not clear in these two cases whether a valid marriage can be expunged without the proper divorce process, for the deportation of non-citizens who secured the residence through a marriage of convenience. Rather, they illustrate the difficulties of relying on

¹³⁰ Section 8(1) of the Immigration Act, known as "the ministerial appeal," allows a person to appeal to the Minister before a decision that has an adverse effect on them is effected.

¹³¹ See *Malhekwa* : (2014) at para 2.

¹³² See *Malhekwa* : (2014) at paras 10–13.

¹³³ See *Malhekwa* : (2014) at paras 14–29.

¹³⁴ See *Malhekwa* : (2014) at para 6.

immigration rules and regulations to conclude that a certain marriage was null and void due to its nature of convenience.

5 CONCLUSION

In this article, it has been demonstrated that the South African government is concerned about the conclusion of marriages of convenience and has taken various measures to combat these marriages. Difficulties in achieving this aim arise because a marriage of convenience is, in terms of family law, still valid and not voidable. With real and actual consent, the marriage is not *in fraudem legis* and can therefore only be dissolved by a decree of divorce, and not expungement. The State made various attempts to redefine the key terms, such as, “marriage”, “spouse”, and “immediate family”, yet it does not deter marriages of convenience or the evasion of provisions of immigration law by concluding these marriages.

The narrow definition of the term “marriage” was heavily relied on to fight against marriages of convenience; however, the State did not succeed as the term cannot be interpreted to mean only monogamous spousal relationship, but also to include forms of various marriages concluded in terms of customary law, civil union law, Islamic law and religious rites, and foreign marriage laws. Accordingly, it will give rise to the violation of the rights of certain foreign spouses if the State officials seek to justify the invalidity of a marriage in the realms of the common law definition of the term “marriage”. The grounding of the definitions of the terms “spouse” or “marriage” in a monogamous context is constitutionally unsound and is inconsistent with the existing South African laws on marriages.

Although the State is committed to curbing marriages of convenience by introducing restrictive immigration measures, the Court in *Khan* : (2014) opined that the validity and authenticity of marriage cannot be determined based on provisions of immigration law. Similarly, the Marriage Act cannot be relied on to determine who to marry or not. The decisions in *Khan* : (2014) and *Malhekwa* : (2014) point out the loopholes in the immigration law and thus open room for marriages of convenience if such marriages are concluded with observance of laws governing marriages.

What is at stake is the protection of the relevance and significance of the institution of marriage, public policy, and the right to dignity as well as the protection of national security through workable immigration and refugee rules and regulations. Notwithstanding the danger and threats posed by marriages of convenience to a society, difficulties to combat these marriages arise in the distinction between genuine, real and actual marriages concluded to create a family unity or permanent spousal relationship, on the one hand, and marriages concluded in order to evade immigration law on a contractual basis, on the other. Because consent is a core requirement of a valid marriage, it is therefore difficult to determine a genuine marriage or to set out characteristics of a relationship in good faith. Hence some marriages are bogus, fake or

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sham, even though both spouses consented thereto . The State opted for the long-term spousal relationship approach to evaluate the genuineness of the marriage between a citizen and a non-citizen. The longer spouses stay in a relationship, the more the State will be convinced that the marriage is faithful and sincere. However, what is apparent from the cases of *Houd* : (2006), *Singh* : (2012), and *Zaheer* : (2013) is that an extended period could be maintained if the couple respect or meet the contractual terms and conditions.

It has been demonstrated that in two cases, South African citizens sought relief from the court stating that they were legally married and that there was no way their husbands could be declared illegal for all purposes of deportation. The Court seemed not to be convinced that the violations of immigration law would warrant the deportation of the spouse even if the marriage was concluded to obtain legal residence or without meeting civil marriage requirements. Rather, the Court was of the view that it has a mandate to ensure that a foreigner, facing deportation and who challenged the deportation based on marriage, should not suffer any harm. The Court , however, has refrained from engaging with the question of whether a non-citizen whose marriage of convenience is found to be valid through judicial processes can or cannot be subjected to deportation.

The Court noted that this is an administrative issue that must be decided by the Minister, taking into consideration the sanctity of the institution of marriage and the need for family unity. The Minister's decision should not prejudice any spouse to the marriage. However, the onus rests on the court to reject arguments put forward by a foreign spouse, if the acceptance of such arguments will facilitate a foreign spouse to benefit from their fraudulent or illegal actions. This is very crucial, based on the notion that the court must act as a guardian of the institution of marriage whose significance of relationship is morally sustained through the establishment of capabilities of the spouse to achieve personal fulfilment in an aspect of life that is of central significance and through enjoyment of the right (and duty) to live together as well as meeting other obligations flowing from *consortium omnis vitae*.¹³⁵

¹³⁵ See *Dawood* (2000) at para 37.

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