

FAMILY LAW STUDENTSHIP

ESSAY AND MOTIVATION LETTER

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MOTIVATION LETTER

Studying the course of the Law of Persons and Family two years ago proved to be thoroughly interesting. It was not until this past June holiday that I had a chance to experience this branch of law once again.

Through a two week internship at Probono.Org, a law non-governmental organisation based in Durban, I experienced divorce and refugee law first hand. The organisation deals with a constant flow of clients and one of the issues that seemed to come up regularly was that of marriages of convenience. When the opportunity of this essay came about, the issue of marriages of convenience seemed to be something that would fit well.

I have spent a great deal of time researching and putting this essay together. I believe it to be a true reflection of the hard work I always put in when I commit to doing something.

The opportunity this Family Law Studentship provides is something that I find to be so exciting. During the course of the LLB degree, foreign law is constantly referred to. Being able to experience another jurisdiction would be such a privilege. I would enthusiastically look forward to making the most of this learning opportunity. Not only in terms of the academic benefits but also in terms of the exposure to another society's cultures and values. I am a motivated student and I know I will greatly benefit from this experience through my people skills and persistent work ethic.

Marriage can be understood as an essential part of society due to the protection it affords before the law, which many other forms of relationships strive to attain. The struggle for gay and lesbian marriage is a clear example of this.¹ Despite the ability to live together and share income and expenses, people require more recognition of their relationship in terms of the law. Marriage provides numerous benefits before the law that other relationships do not allow for, unless specifically contracted for.

Marriages of convenience are marriages that take place with the intention of using the marriage to gain a benefit, rather than for a real marriage relationship.² They can therefore be understood as detracting from the sanctity of marriage. This essay will look at marriages for the purposes of gaining citizenship and how this can be understood as an abuse of the system of marriage. Specifically refugees, who are at the height of desperation, are willing to exploit the system. The problem can be seen as relevant in South Africa as well as experienced in the United Kingdom, where many people are desperate to gain access to a first world country.

In order to understand the abuse that these marriages of convenience commit, it is necessary to determine the role marriage plays in society today. Some believe marriage to be but a formal means of obtaining benefits³ while it can also be argued that over and above the legal benefits, marriage is invaluable.⁴ The creation of the *consortium omnis vitae* can be argued as most important, which means 'a partnership in all of life'.⁵ This is an acknowledgment of the seriousness of a relationship as well as demonstrating the level of trust between the spouses. Marriage is clearly a unique institution which allows for the formalisation of a relationship resulting in an inextricable tie between a pair.

The important obligations that arise as a result of marriage are: a reciprocal duty of support,⁶ managing the common household,⁷ a right of intestate succession between spouses,⁸ a right to claim maintenance upon divorce or death and different consequences depending on what

¹ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

² Amanda Barratt *Law of Persons and Family* 1ed (2012) 241.

³ N Semple "In sickness and in health? Spousal support and unmarried cohabitants" (2008) *Canadian Journal of Family Law*.

⁴ F Botha and F Booysen "The relationship between marital status and life satisfaction among South African adults" (2012).

⁵ *Op cit* note 2 at 255.

⁶ This duty entails financially supporting each other for the duration of the marriage and even upon dissolution of the marriage.

⁷ Due to the fact that there is a joint household which can also be referred to as the matrimonial home, both spouses are obliged to contribute.

⁸ Provided there is no will.

matrimonial property system is adopted.⁹ These obligations and benefits are exclusive to marriage. Being in a relationship that has not been formalised¹⁰ can be seen as leaving one or both of the parties in a vulnerable position. Therefore taking the next step in a relationship could be argued as necessary in ensuring that both parties are protected in terms of the law.

The Constitution saw the scope of the conventional interpretation of what marriage entailed expanding.¹¹ Along with changing values in society, the need to be able to be married is sought after due to the initial restrictiveness in terms of who could enter into it. Traditionally, marriage was seen as a commitment between a man and woman. However challenges to this have rightly resulted in recognition of same sex marriage and the resultant conferring of benefits.¹² South African law has also gone on to recognise marriages that take place under African Customary law¹³ as well as Muslim rites.¹⁴ Domestic partnerships between same sex couples have been afforded legal recognition¹⁵ while heterosexual couples can find protection through satisfying the requirements for a universal partnership.¹⁶

The protection that marriage affords has expanded as the courts recognise the different forms of relationships in society. These benefits should not be limited to heterosexual marriages but rather should acknowledge the various forms of committed relationships in society today, and allow these relationships to provide protection as well as confer obligations and benefits. The stereotypical marriage and conventional family has evolved tremendously from what it initially was. The judiciary and legislature have not been as speedy as they should have been in affording these relationships due status. It could be seen as a struggle for these relationships to have legal recognition, with legislation regarding Muslim marriages still be passed.¹⁷

Understanding the importance of marriage as well as the challenges to legal recognition that other forms of relationship have had to experience, marriages of convenience can be viewed as

⁹ The matrimonial property regimes comprise of in community of property, out of community of property and out of community of property with accrual.

¹⁰ This formalisation could have taken place through marriage, a civil union, Muslim marriage or African customary law marriage.

¹¹ JA Robinson "The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994".

¹² Supra note 1.

¹³ Recognition of Customary Marriages Act 120 of 1998.

¹⁴ Around April 2014, Muslim clerics graduated as marriage officers in a pilot project by the Department of Home Affairs.

¹⁵ *Gory v Kolver NO 2007 (4) SA 97 CC para 28.*

¹⁶ *Butters v Mncora 2012 (4) SA 1 (SCA).*

¹⁷ The Bill has not set date to be passed post the pilot project being worked on.

disregarding the importance of genuine marriage¹⁸ and abusing a status that so many groups in society have struggled to have the option of.

*Volks NO V Robinson*¹⁹ is a telling case of how beneficial marriage is and how the court will not easily extend the benefits it affords. The Maintenance of Surviving Spouses Act²⁰ was under contest for discrimination based on marital status. The court, in deciding whether the discrimination was justified, had to analyse the place of marriage in society. Quoting *Dawood*²¹ saw the court acknowledge that marriage is of vital importance in society, marriage should be understood as a 'promise to establish and maintain an intimate relationship for the rest of their lives which [the parties] acknowledge obliges them to support one another'.

Marriage is of personal significance to the parties involved as well as of public significance.²² It is celebrated by means of a public ceremony in some form, which highlights its significance as well the acknowledgment of the obligations it presents. Mrs Robinson was not married to her partner and the distinction between married and unmarried is not unfair when seen in the larger context of the rights and obligations uniquely attached to marriage.²³ Ultimately marriage can be understood as something that is necessary and also sacred. Other forms of relationships do not afford as much protection as marriage does.

South Africa has experienced an influx of refugees, more so than in the previous few years. The temptation to marry a South African citizen is high as this proves to be a much easier way in order to gain residence, rather than going through the asylum seeking process. Prior to the change in the law governing a foreigner marrying a South African citizen,²⁴ marriage for citizenship could be argued to be a guaranteed manner upon which staying in South Africa could be secured. The courts have seen a steady stream of cases in recent years pertaining to refugees entering marriages in order to secure South African citizenship.

*Martens v Martens*²⁵ found that despite the motives behind a marriage of convenience being questionable, the marriage was still valid as the two spouses intended a legal marriage. The couple importantly intended the positive consequence which legally allowed for one of the spouses to

¹⁸ Again here to include all forms of marriages, unions and partnerships afforded legal recognition.

¹⁹ 2005 5 BCLR 447 (CC).

²⁰ 27 of 1990.

²¹ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

²² *Supra* note 19 at 54.

²³ *Ibid* at 56.

²⁴ Immigration Regulations at 26 May 2014.

²⁵ 1952 (3) SA 771 (W).

remain in South Africa.²⁶ This decision could be seen as undermining those marriages that were entered into sincerely. This judgment could be criticised for looking at the technical meaning over and above the sanctity of marriage.

The case of *Mahmood*²⁷ clearly sets out that 'a good faith spousal relationship shall be a relationship that was not entered into primarily for the purpose of gaining benefits and shall be confined to a relationship of two persons calling for cohabitation and intended to be permanent.' The couple in question in this case had not cohabited for over six years. Additionally Mahmood's spouse had an extra-marital affair which produced a child. These two pertinent facts prove that Mahmood, a Pakistani national, had not been a good faith spousal relationship with his South African wife.

This case clearly showed that marriage has an expected standard that must be met in order for the relationship to be viewed as good faith. Where one or both of the parties disregard the consortium then it becomes evident that the marital vows are not being upheld. Mahmood's attempt at using marriage to gain citizenship was unsuccessful when it was ascertained that the marriage was not a genuine one.

*Iqbal*²⁸ displayed a marriage between a Pakistani national and a South African where the South African spouse was paid a fee per month for a 'marriage' where she was not even in the know of where her spouse resided. There is no doubt that this arrangement constitutes a sham marriage, a clear abuse of marriage as a means to gain citizenship. It would be near impossible to prove that where one spouse does not know where the other spouse resides, that the marriage is one in good faith and both the parties are equally committed. Iqbal and his spouse were found to be married in the eyes of the law but were not living as spouses should be.

In the case of *Khan v Minister of Home Affairs and Others*,²⁹ the marriage between a South African and Pakistani national was contested as Khan married his spouse shortly after entering South Africa. Khan had already been married in Pakistan, when he subsequently entered into a marriage in South Africa. There was no evidence to suggest that this second marriage was to be allowed as valid where he was already married. Despite the first marriage not serving as an impediment to the South African marriage, the circumstances under which it took place should be scrutinised.

²⁶ Op cit note 2 at 241.

²⁷ (22394/12) [2013] ZAWCHC 75 (8 May 2013).

²⁸ *Iqbal v Minister of Home Affairs and Others* [2013] 2 All SA 455 (GSJ).

²⁹ *Mahmood v Director-General, Department of Home Affairs and Others* (8231/2014) [2014].

Where a South African citizen is asked to marry a foreigner on the basis of that foreigner being able to remain in the country, the marriage should immediately warrant attention.³⁰ Upon being questioned, the South African spouse in question stated that the marriage was one of convenience. Houd and his spouse had never cohabited as husband and wife for the duration of their marriage. The intention behind the marriage was to assist Houd in remaining in the country. Ms Cassiem, the South African spouse, admitted to being in a relationship with another South African citizen with whom she had a child with.

Despite Ms Cassiem not being married to her South African partner as she was already in a marriage of convenience with Mr Houd, the relationship with her partner was more committed and like marriage than what she shared with Houd. The marriage to Houd was clearly something in terms of the law but the reality was not a marriage of sharing benefits and obligations. The only benefit Houd was interested in was that of citizenship. The parties were not interested in pursuing the marriage or actually seeing it materialise into what it was intended to be.

This line of case law is indicative of the abuse of the marriage system. One of the spouses in each of the marriages mentioned was a refugee who was desperately seeking any means to remain in South Africa. The idea of marrying a South African citizen is a simple one, an easy way to manipulate the system rather than applying for asylum and awaiting the outcome. Inspection of these marriages showed a disjoint between the spouses. None of the spouses in the abovementioned cases were engaging in a genuine marriage but rather using it as a vehicle for citizenship for one of the spouses.

The South African government, in the aim of decreasing marriages of convenience, have introduced regulations which call for five year evidence of cohabitation and/or the financial sharing of responsibilities. This could be seen as a higher threshold to prove that the marriage between a foreigner and citizen is one that has genuinely been entered into. It has been argued that these regulations are overly burdensome and may negatively affect couples that have entered into good faith marriages, as the test introduced is out of date.³¹ Regardless of whether this is the best test or not, the need to introduce something is indicative of how big a problem this is becoming. Some form of regulation is necessary to address the issue and prevent further marriages of convenience. Furthermore, it is also important to prevent people who have not attempted to legally ensure their stay to not be accommodated.

³⁰ *Houd v Minister of Home Affairs and Others* [2006] JOL 18152 (C).

³¹ Op cit note 24.

This issue of marriages of convenience is not one that is limited to South Africa. Many first world countries also experience this, even where the foreigners are not refugees, but are desperate to gain access to a first world country by any means. The problems the United Kingdom face with regards to this form of marriages will be examined.

Looking to an internal guide by the United Kingdom Border Agency³² to be used when considering marriages of convenience, criteria are listed of what could possibly evidence a genuine marriage over a sham. It is interesting to note that it is stated that where there is a child from the marriage then further criteria does not need to be looked to and the marriage will not further be considered one of convenience. Clearly having a child together is an indication of a level of commitment between the spouses, particularly in terms of the obligations relating to the child that must be fulfilled.

Other factors to consider include: evidence of a previous relationship, immigration/refugee history, intention to live together, claims of previous marriage, money handed over from one spouse to the other³³ or any other suspicious facts such as no common language between the couple. Where the spouses have been together for an extended period of time then that would count in their favour as an indication of a genuine marriage. However if in that period and subsequent to the marriage there is no intention to live together, then the genuineness of the marriage could be questioned. No common language between the spouses seems to be a factor that couples in genuine marriages could experience. This factor should therefore be looked at in addition to some of the others mentioned so as not to result in unfair outcomes.

A case to be discussed as heard in the Crown Court of Northern Ireland is *Buckley v R*,³⁴ which pertained to a Buckley pleading guilty on fraud charges. The fraud related to Buckley's role as the solemniser of marriages between Portuguese citizens, who are European Union citizens, and Bangladeshi men seeking to acquire citizenship through marriage. This was found by the court to be a serious matter, a breach of immigration law in order to gain hefty remuneration from the foreigners involved.

Analysing this case shows what a prevalent problem these marriages of convenience are becoming. People like Buckley are willing to abuse the system in return for a monetary reward. Furthermore, the disrespect these marriages show to genuine marriages is profound. Buckley's actions assisted multiple illegal immigrants to manipulate immigration authorities over the benefit of

³² November 2009.

³³ This would exclude culturally required amounts such as lobolo or dowry.

³⁴ [2013] NICC 24 (19 December 2013).

marriage that allows for citizenship where spouses are from different countries. This undermining of this marital benefit should be harshly penalised.

*O' Donoghue and Others v the United Kingdom*³⁵ which pertained to whether certain regulations aimed at eradicating marriages of convenience were too stringent, were contested as affecting marriages that had intended to be genuine. The court found that it was reasonable to impose conditions on the right of a third-country national to marry in order to determine whether the marriage was to be one of convenience.³⁶ States are therefore allowed some leniency in determining the genuineness of a marriage where spouses are citizens of different countries.

Investigating the marriage between a Kenyan national and a citizen of the Republic of Ireland was dealt with in *VK v Immigration Officer-Waterloo*.³⁷ Both spouses when interviewed gave conflicting evidence regarding the marriage. The couple lived separately after their marriage ceremony and claimed benefits as single people rather than the married couple that they were. There was no evidence of a joint bank account, sharing of expenses, joint activities or supportive statements from family or friends confirming the marriage. The court was satisfied that this was a marriage of convenience.³⁸

It is not necessary to prove cohabitation or intention to cohabit but rather that the marriage was one of substance.³⁹ The marriage can never be concluded to be one of substance where there is no support between the parties or companionship. There is generally a presumption in favour of family life⁴⁰ but where the law is abused in this manner then this presumption should be disregarded. The couple in this case had no intention of having a genuine marriage. This marriage was solely a means for one of the spouses to gain citizenship.

The foreign case law that has been discussed shows a similar line of disingenuous marriages, aimed at abusing the system in an effort to assist one of the spouses in gaining citizenship. The subject of marriages of convenience can be viewed as well documented to the extent that it affects immigration and border controls to a country. But understanding the role these marriages play in terms of the role of society today is as important to analyse. What these cases have in common, whether from South Africa or the United Kingdom, is the disregard of the sanctity of marriage. These

³⁵ [2010] ECHR 2022 (14 December 2010).

³⁶ *Ibid* at 87.

³⁷ [2004] UKIAT 00305 (24 November 2004).

³⁸ *Ibid* at 12.

³⁹ *Ibid* at 21.

⁴⁰ *Ibid* at 28.

marriages are merely seen as a tool to gain a benefit and nothing more. But marriage is so much more than a single benefit as the struggle for it has highlighted.

Marriage as an institution is unique and irreplaceable in society today. Many different forms of relationships have been granted legal recognition and afforded marital benefits. This is clearly a form of relationship that is in demand. It is necessary to put measures in place to deter marriages of convenience and thus reduce the likelihood of the abuse of the system in this regard. The sanctity of marriage has been proven to be undermined in the cases where these marriages of convenience have taken place. Marriage should be respected and so regardless of the measures employed in detecting sham marriages; it is asserted that this issue should be highlighted as detracting from a fundamental institution in society today.