IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

JUDGMENT

Case No: A146/2025
Magistrate's Court: 11892/2022

In the matter between:

Y[...] M[...]	**Appellant (Plaintiff in court *a quo*)**
And	
S[...] P[...]	**Respondent (Defendant in court *a quo*)**

CORAM: **PANGARKER J and HIGGINS AJ**

HEARD: **7 NOVEMBER 2025**

DELIVERED: 13 APRIL 2026 (delivered electronically)

Summary: ***Appeal from Magistrates' Court –*** *Appellant and respondent previously concluded an Islamic marriage – Marriage dissolved after a year – Appellant instituted a civil action against respondent in the Magistrates' Court for monies paid to him and on his behalf – Islamic legal*

obligation of nafaqah relied upon - Waiver, unjustified enrichment and agreement between the parties, considered – Magistrate's rejection of nafaqah principle on the basis that it has no place in South African law, considered

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ORDER

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1. The appeal is upheld to the extent set out in paragraph 2 below.

2. The order of the Wynberg Magistrates' Court dated 4 September 2024 is set aside and substituted with the following:

    a. The plaintiff's claim is upheld in the amount of R96 780.

    b. Judgment is entered in favour of the plaintiff against the defendant for R96 780 together with interest *a tempore morae* from date of letter of demand, and costs (including the costs of counsel).

3. The respondent is ordered to pay the costs of the appeal (counsel's fees on scale B).

JUDGMENT

THE COURT (PANGARKER J and HIGGINS AJ)

Introduction

[1] This appeal concerns the financial consequences of a brief marriage solemnised according to Islamic rites. The appellant, Ms Y[...] M[...], sought to recover R154 118.61 from the respondent, Mr S[...] P[...], her former husband. The claim was for various expenses she incurred for the joint household and for the respondent's personal benefit during their marriage from August 2020 to August 2021. The marriage was dissolved by way of an Islamic annulment (*faskh*).

[2] The appeal is against the whole judgment and order of the Magistrates' Court for the District of Wynberg, in which the appellant's claim was dismissed with costs after conclusion of a trial. The central issue before this Court is whether the appellant's payments were voluntary gifts or whether they gave rise to a legally enforceable obligation to be reimbursed by the respondent once he regained financial strength, arising either from an agreement between the parties (express or tacit), the principles of Islamic law (*nafaqah*), or unjustified enrichment.

Factual background

[3] The parties, both Muslim professionals residing in the Western Cape, rekindled a prior relationship in March 2020. The appellant is an attorney who ran her own legal practice. The respondent was employed in the NGO sector but, crucially, was under debt review and had a duty to support his mother. His financial position was therefore constrained.

[4] In June 2020, the relationship progressed towards marriage. In accordance with Islamic custom, the respondent approached the appellant's father, Mr A[...] M[...], to seek his blessing and to ask for his daughter's hand in marriage. During this meeting, the respondent affirmed his intention to fulfil the Islamic obligation of *nafaqah* – spousal maintenance. The appellant's father testified during the trial that he would not have granted his blessing had he not

been satisfied that the respondent understood and intended to honour this duty. The parties were subsequently married according to Islamic rites (*nikah*) on 8 August 2020.

[5] The marriage was, by all accounts, short and turbulent. The appellant conceived shortly after the wedding, and their son, M..A.., was born prematurely in 2021. This resulted in significant and unexpected medical expenses. The relationship deteriorated rapidly thereafter, and the marriage was eventually dissolved by *faskh* on 12 August 2021.

[6] During the subsistence of the marriage, it is common cause that the appellant bore the lion's share of the household expenses. Her evidence during the trial in the court *a quo*, supported by a detailed schedule and bank and credit card statements, itemised the expenses. These included rental payments of R6 000 per month (totalling R78 000 for the period claimed); groceries and household provisions (R17 011); 50% of the total medical costs for her pregnancy and the premature birth (R16 360); travel and fuel costs, including an expense for a trip to Durban (R5 952); an insurance excess of R4 000 arising from damage to the appellant's vehicle caused by the respondent; capital of R2 600 advanced for a vape juice business venture proposed by the respondent; and various telecommunication charges such as Vodacom and iCloud fees.

[7] The respondent did not dispute that these expenses were paid by the appellant nor that he and the household benefited from them. His defence was that there was no agreement to repay. He contended that the payments were voluntary contributions or gifts made by the appellant with full knowledge of his financial situation, effectively discharging his *nafaqah* obligation as an act of kindness.

The pleadings and the case advanced on appeal

[8] The appellant's amended Particulars of Claim were framed around an alleged verbal premarital agreement concluded in June 2020. The terms pleaded were that the respondent undertook to maintain her in accordance with *nafaqah,* but given his temporary financial constraints, she would assist with expenses with the express understanding that he would reimburse her in full once he was financially able to do so.

[9] The respondent's Plea was a bare denial. He denied the existence of any such agreement and asserted that all payments were voluntary.

[10] Importantly, counsel for the appellant argued on appeal that the pleadings, while structured around an agreement, were broad enough to encompass alternative bases for recovery, such as loans or enrichment. He relied on the principle in ***Shill v Milner***[1] that pleadings are made for the court and that a court is not debarred from deciding a dispute that has been fully ventilated merely because the pleadings were not explicit.

[11] Counsel for the respondent argued forcefully that the appellant's case stood or fell on the proof of the verbal agreement. She submitted that the court *a quo* was correct in finding that the appellant failed to prove that the respondent had the requisite *animus contrahendi* (intention to contract) and that, without such an agreement, all payments were irrecoverable donations (gifts).

The appellant’s submissions

[12] Before analysing the matter, it is necessary to address the key submissions made by counsel, as it is a fundamental tenet of justice that a court

[1] *Shill v Milner* 1937 AD 101 at 105-106.

on appeal must demonstrate that it has considered the arguments placed before it.

[13] The appellant's counsel submitted that the magistrate erred in confining the claim to the express agreement. He argued that the pleadings, which included schedules of expenses, were wide enough to allow for recovery on the basis of a tacit agreement, loans, or unjustified enrichment, thus relying on ***Shill v Milner***.[2] On Islamic law, counsel argued that the magistrate failed to properly consider the expert evidence of Mufti Mogamat Maker, the appellant's expert witness. He submitted that *nafaqah* is a legal obligation, not a moral one, and where a wife pays in the husband's stead, the presumption in Islamic law is that it constitutes a loan, not a gift, unless the wife explicitly waives repayment.

[14] On the facts, the appellant's counsel pointed to concessions elicited from the respondent under cross-examination, including that he would not have married if the appellant had not paid the rent; that he asked for the vape juice capital and that he caused an accident with the appellant's vehicle. He submitted that the appellant had proved her claim or at least a significant portion thereof, with a minimum proven quantum of R111 923. Counsel further submitted that the magistrate placed undue emphasis on minor discrepancies to discredit the entire claim.

The respondent's submissions

[15] The respondent's counsel submitted that the appellant bore the onus of proving the agreement she pleaded, citing ***Dave v Birrell***[3] and ***Pillay v Krishna***.[4] She argued that the respondent lacked *animus contrahendi*, pointing to the

[2] Op cit footnote 1
[3] 1936 TPD 192 at 196
[4] 1946 AD 946 at 952-953

appellant's testimony that she did not mind contributing financially at first, and relied on ***Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd***[5] for the proposition that proving a contract requires proving the parties' intention to be bound. On Islamic law, she argued that Mufti Maker's evidence supported the respondent's case: a wife may spend her money on the household without creating an obligation on the husband to reimburse her. Regarding quantum, counsel for the respondent attacked the proof of specific claims, such as the insurance excess and business capital, submitting that if the latter was a loan, it was not pleaded as such.

[16] These submissions are considered in the analysis that follows.

Evaluation of the court *a quo's* judgment

[17] The appellant amended her Notice of Appeal prior to the hearing of the appeal. The main grounds of appeal are that the court *a quo* erred in limiting the appellant's claim strictly to a pre-marital agreement; that it failed to consider her claims based on unjustified enrichment or loans; it mischaracterised the appellant's claims and disregarded the testimony of Mufti Maker. These grounds are addressed below.

[18] The magistrate delivered a comprehensive judgment, and additional reasons for her order. However, in our view, she fell into several material errors of law and fact which justify interference by this Court.

[19] Firstly, the magistrate concluded in her judgment that the Islamic principle of *nafaqah* finds no place in South African law and repeated this view in her written reasons some months later. As a general proposition, and prior to the

[5] [2002] 3 All SA 369 (A) para 33

recognition of Muslim marriages, such finding would in all probability have been correct.

[20] However, in the context and circumstances of the parties as ex-spouses in an Islamic marriage, the evidence led in the trial and in view of recent developments such as the Divorce Amendment Act 1 of 2024[6], the magistrate was required to consider the context of the parties in relation to the action instituted by the appellant. In other words, that the parties are Muslim and were previously married in terms of Islamic (Shariah) law.

[21] In addition, the magistrate should have been mindful that the precursor to the Divorce Amendment Act was the Constitutional Court's judgment in ***Women's Legal Centre Trust v President of the Republic of South Africa,***[7] which finally recognised Muslim marriages.

[22] While the matter before the court *a quo* was a civil trial, and not a family law dispute, the magistrate's adoption of a strictly civil law outlook whereby she rejected the appellant's case based on *nafaqah* as it had no place in South African law, impacted on her findings in the judgment. In our view, she adopted an overly cautious approach to the principle of *nafaqah* as it related to this crucial legal obligation in the parties' marriage.

[23] In respect of the evidence presented during the trial, the magistrate unfortunately paid little regard to the expert evidence of Mufti Maker who explained the respondent's Islamic legal obligation of paying for the essential needs of the appellant (his spouse) such as clothing, food, shelter and medical care and the implications of non-fulfilment of this obligation. It is apparent from

[6] The Divorce Amendment Act 1 of 2024 took effect on 1 May 2024.
[7] 2022 (5) SA 323 (CC) paras 85-90.

the record that the expert's testimony was not materially gainsaid by the respondent nor seriously attacked in cross-examination.

[24] Secondly, the magistrate erred in treating the appellant's claim as standing or falling entirely on the basis of lack of proof of a formal, express oral agreement. While the agreement was the primary basis pleaded, the pleadings were not so narrow as to preclude recovery of monies on alternative grounds. The Particulars of Claim catalogued a wide range of expenses and the respondent's blanket denial placed all issues in dispute.

[25] The trial proceeded with both parties leading extensive evidence on the nature of the payments. The real dispute ventilated was whether the respondent was obliged to reimburse the appellant. In such circumstances, to dismiss the claim solely because the formal agreement was not proved with textbook precision was unjust. The Appellate Division in ***Shill v Milner*** held that:[8]

> *'Pleadings are made for the Court, not the Court for pleadings… Once the parties have, without objection, joined issue and led their evidence upon the real question in dispute, the Court is not debarred from deciding that question merely because it may not have been raised with due accuracy by the pleadings.'*

[26] Thirdly, the magistrate failed to properly consider whether a tacit agreement could be inferred from the parties' conduct. The legal principles regarding tacit contracts are well-established. The question was whether the conduct of the parties, viewed objectively, gave rise to an inference that they intended to contract. In ***Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis,***[9] the

[8] Op cit fn 1 at 105-106.
[9] 1992 (3) SA 234 (A) at 239I-240C

court set out the test as follows: what would a reasonable person in the position of the other party have understood the first party's intention to be?

[27] Applying that test to this matter, our view is that the evidence supports the existence of a tacit agreement that the appellant's payments for core living expenses were loans, not gifts, for the following reasons:

[27.1] The respondent approached the appellant's father, affirming his duty of *nafaqah*.

[27.2] The respondent admitted under cross-examination that if the appellant had not paid the rent, they would not have married. This demonstrated a clear understanding that her payment was a necessary condition for the marriage to proceed, not a voluntary gift to which he was entitled to.

[27.3] In April 2021, prior to the marriage ending, the appellant demanded that the respondent starts contributing to the rent. This demand was entirely inconsistent with her payments being intended as irrevocable gifts. A reasonable person in the respondent's position would have understood from this that the appellant expected repayment of such amounts.

[27.4] The respondent also requested the appellant to purchase a supply of vape juice to start a business. This was an express request for capital for his personal venture, and this can only reasonably be interpreted as a request for a loan[10].

[10] The respondent admitted to consuming the vape juice

[28] The conduct of the parties, therefore, speaks not of a series of gifts but of a common understanding that the appellant was temporarily assisting the respondent, with the expectation of eventual reimbursement.

[29] Fourthly, the magistrate mischaracterized the nature of the claim. It was not a claim for maintenance but comprised distinct categories, as follows:

[29.1] Essential living expenses (rent, groceries, medical costs): these are the core components of the Islamic *nafaqah* obligation.

[29.2] A delictual claim (insurance excess): this arose from the respondent's negligent act of crashing the appellant's car. This is a claim for damages.

[29.3] A commercial loan (vape juice): this was capital advanced for a business venture.

The application of *nafaqah*

[30] The Holy Quran explicitly imposes a duty of maintenance on the husband as follows[11]:

> *'Let the man of means spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him.'*

[31] This verse establishes that the obligation is scaled to the husband's ability, but it remains his obligation. The expert evidence of Mufti Maker was clear and unchallenged: he testified that *nafaqah* is a mandatory legal obligation[12] and he

[11] Surah At-Talaq 65:7 – see https://quran.com, Abdullah Yusuf Ali English translation
[12] The Arabic term is *Wajib*, meaning obligatory, necessary or mandatory

distinguished between a gift and a loan. Crucially, Mufti Maker also testified that in circumstances where the husband is unable to pay and the wife steps in, the presumption is not that she is making a gift; rather, she is extending what is effectively a loan[13] which the husband must repay when he is able to. This is to protect the wife's financial independence and prevent her from being unjustly impoverished by fulfilling the husband's primary duty.

[32] The presumption regarding a loan only shifts if the wife explicitly declares her intention to waive repayment as a gift. As stated in the Quran[14], regarding financial matters between spouses, there is an emphasis on mutual consumption with enjoyment and goodwill, but this does not negate underlying obligations. To add, the principle of not consuming another's wealth unjustly is foundational in Islam[15]. The respondent led no evidence to suggest that the appellant ever made such an unequivocal or explicit declaration of waiver.

[33] The Islamic legal context thus provides the normative backdrop against which the parties' conduct must be understood. It explains why the respondent approached the appellant's father first to seek permission to marry the appellant. It also explains why the appellant would have expected to be reimbursed for the sums of money she spent during the marriage, as described in the pleadings and during the trial. In addition, it demonstrates that her payments for rent, food and essential medical care were not voluntary benevolence, but a step-in to satisfy the respondent's own primary obligation as a Muslim husband. To hold otherwise would thus be to permit the respondent to be unjustly enriched at the appellant's expense.

The insurance excess and business capital

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[13] *Qard is* the Arabic term for loan – see, for example, https://islamic-relief.org for English translation
[14] Surah An-Nisa 4:4 – English translation, https://legacy.quran.com
[15] Surah Al Baqarah 2:188 – English translation, https://quran.com

[34] The insurance excess and business capital amounts stand on an even firmer footing. The claim for the R4 000 insurance excess is a claim for damages and in this regard, the evidence shows the respondent took the appellant's vehicle without her being present and caused an accident. He is thus liable for the damages caused by his negligence. His defence that he was never asked to pay is, in our view, no defence to a liability that arises by operation of law and as a result of his actions.

[35] Similarly, the amount of R2 600 as vape juice capital is either an oral loan agreement as the respondent requested the money for a specific purpose or, at the very least, a claim based on unjustified enrichment. The respondent admitted that he asked for the stock, the business failed and he personally consumed the stock. He was thus enriched at the appellant's expense, and there is no legal cause for him to have retained that benefit.

Waiver

[36] The respondent's submissions that the appellant's payments were voluntary gifts is unconvincing because he did not discharge the onus of proving waiver. Waiver is not lightly presumed. It requires a clear and unequivocal demonstration of an intention to abandon a known right[16] and furthermore, the party who asserts waiver has the onus of proving it on a balance of probabilities.

[37] In ***Alfred McAlpine and Sons (Pty) Ltd v Transvaal Provincial Administration*****,**[17] the High Court set out the principles regarding the onus and proof of waiver by conduct. The appellant's willingness to pay and the provision of her bank card were acts which were consistent with temporary assistance. Her demand for repayment in April 2021 is unequivocal evidence that she had not

[16] Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa 2026 91) SA 460 (SCA) par [23]
[17] 1977 (4) SA 310 (T) at 323D-325A.

waived her rights, and the respondent's case on this point must therefore be rejected.

Quantum

[38] The magistrate also erred in dismissing the quantum as unproven due to minor discrepancies. The proper approach was to weigh up the evidence holistically, including the documentary evidence, which was substantial. While the appellant conceded some minor misallocations, her core evidence was consistent and corroborated.

[39] On the other hand, the respondent's concessions, detailed in the appellant's heads of argument, were devastating to his case. He did not dispute that the appellant paid the rent but took issue only with the total. He did not deny that groceries were consumed, only that the amount was excessive. Furthermore, the respondent did not deny being present when the appellant paid medical bills.

[40] However, we are of the view that appellant's claim was over-inclusive in that not every item she paid for fell within the scope of the tacit agreement or the *nafaqah* obligation as it operated between the parties. To elaborate, travel costs for a Durban trip and personal items such as sunglasses and vape juice for the respondent, were not recoverable as they were either joint expenses or gifts of a personal nature for which no specific agreement to repay was proved. Accordingly, the appellant was not entitled to the recovery of these amounts.

[41] Having reviewed the evidence, the appellant succeeded in proving the following items on a balance of probabilities:

> Rent: R72 000 (R6 000 x 12 months). The marriage lasted 12 months. The full amount was paid by the appellant for the respondent's housing, his primary *nafaqah* duty;
>
> Groceries: R10 000, which constitutes a reasonable estimate of the appellant's share of the proved grocery expense in relation to the respondent's food, another primary *nafaqah* duty;
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> Medical expenses: R8 180, being the appellant's 50% contribution as pleaded, which represents a fair apportionment of the *nafaqah* obligation in relation to the birth of the parties' child;
>
> Insurance excess: R4 000, a delictual claim;
>
> Vape juice business capital: R2 600 which constituted a loan/enrichment;
>
> Total: R96 780.

[42] In view of the above discussion and our findings, we conclude that the magistrate thus erred in dismissing the appellant's claim with costs. In our view, at best for the appellant, her claim should have succeeded to the extent proved at trial in the sum of R96 780.

Costs

[43] The appellant's claim in the magistrates' court was for a capital sum of R154 118,81 and it is evident from the findings above, that she successfully proved R96 780 of her quantum, which equates to 63% of the initial capital

claimed. This percentage represents a successful claim, albeit for a slightly lesser amount than that claimed in the Summons. She would thus be entitled to an order that judgment in the sum of R96 780 is entered in her favour.

[44] It thus follows that the appeal should succeed. Having regard to the submissions on costs, this is not a case of mixed success. It would have been a different case if, for example, less than 50% of the appellant's claim was successful, as in such instance the appellant would have been largely unsuccessful. This eventuality would have impacted the appropriate costs order.

[45] The appellant's counsel submitted that if the appeal proved to be successful, costs should be awarded in her favour with counsel's fees in terms of Rule 67A, on scale B. As the appellant's claim should have been upheld by the court *a quo*, costs should have followed the result in the magistrates' court. She had prosecuted the appeal successfully. Both parties were represented by counsel during the trial in the Magistrates' Court.

[46] Counsel for the respondent submitted that if the appeal was upheld, then no costs order should be granted against the respondent as the appellant is a legal representative and the legal representation fell far below what was expected. It is common cause that the appeal should have been heard on an earlier date and due to issues with the record, and after a meeting with all legal representatives, the appeal was postponed to a later date. At the hearing, both parties' condonation applications were granted with costs being costs in the cause. There were thus no additional costs aspects to consider in the appeal.

[47] In our view, the appellant should be entitled to the costs of the action and costs on appeal. It bears mentioning that the respondent sought an order dismissing the appeal with costs but, in the same instance submitted that were

the appeal were to succeed, this court should order that each party should pay their own costs or that there should be no order as to costs. The basis for this submission was the legal representation issue, which is simply unpersuasive. There is no basis to stray from an order that costs should follow the result.

[48] Lastly, the appellant sought attorney and client costs in her action, which was neither motivated nor justified in the circumstances of the matter.

Order

[49] In the result, the following order is granted:

1. The appeal is upheld to the extent set out in paragraph 2 below.

2. The order of the Wynberg Magistrates' Court dated 4 September 2024 is set aside and substituted with the following:

    a. The plaintiff's claim is upheld in the amount of R96 780.

    b. Judgment is entered in favour of the plaintiff against the defendant for R96 780 together with interest *a tempore morae* from date of letter of demand, and costs (including the costs of counsel).

3. The respondent is ordered to pay the costs of the appeal (counsel's fees on scale B).

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M PANGARKER

JUDGE OF THE HIGH COURT

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I HIGGINS

ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant:	**Adv P Tredoux**
Instructed by:	**Moollajie and Associates Attorneys**
	Cape Town
For respondent:	**Adv E Carey-Wessels**
Instructed by:	**Parker Attorneys and Conveyancers**
	Cape Town