

Another case of a Muslim woman who turned to the court for relief, was that of the *Daniels*⁶³ case. The applicant first approached the High Court in 1998⁶⁴ for a declaration that she was entitled to the house of Mr Daniels who had died intestate. Steyn AJ dismissed the application on the basis of the non-recognition of the validity of the Muslim marriage between the deceased and Mrs Daniels.

In 2000 Mrs Daniels approached the High Court⁶⁵ for the second time, for an order declaring (i) that she was a spouse for the purposes of the ISA,⁶⁶ and (ii) that she was a survivor for the purposes of section 2 of the MOSSA.⁶⁷ It was a daunting task for counsel, for the applicant had to convince Van Heerden J that the word ‘spouse’ as used in the two Acts, should be interpreted to include spouses married in terms of Muslim rites.

Although Van Heerden J applauded the judgments of Farlam J in the *Rylands*⁶⁸ case and Mahomed CJ in the *Amod*⁶⁹ case, she was adamant that the two judgments could not be interpreted as authority that Muslim marriages were valid in terms of South African law, nor that parties to such a union were to be regarded as ‘spouses’ when interpreting South African legislation. The position adopted by the learned Judge does not fit in with the most basic principles of Chapter Two of the Bill of Rights, nor is her interpretation the only plausible one that can be accepted.⁷⁰

Insolvency Act, 1936 describes the word ‘spouse’ to include a wife or husband married ‘according to any law or custom’; and the Domestic Violence Act, 1998 defines that there is protection for ‘all people in a domestic relationship and include all people (whether they are of the same or of the opposite sex) who live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other’.

⁶³ *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC).

⁶⁴ *Daniels v Daniels and The Master* CPD 1998-05-1 Case No. 9787/98 (Unreported).

⁶⁵ *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C).

⁶⁶ ISA, 1987 section 1.

⁶⁷ MOSSA, 1990.

⁶⁸ *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C).

⁶⁹ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

⁷⁰ The Judge was in the position to rely on sections 9(3) and 15(3) of the Constitution, which stated that it could not be discriminated against fairly and unjustifiably on the grounds of, *inter alia*, religion and culture, and that the inclusion of Muslim wives and husbands within the meaning of the word ‘spouse’ in the two Acts, was a ‘probable’ interpretation.

In the Constitutional Court,⁷¹ Sachs J disagreed with Van Heerden J that the decisions of the two cases she relied on could ‘serve as authority for denying partners to Muslim marriages the protection offered by the Acts’.⁷² Sachs J, instead, agreed with the statement of Mahomed CJ in the *Amod*⁷³ case, that the marriage between the appellant and the deceased was one of husband and wife.⁷⁴

The majority judgment decided that the word ‘spouse’ in both the ISA⁷⁵ and the MOSSA⁷⁶ could be interpreted so as to include a party to a monogamous Muslim marriage. This implies that, if so construed, they were not invalid and unconstitutional.⁷⁷

Although this decision may be seen as a landmark case regarding the rights of Muslim women under the South African law of intestate succession, its effect, until recently, was not to give recognition to polygynous Muslim marriages. The *Hassam*⁷⁸ case, recently, recognised the concerns of the majority of South Africans with regard to the recognition of polygynous Muslim marriages. The issue in this case was whether a surviving spouse in a polygynous marriage in terms of Muslim Personal Law, was entitled to the benefits stipulated in the ISA⁷⁹ and the MOSSA⁸⁰.

In this case, Van Reenen J emphasised that the applicant’s polygynous marriage to the deceased, distinguished her matter from the *Daniels*⁸¹ case - in which case, the provisions of the two Acts, were interpreted to include a spouse in a *de facto* Muslim monogamous marriage within their ambit⁸².

⁷¹ *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at 740.

⁷² *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at 749D.

⁷³ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

⁷⁴ *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at 748C.

⁷⁵ ISA, 1987.

⁷⁶ MOSSA, 1990.

⁷⁷ *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at 750B-C.

⁷⁸ *Hassam v Jacobs NO and others* [2008] 4 All SA 350 (C).

⁷⁹ ISA, 1987.

⁸⁰ MOSSA, 1990.

⁸¹ *Supra*.

⁸² *Hassam v Jacobs NO and others* [2008] 4 All SA 350 (C) at paras 8 and 23.

It was, therefore, held that the exclusion of spouses in polygynous Muslim marriages would not pass the test of constitutional scrutiny. The Constitutional Court⁸³ concurred with Van Reenen J that the exclusion of polygynous Muslim marriages from the protection of both the ISA⁸⁴ and the MOSSA,⁸⁵ was constitutionally invalid.⁸⁶

After their initial Report of 2000, the SALC followed it up with a Draft Bill on Muslim Marriages of 2003.

It is evident that the Draft Bill will definitely effect changes to the position of Muslim women if and when it is passed. The Draft Bill contains clauses relating to equality (clause 3); the status of marriages entered into before and after the commencement of the Act (clause 4); registration of Muslim marriages (clause 6); proprietary consequences (clause 8); dissolution of marriages (clause 9); and, among others, the legal requirement of the age eighteen years for Muslim marriages to be valid (clause 5).⁸⁷

This Draft Bill has been received with mixed feelings amongst Muslims. According to Motala,⁸⁸ some Muslims oppose the draft Muslim Bill claiming that the Draft Bill amounts to State interference in matters of religion, while others claim that the mere fact that the Draft Bill is in the name of Islam, misrepresents the true nature of Islamic law.

The question remains whether the Draft Muslim Marriages Bill will ever become law. It has already been challenged in the Constitutional Court.⁸⁹ According to the Mail & Guardian,⁹⁰ the Constitutional Court had to make a decision as to whether the Court could compel Parliament or the President, to pass the Muslim Marriages Bill. The Court questioned whether it had the power to tell Parliament or the President what to do in terms of law-making, and whether it should be the court of first instance in this regard. Is

⁸³ *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC) at para 30.

⁸⁴ ISA, 1987.

⁸⁵ MOSSA, 1990.

⁸⁶ *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC) at para 39.

⁸⁷ Draft Muslim Marriages Bill (2003).

⁸⁸ Motala (2009) at 1.

⁸⁹ Maughan (2009) at 6.

⁹⁰ 'Muslim Marriages law bid under the spotlight' Mail & Guardian Online (2009) at 1.

Parliament not the law-maker? Why is the Court reluctant to tell Parliament to enact the Draft Bill?

4 Conclusion

The inclusion of marital status discrimination in the listed grounds of unfair discrimination in the equality rights of the Constitution, has created the expectation that domestic partnerships will be placed on a better footing within family law.⁹¹

Although women remain the most vulnerable group in society, there has definitely been some a development in the status of the woman who marry in terms of Muslim rites. The research reflects clearly that there has been a dramatic change from the Common law perception of a marriage contracted according to Muslim rites, to the constitutional recognition of such a marriage. This dramatic change is an indication that South Africa is ready for the passing of legislation that will recognise Muslim marriages.

The consequences of non-recognition have been particularly unfair to women in general and Muslim women in particular. It is likely that Muslim woman will find protection when Parliament passes either the Draft Muslim Marriages Bill,⁹² or at least the Draft Domestic Partnerships Bill,⁹³ if the former remains in its current 'deadlock' position.

However, considering all the conflicting comments towards the Draft Bill⁹⁴ it is at this stage unpredictable whether Parliament will ever pass the Draft Bill⁹⁵, or not.

⁹¹ The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 prohibits discrimination on the ground of marital status and defines marital status to include: 'the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship'.

⁹² Draft Muslim Marriages Bill (2003).

⁹³ Draft Domestic Partnerships Bill (2008).

⁹⁴ Draft Domestic Partnerships Bill (2008).

⁹⁵ Draft Domestic Partnerships Bill (2008).

CHAPTER THREE

POSITION OF WOMEN IN AFRICAN CUSTOMARY MARRIAGES

1 Introduction

The African woman, unlike the Muslim 'spouse', has the choice of entering into either a marriage in accordance with the law of the land, that is civil law, or statutory Customary law.

A very important cultural practice in South Africa is *lobolo*. In order to form a Customary marriage in traditional African law, the man's family would give cattle to the guardian of the prospective bride. Today the bride wealth tends to be paid in cash by the prospective husband to the wife's family.⁹⁶ According to Sinclair⁹⁷ the importance of the contract of *lobolo* in all tribal systems, even where it is not essential for the validity of the marriage, is that it serves to transfer the woman, and her reproductive capacity, from the family of her guardian to the family of her husband.⁹⁸ Another one of the key principles of *lobolo* was to provide security for the woman when the marriage was to be terminated.

Africans who marry almost invariably conclude a *lobolo* agreement in respect of their marriage, be it in terms of the RCMA⁹⁹ or the Marriage Act.¹⁰⁰

Sinclair¹⁰¹ avers that as Customary marriages are potentially polygynous, African Customary family law is not a system adhered to by persons professing a certain religion. In Customary Law a man can have more than one wife. As Customary law recognises a system of polygyny, a wife may not object if her husband wishes to conclude a second or further marriage.

⁹⁶ Bronstein (1998) at 391; See also Sinclair (1996) at 242.

⁹⁷ Sinclair (1996) at 170-1.

⁹⁸ Sinclair (1996) at 243.

⁹⁹ RCMA, 1998.

¹⁰⁰ Marriage Act, 1961.

¹⁰¹ Sinclair (1996) at 158.

Bennett¹⁰² asserts that when the British occupied the Cape, Customary law was dismissed as a barbarous and pre-legal ‘custom’. In the mid-nineteenth century, Customary law attained grudging recognition in Natal, Transvaal and Transkei as ‘Native law’, and in the twentieth-century it was rechristened ‘Bantu law’ by the architects of the apartheid regime. According to Bonthuys,¹⁰³ despite the fact that Customary marriages were not fully recognised in our law in the past, they were afforded limited recognition for certain purposes. The women in these marriages were not in the same position as cohabitees, as they found themselves in a better position. Lesser legal consequences were afforded to cohabitees in comparison to those women who entered into a Customary marriage. Before November 2000 Customary marriages were recognised by some South African statutory laws, such as the Transkei Marriage Act¹⁰⁴ and the KwaZulu-Natal Codes of Zulu law.¹⁰⁵ The Transkei Marriage Act¹⁰⁶ afforded full recognition to Customary marriages. In terms of it, men were allowed to be party to more than one marriage simultaneously, irrespective of whether one of the marriages was a civil marriage out of community of property - but not in community of property.

2 Brief overview of Customary marriages prior to 1994

Until the advent of the interim Constitution in 1993, Customary law had not been recognised as a basic component of the South African legal system.¹⁰⁷ Section 35 of the BAA¹⁰⁸ defined a Customary ‘union’ as ‘the association of a man and a woman in a conjugal relationship according to Black law and custom, whether neither man nor woman is party to a subsisting marriage’. Although Customary marriages were not recognised in civil law because of their potentially polygynous nature, they were given limited recognition for particular purposes. When a husband who married in accordance with Customary law died, his estate would devolve in accordance with the principles of

¹⁰² Bennett (1994) at 122.

¹⁰³ Bonthuys and Pieterse (2000) at 617.

¹⁰⁴ Transkei Marriage Act, 1978.

¹⁰⁵ See, e.g. KwaZulu Act on the Code of Zulu law, 1985.

¹⁰⁶ Section 3(1) of the Transkei Marriage Act, 1978.

¹⁰⁷ Bennett (2004) at 34.

¹⁰⁸ BAA, 1927.

Customary law. Even where he left a will, certain assets would, nevertheless, devolve in accordance with Customary law.¹⁰⁹

Widows of Customary marriages were given statutory claims for loss of support in cases where the deaths of their breadwinners were caused either intentionally or negligently.¹¹⁰

A man who contracted a civil marriage while a Customary marriage subsisted, did not commit bigamy; neither could the subsistence of a Customary marriage be regarded as an impediment to a civil marriage.¹¹¹

This was particularly problematic to Customary law wives whose husbands concluded civil marriages with other women during the subsistence of the former's marriages. Such Customary marriages were regarded as automatically dissolved by such later Civil marriages. The KwaZulu Code of Zulu Law¹¹² was the first to improve the position of women, in that irrespective of which marriage was entered into first (whether Customary or civil), the first marriage was recognised. Since 1988 the existence of such a Customary marriage had acted as a barrier to a subsequent civil law marriage by the husband to another woman in the rest of South Africa, excluding the Homelands, and in 1998 the RCMA¹¹³ extended this rule to the whole of South Africa.

The status of the woman, prior to the passing of the RCMA,¹¹⁴ was equal to that of a minor. In terms of section 11(3)(b) of the BAA,¹¹⁵ the Customary law wife who lived with her husband, was regarded as a minor for the purposes of contractual capacity and *locus standi in judicio*. Their husbands were regarded as their guardians. The wife's status was not merely reduced to that of a Common law minor, but was reduced to that of a Customary law minor, which had particularly subordinating effects.¹¹⁶

¹⁰⁹ Section 23 of the BAA, 1927.

¹¹⁰ Section 31 (1) of the Black Laws Amendment Act, 1963.

¹¹¹ Hahlo (1985) at 33.

¹¹² KwaZulu Act on the Code of Zulu law, 1985.

¹¹³ RCMA, 1998.

¹¹⁴ RCMA, 1998.

¹¹⁵ BAA, 1927.

¹¹⁶ Robinson (1995) at 461.

This statute effectively prevented women, who fell within its provisions, from owning property. So too, the inability of African women to obtain credit which was linked to their lack of property rights. Moreover, wives had limited contractual capacity, and their ability to sue in court was also restricted. Wives had no authority to terminate their marriage. It could only be terminated at the behest of the husband or the wife's guardian acting on her behalf.¹¹⁷

3 Status and position of African women after 1994: Constitution and protection afforded by legislation and case law

Before the dawn of South Africa's new constitutional dispensation, South African Customary law existed separately from the Common law and enjoyed a significantly lesser status. The new constitutional dispensation began not only a political, but also a legal revolution. For the first time in South Africa's legal history Customary law became an issue of constitutional importance. Calls for increased recognition of Customary law in the new order, resulted in the Constitution recognising such law, and mandating the application thereof, while subjecting it to the same levels of constitutional scrutiny as Common law.¹¹⁸

As said at the beginning, South Africa has a history of discrimination against the majority of its people. This changed as from 1994, particularly when the Constitution¹¹⁹ became the supreme law of the country. The Constitution aims to protect the rights, dignity and equality of all citizens. Section 7 states 'The Draft Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.¹²⁰

¹¹⁷ Section 22 of the BAA, 1927.

¹¹⁸ Section 211(3); the other relevant section is section 39(2). See also sections 33 (2); 33 (3); 35 (3) and 181 (2) of the interim Constitution, 1993.

¹¹⁹ Constitution, 1996.

¹²⁰ Section 1. See also the statement of Cameron E in the 'Sunday Times' 4 Jan 2009 at 2 that 'the Constitution is the bedrock of our democracy and that the Court is the guardian of the Constitution'.

The interim Constitution of 1993 came into force against the backdrop of several centuries of ethnic and race-based autocratic rule, which lacked democratic accountability, constitutionalism and a right to culture.¹²¹ The Constitution protects cultural rights and the rights of cultural, religious and linguistic communities.¹²² Section 211 also protects those institutions that are unique to Customary law.

Following upon the Constitution, another piece of legislation, the RCMA¹²³ contributed substantially to the improvement of the position of African women who entered into Customary marriages. In the past marriages under Customary law had not been recognised by the state as full marriages and were called ‘Customary unions’ to distinguish them from full marriages.

However, the RCMA bestowed recognition on such marriages ‘for all purposes’¹²⁴. This Act brought an end to the inferior status of the marriage entered into under Customary law. The Act does not only specify the important requirements for a valid Customary marriage, but also governs the registration of such marriages, its consequences, and termination.



The Act addresses the insulting history of non-recognition of Customary marriages in South Africa and gives expression to a number of legislative objectives.¹²⁵ Bronstein¹²⁶ adds that the Act purports to recognise and value, traditional African culture, and is concerned with regularising Customary marriages within the context of a state bureaucratic system. In addition, the Act also addresses women’s rights under Customary law.¹²⁷ African women have the choice to marry either in terms of civil law or Customary law.

¹²¹ Basson (1995) at v.

¹²² Sections 30, 38 and 31 of the Constitution, 1996.

¹²³ RCMA, 1998.

¹²⁴ Section 2 RCMA, 1998.

¹²⁵ Bronstein (2000) at 558.

¹²⁶ Bronstein (2000) at 558.

¹²⁷ Bronstein (2000) at 558.

The RCMA¹²⁸ represents a major initiative by the new Government in combining Customary and Common law principles and rules in conjunction with the Constitution, according to my supervisor, Professor F.A. de Villiers.

The next important development, was the *Bhe*¹²⁹ case, denoting the supremacy of the Constitution. The constitutionality of sections 23(10) (a), (c) and (e) of the BAA,¹³⁰; regulation 2 (e) of the Regulations for the Administration and Distribution of Estates of Deceased Blacks,¹³¹ and section 1(4)(b) of the ISA,¹³² were challenged in the High Court. Intestate succession under Customary law was based on the principles of male primogeniture. The issue in this case was whether a female African person, whose parents' marriage according to African law custom, could not be proved to the satisfaction of the Court, is entitled to inherit in terms of intestate succession. The High Court, per Ngwenya J, emphasised concern with the attitude of our courts towards African Customary law. The Judge concluded that the only reason why the applicants could not inherit was because they were female and Black, and that this system constituted discrimination on the grounds of race and gender.¹³³ The Court consequently held that the discrimination offended sections 9(1) and (3) of the Constitution,¹³⁴ and that such law¹³⁵ was unconstitutional and invalid.¹³⁶

The Constitutional Court¹³⁷ agreed that section 23(10) of the BAA¹³⁸ was a racist provision which was fundamentally incompatible with the Constitution. Langa DCJ applauded the judgment Sachs J, for the majority, in the *Moseneke*¹³⁹ case. Sachs had said that 'no society based on equality, freedom and dignity would tolerate differential

¹²⁸ RCMA, 1998.

¹²⁹ *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C).

¹³⁰ BAA, 1927.

¹³¹ Published in *Government Gazette* 10601 dated 6 February 1987.

¹³² ISA, 1987.

¹³³ *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C) at para 36.

¹³⁴ Constitution, 1996.

¹³⁵ Sections 2 (10)(a), (c) and (e) of BAA; as well as regulation 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks; and section 1(4)(b) of ISA, 1987.

¹³⁶ *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C) at para 36.

¹³⁷ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR (1) (CC).

¹³⁸ BAA, 1927.

¹³⁹ *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC) at para 23.

treatment based on skin colour, particularly where the legislative provisions in question formed part of a broader package of racially discriminatory legislation that systematically disadvantaged Africans.¹⁴⁰

Langa DCJ concluded that, in the light of its history and context, it was evident that section 23 of BAA¹⁴¹ and its regulations, were discriminatory and violated section 9(3) of the Constitution.¹⁴²

This judgment paved the way for all African women in similar circumstances as the applicants in the *Bhe* case to inherit from their spouses in terms of the ISA.¹⁴³ Parliament has just confirmed this when it passed the Reform of Customary Law of Succession and Regulation of Related Matters Act.¹⁴⁴

Two Transkeian cases should also be referred to, before ending this section. In the *Prior*¹⁴⁵ case the Court held that the provisions of section 37¹⁴⁶ of the Transkei Marriage Act,¹⁴⁷ as well as the Common law rule with regard to the husband's marital power over his wife, were inconsistent with the interim Constitution. In the *Makholiso*¹⁴⁸ case, the Common law concept of a 'putative marriage' was extended to the realm of Customary marriages.

The above cases illustrate how the Constitution and the RCMA together developed the Common law. I will now proceed to discuss the important sections of this Act.

4 Fundamental contribution of RCMA

¹⁴⁰ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR (1) (CC) at para 65.

¹⁴¹ BAA, 1927.

¹⁴² *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR (1) (CC) at para 68.

¹⁴³ ISA, 1987.

¹⁴⁴ Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009.

¹⁴⁵ *Prior v Battle and Others* 1999 (2) SA 850 (Tk).

¹⁴⁶ This section provides that a woman married in terms of the Act in a civil marriage be under her husband's guardianship for the duration of the marriage.

¹⁴⁷ Transkei Marriage Act, 1978.

¹⁴⁸ *Makholiso v Makholiso* 1997 (4) SA 509 (Tk).

An important contribution of the Act is that it protects and sustains cultural rights in various ways, for example, fully recognizes Customary marriages, retains polygyny and endorses a living version of Customary law.¹⁴⁹

Section 2 determines that all valid Customary marriages entered into before or after the commencement of the Act, will be recognised as marriages for all purposes.¹⁵⁰ If a man had more than one valid Customary marriage, then all of his marriages will be fully recognised.¹⁵¹ Very often, however, one has to prove to the court that a valid Customary marriage existed between the two parties. An example of such an instance, was the issue in the *Mabena*¹⁵² case. The respondent claimed that she was married to the deceased in terms of Customary law, and the magistrate upheld this contention. On appeal, the appellant averred that the respondent's mother had negotiated the *lobolo* with the deceased, which was contrary to the rules of Customary law. However, expert witness Labuschagne¹⁵³ took a different view on the same issue in terms of 'living Customary law':

'Dit gebeur in praktyk reeds dat die vrou self die lobolo aan haar man terugbetaal as sy nie met die huwelik wil voortgaan nie. Dit gebeur soms dat die man sy vrou en kinders vir n lang tydperk verlaat. In sodanige omstandighede ontvang die vrou soms haar dogter se lobolo om haarself en die kinders te onderhou'.

The Court held that a valid Customary marriage existed between the respondent and the deceased.

Section 4 determines the registration of Customary marriages. When a marriage is registered the parties are issued with a certificate which serves as proof that a valid Customary marriage existed. However, in terms of section 4(9) of the Act, failure to register a Customary marriage does not affect the validity of the marriage. In the

¹⁴⁹ Bronstein (2000) at 558.

¹⁵⁰ Sections 2(1) and 2(2).

¹⁵¹ Sections 2(3) and 2(4).

¹⁵² *Mabena v Letsoala* 1997 (2) SA 1068 (T).

¹⁵³ Labuschagne (1991) at 551.

*Baadjies*¹⁵⁴ case the applicant failed to produce any certificate of registration of a Customary marriage. Francis AJ, after considering all the evidence, held that no Customary marriage had existed between the applicant and the respondent.

In the *Sokhewu*¹⁵⁵ case the provisions of section 4 of the Act were to the advantage of the plaintiff. This case has striking similarities to the *Ismail*¹⁵⁶ case.

The issue was that the marriage was invalid because it was not registered in terms of section 4 of the RCMA. Jafta AJP had to consider whether the Court would rely on the decision of Kruger AJ in the *Kwitshane*¹⁵⁷ case that the failure to register a marriage within a reasonable time resulted in the marriage either falling away completely, or remaining invalid until it had been registered. In the present case, the learned Judge considered the plaintiff's illiteracy and ignorance regarding the Transkei Marriage Act¹⁵⁸ which required the registration of Customary marriages.

In conclusion, the learned Judge was satisfied that the Court in the *Kwitshane*¹⁵⁹ case had erred in concluding that Customary marriages could not be regarded as valid marriages unless they were registered.¹⁶⁰

However, in the *Wormald*¹⁶¹ case Maya AJA, writing for the majority, declined to deal with the application for a declaratory order concerning the validity of the Customary marriage. The majority concluded that there were conflicting decisions in the Transkei Division as to whether registration under the Transkei Marriage Act was a prerequisite to the validity of a Customary marriage:¹⁶²

¹⁵⁴ *Baadjies v Matubela* 2001 (3) SA 427 (W).

¹⁵⁵ *Sokhewu and Another v Minister of Police* 2002 JOL 9424 (Tk).

¹⁵⁶ *Ismail v Ismail* 1983 (1) SA 1006 (A).

¹⁵⁷ *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

¹⁵⁸ Transkei Marriage Act, 1978.

¹⁵⁹ *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

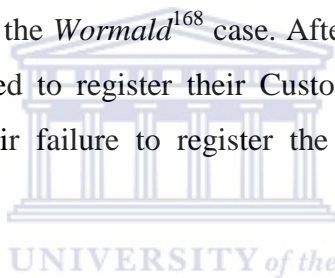
¹⁶⁰ *Sokhewu and Another v Minister of Police* 2002 JOL 9424 (Tk) at 16.

¹⁶¹ *Wormald v Kambule* 2006 (3) SA 562 (SCA).

¹⁶² *Wormald NO and Others v Kambule* 2006 (3) SA 562 (SCA) at 572J – 573A-B.

‘The one is *Kwitshane v Magalela and Another* 1999 (4) SA 610 (Tk) and the other judgment of Jafta AJP in *Shwalakhe Sokhewu and Another v Minister of Police* (Unreported – Transkei Division Case No 293/94). In the former case it was held that registration was essential to a valid Customary marriage, whereas the latter decided the contrary. The court *a quo* considered both judgments and concluded that *Kwitshane* had been wrongly decided and that the *Sokhewu* judgment was correct and should be followed’.¹⁶³

In the *Kambula*¹⁶⁴ case the Court was confronted with two issues, namely whether the failure to register the alleged Customary marriage made it invalid, and whether the applicant was a survivor in terms of the provisions of the MOSSA.¹⁶⁵ Pickering J made reference to the decisions in the *Kwitshane*¹⁶⁶ case, the *Sokhewu*¹⁶⁷ case and the minority judgment of Combrink AJA in the *Wormald*¹⁶⁸ case. After much consideration Pickering J held that if parties had failed to register their Customary marriage in terms of the Transkei Marriage Act¹⁶⁹, their failure to register the marriage would not affect its validity.¹⁷⁰



Section 6 of the RCMA¹⁷¹ brought about drastic changes. African women were freed from the guardianship and marital power of their husbands. Women are now legally autonomous and no longer the perpetual wards of their husbands. As a consequence of the Act, the legal status of African women improved in that they now have full contractual capacity, the right to own property and acquire credit, and ‘*locus standi*’.

Section 6 was applied in the *Seemela*¹⁷² case. The respondent averred that the appellant, an African woman, had no legal capacity to bring a civil damages claim in the

¹⁶³ *Wormald NO and Others v Kambule* 2006 (3) SA 562 (SCA) at 572J – 573A-B.

¹⁶⁴ *Kambule v The Master and Others* 2007 (3) SA 403 (E).

¹⁶⁵ MOSSA, 1990.

¹⁶⁶ *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

¹⁶⁷ *Sokhewu and another v Minister of Police* (2002) JOL 9424 (Tk).

¹⁶⁸ *Wormald NO and Others v Kambule* 2006 (3) SA 562 (SCA).

¹⁶⁹ Transkei Marriage Act, 1978.

¹⁷⁰ *Kambule v The Master and Others* 2007 (3) SA 403 (E) at 413B-C.

¹⁷¹ RCMA, 1998.

¹⁷² *Seemela v Minister of Safety and Security* [1998] 1 All SA 408 (W).

Magistrates Court. The Court held that the appellant had legal capacity to institute proceedings.

Section 7 deals with the proprietary consequences of Customary marriages. The constitutionality of section 7 was challenged in the *Gumede*¹⁷³ case. Moseneke DCJ gave recognition to the purpose of the RCMA¹⁷⁴ to the extent that it was enacted in terms of section 15(3) of the Constitution. However, the Court was still of the opinion that sections 7(1) and 7(2) of the RCMA¹⁷⁵ were clearly discriminatory on one of the listed grounds, namely, gender. The reason for this averment was that women in Customary marriages concluded before 15 November 2000 were subjected to unequal proprietary consequences¹⁷⁶ - causing the Court to declare these sections to be inconsistent with the Constitution.¹⁷⁷

This judgment was applauded from all angles and once again proved that the courts had to interpret Customary law in line with the Constitution.

5 Conclusion

It is evident that the position of the African woman has improved since the enactment of the Constitutions (interim and final). When the RCMA came into operation, the woman who was a partner to such a marriage, was no longer regarded as a cohabitee. But although the RCMA¹⁷⁸ brought relief to the position of the African woman, it did not bring relief to those still regarded as cohabitees. The African woman has the choice to conclude a civil marriage,¹⁷⁹ or a Customary marriage,¹⁸⁰ enjoying the protection of the law in both cases, or may cohabit with no protection at all.

¹⁷³ *Gumede v The President of South Africa* 2009 (3) BCLR 243 (CC).

¹⁷⁴ RCMA, 1998.

¹⁷⁵ RCMA, 1998.

¹⁷⁶ *Gumede v The President of South Africa* 2009 (3) BCLR 243 (CC) at para 34.

¹⁷⁷ *Gumede v The President of South Africa* 2009 (3) BCLR 243 (CC) at para 45.

¹⁷⁸ RCMA, 1998.

¹⁷⁹ In terms of the Marriage Act, 1961.

¹⁸⁰ In terms of the RCMA, 1998.

Development has taken place gradually in favour of African women after the enactment of the Constitution and RCMA,¹⁸¹ as well as recent case law. South Africans are now subject to a 'uniform code of marriage law'. The latter affords legal recognition to Customary marriages next to civil marriages. This legislation is also entrenched in the Constitution¹⁸² which permits legislation to recognise marriages that are contracted under any tradition or system of religious, personal or family law, with the provision that such legislation must be consistent with the Constitution.¹⁸³

Langa DCJ correctly, it is submitted, stated in the *Bhe* case¹⁸⁴ that the Constitution envisaged a place for Customary law in our legal system and, more importantly, that some provisions of the Constitution necessitate that Customary law should be accommodated and not simply tolerated as part of South African law and that it is not immune from being declared unconstitutional if found to be inconsistent with the Bill of Rights.

The Act was enacted to recognise the rights of women to practise their customs and culture. It was also enacted to ensure that women in Customary marriages were afforded an adequate share upon the dissolution of the marriage.

The main object of the RCMA is to extend full legal recognition to marriages entered into in accordance with Customary law. The Act also engenders a new respect for the African legal tradition, and, furthermore, also elevates the status of women and children by improving their position. It will also provide certainty by identifying the rights and duties of spouses in contracting a marital union in accordance with Customary law.

Bronstein¹⁸⁵ is impressed with the drafters of the RCMA¹⁸⁶, and so am I. She asserts that the Act advanced the status of South African women. Section 6 is just as important as

¹⁸¹ RCMA, 1998.

¹⁸² Section 15(3) of the Constitution, 1996.

¹⁸³ O'Sullivan and Murray (2005) at 17.

¹⁸⁴ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 39.

¹⁸⁵ Bronstein (2000) at 574.

section 2, because the former put an end to the perpetual minority status of women under Customary law. This implies that equality between spouses has been entrenched, and that practices, which have the potential to discriminate between spouses on grounds of sex, are excluded. By treating women with equal concern and respect, the courts will construct a foundation of civil rights. This is only a first step. African women, like their Western counterparts, will have to take advantage of their new political rights and build upon them. If women are not aware of the RCMA, it will merely remain 'paper law', and will not achieve its purpose. The best empowerment tool that can be utilised to realise the purpose of the RCMA is education.

As stated earlier,¹⁸⁷ most of the African women are not aware of their rights or the pot-holes in South African law. But I am confident that African women cohabitees will pay attention to future developments in the law and will organise their lives accordingly.

Throughout this research, the development of both the Common law and Customary law have been prominent. But I also agree with Currie,¹⁸⁸ that all of us need a subtle understanding of cultural practices before we begin to tamper with them.

¹⁸⁶ RCMA, 1998.

¹⁸⁷ Bonthuys (2002) at 757.

¹⁸⁸ Currie (1994) at 153-4.

CHAPTER FOUR

WOMEN COHABITEES AND THE LAW

1 Introduction

Cohabitation has become extremely common in South Africa, and on this basis one would have expected that legislation would have undergone drastic change. Section 15(3)(a)(i) of the Constitution¹⁸⁹ should be interpreted as to include all cohabitees irrespective of race, colour and creed. There are many reasons why women across the racial spectrum opt to cohabit, and while our courts and legislature fail to acknowledge sufficiently that the Bill of Rights¹⁹⁰ prohibits discrimination against non-traditional forms of family, cohabitation will remain, largely, outside the coverage of family law.

I agree with Sloth-Nielsen and Van Heerden¹⁹¹ that within a short period of time our law has provided greater recognition and protection to women - but not to everyone!

Some people are under the impression that if they live together as a couple for a number of years, they are considered to be 'married'; and this 'marriage' has been referred to as a 'Common law marriage' by some.¹⁹²

While most authors adopt the same definition for cohabitation, others have a different interpretation. Schwellnus¹⁹³ defines cohabitation as a 'stable, monogamous relationship where couples who do not wish to, or are not allowed to, get married, live together as spouses'. The traditional definition limits the term cohabitation to two people of the opposite sex living together. In terms of the Constitution, however, this limitation is unwarranted.¹⁹⁴

¹⁸⁹ Constitution, 1996.

¹⁹⁰ Chapter Two of the Constitution, 1996.

¹⁹¹ Sloth-Nielsen and Van Heerden (2003) at 123.

¹⁹² E.g. Hahlo (1983) at 244.

¹⁹³ Schwellnus (2007) at 1.

¹⁹⁴ Section 9(3) of the Constitution, 1996

Hahlo¹⁹⁵ says that the term ‘concubinage’ (alias ‘*de facto* marriage’, ‘quasi-marriage’, ‘extra-marital cohabitation’, ‘putative marriage,’ ‘Common-law marriage’) connotes the relationship between a man and a woman who live together as ‘husband’ and ‘wife’ but have not gone through the legal ceremony of a marriage. Hutchings and Delpont¹⁹⁶ concur with Hahlo, that the term cohabitation is the most commonly employed term, because it is not a legal marriage and neither does it develop into one as a result of the lapse of time.

In the *Owen-Smith*¹⁹⁷ case the phrase ‘on a permanent basis’ was held to mean a relationship that was intended by the parties to continue indefinitely without change. Goldblatt¹⁹⁸ opines that domestic partnership should be defined as ‘a permanent intimate life partnership between two adults’, a similar approach to that of the New South Wales Property Relationships Act,¹⁹⁹ which should be followed.

In general, I would agree with Schwellnus,²⁰⁰ that cohabitation is an emotionally, and/or physically, intimate relationship conducted in a Common living place. In comparison with civil and other form of marriage, these men and women are referred to as cohabitees.

In South Africa cohabitation is not as common as in Europe and this may be as a result of South Africa’s conservative and Calvinistic background.²⁰¹ Lind says that it is unsurprising that women would opt to be categorised as cohabitees despite the fear of insecurity and the legal consequences of their choice.²⁰²

¹⁹⁵ Hahlo (1983) at 244. See also Sinclair assisted by Heaton (1996) at 267.

¹⁹⁶ Hutchings and Delpont (1992) at 122. Traditionally, the word ‘mistress’ was used by the courts to describe a woman cohabiting outside of marriage. This term is outdated and inappropriate. For other labels for cohabitation and the parties to it, and on the terminological difficulties generally, see Hahlo HR ‘Cohabitation, Concubinage and the Common-Law Marriage’ in Kahn *Fiat Iustitia* 244 at 245 and ‘The Law of Concubinage’ (1972) 89 *SALJ* 321 at 321-322.

¹⁹⁷ *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZSC).

¹⁹⁸ Goldblatt (2003) at 624.

¹⁹⁹ New South Wales Property Relationships Act, 1984.

²⁰⁰ Schwellnus (2007) at 2.

²⁰¹ Schwellnus (2007) at 2.

²⁰² Lind ‘Domestic partnerships and marital status discrimination’ in C Murray *et al* (2005) at p116.

Despite the fact that different legal systems attribute different requirements for cohabitation, it remains undisputed that three elements must exist in order to establish a cohabitation relationship. The three elements consist of ‘a sexual relationship between the people’, ‘a factual cohabitative relationship and a measure of durability and stability for each other,’ as well as ‘a sense of responsibility for each other’.²⁰³

South Africa demonstrates a rising trend in domestic partnerships. These domestic partnerships serve a role in meeting the financial, emotional and other needs of the people involved.²⁰⁴ Goldblatt²⁰⁵ says that more than a million South Africans are in non-marital relationships with their intimate partners. Furthermore, ‘one of the main reasons for the prevalence of this type of relationship in South Africa is the extent of migrancy in our country’.²⁰⁶ The author²⁰⁷ further addresses the presumption that people who choose not to marry are exercising their freedom of choice in the South African context. Mrs Robinson’s predicament in the *Volk’s* case²⁰⁸ is not a result of her and the deceased’s failure to marry; rather, it was because their failure to marry had become a feasible social option.

In 2004 De Vos²⁰⁹ was of the opinion that cohabitantes who choose not to marry will continue to be marginalised, and that the South African law will make no effort to protect the weaker and more vulnerable partners in such a relationship.

Goldblatt distinguishes three types of cohabitation, namely:²¹⁰

- ‘ (a) *A man has a rural wife and cohabits with a woman in a long-term relationship*
- (b) *Urban cohabitants without other ties who are in committed relationships*
- (c) *“Easy come, easy go”: Cohabitation is seen as an impermanent arrangement of convenience that arises from material and other needs’.*

²⁰³ Schwelnus (2007) at 2.

²⁰⁴ Monareng (2007) at 126.

²⁰⁵ Goldblatt (2003) at 610.

²⁰⁶ Goldblatt (2003) at 610.

²⁰⁷ Goldblatt (2003) at 610.

²⁰⁸ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

²⁰⁹ De Vos (2004) at 187.

²¹⁰ Goldblatt (2003) at 613.

Clark²¹¹ is of the opinion that there is a wide range of different types of cohabitants ranging from those who are committed to each other to those who are merely in a 'contingent' relationship.

De Vos²¹² finds it ironic that same sex couples who have not entered into a civil union marriage receive more protection than heterosexual cohabitants despite the fact that most South Africans who cohabit are heterosexual and yet their relationships are not protected.

2 Legal consequences of cohabitation

Sinclair opines²¹³ that the general rule of our law is that cohabitation does not give rise to special legal consequences irrespective of how long the relationship has endured. Cohabitation does not give rise to property rights unless the ordinary rules of the law of contract, property and unjustified enrichment might be invoked by a cohabitee in order to enforce rights acquired in or to each other's property.²¹⁴

For most purposes, South Africa does not afford legal recognition to a 'Common-law marriage', no matter how long it has existed. There is no law that regulates cohabitation, neither is there a 'law of cohabitation' similar to there being a law of husband and wife.²¹⁵

There are many practical problems arising from mere cohabitation and most of these problems only become prevalent when the relationship is terminated. Although our law does not prohibit extra-marital cohabitation, it does not promote such relationships, in that the parties' relationships generally do not enjoy special protection in family law. Legislation²¹⁶ deals with marriages and cohabitation on an equal footing only in certain circumstances.²¹⁷ This will be discussed later.

²¹¹ Clark (2002) at 635.

²¹² De Vos (2008) at p129.

²¹³ Sinclair (1996) at 274.

²¹⁴ Sinclair (1996) at 274.

²¹⁵ Schweltnus (2007) at 2.

²¹⁶ See eg, Insolvency Act, 1936, Pension Funds Act, 1956, COIDA, 1993 and Domestic Violence Act, 1998.

²¹⁷ Visser and Potgieter (1998) at 45. See also Hahlo (1983) at 248.

2.1 Universal partnership

Roman and Roman-Dutch law distinguished between two types of universal partnerships, that is, *societas universorum bonorum* and *societas universorum quae ex quaestu veniunt*.²¹⁸ The former is one in which contracting parties agree to combine their assets, both of the present and of the future,²¹⁹ and the latter is a partnership of all their profits.²²⁰ In certain instances our courts have decided in favour of a party that an express or implied universal partnership proper (*societas universorum bonorum*) exists between the couple. In order for the court to rule in favour of the party who claims that a universal partnership existed during their cohabitation, the applicant must satisfy four legal requirements, namely-²²¹

- ‘ (a) the aim of the partnership must be to make a profit;
- (b) both parties must contribute to the enterprise;
- (c) the partnership must operate for the benefit of both parties; and
- (d) the contract between the parties must be legitimate’.

However, this universal partnership is not regarded as a marriage; but when the relationship has irretrievably broken down, the courts will have the assets divided.²²² Our courts will only regard such a partnership as valid if it was created either tacitly or expressly.²²³ Van Heerden, Cockrell and Keightly²²⁴ say that if a couple live together in a long-standing relationship, it may be held that the parties have tacitly or by implication

²¹⁸ *V. (also known as L.) v De Wet, N.O.* 1953 (1) SA 613 (O) at 614E-H; *Annabhay v Ramlall* 1960 (3) SA 802 (N) at 805A; *Ally v Dinath* 1984 (2) SA 451 (T) at 453E-G.

²¹⁹ *Snyman-Van Deventer and Henning* (2003) 76; See also *Muhlmann v Muhlmann* 1984 (3) SA 102 (A).

²²⁰ *Annabhay v Ramlall* (1960) at 805A; *V (also known as L) v De Wet* (1953) at 614G-H as per De Beer JP: ‘The second type of partnership known to Roman-Dutch Law, the *societas universorum quae ex quaestu veniunt*, is the usual contract of partnership where the parties intend that all they may acquire during its continuance from any and every kind of commercial venture, shall be partnership property’. See also Hahlo *South African Law of Husband and Wife* 4th ed at 290 where the learned author states the following: ‘However, there must be something to indicate that the parties intended to operate as a partnership, the mere fact that the wife worked in her husband’s business without pay is not sufficient unless it can be shown that she made a substantial financial contribution or regularly rendered service going beyond those ordinarily expected of a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement’.

²²¹ *Schwellnus* (2007) at 3.

²²² E.g. *Ally v Dinath* 1984 (2) SA 451 (T) at 455D.

²²³ E.g. *Ally v Dinath* 1984 (2) SA 451 (T) at 455A.

²²⁴ *Van Heerden, Cockrell and Keightley* (1999) at 255.

entered into a universal partnership and accumulated a joint estate. Hahlo²²⁵ is also of the opinion that if a man and his partner have pooled their resources or built up a business together, then the court may infer that they had the intention to establish a universal partnership.

In the *V (also known as L)*²²⁶ case the Court held that the four requirements to establish a universal partnership had been met, and half of the partnership estate was awarded to the applicant. However, in the *Francis*²²⁷ case the issue was whether a universal partnership had existed. After the Court had addressed the requirements for the establishment of a universal partnership, it concluded that the plaintiff had failed to prove on a balance of probabilities the essential elements of the alleged partnership.

A universal partnership is different from a marriage. The former exists when a contract is concluded between the two parties in the relationship. Upon dissolution of such relationship, the assets are divided. It is clear that a universal partnership is not easy to prove. In the *Sepehri*²²⁸ case the Court once again emphasised the importance of the four essential requirements in order to establish a universal partnership.

2.2 Maintenance and duty to support

According to Hutchings and Delpont,²²⁹ when cohabitation is terminated during the lifetime of the cohabitants, no mutual duty of support exists between them.

Schwellnus²³⁰ asserts that no enforceable right to claim maintenance from a cohabiting partner exists either during the cohabitative relationship or after termination of the relationship. She argues further that cohabitation only has an effect on maintenance which is payable in respect of a previous marriage, where the court may follow one of two routes when it awards maintenance after a divorce. The court will either 'confirm a

²²⁵ Hahlo (1985) at 38.

²²⁶ *V (also known as L) v De Wet NO* 1953 (1) SA 613 (O).

²²⁷ *Francis v Dhanai* 2006 JOL 18401 (N).

²²⁸ *Sepehri v Scanlan* 2008 (1) SA 322 (C).

²²⁹ Hutchings and Delpont (1992) at 122. See also Hahlo (1985) at 37, and Clark (2002) at 639.

²³⁰ Schwellnus (2007) at 7.

written agreement between the parties as an order of the court, or, in the absence of an agreement, award maintenance after considering the relevant factors’.

The written agreement which stipulates that maintenance would cease upon cohabitation by a divorced recipient, is known as a *dum casta* clause²³¹. In South Africa, the courts have no objection to enforce such an agreement between two parties.²³² However, our courts have different approaches to the terms of these agreements. In the *Schlesingerr*²³³ case Nicholas, J held that the relationship between the respondent and her partner cannot be construed as a marriage, and, therefore, the maintenance cannot cease just because the divorced respondent lives in concubinage.²³⁴ In *Ex parte Dessels*²³⁵ the Court upheld the validity of the condition on the ground that the condition intended to ensure that the annuity would cease not only on the widow’s remarriage, but also if she cohabits with a man as his wife. The judgment in the *Drummond*²³⁶ case proved the contrary. The issue was whether the appellant and her partner had cohabited, since the respondent had succeeded in the Court *a quo* to have the order for maintenance, in terms of section 10(1), set aside.²³⁷ The Court was satisfied that the appellant and her partner lived together as man and wife on a permanent basis, and the appeal was dismissed with costs²³⁸.

Three years later, another court came to a similar conclusion. In the *Owen-Smith*²³⁹ case, the Court *a quo* held that the appellant deliberately refrained from getting married to her partner in order to protect her claim for maintenance from the respondent. On appeal, the Court held that if a woman lives with a man in order to contribute to the expenses, it is

²³¹ Schweltnus (2007) at 7.

²³² ‘*Dum casta clause*’ www.yahoo.com [accessed on 16/06/08] A maintenance agreement may embody a *dum casta* clause, that is, a clause which provides that the recipient will forfeit her maintenance if she fails to lead a chaste life. However, the court will not read an implied clause to this effect into every maintenance agreement.

²³³ *Schlesinger v Schlesinger* 1968 (1) SA 699 (W).

²³⁴ *Schlesinger v Schlesinger* 1968 (1) SA 699 (W) at 700E-F.

²³⁵ *Ex parte Dessels* 1976 (1) SA 851 (D).

²³⁶ *Drummond v Drummond* 1979 (1) SA 161 (A).

²³⁷ Matrimonial Affairs Act, 1953.

²³⁸ *Drummond v Drummond* 1979 (1) SA 161 (A) at 167A-B.

²³⁹ *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZSC).

immaterial whether she will marry him or not and the magistrate erred in reducing her maintenance.²⁴⁰

The duty to support in respect of heterosexual unions which are stable and long-standing remains unclear in our law. However, the Draft Bill²⁴¹ makes provisions for all these uncertainties and its passing may see the light soon.

2.3 Succession

Another problem arises when looking at succession rights. If the male partner dies during their cohabitation, the surviving spouse will only inherit if she has been named as heir in his will. If there is no will, then the ISA²⁴² will come into operation.

In terms of the ISA,²⁴³ if a person dies intestate, the estate will devolve to a surviving spouse and, if there is no such spouse, then to the children of the deceased. If there is no such spouse or children, the estate will go to the parents or other relatives. If there are no such relatives, the estate will pass as *bona vacantia* to the state. The surviving cohabitee will have no right to claim.²⁴⁴

In terms of testate succession, a surviving cohabitee can only inherit if the deceased leaves a valid will instituting him or her as heir or legatee. The deceased cohabitee is entitled to disinherit a spouse or children in order to make provision for a cohabitee. The testator will, however, have to make it clear that he or she wants to benefit the cohabiting partner.²⁴⁵

²⁴⁰ *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZSC) at 518G-H.

²⁴¹ Draft Domestic Partnerships Bill, 2008.

²⁴² ISA, 1987.

²⁴³ ISA, 1987.

²⁴⁴ Schweltnus (2007) at 13.

²⁴⁵ Sinclair (1996) at 289. See also Schweltnus (2007) at 13.

Despite the fact that certain legislative benefits extend to cohabitees (See later), these relationships are still deprived of protection as far as the distribution of property or maintenance upon the death of one of the partners are concerned.²⁴⁶

During the last ten years, the Constitutional Court has provided protection for a number of different family forms that used to fall outside of the traditional marriage relationship. The *Volks* case²⁴⁷ underpins the failure of our law to keep pace with social change and this failure generalises the problem Mrs Robinson faced.

The *Volks*²⁴⁸ case is the most recent case in which the Constitutional Court has declined to develop the law relating to maintenance under the MOSSA²⁴⁹ and intestate succession under the ISA²⁵⁰ where the majority of the Constitutional Court decided not to involve itself in the transformation of the law regulating cohabitation. *In casu*, Mrs Robinson and Mr Shandling, the deceased, had been in a permanent life partnership for 16 years. They never married (although there was no legal impediment to the marriage) and no children were born of this relationship. Mrs Robinson regarded their relationship as a 'permanent life partnership'. Mr Volks, the executor of Mr Shandling's deceased estate, did not dispute the characterisation of the relationship as a 'permanent life partnership'. Mrs Robinson's inheritance consisted of a Toyota motor vehicle, the contents of the flat which she and the deceased had occupied, as well as a sum of R100 000. Mrs Robinson was only entitled to live in the house for a period not exceeding nine months. Upon the death of Mr Shandling, Mrs Robinson filed a maintenance claim against his estate in terms of the MOSSA²⁵¹. The section in question was section 2(1) which reads as follows:

'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable

²⁴⁶ Goldblatt (2008) at 6.

²⁴⁷ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

²⁴⁸ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

²⁴⁹ MOSSA, 1990.

²⁵⁰ ISA, 1987.

²⁵¹ ISA, 1987.

maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings’.

Mr Volks refused the claim on the basis that the Act did not include cohabitees. Despite the refusal, Mr Volks never disputed the fact that Mrs Robinson and the deceased had supported one another financially and emotionally, and that both had regarded their relationship to be a permanent one. Mrs Robinson applied to the High Court (the Court *a quo*) to challenge the definition of ‘survivor’ in the Act. She argued that the exclusion of permanent life partners was a violation of her rights to equality and dignity and that it was unconstitutional.

The High Court developed the law to include cohabitation within the ambit of the MOSSA²⁵². The matter was referred to the Constitutional Court for confirmation.²⁵³ The majority of judges in the Constitutional Court, however, refused to concur with the decision of the High Court. Skweyiya J, who gave the majority judgment, agreed with the decision of the High Court only to the extent in that the Act is not capable of being interpreted so as to include heterosexual cohabitees. The majority was also of the opinion that the aim of the Act is to extend one of the invariable consequences of marriage, duty of support, beyond the death of the spouses. This duty does not arise in unmarried relationships.

There is some light at the end of the tunnel in that three Justices gave their dissenting judgments in favour of Mrs Robinson. What is really sad is that the majority judgment concluded that if they allow Mrs Robinson to benefit under the Act, it would mean imposing a legal duty of support after death whereas it never existed during the deceased’s lifetime.

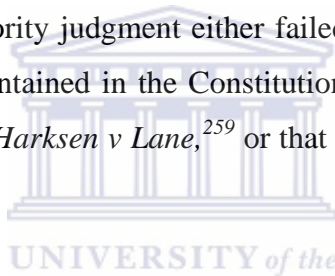
²⁵² MOSSA, 1990.

²⁵³ Section 172(2)(b) of the Constitution, 1996 states that ‘A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct’.

The Court acknowledged the vulnerability of the female cohabitee, as well as the dependence of women in heterosexual unmarried relationships, not only in South Africa but also in other countries.²⁵⁴ It is regrettable, however, that while Skweyiya J displayed concern for the plight of female cohabitees,²⁵⁵ his decision moved in a different direction. Significant was the dissenting judgment of Mokgoro J and O'Regan J, in which they concluded that the 'cohabiting partners under consideration in this case are a vulnerable group'.²⁵⁶

I applaud the dissenting judgments of Sachs J and Mokgoro J and O'Regan J, who sought to understand the way in which families work and who understood that maintenance is definitely concerned with survival.

De Vos²⁵⁷ argues that the majority judgment either failed to apply the appropriate 'test' for unfair discrimination as contained in the Constitution,²⁵⁸ which had been developed by the Constitutional Court in *Harksen v Lane*,²⁵⁹ or that it attempted to apply the correct test, but was unsuccessful.



It is evident that the decision of the majority in the *Volks* case²⁶⁰ has negative implications for those women living similar lives, because this case is the most recent reported case of the highest court. The reasons for the rejection of her claim should have been treated with much more caution. Why would certain legislation regard women in the position of Mrs Robinson as a 'spouse' and a 'survivor', but the same words in the MOSSA²⁶¹ cannot be interpreted as such? The majority was also of the opinion that the Common law duty of support is so isolated from the question of the constitutionality of

²⁵⁴ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 63.

²⁵⁵ See, for example, the concerns of Skweyiya J at paras 64-66.

²⁵⁶ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 124.

²⁵⁷ De Vos (2008) at 131.

²⁵⁸ Section 9(3) of the Constitution, 1996

²⁵⁹ *Harksen v Lane* 1998 (1) SA 300 (CC) at para 54.

²⁶⁰ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

²⁶¹ MOSSA, 1990.

section 2(1) of the Act, that the Constitutional Court could not address it; but the minority in their dissenting judgments addressed the issue.²⁶²

Cooke²⁶³ is also of the opinion that the decision of the majority, that no duty of support existed, was in stark contrast to the factors that the dissenting judgments cited as evidence of such a duty.

The focus should not only be on a duty to support, but also on other areas of law, e.g. intestate succession,²⁶⁴ criminal procedure²⁶⁵ etc. Some statutes have been amended to include cohabitees and the fact that the MOSSA²⁶⁶ has not yet been amended as to recognise the female cohabitee as a ‘survivor’ and a ‘spouse’ for the purposes of the Act, should not be taken as indicative of a legislative intent to exclude partners from the protection of the law.

2.4 Statutory recognition

2.4.1 Insolvency Act²⁶⁷

The Insolvency Act²⁶⁸ includes in the definition of ‘spouse’ a woman who is living with a man as his wife or a man who is living with a woman as her husband, who are not married to one another in both cases. The Act provides that if a separate estate of one of two spouses, who are not living apart, is sequestrated, the estate of the solvent as well as that of the insolvent spouse vests in the Master, and then in the trustee of the insolvent estate. The estate of the solvent spouse has to be released if he or she proves that it was acquired by a title which cannot be assailed by the creditors of the insolvent spouse. However, if the insolvent spouse is legally married and he or she cohabits with another partner, the estate of his or her spouse, and not that of his or her partner, will vest in the Master and trustee.²⁶⁹

²⁶² *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).at para 216.

²⁶³ Cooke (2005) at 544.

²⁶⁴ There is no right of intestate succession between cohabitants. See Sinclair (1996) at 289.

²⁶⁵ Section 198 of the CPA (1997).

²⁶⁶ MOSSA, 1990.

²⁶⁷ Insolvency Act, 1936.

²⁶⁸ Section 21(13). See also Cronjé and Heaton (2004) at 229.

²⁶⁹ Cronjé and Heaton (2004) at 229. See also Hahlo (1983) at 249.

In *Chaplin NO v Gregory (or Wyld)*,²⁷⁰ the preference of the law for legal wives worked to the disadvantage of the legal wife. In this instance the insolvent spouse lived with his mistress, apart from his legal wife. The Court held that the estate of his legal wife, not that of his Common-law wife, vested in the trustee.²⁷¹

2.4.2 Pension Funds Act²⁷²

In terms of this Act, pension benefits may, after the death of a member of the fund, be paid either to the dependants of the deceased member, or to a nominee.²⁷³ Dependants include both legal and factual dependants of a fund member. This has the effect that a cohabitee may qualify as a factual dependant, provided that, despite the fact that, though such a member is not legally obligated to maintain his or her cohabitee, he or she did in fact maintain the other one.²⁷⁴ However, if the cohabitee was financially independent of the member, such cohabitee will not qualify as the member's factual dependant.²⁷⁵

2.4.3 COIDA²⁷⁶

In this Act, section 1(c) provides that if one of the cohabitees dies as a result of injuries received during the course of employment, his or her partner may claim compensation if the latter can prove that he or she was 'at the time of the accident ... wholly or partly financially dependent upon the employee'.²⁷⁷ The Act states clearly that the claim is only available in the absence of a legal spouse at the time of the accident.²⁷⁸

2.4.4 Domestic Violence Act²⁷⁹

In terms of section 1 of this Act, a cohabitee is granted protection from violence in their relationship and protection is granted to 'all people in a domestic relationship'.²⁸⁰

²⁷⁰ *Chaplin v Gregory (or Wyld)* 1950 (3) SA 555 (C).

²⁷¹ Sinclair (1996) at 290.

²⁷² Pension Funds Act, 1956.

²⁷³ Section 37C (1) (a).

²⁷⁴ Cronjé and Heaton (2004) at 229.

²⁷⁵ Schwellnus (2007) at 15.

²⁷⁶ COIDA, 1993 section (1) (c).

²⁷⁷ Sinclair (1996) at 285.

²⁷⁸ Cronjé and Heaton (2004) at 229.

²⁷⁹ Domestic Violence Act, 1998.

²⁸⁰ Cronjé and Heaton (2004) at 229. See also Clark (2002) at 637 and Schwellnus (2007) at 16.

3 Conclusion

This chapter has sought to address the failure of our law to expand discretionary judicial powers to provide equal protection to heterosexual cohabitants, particularly women. If there is no intervention, in the context of cohabitation, it will allow substantial suffering to continue in terms of the female cohabitee.

Since heterosexual cohabitation is not legally recognised currently, it is evident that judges and magistrates are powerless to do anything. Judges and magistrates cannot enforce a law or provide a legal remedy to a relationship that is not legally protected. South African legislation, like English law, has not been consistent. As yet, there is no single statute that regulates heterosexual cohabitation or addresses the consequences of its breakdown.

Fortunately, the Draft Domestic Partnerships Bill²⁸¹ may provide some relief if and when Parliament decides to enact it. (The Draft Bill will be discussed in Chapter six).

As stated earlier, the victims of the collapse of domestic partnerships are largely women, finding themselves without legal redress, unless they happen to fall under one of the statutes that offer limited protection, e.g. the Domestic Violence Act²⁸². Those who suffer most are women cohabitees, and they are mostly the ones, after the termination of the relationship, who are left without assets or support.

The increase in cohabitation is indicative of changing mores. Many people are accepting cohabitation these days and although the moral and social stigmas attached thereto have not disappeared completely, they have diminished substantially.

I am of the opinion that our law fails to protect women who cohabit, since domestic partnerships entail mutual dependence and support, and the legal duty of support should be extended to them. When the legislature fulfils its duty, it will clarify and simplify

²⁸¹ Draft Domestic Partnerships Bill (2008).

²⁸² Domestic Violence Act, 1998.

issues, such as, maintenance, dependant's action for damages, maintenance of a surviving partner out of the deceased's estate, etc. But now the Draft Bill²⁸³ has changed that perception of the majority in South Africa, despite some criticism against it.

Mrs Robinson's misfortune causes one to ask further questions, such as, whether her situation was the most appropriate one to test the rights of heterosexual cohabitants? How does a person determine when somebody is vulnerable enough for a court to come to his or her assistance? In this context, one can submit that, by contrast, it was theoretically open to Mrs Robinson and Mr Shandling to marry and, by doing so, that would have brought about the ensuing mutual duty of support. However, they exercised their freedom of choice.

In my view, the Legislature has a duty to intervene in order to help vulnerable cohabitants and the passing of the Draft Bill²⁸⁴ will fulfill that duty.

The Draft Bill²⁸⁵ does not only contain clauses to provide protection for intestate succession²⁸⁶ but also for delictual claims²⁸⁷ and any reference to 'spouse' in the MOSSA²⁸⁸ includes the cohabitee.²⁸⁹

²⁸³ Draft Domestic Partnerships Bill (2008).

²⁸⁴ Draft Domestic Partnerships Bill (2008).

²⁸⁵ Draft Domestic Partnerships Bill (2008).

²⁸⁶ Clause 20.

²⁸⁷ Clause 21.

²⁸⁸ MOSSA, 1990.

²⁸⁹ Clause 19.

CHAPTER FIVE

WOMEN COHABITEES AND MARRIAGE PARTNERS: A COMPARISON

1 Introduction

‘... a man and woman who, for good or bad elect to live in concubinage rather than marry, make a deliberate choice and cannot complain if the consequences of marriage do not attach to their union. To use a well-worn cliché, they cannot “have their cake and eat it”. I am not persuaded that there is a case for creating a special status of concubinage, either equivalent in its effect to a valid marriage or positioned somewhere between a marriage and a passing, promiscuous relationship’.²⁹⁰

This 1972 statement is one of the reasons that prompted me to conduct this research with regard to cohabitation in South Africa.

Having regard to my discussion of African Customary, and Muslim marriages, as well as cohabitation generally, it is evident that the Legislature is in the position to provide protection for women in a domestic relationship²⁹¹ in the form of the Draft Domestic Partnerships Bill²⁹² which was tabled specifically to address the protection for cohabitees.

The aim of this research, *inter alia*, has been to determine whether any development in relation to the law relevant to cohabitation will transpire.²⁹³ The Civil Union Act²⁹⁴ came into operation on 30 November 2006. The purpose of the Act is ‘to provide for the solemnisation of civil unions, by way of either a marriage or civil partnership ...’²⁹⁵ but the position of heterosexual cohabitees appears to be less certain.

²⁹⁰ Hahlo (1972) 331.

²⁹¹ The Constitution, 1996. Section 9(4) states that ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including... marital status...’.

²⁹² Draft Domestic Partnerships Bill (2008).

²⁹³ Draft Domestic Partnerships Bill (2008).

²⁹⁴ Civil Union Act, 2006.

²⁹⁵ Civil Union Act, 2006.

The RCMA²⁹⁶ denotes the development with regard to Customary marriages, and gives the woman the option to either enter into a Customary marriage or a civil marriage. The RCMA²⁹⁷, in particular, protects the equal status of women to that of men.²⁹⁸ Whilst one can applaud the gradual development of this by means of case law as well as legislation, the relief, however, has been only for women in Customary marriages and, to a certain extent, Islamic marriages, but there has been no relief for cohabitants in similar circumstances.²⁹⁹

This chapter will investigate the difference between marriage and cohabitation in terms of the legal consequences attached to such relationships. A distinction must be drawn between marriage and cohabitation, and the decision in the *Volks*³⁰⁰ case illustrates the discrimination against females who choose to cohabit. The question that raises the most concern is: How should the law treat people who choose to live in what is called cohabitation, but which does not result in marriage? The problem is actually complicated by a lack of definitional clarity of what, for instance, could be included under ‘marriage’ or ‘spouse’ in our family law. This is clear from the *Daniels* case,³⁰¹ and the *Volks* case.³⁰²

The majority judgment in the *Volks*³⁰³ case demonstrates no compassion for the social and economic context of women’s lives, and the disadvantage suffered by them.³⁰⁴

According to Jagwanth,³⁰⁵ women who cohabit are stigmatised and suffer tremendous prejudice, which the Legislature fails to address. The Draft Domestic Partnerships Bill³⁰⁶ attempts to alleviate this stigmatisation.

²⁹⁶ RCMA, 1998.

²⁹⁷ RCMA, 1998.

²⁹⁸ *Seemela v Minister of Safety and Security* (1998) 1 ALL SA 408 (W) at 410B-D.

²⁹⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁰⁰ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁰¹ *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC).

³⁰² *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C).

³⁰³ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at paras 63-68.

³⁰⁴ Lind ‘Domestic partnerships and marital status discrimination’ in C Murray *et al* (2005) at 112.

³⁰⁵ Jagwanth ‘Expanding equality’ in C Murray *et al* (2005) at 136.

³⁰⁶ Draft Domestic Partnerships Bill (2008).

More questions come to mind when one attempts to differentiate between the two concepts, namely, marriage and cohabitation. To some extent, they are so synonymous with each other, and yet legislation provides full legal protection to marriage but only some protection to cohabitation.

Marriage, including polygynous marriages in terms of the RCMA,³⁰⁷ and civil unions, are currently the only legally recognised intimate partnership. Whereas marriage is considered to be sacred, cohabitation has a more sinister connotation, and is regarded as a threat to the institution of marriage and to a stable society.³⁰⁸ Traditionally cohabitation refers to the relationship between a man and a woman who live together apparently as husband and wife, without having gone through a legal ceremony of marriage.³⁰⁹

At first, the High Court in the *Volks*³¹⁰ case gave the impression that cohabitation and marriage was on an equal footing, and that both shared the same legal consequences on the death of a spouse or partner, but the turning point came when the majority in the Constitutional Court decided that there was a distinction between marriage and cohabitation, and that this distinction could not be construed as to be unfair.³¹¹ Cohabitation without marriage is common, and over the years various issues relating to the position of women in society and the disadvantages suffered by them, have been identified.³¹²

Therefore this chapter attempts to harmonise the law in this area with the rights to equality³¹³ and dignity³¹⁴ contained in the Draft Bill of Rights. The emphasis is on the existence of equality between marriage and cohabitation, and the Legislature and the Court's failure to develop the Common law with regard to cohabitation, but specifically

³⁰⁷ RCMA, 1998.

³⁰⁸ Hutchings and Delpont (1992) at 121; see also Kaganas and Murray (1991) *Acta Juridica* 116; Dlamini (1985) at 701.

³⁰⁹ Hahlo (1983) at 244; see also Bekker (1991) at 1.

³¹⁰ *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C).

³¹¹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 56.

³¹² See Church (1997) at 289.

³¹³ Constitution, 1996 section 9.

³¹⁴ Constitution, 1996 section 10.

the Legislature's reluctance to expedite the enactment of the 2008 Draft Domestic Partnerships Bill.

2 Distinction between marriage and cohabitation

Different forms of marriages are recognised in South African law. We can distinguish between monogamous civil marriages, monogamous and polygynous African Customary marriages, monogamous and polygynous Muslim marriages, and other marriages. The civil marriage is the marriage that was introduced via the Roman-Dutch law. When the RCMA³¹⁵ came into effect, Customary marriages were recognised as valid marriages. One of the great advantages of a society based on the marriage relationship is that marriage is easily proved. Cohabitation, on the other hand, not only exists for a variety of reasons, but a greater variety of circumstances might be used to demonstrate whether or not it exists.³¹⁶

There are some significant differences between marriage and cohabitation, as determined by our legislation and case law.³¹⁷ Marriage partners are unable to enter into another civil marriage during the subsistence of the marriage, whereas both partners who cohabit are entitled to conclude a civil marriage with someone else.³¹⁸ Spouses are obliged to provide maintenance to one another, but cohabitees are not obliged to provide maintenance unless the parties have contractually agreed to it.³¹⁹ The marriage can only be terminated during the lifetime of both spouses by an order of divorce, but cohabitees need no order from a court to terminate their relationship.³²⁰

In the *Volks*³²¹ case Skweyiya J acknowledged that women in domestic partnerships were often unmarried because they had no choice in the matter, but held that the answer lay in regulating long-term life partnerships through legislation.³²²

³¹⁵ RCMA, 1998.

³¹⁶ Lind (2005) at 122.

³¹⁷ Examples are the ISA (1987), MOSSA (1990) and the *Volks* case (2005).

³¹⁸ Robinson (2009) at 40.

³¹⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 56.

³²⁰ Robinson (2009) at 40.

³²¹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 59.

³²² *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at paras 64-66.

In the first place, as in other societies, in South African family law marriage is recognised as a legal institution.³²³ This is clear from the various legislative enactments that provides for its conclusion and dissolution.³²⁴

One of the arguments against the recognition of domestic partnership, is that it can undermine the sacredness of marriage, and discourage people from marrying.³²⁵ These marginalised, vulnerable people of society are only protected, to some extent, if they conclude any valid marriage or a civil union.³²⁶

Sinclair³²⁷ says that marriage ‘is most often distinguishable from cohabitation only by the piece of paper that testifies to its existence’.

Murray³²⁸ argues that women would be able to show oppressive practices irrespective of the type of marriage they may be in. I would say that many people in South Africa see little difference between marriage and cohabitation.

Although most international instruments dealing with human rights and many constitutions of other countries,³²⁹ contain specific provisions on the protection of families as well as the right to marry, there are no such provisions in the Constitution of South Africa.³³⁰ I prefer to argue that our courts should focus more on section 15(3)(a) of the Constitution that states clearly-

‘This section does not prevent legislation recognizing –

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or

³²³ Robinson *et al* (2009) at 40.

³²⁴ Notably the Marriage Act, 1961 and the Divorce Act, 1979.

³²⁵ See Hahlo (1983) at 262-3.

³²⁶ De Vos (2008) at 129.

³²⁷ Sinclair (1996) at 293.

³²⁸ Murray (1994) at 37; also see Church J (1997) at 292.

³²⁹ See Article 23(1) of the International Covenant on Civil and Political Right (1996) which was ratified by South Africa in December 1998; see too The Africa [Banjul] Charter on Human and People’s Rights (1986) ratified by South Africa in July 1986.

³³⁰ See *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 T (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), in which the Constitutional Court rejected the argument that the present Constitution should contain such a right.

- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion’.

Currently marriage is also seen as an institution which forms the basis of the social structure which serves the public interest, and which is the focus of public attention. In *Ryland v Edros*,³³¹ Farlam J indicated the need for South African family law to recognise diversity in marriage forms and the possibility of a pluralistic recognition of different forms of marriage, including the potentially polygynous Muslim marriage.³³²

3 Why do people choose to cohabit?

Hutchings and Delpont³³³ opine that one should distinguish between persons who do not wish to marry and those persons who are not allowed to marry. According to these authors, the former occurs either because of a previous unhappy marriage, or the parties may feel that their relationship might be spoiled by the formality of marriage. They opine that cohabitation, on the other hand, represents a more flexible, free and equal relationship. This has, therefore, become an important factor in choosing cohabitation above marriage.³³⁴

Those not allowed to marry, include persons within the prohibited degrees of blood-relationship or affinity. A person may naturally not marry if he or she is already married. Most of these people view cohabitation as the only solution.³³⁵

Clark³³⁶ avers that most cohabitees prefer not to formalize their relationship publicly. Some couples prefer cohabitation because it does not legally commit them for an extended period, and because it is easier to establish and dissolve without the pricey legal costs often associated with a divorce.

³³¹ *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) at 704D.

³³² *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) at 704D.

³³³ Hutchings and Delpont (1992) at 122.

³³⁴ Hutchings and Delpont (1992) at 122.

³³⁵ Hutchings and Delpont (1992) at 122.

³³⁶ Clark (2002) at 635.

Goldblatt,³³⁷ on the other hand, states that migrancy is one of the main reasons why people in South Africa cohabit. She says that there are people who are of the view that those people who choose cohabitation above marriage are merely exercising their freedom of choice because the consequences attached to marriage eliminate their powers.³³⁸

Lind³³⁹ is amazed that so many people choose to cohabit despite the insecurity attached to it, as well as the legal position they find themselves in. The author states further that if South Africans perceived marriage as the exclusive field of relationship, the coming into effect of the Constitution changed that perception.³⁴⁰ This averment is also supported by the progress towards the recognition of cohabitation made in legislation since 1996.³⁴¹

Schwellnus³⁴² opines that parties are cohabiting if they have a stable relationship in which they cohabit as married persons. Heterosexual cohabitation differs from marriage, both as regards the way it is entered into, and as regards to the consequences it entails.

Monareng³⁴³ is of the opinion that the main reasons why people cohabit are

- ‘1 Poverty and unemployment: women get into these relationships because most of them need men to support them and their children, because men usually have access to work, income and accommodation.
- 2 Women are in a weaker position than men and are unable to compel their partners to marry them. Men refuse, because they know they will be able to enter and leave relationships freely with no legal obligations to support the woman.
- 3 Legal ignorance. Many women believe that simply living with a man for a period of time will entitle them to legal rights.

³³⁷ Goldblatt (2003) at 610.

³³⁸ Goldblatt (2003) at 615

³³⁹ Lind (2005) at 116.

³⁴⁰ Lind (2005) at 116.

³⁴¹ Lind (2005) at 116.

³⁴² Schwellnus (2007) at 1.

³⁴³ Monareng (2007) at 128; see also Goldblatt (2003) at 610.

- 4 Some men are married to other spouses and, accordingly, cannot marry their current partner’.

Monareng³⁴⁴ states further that some African cohabitees erroneously believe that if they cohabit for more than 6 months, their relationship will be recognised and they will be entitled to support upon the termination of their relationship.

4 Principle of equality

It is important to remember that Mrs Robinson in the *Volks*³⁴⁵ case was simply the latest example of the inequality in all family relationships by married women as well as women who cohabit in the current social climate. In the *Volks*³⁴⁶ case the majority found that Mrs Robinson’s claim could only succeed if she could convince the Court that the MOSSA³⁴⁷ breached the equality right entrenched in section 9 of the Constitution.

After the *Volks*³⁴⁸ case, the first version of the Draft Civil Union Bill³⁴⁹ contained provisions dealing with domestic partnerships. Parliament, however, enacted the Civil Union Act³⁵⁰ in November 2006 but excluded the provisions dealing with heterosexual domestic partnerships.³⁵¹ The provisions of this Act had an effect to the judgment in the *Gory*³⁵² case where the Court gave recognition not only to married same sex couples but also to unmarried same sex partners.³⁵³ The same rights were not extended to heterosexual cohabitees.³⁵⁴ It was only in 2008 that the Draft Domestic Partnerships Bill³⁵⁵ was tabled for the public’s comment. The Draft Bill³⁵⁶ is a step in the right direction and when passed, the relevant equality and human dignity will be provided.

³⁴⁴ Monareng (2007) at 126.

³⁴⁵ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁴⁶ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 49.

³⁴⁷ MOSSA, 1990.

³⁴⁸ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁴⁹ Civil Union Bill (2006).

³⁵⁰ Civil Union Act, 2006.

³⁵¹ Goldblatt (2008) at 1.

³⁵² *Gory v Kolver NO* 2007 (4) SA 97 (CC).

³⁵³ *Gory v Kolver NO* 2007 (4) SA 97 (CC) at para 29.

³⁵⁴ De Vos (2008) at 130.

³⁵⁵ Draft Domestic Partnerships Bill (2008).

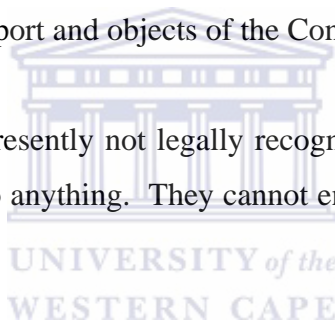
³⁵⁶ Draft Domestic Partnerships Bill (2008).

Subject to a few criticisms regarding the Draft Bill,³⁵⁷ all our hopes and beliefs to be treated equally and with dignity are contained in the Draft Bill.³⁵⁸ It is so ironic that Parliament is delaying the enactment of the Draft Bill³⁵⁹ and yet it recognised registered partnerships for same sex partners.

5 Conclusion

The position of the woman in society has improved dramatically over the past few years, and the growing trend towards individualism has led to women's economic, social and sexual independence. Independence and equality are of the utmost importance to modern women, and traditional marriages were often seen to enforce inequality.³⁶⁰ It is not only the courts that have a duty to ensure that equality, which is one of the objectives of the Constitution, is achieved; the Legislature also has the task of ensuring that the law is not inconsistent with the spirit, purport and objects of the Constitution.³⁶¹

Heterosexual cohabitation is presently not legally recognised and, until it is, judges and magistrates are powerless to do anything. They cannot enforce a law upon a relationship that is not legally protected.



The Civil Union Act³⁶² was enacted to afford protection for same sex marriages and domestic partnerships. The emphasis was on the fact that the partners must have undertaken reciprocal duties.³⁶³

Since 1994 the law has changed significantly to recognise not only Customary monogamous and polygynous marriages but also Muslim monogamous and polygynous marriages to some extent, same-sex marriages and registered partnerships.³⁶⁴ African and Muslim marriages underpin development because the consequences of non-recognition

³⁵⁷ Draft Domestic Partnerships Bill (2008).

³⁵⁸ Draft Domestic Partnerships Bill (2008).

³⁵⁹ Draft Domestic Partnerships Bill (2008).

³⁶⁰ See Hutchings and Delport (1992) at 122.

³⁶¹ Constitution, 1996. Section 35(3).

³⁶² Civil Union Act, 2006.

³⁶³ *Gory v Kolver NO* 2007 (4) SA 97 (CC) at para 28.

³⁶⁴ The Alliance (2008) at 3

can be offensive for members of the family; left unprotected by law, they are accorded few of the rights enjoyed by members of legally constituted families. Following earlier decisions on monogamous Muslim marriages, the decision in the *Hassam*³⁶⁵ case has brought some relief for Muslim women who find themselves in polygynous marriages.

The RCMA³⁶⁶ was enacted to bring relief to Customary marriages and to recognise the rights of people to practise their customs and culture. It was also enacted to ensure that women in Customary marriages are entitled to an adequate share upon the dissolution of the marriage. If women are not aware of the Act, it will just be a 'paper law' and the Act will not achieve its purpose.³⁶⁷ The best empowerment tool that can be utilised to realise the purpose of the Act, is education.³⁶⁸

The only hope for cohabitantes now lies in the enactment of the Draft Domestic Partnerships Bill.³⁶⁹

The question that some people would ask is: Is it desirable to impose laws upon cohabitants who obviously wish to escape the legal implications of marriage? Some authors³⁷⁰ are of the opinion that marriage, the cornerstone of our society, would be threatened if the law gave even the vaguest recognition to cohabitation.

Some people do, after all, choose to cohabit without marriage in order to avoid the legal consequences of marriage. Those who live family lives outside of the traditional norms of marriage, will be left with the unjust results which the Constitutional Court in the *Volks*³⁷¹ case recognised, but failed to resolve.³⁷²

³⁶⁵ *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC).

³⁶⁶ RCMA, 1998.

³⁶⁷ Monareng (2007) at 129.

³⁶⁸ Monareng (2007) at 129.

³⁶⁹ Draft Domestic Partnerships Bill, 2008.

³⁷⁰ See Goldblatt (2003) at 617. See also Clark (2002) at 636-637, and Cooke (2005) at 557.

³⁷¹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁷² Lind (2005) at 130.

The *Volks*³⁷³ case illustrates that factors such as that the parties have shown their commitment to a shared household, the existence of a significant period of cohabitation, and the nature of financial and other dependency should be taken into account in assessing whether the arrangements that subsist constitute a domestic life partnership.³⁷⁴

The responsibility lies with the individual to protect his or her rights through an agreement that regulates the relationship itself.³⁷⁵ It is trite that the institution of marriage is regarded as a sacred union, and that it represents a fundamental aspect of society. This is emphasised by the way marriages are deemed to come into existence in terms of South African law albeit civil marriages, Customary marriages, Muslim marriages and civil unions. Any union that does not comply with the stipulated requirements of a civil union or any other marriage, does not enjoy the protection of the law. This is evident throughout this research. The Draft Bill³⁷⁶ makes provision for most of the protection afforded to married couples and, therefore, it is imperative that Parliament must expedite its enactment, since it ignored the plight of cohabitants when the Civil Union Act³⁷⁷ came into operation. The Draft Bill³⁷⁸ should be lauded for containing two categories of domestic partnerships, namely, registered domestic partnerships and unregistered domestic partnerships,

In the *Volks*³⁷⁹ case the Court was not asked to draft legislation that would regulate unmarried relationships. According to Lind,³⁸⁰ Mrs Robinson was simply asking the Court to find that the MOSSA³⁸¹ was inconsistent with the Constitution. Since the Court had sympathy for the vulnerability of cohabitants, one would have expected that it would find the statute in question to be non-compliant with the Constitution.³⁸² Cooke argues that this finding would have been one way to reduce that vulnerability, yet it may not

³⁷³ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁷⁴ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 18.

³⁷⁵ See *Ally v Dinath* 1984 (2) SA 451 (T) at 453G.

³⁷⁶ Draft Domestic Partnerships Bill, 2008.

³⁷⁷ Civil Union Act, 2006.

³⁷⁸ Draft Domestic Partnerships Bill, 2008.

³⁷⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 49.

³⁸⁰ Lind (2005) at 120.

³⁸¹ MOSSA, 1990.

³⁸² Cooke (2005) at 557.

have totally eliminated the vulnerability of cohabitants, but it would have narrowed the scope of their vulnerability.³⁸³

Rautenbach³⁸⁴ states that the non-recognition of cohabitation violates the values of human dignity and equality.

Lind³⁸⁵ says that it is entrenched in the Constitution that the drafting and practice of the law must promote and pursue equality actively.³⁸⁶ This is the most useful way in which the law can be used to remedy patterns of past inequality, even in the instance that the majority judges in *Volks*³⁸⁷ appeared to have failed.³⁸⁸

In order to achieve legal certainty about the recognition of domestic partnerships, legislative recognition should be given to all domestic partnerships in order to protect females in circumstances similar to those of Mrs Robinson in *Volks*.³⁸⁹ As mentioned earlier, Muslim polygynous marriages have received some recognition in South Africa. The RCMA³⁹⁰ also serves as an example with the recognition of polygynous Customary marriages as valid marriages. We also have the proposed Muslim Marriages Bill as well as the Domestic Partnerships Bill, 2008.

I therefore submit that it is of paramount importance that some degree of legal guidance is essential to clarify the position with regard to cohabitation and that the enactment of the Draft Bill³⁹¹ must see the light to bring cohabitants on equal footing with their married counterparts.

³⁸³ Cooke (2005) at 557.

³⁸⁴ Rautenbach and Du Plessis (2000) at 309.

³⁸⁵ Lind (2005) at 117.

³⁸⁶ Constitution, 1996. Section 9(2).

³⁸⁷ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁸⁸ Lind (2005) at 117.

³⁸⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³⁹⁰ RCMA, 1998.

³⁹¹ Draft Domestic Partnerships Bill (2008).

CHAPTER SIX

DRAFT DOMESTIC PARTNERSHIPS BILL

1 Introduction

The long awaited Draft Domestic Partnerships Bill made its appearance on 14 January 2008. This Draft Bill raised the hopes of cohabitees that they would receive the same legal protection as their married counterparts. The Department of Home Affairs published the Draft Domestic Partnerships Bill³⁹² (hereinafter the Draft Bill) in order to allow the public to give its input in respect thereof. The Department of Home Affairs had approached the South African Law Reform Commission (SALRC) during 1996 to investigate and recommend legislation for a new marriage dispensation for South Africa.³⁹³ The SALRC invited interested parties and bodies to comment on the adequacy of the Marriage Act.³⁹⁴

In 1984 New South Wales, Australia, enacted the *De Facto Relationships Act*³⁹⁵ which granted extensive rights to heterosexual domestic partners, and put them almost on an equal legal footing with married couples. Goldblatt³⁹⁶ states that this presumption-based approach to *de facto* relationships is a progressive and practical model where the focal point is to focus on the functions of specific relationships rather than on their form. Goldblatt also raises an interesting point, namely that since the law has generally been written by middle class men, other members of society, namely women, gay men and lesbians, the indigent and disadvantaged groups found themselves outside the law's positive embrace,³⁹⁷

³⁹² Domestic Partnerships Bill (2008).

³⁹³ SALRC (2006) at 1.

³⁹⁴ Marriage Act, 1961.

³⁹⁵ *De Facto Relationships Act*, 1984 (NSW).

³⁹⁶ Goldblatt (2008) at 4.

³⁹⁷ Goldblatt (2008) at 3.

Before the drafting of the Draft Bill a report³⁹⁸, calling for a system of registration of domestic partnerships alongside the recognition of *de facto* partnerships, was incorporated in the Civil Union Bill.³⁹⁹ This report was heavily influenced by the New South Wales' *De Facto* Relationships Act.⁴⁰⁰ The Centre for Applied Legal Studies (CALS) recommended that Parliament should accept the provisions of the Bill⁴⁰¹ which regarded domestic partnerships. According to the CALS submission,⁴⁰² the 2001 census revealed that 2 389 705 individuals described themselves as living in domestic partnerships, and that this large group of people, unfortunately, did not fall within the scope of family law. According to the Alliance, the CALS conducted research as to why people cohabit, and the research indicated that poor women have limited choices with regards to the type of relationship in which they find themselves or their financial arrangements.⁴⁰³ In the *Volks*⁴⁰⁴ case the Court held that:

'Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners...'.⁴⁰⁵

The Court said that legislative intervention to assist these vulnerable women, who are mostly poor and illiterate, was appropriate and necessary.⁴⁰⁶

According to Goldblatt⁴⁰⁷ the first draft of the Civil Union Bill⁴⁰⁸ also contained provisions which dealt with the recognition of domestic partnerships, but that, during the preparation of the second draft of the Civil Union Bill,⁴⁰⁹ intervention took place.

³⁹⁸ Goldblatt (2008) at 6.

³⁹⁹ Civil Union Bill (2006).

⁴⁰⁰ *De Facto* Relationships Act, 1984.

⁴⁰¹ Draft Domestic Partnerships Bill (2008).

⁴⁰² Centre for Applied Legal Studies (2006) at 2.

⁴⁰³ The Alliance for the Legal Recognition of Domestic Partnerships 'Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill, 2008,' (2008) at 2.

⁴⁰⁴ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

⁴⁰⁵ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at paras 63-4.

⁴⁰⁶ Centre for Applied Legal Studies (2006) at 3.

⁴⁰⁷ Goldblatt (2008) at 7.

⁴⁰⁸ Civil Union Bill (2006).

⁴⁰⁹ Civil Union Bill (2006).

Goldblatt⁴¹⁰ asserts that the Parliamentary Portfolio Committee made a recommendation that the section which deals with domestic partnerships should be removed because of time constraints, and as a result of the complexity of the issues involved. The Civil Union Act was passed in 2006 without the section that deals with domestic partnerships. The Parliamentary Portfolio Committee also undertook to table a Domestic Partnerships Bill in 2007, but to no avail.⁴¹¹ The Draft Bill did, however, see the light of day in 2008, and was placed in the public domain by the Department of Home Affairs for comments, with submissions being called for by 15 February 2008. De Vos⁴¹² criticises the Draft Bill in that it was tabled without the provision which had been stipulated in the Civil Union Bill.⁴¹³ Instead, the Draft Bill distinguishes between registered partnerships and unregistered partnerships, and it seems as if the authors of the Draft Bill 'rely heavily on the agency of individual partners or - where that fails - on the court to protect the marginalised and vulnerable'.⁴¹⁴

2 Purpose of Draft Bill

The purpose of this Bill is to provide for the legal recognition of domestic partnerships, to enforce the legal consequences of domestic partnerships, and also to provide details on matters incidental to domestic partnerships.⁴¹⁵

3 Preamble of Draft Bill

The Preamble of the Draft Bill refers to section 9(1) of the Constitution,⁴¹⁶ which states that 'everyone is equal before the law and has the right to equal protection and benefit of the law', despite the fact that heterosexual cohabitantes have no protection when he or she finds him or herself in a permanent domestic partnership. The Alliance for the Legal Recognition of Domestic Partnerships (hereinafter 'the Alliance') recommended a more detailed Preamble which outlines the rationale behind the right to equality and dignity.⁴¹⁷

⁴¹⁰ Goldblatt (2008) at 8.

⁴¹¹ The Alliance (2008) at 1-2.

⁴¹² De Vos (2008) at p134.

⁴¹³ Civil Union Bill, 2006 .

⁴¹⁴ De Vos (2008) at 134.

⁴¹⁵ Draft Domestic Partnerships Bill (2008).

⁴¹⁶ Constitution of the Republic of South Africa, 1996.

⁴¹⁷ The Alliance (2008) at 4.

The Alliance further requested the deletion of the term ‘opposite sex’, as it was discriminatory in that it excluded same-sex couples from benefiting under the Act.⁴¹⁸

4 Definitions in Draft Bill

The Draft Bill defines ‘domestic partnership’ to mean ‘a registered domestic partnership or unregistered domestic partnership between two persons who are both 18 years of age or older, and includes a former domestic partnerships’. The Alliance supports the definition of ‘child of domestic partnership’⁴¹⁹ which I also support, because the status of the child automatically changes, that is, from a child born out of wedlock to a legitimate child. I also share the Alliance’s sentiments that the term ‘duty of support’ should have the same meaning as the one provided for in Common law.⁴²⁰ The Alliance rightfully argues that the term ‘pet’ should be replaced with ‘animals’, because what could happen when the one partner owned a horse or chickens, etc.⁴²¹. The Alliance recommends that the definition of ‘court’ should be broadened to include magistrates’ courts, and rightfully also points out that the definition of ‘family’ should be deleted.⁴²² What is also important is that we have at present a Draft Bill, and that, when the final Bill is passed, the Constitutional Court could decide on the constitutionality of the Act’s provisions.

5 Objectives of Draft Bill

The Draft Bill aims to guarantee the rights of equality and the dignity of cohabiters. The aim is also to reform family law to be in compliance with the applicable provisions contained in the Draft Bill of Rights, through the-

- ‘ (a) recognition of the legal status of domestic partners;
- (b) regulation of the rights and obligations of domestic partners;
- (c) protection of the interests of both domestic partners and interested parties on the termination of domestic partnerships; and
- (d) final determination of the financial relationships between domestic partners and interested parties when domestic partnerships terminate’.⁴²³

⁴¹⁸ The Alliance (2008) at 4.

⁴¹⁹ The Alliance (2008) at 4.

⁴²⁰ The Alliance (2008) at 5.

⁴²¹ The Alliance (2008) at 5.

⁴²² The Alliance (2008) at 5.

⁴²³ Draft Domestic Partnerships Bill (2008) at clause 2.

The Alliance does not support the objectives of the Draft Bill, since it merely refers to the children of domestic partnerships. It should also have included the protection of children as part of its objectives as well.⁴²⁴

6 Requirements for registered domestic partnerships

The Draft Bill distinguishes between registered domestic partnerships⁴²⁵ and unregistered domestic partnerships.⁴²⁶ The Alliance welcomes the introduction of registered domestic partnerships since more options are created in order for couples to choose how their relationship should be regulated.⁴²⁷ Unlike civil unions, civil marriages and Customary marriages which are by default in community of property if no antenuptial contract is concluded, a couple may enter into a registered domestic partnership which has lesser cumbersome registration requirements.⁴²⁸ As in the case of marriage, a cohabitee may only be a partner in one registered domestic partnership at any given time.⁴²⁹ If one of the partners, or both, were previously married or a partner to any union, then documentary proof of a divorce order, or death certificate of the former spouse or partner, or a termination certificate⁴³⁰ must be submitted to the registration officer before the registration of a domestic partnership can take effect. Unlike in the case of a marriage, the Minister, or any officer in the public service authorised by the Minister, may appoint a registration officer to register the domestic partnership after the parties have declared in writing their willingness to register their domestic partnership.⁴³¹

As with a marriage, the declaration of the two domestic partners must be made in the presence of the registration officer, and the registration officer will then issue a registration certificate. The domestic partnership can only be registered if one of the

⁴²⁴ The Alliance (2008) at 7.

⁴²⁵ Clause 4.

⁴²⁶ Clause 26.

⁴²⁷ The Alliance (2008) at 7.

⁴²⁸ The Alliance (2008) at 7.

⁴²⁹ Clause 4(1).

⁴³⁰ Clause 4(3).

⁴³¹ Clauses 5 and 6.

parties to the relationship is a South African citizen.⁴³² De Vos⁴³³ is of the opinion that clause 26(5) of the Draft Bill is discriminatory in that it provides no protection unless one of the partners is a South African. De Vos⁴³⁴ also opines that clause 26(5) is problematic in that it implies that ‘woman refugees, undocumented immigrants or even permanent residents’ are not entitled to protection when they choose to enter into a domestic partnership with another ‘refugee, undocumented immigrant or permanent resident’. The Alliance shares this sentiment to the extent that the Draft Bill ignores the fact that many of the people who are not South African citizens, are usually those who find themselves in domestic partnerships.⁴³⁵ The Alliance⁴³⁶ submits that section 8 of the Civil Union Act⁴³⁷ and section 3(2) of the RCMA⁴³⁸ should be amended to include a reference to registered domestic partnerships. The Draft Bill sets out that both parties must be 18 years old or older if they intend having their relationship registered as a domestic partnership.⁴³⁹ In the case of marriage, a person under the age of 18 may conclude a marriage if both parents consent to the marriage. In addition, however, when a boy is below the age of 18 years and a girl below the age of 15 years, the Minister of Home Affairs must grant written permission if he or she considers the marriage to be desirable.⁴⁴⁰ The Draft Bill is silent in respect of minors, prodigals, mentally ill persons and partners who have been placed under curatorship, and who wish to register a domestic partnership.

As in the case of marriage, the registration officer submits the registration register to the officer in the public service who is responsible for the population register in his or her area of responsibility. The officer in the public service will then include the particulars of the registered domestic partnership in the population register, as prescribed by the provisions of section 8(e) of the Identification Act.⁴⁴¹

⁴³² Clause 4(6).

⁴³³ De Vos (2008) at 137.

⁴³⁴ De Vos (2008) at 137.

⁴³⁵ The Alliance (2008) at 8.

⁴³⁶ The Alliance (2008) at 8.

⁴³⁷ Civil Union Act, 2006.

⁴³⁸ RCMA, 1998

⁴³⁹ Clause 6(1).

⁴⁴⁰ Cronjé and Heaton (2004) at 20-21.

⁴⁴¹ Identification Act, 1997.

6.1 Property regime

The Alliance proposes that clause 7(2) of the Draft Bill should be amended so as to refer to clauses 22 and 21.⁴⁴²

As with a marriage, where the parties to the marriage are issued with a marriage certificate, the parties to the registered domestic partnership are issued with a registration certificate. Similarly to a marriage with an antenuptial contract, the Draft Bill also makes provision for the parties to enter into a further agreement which regulates their financial affairs. The registered domestic partnership agreement must also be attached to the registration certificate.⁴⁴³

The law presumes that all marriages are in community of property. However, no general community of property exists between the parties in a registered domestic partnership. As stated earlier, the Draft Bill provides for the partners to conclude a registered domestic partnership agreement.⁴⁴⁴ In the absence of such a registered partnership agreement,⁴⁴⁵ any other agreement concluded between the two partners will only bind them to the agreement.⁴⁴⁶

De Vos⁴⁴⁷ points out that even though a domestic partnership agreement was registered, a court still has the discretion to set aside the agreement if such agreement could result in serious injustice to any of the partners. The court thus has to consider the following⁴⁴⁸:

- ‘ (a) the terms of the registered domestic partnership agreement;
- (b) the time that has elapsed since the registered domestic partnership agreement was concluded;

⁴⁴² The Alliance (2008) at 8.

⁴⁴³ Clause 6(6).

⁴⁴⁴ Clause 7(3).

⁴⁴⁵ In terms of clause 6(8), a registration officer had to keep a record of all registrations of domestic partnerships he or she had conducted and also had to indicate in the register that a registered domestic partnership agreement did exist and had to attach a copy to the registration certificate.

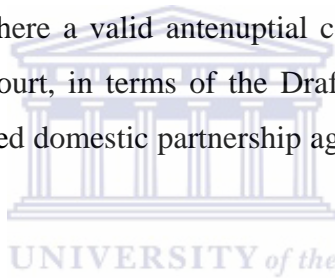
⁴⁴⁶ Clause 7(4).

⁴⁴⁷ De Vos (2008) at 134

⁴⁴⁸ Clause 8(3).

- (c) whether the registered domestic partnership agreement was unfair or unreasonable in the light of all circumstances at the time it was made;
- (d) whether the registered domestic partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made and whether those changes were foreseen by the parties or not;
- (e) the fact that the parties wished to achieve certainty as to the status, ownership and division of property by entering into the registered domestic partnership agreement;
- (f) the contributions of the parties to the registered domestic partnership;
and
- (g) any other matter that the court considers relevant'.⁴⁴⁹

As in the case of marriage, where a valid antenuptial contract determines the property division of the spouses,⁴⁵⁰ a court, in terms of the Draft Bill, may also decide on any matter with regard to a registered domestic partnership agreement based on the principles of the law of contract.⁴⁵¹



7 Legal consequences of registered domestic partnerships

With regard to the status of the parties, the Draft Bill does not specify whether the parties' status changes upon registering the domestic partnership, as in the case of a marriage. However, the Draft Bill is clear in stating that any party who is married under the Marriage Act,⁴⁵² married in compliance with the RCMA,⁴⁵³ or a spouse or a partner in a civil union, may not register a domestic partnership.⁴⁵⁴

If a potential partner was previously married, whether under the Marriage Act⁴⁵⁵ or the RCMA,⁴⁵⁶ or was a partner in a civil union partnership under the Civil Union Act,⁴⁵⁷ or a

⁴⁴⁹ Clause 8(3).

⁴⁵⁰ Cronjé and Heaton (2004) at 70.

⁴⁵¹ Clause 8(5).

⁴⁵² Marriage Act, 1961.

⁴⁵³ RCMA, 1998.

⁴⁵⁴ Clause 4(2).

⁴⁵⁵ Marriage Act, 1961.

⁴⁵⁶ RCMA, 1998.

partner in a registered domestic partnership as specified in the Draft Bill, he or she must provide a certified copy of the divorce order, or a death certificate of the former spouse or partner, or a termination certificate, where applicable. The certified copy will serve as proof that the former marriage, civil union or registered domestic partnership, had been legally terminated.⁴⁵⁸ This is the same as in the case of marriage.

One of the invariable consequences of a marriage is that it automatically gives rise to a reciprocal duty of support.⁴⁵⁹ In the Draft Bill, too, the registered domestic partners are required to maintain one another, in accordance with their respective financial means and needs,⁴⁶⁰ and the Alliance welcomes the recognition of a duty of support.⁴⁶¹

The children of a marriage are regarded as legitimate, and both parents have legal rights and responsibilities in respect of the child. The Draft Bill also makes provision that, when a child is born into a registered domestic partnership between a heterosexual couple, the male partner is deemed to be the biological father of that child. Similar rights and responsibilities are conferred upon him as in the case of his male counterpart in a marriage.⁴⁶² The Alliance urges that this section must be removed because the rights of fathers are already covered in the Children's Act⁴⁶³.

With regard to the occupation of the family home, both domestic partners are entitled to live there during the existence of the registered domestic partnership. As in the case of a marriage, it does not matter who owns or rents the property.⁴⁶⁴ However, the owning or renting registered partner may not eject the other registered partner from the family home during the existence of the registered domestic partnership.⁴⁶⁵ As with a marriage in community of property, the partner in a registered domestic partnership may not, without

⁴⁵⁷ Civil Union Act, 2006.

⁴⁵⁸ Clause 4(3).

⁴⁵⁹ Cronjé and Heaton (2004) at 40.

⁴⁶⁰ Clause 9.

⁴⁶¹ The Alliance (2008). at 8.

⁴⁶² Clause 17.

⁴⁶³ The Alliance (2008) at 10.

⁴⁶⁴ Clause 11(1).

⁴⁶⁵ Clause 11(2).

the written consent of the other registered partner, sell, donate, mortgage, let, lease or dispose of the joint property.⁴⁶⁶ The Alliance welcomes this clause, as well as clause 11(2)⁴⁶⁷ which states: ‘The registered partner who owns or rents the family home may not evict the other registered partner from the family home during the existence of the registered domestic partnership’.

8 Termination of registered domestic partnerships

Termination of the registered domestic partnership is both similar to, and different from, the termination of a marriage. As is the case of a marriage, the registered domestic partnership can be dissolved by death of one, or both, registered domestic partners,⁴⁶⁸ or by a court order.⁴⁶⁹ The difference is that the registered domestic partners may conclude a termination agreement, in order to regulate the financial consequences of the termination of their registered domestic partnership.⁴⁷⁰ The Alliance does not support this provision, and recommends that it will be in the interest of both registered domestic partners if the dissolution of their registered domestic partnership takes effect through a court order. The Alliance recommends that the court order enables the partners to enforce their termination agreement much easier,⁴⁷¹ and the Draft Bill should correspond with the intention of the Jurisdiction of Regional Courts Amendment Bill.⁴⁷² I support the Alliance’s⁴⁷³ view that it would be practical to consider the inclusion of sections similar to sections 8 (rescission, suspension or variation of orders), 10 (costs) and 12 (limitation of publication of particulars of divorce action) of the Divorce Act.⁴⁷⁴ I am also of the opinion that one party may, for some or other reason, be reluctant to execute his or her part of the agreement, and the other party will be compelled to approach a court for

⁴⁶⁶ Clause 10.

⁴⁶⁷ The Alliance (2008) at 8.

⁴⁶⁸ Clause 12(1)(a).

⁴⁶⁹ Clause 15(1).

⁴⁷⁰ Clause 14(1).

⁴⁷¹ The Alliance (2008) at 9.

⁴⁷² The Alliance (2008) at 9. The purpose of this Amendment Bill is to ‘enhance access to justice by conferring jurisdiction on courts for regional divisions which are distributed throughout the national territory to deal with civil matters ...’.

⁴⁷³ The Alliance (2008) at 9.

⁴⁷⁴ Divorce Act, 1979.

assistance.⁴⁷⁵ The Draft Bill specifies that the termination agreement must be in writing, must be signed by both registered domestic partners, and both registered domestic partners must declare that they have entered into the agreement without duress.⁴⁷⁶ The termination agreement may provide for-

- ‘(a) the division of joint and separate property;
- (b) the payment of maintenance to the other registered domestic partner; arrangements regarding the family home; and
- (c) any other matter relevant to the financial consequences of the termination of the registered domestic partnership’.⁴⁷⁷

The termination by a court order only applies where there are minor children born into the relationship. The registered domestic partners who have minor children, and who intend to terminate the registered domestic partnership, are compelled to make an application to a court for the termination order.⁴⁷⁸ The application to a court must be made in compliance with the provisions of the Supreme Court Act.⁴⁷⁹ The Alliance contends that specific reference to the High Court places limitations on access to justice, especially in the case of vulnerable women.⁴⁸⁰ One should also look at costs, because not everybody can afford to institute legal action. In approaching the High Court, the termination takes the same route as a divorce order. De Vos⁴⁸¹ raises an interesting question: what happens if there are no minor children, and one of the partners requests termination and the other party refuses. De Vos recommends, and I support the recommendation, that the Draft Bill should have made provision for such a situation.⁴⁸² The court takes cognisance of the welfare of minor children, and will only make an order which is in the best interests of a child. The same approach applies to the dissolution of a marriage.⁴⁸³ The court will go to the extent of appointing a legal practitioner to act on

⁴⁷⁵ The Alliance (2008) at 9.

⁴⁷⁶ Clause 14(2).

⁴⁷⁷ Clause 14(3) read with clause 12(1) (b).

⁴⁷⁸ Clause 15(1).

⁴⁷⁹ Supreme Court Act 59 of 1959 read with clause 15(2) of the Draft Domestic Partnerships Bill (2008).

⁴⁸⁰ The Alliance (2008) at 9.

⁴⁸¹ De Vos (2008) at 136.

⁴⁸² De Vos (2008) at 136.

⁴⁸³ Clause 16(1).

behalf of the child during the proceedings, and both registered partners may be held liable to pay the costs of such legal representation.⁴⁸⁴ I support the view of the Alliance that clause 16(5)(b) of the Draft Bill should be amended in accordance with the new terminology of the Children's Act 78 of 2005.⁴⁸⁵ Clause 17 of the Draft Bill deals with the rights of the male partner as the biological father of the children born into that relationship, and the Alliance rightfully request the deletion of this section since the rights of fathers are adequately dealt with in the Children's Act.⁴⁸⁶

After the termination of a registered domestic partnership, the court may, as with the dissolution of a marriage do make the following. It can set out a maintenance order, which is just and equitable, in respect of payment of maintenance by one registered domestic partner to the other partner for a specified period or until the other partner dies, marries, enters into a civil union or enters into another registered domestic partnership.⁴⁸⁷

The court will also consider certain factors before ordering the payment of maintenance, and the amount and nature of such maintenance. Such factors will include-

- (a) the respective contributions of each partner to the registered domestic partnership;
- (b) the existence and prospective means of each of the registered domestic partners;
- (c) the respective earning capacities, future financial needs and obligations of each of the registered partners;
- (d) the age of the registered partners;
- (e) the duration of the registered domestic partnership;
- (f) the standard of living of the registered domestic partners prior to the termination of the registered domestic partnership; and
- (g) any other factor which in the opinion of the court should be taken into account'.⁴⁸⁸

⁴⁸⁴ Clause 16(7).

⁴⁸⁵ The Alliance (2008) at 10.

⁴⁸⁶ The Alliance (2008) at 10.

⁴⁸⁷ Clauses 18(1).

⁴⁸⁸ Clauses 18(2).

The Alliance supports this clause as well as clauses 19 and 20 of the Draft Bill.⁴⁸⁹ Another advantage of the Draft Bill is that it makes provision that any reference to “spouse” in the MOSSA⁴⁹⁰ and in the ISA⁴⁹¹ must be construed as including a registered domestic partner.⁴⁹² I support the view of De Vos,⁴⁹³ that the Draft Bill partially remedies the injustice inflicted upon Mrs Robinson in the *Volks* case,⁴⁹⁴ because, in effect, it will, after its enactment, contribute to the amendment of the MOSSA⁴⁹⁵ which will then state that ‘spouse’ in that Act will also include a registered domestic partner.

A court may consider some of the above factors in its decision to make a maintenance order after the termination of a marriage.⁴⁹⁶ The Draft Bill also granted rights for the purpose of claiming damages in a delictual claim, in a case where one of the partners in a registered domestic partnership is killed by a third party in a wrongful and culpable manner.⁴⁹⁷ The Alliance proposes a more positive phrasing for clause 21(2), namely that ‘A partner in a registered domestic partnership may institute a delictual claim for damages based on the wrongful death of the other partner’. The Alliance⁴⁹⁸ also requests that clause 21(3) should be re-phrased accordingly since the clause only refers to COIDA, and yet there are quite a number of laws in which the partner is, or should be, recognized as a dependant. I find it unnecessary that both clauses should be re-phrased⁴⁹⁹ The Alliance is also of the opinion that the Draft Bill should not only regulate domestic partnerships which have ended, but should also provide some legal protection to domestic partners during their partnership.⁵⁰⁰

⁴⁸⁹ The Alliance (2008) at 10. Clause 19 states that ‘... a reference to “spouse” in the Maintenance of Surviving Spouses Act must be construed as to include a registered domestic partner,’ and section 20 states that ‘... a reference to “spouse” in the Intestate Succession Act must be construed to include a registered domestic partner’.

⁴⁹⁰ MOSSA , 1990.

⁴⁹¹ ISA, 1987.

⁴⁹² Clauses 19 and 20.

⁴⁹³ De Vos (2008) at 136.

⁴⁹⁴ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

⁴⁹⁵ MOSSA , 1990.

⁴⁹⁶ Cronjé and Heaton (2004) at 147-148.

⁴⁹⁷ Clause 21.

⁴⁹⁸ The Alliance (2008) at 10.

⁴⁹⁹ The Alliance (2008) at 10.

⁵⁰⁰ The Alliance (2008) at 7.

8.1 Property division after termination of registered domestic partnerships

When a dispute arises with regard to the division of property after the dissolution of a registered domestic partnership, then one or both of the registered domestic partners who dispute the division of property, may apply to a court for an order to divide their joint or separate property, as the court may deem fit.⁵⁰¹ The court will make an order which is just and equitable, after taking all relevant factors into consideration.⁵⁰² The court may also make an order, which is just and equitable, in a case where an application had been for the division of their separate property, and also to have the property transferred from one registered domestic partner to the other partner.⁵⁰³ De Vos correctly states that this clause seeks to address the imbalances in many relationships, where women mainly perform the chores in the relationship without being remunerated.⁵⁰⁴

When granting an order upon the application for the division of joint or separate property, the court must take into account-

- ‘(a) the existing means and obligations of the registered domestic partners;
- (b) any donation made by one of the registered domestic partners to the other during the subsistence of the registered domestic partnership;
- (c) the circumstances of the registered domestic partnership;
- (d) the vested rights of interested parties in the joint and separate property of the registered domestic partners;
- (e) the existence and terms of a registered domestic partnerships agreement, if any, between the registered domestic partners; and
- (f) any other relevant factors’.⁵⁰⁵

The Alliance welcomes the reference to both joint and separate property in clause 22 because it gives recognition to the partner who made contributions to the separate property of the other partner.⁵⁰⁶

⁵⁰¹ Clause 22(1). This section is erroneously referred to in clause 7(2) as clause 21.

⁵⁰² Clause 22(2).

⁵⁰³ Clause 22(3).

⁵⁰⁴ De Vos (2008) at 135.

⁵⁰⁵ Clause 22(4).

⁵⁰⁶ The Alliance (2008) at 10.

Before granting an order as contemplated in clause 22(3) of the Draft Bill,⁵⁰⁷ the court must be satisfied that it is just and equitable to do so, in that the applicant contributed directly or indirectly to the maintenance, or the increase, of the separate property or part of the separate property, of the respondent, during the existence of the registered domestic partnership.⁵⁰⁸ De Vos⁵⁰⁹ defines ‘contribution’ to include the contribution made in the capacity as a parent which was in the interest of the other party or the family as a whole. The Alliance⁵¹⁰ also supports the broad definition of ‘contribution’ in the Draft Bill because it reflects a growing perception by the courts, and the public at large, of value that is created by partners, specifically women, who care for families and children.

A party who wishes to make an application to a court for an order under clause 22 of the Draft Bill, must do so within two years after the termination of the registered domestic partnership.⁵¹¹ The Alliance raises a concern with regard to this requirement, because the same condition is not applicable to divorces in respect of civil marriages, civil unions or Customary marriages.⁵¹² The Draft Bill requires both registered partners to give written notice of the registered domestic partnership’s termination to interested parties.⁵¹³ The Alliance opposes this clause by claiming that it would result in a cumbersome process, especially if one partner is unaware of the other partner’s financial affairs.⁵¹⁴ The Draft Bill states that ‘when a registered domestic partnership is terminated, both registered partners are liable to give written notice of the termination to interested parties’.⁵¹⁵ In the event of the death of one or both of the registered domestic partners, the surviving registered partner or the executor of the estate of either registered domestic partner, will

⁵⁰⁷ Draft Domestic Partnerships Bill (2008).

⁵⁰⁸ Clause 22(5).

⁵⁰⁹ De Vos (2008) at 135.

⁵¹⁰ The Alliance (2008) at 4-5.

⁵¹¹ Clause 23(1). Clause 21 in this section must be replaced with Clause 22. The same applies to clause 25 of the Draft Domestic Partnerships Bill.

⁵¹² The Alliance (2008) at 11.

⁵¹³ Clause 24(1).

⁵¹⁴ The Alliance (2008) at 11.

⁵¹⁵ Clause 24(1).

be obliged to give written notice of the termination of the registered domestic partnership to all interested parties.⁵¹⁶

The Draft Bill is explicitly clear with regard to the termination of registered domestic partnerships by death and the registration of a termination agreement. Unlike the position which exists in a marriage, the Draft Bill is silent on what would happen in the event of one partner who wishes to terminate, while the other partner refuses to conclude a termination agreement.

9 Maintenance and property division after termination of unregistered domestic partnerships

The Draft Bill not only provides protection for registered domestic partnerships, but also for unregistered domestic partnerships. In this instance, one or both unregistered domestic partners may, after the dissolution of the unregistered domestic partnership through either death or separation, apply to a court for a maintenance order, an intestate succession order, or a property division order.⁵¹⁷ The Alliance rejects the phrase ‘after the unregistered domestic partnership has ended through death or separation’, and requests the deletion of clause 26(1), so that a person can approach a court during the subsistence of the partnership to claim relief.⁵¹⁸ A court will, however, decide whether a partnership is entitled to protection⁵¹⁹ considering all the circumstances of the relationship, including-

- (a) the duration and nature of the relationship;
- (b) the nature and extent of Common residence;
- (c) the degree of financial dependence or interdependence and any arrangements for financial support, between the unregistered domestic partners;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children of the unregistered domestic partnership;
- (g) the performance of household duties;

⁵¹⁶ Clause 24(2).

⁵¹⁷ Clause 26(1).

⁵¹⁸ The Alliance (2008) at 13.

⁵¹⁹ De Vos (2008) at 138.

- (h) the reputation and public aspects of the relationship; and
- (i) the relationship status of the unregistered domestic partners with third parties'.⁵²⁰

De Vos⁵²¹ is of the opinion that, despite the protection the Draft Bill purports to provide, the protection is not automatic. The Draft Bill in essence provides for a threshold test before legal protection for unregistered partners takes effect. De Vos⁵²² rightfully avers that the marginalised partner in an unregistered domestic partnership has to cross a number of hurdles in order to be entitled to protection. One hurdle, for instance, is proof that the partnership is of such a nature that it is entitled to legal protection. The SALRC recommended that the threshold question should be: whether the partners have lived as a couple.⁵²³ The SALRC correctly proposes that, when the court is satisfied that the parties lived as a couple, then it can be accepted that there was a mutual commitment.⁵²⁴ The SALRC⁵²⁵ also proposed two alternative options which could regulate unmarried and unregistered family partnerships. The first alternative is referred to as the *de facto* option, but should not be confused with the term “*de facto* relationship” of the NSW legislation. The second alternative is referred to as the *ex post facto* option. The former option refers to a ‘ascription’ model which creates rights and obligations for a couple in an intimate relationship during the existence of the unregistered relationship; and the latter option refers to the judicial discretion model which allows partners in former relationships to apply to the court for property division or maintenance in the event that the partners cannot reach agreement after the termination of their relationship. The SALRC recommended that legislation should automatically apply to both options.⁵²⁶ This would have created an ideal opportunity for unregistered domestic partners whose relationship has ended to be entitled to an automatic right to legal protection, and to apply to a court for property division or maintenance.

⁵²⁰ Clause 26(2).

⁵²¹ De Vos (2008) at 137.

⁵²² De Vos (2008) at 136.

⁵²³ SALRC (2006) at 393.

⁵²⁴ SALRC (2006) at 393.

⁵²⁵ SALRC (2006) at 369.

⁵²⁶ SALRC (2006) at 370.

In terms of the Draft Bill, a court will not make an order regarding the relationship of a partner who, at the time of the relationship, was also a spouse in a civil marriage, or a partner in a civil union or a registered domestic partnership, with a third party.⁵²⁷ This provision appears to be discriminatory, according to De Vos, who presumes that men in Customary marriages will be more likely to enter into unregistered domestic partnerships.⁵²⁸ The Alliance⁵²⁹ is of the opinion that the clause should be removed and replaced with one that allows courts to grant an order not only in respect of unregistered domestic partnerships that co-exist with a Customary marriage, but also where another type of union exists. De Vos⁵³⁰ argues that clause 26(5) may not pass constitutional scrutiny. I support the views of both the Alliance and De Vos that the law condones that an unregistered domestic partnership co-exists with a Customary union, but not with a civil marriage, civil union or registered domestic partnership. De Vos⁵³¹ argues further that men in Customary marriages are now allowed to have intimate partners as well as their traditional Customary spouses. De Vos⁵³² raises an interesting point: that women who enter into an unregistered domestic partnership with men who are married in terms of the Marriage Act⁵³³ or the Civil Union Act,⁵³⁴ will find no protection in law because they will not be viewed as being part of the vulnerable people in society.

De Vos⁵³⁵ relied on Constitutional Court decisions⁵³⁶ which, he claimed, categorically state that different treatment by law of at least permanent residents can constitute unfair discrimination in terms of section 9(3) of the Constitution⁵³⁷.

9.1 Maintenance after termination of unregistered domestic partnerships

⁵²⁷ Clause 26(4).

⁵²⁸ De Vos (2008) at 137.

⁵²⁹ The Alliance (2008) at 11.

⁵³⁰ De Vos (2008) at 137.

⁵³¹ De Vos (2008) at 141.

⁵³² De Vos (2008) at 137.

⁵³³ Marriage Act, 1961.

⁵³⁴ Civil Union Act, 2006.

⁵³⁵ De Vos (2008) at 137.

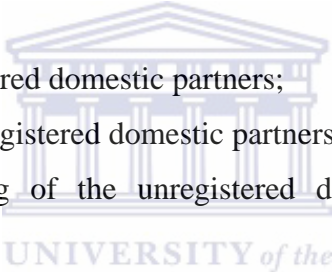
⁵³⁶ See *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B).

⁵³⁷ Constitution, 1996.

Unregistered domestic partners are not liable to maintain each other, and neither party is entitled to claim maintenance from the other, except as provided for in the Draft Bill. The Draft Bill makes provision for two types of maintenance orders.⁵³⁸ The Alliance proposes the deletion of clause 27, and that that clause should be replaced with the wording of clause 9 in the Draft Bill.⁵³⁹

9.1.1 Maintenance order after separation of unregistered domestic partners

In this instance, the court may, upon application of one or both partners in an unregistered domestic partnership, make an order which is just and equitable in respect of the payment of maintenance by one unregistered domestic partner to the other, for a specified period.⁵⁴⁰ The court, when deciding whether to order the payment of maintenance, and the amount and nature of such maintenance, must consider all relevant matters including-

- 
- (a) the age of the unregistered domestic partners;
 - (b) the duration of the unregistered domestic partnership;
 - (c) the standard of living of the unregistered domestic partners prior to the separation;
 - (d) the ability of the applicant to support him or herself adequately, in view of him or her having custody of a minor child of the unregistered domestic partnership;
 - (e) the respective contributions of each unregistered domestic partner to the unregistered domestic partnership;
 - (f) the existing and prospective means of each unregistered domestic partner;
 - (g) the respective earning capacities, future financial needs and obligations of each unregistered domestic partner; and
 - (h) the relevant circumstances of another unregistered domestic partnership or Customary marriage of one or both unregistered domestic partners, where applicable, insofar as they are connected to the existence and circumstances of

⁵³⁸ Clause 27. See also De Vos (2008) at 138.

⁵³⁹ The Alliance (2008) at 13.

⁵⁴⁰ Clause 28(1).

the unregistered domestic partnership, and any other factor which, in the opinion of the court, should be taken into account'.⁵⁴¹

9.1.2 Maintenance order after death of unregistered domestic partners

The Alliance correctly states that the appropriate heading under Part 11 of the Draft Bill should read 'Maintenance with respect to an unregistered domestic partnership' and not 'Maintenance after termination of unregistered domestic partnership'.⁵⁴² The Alliance also recommends that the heading above clause 28 of the Draft Bill should read 'Application for maintenance order' and not 'Application for maintenance order after separation'.⁵⁴³ The Alliance recommends further that clause 9, which extends the duty of support to registered partners, should also apply to unregistered domestic partners.⁵⁴⁴

When one of the unregistered domestic partners dies, the surviving partner is entitled to make an application to a court for an order for the payment of reasonable maintenance from the deceased's estate until his or her death, remarriage, or the registration of another registered domestic partnership.⁵⁴⁵ The provisions of the Administration of Estates Act⁵⁴⁶ apply in the event of an application to a court for the payment of maintenance.⁵⁴⁷ The Alliance⁵⁴⁸ does not support clause 29(3)(c) because it refers to competing claims between the surviving unregistered domestic partner and the surviving Customary spouse. I agree with the Alliance that clause 29(3)(c) constitutes unfair discrimination, and that the word 'Customary' should be removed, and the words 'or partner or spouse in a civil union, or registered domestic partnership' should be added after the word 'spouse'.⁵⁴⁹

⁵⁴¹ Clause 28(2).

⁵⁴² The Alliance (2008) at 13.

⁵⁴³ The Alliance (2008) at 13.

⁵⁴⁴ The Alliance (2008) at 12.

⁵⁴⁵ Clause 29(1).

⁵⁴⁶ Administration of Estates Act, 1965.

⁵⁴⁷ Clauses 29(2) and (3).

⁵⁴⁸ The Alliance (2008) at 12.

⁵⁴⁹ The Alliance (2008) at 12.

The court may consider the following circumstances when determining the reasonable maintenance needs of a surviving unregistered domestic partner-

- (a) the amount in the estate of the deceased available for distribution to heirs and legatees;
- (b) the existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered domestic partner;
- (c) the standard of living of the surviving unregistered domestic partner during the subsistence of the unregistered domestic partnership and his or her age at the time of death of the deceased;
- (d) the existence and circumstances of multiple relationships between the deceased and an unregistered domestic partner, and between the deceased and a Customary spouse; and
- (e) any other factor that it regards relevant'.⁵⁵⁰

The Alliance recommends the amendment of clause 30(d) of the Draft Bill: that the term 'Customary spouse' should be deleted and replaced with the words 'spouse, partner or spouse in a civil union or a registered domestic partner'.⁵⁵¹ The same proposal applies to clause 31(3) of the Draft Bill.

The surviving unregistered domestic partner may also bring an application to court for an order that he or she may inherit intestate, subject to two provisions.⁵⁵² In terms of the first provision,⁵⁵³ it is stated that 'where the deceased is survived by an unregistered domestic partner as well as a descendant, such unregistered domestic partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette*, whichever is the greater, as provided for in the Intestate Succession Act'.⁵⁵⁴

⁵⁵⁰ Clause 30. See also De Vos (2008) at 139.

⁵⁵¹ The Alliance (2008) at 12.

⁵⁵² Clause 31(1). See also De Vos (2008) at 139.

⁵⁵³ Clause 31(2).

⁵⁵⁴ ISA, 1987.

The second provision⁵⁵⁵ provides that, in the event of a dispute between the surviving unregistered domestic partner and the Customary spouse of a deceased partner regarding the benefits to be awarded, the court may once again make an order which is just and equitable having regard to all relevant circumstances of both relationships.

9.2 Property division after termination of unregistered domestic partnerships

If there is no agreement between the unregistered domestic partners, one, or both of them, may apply to court for an order to divide their joint or separate property.⁵⁵⁶ The court will make an order it deems just and equitable having regard to all the circumstances, also after taking into account⁵⁵⁷

- ‘(a) the existing means and obligations of the unregistered domestic partners;
- (b) any donation made by one unregistered domestic partner to the other during the subsistence of the unregistered domestic partnership;
- (c) the circumstances of the unregistered domestic partnership; the vested rights and interested parties in the joint and separate property of the unregistered domestic partnership; and
- (d) any other relevant factors’.



The Alliance requests that a further factor be added, viz, ‘the needs and interests of any child or children of the domestic partnership’.⁵⁵⁸

According to De Vos,⁵⁵⁹ before a court decides transfer to property of one party to another, the court must be satisfied that the beneficiary contributed directly or indirectly to the maintenance or increase of the separate property. He further proposed that ‘contribution’ should be defined as including ‘financial and non-financial contributions made directly or indirectly by the domestic partners’⁵⁶⁰ to the improvement of the joint property or the separate property of either domestic partner.

⁵⁵⁵ Clause 31(3).

⁵⁵⁶ Clause 32(1).

⁵⁵⁷ De Vos (2008) at 140.

⁵⁵⁸ The Alliance (2008) at 14.

⁵⁵⁹ Clause 32(4).

⁵⁶⁰ Clause 1.

An application for a court order in terms of clause 32 must be made within two years after the date on which an unregistered domestic partnership has terminated through separation or death.⁵⁶¹ The Alliance correctly points out that the references to clause 31 in clauses 33(1) and (2) were errors which have to be replaced with references to clause 32. According to the Alliance, the two years' application period will limit access to the courts, especially for vulnerable partners whom the Draft Bill purports to protect.⁵⁶²

10 Conclusion

It is evident that Mrs Robinson in *Volks v Robinson*⁵⁶³ would have been protected by the Draft Bill. However, other female cohabitees who enter into domestic partnerships with men, and who are simultaneously married in terms of the Marriage Act⁵⁶⁴ or Civil Union Act⁵⁶⁵, will not find protection under this Bill.⁵⁶⁶ De Vos⁵⁶⁷ rightly raises concern for women who find themselves in relationships with men who had already entered into a Customary marriage with someone else. Will these women be able to convince a court that their relationship is worthy of protection? He avers further that such relationships may not contain most of the characteristics that the Draft Bill requires in order to be entitled to protection.⁵⁶⁸

Despite the minimum protection that the Draft Bill provides, it is still caught up in a traditionalist paradigm based on the fiction that every individual is capable of making their own decisions with regard to their affairs⁵⁶⁹. The choice will still rest with them to make the right decision with regard to their relationships. The CALS also conducted research which showed that women who find themselves in a domestic partnership are unable to convince their partners to marry them.⁵⁷⁰

⁵⁶¹ Clause 33(1).

⁵⁶² The Alliance (2008) at 13.

⁵⁶³ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

⁵⁶⁴ Marriage Act, 1961.

⁵⁶⁵ Civil Union Act, 2006.

⁵⁶⁶ De Vos (2008) at 138.

⁵⁶⁷ De Vos (2008) at 138.

⁵⁶⁸ De Vos (2008) at 138.

⁵⁶⁹ De Vos (2008) at 140.

⁵⁷⁰ Centre for Applied Legal Studies (2006) at 3.

The Draft Bill provides some protection to cohabitantes. However, I agree with De Vos⁵⁷¹ that, to some extent, the Draft Bill raises more questions than supplying answers. De Vos⁵⁷² questions the assumption that individuals whose relationships have terminated are able to engage with the courts. He describes this assumption as a fiction that is deeply rooted in the traditional South African legal culture. He questions⁵⁷³ how a poor and marginalised woman whose domestic partnership has ended will be able to rely on the Draft Bill for protection, and how the court will deal with the numerous types of relationships which do not comply with the traditional patriarchally inspired nuclear model of relationships and family life. The Alliance questions the limited legal protection afforded to domestic partnerships in South Africa. The limited protection leaves vulnerable partners, mostly women, penniless and without recourse when these relationships end.⁵⁷⁴

Finally, De Vos⁵⁷⁵ questions whether the Draft Bill would be able to remedy the hardship faced by women who find themselves in either a registered domestic partnership or an unregistered domestic partnership. The Alliance poses the question whether we should leave a woman who finds herself in a domestic partnership, destitute, without rights or recourse. The Alliance rightfully argues that it is very often the male partner in a domestic partnership who created the relationship of dependency and who is the one who married someone else without telling the female partner in the domestic partnership.⁵⁷⁶

It is also unacceptable that the Draft Bill contains an arbitrary distinction between marriages in terms of the Marriage Act⁵⁷⁷ or the Civil Union Act⁵⁷⁸ and the RCMA⁵⁷⁹. The Alliance supports this view, and questions the fact that the co-existence of a marriage

⁵⁷¹ De Vos (2008) at 141.

⁵⁷² De Vos (2008) at 141.

⁵⁷³ De Vos (2008) at 141.

⁵⁷⁴ The Alliance (2008) at 2.

⁵⁷⁵ De Vos (2008) at 133-134.

⁵⁷⁶ The Alliance (2008) at 11.

⁵⁷⁷ Marriage Act, 1961.

⁵⁷⁸ Civil Union Act, 2006.

⁵⁷⁹ RCMA, 1998.

should be adequate in preventing any other form of protection to those in domestic partnerships.⁵⁸⁰

De Vos⁵⁸¹ contends that this distinction questions the assumption of the Draft Bill that men in a Customary marriage are allowed to enter into an unregistered domestic partnership with someone other than their spouses.

I agree with De Vos⁵⁸² that constitutional law is tainted with ‘traditional’ Common law rules. He correctly says that this averment is based on the notion that the Bill of Rights protects the individual, in that every individual has the freedom to make choices and to decide how they want to live their lives. De Vos⁵⁸³ recommends that, for the purpose of transformation, the Constitution should review the Common law assumption that every citizen is free to decide how they arrange their affairs. It is especially the women who suffer and, together with De Vos I subscribe to the view that, due to patriarchy, women lack the negotiating power to choose to either enter into an intimate relationship, or not.

How will the Legislature be able to determine whether a relationship was indeed a domestic partnership, especially an unregistered one. The Alliance proposes that legislation should address the problem of the unequal position of poor women in domestic partnerships, whether registered or unregistered.⁵⁸⁴ The Draft Bill is silent with regard to the duration of a domestic partnership, and I agree with the recommendation of the SALRC that it may create problems to determine the actual starting and end dates of a relationship. The SALRC poses the question: what would happen if one partner dies just before the minimum period runs out?⁵⁸⁵ It actually became a rhetorical question, since this requirement was subsequently rejected.

⁵⁸⁰ The Alliance (2008) at 11.

⁵⁸¹ De Vos (2008) at 141.

⁵⁸² De Vos (2008) at 131.

⁵⁸³ De Vos (2008) at 131.

⁵⁸⁴ The Alliance (2008).

⁵⁸⁵ SALRC (2006) at 393.

The Alliance also recommends that the Draft Bill should allow parties to register their domestic partnership after they have been in that partnership for a number of years. The Draft Bill should take into account that the parties have made financial contributions, and that it is their choice to decide when to register their domestic partnership.⁵⁸⁶

I trust that a final Bill will be tabled soon for Parliament's approval. Parliament has a duty towards every citizen in South Africa. Until then, women's groups and Human Rights organizations deserve to be supported in their quest for change.

I, therefore, urge Parliament to expedite the process concerning the enactment of this important piece of legislation. Parliament should obviously take cognisance of all the recommendations of relevant parties and bodies, before finally passing the Draft Bill.



⁵⁸⁶ The Alliance (2008) at 7.

CHAPTER SEVEN

CONCLUDING REMARKS

In 1990 Sachs⁵⁸⁷ wrote that-

‘[T]here is no such thing as a typical South African family, let alone an ideal one. There are too many South African families, constituted and dissolved according to a great variety of marriage and divorce systems. The varied origin of the people who make up the population of our country is reflected in the multiplicity of marriage rites. We have marriages based on lobola or *bohadi*, marriages solemnized in church or temple or synagogue or before the imam, and marriages celebrated in civil registries’.

This diversity has been further substantiated and added to by legislation and case law since 1990, as set out in this mini-thesis.

Parliament gave full recognition to polygynous marriages through the enactment of RCMA.⁵⁸⁸ For certain purposes recognition has also been given to monogamous and polygynous Muslim marriages. However, it is sad that the Constitutional Court in the *Volks*⁵⁸⁹ case did not urge Parliament to amend MOSSA,⁵⁹⁰ so as to include the cohabitee as a ‘spouse’. This intervention would have alleviated the plight of women as vulnerable and marginalised people.

Currently we are on the brink of having the Draft Domestic Partnerships Bill⁵⁹¹ passed. The sooner Parliament passes this Draft Bill,⁵⁹² the sooner there will be an end to the suffering of women - the most vulnerable members of society, who very often do not have an equal chance of choosing the marriage related type of relationship that they may wish to enter into.

⁵⁸⁷ Sachs (1990) at 70.

⁵⁸⁸ RCMA, 1998.

⁵⁸⁹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

⁵⁹⁰ MOSSA, 1990.

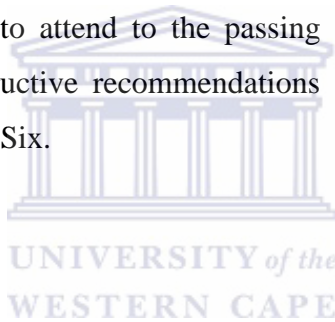
⁵⁹¹ Draft Domestic Partnerships Bill, 2008.

⁵⁹² Draft Domestic Partnerships Bill, 2008.

Since the decision in the *Volks* case,⁵⁹³ I have always wondered what the outcome would have been had the composition of the Constitutional Court been different from what it was at the time. If the majority of Justices had been females, they could have given Parliament a year to amend ISA⁵⁹⁴ and/or MOSSA,⁵⁹⁵ similarly to what the Constitutional Court had decided in relation to same-sex relationships. Mrs Robinson might just have been entitled to protection under these Acts since she sacrificed her life to a relationship which became meaningless upon the death of her partner.

The SALRC must be lauded for drafting the Draft Bill⁵⁹⁶ to assist cohabitees, irrespective whether they find themselves in a registered domestic partnership, or an unregistered domestic partnership.

I cannot but urge Parliament to attend to the passing of the Draft Bill⁵⁹⁷ as soon as possible, subject to the constructive recommendations of De Vos, Goldblatt and ‘the Alliance’, as set out in Chapter Six.



⁵⁹³ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

⁵⁹⁴ ISA, 1987.

⁵⁹⁵ MOSSA, 1990.

⁵⁹⁶ Draft Domestic Partnerships Bill (2008).

⁵⁹⁷ Draft Domestic Partnerships Bill (2008).

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