

The effect of modern constitutional development on marriages in community of property

by

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List of abbreviations

CILSA	The Comparative and International Law Journal of Southern Africa
DR	De Rebus
PER	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	South African Public Law
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Summary

This study asks the question: What is the effect of modern constitutional development on marriages in community of property?

The study commences with a brief overview of the history of marriage and specifically of marriage in community of property with reference to marital power. The unique *ex lege* consequences of marriage in community of property is comprehensively discussed.

The Constitutional Court decision in *Harksen v Lane* determined the test for unconstitutionality. The test for unconstitutionality is discussed with specific reference to the Bill of Rights. The Constitutional Court's decision in *Volks v Robinson* is critically evaluated as the Court propounded the so-called "choice argument" in terms of which people purposefully decide to marry instead of cohabiting and therefore the law may accord certain benefits to married people which are not available to unmarried life partners. The Constitutional Court decision in *Van der Merwe v RAF* as well as its consequences are discussed. It concluded that section 18(b) of the Matrimonial Property Act constituted unjustifiable discrimination between spouses married in community of property and those married out of community of property and the said section was therefore declared unconstitutional.

The law of insolvency in respect of the joint estate of spouses married in community of property is investigated. Freedom of testation and case law relating thereto is considered briefly. The study concludes with the submission that the common law provision that separate assets of a spouse in a marriage in community of property form part of the joint insolvent estate even if a testator expressly determined in his will that a bequest will not form part of the joint estate of a beneficiary, amounts to unfair discrimination and is unconstitutional. It is submitted that the principle unfairly discriminates between spouses married in community of property and those married out of community of property on the ground of marital status.

Keywords

Constitutional development, history of marriage, marriage in community of property, marital power, *ex lege* consequences of marriage in community of property, *Harksen v*

Lane, Bill of Rights, *Volks v Robinson*, choice argument, *Van der Merwe v RAF*, Matrimonial Property Act, insolvency, joint estate of spouses married in community of property, freedom of testation.

Opsomming

Hierdie studie vra die regspraak: wat is die invloed van die huidige grondwetlike ontwikkeling op huwelike in gemeenskap van goedere?

Hierdie studie neem in aanvang met 'n oorsig van die geskiedenis van die huwelik met spesifieke verwysing na huwelike in gemeenskap van goedere en maritale mag. Die eiesoortige *ex lege* gevolge van 'n huwelik in gemeenskap van goed word bespreek.

Die Grondwetlike Hof uitspraak in *Harksen v Lane* het die toets vir onbillike diskriminasie daargestel. Hierdie spesifieke toets word bespreek met verwysing na die Handves van Regte. Die Grondwetlike Hof uitspraak in *Volks v Robinson* word krities bespreek. In hierdie uitspraak het die Hof die sogenaamde "eie keuse" argument gebruik. Hierdie argument lui dat die Suid Afrikaanse reg sekere voordele aan getroude persone mag verleen aangesien hierdie persone self kan besluit of hulle in die huwelik wil tree of saamwoon. Die Grondwetlike Hof uitspraak in *Van der Merwe v RAF* en die gevolge daarvan word ondersoek. Hierdie uitspraak het bevind dat artikel 18(b) van die *Huweliksgoedere Wet* ongrondwetlik is aangesien die artikel onbillike en ongrondwetlike onderskeid gemaak het tussen gades getroud in gemeenskap van goed en gades getroud buite gemeenskap van goed.

Testeervryheid en die Insolvensiereg met spesifieke verwysing na die gesamentlike boedel van gades getroud in gemeenskap van goed word ondersoek. Ten slotte doen hierdie studie aan die hand dat die gemeenregtelike beginsel dat die afsonderlike bates van 'n gade getroud in gemeenskap van goed deel vorm van sy of haar gesamentlike boedel in geval van insolvensie van die gesamentlike boedel (al word gemeenskap van goedere ten opsigte van hierdie bates uitgesluit in 'n testament) ongrondwetlik is. Hierdie gemeenregtelike beginsel diskrimineer onbillik op grond van huwelikstatus tussen gades getroud in gemeenskap van goed en gades getroud buite gemeenskap van goed.

Sleutelwoorde

Grondwetlike ontwikkeling, geskiedenis van die huwelik, huwelik in gemeenskap van goedere, maritale mag, eiesoortige *ex lege* gevolge, *Harksen v Lane*, Handves van Regte, *Volks v Robinson*, eie keuse argument, *Van der Merwe v RAF*, Huweliksgoedere Wet, insolvensie, gesamentlike boedel van gades getroud in gemeenskap van goed, testeervryheid.

Social change is desirable; law can be a potent tool in aiding that change. But it is a precision tool, and one which like the carpenter's chisel, is easily blunted in unskilled hands.¹

A marriage in community of property effect(s) economic equality but juridical inequality while marriage out of community of property result(s) in juridical equality but economic inequality.²

1 Herbst and Du Plessis *Electronic Journal of Comparative Law* 15.

2 Robinson and Hosten 2010 vol 24 part 1 *Speculum Juris* 96 footnote 4.

1 Chapter 1

1.1 Introduction

The South African Constitutional Court is the custodian of the principles, values and norms that underlie an open and democratic society based on human dignity, equality and freedom enshrined in the Bill of Rights and is the final Court of appeal in constitutional matters. A constitutional matter "[i]nvolves the interpretation or enforcement of a provision of the Constitution".³

The adoption of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) has had (and will no doubt still have) a profound influence on legislation and the interpretation of the common law. Reference may be made in this regard to established common law principles such as the definition of marriage that were declared unconstitutional⁴ as the common law definition of marriage only allowed a marriage between people of different sex. The same legal consequences therefore pertain *mutatis mutandis* to marriage in terms of the Marriage Act 25 of 1961 (hereafter the Marriage Act) and civil unions in terms of the Civil Union Act 17 of 2006 (hereafter the Civil Union Act). Same sex partners can engage in a civil union either in the form of a civil partnership or a marriage. Furthermore, the meaning of *spouse* now also includes a surviving partner in a monogamous Muslim marriage⁵ for purposes of the Intestate Succession Act 81 of 1987 (hereafter the Intestate Succession Act) and the Maintenance of Surviving Spouses Act 27 of 1990 (hereafter the Maintenance of Surviving Spouses Act).

The Constitutional Court has acknowledged that

[o]ver the past decades an accelerating process of transformation had taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises⁶

3 De Vos 23 November 2011 <http://constitutionallyspeaking.co.za/justice-kate-oregans-helen-suzman-memorial-lecture>.

4 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) and hereafter referred to as "*Fourie*".

5 *Daniels v Campbell* 2004 (5) SA 331 (CC).

6 *Fourie* para 52.

and that the protective and supportive measures relating to spouses in a marriage are generally not available to unmarried couples.⁷ An example in point is the fact that unmarried heterosexual life partners do not have a right of intestate succession.⁸ The word *spouse* has not been defined in the Intestate Succession Act and therefore the common law definition of *spouse* with reference to marriage must still be used.⁹

Section 39(2) of the Constitution states

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

South African courts are therefore tasked with developing common law according to the principles enshrined in the Bill of Rights. In *Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the RSA*¹⁰ the Constitutional Court re-iterated its obligation in this respect and confirmed that the Constitution is the supreme law of South Africa. Any conduct or legislation inconsistent with the Constitution is invalid and therefore the Constitution limits the exercise of public power. Only the Constitutional Court can effectively declare legislation (whether national or provincial) or the conduct of the President of the Republic of South Africa unconstitutional as an order of invalidity by any inferior court must be confirmed by the Constitutional Court.¹¹

In *Carmichele v Minister of Safety and Security*¹² the Constitutional Court confirmed that the obligation of courts to develop the common law is not purely discretionary. If a court is of the opinion that an aspect of the common law might have to be developed if section 39(2) of the Constitution is implicitly raised, the court is obligated to investigate whether the common law needs to be so developed.¹³ If the common law does not accord with the spirit, purport and objects of the Bill of Rights, courts have a general obligation to develop the common law appropriately.¹⁴

7 *Volks v Robinson* 2005 5 BCLR 446 (CC) hereafter referred to as "*Volks*".

8 *Robinson and Smith* 2010(13)2 *PER* 53.

9 De Waal *Bill of Rights Compendium* 3G15.

10 2000 2 SA 674 (CC).

11 Section 15 of the Superior Courts Act 10 of 2013 and s 172(2)(a) of the Constitution.

12 2001 (4) SA 938 (CC) and hereafter referred to as "*Carmichele*".

13 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (2012 (1) SA 256 (CC) para 34.

14 *Carmichele* para 30.

In the event that common law must be developed a court is obliged to undertake a two-staged and intrinsically linked enquiry.¹⁵ A court has to consider whether the common law requires development in order to comply with the objectives of section 39(2) of the Constitution and if the answer is affirmative the court needs to consider how such development should be effected to comply with the section 39(2) objectives.¹⁶

The Bill of Rights enshrined in the Constitution *inter alia* makes it clear in Section 9 that:

- everyone is equal before the law;
- the state may not unfairly discriminate against anyone based on marital status and
- discrimination based on marital status is unfair.

The Bill of Rights is limited in terms of law of general application.¹⁷ The limitation must however be reasonable and justifiable in an open and democratic society and factors such as the importance and purpose of the limitation and the nature and extent of the limitation must be taken into consideration.¹⁸

The *locus classicus* to determine whether discrimination is unfair is the Constitutional Court case of *Harksen v Lane*.¹⁹ The test for unfair discrimination was formulated as follows:

- Does the provision differentiate between people or categories of people?
- If so, is there a rational connection to a legitimate governmental purpose? If not, it might be discrimination.
- Does the differentiation amount to unfair discrimination?
- If so, the court must determine whether the provision can be justified under the limitation clause contained in section 36 of the Constitution.

15 *Carmichele* para 39.

16 *Carmichele* paras 39 and 40.

17 Section 36(1) of the Constitution.

18 Sections 36(1)(a)-(e) of the Constitution.

19 1998 (1) SA 300 (CC) and hereafter referred to as "*Harksen*".

The test formulated in *Harksen* has frequently been used to declare legislation and common law unconstitutional.²⁰ With specific reference to marriage in community of property the Constitutional Court applied the test in *Harksen* strictly in *Van Der Merwe v RA*²¹ and declared certain sections of the Matrimonial Property Act 88 of 1984 (hereafter the Matrimonial Property Act) unconstitutional as the Act discriminated between women married in community of property and women married out of community of property. Furthermore, the Court could not find justification as required by *Harksen* for the discrimination. However in *Du Plessis v Pienaar*²² the Court found (and without any reference to *Harksen*) that separate property of spouses married in community of property is available to satisfy the claims of creditors of the joint insolvent estate.

As at November 2011 the Constitutional Court had handed down 422 judgements²³ in total. These range from the extremely contentious such as the unconstitutionality of the death penalty²⁴ to the more mundane such as declaring the right of an inspector to enter premises if the inspector reasonably believed medicines could be found there, too wide.²⁵ Only four affirmative decisions of the Constitutional Court concerned discrimination based on sex, nine were based on sexual orientation and three based on race.

Public policy or *boni mores* are constantly evolving²⁶ and represent the "[l]egal convictions of the community (and) those values that are held most dear by society".²⁷ The Constitutional Court has however determined in *S v Makwanyane*²⁸ that public opinion may have some relevance to a constitutional enquiry but it can never be a substitute for interpreting the Constitution.

20 For a summary of relevant case law see Kruger Vol. 128, Issue 3 (2011) *SALJ* 479 footnote 2.

21 2006 4 SA 230 (CC) and hereafter referred to as "*Van der Merwe*".

22 2003 1 SA 671 (SCA).

23 De Vos 23 November 2011 <http://constitutionallyspeaking.co.za/justice-kate-oregans-helen-suzman-memorial-lecture>. The constitutional validity of the conduct of the President was challenged seven times of which two judgements were against former President Mandela.

24 *S v Makwanyane* 1995 (3) SA 391 para 330.

25 *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC) relating to s 28(1)(a) of the Medicines and Related Substances Control Act 101 of 1965.

26 *Cloete v Maritz* 2013 (5) SA 448 (WCC) para 44. Also see *S v Dikqacwi* [2013] ZAWCHC 67.

27 *Napier v Barkhuizen* [2006] 2 All SA 469 (SCA) para 28.

28 1995 (3) SA 391 (CC) para 88.

A marriage in community of property is the default marital regime in South Africa. The difference between marriages in community of property and out of community of property has been described as

a marriage in community of property effect(s) economic equality but juridical inequality while marriage out of community of property result(s) in juridical equality but economic inequality.²⁹

The South African legislator extolls stable marital unions and therefore by implication the institution of marriage itself. The *White Paper on Families in South Africa*³⁰ states

the established body of research evidence show(s) that families founded upon stable marital unions provide significant economic and psychosocial benefits for men, women and children.³¹

The importance of *marriage* and *family* in the South African context was summarised by O'Regan J

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.³²

Conversely the traditional family has also been called "[t]hat primary, terrifying tool of the state".³³ De Vos³⁴ maintains that the traditional concept of *family* fails to recognise the cultural, religious and traditional diversity of South African individuals. Intimate relations in fact take various forms as is evident from Jewish, Muslim, Hindu and customary marriages and same-sex and co-habitation relationships.

29 Robinson and Hosten 2010 vol 24 part 1 *Speculum Juris* 96 footnote 4.

30 Department of Social Development Republic of South Africa *White Paper on Families in South Africa* October 2012 39.

31 For criticism of the White Paper see Judge 8 September 2012 <http://www.citypress.co.za/columnists/are-we-really-family-20120908> and Davis 18 September 2013 <http://www.dailymaverick.co.za/article/2013-09-17-analysis-bedroom-politics-marriage-and-work-social-development-anc-and-da-style/#.U9Zb5vmSxx2>.

32 *Volks* para 106 and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

33 De Vos 28 July 2014 <http://constitutionallyspeaking.co.za/a-marriage-made-in-hell/> dou28/7/14.

34 De Vos (2004) 20 *SAJHR* 192.

South African courts are only concerned with secular law. Although a marriage ceremony usually has a religious dimension, a marriage officer appointed in terms of the Marriage Act 25 of 1961 (hereafter the Marriage Act) merely officiates a secular legal bond between the parties which is also recognized by the State. Clerics who are marriage officers are however entitled to refuse to marry a couple if such a marriage would be against his or her religious beliefs. The Marriage Act recognises the religious institution of marriage but regulates the secular institution of marriage. According to Farlam³⁵ JA it would be improper and inappropriate for judges in a secular state to deal with marriage as a religious institution.

The Marriage Act does not prohibit purely religious marriages. These marriages lack legal validity but are regarded as lawful in terms of the common law. The doctrine of non-entanglement is part of South African law.³⁶ In terms of this doctrine a court will not dissolve a religious marriage if a couple practises a faith which does not allow divorce, as a divorce order will not absolve the parties from their religious vows. The Divorce Act 70 of 1979 (hereafter the Divorce Act) does not regulate the dissolution of an Islamic marriage unless the marriage was solemnised by a marriage officer appointed in terms of the Marriage Act. Therefore, according to Rogers³⁷ J the dissolution of an Islamic marriage in a manner recognised by Islamic faith results in a woman not being recognised as a surviving spouse for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. According to the Constitutional Court however, if she was a spouse in a polygamous Muslim marriage she would be regarded as a spouse in respect of the aforementioned acts.³⁸

The current position regarding women in an Islamic marriage leaves such women extremely vulnerable.³⁹ Islamic marriages are however not recognised as marriages in

35 *Fourie* para 82.

36 *Singh v Ramparsad* [2007] JOL 19113 (D).

37 *Faro v Bingham* [2013] ZAWCHC 159 para 1. According to the Court these inconsistencies would be addressed by the *Muslims Marriages Bill*. As at 10 November 2014 the said Bill has not been promulgated.

38 *Hassam v Jacobs* 2009 (5) SA 572 (CC) para 23 which determined that s 1(4)(f) of the Intestate Succession Act was unconstitutional. The Court also declared that "the word 'survivor' as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes a surviving partner to a polygamous Muslim marriage".

39 See the facts in *Faro v Bingham* [2013] ZAWCHC 159.

terms of either the Marriage Act or the Divorce Act and therefore these spouses will not benefit from the protection of the law and the Constitution until the legislator intervenes.

As aforesaid the Constitutional Court is obliged to develop the common law. In an effort to develop law, the strict application of the test for unconstitutionality as determined in *Harksen* and *Van der Merwe* will have profound (and even possibly absurd) consequences on statutory law and the common law relating to marriages in community of property.

1.2 Hypotheses

Given the Constitutional Court's devotion to develop common law and statutory law to comply with the values of the Constitution it is clear that situations not contemplated by either the Constitutional Court or the legislator will be raised on the basis of *Van der Merwe* and one may be justified to reason that the distinction between marriages in and out community of property may become less visible in the near future.

This study takes the form of a literature review and critically considers the effect of modern constitutional development on marriage in community of property. The study commences with a brief overview of the history of marriage and specifically of marriage in community of property with a brief reference to marital power. The unique *ex lege* consequences of marriage in community of property is comprehensively discussed. The next chapter focuses on the Constitutional Court decision in *Harksen*. The test for unconstitutionality is discussed with specific reference to the Bill of Rights. The Constitutional Court's decision in *Volks* is critically evaluated as the Court propounded the so-called "choice argument" in terms of which people purposefully decide to marry instead of cohabiting and therefore the law may accord certain benefits to married people which are not available to unmarried life partners. Chapter 4 discusses case law relating to the Constitution and marriage in community of property. The Constitutional Court decision in *Van der Merwe* as well as its consequences are discussed. The Court referred to *Volks* and conducted a detailed analysis of the equality principle. It concluded that section 18(b) of the Matrimonial Property Act constituted unjustifiable discrimination between spouses married in community of property and those married out of community of property and the said section was therefore declared unconstitutional. Although case law relating to the Constitution and marriage in community of property is scarce, five

court decisions are discussed. The chapter proceeds to evaluate *Badenhorst v Bekker*⁴⁰ *Brink v Kitshoff*⁴¹ and *Du Plessis v Pienaar*⁴² with specific reference to the law of insolvency in respect of the joint estate of spouses married in community of property. Freedom of testation and case law relating thereto is considered briefly. This study concludes with certain observations regarding the *boni mores* and the courts' obligation to develop common law. Chapter 5 concludes with the submission that the common law provision that separate assets of a spouse in a marriage in community of property form part of the joint insolvent estate even if a testator expressly determined in his will that a bequest will not form part of the joint estate of a beneficiary, amounts to unfair discrimination and is unconstitutional. It is submitted that the principle unfairly discriminates between spouses married in community of property and those married out of community of property on the ground of marital status.

40 1994 (2) SA 155 (N).

41 1996 (6) BCLR 752.

42 2003 1 SA 671 (SCA).

2 The nature of marriage in community of property

The Bill of Rights⁴³ which is enshrined in the South African Constitution, states that neither the State⁴⁴ nor any person⁴⁵ may unfairly discriminate directly or indirectly against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The rights in the Bill of Rights can be limited in terms of law of general application if the limitation is reasonable and justifiable in an open and democratic society, provided that factors such as the importance and purpose of the limitation and the nature and extent of the limitation are taken into consideration.⁴⁶ In order to comment on the influence of the Bill of Rights on marriage in community of property, it is prudent to briefly investigate the legal history of marriage and the legal consequences of a marriage in community of property.

Hahlo⁴⁷ describes community of property as

a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.

Marriage in community of property is the default marital regime in South Africa⁴⁸ unless the parties have entered into an antenuptial agreement which excludes community of profit and loss. The presentation of a duly executed antenuptial agreement would therefore constitute *prima facie* evidence that parties are married out of community of property.⁴⁹

The Marriage Act regulates the solemnisation of traditional civil marriages. The Divorce Act regulates the dissolution of marriages and the Matrimonial Property Act controls matrimonial property regimes and the financial effects thereof. The Recognition of

43 Sections 7-39 of the Constitution.

44 Section 9(3) of the Constitution.

45 Section 9(4) of the Constitution.

46 Section 36 of the Constitution.

47 Hahlo *et al* *The South African Law of Husband and Wife* 157–158.

48 *Edelstein v Edelstein* 1952 3 All SA 20 (AD) para 10.

49 *Odendaal v Odendaal* 2002 (1) SA 763 (W) and Van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* 1.1.

Customary Marriages Act 120 of 1998 (hereafter the Recognition of Customary Marriages Act) recognises customary law marriages and the Civil Union Act permits two people (regardless of sex) to enter into a civil marriage or civil partnership.

2.1 A brief history of the law of marriage⁵⁰

A Roman marriage during the first two and a half centuries of the Christian era was not a legal relationship but a social fact.⁵¹ A marriage had no effect on the proprietary rights of either spouse. Spouses retained their power of property and each spouse was exclusively liable for his or her own debt.⁵²

The marriage did not have to be registered, no official record was required, no state official was involved and no ecclesiastical rite was required even after Christianity became the official religion in 313 AD. The only requirement was the reciprocal consent of the parties⁵³ "*nuptias non concubitus, sed consensus facit*"⁵⁴ (consent not cohabitation makes a marriage). Cohabitation was unnecessary.⁵⁵

The position remained similar after the disintegration of the Roman Empire but changed in the middle of the sixteenth century when the Roman Catholic Church enforced a uniform law of marriage. The Church regarded marriage as a sacrament and indissoluble as marriage was a grace of God.⁵⁶ A uniform law of marriage developed. The Church encouraged parties to a marriage to declare their consent before a priest and the Fourth Lateran Council of 1215 declared it a prerequisite to a valid marriage.

The Council of Trent passed a decree in 1563 confirming *inter alia* that parties declared their consent before a priest in order for a marriage to be valid. The States of Holland enacted the Political Ordinance of 1 April 1580 which provided that marriages had to be

50 This section is mostly based on *Fourie v Minister of Home Affairs* 2004 ZASCA 132 per Farlam JA paras 69-79. Hereafter referred to as "*Fourie*" in this chapter.

51 For a detailed exposition of Roman law regarding marriage see Robinson *et al Introduction to South African Family Law* Chapter 4 20-27 and hereafter in this chapter referred to as "Robinson".

52 *Campher v Campher* 1978 3 All SA 722 (O) para 724.

53 *Ex Parte Dow* 1987 (3) SA 829 (D).

54 *Fourie* para 69.

55 *Fourie* para 69.

56 Robinson Chapter 4.23.

solemnised by a magistrate or minister of religion. According to Farlam⁵⁷ JA Holland was the first European jurisdiction to allow civil marriages.

St Thomas Aquinas (1225-1274) promoted the secularisation of marriage by emphasising that marriage is a contract of natural law (based on the opinion of Roman scholars), a civil contract governed by Roman law and a sacrament which could not exist without a civil contract.⁵⁸

In 1809 the Kingdom of Holland⁵⁹ adopted the principle that marriages had to be solemnised by a civil official.

Civil marriage officers were appointed in the Cape of Good Hope in terms of the provisions of the Order in Council (1838). Resident magistrates were appointed as marriage officers by the Marriage Act.⁶⁰ Similar laws were passed in the other colonies which eventually became the Union of South Africa. The Marriage Act 25 of 1961 consolidated previous pre-Union legislation and is concerned with marriage as an exclusively secular institution.

2.2 A brief history of marriage in community of property⁶¹

Watermeyer⁶² CJ was of the opinion that the origin of community of property has been dealt with by various authors but that most of them did not express definite opinion in this respect. In this regard Voet⁶³ observed

in a matter so ancient and so obscure... (opinions) are bare conjecture having no certain grounds...

In terms of the early Germanic national codes males capable of military service were accorded full proprietary rights. Women had a subordinate status and were under the guardianship (*mundium*⁶⁴) of a man, usually her closest male relative when she was unmarried and her husband upon marriage. A woman was regarded as a minor although

57 *Fourie* para 73.

58 *Fourie* para 74.

59 The Kingdom of Holland was set up by Napoleon Bonaparte and eventually became the Kingdom of the Netherlands.

60 16 of 1860.

61 *Erasmus v Erasmus* 1942 OPD 24 paras 32-33 and hereafter referred to as "*Erasmus*").

62 *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 para 395.

63 *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 para 395.

64 Dunn *Germanic Women: Mundium and Property, 400-1000* 35.

she could have her own assets.⁶⁵ Her husband was the administrator of the assets of both spouses.⁶⁶ In Germanic tribes a wife had a claim to the *universitas bonorum* after dissolution of her marriage.

Roman law was slowly reintroduced throughout Europe during the middle Ages.⁶⁷ Roman law improved on traditional laws as it was better suited to complicated economic transactions. It regulated the legal protection of property and the equality of legal subjects.

The introduction of Roman law perplexed Dutch jurists. Roman law had a much stricter interpretation than Germanic law of the principle of property.⁶⁸ *Dominium* in Roman law implied that ownership of a thing could not be lost without the owner's consent.⁶⁹ It further implied that a challenger to property not only had to prove his title to the thing but also the title of his predecessors.⁷⁰ Dutch jurists were appalled at the Roman law notion that a woman could exclude property from community of property and that her husband could therefore not dispose of the property as he wished.

2.3 Marital power

The marital power regime appeared in the Netherlands around the middle of the thirteenth century and implied a new notion towards property.⁷¹

Grotius observed that the law of nature provided husbands with power over their wives as

(f)emales are generally moodier and less understanding than males and therefore the wisest sex has to rule.⁷²

65 Initially her patrimony was limited to her clothes, jewellery and gifts from her husband. It was later accepted that she could have her own patrimony. See Robinson Chapter 4.22.

66 Robinson Chapter 4.23.

67 For a historical discussion of the process see Wieacker *Boston College International and Comparative Law Review* Volume 4 Issue 2 Article 2.

68 Holmes 2005 <http://www.constitution.org/cmt/owh/commonlaw06.htm>.

69 Mostert and Bennett *Plurism and Development: Studies in Access to Property in Africa* 25.

70 Mostert and Bennett *Plurism and Development: Studies in Access to Property in Africa* 27 the so-called *probatia diabolica* or devil's-proof which is a requirement to prove the impossible.

71 *Erasmus* para 33.

72 Van Zyl XXIII 1990 *CILSA* 228.

As late as 1942 De Beer J⁷³ stated confidently that marital power owes its origin

not solely to the interests, the superior abilities and dominating qualities of the husband but ...to the interest of the wife and the infirmity of her sex.

Marital power entailed that a wife passed into the tutelage of her husband, her husband had the power to control property she brought into the marriage, she followed her husband's domicile and in general she ceased to be *sui iuris*.⁷⁴ Marital power could be excluded if a wife carried on business as a public trader, a court ordered a *seperatio bonorum* or the spouses entered into an antenuptial agreement which specifically excluded marital power.⁷⁵ One of the consequences of a marriage in community of property was that the husband was the head of the household and had the final say in matters relating to the common life shared by the parties.⁷⁶

Marital power was curtailed in 1953 by the promulgation of the Matrimonial Affairs Act.⁷⁷ A husband's power over a wife's separate movable and immovable property was reduced. A wife could operate a banking account and litigate in certain matters without her husband's consent. In 1984 the marital power in respect of marriages concluded after 1 November 1984 was abolished.⁷⁸ The husband was however still the head of the household and the law regarding guardianship and domicilium was unaffected. The provisions of the Matrimonial Property Act were made applicable to Black marriages in terms of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. After the promulgation of the Domicile Act 3 of 1992 a wife could determine her own domicile. The General Law Fourth Amendment Act 132 of 1993 (hereafter the General Law Fourth Amendment Act) abolished marital power *in toto* irrespective of the date of marriage.⁷⁹

According to Van den Heever J⁸⁰ the marital power is the "very *fons et origo* of community of property". If one assumes for argument's sake that his statement is correct and the

73 *Erasmus* para 37.

74 *Erasmus* para 37 and the Roman-Dutch authorities quoted there.

75 *Erasmus* para 37.

76 Robinson 109.

77 57 of 1953.

78 In terms of the Matrimonial Property Act.

79 See however criticism on the position in the former TBVC countries by Sinclair "The Law of Marriage" 129-130 and hereafter referred to as "Sinclair".

80 *Erasmus* para 32.

marital power has been abolished it would appear that the common law basis for such marriages no longer exists. Marriages in community of property however have *ex lege* legitimacy due to the provisions of the Matrimonial Property Act. It would therefore follow that if the General Law Fourth Amendment Act was passed *before* the Matrimonial Property Act marriages in community of property would have been unlawful until the promulgation of the Matrimonial Property Act, as such marriages would not have been authorised in terms of common law or *ex lege*.

2.4 The legal consequences of a marriage in community of property

Generally, the legal consequences of marriage are variable if these consequences relate to the control parties have over property. Invariable consequences are related to the person of the spouses and come into being *ex lege*.⁸¹

2.4.1 Explanations regarding the legal consequences

Various explanations have been presented to explain the legal consequences of a marriage in community of property. These explanations are mostly directed at the ownership of property introduced by the spouses in a marriage in community of property.

2.4.1.1 The husband is the sole owner

This contention is based on the Scottish law of *communio bonorum*. It originated in Germanic customs and was adopted in France and subsequently in Scotland. South African matrimonial law is based on Roman-Dutch principles and therefore Scottish law is not applicable. The Appellate Division (as it then was) rejected the sole owner theory in *Estate Sayle v Commissioner for Inland Revenue*.⁸²

2.4.1.2 Partnership

According to this theory, the husband is the administrator (or *senior partner*) of the partnership and the wife is the *junior partner*.⁸³

81 Sinclair 170.

82 1945 AD 388 para 396 and confirmed in *De Wet v Jurgens* 1970 (3) SA 38 (A).

83 Robinson 139.

Marriages in community of property cannot be described as a true partnership as a marriage in community of property does not comply with all the legal requirements of a partnership. Marriage in community of property affects the contractual capacity of spouses but partnership does not. The termination of a partnership entails few formalities whereas any civil marriage terminates only after divorce or death of one of the spouses. A partnership must contain a profit motive whereas a marriage does not have a profit motive.⁸⁴

2.4.1.3 Juristic person

The juristic person theory was rejected in *Ex Parte Menzies et Uxor*⁸⁵ as a marriage in community of property is not as independent as is required from a separate legal entity especially if applied to spouses' joint debts.

2.4.1.4 The current position

The current position⁸⁶ in South Africa is that spouses married in community of property are joint co-owners of the joint estate in equal undivided shares. The currently held opinion was established in *Estate Sayle v CIR*⁸⁷ and followed with approval in *inter alia Nedbank v Van Zyl*.⁸⁸

Generally the personal consequences of a marriage are invariable while the proprietary consequences are variable if the said consequences can be excluded by an antenuptial contract.⁸⁹ The unique *ex lege* consequences of a marriage in community of property are discussed below.⁹⁰

2.4.2 Community of property and of profit and loss

All assets which belonged to the individual spouses prior to their date of marriage as well as all assets accumulated by the spouses after date of marriage fall into the joint estate

84 Robinson 139.

85 1993 (3) SA 799 (C) paras 809G-H.

86 Confirmed in *Ex Parte Menzies et Uxor* para 808I.

87 1945 AD 388 and after an analysis of the common law.

88 1990 (2) SA 469 (A).

89 Sinclair 170.

90 See Visser and Potgieter *Introduction to Family Law* 72-83 and Cronje and Heaton *Casebook on South African Family Law* 57-81 for a detailed discussion of the consequences of marriages in- and out of community of property.

in equal undivided shares. Ownership of all assets passes to the joint estate *ex lege* at the conclusion of the marriage and the normal rules of passing of ownership are not applicable. Registration at the Deeds Office is not required.⁹¹

Co-ownership of the joint estate of spouses married in community of property is a form of "tied" or bound co-ownership. The shares of the spouses are undivided and indivisible (unless a division of the joint estate is ordered).⁹² The most important distinction between bound and free ownership is the right to alienate the assets which are so owned. Assets cannot be physically divided and a spouse can therefore not alienate only his or her undivided half share of the community assets. In the event of a divorce the former spouses become free owners of the assets and are entitled to a division of the former joint estate. The "tie" restricting co-ownership is dissolved rather than the actual joint ownership or co-ownership *per se*. Former spouses married in community of property and subsequently divorced may apply in terms of section 45(bis)(1A)(a) of the Deeds Registries Act⁹³ to endorse a title deed of property which formed an asset in a joint estate to the effect that both former spouses are entitled to deal with the property as if each has taken transfer of his or her respective share.

2.4.2.1 Assets excluded from the joint estate

The Matrimonial Property Act makes provision for separate estates in the definition clause as well as in sections 17, 18 and 19. In *Du Plessis v Pienaar*⁹⁴ the Supreme Court of Appeal found that although the Matrimonial Property Act authorises spouses to have a separate estate from the joint estate, this authorisation does not mean that either the joint estate or the separate estate of a spouse is protected against joint creditors of the spouses. According to the Court that argument would lead to the conclusion that a spouse may be solvent in one estate and insolvent in the other which position is untenable in current South African law.⁹⁵

91 *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C).

92 In terms of s 20 of the Matrimonial Property Act.

93 47 of 1937.

94 2003 (1) SA 671 (SCA) and hereafter referred to as "*Du Plessis*".

95 See however chapter 5.1 below.

The existence of a separate estate of a spouse married in community of property does not affect the rights of third parties.⁹⁶ Property that is owned separately by spouses married in community of property is relevant in the way the parties deal with the property *inter se* and on dissolution of the marriage but does not affect the rights of creditors to look at all the property of a debtor.⁹⁷

2.4.2.1.1 Bequests and donations

Property bequeathed or donated to a spouse by a third party with an express condition that such property will not form part of the joint estate or will be subject to a *fideicommissum* or usufruct will be excluded from the joint estate.⁹⁸ During the existence of the *fideicommissum*, fruits and income from the fideicommissary property fall into the joint estate.⁹⁹

The legal question in *Badenhorst v Bekker*¹⁰⁰ was whether certain assets which a testator expressly excluded from the community of property of a beneficiary do in fact form part of the joint estate of the beneficiary. The Court decided that a testator may bequeath his assets to a beneficiary free of the marital power of the beneficiary's spouse. Such a bequest can further be excluded from the beneficiary's joint estate.¹⁰¹ It is however trite law that a testator may not stipulate that a bequest may not be attached by creditors or that such a bequest may not form part of the beneficiary's insolvent estate.¹⁰²

96 *Du Plessis* para 9.

97 *Du Plessis* para 5.

98 Heaton, Church and Church "Marriage" Vol 16 70.

99 Robinson 141.

100 1994 (2) SA 155 (N).

101 *Erasmus v Erasmus* 1942 AD 265; *Cuming v Cuming* 1945 AD 201.

102 The court refers to *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388, *Pritchard's Trustee v Estate Pritchard* 1912 CPD 87 para 95 and *Vorster v Steyn* 1981 (2) SA 831 (O) paras 832E-833C.

2.4.2.1.2 Life insurance policy

A life insurance policy payable to a beneficiary other than the surviving spouse¹⁰³ of the deceased will not form part of the joint estate.¹⁰⁴ It follows therefore that the proceeds of a life insurance policy payable to a surviving spouse will form part of the joint estate.¹⁰⁵

2.4.2.1.3 Certain damages

Section 18(a) of the Matrimonial Property Act states that damages awarded to a spouse by reason of a delict committed against him or her (other than damages for patrimonial loss) will form part of that spouse's separate property. Patrimonial damages awarded in respect of damage to community property, medical expenses and loss of earnings due to a third party will form part of the joint estate.¹⁰⁶

2.4.3 Liabilities of the joint estate

The general rule states that *all* liabilities whether pre- or post-marriage form part of the joint estate, the principle being "(d)ie de man ofte wijf trouwt, die trouwt oock de schulder".¹⁰⁷ This principle however conflicts with the common law general rule that no person should be liable for another's wrongdoing. A distinction needs to be drawn between post-nuptial contractual debts and delictual debts to determine liability for either the joint estate or the separate estate of a spouse.¹⁰⁸

2.4.3.1 Contractual debts

If debts are incurred for household necessities, a creditor must be paid from the joint estate. A creditor may also claim payment from the separate estate of the spouse who incurred the debt but apparently not from the separate estate of the other spouse.¹⁰⁹

In terms of section 15 of the Matrimonial Property Act certain juristic acts may not be performed without the other spouse's written consent. These acts include *inter alia*

103 Muller 2006 *THRHR* 268.

104 See however Wood-Bodley 2010 *SALJ* 224 for commentary on *Danielz v De Wet* 2009 (6) SA 42 (C) where it was decided that a life policy does not form part of a joint estate.

105 See also s 3(3) of the Estate Duty Act 45 of 1955.

106 Sinclair 186 footnote 84.

107 Sonnekus 1994 *TSAR* 149.

108 Robinson 2007(10) 3 *PER* 72-73.

109 Robinson 147.

buying, selling or mortgaging immovable property belonging to the joint estate, alienating shares and stocks belonging to the joint estate, alienating investments belonging to the joint estate, withdrawing money from a bank account held in the name of the other spouse and binding oneself as surety. Other acts may be performed with mere oral consent such as the sale of furniture belonging to the joint estate, remuneration received and receipt of proceeds from an insurance policy.

In general a contract is void if consent of a spouse is required but has not been obtained.¹¹⁰ The contract may however be valid if the third party contractor did not have knowledge or could not reasonably have known that the other contracting party was married in community of property.¹¹¹ If the creditor was negligent in determining whether the necessary consent was required, he or she cannot avail himself of the remedy contained in section 15(9)(a) of the Matrimonial Property Act. In the event of a contract being void due to the non-compliance with section 15 of the said Act, a creditor may claim payment in terms of undue enrichment or if an asset or money has been transferred to a debtor, the *conditio indebiti* or the *rei vindicatio*.¹¹² These claims are however notoriously difficult to prove.

The Act does not prescribe the form of the consent¹¹³ but merely the manner in which informal consent may be given. Without the necessary consent the juristic act is incomplete but once it is apparent that the necessary consent will not be sought or given, the juristic act which requires consent is unlawful and therefore void.¹¹⁴ If a spouse enters in to a contract in the ordinary course of his or her business, the other spouse's consent is not necessary.¹¹⁵

Section 15(9)(a) of the Matrimonial Property Act contains a remedy for creditors and was discussed in *Distillers Corporation Ltd v Modise*.¹¹⁶ According to the Court opinions differ

110 Robinson 157.

111 Section 15(9)(a) of the Matrimonial Property Act.

112 Robinson 157.

113 *Bopape v Moloto* 2000 (1) SA 383 (T) para 386H and hereafter referred to as "*Bopape*".

114 *Bopape* para 388E.

115 *Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste BK* 1995 (3) SA 314 (T). In this regard the Supreme Court of Appeal confirmed in *Strydom v Engen Petroleum Limited* 2013 (2) SA 187 (SCA) that the s 15 consent requirement must be read with the *proviso* contained in s 15(6). Section 15(6) is not applicable to all consents required in terms of s 15 as the Act does not state that it is applicable to ss 15(2)(a), (d) and (e).

116 2001 (4) SA 1071 (O) and hereafter referred to as "*Distillers*".

as to whether a surety signed without the necessary consent is void¹¹⁷ or voidable.¹¹⁸ The test whether a *creditor does not know and cannot reasonably know* about the marital status of a debtor is an objective one.¹¹⁹ *In casu* the Court found that the creditor was entitled to accept that the debtor had the necessary consent from his spouse to sign the surety.

Steyn¹²⁰ believes that the correct formulation should rather be whether the third party cannot *reasonably know* that the required consent is lacking instead of *does not know and cannot reasonably know*. The word *cannot* implies a duty upon a third party to investigate whether a debtor requires consent from his or her spouse to enter into an agreement and if so, whether consent has been obtained.¹²¹ The third party needs to investigate the factual position in order to satisfy the test that a reasonable person cannot reasonably know whether a debtor is married in community of property.¹²² A third party is therefore expected to rely on more than a mere statement from a debtor regarding his or her marital status.¹²³ Zaal¹²⁴ maintains that *reasonable* knowledge is a semantically elusive concept as one either has knowledge or does not have knowledge whether a person is married in community of property and the reasonableness of the knowledge is irrelevant.

Section 15(9)(b) of the Matrimonial Property Act provides a remedy to the aggrieved spouse in that an adjustment in favour of the spouse upon dissolution of the marriage may be effected.

In *De Wet v Jurgens*¹²⁵ the Appeal Court (as it then was) confirmed that spouses' debts are debts of the joint estate¹²⁶ and therefore spouses married in community of property are co-debtors. Sequestration of the joint estate inevitably entails that both spouses are declared insolvent. One spouse does not have a separate estate which may not be

117 *Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste BK* 1995 (3) SA 314 (T).

118 *Bopape* paras 387-388.

119 *Distillers* par 5.

120 Steyn 2002 *SALJ* 256 and hereafter referred to as "Steyn".

121 Steyn 256.

122 Steyn 256.

123 Steyn 257.

124 Zaal 1986.1 *TSAR* 65.

125 1970 (3) SA 38 A.

126 Confirmed in *Nedbank v Van Zyl* 1990 (2) SA 469 (A).

declared insolvent.¹²⁷ Debts are not incurred by a person's estate but by the person. A person's estate is merely the source from which the debts are paid and hence the husband cannot be regarded as the only debtor.¹²⁸

2.4.3.2 Delictual debts

Section 19 of the Matrimonial Property Act stipulates that when a spouse married in community of property is liable for the payment of damages, the creditor can recover the amount firstly from the separate estate of that spouse and secondly from the joint estate if that spouse does not possess a separate estate. The amount so paid may be recovered by the other spouse on dissolution of the marriage. An unpaid delictual debt must be paid after the dissolution of the marriage by the guilty spouse from his or her half share of the estate.¹²⁹

2.4.3.3 Other debts

These debts would include *inter alia* speeding and criminal fines, and a spouse's maintenance obligations. These debts are neither contractual debts nor are they *sensu stricto* delictual debts. It is respectfully submitted that section 19 of the Matrimonial Property Act must be interpreted or extended by legislation to include the abovementioned debts.

2.4.4 Insolvency

In the event of insolvency, both spouses married in community of property become insolvent.¹³⁰ The Insolvency Act 24 of 1936 (hereafter the Insolvency Act) does not specifically mention separate estates of a debtor but section 20 of the said Act provides *inter alia* that the estate of the insolvent shall vest in a trustee and that property of the insolvent includes all property of the insolvent at the date of sequestration *as well as* property which may accrue to the insolvent during sequestration. The Insolvency Act does contain exceptions to section 20, but excluded assets do not form part thereof. Section 21 of the Insolvency Act provides that a trustee shall release property of the

127 *De Wet v Jurgens* 1970 (3) SA 38 A para 48.

128 *De Wet v Jurgens* 1970 (3) SA 38 A para 47.

129 *Pelser v Lessing* [2014] ZAGPPHC 521 para 44.

130 *De Wet v Jurgens* 1970 (3) SA 38 (A) para 48.

solvent spouse should the solvent spouse prove that he or she acquired the assets by way of a valid title against creditors. Section 21 of the Insolvency Act cannot be applicable to a joint insolvent estate as both spouses are regarded as being insolvent.¹³¹ In *Maharaj v Sanlam Life Insurance Ltd*¹³² it was confirmed that the dissolution of a marriage in community of property does not absolve a solvent spouse from debts incurred *stante matrimonio*.

In 2003 the Supreme Court of Appeal confirmed in *Du Plessis v Pienaar*¹³³ that spouses married in community of property are jointly liable for debts incurred by either one of them. Creditors are therefore entitled to recover the debt from the separate property of either one of the spouses.

The decision in the *Du Plessis* case is summarised in *Van der Merwe v RAF*¹³⁴ as follows:

...whilst sections 17-19 of the Act (the Insolvency Act) authorise an estate separate from the joint estate it does not mean that either of the estates is protected from the incursions of joint creditors of the spouses. If that were so it would lead to the anomaly that a debtor might be insolvent in relation to one estate and not insolvent in relation to the other. The court concluded that the Act recognizes the existence of separate property in the relationship between the spouses between each other but it does not affect the rights of third parties.

Du Plessis confirmed the judgment in *Badenhorst v Bekker*¹³⁵ which concluded that a property inherited by a spouse may be attached by creditors despite a clause in a will that such property will be excluded from community of property.

Roux¹³⁶ maintains that the conclusion of the Court disregards the principle of freedom of testation as the testator's intention was effectively invalidated.

Du Plessis was heard three years before *Van der Merwe*. It will be argued in chapter 5 that the decision in *Du Plessis* may very well have been totally different if it had been heard after *Van der Merwe*.

131 *Badenhorst v Bekker* 1994 2 SA 155 (N) para 160.

132 2011 (6) SA 17 (KZD).

133 2003 1 SA 671 (SCA).

134 2006 (4) SA 230 (CC) footnote 41 and hereafter referred to as "*Van der Merwe*".

135 1994 2 SA 155 (N) and followed with approval in *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A).

136 Roux September 2012 *DR* 30.

2.4.5 Litigation

In terms of section 17 of the Matrimonial Property Act spouses married in community of property may not institute or defend legal proceedings without the other spouse's written consent. A spouse does not require written consent in respect of legal proceedings regarding his or her separate property for the recovery of damages (other than damages for patrimonial loss) due to the commission of a delict or in respect of a matter relating to his or her business, profession or trade.

Absence of consent does not render the legal proceedings invalid and a party to legal proceedings may not challenge the validity of the proceedings on this ground. A spouse who continues with legal proceedings without the necessary consent runs the risk of a cost order against his or her separate estate. If he or she does not have a separate estate the costs must be recovered from the joint estate and a court may also order that the awarded costs must be taken into account at the division of the joint estate.¹³⁷

Even though a court will not easily grant the eviction of a spouse, Section 17 of the Matrimonial Property Act makes it virtually impossible for a spouse married in community of property to evict the other spouse from the matrimonial home.¹³⁸

2.4.6 Surrender

Both spouses must launch an application for the surrender of the joint estate.¹³⁹

2.4.7 Application for liquidation

An application for liquidation must be made against both spouses unless the applicant can satisfy the court that despite reasonable steps, he or she could not determine whether the debtor's estate is a joint estate.¹⁴⁰

137 Section 17(3) of the Matrimonial Property Act.

138 *Oosthuizen v Oosthuizen* 1986 (4) SA 984 (T).

139 Section 17(4)(a) of the Matrimonial Property Act .

140 Section 17(4)(a) and (b) of the Matrimonial Property Act.

2.4.8 Duty of support

The High Court in the Transvaal Provincial Division (as it then was) extended the duty of support to children of a spouse from a previous marriage.¹⁴¹ The reasoning was that a consequence of a marriage in community of property is a *consortium* with the children's mother. The consortium prevails while the marriage subsists and therefore the stepfather was ordered to pay maintenance to his stepchildren until a divorce order was granted.¹⁴²

2.5 Protection of spouses *inter se*

Should one spouse be incapable of providing the required consent in terms of sections 15(2) and (3) or 17 of the Matrimonial Property Act or unreasonably withholds such consent, the other spouse may approach a court for an order in terms of Section 16(1) of the Matrimonial Property Act and obtain leave to enter into a transaction without the required consent. A spouse may also approach a court in terms of section 16(2) to suspend another spouse's contractual capacity regarding the joint estate.

A court can, in terms of an application based on section 20 of the Act, order the division of the joint estate. The joint estate may be replaced with another matrimonial regime after the court has considered the prejudice which the conduct of one spouse caused the other in respect of the assets of the joint estate.¹⁴³

The *Actio Pauliana* is available to a spouse only if the other spouse acted *in fraudem uxoris*.¹⁴⁴ No common law remedies are available if the other spouse acted negligently or recklessly.

An enrichment action is available if property is transferred to a defendant under an illegal agreement and the defendant knew of the illegality at the time of transfer.¹⁴⁵ In such an event a court may order an adjustment in favour of the aggrieved spouse upon division of the joint estate.¹⁴⁶

141 *Heystek v Heystek* 2002 (2) SA 754 (T).

142 Heaton *Family Law and the Bill of Rights* 3C46.

143 *Leeb v Leeb* 1999 (2) ALL SA 588 (N) para 597.

144 *Visser v Hull* 2010 (1) SA 521 (WCC) para 13.

145 *First National Bank of Southern Africa v Perry* 2001 (3) SA 960 (SCA) and *Visser v Hull* 2010 (1) SA 521 (WCC) para 19.

146 Section 15(9)(b) of the Matrimonial Property Act.

2.6 Management of the joint estate

Spouses married in community of property are regarded as two captains on a ship with equal control after the marital power has been abolished.

In terms of section 14 of the Matrimonial Property Act spouses have equal power regarding the disposal of the assets of the joint estate, contracting of debts against the joint estate and the management of the joint estate.

2.7 Conclusion

It is clear from the above discussion that a marriage in community of property has unique *ex lege* invariable consequences. None of these consequences are applicable to marriages out of community of property.

In terms of common law the husband was the head of the family, had power over his wife's property and person and guardianship over his children during the subsistence of the marriage. A wife automatically followed her husband's domicile. The General Law Fourth Amendment Act abolished the marital power *in toto* and the Domicile Act¹⁴⁷ now confers the right on persons older than 18 to acquire a domicile of choice.

It seems that the only common law rule in matrimonial law where it is relevant to identify the husband is the rule that determines that a husband's domicile at the date of the marriage determines the proprietary consequences of a marriage if the spouses have different domiciles.¹⁴⁸

Community of property seems archaic in the modern world, yet it is still popular in South Africa. The modern commercial world moves fast and requires prompt decisions. In terms of the Matrimonial Property Act spouses married in community of property requires written consent from each other for certain contracts. As seen above, an agreement entered into without the necessary consent may be void. Lack of the necessary consent from a spouse in a commercial transaction can be detrimental to a creditor as such an agreement may be invalid. It is submitted that the test regarding consent proposed by

147 3 of 1992.

148 The principle can of course not be applicable in same sex marriages. See *Fourie v Minister of Home Affairs* 2004 ZASCA 132 para 124.

Steyn¹⁴⁹ should be followed. Third parties often have only the assurance of a person that he or she is either not married or married out of community of property. A marriage out of community of property can be proven by providing a registered antenuptial contract. By inference a marriage in community of property can then be proven by the absence of an antenuptial contract which is obviously a legal absurdity. A third party should be able to rely on a mere statement from a debtor regarding his or her marital status.

In terms of section 15(9) of the Matrimonial Property Act a spouse may find himself or herself in a position where an agreement will be enforced although he or she did not consent thereto. It is a small consolation that he or she may claim damages on dissolution of the marriage.

The Constitutional Court in *Van Der Merwe* had no hesitation in amending the Matrimonial Property Act to bring it in line with the Constitution. There will no doubt be further challenges to the Matrimonial Property Act in future.

3 The application of the Bill of Rights

The Bill of Rights contained in the Constitution *inter alia* states that:

- everyone is equal before the law;
- the state may not unfairly discriminate against anyone based on marital status;
and
- discrimination based on marital status is unfair.

The Bill of Rights may be limited in terms of law of general application provided however that the limitation is reasonable and justifiable in an open and democratic society. Factors such as the importance and purpose of the limitation and the nature and extent of the limitation are taken into consideration.

149 See 2.4.3.1 above.

3.1 Section 9 of the Constitution¹⁵⁰

Section 9 states

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2)
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

3.2 Equality

Equality includes a universal moral sense that all people are equally worthy.¹⁵¹ Scholars of the equality principle often refer to Kant¹⁵² who stated

...a human being...is exalted above any price. (He) possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.

The nature of inequality is fiercely debated.¹⁵³ The debate is predominantly subjective, influenced by the particular political, legal and historical perspectives and *boni mores* of society and includes such questions as to the nature of inequality and how to decide an assertion of inequality.¹⁵⁴

150 Section 8 of the Constitution of the Republic of South Africa 200 of 1993. The wording of the two sections differ but no material differences in equality jurisprudence exist. See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 52; *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 29; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 15.

151 Cheadle, Davis and Haysom *South African Constitutional Law: the Bill of Rights* 4.1 and hereafter referred to as "Cheadle".

152 Gregor Kant *The Metaphysics of Morals* 237.

153 Cheadle 4.1.

154 Cheadle 4.1.

The principle of equality is often criticised as an empty concept.¹⁵⁵ Sachs J¹⁵⁶ stated that equality jurisprudence must be developed around the principle of unfair discrimination as

...(i)t reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasising the Court's special responsibility for protecting fundamental rights in an affirmative manner. It also diminishes the possibility of the Court being inundated by unmeritorious claims, and best enables the Court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility. Finally, it places the Court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history.

3.3 Dignity¹⁵⁷

Section 10 of the Constitution states that

Everyone has inherent dignity and the right to have their dignity respected and protected.

Dignity was defined by the Constitutional Court¹⁵⁸ as the "(v)alue and worth of all individuals as members of our society". Humans have this right solely because they are human.¹⁵⁹

The right to dignity forms the basis of protection of other rights enshrined in the Constitution.¹⁶⁰ Furthermore

[i]t is the dignity and importance of the individual which is the essence and the cornerstone of democratic government.¹⁶¹

The right to equality protects the equal worth of humans and the right to dignity protects the intrinsic worth of humans.¹⁶²

155 For an in-depth discussion see Westen 95 *Harvard Law Review* 537.

156 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 para 143.

157 For a detailed discussion of the meaning of dignity see Wood 2007 <http://web.stanford.edu/~allenw/webpapers/keynote2007.doc>.

158 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 143 para 28; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 48.

159 "human beings are required to be treated as human beings" as per Yacoob J in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 para 83.

160 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 para 41 and *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (CC).

161 Per O'Regan J in *S v Makwanyane* 1995 (3) SA 391 para 330.

162 Rautenbach *Introduction to the Bill of Rights* 1A57.1.

3.4 Unfair discrimination

The *locus classicus* to determine whether discrimination is unfair is the Constitutional Court case of *Harksen v Lane*.¹⁶³ A discussion of the decision is relevant for the development of the argument in chapter 5 that some legislation which impacts on marriage in community of property might be unconstitutional.

The applicant and her husband were married out of community when his estate was sequestrated. She contended that section 21 of the Insolvency Act which provides that the estate of a solvent spouse shall vest in the Master until a trustee in the insolvent estate has been appointed¹⁶⁴ constituted expropriation of the solvent spouse's property without compensation as per section 28(3) of the Interim Constitution.¹⁶⁵ Furthermore, she was of the opinion that the vesting provision discriminated between solvent and insolvent spouses.¹⁶⁶ This particular case dealt with section 8 of the Interim Constitution. The wording of section 8 of the Interim Constitution and section 9 of the Constitution differ but no material differences in equality jurisprudence exist.

3.4.1 The test for unfair discrimination

The test for unfair discrimination was formulated and is summarised as follows:¹⁶⁷

- Does the provision differentiate between people or categories of people?
- If so, is there a rational connection to a legitimate governmental purpose? If not, it might be discrimination.
- Does the differentiation amount to unfair discrimination? and

¹⁶³ 1998 (1) SA 300 and hereafter referred to as "*Harksen*".

¹⁶⁴ Section 21(1) states: "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."

¹⁶⁵ *Harksen* para 30.

¹⁶⁶ *Harksen* para 40.

¹⁶⁷ *Harksen* para 52.

- if so, the Court must determine whether the provision can be justified under the limitation clause.

3.4.1.1 Does the provision differentiate between people or categories of people?

The Constitutional Court conceded in *Prinsloo v Van der Linde*¹⁶⁸ that it is impossible to govern a country efficiently and harmonise the interests of all its people without extensive regulation. Regulation entails differentiation and classification which treat and affect people differently.¹⁶⁹ Such differentiation often involves discrimination which may be fair or unfair.¹⁷⁰ Fair discrimination amounts to mere differentiation which is common practice in a modern state as for example income differentiation for purposes of taxation.¹⁷¹ Differentiation which is arbitrary or irrational will however be unconstitutional.¹⁷²

The Constitutional Court¹⁷³ found that an enquiry into section 9 of the Constitution necessarily involved a determination of both direct and indirect differentiation. If no differentiation exists between groups or individuals section 9(1) cannot be violated.¹⁷⁴ Whether differentiation exists has seldom been contested.¹⁷⁵

3.4.1.2 Is there a rational connection to a legitimate governmental purpose?

Firstly, one must identify whether the challenged action has a legitimate purpose.¹⁷⁶ Courts are not obliged to examine the impact of the impugned action and therefore most legislation will pass the rationality test.¹⁷⁷

168 1997 (6) BCLR 759 para 24 and hereafter referred to as "*Prinsloo*".

169 *Prinsloo* para 24.

170 Cheadle 4.6.1.

171 Cheadle 4.6.1.

172 *Prinsloo* para 25.

173 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 para 143.

174 Cheadle 4.6.1.1.

175 In *S v Jordan* 2002 (6) SA 642 (CC) the issue before the Court was whether a provision that criminalised sex work differentiated between sex worker and client. The majority found no discrimination based on gender but ruled that legislation differentiated between sex worker and client.

176 Cheadle 4.6.1.1.

177 Cheadle 4.6.1.1. See his footnote 93 for a discussion of case law regarding a rational connection to a legitimate government purpose.

Secondly, one must determine whether a reason that is rationally linked to a legitimate government purpose exists for the differentiation.¹⁷⁸ Yacoob¹⁷⁹ J aptly summarises the rationality concept as follows:

Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution... If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on the grounds of "unreasonableness". Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant.

The courts have however regularly confirmed that equality jurisprudence may be developed as new circumstances present themselves which may influence the current sentiment regarding rationality.¹⁸⁰ Capricious action by Parliament will be unconstitutional.¹⁸¹

3.4.1.3 Does the differentiation amount to unfair discrimination?

Discrimination was styled in *Prinsloo v Van der Linde*¹⁸² as follows:

"Discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.

The intention behind discrimination is irrelevant as discrimination and unfairness must be determined objectively.¹⁸³ The purported discrimination must have occurred on a prohibited ground which can be either a listed ground in sections 9(3) and (4) or a similar

178 *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 24.

179 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 para 24.

180 Cheadle 4.6.4.

181 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 para 19.

182 *Prinsloo* para 31.

183 *City Council of Pretoria v Walker* 1998 (2) SA 363 para 43.

ground.¹⁸⁴ Seventeen grounds are listed in the Constitution.¹⁸⁵ These grounds are race, colour, ethnic origin, sex, gender, pregnancy, marital status, sexual orientation, disability, age, religion, belief, conscience, culture, language, social origin and birth. The Constitutional Court has confirmed that inequality can occur in respect of more than one of the prohibited grounds (intersectional discrimination) but it would be sufficient if the discrimination were substantially based on one of the listed grounds.¹⁸⁶

Although sections 9(3) and (4) specifically provide protection against unfair discrimination, the Constitutional Court confirmed in *Minister of Finance v Van Heerden*¹⁸⁷ that all the provisions in section 9 of the Constitution must be harmoniously read in order to understand the equality principle in the Constitution.

3.4.1.4 Can the provision be justified under the limitation clause?

Section 36 of the Constitution confirms that the Bill of Rights may be limited only

- (1) ... in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

The limitation clause is in essence a balancing act between a democratically elected legislature on the one hand and the courts on the other in order to ensure the protection of constitutional values.¹⁸⁸ The main function of the limitation clause is the recognition that constitutional rights are not absolute and may be limited by legislation to reflect social interests.¹⁸⁹ The Constitutional Court has held that judicial independence, which is

184 Cheadle 4.8.2.2.

185 S 9(3) of the Constitution.

186 *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) para 43.

187 2004 (6) SA 121 (CC) para 28.

188 Cheadle 30.1.1.

189 Cheadle 30.1.1.

not mentioned in the Bill of Rights *per se* is not subject to the limitation of the general limitation clause.¹⁹⁰

The limitation of a right must be based on a law of general application and not in an executive act or policy¹⁹¹ or in the internal rules of an organisation.¹⁹² Law of general application includes common law, statutory law and customary law.¹⁹³ It also includes law created by courts in the application, interpretation and development of common law.¹⁹⁴ Administrative, judicial, executive and private actions are not law *per se*.¹⁹⁵ The legislature may pass legislation to advance social interests but the legislation may not be arbitrary in its application.¹⁹⁶ This entails that the legislation which limits rights must be precise and accessible to those affected by it and must apply equally to all.¹⁹⁷ Such legislation may not limit the rights of a specific person or unique set of circumstances.¹⁹⁸

The application of the limitation requirement in section 36 is aptly summarised in the Constitutional Court case of *S v Makwanyane*¹⁹⁹

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality...(T)here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where a limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

190 *Van Rooyen v State* 2002 (5) SA 246 (CC) para 35 and *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 103.

191 *Hoffmann v South African Airways* 2000 (11) BCLR 1211. Rautenbach *Introduction to the Bill of Rights* 2011 1A45(a) and hereafter referred to as "Rautenbach" is however of the opinion that the *Legal Succession of the South African Transport Services Act* 9 of 1989 is the law of general application in casu.

192 *Taylor v Kurtzsdag* 2005 1 SA 365 (W) para 45.

193 According to the minority judgement in *President of the Republic v Hugo* a Presidential Act is not a law of general application.

194 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 4 BCLR 492 (T) para 537.

195 Rautenbach 1A45(b).

196 Cheadle 30.4.1.

197 Currie and De Waal *The Bill of Rights Handbook* 2008 169.

198 Rautenbach 1A45(g).

199 1995 (6) BCLR 665 (CC).

3.5 Criticism of the discrimination test

The Constitutional Court applied the discrimination test in *Da Silva v Road Accident Fund*²⁰⁰ as recently as 19 June 2014. Although the test for discrimination formulated in *Harksen* has been applied by South African courts²⁰¹ it has drawn criticism.

Kruger²⁰² is of the opinion that the test suggests that *both* sections 9(1) and 9(3) of the Constitution must be analysed if the right to equality is raised. Furthermore, the test emphasises dignity in the equality analysis but fails to indicate the effect of unfair discrimination on the dignity of a complainant. She suggests²⁰³ that a sensitivity to the nature of history and a "dignity-centred approach" would focus the courts' analysis and lead to eradication of discrimination. Furthermore, she advocates a refinement of the discrimination test by recognising the distinct differences in the aspects of equality mentioned in sections 9(1) and 9(3) of the Constitution.²⁰⁴

De Vos²⁰⁵ refers to the Supreme Court of Appeal decision in *Potgieter v Potgieter*²⁰⁶ when the Court expressed its disagreement with the reasoning of the court *a quo* which found that a court can deviate from common private law principles by invoking the Bill of Rights if the results will be more equitable. The Supreme Court of Appeal stated

Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.²⁰⁷

According to De Vos the attitude of the Supreme Court of Appeal indicates a lack of appreciation of the Bill of Rights. He mentions that the Constitution must be utilised to assist in the transformation of the legal system. Section 39(2) of the Constitution states that

(w)hen developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

200 2014 (5) SA 573 (CC).

201 For a summary of relevant case law see Kruger Vol. 128, Issue 3 (2011) *SALJ* 479 footnote 2 and hereafter referred to as "Kruger".

202 Kruger 480.

203 Kruger 495.

204 Kruger 512.

205 De Vos 13 October 2011 <http://constitutionallyspeaking.co.za/2011/10/13>.

206 2012 (1) SA 637 (SCA).

207 *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) para 36.

De Vos argues that the courts have a general obligation to develop common law based on the Bill of Rights. The courts should always ask when a common law rule is applied whether the particular rule should not be developed to bring the rule in line with the principles enshrined in the Bill of Rights. The courts should therefore at all times be concerned with dignity, equality and fairness.

3.6 *Volks v Robinson*²⁰⁸

The Constitutional Court decision in *Volks v Robinson* has attracted substantial disapproval²⁰⁹ mostly regarding the Court's extolment of the importance of marriage and its criticism of the modern trend not to get married but rather to cohabit as husband and wife. The facts were briefly as follows: Mrs Robinson was involved in a permanent heterosexual relationship. After the death of her partner she instituted a claim for maintenance against the estate of the deceased in terms of the Maintenance of Surviving Spouses Act. The court *a quo*²¹⁰ found the provision in the said Act which referred only to the survivor of a spouse *in a marriage* discriminated unfairly against surviving life partners on the basis of dignity and equality. In a majority judgement the Constitutional Court reversed the decision of the High Court.

Skweyiya J writing for the majority of the Constitutional Court found that the impugned Act did discriminate on the basis of marital status. As a listed ground in the Bill of Rights discrimination is presumed unfair unless the contrary can be proven.²¹¹ He found that marriage as an institution is founded on section 15(3)(a)(i)²¹² of the Constitution. He stated²¹³

Marriage and family are important social institutions in our society.. Marriage is also an internationally recognised social institution.. From this recognition, it follows that the law may distinguish between married people and unmarried people (and therefore) the law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people.. The distinction between married and unmarried people

208 2005 5 BCLR 446 (CC) and hereafter referred to as "*Volks*".

209 See *inter alia* Lind 2005 *Acta Juridica* 108 and Cooke 2005 *SALJ* 542.

210 *Robinson v Volks* 2004 6 SA 288 (C).

211 *Volks* para 50.

212 "S15. Freedom of religion, belief and opinion

3(a)(i) This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law".

213 *Volks* paras 52-56.

cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage.

He propounded the so-called "choice argument" by arguing that couples have a choice whether to get married or to cohabit.²¹⁴ Marriage creates various *ex lege* benefits and obligations whereas the cohabitation relationship is mostly governed by agreement.²¹⁵ He found that the purpose of the Maintenance of Surviving Spouses Act was to extend an *ex lege* consequence of marriage (namely maintenance) to a surviving spouse. He was not prepared to posthumously impose a duty of support to a life partner if such a duty did not exist *ex lege* during the deceased's lifetime.²¹⁶

In a dissenting judgement Sachs J is of the opinion that the mere fact that Mrs Robinson could marry her heterosexual partner but decided not to do so is insufficient reason to conclude that a life partner in her position should not be entitled to maintenance.²¹⁷ Sachs J realistically argued that the option to marry often only exists in theory.²¹⁸ Smith²¹⁹ is of the opinion that Sachs J's statement that Sachs J saw "(l)ittle reason in fairness" why a contractual duty to support could not be extended after the death of a partner²²⁰ should have been taken further. Smith reasons that the Court should have found that a factual reciprocal duty of support did indeed exist between Mrs Robinson and her partner and that the Court should simply have given effect to the *de facto* duty of support between the parties.²²¹

After the decision in *Volks* the Supreme Court of Appeal and the Constitutional Court extended the conventional meaning of *spouse* (being a person involved in a heterosexual marriage registered as such in terms of the Marriage Act to include alternative forms of partnership. The meaning of *spouse* now includes a surviving partner in a monogamous Muslim marriage²²² for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. It also includes the same sex life partner of a judge²²³ for purposes

214 For criticism of the choice argument see Smith [2010] *PER* 23.

215 *Volks* para 58.

216 *Volks* para 60.

217 *Volks* paras 155-162.

218 *Volks* para 225.

219 Smith 2010(13)(3) *PER* 255.

220 *Volks* para 216.

221 Smith 2010(13)(3) *PER* 255.

222 *Daniels v Campbell* 2004 (5) SA 331 (CC).

223 *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC).

of the Judge's Remuneration and Conditions of Employment Act 47 of 2001. In *Minister of Home Affairs v Fourie*²²⁴ the common law definition of marriage was extended to include a same-sex permanent life partnership.²²⁵

The legislature proposed the Domestic Partnerships Bill²²⁶ to protect parties in a domestic partnership without the need of a formalised agreement to arrange their relationship.²²⁷ The Bill has not been passed into law as at 1 November 2014.

The Constitutional Court in *Van der Merwe* distinguished *Van der Merwe* from *Volks*. The impugned legislation in *Volks* accorded rights to married people but not to unmarried people²²⁸ whereas the impugned legislation in *Van der Merwe* differentiated between different marital regimes.²²⁹ *Van der Merwe* did however discard the "choice argument". According to Moseneke DCJ the argument that parties have a choice whether to get married in or out of community of property and therefore have to abide with their decision, implied an undertaking by married people not to attack the legal validity of the laws that regulate their marriages.²³⁰ The constitutional validity of legislation is not influenced by personal choice, preference or conduct of a person affected.²³¹ The Constitution itself confirms the objective validity of legislation.²³² Therefore the submission that a person by his or her own choice confers validity on an otherwise invalid act has no merit.

3.7 Conclusion

It should be clear from the discussion above that South African Courts will enforce the principles enshrined in the Bill of Rights. It is submitted that De Vos' argument is correct that courts should automatically inquire when a common law rule is applied whether the particular rule should not be developed to bring the rule in line with the principles

224 2006 (1) SA 524 (CC).

225 This definition is also applicable to section 1(b)(ii) of the Pension Funds Act 24 of 1956. See *De Wilzem v South African Retirement Annuity Fund* [2005] 2 BPLR 180 (PFA).

226 GN 511 in GG 30663 of 14 January 2008.

227 For a short summary of the Bill see Vogelpath 1 Feb 2011 <http://www.polity.org.za/article/what-are-the-consequences-of-living-together-2011-02-01>.

228 See *Volks* above.

229 Para 46.

230 *Van der Merwe* para 60.

231 *Van der Merwe* para 61.

232 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 46.

enshrined in the Bill of Rights. This will ensure that the courts will interpret the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

4 A discussion of case law relating to the Constitution and marriages in community of property

One of the distinguishing characteristics of marriages in community of property seems to be a lack of constitutional activity. South African courts are flooded with the ubiquitous division of joint estate matters in divorce proceedings²³³ but at the time of writing hereof, the Constitutional Court has only adjudicated once on an aspect of marriage in community of property.

It is suggested that one of the most profound, yet underrated Constitutional Court decisions is the judgment in *Van Der Merwe v Road Accident Fund*²³⁴ decided on 30 March 2006. Prior to this decision section 18(b) of the Matrimonial Property Act stated that a spouse married in community of property may claim damages, *other than damages for patrimonial loss*, against the other spouse. The Court drastically amended legislation and the common law by sanctioning claims for patrimonial loss amongst spouses married in community of property.

4.1 Facts of *Van der Merwe v RAF*

Mr and Mrs van der Merwe were married to each other in community of property. Mr van der Merwe intentionally drove over Mrs Van Der Merwe with his motor vehicle. Mrs van der Merwe instituted an action against the Road Accident Fund (hereafter referred to as the "RAF") for bodily injuries sustained during the collision.²³⁵

In terms of section 17 of the Road Accident Fund Act 56 of 1996 the Fund is only liable to compensate a claimant if the claimant can institute a lawful claim against the driver of the vehicle that caused the bodily harm. The RAF raised a special plea and denied liability

233 One has only to glance briefly at the website of Saflii (<http://www.saflii.org.za>) to determine how many divorce matters reach the High Courts.

234 2006 (4) SA 230 (CC) hereafter referred to as "*Van der Merwe*".

235 Moseneke DCJ (the presiding judge) dryly observed that the marriage had ended in divorce.

based on section 18 of the Matrimonial Property Act which in effect excluded claims for patrimonial loss between spouses married in community of property. Mrs van der Merwe contended that sections 18(a) and (b) of the Act unfairly discriminate against persons married in community of property. She averred that her right to dignity was further impugned by her legislative inability to recover patrimonial loss from her spouse to whom she was married in community of property. She contended the relevant legislation constituted an arbitrary deprivation of property.

The court *a quo* found that section 18(b) of the Act constituted unjustifiable discrimination under section 36(1) of the Constitution and subsequently the phrase *other than damages for patrimonial loss* was declared invalid.²³⁶ The court *a quo* made an order of constitutional invalidity and in terms of section 172(2)(a) of the Constitution, the Constitutional Court had to confirm or refuse the constitutional invalidity.²³⁷

Certain aspects of the Constitutional Court decision are discussed below.

4.2 The common law and section 18(b) of the Matrimonial Property Act

In terms of common law spouses married in community of property could not litigate against each other for patrimonial or non-patrimonial loss.²³⁸ This rule emanated from the historical unfettered marital power of a husband as the administrator of the estate.²³⁹ The Court refers to *Tomlin v London Lancashire Insurance Co Ltd*²⁴⁰ where it was decided that it would be futile for one spouse married in community of property to sue the other spouse for any cause in delict as the spouses do not have separate estates and whatever is recovered from one spouse merely comes from the joint estate and immediately falls back into the joint estate. These common law restrictions are not applicable to spouses married out of community of property to each other.

236 *Van der Merwe v Road Accidents Fund* [2005] ZAWCHC 66 paras 42 and 43.

237 *Van der Merwe* para 5.

238 *Van der Merwe* para 29. See however Sonnekus 2006-4 *TSAR* 852-853 who is of the opinion that this principle was incorrectly taken from English law.

239 *Van der Merwe* para 29.

240 At para 29. *Tomlin v London Lancashire Insurance Co Ltd* 1962 (2) SA 30 (D) paras 33F-G and hereafter referred to as "*Tomlin*".

The Matrimonial Property Act amended the common law drastically.²⁴¹ The marital power was abolished and spouses married in community of property may now have separate property which does not form part of the joint estate.²⁴² In terms of the Act a spouse may claim damages, *other than damages for patrimonial loss* against the other spouse.²⁴³

4.3 Patrimonial and non-patrimonial damages

The Matrimonial Property Act does not define *damage* or *damages for patrimonial loss* and therefore its meaning must be obtained from common law.²⁴⁴ Common law recognises both patrimonial and non-patrimonial loss.²⁴⁵ The primary objective of awarding damages is to place an injured party in the same position he or she would have been had the wrongful conduct not happened.²⁴⁶ Patrimonial damage or special damage refers to a person's actual loss and is calculated in monetary value.²⁴⁷ Patrimonial damage in bodily injury claims consist of past and future medical expenses, past and future loss of income, loss of earning capacity and loss of support.²⁴⁸ Non-patrimonial damage or general damages are applicable to

...deterioration of highly personal legal interests that attach to the body and personality of the claimant.²⁴⁹

Owing to its nature it does not have an easily determinable monetary value.²⁵⁰ General damages in bodily injury claims include claims for pain and suffering, disfigurement and loss of amenities of life.²⁵¹ It also includes other interests such as dignity, reputation, privacy and feeling.²⁵² The Court is of the opinion that it is artificial to distinguish between patrimonial and non-patrimonial damages in delictual personal injury claims between spouses married in community of property.²⁵³ Patrimonial and non-patrimonial damages assume the form of a pecuniary award and an award to compensate a breach of a

241 *Van der Merwe* para 30.

242 Sections 1, 17(1)(a) and (b), 19 and 20.

243 *Van der Merwe* para 31.

244 *Van der Merwe* para 37.

245 *Van der Merwe* para 37.

246 *Van der Merwe* para 37.

247 *Van der Merwe* para 38.

248 *Van der Merwe* para 38.

249 *Van der Merwe* para 39.

250 *Administrator-General, South West Africa, v Kriel* 1988 (3) SA 275 (A).

251 *Van der Merwe* para 39.

252 *Van der Merwe* para 40.

253 *Van der Merwe* para 56.

personality right ultimately adds to a claimant's patrimony.²⁵⁴ The object of general damages are to place the claimant in the same position he or she would have been if it had not been for the wrongdoing.²⁵⁵

4.4 Equality analysis

The constitutional principle of equality will be applicable unless the differentiation has a legitimate rationale.²⁵⁶ If no rationale for the differentiation exists, the legislation is *prima facie contra* the principle of equal protection entrenched in the Constitution.²⁵⁷

4.4.1 Does the section differentiate?

The Court quotes the equality and unfair discrimination test formulated in *Harksen* and concludes that section 18 differentiates between marriages in community of property and out of community of property in respect of proprietary interests and protection.²⁵⁸ The law denies one class of married people a form of protection which another class enjoys.²⁵⁹

4.4.2 Does the differentiation bear a rational connection to a legitimate governmental purpose?

Moseneke DCJ refers to the rationale in the common law as stated in *Tomlin*: what he or she recovers from the other comes out of the joint estate and falls back instantly²⁶⁰ but finds that this rationale has fallen away after the enactment of the Matrimonial Property Act.²⁶¹ He concludes that *Tomlin* is not applicable to South African law anymore as damages recovered by one spouse from another in a marriage in community of property now becomes the property of the injured spouse.²⁶² Furthermore, a spouse may institute

254 Robinson Vol 10(3) 2007 *PER* 77.

255 *Van der Merwe* para 41.

256 See Chapter 3 and the discussion of *Harksen v Lane*.

257 *Van der Merwe* para 42.

258 *Van der Merwe* para 43.

259 *Van der Merwe* para 45.

260 *Tomlin* paras 33C-D.

261 *Van der Merwe* para 51 "...section 18(b) seeks to retain the notional purity of the universal community and to escape the futility of damages that would come from and return to joint patrimony".

262 *Van der Merwe* para 52.

a claim against the separate estate of the other spouse or against the joint estate upon its division if no separate estate exists.²⁶³

He finds no reason for the Matrimonial Property Act not to allow a battered spouse to claim patrimonial damages resulting from spousal violence as the proceeds of the claim would form part of the separate estate of the battered spouse.²⁶⁴ Furthermore, it is peculiar to allow a spouse married out of community of property a claim for patrimonial loss in the event of spousal violence but not accord the same right to a spouse married in community of property.²⁶⁵ He rhetorically asks why in one marital regime, the negligent driving of a spouse should attract delictual relief but in another it does not.²⁶⁶

Section 18(b) randomly prevents spouses married in community of property to each other to recover patrimonial damages from the other spouse in the event of spousal violence, negligent driving or conduct that leads to bodily harm.²⁶⁷ In bodily injury claims the distinction between patrimonial and non-patrimonial loss is often blurred because

the infringed personality interest often causes loss that affects both the person and the patrimony²⁶⁸

and therefore the lack of distinction between patrimonial and non-patrimonial damages in bodily injury suits does not comply with the requirement of differentiation being rational.²⁶⁹ *In casu* Mrs van der Merwe alleged that she suffered general damages in the form of disfigurement and pain and suffering and patrimonial damages in the form of loss of earnings and hospital expenses.²⁷⁰

Moseneke DCJ finds that section 18(b) limits the rights of spouses married in community of property to equal protection in terms of the Constitution as the differentiation itself is arbitrary and does not serve the public interest.²⁷¹

263 Section 19 of the Matrimonial Property Act.

264 *Van der Merwe* para 54.

265 *Van der Merwe* para 55.

266 *Van der Merwe* para 55.

267 *Van der Merwe* para 56.

268 *Van der Merwe* para 57.

269 *Van der Merwe* para 57.

270 *Van der Merwe* para 57.

271 *Van der Merwe* para 58.

4.4.3 Justification

The RAF alleged that Mrs van der Merwe had a choice whether to get married in or out of community of property and therefore she had to abide by her decision.²⁷² To Moseneke DCJ that line of reasoning implied an undertaking by married people not to attack the legal validity of the laws that regulate their marriages.²⁷³ The constitutional validity of legislation is not influenced by personal choice, preference or conduct of a person affected.²⁷⁴ The Constitution itself confirms the objective validity of legislation²⁷⁵ and therefore the submission that a person by his or her own choice confers validity on an otherwise invalid act has no merit.²⁷⁶ The Court refers to but distinguishes *Volks* from the present case as the impugned legislation in *Volks* accorded rights to married people but not to unmarried people²⁷⁷ and the matter *in casu* differentiated between different marital regimes.²⁷⁸

The Court is of the opinion that domestic violence and economic vulnerability are gendered in nature.²⁷⁹ The Court finds it absurd that a victim married in community of property to his or her abuser has to effectively obtain the abuser's consent to pay his or her medical and other bills.²⁸⁰ Even if Mrs van der Merwe divorced her husband, she could not claim patrimonial damages from her former husband in terms of the then current wording of section 18(b) of the Matrimonial Property Act.²⁸¹

Ultimately the Court declared section 18(b) of the Matrimonial Property Act inconsistent with the Constitution as it limited the equality provision of section 9(1) of the Constitution without any justification.²⁸²

272 *Van der Merwe* para 59.

273 *Van der Merwe* para 60.

274 *Van der Merwe* para 61.

275 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 46.

276 *Van der Merwe* para 61.

277 See *Volks* above.

278 *Van der Merwe* para 46.

279 *Van der Merwe* para 67.

280 *Van der Merwe* para 67.

281 *Van der Merwe* para 68.

282 The order reads as follows: "It is declared that the inclusion of the words "*other than damages for patrimonial loss*" in section 18(b) of the Matrimonial Property Act 88 of 1984 is inconsistent with the Constitution and invalid.

(a) The words "*other than damages for patrimonial loss*" in section 18(b) of the Matrimonial Property Act 88 of 1984 are severed.

4.5 The effect of the Van der Merwe case

Robinson²⁸³ states that the Constitutional Court demonstrated its willingness to enforce the values of the Constitution on something even as personal as the chosen patrimonial consequences of a marital regime. He is of the opinion that the decision may lead to confusion regarding the patrimonial consequences of the various marital regimes.²⁸⁴ In the event of a marriage out of community of property the property dispensation is regulated in an antenuptial agreement whereas all assets form *ex lege* part of a joint estate in a marriage in community of property.²⁸⁵

He does have reservations about the impact of *Van der Merwe* on insolvency law.²⁸⁶ The courts may find that a marriage in community of property is to the detriment of individual spouses in the event of insolvency.²⁸⁷ Such a decision will most definitely have a detrimental effect on commercial interaction and creditors will find themselves with a substantial reduction in their perceived security.²⁸⁸

Sonnekus²⁸⁹ criticises some assumptions of the Constitutional Court. Most of his criticism is academic and not relevant *in casu*. He is of the opinion that the Matrimonial Property Act (prior to the amendment of section 18) did provide for a spouse married in community of property to indirectly claim patrimonial damages in terms of section 20 of the said Act.²⁹⁰ This section states that an aggrieved spouse may approach a court to order a

(b) The omission from section 18(b) of Matrimonial Property Act 88 of 1984 of the words "*[s]uch damages do not fall into the joint estate but become the separate property of the injured spouse*" after the words "either wholly or in part to the fault of that spouse" is inconsistent with the Constitution and invalid.

(c) The words "*[s]uch damages do not fall into the joint estate but become the separate property of the injured spouse*" shall be read in after the words "either wholly or in part to the fault of that spouse" in section 18(b) of Matrimonial Property Act 88 of 1984".

283 Robinson Vol 10(3) 2007 *PER* 81 hereafter referred to as "Robinson 2007".

284 Robinson 2007 81.

285 Robinson 2007 81.

286 Robinson 2007 83.

287 Robinson 2007 83.

288 Robinson 2007 83.

289 Sonnekus 2006-4 *TSAR* 848-863 hereafter referred to as "Sonnekus 2006".

290 Sonnekus 2006 861.

division of the joint estate. He maintains that the Constitutional Court order to amend legislation was unnecessary as the public was not without a remedy prior to the *Van der Merwe* decision.²⁹¹ It is suggested that in theory he may be correct but in practice he loses sight of the prohibitive legal costs of applying to court for the division of a joint estate.

Sonnekus argues that the Court used too much emotion in its argument.²⁹² The Court uses phrases such as *the physically brutalised spouse, the battered spouse* and *arising from spousal violence*.²⁹³ According to him the Court incorrectly assumes a link between the prohibition to claim patrimonial loss and family violence.²⁹⁴ He concludes by stating that the desire of the Constitutional Court to address the inequality between marital regimes was disproportionate to the disturbance of a fundamental principle of law.²⁹⁵

Klopper²⁹⁶ maintains that the Court's judgement may have peculiar and undesirable consequences where a motor vehicle is used to perpetrate domestic violence. He argues that the perpetrator may escape the financial consequences of his or deed if the victim of domestic violence successfully institutes a claim against the RAF.

In 1994 the High Court decided in *Badenhorst v Bekker*²⁹⁷ that assets bequeathed to a person married in community of property may be utilised to liquidate claims against the joint estate despite the express stipulation in a will that such a bequest will not form part of the joint estate of the beneficiary. *Badenhorst* found that the exclusion of certain assets from the joint estate of spouses married in community of property is only valid *inter partes*. *Badenhorst* referred to section 20(1)(a) of the Insolvency Act which states inter alia that

The effect of the sequestration of the estate of an insolvent shall be...to divest the insolvent of his estate...

The decision in *Badenhorst* would in all probability have been different if the matter had been heard by the High Court *after* the decision in *Van der Merwe* was handed down in

291 Sonnekus 2006 861.

292 Sonnekus 2006 861.

293 Sonnekus 2006 861-862.

294 Sonnekus 2006 861-862.

295 Sonnekus 2006 863.

296 Klopper 2007(70) *THRHR* 684.

297 1994 (2) SA 155 (N) and hereafter referred to as "*Badenhorst*".

2006. If the two-pronged test formulated in *Van der Merwe* is applied the first question to be answered is simply whether an impugned section of legislation differentiates between people and if so, whether justification exists for the differentiation.

The insolvent's *estate* includes the separate assets of his wife as both husband and wife are joint debtors in the event of their being married in community of property. If parties are married *out* of community and only one of them is declared insolvent the separate assets of the solvent spouse do not form part of the insolvent's estate. Section 20(1)(a) of the Insolvency Act differentiates between people based on one of the listed grounds mentioned in Section 9(3) of the Constitution namely marital status.

The next question to be answered is whether any justification exists for the differentiation. It is submitted that no such justification exists. The purpose of the Insolvency Act is to protect the interests of creditors by amongst others preventing an insolvent from disposing of assets to the prejudice of his or her creditors. The Insolvency Act contains provisions to prevent such a prejudicial disposal of assets.²⁹⁸ The differentiation between the separate assets of a spouse in insolvency proceedings has no justification in modern law and seems to be a relic of the common law.

Van der Merwe ensured that there is presently no obstacle for a spouse married in community of property to claim patrimonial loss from the other spouse. Robinson²⁹⁹ is of the opinion that the judgment brings the Matrimonial Property Act in line with the constitutional values enshrined in the Bill of Rights in an open and democratic society based on human dignity, equality and freedom.

4.6 Case law relating to the Constitution and marriage in community of property

Case law relating to the Constitution and marriage in community of property is extremely rare. It would seem that the adage

For better or for worse, for richer, for poorer, in sickness and in health, to love and to cherish; from this day forward until death do us part³⁰⁰

298 See *inter alia* sections 18B, 19, 25, 26, 29, 30 and 31.

299 Robinson 2007 84.

300 From the *Book of Common Prayer* used in the Anglican Communion originally published in 1549.

is particularly apt regarding marriages in community of property. Case law does exist where marriage in community is relevant³⁰¹ but only *Van der Merwe* declared a section of the Matrimonial Property Act (which is the legislative *fons et origo* of marriage in community of property) unconstitutional.

4.6.1 *Gumede v President of the Republic of South Africa*³⁰²

The Constitutional Court found that a provision in section 7(1) of the Recognition of Customary Marriages Act which related to monogamous customary marriages was inconsistent with the Constitution. In terms of the decision the patrimonial consequences of *polygamous* customary marriages entered into before 15 November 2000 (the date of the commencement of the said Act) are governed by customary law.³⁰³ Therefore all *monogamous* marriages entered into before or after 15 November 2000 and in which a spouse is not a party in another customary marriage, are marriages in community of property by default.³⁰⁴

Although polygamous marriages are not similar to marriages in community of property, the Court found that polygamous marriages must be regulated by customary law until the legislator intercedes.³⁰⁵

The Supreme Court of Appeal decided in *Ngwenyama v Mayelane*³⁰⁶ that a further customary marriage by a party already married by customary law, is valid despite the absence of a court order³⁰⁷ to regulate the proprietary consequences of the *marriage*. The Court concluded that a marriage without a court order as aforesaid must be regarded as a marriage out of community of property³⁰⁸ as to find otherwise would imply the existence of more than one joint estate.

301 See 4.6.1 below.

302 2009 (3) SA 152 (CC).

303 Meyer 2012

http://www.lawlibrary.co.za/professionalupdate/2012/03/justicecollege_recognitionofcustomarymarriages.pdf and hereafter referred to as "Meyer".

304 Meyer 16.

305 Bekker and Van Niekerk 24 *SAPR/PL* 209.

306 2012 (4) SA 527 (SCA).

307 As required by section 7(6) of the Recognition of Customary Marriages Act.

308 Para 38.

Herbst³⁰⁹ believes that customary marriages are no longer traditional marriages but contain a fusion of Roman Dutch, English and African customary law all governed by the principles of the Constitution.

4.6.2 *Gounder v Top Spec Investments (Pty) Ltd*³¹⁰

The appellant alleged that her husband to whom she was married in community of property entered into an agreement to mortgage property belonging to their joint estate, without her written consent. In terms of section 15(2)(a) of the Matrimonial Property Act a spouse married in community of property may not mortgage property forming part of his or her joint estate without the consent of the other spouse.

The Court *in casu* found that two separate agreements were intended.³¹¹ The first agreement which was signed by the appellant was in respect of a loan and the second agreement (which the appellant did not sign) was in respect of a mortgage bond to be registered.³¹² The Court found that section 15(1) of the said Act permits one spouse to enter a loan agreement without consent from the other.³¹³ The mortgage bond was however not registered and therefore the appellant's lack of consent was irrelevant.³¹⁴

4.6.3 *Scriven v Schoemar*³¹⁵

The parties were married to each other in community of property before their divorce. Their property was expropriated through racially discriminating laws while they were married. The Court found that it would be fair and equitable if a subsequent land claim in terms of the Restitution of Land Rights Act 22 of 1994 by the former husband resuscitated the joint estate after divorce and created a residual of the joint estate which was not covered by the divorce agreement.³¹⁶

309 Herbst and Du Plessis May 2008 *Electronic Journal of Comparative Law* 14.

310 2008 (5) SA 151 (SCA) and hereafter referred to as "*Gounder*".

311 *Gounder* para 18.

312 *Gounder* para 18.

313 *Gounder* para 17.

314 *Gounder* para 19.

315 [2005] ZAGPHC 87 and hereafter referred to as "*Scriven*".

316 *Scriven* para 23.

4.6.4 *Mazibuko v National Director of Public Prosecutions*³¹⁷

The appellant was married in community of property. The respondent launched an asset forfeiture application in terms of the Prevention of Organised Crime Act 121 of 1998 against her husband.

The Supreme Court of Appeal found that the deprivation of the appellant's joint share in the property was "constitutionally indefensible".³¹⁸ Based on the principle that an innocent party should not be punished (*poenae suos tenent auctores*) the Court ordered that the appellant must receive her half share of the proceeds of the sale and that her half share would form part of her separate property.³¹⁹

From the abovementioned cases one can deduce that the South African courts are not hesitant to enforce the basic principles of human dignity, equality and freedom contained in the Bill of Rights.

4.7 *Insolvency*³²⁰

It is trite law that *both* spouses in a marriage in community of property are declared insolvent in the event of the insolvency of one of them.³²¹ According to Voet³²² it was possible to exclude an inheritance from community of property by either the registration of a fideicommissum over the bequeathed property or simply excluding the bequeathed property from community of property.

4.7.1 *Badenhorst v Bekker*³²³

The judgement in *Badenhorst* was handed down prior to the adoption of the Constitution but the exposition of the legal principles remain constitutionally unchallenged. *In casu* a testator bequeathed a farm to his daughter and specifically excluded the farm from the

317 2009 (6) SA 479 (SCA) and hereafter referred to as "*Mazibuko*".

318 *Mazibuko* para 23.

319 *Mazibuko* para 59.

320 For a proposal to reform insolvency law see Calitz 2011 *De Jure* 290-308.

321 It seems contradictory that both spouses are declared insolvent when one becomes insolvent. However *De Wet v Jurgens* 1970 (3) SA 38 (A) para 48B confirmed the position in law.

322 Unknown 27 October 2005 <http://www.ghostdigest.co.za/articles/excluding-community-of-property/52022>.

323 1994 (2) SA 155 (N) and hereafter referred to as "*Badenhorst*".

community of property of the beneficiary and "free from the debts of her husband". The beneficiary's husband was declared insolvent and his creditors attached the farm.

The Court confirmed that a bequest can be excluded from the beneficiary's joint estate.³²⁴ A testator may however not stipulate that a bequest may not be attached by creditors or that such a bequest may not form part of the beneficiary's insolvent estate.³²⁵

The Insolvency Act does not specifically mention excluded assets but section 20 of the Act provides *inter alia* that the estate of the insolvent shall vest in a trustee and that property of the insolvent includes all property of the insolvent at the date of sequestration as well as property which may accrue to the insolvent during sequestration. The Insolvency Act does contain exceptions to section 20, but excluded assets do not form part thereof.³²⁶ Any provision of the common law in terms of which an insolvent's assets do not vest in the trustee of the joint estate is contrary to the Insolvency Act and therefore invalid.³²⁷

Section 21 of the Insolvency Act provides that a trustee shall release property of the *solvent* spouse should the solvent spouse prove that he or she acquired the assets by way of a valid title against creditors. Section 21 of the Act cannot be applicable to a joint insolvent estate as both spouses are regarded as being insolvent.³²⁸

McLaren J examines excluded assets in case law and common law.³²⁹ He refers to various writers and legal articles and confirms that creditors can only attach one estate in terms of the common law. He concludes that the exclusion of assets from a joint estate is only applicable *inter partes*.³³⁰ The exclusion of an asset from the joint estate entails that the receiving spouse need not share the asset with the other spouse when the marriage is

324 *Badenhorst* para 246. For a discussion of the common law position see *Erasmus v Erasmus* 1942 AD 265 and *Cuming v Cuming* 1945 AD 201.

325 The court refers to *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *Pritchard's Trustee v Estate Pritchard* 1912 CPD 87 para 95 and *Vorster v Steyn* 1981 (2) SA 831 (O) paras 832E-833C.

326 *Badenhorst* para 244.

327 *Badenhorst* para 244. *Cornelissen v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) paras 170B-C.

328 *Badenhorst* paras 244-245.

329 *Badenhorst* paras 245-254.

330 *Badenhorst* para 254.

dissolved and furthermore has exclusive control of the asset during the course of the marriage.³³¹

The Court refers to the judgement in *De Wet v Jurgens*³³² where it was found that spouses married in community of property are jointly liable for debt and that the debt must indeed be paid from the joint estate. Although a husband usually pays the debt, he does so as administrator of the joint estate and not because he is the sole debtor.³³³ If he does not pay a judgement debt, the creditor executes against the joint estate.³³⁴

The learned judge came to the conclusion that the applicant was indeed a joint debtor of the creditors in the joint estate and therefore the excluded assets might be utilised to liquidate claims against the estate.³³⁵

4.7.2 *Brink v Kitshoff*³³⁶

Mr Brink ceded a life policy to his wife before he died. The executor in his estate demanded that the proceeds of the life policy be paid to the estate in terms of section 44³³⁷ of the Insolvency Act as the estate was insolvent. The insurer refused. Mrs Brink contended that sections 44(1) and (2) of the Insolvency Act were unconstitutional as the sections differentiated between married women and married men. The Constitutional Court agreed and ordered sections 44(1) and (2) of the Insolvency Act unconstitutional as these sections unfairly discriminated between married men and married women.³³⁸ The Court specifically refrained from determining whether marital status would *in casu* be a ground for discrimination³³⁹ as the discrimination *in casu* was clearly based on sex.

331 *Badenhorst* paras 248-251. In *Ex parte Oberholzer* 1967 (1) PH C7 (GW) the Court found that excluded assets may not be utilised to liquidate debts of a joint insolvent estate. McLaren J analyses case law and states that the court erred in its decision in the *Oberholzer* case.

332 *Badenhorst* para 244. *De Wet v Jurgens* 1970 (3) SA 38 (A) para 48B.

333 One should note that the husband was regarded as the administrator of the joint estate as marital power had not been abolished at that stage.

334 *De Wet v Jurgens* 1970 (3) SA 38 (A) para 47.

335 *Badenhorst* para 256.

336 1996 (6) BCLR 752 and hereafter referred to as "*Brink*".

337 Section 44(1) of the Act provides *inter alia* as follows:

"If the estate of a *man* who has ceded or effected a life policy in terms of section forty-two or forty-three has been sequestrated as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that estate..".

338 *Brink* paras 47-48.

339 *Brink* para 43.

4.7.3 *Du Plessis v Pienaar*³⁴⁰

In casu Nugent JA agreed with the conclusion reached in *Badenhorst*.³⁴¹ The Court confirmed that section 19 of the Matrimonial Property Act authorises spouses to have a separate estate from their joint estate.³⁴² This authorisation however does not mean that either the joint estate or the separate estate of a spouse is protected against joint creditors of the spouses. That argument would lead to the untenable conclusion that a spouse may be solvent in one estate and insolvent in the other.³⁴³

The existence of a separate estate of a spouse married in community of property does not affect the rights of third parties.³⁴⁴ Property that is owned separately by spouses married in community of property is relevant to the way the parties deal with the property *inter se* and at dissolution of the marriage but does not affect the rights of creditors to look at all the property of a debtor.³⁴⁵

This decision led to a flurry of activity in the ranks of estate planners. Testamentary clauses which excluded community of property from an inheritance were suddenly ineffective as creditors of an insolvent joint estate could attach assets even if those assets were excluded from community of property in terms of a last will and testament. Estate planners are usually quick to react to changes in estate planning law and it has become common practice to include a roll-over provision in a will which provides that an inheritance will devolve on a solvent beneficiary or a trust (of which the insolvent is a beneficiary) in the event of the insolvency of a beneficiary on *dies cedit*. An inheritance may not be withdrawn once it has vested and therefore a clause such as the abovementioned will not be applicable in the event of the insolvency of a beneficiary married in community of property after vesting (*dies venit*) of an inheritance.³⁴⁶

340 2003 (1) SA 671 (SCA) and hereafter referred to as "*Du Plessis*".

341 *Du Plessis* para 677.

342 *Du Plessis* para 677.

343 *Du Plessis* para 677.

344 *Du Plessis* para 676.

345 *Du Plessis* para 675.

346 It is suggested that the following clause be inserted in a will : "In the event of an heir's estate being declared insolvent or him or her committing an act of insolvency as defined in the Insolvency Act, then applicable in South Africa such heir shall forfeit his or her right to receive his or her inheritance and our trustees shall in their absolute discretion during such heir's lifetime retain the inheritance in trust and utilise some for the maintenance of such heir and his or her dependents for as long a period as

The judgment makes no mention of *Harksen*.³⁴⁷ Unfortunately the decision of the court *a quo* was not reported. It would however appear that the applicant did not raise any constitutional issues as the Supreme Court of Appeal did not rule on the possible unconstitutionality of whether separate property of a spouse may be utilised to satisfy the claims of creditors of the joint insolvent estate. The facts in this case would have been ideal for a constitutional challenge of the common law that allows creditors of a joint insolvent estate to attach separate assets which belong to the other spouse.

4.8 Freedom of testation

Private ownership and the concomitant right of an owner to dispose of his or her property even after death, are basic principles of property law.³⁴⁸ Freedom of testation is a basic principle in the law of succession.³⁴⁹ Du Toit³⁵⁰ describes freedom of testation as

(the freedom) a South African testator enjoys ... to dispose of the assets which form part of his or her estate upon death in any manner he deems fit.

Freedom of testation is limited in that the provisions of a will may not be illegal³⁵¹, *contra bonos mores* or impossible to implement.³⁵² Freedom of testation is further restricted by the protection of the dependants of a testator. A testator is obliged to maintain and educate his minor and penurious children.³⁵³ This obligation extends after the death of the testator.³⁵⁴ A child's maintenance claim ranks after that of creditors but before payment of legacies and bequests.³⁵⁵ In terms of common law a child born out of wedlock has a maintenance claim against his or her maternal grandparents only.³⁵⁶ In *Petersen v Maintenance Officer*³⁵⁷ the Court found that the abovementioned common law principle

they consider necessary, and on his or her death, such inheritance shall devolve on his or her intestate heirs".

347 1998 (1) SA 300.

348 Du Toit 2001 *Stellenbosch Law Review* 224.

349 *Bydowell v Chapman* 1953 (3) SA 514 (A) para 531.

350 Du Toit 2001 *Stellenbosch Law Review* 224.

351 The Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 which limits a fideicommissum over immovable property to two successive fideicommissa and the Subdivision of Agricultural Land Act 70 of 1970 which limits the subdivision of agricultural land under certain circumstances.

352 Sedutla Jan/Feb 2013 *DR* 55.

353 Pace and Van der Westhuizen *Wills and Trusts* A2.

354 *In re estate Visser* 1948 (3) SA 1129 (C).

355 Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 21.31.

356 *Motan v Joosub* 1930 AD 61.

357 [2004] 1 All SA 117 (C).

is unconstitutional as the rule infringes the dignity of children born out of wedlock and furthermore constitutes unfair discrimination on the grounds of birth.³⁵⁸ It is not settled in law whether a child would be able to claim maintenance from the estate of his or her grandparents.³⁵⁹ It is submitted that a child would be able to claim maintenance from the estate of his or her grandparents as to deny such a claim would be contrary to the principles of the Maintenance Act 99 of 1998 and the constitutional rights of children.

A surviving spouse has a claim against the estate of the first-dying spouse for maintenance under certain circumstances.³⁶⁰ A spouse who had been married to a deceased out of community of property and subject to the accrual system, acquires a claim against the deceased's estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.³⁶¹

Testamentary conditions which discriminate on race, sex or religion are usually against public policy.³⁶² Opinions may differ on the question of what constitutes public opinion and therefore courts are obliged to consider the merits of each case and balance conflicting interests.³⁶³ A testator is entitled to benefit a particular class of persons (which equates to differentiation and not necessarily discrimination) and only when such bequest is tantamount to unfair discrimination would it be regarded as contrary to public policy.³⁶⁴ Discrimination to achieve a legitimate objective and redress past injustice is not unfair.³⁶⁵

In *Minister of Education v Syfrets Trust Ltd*³⁶⁶ the Court stated *obiter* that freedom of testation forms a fundamental part of a testator's right to property and must be protected by section 25 of the Constitution.³⁶⁷ The Supreme Court of Appeal confirmed in *Ex Parte BoE Trust Ltd*³⁶⁸ "[t]hat section 25 protects a person's right to dispose of their assets as they wish, upon their death".³⁶⁹ Should the contrary prevail it could result in the arbitrary

358 Para 21.

359 Ndaba March 2012 *DR* 28.

360 Section 2 of the Maintenance of Surviving Spouses Act.

361 Section 3(1) of the Matrimonial Property Act.

362 Sedutla Jan/Feb 2013 *DR* 55. For examples of conditions which are probably not against public policy see De Waal *The Law of Succession and the Bill of Rights* 3G12(d).

363 *Ex parte: BoE Trust Ltd* 2009 (6) SA 470 (WCC) para 13 and hereafter referred to as "*BOE a quo*".

364 *BoE a quo* para 6.

365 *BoE a quo* para 14.

366 2006 (4) SA 205 (C) 18.

367 For criticism of this case see Wood-Bodley 2007 *SALJ* 687.

368 2013 (3) SA 236 (SCA) and hereafter referred to as "*BoE*".

369 *BoE* para 26.

deprivation of property rights after death.³⁷⁰ The denial of freedom of testation will be contrary to the constitutional principle of human dignity as dignity allows the dying the assurance that their wishes would be respected after their death.³⁷¹

The conundrum regarding freedom of testation and constitutional values is eloquently summarised as follows:³⁷²

(i) in the final analysis, the court is required to weigh up or balance certain competing constitutional values and principles of public policy. On the one hand, there is the fundamental constitutional right to equality and freedom from unfair discrimination; on the other, the constitutionally guaranteed principle of private ownership, together with its corollaries of private succession and freedom of testation.

The approach to balance the aforesaid rights and values was determined in *Holomisa v Argus Newspapers Ltd*³⁷³

The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.

De Waal argues that the limitations placed on freedom of testation do not contravene section 25(1) of the Constitution.³⁷⁴ He posits that the limitations are "in terms of a law of general application" as the restrictions are based on either common law or statutory provisions.³⁷⁵ Furthermore the limitations are founded on economic and social considerations and are therefore reasonable and justifiable.³⁷⁶ These restrictions are justifiable in terms of the general limitation clause regarding the "importance of the purpose thereof".

From the above discussion of freedom of testation it is clear that this principle is a fundamental right in South African law. To date hereof no constitutional challenge has been brought against freedom of testation.³⁷⁷ In a constitutional challenge the values enshrined in the Constitution must be weighed up against the principle of freedom of

370 *BoE* para 26.

371 *BoE* para 27.

372 *Ex Parte BoE Trust Ltd* 2013 (3) SA 236 (SCA) para 39.

373 1996 (2) SA 588 (W) paras 607D–608A.

374 De Waal *The Law of Succession and the Bill of Rights* 3G7(b) hereafter referred to as "De Waal".

375 De Waal 3G7.

376 For a detailed discussion of the social and economic limitations see De Waal 3G7 (aa)– (dd).

377 De Waal 3G12.

testation. As any other legislation and common law in South Africa, freedom of testation is subordinate to the Constitution.

5 Conclusion

Marriage in community of property is the default marital regime in South Africa.³⁷⁸ The primary difference between marriages in community of property and out of community of property has been described as

a marriage in community of property effect(s) economic equality but juridical inequality while marriage out of community of property result(s) in juridical equality but economic inequality.³⁷⁹

The adoption of the Constitution had (and will no doubt still have) a profound influence on legislation and the interpretation of the common law. Cameron J³⁸⁰ summarised the role of the Constitution as follows: "[T]he Constitution has changed the context of all legal thought ...in South Africa".

The Constitutional Court has acknowledged that substantial transformation in family relationships and societal and legal concepts regarding family has taken place during the past decades.³⁸¹ In *Minister of Home Affairs v Fourie*³⁸² the common law consequences of marriage were extended to a same-sex permanent life partnership.³⁸³ Same-sex partners are *mutatis mutandis* accorded similar rights as spouses in terms of the Civil Union Act and can engage in a civil union (either in the form of a civil partnership or a marriage). The meaning of *spouse* now includes a surviving partner in a monogamous Muslim marriage³⁸⁴ for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. *Spouse* also includes the same sex life partner of a judge³⁸⁵ for purposes of the Judge's Remuneration and Conditions of Employment Act 47 of 2001.

378 In 1984 the legislator had the opportunity to change the default marital system from in community of property. It decided to retain the *status quo* despite advice to the contrary from experts in family law. See Sonnekus 2006,4 *TSAR* 850.

379 Robinson and Horsten *Speculum Juris* page 96 footnote 4.

380 *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) para 505.

381 *Fourie* para 52.

382 2006 (1) SA 524 (CC).

383 This definition is also applicable to section 1(b)(ii) of the Pension Funds Act 24 of 1956. See *De Wilzem v South African Retirement Annuity Fund* [2005] 2 BPLR 180 (PFA).

384 *Daniels v Campbell* 2004 (5) SA 331 (CC).

385 *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC).

Customary marriages are recognised in terms of the Recognition of Customary Marriages Act.

The Constitutional Court has however ruled that the protective and supportive measures created by family law are generally not available to unmarried heterosexual couples.³⁸⁶ Such partners may not inherit intestate from each other as the word *spouse* has not been defined in the Intestate Succession Act and therefore the common law definition of spouse with reference to marriage must be used. Partners in a same-sex relationship are however regarded as spouses in terms of the Intestate Succession Act since the judgement in *Gory v Kolver*.³⁸⁷ It is submitted that a constitutional challenge to the legal rule that heterosexual life partners may not inherit intestate from each other will probably be successful.

Since the advent of the South African constitutional democracy the determination of public policy is rooted in the constitutional values of human dignity and human rights, equality and the rule of law.³⁸⁸

The *boni mores* are constantly evolving³⁸⁹ and represent the "[l]egal convictions of the community (and) those values that are held most dear by society".³⁹⁰ The Constitutional Court has however determined in *S v Makwanyane*³⁹¹ that public opinion may have some relevance to a constitutional enquiry but it can never be a substitute for interpreting the Constitution. Chaskalson J wryly remarked that "[I]f public opinion were to be decisive there would be no need for constitutional adjudication".³⁹²

386 *Volks v Robinson* 2005 5 BCLR 446 (CC).

387 2007 (4) SA 97 (CC).

388 *Napier v Barkhuizen* [2006] 2 All SA 469 (SCA) para 8.

390 *Cloete v Maritz* 2013 (5) SA 448 (WCC) para 44. Also see *S v Dikgacwi* [2013] ZAWCHC 67 at par 8 where it was held that "in weighing an appropriate sentence I think it is necessary to acknowledge that crimes committed in the context of vigilantism will often be different from the same acts perpetrated out of greed or delinquency. While their gravity should not be seen as being diminished on that account, the context does, I think, justify consideration of a different response when it comes to sentencing; one determined with especial regard to the need to promote rather than retard societal reconstruction and rehabilitation."

390 *Napier v Barkhuizen* [2006] 2 All SA 469 (SCA) para 28.

391 1995 (3) SA 391 (CC) para 88.

392 *S v Makwanyane* 1995 (3) SA 391 (CC) para 88.

The assessment of *boni mores* is a legislative rather than a judicial function.³⁹³ No empirical study of public opinion regarding marriage has been conducted but according to the latest available information published by the Department of Statistics³⁹⁴ there has been a consistent decline in the number of marriages registered and it therefore seems that the institution of marriage is losing favour with the general public. Public opinion regarding marriage in community is basically irrelevant according to the abovementioned *dictum* of Chaskalson J. What is important is whether *ex lege* consequences of marriage in community of property comply with the constitutional principles that underlie an open and democratic society based on human dignity, equality and freedom.

In *Minister of Health v Treatment Action Campaign*³⁹⁵ the Constitutional Court confirmed that courts in general are ill-suited to decide on issues where judgments could have far reaching social and economic consequences for the community. In terms of the Constitution the legislator must meet its constitutional obligations and the courts should evaluate the reasonableness of these measures.³⁹⁶ Furthermore in *National Coalition for Gay and Lesbian Equality v Minister of Justice*³⁹⁷ the Court confirmed that historic statutory provisions which caused unfair discrimination must be eliminated but warned that the ongoing negative consequences must be addressed as "[e]quality delayed is equality denied".

In *Carmichele v Minister of Safety and Security*³⁹⁸ the Constitutional Court confirmed that the obligation of courts to develop common law is not purely discretionary. If a court is of the opinion that the common law should be developed if section 39(2) of the Constitution is implicitly raised, the court is obligated to do so.³⁹⁹ Should the common law not accord with the spirit, purport and objects of the Bill of Rights courts have a general obligation to develop the common law appropriately.⁴⁰⁰

393 *S v Makwanyane* 1995 (3) SA 391 (CC) para 188.

394 Statistics South Africa Statistical Release P0307 Marriages and Divorce 2011 on page 2.

395 2002 (5) SA 721 (CC).

396 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC) para 38.

397 Para 60.

398 2001 (4) SA 938 (CC) para 39 and hereafter referred to as "*Carmichele*".

399 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 34.

400 *Carmichele* para 30.

5.1 *Insolvency and separate property*

The test for unconstitutionality was determined in *Harksen v Lane* and boldly applied in *Van der Merwe v RAF*. The test entails the following:

- Does the provision differentiate between people or categories of people?
- If so, is there a rational connection to a legitimate governmental purpose? If not, it might be discrimination.
- Does the differentiation amount to unfair discrimination?
- If so, the Court must determine whether the provision can be justified under the limitation clause.

There is no denial that the consequences of insolvency differentiate between spouses married in community of property and those married out of community of property. It is trite that both spouses in a marriage in community of property are declared insolvent whereas the same does not happen if spouses are married out of community of property.

In *Du Plessis v Pienaar*⁴⁰¹ the Supreme Court of Appeal found that although section 19 of the Matrimonial Property Act authorises spouses married in community of property to have a separate estate⁴⁰² from the joint estate, it does not automatically follow that either the joint estate or the separate estate of a spouse is protected against joint creditors of the spouses. According to the Court such argument would lead to the untenable conclusion that a spouse may be solvent in one estate and insolvent in the other. It is submitted that it should not be too difficult to determine which assets of a spouse form part of his or her separate estate as these assets can only be obtained by limited means as for example by way of inheritance should the testator expressly state that the inheritance will be excluded from community of property, damages (other than for patrimonial loss) recovered by reason of a delict committed against him or her and amounts recovered from the other spouse in respect of bodily injuries under the circumstances mentioned in sections 18 (a) and (b) of the Matrimonial Property Act.

401 2003 1 SA 671 (SCA) and hereafter referred to as "*Du Plessis*".

402 See also sections 17 and 18.

It has been argued that the rationale behind insolvency legislation is *inter alia* to protect public interest⁴⁰³ and creditors. The Insolvency Act does contain provisions to protect creditors from collusion or fraud by spouses.⁴⁰⁴ Creditors are further protected by other legislation⁴⁰⁵ and common law and therefore it is unnecessary to include separate property of a spouse married in community of property in a joint insolvent estate to protect public interest and creditors.

The important constitutional question is therefore whether the legal principle that the separate assets of a spouse in a marriage in community of property form part of the joint insolvent estate, constitutes discrimination and if so, whether the discrimination is unfair. It is submitted that the principle clearly unfairly discriminates between spouses married in community of property and those married out of community of property on the ground of marital status.

The so-called choice-argument (whether to get married in or out of community of property and to abide by such a decision as propounded in *Volks v Robinson*) was effectively defeated in *Van der Merwe*. The constitutional validity of legislation is not influenced by personal choice, preference or conduct of a person affected. The Constitution itself confirms the objective validity of legislation. The submission that a person by his or her own choice is married in community of property and therefore has no choice but to accept that his or her separate estate forms part of the joint insolvent estate, has no merit should a Court find that the abovementioned principle is unconstitutional.

It is further submitted that this specific principle of insolvency law limits the right to equal protection of spouses married in community of property as the differentiation itself is arbitrary, does not serve the public interest and can neither be reasonable nor justifiable.

It is submitted that if the discrimination test formulated in *Harksen v Lane* is applied to the common law principle that the separate property of a spouse married in community of property forms part of the joint insolvent estate, the result may very well be a

403 Unknown January 2000 http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-report-up.pdf.

404 Sections 19 and 21.

405 For example the Companies Act 71 of 2008.

declaration of unconstitutionality. Should a Court determine that separate property of a spouse married in community of property will not form part of a joint insolvent estate, the security ostensibly held by creditors of the joint estate may diminish substantially with concomitant disastrous consequences to the creditors of insolvent estates.

5.2 Freedom of testation

Freedom of testation is subordinate to the Constitution. The Supreme Court of Appeal⁴⁰⁶ stated that freedom of testation must be weighed up against the values enshrined in the Constitution. The same court also determined in the *Du Plessis* case that the separate estate of a spouse is *not* protected against joint creditors of the spouses even if a testator expressly determined in his will that a bequest will not form part of the joint estate of a beneficiary.

This specific rule of law clearly differentiates between beneficiaries married in community of property and those married out of community of property. The rationale for the principle seems to be rooted in the statement that a spouse may not be solvent in one estate and insolvent in the other⁴⁰⁷ and in the common law principle that spouses married in community of property have a joint estate in which they are owners in equal, undivided shares. It does not seem to have a rational connection with a legitimate governmental purpose. Furthermore the principle unfairly discriminates on the ground of marital status against testators who bequeath property to beneficiaries married in community of property. The specific limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Constitutional rights of the testator to freedom of testation, private succession and the right to property guaranteed in section 25 of the Constitution as well as the right to dignity and equality of the beneficiary married in community of property certainly exceeds the nature and extent of this specific limitation to freedom of testation.

The principle that the separate estate of a spouse is not protected against joint creditors of the spouses even if a testator expressly determined in his will that a bequest will not form part of the joint estate of a beneficiary, undermines freedom of testation. If the test

⁴⁰⁶ *Ex Parte BoE Trust Ltd* 2013 (3) SA 236 (SCA) para 39.

⁴⁰⁷ *Du Plessis* para 677.

for unconstitutionality as determined in *Harksen v Lane* is applied to the *Du Plessis* case it is submitted that the abovementioned legal principle will be unconstitutional.

Given government's interest in the traditional institutions of marriage and family it is unlikely that the legislator will address any possible unconstitutional issue regarding marriage in community of property without the courts' intervention. It is submitted that it is inevitable that the principles of freedom of testation and separate property of spouses married in community of property as discussed above, will eventually be tested for constitutionality. Given the Constitutional Court's devotion to develop common law and statutory law to comply with the values of the Constitution it is suggested that these principles will in all probability be declared unconstitutional.

It is clear that situations not contemplated by either the Constitutional Court or the legislator will definitely be raised on the basis of *Van der Merwe* and one may be justified to think that the distinction between marriages in and out of community of property may become less visible in the near future. It is submitted that the relatively simple application of the test formulated in *Van der Merwe* may lead to peculiar if not downright bizarre consequences. The test may be applied to various instances of inequality, differentiation and discrimination between marriage in community of property and those out of community of property. Most legislation and common law relating to marriage differentiate between the two regimes in one way or the other on the prohibited grounds mentioned in section 9 of the Constitution. The more important question is whether such discrimination is justified. Only time will tell. It is even possible that South African law might develop to the point where a marriage in community of property *per se* is unconstitutional.

BIBLIOGRAPHY

Literature

Bekker and Van Niekerk 24 *SAPR/PL* 209

Bekker J and Van Niekerk G "Gumede v President of the Republic of South Africa: Harmonisation, or the Creation of New Marriage Laws in South Africa?" 24 *SAPR/PL* 206-222

Book of Common Prayer used in the Anglican Communion

Calitz 2011 *De Jure*

Calitz J "Some Thoughts on State Regulation of South African Insolvency Law" [2011] *De Jure* 290-308.

Cheadle, Davis and Haysom *South African Constitutional Law: the Bill of Rights*

Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: the Bill of Rights* (LexisNexis Durban 2014)

Cooke 2005 *SALJ*

Cooke A "Choice, Heterosexual Life Partnerships, Death and Poverty" Vol. 122, Issue 3 (2005) *SALJ* 542-557

Cronje and Heaton *Casebook on South African Family Law*

Cronje DSP and Heaton J *Casebook on South African Family Law* 3rd ed (LexisNexis Durban 2010)

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* (Juta Cape Town 2008)

De Vos (2004) 20 *SAJHR*

De Vos P "Same-Sex Sexual Desire and the Re-Imagining of the South African Family" (2004) 20 *SAJHR* 179-206

De Waal *The Law of Succession and the Bill of Rights*

De Waal *The Law of Succession and the Bill of Rights* (LexisNexis Durban 2012)

Dunn *Germanic Women: Mundium and Property, 400-100*

Dunn KH *Germanic Women: Mundium and Property, 400-100* (Master of Science thesis University of North Texas 2006)

Du Toit 2001 *Stellenbosch Law Review*

Du Toit F "The Constitutionally Bound Dead Hand? The Impact of Constitutional Rights and Principles on Freedom of Testation in South African Law" 2001 *Stellenbosch Law Review* 222-257

Gregor *Kant The Metaphysics of Morals*

Gregor M *Kant The Metaphysics of Morals* (Cambridge University Press Cambridge 1996)

Hahlo *The South African Law of Husband and Wife*

Hahlo H R et al *The South African Law of Husband and Wife* 5th ed (Juta Cape Town 1985)

Heaton *Family Law and the Bill of Rights*

Heaton J *Family Law and the Bill of Rights* (LexisNexis Durban 2005)

Heaton, Church and Church "Marriage" Vol 16

Heaton J, Church J and Church J "Marriage" in Joubert WA and Church J (eds) *The Law of South Africa Volume 16* 2nd ed (Butterworths Durban 2007)

Herbst and Du Plessis May 2008 *Electronic Journal of Comparative Law*

Herbst M and Du Plessis W "Customary Law v Common Law Marriages: a Hybrid Approach in South Africa" Vol 12.1 (May 2008) *Electronic Journal of Comparative Law* 1-15

Klopper 2007 *THRHR*

Klopper HB "Domestic Assault with a Motor Vehicle" 2007 (70) *THRHR* 672-687

Kruger 2011 *SALJ*

Kruger R "Equality and Unfair Discrimination: Refining the Harksen Test" Vol. 128, Issue 3 (2011) *SALJ* 479-512

Lind 2005 *Acta Juridica*

Lind C "Domestic Partnerships and Marital Status Discrimination" 2005 *Acta Juridica* 108-130

Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation*

Meyerowitz D *The Law and Practice of Administration of Estates and Their Taxation* (Meytax Cape Town 2010)

Mostert and Bennett *Plurism and Development: Studies in Access to Property in Africa*

Mostert H and Bennett T (eds) *Plurism and Development: Studies in Access to Property in Africa* (Juta Cape Town 2012)

Muller 2006 *THRHR*

Muller E "The Treatment of Life Insurance Policies in Deceased Estates with a Perspective on the Calculation of Estate Duty" 2006 (69) *THRHR* 259-278

Ndaba March 2012 *DR*

Ndaba TA "Child Maintenance after a Parent's Death" March 2012 *DR* 26-28

Pace and Van der Westhuizen *Wills and Trusts*

Pace RP and Van der Westhuizen WM *Wills and Trusts* (LexisNexis Durban 2013)

Rautenbach *Introduction to the Bill of Rights*

Rautenbach IM *Introduction to the Bill of Rights* (LexisNexis Durban 2011)

Robinson 2007 *PER*

Robinson JA "Matrimonial Property Regimes and Damages: the Far Reaches of the South African Constitution" 2007(10) 3 *PER* 70-88

Robinson and Hosten 2010 vol 24 part 1 *Speculum Juris*

Robinson JA and Hosten D "The Quantification of 'Labour of Love': Reflections on the Constitutionality of the Discretion of a Court to Redistribute Capital Assets in terms of Section 7(3)–(6) of the South African Divorce Act" 2010 vol 24 part 1 *Speculum Juris* 96-117

Robinson and Smith 2010 *PER*

Robinson JA and Smith BS "An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the Civil Union Act 17 of 2006 in the Light of Prospective Domestic Partnerships Legislation in South Africa" 2010 (13) 3 *PER* 30-75

Robinson *et al* *Introduction to South African Family Law*

Robinson JA *et al* *Introduction to South African Family Law* 5th ed (Printing things Potchefstroom 2009)

Roux September 2012 *DR*

Roux E "Testators Should be Careful What They Wish For" September 2012 *DR* 30-32

Sedutla Jan/Feb 2013 *DR*

Sedutla M "Freedom of Testation v Public Policy" *DR* Jan/Feb 2013 54-55

Sinclair "Marriage"

Sinclair J "Marriage" in Boberg P Q R (ed) *Boberg's Law of Persons and the Family* (Juta Cape Town 1999)

Smith 2010 *PER*

Smith S "Rethinking Volks V Robinson: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnerships Legislation" 2010(13) 3 *PER* 238-300

Sonnekus 1994 *TSAR*

Sonnekus JC "Privé Bates en Sekwestrasie in Huwelik in Gemeenskap van Goed" 1994 *TSAR* 143-150

Sonnekus 2006 *TSAR*

Sonnekus JC "Skadevergoedingseise by Huwelike in Gemeenskap van Goed" 2006-4 *TSAR* 848-863

Steyn 2002 *South African Law Journal*

Steyn L "When a Third Party Cannot Reasonably Know That a Spouse's Consent to a Contract is Lacking" (2002) *SALJ* 253-260

Van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions*

Van Niekerk P *A Practical Guide to Patrimonial Litigation in Divorce Actions* Issue 14 (Lexisnexis Durban 2013)

Van Zyl 1990 *CILSA*

Van Zyl L "Section 13 of the Matrimonial Property Act - a historical relic?" XXIII 1990 *CILSA* 228-233

Visser and Potgieter's *Introduction to Family Law*

Visser and Potgieter's *Introduction to Family Law* (Juta Cape Town 1998)

Westen 95 *Harvard Law Review*

Westen P "The Empty Idea of Equality" 95 *Harvard Law Review* 537-596

Wieacker Volume 4 Issue 2 Article 2 *Boston College International and Comparative Law Review*

Wieacker F "The Importance of Roman Law for Western Civilization and Western Legal Thought" Volume 4 Issue 2 Article 2 *Boston College International and Comparative Law Review* 257-281

Wing 2008 *Harvard Blackletter Law Journal*

Wing AW "The South African Constitution as a Role Model for the United States" Vol 24 2008 *Harvard Blackletter Law Journal* 73-80

Wood-Bodley 2007 *SALJ*

Wood-Bodley M C "Freedom of Testation and the Bill of Rights: Minister of Education v Syfrets Trust Ltd" 2007 *SALJ* 687-702

Wood-Bodley 2010 *SALJ*

Wood-Bodley M C "Life Policies and Marriages in Community of Property— Who Owns the Proceeds of the Policy on the Insured's Death? Danielz No V De Wet" 2010 *SALJ* 224-230

Zaal 1986 *TSAR*

Zaal N "Marital Milestone or Gravestone - The Matrimonial Property Act 88 of 1984 as a Reformative Half-Way Mark for the Eighties" 1986.1 *TSAR* 57-69

Case law

Administrator-General, South West Africa, v Kriel 1988 (3) SA 275 (A)

Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste BK 1995 (3) SA 314 (T)

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 4 BCLR 492 (T) 537

Badenhorst v Bekker 1994 (2) SA 155 (N)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Bel Porto School Governing Body v Premier of the Province, Western Cape 2002 (3) SA 265

Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC)

Bopape v Moloto 2000 (1) SA 383 (T)

Brink v Kitshoff 1996 (4) SA 197 (CC)

Bydawell v Chapman 1953 (3) SA 514 (A)

Campher v Campher 1978 3 All SA 722 (O)

City Council of Pretoria v Walker 1998 (2) SA 363

Cornelissen v Universal Caravan Sales (Pty) Ltd 1971 (3) SA 158 (A)

Cuming v Cuming 1945 AD 201

Daniels v Campbell 2004 (5) SA 331 (CC)

Danielz v De Wet 2009 (6) SA 42 (C)

Da Silva v Road Accident Fund 2014 (5) SA 573 (CC)

De Wet v Jurgens 1970 (3) SA 38 (A)

De Wilzem v South African Retirement Annuity Fund [2005] 2 BPLR 180 (PFA)

Distillers Corporation Ltd v Modise 2001 (4) SA 1071 (O)

Du Plessis v Pienaar 2003 (1) SA 671 (SCA)

East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council 1998 (2) SA 61 (CC)

Edelstein v Edelstein 1952 3 All SA 20 (AD)

Ex parte: BoE Trust Ltd 2009 (6) SA 470 (WCC)

Ex Parte BoE Trust Ltd 2013 (3) SA 236 (SCA)

Ex Parte Dow 1987 (3) SA 829 (D)

Ex Parte Menzies et Uxor 1993 (3) SA 799 (C)

Erasmus v Erasmus 1942 OPD 24

Estate Sayle v Commissioner for Inland Revenue 1945 AD 388

Faro v Bingham [2013] ZAWCHC 159 1

First National Bank of Southern Africa v Perry 2001 (3) SA 960 (SCA)

Fourie v Minister of Home Affairs 2006 (1) SA 524 (CC)

Gounder v Top Spec Investments (Pty) Ltd 2008 (5) SA 151 (SCA)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC)

Harksen v Lane 1998 (1) SA 300 (CC)

Hassam v Jacobs 2009 (5) SA 572 (CC)

Heystek v Heystek 2002 (2) SA 754 (T)

Hoffman v South African Airways 2001 (1) SA 1 (CC)

Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W)

In re estate Visser 1948 (3) SA 1129 (C)

Leeb v Leeb 1999 (2) ALL SA 588 (N)

Maharaj v Sanlam Life Insurance Ltd 2011 (6) SA 17 (KZD)

Maritz v Absa Groep Pensioenfonds (PFA/GA/1387/00/KM)

Mazibuko v National Director of Public Prosecutions 2009 (6) SA 479 (SCA)

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) 52

Mistry v Interim National Medical and Dental Council 1998 (4) SA 1127 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (6) BCLR 726 (W) 746G

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) 15

Nedbank v Van Zyl 1990 (2) SA 469 (A)

New National Party v Government of the Republic of South Africa 1999 (3) SA 191 24

Ngwenyama v Mayelane 2012 (4) SA 527 (SCA)

Odendaal v Odendaal 2002 (1) SA 763 (W)

Oosthuizen v Oosthuizen 1986 (4) SA 984 (T)

Pelser v Lessing [2014] ZAGPPHC 521 44

Potgieter v Potgieter 2012 (1) SA 637 (SCA)

Prinsloo v Van der Linde 1997 (6) BCLR 759 24

Pritchard's Trustee v Estate Pritchard 1912 CPD 87

Robinson v Volks 2004 (6) SA 288 (C)

Robertson v Robertson's Executors 1914 AD 503 507

S v Dikqacwi [2013] ZAWCHC 67

S v Jordan 2002 (6) SA 642 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Satchwell v President of the Republic of South Africa 2003 (4) SA 266 (CC)

Scriven v Schoeman [2005] ZAGPHC 87

Singh v Ramparsad [2007] JOL 19113 (D)

Strydom v Engen Petroleum Limited 2013 (2) SA 187 (SCA)

Taylor v Kurtsdag 2005 1 SA 365 (W)

Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC)

Tomlin v London Lancashire Insurance Co Ltd 1962 (2) SA 30 (D)

Van der Merwe v RAF 2006 (4) SA 230 (CC)

Van der Merwe v Road Accidents Fund [2005] ZAWCHC 66

Van Rooyen v State 2002 (5) SA 246 (CC)

Visser v Hull 2010 (1) SA 521 (WCC)

Volks v Robinson 2005 (5) BCLR 446 (CC)

Vorster v Steyn 1981 (2) SA 831 (O)

Legislation and Government publications

Civil Union Act 17 of 2006

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Deeds Registries Act 47 of 1937

Divorce Act 70 of 1979

Domicile Act 3 of 1992

Estate Duty Act 45 of 1955

General Law Fourth Amendment Act 132 of 1993

Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965

Insolvency Act 24 of 1936

Intestate Succession Act 81 of 1987

Judge's Remuneration and Conditions of Employment Act 47 of 2001

Legal Succession of the South African Transport Services Act 9 of 1989

Maintenance of Surviving Spouses Act 27 of 1990

Marriage Act 16 of 1860

Marriage Act 25 of 1961

Marriage and Matrimonial Property Law Amendment Act 3 of 1988

Matrimonial Affairs Act 57 of 1953

Matrimonial Property Act 88 of 1984

Medicines And Related Substances Act 101 of 1965

Pension Funds Act 24 of 1956

Prevention of Organised Crime Act 121 of 1998

Road Accident Fund Act 56 of 1996

Recognition of Customary Marriages Act 120 of 1998

Restitution of Land Rights Act 22 of 1994

Subdivision of Agricultural Land Act 70 of 1970

Superior Courts Act 10 of 2013

Department of Social Development Republic of South Africa *White Paper on Families in South Africa* October 2012

GN 511 in GG 30663 of 14 Jan 2008

Statistics South Africa *Statistical Release P0307 Marriages and Divorce 2011*

Internet sources

Anonymous Date Unknown <http://www.saflii.org.za> [date of use 29 Aug 2014]

Anonymous Date Unknown *Parliament of the Republic of South Africa*
http://www.parliament.gov.za/live/content.php?Category_ID=11 [date of use 15 May 2014]

Anonymous Date Unknown <http://www.worldbank.org/en/country/southafrica/overview>
[date of use 7 Apr 2014]

Anonymous Jan 2000 *Final Report Containing Proposals on a Unified Insolvency Act*
http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-report-up.pdf
[date of use 8 Sep 2014]

Anonymous 27 Oct 2005 *Excluding Community of Property*
<http://www.ghostdigest.co.za/articles/excluding-community-of-property/52022> [date of use 28 Aug 2014]

Davis R 18 Sep 2013 *Analysis: Bedroom Politics, Marriage and Work, Social Development ANC and DA-style* <http://www.dailymaverick.co.za/article/2013-09-17-analysis-bedroom-politics-marriage-and-work-social-development-anc-and-da-style/#.U9Zb5vmSxx2> [date of use 14 Apr 2014]

De Vos 13 Oct 2011 *About family fights and transformative constitutionalism*
<http://constitutionallyspeaking.co.za/2011/10/13> [date of use 26 Jul 2014]

De Vos 23 Nov 2011 *Justice Kate O'Regan's Helen Suzman Memorial Lecture*
<http://constitutionallyspeaking.co.za/justice-kate-oregans-helen-suzman-memorial-lecture> [date of use 30 Aug 2014]

Gelb S Date Unknown *Inequality in South Africa: Nature, Causes and Responses Policy Initiative on Addressing Inequality in Middle-income Countries*
http://www.tips.org.za/files/Gelb_Inequality_in_SouthAfrica.pdf [date of use 26 May 2014]

Holmes OW 2005 *The Common Law*
<http://www.constitution.org/cmt/owh/commonlaw06.htm> [date of use 14 Apr 2014]

Judge J 8 Sep 2012 *Are we really family?* <http://www.citypress.co.za/columnists/are-we-really-family-20120908> [date of use 3 Oct 2014]

Meyer MM 2012 *Recognition of Customary Marriages*
http://www.lawlibrary.co.za/professionalupdate/2012/03/justicecollege_recognitionofcustomarymarriages.pdf [date of use 6 September 2014]

Wood Date Unknown *Human Dignity, Right and the Realm of Ends*
web.stanford.edu/~allenw/webpapers/keynote2007.doc [date of use 19 Jul 2014]

Vogelpath C Date Unknown *Permanent Domestic Partnerships*
<http://www.polity.org.za/article/what-are-the-consequences-of-living-together-2011-02-01> [date of use 8 May 2014]