

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**HETEROSEXUAL COHABITATION IN SOUTH AFRICA, AGAINST THE  
BACKGROUND OF DEVELOPMENTS IN THE LAW OF MARRIAGE AND  
MARRIAGE ALTERNATIVES.**

**By**

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## DECLARATION

I, SHARON DENISE LOOPS, declare that *Heterosexual cohabitation in South Africa, against the background of developments in the law of marriage and marriage alternatives* is my own work. It has never been submitted before for any degree or examination in any other university. All the sources that I have used or quoted have been indicated and acknowledged as complete references.

Signed .....

Date: 13 November 2009

Student Number: 9538916



## **KEYWORDS**

Cohabit

Common law

Customary law

Draft Domestic Partnerships Bill

Marriage

Monogamous

Muslim

Polygynous

South Africa

Woman



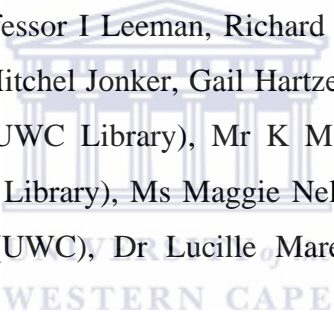
## **DEDICATION**

This work is dedicated to my husband, Richard Loops and my mother, Magdalene Alexander.

## **ACKNOWLEDGEMENTS**

I acknowledge with great thanks and gratitude the assistance of the following persons:

Professor FA de Villiers, Professor I Leeman, Richard (my husband), Magdalene (my mother), Nathaniel Da Silva, Mitchel Jonker, Gail Hartzenberg, Elton Koopman, Denise Hendricks, Adiel Abrahams (UWC Library), Mr K Malemane, Mr S Tarkey (UWC Library), Mr I Paleker (UWC Library), Ms Maggie Nelson (UWC), Ms Lynn Thomas (UWC), Dr Lorna Holtman (UWC), Dr Lucille Maré and Mr H Davids (Student Administration Office - UWC)



## ABBREVIATIONS

BAA – Black Administration Act

COIDA – Compensation for Occupational Injuries and Diseases Act

CPA – Criminal Procedure Act

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

ISA – Intestate Succession Act

JOL - Judgment Online

MOSSA – Maintenance of Surviving Spouses Act

RCMA – Recognition of Customary Marriages Act

SAJHR - South African Journal on Human Rights

SALC – South African Law Commission

SALJ - South African Law Journal

SALRC – South African Law Reform Commission

THRHR - Tydskrif vir Hedendaagse Romeins-Hollandse Reg





## CHAPTER ONE

### PREVIEW

#### 1 Introduction

South Africa has a history of discrimination against the majority of its people.

Before the advent of the New South Africa, women found themselves the most discriminated against, vulnerable and oppressed group in South African society and it was believed that the enactment of the successive Constitutions<sup>1</sup> would pave the way for the recognition of different cultural, religious and Customary norms and practices.<sup>2</sup> This research is involved with the area of cohabitation, and, also, seeks to establish the role successive legislatures and courts have played in the disparity between cohabitation and marriage. It seemed obvious when the new Constitution was adopted in South Africa that all citizens' rights were apparently protected. It became clear, however, that this was not the case when, in view of developments elsewhere in the world, one takes cognisance of the discrimination against those women who cohabit. The reason why I originally undertook to conduct this research was to investigate the causes of the inequality between women who cohabit and women who are a party to a civil marriage. The Constitution, it seemed, aimed to protect the rights, dignity and equality of all citizens. I did, therefore, decide to explore the role of the legislature and courts regarding the issue of inequality.

My aim with this research is not to suggest that certain privileges should be taken away from married women, but that South African law should embrace the right to equality fully and provide the right to cohabit to all women. I do not suggest rapid change, but that at least some development in the area of cohabitation should take place. The law has indeed demonstrated substantial progress in terms of monogamous and polygynous Customary marriages,<sup>3</sup> as well as monogamous and polygynous Muslim marriages,<sup>4</sup> but

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<sup>1</sup> Interim Constitution, 1993 and the Constitution, 1996.

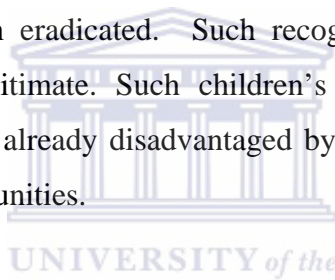
<sup>2</sup> In this regard, the RCMA (1998) followed upon the Constitution.

<sup>3</sup> RCMA, 1998.

despite this gradual development, discrimination is still prevalent against the female cohabitee. Singh<sup>5</sup> contends that South Africa opened itself to scrutiny when it accepted the CEDAW, and I believe that the country is compelled to develop its law in compliance with the principles of that Convention. Therefore, my ultimate goal is to explore ways and means to eliminate unfair discrimination in the field of marriage related partnerships. I submit that the Legislature must abolish legislation that contains discriminatory provisions, and am of the opinion that most of the South Africans are waiting in anticipation for the Legislature's passing of the Draft Bill on Domestic Partnerships that was published on 14 January 2008.

## **2 Overview of approach and chapters**

The myth, that when you lived with your partner for five years, you would be entitled to legal protection, has not been eradicated. Such recognition would have resulted in children being treated as legitimate. Such children's extra-marital status obviously disadvantages women that are already disadvantaged by, for example, being Black and living within patriarchal communities.



The purpose of this research is to present a preliminary investigation of the influence of Common law on cohabitation prior to the enactment of the Constitution, and, thereafter, the influence of constitutional rights on family law. Marriage, in South Africa, used to be seen as sacred, and the conception that it refers exclusively to the voluntary, monogamous union of one man and one woman, has to some extent become outdated, and is inequitable in a multi-cultural South African society. To me, it seems as if cohabitation has become a Cinderella subject, particularly after the *Volks*<sup>6</sup> case, and it is now the right time for legislation to change the rules in order to recognise this alternative form of 'marriage'.

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<sup>4</sup> See *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) and *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC), dealt with *infra*.

<sup>5</sup> Singh (1999) at 315.

<sup>6</sup> *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

In Chapter Two I explore the position of Muslim women. A brief overview of the position of women prior to and after the advent of the Constitution, is given. This chapter also demonstrates, through case law, how the Common law has developed in order to improve the status of monogamous Muslim marriages, and to a certain extent polygynous Muslim marriages. Our courts are required to develop the Common law so as to ‘promote the spirit, purport and object of the Draft Bill of Rights’.<sup>7</sup> Case law demonstrates why it is important for the courts not to ignore the outcry of oppressed women who are parties to *de facto* ‘marriages’.

Chapter Three explains the status of African women in Customary law type of relationships prior to, and after, the advent of the Constitution. Special reference is made to the fundamental contribution of the RCMA<sup>8</sup>.

In Chapter Four, I explore the position of women in Common law type of relationships in terms of the Constitution, as well as other legislation, with special reference to the *Volks*<sup>9</sup> case. The majority judgment in the *Volks*<sup>10</sup> case, indicates a marked contrast to the Constitutional Court’s approach in earlier cases, where rights and benefits were extended to people in monogamous and now polygynous Muslim marriages.<sup>11</sup> In this research I question the reasons given by the Court in the *Volks*<sup>12</sup> case for the applicant’s failure to prove her case, and I suggest that the Court should have assisted Mrs Robinson, and have provided for the protection of vulnerable heterosexual cohabitants.<sup>13</sup> As Cooke<sup>14</sup> has said, it important for me to determine whether Mrs Robinson’s misfortunes may cause one to ask whether this case was the most appropriate one to test the rights of heterosexual cohabitants.

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<sup>7</sup> Section 39 of the Constitution, 1996.

<sup>8</sup> RCMA, 1998.

<sup>9</sup> *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

<sup>10</sup> *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

<sup>11</sup> For example, *Daniels v Campbell NO* 2004 (5) SA 331 (CC).

<sup>12</sup> *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

<sup>13</sup> Cooke (2005) at 542.

<sup>14</sup> Cooke (2005) at 556.

In Chapter Five, I explore the differences between the two ‘institutions’, namely, marriage and cohabitation, and argue that a piece of paper is the main cause of discrimination against a female cohabitee. There is also the assumption that there is an inherent difference between cohabitation and a civil marriage. The courts, in general, based their views on ‘public policy’, but some authors are of the opinion that it is not ‘public policy’, but rather ‘state policy’. Dlamini,<sup>15</sup> for instance, asserts that our courts occasionally equate civil marriages with Christianity. He further states that this comparison misleads the public, because it creates the impression that a civil marriage was established by Jesus Christ. Yet, it is interesting to note that nowhere does Jesus state that marriages amongst His followers had to be monogamous or that a polygynous marriage was necessarily sinful.

I also address the equality principle. Sloth-Nielsen<sup>16</sup> asserts that the principle of equality, as well as the concern for the vulnerability of the marginalised groups in society, have contributed to the fact that the meaning of family, cohabitation and marriage has to be revisited. In *Mthembu v Letsela*,<sup>17</sup> for example, the Court failed to analyse the disadvantaged position of women who found themselves in the position of the applicant.

The research will show that it is unnecessary to limit the question to ‘cohabitation vs monogamous marriage’, since the Constitution allows for equality, and both monogamous and polygynous marriages have been recognised by Parliament and courts, in respect of African and Islamic marriages.

My aim is also to examine why courts are so reluctant to develop the Common law, because it seems as if they are unwilling to give effect to the authoritative constitutional command of gender equality, and to accommodate certain alternative marriage practices in South Africa.

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<sup>15</sup> Dlamini (1985) at 701-2.

<sup>16</sup> Sloth-Nielsen (2003) at 127.

<sup>17</sup> *Mthembu v Letsela* 1997 (2) SA 936 (T).

Chapter Five also investigates the use of equality as both a right and a value. It furthermore demonstrates the importance of expanding the role of equality to all cases in which groups suffering disadvantages are affected, including those in non-constitutional matters. Equality as a value should also be utilised by our courts in order to allow substantive equality to form the transparent structure through which the application of the law takes place. Throughout this chapter I urge the Legislature and courts to take cognisance of the right to equality, as well as to consider past unfair discrimination against women.

Finally, this research covers very much the same time span as the period during which the ‘fight’ for the recognition of same-sex relationships took place, culminating in the passing of the Civil Union Act<sup>18</sup> - leaving the detail of ‘same-sex domestic partnerships’ still to be attended to by the legislature and courts.



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<sup>18</sup> Civil Union Act, 2006.

## CHAPTER TWO

### POSITION OF WOMEN IN MUSLIM MARRIAGES

#### 1 Introduction

Muslim marriages are potentially polygynous and for this reason are not generally recognised as valid in our law.<sup>19</sup>

Muslim women who find themselves in a relationship may choose to marry in terms of the Marriage Act,<sup>20</sup> or Muslim rites, or to cohabit. Certain statutory and case law recognise monogamous and polygynous Muslim marriages for certain purposes. However, women who are not married under the Marriage Act<sup>21</sup> or by Muslim rites, whether monogamous or polygynous, may be categorised as cohabitees. Such cohabitees, currently, find no protection under our law until either the Draft Muslim Marriages Bill<sup>22</sup> or the Draft Domestic Partnerships Bill<sup>23</sup> is passed.

In South Africa we have a diverse society in which various communities, such as, Muslims, Jews, Hindus and Africans, live according to their own customs and usages. Currently, the law of South Africa generally recognises the validity of some of these customs and usages as law.<sup>24</sup> Various judicial decisions have refused to recognise the validity of potentially polygynous Islamic marriages concluded in South Africa and abroad.<sup>25</sup> Sinclair<sup>26</sup> stated that Muslim marriages had been refused recognition as valid marriages in South African law because polygyny had been ‘reprobated by the majority of “civilized people”, on the ground of morality and religion’.<sup>27</sup>

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<sup>19</sup> Sinclair (1996) at 158.

<sup>20</sup> Marriage Act, 1961.

<sup>21</sup> Marriage Act, 1961.

<sup>22</sup> Draft Bill on Islamic Marriages (2003).

<sup>23</sup> Draft Domestic Partnerships Bill (2008).

<sup>24</sup> Rautenbach (2003) at 168.

<sup>25</sup> See *Seedat's Executors v The Master (Natal)* 1917 AD 302. See also *Ismail v Ismail* 1983 (1) SA 1006 (A) where the Court came to the conclusion that the polygynous union between the parties must be regarded as void on the ground of public policy. According to these cases, Muslim marriages were contrary to public policy as a result of their potentially polygynous nature and, therefore, unenforceable.

<sup>26</sup> Sinclair (1996) at 164.

<sup>27</sup> *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307.

This chapter will address how the position of Muslim women developed through case law.

## **2. Brief overview of Muslim marriages prior to 1994**

Prior to the enactment of the interim Constitution, Muslim marriages were regarded as invalid at Common law on the ground that they were potentially polygynous and, therefore, offended public policy. Under colonialism and apartheid there was a refusal on the part of both the legislature and the courts to afford legal protection to parties in a Muslim marriage. Historically, South Africa recognised only one type of family. Only a husband and wife who married in terms of civil law had rights and obligations towards each other.<sup>28</sup> There were two kinds of relationship to which the full range of family law was not extended despite the fact that they are common in South Africa, viz, African Customary marriages, that received some recognition for certain purposes, and religious Muslim marriages, that received no recognition. When parties ‘marry’ in terms of Islamic law with the intention that the principles of Islamic law should govern their relationship, they were not regarded as married according to South African law.

Courts were adamant in their non-recognition of a marriage if it was a potentially polygynous one, whether or not it was recognised as valid in other countries. Innes CJ adopted this principle in the *Seedat’s Executors*<sup>29</sup> case where the learned Judge declined to recognise a potentially polygynous Muslim marriage.

It becomes even more problematic when a party to a potentially polygynous marriage that has in fact been monogamous, is denied the protection of the law. The circumstances of *Ismail*<sup>30</sup> are in point here. Trengrove J held that the ‘polygynous union between the two parties in the instant case must be regarded as void on the grounds of public policy’.<sup>31</sup>

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<sup>28</sup> See *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>29</sup> *Seedat’s Executors v The Master (Natal)* 1917 AD 302.

<sup>30</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>31</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1025B.

The approach adopted by the Court is regrettable and Goldblatt<sup>32</sup> correctly avers that the decision in the *Ismail*<sup>33</sup> case remains, in South African law, as an example of the narrow Western bias approach that South Africa adopted towards marriages that did not conform to the Christian or civil model.

Muslim women cohabitees have no rights and duties, yet our courts, to a certain extent, came to the assistance of cohabitees by deciding that an express or implied universal partnership existed between the couple. In the *Ally*<sup>34</sup> case the Court gave recognition to a cohabitation that had lasted fifteen years, because the female cohabitee met the requirements for an implied universal partnership to exist, in that ‘the aim of the partnership was to make a profit; both parties contributed to the enterprise; the partnership operated for the benefit of both parties; and the contract between the parties was legitimate’.<sup>35</sup>

With regard to the legal consequences for the Muslim cohabitee, the South African law contradicts itself by not recognising the Muslim cohabitee as a ‘spouse’ in terms of section 198 of the CPA, yet she is recognised as a ‘spouse’ in terms of subsection (13) of section 21 of the Insolvency Act.<sup>36</sup>

### **3 Status and position of Muslim women after 1994: Constitution and protection afforded by legislation, case law and draft Muslim Marriages Bill**

In 1994 South Africa entered into a new constitutional dispensation with the commencement of the 1993 interim Constitution, which was repealed by the 1996 Constitution. South Africa’s post-apartheid case law provides important direction on the legal treatment of Muslim marriages and the right to freedom of religion. The pre-democracy era stands in stark contrast to the subsequent jurisprudence emanating from the Courts.

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<sup>32</sup> Goldblatt (2000) at 141.

<sup>33</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>34</sup> *Ally v Dinath* 1984 (2) SA 451 (T) at 455.

<sup>35</sup> See also *V (also known as L) v De Wet* 1953 (1) SA 612 (O) at 615B; *Muhlmann v Muhlman* 1981 (4) SA 632 (W) at 634C, referred to in *Ally supra*.

<sup>36</sup> Insolvency Act, 1936.



In the post-apartheid era the constitutional validity of the Common law rule, enunciated in the *Ismail*<sup>37</sup> case, was challenged in the *Ryland*<sup>38</sup> case. This case will be dealt with later in this section. The interim Constitution and the final Constitution highlight the distinction between Customary law and religious law. Both Constitutions recognise the possibility that religious personal law and religious marriages may be recognised respectively. However, I do not agree that Muslim Personal Law will continue to function independently, because case law has proven that our courts are prepared to constitutionalise Muslim marriages.<sup>39</sup>

Sections 15(3)(a)(i) and 31(1) of the Constitution are incorporated in the Bill of Rights to protect the woman who marries in accordance with religion or in accordance with Customary law. Whereas section 15 encompasses protection of freedom of religion, section 31(1) provides protection of a right to religious practice in community with others. Woolman<sup>40</sup> asserts that both sections must be read together and that the inclusion of section 31 in the Constitution indicates a commitment to the maintenance of cultural pluralism.

Other provisions in the Bill of Rights<sup>41</sup> protect the cultural and religious diversity of South Africa, and it could be argued that the exercising of these rights include the right to be subject to one's own personal legal system. Moosa<sup>42</sup> argues that the interim Constitution did not bring much relief to the position of Muslim women because it failed to address the apparent conflict between the right to religious freedom and equality between sexes, which were equally provided for. However, it should be noted that certain case law reflects the impact of the Constitution on Muslim marriages, as well as how the position of married Muslim women has developed in a very dynamic way.

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<sup>37</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>38</sup> *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) .

<sup>39</sup> Moosa (1998) at 202. See also *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC), *Khan v Khan* 2005 (2) SA 272 (T), and *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC).

<sup>40</sup> Woolman (2006) at 58-40.

<sup>41</sup> See, *inter alia*, sections 9, 15, 30 and 31 of the Constitution, 1996.

<sup>42</sup> Moosa (1998) at 201-202.

Potentially polygynous marriages were gradually recognised by South African law as can be observed from the discussions of the cases below.

In the *Rylands*<sup>43</sup> case Farlam J had to decide whether the Court should follow the decision in the *Ismail*<sup>44</sup> case, and found that certain contracts flowing from a marital relationship which is potentially polygynous could be enforced. However, the Court was not asked to recognise the marriage by Muslim rites as a valid marriage ‘but merely to enforce certain terms of a contract made between the parties which are in sense collateral thereto’.<sup>45</sup> In arriving at this decision, the Court was satisfied that it was no longer bound by the decision in the *Ismail*<sup>46</sup> case. In light of the decision of Farlam J, one must take cognisance of the fact that the Court had not decided that the Muslim marriage generated a legal duty to support a wife.<sup>47</sup> It is submitted that Moosa’s view that issues, such as, reasonableness, need, and the ability to provide maintenance, underpin the duty to support,<sup>48</sup> is the preferred one. I support Church’s<sup>49</sup> view when she applauds the court in the *Rylands*<sup>50</sup> case for having deviated from a ‘long line of decisions’ that had emphasised the monogamous notion of marriage, and the fact that the Court afforded recognition and enforced the consequences of a Muslim marriage.

The *Amod*<sup>51</sup> case afforded recognition to *de facto* monogamous Muslim marriages. In this case, the Court had to decide whether the appellant’s right of support from the deceased, deserved recognition and protection from law. The Court, in fact, afforded recognition on the ground that the Islamic marriage between the appellant and the deceased, was a *de facto* monogamous marriage, and concluded that the appellant had a cause of action.<sup>52</sup>

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<sup>43</sup> *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) at 690.

<sup>44</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>45</sup> *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) at 709F.

<sup>46</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>47</sup> *Moosa and Karbanee* (2004) at 281.

<sup>48</sup> *Moosa and Karbanee* (2004) at 282.

<sup>49</sup> *Church* (1997) at 292.

<sup>50</sup> *Ryland v Edros* 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C) .

<sup>51</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

<sup>52</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA at 1327G-H).

Bonthuys<sup>53</sup> is of the opinion that this judgment did not provide relief for Muslim women who found themselves in a polygynous marriage, because the decision retained the traditional Common law bias in favour of monogamous family groups. According to Rautenbach,<sup>54</sup> the decision in *Amod*<sup>55</sup> can be viewed as a landmark case regarding the rights of Muslim women in South Africa. There is uncertainty whether the SCA would have made the same judgment had the marriage been a polygynous marriage. Goldblatt's<sup>56</sup> view confirms this concern when she stated that the judgment consciously left open the question of polygynous marriages or other religious marriages. Mahomed CJ, who gave the judgment, stressed that the appellant was a party to a *de facto* monogamous marriage, and yet he was cautious to say that he left the issue of a polygynous Muslim marriage 'entirely open'.

The *Amod*<sup>57</sup> decision is significant in that it improved the legal position of parties to Muslim marriages. It achieved this by developing and altering the previous direction of the Common law.

The *Khan*<sup>58</sup> case challenged traditional and culturally bound notions of marriage within our law. In this case, the Court found that it is not *contra bonos mores* to grant a Muslim wife maintenance in a polygynous marriage.<sup>59</sup> The *Khan*<sup>60</sup> case reflects the Court's willingness to develop the Common law, not only in terms of the Maintenance Act,<sup>61</sup> but also other statutes.<sup>62</sup>

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<sup>53</sup> Bonthuys (2002) at 763.

<sup>54</sup> Rautenbach and Du Plessis (2000) at 302.

<sup>55</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

<sup>56</sup> Goldblatt (2000) at 144.

<sup>57</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

<sup>58</sup> *Khan v Khan* 2005 (2) SA 272 (T).

<sup>59</sup> *Khan v Khan* 2005 (2) SA 272 (T) at 283A-B.

<sup>60</sup> *Khan v Khan* 2005 (2) SA 272 (T).

<sup>61</sup> Maintenance Act, 1998.

<sup>62</sup> Section 31 of the Special Pensions Act, 1996 defines 'dependant' to include the spouse of a deceased to whom he or she was married 'under any Asian religion'; Section 1 of the Demobilisation Act, 1996 defines 'dependant' to include the surviving spouse to whom the deceased was married 'in accordance with the tenets of a religion'; Section 1(2)(a) of the Births and Deaths Registration Act, 1992 includes in the word 'marriage' all marriages concluded according to the 'tenets of any religion'; Section 21(13) of the

Another case of a Muslim woman who turned to the court for relief, was that of the *Daniels*<sup>63</sup> case. The applicant first approached the High Court in 1998<sup>64</sup> for a declaration that she was entitled to the house of Mr Daniels who had died intestate. Steyn AJ dismissed the application on the basis of the non-recognition of the validity of the Muslim marriage between the deceased and Mrs Daniels.

In 2000 Mrs Daniels approached the High Court<sup>65</sup> for the second time, for an order declaring (i) that she was a spouse for the purposes of the ISA,<sup>66</sup> and (ii) that she was a survivor for the purposes of section 2 of the MOSSA.<sup>67</sup> It was a daunting task for counsel, for the applicant had to convince Van Heerden J that the word ‘spouse’ as used in the two Acts, should be interpreted to include spouses married in terms of Muslim rites.

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

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

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

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

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

<sup>66</sup> ISA, 1987 section 1.

<sup>67</sup> MOSSA, 1990.

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

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

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

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

The majority judgment decided that the word 'spouse' in both the ISA<sup>75</sup> and the MOSSA<sup>76</sup> could be interpreted so as to include a party to a monogamous Muslim marriage. This implies that, if so construed, they were not invalid and unconstitutional.<sup>77</sup>

Although this decision may be seen as a landmark case regarding the rights of Muslim women under the South African law of intestate succession, its effect, until recently, was not to give recognition to polygynous Muslim marriages. The *Hassam*<sup>78</sup> case, recently, recognised the concerns of the majority of South Africans with regard to the recognition of polygynous Muslim marriages. The issue in this case was whether a surviving spouse in a polygynous marriage in terms of Muslim Personal Law, was entitled to the benefits stipulated in the ISA<sup>79</sup> and the MOSSA<sup>80</sup>.

In this case, Van Reenen J emphasised that the applicant's polygynous marriage to the deceased, distinguished her matter from the *Daniels*<sup>81</sup> case - in which case, the provisions of the two Acts, were interpreted to include a spouse in a *de facto* Muslim monogamous marriage within their ambit<sup>82</sup>.

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

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

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

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

<sup>75</sup> ISA, 1987.

<sup>76</sup> MOSSA, 1990.

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

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

<sup>79</sup> ISA, 1987.

<sup>80</sup> MOSSA, 1990.

<sup>81</sup> *Supra*.

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

It was, therefore, held that the exclusion of spouses in polygynous Muslim marriages would not pass the test of constitutional scrutiny. The Constitutional Court<sup>83</sup> concurred with Van Reenen J that the exclusion of polygynous Muslim marriages from the protection of both the ISA<sup>84</sup> and the MOSSA,<sup>85</sup> was constitutionally invalid.<sup>86</sup>

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

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

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

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

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

<sup>84</sup> ISA, 1987.

<sup>85</sup> MOSSA, 1990.

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

<sup>87</sup> Draft Muslim Marriages Bill (2003).

<sup>88</sup> Motala (2009) at 1.

<sup>89</sup> Maughan (2009) at 6.

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

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

#### **4 Conclusion**

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

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

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

However, considering all the conflicting comments towards the Draft Bill<sup>94</sup> it is at this stage unpredictable whether Parliament will ever pass the Draft Bill<sup>95</sup>, or not.

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

<sup>92</sup> Draft Muslim Marriages Bill (2003).

<sup>93</sup> Draft Domestic Partnerships Bill (2008).

<sup>94</sup> Draft Domestic Partnerships Bill (2008).

<sup>95</sup> Draft Domestic Partnerships Bill (2008).

## CHAPTER THREE

### POSITION OF WOMEN IN AFRICAN CUSTOMARY MARRIAGES

#### 1 Introduction

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

A very important cultural practice in South Africa is *lobolo*. In order to form a Customary marriage in traditional African law, the man's family would give cattle to the guardian of the prospective bride. Today the bride wealth tends to be paid in cash by the prospective husband to the wife's family.<sup>96</sup> According to Sinclair<sup>97</sup> the importance of the contract of *lobolo* in all tribal systems, even where it is not essential for the validity of the marriage, is that it serves to transfer the woman, and her reproductive capacity, from the family of her guardian to the family of her husband.<sup>98</sup> Another one of the key principles of *lobolo* was to provide security for the woman when the marriage was to be terminated.

Africans who marry almost invariably conclude a *lobolo* agreement in respect of their marriage, be it in terms of the RCMA<sup>99</sup> or the Marriage Act.<sup>100</sup>

Sinclair<sup>101</sup> avers that as Customary marriages are potentially polygynous, African Customary family law is not a system adhered to by persons professing a certain religion. In Customary Law a man can have more than one wife. As Customary law recognises a system of polygyny, a wife may not object if her husband wishes to conclude a second or further marriage.

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<sup>96</sup> Bronstein (1998) at 391; See also Sinclair (1996) at 242.

<sup>97</sup> Sinclair (1996) at 170-1.

<sup>98</sup> Sinclair (1996) at 243.

<sup>99</sup> RCMA, 1998.

<sup>100</sup> Marriage Act, 1961.

<sup>101</sup> Sinclair (1996) at 158.



Bennett<sup>102</sup> asserts that when the British occupied the Cape, Customary law was dismissed as a barbarous and pre-legal ‘custom’. In the mid-nineteenth century, Customary law attained grudging recognition in Natal, Transvaal and Transkei as ‘Native law’, and in the twentieth-century it was rechristened ‘Bantu law’ by the architects of the apartheid regime. According to Bonthuys,<sup>103</sup> despite the fact that Customary marriages were not fully recognised in our law in the past, they were afforded limited recognition for certain purposes. The women in these marriages were not in the same position as cohabitees, as they found themselves in a better position. Lesser legal consequences were afforded to cohabitees in comparison to those women who entered into a Customary marriage. Before November 2000 Customary marriages were recognised by some South African statutory laws, such as the Transkei Marriage Act<sup>104</sup> and the KwaZulu-Natal Codes of Zulu law.<sup>105</sup> The Transkei Marriage Act<sup>106</sup> afforded full recognition to Customary marriages. In terms of it, men were allowed to be party to more than one marriage simultaneously, irrespective of whether one of the marriages was a civil marriage out of community of property - but not in community of property.

## **2 Brief overview of Customary marriages prior to 1994**

Until the advent of the interim Constitution in 1993, Customary law had not been recognised as a basic component of the South African legal system.<sup>107</sup> Section 35 of the BAA<sup>108</sup> defined a Customary ‘union’ as ‘the association of a man and a woman in a conjugal relationship according to Black law and custom, whether neither man nor woman is party to a subsisting marriage’. Although Customary marriages were not recognised in civil law because of their potentially polygynous nature, they were given limited recognition for particular purposes. When a husband who married in accordance with Customary law died, his estate would devolve in accordance with the principles of

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<sup>102</sup> Bennett (1994) at 122.

<sup>103</sup> Bonthuys and Pieterse (2000) at 617.

<sup>104</sup> Transkei Marriage Act, 1978.

<sup>105</sup> See, e.g. KwaZulu Act on the Code of Zulu law, 1985.

<sup>106</sup> Section 3(1) of the Transkei Marriage Act, 1978.

<sup>107</sup> Bennett (2004) at 34.

<sup>108</sup> BAA, 1927.

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

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

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

This was particularly problematic to Customary law wives whose husbands concluded civil marriages with other women during the subsistence of the former's marriages. Such Customary marriages were regarded as automatically dissolved by such later Civil marriages. The KwaZulu Code of Zulu Law<sup>112</sup> was the first to improve the position of women, in that irrespective of which marriage was entered into first (whether Customary or civil), the first marriage was recognised. Since 1988 the existence of such a Customary marriage had acted as a barrier to a subsequent civil law marriage by the husband to another woman in the rest of South Africa, excluding the Homelands, and in 1998 the RCMA<sup>113</sup> extended this rule to the whole of South Africa.

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

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<sup>109</sup> Section 23 of the BAA, 1927.

<sup>110</sup> Section 31 (1) of the Black Laws Amendment Act, 1963.

<sup>111</sup> Hahlo (1985) at 33.

<sup>112</sup> KwaZulu Act on the Code of Zulu law, 1985.

<sup>113</sup> RCMA, 1998.

<sup>114</sup> RCMA, 1998.

<sup>115</sup> BAA, 1927.

<sup>116</sup> Robinson (1995) at 461.

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

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

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

As said at the beginning, South Africa has a history of discrimination against the majority of its people. This changed as from 1994, particularly when the Constitution<sup>119</sup> became the supreme law of the country. The Constitution aims to protect the rights, dignity and equality of all citizens. Section 7 states 'The Draft Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.<sup>120</sup>

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<sup>117</sup> Section 22 of the BAA, 1927.

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

<sup>119</sup> Constitution, 1996.

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

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

Following upon the Constitution, another piece of legislation, the RCMA<sup>123</sup> contributed substantially to the improvement of the position of African women who entered into Customary marriages. In the past marriages under Customary law had not been recognised by the state as full marriages and were called ‘Customary unions’ to distinguish them from full marriages.

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

The Act addresses the insulting history of non-recognition of Customary marriages in South Africa and gives expression to a number of legislative objectives.<sup>125</sup> Bronstein<sup>126</sup> adds that the Act purports to recognise and value, traditional African culture, and is concerned with regularising Customary marriages within the context of a state bureaucratic system. In addition, the Act also addresses women’s rights under Customary law.<sup>127</sup> African women have the choice to marry either in terms of civil law or Customary law.

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<sup>121</sup> Basson (1995) at v.

<sup>122</sup> Sections 30, 38 and 31 of the Constitution, 1996.

<sup>123</sup> RCMA, 1998.

<sup>124</sup> Section 2 RCMA, 1998.

<sup>125</sup> Bronstein (2000) at 558.

<sup>126</sup> Bronstein (2000) at 558.

<sup>127</sup> Bronstein (2000) at 558.

The RCMA<sup>128</sup> represents a major initiative by the new Government in combining Customary and Common law principles and rules in conjunction with the Constitution, according to my supervisor, Professor F.A. de Villiers.

The next important development, was the *Bhe*<sup>129</sup> case, denoting the supremacy of the Constitution. The constitutionality of sections 23(10) (a), (c) and (e) of the BAA,<sup>130</sup>; regulation 2 (e) of the Regulations for the Administration and Distribution of Estates of Deceased Blacks,<sup>131</sup> and section 1(4)(b) of the ISA,<sup>132</sup> were challenged in the High Court. Intestate succession under Customary law was based on the principles of male primogeniture. The issue in this case was whether a female African person, whose parents' marriage according to African law custom, could not be proved to the satisfaction of the Court, is entitled to inherit in terms of intestate succession. The High Court, per Ngwenya J, emphasised concern with the attitude of our courts towards African Customary law. The Judge concluded that the only reason why the applicants could not inherit was because they were female and Black, and that this system constituted discrimination on the grounds of race and gender.<sup>133</sup> The Court consequently held that the discrimination offended sections 9(1) and (3) of the Constitution,<sup>134</sup> and that such law<sup>135</sup> was unconstitutional and invalid.<sup>136</sup>

The Constitutional Court<sup>137</sup> agreed that section 23(10) of the BAA<sup>138</sup> was a racist provision which was fundamentally incompatible with the Constitution. Langa DCJ applauded the judgment Sachs J, for the majority, in the *Moseneke*<sup>139</sup> case. Sachs had said that 'no society based on equality, freedom and dignity would tolerate differential

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<sup>128</sup> RCMA, 1998.

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

<sup>130</sup> BAA, 1927.

<sup>131</sup> Published in *Government Gazette* 10601 dated 6 February 1987.

<sup>132</sup> ISA, 1987.

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

<sup>134</sup> Constitution, 1996.

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

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

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

<sup>138</sup> BAA, 1927.

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

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

Langa DCJ concluded that, in the light of its history and context, it was evident that section 23 of BAA<sup>141</sup> and its regulations, were discriminatory and violated section 9(3) of the Constitution.<sup>142</sup>

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

Two Transkeian cases should also be referred to, before ending this section. In the *Prior*<sup>145</sup> case the Court held that the provisions of section 37<sup>146</sup> of the Transkei Marriage Act,<sup>147</sup> as well as the Common law rule with regard to the husband's marital power over his wife, were inconsistent with the interim Constitution. In the *Makholiso*<sup>148</sup> case, the Common law concept of a 'putative marriage' was extended to the realm of Customary marriages.

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

#### **4 Fundamental contribution of RCMA**

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

<sup>141</sup> BAA, 1927.

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

<sup>143</sup> ISA, 1987.

<sup>144</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009.

<sup>145</sup> *Prior v Battle and Others* 1999 (2) SA 850 (Tk).

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

<sup>147</sup> Transkei Marriage Act, 1978.

<sup>148</sup> *Makholiso v Makholiso* 1997 (4) SA 509 (Tk).

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

Section 2 determines that all valid Customary marriages entered into before or after the commencement of the Act, will be recognised as marriages for all purposes.<sup>150</sup> If a man had more than one valid Customary marriage, then all of his marriages will be fully recognised.<sup>151</sup> Very often, however, one has to prove to the court that a valid Customary marriage existed between the two parties. An example of such an instance, was the issue in the *Mabena*<sup>152</sup> case. The respondent claimed that she was married to the deceased in terms of Customary law, and the magistrate upheld this contention. On appeal, the appellant averred that the respondent's mother had negotiated the *lobolo* with the deceased, which was contrary to the rules of Customary law. However, expert witness Labuschagne<sup>153</sup> took a different view on the same issue in terms of 'living Customary law':

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

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

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

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<sup>149</sup> Bronstein (2000) at 558.

<sup>150</sup> Sections 2(1) and 2(2).

<sup>151</sup> Sections 2(3) and 2(4).

<sup>152</sup> *Mabena v Letsoala* 1997 (2) SA 1068 (T).

<sup>153</sup> Labuschagne (1991) at 551.

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

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

The issue was that the marriage was invalid because it was not registered in terms of section 4 of the RCMA. Jafta AJP had to consider whether the Court would rely on the decision of Kruger AJ in the *Kwitshane*<sup>157</sup> case that the failure to register a marriage within a reasonable time resulted in the marriage either falling away completely, or remaining invalid until it had been registered. In the present case, the learned Judge considered the plaintiff's illiteracy and ignorance regarding the Transkei Marriage Act<sup>158</sup> which required the registration of Customary marriages.

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

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

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<sup>154</sup> *Baadjies v Matubela* 2001 (3) SA 427 (W).

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

<sup>156</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>157</sup> *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

<sup>158</sup> Transkei Marriage Act, 1978.

<sup>159</sup> *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

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

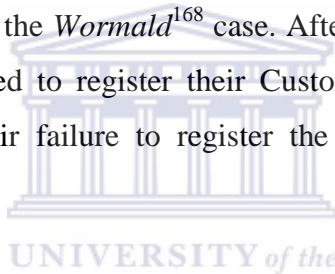
<sup>161</sup> *Wormald v Kambule* 2006 (3) SA 562 (SCA).

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



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

In the *Kambula*<sup>164</sup> case the Court was confronted with two issues, namely whether the failure to register the alleged Customary marriage made it invalid, and whether the applicant was a survivor in terms of the provisions of the MOSSA.<sup>165</sup> Pickering J made reference to the decisions in the *Kwitshane*<sup>166</sup> case, the *Sokhewu*<sup>167</sup> case and the minority judgment of Combrink AJA in the *Wormald*<sup>168</sup> case. After much consideration Pickering J held that if parties had failed to register their Customary marriage in terms of the Transkei Marriage Act<sup>169</sup>, their failure to register the marriage would not affect its validity.<sup>170</sup>



Section 6 of the RCMA<sup>171</sup> brought about drastic changes. African women were freed from the guardianship and marital power of their husbands. Women are now legally autonomous and no longer the perpetual wards of their husbands. As a consequence of the Act, the legal status of African women improved in that they now have full contractual capacity, the right to own property and acquire credit, and ‘*locus standi*’.

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

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

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

<sup>165</sup> MOSSA, 1990.

<sup>166</sup> *Kwitshane v Magalela* 1999 (4) SA 610 (Tk).

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

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

<sup>169</sup> Transkei Marriage Act, 1978.

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

<sup>171</sup> RCMA, 1998.

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

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

Section 7 deals with the proprietary consequences of Customary marriages. The constitutionality of section 7 was challenged in the *Gumede*<sup>173</sup> case. Moseneke DCJ gave recognition to the purpose of the RCMA<sup>174</sup> to the extent that it was enacted in terms of section 15(3) of the Constitution. However, the Court was still of the opinion that sections 7(1) and 7(2) of the RCMA<sup>175</sup> were clearly discriminatory on one of the listed grounds, namely, gender. The reason for this averment was that women in Customary marriages concluded before 15 November 2000 were subjected to unequal proprietary consequences<sup>176</sup> - causing the Court to declare these sections to be inconsistent with the Constitution.<sup>177</sup>

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

## 5 Conclusion

It is evident that the position of the African woman has improved since the enactment of the Constitutions (interim and final). When the RCMA came into operation, the woman who was a partner to such a marriage, was no longer regarded as a cohabitee. But although the RCMA<sup>178</sup> brought relief to the position of the African woman, it did not bring relief to those still regarded as cohabitees. The African woman has the choice to conclude a civil marriage,<sup>179</sup> or a Customary marriage,<sup>180</sup> enjoying the protection of the law in both cases, or may cohabit with no protection at all.

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

<sup>174</sup> RCMA, 1998.

<sup>175</sup> RCMA, 1998.

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

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

<sup>178</sup> RCMA, 1998.

<sup>179</sup> In terms of the Marriage Act, 1961.

<sup>180</sup> In terms of the RCMA, 1998.

Development has taken place gradually in favour of African women after the enactment of the Constitution and RCMA,<sup>181</sup> as well as recent case law. South Africans are now subject to a 'uniform code of marriage law'. The latter affords legal recognition to Customary marriages next to civil marriages. This legislation is also entrenched in the Constitution<sup>182</sup> which permits legislation to recognise marriages that are contracted under any tradition or system of religious, personal or family law, with the provision that such legislation must be consistent with the Constitution.<sup>183</sup>

Langa DCJ correctly, it is submitted, stated in the *Bhe* case<sup>184</sup> that the Constitution envisaged a place for Customary law in our legal system and, more importantly, that some provisions of the Constitution necessitate that Customary law should be accommodated and not simply tolerated as part of South African law and that it is not immune from being declared unconstitutional if found to be inconsistent with the Bill of Rights.

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

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

Bronstein<sup>185</sup> is impressed with the drafters of the RCMA<sup>186</sup>, and so am I. She asserts that the Act advanced the status of South African women. Section 6 is just as important as

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<sup>181</sup> RCMA, 1998.

<sup>182</sup> Section 15(3) of the Constitution, 1996.

<sup>183</sup> O'Sullivan and Murray (2005) at 17.

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

<sup>185</sup> Bronstein (2000) at 574.

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

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

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

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<sup>186</sup> RCMA, 1998.

<sup>187</sup> Bonthuys (2002) at 757.

<sup>188</sup> Currie (1994) at 153-4.

## CHAPTER FOUR

### WOMEN COHABITEES AND THE LAW

#### 1 Introduction

Cohabitation has become extremely common in South Africa, and on this basis one would have expected that legislation would have undergone drastic change. Section 15(3)(a)(i) of the Constitution<sup>189</sup> should be interpreted as to include all cohabitees irrespective of race, colour and creed. There are many reasons why women across the racial spectrum opt to cohabit, and while our courts and legislature fail to acknowledge sufficiently that the Bill of Rights<sup>190</sup> prohibits discrimination against non-traditional forms of family, cohabitation will remain, largely, outside the coverage of family law.

I agree with Sloth-Nielsen and Van Heerden<sup>191</sup> that within a short period of time our law has provided greater recognition and protection to women - but not to everyone!

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

While most authors adopt the same definition for cohabitation, others have a different interpretation. Schwelnus<sup>193</sup> defines cohabitation as a 'stable, monogamous relationship where couples who do not wish to, or are not allowed to, get married, live together as spouses'. The traditional definition limits the term cohabitation to two people of the opposite sex living together. In terms of the Constitution, however, this limitation is unwarranted.<sup>194</sup>

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<sup>189</sup> Constitution, 1996.

<sup>190</sup> Chapter Two of the Constitution, 1996.

<sup>191</sup> Sloth-Nielsen and Van Heerden (2003) at 123.

<sup>192</sup> E.g. Hahlo (1983) at 244.

<sup>193</sup> Schwelnus (2007) at 1.

<sup>194</sup> Section 9(3) of the Constitution, 1996

Hahlo<sup>195</sup> says that the term ‘concubinage’ (alias ‘*de facto* marriage’, ‘quasi-marriage’, ‘extra-marital cohabitation’, ‘putative marriage,’ ‘Common-law marriage’) connotes the relationship between a man and a woman who live together as ‘husband’ and ‘wife’ but have not gone through the legal ceremony of a marriage. Hutchings and Delpont<sup>196</sup> concur with Hahlo, that the term cohabitation is the most commonly employed term, because it is not a legal marriage and neither does it develop into one as a result of the lapse of time.

In the *Owen-Smith*<sup>197</sup> case the phrase ‘on a permanent basis’ was held to mean a relationship that was intended by the parties to continue indefinitely without change. Goldblatt<sup>198</sup> opines that domestic partnership should be defined as ‘a permanent intimate life partnership between two adults’, a similar approach to that of the New South Wales Property Relationships Act,<sup>199</sup> which should be followed.

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

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

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

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

<sup>197</sup> *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZSC).

<sup>198</sup> Goldblatt (2003) at 624.

<sup>199</sup> New South Wales Property Relationships Act, 1984.

<sup>200</sup> Schwellnus (2007) at 2.

<sup>201</sup> Schwellnus (2007) at 2.

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

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

South Africa demonstrates a rising trend in domestic partnerships. These domestic partnerships serve a role in meeting the financial, emotional and other needs of the people involved.<sup>204</sup> Goldblatt<sup>205</sup> says that more than a million South Africans are in non-marital relationships with their intimate partners. Furthermore, ‘one of the main reasons for the prevalence of this type of relationship in South Africa is the extent of migrancy in our country’.<sup>206</sup> The author<sup>207</sup> further addresses the presumption that people who choose not to marry are exercising their freedom of choice in the South African context. Mrs Robinson’s predicament in the *Volk’s* case<sup>208</sup> is not a result of her and the deceased’s failure to marry; rather, it was because their failure to marry had become a feasible social option.

In 2004 De Vos<sup>209</sup> was of the opinion that cohabitantes who choose not to marry will continue to be marginalised, and that the South African law will make no effort to protect the weaker and more vulnerable partners in such a relationship.

Goldblatt distinguishes three types of cohabitation, namely:<sup>210</sup>

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

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<sup>203</sup> Schwellnus (2007) at 2.

<sup>204</sup> Monareng (2007) at 126.

<sup>205</sup> Goldblatt (2003) at 610.

<sup>206</sup> Goldblatt (2003) at 610.

<sup>207</sup> Goldblatt (2003) at 610.

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

<sup>209</sup> De Vos (2004) at 187.

<sup>210</sup> Goldblatt (2003) at 613.

Clark<sup>211</sup> is of the opinion that there is a wide range of different types of cohabitants ranging from those who are committed to each other to those who are merely in a 'contingent' relationship.

De Vos<sup>212</sup> finds it ironic that same sex couples who have not entered into a civil union marriage receive more protection than heterosexual cohabitants despite the fact that most South Africans who cohabit are heterosexual and yet their relationships are not protected.

## **2 Legal consequences of cohabitation**

Sinclair opines<sup>213</sup> that the general rule of our law is that cohabitation does not give rise to special legal consequences irrespective of how long the relationship has endured. Cohabitation does not give rise to property rights unless the ordinary rules of the law of contract, property and unjustified enrichment might be invoked by a cohabitee in order to enforce rights acquired in or to each other's property.<sup>214</sup>

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

There are many practical problems arising from mere cohabitation and most of these problems only become prevalent when the relationship is terminated. Although our law does not prohibit extra-marital cohabitation, it does not promote such relationships, in that the parties' relationships generally do not enjoy special protection in family law. Legislation<sup>216</sup> deals with marriages and cohabitation on an equal footing only in certain circumstances.<sup>217</sup> This will be discussed later.

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<sup>211</sup> Clark (2002) at 635.

<sup>212</sup> De Vos (2008) at p129.

<sup>213</sup> Sinclair (1996) at 274.

<sup>214</sup> Sinclair (1996) at 274.

<sup>215</sup> Schweltnus (2007) at 2.

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

<sup>217</sup> Visser and Potgieter (1998) at 45. See also Hahlo (1983) at 248.



## 2.1 Universal partnership

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

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

However, this universal partnership is not regarded as a marriage; but when the relationship has irretrievably broken down, the courts will have the assets divided.<sup>222</sup> Our courts will only regard such a partnership as valid if it was created either tacitly or expressly.<sup>223</sup> Van Heerden, Cockrell and Keightly<sup>224</sup> say that if a couple live together in a long-standing relationship, it may be held that the parties have tacitly or by implication

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

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

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

<sup>221</sup> *Schwellnus* (2007) at 3.

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

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

<sup>224</sup> *Van Heerden, Cockrell and Keightley* (1999) at 255.

entered into a universal partnership and accumulated a joint estate. Hahlo<sup>225</sup> is also of the opinion that if a man and his partner have pooled their resources or built up a business together, then the court may infer that they had the intention to establish a universal partnership.

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

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

## **2.2 Maintenance and duty to support**

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

Schwellnus<sup>230</sup> asserts that no enforceable right to claim maintenance from a cohabiting partner exists either during the cohabitative relationship or after termination of the relationship. She argues further that cohabitation only has an effect on maintenance which is payable in respect of a previous marriage, where the court may follow one of two routes when it awards maintenance after a divorce. The court will either 'confirm a

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<sup>225</sup> Hahlo (1985) at 38.

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

<sup>227</sup> *Francis v Dhanai* 2006 JOL 18401 (N).

<sup>228</sup> *Sepehri v Scanlan* 2008 (1) SA 322 (C).

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

<sup>230</sup> Schwellnus (2007) at 7.

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

The written agreement which stipulates that maintenance would cease upon cohabitation by a divorced recipient, is known as a *dum casta* clause<sup>231</sup>. In South Africa, the courts have no objection to enforce such an agreement between two parties.<sup>232</sup> However, our courts have different approaches to the terms of these agreements. In the *Schlesingerr*<sup>233</sup> case Nicholas, J held that the relationship between the respondent and her partner cannot be construed as a marriage, and, therefore, the maintenance cannot cease just because the divorced respondent lives in concubinage.<sup>234</sup> In *Ex parte Dessels*<sup>235</sup> the Court upheld the validity of the condition on the ground that the condition intended to ensure that the annuity would cease not only on the widow’s remarriage, but also if she cohabits with a man as his wife. The judgment in the *Drummond*<sup>236</sup> case proved the contrary. The issue was whether the appellant and her partner had cohabited, since the respondent had succeeded in the Court *a quo* to have the order for maintenance, in terms of section 10(1), set aside.<sup>237</sup> The Court was satisfied that the appellant and her partner lived together as man and wife on a permanent basis, and the appeal was dismissed with costs<sup>238</sup>.

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

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<sup>231</sup> Schweltnus (2007) at 7.

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

<sup>233</sup> *Schlesinger v Schlesinger* 1968 (1) SA 699 (W).

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

<sup>235</sup> *Ex parte Dessels* 1976 (1) SA 851 (D).

<sup>236</sup> *Drummond v Drummond* 1979 (1) SA 161 (A).

<sup>237</sup> Matrimonial Affairs Act, 1953.

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

<sup>239</sup> *Owen-Smith v Owen-Smith* 1982 (1) SA 511 (ZSC).

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

The duty to support in respect of heterosexual unions which are stable and long-standing remains unclear in our law. However, the Draft Bill<sup>241</sup> makes provisions for all these uncertainties and its passing may see the light soon.

### 2.3 Succession

Another problem arises when looking at succession rights. If the male partner dies during their cohabitation, the surviving spouse will only inherit if she has been named as heir in his will. If there is no will, then the ISA<sup>242</sup> will come into operation.

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

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

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

<sup>241</sup> Draft Domestic Partnerships Bill, 2008.

<sup>242</sup> ISA, 1987.

<sup>243</sup> ISA, 1987.

<sup>244</sup> Schwellnus (2007) at 13.

<sup>245</sup> Sinclair (1996) at 289. See also Schwellnus (2007) at 13.

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

During the last ten years, the Constitutional Court has provided protection for a number of different family forms that used to fall outside of the traditional marriage relationship. The *Volks* case<sup>247</sup> underpins the failure of our law to keep pace with social change and this failure generalises the problem Mrs Robinson faced.

The *Volks*<sup>248</sup> case is the most recent case in which the Constitutional Court has declined to develop the law relating to maintenance under the MOSSA<sup>249</sup> and intestate succession under the ISA<sup>250</sup> where the majority of the Constitutional Court decided not to involve itself in the transformation of the law regulating cohabitation. *In casu*, Mrs Robinson and Mr Shandling, the deceased, had been in a permanent life partnership for 16 years. They never married (although there was no legal impediment to the marriage) and no children were born of this relationship. Mrs Robinson regarded their relationship as a 'permanent life partnership'. Mr Volks, the executor of Mr Shandling's deceased estate, did not dispute the characterisation of the relationship as a 'permanent life partnership'. Mrs Robinson's inheritance consisted of a Toyota motor vehicle, the contents of the flat which she and the deceased had occupied, as well as a sum of R100 000. Mrs Robinson was only entitled to live in the house for a period not exceeding nine months. Upon the death of Mr Shandling, Mrs Robinson filed a maintenance claim against his estate in terms of the MOSSA<sup>251</sup>. The section in question was section 2(1) which reads as follows:

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

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<sup>246</sup> Goldblatt (2008) at 6.

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

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

<sup>249</sup> MOSSA, 1990.

<sup>250</sup> ISA, 1987.

<sup>251</sup> ISA, 1987.

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

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

The High Court developed the law to include cohabitation within the ambit of the MOSSA<sup>252</sup>. The matter was referred to the Constitutional Court for confirmation.<sup>253</sup> The majority of judges in the Constitutional Court, however, refused to concur with the decision of the High Court. Skweyiya J, who gave the majority judgment, agreed with the decision of the High Court only to the extent in that the Act is not capable of being interpreted so as to include heterosexual cohabitees. The majority was also of the opinion that the aim of the Act is to extend one of the invariable consequences of marriage, duty of support, beyond the death of the spouses. This duty does not arise in unmarried relationships.

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

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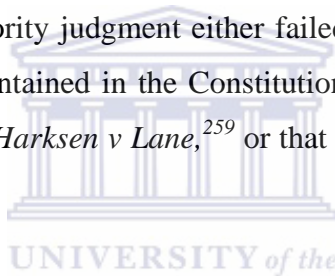
<sup>252</sup> MOSSA, 1990.

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

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

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

De Vos<sup>257</sup> argues that the majority judgment either failed to apply the appropriate 'test' for unfair discrimination as contained in the Constitution,<sup>258</sup> which had been developed by the Constitutional Court in *Harksen v Lane*,<sup>259</sup> or that it attempted to apply the correct test, but was unsuccessful.



It is evident that the decision of the majority in the *Volks* case<sup>260</sup> has negative implications for those women living similar lives, because this case is the most recent reported case of the highest court. The reasons for the rejection of her claim should have been treated with much more caution. Why would certain legislation regard women in the position of Mrs Robinson as a 'spouse' and a 'survivor', but the same words in the MOSSA<sup>261</sup> cannot be interpreted as such? The majority was also of the opinion that the Common law duty of support is so isolated from the question of the constitutionality of

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

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

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

<sup>257</sup> De Vos (2008) at 131.

<sup>258</sup> Section 9(3) of the Constitution, 1996

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

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

<sup>261</sup> MOSSA, 1990.

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

Cooke<sup>263</sup> is also of the opinion that the decision of the majority, that no duty of support existed, was in stark contrast to the factors that the dissenting judgments cited as evidence of such a duty.

The focus should not only be on a duty to support, but also on other areas of law, e.g. intestate succession,<sup>264</sup> criminal procedure<sup>265</sup> etc. Some statutes have been amended to include cohabitees and the fact that the MOSSA<sup>266</sup> has not yet been amended as to recognise the female cohabitee as a ‘survivor’ and a ‘spouse’ for the purposes of the Act, should not be taken as indicative of a legislative intent to exclude partners from the protection of the law.

## **2.4 Statutory recognition**

### **2.4.1 Insolvency Act<sup>267</sup>**

The Insolvency Act<sup>268</sup> includes in the definition of ‘spouse’ a woman who is living with a man as his wife or a man who is living with a woman as her husband, who are not married to one another in both cases. The Act provides that if a separate estate of one of two spouses, who are not living apart, is sequestrated, the estate of the solvent as well as that of the insolvent spouse vests in the Master, and then in the trustee of the insolvent estate. The estate of the solvent spouse has to be released if he or she proves that it was acquired by a title which cannot be assailed by the creditors of the insolvent spouse. However, if the insolvent spouse is legally married and he or she cohabits with another partner, the estate of his or her spouse, and not that of his or her partner, will vest in the Master and trustee.<sup>269</sup>

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

<sup>263</sup> Cooke (2005) at 544.

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

<sup>265</sup> Section 198 of the CPA (1997).

<sup>266</sup> MOSSA, 1990.

<sup>267</sup> Insolvency Act, 1936.

<sup>268</sup> Section 21(13). See also Cronjé and Heaton (2004) at 229.

<sup>269</sup> Cronjé and Heaton (2004) at 229. See also Hahlo (1983) at 249.



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

#### **2.4.2 Pension Funds Act<sup>272</sup>**

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

#### **2.4.3 COIDA<sup>276</sup>**

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

#### **2.4.4 Domestic Violence Act<sup>279</sup>**

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

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<sup>270</sup> *Chaplin v Gregory (or Wyld)* 1950 (3) SA 555 (C).

<sup>271</sup> Sinclair (1996) at 290.

<sup>272</sup> Pension Funds Act, 1956.

<sup>273</sup> Section 37C (1) (a).

<sup>274</sup> Cronjé and Heaton (2004) at 229.

<sup>275</sup> Schweltnus (2007) at 15.

<sup>276</sup> COIDA, 1993 section (1) (c).

<sup>277</sup> Sinclair (1996) at 285.

<sup>278</sup> Cronjé and Heaton (2004) at 229.

<sup>279</sup> Domestic Violence Act, 1998.

<sup>280</sup> Cronjé and Heaton (2004) at 229. See also Clark (2002) at 637 and Schweltnus (2007) at 16.

### 3 Conclusion

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

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

Fortunately, the Draft Domestic Partnerships Bill<sup>281</sup> may provide some relief if and when Parliament decides to enact it. (The Draft Bill will be discussed in Chapter six).

As stated earlier, the victims of the collapse of domestic partnerships are largely women, finding themselves without legal redress, unless they happen to fall under one of the statutes that offer limited protection, e.g. the Domestic Violence Act<sup>282</sup>. Those who suffer most are women cohabitees, and they are mostly the ones, after the termination of the relationship, who are left without assets or support.

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

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

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<sup>281</sup> Draft Domestic Partnerships Bill (2008).

<sup>282</sup> Domestic Violence Act, 1998.

issues, such as, maintenance, dependant's action for damages, maintenance of a surviving partner out of the deceased's estate, etc. But now the Draft Bill<sup>283</sup> has changed that perception of the majority in South Africa, despite some criticism against it.

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

In my view, the Legislature has a duty to intervene in order to help vulnerable cohabitants and the passing of the Draft Bill<sup>284</sup> will fulfill that duty.

The Draft Bill<sup>285</sup> does not only contain clauses to provide protection for intestate succession<sup>286</sup> but also for delictual claims<sup>287</sup> and any reference to 'spouse' in the MOSSA<sup>288</sup> includes the cohabitee.<sup>289</sup>

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<sup>283</sup> Draft Domestic Partnerships Bill (2008).

<sup>284</sup> Draft Domestic Partnerships Bill (2008).

<sup>285</sup> Draft Domestic Partnerships Bill (2008).

<sup>286</sup> Clause 20.

<sup>287</sup> Clause 21.

<sup>288</sup> MOSSA, 1990.

<sup>289</sup> Clause 19.

## CHAPTER FIVE

### WOMEN COHABITEES AND MARRIAGE PARTNERS: A COMPARISON

#### 1 Introduction

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

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

Having regard to my discussion of African Customary, and Muslim marriages, as well as cohabitation generally, it is evident that the Legislature is in the position to provide protection for women in a domestic relationship<sup>291</sup> in the form of the Draft Domestic Partnerships Bill<sup>292</sup> which was tabled specifically to address the protection for cohabitees.

The aim of this research, *inter alia*, has been to determine whether any development in relation to the law relevant to cohabitation will transpire.<sup>293</sup> The Civil Union Act<sup>294</sup> came into operation on 30 November 2006. The purpose of the Act is ‘to provide for the solemnisation of civil unions, by way of either a marriage or civil partnership ...’<sup>295</sup> but the position of heterosexual cohabitees appears to be less certain.

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<sup>290</sup> Hahlo (1972) 331.

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

<sup>292</sup> Draft Domestic Partnerships Bill (2008).

<sup>293</sup> Draft Domestic Partnerships Bill (2008).

<sup>294</sup> Civil Union Act, 2006.

<sup>295</sup> Civil Union Act, 2006.

The RCMA<sup>296</sup> denotes the development with regard to Customary marriages, and gives the woman the option to either enter into a Customary marriage or a civil marriage. The RCMA<sup>297</sup>, in particular, protects the equal status of women to that of men.<sup>298</sup> Whilst one can applaud the gradual development of this by means of case law as well as legislation, the relief, however, has been only for women in Customary marriages and, to a certain extent, Islamic marriages, but there has been no relief for cohabitantes in similar circumstances.<sup>299</sup>

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

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

According to Jagwanth,<sup>305</sup> women who cohabit are stigmatised and suffer tremendous prejudice, which the Legislature fails to address. The Draft Domestic Partnerships Bill<sup>306</sup> attempts to alleviate this stigmatisation.

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<sup>296</sup> RCMA, 1998.

<sup>297</sup> RCMA, 1998.

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

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

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

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

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

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

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

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

<sup>306</sup> Draft Domestic Partnerships Bill (2008).

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

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

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

Therefore this chapter attempts to harmonise the law in this area with the rights to equality<sup>313</sup> and dignity<sup>314</sup> contained in the Draft Bill of Rights. The emphasis is on the existence of equality between marriage and cohabitation, and the Legislature and the Court's failure to develop the Common law with regard to cohabitation, but specifically

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<sup>307</sup> RCMA, 1998.

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

<sup>309</sup> Hahlo (1983) at 244; see also Bekker (1991) at 1.

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

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

<sup>312</sup> See Church (1997) at 289.

<sup>313</sup> Constitution, 1996 section 9.

<sup>314</sup> Constitution, 1996 section 10.

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

## **2 Distinction between marriage and cohabitation**

Different forms of marriages are recognised in South African law. We can distinguish between monogamous civil marriages, monogamous and polygynous African Customary marriages, monogamous and polygynous Muslim marriages, and other marriages. The civil marriage is the marriage that was introduced via the Roman-Dutch law. When the RCMA<sup>315</sup> came into effect, Customary marriages were recognised as valid marriages. One of the great advantages of a society based on the marriage relationship is that marriage is easily proved. Cohabitation, on the other hand, not only exists for a variety of reasons, but a greater variety of circumstances might be used to demonstrate whether or not it exists.<sup>316</sup>

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

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

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<sup>315</sup> RCMA, 1998.

<sup>316</sup> Lind (2005) at 122.

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

<sup>318</sup> Robinson (2009) at 40.

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

<sup>320</sup> Robinson (2009) at 40.

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

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

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

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

Sinclair<sup>327</sup> says that marriage ‘is most often distinguishable from cohabitation only by the piece of paper that testifies to its existence’.

Murray<sup>328</sup> argues that women would be able to show oppressive practices irrespective of the type of marriage they may be in. I would say that many people in South Africa see little difference between marriage and cohabitation.

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

‘This section does not prevent legislation recognizing –

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

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<sup>323</sup> Robinson *et al* (2009) at 40.

<sup>324</sup> Notably the Marriage Act, 1961 and the Divorce Act, 1979.

<sup>325</sup> See Hahlo (1983) at 262-3.

<sup>326</sup> De Vos (2008) at 129.

<sup>327</sup> Sinclair (1996) at 293.

<sup>328</sup> Murray (1994) at 37; also see Church J (1997) at 292.

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

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



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

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

### 3 Why do people choose to cohabit?

Hutchings and Delpont<sup>333</sup> opine that one should distinguish between persons who do not wish to marry and those persons who are not allowed to marry. According to these authors, the former occurs either because of a previous unhappy marriage, or the parties may feel that their relationship might be spoiled by the formality of marriage. They opine that cohabitation, on the other hand, represents a more flexible, free and equal relationship. This has, therefore, become an important factor in choosing cohabitation above marriage.<sup>334</sup>

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

Clark<sup>336</sup> avers that most cohabitees prefer not to formalize their relationship publicly. Some couples prefer cohabitation because it does not legally commit them for an extended period, and because it is easier to establish and dissolve without the pricey legal costs often associated with a divorce.

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

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

<sup>333</sup> Hutchings and Delpont (1992) at 122.

<sup>334</sup> Hutchings and Delpont (1992) at 122.

<sup>335</sup> Hutchings and Delpont (1992) at 122.

<sup>336</sup> Clark (2002) at 635.

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

Lind<sup>339</sup> is amazed that so many people choose to cohabit despite the insecurity attached to it, as well as the legal position they find themselves in. The author states further that if South Africans perceived marriage as the exclusive field of relationship, the coming into effect of the Constitution changed that perception.<sup>340</sup> This averment is also supported by the progress towards the recognition of cohabitation made in legislation since 1996.<sup>341</sup>

Schwellnus<sup>342</sup> opines that parties are cohabiting if they have a stable relationship in which they cohabit as married persons. Heterosexual cohabitation differs from marriage, both as regards the way it is entered into, and as regards to the consequences it entails.

Monareng<sup>343</sup> is of the opinion that the main reasons why people cohabit are

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

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<sup>337</sup> Goldblatt (2003) at 610.

<sup>338</sup> Goldblatt (2003) at 615

<sup>339</sup> Lind (2005) at 116.

<sup>340</sup> Lind (2005) at 116.

<sup>341</sup> Lind (2005) at 116.

<sup>342</sup> Schwellnus (2007) at 1.

<sup>343</sup> Monareng (2007) at 128; see also Goldblatt (2003) at 610.

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

Monareng<sup>344</sup> states further that some African cohabitees erroneously believe that if they cohabit for more than 6 months, their relationship will be recognised and they will be entitled to support upon the termination of their relationship.

#### 4 Principle of equality

It is important to remember that Mrs Robinson in the *Volks*<sup>345</sup> case was simply the latest example of the inequality in all family relationships by married women as well as women who cohabit in the current social climate. In the *Volks*<sup>346</sup> case the majority found that Mrs Robinson’s claim could only succeed if she could convince the Court that the MOSSA<sup>347</sup> breached the equality right entrenched in section 9 of the Constitution.

After the *Volks*<sup>348</sup> case, the first version of the Draft Civil Union Bill<sup>349</sup> contained provisions dealing with domestic partnerships. Parliament, however, enacted the Civil Union Act<sup>350</sup> in November 2006 but excluded the provisions dealing with heterosexual domestic partnerships.<sup>351</sup> The provisions of this Act had an effect to the judgment in the *Gory*<sup>352</sup> case where the Court gave recognition not only to married same sex couples but also to unmarried same sex partners.<sup>353</sup> The same rights were not extended to heterosexual cohabitees.<sup>354</sup> It was only in 2008 that the Draft Domestic Partnerships Bill<sup>355</sup> was tabled for the public’s comment. The Draft Bill<sup>356</sup> is a step in the right direction and when passed, the relevant equality and human dignity will be provided.

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<sup>344</sup> Monareng (2007) at 126.

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

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

<sup>347</sup> MOSSA, 1990.

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

<sup>349</sup> Civil Union Bill (2006).

<sup>350</sup> Civil Union Act, 2006.

<sup>351</sup> Goldblatt (2008) at 1.

<sup>352</sup> *Gory v Kolver NO* 2007 (4) SA 97 (CC).

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

<sup>354</sup> De Vos (2008) at 130.

<sup>355</sup> Draft Domestic Partnerships Bill (2008).

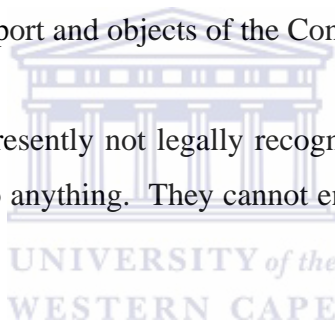
<sup>356</sup> Draft Domestic Partnerships Bill (2008).

Subject to a few criticisms regarding the Draft Bill,<sup>357</sup> all our hopes and beliefs to be treated equally and with dignity are contained in the Draft Bill.<sup>358</sup> It is so ironic that Parliament is delaying the enactment of the Draft Bill<sup>359</sup> and yet it recognised registered partnerships for same sex partners.

## 5 Conclusion

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

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



The Civil Union Act<sup>362</sup> was enacted to afford protection for same sex marriages and domestic partnerships. The emphasis was on the fact that the partners must have undertaken reciprocal duties.<sup>363</sup>

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

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<sup>357</sup> Draft Domestic Partnerships Bill (2008).

<sup>358</sup> Draft Domestic Partnerships Bill (2008).

<sup>359</sup> Draft Domestic Partnerships Bill (2008).

<sup>360</sup> See Hutchings and Delport (1992) at 122.

<sup>361</sup> Constitution, 1996. Section 35(3).

<sup>362</sup> Civil Union Act, 2006.

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

<sup>364</sup> The Alliance (2008) at 3

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

The RCMA<sup>366</sup> was enacted to bring relief to Customary marriages and to recognise the rights of people to practise their customs and culture. It was also enacted to ensure that women in Customary marriages are entitled to an adequate share upon the dissolution of the marriage. If women are not aware of the Act, it will just be a 'paper law' and the Act will not achieve its purpose.<sup>367</sup> The best empowerment tool that can be utilised to realise the purpose of the Act, is education.<sup>368</sup>

The only hope for cohabittees now lies in the enactment of the Draft Domestic Partnerships Bill.<sup>369</sup>

The question that some people would ask is: Is it desirable to impose laws upon cohabitants who obviously wish to escape the legal implications of marriage? Some authors<sup>370</sup> are of the opinion that marriage, the cornerstone of our society, would be threatened if the law gave even the vaguest recognition to cohabitation.

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

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

<sup>366</sup> RCMA, 1998.

<sup>367</sup> Monareng (2007) at 129.

<sup>368</sup> Monareng (2007) at 129.

<sup>369</sup> Draft Domestic Partnerships Bill, 2008.

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

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

<sup>372</sup> Lind (2005) at 130.

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

The responsibility lies with the individual to protect his or her rights through an agreement that regulates the relationship itself.<sup>375</sup> It is trite that the institution of marriage is regarded as a sacred union, and that it represents a fundamental aspect of society. This is emphasised by the way marriages are deemed to come into existence in terms of South African law albeit civil marriages, Customary marriages, Muslim marriages and civil unions. Any union that does not comply with the stipulated requirements of a civil union or any other marriage, does not enjoy the protection of the law. This is evident throughout this research. The Draft Bill<sup>376</sup> makes provision for most of the protection afforded to married couples and, therefore, it is imperative that Parliament must expedite its enactment, since it ignored the plight of cohabitantes when the Civil Union Act<sup>377</sup> came into operation. The Draft Bill<sup>378</sup> should be lauded for containing two categories of domestic partnerships, namely, registered domestic partnerships and unregistered domestic partnerships,

In the *Volks*<sup>379</sup> case the Court was not asked to draft legislation that would regulate unmarried relationships. According to Lind,<sup>380</sup> Mrs Robinson was simply asking the Court to find that the MOSSA<sup>381</sup> was inconsistent with the Constitution. Since the Court had sympathy for the vulnerability of cohabitantes, one would have expected that it would find the statute in question to be non-compliant with the Constitution.<sup>382</sup> Cooke argues that this finding would have been one way to reduce that vulnerability, yet it may not

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

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

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

<sup>376</sup> Draft Domestic Partnerships Bill, 2008.

<sup>377</sup> Civil Union Act, 2006.

<sup>378</sup> Draft Domestic Partnerships Bill, 2008.

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

<sup>380</sup> Lind (2005) at 120.

<sup>381</sup> MOSSA, 1990.

<sup>382</sup> Cooke (2005) at 557.

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

Rautenbach<sup>384</sup> states that the non-recognition of cohabitation violates the values of human dignity and equality.

Lind<sup>385</sup> says that it is entrenched in the Constitution that the drafting and practice of the law must promote and pursue equality actively.<sup>386</sup> This is the most useful way in which the law can be used to remedy patterns of past inequality, even in the instance that the majority judges in *Volks*<sup>387</sup> appeared to have failed.<sup>388</sup>

In order to achieve legal certainty about the recognition of domestic partnerships, legislative recognition should be given to all domestic partnerships in order to protect females in circumstances similar to those of Mrs Robinson in *Volks*.<sup>389</sup> As mentioned earlier, Muslim polygynous marriages have received some recognition in South Africa. The RCMA<sup>390</sup> also serves as an example with the recognition of polygynous Customary marriages as valid marriages. We also have the proposed Muslim Marriages Bill as well as the Domestic Partnerships Bill, 2008.

I therefore submit that it is of paramount importance that some degree of legal guidance is essential to clarify the position with regard to cohabitation and that the enactment of the Draft Bill<sup>391</sup> must see the light to bring cohabitants on equal footing with their married counterparts.

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<sup>383</sup> Cooke (2005) at 557.

<sup>384</sup> Rautenbach and Du Plessis (2000) at 309.

<sup>385</sup> Lind (2005) at 117.

<sup>386</sup> Constitution, 1996. Section 9(2).

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

<sup>388</sup> Lind (2005) at 117.

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

<sup>390</sup> RCMA, 1998.

<sup>391</sup> Draft Domestic Partnerships Bill (2008).

## CHAPTER SIX

### **DRAFT DOMESTIC PARTNERSHIPS BILL**

#### **1 Introduction**

The long awaited Draft Domestic Partnerships Bill made its appearance on 14 January 2008. This Draft Bill raised the hopes of cohabitees that they would receive the same legal protection as their married counterparts. The Department of Home Affairs published the Draft Domestic Partnerships Bill<sup>392</sup> (hereinafter the Draft Bill) in order to allow the public to give its input in respect thereof. The Department of Home Affairs had approached the South African Law Reform Commission (SALRC) during 1996 to investigate and recommend legislation for a new marriage dispensation for South Africa.<sup>393</sup> The SALRC invited interested parties and bodies to comment on the adequacy of the Marriage Act.<sup>394</sup>

In 1984 New South Wales, Australia, enacted the *De Facto Relationships Act*<sup>395</sup> which granted extensive rights to heterosexual domestic partners, and put them almost on an equal legal footing with married couples. Goldblatt<sup>396</sup> states that this presumption-based approach to *de facto* relationships is a progressive and practical model where the focal point is to focus on the functions of specific relationships rather than on their form. Goldblatt also raises an interesting point, namely that since the law has generally been written by middle class men, other members of society, namely women, gay men and lesbians, the indigent and disadvantaged groups found themselves outside the law's positive embrace,<sup>397</sup>

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<sup>392</sup> Domestic Partnerships Bill (2008).

<sup>393</sup> SALRC (2006) at 1.

<sup>394</sup> Marriage Act, 1961.

<sup>395</sup> *De Facto Relationships Act*, 1984 (NSW).

<sup>396</sup> Goldblatt (2008) at 4.

<sup>397</sup> Goldblatt (2008) at 3.



Before the drafting of the Draft Bill a report<sup>398</sup>, calling for a system of registration of domestic partnerships alongside the recognition of *de facto* partnerships, was incorporated in the Civil Union Bill.<sup>399</sup> This report was heavily influenced by the New South Wales' *De Facto* Relationships Act.<sup>400</sup> The Centre for Applied Legal Studies (CALS) recommended that Parliament should accept the provisions of the Bill<sup>401</sup> which regarded domestic partnerships. According to the CALS submission,<sup>402</sup> the 2001 census revealed that 2 389 705 individuals described themselves as living in domestic partnerships, and that this large group of people, unfortunately, did not fall within the scope of family law. According to the Alliance, the CALS conducted research as to why people cohabit, and the research indicated that poor women have limited choices with regards to the type of relationship in which they find themselves or their financial arrangements.<sup>403</sup> In the *Volks*<sup>404</sup> case the Court held that:

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

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

According to Goldblatt<sup>407</sup> the first draft of the Civil Union Bill<sup>408</sup> also contained provisions which dealt with the recognition of domestic partnerships, but that, during the preparation of the second draft of the Civil Union Bill,<sup>409</sup> intervention took place.

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<sup>398</sup> Goldblatt (2008) at 6.

<sup>399</sup> Civil Union Bill (2006).

<sup>400</sup> *De Facto* Relationships Act, 1984.

<sup>401</sup> Draft Domestic Partnerships Bill (2008).

<sup>402</sup> Centre for Applied Legal Studies (2006) at 2.

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

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

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

<sup>406</sup> Centre for Applied Legal Studies (2006) at 3.

<sup>407</sup> Goldblatt (2008) at 7.

<sup>408</sup> Civil Union Bill (2006).

<sup>409</sup> Civil Union Bill (2006).

Goldblatt<sup>410</sup> asserts that the Parliamentary Portfolio Committee made a recommendation that the section which deals with domestic partnerships should be removed because of time constraints, and as a result of the complexity of the issues involved. The Civil Union Act was passed in 2006 without the section that deals with domestic partnerships. The Parliamentary Portfolio Committee also undertook to table a Domestic Partnerships Bill in 2007, but to no avail.<sup>411</sup> The Draft Bill did, however, see the light of day in 2008, and was placed in the public domain by the Department of Home Affairs for comments, with submissions being called for by 15 February 2008. De Vos<sup>412</sup> criticises the Draft Bill in that it was tabled without the provision which had been stipulated in the Civil Union Bill.<sup>413</sup> Instead, the Draft Bill distinguishes between registered partnerships and unregistered partnerships, and it seems as if the authors of the Draft Bill 'rely heavily on the agency of individual partners or - where that fails - on the court to protect the marginalised and vulnerable'.<sup>414</sup>

## **2 Purpose of Draft Bill**

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

## **3 Preamble of Draft Bill**

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

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<sup>410</sup> Goldblatt (2008) at 8.

<sup>411</sup> The Alliance (2008) at 1-2.

<sup>412</sup> De Vos (2008) at p134.

<sup>413</sup> Civil Union Bill, 2006 .

<sup>414</sup> De Vos (2008) at 134.

<sup>415</sup> Draft Domestic Partnerships Bill (2008).

<sup>416</sup> Constitution of the Republic of South Africa, 1996.

<sup>417</sup> The Alliance (2008) at 4.

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

#### **4 Definitions in Draft Bill**

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

#### **5 Objectives of Draft Bill**

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

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

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<sup>418</sup> The Alliance (2008) at 4.

<sup>419</sup> The Alliance (2008) at 4.

<sup>420</sup> The Alliance (2008) at 5.

<sup>421</sup> The Alliance (2008) at 5.

<sup>422</sup> The Alliance (2008) at 5.

<sup>423</sup> Draft Domestic Partnerships Bill (2008) at clause 2.

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

## **6 Requirements for registered domestic partnerships**

The Draft Bill distinguishes between registered domestic partnerships<sup>425</sup> and unregistered domestic partnerships.<sup>426</sup> The Alliance welcomes the introduction of registered domestic partnerships since more options are created in order for couples to choose how their relationship should be regulated.<sup>427</sup> Unlike civil unions, civil marriages and Customary marriages which are by default in community of property if no antenuptial contract is concluded, a couple may enter into a registered domestic partnership which has lesser cumbersome registration requirements.<sup>428</sup> As in the case of marriage, a cohabitee may only be a partner in one registered domestic partnership at any given time.<sup>429</sup> If one of the partners, or both, were previously married or a partner to any union, then documentary proof of a divorce order, or death certificate of the former spouse or partner, or a termination certificate<sup>430</sup> must be submitted to the registration officer before the registration of a domestic partnership can take effect. Unlike in the case of a marriage, the Minister, or any officer in the public service authorised by the Minister, may appoint a registration officer to register the domestic partnership after the parties have declared in writing their willingness to register their domestic partnership.<sup>431</sup>

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

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<sup>424</sup> The Alliance (2008) at 7.

<sup>425</sup> Clause 4.

<sup>426</sup> Clause 26.

<sup>427</sup> The Alliance (2008) at 7.

<sup>428</sup> The Alliance (2008) at 7.

<sup>429</sup> Clause 4(1).

<sup>430</sup> Clause 4(3).

<sup>431</sup> Clauses 5 and 6.

parties to the relationship is a South African citizen.<sup>432</sup> De Vos<sup>433</sup> is of the opinion that clause 26(5) of the Draft Bill is discriminatory in that it provides no protection unless one of the partners is a South African. De Vos<sup>434</sup> also opines that clause 26(5) is problematic in that it implies that ‘woman refugees, undocumented immigrants or even permanent residents’ are not entitled to protection when they choose to enter into a domestic partnership with another ‘refugee, undocumented immigrant or permanent resident’. The Alliance shares this sentiment to the extent that the Draft Bill ignores the fact that many of the people who are not South African citizens, are usually those who find themselves in domestic partnerships.<sup>435</sup> The Alliance<sup>436</sup> submits that section 8 of the Civil Union Act<sup>437</sup> and section 3(2) of the RCMA<sup>438</sup> should be amended to include a reference to registered domestic partnerships. The Draft Bill sets out that both parties must be 18 years old or older if they intend having their relationship registered as a domestic partnership.<sup>439</sup> In the case of marriage, a person under the age of 18 may conclude a marriage if both parents consent to the marriage. In addition, however, when a boy is below the age of 18 years and a girl below the age of 15 years, the Minister of Home Affairs must grant written permission if he or she considers the marriage to be desirable.<sup>440</sup> The Draft Bill is silent in respect of minors, prodigals, mentally ill persons and partners who have been placed under curatorship, and who wish to register a domestic partnership.

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

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<sup>432</sup> Clause 4(6).

<sup>433</sup> De Vos (2008) at 137.

<sup>434</sup> De Vos (2008) at 137.

<sup>435</sup> The Alliance (2008) at 8.

<sup>436</sup> The Alliance (2008) at 8.

<sup>437</sup> Civil Union Act, 2006.

<sup>438</sup> RCMA, 1998

<sup>439</sup> Clause 6(1).

<sup>440</sup> Cronjé and Heaton (2004) at 20-21.

<sup>441</sup> Identification Act, 1997.

## 6.1 Property regime

The Alliance proposes that clause 7(2) of the Draft Bill should be amended so as to refer to clauses 22 and 21.<sup>442</sup>

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

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

De Vos<sup>447</sup> points out that even though a domestic partnership agreement was registered, a court still has the discretion to set aside the agreement if such agreement could result in serious injustice to any of the partners. The court thus has to consider the following<sup>448</sup>:

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

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<sup>442</sup> The Alliance (2008) at 8.

<sup>443</sup> Clause 6(6).

<sup>444</sup> Clause 7(3).

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

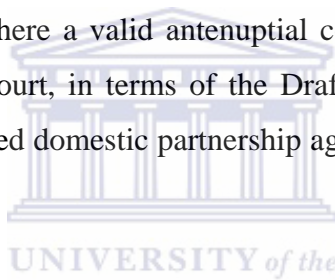
<sup>446</sup> Clause 7(4).

<sup>447</sup> De Vos (2008) at 134

<sup>448</sup> Clause 8(3).

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

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



## **7 Legal consequences of registered domestic partnerships**

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

If a potential partner was previously married, whether under the Marriage Act<sup>455</sup> or the RCMA,<sup>456</sup> or was a partner in a civil union partnership under the Civil Union Act,<sup>457</sup> or a

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<sup>449</sup> Clause 8(3).

<sup>450</sup> Cronjé and Heaton (2004) at 70.

<sup>451</sup> Clause 8(5).

<sup>452</sup> Marriage Act, 1961.

<sup>453</sup> RCMA, 1998.

<sup>454</sup> Clause 4(2).

<sup>455</sup> Marriage Act, 1961.

<sup>456</sup> RCMA, 1998.

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

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

The children of a marriage are regarded as legitimate, and both parents have legal rights and responsibilities in respect of the child. The Draft Bill also makes provision that, when a child is born into a registered domestic partnership between a heterosexual couple, the male partner is deemed to be the biological father of that child. Similar rights and responsibilities are conferred upon him as in the case of his male counterpart in a marriage.<sup>462</sup> The Alliance urges that this section must be removed because the rights of fathers are already covered in the Children's Act<sup>463</sup>.

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

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<sup>457</sup> Civil Union Act, 2006.

<sup>458</sup> Clause 4(3).

<sup>459</sup> Cronjé and Heaton (2004) at 40.

<sup>460</sup> Clause 9.

<sup>461</sup> The Alliance (2008). at 8.

<sup>462</sup> Clause 17.

<sup>463</sup> The Alliance (2008) at 10.

<sup>464</sup> Clause 11(1).

<sup>465</sup> Clause 11(2).



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

## **8 Termination of registered domestic partnerships**

Termination of the registered domestic partnership is both similar to, and different from, the termination of a marriage. As is the case of a marriage, the registered domestic partnership can be dissolved by death of one, or both, registered domestic partners,<sup>468</sup> or by a court order.<sup>469</sup> The difference is that the registered domestic partners may conclude a termination agreement, in order to regulate the financial consequences of the termination of their registered domestic partnership.<sup>470</sup> The Alliance does not support this provision, and recommends that it will be in the interest of both registered domestic partners if the dissolution of their registered domestic partnership takes effect through a court order. The Alliance recommends that the court order enables the partners to enforce their termination agreement much easier,<sup>471</sup> and the Draft Bill should correspond with the intention of the Jurisdiction of Regional Courts Amendment Bill.<sup>472</sup> I support the Alliance’s<sup>473</sup> view that it would be practical to consider the inclusion of sections similar to sections 8 (rescission, suspension or variation of orders), 10 (costs) and 12 (limitation of publication of particulars of divorce action) of the Divorce Act.<sup>474</sup> I am also of the opinion that one party may, for some or other reason, be reluctant to execute his or her part of the agreement, and the other party will be compelled to approach a court for

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<sup>466</sup> Clause 10.

<sup>467</sup> The Alliance (2008) at 8.

<sup>468</sup> Clause 12(1)(a).

<sup>469</sup> Clause 15(1).

<sup>470</sup> Clause 14(1).

<sup>471</sup> The Alliance (2008) at 9.

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

<sup>473</sup> The Alliance (2008) at 9.

<sup>474</sup> Divorce Act, 1979.

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

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

The termination by a court order only applies where there are minor children born into the relationship. The registered domestic partners who have minor children, and who intend to terminate the registered domestic partnership, are compelled to make an application to a court for the termination order.<sup>478</sup> The application to a court must be made in compliance with the provisions of the Supreme Court Act.<sup>479</sup> The Alliance contends that specific reference to the High Court places limitations on access to justice, especially in the case of vulnerable women.<sup>480</sup> One should also look at costs, because not everybody can afford to institute legal action. In approaching the High Court, the termination takes the same route as a divorce order. *De Vos*<sup>481</sup> raises an interesting question: what happens if there are no minor children, and one of the partners requests termination and the other party refuses. *De Vos* recommends, and I support the recommendation, that the Draft Bill should have made provision for such a situation.<sup>482</sup> The court takes cognisance of the welfare of minor children, and will only make an order which is in the best interests of a child. The same approach applies to the dissolution of a marriage.<sup>483</sup> The court will go to the extent of appointing a legal practitioner to act on

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<sup>475</sup> *The Alliance* (2008) at 9.

<sup>476</sup> Clause 14(2).

<sup>477</sup> Clause 14(3) read with clause 12(1) (b).

<sup>478</sup> Clause 15(1).

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

<sup>480</sup> *The Alliance* (2008) at 9.

<sup>481</sup> *De Vos* (2008) at 136.

<sup>482</sup> *De Vos* (2008) at 136.

<sup>483</sup> Clause 16(1).

behalf of the child during the proceedings, and both registered partners may be held liable to pay the costs of such legal representation.<sup>484</sup> I support the view of the Alliance that clause 16(5)(b) of the Draft Bill should be amended in accordance with the new terminology of the Children's Act 78 of 2005.<sup>485</sup> Clause 17 of the Draft Bill deals with the rights of the male partner as the biological father of the children born into that relationship, and the Alliance rightfully request the deletion of this section since the rights of fathers are adequately dealt with in the Children's Act.<sup>486</sup>

After the termination of a registered domestic partnership, the court may, as with the dissolution of a marriage do make the following. It can set out a maintenance order, which is just and equitable, in respect of payment of maintenance by one registered domestic partner to the other partner for a specified period or until the other partner dies, marries, enters into a civil union or enters into another registered domestic partnership.<sup>487</sup> The court will also consider certain factors before ordering the payment of maintenance, and the amount and nature of such maintenance. Such factors will include-

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

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<sup>484</sup> Clause 16(7).

<sup>485</sup> The Alliance (2008) at 10.

<sup>486</sup> The Alliance (2008) at 10.

<sup>487</sup> Clauses 18(1).

<sup>488</sup> Clauses 18(2).

The Alliance supports this clause as well as clauses 19 and 20 of the Draft Bill.<sup>489</sup> Another advantage of the Draft Bill is that it makes provision that any reference to “spouse” in the MOSSA<sup>490</sup> and in the ISA<sup>491</sup> must be construed as including a registered domestic partner.<sup>492</sup> I support the view of De Vos,<sup>493</sup> that the Draft Bill partially remedies the injustice inflicted upon Mrs Robinson in the *Volks* case,<sup>494</sup> because, in effect, it will, after its enactment, contribute to the amendment of the MOSSA<sup>495</sup> which will then state that ‘spouse’ in that Act will also include a registered domestic partner.

A court may consider some of the above factors in its decision to make a maintenance order after the termination of a marriage.<sup>496</sup> The Draft Bill also granted rights for the purpose of claiming damages in a delictual claim, in a case where one of the partners in a registered domestic partnership is killed by a third party in a wrongful and culpable manner.<sup>497</sup> The Alliance proposes a more positive phrasing for clause 21(2), namely that ‘A partner in a registered domestic partnership may institute a delictual claim for damages based on the wrongful death of the other partner’. The Alliance<sup>498</sup> also requests that clause 21(3) should be re-phrased accordingly since the clause only refers to COIDA, and yet there are quite a number of laws in which the partner is, or should be, recognized as a dependant. I find it unnecessary that both clauses should be re-phrased<sup>499</sup> The Alliance is also of the opinion that the Draft Bill should not only regulate domestic partnerships which have ended, but should also provide some legal protection to domestic partners during their partnership.<sup>500</sup>

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

<sup>490</sup> MOSSA , 1990.

<sup>491</sup> ISA, 1987.

<sup>492</sup> Clauses 19 and 20.

<sup>493</sup> De Vos (2008) at 136.

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

<sup>495</sup> MOSSA , 1990.

<sup>496</sup> Cronjé and Heaton (2004) at 147-148.

<sup>497</sup> Clause 21.

<sup>498</sup> The Alliance (2008) at 10.

<sup>499</sup> The Alliance (2008) at 10.

<sup>500</sup> The Alliance (2008) at 7.

## 8.1 Property division after termination of registered domestic partnerships

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

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

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

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

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

<sup>502</sup> Clause 22(2).

<sup>503</sup> Clause 22(3).

<sup>504</sup> De Vos (2008) at 135.

<sup>505</sup> Clause 22(4).

<sup>506</sup> The Alliance (2008) at 10.

Before granting an order as contemplated in clause 22(3) of the Draft Bill,<sup>507</sup> the court must be satisfied that it is just and equitable to do so, in that the applicant contributed directly or indirectly to the maintenance, or the increase, of the separate property or part of the separate property, of the respondent, during the existence of the registered domestic partnership.<sup>508</sup> De Vos<sup>509</sup> defines ‘contribution’ to include the contribution made in the capacity as a parent which was in the interest of the other party or the family as a whole. The Alliance<sup>510</sup> also supports the broad definition of ‘contribution’ in the Draft Bill because it reflects a growing perception by the courts, and the public at large, of value that is created by partners, specifically women, who care for families and children.

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

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<sup>507</sup> Draft Domestic Partnerships Bill (2008).

<sup>508</sup> Clause 22(5).

<sup>509</sup> De Vos (2008) at 135.

<sup>510</sup> The Alliance (2008) at 4-5.

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

<sup>512</sup> The Alliance (2008) at 11.

<sup>513</sup> Clause 24(1).

<sup>514</sup> The Alliance (2008) at 11.

<sup>515</sup> Clause 24(1).

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

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

### **9 Maintenance and property division after termination of unregistered domestic partnerships**

The Draft Bill not only provides protection for registered domestic partnerships, but also for unregistered domestic partnerships. In this instance, one or both unregistered domestic partners may, after the dissolution of the unregistered domestic partnership through either death or separation, apply to a court for a maintenance order, an intestate succession order, or a property division order.<sup>517</sup> The Alliance rejects the phrase ‘after the unregistered domestic partnership has ended through death or separation’, and requests the deletion of clause 26(1), so that a person can approach a court during the subsistence of the partnership to claim relief.<sup>518</sup> A court will, however, decide whether a partnership is entitled to protection<sup>519</sup> considering all the circumstances of the relationship, including-

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

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<sup>516</sup> Clause 24(2).

<sup>517</sup> Clause 26(1).

<sup>518</sup> The Alliance (2008) at 13.

<sup>519</sup> De Vos (2008) at 138.

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

De Vos<sup>521</sup> is of the opinion that, despite the protection the Draft Bill purports to provide, the protection is not automatic. The Draft Bill in essence provides for a threshold test before legal protection for unregistered partners takes effect. De Vos<sup>522</sup> rightfully avers that the marginalised partner in an unregistered domestic partnership has to cross a number of hurdles in order to be entitled to protection. One hurdle, for instance, is proof that the partnership is of such a nature that it is entitled to legal protection. The SALRC recommended that the threshold question should be: whether the partners have lived as a couple.<sup>523</sup> The SALRC correctly proposes that, when the court is satisfied that the parties lived as a couple, then it can be accepted that there was a mutual commitment.<sup>524</sup> The SALRC<sup>525</sup> also proposed two alternative options which could regulate unmarried and unregistered family partnerships. The first alternative is referred to as the *de facto* option, but should not be confused with the term “*de facto* relationship” of the NSW legislation. The second alternative is referred to as the *ex post facto* option. The former option refers to a ‘ascription’ model which creates rights and obligations for a couple in an intimate relationship during the existence of the unregistered relationship; and the latter option refers to the judicial discretion model which allows partners in former relationships to apply to the court for property division or maintenance in the event that the partners cannot reach agreement after the termination of their relationship. The SALRC recommended that legislation should automatically apply to both options.<sup>526</sup> This would have created an ideal opportunity for unregistered domestic partners whose relationship has ended to be entitled to an automatic right to legal protection, and to apply to a court for property division or maintenance.

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<sup>520</sup> Clause 26(2).

<sup>521</sup> De Vos (2008) at 137.

<sup>522</sup> De Vos (2008) at 136.

<sup>523</sup> SALRC (2006) at 393.

<sup>524</sup> SALRC (2006) at 393.

<sup>525</sup> SALRC (2006) at 369.

<sup>526</sup> SALRC (2006) at 370.



In terms of the Draft Bill, a court will not make an order regarding the relationship of a partner who, at the time of the relationship, was also a spouse in a civil marriage, or a partner in a civil union or a registered domestic partnership, with a third party.<sup>527</sup> This provision appears to be discriminatory, according to De Vos, who presumes that men in Customary marriages will be more likely to enter into unregistered domestic partnerships.<sup>528</sup> The Alliance<sup>529</sup> is of the opinion that the clause should be removed and replaced with one that allows courts to grant an order not only in respect of unregistered domestic partnerships that co-exist with a Customary marriage, but also where another type of union exists. De Vos<sup>530</sup> argues that clause 26(5) may not pass constitutional scrutiny. I support the views of both the Alliance and De Vos that the law condones that an unregistered domestic partnership co-exists with a Customary union, but not with a civil marriage, civil union or registered domestic partnership. De Vos<sup>531</sup> argues further that men in Customary marriages are now allowed to have intimate partners as well as their traditional Customary spouses. De Vos<sup>532</sup> raises an interesting point: that women who enter into an unregistered domestic partnership with men who are married in terms of the Marriage Act<sup>533</sup> or the Civil Union Act,<sup>534</sup> will find no protection in law because they will not be viewed as being part of the vulnerable people in society.

De Vos<sup>535</sup> relied on Constitutional Court decisions<sup>536</sup> which, he claimed, categorically state that different treatment by law of at least permanent residents can constitute unfair discrimination in terms of section 9(3) of the Constitution<sup>537</sup>.

## 9.1 Maintenance after termination of unregistered domestic partnerships

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<sup>527</sup> Clause 26(4).

<sup>528</sup> De Vos (2008) at 137.

<sup>529</sup> The Alliance (2008) at 11.

<sup>530</sup> De Vos (2008) at 137.

<sup>531</sup> De Vos (2008) at 141.

<sup>532</sup> De Vos (2008) at 137.

<sup>533</sup> Marriage Act, 1961.

<sup>534</sup> Civil Union Act, 2006.

<sup>535</sup> De Vos (2008) at 137.

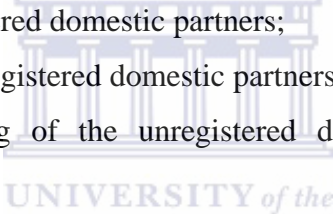
<sup>536</sup> See *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B).

<sup>537</sup> Constitution, 1996.

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

### **9.1.1 Maintenance order after separation of unregistered domestic partners**

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

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

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<sup>538</sup> Clause 27. See also De Vos (2008) at 138.

<sup>539</sup> The Alliance (2008) at 13.

<sup>540</sup> Clause 28(1).

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

### **9.1.2 Maintenance order after death of unregistered domestic partners**

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

When one of the unregistered domestic partners dies, the surviving partner is entitled to make an application to a court for an order for the payment of reasonable maintenance from the deceased's estate until his or her death, remarriage, or the registration of another registered domestic partnership.<sup>545</sup> The provisions of the Administration of Estates Act<sup>546</sup> apply in the event of an application to a court for the payment of maintenance.<sup>547</sup> The Alliance<sup>548</sup> does not support clause 29(3)(c) because it refers to competing claims between the surviving unregistered domestic partner and the surviving Customary spouse. I agree with the Alliance that clause 29(3)(c) constitutes unfair discrimination, and that the word 'Customary' should be removed, and the words 'or partner or spouse in a civil union, or registered domestic partnership' should be added after the word 'spouse'.<sup>549</sup>

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<sup>541</sup> Clause 28(2).

<sup>542</sup> The Alliance (2008) at 13.

<sup>543</sup> The Alliance (2008) at 13.

<sup>544</sup> The Alliance (2008) at 12.

<sup>545</sup> Clause 29(1).

<sup>546</sup> Administration of Estates Act, 1965.

<sup>547</sup> Clauses 29(2) and (3).

<sup>548</sup> The Alliance (2008) at 12.

<sup>549</sup> The Alliance (2008) at 12.

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

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

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

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

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<sup>550</sup> Clause 30. See also De Vos (2008) at 139.

<sup>551</sup> The Alliance (2008) at 12.

<sup>552</sup> Clause 31(1). See also De Vos (2008) at 139.

<sup>553</sup> Clause 31(2).

<sup>554</sup> ISA, 1987.

The second provision<sup>555</sup> provides that, in the event of a dispute between the surviving unregistered domestic partner and the Customary spouse of a deceased partner regarding the benefits to be awarded, the court may once again make an order which is just and equitable having regard to all relevant circumstances of both relationships.

## **9.2 Property division after termination of unregistered domestic partnerships**

If there is no agreement between the unregistered domestic partners, one, or both of them, may apply to court for an order to divide their joint or separate property.<sup>556</sup> The court will make an order it deems just and equitable having regard to all the circumstances, also after taking into account<sup>557</sup>

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



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

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

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<sup>555</sup> Clause 31(3).

<sup>556</sup> Clause 32(1).

<sup>557</sup> De Vos (2008) at 140.

<sup>558</sup> The Alliance (2008) at 14.

<sup>559</sup> Clause 32(4).

<sup>560</sup> Clause 1.

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

## 10 Conclusion

It is evident that Mrs Robinson in *Volks v Robinson*<sup>563</sup> would have been protected by the Draft Bill. However, other female cohabitees who enter into domestic partnerships with men, and who are simultaneously married in terms of the Marriage Act<sup>564</sup> or Civil Union Act<sup>565</sup>, will not find protection under this Bill.<sup>566</sup> De Vos<sup>567</sup> rightly raises concern for women who find themselves in relationships with men who had already entered into a Customary marriage with someone else. Will these women be able to convince a court that their relationship is worthy of protection? He avers further that such relationships may not contain most of the characteristics that the Draft Bill requires in order to be entitled to protection.<sup>568</sup>

Despite the minimum protection that the Draft Bill provides, it is still caught up in a traditionalist paradigm based on the fiction that every individual is capable of making their own decisions with regard to their affairs<sup>569</sup>. The choice will still rest with them to make the right decision with regard to their relationships. The CALS also conducted research which showed that women who find themselves in a domestic partnership are unable to convince their partners to marry them.<sup>570</sup>

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<sup>561</sup> Clause 33(1).

<sup>562</sup> The Alliance (2008) at 13.

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

<sup>564</sup> Marriage Act, 1961.

<sup>565</sup> Civil Union Act, 2006.

<sup>566</sup> De Vos (2008) at 138.

<sup>567</sup> De Vos (2008) at 138.

<sup>568</sup> De Vos (2008) at 138.

<sup>569</sup> De Vos (2008) at 140.

<sup>570</sup> Centre for Applied Legal Studies (2006) at 3.

The Draft Bill provides some protection to cohabitees. However, I agree with De Vos<sup>571</sup> that, to some extent, the Draft Bill raises more questions than supplying answers. De Vos<sup>572</sup> questions the assumption that individuals whose relationships have terminated are able to engage with the courts. He describes this assumption as a fiction that is deeply rooted in the traditional South African legal culture. He questions<sup>573</sup> how a poor and marginalised woman whose domestic partnership has ended will be able to rely on the Draft Bill for protection, and how the court will deal with the numerous types of relationships which do not comply with the traditional patriarchally inspired nuclear model of relationships and family life. The Alliance questions the limited legal protection afforded to domestic partnerships in South Africa. The limited protection leaves vulnerable partners, mostly women, penniless and without recourse when these relationships end.<sup>574</sup>

Finally, De Vos<sup>575</sup> questions whether the Draft Bill would be able to remedy the hardship faced by women who find themselves in either a registered domestic partnership or an unregistered domestic partnership. The Alliance poses the question whether we should leave a woman who finds herself in a domestic partnership, destitute, without rights or recourse. The Alliance rightfully argues that it is very often the male partner in a domestic partnership who created the relationship of dependency and who is the one who married someone else without telling the female partner in the domestic partnership.<sup>576</sup>

It is also unacceptable that the Draft Bill contains an arbitrary distinction between marriages in terms of the Marriage Act<sup>577</sup> or the Civil Union Act<sup>578</sup> and the RCMA<sup>579</sup>. The Alliance supports this view, and questions the fact that the co-existence of a marriage

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<sup>571</sup> De Vos (2008) at 141.

<sup>572</sup> De Vos (2008) at 141.

<sup>573</sup> De Vos (2008) at 141.

<sup>574</sup> The Alliance (2008) at 2.

<sup>575</sup> De Vos (2008) at 133-134.

<sup>576</sup> The Alliance (2008) at 11.

<sup>577</sup> Marriage Act, 1961.

<sup>578</sup> Civil Union Act, 2006.

<sup>579</sup> RCMA, 1998.

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

De Vos<sup>581</sup> contends that this distinction questions the assumption of the Draft Bill that men in a Customary marriage are allowed to enter into an unregistered domestic partnership with someone other than their spouses.

I agree with De Vos<sup>582</sup> that constitutional law is tainted with ‘traditional’ Common law rules. He correctly says that this averment is based on the notion that the Bill of Rights protects the individual, in that every individual has the freedom to make choices and to decide how they want to live their lives. De Vos<sup>583</sup> recommends that, for the purpose of transformation, the Constitution should review the Common law assumption that every citizen is free to decide how they arrange their affairs. It is especially the women who suffer and, together with De Vos I subscribe to the view that, due to patriarchy, women lack the negotiating power to choose to either enter into an intimate relationship, or not.

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

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<sup>580</sup> The Alliance (2008) at 11.

<sup>581</sup> De Vos (2008) at 141.

<sup>582</sup> De Vos (2008) at 131.

<sup>583</sup> De Vos (2008) at 131.

<sup>584</sup> The Alliance (2008).

<sup>585</sup> SALRC (2006) at 393.



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

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

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



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<sup>586</sup> The Alliance (2008) at 7.

## CHAPTER SEVEN

### CONCLUDING REMARKS

In 1990 Sachs<sup>587</sup> wrote that-

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

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

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

Currently we are on the brink of having the Draft Domestic Partnerships Bill<sup>591</sup> passed. The sooner Parliament passes this Draft Bill,<sup>592</sup> the sooner there will be an end to the suffering of women - the most vulnerable members of society, who very often do not have an equal chance of choosing the marriage related type of relationship that they may wish to enter into.

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<sup>587</sup> Sachs (1990) at 70.

<sup>588</sup> RCMA, 1998.

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

<sup>590</sup> MOSSA, 1990.

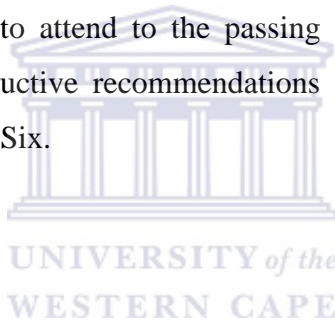
<sup>591</sup> Draft Domestic Partnerships Bill, 2008.

<sup>592</sup> Draft Domestic Partnerships Bill, 2008.

Since the decision in the *Volks* case,<sup>593</sup> I have always wondered what the outcome would have been had the composition of the Constitutional Court been different from what it was at the time. If the majority of Justices had been females, they could have given Parliament a year to amend ISA<sup>594</sup> and/or MOSSA,<sup>595</sup> similarly to what the Constitutional Court had decided in relation to same-sex relationships. Mrs Robinson might just have been entitled to protection under these Acts since she sacrificed her life to a relationship which became meaningless upon the death of her partner.

The SALRC must be lauded for drafting the Draft Bill<sup>596</sup> to assist cohabitees, irrespective whether they find themselves in a registered domestic partnership, or an unregistered domestic partnership.

I cannot but urge Parliament to attend to the passing of the Draft Bill<sup>597</sup> as soon as possible, subject to the constructive recommendations of De Vos, Goldblatt and ‘the Alliance’, as set out in Chapter Six.



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

<sup>594</sup> ISA, 1987.

<sup>595</sup> MOSSA, 1990.

<sup>596</sup> Draft Domestic Partnerships Bill (2008).

<sup>597</sup> Draft Domestic Partnerships Bill (2008).

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