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INTRODUCTION

On 1 December 2005 the Constitutional Court\(^1\) of South Africa delivered one of the most ground-breaking judgments in relation to family law when, in Minister of Home Affairs and Another v Fourie and Another,\(^2\) (hereinafter “the Fourie case”) the possibility of the conclusion of a valid marriage between two persons of the same-sex became a reality in South Africa.\(^3\)

In terms of this judgment, the common law definition\(^4\) of “marriage”\(^5\) was declared to be unconstitutional to the extent that it [did] not permit same-sex couples to enjoy the status and the benefits coupled with the responsibilities it accords to heterosexual couples.”\(^6\)

The declaration of invalidity referred to above was suspended for a period of one year as from the date of the judgment in order to allow Parliament to remedy the defect.

1. THE CIVIL UNION ACT 17 OF 2006

A. Introduction

In order to meet the deadline of 1 December 2006, the first Civil Union Bill saw the light of day in August 2006.\(^7\) This Bill was followed by a simplified version (which I might
add, was only introduced three weeks prior to enactment) which was eventually promulgated as the Civil Union Act 17 of 2006.  

This Act, which came into operation on 30 November 2006, makes provision for the conclusion of a “civil union” which may take the form of either a marriage or a civil partnership. 

According to section 1 of the Act, “civil union” is defined as being:

[T]he voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others … (italics added)

B Interpretative difficulties

By way of introduction, it must be stated that the Act is fraught with interpretative difficulties. There can be no doubt that the Act provides for persons of the same sex to conclude a civil union. However, upon closer inspection, an interesting question arises, namely: Does the wording of the Act clearly permit persons of the opposite sex to conclude a civil union?

Prior to the adoption of the Bill in the National Assembly on 14 November 2006, the South African Minister of Home Affairs remarked that:

…. this Bill makes provision for opposite and same-sex couples of 18 years or older to solemnise and register a voluntary union by way of either a marriage or a civil partnership. (emphasis added)

However, despite what the Minister says, the following points are of interest:

1. It is interesting to note that not one single provision of the Civil Union Act contains any reference whatsoever to persons of the opposite sex – all references are to same-sex couples only.
2. In section 8(6) of the Act it is stated that:

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act. (italics added)

It is submitted that, had the solemnisation of civil unions between heterosexual couples also been intended, this provision of the Act would rather have included wording such as “apart from the fact that they may be of the same sex”.¹¹

3. Even the preamble to the Act only refers to the necessity of providing legal protection for same-sex couples and does not contain a single reference to persons of the opposite sex.

4. However, section 39(2) of the Constitution of 1996 requires all legislation to be interpreted in such a way as to “promote the spirit, purport and objects of the Bill of Rights”.¹² It is submitted that the saving grace as far as the Civil Union Act is concerned is probably to be found in this section as it might allow for an interpretation which does include heterosexual civil unions. However, uncertainty will prevail until this aspect is clarified by our Courts.

The question that now arises is whether the Act has been drafted in such a way as to enable the average South African citizen or official to understand what is expected of him or her. In the light of the above discussion it is submitted that it has not.
C The importance of ascertaining the ambit of the Act: The (erstwhile) distinction between marriage and extramarital cohabitation

The answer to the question as to whether or not the Act provides for heterosexual civil unions may not be of paramount importance as far as marriage is concerned, as heterosexuals have always had (and still do have) the option of marrying one another in terms of the Marriage Act of 1961. While heterosexual persons may therefore have little or no practical need for concluding a civil union in the form of marriage, the same cannot be said regarding the conclusion of a heterosexual civil union in the form of a civil partnership.

The reason for insisting that the position is clarified can be explained by stating that, prior to the coming into operation of the Civil Union Act, marriage was the only form of conjugal relationship that was automatically recognised by South African law. Persons who lived together “as husband and wife” in an extramarital cohabitation arrangement did not enjoy any automatic legal recognition of their union in terms of South African law.

The Civil Union Act now makes provision for parties who do not wish to marry one another to conclude a “civil partnership” instead. In so doing, the civil union partners are now able to secure full legal recognition for a relationship that, in the past, would hardly have been recognised at all. Due to this drastic improvement in the legal position of civil union partners over mere cohabitants, it is clear that it is of cardinal importance for the Act to provide an unequivocal indication as to whether or not it allows for heterosexual cohabitants to register a civil partnership.
2. FURTHER INSTANCES OF LEGAL UNCERTAINTY CREATED BY THE ACT AND THE JUDICIARY

A. Introduction

As seen in the preceding discussion, the Civil Union Act of 2006 has drastically altered the South African family law landscape in that it not only provides for full legal recognition to be accorded to civil unions, but also regulates the legal consequences of the conclusion thereof. These legal consequences are regulated by section 13 of the Act, which provides that (summarised):

(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

(2) Any reference to-
   (a) “marriage” in any other law, includes a civil union; and
   (b) “husband,” “wife” or “spouse” in any other law, includes a civil union partner.¹⁶

It is important to note that the legal consequences mentioned in section 13 do not without more apply to persons who live together permanently – such persons are required to take the proactive step of concluding a registered civil union that complies with the requirements and formalities prescribed by the Act before they can be assured of securing full legal recognition of their marriage or civil partnership.

It must however be borne in mind that a period of almost 13 years elapsed between the advent of a democratic Constitutional dispensation in South Africa (on 27 April 1994), and the coming into operation of the Civil Union Act on 30 November 2006. It is therefore not surprising that a number of ad hoc instances arose during this interim period in which the Courts were requested to extend particular personal consequences pertaining to marriage to homosexual people living together permanently.¹⁷ Although it can certainly be argued that these developments were progressive in that they furthered a human rights culture in South Africa, it must also be mentioned that there is a downside
in that a number of anomalies have been created as a result of the fact that these
extensions have not (yet) been made applicable to heterosexual cohabitants.

In the paragraphs that follow, a number of the anomalies upon which the above-
mentioned issues are founded, will be discussed.

**B Anomaly 1: Adoption**

The judgments preceding the *Civil Union Act* have created a strange anomaly in respect
of the adoption of children. *Du Toit v Minister of Welfare and Population Development*
\(^{18}\) dealt with section 17 of the *Child Care Act*.\(^ {19}\) This provision determined that a child
may only be adopted “(a) by a *husband and his wife jointly*; (b) …” The Constitutional
Court held that this section discriminates unfairly against people living together in a
same-sex life partnership:

> The impugned provisions do not prevent lesbian or gay people from adopting children at all. They
make no provision, however, for gay and lesbian *couples* to adopt children jointly. … It is a
matter of our history … that these relationships have been the subject of unfair discrimination in
the past. However, our Constitution requires that unfairly discriminatory treatment of such
relationships cease. \(^ {20}\)

Consequently, the decision of the Constitutional Court allowed homosexual cohabitants
to adopt children legally but, as the situation currently stands, South African law does not
allow heterosexual cohabitants the same privilege. It goes without saying that there is no
justification for this position after the coming into operation of the *Civil Union Act*. Moreover,
the importance of resolving the question as to whether or not heterosexual persons are included within the ambit of the latter Act is clearly illustrated by this
discrepancy, as section 13 of the Act would resolve this issue in the case of persons *who
have concluded a valid civil union*\(^ {21}\) because of the fact that the words “husband” and
“wife” in section 17 of the *Child Care Act* \(^ {22}\) would henceforth have to be read in such a
way as to include civil union partners, thereby providing for heterosexual civil union
partners to adopt within this framework as well.
It is to be noted, though, that section 231 of the *Children’s Act* (of which certain sections came into operation on 1 July 2007) appears to solve the problem by stipulating in this respect that a child may be adopted jointly by, *inter alia*, “a husband and a wife, partners in a permanent domestic life-partnership* or by other persons sharing a common household and forming a permanent family unit…” Unfortunately section 231 has not yet come into operation, which implies that the anomaly explained above will persist until the section in question becomes operative.

C. **Anomaly 2: Maintenance**

A further aspect that needs to be considered by the Legislature relates to the issue of maintenance. In *Du Plessis v Road Accident Fund* the Supreme Court of Appeal focused on the question as to whether or not the common law action for damages for loss of support should be developed to include a person involved in a permanent same-sex life partnership. The Court found that the plaintiff and the deceased *had undertaken a reciprocal duty of support* which was worthy of constitutional protection. On this basis the Court set out to develop the common law in terms of section 173 of the Constitution which provides that the Supreme Court of Appeal and the High Courts have the inherent power to develop the common law. It held as follows:

> To extend the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who *had a contractual duty to support one another*, would be an *incremental step* to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution … (italics added)

The unsatisfactory state of affairs that persists in South African law in consequence of this case is succinctly summarised by Cronjé and Heaton (2004) when they state that:

> …. [E]ven if heterosexual life partners contractually undertake a duty of support, the surviving heterosexual life partner does not have a claim for damages for loss of support, while a surviving same-sex life partner has such a claim.
In the meantime, one of the first post-1994 decisions involving the possibility of increasing the legal recognition enjoyed by heterosexual life partnerships was being adjudicated by the South African courts. In Volks NO v Robinson and Others\textsuperscript{32} the facts clearly showed that the deceased and the survivor, heterosexual partners in a permanent life partnership, had been involved in a relationship substantially similar to a marriage relationship. The deceased supported the survivor financially and she was even accepted as a dependant on his medical aid scheme.\textsuperscript{33} After his death she instituted a claim against his estate in terms of section 2(1)\textsuperscript{34} of the Maintenance of Surviving Spouses Act.\textsuperscript{35} In essence her argument ran along the line that the survivor in a permanent heterosexual relationship who, together with the deceased cohabitant, had lived a life akin to that of husband and wife should be afforded the same protection as that which is afforded to the survivor of a marriage that has been terminated by the death of one of the spouses.

The Constitutional Court rejected this argument. After reiterating the fact that the purpose of the Act was to extend one of the invariable consequences of marriage (in this instance the reciprocal duty of support) beyond the death of one of the spouses,\textsuperscript{36} the Court came to the conclusion that an interpretation of the Act that would include permanent life partnerships would be “unduly strained” and “manifestly inconsistent” with the text.\textsuperscript{37} Judge Skweyiya also emphasized the importance of marriage as an institution that provides for the “security, support and companionship of members of our society”\textsuperscript{38} and concluded that the law could legitimately distinguish between married and unmarried people.\textsuperscript{39}

Reading Volks in conjunction with Du Plessis leads to an anomalous result: A legal duty to support did not exist in either case. In both situations the facts clearly showed that the parties involved had (contractually) undertaken to maintain one other. In Du Plessis the Court was prepared to extend the common law to include homosexual life partnerships, whereas in Volks the Court refused to adapt the law in respect of heterosexual life partners.
Within the context of the issues before the Courts in Du Plessis and Volks, the civil union legislation has (once again) brought about a drastic alteration to the legal landscape: The common law action for loss of support will henceforth have to be interpreted so as to provide for civil unions, while the surviving partner to a civil union will similarly be entitled to benefit in terms of the Maintenance of Surviving Spouses Act.\textsuperscript{40}

In conclusion, a pivotal issue remains in that the legal consequences of concluding a civil union do not apply to cohabitants \textit{per se} but only apply if a valid civil union has indeed been concluded in terms of the Act. In this regard an anomalous situation is, once again, simply perpetuated by the fact that cohabiting parties of the same-sex do not need to take the proactive step of registering a valid civil union in order to have the loss of support claim extended, while cohabitants of the opposite sex do not currently enjoy similar protection. In addition, the unwillingness displayed by the Constitutional Court to develop the law in respect of heterosexual cohabitants serves to further highlight the fragmented and disjointed landscape that currently characterizes South African family law.\textsuperscript{41}

\textbf{D. Anomaly 3: Intestate succession}

The Intestate Succession Act 81 of 1987 makes provision for (\textit{inter alia}) the surviving spouse and children of a person who dies either entirely or partially intestate to inherit the intestate estate.\textsuperscript{42} Originally, the Act only catered for spouses who had concluded a valid civil marriage that had been solemnised and registered in accordance with the Marriage Act 25 of 1961. However, it goes without saying that the advent of a human rights culture has necessitated a more inclusive and pluralistic approach towards intestate succession in South Africa. In this regard, the following developments have recently occurred:
(i)  *Marriages concluded according to religious rites only*

The issue as to whether or not the *Intestate Succession Act* applied to certain religious marriages arose in *Daniels v Campbell*. In this case the parties were married according to the rites of the Islamic faith, without their marriage being solemnised and registered in accordance with the *Marriage Act* 25 of 1961. At present, Islamic religious marriages are not (save for the purposes of certain specific legislation) regarded as being valid according to South African law, although it has been held that effect can be given to the underlying contractual obligations pertaining to the parties to a *de facto* monogamous Islamic marriage (see *Ryland v Edros*). In *Daniels* the Constitutional Court held that the surviving spouse of a *monogamous* Islamic marriage qualified as a “spouse” for the purposes of the *Intestate Succession Act* and could therefore inherit intestate.

(ii)  *Customary marriages*

Prior to the decision in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*, the deceased estates of parties to a marriage concluded in accordance with customary law devolved according to customary law of succession, which was based on the principle of male primogeniture. In *Bhe* this principle was found to be in conflict with the Bill of Rights and the ambit of the *Intestate Succession Act* was consequently expanded to encompass both monogamous and polygamous customary marriages.

(iii)  *Homosexual life partners*

The developments in (i) and (ii) above all dealt with deceased estates of persons who had passed away while being married in terms of either civil law, customary law, or the tenets of a specific religion. However, in *Gory v Kolver NO and Others (Starke and Others intervening)* the Constitutional Court expanded the ambit of Act 81 of 1987 even further by finding that the omission of the words “or partner in a permanent *same-sex* life partnership in which the partners have undertaken reciprocal duties of support” after the
word “spouse” in section 1(1) of the Act was unconstitutional. In consequence hereof, the Court held that these omitted words had to be read into the provision in question. Furthermore, in a surprising step, the Court held that these words would not merely apply to prospective readings of the Act, but that the omitted words had to be read in “with effect from 27 April 1994”. The retrospective effect of the order would (mercifully!) not invalidate any transfer of property that had taken place prior to the order unless “the transferee was on notice that the property in question was subject to a legal challenge” on the same basis as the application in casu.

(iv) Conclusion

The upshot of the developments elucidated above is that the Intestate Succession Act currently applies to most marriage and marriage-like institutions encountered in South Africa. However, there is one important exception – heterosexual life partners are not included within the ambit of the Act, irrespective of whether or not they have undertaken to maintain one another. Once again, this state of affairs amply illustrates the importance of clarifying the issue as to whether or not the Civil Union Act makes provision for the conclusion of heterosexual civil unions. If it does, section 13 of the latter Act will automatically allow for the parties to such a union to inherit intestate, and the only differentiation encountered would then relate to the fact that heterosexual cohabitants who are either unmarried or who have not concluded a civil union would not be allowed to inherit intestate (while their same-sex counterparts who had undertaken to maintain one another would). However, should the Civil Union Act not provide for heterosexual civil unions to be included, the differentiation would be encountered on two fronts as section 13 of the latter Act would not be of any assistance whatsoever.
3 CONCLUSION

The Civil Union Act of 2006 was promulgated in consequence of a judgment of the highest court in South Africa, in which it was found that the body of South African legislation as comprised at that point contained a fatal omission in that it did not provide for persons of the same sex to marry one another. In the majority judgment Sachs J intimated that the remedial legislative intervention required should not solely provide relief for same-sex couples, but that:

….. whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. 58 (italics added)

Although the Civil Union Act did succeed in realising one of its primary objectives, namely that of formalising the position of same-sex life partnerships for the first time in South African law, it is submitted that, in its current form, the Act shows that its drafters have paid mere lip service to this guidelines proffered by the Court.

The two fundamental issues referred to in this contribution illustrate the unsatisfactory position in which South African law currently finds itself in a palpable fashion:

- Regarding the first one (namely whether the Act clearly and unequivocally provides for heterosexual civil unions) the question remains as to why it should be necessary to resort to the principles of statutory interpretation 59 about such a fundamental issue. It boggles the mind to think that the Legislature could pass legislation that is even remotely unclear on this point.

- Regarding the second issue, namely the anomalies created by the Act and the judiciary, the silence of the Legislature on the status of the piecemeal extension of personal consequences pertaining to marriage to heterosexual partnerships is certain to cause uncertainty which, it is submitted, undoubtedly leads to unfair discrimination.
In conclusion, in the *Fourie* case Sachs J stated that recent judicial pronouncements have resulted in:

a patchwork of laws that did not express a coherent set of family law rules.

Although the *Civil Union Act* has certainly ameliorated the problems faced by homosexual couples, it appears, in the light of the problems elucidated above, that the Legislature has added a few patches to this incoherent set of rules instead of creating new fabric.

Furthermore, if it is borne in mind that the Act in its final form appeared a mere three months after the original (far more comprehensive) Bill first appeared, the Act appears to be a good example of bad drafting that illustrates the dangers of rushing the legislative process and which has possibly led to the absurd situation that gay couples currently enjoy far more rights than their heterosexual counterparts.

Thank you very much!
The Constitutional Court is South Africa’s highest court in all constitutional matters. It is a specialist court, and not a court of general jurisdiction (see Currie and De Waal 2005: 103). The jurisdiction of the Constitutional Court is set out in section 167(3)-(6) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”):

“(3) The Constitutional Court-
(a) is the highest court in all constitutional matters;
(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the Constitutional Court may-
(a) ……;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) ……….

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) ……….

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”

NOTES

1. The Constitutional Court is South Africa’s highest court in all constitutional matters. It is a specialist court, and not a court of general jurisdiction (see Currie and De Waal 2005: 103). The jurisdiction of the Constitutional Court is set out in section 167(3)-(6) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”):

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(6) ……….

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”

2. 2006 (1) SA 524 (CC).

3. For an exposition of the development of the concept of “marriage” see Robinson (2005) at 488 – 492.

4. It is important to note that recourse had to be had to the common law definition of “marriage”, as the Marriage Act 25 of 1961 did not define this concept.

5. For example, see Ismail v Ismail 1983 (1) SA 1006 (A) where “marriage” was defined as being “… the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts” (at 1019 (H)) and Farlam JA’s minority judgment in Fourie and Another v Minister of Home Affairs and Others 2005 (3) SA 429 (SCA) at paras [83] – [84].

6. See the Fourie case at para [162].


8. Government Gazette No 29441 of 30 November 2006. For criticism of a number of aspects pertaining to the Bill’s adoption, see http://www.avc.org.za/papers/President.pdf (accessed on 23 October 2007).

9. See the definition of “civil union” in section 1 of the Act. “Civil partnership” is not, however, defined.


11. In fact it is interesting to note that, following its proposal on 7 November 2006 (see the discussion in ***para 1 A above) to the Home Affairs Portfolio Committee to the effect that the restriction (in terms of the original Bill) of civil unions to homosexuals only should be removed, the Democratic Alliance had already suggested that the words “apart from the fact that they are of the same sex” in clause 8.5 of the original Bill (which in substance corresponds to section 8(6) of the Act in its current form) should be deleted – see http://www.pmg.org.za/viewminute.php?id=8488 (accessed on 19 October 2007). This lucid proposal does not appear to have been implemented.

12. Section 39(2) states that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. Devenish (2006) at 400, 401; (2006(a)) at 240 and (2005) at 203, 204 advocates that a “value-based theory” should be employed as a theory of general application.
instead of the purposive approach. His opinion is based chiefly (i) on the view that a “narrow purposive approach” might lead to the neglect of values which are essential towards viewing the legal system as a coherent whole, and (ii) on the fact that the use of the “word ‘spirit’ in conjunction with the words ‘purport’ and ‘objects’” necessitates a “wider and more comprehensive” interpretative approach (see (2006) at 400).

See SALRC (2006) at xi and 3; National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para [36]; Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC) at para [22] and Volks NO v Robinson 2005 (5) BCLR 446 (CC) at para [65]. South African law did therefore not provide any legal recognition to relationships which have from time to time been referred to as “concubinage”, “domestic partnerships” or “common-law marriages”. Regarding the use of the term “common-law marriage”, see Hahlo (1985) at 36 who is of the opinion that it is misleading and should not be used in a South African context. Hahlo’s view is shared by the South African Law Reform Commission [see SALRC (2006) at 12].


It may be worth mentioning that it appears as if the distinction between a “marriage” and a “civil partnership” is purely semantic as exactly the same legal consequences attach to both – see section 13 of the Civil Union Act.

Italics added.

See for example Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC); Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC).

74 of 1983.

Para [32].

Section 13 would obviously not make any difference to the position of heterosexual couples who have not elected to conclude a civil union but who merely cohabitate.

74 of 1983.

38 of 2005.

The Children’s Act 38 of 2005 does not define the concept of a “domestic life-partnership”. This fact, coupled with the fact that the Civil Union Act 17 of 2006 contains no reference to this concept as such (but only refers to a “civil partnership” without defining the same) creates uncertainty as it is unclear whether the concepts “domestic life-partnership” and “civil partnership” are to be equated. In the light of the fact that the Children’s Act had already been assented to by the State President on 8 June 2006, while the Civil Union Act only appeared in its final form in November of that year (see **para 1A and as well as note **27 above), the point could surely be raised that the Legislature should have employed consistent terminology in this respect.

When this will happen is uncertain, but recent newspaper reports have indicated that the remainder of the Act will not come into operation in 2007 – see Du Toit in Volksblad 13 September 2007.

2004 (1) SA 359 (SCA).

Para [14].

Paras [17] – [33].


Para [37]. In Satchwell v President of the RSA 2002 (6) SA 1 (CC) the Constitutional Court held that duty of support applied ex lege to a number of family relationships, such as, for example, husband and wife and parent and child. In addition, “[i]n a society where the range of family formations has widened, however, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case” (per Madala J at para [25]).

At 232.

2005 (5) BCLR 446 (CC).

Section 2(1), entitled “[c]laim for maintenance against estate of deceased spouse” reads as follows (emphasis added) “[i]f 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 maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.”


Also see para [54] of the Volks judgment where Skweyiya J quotes the following passage from Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 261 (CC): “[i]n the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with.”

For the sake of interest, the legal position regarding Islamic (purely religious) marriages further illustrates the fragmented landscape alluded to above: Although Islamic marriages that have not been concluded and registered in accordance with South African (civil) marriage legislation are not legally valid marriages (see, for example, Ryland v Edros 1997 (2) SA 690 (C)), in Daniels v Campbell 2004 (7) BCLR 735 (CC) the Constitutional Court found that the surviving spouse of such a marriage was entitled to a maintenance claim from the deceased spouses’ estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. In addition, in Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA) the Supreme Court of Appeal was prepared to recognise the dependant’s action for loss of support on the basis of the contractual obligations arising from an Islamic marriage.

The Roman law principle that no person could die partially testate and partially intestate (nemo pro parte testatus pro parte intestatus decedere potest) does not apply in South African law – see Havemann’s Assignee v Havemann’s Executor 1927 AD 473. This principle is confirmed in section 1 of Act 81 of 1987.

For example, the Domestic Violence Act 116 of 1998, the Criminal Procedure Act 51 of 1977 and tax legislation.

Such a marriage can be termed a “customary marriage” – see section 1 of the Recognition of Customary Marriages Act 120 of 1998. This Act also defines “customary law” as being “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.

The Recognition of Customary Marriages Act 120 of 1998 defines a “customary marriage” as “a marriage concluded in accordance with customary law”.

See para [66] (italics added).

See note ***51 above for an explanation of the relevance of this date. Par [66]. 81 of 1987.

At para [153].

See 1D (i) – (iv) above.

See the discussion in **para 1A above.
REFERENCES


