

THE MARRIAGE ACT 25 OF 1961, THE DIVORCE ACT 70 OF 1979, AND THE DISSOLUTION OF A HINDU MARRIAGE [DISCUSSION OF SINGH V RAMPARSAD 2007 3 SA 445 (D)]

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1 Introduction

South African law recognises three types of marriages, namely civil marriages, customary marriages and marriages that are civil unions. A civil union may also be called a civil partnership.¹ The choice of whether their civil union is to be known as a marriage or a civil partnership rests with the parties to the union.² The consequences of the civil union are the same regardless of whether it is called a marriage or a civil partnership, and correspond to those of a civil marriage.³

Civil marriages must comply with the requirements of the common law and the Marriage Act 25 of 1961 (“the Marriage Act”), customary marriages with the requirements of the Recognition of Customary Marriages Act 120 of 1998 (“the Recognition of Customary Marriages Act”), and marriages (and civil partnerships) that are civil unions with the requirements of the Civil Union Act 17 of 2006 (“the Civil Union Act”). For the sake of simplification, and because the consequences of a civil union correspond to those of a civil marriage,⁴ the phrase “civil marriage” will be used as a substitute for “civil marriage or civil union” in the remainder of the note.⁵

¹ Ss 1 and 2(a) of the Civil Union Act 17 of 2006

² S 11(1)

³ A civil union has the same consequences as “a marriage contemplated in the Marriage Act ... with such changes as may be required by the context” (s 13(1) of the Civil Union Act 17 of 2006). S 13(2) of the Civil Union Act further provides that, with the exception of the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998, any reference to “marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union” and any reference to “husband, wife or spouse in any other law, including the common law, includes a civil union partner”. The end result is that the consequences of a civil union correspond to those of a civil marriage. However, this does not mean that a civil union is the same as a civil marriage or that the Civil Union Act offers an alternative method for entering into a civil marriage. If the legislature intended civil unions to be civil marriages, it could have inserted a definition in the Marriage Act that covered civil unions. The legislature would, furthermore, not have afforded the parties to a civil union the opportunity of calling their union a civil partnership. Moreover, by specifically stating in s 13(2) of the Civil Union Act that the terms “marriage”, “husband”, “wife” and “spouse” in the Marriage Act and the Recognition of Customary Marriages Act do not apply to a civil union and the parties to the union, the legislature indicated that civil unions are neither civil nor customary marriages.

⁴ See n 3 above

⁵ A *caveat* has to be added: where reference is made to solemnisation of a civil marriage in terms of the Marriage Act, it must be borne in mind that solemnisation of a civil union is regulated by the Civil Union Act, not the Marriage Act.

Marriages that are concluded in terms of religious rites are fully recognised if they are *de facto* monogamous and meet the requirements of the Marriage Act or the Civil Union Act. Religious marriages that are fully recognised because they are monogamous and meet the requirements of the Marriage Act qualify as civil marriages and have dual validity.⁶ In other words, the religious and civil marriage exist side by side, with the consequences of the civil marriage being governed by the common law and the legislation that applies to civil marriages, and the consequences of the religious marriage being governed by the particular system of religious law in terms of which the marriage was celebrated. Religious marriages that do not meet the requirements of a civil marriage are not yet fully recognised⁷ although some Acts recognise them for specific purposes.⁸ Court decisions have also extended protection to such marriages for specific purposes.⁹

The marriage in *Singh v Ramparsad*¹⁰ did not have dual validity. This note sets out the facts and critically discusses four aspects of the judgment. The first aspect relates to the solemnisation of religious marriages. The significance of solemnisation by a marriage officer who has been appointed in terms of the Marriage Act is explained. It is then concluded that the court does not have the power to convert a Hindu marriage that has not been solemnised in terms of the Marriage Act into a civil marriage by declaring that it falls within the ambit of the Marriage Act. Secondly, the effect of granting a secular divorce in terms of the Divorce Act 70 of 1979 (“the Divorce Act”) if the spouses have entered into a religious marriage is discussed. It is explained that it would have been futile to declare the Hindu marriage of the plaintiff in *Singh* to fall within the ambit of the Divorce Act. It is also explained that it would have been impermissible to impose divorce on Hindu spouses. Thirdly, the court’s decision regarding the plaintiff’s constitutional attack on the Marriage Act and Divorce Act is discussed. Finally, the court’s statements regarding so-called common-law marriages, marriages by common law and marriages under the common law are investigated.

⁶ Jewish and Christian marriages are examples of marriages that usually have dual validity

⁷ See eg *Ismail v Ismail* 1983 1 SA 1006 (A); *Kalla v The Master* 1995 1 SA 261 (T); *Ramayee v Vandiyar* 1977 3 SA 77 (D)

⁸ See eg the Births and Deaths Registration Act 51 of 1992, the Child Care Act 74 of 1983, the Domestic Violence Act 116 of 1998 and the Children’s Act 38 of 2005 which, as a whole, apply to religious marriages. Other examples are s 10A of the Civil Proceedings Evidence Act 25 of 1965 and s 195(2) of the Criminal Procedure Act 51 of 1977 which recognise religious marriages for purposes of compelling a spouse as a witness in civil and criminal proceedings; s 4(q) read with s 1 of the Estate Duty Act 45 of 1955, which exempts property accruing to a surviving spouse in a religious marriage from estate duty; and s 1 read with s 9(1)(f) of the Transfer Duty Act 40 of 1949, which exempts property inherited by a spouse in a religious marriage from transfer duty

⁹ See eg *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Daniels v Campbell NO* 2004 5 SA 331 (CC); *Khan v Khan* 2005 2 SA 272 (T); *Ryland v Edros* 1997 2 SA 690 (C)

¹⁰ 2007 3 SA 445 (D)

2 The facts in *Singh v Ramparsad*

The plaintiff and her husband (first defendant) married in terms of the Vedic branch of the Hindu religion in 1987.¹¹ This branch of Hinduism does not recognise divorce, because it considers marriage to be an indissoluble sacrament.¹² Both spouses were aware of the indissolubility of their marriage. They also knew that their marriage would not be recognised unless it was solemnised in terms of the Marriage Act.¹³

The spouses initially agreed that they would not immediately have their Hindu marriage “registered” in terms of the Marriage Act. In the end they never had their marriage “registered”.¹⁴ The so-called registration of a religious marriage in terms of the Marriage Act refers to going through a civil marriage ceremony at the magistrate’s court. Thus the “registration” actually refers to entering into a civil marriage.¹⁵ The practice of referring to registration of religious marriages is a remnant of the registration procedure that used to be available under section 2 of the Indians Relief Act 22 of 1914.¹⁶ In terms of this procedure, a monogamous Muslim or Hindu marriage could be transformed into a legally recognised marriage by mere registration. Section 2 of the General Law Amendment Act 80 of 1971 abolished this procedure in 1972.¹⁷

In *Singh* the marriage relationship between the plaintiff and her husband broke down and they eventually separated.¹⁸ The plaintiff wanted a divorce to get closure.¹⁹ However, as Hindu law does not recognise divorce, the plaintiff could not obtain a divorce in terms of her religion. She approached the Durban and Coast Local Division of the High Court for an order declaring that, on a constitutional interpretation, the Marriage Act either recognised the solemnisation and legal validity of religious marriages or did not preclude recognition of the solemnisation and legal validity of such marriages. In the alternative she attacked the constitutionality of section 11(3) of the Marriage Act, which provides that unauthorised solemnisation of a marriage in accordance with religious rites is not an offence if the ceremony does not purport to effect a valid marriage. She sought an order declaring section 11(3) unconstitutional to the extent that it precludes the solemnisation and legal validity of religious marriages that are not solemnised in terms of the Act. She further

¹¹ Para 3

¹² All the traditional branches of Hindu religious law consider marriage to be indissoluble because of its sacramental nature. See *Singh v Ramparsad* 2007 3 SA 445 (D) paras 1, 2, 8, 9; Chakraborty *Hindu Marriage. A Critique* (1995) 1, 2; Mishra *Ancient Hindu Marriage Law and Practice* (1994) 2, 10, 12, 13; Nanda “Marriage and Divorce in India: Conflicting Laws” 1960 *Northwestern Univ LR* 624 627. Customary modes of divorce are recognised by various Hindu tribes, but these modes are viewed as reflecting the practices of lower castes: Basu *Hindu Women and Marriage Law: From Sacrament to Contract* (2001) 100; Mishra *Ancient Hindu Marriage Law* 13; Kosambi “Gender Reform and competing State Controls over Women: The Rakhmabai Case (1884-1888)” in Uberoi (ed) *Social Reform, Sexuality and the State* (1996) 265 283; Nanda 1960 *Northwestern Univ LR* 630

¹³ *Singh v Ramparsad* 2007 3 SA 445 (D) paras 21, 22, 24

¹⁴ Paras 3, 21, 22

¹⁵ *MNO v M* 1991 4 SA 587 (D)

¹⁶ 590E-H

¹⁷ The abolition took effect on 1 February 1972

¹⁸ *Singh v Ramparsad* 2007 3 SA 445 (D) paras 3, 23

¹⁹ Para 23

sought an order declaring her Hindu marriage “to be a legally valid marriage in law”.²⁰

As an alternative to the above, the plaintiff sought an order declaring that, on a constitutional interpretation, the word “marriage” in the Divorce Act included religious marriages and that her Hindu marriage therefore fell within the ambit of that Act. She also asked the court to make a declaratory order that she was entitled to sue her husband for divorce.²¹

In other words, what the plaintiff actually wanted was either to have her Hindu marriage turned into a civil marriage which could be dissolved by secular divorce, or to have the consequences of a civil marriage imposed on it so that she could obtain a secular divorce. If the relief were to be granted, she further wanted the court to dissolve her marriage in terms of the Divorce Act and to make an order for token maintenance in her favour.²² By agreement between the parties, the plaintiff’s claim for token maintenance was subsequently postponed for determination pending the court’s decision on the legal validity of her Hindu marriage. The plaintiff undertook to abandon her claim for token maintenance if the court were to find that her marriage was not legally valid.²³

The plaintiff’s husband as well as the Minister of Home Affairs (second defendant) and the Director-General of Home Affairs (third defendant) opposed the relief sought by the plaintiff. The Minister of Justice and Constitutional Development (fourth defendant) abided by the decision of the court.²⁴ The matter came before Patel J, who dismissed the action, with costs.

3 Critical discussion of the judgment

3.1 The Marriage Act and religious marriage ceremonies

Insofar as the plaintiff’s challenge to the Marriage Act was concerned, Patel J pointed out that the Act does not proscribe religious marriages or religious marriage ceremonies.²⁵ The Act makes provision for two types of marriage ceremonies, namely secular and religious ones.²⁶ Prospective spouses are free to choose either of these ceremonies. The plaintiff and her husband were therefore not precluded from solemnising their marriage in terms of their chosen religious rites. However, for a religious marriage ceremony to bring about a legally recognised marriage, the ceremony must be performed by a marriage officer who has been duly appointed in terms of the Marriage Act.²⁷ Patel J incorrectly stated that appointment as a marriage officer “is open to members of all religious faiths”.²⁸ Section 3(1) of the Marriage Act permits appointment of a person as a marriage officer “for the purpose of solemnizing

²⁰ Para 5

²¹ Para 5

²² Para 6

²³ Para 19

²⁴ Para 12

²⁵ Para 37

²⁶ Paras 32, 34

²⁷ S 11(1)

²⁸ Para 34; see also para 45

marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion". This list does not cover all religions practised within South Africa. The section may be unconstitutional to the extent that it excludes the officers of some religions from appointment as marriage officers.²⁹ The possible unconstitutionality does not affect the present case though, for Hindu religious officers solemnise marriages in accordance with the rites of an Indian religion and accordingly fall within the ambit of section 3(1).

As indicated above, a religious marriage that is not solemnised by a marriage officer who has been appointed in terms of the Marriage Act is not recognised by South African law. It is recognised only by the relevant religious system. If, however, the marriage is solemnised by a religious officer who has been duly appointed under the Marriage Act, it acquires dual validity.³⁰ In *Singh* the issue of dual validity did not arise, for the spouses had entered into one type of marriage only, namely a religious marriage. By seeking to have her Hindu marriage covered by the Marriage Act, the plaintiff was actually asking the court to convert her Hindu marriage into a civil marriage which could be dissolved by divorce.

Neither the Marriage Act, nor the Civil Union Act nor any other act authorises conversion of a religious marriage into a civil marriage by judicial decree. The common law also does not empower the court to convert a polygamous or potentially polygamous religious marriage³¹ into a civil marriage, for civil marriages are monogamous.³² It is submitted that the Constitution of the Republic of South Africa, 1996 ("the Constitution") does not allow the court to convert a Hindu marriage into a civil one either, and that this is the position even if the marriage is *de facto* monogamous. Section 8(3)(a) of the Constitution empowers the court to develop the common law in order to give effect to a right in the Bill of Rights. However, if the court were to develop the common-law definition of "marriage" to encompass a Hindu marriage, it would be turning the Hindu marriage into a civil marriage. It is submitted that such a conversion would entail too drastic a limitation of the right

²⁹ Heaton "Family Law and the Bill of Rights" in *Bill of Rights Compendium* service 22 (1998) para 3C17. The legislature seems to have taken cognisance of this criticism, for clause 3 of the draft Marriage Amendment Bill of 2008 (Gen N 35 of GG 30663 of 2008-01-14) does not refer to specific religions. Instead it permits "any religious denomination or organisation" to apply to be designated as a religious organisation that may solemnise marriages (clause 3(1)). See also s 5(1) of the Civil Union Act which contains a similar provision in respect of civil unions.

³⁰ See 1 above.

³¹ Although monogamy has become the approved norm for Hindu marriages, polygamy does exist: Chakraborty *Hindu Marriage* 2; Gokul "The Law of Marriage: Hindu Law" in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II: Religious Legal Systems* (2002) 41; Mishra *Ancient Hindu Marriage Law* 162, 163.

³² Recent family-law Acts confirm the monogamous nature of civil marriages. Ss 8(2) and 8(3) of the Civil Union Act prohibit the conclusion of a civil union during the subsistence of a civil marriage and *vice versa*. The monogamous nature of a civil marriage is also recognised by ss 3(2) and 10(4) of the Recognition of Customary Marriages Act. S 3(2) provides that "[s]ave as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No 25 of 1961), during the subsistence of such customary marriage", while s 10(4) provides that "no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage" (S 10(1) of the Act permits spouses who are married to each other at customary law subsequently to enter into a civil marriage with each other, provided that the husband is not a party to another customary marriage).

to freedom of religion to be permissible in terms of the limitation clause of the Constitution.³³ The order would negate the particular religious marriage system, for it would replace the religious marriage with a secular one.³⁴ Such negation of the religious marriage system could, it is submitted, not be justified in terms of the Constitution.

3.2 The Divorce Act and the dissolution of religious marriages

In respect of a religious marriage that is solemnised in terms of the Marriage Act, Patel J stated that the marriage is “both secular and religious”.³⁵ By this he meant that the marriage acquires the dual validity of a civil marriage and a religious marriage. If the marriage has dual validity, the civil marriage can be dissolved in terms of the Divorce Act. However, the religious marriage will not necessarily be terminated by the secular divorce order that is granted in terms of the Act, for the specific religion to which the parties subscribe may not allow divorce at all (as in the present case and in the case of the Roman-Catholic faith) or it may set additional requirements for dissolution of the religious marriage (as in the case of the Jewish faith).³⁶ If the particular religion allows divorce but sets additional requirements for the dissolution of the religious marriage, the religious marriage continues to exist unless it is dissolved in accordance with the rules of the particular religion. If the particular religion does not allow divorce at all, there obviously is no way in which the religious marriage can be dissolved, regardless of any order the court may make in terms of the Divorce Act. In other words, merely granting a secular divorce order in terms of the Act does not free the spouses from the bonds of their religious marriage if their religion prohibits divorce or sets additional requirements for dissolution of their religious marriage.³⁷

As was indicated above,³⁸ in *Singh* the issue of dual validity could not arise at all, for the spouses had entered into a religious marriage only and the

³³ S 15(1) of the Constitution contains the right to freedom of religion. S 36 contains the limitation clause.

³⁴ The Hindu marriage could not be retained intact with a civil marriage being added to it, for spouses who have entered into one marriage only cannot, by judicial decree, be deemed to have entered into two marriages.

³⁵ Para 34.

³⁶ In Jewish religious law only the husband has the power to grant a divorce (ie, a *get*). See, for example, Blackbeard “To get – or not to get a *Get*” 1994 *THRHR* 641; Goldstein “The Law of Marriage: Jewish Law” in *Legal Pluralism* 59; Segal “The Enforcement of an Agreement to grant a *Get* or Jewish Ecclesiastical Bill of Divorce” 1988 *SALJ* 97-99.

³⁷ It was precisely for this reason that s 5A was introduced into the Divorce Act by s 1 of the Divorce Amendment Act 95 of 1996. Section 5A provides that the court may refuse to issue a decree of divorce, or make any other order it considers just, if both spouses or either of them will not be free to remarry after the divorce unless the marriage is also dissolved in accordance with the prescripts of their religion or the religion of either of them or unless a religious barrier to remarriage is removed. It is important to note that the section imposes a qualification, namely that the court may not refuse the divorce if the spouse within whose power it is to have the religious marriage dissolved or the religious barrier removed has taken all the necessary steps in this regard. The civil divorce order is therefore not dependent on the successful outcome of an application for dissolution of the religious marriage or the actual removal of the barrier but merely on the spouse’s taking “all the necessary steps” to obtain dissolution or removal of the barrier. If neither spouse has the power to take steps to obtain dissolution – as in the case of spouses who entered into a marriage in terms of the Roman-Catholic or Hindu faith – an order can, logically, not be made in terms of s 5A.

³⁸ See 3.1 above.

court was not prepared (and, in my view, did not have the power) to subject the religious marriage to the Marriage Act and turn it into a civil marriage. Unfortunately it seems that Patel J himself at times lost sight of this fact, for he states that:

“[if] the plaintiff professes to be a devout Hindu then a secular pronouncement of divorce by this Court will in no way absolve her from her religious vows.”³⁹

As an abstract statement this is true, but in light of the facts of the present case the point is that a secular divorce order could not have been granted at all, as there was no marriage that could have been dissolved by means of a secular divorce order. As the court rejected the plaintiff’s contention that her Hindu marriage should be covered by the Marriage Act, inclusion of her marriage within the ambit of the Divorce Act would have served no purpose because it would not have conferred the consequences of a civil marriage on the Hindu marriage. The marriage would have remained a Hindu marriage, which could not be dissolved by divorce because of the rules of Hindu law. Granting the order the plaintiff sought in respect of the Divorce Act would therefore have been futile, unless the court had gone further and imposed divorce on all Hindu spouses.

Imposition of divorce on all Hindu spouses would limit the right to freedom of religion, for it would change the sacramental nature of the Hindu marriage. In *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, Sachs J, who delivered the majority judgment, held that people have “the right ... to self-expression without being forced to subordinate themselves to the cultural and religious norms of others”.⁴⁰ He further held that the adherents of a religion have the right to regard “marriage as sacramental, [and] to belong to a religious community that celebrates its marriages according to its own doctrinal tenets”.⁴¹ It is submitted that a logical corollary of this right is that the adherents of a particular religion have the right not to have the sacramental nature of their religious marriages abolished at the insistence of one of their fellow-believers for whom this nature has become inconvenient. Imposition of divorce on Hindu spouses would, it is submitted, be justifiable only if it is found that their sacramental nature is not central to Hindu marriages. Deciding on such centrality is not a matter our courts should become involved in, for it would involve entanglement in doctrinal issues. As Patel J pointed out, it is not appropriate for a court to decide whether a particular religion should permit divorce. Relying on our courts’ unwillingness to get entangled in doctrinal issues,⁴² Patel J concluded that “it is not for the Court

³⁹ Para 52

⁴⁰ 2006 1 SA 524 (CC) para 61 Sachs J’s statement is based on the *dictum* in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 24

⁴¹ Para 93 (footnote omitted)

⁴² *Singh v Ramparsad* 2007 3 SA 445 (D) para 50 See further *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 92; *Mohamed v Jassiem* 1996 1 SA 673 (A) 714A-B; *Taylor v Kurtstag NO* 2005 1 SA 362 (W) para 61 See also Ngcobo J’s minority judgment in *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) para 42 and Farlam J’s *obiter* statement in *Ryland v Edros* 1997 2 SA 690 (C) 703E-F The doctrine of entanglement “entails a reluctance of the courts to become involved in doctrinal disputes of a religious character”: *Taylor v Kurtstag NO* 2005 1 SA 362 (W) para 39

to pronounce the parties as being divorced if they elected to practice a faith and took vows which did not countenance divorce”.⁴³ It is submitted that his conclusion is correct. The court is not the proper forum for effecting fundamental changes to a system of religious law. If divorce is to be made available to spouses in Hindu marriages, that is the task of the legislature.⁴⁴

3 3 “Common-law marriages”, marriages “by common law” and marriages “under the common law”

In *Singh*, Patel J stated that:

“The Marriage Act does not proscribe purely religious marriages. These marriages involve the solemnisation by a minister of religion who is not designated as a marriage officer for the purposes of the Marriage Act. These religious marriages although they lack legal validity are regarded as lawful marriages in terms of the common law.”⁴⁵

By the latter statement the judge presumably intended to indicate that the common law does not prohibit these marriages, which is legally correct. However, the statement creates the impression that the common law not only does not prohibit these marriages but also somehow clothes them with legal validity, which is incorrect, as the common law does not recognise these marriages.⁴⁶ This incorrect impression is strengthened by Patel J’s references to *Ryland v Edros*,⁴⁷ *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,⁴⁸ *Daniels v Campbell NO*⁴⁹ and *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*⁵⁰ as examples of the willingness of the courts to come to the aid of spouses in “marriage under the common law”,⁵¹ dependants in a “common-law marriage”,⁵² and “spouses married by common law”.⁵³

Not only is the impression created by the quoted statement incorrect, but Patel J’s use of the terms “marriage under the common law”, dependants in a “common-law marriage”, and “spouses married by common law” is also confusing and incorrect. Firstly, marriage “by” or “under the common law” does not form part of our law. As explained above,⁵⁴ South African law recognises civil marriages, customary marriages and marriages that are civil unions.

⁴³ *Singh v Ramparsad* 2007 3 SA 445 (D) para 51

⁴⁴ In India, where the Hindu religion is dominant, s 13 of the Hindu Marriage Act 1955 afforded all Hindus the right to divorce. On s 13, see Aggarwal *The Hindu Marriage Act, 1955* (2005) 160-303; Chakraborty *Hindu Marriage* 185-197; Malhotra & Malhotra “Divorce nullity and related matters under the Hindu Marriage Act 1955” in Bainham & Rwezaura (eds) *The International Survey of Family Law* (2005) 275-302

⁴⁵ *Singh v Ramparsad* 2007 3 SA 445 (D) para 37

⁴⁶ See *Seedat’s Executors v The Master (Natal)* 1917 AD 302; *Daniels v Campbell NO* 2004 5 SA 331 (CC) para 69; and the sources cited in n 7 above

⁴⁷ 1997 2 SA 690 (C)

⁴⁸ 1999 4 SA 1319 (SCA)

⁴⁹ 2004 5 SA 331 (CC)

⁵⁰ 2006 1 SA 524 (CC)

⁵¹ *Singh v Ramparsad* 2007 3 SA 445 (D) para 38

⁵² Paras 39, 40

⁵³ Para 43

⁵⁴ See 1 above

Religious marriages enjoy limited recognition unless they meet the requirements of the common law and the Marriage Act and therefore also qualify as civil marriages. The marriage “by” or “under the common law” that Patel J refers to therefore does not exist.

Patel J’s reference to a “common-law marriage” is equally problematic. The phrase “common-law marriage” is indeed sometimes used in our law, but then it refers to a cohabitation relationship, or a life or domestic partnership as it is frequently called nowadays. It seems clear that the latter type of relationship is not what the judge had in mind. What he had in mind were religious marriages that lack official recognition. Calling such marriages “common-law marriages” is incorrect.⁵⁵

Secondly, the decisions in *Ryland*, *Amod*, *Daniels* and *Fourie* did not relate to “common-law marriages”. Nor did they relate to marriages “by” or “under the common law”. They offer no support for Patel J’s references to or views on such marriages. *Ryland* dealt with the recognition of a contractual duty of support. The court re-interpreted the common-law concept of “public policy” and held that the contractual obligations flowing from a *de facto* monogamous Muslim marriage can be recognised and enforced as between the spouses, because potentially polygamous marriages and the contractual obligations flowing from them should no longer be viewed as being against public policy.⁵⁶ In *Amod* the Supreme Court of Appeal extended the common-law action for loss of support to the surviving spouse in a monogamous Muslim marriage.⁵⁷ In *Ryland* and *Amod* the courts re-interpreted or extended the common law to protect spouses in monogamous Muslim marriages for very specific purposes. The courts did not recognise a type of marriage that might be termed either a “common-law marriage” or a marriage “by” or “under the common law”. *Daniels* and *Fourie* likewise did not relate to a “common-law marriage” or a marriage “by” or “under the common law”. In *Daniels* the Constitutional Court held that a surviving spouse in a monogamous Muslim marriage qualifies as a “spouse” and “survivor” in terms of the Intestate Succession Act 81 of 1987 (“the Intestate Succession Act”) and the Maintenance of Surviving Spouses Act 27 of 1990 (“the Maintenance of Surviving Spouses Act”) as this interpretation is in keeping with the ordinary meaning of the word “spouse” and also serves the purpose of the Acts.⁵⁸ The central issue was not whether the surviving spouse was lawfully married to her deceased spouse, but whether the protection of the Acts should be extended to spouses in monogamous Muslim marriages. The court was not required to make a decision on the extension of the common law. It simply interpreted statutory terms linguistically and contextually. In *Fourie* the Constitutional Court declared the common-law definition of “marriage” unconstitutional to the extent that it excludes same-sex couples from the status, benefits and responsibilities

⁵⁵ See Sinclair assisted by Heaton *The Law of Marriage I* (1996) 267-268 n 3; South African Law Reform Commission *Report on Domestic Partnerships Project 118* (2006) paras 1 4 12, 1 4 29, 2 2 29

⁵⁶ *Ryland v Edros* 1997 2 SA 690 (C) 709B-E

⁵⁷ *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) paras 26, 28

⁵⁸ *Daniels v Campbell NO* 2004 5 SA 331 (CC) paras 30, 31

accorded to heterosexual couples.⁵⁹ The court also declared the marriage formula contained in section 30(1) of the Marriage Act unconstitutional to the extent that it relates to heterosexual couples only and permits only such couples to enter into a civil marriage.⁶⁰ Like the other decisions Patel J cited, *Fourie* too did not relate to some sort of “common-law marriage” or a marriage “by” or “under the common law”.

3 4 The plaintiff’s arguments in support of her constitutional challenge to the Marriage Act and the Divorce Act

In arguing her point about the alleged unconstitutionality of the Marriage Act and the Divorce Act, the plaintiff stated that the non-recognition of her Hindu marriage for purposes of these Acts violates her constitutional rights to equality and dignity.⁶¹ Patel J rejected this allegation. He focused on the Marriage Act and indicated that the plaintiff and her witnesses had conceded that the requirements of the Act were not *per se* unreasonable. And, he said, there was no “suggestion that considered objectively the requirements contained in the Marriage Act are such as to limit the dignity of anyone”.⁶² The latter assertion strikes one as odd in view of the fact that earlier in his judgment Patel J had indicated that the plaintiff specifically relied on, *inter alia*, the right to dignity.⁶³

In rejecting the plaintiff’s constitutional challenge Patel J further stated that the plaintiff “did not in so many words advert to the violation of her rights save to say that the primary purpose in bringing this action was that she was wanting closure”.⁶⁴ One wonders whether Patel J thought that because the plaintiff “did not in so many words advert to the violation of her rights” she did not seriously contend that her rights were being infringed. If this is indeed what he meant, his view is doubtful. His view also seems strange in light of the fact that the plaintiff referred to the Recognition of Customary Marriages Act and pointed out that even unregistered customary marriages are valid in terms of this Act.⁶⁵ This point clearly related to the plaintiff’s contention that she was being unfairly discriminated against.

In dealing with the Recognition of Customary Marriage Act, Patel J referred to four aspects of the Act that, in his view, rendered the argument that the promulgation of the Act favoured spouses in customary marriages over the plaintiff invalid.⁶⁶ These aspects are:

(a) The Act deals with potentially polygamous marriages that do not qualify as marriages that may be solemnised in accordance with the Marriage Act.

⁵⁹ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 162

⁶⁰ Para 162

⁶¹ Ss 9 and 10 of the Constitution

⁶² *Singh v Ramparsad* 2007 3 SA 445 (D) para 45

⁶³ See paras 12, 16, 28

⁶⁴ Para 45

⁶⁵ S 4(9)

⁶⁶ Paras 48, 49

The relevance of this distinction is unclear. Perhaps Patel J was trying to indicate that customary marriages cannot be solemnised in terms of the Marriage Act while Hindu marriages can, and that Hindu spouses are therefore actually favoured because they may use the Marriage Act while customary spouses may not. If this is what Patel J had in mind, his view is without merit, since customary marriages are fully recognised if they are celebrated in terms of customary law,⁶⁷ while Hindu marriages are not recognised if the spouses meet only the requirements that are set by Hindu law. Therefore spouses in Hindu marriages are clearly at a disadvantage when compared to spouses in customary marriages.

(b) The promulgation of the Act was

“premised on the need to give secular recognition to marriages which were a ‘lived reality’ for a large group of our society who come from a rural background and who have engaged in polygamous customary marriages as part of their religious tradition”.⁶⁸

This statement suggests, firstly, that Hindu marriages are not a “lived reality”, which is nonsensical. The statement also suggests that marriages of large groups of people who come from a rural background are worthy of protection while those of smaller groups and/or those of groups who do not come from a predominantly rural background are not, which is incorrect. People from a rural background may be particularly deserving of protection because they are especially vulnerable,⁶⁹ but the corollary is not that people from urban or semi-urban backgrounds, or minorities, are not worthy of protection.⁷⁰

(c) Whilst the Act recognises the validity of unregistered customary marriages, it obliges the spouses to register their marriage.

The point Patel J seems to have had in mind is that customary spouses are obliged by legislation to register their marriage while Hindu spouses are not, and that Hindu spouses are therefore actually better off than customary spouses. This point loses sight of a crucial difference between the consequences of non-registration of the two types of marriages in that an unregistered customary marriage is valid according to South African law,⁷¹ while a Hindu marriage that is not “registered” is invalid.⁷²

⁶⁷ S 2(1) and s 2(2) read with s 3(1)(b) of the Recognition of Customary Marriages Act

⁶⁸ Para 48

⁶⁹ The Constitutional Court has repeatedly stressed the need to protect particularly vulnerable people. See *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Daniels v Campbell* NO 2004 5 SA 331 (CC); *Hoffmann v South African Airways* 2001 1 SA 1 (CC); *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC); *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 5 SA 30 (CC); *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC); *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC)

⁷⁰ See eg *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 94: “It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom”

⁷¹ S 4(9) of the Recognition of Customary Marriages Act

⁷² See 2 above on the so-called registration of Hindu marriages

(d) The Act regulates the proprietary rights of spouses in customary marriages in “clear and unambiguous language”.⁷³

The relevance of this factor as a ground for justifying a distinction between Hindu and customary marriages is unclear. Furthermore, the evidence before the court showed that the plaintiff and her husband retained their separate estates. The proprietary consequences of their marriage were therefore also clear.

As an aside, it could be mentioned that many lawyers will vehemently disagree with Patel J’s statement that the Act regulates the proprietary rights of spouses in customary marriages in “clear and unambiguous language”.⁷⁴

Although Patel J’s reasons for rejecting the plaintiff’s reliance on the Recognition of Customary Marriages Act are unconvincing, this does not mean that the Act offers support for the relief the plaintiff sought. The main difficulty with the relief she sought is unaffected by any differences there may or may not be between customary and Hindu marriages and the issue of whether these differences justify favouring one type of marriage over the other.⁷⁵ The essential problem with the relief the plaintiff sought is that a court cannot turn a Hindu marriage into a civil marriage or impose divorce on it.

In support of his view that the plaintiff had failed to show any infringement of her constitutional rights, Patel J also indicated that the plaintiff had not contended that the common law should be developed so as to include Vedic Hindu marriages in the definition of “marriage”. This statement once again illustrates the misconception regarding the legal systems that govern the various types of marriages. If the common-law definition of “marriage” were to be developed to include a Hindu marriage, the Hindu marriage would become a civil marriage.

Patel J stated further that “[the] requirements of the Marriage Act do not discriminate on the basis of one’s religion”.⁷⁶ As was pointed out above,⁷⁷ this statement is inaccurate, but the inaccuracy is unimportant in the context of the present case because the Act includes Hindu religious officers within the category of people who can be appointed as marriage officers.

Patel J concluded that the plaintiff’s attack on the constitutionality of the Marriage Act and the Divorce Act had to fail, as she could not prove that the non-recognition of her religious marriage by these Acts offended her right to

⁷³ *Singh v Ramparsad* 2007 3 SA 445 (D) para 48

⁷⁴ See eg the conflicting interpretations of ss 7(6), 7(7) and 8(4) of the Recognition of Customary Marriages Act advocated or referred to by Bakker “The new unofficial Customary Marriage: Application of Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998” 2007 *THRHR* 481 482, 484-489; Cronjé & Heaton *South African Family Law* 2 ed (2004) 195-197, 203-206; Jansen “The Recognition of Customary Marriages Act: Many Women still left out in the Cold” 2002 *Journal for Juridical Science* 115 122-124; Van Schalkwyk “Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998” 2000 *THRHR* 479 491-493, 495-497

⁷⁵ This point should not be interpreted as support for the view that non-recognition of Hindu marriages is justified or that Hindus do not suffer disadvantage because of the current non-recognition of Hindu marriages. There are very valid reasons for attacking the non-recognition of Hindu marriages, but in the context of the case under discussion the point is that recognition of the plaintiff’s Hindu marriage would not have entitled her to the relief she sought

⁷⁶ *Singh v Ramparsad* 2007 3 SA 445 (D) para 45

⁷⁷ See 3 1 above

dignity or her right to equality. Furthermore, she failed to “advance any cogent evidence as to how her dignity, if it was indeed lost, would be regained if a secular decree of divorce was granted”.⁷⁸ With regard to the latter statement, it must once again be emphasised that a secular divorce could not have been obtained at all as the plaintiff had never entered into a marriage that could be dissolved by means of a secular divorce. The court was, quite properly, not prepared to recognise the Hindu marriage under the Marriage Act and thus to confer the consequences of a civil marriage on it or to impose divorce on Hindu spouses.

4 Conclusion

Although the outcome of *Singh* is correct, Patel J’s judgment is flawed in some respects. Apart from the various incorrect and misleading terms and statements in the judgment, the judgment fails to properly explain why the remedies the plaintiff sought could not, legally, be granted. One has to read quite a lot into the judgment in order to make sense of the outcome. The judgment fails to explain that the order the plaintiff sought in respect of the Marriage Act amounted to a request for conversion of a Hindu marriage into a civil marriage, which could not be granted. In respect of the Divorce Act, the judgment likewise fails to explain what the effect would be if the order the plaintiff sought were to be granted and why such an order could not be granted. Further, the manner in which the court deals with the plaintiff’s constitutional attack is weak. However, it must be emphasised once again that the outcome of the decision is correct as the plaintiff was not entitled to the relief she sought.

Another case regarding a Hindu marriage is pending before the Durban and Coast Local Division, namely *Govender v Ragavayah NO*.⁷⁹ When the *Govender* case came before the court on 5 June 2008 it was postponed *sine die*. It is submitted that if the case were ever to proceed to trial, the plaintiff would be successful. The issue in *Govender* is different from that in *Singh*, and the remedy the plaintiff seeks does not involve the conversion of her Hindu marriage into a civil marriage or the changing of any aspect of Hindu doctrine. *Govender* deals with a claim by a Hindu widow to be recognised as her deceased husband’s intestate heir in terms of the Intestate Succession Act. She married her husband by Hindu marriage rites in 2004. The marriage was not solemnised in terms of the Marriage Act and the parties did not subsequently enter into a civil marriage. After her husband’s death, his father, who is also the executor of the deceased estate, rejected her claim to inherit as her deceased husband’s intestate heir. Her father-in-law argued that he and his wife were the deceased’s sole heirs, as his deceased son’s Hindu marriage was invalid.

⁷⁸ *Singh v Ramparsad* 2007 3 SA 445 (D) para 53

⁷⁹ D & CLD 05-06-2008 case no 6715/2008

In view of the decision of the Constitutional Court in *Daniels*,⁸⁰ the widow's claim in *Govender* should succeed. As in *Daniels*, the court in *Govender* would not have to decide whether the widow was lawfully married to her deceased husband. The central issue would be whether the protection of the Intestate Succession Act should be extended to spouses in monogamous Hindu marriages, just as the central issue in *Daniels* was whether the protection of the Intestate Succession Act and the Maintenance of Surviving Spouses Act should be extended to spouses in monogamous Muslim marriages. In *Daniels* the Constitutional Court held that interpreting the term "spouse" in these Acts to include a surviving spouse in a monogamous Muslim marriage is in keeping with the ordinary meaning of the word "spouse" and also serves the purpose of the Acts.⁸¹ As in *Daniels*, the court in *Govender* would simply have to interpret the term "spouse" in the Intestate Succession Act linguistically and contextually. It is unthinkable that the court would come to a different conclusion to the one the Constitutional Court reached in *Daniels* and hold that, unlike a surviving spouse in a monogamous Muslim marriage, a surviving spouse in a monogamous Hindu marriage does not qualify as a "spouse" in terms of the Act.

SUMMARY

In *Singh v Ramparsad* 2007 3 SA 445 (D) the court was asked to find that a Hindu marriage falls within the ambit of the Marriage Act 25 of 1961 or, alternatively, within the ambit of the Divorce Act 70 of 1979. The purpose of the claim was to enable the plaintiff to have her Hindu marriage dissolved by divorce. Hindu law does not permit divorce. Thus, the plaintiff could not obtain a divorce in terms of Hindu law. The court refused to grant the relief the plaintiff sought. It is submitted that the outcome of the decision is correct although the *rationes decidendi* are incomplete in some respects and wrong in others. In essence, the relief the plaintiff sought amounted to a request to convert her Hindu marriage into a civil marriage or to impose divorce on Hindu spouses. It is submitted that the court does not have the power to convert a Hindu marriage that has not been solemnised in terms of the Marriage Act into a civil marriage by declaring that it falls within the ambit of the Marriage Act. It is further explained that it would have been futile for the court to declare the plaintiff's Hindu marriage to fall within the ambit of the Divorce Act unless the court also imposed divorce on all Hindu spouses. It is submitted that it is impermissible for the court to impose divorce on Hindu spouses.

⁸⁰ *Daniels v Campbell* NO 2004 5 SA 331 (CC)

⁸¹ See n 58 above