THE SOUTH AFRICAN LAW JOURNAL

VOL 128
(Part 2)
2011

NOTES

A MISSED OPPORTUNITY TO ACHIEVE JUSTICE IN RESPECT OF MAINTENANCE FOR DIVORCED SPOUSES WHOSE FORMER SPOUSES DIE: *KRUGER NO v GOSS*

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INTRODUCTION

In *Kruger NO v Goss & another* 2010 (2) SA 507 (SCA) (*Kruger*) the Supreme Court of Appeal delivered judgment on whether an order for maintenance made in terms of s 7(2) of the Divorce Act 70 of 1979 can be enforced against the deceased estate of the spouse who was ordered to pay maintenance (i e the maintenance debtor). Section 7(2) expressly deals with termination of the maintenance obligation by the death of the maintenance recipient, but is silent on the effect of the death of the maintenance debtor. The section provides as follows:

> 'In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur.'

In *Kruger* the Supreme Court of Appeal concluded that s 7(2) does not permit enforcement of a maintenance order against the estate of the deceased

* In so far as Jacqueline Heaton's contribution to this note is concerned, this material is based upon work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard thereto.

maintenance debtor. As is explained below, the result of this judgment is injustice, which was largely caused by the court's failure to take its constitutional obligations with regard to the interpretation of legislation and the development of the common law into account.

THE FACTS

As in so many cases that reach the Supreme Court of Appeal, *Kruger* is the culmination of a long history of fiercely contested litigation. The first litigation was the spouses' divorce, which apparently occurred after a marriage lasting only three-and-a-half years. (Despite Navsa JA's express statement at para 3 that the marriage lasted only three-and-a half years, the marriage might in fact have lasted for fourteen-and-a-half years. In para 2 of the judgment the date of the marriage is indicated as being 23 March 1988, while the divorce was apparently granted in 2003 (the divorce order refers to the months of October, November and December 2003 (para 3)). See also J C Sonnekus 'Huweliksgevolge eindig in die reël met ontbinding van die huwelik? *Kruger NO v Goss* 2010 2 SA 507 (HHA)' 2010 *TSAR* 626 at 628. Our attempts to establish the true duration of the marriage were unfortunately unsuccessful.) The spouses were married out of community of property without the accrual system. Because complete separation of property operated in their marriage, neither spouse had a claim to any assets of the other spouse. The wife (Ms Goss) sought an order for maintenance against her husband (Mr Kruger). He opposed her claim. After a trial lasting a whole week, Hartzenberg J made an order for rehabilitative maintenance in favour of Ms Goss in terms of s 7(2) of the Divorce Act. The maintenance was to be paid for five years regardless of whether Ms Goss obtained employment and an income.

Mr Kruger died after having paid the rehabilitative maintenance instalments regularly for three years. After Mr Kruger's death, Ms Goss lodged a claim against his estate for the remainder of the rehabilitative maintenance, which came to an amount of R144 000. The executor of the estate (the deceased's son) rejected the claim. Ms Goss thereupon brought an application in the Pretoria High Court against the executor. She sought an order declaring that the estate was liable to pay her the amount of R144 000 with interest a tempore morae. The matter, once again, came before Hartzenberg J. From remarks made in the subsequent appeal to the Supreme Court of Appeal (*Kruger* para 14), it appears that Hartzenberg J regarded the rehabilitative maintenance that had been awarded to Ms Goss as a particular type of maintenance ('an animal of its own') to which s 7(2) of the Divorce Act was not applicable. He granted Ms Goss the relief she sought and also ordered the executor to pay her costs. The executor appealed against this judgment to the Supreme Court of Appeal.

THE DECISION OF THE SUPREME COURT OF APPEAL

The Supreme Court of Appeal (per Navsa JA, Brand and Ponnan JJA concurring) upheld the appeal (para 19). The court rejected Hartzenberg J's

view that rehabilitative maintenance of the type awarded in the present case was 'an animal of its own' with the result that the principles relating to enforcement of orders made in terms of s 7(2) were inapplicable to it (para 14). Navsa JA held that rehabilitative maintenance is simply a species of maintenance (para 15).

He further held that s 7(2) must be seen against its common law background. In terms of the common law, the spousal duty of support terminates on termination of the marriage whether through the death of one of the spouses or through divorce (para 10). The Maintenance of Surviving Spouses Act 27 of 1990, which came into operation in 1990, changed the common law with regard to surviving spouses in that they now have a claim for maintenance against their deceased spouses' estates if they are unable to provide for their reasonable maintenance needs from their own means and earnings (s 2(1)). However, when s 7(2) of the Divorce Act was enacted some ten years earlier, surviving spouses had no such claim. Navsa JA concluded that when the legislator enacted s 7(2) it could never have intended to put surviving divorced spouses in a better position than widows or widowers by allowing divorced spouses to claim maintenance from their former spouses' estates while surviving spouses had no such claim. He held that, except for the changes brought about by the Maintenance of Surviving Spouses Act, the common law 'remained otherwise untouched' (para 11). He approved *Hodges v Coubrough* 1991 (3) SA 58 (D) in which it was held that s 7(2) did not alter the common law by permitting enforcement of a maintenance order against the deceased estate of the maintenance debtor (para 13).

Navsa JA further distinguished the present case, in which the court had made a maintenance order in terms of s 7(2), from the case where a husband agrees in a divorce settlement to bind his estate to pay maintenance after his death. He held that although a spouse is empowered to bind his or her deceased estate for payment of post-divorce maintenance in a settlement agreement which may be made an order of court in terms of s 7(1), allowing divorced wives to claim maintenance from their late former husbands' estates if the maintenance was payable in terms of s 7(2) might 'have all sorts of undesirable consequences' (para 16). He specifically referred to the maintenance claims of the deceased's minor children being diminished or excluded, the rights of beneficiaries being implicated, and the divorcee's claim competing with the claims of the deceased's widow and children (ibid).

Navsa JA ended his decision with the following statement (para 18):

> 'If there is to be intervention of any kind it should be by the legislature on an informed and well-considered basis. For the moment the legislature is content with s 7(2) of the Divorce Act. So too, should we be.'

ANALYSIS

Injustice and the need to develop the common law

The court's decision that the wife's claim for maintenance does not operate against her deceased former husband's estate strikes one as most unjust (see

also Sonnekus op cit at 635, 637). First, in an extreme, pathological situation the decision enables the maintenance debtor successfully to scupper his or her ex-spouse's court-awarded maintenance claim by committing suicide.

Secondly, and more importantly, if a settlement agreement which has been made an order of court in terms of s 7(1) is silent on whether the maintenance recipient's claim survives the death of the maintenance debtor, the courts favour continuation of the claim (*Colly v Colly's Estate* 1946 WLD 83; *Owens v Stoffberg NO & another* 1946 CPD 226; *Hughes NO v The Master & another* 1960 (4) SA 936 (C); incidentally, the same approach now applies to continuation of the maintenance recipient's claim after his or her remarriage if the settlement agreement is silent: *Odgers v De Gersigny* 2007 (2) SA 305 (SCA)). Section 7(2), which applies in the absence of an order in terms of s 7(1), empowers the court to limit the duration of the maintenance order it makes to 'any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur'. Nothing in this wording precludes the court from regulating the duration of the maintenance order with reference to the *maintenance debtor's* death. Thus, the court may order that the maintenance is payable only for the period until the death of the maintenance debtor. Yet, like spouses who enter into settlement agreements, the courts rarely, if ever, regulate termination of the maintenance claim by the death of the maintenance debtor. Why should a maintenance recipient be deprived of his or her maintenance claim because the order the court made in terms of s 7(2) is silent on termination of the maintenance obligation by the maintenance debtor's death, while the maintenance recipient retains his or her claim if it arises from a settlement agreement that is silent on termination of the maintenance obligation by the maintenance debtor's death?

Navsa JA would presumably justify this differentiation by relying on the common law background of s 7(2), *Hodges v Coubrough* (supra), and his view that, apart from the changes brought about by the Maintenance of Surviving Spouses Act, the common law has 'remained otherwise untouched' (para 11). However, such justification assumes that the current state of the common law is acceptable. This is not so. The current state of the common law gives rise to glaring injustice, namely the loss of a court-awarded maintenance claim purely on the ground of the fortuitous event of the death of the maintenance debtor at a time when maintenance is still owed to the maintenance recipient.

The injustice becomes particularly stark if one considers the following example: Assume that when Mr and Mrs A get divorced the court applies the clean-break principle and orders Mr A to pay lump-sum maintenance in the amount of R300 000 to Mrs A. Two months later, Mr A dies. Mr A's death has no effect on Mrs A's maintenance claim, for her former husband was sufficiently well-off to be able to pay her maintenance in a single amount. Now, let us assume that Mr and Mrs B are also getting divorced. In this case too, the court is of the view that the clean-break principle should be applied. Mr B is less affluent than Mr A and cannot afford to pay maintenance to

Mrs B by way of a single payment. The court arrives at the conclusion that R300 000 would have been a just lump-sum amount in the present case. However, due to Mr B's inability to pay the full amount in a single payment, the court divides the R300 000 into 30 monthly amounts of R10 000 each. Mr B dies two months after the order is made. In terms of the decision in *Kruger*, Mrs B loses R280 000 of her maintenance claim upon her former husband's death simply because he was not sufficiently well-off to afford to pay maintenance in a single amount upon their divorce. Thus Mrs B, who might very well be more financially vulnerable than Mrs A, is prejudiced by losing most of her maintenance simply because her former husband happened to die before having paid the total amount of maintenance to her. (As regards the court's power to make a lump-sum maintenance order, see *Oshry & another NNO v Feldman* 2010 (6) SA 19 (SCA) in which the Supreme Court of Appeal held that the cases in which it had been held that maintenance excludes a single, lump-sum amount were no longer applicable as they were either based on the Maintenance Act 26 of 1963 which expressly restricted maintenance to periodical amounts, or failed to take into account that the definition of 'maintenance order' in the 1963 Act was no longer in operation as the Act had been replaced by the Maintenance Act 99 of 1998 (paras 51 and 52). The definition of 'maintenance order' in the 1998 Act does not exclude the payment of maintenance by way of a lump sum (para 54). Although the facts of *Oshry* (supra) relate to lump-sum maintenance in terms of the Maintenance of Surviving Spouses Act, the scope of the court's dictum regarding the change brought about by the 1998 Act extends beyond the Maintenance of Surviving Spouses Act and makes it clear that lump-sum maintenance awards are competent in terms of s 7(2) of the Divorce Act too.)

The glaring injustice occasioned by the common law position brings s 173 of the Constitution of the Republic of South Africa, 1996 into play. This section provides that the Supreme Court of Appeal (and the High Courts and Constitutional Court) has the inherent power to develop the common law, taking into account the interests of justice. (See also *Linvestment CC v Hammersley & another* 2008 (3) SA 283 (SCA) para 25 where the Supreme Court of Appeal held that it has always had an inherent power to develop the common law and that that power has been confirmed by s 173 of the Constitution.) Unfortunately, in *Kruger* the Supreme Court of Appeal failed to consider using its power to develop the common law in the interests of justice. It chose to approve *Hodges v Coubrough* (supra) without bearing in mind that that decision was made before the coming into operation of the Constitution and that the common law position as set out in *Hodges v Coubrough* (supra) should no longer uncritically be accepted as the be-all and end-all.

The Constitutional Court has on more than one occasion held that the courts are obliged to develop the common law if the common law fails to satisfy the provisions of the Constitution (see eg *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 39; *Director of Public Prosecutions, Transvaal v Minister of Justice and*

Constitutional Development & others 2009 (4) SA 222 (CC) para 35). Although no constitutional issue was raised by the parties in either the High Court or the Supreme Court of Appeal in *Kruger*, and the court was not ever asked to develop the common law, this failure did not preclude the High Court or the Supreme Court of Appeal from raising and considering the need to develop the common law to bring it in line with the Constitution. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* (supra) the Constitutional Court held that the duty of judges to develop the common law arises regardless of whether or not the parties request the court to consider such development and that the court may sometimes be obliged to raise the matter of development of the common law of its own accord and require full argument from the parties (paras 36 and 39). As the Constitutional Court pointed out in *Matatiele Municipality v President of the Republic of South Africa (No 1)* 2006 (5) SA 47 (CC) para 67, *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1 (CC) para 132 and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* (supra) para 36, the rationale for permitting a court to raise a constitutional issue is the supremacy of the Constitution — as all courts must uphold the Constitution, a court is permitted to raise a constitutional issue of its own accord.

As regards the circumstances in which a court may of its own accord raise a constitutional matter, the Constitutional Court held as follows in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* (supra) para 40:

> 'There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done.'

Because the circumstances in which it would be in the interests of justice for a court to raise a constitutional issue depend on the facts and circumstances of each case, the Constitutional Court refused to catalogue the circumstances in which a court should, of its own accord, raise a constitutional issue (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* (supra) para 41). It however emphasised that the particular constitutional issue must arise on the facts of the case before the court and that the parties must be afforded an adequate opportunity to deal with the issue. It concluded (supra para 43) that:

> '[a] court may . . ., of its own accord, raise and decide a constitutional issue where *(a)* the constitutional question arises on the facts; and *(b)* a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so'.

The circumstances in *Kruger* met both these requirements. Yet, disap-

pointingly, the Supreme Court of Appeal failed to recognise this and to raise the need to develop the common law of its own accord.

Section 39(2) of the Constitution and the interpretation of section 7(2) of the Divorce Act

Even if one were to leave aside the issue of development of the common law in the interests of justice, the Supreme Court of Appeal failed to comply with the constitutional injunctions to which courts are subject. In terms of s 39(2) of the Constitution, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. As s 7(2) of the Divorce Act is indeterminate as regards the legal question that arose in *Kruger*, the court had no option but to engage in interpreting the section. (On the difference between determinate and indeterminate legislative provisions and the court's constitutional obligations in respect of the two categories of provisions, see Anton Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611 at 620–1.) And, because it had to interpret the section, it had to apply s 39(2) of the Constitution. Therefore, the court was constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights when interpreting s 7(2).

It has by now become trite that the spirit, purport and objects of the Bill of Rights include protecting and promoting the constitutional values of equality and dignity. (If authority is nevertheless sought for this proposition, see eg *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) paras 19–21; *Daniels v Campbell NO* 2005 (5) SA 331 (CC) para 45.) The interpretation in *Kruger* fails to comply with s 39(2) of the Constitution as it does not promote equality and dignity. It creates a differentiation between various maintenance recipients whose former spouses die by denying some of them their court-awarded maintenance on the ground of whether the court made the maintenance award in terms of s 7(1) or s 7(2) of the Divorce Act. This differentiation does not bear a rational connection to a legitimate government purpose. It therefore violates not only the constitutional *value* of equality but also s 9(1) of the Constitution, which entrenches the *right* to equality before the law and to equal protection and benefit of the law. (The test for determining whether a law results in inequality before the law was set out in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 53.) The interpretation in *Kruger* also infringes the dignity of some divorced maintenance recipients by denying them their court-awarded maintenance without any regard to their possible vulnerability, even though the courts have repeatedly emphasised the duty to protect the vulnerable (see eg *Gumede v President of the Republic of South Africa & others* 2009 (3) SA 152 (CC) paras 36, 43 and 46; *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) paras 41 and 49; *Oshry & another NNO v Feldman* (supra) para 35). In a different maintenance case, namely *Oshry & another NNO v Feldman* (supra), Navsa JA (with Saldulker AJA) was very much alive to the

need to construe legislation in accordance with constitutional norms and values such as dignity. To this end he declared that 'dignity, particularly of the vulnerable is a prized asset' ((supra) para 35). It is puzzling and disappointing that he failed to approach the decision in *Kruger* in the same way.

Unfortunately, the court in *Kruger* did not refer to the constitutional issues mentioned above and made a harsh decision against a vulnerable group of people, namely divorced wives who are dependent upon their former husbands for maintenance. The court passed the responsibility to rectify the situation onto the legislator. However, legislative rectification is not required. All that is required is an interpretation of s 7(2) which is in keeping with the wording of the section and the constitutional injunction in s 39(2). In our opinion, if the wording of s 7(2) is to be interpreted literally and given its grammatical and ordinary meaning according to the golden rule of interpretation of statutes and, especially, if it is interpreted in keeping with s 39(2) of the Constitution, a divorced wife should retain her court-awarded maintenance claim after her former husband's death, until she dies or remarries.

The action for loss of support by a divorced spouse

Another argument which might be raised in support of continuation of a maintenance claim in terms of s 7(2) after the death of the maintenance debtor relies on the analogy provided by the decision of the Supreme Court of Appeal in *Santam Bpk v Henery* 1999 (3) SA 421 (SCA). In this case, the court held that a woman in whose favour a maintenance order had been made in terms of s 7(2) could institute the action for loss of support against a third party who negligently killed her former husband. In a previous edition of their textbook on family law (*South African Family Law* 2 ed (2004) 155–6) DSP Cronjé & Jacqueline Heaton argued that if the right which arises from an order in terms of s 7(2) can be protected by means of an action for loss of support against a third party, it should also operate against the deceased estate of the ex-husband who was obliged to pay the maintenance. Experts in the law of delict might comment that this argument does not really support the continuation of a maintenance claim in terms of s 7(2) after the death of the maintenance debtor, because the delictual claim is instituted against the third party for the very reason that the wife lost her maintenance claim upon the maintenance debtor's death due to a third party's unlawful conduct. Nonetheless the differentiation between the situation where a wife's former husband is killed through the delict of another and the situation where the former husband dies of natural causes or commits suicide results in inequality and injustice. Denying some divorced women their court-awarded maintenance because of the way in which their former husbands die results in inequality and injustice.

The 'undesirable consequences' of conferring a claim on more than one person in addition to the deceased's children

Apart from the arguments set out above, the decision in *Kruger* can be criticised on yet another point. In our view, Navsa JA's observation that

allowing divorced wives to claim maintenance from their late former husbands' estates if the maintenance was payable in terms of s 7(2) might 'have all sorts of undesirable consequences' (para 16) is neither here nor there. If somebody has a maintenance claim in terms of a court order, why should enforcing the claim against the maintenance debtor's deceased estate lead to undesirable consequences if enforcement of maintenance claims by surviving spouses and dependent children against deceased estates do not lead to undesirable consequences?

The 'undesirable consequences' of allowing a divorcee's claim Navsa JA specifically mentions are, first, that the 'legitimate claims to maintenance of minor children might be diminished or excluded' (para 16). He further mentions the rights of beneficiaries being 'implicated' (ibid). He ends by indicating that a claim for maintenance such as the one by Ms Goss 'could compete with the claim of a surviving spouse and with claims by dependent children and beneficiaries' (ibid). It seems as if Navsa JA is of the opinion that there should be a bar against maintenance claims by more than one woman (ie a claim from a widow plus a claim from a divorced wife) against the deceased's estate. It can, however, be asked why, for example, the maintenance claim of a 35-year-old widow (wife no 2) should be considered legitimate, while the claim of a 62-year-old wife (wife no 1), who was dependent on her husband for maintenance during her whole married life and during the two years since their divorce, should be considered illegitimate or an undesirable consequence. Is it simply because she is one too many a person to be allowed a claim? Surely, the number of potential claimants cannot determine whether any individual person's claim is legitimate or a 'desirable' consequence?

Furthermore, one wonders whether Navsa JA bore polygynous customary marriages in mind. The maintenance claims of more than one widow in a polygynous customary marriage would most definitely diminish the maintenance claims of each widow and of the deceased's children, but this is no reason to deny the widows their claims.

The propriety of the order made by the court a quo

A final issue is the nature and propriety of the order Hartzenberg J made at the time of the divorce. It seems rather strange that he made an order for rehabilitative maintenance for five years, while the marriage between the parties had lasted for only three-and-a-half years (although we have indicated that there is a puzzling discrepancy regarding the duration of the marriage in the judgment). But regardless of the duration of the marriage, it may be that the maintenance award Hartzenberg J made contained an element of compensation due to the fact that the marriage between the parties was out of community of property with the exclusion of the accrual system. A maintenance award was therefore the only available route to compensate Ms Goss for any contributions or sacrifices she made during and/or because of the marriage (see Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 84). The

fact that the maintenance had to be paid regardless of whether Ms Goss obtained employment and an income is a further indication that Hartzenberg J intended that the total amount of maintenance awarded to Ms Goss should not be reduced at all. Thus Hartzenberg J might have used the order for rehabilitative maintenance as a ploy to award 'compensatory' maintenance to Ms Goss because she was married subject to complete separation of property and had no patrimonial claim against her husband. If this inference is correct, it raises the issue of the purpose of maintenance. Is it intended to meet the requirements of need, compensation or entitlement?

There are indeed cases in which the fact was stressed that post-divorce maintenance in terms of s 7(2) of the Divorce Act is not solely dependent on the common law requirements for maintenance, namely need on the one hand and ability to pay on the other, but also on other factors such as one spouse's contribution to the household and the upbringing of children. In *Rousalis v Rousalis* 1980 (3) SA 446 (C) (at 350G) the court stated that a wife of long standing who had helped her husband to build up his separate estate by working, would be entitled to far more maintenance in terms of s 7(2) than one who had merely shared his bed and kept his house for a few years. In *Nillson v Nillson* 1984 (2) SA 294 (C) (at 297) it was suggested that s 7(2) of the Divorce Act could and should be used by the courts to ensure fairness between the parties. Despite some support for these judgments (see De Jong op cit; Brigitte Clark & Beth Goldblatt 'Gender and family law' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 221–2), the viewpoint that post-divorce maintenance in terms of s 7(2) may include a compensatory element has been the subject of considerable criticism by academics (see inter alia June Sinclair 'Financial provision on divorce — need, compensation or entitlement?' (1981) 98 *SALJ* 469 at 474–5; J C Sonnekus 'Onderhoud na egskeiding' 1988 *TSAR* 440 at 446 and 'Statutêre begrensing van versorgingsaansprake na egskeiding — die Nederlandse en Duitse voorbeelde' 1994 *TSAR* 607 at 613–4; Lesbury van Zyl 'Post-divorce support — theory and practice' (1989) 22 *De Jure* 71 at 74–5; and indirectly also Jacqueline Heaton & Elsabe Schoeman 'Foreign marriages and section 7(3) of the Divorce Act 70 of 1979' (2000) 63 *THRHR* 141 at 149). The gist of the criticism is that this manipulation by the courts of s 7(2) is in direct conflict with the objectives of awarding maintenance as opposed to dividing matrimonial property, the clean-break principle and the movement towards rehabilitative maintenance.

The reasoning in *Rousalis* (supra) and *Nillson* (supra) has also not been followed in subsequent reported cases. It is clear that our courts today increasingly grant employable women only rehabilitative maintenance for a limited period of time to get them back on their feet (see e g *Kroon v Kroon* 1986 (4) SA 616 (E); *V v V* 1998 (4) SA 169 (C); *Joubert v Joubert* [2004] 1 All SA 426 (C); *Pillay v Pillay* 2004 (4) SA 81 (SE); *Kooverjee v Kooverjee* 2006 (6) SA 127 (C)) and not to compensate them for any marriage-related sacrifices or contributions. The propriety of using s 7(2) to achieve a type of redistribution of property therefore seems to be doubtful.

However, even though 'compensatory maintenance' may not be in keeping with the judicial view which currently predominates, one can readily grasp why courts might sometimes want to make such orders. Because our law does not accord the courts a general judicial discretion to order redistribution of assets between spouses upon divorce in civil marriages, courts might be tempted to use s 7(2) in an artificial way in order to achieve a type of redistribution of property (in instalments or a lump sum) where such a redistribution is not permitted by s 7(3) of the Divorce Act. (Section 7(3) of the Divorce Act restricts redistribution of assets upon divorce to civil marriages which are subject to complete separation of property and were concluded prior to 1 November 1984 in the case of white, coloured or Asian persons or prior to 2 December 1988 in the case of black persons.) Perhaps this was why Hartzenberg J was eager to describe the order for rehabilitative maintenance he made as 'an animal of its own' which is not subject to s 7(2) (*Kruger* para 13).

The inference that the original rehabilitative maintenance award upon divorce did contain a compensatory element (especially in the light of Hartzenberg J's insistence that the total amount of maintenance awarded should not be reduced should Ms Goss obtain employment or income) is therefore not far-fetched. Because of the decision in *Kruger* the 'compensation' was never paid in full and Ms Goss was left in a tight spot upon the death of her former husband. In this way, too, Navsa JA's conclusion that s 7(2) of the Divorce Act does not permit enforcement of a maintenance order against the estate of the deceased maintenance debtor results in unfairness in the circumstances of this particular case. If the judicial discretion to redistribute property upon divorce were to be extended to all civil marriages (as has been called for: see June Sinclair (1981) 98 *SALJ* 480–5 and Jacqueline Heaton 'Striving for substantive gender equality in family law: selected issues' (2005) 21 *SAJHR* 547 at 556, 562–6), the need to resort to using s 7(2) for artificial purposes would disappear. (Support for the plea for a general judicial discretion to redistribute property in all civil marriages is to be found in the fact that, in terms of s 8(4)*(a)* and *(b)* of the Recognition of Customary Marriages Act 120 of 1998 and the decision in *Gumede v President of the Republic of South Africa* (supra), courts already have such discretion in all customary marriages regardless of when they were concluded and regardless of the matrimonial property system that operates in them.)

CONCLUSION

All in all, the decision in *Kruger* is unsatisfactory. Nevertheless, because it is a decision of the Supreme Court of Appeal, it must be followed by all courts except the Constitutional Court.

As a constitutional matter is involved in *Kruger*, Ms Goss could have appealed to the Constitutional Court against the order of the Supreme Court of Appeal (s 167(3)*(b)* of the Constitution). By January 2011 she had not done so (this was confirmed in telephone conversations with officials in the

offices of the Registrars of the Supreme Court of Appeal and the Constitutional Court, 28 January 2011). The decision of the Supreme Court of Appeal was delivered on 21 September 2009. In terms of Rule 19 of the Rules of the Constitutional Court, a litigant who is aggrieved by the decision of a court and who wishes to appeal directly to the Constitutional Court on a constitutional matter must lodge an application for leave to appeal within fifteen days of the order of the court having been made. Thus, unless the Constitutional Court condones a late application for appeal in terms of Rule 32, Ms Goss can no longer appeal against the judgment of the Supreme Court of Appeal.

It is in any event most unlikely that she ever considered appealing against the judgment. First, in view of their failure to raise any constitutional issue in the High Court or the Supreme Court of Appeal, her legal representatives probably did not ever advise her that the Constitutional Court might be approached on the ground of a constitutional issue being involved. Secondly, unless a Good Samaritan or a non-governmental body such as the Women's Legal Centre came to her assistance she would probably not be able to afford the costs of an appeal — especially since her means have been reduced even more by the termination of her maintenance claim by the Supreme Court of Appeal. Whether she would be able to obtain assistance from Legal Aid South Africa is doubted. Legal Aid South Africa does not provide legal aid in civil appeals without the National Operation Executive's consent. In considering whether to grant consent, the National Operation Executive must be satisfied that on a balance of probabilities there is a chance that the appeal will succeed and that the costs of the appeal will justify the benefit to the legal aid applicant (*Legal Aid Guide* 11 ed (2009) at 50; the guide is available online at http://www.legal-aid.co.za/images/legal-services/Guide/laguide.pdf). In Ms Goss's case, the amount of maintenance in issue is R144 000, which might be insufficient to convince the National Operation Executive to grant consent.

Furthermore, even if Ms Goss did lodge an application for leave to appeal, the Constitutional Court might dismiss it, as the court has held that 'where possible, constitutional matters must be raised at the earliest opportunity by litigants' and that an application for appeal would not usually be allowed if a constitutional issue has not been properly raised earlier (see e g *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* (supra) paras 50–55, 59–60; *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC) paras 10 and 19; *Phumelela Gaming and Leisure Ltd v Gründlingh & others* 2007 (6) SA 350 (CC) para 25: the quotation appears at para 10 of *National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd & another*). The Constitutional Court further considers that, as a rule, the High Court and the Supreme Court of Appeal are the best fora of first instance to consider development of the common law and that it, (i e the Constitutional Court) ought normally not to be the court of first and final instance (see e g *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) para 33; *Carmichele v Minister of*

Safety and Security (Centre for Applied Legal Studies Intervening) (supra) paras 50–60; *Fourie & another v Minister of Home Affairs & another* 2003 (5) SA 301 (CC) para 12; *Phumelela Gaming and Leisure Ltd v Gründlingh & others* (supra) para 25). However, the interests of justice are the determining issue in the Constitutional Court's decision whether or not to grant an application for leave to appeal. Whether the issue has been decided by the Supreme Court of Appeal is only one of the factors to be considered in this regard. (Factors which are relevant with regard to the interests of justice include the circumstances of the parties, the nature of the rights involved, whether the issue has been decided by the Supreme Court of Appeal, whether or not anyone else might be harmed by the relief sought and the prospects of success: see e g *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & others* 1998 (4) SA 1157 (CC) para 32; *Brummer v Gorfil Brothers Investments (Pty) Ltd & others* 2000 (2) SA 837 (CC) para 3; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2004 (1) SA 406 (CC)) para 3; *Phumelela Gaming and Leisure Ltd v Gründlingh & others* (supra) para 24.) Ms Goss's chances of obtaining leave to appeal if she sought it are therefore uncertain.

Thus it seems that for the foreseeable time to come *Kruger* will reflect the state of the law. Hopefully, another plaintiff will challenge the legal position on constitutional grounds in the future.