FAMILY LAW

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LEGISLATION

Government Employees Pension Law Amendment Act 19 of 2011

The Government Employees Pension Law Amendment Act 19 of 2011 ('the Amendment Act') came into operation upon its publication in *Government Gazette* 34864 of 14 December 2011 (s 8(1)). The purpose of the Amendment Act includes amending the Government Employees Pension Law, 1996 (Proc 21 *GG* 17135 of 19 April 1996) to bring its provisions in line with those of the Divorce Act 70 of 1979 and the Pension Funds Act 24 of 1956 with regard to the sharing of pension interests on divorce (Memorandum on the Objects of the Government Employees Pension Law Amendment Bill, 2011 paras 1.2–1.5).

Section 7(7) and (8) of the Divorce Act read with section 37D(4) of the Pension Funds Act deems a spouse's pension interest to be part of his or her assets on divorce and permit the payment of the non-member spouse's share of the member's pension interest to the non-member spouse after divorce. However, the definition of 'pension interest' in section 1 of the Divorce Act relates only to the pension interests of persons who are members of a pension fund as defined in section 1(1) of the Pension Funds Act. Government employees do not belong to such a pension fund. They belong to the Government Employees Pension Fund ('GEPF'), which is governed by the Government Employees Pension Law. Accordingly, prior to the coming into operation of the Amendment Act, the spouses of government employees could not share in their spouse's pension interest on divorce. This differentiation between non-member spouses of members of the GEPF and non-member spouses of members who belong

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to pension funds governed by the Pension Funds Act has long been the subject of criticism, and was declared unconstitutional in *Wiese v GEPF and Others* [2011] 4 All SA 280 (WCC). The declaration of constitutional invalidity of the relevant provisions of the Government Employees Pension Law was suspended to allow the legislature an opportunity to remedy the defect in the legislation within a year and, of course, the order was referred to the Constitutional Court for confirmation (see the discussion of *Wiese* below). Since then, the Amendment Act has rectified the position.

Section 1 of the Amendment Act inserts a definition of 'pension interest' in section 1 of the Government Employees Pension Law that is similar to the definition in section 1 of the Divorce Act. In terms of the inserted definition, the pension interest of a member of the GEPF is the benefit to which the member would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce by resigning from his or her employment. The amount of the member's pension interest is reduced by any part of the pension interest to which another person is entitled by virtue of a previous divorce (s 24A(2)*(c)* of the Government Employees Pension Law as inserted by s 3 of the Amendment Act). Thus, if someone is getting divorced for a second or a further time, the amount of the pension interest that is deemed to be part of his or her estate for purposes of the latest divorce is reduced by any amount of the pension interest that was awarded to his or her former spouse(s) in the first or further divorce.

Section 3 of the Amendment Act inserts section 24A into the Government Employees Pension Law. The new section governs payment of a share of a member's pension interest to his or her spouse on divorce. It provides that if a portion of the pension interest of a member of the GEPF is assigned to his or her spouse on divorce, that portion is deemed to accrue to the member on the date of the divorce (s 24A(2)*(a)*). In the case of divorce orders made before the coming into operation of section 24A, the non-member's portion is deemed to have accrued to the member on the date of the coming into operation of the section, that is, on 14 December 2011 (s 24A(2)*(j)*).

The new section further provides that if the non-member spouse submits the divorce order to the GEPF, the fund must, within 45 days, request the non-member spouse to elect whether to have the amount of the pension interest that was assigned to him or her on divorce paid directly to him or her or to have it

transferred to a pension fund of his or her choice (s 24A(2)*(e)*). The non-member spouse has 120 days to inform the fund of his or her election and must provide the fund with the necessary details to enable it to give effect to the election (s 24A(2)*(f)*). The fund has 60 days to give effect to the non-member spouse's election (s 24A(2)*(g)*). If the non-member spouse fails to make an election or to provide the necessary details to enable the fund to give effect to his or her election, the fund must pay the amount directly to the non-member spouse within 30 days of the end of the election period (s 24A(2)*(h)*). If the fund cannot reasonably ascertain how payment is to be made, it must retain the amount, as well as interest on it, until such time as the member, the non-member or any other person who has the necessary authority and capacity to do so provides details of how payment must be effected (s 24A(2)*(i)*).

Because the consequences of a civil union correspond to those of a marriage (s 13 of the Civil Union Act 17 of 2006), the above amendments apply equally to pension sharing on the dissolution of a civil union of a member of the GEPF.

SUBORDINATE LEGISLATION

Regulation 5B of the regulations under the Marriage Act 25 of 1961 was substituted with effect from 1 April 2011 (GN R26 *GG* 334941 of 19 January 2011). This regulation deals with the forms and fees relating to the issuing of marriage certificates and letters of confirmation of marital status.

DRAFT LEGISLATION

Government Employees Pension Law Amendment Bill 15 of 2011

The explanatory summary of the draft Government Employees Pension Law Amendment Bill, 2011 was published in General Notice 417 *GG* 34391 of 24 June 2011. The draft Amendment Bill has since evolved into the Government Employees Pension Law Amendment Bill 15 of 2011 and the Government Employees Pension Law Amendment Act, which came into operation on 14 December 2011 (see above).

Draft Judicial Matters Amendment Bill, 2011

The explanatory summary of the draft Judicial Matters Amendment Bill, 2011 was published in May 2011 (General Notice 319

GG 34338 of 27 May 2011). The draft Bill concerns the amendment of various Acts, including the Maintenance Act 99 of 1998 ('the Act'). The amendments to the Act were previously contained in the draft Judicial Matters Amendment Bill, 2010, which was discussed in last year's *Survey*.

The 2011 draft Amendment Bill amends the provisions of the Act regarding the area of jurisdiction of a Maintenance Court, the circumstances in which maintenance orders may be granted by default, the transfer of maintenance orders, and the conversion of criminal proceedings into maintenance enquiries (cll 22, 23, 25, and 31, which amend ss 6, 18, 23 and 41 of the Act). It further increases the maximum penalties for certain offences and creates new offences under the Act (cll 26–30, which amend ss 31, 35, 38, and 39 of the Act and insert s 39A into it).

Clause 24 of the draft Amendment Bill clarifies the legal position regarding the effect of the amendment or discharge of an existing order of the High Court by a Maintenance Court. This clause substitutes section 22 of the Act. The substituted section provides that if a maintenance court makes a maintenance order in substitution or discharge of an existing maintenance order, the existing order ceases to be of force and effect only in so far as the maintenance court expressly, or by necessary implication, replaces the existing order or part of the existing order. The substituted section further obliges the maintenance officer forthwith to give notice of the decision to the registrar or clerk of the court where the maintenance order was issued. The registrar or clerk must amend the relevant record or register accordingly. If enacted, the substituted section 22 will reflect the interpretation the Supreme Court of Appeal adopted in *Cohen v Cohen* 2003 (3) SA 337 (SCA). In this case, it was held that if a maintenance court varies the amount of maintenance that is payable in terms of an existing order of the High Court and does not expressly or by necessary implication deal with other aspects of the existing order, those other aspects remain in force.

Draft Muslim Marriages Bill, 2011

At present, Muslim marriages receive recognition only for specific, limited purposes (see, for example, s 4*(q)* read with s 1 of the Estate Duty Act 45 of 1955; s 1 of the Domestic Violence Act 116 of 1998; s 1(1) of the Children's Act 38 of 2005; *Ryland v Edros* 1997 (2) SA 690 (C); *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Inter-*

vening) 1999 (4) SA 1319 (SCA); *Daniels v Campbell NO* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO* 2009 (5) SA 572 (CC); *AM v RM* 2010 (2) SA 223 (ECP); *Hoosein v Dangor* 2010 (4) BCLR 362 (WCC)). The Draft Muslim Marriages Bill, 2011 seeks to afford full legal recognition to certain Muslim marriages. The draft was published for public comment on 21 January 2011 (GN 37 *GG* 33946 of 21 January 2011). The gazetted draft Bill in many respects corresponds to the draft Bill attached to the South African Law Reform Commission's report on Islamic marriages, which was published in 2003 (South African Law Reform Commission *Project 106 Islamic Marriages and Related Matters Report* (2003)). That draft was fiercely criticized and led to bitter division in the Muslim community. Unsurprisingly, the gazetted draft Bill is also the subject of much controversy. As the current limited recognition of Muslim marriages is particularly disadvantageous to women, many feminists and gender empowerment bodies support legislative recognition of Muslim marriages even though some of them are critical of specific provisions of the draft Bill (see, for example, Linda Ensor 'Promise of Rights in Muslim Marriages' Business Day 17 January 2011, available at <http://www.businessday.co.za/Articles/Content.aspx?id=131656>, accessed 23 January 2012; Teneshia Naidoo 'Rift Looms over Muslim Marriage Bill' Sunday Times, 6 March 2011, available at <http://www.timeslive.co.za/sundaytimes/article949955.ece/Rift-looms-over-Muslim-marriage-bill?service>, accessed 23 January 2012). However, some Muslim bodies and individuals reject the draft as a whole on the grounds that *Shari'ah* law should trump constitutional equality claims and that adjudication of Muslim disputes should remain in the hands of Muslims (see, for example, Ensor <http://www.businessday.co.za/Articles/Content.aspx?id=131656>; Fatima Schroeder 'Legal Bid on Muslim Marriages' Independent Online, 3 March 2011, available at <http://www.iol.co.za/news/south-africa/legal-bid-on-muslim-marriages-1.1035844>, accessed 23 January 2012). Clearly, the contention that a system of religious law should prevail over the dictates of the Bill of Rights is without merit in view of the express provision in section 8(1) of the Constitution that '[t]he Bill of Rights applies to all law'. (See also section 15(3)*(a)* and *(b)* of the Constitution, which provides that legislative recognition of marriages concluded under any tradition, or system of religious, personal or family law, or of religious systems of personal and family law must be consistent with the right to freedom of conscience, religion, thought, belief and

opinion and the other provisions of the Constitution.) Six of the seven bodies that make up the United Ulama Council of South Africa (the national umbrella body of Muslim religious authorities) have adopted the view that total rejection of the gazetted draft Bill is unwise. They have prepared comments on the clauses which violate *Shari'ah* law and have indicated that '[i]f the final draft contains *fundamental provisions* that are un-Islamic' they will review their position (United Ulama Council of South Africa *Muslim Marriages Bill. Frequently Asked Questions Answered* (UUCSA 2011) 8, original emphasis). The seventh member, the Jamiatal Ulama of KwaZulu-Natal, advocates total rejection of the draft Bill (United Ulama Council of South Africa *Muslim Marriages Bill* i). As the legislation is still only in draft form and because it will in all probability be amended before becoming a Bill, its provisions will not be discussed in this year's *Survey*. (On the gazetted draft Bill, see Pieter Bakker 'Traditional Muslim family law and the compatibility of the proposed Muslim marriage legislation with Shari'ah' (2010) 24(2) *Speculum Juris* 66; H Sader 'The Muslim Marriages Bill' October 2011 *De Rebus* 50. For a historical overview of the process up to the publication of the draft Bill, and the reception of the draft Bill by the Muslim community, see Najma Moosa *Unveiling the Mind — The Legal Position of Women in Islam — A South African Context* 2 ed (2011) 154–60.)

CASE LAW

Accrual System

Radebe and Another v Sosibo NO and Others 2011 (5) SA 51 (GSJ) deals partly with family law and partly with the law of succession. The discussion below focuses on the family-law issues that arose in the case.

Mr and Mrs Sosibo married out of community of property subject to the accrual system on 11 November 2006. Mrs Sosibo died a few weeks later without leaving a will. A dispute arose whether a house she owned was to be inherited by her husband or her parents. Mr and Mrs Sosibo's antenuptial contract excluded the house from the accrual system but did not otherwise deal with it. Mr Sosibo contended that he was the intestate beneficiary of all of his deceased wife's property, including the house, while Mrs Sosibo's parents contended that their daughter's intention in excluding the house from the accrual system was

to prevent it from devolving on her husband on her death. They also contended that, during her lifetime, their deceased daughter had told her sister that she wanted the house to pass to them and had told them that she wanted them to become the owners of the house after her death. The trial court held that Mr Sosibo was the intestate heir of his deceased wife's entire estate, including the house. Mrs Sosibo's parents appealed to the full bench. On appeal, they argued that their daughter did not die wholly intestate as the exclusion clause in the antenuptial contract was a testamentary disposition which entailed that the house would not devolve on Mr Sosibo, and that the exclusion clause proved that their daughter had either donated or bequeathed the house to them.

Satchwell J delivered the decision of the full bench. She began by pointing out that the first step on dissolution of a marriage that is subject to the accrual system is to calculate the accrual in each spouse's estate. Once such calculation has been done for each estate, the accrual of the two estates is compared to determine which estate shows the smaller accrual. The spouse whose estate shows the smaller accrual has a right to claim half the difference between the two accruals (paras [14]–[15]; see also s 3(1) of the Matrimonial Property Act 88 of 1984). It is only once the accrual claim has been satisfied that succession comes into play (paras [17] and [18]; see also s 4(2) of the Matrimonial Property Act).

Satchwell J then considered whether the exclusion clause in the antenuptial contract amounted to a testamentary disposition. She pointed out that an antenuptial contract may include a testamentary disposition (*pactum successorium*) (para [32]). She correctly concluded that the exclusion clause in the Sosibos' antenuptial contract was not a *pactum successorium*; it simply excluded an asset from the accrual system for purposes of calculating the accrual in Mrs Sosibo's estate (paras [33] and [51]). Accordingly, Mrs Sosibo had died wholly intestate (paras [35]–[36]). Satchwell J also rejected the contention that Mrs Sosibo's parents had acquired the house as a result of an *inter vivos* bequest or a *donatio mortis causa* (paras [38]–[44]). The appeal was, accordingly, dismissed (para [56]).

In so far as the applicable family-law principles are concerned, the decision is uncontentious. The aspects of the decision relating to the law of succession are discussed in the chapter on The Law of Succession and Trusts.

Children

Abduction

Central Authority of the Republic of South Africa and Another v LG 2011 (2) SA 386 (GNP) and *Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP) concern applications for the return of children who had been removed to South Africa, allegedly in contravention of the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'), which is part of South African law (s 275 of the Children's Act ('the Act')). In terms of the Convention, the court in the contracting state to which a child has been wrongfully removed, or in which a child is wrongfully retained is normally compelled to order the child's immediate return to the state in which the child was habitually resident before the unlawful removal or retention. The court may, however, refuse to order the child's return if a defence (exception) to the mandatory return of the child is proved. The onus of proof, which must be discharged on a balance of probabilities, is borne by the person who relies on the defence (*Smith v Smith* 2001 (3) SA 845 (SCA); *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA); *Senior Family Advocate, Cape Town and Another v Houtman* 2004 (6) SA 274 (C); *Central Authority v H* 2008 (1) SA 49 (SCA); *Family Advocate, Cape Town and Another v EM* 2009 (5) SA 420 (C)).

In *LG*, the child's mother had brought the child to South Africa from the United Kingdom with the permission of the child's father to attend a family wedding. The mother and child never returned to the United Kingdom. The first issue that arose for decision was whether the child had been wrongfully removed from his habitual residence, as is required by article 3 of the Convention. The child's mother argued that the removal was not unlawful as she and her husband (the child's father) had agreed to separate permanently before she and the child returned to South Africa and that they had also agreed that she would return to South Africa with the child. In contrast, her husband alleged that he did not agree to a permanent separation before his wife and child left the United Kingdom; all he agreed to was that she and the child could come to South Africa for the wedding and stay in the country for up to six months.

The child's mother further argued that, even if the child's removal was wrongful, the defences in article 13*(a)* and *(b)* of the

Convention applied and that the court should not order the child's return. These defences provide that the court need not order the return of a child who has been wrongfully removed or is being unlawfully retained if *(a)* the person, body or institution that has rights of custody in respect of the child (the child's father, in this case) 'was not actually exercising . . . custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention'; or *(b)* 'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. In support of the mother's contention that these defences applied, she alleged that the child's father was never the child's primary caregiver; had never cared for the child (who was some sixteen months old when she brought him to South Africa) and would not be able to do so; had no emotional bond with the child; had given the child very little attention; and refused to pay maintenance for the child.

On the evidence, the court concluded that the child's parents had indeed agreed to separate before the mother and child had left the United Kingdom and that the father had also agreed to the child living in South Africa with his mother on a permanent basis (at 393–4). Thus, the child's removal did not contravene article 3 of the Convention. After the mother and child arrived in South Africa, the parents agreed to divorce and also agreed that the child would be in his mother's care after the divorce (at 394B). Therefore, even if the child's removal were unlawful, the father subsequently consented to the child's staying in South Africa. Consequently, the mother had proved the defence in article 13*(a)*. The court further held that the mother had proved that the minor would be exposed to grave risk of harm if he were to be returned to the United Kingdom (at 394J). Accordingly, the defence in article 13*(b)* had also been proven.

The court exercised its discretion in favour of the mother and dismissed the application for the child's return (at 395B–C)). It further chastized the Family Advocate for not being objective and for sympathizing with the father's alleged 'extreme stress and anxiety' resulting from the child's retention in South Africa even though he had been separated from the child for various periods before the retention and, even on his own version of the facts, had consented to his wife's bringing the child to South Africa for a period as long as six months (at 394F–G). (For examples of other cases in which courts have emphasized the duty of the Family

Advocate to refrain from bias and to make balanced recommendations, see *Whitehead v Whitehead* 1993 (3) SA 72 (SEC); *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC).)

In *MR*, the maternal grandmother of a seven-year-old girl refused to return the child to her father in the United States after the child came to South Africa to visit her grandmother with her father's consent. The child's mother had died approximately two years before. While the child's mother was alive, the child had lived with her in South Africa. After her mother's death, her father had taken her to Belgium to live with him in that country. She and her father were domiciled and officially resident in Belgium. Her father worked throughout the world, but while the child was living with him, he worked mainly in Europe and the United States. When the child came to South Africa to visit her grandmother, she and her father and his wife were living in Los Angeles in the United States of America and she was attending a school there. At the time, they had been living in Los Angeles for approximately a year. After the child's retention in South Africa, her father sought her return to the United States. The child's grandmother resisted the child's return, firstly, on the ground that the child was not habitually resident in the United States, with the result that the court could not make the order sought. She secondly argued that, even if the court were to find that the child was habitually resident in Los Angeles, it should not order the child's return because there was a grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation; in other words, the grandmother invoked the defence in article 13*(b)* of the Convention. In separate proceedings, the grandmother also sought an order awarding full parental responsibilities and rights of the child to her.

As regards the issue of 'habitual residence', Fabricius J pointed out that the concept is not defined in the Convention. Citing *Senior Family Advocate, Cape Town and Another v Houtman* (supra), he stated that the question of a child's habitual residence must be determined in view of all the circumstances of the case. He held that the word 'habitual' implies 'a stable territorial link, which may be achieved through length of stay, or through evidence of a particularly close tie between the person and the place' (para [20]). Without referring to any specific judgment, he further stated that a number of foreign decisions have established that some degree of settled purpose or intention to live at a particular place is required to establish habitual

residence (ibid). On the evidence (especially the evidence regarding the child's domicile), Fabricius J concluded that the child's residence in Los Angeles was 'at best, of a temporary nature' and that the child and her father did not have a particularly close tie with either Los Angeles or the United States in general (para [21]). He accordingly held that there was insufficient evidence to prove that the child was habitually resident in the United States immediately before any breach of custody or access rights occurred. As the child was not habitually resident in the United States, the court could not order the child's return to that country. Accordingly, the application had to be dismissed (para [22]).

Even though this could have been the end of the matter, Fabricius J offered additional reasons why the application for the child's return should be refused. He emphasized the child's right to participate and the paramountcy of the child's interests as embodied in the Constitution, the Act and the Convention. He first cited the part of article 13 of the Convention that empowers the court to refuse to order the child's return if the child 'objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views' (para [25]). He then pointed out that this part of article 13 finds resonance in section 278(3) of the Act, which provides that the court must afford the child whose return is being sought 'the opportunity to raise an objection to being returned' and that the court must 'give due weight to that objection, taking into account the age and maturity of the child' (para [26]). Further, section 10 of the Act affords every child who is of an age, maturity and stage of development to be able to do so, the right to participate in an appropriate way in any matter concerning him or her, and due consideration must be given to the child's views (para [26.4]). Fabricius J further cited section 2*(b)*(iv) of the Act, which provides that one of the objects of the Act is to render the best interests of the child of paramount importance in every matter concerning the child, and he pointed out that the same obligation is entrenched in section 28(2) of the Constitution. He also referred to section 6(2)*(a)* of the Act, which requires that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights in the Constitution, the best interests of the child standard set out in section 7 of the Act, and the rights and principles set out in the Act, subject to any lawful limitation. Also, section 6(5)

provides that, having regard to his or her age, maturity and stage of development, the child must be informed of any action or decision taken in a matter concerning him or her, if the matter significantly affects the child (paras [26.1] and [26.2]). He concluded that, since section 275 of the Act provides that the Convention applies in South Africa 'subject to the provisions of this Act', the court had to take all the provisions and considerations regarding the child's best interests and the child's right to object to being returned into account when considering an application under the Convention. Furthermore, the Convention is subject to the Constitution, which entrenches the paramountcy of the child's best interests (para [26.3]; see also para [13]).

In view of the above provisions and the evidence in this case, Fabricius J concluded that the child's best interests also required that the application for the child's return be dismissed (paras [28] and [29]). He specifically pointed out that the child had stated that her home was in the town where her grandmother lived; she had more experience of life in the extended family and scholastic environment in South Africa; she had settled into life in South Africa and seemed to be well adjusted and stable; she has an ambivalent attitude towards her father and his way of life; she has had less contact with her father than is generally desirable; and she would, in the context of the present proceedings, generally be better off in South Africa with her grandmother until the court decided the grandmother's application for parental responsibilities and rights (paras [21] and [28.1]–[28.7]). The application for the child's return was, accordingly, dismissed (para [30]).

Although Fabricius J's decision not to order the child's return pending decision of the grandmother's application for full parental responsibilities and rights is understandable in view of his emphasis on the child's best interests, his first ground for dismissing the application for the child's return is open to criticism or, at the very least, to some reservation. In deciding that the child was not habitually resident in the United States of America he seems to have placed an inordinate amount of emphasis on the issue of where the child and her father were domiciled. Even though it is likely that most people are habitually resident where they are domiciled, habitual residence and domicile remain two different concepts in so far as applications under the Convention are concerned.

Acquisition of parental responsibilities and rights

FS v JJ and Another 2011 (3) SA 126 (SCA) relates to a dispute between an unmarried father and relatives of the child's mother

regarding the acquisition of parental responsibilities and rights by the father. The case is discussed in the chapter on The Law of Persons.

The decision in *M v V (born N)* [2011] JOL 27045 (WCC) concerns the issue of whether an unmarried biological father who was acknowledged as the child's father and who performed his parental responsibilities and rights towards his child can be excluded as the child's parent because of the mother's allegation, nearly a decade after the child's birth, that he had raped her. It also deals with the question whether an unwilling parent can be compelled to enter into a parenting plan. The case is discussed in the chapter on The Law of Persons. The judgment regarding the main relief sought by the applicant (*MM v AV* unreported, [2011] ZAWCHC 425 (16 November 2011)) is also discussed in the chapter on The Law of Persons.

Care/custody and contact/access

WW v EW 2011 (6) SA 53 (KZP) (also reported using the full surname of the parties: *Wheeler v Wheeler and Other Cases* [2011] 2 All SA 459 (KZP)) is primarily a decision about terminology. The decision relates to several unopposed divorces that had already been granted. Rall AJ had reserved judgment on the wording of parts of the orders relating to the divorcing couples' children because he was concerned about the terminology that should be used in formulating the orders now that the Children's Act ('the Act') has come into operation. (The first batch of sections of the Act came into operation on 1 July 2007: Proc 13 *GG* 30030 of 29 June 2007. The remaining sections came into operation on 1 April 2010: Proc R12 *GG* 33076 of 1 April 2010.)

Rall AJ pointed out that the Act does not use the term 'parental authority'. Instead, it uses the term 'parental responsibilities and rights'. In terms of the Act, parental responsibilities and rights include the responsibility and right to care for the child, maintain contact with the child, act as guardian of the child and contribute to the child's maintenance (s 18(2)). The parental responsibility and right of 'care' is defined as:

> 'where appropriate —
> *(a)* within available means, providing the child with —
> (i) a suitable place to live;
> (ii) living conditions that are conducive to the child's health, well-being and development; and
> (iii) the necessary financial support;

(b) safeguarding and promoting the well-being of the child;
(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act [that is, the Children's Act];
(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
(g) guiding the behaviour of the child in a humane manner;
(h) maintaining a sound relationship with the child;
(i) accommodating any special needs that the child may have; and
(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child' (s 1(1)).

'Contact' is defined as:
'*(a)* maintaining a personal relationship with the child; and
(b) if the child lives with someone else —
(i) communication on a regular basis with the child in person, including —
(aa) visiting the child; or
(bb) being visited by the child; or
(ii) communication on a regular basis with the child in any other manner, including —
(aa) through the post; or
(bb) by telephone or any other form of electronic communication' (ibid).

Rall AJ pointed out that the Act does not abolish the terms 'custody' and 'access', which are used at common law (paras [15], [22], and [25]). Instead, it provides that '[i]n addition to the meaning assigned to the terms ''custody'' and ''access'' in any law, and the common law, the terms ''custody'' and ''access'' must be construed to also mean ''care'' and ''contact'' as defined in this Act' (s 1(2)). He stated that the common-law term 'custody' broadly corresponds to the statutory term 'care' and the common-law term 'access' broadly corresponds to the statutory term 'contact' (paras [19] and [21]). However, the statutory concepts are wider than the common-law concepts. For example, 'maintaining a sound relationship with the child' was not traditionally part of 'custody', while it is part of 'care' (para [21]).

Rall AJ also stated that 'accommodating the special needs that the child may have' (para (i) of the definition of 'care') was not traditionally part of 'custody', but this view is incorrect. The common-law concept 'custody' refers to a person's capacity physically to have the child with him or her and to control and supervise the child's daily life. Clearly, such supervision must accommodate any special needs the child might have. The same applies to the court's statement that paragraph *(a)* of the definition of 'contact' was not traditionally part of 'access'. This paragraph refers to maintaining a personal relationship with the child, which is encompassed in the essence of the common-law concept 'access'. Further, Rall AJ neglected to mention what is probably the most striking difference between 'custody' and 'care' — 'care' includes the duty of support (para *(a)*(iii)), while, at common law, the duty of support exists independently of custody or any other element of parental authority (see, for example, Brigitte Clark 'Duties of Support of Living Persons' in Belinda van Heerden, Alfred Cockrell & Raylene Keightley (general eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 240; Jacqueline Heaton *South African Family Law* 3 ed (2010) 169n39; Ann Skelton & Marita Carnelley (eds) *Family Law in South Africa* (2010) 243; Erwin Spiro *Law of Parent and Child* 4 ed (1985) 385).

Rall AJ held that, since 'most of the elements of custody and access are shared by care and contact respectively, . . . the Legislature in a rather clumsy way has equated custody and access to care and contact respectively' (para [26]). Thus, 'custody' and 'care' can be used interchangeably, and the same applies to 'access' and 'contact'. However, Rall AJ stated, it is best to use the statutory terminology in pleadings and court orders as this will avoid confusion (para [28]). He then referred to the practice in the Durban High Court of referring to 'care and custody' and rejected it as amounting to tautology, which should be avoided (paras [29] and [30]).

The responsibility and right to have one's child live with one on a day-to-day basis is sometimes described with reference to the terms 'primary caregiver' and 'primary residence' (para [32]). Rall AJ held that 'primary caregiver' and 'primary residence' should be used only if 'a qualified joint custody' order is to be made; in other words, if the child is to reside with one parent while both parents are to retain the remaining elements of parental responsibilities and rights (para [33]). He indicated that 'joint custody' is the same as having full parental responsibilities and rights under

the Act (para [33]). However, this view attaches an overbroad interpretation to joint custody in the sense that it equates joint custody with guardianship, care, contact and maintenance all joined together. This interpretation deviates from the common-law interpretation of joint custody. At common law, joint custody has two meanings — joint legal custody and joint physical custody. Joint legal custody is limited to joint decision-making about important issues, such as whether an operation should be performed on the child, where the child should be educated, and in which language and religion the child should be brought up. The child usually resides with only one parent, and decisions which are taken on a day-to-day basis are left to that parent. In contrast, joint physical custody entails that the child spends substantial amounts of time, such as alternate weeks, with each parent. In view of Rall AJ's earlier statement that 'custody' and 'care' are more or less the same and that 'custody' and 'care' can be used interchangeably (subject to the proviso that keeping to the terminology used in the Act will avoid confusion), it is unclear why he chose to equate joint custody with full parental responsibilities and rights rather than using the term 'joint care' for joint custody. He could have referred to joint physical custody as 'joint residency' and joint legal custody as 'joint legal care', or perhaps even just 'joint care'. (On the distinction between joint legal custody/care and joint physical custody/care (joint residency), see further *Krugel v Krugel* 2003 (6) SA 220 (T); Belinda van Heerden 'Judicial Interference with Parental Power' in Belinda van Heerden, Alfred Cockrell & Raylene Keightley (general eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 551–2.)

Rall AJ proceeded to state that if primary residence or the status of primary caregiver is awarded to a parent, the child spends more time with that parent. However, that parent is not in the same position as a custodial parent is at common law, because the other parent 'would have an equal say, except that for practical purposes the primary caregiver would play a greater role in caring for the child' (para [33]). It seems that this statement signifies that making an award of primary residence or making an order that one parent is to be the child's primary caregiver, is the same as awarding common-law joint legal custody to the child's parents.

Rall AJ concluded that if one parent is to have what is called 'custody' at common law, while the other parent is to have what is called 'access' at common law, the court should make an order

that both parents will have full parental responsibilities and rights but that the child 'shall reside with' a particular parent and that the specified parent will have 'the responsibility and right to care for' the child, while the other parent will have 'the responsibility and right to maintain contact with' the child. He formulated the orders in the unopposed divorces accordingly (paras [35]–[43]).

A final comment regarding the terminology Rall AJ employed in respect of care relates to the term 'caregiver', for instance, as used in the sense of one parent being appointed the child's 'primary caregiver'. The Act ascribes a particular meaning to the term 'care-giver', which excludes a parent and guardian. In terms of section 1(1), a 'caregiver' is:

> 'any person *other than a parent or guardian*, who factually cares for a child and includes —
> *(a)* a foster parent;
> *(b)* a person who cares for a child with the implied or express consent of a parent or guardian of the child;
> *(c)* a person who cares for a child whilst the child is in temporary safe care;
> *(d)* the person at the head of a child and youth care centre where a child has been placed;
> *(e)* the person at the head of a shelter;
> *(f)* a child and youth care worker who cares for a child who is without appropriate family care in the community; and
> *(g)* the child at the head of a child-headed household' (emphasis added).

In view of this definition, the term 'caregiver' should be used with circumspection and ought to be avoided in the context of parents and guardians. For this reason, the terms 'care-giving parent' and 'non-care-giving parent' may be preferable.

Child in need of care and protection

In *Chirindza and Another v Gauteng Department of Health and Social Welfare and Others* [2011] 3 All SA 625 (GNP), the facts were that social workers of the Gauteng Department of Social Development removed the children of C, a shoe repairer, and B, a blind beggar, from C and B at an intersection in Pretoria without a court order sanctioning the children's removal. C plied his trade at the intersection every day. On the particular day, his three-year-old daughter was with him because her mother, who usually looked after the child, was in hospital. B's children, aged one and four years, and an assistant were with her while she begged. The removal of the children took place during a raid by the provincial

Department of Social Development and city officials on people who have children with or near them whilst begging. The raid had been planned in advance and parents and the media had been advised that it would be taking place. However, the social workers never sought court orders authorizing the children's removal to a place of safety in terms of section 151 of the Children's Act. Instead, they used the emergency procedure provided for in section 152(1) of the Act. This section permits removal of a child to temporary safe care by a social worker or police official without a court order if there are reasonable grounds for believing that the child is in need of care and protection and needs immediate emergency protection; that the delay caused by obtaining a court order authorizing the removal of the child and his or her placement in temporary safe care may jeopardize the child's safety and well-being; and that removal of the child is the best way to secure his or her safety and well-being.

With the assistance of Lawyers for Human Rights, C and B approached the High Court for relief. Firstly, on an urgent basis, the court made an order that C's child be returned to him and the child's mother immediately, and that B's children remain at the place of safety where they were being looked after for five weeks while an investigation was undertaken into whether they were in need of care and protection. The Children's Court subsequently made an order returning B's children to her care and that of their father, under supervision of a social worker.

The second part of the application by C and B, which was heard later, related to the constitutionality of sections 151 and 152 of the Act. C and B contended that these sections were unconstitutional to the extent that they fail to provide for judicial review of the placement of a child in temporary safe care by social workers or the police and that they should be declared invalid to the extent of their unconstitutionality. The respondents did not oppose the relief sought. A draft order was agreed on and submitted to the court. Fabricius J made the draft an order of court and gave reasons for doing so.

He referred to section 28(1)*(b)* and (2) of the Constitution, which grants the child a right to family or parental care and provides that the child's best interests are the paramount consideration, and to article 9 of the United Nations Convention on the Rights of the Child and article 19 of the African Charter on the Rights and Welfare of the Child, which protect the child's rights to

parental care and not to be separated from his or her parents unless separation is in his or her best interests and is subject to judicial review (para [5]). Unjustified removal of a child violates these rights as well as the right to privacy contained in section 12 of the Constitution, and traumatizes the child who is removed (paras [6], [11] and [13]).

Fabricius J pointed out that, unlike their predecessor (s 12 of the Child Care Act 74 of 1983), sections 151 and 152 do not provide for automatic judicial review of removal of children from their parents (para [12]). In terms of the Children's Act, a social worker has 90 days after the removal of the child to complete an investigation into whether the child is in need of care and protection (para [12]). It is only at that point that the child comes before the court. The Act does not require any judicial oversight during the 90-day period and does not provide an opportunity to a parent whose child has been removed to oppose the removal and show reasons why the removal was not justified (para [13]). Accordingly, as Jacqui Gallinetti ('The wisdom of Solomon: Removal of children as part of the child protection system in the Children's Act 38 of 2005' (2009) 23 (2) *Speculum Juris* 54 at 65) has indicated, the Act does not provide adequate protective mechanisms to ensure that the very drastic interference with the child's right to parental care that is caused by the child's removal is not arbitrary (para [13]).

Fabricius J consequently declared sections 151 and 152 unconstitutional to the extent that they fail to provide for a child who has been removed in terms of these sections and placed in temporary safe care to be brought before the Children's Court for a review of the placement in temporary safe care (para [17]). He further, by agreement between the parties, regulated the position pending confirmation of the order of invalidity by the Constitutional Court by making a reading-in order in respect of sections 151(7), 152(3)*(b)* and 152(7) of the Children's Act. The reading-in order has the effect of obliging the person who removed the child to place the matter before the Children's Court within 48 hours after the removal; to give notice of the date and time of the review to the child's parent, guardian or caregiver; and to cause the child to be present at the review proceedings where practicable. Further, if a police official removed the child, he or she must, without delay and within 24 hours, refer the matter to a social worker who must place the matter before the Children's Court for review.

The declaration of unconstitutionality was confirmed by the Constitutional Court in 2012, but the order Fabricius J made was set aside because it contained technical errors, was incomplete and unnecessarily included a reading-in order in respect of section 155 of the Act (*C and Others v Department of Health and Social Welfare, Gauteng and Others* unreported, [2012] ZACC 1, 11 January 2012). The decision of the Constitutional Court will be discussed in next year's *Survey*.

Children's rights

In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), the Constitutional Court set out the guidelines to be followed when a court has to decide whether or not to impose a custodial sentence on a primary care-giving parent. In *MS v S (Centre for Child Law as Amicus Curiae*) 2011 (2) SACR 88 (CC), the Constitutional Court again dealt with the propriety of the imposition of a custodial sentence on the primary caretaker of children. The court distinguished the facts of this case from those in *S v M* inter alia because the mother in *S v M* was a single parent who was almost exclusively responsible for the children's care, while the mother in *MS v S* did not bear sole responsibility for the children's care. It concluded that sentencing the mother in *MS v S* to incarceration would not inappropriately compromise the children's best interests because she was not the children's sole care-giving parent. Their father could care for the children, albeit with some difficulty and inconvenience (paras [62]–[63]).

S v Londe 2011 (1) SACR 377 (ECG) also deals with the imposition of a custodial sentence on a primary care-giving parent. In this case, no investigation had been made into the effect that incarceration of the accused would have on the interests of her children. On review, the Eastern Cape High Court confirmed the mother's conviction of assault with intent to do grievous bodily harm. However, it set her custodial sentence aside and ordered the magistrate's court to obtain pre-sentence and correctional supervision reports that considered the children's interests, to consider those reports, and to reconsider an appropriate sentence for their mother. *MS v S (Centre for Child Law as Amicus Curiae*) and *Londe* are discussed in more detail in the chapters on Criminal Procedure and Bill of Rights Jurisprudence.

Foster care

In terms of section 314 of the Children's Act ('the Act'), anything done in terms of a law repealed by the Act which can be done in

terms of the Act, 'must be regarded as having been done in terms of that provision of this Act'. Section 313 read with Schedule 4 of the Act repealed the whole of the Child Care Act. Prior to its repeal, the Child Care Act regulated foster care orders and their renewal. Now, foster care orders and their renewal are regulated by the Children's Act. Thus, by virtue of section 314 of the Act, any foster care order made in terms of the Child Care Act must be regarded as having been made in terms of the Children's Act. Consequently, applications for renewals of foster care orders made under the Child Care Act must be made in terms of the process provided for by the Children's Act.

In terms of section 159(1) of the Act, a foster care order generally endures for a maximum period of two years. Before the order expires, it may be extended by the Children's Court for not more than two years at a time. If the order is to be extended, an application for its renewal, accompanied by a report by a social worker, must be made to the Children's Court (s 159(1)*(b)* read with s 155). If the application is not granted before the order expires, the order obviously comes to an end and the foster parent loses his or her entitlement to receive a foster child grant for the child. In terms of the Child Care Act, the procedure for renewal of foster care was purely administrative and did not require the intervention of the court.

As a result of the changed procedure under the Children's Act, the shortage of social workers, and the increased case load of the Children's Courts, many foster care orders expired because the applications for renewal could not be processed and/or renewal orders could not be made in time (Reply by the Minister of Social Development in the National Assembly to Question 1244/2011 raised by H Lamoela in 'Internal Question Paper 11' available at <http://www.pmg.org.za/node/28542>, accessed 24 January 2012; 'Children at risk as grants are delayed' Times Live, 13 March 2011, available at <http://m.timeslive.co.za/?i=3692/0/0&artId=4143334&showonly=1>, accessed 27 October 2011). The South African Social Security Agency nevertheless continued paying foster child grants to the foster parents of the children whose foster care orders had lapsed (Reply by the Minister of Social Development to Question 1244/2011 <http://www.pmg.org.za/node/28542>). However, the Agency could not continue making such payments indefinitely without the renewal of the foster care orders on which the payments were based.

On 10 May 2011, the Centre for Child Law obtained an order from the North Gauteng High Court against the Minister of Social

Development, the South African Social Security Agency, and the Members of the Executive Committees for Social Development in all the provinces of the country. The order deemed the lapsed foster care orders not to have expired and extended all foster care orders which had expired since 1 April 2009 by two years. It further ordered that, despite section 314 of the Act, the administrative procedure for the renewal of foster care provided for by the Child Care Act must be used to process renewals until the end of 2014 or until the Children's Act is amended to provide a more comprehensive legal solution to the problem, whichever happens first. The court's order was published in Government Notice 441 *GG* 34303 of 20 May 2011. The order was subsequently refined and re-cast by the court to exclude foster care orders which had expired as a result of the foster child's attaining the age of majority. The revised order was published in Government Notice 585 *GG* 34472 of 19 July 2011.

Guardianship

Ex parte Sibisi 2011 (1) SA 192 (KZP) concerns an application by a grandmother for an order awarding full, sole parental responsibilities and rights in respect of her nine-year-old orphaned grandson to her. When the matter came before a single judge in the High Court, the judge referred the matter to the children's court, apparently on the ground that that court was the appropriate forum to deal with issues relating to guardianship of minors. The presiding officer in the children's court submitted that the children's court does not have jurisdiction to hear matters relating to guardianship. Because of the importance of the subject-matter and the conflicting views on the jurisdiction of the children's court in matters concerning guardianship, the application ended up before a full bench of the High Court. The State Attorney submitted that only the High Court may hear matters relating to guardianship, while the applicant's representative submitted that the children's court and the High Court have concurrent jurisdiction in such matters.

Delivering the judgment of the full bench, Swain J (Mnguni and Pillay JJ concurring) indicated that the uncertainty is created by section 29(1) of the Children's Act (para [7]). This section reads as follows:

> 'An application in terms of section 22(4)*(b)*, 23, 24, 26(1)*(b)* or 28 may be brought before the High Court, a divorce court in a divorce matter

or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.'

Section 22(4)*(b)* deals with parental responsibilities and rights agreements. It provides that such an agreement takes effect only if it is registered with the Family Advocate or 'made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement'. Section 23 regulates applications for assignment of contact and care to a person having an interest in the care, well-being or development of a child. In terms of section 23(1), such applications are to be brought in 'the High Court, a divorce court in divorce matters or the children's court'. Section 24 specifically deals with applications for the assignment of guardianship to a person having an interest in the care, well-being or development of a child. In terms of section 24(1), such applications must be brought in the High Court. Section 26 deals with paternity claims. Section 26(1)*(b)* provides that a man who is not married to a child's mother and who is or claims to be the child's biological father may in certain circumstances apply to 'a court' for an order confirming his paternity. Section 28 governs termination, extension, suspension or restriction of parental responsibilities and rights on application to 'the High Court, a divorce court in a divorce matter or a children's court'.

The full bench held that when the distinction between the applications the various sections provide for is borne in mind, it becomes clear that section 29 does not confer jurisdiction on the children's court to hear a matter relating to guardianship. The full bench pointed out that section 29 refers to proceedings being brought in the various courts 'as the case may be'. The section thus does not extend jurisdiction to all the courts that are mentioned; it merely deals with the territorial jurisdiction of those courts and restricts such jurisdiction to the court 'in whose area of jurisdiction the child concerned is ordinarily resident' (para [10]). The full bench held that section 45(3)*(a)* places this conclusion beyond doubt. It provides that 'the High Courts and Divorce Courts have exclusive jurisdiction over . . . the guardianship of a child' (para [11]). This section makes it clear that the children's court does not have jurisdiction to hear a matter relating to guardianship (para [12]; see also Jacqueline Heaton 'Parental Responsibilities and Rights' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 3-18–3-19). The court exercised its powers in favour of the applicant, and granted her

sole, full parental responsibilities and rights in respect of her grandchild (paras [15] and [17]).

Although the full bench was correct in holding that section 45(3)*(a)* makes it clear that the children's court does not have jurisdiction to hear a matter relating to guardianship, one may ask whether it is appropriate that jurisdiction to make orders for guardianship is restricted to High Courts. Firstly, obtaining an order in the High Court is usually more expensive and time-consuming than approaching the children's court. Secondly, it seems strange and illogical to afford children's courts the power to make adoption orders, which terminate all existing parental responsibilities and rights (including guardianship) and vest parental responsibilities and rights in the adoptive parents (s 242), but to deny the children's court the power to make orders relating solely to guardianship.

Finally, in an *obiter dictum* the full bench suggested that, despite the provisions of section 45(3), the jurisdiction of divorce courts to determine issues pertaining to the guardianship of a child is unclear, because section 22(7) of the Act provides that only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to guardianship and section 24 provides that assignment of guardianship may only be ordered by the High Court. Furthermore, section 45(4) provides that the Act does not limit the inherent jurisdiction of the High Court as upper guardian of all minors (para [13]). The full bench accordingly opined that intervention by the legislature may be necessary to clarify the jurisdiction of courts other than the High Court to determine the guardianship of children (para [14]). The issue of the jurisdiction of the divorce courts to make orders relating to guardianship has become largely academic, since these courts have been replaced by the regional divisions of the magistrates' courts, which have the same jurisdiction as the High Court in respect of divorce and nullity cases, cases relating to customary marriages, and matters arising from such cases (s 29(1B)*(a)* and *(b)* of the Magistrates' Courts Act 32 of 1944 as inserted by s 7 of the Jurisdiction of Regional Courts Amendment Act 31 of 2008; the insertion came into operation on 9 August 2010: Proc R41 in *GG* 33448 of 6 August 2010). As the regional courts have the same jurisdiction as the High Courts in respect of the abovementioned matters, they clearly have jurisdiction to make orders relating to guardianship in such matters.

Joint exercising of parental responsibilities and rights

The decision in *M v V (born N)* (supra), which is mentioned above in respect of acquisition of parental responsibilities and rights by unmarried parents, also deals with the joint exercising of parental responsibilities and rights and the question whether an unwilling parent can be compelled to enter into a parenting plan. The case is discussed in the chapter on The Law of Persons.

Maintenance

In so far as child maintenance is concerned, see the discussion of *GF v SH and Others* 2011 (3) SA 25 (GNP) below.

Surrogate motherhood

Until 1 April 2010, surrogate motherhood was unregulated in South Africa. Now, Chapter 19 of the Children's Act ('the Act') sets strict requirements for altruistic surrogacy and prohibits commercial surrogacy. It inter alia provides that the parties must enter into a written surrogate motherhood agreement and that the agreement is valid only if it is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident (s 292(1)*(a)* and *(e)*). (The commissioning parent is the person who enters into a surrogate motherhood agreement with the surrogate mother with the objective that the surrogate mother will be artificially fertilized and will bear a child for him or her: definition of 'commissioning parent' read with the definition of 'surrogate motherhood agreement' in s 1(1) of the Act.) The surrogate mother may not be artificially fertilized until the agreement has been confirmed (ss 296(1)*(a)* and 303(1)).

The court may confirm the agreement only if, in the first instance, the commissioning parent or parents are unable to give birth to a child due to a permanent and irreversible condition (s 295*(a)*). Secondly, the court must be satisfied that the commissioning parent(s) are competent to enter into the surrogate motherhood agreement; are in all respects suitable to accept parenthood of the child who is to be conceived; and understand and accept the legal consequences of the surrogate motherhood agreement and the Act and their rights and obligations in terms of the agreement and the Act (s 295*(b)*). Thirdly, the surrogate mother must be competent to enter into the agreement; in all respects be a suitable person to act as surrogate mother;

understand and accept the legal consequences of the agreement and the Act and her rights and obligations in terms of the agreement and the Act; not use surrogacy as a source of income; have entered into the agreement for altruistic reasons and not for commercial purposes; have a documented history of at least one pregnancy and viable delivery; and have a living child of her own (s 295*(c)*). Fourthly, the agreement must include adequate provisions for the contact, care, upbringing and general welfare of the child in a stable home environment, including provisions on the child's position if the commissioning parents or one of them were to die, or if they were to divorce or separate before the child's birth (s 295*(d)*). Fifthly, the court must be satisfied that, in view of the personal circumstances and family situations of all the parties and, above all, the interests of the child who is to be born, the agreement should be confirmed (s 295*(e)*).

Because the statutory provisions on surrogate motherhood are relatively new and the regulations under the Act do not contain details on how applications for confirmation of a surrogate motherhood agreement are to be dealt with, applicants have had to contend with a great deal of uncertainty on the information the court might require before it would be prepared to confirm a surrogate motherhood agreement. In *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ) and *Ex parte WH and Others* 2011 (6) SA 514 (GNP) this uncertainty was addressed by the Gauteng North and Gauteng South High Courts. In these judgments, judicial guidelines were provided on the information applications for confirmation of surrogate motherhood agreements must contain in order to enable the court to assess whether the particular surrogate motherhood agreement should be confirmed. The judgments stipulate different requirements in respect of applications made in the two courts. It is hoped that the comprehensive guidelines provided by Tolmay and Kollapen JJ in the Gauteng North High Court will be adopted by the other High Courts.

In *In re Confirmation of Three Surrogate Motherhood Agreements*, the Gauteng South High Court postponed applications for the confirmation of three surrogate motherhood agreements *sine die* to enable the applicants to correct and supplement their applications to comply with the provisions of the Act, to place sufficient information before the court to enable it to consider the matters on their merits, and to adhere to Practice Directive 5 of 2011 which the Deputy Judge President of the Gauteng South

High Court had issued (para [28]). The applications had been shoddily drafted by a lawyer who had copied previous applications carelessly and without proper regard for the factual circumstances of each set of applicants.

The court held that, as is clear from section 28 of the Constitution, the best interests of the child are paramount in considering the confirmation of a surrogate motherhood agreement. Moreover, as upper guardian of all minors, the High Court must ensure that the interests of the child, once born, are best served by the contents of the surrogate motherhood agreement concluded before his or her birth (para [16]). To enable the court to fulfil this duty, full and reliable facts must be supplied to the court and the confirmation proceedings must not be viewed as a rubber stamp (para [25]). It must be clear that all the provisions of the Act have been fully complied with (para [26]).

The requirements set in this judgment must also be complied with (ibid). The applicants for confirmation of a surrogate motherhood agreement must, in particular, supply proper and full details regarding themselves to enable the court to determine whether they are 'in all respects suitable persons to accept the parenthood of the child that is to be conceived' as is required by section 295*(b)*(ii) of the Act (paras [19] and [24]). The court specifically held that it must be provided with details regarding the identity, financial position and living conditions of the commissioning parents; what support systems, if any, the commissioning parents have in place; and how the child will be taken care of. The court stated that the practice in adoptions, where expert assessment reports from social workers are required and a police clearance is obtained to demonstrate the suitability of the adoptive parents could be analogously applied to commissioning parents in surrogate motherhood applications 'with very good results' (para [17]). An expert report could also be provided to address the suitability of the surrogate mother (ibid).

Further, to prevent commercial surrogacy, full details must be provided on any compensation that is to be paid to the surrogate mother for expenses relating to her artificial fertilization and pregnancy, the birth of the child, the confirmation of the surrogate motherhood agreement, her loss of earnings as a result of the surrogate motherhood agreement, and insurance to cover her for anything that may lead to her death or disability as a result of the pregnancy in order to determine whether such compensation is permissible in terms of section 301 of the Act. The same applies

to any payments in respect of professional legal or medical service with a view to the confirmation of the surrogate motherhood agreement or in the execution of such an agreement, because such payments may affect the validity of the surrogacy agreement (para [22]).

Finally, particulars must be provided to satisfy the court that the prohibitions on artificial fertilization of a surrogate mother in the absence of a confirmed surrogate motherhood agreement and on advertisements for commercial gain that a woman may be prepared to act as a surrogate mother have not been violated (para [23]).

In *Ex parte WH and Others*, the Gauteng North High Court laid down even more detailed guidelines. In this case, the court was, apart from having to consider the individual application by same-sex commissioning parents, specifically tasked by the Deputy Judge President of the Gauteng North High Court to determine and provide guidelines on how similar applications should in future be dealt with. The court also issued instructions on the enrolment of such applications (para [78]).

Referring to the judgment in *In re Confirmation of Three Surrogate Motherhood Agreements*, the court emphasized that, being the upper guardian of all minor children, it must ensure that the formal and substantive requirements of the Act are complied with and that it cannot simply rubber stamp surrogacy arrangements (paras [72]–[73]). As applications for confirmation of surrogacy agreements are brought on an *ex parte* basis, the court is dependent on the information placed before it by the applicants and it requires the utmost good faith of them (para [73]).

The court stipulated that, to enable it properly to fulfil its function in applications for confirmation of a surrogate motherhood agreement, each application for confirmation must contain the following: In the first instance, information regarding all factors set out in the Act together with documentary proof, where applicable. Such information should include full particulars on how the commissioning parents came to know the surrogate mother, why she is willing to act as a surrogate to them, her background, and her financial position. The court must also be provided with sufficient information to support any conclusions the applicants contend for. Thus, if an applicant seeks to draw conclusions with regard to matters such as his or her financial, emotional or general suitability as a parent, sufficient facts should

be included to support such conclusions (para [77] read with paras [67] and [74]). Secondly, information must be provided on whether there have been any previous applications for surrogacy, the division in which the application was brought, and whether such an application was granted and/or refused. If it was refused, the reasons for the refusal must be set out (para [77]). Thirdly, a report on the commissioning parents by a clinical psychologist and a report on the surrogate and her partner, if any, must be attached. As regards the surrogate mother, the report should, in particular, deal with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her (para [77] read with para [67]). Fourthly, a medical report regarding the physical condition of the surrogate mother must be provided to indicate whether surrogacy poses any dangers for her and/or the child. The report should inter alia deal with the mother's HIV status and any disease she could transfer to the child (ibid). Fifthly, details and proof of payment of any compensation for services rendered, either to the surrogate or to the intermediary, the donor, the clinic or any third party involved in the process must be provided (paras [29] and [77]). In the sixth place, all agreements between the surrogate and any intermediary or any other person who is involved in the process must be attached (para [77]). In the seventh place, if any agency was involved, full particulars must be provided of any payment to such agency. The agency must also provide an affidavit setting out its business; whether any form of payment was or will be paid to or by it in respect of any aspect of the surrogacy; what the agency's involvement was regarding the introduction of the surrogate mother to the commissioning parents; how the agency obtained the information regarding the surrogate mother; and whether the surrogate mother received any compensation from the agency or the commissioning parents. The affidavit must also include a statement that no facilitation fee was paid to any person who introduced the surrogate mother to the commissioning parents and that no compensation other than the payments allowed by the Act has been or will be paid (para [77] read with paras [30], [65], and [66]). In the eighth place, information must be provided on whether any of the commissioning parents have been charged with or convicted of a crime of a violent or sexual nature. If such a crime has been committed, the circumstances surrounding the crime should be fully set out (paras [69] and [77]). Finally, information must be provided on where the gametes

for the artificial fertilization of the surrogate mother will come from, but the identity of the donor may not be revealed (para [68]).

As the commissioning parents in this case were same-sex spouses, the court also dealt with specific issues relating to surrogate motherhood in the case of same-sex couples. It pointed out that same-sex couples who wish to have a child who is genetically linked to one of them have little choice other than to enter into a surrogate motherhood agreement (para [36]). Referring to constitutional jurisprudence on same-sex relationships and the equality clause in section 9 of the Constitution, the court held that same-sex couples must be treated in exactly the same manner as heterosexual couples for purposes of surrogate motherhood (para [54.1]). Care should be taken not to apply different and discriminatory tests to same-sex couples, such as requiring male couples to show that the child would experience so-called 'maternal influences' (para [54.2]). It aptly pointed out that many children grow up without a father or a mother and warned that the court should not try to create a utopia for children born from surrogacy that is removed from social reality (ibid).

The court also warned that judicial officers should consciously guard against being influenced by their personal perceptions when they have to decide whether a person is suitable as a commissioning parent or surrogate mother (para [69]). It pointed out that most people can procreate without any restrictions or prohibitions. Unreasonably high standards should not be set for people who choose surrogacy, because doing so would contravene the principle of equality contained in the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It held that an objective test should be applied when deciding on the suitability of a person to be a commissioning parent. Such test should include an enquiry into the ability of the person(s) to care for the child both emotionally and financially, and to provide an environment for the harmonious growth and development of the child (para [70]). As regards the relationship between the interests of the child and those of the commissioning parents, the court held that although the best interests of the child are paramount, 'care should be taken that the rights of the commissioning parents in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act are not violated by unnecessary invasion of the privacy of commissioning parents or by setting the bar too high for parents whose only option is to have a child by way of surrogacy' (para [63]).

Finally, on the facts and evidence, the court found that the commissioning parents made out a proper case for confirmation of the surrogate motherhood agreement. The agreement was accordingly confirmed (paras [79]–[80]).

Divorce

Deed of settlement

JW v HW 2011 (6) SA 237 (GSJ) is yet another case dealing with enforcement of a divorce settlement agreement. Section 7(1) of the Divorce Act empowers a court granting a decree of divorce to make an order in accordance with a written agreement between the parties regarding the division of their assets or the payment of maintenance by one party to the other. The section does not indicate whether the court should incorporate the settlement agreement in its order or rather repeat the enforceable terms of the agreement in its order. Nor does it indicate whether declaring that the settlement agreement is binding between the parties amounts to incorporating the agreement into the court order. In most divisions of the High Court the settlement agreement is incorporated and is thus turned into an order of court (*Thutha v Thutha* 2008 (3) SA 494 (Tk) para [17]). However, in some divisions, such as KwaZulu-Natal and the Free State, the practice is not to incorporate the agreement, but rather to embody those clauses of the agreement which the court considers readily enforceable in the divorce order (*Thutha* paras [35] and [40]).

In *JW v HW*, the court declared the settlement agreement binding between the parties when it issued the divorce order. The applicant failed to meet his maintenance obligations in terms of the settlement agreement, resulting in the respondent having a writ issued against him. The applicant then sought an order setting the writ aside on the ground that a writ may only be issued pursuant to a valid court order. He contended that the court's declaration that the settlement was binding between the parties did not constitute such a court order. In support of this contention, the applicant relied on *Thutha* (supra), in which Alkema J had disapproved of the practice of incorporating settlement agreements, as he was of the view that incorporating a settlement agreement in a court order could lead to problems in respect of enforcement of the order. The applicant also relied on *Brandtner v Brandtner* 1999 (1) SA 866 (W), in which the same division in

which the present application was being decided had held that declaring a settlement agreement binding does not amount to incorporating the agreement into the divorce order and turning it into an order of court which is capable of sustaining a writ of execution.

In *JW v HW*, Wepener J rejected the decision in *Thutha*. In doing so, he referred to his earlier judgment in *Butchart v Butchart* 1997 (4) SA 108 (W), where he had set out practical means for overcoming difficulties arising from settlement agreements. (The decision in *Butchart* was delivered by Wepener J when he was still an acting judge. Cameron J (as he then was) and Pretorius AJ concurred in Wepener AJ's judgment.) He pointed out that Alkema J had not referred to *Butchart* (para [3]). Wepener J further indicated that the decision in *Brandtner* has not been followed in subsequent decisions in the Gauteng South High Court (paras [5]–[6]). Thus, in *Tshetlo v Tshetlo* 2000 (4) SA 673 (W) it was held that an order declaring a settlement agreement binding is intended to have the same effect as an order incorporating the settlement into the decree of divorce or making it an order of court which can be enforced by way of a writ, and that this is what parties intend when they ask the court to declare their settlement binding. In *Lebeloane v Lebeloane* [2000] 4 All SA 525 (W), the same division again declined to follow *Brandtner*. Wunsh J adopted the approach in *Tshetlo* on the ground that if a settlement agreement is declared binding, the intention is to comply with the provisions of the Divorce Act, and the intention of the parties and the judge is to make the agreement an order of court. He further held that the ground on which Alkema J had set aside the writ was highly technical and 'in conflict with the substance of the case' (*Lebeloane* para [22]).

Wepener J preferred to follow the latter decisions as he was of the view that they set out the law correctly and that the parties in this case also intended the settlement agreement to operate as a court order (para [7]). This common-sense approach is to be supported.

Forfeiture of patrimonial assets upon divorce

The spouses in *JW v SW* 2011 (1) SA 545 (GNP) entered into a marriage in community of property in 1989. After their wedding, they moved into a house that was registered in the name of the husband's father. The husband's father died shortly after that and the husband inherited the house. The house was registered in the

spouses' name in 1992. Thus, for all practical purposes, it could be said that the husband brought the house into the marriage more or less at the time when the marriage was concluded, and this was the way the court viewed matters. The wife had no assets at the time of entering into the marriage. During the subsistence of the marriage, the wife worked as a nurse, paid for renovations to the husband's house and built up a pension interest. The husband was employed only occasionally. When the wife sued for divorce some two decades after the date of the marriage, she claimed forfeiture of the patrimonial benefits of the marriage against the husband in terms of section 9(1) of the Divorce Act. She inter alia alleged that he had assaulted her, had had numerous adulterous relationships, was unemployed and had failed or neglected to contribute to the joint estate over the last ten years of the marriage; that the parties had not lived as husband and wife for approximately three months; and that she had maintained him while he had verbally abused her and threatened her life. The husband denied the wife's allegations. He further alleged that the reason for the breakdown of the marriage was that his wife had misled him into believing that he was the biological father of a child who had in fact been sired by another man before the marriage; that the marriage took place as a result of this misrepresentation; and that the marital relationship became strained when he discovered the truth in 2005. He counterclaimed equal division of the joint estate and sought an order in terms of section 7(8)*(a)* of the Divorce Act compelling the pension fund of which his wife was a member to pay his share of her pension interest to him when any pension benefits accrued to her.

Although Makgoka J preferred the wife's evidence to that of the husband, he dismissed her claim for a forfeiture order (paras [13]–[15] [23], [24], [33], and [39]). He held that because a spouse does not benefit from an asset he or she brought into the marriage, he or she cannot be ordered to forfeit such asset (para [1]). Thus, the husband could not be ordered to forfeit the house. Applying a dictum in *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C), he further held that a party who seeks a forfeiture order must establish the nature and extent of the benefit that is to be forfeited (para [20]). In the present case, the wife had failed to prove the difference between the value of the husband's house at the time of the marriage and the value when the divorce proceedings were instituted. Accordingly, she had not proved the extent to

which her husband had benefited from the renovations she had paid for (para [22]). Thus, there was no evidence of an undue benefit the husband could forfeit (para [23]).

Makgoka J further stated that even if the above conclusion were wrong, application of the factors listed in section 9(1) did not justify a forfeiture order in the present case (para [24]). Section 9(1) permits a forfeiture order only if 'the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited'. The judge was not satisfied that the duration of the spouses' marriage, the circumstances giving rise to the breakdown of the marriage and the parties' respective misconduct justified the granting of a forfeiture order (paras [25]–[30] and [33]). Furthermore, any benefit the husband might have gained from his wife's paying for the renovations to his house was a consequence of their marriage in community of property. Because such benefit was obtained as a result of the matrimonial property system that operated in the marriage, it was not necessarily an undue benefit (paras [31]–[32]).

Makgoka J also dismissed the husband's counterclaim (paras [39] and [44]). He pointed out that the Divorce Act provides that the pension interest of a spouse is deemed to be part of his or her assets in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled (para [34]). (The judge incorrectly indicated that this provision is contained in s 7(8)*(a)* of the Divorce Act, while it appears in s 7(7)*(a)*.) He then quoted section 7(8)*(a)* of the Divorce Act, subparagraph (i) of which provides as follows:

> 'Notwithstanding the provisions of any other law or of the rules of any pension fund —
> *(a)* the court granting a decree of divorce in respect of a member of such a fund, may make an order that —
> (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member. . . .'

He held that section 7(8)*(a)* (which he incorrectly called section 8*(a)*) confers a discretion on the court to make an order compelling the pension fund to pay the non-member spouse's portion of the member spouse's pension directly to the non-member

spouse when the member spouse becomes entitled to a pension benefit. He further held that this discretion has to be exercised 'judiciously, taking into consideration relevant factors' (para [36]). He held that considerations of fairness apply in determining whether an order should be made (ibid). He took the wife's continuous employment for 25 years and the husband's erratic employment history into consideration and concluded that no order should be made in terms of section 7(8)*(a)* (paras [37]–[38]). He then held that refusing to make an order in terms of s 7(8)*(a)* meant that the husband was not entitled to share in the wife's pension interest (para [38]).

Although Makgoka J was correct in holding that section 7(8)*(a)* confers a discretion on the court, his inference that declining to make an order in terms of the section means that the non-member spouse is deprived of the right to share in the member spouse's pension interest is incorrect. Section 7(8)*(a)* deals solely with the court's power to make an order compelling the pension fund to transfer part of the member spouse's pension benefit directly to the non-member spouse when the member spouse becomes entitled to his or her pension benefit. It does not deal with the issue of whether or not the non-member spouse is entitled to share in the member spouse's pension. The latter issue is governed by section 7(7)*(a)* of the Divorce Act which, in express and clear terms, provides that '[i]n the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party *shall . . . be deemed to be part of his assets*' (emphasis added). The wording of the section leaves no room for holding that the court has a discretion whether or not to include a spouse's pension interests in his or her assets. Thus, even if the court is not requested, or declines, to make an order in terms of section 7(8)*(a)* the spouse's pension interest still forms part of the spouse's assets. By declining to make an order in terms of section 7(8)*(a)*, Makgoka J accordingly did not achieve what he wanted to — to deprive the husband of the right to share in the wife's pension.

It should be noted that, despite the clear wording of section 7(7)*(a)*, courts have adopted conflicting views on whether a pension interest automatically forms part of a spouse's estate. The conflicting cases are *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O) and *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D). Unfortunately, Makgoka J failed to consider these cases. The only cases he referred to in his judgment are

Engelbrecht v Engelbrecht (supra) and *Wijker v Wijker* 1993 (4) SA 720 (A).

In *Sempapalele*, Musi J held that section 7(7) of the Divorce Act did not change the rule that a pension interest is not an asset in the spouse's estate. He held that it simply 'opens a window, and provides a mechanism, for parties engaged in divorce proceedings to have access to the pension interest of either of them for purpose of achieving an equitable distribution of their assets' (at 311A–B). He was of the view that section 7(7)*(a)* means that a spouse's pension interest is not ordinarily part of the joint estate of a couple who married in community of property, but that it may be taken into account upon divorce. He concluded that the pension interest must be dealt with expressly at the time of the divorce, as it does not automatically fall into the joint estate. This view was rejected in *Maharaj v Maharaj*. As Magid J pointed out in *Maharaj*, section 7(7)*(a)* 'states quite unequivocally that a pension interest is deemed to be part of the assets of a party ''in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled''' (at 37*d*).

Maharaj is the correct decision, because if an interest is deemed to be part of a person's assets, it cannot but fall into that person's estate, and if the person is married in community of property, the interest obviously falls into the joint estate. Furthermore, the wording of section 7(7) contains no suggestion that the court is empowered to exclude a spouse's pension interest from his or her estate upon divorce or that spouses who are married in community of property must expressly deal with their pension interests upon divorce. (See also Heaton *South African Family Law* 126–7; L Neil van Schalkwyk '*Sempapalele v Sempapalele* 2001 2 SA 306 (O). Egskeiding — Moet 'n pensioenbelang verdeel word waar die skikkingsakte niks meld nie' (2002) 35 *De Jure* 170 at 173, 175; JC Sonnekus 'Verbeurdverklaring van voordele — welke voordele? *JW v SW* 2011 1 SA 545 (GNP)' 2011 *TSAR* 787 at 793 and 794–5.)

Jurisdiction in respect of foreign same-sex civil partnership

AS v CS 2011 (2) SA 360 (WCC) is the first reported case on the dissolution of a foreign same-sex civil partnership in South Africa. The decision is discussed in the chapter on Conflict of Laws.

Liability for debts after divorce of spouses married in community of property

Maharaj v Sanlam Life Insurance Ltd and Others 2011 (6) SA 17 (KZD) concerns liability for debts a spouse who was married in

community incurred before the marriage was dissolved by divorce. While the applicant and her former husband were married in community of property, her husband entered into a broker's contract with Sanlam. He received commission on policies in respect of which he acted as broker. When several of the policies lapsed, Sanlam reversed the commission that had been paid in respect of those policies and sought to recover the reversed commission from the applicant's husband. The amount of the reversed commission was R361 247,88. The applicant and her husband were divorced shortly after Sanlam issued summons for payment of the reversed commission. After the divorce, the applicant's husband ceded two policies to her in order to meet his maintenance obligations towards the spouses' minor children. Some three months later, an amount of R365 700 became payable under one of the ceded policies. At around the same time, the estate of the applicant's former husband was sequestrated and Sanlam abandoned its claim for half the reversed commission against him. Sanlam sought to recover the remaining half of the debt from the applicant, but she denied liability. Sanlam refused to pay the proceeds of the ceded policy to her. She thereupon sued Sanlam for the proceeds. Sanlam pleaded set-off of half the reversed commission against the proceeds of the policy, that is, R180 623,94.

The issues the court had to decide were whether the applicant could only be held liable for the reversed commission if she consented to the broker's contract her former husband concluded; whether she was liable for the debt in respect of the reversed commission if the broker's contract was valid; and, if so, whether Sanlam could set off its claim for half the debt for the reversed commission against her claim for the proceeds of the ceded policy.

With regard to the first issue, Pillay J correctly held that, in terms of the Matrimonial Property Act, a spouse who is married in community of property does not require his or her spouse's consent to enter into a contract to earn remuneration. As the broker's contract related to earning remuneration in the form of commission, the applicant's consent was not required. Nor was it required for the subsequent reversal of the commission that had been paid on the lapsed policies (para [4]).

In so far as the applicant's liability for the reversed commission was concerned, Pillay J started by quoting section 17(5) of the Matrimonial Property Act. This section provides that, if a debt is

'recoverable from a joint estate', the spouse who incurred the debt or both spouses jointly, can be sued for the debt, unless it 'has been incurred for necessaries for the joint household', in which event the spouses can be sued 'jointly or severally'; in other words, either of them or both of them together can be sued for the full debt. Pillay J rejected the argument by applicant's counsel that the debt for the reversed commission did not relate to necessaries for the household. She held that because the debt for the reversed commission was incurred in the course of the husband's earning an income for the joint estate, it related to necessaries for the joint household with the result that the applicant was jointly liable for it (paras [6] and [7]). Pillay J concluded that, because the applicant was jointly liable, she could be sued for the debt but that 'the preferred view' was that, being the spouse who did not incur the debt, she could only be sued for half the amount of the debt (para [6]).

This part of the decision is wrong in two respects.

In the first instance, Pillay J's view that the debt related to 'necessaries for the joint household' is wrong. The expression 'necessaries for the joint household' refers to household necessaries, not income that is necessary to maintain the joint household, as she held. (On the meaning of 'necessaries for the joint household', see, for example, HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 253; Heaton *South African Family Law* 84; Chuma Himonga 'Marriage' in Francois du Bois et al (ed) *Wille's Principles of South African Law* 9 ed (2007) 259; Skelton & Carnelley (eds) *Family Law in South Africa* 97.) Household necessaries are everyday items which are needed for the running of the spouses' joint household. These items are food, clothing, medical and dental services, food and veterinary services for the family's pets, and so forth, provided that the particular items were necessary in the particular household at the time when they were acquired on credit (see, for example, *Reloomel v Ramsay* 1920 TPD 371; *Bing and Lauer v Van den Heever* 1922 TPD 279; *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T)). Pillay J probably adopted the artificial interpretation of the phrase 'necessaries for the joint household' in order to be able to hold that the applicant could be sued for the debt, for, had she found that the debt did not relate to 'necessaries for the joint household', section 17(5) would not have permitted Sanlam to sue the applicant alone.

Secondly, an even more fundamental error is that Pillay J confused the circumstances in which section 17(5) of the Matri-

monial Property Act applies and those in which the common law applies to debts incurred during the subsistence of a marriage in community of property. In terms of the express wording of section 17(5), the section applies '[w]here a debt is recoverable from a joint estate'. As the joint estate of spouses who are married in community of property is terminated on divorce, the section cannot apply after divorce — after all, there is then no longer a joint estate from which any debt can be recovered. In such event, the common law regulates recovery of unpaid debts (Heaton *South African Family Law* 73; Himonga in *Wille's Principles* 316n810; Annél van Aswegen 'Transactions Between a Spouse and a Third Party: The Effect of the Matrimonial Property Act 88 of 1984' 1984 *Modern Businessman's Law* 140 at 145; but see Hahlo *The South African Law of Husband and Wife* 382, who might be read as suggesting that s 17(5) applies after divorce too; it is unclear whether the author's discussion relates to the position on divorce (when debts are to be paid at the time of the divorce) or after the divorce).

In terms of the common-law rule as set out in the works of old authorities and in case law, a joint contractual debt that is unpaid after a marriage in community has been dissolved can be claimed in full from the spouse who originally incurred the debt, or half the debt can be claimed from the original debtor and the other half from the other spouse (see, for example, Voet *Commentarius ad Pandectas* 23.2.52, 23.2.80, and 42.1.33; but see also Skelton & Carnelley (eds) *Family Law in South Africa* 98 where it is stated — confusingly and without reference to authority — that a debt that was incurred during the subsistence of a marriage in community of property may be recovered 'only from the original debtor' and also that 'the creditor can recover 50% of the debt from the original debtor and the other 50% from the spouse who did not incur the debt'). (An exception to the common-law rule applies if one of the spouses possesses most of the assets of the former joint estate after the dissolution of the marriage, for example, due to an order for forfeiture of the patrimonial benefits of the marriage having been made against the other spouse in terms of section 9 of the Divorce Act. In such event, the debt can be claimed in full from the spouse who possesses most of the assets, without the other spouse first being excussed: *Maury (Edms) Bpk h/a Franelle Gordyn Boutique v Erasmus* 1988 (2) SA 314 (O); *BP Southern Africa v Viljoen* (supra).)

This rule was applied, inter alia, in *BP Southern Africa v Viljoen* (supra). Although Pillay J referred to the *BP* case as reflecting 'the preferred view' that only half the debt can be recovered from the spouse who did not incur the debt, she failed to realize that 'the preferred view' she was referring to was actually the common-law rule with regard to recovery of contractual debts that are unpaid after the dissolution of a marriage in community of property and that it had nothing to do with section 17(5) of the Matrimonial Property Act.

With regard to the last issue that arose in *Maharaj*, that is, whether the defence of set-off could be upheld, Pillay J held that all the requirements for set-off had been met (paras [8]–[16]). She accordingly ordered Sanlam to pay the applicant the difference between the policy proceeds and half the debt relating to the reversed commission (para [18]). The order was for payment of R185 016,06, while the difference is actually R185 076,06. The discrepancy is probably due to a typing error.

A final, odd aspect of the judgment that should be mentioned is that when discussing the matter of costs, the judge stated that the applicant should be awarded costs inter alia because Sanlam had (apparently incorrectly) 'persisted in claiming set-off' (para [17]). However, the order she formulated states that each party is to pay his or her own costs (para [19]). Her statement regarding Sanlam's persistence in pursuing set-off is extremely odd in view of the fact that she found that the requirements for set-off had indeed been met (paras [8]–[16]). Pillay J's statement regarding costs and Sanlam's persistence in claiming set-off is probably also the reason why the headnote/editor's summary of the case incorrectly states that the defence of set-off was dismissed and that Sanlam was ordered to pay the applicant the amount she had claimed.

Pension interests on divorce

The definition of a pension interest in section 1 of the Divorce Act provides that if a spouse is a member of a pension fund under the Pension Funds Act other than a retirement annuity fund, his or her pension interest is the benefit to which he or she would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce by resigning from his or her employment (para *(a)* of the definition). If he or she is a member of a retirement annuity fund, his or her pension interest is equal to all the contributions he or she made to the fund up to the date of

the divorce plus annual simple interest on those contributions calculated at the rate the Minister of Justice and Constitutional Development prescribes in terms of the Prescribed Rate of Interest Act 55 of 1975 (para *(b)* of the definition). In terms of section 37D(6) of the Pension Funds Act, a spouse who is a member of a pension preservation fund or a provident preservation fund also has a pension interest that is part of his or her assets on divorce. The latter pension interest is equal to the benefits to which the spouse would have been entitled in terms of the rules of the pension or provident preservation fund had his or her membership of the fund terminated on the date of the divorce.

In *Eskom Pension and Provident Fund v Krugel and Another* (unreported, [2011] ZASCA 96, 31 May 2011), the Supreme Court of Appeal had to decide whether a husband who had resigned from his employment prior to getting divorced and, at the time of his resignation, had elected to defer payment of his pension benefit until his retirement had a pension interest which formed part of his assets on divorce. When the spouses divorced, they agreed in a deed of settlement which was made an order of court that the wife was entitled to 25 per cent of the husband's 'pension interest with Eskom Pension Fund'. They further agreed that the husband's attorneys would secure registration of an endorsement to this effect against the records of Eskom Pension Fund. However, after the divorce, the fund refused to register the endorsement on the ground that the husband was no longer a member of the fund as he had resigned from his employment prior to the divorce. His election to have payment of his pension benefit deferred had made him a deferred member of the fund, but not a member. Consequently, he no longer had a pension interest as defined in section 1 of the Divorce Act and no endorsement could be made against the records of the fund. The wife lodged a complaint with the Pension Funds Adjudicator against the fund's refusal to make an endorsement. The Pension Funds Adjudicator upheld the complaint. The fund was dissatisfied with the determination by the Pension Funds Adjudicator. It unsuccessfully approached the High Court for an order in its favour. It then appealed to the Supreme Court of Appeal, which unanimously upheld the appeal.

Delivering the judgment of the Supreme Court of Appeal, Maya JA pointed out that a 'pension interest' is narrowly defined by the Divorce Act. The definition refers to the value of an interest in respect of a pension benefit that will accrue at some future date

(para [11]). Thus, if a pension benefit accrues before divorce, there no longer is a pension interest that can be deemed to be part of the spouse's assets on divorce. When the husband in the present matter resigned, his pension benefit accrued to him. This happened before the divorce. Accordingly, there was no longer a pension interest as defined in the Divorce Act that could be deemed to be part of his assets on divorce (para [12]). The provisions of the Pension Funds Act regarding a spouse who is a member of a pension preservation fund or a provident preservation fund also did not assist the wife in the present matter, because there was no evidence that the husband had transferred his pension benefit to a pension or provident preservation fund. Moreover, the extension of the definition of 'pension interest' in the Divorce Act by section 37D(6) of the Pension Funds Act was inapplicable in view of the facts of the case (para [14]). Upholding the appeal, Maya JA pointed out that the wife was not left entirely without a remedy because the deed of settlement between the parties was binding and entitled her to a share of her former husband's pension when he became entitled to claim it, that is, upon retirement (paras [15] and [16]).

Like the earlier decision of the Supreme Court of Appeal in *Government Employees Pension Fund v Naidoo and Another* 2006 (6) SA 304 (SCA) and the decisions of the High Court in *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) and *Elesang v PPC Lime Ltd and Others* 2007 (6) SA 328 (NC), the decision in *Eskom Pension Fund* illustrates the importance of distinguishing between a pension interest and a pension benefit. A pension interest is an interest which has not yet accrued at the time of the divorce. In contradistinction, a pension benefit relates to a benefit which has already accrued. As was held in *De Kock* and *Elesang*, and again in *Eskom Pension Fund*, once a pension benefit has accrued, the provisions of the Divorce Act (as extended by s 37D of the Pension Funds Act) no longer apply, because those provisions relate only to pension interests, not to pension benefits. The reason for the inapplicability of the provisions is simple: when a pension benefit accrues to a spouse, the spouse becomes entitled to claim the pension benefit, with the result that the benefit is part of the spouse's asset. If the benefit is part of the spouse's estate, there is no reason to deem it to be part of his or her assets (*De Kock v Jacobson* (supra); *Government Employees Pension Fund v Naidoo* (supra); *Elesang v PPC Lime Ltd* (supra); *Eskom Pension and Provident Fund v Krugel* para [12]). In a case

such as the present, where the husband had elected to defer payment of his pension benefit, he still became entitled to the benefit when he resigned; it is merely the date of payment of the benefit that was postponed.

Russouw v Reid and Another [2011] 3 All SA 106 (GSJ) deals with the liability for tax that arises when a non-member's portion of the member's pension interest is paid to him or her after the spouses' divorce. When the parties divorced in 2006, the wife (first respondent) was awarded 30 per cent of her husband's (applicant's) pension interest as at the date of the divorce. The husband was a member of a pension fund governed by the Pension Funds Act. At the time, the Pension Funds Act provided that the non-member's portion of the member's pension interest became payable when the member became entitled to claim his or her pension, that is, upon his or her retirement, death, resignation or retrenchment. The Pension Funds Act was subsequently amended to allow the non-member to claim the portion of the member's pension interest that was awarded to him or her upon divorce once the divorce order had been made (s 37D(4)(*a*)). (This change was brought about by s 28 of the Pension Funds Amendment Act 11 of 2007, which came into operation on 13 September 2007: Proc 26 *GG* 30297 of 13 September 2007.) In the case of divorce orders made before 13 September 2007, the non-member's portion was deemed to have accrued to the member on 13 September 2007, with the result that the non-member could immediately claim his or her portion of the pension interest (s 37D(4)(*d*) as amended by s 16 of the Financial Services Laws General Amendment Act 22 of 2008, which came into operation on 1 November 2008: GN R1170 *GG* 31561 of 31 October 2008).

After the latter amendment came into operation, the first respondent claimed her 30 per cent of her former husband's pension interest. The pension fund paid an amount of R300 199,99 to her, which was equal to 30 per cent of her former husband's total pension interest at the time of the divorce without any deduction for tax having been made. Two days later, the pension fund informed her former husband that, in terms of the Income Tax Act 58 of 1962, tax in the amount of R135 614,27 was payable on the amount that had been paid to her. In accordance with the provisions of the Income Tax Act, the tax was deducted from his pension. Relying on section 2B of the Second Schedule to the Income Tax Act, he sought to recover the amount

of the tax from the first respondent. (Section 2B provides that the tax that becomes payable as a result of the payment of the non-member's part of the member's pension interest 'may be recovered [by the member] . . . from the former spouse to whom or in whose favour the part in question is paid or becomes payable'.)

She refused to reimburse him for the tax. She contended that the terms of their settlement entitled her to the full 30 per cent of the pension interest and that the settlement excluded her liability for her former husband's tax debt because it provided that each party would be 'responsible for the payment of their respective individual accounts owed and in either party's name'. She further contended that, when they had executed the settlement agreement, it was within their contemplation that the tax liability triggered by the payment of her portion of the pension interest would accrue to her husband. Accordingly, he had no contractual right to claim recovery of the amount of the tax liability from her. She further relied on a clause in the settlement agreement which provides that the parties would have no further claims against each other as from the date of the divorce and that they waived and abandoned any claims that existed during the marriage.

Mokgoathleng J rejected her contentions. He held that when the spouses entered into their settlement agreement they could never have contemplated the tax liability arising from the payment of her portion of her husband's pension interest before his retirement, death, resignation or retrenchment because the law did not permit such payment and the parties could not have contemplated that the Pension Funds Act would be amended to permit such payment (paras [21], [29], and [31]). He, quite correctly, further held that the right to recover the tax that had been paid was not a contractual right; it arose *ex lege* after the dissolution of the marriage and was not covered by the terms of the settlement agreement relating to each party's liability for his or her own accounts (paras [24] and [32]). Nor did the settlement agreement contain a waiver of the right to invoke the provisions of section 2B of the Second Schedule of the Income Tax Act (para [32]). He ordered the first respondent to pay R135 614,27 into her former husband's pension fund and to pay the costs of the application (para [33]).

Another case on pension interests which was decided during the period under review is *Wiese v GEPF* (supra). In this case, the parties' divorce settlement agreement provided that the wife was

entitled to 25 per cent of the husband's pension interest in the GEPF on divorce. The agreement was incorporated into the divorce order. After the divorce, the wife unsuccessfully sought payment of her share of the pension interest from the GEPF. At the time, the law governing the GEPF did not permit payment of a non-member spouse's share of the member's pension interest on divorce, while the Divorce Act read with the Pension Funds Act permitted such payment to non-member spouses of employees who were not members of the GEPF. The wife challenged the constitutionality of the differentiation between non-member spouses of members of the GEPF and non-member spouses of members who belong to pension funds governed by the Pension Funds Act in so far as the right to claim payment of a share of the member's pension interest on divorce is concerned. She sought an order declaring the Government Employees Pension Law, which governs the GEPF, inconsistent with section 9(1) of the Constitution and invalid to the extent of the inconsistency. She further sought an order reading certain provisions of the Pension Funds Act into the Government Employees Pension Law.

The GEPF and the Minister of Finance (second respondent) conceded that the wife's constitutional right to equality before the law and equal protection and benefit of the law (s 9(1)) was violated by the differential impact of the legislation on non-member spouses of members of the GEPF and members whose pension funds are governed by the Pension Funds Act. However, they argued that, instead of making the reading-in order sought by the wife, the court should suspend the declaration of invalidity of the Government Employees Pension Law to allow the legislature an opportunity to remedy the defect in the legislation within a stipulated period, and that it should couple the suspension to a reading-in order that would take effect if the legislature failed to remedy the defect within the stipulated period.

Applying the familiar test in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), Bozalek J found that the Government Employees Pension Law differentiated between non-member spouses of members of the GEPF and non-member spouses of members whose pension funds are governed by the Pension Funds Act, and that this differentiation did not have a rational connection to a legitimate government purpose (para [16]). The Minister and the GEPF had conceded as much. He held that the prejudice arising from the differentiation was that non-member spouses of members whose pension funds are gov-

erned by the Pension Funds Act had the right to gain access to their share of their former spouse's pension interest immediately after the divorce, while non-member spouses of members of the GEPF could not do so (para [18]). He pointed out that the irrationality and unfairness of the differentiation was recognized in public (government) documents such as the National Treasury's document entitled 'A Safer Financial Sector to Serve South Africa Better' (paras [20]–[21]).

In view of the concessions by the Minister and the GEPF that the differentiation was unconstitutional, Bozalek J found it unnecessary to determine whether there was any justification for the differentiation (para [23]). He held that the failure of the Government Employees Pension Law to enable spouses to achieve a clean break by allowing the non-member spouse to gain access to his or her share of his or her former spouse's pension interest immediately after the divorce violated section 9(1) of the Constitution, with the result that the law was invalid to the extent that it violated this right (paras [24] and [45]).

In respect of the appropriate remedy to address the unconstitutionality, he held that it would be just and equitable to suspend the declaration of invalidity and to leave the nature and formulation of the changes that were required to remedy the defect in the legislation to the legislature (paras [40] and [45]). He granted Parliament a year to remedy the constitutional defect (paras [42] and [45]). He further formulated a reading-in order that would change the Government Employees Pension Law in keeping with the provisions of the Pension Funds Act should the legislature fail to correct the defect within a year from the date of the order (para [45]). Bozalek J's judgment was handed down on 1 July 2011. Since then, the Government Employees Pension Law Amendment Act has come into operation. It amended the Government Employees Pension Law to bring its provisions in line with those of the Divorce Act and the Pension Funds Act with regard to the sharing of pension interests on divorce (see above).

Finally, on pension interests on divorce, see also the discussion of *JW v SW* 2011 (1) SA 545 (GNP) above.

Post-divorce spousal maintenance

AV v CV 2011 (6) SA 189 (KZP) is an appeal in which a three-judge bench of the KwaZulu-Natal High Court, Pietermaritzburg approved the view Satchwell J had earlier adopted in the Witwatersrand Local Division (now the Gauteng South High

Court) in *Botha v Botha* 2009 (3) SA 89 (W) that a spouse does not have a right to post-divorce spousal maintenance. As in *Botha*, the court held that it has a discretion whether or not to award post-divorce maintenance and that such award will be made only if the spouse who seeks maintenance persuades the court to exercise its discretion in his or her favour by providing a factual basis for the making of a maintenance award (*AV v CV* paras [7] and [9]; *Botha v Botha* paras [32] and [114]). In this case, as in *Botha*, the applicant was an employed woman who would, in the court's view, be able to maintain herself provided that she was more prudent with her income (paras [19] and [23]). Further, her assets had a value that was nearly double that of her husband's (para [19]). The appeal court also differed from the trial court's view that the case was comparable to *Rowe v Rowe* (unreported DCLD Case No 6166/01), in which permanent maintenance was awarded to a wife who was 58 years old, had no formal qualifications and did not work during the subsistence of the marriage. The appeal court emphasized that the wife in *AV v CV* was employed and computer-literate (para [21]). It also rejected the wife's contention that permanent maintenance should be awarded to her because it was uncertain whether she would be able to remain employed after turning 60. In this regard the appeal court referred to the *dictum* of the then Appellate Division in *Beaumont v Beaumont* 1987 (1) SA 967 (A) that both parties will suffer hardship because of a divorce and that it is 'impossible to assess accurately the relative degrees of hardship which each of the parties will suffer' (*Beaumont v Beaumont* at 995G cited in *AV v CV* at paras [18] and [21]). The appeal court concluded that the clean-break principle had to be applied (para [17]). It accordingly held that the trial court had misdirected itself in granting the wife permanent maintenance (paras [6] and [24]). It set the order of the trial court aside and made no maintenance order in favour of the applicant. It did, however, hold that the payments her husband had already made in partial performance of the order of the trial court did not have to be refunded (para [24]). Although this is not clearly indicated in the judgment, the appeal court seems to have viewed those payments as constituting rehabilitative maintenance, for earlier in its judgment it held that to find that the wife 'cannot be rehabilitated to become self-supporting is . . . a misdirection' (para [22]). One can but assume that the court considered the payments to be sufficient to 'rehabilitate' the wife.

SH v EH 2011 (5) SA 496 (ECP) also deals with post-divorce spousal maintenance. In 2003, the wife instituted divorce proceedings. At the time, her husband had been living with another man for approximately two years. After the institution of the divorce proceedings, the spouses entered into a settlement agreement in terms of which the husband undertook to pay the wife R3 000 per month and to keep her registered as a dependant on his medical-aid scheme. A day before the divorce was to be finalized, the husband's estate was sequestrated and the spouses' assets were frozen. As a consequence, the divorce proceedings could not go ahead. Since the spouses' marriage was out of community of property, the wife claimed release of her assets from her husband's insolvent estate, but a dispute arose between her and the trustees of the insolvent estate about her assets. The dispute was eventually settled and her assets were released to her, but this occurred only in 2008. In the meantime, her husband did not pay any maintenance to her and she had no assets from which to maintain herself. Her husband also removed her from his medical-aid scheme in 2006. A male family friend (S) maintained her during the period of her destitution and continued to do so after her assets were released. Around the time of the institution of the divorce proceedings in 2003, she moved in with S and they started living together as husband and wife. In 2009, the wife was diagnosed with cancer and had to use approximately R150 000 of her released assets for her treatment as she was no longer registered as a dependant on her husband's medical-aid scheme. She would have to undergo further treatment in the future and would have to have such treatment at a state hospital as most of her assets were depleted by her earlier treatment. In October 2010, the spouses' divorce finally came before the court. The only outstanding dispute between the spouses was the wife's claim for maintenance in the amount of R5 000 per month. It was clear that she was entitled to a decree of divorce, and the parties' patrimonial rights had been resolved when her assets were released to her. Her husband opposed her claim for maintenance. In the first instance, he relied on the judgment a different judge had delivered when the wife had sought interim maintenance in terms of rule 43 of the Uniform Rules of Court in April 2010. In that application, the judge had held that the wife was not entitled to interim maintenance inter alia because it was unlikely that she would succeed with a claim for maintenance in the divorce action. Secondly, the husband con-

tended that he should not be ordered to pay maintenance as it was against public policy that a woman should be supported by two men.

Schoeman J correctly rejected the husband's first argument on the ground that an order in a rule 43 application is valid only until the main action is finalized and is not a final determination on maintenance. The statement of the judge in the rule 43 application that the wife was unlikely to obtain a maintenance award in the main action was accordingly no more than an opinion and was not binding on the court which decided the main action (paras [21]–[22]).

Schoeman J also rejected the husband's contention that public policy dictated that a woman should not be maintained by more than one man. She began by stating that the only cases in which it has thus far been held that a woman is not entitled to be maintained by two men are cases dealing with rule 43; in other words, cases dealing with maintenance *pendente lite* (interim maintenance), not maintenance in terms of s 7(2) of the Divorce Act (para [24]). She specifically referred to *Carstens v Carstens* 1985 (2) SA 351 (SE) in which it was held that it was against public policy to allow a woman to claim interim maintenance from her husband while she was living with another man as husband and wife, and *SP v HP* 2009 (5) SA 223 (O) in which the court held, on the strength of *Carstens*, that a woman should not be maintained by two men at the same time (paras [27]–[28]). She also cited *Qonqo v Qonqo* (unreported, [2010] ZAFSHC 107, 11 March 2010) in which the court ordered a husband to pay interim maintenance to his wife even though she was living with another man, because there was no proof that the other man was supporting her (*SH v EH* para [29]).

In so far as the position in terms of the Divorce Act is concerned, Schoeman J referred to *Drummond v Drummond* 1979 (1) SA 161 (A) and *Cohen v Cohen* 2002 (2) SA 571 (C), which dealt with *dum casta* clauses (paras [25]–[26]). A *dum casta* clause provides that the maintenance recipient forfeits maintenance if he or she lives with someone as husband/man and wife. In *Drummond*, the court explained that the phrase 'living as man and wife' refers to living under the same roof; establishing, maintaining and contributing to a joint household; and having an intimate relationship. The *Cohen* decision Schoeman J cited is the decision of the High Court in which it was held that a *dum casta* clause in a settlement agreement which was

made an order of court upon divorce ceases to be of force if a Maintenance Court subsequently varies the order in respect of maintenance without again including the *dum casta* clause. Unfortunately, she neglected to indicate that the Supreme Court of Appeal overturned this decision on appeal. The Supreme Court of Appeal held that if a Maintenance Court varies a maintenance order, the order ceases to be of force and effect only in so far as the order of the Maintenance Court expressly or by necessary implication replaces it. Thus, if the Maintenance Court merely varies the amount of maintenance which is payable and does not expressly or by necessary implication deal with other aspects, those other aspects remain in force. For example, a *dum casta* clause does not cease to be of force if the Maintenance Court varies the amount of maintenance that is payable and fails to repeat the *dum casta* clause in its order (*Cohen v Cohen* 2003 (3) SA 337 (SCA); see also *Botha v Botha* 2005 (5) SA 228 (W)).

After citing the abovementioned cases, Schoeman J considered the evidence and concluded that S had maintained the wife because her assets were frozen for some five years and her husband had failed to make any contribution to her maintenance. When she fell ill, she had to use most of her released assets to pay for her cancer treatment because her husband had removed her from his medical-aid scheme (para [30]). Her husband's failure to contribute to her maintenance, his removal of her from his medical-aid scheme and his insolvency were accordingly the reasons for her having to rely on S for maintenance.

Referring to the decision of the Constitutional Court in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), Schoeman J pointed out that heterosexual life partners do not have an *ex lege* duty to support each other while they live together (para [33]). (In *Volks*, the Constitutional Court stated, quite correctly, that the law does not provide for an *ex lege* duty of support between heterosexual life partners: para [56]. Recently, the Supreme Court of Appeal held that '[t]his was an unequivocal statement of the law by the Constitutional Court': *McDonald v Young* [2011] ZASCA 31, 24 March 2011 para [19].) Accordingly, the wife had no right to claim maintenance from S unless she and S got married, which was not on the cards because of her age and ill health (para [34]). Schoeman J further correctly stated that the facts in this case differed materially from those in *Carstens*, *SP v HP* and *Qonqo* — those cases dealt with rule 43, while the present case dealt with section 7(2) of the Divorce Act, and in this

case the wife's dire financial straits were attributable to the sequestration of her husband's estate, his failure to maintain her and his removal of her from his medical-aid scheme (para [40]). In respect of the husband's failure to maintain his wife, Schoeman J held that it was immaterial whether the failure arose of unwillingness or inability to pay (ibid).

As regards whether public policy dictates that a wife should not be maintained by two men, Schoeman J pointed out that even if receiving maintenance from two men was unacceptable in the past, this is no longer the case as the Recognition of Customary Marriages Act 120 of 1998 now entitles a man to receive maintenance from two wives after divorce if he is a party to a polygynous customary marriage (para [41]). If a man may receive maintenance from two women, it stands to reason that a woman may also receive maintenance from two men after divorce. Thus, public policy does not preclude the wife's claim in this case; nor does morality or any legislation do so (para [42]). Whether the wife should receive maintenance must accordingly be determined in light of the factors stipulated by section 7(2) of the Divorce Act. Schoeman J specifically held that the fact that the wife was currently living with another man as husband and wife and was being supported by him was only one of the factors that should be considered (para [38]). Taking into account, inter alia, the 38-year duration of the marriage, the parties both being in their sixties, the wife's ill health, her depletion of her resources as a result of her illness, and her inability to enter the labour market because of her age and health, Schoeman J found that the wife was entitled to maintenance (paras [37] and [51]).

In respect of the amount of maintenance that should be paid, the judge found that the evidence showed that the husband was unable to pay R5 000 per month (paras [44] and [48]). However, in Schoeman J's opinion, the husband could afford to pay R2 000 per month (para [48]). She accordingly dissolved the marriage and ordered the husband to pay R2 000 per month to his wife towards her maintenance. She also made an order for costs against the husband (para [51]).

The decision offers a welcome and realistic approach, which is in keeping with the position that applies if an application for rescission or variation of a maintenance award that was made upon divorce is sought. In such cases, the courts have held that if the maintenance order does not expressly provide for cessation of the maintenance if the maintenance recipient lives with another

person as husband and wife, the mere living together does not justify rescission of the maintenance order (see, for example, *Watson v Watson* 1959 (1) SA 185 (N); *Hughes NO v The Master and Another* 1960 (4) SA 936 (C); *Schlesinger v Schlesinger* 1968 (1) SA 699 (W); *Drummond v Drummond* 1979 (1) SA 161 (A)). However, the fact that the person is being maintained by his or her life partner is a factor which can be taken into account in determining his or her *need for maintenance* if variation of the maintenance order is sought. Another indication that maintenance of one woman by more than one man is permissible is to be found in the cases dealing with the continuation of maintenance after an ex-wife's remarriage. Some courts have held that if a settlement agreement that was made an order of court in terms of section 7(1) of the Divorce Act is silent on whether the maintenance recipient's remarriage terminates the duty to pay maintenance, the duty continues after the maintenance recipient's remarriage (*Smit v Pienaar* unreported, Case 13829/94, 20 Nov 1997 (C); *Welgemoed v Mennell* 2007 (4) SA 446 (SE)). Others have, however, adopted the opposite approach (*Geldenhuys v Meyers* unreported, Case 556/96, 19 July 1996 (SEC); *Van der Vyver v Du Toit* 2004 (4) SA 420 (T)). In the context of a settlement agreement which was never made an order of court in terms of section 7(1), the Supreme Court of Appeal has settled the dispute by holding that the duty to pay maintenance after the maintenance recipient's remarriage continues unless the terms of the agreement clearly exclude continuation of the duty (*Odgers v De Gersigny* 2007 (2) SA 305 (SCA)). Surely, these cases give the lie to any contention that public policy precludes a wife from being maintained by more than one man.

Universal partnership on divorce

In *JPW v CW* [2011] JOL 27572 (NCK), a wife who was being sued for divorce sought a declaratory order that a universal partnership existed between her and her husband. The spouses had married in 1992. Their antenuptial contract not only provided for complete separation of property (marriage out of community of property with exclusion of the accrual system) but also provided that they would act in the spirit of the contract in so far as their property was concerned. The wife alleged that, shortly after marrying, the parties had tacitly entered into a universal partnership and that the partnership assets encompassed all their movable and immovable assets. The husband's legal repre-

sentative alleged that the wife was seeking to prove the existence of a universal partnership in the form of a partnership *universorum bonorum* (a universal partnership relating to all the assets of the parties), and that such a partnership offended the express terms of the spouses' antenuptial contract. Procedural issues arose regarding the wife's claim, but those issues are unimportant for present purposes. This discussion focuses only on the issue of whether the alleged universal partnership could have come into existence.

Olivier J pointed out that a universal partnership may take one of two forms — a partnership *universorum bonorum* or a partnership *universorum quae ex quaestu veniunt* (a universal partnership that is limited to assets acquired from the partners' engaging in commercial activities) (para [9]). The wording and implication of the wife's pleadings indicated that the type of universal partnership she alleged existed between the spouses was a universal partnership *universorum bonorum*. Such a universal partnership was irreconcilable with the terms of the spouses' antenuptial contract (paras [15] and [19]). However, even if the wife had contended for a partnership *universorum quae ex quaestu veniunt* her contention would have been irreconcilable with the terms of the antenuptial contract, for the antenuptial contract does not distinguish between existing and future property and does not provide for complete separation of property only in respect of some assets; it establishes complete separation of property in respect of all assets and also provides that the spouses must act in the spirit of such separation of property (paras [12], [15], [20], and [23]). Olivier J stated that earlier cases in which it had been held that spouses who are married out of community of property may enter into a universal partnership related only to the partnership *universorum quae ex quaestu veniunt* (paras [33]–[34]). The judge further warned that even though spouses who are married out of community may enter into a universal partnership, 'the specific terms of a particular antenuptial contract may exclude a future partnership (by whatever name it may be called) if the terms of the particular partnership would contradict the antenuptial agreement' (para [24]). This was the situation in the present case.

Olivier J held that the universal partnership the wife sought to prove would in effect amount to a marriage in community of property, defeat the clear purpose of the antenuptial contract, and not be in the spirit of the antenuptial contract (paras [22] and

[25]). The agreement to establish a universal partnership would accordingly amount to an unauthorized revocation or variation of the essence of the antenuptial contract (paras [29]–[30]). Consequently, Olivier J held that evidence in substantiation of the wife's allegations regarding the universal partnership would be inadmissible (para [42]).

In view of the terms of this particular antenuptial contract and the way in which the pleadings were framed, Olivier J's views on the wife's claim regarding a universal partnership *universorum bonorum* are correct. However, the judgment should not be interpreted as constituting authority for the blanket statement that spouses who are married subject to complete separation of property are unable ever to enter into a universal partnership. Universal partnerships between such spouses have been recognized in, for example, *Fink v Fink and Another* 1945 WLD 226 and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A). (See also *Ponelat v Schrepfer*, which is discussed below.) The facts and circumstances of each case will determine whether a universal partnership can, and did, legally arise between the spouses.

Domestic Violence

Minister of Safety and Security v Venter 2011 (2) SACR 67 (SCA) is a welcome decision in the field of the law of delict which deserves to be mentioned very briefly in the context of family law too. The respondents were victims of domestic violence. They suffered loss as a result of the negligent failure by members of the South African Police Service to assist them and to inform them of their rights under the Domestic Violence Act 116 of 1998. As a result of this failure, the respondents did not seek a protection order under the Act and suffered rape and injury at the hands of the perpetrator of domestic violence. The Supreme Court of Appeal confirmed an order by the High Court compelling the Minister of Safety and Security to pay damages to the respondents. The decision is discussed in more detail in the chapter on The Law of Delict.

Life Partnerships

McDonald v Young (unreported, [2011] ZASCA 31, 24 March 2011) is an appeal against the Western Cape High Court's refusal to declare that a joint venture had come into existence during the subsistence of a life partnership between the appellant and

the respondent and its refusal to hold the respondent liable for the appellant's maintenance after the dissolution of the life partnership. The parties had lived in a heterosexual life partnership for approximately seven years. During that time, the respondent, who was a wealthy woman, bought immovable property in her own name. After the breakdown of their relationship, the appellant, who was a man of limited means, sought an order declaring that a joint venture existed between the parties in respect of the immovable property the respondent had purchased, and that he was entitled to a half-share in it. He alleged that he and the respondent had entered into an express oral joint venture agreement in terms of which he would contribute his time and expertise to oversee the development of the property and the respondent would make financial contributions to the purchase, completion and refurbishment of the property. The appellant stated that the primary objective of the joint venture agreement was to ensure that he gained financial independence from the respondent. The trial court dismissed the claim on the ground that the appellant had failed to prove the existence of the joint venture. The Supreme Court of Appeal agreed with the trial court's decision in this regard (para [14]).

For present purposes, the alternative claim for maintenance is more interesting. The appellant submitted that the respondent was, by operation of law (*ex lege*), alternatively, by virtue of a tacit contract, obliged to support him after the termination of their life partnership. In so far as the alleged *ex lege* duty of support was concerned, the appellant's counsel contended that *Amod v Multilateral Motor Vehicle Accidents Fund* (supra), *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) and *Khan v Khan* 2005 (2) SA 272 (T) are authority for the view that life partners have an *ex lege* duty to support each other. However, as the Supreme Court of Appeal pointed out, these cases concern contractual duties of support and are accordingly inapposite in the context of an *ex lege* duty of support (para [16]). Relying on *Volks NO v Robinson* (supra), the Supreme Court of Appeal, correctly, rejected the contention that life partners have an *ex lege* duty to support each other (paras [17]–[19]). In *Volks*, the Constitutional Court held that the law may distinguish between married and unmarried people and may, in appropriate circumstances, accord benefits to spouses while denying them to unmarried people, and that life partners do not have an *ex lege* duty of support (*Volks* paras [54] and [56]). The Supreme Court of

Appeal held that the *dictum* in respect of the absence of an *ex lege* duty of support between heterosexual life partners was 'an unequivocal statement of the law by the Constitutional Court' (para [19]). Thus, the appellant's contention regarding an *ex lege* duty of support between life partners was unfounded in law.

The Supreme Court of Appeal also, correctly, rejected the appellant's contention that he and the respondent had tacitly entered into a contract in terms of which the respondent had undertaken to support him. It pointed out that in order to establish a tacit contract, the conduct of the parties must be such that it justifies an inference that they intended to, and did, contract on the terms alleged. In this case, the evidence showed that there was no agreement between the parties (para [25]). The appellant himself indicated that the respondent had always adopted the attitude that he would receive no financial benefit from her should their relationship come to an end (para [24]). Furthermore, inferring a tacit contractual duty by the respondent to support the appellant would be in conflict with the appellant's evidence that the object of the alleged joint venture between the parties was to provide him with financial independence, thus enabling him to support himself without relying on the respondent or anybody else for maintenance (para [22]). If the appellant allegedly entered into an express joint venture agreement to ensure his financial independence, he could not simultaneously have intended to enter into a tacit agreement with the respondent that she would support him for the rest of his life. The parties could accordingly never have entered into a tacit contract providing the appellant with a right to claim maintenance from the respondent (paras [22]–[23] and [25]). Thus, the appellant's claim for maintenance also failed (para [26]). Theron JA (Mpati P, Cloete JA, Snyders JA, and Petse AJA concurring) accordingly dismissed the appeal with costs (para [27]).

Ponelat v Schrepfer, which was unreported in the year under review (unreported, [2011] ZASCA 167, 29 September 2011) and has since been reported in 2012 (1) SA 206 (SCA), also deals with the consequences of a heterosexual life partnership. The parties lived together for sixteen years. When they started living together, P owned an established electrical business and S worked as a beautician. At P's insistence, S stopped working after moving in with P. During the subsistence of the life partnership, S performed all domestic duties without the assistance of a domestic worker. She also assisted with the administration of the

electrical business after hours and during lunch times, and helped out when P's secretary was away or on leave. After P retired, he sold his business and the parties' common home and bought a farm. S was actively involved in improving and running the farm and operated two self-catering cottages on the farm to generate additional income for the couple. A few years later, the farm was sold at a profit. The couple bought a house, which they improved. They also let out an apartment on the property. Like the value of the farm, the value of the home was increased by the contribution of S's skills, labour and expertise. During the subsistence of their life partnership, P repeatedly told S that what was his was hers. He also told her that he would provide for her. In 2004, P experienced unspecified life-threatening incidents which led to feelings of financial insecurity on the part of S. She asked P for written confirmation that she was entitled to a half share of the assets of the universal partnership that she alleged existed between them. In response, P's attorney drafted a letter indicating that S would inherit certain property should S and P still be living together at the time of P's death; should P and S separate, S would receive R200 000. The letter further indicated that P was prepared to enter into a contract with S to this effect. S refused the offer. The parties' relationship came to an end some five months later (on 1 April 2005). S approached the High Court for an order declaring that a universal partnership existed between the parties, confirming the dissolution of the partnership, and appointing a liquidator. She based her claim on an oral agreement, alternatively an implied and/or tacit agreement based on the parties' conduct. P denied the existence of the partnership but did not testify in the case. The trial court found that a universal partnership had existed between the parties until 1 April 2005, and awarded S 35 per cent of the partnership assets. P appealed to the Supreme Court of Appeal.

Meer AJA delivered the judgment of the Supreme Court of Appeal. Heher, Maya, Malan and Majiedt JJA concurred in her judgment. Meer AJA reiterated the requirements for the coming into existence of a universal partnership as set out in *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) (confirmed on appeal: 1984 (3) SA 102 (A)) read with *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A); see also *V (aka L) v De Wet NO* 1953 (1) SA 612 (O); *Isaacs v Isaacs* 1949 (1) SA 952 (C)): *(a)* each partner must bring money, skill or labour into the partnership; *(b)* the partnership must be carried on for the joint benefit of the parties; *(c)* the

object of carrying on the partnership must be to make a profit; and *(d)* the contract must be legitimate (legal).

She further pointed out that the partnership contract need not be concluded in express terms. It may be tacit or implied from the facts, provided that the facts lead to the conclusion that the parties intended to establish a partnership (para [19]). She pointed out that in *Mühlmann* it was held that the test for determining whether or not a universal partnership had tacitly come into existence is whether it is more probable than not that a tacit partnership agreement had been concluded (*Mühlmann* 1984 (3) SA 102 (A) at 124C–D, cited at para [20] of *Ponelat v Schrepfer*). It was also held that it must be clear that the parties intended to enter into a universal partnership and that the conduct from which the agreement is to be inferred amounts to more than 'what is ordinarily to be expected of a wife in a given situation' (*Mühlmann* 1981 (4) SA 632 (W) at 123H–I and *Mühlmann* 1984 (3) SA 102 (A) at 634F–H, cited at para [20] of *Ponelat v Schrepfer*). Meer AJA held that a universal partnership can arise between spouses or between parties who are not married to each other, provided that the requirements for the coming into operation of such a partnership are met (para [22]).

On the evidence, she concluded that the requirements for a universal partnership were met in this case (para [24]). P and S had intended to enter into a universal partnership and had pooled their assets and resources during the sixteen-year duration of their life partnership. Both parties had contributed to the partnership — P had contributed his business and financial means, while S had contributed financially and physically by providing money, time, energy, labour, skills and expertise, and her conduct was more than that which is ordinarily to be expected of a life partner. The pooling of their resources; their joint investment and effort; and P's offer, reflected in his attorney's letter to S, all indicated that a universal partnership existed between the parties (para [23]). Meer AJA accordingly agreed with the trial court that it was more probable than not that a tacit universal partnership existed between the parties (para [24]). The appeal was, accordingly, dismissed with costs (para [27]).

The judgment is supported as the uncontested facts of the case show that a universal partnership came into existence between the parties. As P entered the partnership with an existing and established business, the 35/65 per cent division of the partnership assets is also supported.

Maintenance

Post-divorce spousal maintenance

On post-divorce spousal maintenance, see the discussions of *AV v CV* and *SH v EH* above.

Variation of post-divorce maintenance for child

The principle that a written agreement may not be varied orally if it contains a clause stipulating that variation must be in writing was established in *Shifren and Others v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O) and confirmed on appeal by the then Appellate Division in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A). The principle was again confirmed by the Supreme Court of Appeal in *Brisley v Drotsky* 2002 (4) SA 1 (SCA). In *GF v SH and Others* 2011 (3) SA 25 (GNP), the application of the principle to a settlement agreement parents had concluded when they got divorced and which had been made an order of court was at issue. The settlement agreement inter alia regulated payment of maintenance for the parties' minor children, residency of the children with their mother, and contact with their father. The settlement agreement also provided that the terms of the agreement could only be varied by way of a written document signed by both parties. After the divorce, the parties had recurrent disputes about maintenance for the children. At one stage, they agreed to change the maintenance and residency arrangements. However, their difficulties continued. Eventually they sought the assistance of a mediator. They reached a mediated agreement which varied the maintenance arrangements. The terms of the mediated agreement were captured in a letter the mediator sent to both parties, but were not set out in a written document signed by both parties. The mediated agreement still did not bring an end to the parties' disputes and they eventually agreed that their obligations would revert to those set out in the divorce settlement. Subsequently, the children's mother (first respondent) caused a writ of execution in the sum of R303 154,62 plus interest and costs to be issued against the father (applicant) for arrear child maintenance, resulting in some of his assets being attached. The father thereupon brought an application to the High Court to have the writ set aside. He contended that the writ should not have been issued since it reflected an incorrect amount because it was based on his maintenance obligations as deter-

mined in the parties' settlement agreement, while the parties had agreed on maintenance obligations that differed from those the settlement agreement had imposed on him. Relying on the clause in the settlement agreement that required variation to be reduced to writing and to be signed by both parties, the children's mother opposed the application. She further brought a counter-application for an order declaring the children's father to be in contempt of court, sentencing him for such contempt and authorizing the sale in execution of the attached goods.

The main issues the court had to decide were whether the original maintenance obligations could be varied without the variation being reduced to writing and being signed by both parties; if so, whether the obligations were indeed varied; and whether the applicant was in contempt of court for failing to meet his maintenance obligations. In a balanced judgment, Kollapen AJ (as he then was) answered all of these questions in the affirmative.

He held that even though the *Shifren* principle is firmly entrenched in South African law, public policy permits departure from the principle in appropriate cases (para [13]). In a realistic and most welcome *dictum*, he held that in the context of family law, considerations that are different from those that apply to commercial contracts 'may well warrant consideration' in determining whether public policy permits such departure (para [18]). Such considerations include the constitutional instruction that the child's best interests must be paramount and the parental duty of support, which must not be sacrificed 'at the altar of ensuring certainty at all times' (paras [19.1] and [19.2]). Another consideration is that it would be 'impractical and inconvenient to suggest that, in all . . . instances, and in the face of a non-variation-except-in-writing clause, parents should . . . be constrained in their ability to take decisions and to do things, even by mutual agreement, that would advance the interests and the wellbeing of [their] . . . minor children' (para [19.3]). In view of these considerations, Kollapen AJ concluded that although departure from the *Shifren* principle should not be 'easily justified or readily countenanced', the context in which parenting takes place and in which decisions are made in order to advance the best interests of the child must be given due regard (para [20]). Furthermore, strict adherence to the *Shifren* principle may saddle parents with a disproportionate share of their parental responsibilities and may restrict their ability to do what is in the child's best interests, because their settlement agreement might not be in keeping with changed circumstances

(para [22]). Therefore, a settlement agreement can, in appropriate cases, be varied orally even if the agreement stipulates that variation must be agreed on in writing.

Analysing the facts of the case, Kollapen AJ concluded that the parties' divorce settlement had been varied, but that there was a dispute about the financial arrangements that had operated at certain stages. This dispute could not be resolved on the papers before the court (paras [23]–[25]). However, in respect of other variations the parties were in agreement. The latter variations resulted from the parties' attempts to take changed circumstances into account and to resolve their disputes in the best interests of their children. Those variations were accordingly agreed on for reasons that justified departure from the *Shifren* principle. Ignoring them would offend public policy, because the *de facto* contributions of one party (the father) would not be ignored purely because they were not in line with the settlement agreement (paras [27]–[30]).

With regard to the issue of contempt of court, Kollapen AJ found that the changes in the maintenance arrangements meant that the writ of execution had been issued in the wrong amount because the amount had been calculated solely with reference to the settlement agreement. Thus, the writ of execution had to be set aside (paras [31], [32], and [40]). However, on the facts, it was clear that the father had indeed failed to comply with his maintenance obligations at certain times. Because of the dispute between the parties about the maintenance obligations that had been agreed on in respect of certain periods and the amounts the father had to pay during those periods, the court was unable to determine precisely what was supposed to be paid and what was actually paid during those periods. However, in respect of other periods it was possible to determine what had to be paid and what was in fact paid (para [33]). In respect of the latter periods the facts showed that the father had indeed partially failed to comply with his maintenance obligations (para [34]). On the evidence, Kollapen AJ concluded that the father's failure was wilful and/or *mala fide*, because the father did not provide a satisfactory explanation for the default and because he had had access to funds for a holiday in Mauritius and financial transactions that ran into millions of Rands at times when he had failed to meet his maintenance obligations towards his children (para [36]). He had accordingly committed contempt of court (paras [36] and [40]). Kollapen AJ sentenced him to six months'

imprisonment, wholly suspended for three years on condition that he pay the arrears in four specified instalments (para [40]).

Marriage

Customary marriage

As a customary marriage is not concluded in front of an official marriage officer and the requirements for the coming into existence of the marriage are frequently met in phases, it is often difficult to determine whether a customary marriage has in fact come into existence. Although the spouses are obliged to register their customary marriage once it has come into existence, non-registration does not affect the validity of the marriage (s 4(9) of the Recognition of Customary Marriages Act). Furthermore, registration may take place even after the death of one or both of the spouses (s 4(5)). The applicant in *Motsoatsoa v Roro and Another* [2011] 2 All SA 324 (GSJ) had sought such posthumous registration, but the Department of Home Affairs refused to register the marriage on the ground that some of the requirements for a valid customary marriage had not been met. The applicant thereupon approached the High Court for an order declaring that a valid customary marriage had existed between her and the deceased. In the alternative, she sought an order directing the Minister of Home Affairs to register the marriage.

The main issue before the court was whether all the requirements for the coming into existence of a customary marriage had been met. On the evidence it was clear that the applicant and the deceased had lived together, that *lobolo* negotiations had taken place and that part of the *lobolo* had already been delivered. The main dispute related to the requirement of the handing over of the bride. The court held that the handing over of the bride is a crucial element of a customary marriage and that such handing over must take place in the presence of the families of both spouses (para [19]). Accordingly, a wife cannot hand herself over; she must be accompanied by family members (para [20]). Without the handing over of the bride, couples who live together are not spouses in a valid customary marriage (paras [20] and [21]). In this case, there was no evidence that the bride had been handed over. Accordingly, the application was dismissed (para [24]).

The decision is in keeping with others that have dealt with the requirements for a valid customary marriage (see, for example,

Mabena v Letsoalo 1998 (2) SA 1068 (T); *Fanti v Boto and Others* 2008 (5) SA 405 (C); *Ndlovu v Mokoena and Others* 2009 (5) SA 400 (GNP)). However, whether the rule that a woman may not hand herself over is in keeping with living customary law and, if so, whether it is acceptable in our new constitutional dispensation which places much emphasis on gender equality is debatable. (On the differences between official and current, living customary law, the difficulties in ascertaining the true content of customary law, and the complexities surrounding development of customary law in keeping with the Constitution, see, for example, *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Bhe and Others v Magistrate, Khayelitsa and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); *Shilubana and Others v Nwamitwa and Others* 2009 (2) SA 66 (CC); *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC); TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) 60–4; Wieland Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *SAJHR* 246–7, 250ff; Jan Bekker & Gardiol van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonization, or the creation of new marriage laws in South Africa?' (2009) 24 *SA Public Law* 216–22.)

Netshituka v Netshituka and Others 2011 (5) SA 453 (SCA) is a much less straightforward decision than *Motsoatsoa v Roro and Another*. *Netshituka* deals with the validity of a civil marriage concluded while the husband was a party to several customary marriages. The deceased entered into a civil marriage with M at an unspecified date and obtained a divorce order terminating their marriage in 1984. He entered into another civil marriage with the first respondent (N) in 1997 while he was married to yet more women in terms of customary law. He died in 2008, leaving a will in which he appointed N executrix of his estate. One of the deceased's customary wives and her daughter contested the validity of the deceased's civil marriage to N as well as the validity of his will. The trial court dismissed their application for an order declaring the civil marriage between N and the deceased void and the deceased's will invalid. The appellants appealed to the Supreme Court of Appeal.

As the validity of the will falls outside the scope of family law, this aspect of the decision is not discussed below. The family-law

issue the court had to decide was whether the civil marriage between the deceased and N was valid even though it had been concluded while the deceased was married to other women at customary law. The appellants alleged that the deceased's civil marriage with N violated section 22(1) and (2) of the Black Administration Act 38 of 1927. (Section 22(1)–(5) of the Black Administration Act has since been repealed by section 13 read with the Schedule to the Recognition of Customary Marriages Act. As the repeal does not have retroactive effect, subsections (1) and (2) of section 22 still apply to marriages which were concluded prior to the coming into operation of the Recognition of Customary Marriages Act.) At the time when the deceased entered into the civil marriage with N, section 22 provided that spouses who were married to each other at customary law were competent to enter into a civil marriage with each other, provided that the husband was not also married to another woman at customary law. Apart from this exception, no person who was a party to a customary marriage was competent to enter into a civil marriage.

N denied that the deceased was married in terms of customary law when they entered into their civil marriage. She argued that the deceased's customary marriages had automatically been dissolved when he and M had entered into their civil marriage, with the result that the deceased was an unmarried man when she (N) had entered into a civil marriage with him after the dissolution of his civil marriage to M by divorce. In support of this argument, she cited *Nkambula v Linda* 1951 (1) SA 377 (A). In that case, the then Appellate Division held that '[a] man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union must be regarded by this act as having deserted his wife, and under these circumstances the woman to the customary union is justified in leaving her husband without rendering her guardian liable for a refund of the lobola' (*Nkambula v Linda* at 384D–E). It also held that, apart from preserving the 'material rights' (financial rights) of the customary wife and the children born of the customary marriage, the Black Administration Act 'does not contemplate the existence side by side of a civil marriage and a customary union' (*Nkambula v Linda* at 382G).

The unanimous judgment of the Supreme Court of Appeal was delivered by Petse AJA (Mpati P, Bosielo JA, Tshiqi JA and Seriti JA concurring). He indicated that when the deceased entered into his first civil marriage with M, section 22 of the Black

Administration Act empowered a man who was a party to a customary marriage to enter into a civil marriage with another woman provided that he first declared, on oath, the name of every woman to whom he was married at customary law, the name of every child born of his subsisting customary marriages, the nature and amount of the movable property (if any) he had allotted to each of his customary wives or to each house, and any other information that might have been required. This declaration had to be made to the magistrate or native commissioner of the district in which the husband was domiciled (para [9]). Thus, when the deceased married M, the Black Administration Act permitted the co-existence of a civil and a customary marriage provided that the husband made the required declaration.

Petse AJA pointed out that a number of authors have interpreted *Nkambula v Linda* as authority for the view that an existing customary marriage was automatically dissolved if one of the parties entered into a civil marriage with another person. He specifically referred to IP Maithufi ('The Recognition of Customary Marriages Act of 1998: A commentary' (2000) 63 *THRHR* 511; see also IP Maithufi & GBM Moloi 'The need for the protection of rights of partners to invalid relationships: A revisit of the ''discarded spouse'' debate' (2005) 38 *De Jure* 145), R-M Jansen ('Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage' (2003) 28 (1) *Journal for Juridical Science* 120) and Allan West (' ''Black marriages'' ': The past and the present' (2005) 7 *South African Deeds Journal* 10) (para [10] n 5)). Other authors who have adopted this interpretation of *Nkambula* include Heaton (*South African Family Law* 140), Himonga (in *Wille's Principles* 362), and June D Sinclair (assisted by Jacqueline Heaton) *The Law of Marriage Volume 1* (1996) 247n121). Petse AJA, however, was of the view that *Nkambula* has a narrower reach. He pointed out that in *Nkambula* the customary wife of the man who had entered into a civil marriage with another woman left him because she claimed that he had deserted her by entering into the civil marriage and that, in this context, the Appellate Division had held that a man who enters into a civil marriage with another woman while he is a party to an existing customary marriage can be regarded as having deserted his customary wife, with the result that his customary wife is justified in leaving him without her guardian having to return the lobolo that had been paid in respect of the customary marriage (para [10]). Petse AJA did not interpret the decision as entailing that the

customary marriage was dissolved automatically because of the husband having entered into a civil marriage with another woman.

Referring to the facts of *Netshituka*, Petse AJA stated that it was common cause that the deceased's customary wives did not leave him after he entered into the civil marriage with M. He held that, at customary law, desertion by a husband of his customary wife is not irreparable because the husband may 'phuthuma' (fetch) his wife, and his desertion does not give his wife the right to refuse him when he fetches her unless the circumstances correspond to those set out in *Nkambula* (para [12]). As regards the possibility — hinted at by Bennett (*A Sourcebook of African Customary Law for Southern Africa* (1991) 261–2) — that 'phuthuma' might not be practised by all groups, Petse AJA held that although Bennett states that 'the term "*phutuma*" is used by the Southern Nguni people . . . it was not suggested in this court that the convention is not practised by the nation/s of which the deceased and his customary law wives were members' (para [12] n10). Petse AJA accordingly simply assumed that the custom applied to the deceased and his customary wives. His casual approach in this regard is disconcerting.

Be that as it may, Petse AJA further held that, in this case, the deceased never had to 'phuthuma' his customary wives because they did not leave him after he deserted them by entering into a civil marriage with M. After he divorced M, he again cohabited with his customary wives, thus showing his reconciliation with them. Furthermore, he referred to them as his first, second and third wives in his will. From these facts Petse AJA drew the startling conclusion that 'to the extent that the deceased's civil marriage to . . . [M] may have terminated his unions with his customary law wives, those unions were revived after the divorce' (that is, after he divorced M) (para [13]). As it is legally impossible to revive a marriage that has been terminated, one must assume that the Acting Judge of Appeal simply phrased the statement inaccurately and meant to convey that the customary marriages were actually never terminated by the civil marriage.

Based on the evidence and his interpretation of *Nkambula*, Petse AJA concluded that the deceased was still married to his customary wives when he entered into the civil marriage with N. Petse AJA then considered whether the deceased could validly have entered into a civil marriage with N while his customary marriages existed (para [14]). The civil marriage with N was

solemnized before the coming into operation of the Recognition of Customary Marriages Act, but after the amendment of section 22 of the Black Administration Act by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. (The Recognition of Customary Marriages Act came into operation on 15 November 2000 and the Marriage and Matrimonial Property Law Amendment Act on 2 December 1988.) At the time, spouses who were married to each other at customary law were competent to enter into a civil marriage with each other, provided that the husband was not also married to another woman at customary law. However, they were not competent to enter into any other civil marriage (para [14]). Petse AJA referred to the interpretation of section 22 in *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) in which it was held that a civil marriage that was concluded while the male party was a party to an existing customary marriage with another woman was void (*Netshituka* para [15]). As it 'was not argued . . . that *Thembisile* was wrongly decided', Petse AJA applied the decision and held that the civil marriage between the deceased and N was void (para [15]). He accordingly upheld the appeal in this regard and substituted the order of the trial court with a declaration of nullity of the civil marriage (para [20]).

Petse AJ was correct in stating that the court in *Thembisile* had held that a civil marriage that was concluded while the male party was a party to an existing customary marriage with another woman was void. And, the judgment in *Thembisile* was also correct: As section 22(1) of the Black Administration Act expressly provided that no person 'shall be competent' to enter into a civil marriage while he or she is a party to a customary marriage with another person, a civil marriage concluded in violation of the section is clearly void on the ground of lack of competency to marry (Sinclair *The Law of Marriage* 222, 223–4n52; see also R-M Jansen 'Family Law' in JC Bekker, C Rautenbach & NMI Goolam *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 52; but see IP Maithufi 'Do we have a new type of voidable marriage?' (1992) 55 *THRHR* 632, IP Maithufi 'The Recognition of Customary Marriages Act: A commentary' (2000) 63 *THRHR* 511 and JMT Labuschagne 'Spanningsveld tussen die psigo-kulturele en die juridiese: Opmerkinge oor die vermoënsregtelike gevolge van gemeenregtelike huwelike tussen Swartes' (1995) 58 *THRHR* 309 who, prior to the judgment in *Thembisile*, submitted that the civil marriage is voidable.)

However, whether Petse AJA's interpretation of *Nkambula* and, consequently, his finding that the deceased was still married to his customary wives when he entered into the civil marriage with N is correct, is questionable. Reading the judgment in *Nkambula*, one gets the distinct impression that the Appellate Division held that an existing customary marriage automatically and invariably comes to an end when the husband in the customary marriage enters into a civil marriage with another woman, and that the part of the decision Petse AJA focused on dealt primarily with the issue of the return of lobolo, that is, one of the consequences of the dissolution. At no point in his judgment did Petse AJA attempt to reconcile the express statement in *Nkambula* that, apart from protecting the material rights of the customary wife and her children, 'the [Black Administration] Act does not contemplate the existence side by side of a civil marriage and a customary union' (at 382G) with his views on the continued existence of the customary marriage. This statement by the Appellate Division in *Nkambula* indicates that the court was of the view that an existing customary marriage automatically comes to an end when the husband enters into a civil marriage with another woman. Support for this interpretation is to be found in the further statement in *Nkambula* that the co-existence of a civil and a customary marriage between one man and two different women 'is entirely repugnant to our idea of a civil marriage' (at 382H). The Appellate Division further held that if a customary wife were to be compelled to return to her husband who had entered into a civil marriage with another woman, she would be sent 'to a life of adultery', which the court would not sanction as this would be improper and in conflict with 'the moral and legal standards which we attach to a civil marriage' (at 382H, and 383D–E). It is submitted that these statements indicate that the Appellate Division indeed held that because of the monogamous nature of a civil marriage, an existing customary marriage must necessarily automatically come to an end if the husband enters into a civil marriage with another woman. Therefore, Petse AJA's interpretation of *Nkambula* is incorrect. The application to have the deceased's civil marriage with N declared void should accordingly have been dismissed.

Another concern is Petse AJA's uncritical reliance on old sources in support of his decision that, at customary law, a husband may 'phuthuma' his deserted wife and that his desertion does not give her the right to refuse him when he fetches her,

unless the circumstances are those set out in *Nkambula*. He blithely relied on *Bobotyane v Jack* 1944 NAC (C & O) 9, JC Bekker (*Seymour's Customary Law in Southern Africa* 5 ed (1989) 181–95) and Bennett (*Sourcebook of African Customary Law* 261–2) as authority for this statement of the law. Even though case law and, especially, publications by authors are frequently criticized as conveying an official, stultified version of customary law which does not reflect current, living customary law, Petse AJA was apparently confident that a case that was decided more than 60 years ago and textbooks that are more than twenty years old (and were written before the advent of the new constitutional dispensation) still reflect living customary law.