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Family law

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Legislation

The Children's Amendment Act 17 of 2016 and the Children's Second Amendment Act 18 of 2016 have been published but are yet to come into operation. The provisions of these Amendment Acts correspond to those of the Children's Amendment Bill 13 of 2015 and the Children's Second Amendment Bill 14 of 2015, which were discussed in 2015 *Annual Survey* 407-9.

Subordinate legislation

The fees payable to accredited child protection organisations or adoption social workers in respect of adoptions were amended on 2 September 2016 (reg 107 of the General Regulations Regarding Children, 2010 issued in terms of the Children's Act 38 of 2005 as amended by GN 978 *GG* 40243 of 2 September 2016). The separate regulation relating to fees payable for inter-country adoptions (reg 114A) was repealed by the same Government Notice.

Case law

Accrual system

Date for calculating accrual

One of the issues in *Schmitz v Schmitz* [2015] 3 All SA 85 (KZD) was the date that should be used to determine the accrual claim of the spouse whose estate shows the smaller or no accrual. The case was discussed in 2015 *Annual Survey* 409-10. In the period under review, the decision was also reported as *KS v MS* 2016 (1) SA 64 (KZD). In the comment on *Schmitz* in 2015 *Annual Survey*, it was indicated that the Supreme Court of Appeal settled the

issue as to the date in *Brookstein v Brookstein* (20808/14) [2016] ZASCA 40 (24 March 2016). *Brookstein* has since been reported as *AB v JB* 2016 (5) SA 211 (SCA).

Children

Adoption

In *JGB & another v Presiding Officer, Children's Court, Wynberg NO & others* [2016] 3 All SA 167 (WCC), several decisions a presiding officer of the Children's Court (the magistrate) had made in the course of pending adoption proceedings were set aside on review. H, the child whose adoption was at issue, had been living with her prospective adoptive parents (applicants) since she was three months old, and had been in their uninterrupted care for more than seven years pending the issuing of an adoption order. Five days after H's birth, her unmarried mother had validly consented to her adoption. The applicants' adoption application was completed when the child was ten months old, and the provincial head of social development provided the letter of recommendation in respect of the adoption required in terms of section 239(1)*(d)* of the Children's Act. The magistrate nevertheless instructed the adoption social worker to make further attempts to locate H's father. H's father was located when she was three years old. The magistrate thereupon instructed the applicants to bring H to court to meet her father and paternal grandfather. When H was nearly six years old, her paternal grandfather and his wife applied to adopt her. This adoption application was not supported by a letter of recommendation in terms of section 239(1)*(d)* and the provincial head of social development indicated that the letter would not be issued. Despite the absence of the letter of recommendation, the fact that the letter would not be issued, and the fact that H's father had in the meantime consented to her adoption by the applicants, the magistrate ordered the adoption application by H's paternal grandfather and his wife to proceed. She further ordered that H should be made available for psychological assessment by a mental health professional appointed by her paternal grandfather and his wife, or by another mental health professional of their choice. She also admitted H's biological mother as a party for purposes of opposing the applicants' adoption application and held that her mother was entitled to be provided with legal representation in the adoption proceedings. The applicants obtained an order in

the High Court staying the adoption proceedings. They then sought an order from the High Court setting the abovementioned decisions by the magistrate aside on review and declaring *ultra vires* a *pro forma* adoption order the magistrate had created. The *pro forma* adoption order retained the parental responsibilities and rights of the adopted child's biological parent(s) as well as 'all claims to contact with the child by any family member'.

The High Court reviewed and set aside the magistrate's rulings (para [67]). It held that the requirement regarding a letter of recommendation in terms of section 239(1)*(d)* of the Children's Act is peremptory and that non-compliance with this requirement can be condoned in exceptional circumstances only (paras [29]-[31] [38]; see also *In re XN* 2013 (6) SA 153 (GSJ)). As there was no letter of recommendation and one would also not be issued in respect of the adoption application by H's paternal grandfather and his wife, and exceptional circumstances to justify condonation of the absence of the letter were not present, the adoption application could not have proceeded (paras [39] [40]). Therefore, the magistrate's ruling that the adoption proceedings relating to the application by H's paternal grandfather and his wife should proceed, had to be set aside (paras [41] [67]). As a logical consequence, the ruling that H should be made available for psychological assessment by a mental health professional appointed by H's paternal grandfather and his wife or by another mental health professional of their choice, was also set aside (para [67] read with para [28.1]).

The High Court then turned to the issue of whether a parent who has validly consented to the adoption of his or her child is nevertheless a party to subsequent adoption proceedings. In this case, H's mother had consented to her being adopted by a person or persons unknown to her and had been informed that she was not entitled to be present when the adoption application was being considered, unless the court allowed her to be present in H's interest. The judge held that H's mother had no direct or current interest in the adoption proceedings, because she had already been found validly to have consented to the adoption (para [49]). Therefore, she did not qualify as a party to the adoption proceedings (ibid). At best, she could invoke the right to adduce evidence that section 58 of the Children's Act confers on a 'parent' in a matter before the Children's Court (ibid). Consequently, the magistrate's ruling that allowed H's mother to be a party for purposes of opposing the applicants' adoption application was also set aside (paras [50] [67]).

The High Court also set aside the ruling that H's mother must be provided with legal representation (paras [56] [67]). It held that if she, as a 'parent', wished to avail herself of the right to adduce evidence in terms of section 58 of the Act and wanted to have legal representation in doing so, she had to secure legal representation herself and do so in good time before the applicants' adoption proceedings resumed in the

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Children's Court (paras [53] [67]).

The High Court then considered the magistrate's *pro forma* adoption order which retained the parental responsibilities and rights of the adopted child's biological parents and 'all claims to contact with the child by any family member' even though section 242(1) of the Act provides that all parental responsibilities and rights any person had in respect of the child before the adoption are severed by the adoption. The court held that, even though section 242(1) empowers the court that makes an adoption order to confirm a post-adoption agreement relating to contact and to allow exceptions to the general rule severing parental responsibilities and rights any person had before the adoption, the legislature could not have intended to confer an unfettered discretion on the presiding officer of a Children's Court 'to issue wide-ranging orders eroding the legal concept of adoption' (para [63]). If an adoption order stipulates that the child's biological parents retain full or partial parental responsibilities and rights after the adoption, the child's adoptive parents do not acquire full parental responsibilities and rights as envisaged in section 242(2)*(a)* and (3) of the Act (para [61]). These sections provide, respectively, that an adoption order confers full parental responsibilities and rights in respect of the adopted child on the adoptive parents, and that the adopted child must be regarded as the child of the adoptive parents for all purposes and vice versa. The effect of the *pro forma* adoption order was that something less than adoption was being ordered (ibid). Consequently, the *pro forma* order was *ultra vires* the provisions of the Act (para [64]).

The High Court concluded that the applicants' adoption application need not commence *de novo*. Instead, the court ordered that the adoption proceedings had to be finalised before another presiding officer within three months and that, for this purpose, the record of proceedings in the Children's Court to date would stand as the record of proceedings (paras [66] [67]).

The High Court's decision to set aside the rulings of the magistrate is correct. When reading the judgment, one gets

the impression that the magistrate not only failed to apply the law correctly, but was determined to hamper (if not to scupper) the applicants' adoption proceedings.

Care and contact

The main dispute between the parties in *MT v CT* 2016 (4) SA 193 (WCC) centred on care and contact arrangements in respect of their son. The family advocate was tasked with preparing a report on the child's welfare and recommending care and contact arrangements. She requested a full consultation with the child's mother and an assessment of the child in his domestic environment. The mother undertook to comply with the request, but failed to do so. At a pre-trial hearing the court directed the mother, in terms of rule 37(8) of the High Court rules, to facilitate a meeting with a representative of the family advocate's office to enable the representative to complete the assessment of the child. The mother failed to comply with this direction. She was charged with contempt of court. The question arose whether the mother could be convicted of contempt of court for failing to comply with a direction in terms of rule 37(8) as opposed to a court order. The question was answered in the affirmative. Because the case relates to civil procedure, it is not discussed in this chapter. However, for purposes of family law it should be noted that the court held that the family advocate's final report is critical to enable a trial court to come to a just decision in the child's best interests and that it must be submitted before the matter can be declared ready for trial (para [32]).

Duty to support parents

Seleka v Road Accident Fund 2016 (4) SA 445 (GP) concerns the dependant's action for damages for loss of support. The case is discussed in the chapter 'Law of Delict'. For purposes of family law, it should be noted that the court held that, in terms of Tswana customary law, male and female children have a duty to support their parents who are in need of support.

International relocation

In terms of section 18(3)*(c)* read with section 18(4) and (5) of the Children's Act, the consent of all the child's guardians is required for the child's departure or removal from South Africa, unless the court orders otherwise. In *JP v JC & another* [2016] 1 All SA 794 (KZD), a mother (P) sought judicial approval to

relocate to England with her children despite the opposition of the children's father (C). P and C were parties to a permanent life partnership when the children were born. Consequently, they shared full parental responsibilities and rights, including guardianship, in respect of the children (s 19(1) read with s 21(1)*(a)* of the Act). The children were in P's care, and C had a right to reasonable contact with them. C did not fully comply with his maintenance obligations towards the children. P had a small income and had reached the limit of her employment potential in South Africa. She and the children lived with her parents, who supported them financially and assisted with the children's care. The children had no contact with their paternal grandparents. P's father was a British citizen. Her parents and all her siblings were planning to relocate to England. One of P's brothers was already living in England and offered to support P and the children until P found accommodation and employment in England. P and the children would qualify for free health care and the children would qualify for free schooling in England. P had worked in England for eight years before the children were born.

The court applied well-established rules in deciding whether or not P should be granted permission to emigrate with her children. It held that the children's best interests must be the determining factor in deciding the matter (paras [18] [19] [23] [25] [26]; see also s 28(2) of the Constitution of the Republic of South Africa, 1996; ss 6(2) and 9 of the Children's Act; *Jackson v Jackson* 2002 (2) SA 303 (SCA); *F v F* 2006 (3) SA 42 (SCA)). All relevant factors must be considered. The court must, in particular, take into account the factors relating to the best interests of the child listed in section 7(1) of the Children's Act (para [25]). On the facts, the court found that P's decision to immigrate to England was reasonable and *bona fide* and served the children's best interests (paras [22] [48]). It accordingly authorised P to remove the children permanently to England (para [49]).

For recent discussions of the courts' approach towards granting consent to a child's emigration, see Ann Skelton & Marita Carnelley (eds) *Family Law in South Africa* (2010) 264-7; Trynie Boezaart 'The position of minor and dependent children of divorcing and divorced spouses or civil union partners' in Jacqueline Heaton (ed) *Law of Divorce and Dissolution of Life Partnerships* (2014) 208-9; Jacqueline Heaton 'Parental responsibilities and rights' in Trynie Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 93-4; Latiefa Albertus & Julia Sloth-Nielsen 'Relocation

decisions: Do culture, language and religion matter in the Rainbow Nation?' 2010 *Journal of Family Law and Practice* 86; Wesahl Domingo '"For the sake of the children": South African family relocation disputes' (2011) 14 *PELJ* 148; Brigitte Clark 'The shackled parent? Disputes over relocation by separating parents — Is there a need for statutory guidelines?' (2017) 134 *SALJ* 80.

Maintenance

Du Toit NO v Thomas & others 2016 (4) SA 571 (WCC) concerns maintenance of a child from her deceased father's estate. Before a liquidation and distribution account was lodged, the child's mother obtained a maintenance order in terms of the Maintenance Act 99 of 1998 on behalf of the child against the executor of the deceased estate. The executor unsuccessfully applied to the High Court for an order setting aside the maintenance order on the ground that the maintenance court did not have jurisdiction to make an order against him, because the duty of support envisaged by the Maintenance Act does not apply to the executor of a deceased estate. The High Court dismissed the application. The unreported version of the judgment (*D v T* [2015] ZAWCHC 80 (3 June 2105)) was discussed in 2015 *Annual Survey* 1094-5. The executor unsuccessfully appealed to the Supreme Court of Appeal (*Du Toit NO v Thomas* (635/15) [2016] ZASCA 94 (1 June 2016)). The Supreme Court of Appeal dismissed the appeal on the ground that the executor had consented to the jurisdiction of the maintenance court and had fully participated in its proceedings. The appeal is discussed in the chapter 'Law of Succession (including Administration of Estates)'.

MS v Head of Department, Western Cape Education Department & others [2016] 4 All SA 578 (WCC) deals with the granting of school fee exemptions to separated parents whose children are enrolled at public schools. The separated mother of a child who attended a public school alleged that the current disposition violates mothers' right to equality. The case mainly concerns constitutional and administrative law. For purposes of family law, it should be noted that the court held that a child's parents are jointly — not jointly and severally — liable for public

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school fees if they have separated. This means that each parent is liable only for his or her proportionate share of the fees (paras [88] [104]).

Suspension of parental responsibilities and rights

LM v Goldstein NO & others 2016 (1) SA 465 (GJ) deals with the powers of case managers. Case managers are appointed in

terms of an agreement between high-conflict parties to assist the parties 'in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum' (Madelene de Jong 'Mediation and other appropriate forms of alternative dispute resolution upon divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 615; M de Jong 'Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa' (2015) 18 *PER/PELJ* 150 153). Case management is also known as parenting coordination or facilitation. (De Jong in Heaton (ed) *The Law of Divorce* 615; De Jong (2015) 18 *PER/PELJ* 153 prefers the term 'parenting coordinator'. On the problems arising from employing three different terms for the same concept, see De Jong (2015) 18 *PER/PELJ* 156-7, 159-60.) A case manager attempts to get parents to agree on a solution to their parenting disputes. If this attempt fails, he or she has the power to make decisions or directives regarding the disputes which will bind the parties until a competent court directs or the parties jointly agree otherwise (De Jong in Heaton (ed) *The Law of Divorce* 615; De Jong (2015) 18 *PER/PELJ* 153-4).

In *LM*, the question arose whether a case manager has the power to suspend parental responsibilities and rights. In this case, two case managers were appointed in terms of a divorce settlement agreement that was made an order of court. The settlement agreement awarded guardianship and care jointly to the divorcing parents. The children were to reside with each parent on a rotating week-to-week basis. The settlement agreement conferred very wide powers on the case managers, including the power to mediate, investigate, and resolve parental disputes; furnish written recommendations and reasons for recommendations; assist the parents in relation to any issue arising out of the exercise of care, residence, maintenance of, and contact with the children; and sanction a parent for alienating behaviour. The settlement agreement also provided that the decision of the case managers would be binding on the parents until a court directed otherwise. Approximately one year after the parents' divorce, the case managers made a recommendation awarding full parental responsibilities and rights of the children to their father, subject to supervised contact by their mother. The case managers subsequently made a recommendation that

suspended the mother's right to contact altogether. The mother was dissatisfied with these recommendations. She sought an order declaring that she had full parental responsibilities and rights, that the office of the family advocate should investigate and report on the wellbeing and best interests of the children, and that she should have supervised contact pending the finalisation of the family advocate's report. She contended that the case managers did not have the power to suspend parental responsibilities and rights, because this power was reserved for the judiciary.

The court agreed with this contention and granted the mother's application (paras [33] [35]). The court pointed out that the powers of the case managers were founded in the settlement agreement (para [20]). The settlement agreement did not, and could not, empower the case managers to suspend parental responsibilities and rights, because the court alone had this power (paras [23] [24]). Consequently, the case managers' suspension of the mother's parental responsibilities and rights was a nullity (para [25]). The court used its powers as upper guardian of all minors to order the office of the family advocate to investigate and report on the children's wellbeing and best interests (para [26]). The court also declared that the mother had a right to supervised contact pending the finalisation of the family advocate's report (para [35]).

The court's order is to be supported. Case managers should not be permitted to suspend or terminate parental responsibilities and rights; only a court should be allowed to exercise these powers. This should be the position regardless of the terms of any agreement between parents. Allowing parents to confer the power to terminate or suspend parental responsibilities and rights on a case manager would amount to an improper delegation of judicial authority to the case manager.

Divorce

Applications pending divorce

BR & another v TM; In re: LR [2015] 4 All SA 280 (GJ), which concerns a dispute on paternity and parental responsibilities and rights pending determination of a divorce action, was discussed in 2015 *Annual Survey* 396-402. The decision has also been reported as *BR & another v TM* 2016 (3) SA 417 (GJ). On this case, see further Hanneretha Kruger 'The High Court's refusal to

resolve issues relating to paternity and parental responsibilities and rights in motion proceedings where there is a divorce pending. *BR v TM* 2016 3 SA 417 (GJ) *BR v TM: In re LR* [2015] 4 All SA 280 (GJ)' (2017) 80 *THRHR* 326.

Care and contact

On care and contact of children on or after divorce, see the discussions of *MT v CT* and *LM v Goldstein NO & others* above in this chapter.

Deed of settlement

The decision of the Constitutional Court in *Eke v Parsons* 2015 (11) BCLR 1319 (CC) on the consequences of incorporating a deed of settlement in a divorce order was discussed in 2015 *Annual Survey* 421-2. The case has also been reported as *Eke v Parsons* 2016 (3) SA 37 (CC).

Division of accrual on divorce

On the date for the determination of the accrual in a spouse's estate, see the discussion of *KS v MS* and *AB v JB* above in this chapter.

On the issue of whether trust assets can be taken into account for purposes of calculating the accrual in a spouse's estate, see the discussion of *YB v SM & others NNO* 2016 (1) SA 47 (WCC) below in this chapter.

Forfeiture of patrimonial benefits

When the parties in *MC v JC* 2016 (2) SA 227 (GP) divorced, the regional court made a partial forfeiture order against Mrs C in terms of section 9(1) of the Divorce Act 70 of 1979. Section 9(1) empowers the court that grants a divorce on the ground of the irretrievable breakdown of a marriage, to order forfeiture of the patrimonial benefits of the marriage by one spouse in favour of the other if the spouse against whom the order is made will be unduly benefited if the order is not made. In deciding whether to make the order, the court must have regard to the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage, and any substantial misconduct by either spouse. Mrs C appealed against the order.

On appeal, the High Court held that Mrs C would not benefit unduly if a forfeiture order were not made (paras [23] [24]). It accordingly set the forfeiture order aside (para [24]). The interesting

part of the case is that, during the hearing of the appeal, the court requested counsel to submit supplementary heads of argument on whether, in view of the fact that divorce is no longer fault-based, section 9(1) is constitutionally tenable (para [4]). Counsel for Mrs C contended that section 9(1) is irreconcilable with the value system of the Constitution and that it violates the rights to dignity, privacy, and property (ss 10, 14 and 25 of the Constitution), inter alia, because it subjects private conduct to scrutiny by the court in order to make a moral judgment that might result in a person being deprived of property (para [26]). The court did not deliver judgment on the constitutionality of section 9(1). However, it stated that the argument that section 9(1) is outdated in the present constitutional context may have merit, particularly because it punishes a party for substantial misconduct without the need to prove that the party's misconduct had a financial impact (para [33]). The court

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specifically stated that section 9(1) may infringe the right to equality because the party who committed substantial misconduct may find himself or herself in a weaker bargaining position regarding the division of assets on divorce (para [32.1]). The reproductive rights of a wife who had secretly terminated her pregnancy may be violated if her conduct is viewed as a ground for a forfeiture order (para [32.2]). Furthermore, a spouse's right to dignity may be violated if he or she is compelled to remain in an unhappy marriage for fear of losing patrimonial benefits. Moreover, if the unhappy marriage results in violence, the spouse's right to freedom and security of the person would be violated (para [32.3]). The court ordered Mrs C to follow the procedure in rule 16A of the High Court Rules in respect of raising a constitutional issue. It also ordered that the Minister of Justice and Correctional Services, as the executive authority responsible for the administration of the Divorce Act, and the Speaker of Parliament be joined (paras [34]-[44]).

The recent abolition, on constitutional grounds, of the action for damages for adultery based on the *actio iniuriarum* in *DE v RH* 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 lends support to the view that a forfeiture order based on a spouse's misconduct may be unconstitutional. However, it should be borne in mind that misconduct is not the only consideration when a forfeiture order is at issue, and that all three of the factors listed in section 9(1) need not be present or be alleged (*Wijker v Wijker*; see also *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C)). The short duration of the marriage may, on its own, be sufficient to justify a forfeiture order. The constitutional attack on section 9(1) would have to take this fact into account.

The second case on forfeiture of benefits reported in the period under review is *Tlou v Ralebipi* [2016] 4 All SA 251 (GP). In this case, the spouses were married in community of property. It was undisputed that the wife would benefit in the absence of a forfeiture order, because the husband had acquired most of the assets of the joint estate before the marriage. The court had to decide whether this benefit would be undue, as otherwise a forfeiture order could not be made. Referring to *Wijker v Wijker* 1993 (4) SA 720 (A), Kollapen J held that fairness may not be considered in deciding whether a forfeiture order should be made, because fairness is not included in the three factors stipulated in section 9(1) (ie, the duration of the marriage; the circumstances which gave rise to the breakdown of the marriage; and any substantial misconduct by either spouse). In view of the short duration of the marriage (less than two years), the judge concluded that the benefit would be undue. However, because the marriage and the birth of a child had interrupted the wife's career, Kollapen J made only a partial forfeiture order.

The court's decision to make a partial forfeiture order in view of the short duration of the marriage is justified. However, a disconcerting aspect of the judgment is that Kollapen J did not view the husband's throttling of his wife as substantial misconduct. He stated that 'the throttling incident ... took place after an argument and there was no evidence to suggest that it was thought out or deliberate' (para [20.7]). This is another example of judicial trivialising of domestic violence. (For more examples, see Elsje Bonthuys 'Domestic violence' in Jacqueline Heaton (ed) *Law of Divorce and Dissolution of Life Partnerships* (2014) 491-2.)

Interim relief

Rule 43 of the High Court Rules governs an application by a spouse for interim maintenance pending a matrimonial action. In *TM v ZJ* 2016 (1) SA 71 (KZD), the issue arose whether a spouse in a Muslim marriage may invoke rule 43 even though Muslim marriages are not fully recognised in terms of South African law. The decision is discussed below under 'Muslim marriage'.

Redistribution of assets on divorce

RP v PP 2016 (4) SA 226 (KZP) is a judgment on redistribution of assets in terms of section 7(3) of the Divorce Act. This section empowers the court to order transfer of assets in civil marriages subject to complete separation of property if the marriages were

concluded prior to 1 November 1984 in the case of white, 'coloured' or Asian persons, or prior to 2 December 1988 in the case of black persons, provided that the spouses failed to enter into a settlement agreement, the spouse seeking redistribution contributed to the maintenance or increase of the other spouse's estate during the subsistence of the marriage, and this contribution renders redistribution equitable and just (s 7(3) and (4)). The parties in *RP* married subject to complete separation of property in 1972 and separated in 2009. Both spouses claimed redistribution of assets. The wife alleged that the husband's extramarital affairs were the main cause of the irretrievable breakdown of the marriage and that this factor had to be taken into account in making a redistribution order. The husband denied that his affairs were the major reason for the breakdown of the marriage. The parties also differed as to the date at which their estates should be valued for purposes of redistribution. The wife further resisted the husband's counterclaim for redistribution on the ground that a clause in the spouses' antenuptial contract provided that she had and would continue to have 'sole exclusive and uncontrolled administration and alienation' of all the property she owned at the time of the marriage and all the property she might acquire during the subsistence of the marriage, without her husband's marital power, interference, control, or assistance. She contended that this clause entailed that no portion of her property could be transferred to her husband in terms of section 7(3).

Regarding the issue of whether the husband's extramarital affairs should be taken into account in respect of redistribution, Moodley J pointed out that a conservative approach must be adopted in respect of misconduct, but that misconduct should be considered if it would be inequitable to disregard it (para [38] referring to *Beaumont v Beaumont* 1987 (1) SA 967 (A); *Kritzinger v Kritzinger* 1989 (1) SA 67 (A); *Buttner v Buttner* 2006 (3) SA 23 (SCA)). She held that the factors relating to misconduct must be assessed 'with an awareness of prevailing social mores and attitudes' (para [41]). Extramarital affairs have become commonplace and disapproval of adultery has diminished. However, 'this relaxed attitude towards infidelity ought not unduly [to] diminish the significance of such misconduct in the exercise of a court's discretion in determining an equitable redistribution' (ibid). The effect of one spouse's adultery on the spouse who has remained faithful remains a relevant factor. However, each case must be evaluated on its own facts (ibid). On the facts and evidence,

Moodley J found that the husband's extramarital affairs were the major cause of the irretrievable breakdown of the marriage, and that this misconduct should be taken into account in the determination of the redistribution to be ordered (para [46]).

Turning to the date at which the estates of the parties should be valued for purposes of a redistribution order, Moodley J indicated that this issue has not received much attention, because parties generally agree on the value to be assigned to their estates (para [54]). The only binding decision on the issue is *Katz v Katz* 1989 (3) SA 1 (A), where it was held that the court must have regard 'so far as that is practicable' to the parties' assets and liabilities as at the date of the order (paras [55] [56]). Moodley J held that if using the date of the order is not practicable, the appropriate date must be determined 'with due consideration to the relevant facts of the matter and the course of its litigation, and not at litis contestatio' (paras [56]-[59], the quoted phrase appears in para [59]). She further held that the discretion the court has when it exercises its power to redistribute assets

will ensure that all the relevant factors, including any proven mala fide dissipation of assets or deliberate delay in the finalisation of the proceedings or the date when the contribution by one of the parties to the increase or maintenance of the estate of the other party ceased, will be considered and accorded due weight, thereby dispelling the potential for the prejudice of the parties (para [58]).

As regards the wife's resistance of her husband's counterclaim for redistribution on the ground of the clause in the spouses' antenuptial contract, Moodley J correctly stated that the type of clause in issue was typical of antenuptial contracts concluded before 1 November 1984, and that a central purpose of such clauses was to exclude the husband's marital power that operated at the time (paras [32]-[34]). Moodley J also correctly held that nothing in the clause suggests that the wife's estate is excluded from redistribution (para [35]). Moreover, the objective of redistribution is to ensure a just and equitable distribution of assets. It would be inequitable to begin the consideration of a claim for redistribution by excluding the wife's assets (ibid). Therefore, the wife's submission that the assets in her estate could not be transferred to her husband had no merit.

On the evidence, Moodley J found that each of the spouses had contributed to the increase or maintenance of the other spouse's estate and that it would be just and equitable to order redistribution (paras [20]-[25]). She referred to *Kritzinger v*

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Kritzinger (above), where the Appellate Division held that competing claims for redistribution had to be assessed separately on their own merits 'unless the claim and counterclaim are so inextricably linked that a globular approach is appropriate' (para [17.3]). The judge concluded that in the present case the facts relating to the spouses' claims were indeed so closely interrelated that the 'globular' approach had to be adopted (paras [25] [65] [68]). Applying this approach, she ordered the husband to transfer a motor vehicle and an amount of R500 000 to the wife, and the wife to transfer an immovable property to the husband (para [73]).

The judgment by Moodley J is generally well-considered and properly substantiated. It also contains a concise summary of the law and legal principles relating to redistribution, supported by references to and/or extracts from case law (paras [16] [17]). This summary provides a good starting point for students and practitioners who wish to establish the current state of the law relating to redistribution.

Taking trust assets into account on divorce

In *YB v SM & others NNO* above, the court granted an application for amendment of particulars of claim in a divorce action to include trust assets in a husband's estate for purposes of calculating the accrual in his estate. The decision is not discussed here, because the issue of whether trust assets can be taken into account for purposes of calculating the accrual in a spouse's estate upon divorce was subsequently authoritatively decided by the Supreme Court of Appeal in *REM v VM* 2017 (3) SA 371 (SCA) (also reported as *Mills v Mills* [2017] 2 All SA 364 (SCA)). In the latter case (which falls outside the current period of review) it was held that trust assets can be included if it is proved that a spouse transferred personal assets to the trust and dealt with them as if they were trust assets 'with the fraudulent or dishonest purpose of avoiding his obligation to properly account ... for the accrual of his estate and thereby [to] evade payment of what was due to [his wife] ... in accordance with her accrual claim' (para [20]).

Maintenance

Post-divorce spousal maintenance

After a marriage lasting 24 years, the spouses in *W v H* [2016] 4 All SA 260 (WCC) were involved in very acrimonious divorce

proceedings. They had married in Germany ten days before the birth of their first child. At the time, the wife (W) was a 28-year-old German lawyer who was starting out on her career. She had not been married before. The husband (H), in contrast, was a 53-year-old, divorced senior advocate who practised in South Africa, Namibia, Swaziland, and Lesotho, and whose first divorce was described as 'very, very, very costly' (para [8]). H had convinced a reluctant W to marry him while he was visiting her in Germany. He had offered her the stark choice of either marrying him immediately or never marrying him and denying their child a father. He had further insisted that W sign an antenuptial contract which provided that, in consideration of her accepting certain donations, she waived her right to maintenance should the marriage 'be dissolved in whatever manner and for whatever reason and regardless of the conduct of the parties' (para [19]). The antenuptial contract further subjected the marriage to the accrual system. However, the accrual system was structured in such a way that H's donations to W had to be treated as part of her accrual, thereby rendering the compensation for the waiver of her maintenance claim illusory. The antenuptial contract had been prepared by H in conjunction with a South African attorney who specialised in marriage law. W had no knowledge or understanding of South African law and did not have access to a lawyer who knew South African family law. Her main adviser in respect of the antenuptial contract was a business law expert in Germany. When W instituted divorce proceedings and claimed maintenance in terms of section 7(2) of the Divorce Act, H resisted the claim on the basis of the waiver in the antenuptial contract. W argued that the waiver could not be enforced because it was contrary to public policy. In the alternative, she argued that even if the waiver were not per se contrary to public policy, it should not be enforced because enforcement would be so obviously unfair and unreasonable that public policy would be violated. During the subsistence of the marriage H denuded his estate of assets and hid assets, and during the divorce proceedings he adopted what the court called 'a "scorched earth" policy' (paras [16] [74] [146] [149] [188]). He unnecessarily increased costs, raised spurious defences, sought separation of issues and other interim orders, failed to make full disclosure, and generally adopted an obstructive approach.

The court agreed with W's contention that the waiver in the antenuptial contract was unenforceable because it was per se

contrary to public policy (paras [22]-[35] [51]). It held that, generally, any attempt to oust the jurisdiction of the court 'which deprives a party of a legal right or remedy is per se against public policy' (paras [23] [35]; the quoted portion appears in para [23]). This view was adopted by the Appellate Division a long time ago in *Schierhout v Minister of Justice* 1925 AD 417 (para [24]). Nowadays, public policy must be determined in light of the Constitution and its underlying values, including human dignity, equality, the promotion of human rights and freedoms, and the rule of law. Because the waiver in the spouses' antenuptial contract applied only to W, it violated these values and was contrary to public policy (paras [27] [28]). The waiver further violated constitutional values because it sought to exclude not only the judicial power to award post-divorce maintenance, but also the statutory right to claim maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (para [29]). Furthermore, the waiver was made even before the parties married and sought to waive W's future maintenance claims 'at a time when she could not have known what her position would be on dissolution of the marriage' (paras [31] [33]). The court consequently concluded that this type of waiver was, and has for a long time been, contrary to public policy (para [25]). In order to prevent injustice, the court further took into account the relative situation of the parties at the time when they entered into the antenuptial contract (paras [36] [37]). W was in an inferior bargaining position, inter alia, because H had put unfair pressure on her to marry immediately and to sign the antenuptial contract he had prepared, she did not know South African law, was not able to get advice from a South African expert in marriage law before entering into the antenuptial contract, and her command of English was poor (paras [37] [38]).

Although the court held that the waiver was per se contrary to public policy and unenforceable, it also considered W's alternative argument that even if the waiver were not per se contrary to public policy, enforcement would be so obviously unfair and unreasonable that it would violate public policy. The court accepted W's contention that fairness, justice, equity, and reasonableness are part and parcel of public policy (para [34]). It held that enforcement of the waiver would violate these notions because the circumstances under which the waiver had been concluded rendered its enforcement unreasonable and unjust. Furthermore, the waiver was part of the broader provisions of the

antenuptial contract which ostensibly entitled W to share in the accrual of H's estate, while H in fact subverted any accrual claim by W by failing to make full disclosure, hiding assets, and denuding his estate of assets during the subsistence of the marriage (paras [39] [40] [45]-[47]). W's position was exacerbated by the fact that the antenuptial contract provided that the donations to W had to be treated as part of her accrual, thereby rendering her supposed compensation for the waiver of her maintenance claim illusory (paras [44] [151]). Her earning capacity was and remained limited because she had sacrificed her career in Germany, moved to South Africa after marrying H, and looked after their children (para [43]). If she were not allowed to pursue her maintenance claim, she would suffer prejudice, deprivation, and indignity (para [44]). She was uninformed about and did not have a proper adviser on South African marriage law when she entered into the antenuptial contract (paras [47] [48]).

The court also made the important point that there is a world of difference between waiver of a maintenance claim by a spouse in a divorce settlement agreement, and waiver of future maintenance claims in an antenuptial contract (paras [32] [160] [178]). A waiver in a settlement agreement is valid and can be made an order of court in terms of section 7(1) of the Divorce Act. Such a waiver is part of a negotiated package and the spouses are usually advised by a South African attorney (para [160]). A waiver of future maintenance claims which is included in an antenuptial contract relates to the position when the marriage has not even yet been solemnised. Furthermore, in the present case, the antenuptial contract that included the waiver was concluded under unfair circumstances with the parties being in an unequal bargaining position (ibid). Further, there is no case law holding that this type of waiver is valid (paras [156] [160] [183]). The court accordingly declared the waiver void and unenforceable and ordered H to pay maintenance to W in terms of section 7(2) of the Divorce Act (order in para [208]).

The outcome of the court's decision is welcomed as being in keeping with constitutional values and public policy, and achieving substantive gender equality. The court's recognition of the unequal bargaining position of the parties is particularly welcome. (On the parties' unequal bargaining power and other factors which militate against the achievement of substantive gender equality, see Elsje Bonthuys 'Family contracts'

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(2004) 121 *SALJ* 879 especially 892-4; Jacqueline Heaton 'Striving for

substantive gender equality in family law: Selected issues' (2005) 21 *SAJHR* 547 549-52, 566-8). Unfortunately, however, although the husband richly deserves to be denounced, the court's condemnation of the husband is at times so strongly and emotionally worded that the statements fit uneasily with objective legal discourse.

The second case on post-divorce spousal support reported in 2016 is *Els v Jagga & others* 2016 (6) SA 554 (FB). In this case, the Free State Division of the High Court departed from the long-held judicial view that the duty to pay post-divorce maintenance to a former spouse is transmitted to the maintenance debtor's deceased estate if the former spouses' divorce settlement agreement is silent on or gives rise to doubt as to whether this duty outlasts the maintenance debtor's life. In *Els*, the spouses signed a divorce settlement agreement in 1992. The agreement, which was incorporated in the divorce order in terms of section 7(1) of the Divorce Act, provided for payment of maintenance by the husband (H) to the wife (W) until her death or remarriage. The agreement further provided that the maintenance would increase annually on the date on which H's pension increased. After H's death, W lodged a claim for payment of maintenance against H's estate. The executor allowed the claim, but H's heir (E) lodged an objection to the claim. When the executor refused to sustain the objection, E applied to court for an order setting aside the refusal and declaring W's maintenance claim unenforceable against the estate.

In the past, the courts have held that, unless a divorce settlement agreement provides that a wife's claim for post-divorce maintenance terminates on her husband's death, her claim is enforceable against her husband's estate. In *Colly v Colly's Estate* 1946 WLD 83, the court held that the plain language of the settlement agreement meant what it said, namely that the wife would be entitled to maintenance until her death or remarriage. Consequently, she could claim maintenance from her husband's estate until she died or remarried. *Owens v Stoffberg NO & another* 1946 CPD 226 relied on *Colly* and the court arrived at the same conclusion. It also stated that if the spouses had intended that the duty to pay post-divorce maintenance would terminate on the husband's death, a provision to that effect could easily have been inserted in the agreement. In *Hughes NO v The Master & another* 1960 (4) SA 936 (C), the court held that *Colly* and *Owens* were correctly decided. However, in *Copelowitz v*

Copelowitz & others NO 1969 (4) SA 64 (C), the court stated in an *obiter dictum,* that *Colly* and *Owens* were wrongly decided. Until *Els v Jagga*, *Copelowitz* was the only case in which the accepted legal position had been criticised.

In *Els v Jagga*, the court gave an overview of the decisions mentioned above (paras [9]-[11]). It then pointed out that E relied on *Kruger NO v Goss & another* 2010 (2) SA 507 (SCA) and *Hodges v Coubrough NO* 1991 (3) SA 58 (D) in support of her contention that the duty to pay maintenance terminates on the maintenance debtor's death. In *Kruger* and *Hodges*, it was held that if the court makes a maintenance order in terms of section 7(2) of the Divorce Act (that is, if it makes a maintenance order in circumstances where the spouses failed to conclude a settlement relating to post-divorce maintenance), the duty to pay maintenance does not continue after the death of the spouse against whom the order was made. E submitted that the position should be the same if the duty to pay post-divorce maintenance arises from a settlement agreement that was made an order of court in terms of section 7(1) of the Divorce Act, unless the settlement explicitly states that the obligation is binding on the maintenance debtor's estate (para [13]).

Referring to *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), the court held that although the starting point remains the words in the contract that is to be interpreted, the context of the contract, including the circumstances in which it came into being, must be taken into account in determining the parties' true intention (para [15]). Therefore, the 'relative position in which the parties found themselves at the time' of entering into the settlement agreement had to be considered (para [17]). Without as much as pretending to determine the true relative positions of the parties when they divorced, the court stated that '[i]t can be accepted that, being involved in a divorce, the parties were not friendly with each other' and were, instead, 'at loggerheads' (ibid). The court also stated that it was 'inconceivable' that H would have been willing to give more to W in terms of the settlement agreement than W would have been able to obtain in terms of a maintenance order under section 7(2), that is, post-divorce maintenance that would, by virtue of the decisions in *Kruger* and *Hodges*, terminate on H's death (paras [17] [22]; the quoted phrase appears in para [22]). Referring to *Hodges*, the court further stated that the duty to pay maintenance 'has a character distinctly personal to the

individual to whom it attaches', that maintenance is usually paid from a person's income, that the amount that is payable is usually determined in accordance with the liable party's income, and that most people's income terminates when they die (paras [18] [19]). The court also held that although it would have been easy to insert a clause in the settlement agreement to the effect that the duty to pay maintenance would not terminate at H's death, it would have been just as easy to insert a clause binding H's estate to continue paying maintenance to W (para [20]). The court further attached weight to the fact that the parties' settlement agreement specifically provided that W's maintenance would increase annually when H's pension increased. It stated that, because a person's pension terminates on his or her death, this provision is 'a further indication that the parties had in mind that the maintenance would be payable during the lifetime of the husband' (para [23]). Finally, the court referred to the social changes since *Colly*, *Owens* and *Hughes*. It stated that at the time when those cases were decided, wives were expected to stay at home and to look after the household and the spouses' children, while husbands were expected to be breadwinners and to earn an income. This is no longer the case since women and men are now regarded as equal. In the court's view, this 'modern view and background' should inform the issue of determining the spouses' intention as reflected in their settlement agreement (para [24]). In view of the above, the court concluded that in this case and in general, 'an agreement to pay maintenance until the death or remarriage of the receiving partner terminates at the death of the paying partner, unless there are sufficient indications or express stipulations to the contrary' (para [25]).

The decision in *Els v Jagga* is poorly argued. The only point the court raised that might possibly justify an inference that the parties intended that the duty of support would terminate on H's death is the one relating to W's maintenance being increased annually when H's pension increased and a person's pension being linked to the duration of his or her life (para [23]). The other reasons are odd, based on conjecture, and unconvincing.

The court's view that the 'modern view and background' should assist in determining the spouses' intention as reflected in their settlement agreement is bizarre in view of the fact that the settlement agreement was concluded in 1992. How can the intention of spouses who concluded a settlement agreement 25 years ago be informed by the 'modern view and background'

of supposed equality between the sexes? In 1992, the marital power still existed in some marriages. (Although s 11 of the Matrimonial Property Act abolished the marital power, this provision initially did not apply to civil marriages of African persons: s 25(1) of the Matrimonial Property Act. Nor did it automatically apply to civil marriages white, 'coloured' and Asian persons concluded before the coming into operation of the Matrimonial Property Act: s 25(1) of the Matrimonial Property Act. It was only when s 29 of the General Law Fourth Amendment Act 132 of 1993 came into operation on 1 December 1993 that the marital power was abolished completely in all civil marriages.) Moreover, in 1992 we did not yet have a Bill of Rights that entrenches the right to equality. (The Constitution of the Republic of South Africa 200 of 1993 contained the first Bill of Rights. This interim Constitution came into operation on 27 April 1994.)

Secondly, the facts set out in the judgment do not provide any foundation for the court's assumption that the spouses must have been 'at loggerheads' when they concluded their settlement agreement. No details whatsoever are provided about the state of the spouses' relationship at the time. The court's assumption about acrimony between the spouses amounts to speculation. Furthermore, the court's assumption that divorcing spouses who are entering into a settlement agreement are always at loggerheads and unwilling to give an inch, is out of touch with the real-life situation of some divorcing spouses. Some divorces entail amicable settlement negotiations where one or both of the parties are willing to give more than a strict application of the legal rules on maintenance (and/or division of matrimonial property) would confer on the other party. Even in the case of non-amicable divorces, feelings of guilt and/or emotional 'coercion' may result in the wealthier spouse being financially better disposed towards the poorer spouse — especially if the wealthier spouse has committed a matrimonial wrong (see Heaton (2005) 21 *SAJHR* 576).

Finally, the court's statement about the absence of a clause that explicitly bound H's estate to continue to pay maintenance to W does not

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present a convincing argument for holding that the spouses did not intend to confer a right to claim maintenance from H's estate. Why would W and H have included a clause stating something that was considered settled law at the stage when they entered into their settlement agreement, namely that the post-divorce spousal duty of support that arises in terms of a

settlement agreement continues unless the agreement excludes it? Spouses who are entering into a settlement agreement do not, as a rule, include clauses about all aspects of the law of divorce. They usually deal only with the aspects that are in need of clarification and/or agreement.

Marriage

Customary marriage

In *Jezile v S (National House of Traditional Leaders & others as amici curiae)* [2015] 3 All SA 201 (WCC), the court dismissed an appeal against a man's conviction on criminal charges resulting from an aberrant form of *ukuthwala*. The case is mentioned in 2015 *Annual Survey* 431 and has since also been reported as *S v Jezile* 2016 (2) SA 62 (WCC).

In *Ramuhovhi & another v President of the Republic of South Africa & others* 2016 (6) SA 210 (LT), the Limpopo Division of the High Court (Thohoyandou) considered the constitutionality of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998. This section provides that the proprietary consequences of customary marriages concluded before the commencement of the Act on 15 November 2000 continue to be governed by customary law. The effect of the application of customary law to these so-called 'old' customary marriages is that husbands own and control all family and house property. In *Gumede v President of the Republic of South Africa & others* 2009 (3) SA 152 (CC), 2009 (3) BCLR 243, the Constitutional Court declared section 7(1) unconstitutional in so far as it related to old monogamous customary marriages. The court held that depriving wives in some monogamous customary marriages of a claim to property because of the date on which they had married, constituted unjustifiable unfair discrimination on the ground of gender. (On *Gumede*, see 2009 *Annual Survey* 455-63.) However, section 7(1) continued to apply to old polygynous customary marriages. In *Ramuhovhi*, the applicants sought an order declaring that the section was also unconstitutional in so far as these marriages were concerned.

Ramuhovhi arose as an aftermath of the incorrect decision of the Supreme Court of Appeal in *Netshituka v Netshituka & others* 2011 (5) SA 453 (SCA). In *Netshituka*, the court had to decide on the validity of a civil marriage a man (N) had entered into while married to three other women in a polygynous marriage under

Venda customary law. The issue of the validity of the civil marriage arose as a result of an inheritance dispute between N's wives after his death. The court held that N's polygynous customary marriage had not been dissolved by his subsequent civil marriage, and that the civil marriage was invalid because it was concluded during the subsistence of the polygynous customary marriage. As indicated in 2011 *Annual Survey* 477-81, the decision is wrong: the civil marriage should have been declared valid, because the customary marriages had ceased to exist when the civil marriage was concluded. (See also Pieter Bakker & Jacqueline Heaton 'The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 — The Supreme Court of Appeal introduces polygyny into some civil marriages' 2012 *TSAR* 586; M Buchner-Eveleigh '*Netshituka v Netshituka* 2011 (5) SA 453 (SCA): Revival of a customary marriage previously dissolved by a subsequent civil marriage' (2012) 45 *De Jure* 596; IP Maithufi 'Revisiting the "to be or not to be" debate and comments on *Netshituka v Netshituka* 2011 (5) SA 453 (SCA)' (2015) 78 *THRHR* 307.)

However, armed with the decision in *Netshituka*, some of the children born of N's polygynous customary marriage approached the court for an order declaring section 7(1) of the Recognition of Customary Marriages Act unconstitutional and invalid. These children were the applicants in *Ramuhovhi*. They argued that the imposition of customary law on their mothers' old polygynous customary marriage unjustifiably discriminated unfairly against their mothers, because Venda customary law does not afford wives any rights in or control over property amassed in a polygynous customary marriage. They further sought an order declaring that old polygynous customary marriages are in community of property with the result that their mothers were entitled to a half-share of N's deceased estate. By the time the application in *Ramuhovhi* came before the court, the wives in the polygynous marriage, the wife in the civil marriage, and most of the children N had had with these women had passed away, but the distribution of N's estate had yet to be finalised.

The court pointed out that in *Gumede* the Constitutional Court had found that section 7(1) was discriminatory on the ground of gender (para [45]). This was true in so far as old polygynous customary marriages were concerned, too. Lamminga AJ held that section 7(1) also discriminates on the grounds of race and/or ethnic or social origin by excluding wives in old polygynous

customary marriages from the protection afforded to women in monogamous customary marriages (paras [46] [75]). Conflating sections 9(5) and 36 of the Constitution, she further stated that because this discrimination is based on one or more of the grounds listed in section 9(3) of the Constitution, 'such discrimination is unfair unless justified' (para [46]). (S 9(5) of the Constitution provides that discrimination on a listed ground is unfair unless it is established that the discrimination is fair, while s 36 deals with justification of limitation of a right in the Bill of Rights.) Without engaging in any further equality or justification analysis, the Acting Judge held that section 7(1) was unconstitutional and invalid because no justification had been raised for the violation of the right set out in section 9(3) of the Constitution (paras [46] [75] and the order in para [76]). She also held that section 7(1) differentiates between wives in new and old polygynous customary marriages based on their marriage date — a ground not listed in section 9(3) of the Constitution — because different rules apply depending on whether the marriage took place before or after the coming into operation of the Recognition of Customary Marriages Act (para [46]).

Lamminga AJ held that development of customary law to address the unconstitutionality of section 7(1) is not a suitable remedy because the Constitutional Court has not engaged in incremental development of customary law, and 'the impugned provision affects a class of vulnerable persons across various ethnic groups in significantly similar fashion, making piecemeal remedy on a case-by-case basis undesirable due to the inevitable protraction, unpredictability and legal uncertainty which would result' (para [52]; see also para [75] and the order in para [76]). Lamminga AJ also rejected the option of affording the legislature a specific period within which to address the unconstitutionality of section 7(1). Her reasons for doing so were that Parliament had failed to respond to the warning in *Gumede* that it should address the unsatisfactory position relating to old polygynous customary marriages; it is probable that the rights of older persons are affected; the relevant rights are important; the wives who need protection have long been, and still are 'extremely vulnerable'; and the unfairness and discrimination should be removed 'sooner rather than later' (para [53]; see also para [75]).

Lamminga AJ concluded that the court should create a regime that should apply until such time as Parliament enacts legislation to govern the matrimonial property systems in old polygynous

customary marriages (para [53] and the order in para [76]). This interim relief should ensure that the parties to old polygynous customary marriages enjoy equal rights in and over matrimonial property; the core nature of polygamy is retained in the sense that the rights of the spouses are exercised for the benefit of the family unit; and the differentiation between family, house, and personal property is retained to promote sustainability of the family unit (paras [63] [75] and the order in para [76]). Lamminga AJ ordered that spouses in old polygynous customary marriages must have joint and equal control of their marital property. In the case of house property, the husband and the wife of the house concerned must control the property jointly and in the best interests of the family unit. All family property must be controlled by the husband and all his wives jointly and in the best interests of the family unit. Each spouse must retain exclusive rights to his or her personal property (ibid). If any dispute arises from the court's order, any party to the marriage may approach the court for an order regulating the matrimonial property regime 'on a just and equitable basis' (ibid).

On the question of whether the order should operate retroactively, Lamminga AJ adopted the same approach as the Constitutional Court in *Gumede*. She held that the retrospectivity of the order should not be limited save for excluding old polygynous customary marriages which have already been terminated by death or divorce (paras [68]-[75] and the order in para [76]). The unfortunate implication of this finding is that the

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applicants in *Ramuhovhi* did not obtain any relief as the old polygynous customary marriage from which they were born had been terminated by the death of all the spouses.

As a section of an Act was declared unconstitutional, the order was referred to the Constitutional Court for confirmation. The confirmation hearing was scheduled to take place on 16 May 2017 under case number CCT 194/16. At the time of writing this review, the Constitutional Court had not yet handed down judgment. It is likely that the court will agree with the finding that section 7(1) is unconstitutional, but it remains to be seen whether the court will approve the remedy Lamminga AJ crafted to address the consequences of the invalidity of the section.

On *Ramuhovhi*, see further Lauren Kohn '*Ramuhovhi v President of the Republic of South Africa*: A bittersweet victory for

women in "old" polygamous customary marriages' (2017) 33 *SAJHR* 120.

Muslim marriage

In *TM v ZJ* (above), a woman who was a party to a Muslim marriage sought interim maintenance for herself and two minor children in terms of rule 43 of the High Court Rules pending a divorce action. The marriage did not qualify as a civil marriage as it had never been solemnised under the Marriage Act 25 of 1961. In the pending divorce action, the wife sought an order declaring Muslim marriages to be valid in terms of the Marriage Act. In the past, courts have held that rule 43 can be invoked in respect of a Muslim marriage if a party to the marriage has instituted proceedings to have the marriage declared valid in terms of South African law, or to have the non-recognition of Muslim marriages declared unconstitutional (*AM v RM* 2010 (2) SA 223 (ECP); *Hoosein v Dangor* [2010] 2 All SA 55 (WCC)). The same approach was adopted in *TM v ZJ*. The court, accordingly, granted maintenance *pendente lite* in terms of rule 43. (On applications in terms of rule 43 in respect of Muslim marriages, see further Jacqueline Heaton & Hanneretha Kruger *South African Family Law* 4 ed (2015) 245; Najma Moosa 'The dissolution of a Muslim marriage by divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 353-4.)

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