

education authorities thus seem to lack the will or the capacity to ensure higher levels of school attendance. It will be more important to properly address this issue than to adopt new legislative provisions.

Finally, school attendance is not sufficient. It could be supposed that a parent's obligation to cause a child to attend school until the last school day he or she reaches 15 years or the ninth grade, is realistic in the current South Africa (see generally a 28.1 of the Universal Declaration of Human Rights (1948) which states that "elementary" education must be compulsory and "free"; a 13 of the International Covenant on Economic, Social and Cultural Rights (1966) and the more modest a 17.1 of the Banjul Charter on Human and People's Rights adopted by the then Organisation for African Unity (1981), which merely states that "every person shall have the right to education"). However, over time much more will have to be done to ensure higher levels of "compulsory" quality school education for many more learners if South Africa is to become a more developed country and poverty and backwardness are to be reduced in a meaningful manner. Compulsory school education can only play its proper role provided that it is a properly functioning school providing quality education which learners are compelled to attend (see generally *Education for all: The quality imperative* (UNESCO 2004) 19 on the goal to achieve universal primary education (UPE); see also Visser "Equal educational opportunities defined and evaluated – some practical observations" 2004 *Perspectives in Education* 149–151). Although South Africa has some good public schools, there is much room for improvement in this sphere. Obliging parents to send their children to poor quality schools makes a mockery of what "compulsory" education is all about.

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**TERMINATION OF POST-DIVORCE MAINTENANCE FOR
A SPOUSE OR CIVIL UNION PARTNER IN TERMS OF
A SETTLEMENT AGREEMENT**

1 Introduction

In the recent past, the issue of whether the duty to pay maintenance to a former spouse comes to an end upon the maintenance recipient's remarriage was the subject of a number of conflicting decisions. These decisions relate specifically to the termination of an undertaking to pay maintenance that is contained in a settlement agreement. This note seeks to explain which of the conflicting decisions is correct. Two other authors have already commented on some of the decisions (Van Schalkwyk "Dood en hertrouwe as beëindigingswyses van onderhoudsbevele tussen eggenotes ingevolge die Wet op Egskeiding 70 van 1979" 2002 *De Jure* 144; Sonnekus "Afloop van onderhoudsaansprake na huweliksontbinding – subiet met hertrouwe of tog nie?" 2001 *TSAR* 800, "Grensllose onderhoud. Niks nuuts onder die son nie" Mei 2002 *De Rebus* 26, "Verlengde

onderhoudsaansprake na hertroue – 'n verpaste geleentheid ter aansluiting by internasionale beste praktyk" 2007 TSAR 351). As will appear from the discussion below, their views differ from mine.

To put the discussion into perspective, I start with a brief explanation of the common-law duty of support that exists between spouses and between civil union partners. Next, I deal with the duty of support that sometimes operates after termination of a marriage or civil union and set out the foundations for such post-termination duty. I also briefly distinguish between the foundations of post-divorce maintenance for a divorcing couple's children and post-divorce maintenance for one of the spouses or civil union partners. The remainder of the note focuses on post-divorce maintenance for a spouse or civil union partner in terms of a settlement agreement. Firstly, I mention the basic rule relating to the terms regarding the duration of the duty to pay maintenance that a settlement agreement may contain and illustrate the application of the rule by means of examples. After that I discuss the conflicting case law on the issue of termination of the duty to pay maintenance if the settlement agreement is silent on the effect of the maintenance recipient's remarriage. Finally, I comment on the two conflicting approaches that have been adopted in the case law and explain when the maintenance recipient's remarriage is relevant.

2 The common-law duty of support between spouses and between civil union partners

The common-law duty of support arises when spouses enter into marriage and it ends when their marriage comes to an end. The duty further depends on a need for maintenance on the part of the spouse who claims maintenance, and the ability to provide maintenance on the part of the spouse from whom maintenance is claimed (see eg *Oberholzer v Oberholzer* 1947 3 SA 294 (O); *Reyneke v Reyneke* 1990 3 SA 927 (E)). The same applies to the duty of support between persons who have entered into a civil union (Civil Union Act 17 of 2006 s 13(1) and (2)). If the spouses or civil union partners separate during the subsistence of their marriage or civil union, matrimonial guilt determines whether the common-law duty continues (see eg *Bing and Lauer v Van den Heever* 1922 TPD 279; *Excell v Douglas* 1924 CPD 472; *Pickles v Pickles* 1947 3 SA 175 (W); *Chamani v Chamani* 1979 4 SA 804 (W)).

3 The duty of support after termination of a marriage or civil union

If a marriage or civil union is terminated by death, the surviving spouse or civil union partner sometimes acquires a claim for maintenance against the estate of his or her deceased spouse or civil union partner. The claim is conferred by the Maintenance of Surviving Spouses Act 27 of 1990. The claim arises only if the marriage or civil union was dissolved by death after 1 July 1990 and the survivor's means and earnings are insufficient to meet his or her reasonable maintenance needs (s 2(1)). The claim comes to an end when the survivor dies or remarries (*ibid*).

If the marriage or civil union is terminated by divorce, a claim for maintenance may arise in one of two ways. Firstly, the couple may agree that one of them will pay maintenance to the other. If they enter into a written agreement in this regard, they have two choices: They may either request the court to incorporate the settlement agreement into the divorce order in terms of section 7(1) of the Divorce Act 70 of 1979, or they may refrain from doing so and retain the

agreement as an unincorporated deed of settlement. If they do request the court to incorporate their agreement, the court is not compelled to do so; it has a discretion in the matter (*Rowe v Rowe* 1997 4 SA 160 (SCA); *Lebeloane v Lebeloane* [2000] 4 All SA 525 (W)). If the settlement agreement is not incorporated, it is merely a contract and can be enforced only by means of the usual mechanisms that are available to the parties to a contract. If the settlement agreement is incorporated, it has the additional force of an order of court, which means, *inter alia*, that failure to comply with its terms constitutes contempt of court and also constitutes a ground for attachment of the transgressing party's property.

The second way in which a post-divorce duty of support may arise, applies if the couple do not enter into a written settlement agreement, or if the court does not deem it fit to include their agreement in the divorce order. In either of these situations, the court may make a maintenance order in terms of section 7(2) of the Divorce Act. Section 7(2) empowers the court to make such order as it considers just in respect of the payment of maintenance by the one party to the other for any period of time until the death or remarriage of the party in whose favour the order operates. The section lists various factors that the court has to take into account in arriving at its decision.

From the above summary it should be clear that, as in the case of maintenance of a surviving spouse or civil union partner, post-divorce maintenance for a spouse or civil union partner is not based on the common-law duty of support. When divorcing parties enter into a settlement agreement they create a new duty of support, which is contractual in nature. The terms of the duty are determined by the terms of the settlement agreement, regardless of whether or not the agreement is incorporated into the divorce order. Incorporation results in the agreement acquiring the force of an order of court, but it does not alter the principle that the terms of the agreement govern the post-divorce duty of support. In case of an order in terms of section 7(2) of the Divorce Act, the foundation of the duty of support is the order that the court makes by virtue of the power that the section confers on it. Thus the duty of support that flows from this order has a statutory foundation. It, too, is not merely an application of the common-law duty of support. (See eg *Kemp v Kemp* 1958 3 SA 736 (D); *Santam Bpk v Henery* 1999 3 SA 421 (SCA). But cf *Zwiegelaar v Zwiegelaar* 2001 1 SA 1208 (SCA) para 12 where the court stated in an *obiter dictum* that the common-law duty of support normally ceases upon the dissolution of the marriage but may be "extended after divorce if the court is satisfied having regard to the jurisdictional requirements laid down in section 7(2) of the Act that it is *just* to do so" (emphasis in the original).)

It should also be noted that the foundation of post-divorce maintenance for a spouse or civil union partner differs from the foundation for post-divorce maintenance for the couple's children. In the case of the maintenance of a child, the parental duty of support arises by virtue of the common law. This common-law duty exists quite independently of whether or not the parents are or were ever married to each other or are or were ever civil partners, and it is unaffected by their divorce. The duty operates from the date of the child's birth until the child becomes self-supporting, is adopted, or dies (see eg *Gliksman v Talekinsky* 1955 4 SA 468 (W); *B v B* 1997 4 SA 1018 (E) – confirmed on appeal: *Bursey v Bursey* 1999 3 SA 33 (SCA)). Any order the court makes in respect of a child's maintenance is ancillary to the common-law duty of support and usually merely apportions the common-law duty as between the parents (see eg *Kemp v Kemp*;

Bursey v Bursey 1999 3 SA 33 (SCA); *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C)).

4 Termination of a duty of support that was agreed on in a settlement agreement

4.1 General rule

In their settlement agreement divorcing parties may include any provision that is not impossible or illegal (see eg the authority cited by De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* Vol 1 (1992) 85–92.) A provision is illegal if it violates a statutory or common-law prohibition, is against public policy or is *contra bonos mores* (see eg the authority cited *ibid* 89–92). Thus, if divorcing parties were to provide that the husband would continue paying maintenance to his former wife even after her death, the provision would be unenforceable due to the impossibility of paying maintenance to a legal subject who no longer exists; the entitlement to maintenance vests in a particular natural person, and this entitlement obviously comes to an end when the person dies (see also *Hodges v Coubrough* 1991 3 SA 58 (D); Van Schalkwyk 2002 *De Jure* 144; Sonnekus 2007 *TSAR* 360). The opposite is not true. In other words, the duty to pay maintenance can survive the liable party's death. Therefore parties may validly agree, for example, that all the duties in terms of their settlement agreement are enforceable against their estates. Moreover, if their settlement agreement is incorporated into the divorce order and the agreement is silent on the matter, the courts favour continuation of the maintenance obligation after the liable party's death (*Colly v Colly's Estate* 1946 WLD 83; *Owens v Stoffberg* 1946 CPD 226; *Hughes v The Master* 1960 4 SA 936 (C); *Ex parte Standard Bank Ltd* 1978 3 SA 323 (R)).

4.2 Continuation of the duty after the maintenance recipient's remarriage

4.2.1 An express provision on continuation

Applying the general rule regarding the provisions of a settlement agreement that was set out above, it appears that an express agreement that the liable party will continue paying maintenance after the maintenance recipient has remarried is acceptable (Hahlo *The South African law of husband and wife* (1985) 356, "Non-variation clauses in maintenance agreements: a commentary on *Claassens v Claassens*" 1981 *SALJ* 334; Van Schalkwyk 2002 *De Jure* 148). Clearly such a provision is not impossible or *contra bonos mores*. Nor does it violate public policy even under our new constitutional dispensation. Nowadays, public policy is determined by reference to the constitutional values and the provisions of the Bill of Rights (*Brisley v Drotzky* 2002 4 SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA); *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA); *Barkhuizen v Napier* 2007 7 BCLR 691 (CC)). Allowing a re-married former spouse or civil union partner to continue claiming maintenance in terms of a settlement agreement is not inimical to those values or the provisions of the Bill of Rights. The same applies if a former spouse or civil union partner enters into a new civil union.

4.2.2 Absence of an express provision on continuation

(a) The conflicting case law

The issue of whether maintenance remains payable after the maintenance recipient's remarriage if the settlement agreement is silent on this eventuality is much

more contentious and was the subject of three recently reported decisions. In the 1990s the same issue arose in two unreported decisions. As will appear from the discussion below, the courts adopted two conflicting approaches in their decisions.

In *Geldenhuis v Meyers* unreported case no 556/96 (SEC) 1996-07-19, the couple had entered into a settlement agreement in which the husband undertook to pay rehabilitative maintenance to his wife for 12 months. The agreement was incorporated into the divorce order. Some two weeks after the divorce, the wife remarried. Her former husband never paid maintenance to her, as he was of the view that her remarriage had automatically terminated her right to claim maintenance from him. She sued him for arrear maintenance and eventually obtained a writ of execution in respect of his property. He thereupon approached the high court for an order setting aside the writ. The court issued the requested order. The court held that the settlement agreement had lost its contractual character when it was incorporated into the divorce order. At that point the agreement had acquired the character of a court order. According to the court, this meant that the maintenance provision was subject to the limitations that are contained in section 7(2) of the Divorce Act, namely that the order terminates, at the latest, when the maintenance recipient dies or remarries. The court further stated that the new common-law duty of support that had arisen when the wife had remarried left no room for the continuation of the previous duty of support she had against her former husband.

In *Smit v Pienaar* unreported case no 13829/94 (C) 1997-11-20, the spouses' settlement agreement was also silent on whether the husband's duty to pay maintenance to his former wife was to cease upon her remarriage. It seems that the agreement was incorporated into the divorce order. Two years after the couple's divorce the wife remarried. Her former husband stopped paying maintenance, as he was of the view that his duty to pay maintenance had terminated upon her remarriage. He argued that our law recognises an implicit principle that a maintenance order in favour of a former spouse is terminated by her remarriage. He alleged that this implicit principle applies even if the settlement agreement contains a contradictory provision. He sought support for his contention in the common-law rule that spousal maintenance is payable only during the subsistence of the marriage, and in the limitation regarding the maintenance recipient's death or remarriage that is contained in section 7(2) of the Divorce Act. The court rejected the husband's arguments and granted his former wife's claim for arrear maintenance and interest on the arrears. The court disapproved of the decision in *Geldenhuis v Meyers*. It held that a settlement agreement is a contract and that the terms of the agreement determine when the duty to pay maintenance comes to an end. As the spouses' settlement agreement does not expressly provide that the duty terminates upon the maintenance recipient's remarriage, the duty continues after that date. Further, in reply to the husband's alternative claim that the maintenance order should be varied due to his former wife's remarriage, the court held that remarriage on its own does not constitute sufficient reason for variation of a maintenance order in terms of section 8(1) of the Divorce Act.

The two approaches to the issue of the termination of the duty to pay maintenance that were adopted in the unreported cases are also reflected in the reported cases. In *Van der Vyver v Du Toit* 2004 4 SA 420 (T) the parties had agreed that the husband would make a monthly payment to his wife for ten years after their divorce. The payment would escalate annually in accordance with the consumer

price index. The payment was not labelled “maintenance”. The agreement was incorporated into the divorce order. Prior to the expiry of the ten-year period, the wife remarried. Her former husband thereupon sought a declaratory order that the monthly payment was for maintenance, and that his duty to pay the amount had been terminated by her remarriage. Neither of the parties alleged that the clause relating to the monthly payment was ambiguous, but they differed on whether it related to maintenance and whether the duty to pay had been terminated by the remarriage. The husband alleged that the monthly payment was for maintenance and that his duty to pay had terminated, while his former wife denied this.

The court firstly found that the monthly payment was in fact for maintenance. In respect of the termination of the duty to pay maintenance, it held:

“A party against whom an order is made for maintenance in terms of s 7(1) should only be made liable to continue to pay maintenance after remarriage if he has expressly waived his rights to be relieved from liability to maintain his or her ex-spouse upon death or remarriage. Unless such waiver is apparent from the agreement in terms of s 7(1), such an obligation to maintain should automatically terminate upon remarriage or death” (para 19).

The court further held that the legislature’s intention in respect of section 7(2) of the Divorce Act could be used to interpret settlement agreements that are incorporated in terms of section 7(1) and to determine “what the intention of the Legislature is under section 7(1)” (para 20). As section 7(2) provides that the duty to pay maintenance comes to an end, at the latest, when the maintenance recipient dies or remarries, the court concluded that it could never have been the legislature’s intention that a maintenance recipient

“should have double gain for maintenance unless such a gain is a result of an express provision in the agreement order, s 7(1) obliging such a party against whom an order was made to maintain even after remarriage” (para 20).

Because the spouses’ settlement agreement did not expressly provide that the monthly amount would be payable even if the wife were to remarry, the court concluded that the duty to make the monthly payment had terminated upon the wife’s remarriage.

The second reported case is *Welgemoed v Mennell* 2007 4 SA 446 (SEC). This case was decided before, but reported after, the Supreme Court of Appeal’s decision in *Odgers v De Gersigny* 2007 2 SA 305 (SCA). For this reason, and because *Odgers* concerns an unincorporated settlement agreement, I deal with *Welgemoed* first.

In *Welgemoed* the parties had entered into a settlement agreement that provided that the husband would pay maintenance to his wife until her death. The agreement was incorporated into the divorce order. Some five years later the wife remarried. Relying on *Van der Vyver v Du Toit*, the husband applied for a declaratory order that his former wife’s remarriage had relieved him of his duty to pay maintenance to her. The court dismissed the application.

Selikowitz J pointed out that spouses’ common-law duty of support comes to an end when the marriage comes to an end and that the law relating to maintenance after divorce is to be found in sections 7 and 8 of the Divorce Act. He further indicated that section 7(1) and section 7(2) of the Act differ, as there is no limit on the period for which maintenance may be ordered in terms of section 7(1). It is only in terms of section 7(2) that the court may not grant maintenance for a period that surpasses the maintenance recipient’s death or remarriage. He

then considered and rejected the decision in *Van der Vyver v Du Toit* on the ground that the court had erred by failing to appreciate the difference between section 7(1) and section 7(2) and relying on the legislature's intention in respect of section 7(2) "to import words which . . . had been deliberately left out by the Legislator" (449H) in respect of section 7(1). He further held that the fact that the wording of section 7(2) limits the duration of the maintenance order that the court may make is a positive indication that section 7(1) does not limit the parties' freedom to agree that maintenance will be paid "beyond remarriage and, indeed, beyond death" (449J). (It should be noted that Selikowitz J's remarks regarding the parties' capacity to agree that maintenance would be payable beyond death can clearly relate only to the maintenance debtor's death, for maintenance that is paid for a former spouse or civil union partner relates to that specific person only and does not remain payable after the person has ceased to exist (see para 4 1 above).)

In respect of the view in *Van der Vyver* that the legislature would not have intended to allow a remarried spouse to obtain a double gain by having a right to maintenance in terms of a settlement agreement and also by virtue of the new marriage, Selikowitz J held that it is not clear that there would be a double gain, for remarriage *per se* does not confer a double gain. For example, the new spouse might not be able to properly maintain the maintenance recipient. (Selikowitz J thus adopted a stance that echoes the one that the Supreme Court of Appeal adopted in *Ongevallekommissaris v Santam Bpk* 1999 1 SA 251 (SCA) in respect of remarriage of a widow whose former husband had been negligently killed: see the discussion of *Odgers v De Gersigny* below.)

Selikowitz J further pointed out that in the event of the maintenance recipient's remarriage the maintenance debtor could approach the court for variation, suspension or rescission of the maintenance order in terms of section 8 of the Divorce Act. Then the court would have to decide whether the remarriage constitutes sufficient reason for variation, suspension or rescission. Selikowitz J held that section 8 makes it unnecessary to seek to infer that remarriage automatically terminates the duty to pay maintenance in terms of an incorporated settlement agreement.

He further rejected the view that the duty to pay the agreed maintenance automatically terminates upon the maintenance recipient's remarriage unless the maintenance debtor has waived such termination. He stated that the termination that the court relied on in *Van der Vyver* "is not to be found in our common law" (450F). He again pointed out that, insofar as spouses are concerned, the common-law right to maintenance comes to an end upon termination of their marriage. Therefore, the right to maintenance which is in issue in the case of a settlement agreement is one that flows from the agreement that was incorporated in terms of a statutory provision, namely section 7(1) of the Divorce Act. Selikowitz J concluded that, unless the incorporated agreement affords him or her such a right, section 7(1) does not allow the liable party to stop paying maintenance when the maintenance recipient remarries. In the present case the settlement agreement unambiguously provides that maintenance is payable until the maintenance recipient's death. It does not provide for any other event that will terminate the duty to pay maintenance. Selikowitz J therefore concluded that there was no basis on which a term to the effect that the duty to pay maintenance would terminate upon the maintenance recipient's remarriage could be implied into the agreement. He further held that the law does not imply any such term either. As

the husband had not waived his right to apply for rescission, suspension or variation of the maintenance order, he could, however, in the future approach the court in terms of section 8 of the Divorce Act.

The third reported case is the Supreme Court of Appeal's decision in *Odgers v De Gersigny*. Here too the issue was whether the former wife's remarriage had terminated the duty to pay maintenance in terms of a settlement agreement. In this case, though, the settlement agreement was an unincorporated one. The maintenance clause in the agreement provided that the husband would pay his wife maintenance for 24 months and a "housing subsidy" for 12 months. The agreement further included a non-variation clause. Two months after the divorce, the wife remarried. Her former husband thereupon stopped paying maintenance. She successfully sued him in the magistrate's court. He unsuccessfully appealed to the Natal provincial division. He then appealed to the Supreme Court of Appeal. He argued that it was implicit in the concept of maintenance that his duty to pay would terminate upon the maintenance recipient's death or remarriage. He relied on *Van der Vyver v Du Toit* and *Glass v Santam Insurance Ltd* 1992 1 SA 901 (W) in support of his argument. (In *Glass* it was held that a widow's damages for loss of support are calculated only up to the time that she remarries, as she suffers no loss after her remarriage.)

The Supreme Court of Appeal firstly rejected the husband's reliance on *Glass*. Maya JA held that as *Glass* does not relate to an agreement to pay maintenance it deals with a situation that is entirely different from the one in *Odgers*. Although Maya JA did not mention this, it should furthermore be borne in mind that *Glass* no longer reflects the law, for the Supreme Court of Appeal overturned it in *Ongevallekommissaris v Santam Bpk*. (In *Ongevallekommissaris* it was held that a widow's remarriage does not terminate her loss and does not disentitle her to damages for the period after her remarriage. The prospect or possibility of a remarriage is, however, a factor that is taken into account in calculating the amount that is awarded to her. The court also rejected the view that a subsequent remarriage automatically confers a double gain on the widow. It pointed out, *inter alia*, that the widow could be financially worse off in her new marriage.)

Although the agreement in *Odgers* was never incorporated in terms of section 7(1) of the Divorce Act, Maya JA secondly distinguished between a duty of support that arises in terms of section 7(1) and one that arises in terms of section 7(2). She pointed out that section 7(1) contains no limit as to the period for which the parties may bind themselves. She further stated that for purposes of the interpretation of a settlement agreement it is irrelevant whether or not the agreement was incorporated into the divorce order, for in either event it is the terms of the agreement that must be interpreted to determine when the duty to pay maintenance comes to an end. The settlement agreement therefore has to be interpreted in line with the principles that apply to contracts. Maya JA approved of the approach to the interpretation of settlement agreements that was adopted in *Hodges v Coubrough* and rejected the one that was adopted in *Van der Vyver v Du Toit*. In *Hodges* it was held, *inter alia*, that the field of interpretation of contracts is very different from the field of interpretation of statutes. In the case of interpretation of a statute the intention to be ascertained is that of the legislator, who is legislating in general terms and with general effect. In the case of interpretation of a contract,

"it is the intention of private individuals, minding their own business and dealing solely with that. They have no occasion to reckon with the common law. They have

no reason to worry about issues of policy. Nor do they care a fig if the party who is maintained under their arrangements turns out to be better off than somebody else's widow" (66F–G).

Based on this line of argument, the court held in *Hodges* that section 7(2) of the Divorce Act does not empower the court to grant an order for the payment of maintenance that survives the death of the liable party and binds his or her deceased estate, even though the parties may achieve such a result in their settlement agreement.

In *Odgers* Maya JA pointed out that the liable party did not allege that the settlement agreement contained an implied contractual term to the effect that his duty to pay maintenance would terminate upon the maintenance recipient's remarriage. In respect of the contention that the common law imposes an implied term that the duty comes to an end when the maintenance recipient remarries, Maya JA held that such a provision could not be implied in the face of a directly conflicting term in the parties' agreement. She held that the express terms of the maintenance clause in the parties' agreement left no room for implying a conflicting provision terminating the duty upon the maintenance recipient's remarriage. The appeal was therefore dismissed.

(b) Comments on the conflicting case law

Professors Van Schalkwyk 2002 *De Jure* 144 and Sonnekus 2001 *TSAR* 800; May 2002 *De Rebus* 26, 2007 *TSAR* 351 support the decision in *Geldenhuis v Meyers*. In his most recent contribution on the matter, Professor Sonnekus 2007 *TSAR* 351 also approves of *Van der Vyver v Du Toit*. However, I am of the view that the approach in *Smit v Pienaar*, *Welgemoed v Menell* and *Odgers v De Gersigny* is correct.

In *Geldenhuis* and *Van der Vyver* the courts failed to appreciate the difference between the foundation of the duty of support that arises by virtue of a settlement agreement and the duty that arises by virtue of an order that is made in terms of section 7(2) of the Divorce Act. Insofar as the duty of support arising from an incorporated settlement agreement versus the duty arising from section 7(2) is concerned, the difference is that section 7(1) applies to a duty that has a contractual foundation, while section 7(2) applies to a duty that has a statutory foundation (see also para 3 above). The mere fact that a settlement agreement that is incorporated in terms of section 7(1) acquires the force of an order of court does not eliminate this difference. As the basis of the duty of support to which section 7(1) applies differs completely from the basis of the duty to which section 7(2) applies, there is no justification for importing section 7(2)'s limitations into section 7(1). There is, furthermore, no indication whatsoever that the legislature intended such importation. Although it is true that the provisions of section 7(2) often play a role in determining the respective bargaining positions that couples adopt when negotiating their settlement agreement, the rule, factors and limitations that section 7(2) contains clearly do not automatically apply to section 7(1). (But cf Van Schalkwyk *op cit* 148–149 who argues that section 7(2) contains general maintenance principles that apply in respect of section 7(1) too.) The reasons for rejecting the imposition of section 7(2)'s limitations onto a contractual duty to pay maintenance apply with even more force to an unincorporated settlement agreement, for in the case of an unincorporated settlement agreement even section 7(1) is not an issue.

In *Van der Vyver* the court secondly relied on supposed "rights to be relieved from" the duty to pay maintenance in terms of section 7(1) if the maintenance

recipient remarries (para 19). The court did not indicate the origin of these “rights”. Possibly, the court had in mind the limitation that section 7(2) contains and which the court, incorrectly, imposed on section 7(1) orders too. Or the court might have had a common-law right in mind. However, as the court indicated in *Welgemoed*, there is no pertinent common-law right. Clearly the common-law duty of support between spouses and between civil union partners does not confer any such right, first of all, because the common-law duty terminates upon dissolution of the marriage or civil union and, secondly, because the common-law duty does not deal with remarriage at all because the common-law duty terminates *before* the issue of remarriage can arise. Nor do the principles of the law of contract recognise any right that could possibly be said to allow a party to a contract to renege from his or her obligations on the basis of the other party’s remarriage. The only basis for a right to stop payment in terms of a settlement agreement is the settlement agreement itself. In other words, the right to be relieved from paying the agreed maintenance because of the maintenance recipient’s remarriage exists only if it is expressly or implicitly included in the agreement. Mere silence on the eventuality of the maintenance recipient’s remarriage does not justify implying a term that the duty to pay the agreed maintenance should terminate.

In the context of the alleged right to stop paying maintenance, Prof Sonnekus’ view 2001 TSAR 805 that post-divorce support terminates *ex lege* upon the maintenance recipient’s remarriage, because the maintenance recipient’s need to be maintained by his or her former spouse disappears when he or she acquires the common-law right to claim maintenance from his or her new spouse, should also be mentioned. Prof Sonnekus seems to be of the view that certain common-law principles regarding maintenance, such as that there must be a need for maintenance on the part of the maintenance recipient (see para 2 above), apply to each and every duty of support. It is submitted that this view is incorrect, for, as was explained above, the common-law principles regarding the duty of support that operates during the subsistence of a marriage do not necessarily apply to a contractual duty of support, just as the principles that section 7(2) of the Divorce Act sets out do not automatically apply to a contractual duty of support. When entering into their settlement agreement the parties are not bound to apply either the principles of either the common law or of section 7(2). They are, naturally, at liberty to apply as many of those principles as they like, but common-law and statutory principles that the parties did not include in their agreement should not subsequently be imposed on them unless there is a clear indication that they intended those principles to apply. Therefore, the duty to pay the agreed maintenance should not automatically terminate if the maintenance recipient’s need for maintenance disappears because of, for example, a windfall such as receiving an inheritance, winning the lottery, or winning the jackpot at a casino. The same applies in respect of the maintenance recipient’s remarriage.

- (c) The circumstances in which the maintenance recipient’s remarriage is relevant

The final issue I wish to deal with is whether the maintenance recipient’s remarriage has any relevance if the duty of support arose by virtue of a settlement agreement that is silent on this eventuality. Firstly, if the remarriage occurs shortly after the divorce and the party who is liable for maintenance is able to prove that the maintenance recipient misrepresented his or her position by fraudulently concealing the impending remarriage with the object of convincing the

liable party to agree to a settlement or specific clauses he or she would not otherwise have agreed to, the court may set the agreement or a severable part of the agreement aside on the ground of absence of *consensus*. This is in line with the ordinary principles of the law of contract. (In none of the five decisions I discussed above was misrepresentation an issue.)

The maintenance recipient's remarriage could, secondly, be relevant if the parties agree that the remarriage is a reason for variation, suspension or rescission of the maintenance clause in their settlement agreement. Then the parties may obviously vary, suspend or rescind the clause as they like.

The third scenario is where the parties are unable to reach agreement on variation, suspension or rescission. In such event, the first issue is whether the settlement agreement was incorporated into the divorce order. If it was not incorporated, neither party may approach the court for variation, rescission or suspension on the ground of the remarriage because the statutory provisions regarding variation, suspension and rescission apply only to maintenance *orders* (Divorce Act s 8(1); Maintenance Act 99 of 1998 s 6(1)(b)) and the common law does not confer a general power on the court to vary, suspend or rescind post-divorce maintenance. In a case such as *Odgers* the maintenance recipient's remarriage would therefore be utterly irrelevant. However, if the settlement agreement was incorporated into the divorce order, the first question is whether the agreement contains a non-variation clause that amounts to a waiver of the right to approach the court for variation, suspension or rescission. If the answer is "yes", the maintenance recipient's remarriage is irrelevant. (It should however be borne in mind that our courts tend to adopt a conservative approach to finding that the right to seek variation, suspension or rescission has been waived: see *Davis v Davis* 1993 1 SA 621 (C); *Luttig v Luttig* 1994 1 SA 523 (O); *Girdwood v Girdwood* 1995 4 SA 698 (C); *Hoal v Hoal* 2002 3 SA 209 (N); but cf *Polliack v Polliack* 1988 4 SA 161 (W).) It is only in the absence of a waiver that the maintenance recipient's remarriage could be relevant, for then the high court may be requested to vary, suspend or rescind the maintenance in terms of section 8 of the Divorce Act or the maintenance court may be approached in terms of section 6(1)(b), read with section 16(1)(b), of the Maintenance Act. Whether the maintenance recipient's remarriage is considered adequate justification for variation, suspension or rescission would depend on the court's view of whether the remarriage constitutes "sufficient reason" (Divorce Act s 8(1)) or "good cause" (Maintenance Act s 6(1)(b)) for variation, suspension or rescission.

5 Conclusion

The question this note seeks to address is whether the duty to pay post-divorce maintenance to a spouse or civil union partner is terminated by the maintenance recipient's remarriage if the duty arises from an undertaking in a settlement agreement that is silent on the duty's termination by such remarriage. In view of the different foundations of the common-law duty of support and the post-divorce duty of support, it is submitted that the correct answer is that it does not. Therefore, the decisions in *Smit v Pienaar*, *Welgemoed v Menell* and *Odgers v De Gersigny* are correct and the decisions in *Geldenhuis v Meyers* and *Van der Vyver v Du Toit* are wrong. The implication of this conclusion is that if the duty to pay post-divorce maintenance to a spouse or civil union partner arises from an undertaking in a settlement agreement that is silent on the maintenance recipient's remarriage, the remarriage is relevant in only three instances:

- (1) Where the agreement or a severable part of it can be set aside because the impending remarriage was fraudulently concealed with the object of convincing the other party to agree to a settlement or to specific clauses he or she would not otherwise have agreed to.
- (2) Where the parties subsequently agree that the remarriage is a reason for variation, suspension or rescission of the maintenance clause in their settlement agreement.
- (3) Where the settlement agreement was incorporated into the divorce order, the liable party did not waive his or her right to apply for variation, suspension or rescission of maintenance, and he or she is able to convince the court that the remarriage constitutes “sufficient reason” or “good cause” for variation, suspension or rescission in terms of the Divorce Act or the Maintenance Act.

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SHOULD THE MINISTER OF FINANCE BE JOINED IN PROCEEDINGS BEFORE THE TAX COURT CONCERNING THE CONSTITUTIONALITY AND VALIDITY OF TAX LEGISLATION?

1 Introduction

This note deals with the question whether the Minister of Finance should be joined in proceedings before the Tax Court concerning the constitutionality and validity of certain sections of tax legislation.

2 The leading of evidence pertaining to the constitutional issue in the Tax Court

The Tax Court does not have jurisdiction to make an order concerning the constitutional validity of an Act of Parliament. Section 172(2)(a) of the Constitution provides:

“The Supreme Court of Appeal, a High Court or a Court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

Section 166 of the Constitution establishes the judicial system. The courts are:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Court, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from high courts;
- (d) the Magistrate’s Court; and