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The South African *Civil Union Act 17 of 2006*: A Good Example of the Dangers of Rushing the Legislative Process[‡]

Bradley S. Smith* and J.A. Robinson**

I. SETTING THE SCENE—A CONSTITUTIONAL REVOLUTION

The 27th of April 1994 heralded the dawning of a new era for the Republic of South Africa. On this date, the interim Constitution¹ came into operation and for the first time in its history the Republic was to be governed by a democratic constitutional dispensation, which ousted parliamentary sovereignty in favour of constitutional supremacy. The thrust of this new era was illustrated by the preamble of the interim Constitution which stated:

[T]here is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms

The cornerstone² of this “new order” was a Bill of Rights, one of the most fundamental rights being the right to equality. The interim

[‡] This paper was presented by Bradley Smith as part of a “Symposium on Same-Sex Marriage and Gay Adoptions: Inclusion, Compromise, Protection, and Consequences” on November 2, 2007, at the J. Reuben Clark Law School on the campus of Brigham Young University, Provo, Utah. It constitutes an abridged version of Bradley S. Smith & J.A. Robinson, *The South African Civil Union Act 17 of 2006: Progressive legislation with regressive implications?*, 3 INT’L J.L. POL’Y & FAMILY. (forthcoming 2008). This abridged version has been published with the kind permission of the editorial board of the latter journal. As such, this adaptation includes a number of excerpts from and references to the original article. For the sake of completeness, readers are encouraged to refer to the original version. The authors are greatly indebted to the editorial board of the INT’L J.L. POL’Y & FAMILY for this concession.

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1. S. AFR. (Interim) CONST. 1993 (repealed 1996).

2. See S. AFR. CONST. 1996 § 7 (repealing the interim Constitution, see *infra* note 1). This section states “[the Bill of Rights] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

Constitution was replaced³ by the Constitution of the Republic of South Africa (“the Constitution”), and the right to equality is currently contained in section 9 of the Constitution. According to section 9, the basic premise of this right is that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”⁴ Section 9 also states that neither the state nor any person may discriminate unfairly, either directly or indirectly, against anyone on a number of listed grounds,⁵ which include race, gender, sexual orientation, and marital status. Discrimination on any of these listed grounds is presumed to be unfair, unless proven otherwise.

The South African Bill of Rights also makes express provision for a number of other fundamental rights, such as the right to life,⁶ the right to human dignity,⁷ the right to freedom and security of the person,⁸ the right to freedom of expression,⁹ and the right to privacy.¹⁰ The rights contained in the Bill are, however, not absolute and may be limited in accordance with section 36 of the Constitution (the so-called “limitation clause”).¹¹

As can be expected, the advent of a democratic constitutional order bolstered by a comprehensive Bill of Rights had an enormous and instantaneous impact on almost every facet of South African life, law, and culture. One of the most dramatic and far-reaching of these was occasioned by the newly-created Constitutional Court, which, in its capacity as South Africa’s highest court in all constitutional matters, wasted no time in abolishing the death penalty in 1995.¹² The legal development of human rights in South Africa was by no means limited to criminal law but also extended to private law and family law issues as well. The purpose of this paper is to examine a number of legislative and judicial developments which have occurred in South Africa since 1994

3. The interim Constitution was transitional in nature and was enacted with a view towards the eventual promulgation of a “final” Constitution, the text for which was approved on May 8, 1996. When it came into operation on February 4, 1997, this “final” Constitution repealed the interim Constitution and “complete[d] South Africa’s constitutional revolution.” IAIN CURRIE AND JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 6 (5th ed. 2005).

4. S. AFR. CONST. 1996 § 9(1).

5. S. AFR. CONST. 1996 § 9(3). The grounds listed in section 9(3) are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

6. S. AFR. CONST. 1996 § 11.

7. S. AFR. CONST. 1996 § 10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”).

8. S. AFR. CONST. 1996 § 12.

9. S. AFR. CONST. 1996 § 16.

10. S. AFR. CONST. 1996 § 14.

11. S. AFR. CONST. 1996 § 36.

12. *S v Makwanyane & Another* 1995 (3) SA 391 (CC) (S. Afr.).

and to evaluate the efficacy of recent civil union legislation in light of these developments. To this end the concept of “marriage” and its evolution will be tracked in Part II, followed by an analysis of interpretative difficulties and other anomalous consequences occasioned by the promulgation of the Civil Union Act 17 of 2006 (“Civil Union Act”) in Parts III and IV. Finally, Part V concludes that the drafters of the Civil Union Act paid scant regard to the comprehensive research that had been conducted by the South African Law Reform Commission in the decade preceding the Civil Union Act, with the result that same-sex cohabitants are currently afforded better legal protection than their heterosexual peers.

II. A BRIEF HISTORY OF THE CONCEPT OF MARRIAGE AND THE CHALLENGES TO ITS STATUS AND DEFINITION

A. *Marriage Under Attack*

Prior to the democratic constitutional era, civil marriage (that is, a marriage in terms of the Marriage Act 25 of 1961 (“Marriage Act”)) between two heterosexual persons was the only family form recognized by South African law.¹³ Interestingly, the Marriage Act did not contain a definition of the concept of marriage, which meant courts had to use the common law¹⁴ to define marriage.

In *Ismail v Ismail*,¹⁵ the Appellate Division (which was the highest Court in South Africa at the time) defined marriage in terms of the common law as being “the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts.” This definition shows that civil marriage was viewed and regulated from an exclusively Westernized point of view.¹⁶ Two of the most noticeable deficiencies of this rigid approach were (1) the blanket non-recognition of polygynous¹⁷ marriages and (2) relationships between extra-marital

13. See SOUTH AFRICAN LAW REFORM COMMISSION, PROJECT 118: REPORT ON DOMESTIC PARTNERSHIPS, xi, 3 (2006), available at http://www.doj.gov.za/salrc/reports/r_prj118_2006march.pdf; see also Nat’l Coal. for Gay and Lesbian Equal. v Minister of Home Affairs 2000 (2) SA 1 (CC) ¶ 36 (S. Afr.).

14. The common law can be loosely defined as the body of law that is not found in South African legislation and which is derived chiefly from Roman-Dutch law. H.R. HAHLO & E. KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 132 (1968).

15. 1983 (1) SA 1006 (A) at 1019 (H) (S.Afr); see also Seedat’s Ex’rs v The Master (Natal) 1917 A.D. 302, 309 (S. Afr.) (“With us marriage is the union of one man with one woman, to the exclusion while it lasts of all others.”).

16. J.A. Robinson, *The Evolution of the Concept of Marriage in South Africa*, 26 OBITER 488, 488–93 (2005).

17. For the purposes of South African law, it is more correct to use the term “polygyny” (i.e.,

cohabitants (both heterosexual and homosexual) received minimal legal recognition.

The absence of legal recognition of polygynous marriages was especially problematic as polygyny constitutes an important cultural aspect for many indigenous black people of Southern Africa. Polygynous marriages are also often encountered in (purely religious as opposed to civil) marriages that have been concluded according to the Islamic faith. This lacuna was partially addressed by the Recognition of Customary Marriages Act 120 of 1998 (“Customary Marriages Act”) which came into operation on December 15, 2000.¹⁸ As suggested by its title, this Act provides for full legal recognition of marriages concluded in accordance with customary law. “Customary law” is defined by the Customary Marriages Act as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.”¹⁹

The second problem (namely minimal legal recognition for extra-marital cohabitation) manifested itself in many ways. Examples of the differentiation between cohabitants and spouses include (i) that cohabitants did not automatically inherit intestate from one another in the absence of a valid will in which the survivor was benefited, (ii) that cohabitants were not placed under any legal obligation to maintain one another either during or after the termination of their relationship, and (iii) that cohabitants were not subjected to (or protected by) the various matrimonial property regimes that were available to married couples.²⁰ In short, the rights and duties that were attached to marriage by operation of law²¹ did not apply to cohabitants unless they had contracted to this effect or unless they were specifically included within the ambit of legislation (a situation which was the exception rather than the rule).²²

the situation where one man may be married to more than one woman simultaneously) rather than “polygamy” (i.e., where one or more wife or husband is permitted simultaneously).

18. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

19. *Id.* § 1. Islamic and Hindu marriages are therefore not included within the ambit of this Act, but the South African Law Reform Commission has prepared a draft Muslim Marriages Bill (as part of its Project 106 Islamic Marriages and Related Matters Report) which might, in the future, pave the way for full legal recognition of Islamic marriages. The possible recognition of these marriages is complicated by the conflicting constitutional values of the right to freedom of religion and the right to equality on the basis of gender. *See* D.S.P. CRONJÉ & JACQUELINE HEATON, *SOUTH AFRICAN FAMILY LAW*, 222–223 (2d ed. 2004) (for a brief exposition of this issue).

20. *See* Smith & Robinson, *supra* note †.

21. These included *consortium omnis vitae* and its attendant rights and obligations such as the privilege relating to marital communication which entails that although spouses are competent to do so, they generally cannot be compelled to testify against one another. *See* Criminal Procedure Act 51 of 1977 § 195 (S. Afr.) (containing this principle and applicable exceptions).

22. An example occurs in the case of domestic violence, where the Domestic Violence Act 116 of 1998 (S. Afr.) categorically provides for domestic relationships where the persons “[w]hether

Although this rigid Calvinistic approach towards the law of marriage dictated the course of South African family law for almost 350 years, the coming into operation of the Bill of Rights signified impending change. When viewed against the backdrop of the rights to equality²³ and human dignity²⁴ as guaranteed by the then newly-adopted Constitution, it was clear that the pre-1994 South African definition of marriage would not pass Constitutional muster, and a more pluralistic and inclusive family law system would be demanded of a society which subscribed to the “democratic values of human dignity, equality, and freedom.”²⁵ Societal groups that had faced a history of marginalization, such as gays and lesbians, were quick to approach the Courts in order to challenge the legal legacy left by pre-democratic South Africa. For example, in the 1998 decision of *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Constitutional Court abolished the common law crime of sodomy on the basis that it violated the rights to equality, human dignity, and privacy.²⁶ Two years later, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Another* the same Court found that section 25(5) of the Aliens Control Act 96 of 1991 (“Aliens Control Act”) discriminated against partners in permanent same-sex life partnerships as it only provided for the *spouses* of permanent South African residents to apply for immigration permits.²⁷ In consequence of this finding, the Court ordered that the words “or partner, in a permanent same-sex life partnership” would henceforth be read into the Act after the word “spouse” to remedy this defect.²⁸

As will be seen in this paper, a number of other piecemeal developments pertaining to same- and opposite-sex couples also took place by way of the Courts. These developments attempted to give effect to family law relations between unmarried couples. However, despite these *ad hoc* developments, civil marriage remained an institution reserved solely for two heterosexual persons who had elected to marry in terms of the Marriage Act. It was therefore clear from the outset that it

they are of the same or of the opposite sex] live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.”

23. S. AFR. CONST. 1996 § 9; *see discussion supra* Part I.

24. S. AFR. CONST. 1996 § 10.

25. *Id.* § 7.

26. 1999 (1) SA 6 (CC) (S. Afr.).

27. 2000 (2) SA 1 (CC) (S. Afr.) (citing Aliens Control Act 96 of 1991 § 25(5) (S. Afr.) (stating that “a regional committee may, upon application by the *spouse* or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit”).

28. *Nat’l Coal. for Gay & Lesbian Equal. v Minister of Home Affairs* 2000 (2) SA 1, 45 (CC) (S. Afr.).

was only a matter of time before same-sex couples would approach the Courts for an answer to the million dollar question as to whether or not the law could continue to deny them the right to marry one another.

In 2002, Marié Fourie and Cecilia Bonthuys, a lesbian couple living in Pretoria, approached the High Court for an order directing the Minister of Home Affairs to register their marriage in terms of the Marriage Act.²⁹ After a long and drawn-out legal battle involving a number of appeals and cross-appeals conducted before the full spectrum of higher Courts in South Africa, the couple eventually found themselves litigating in the Constitutional Court—a step which would finally provide a definitive answer to the question as to whether or not same-sex couples would be permitted to marry one another in South Africa.³⁰

On December 1, 2005, the Constitutional Court delivered its judgment in the matter of *Minister of Home Affairs and Another v Fourie and Another* finding in favour of the couple and holding (i) that the common law definition of marriage was unconstitutional to the extent that it did not allow for same-sex couples to enjoy the rights and obligations of marriage, and (ii) that section 30(1) of the Marriage Act was unconstitutional to the extent that it did not provide a gender-neutral marriage formula which could encompass same-sex marriages.³¹

Despite this finding, the majority of the Constitutional Court opted not to make these orders enforceable immediately, but instead gave Parliament a period of one year from the date of the judgment to promulgate legislation which would remedy the deficiencies.³² If Parliament failed to meet the deadline of November 30, 2006, the Court held that the words “or spouse” would simply be read into section 30(1) of the Marriage Act, thereby providing a marriage formula that was wide enough to encompass the conclusion of same-sex marriages.³³ The Legislature responded to the *Fourie* case by enacting the Civil Union Act 17 of 2006 (“Civil Union Act”).

29. *Fourie and Another v Minister of Home Affairs and Another* No. 17280/02 (Transvaal High Ct. Oct. 18, 2002) (S. Afr.) (unreported decision).

30. *Minister of Home Affairs and Another v Fourie and Another*, 2006 (1) SA 524 (CC) 531–39 (S. Afr.).

31. *Id.* at 584.

32. In her minority judgment, Judge O’Regan did not disagree with the merits of Judge Sach’s findings, but simply felt that the declarations of invalidity should be made effective immediately instead of being suspended for the one year period. *Id.* at 584–90 (O’Regan, J., concurring).

33. *Id.* at 586.

B. The Legislature's Response to the Fourie Case

As seen above, the *Fourie* case charged the Legislature with the unenviable task of legislating a highly contentious and emotional issue—namely the legal regulation of same-sex marriage. The difficulty of this assignment was clear from the start. The first Civil Union Bill attempted to make provision for the conclusion of “civil unions” without calling these unions “marriages.”³⁴ The bill provided for a “civil union” to take the form of either a “civil partnership” (which could be concluded by same-sex couples only and which would make all the legal consequences of civil marriage available to such couples) or a “domestic partnership” (which provided for the extension of certain consequences of civil marriage to be extended to the domestic partners and was available to either hetero- or homosexual couples).³⁵

The use of terms such as “civil partnership” was not received favourably by gay and lesbian activists who were outraged at the possibility of not being able to “marry” one another, but only being accorded a “separate but equal” status instead.³⁶ On the other side, public hearings held in consequence of this Bill led the Chairperson of the Home Affairs Portfolio Committee to conclude that “[t]he public was generally opposed to same sex marriages.”³⁷ Nevertheless, the Legislature persisted, and somehow succeeded in tabling a second greatly reduced and (at least *prima facie*) simplified bill for debate in the National Assembly and the National Council of Provinces on November 14 and 28, 2006, respectively. After being signed by the Deputy President of the Republic, the Civil Union Act came into operation on November 30, 2006—exactly one day before the Constitutional Court’s order would have taken effect.

C. The Civil Union Act 17 of 2006

The Civil Union Act defines a “civil union” as “the voluntary union of *two persons* who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to

34. Civil Union Bill, 2006, Bill 26-2006 (GG) (S. Afr.).

35. *Id.* § 1, 4(1), 18(1).

36. Janine du Plessis, *Gay Activists See Red Over Civil Union Bill*, PRETORIA NEWS, Oct. 18, 2006, at 3, available at http://www.iol.co.za/index.php?set_id=14&click_id=6&art_id=vn20061018030414526C988603.

37. See Home Affairs Portfolio Committee, Civil Union Bill [B26-2006]: Deliberations, Oct. 31, 2006, <http://www.pmg.org.za/node/8431> (last visited May 16, 2008).

the exclusion, while it lasts, of all others”³⁸ This definition makes provision for the solemnization of a “civil union” which may take the form of either a marriage or a civil partnership.³⁹ “Civil union partner” is defined as “a *spouse* in a marriage or a *partner* in a civil partnership, as the case may be, concluded in terms of this Act”⁴⁰

From the above definitions it becomes clear that the Civil Union Act provides for two persons of the same sex to *marry* one another, and to be referred to as each other’s *spouses*. It therefore appears that the term “civil union” is merely semantic and that it has simply been employed to facilitate the distinction between marriage and civil partnership. Readers of the Civil Union Act should take care not to conflate the term “civil union” with similar institutions provided in other jurisdictions, where concepts of “marriage” and “civil union” have distinct and separate meanings.⁴¹

Three pieces of legislation currently govern marriage in terms of South African law. Civil marriage is currently available in terms of two Acts of Parliament, namely the Marriage Act (which only provides for heterosexual civil marriage) and the Civil Union Act. However, as will be seen below, uncertainty prevails as to the precise scope and ambit of the Civil Union Act. As discussed in Part II.A, the Customary Marriages Act allows parties to marry in terms of customary law. A customary marriage that complies with the provisions of the Civil Union Act is fully valid and equal in status to a civil marriage. Parties to such a marriage may conclude a civil marriage *with each other* provided that neither of them is also a party to a customary marriage with a third party.⁴²

Section 13 regulates the legal consequences of the conclusion of a civil union:

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) [A]ny reference to-

38. Civil Union Act 17 of 2006 § 1 (S. Afr.) (emphasis added).

39. “Civil union” is defined in section 1 of the Act; however, “civil partnership” is not defined.

40. *Id.* (emphasis added).

41. For example, in the United States of America the state of Vermont recognizes the validity of civil unions which are defined as meaning “that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.” VT. STAT. ANN. tit. 15, § 1201 (1999). Section 1202 also requires that parties to a civil union “be of the same sex *and therefore excluded from the marriage laws of this state.*” § 1202 (emphasis added). The United Kingdom Civil Partnership Act, 2004 allows for same-sex couples to conclude “civil partnerships” which are not referred to as “marriages.”

42. Recognition of Customary Marriages Act 120 of 1998 § 3(2), 10(1), 10(4) (S. Afr.).

- (a) marriage in any other law, . . . includes . . . a civil union; and
 (b) husband, wife or spouse in any other law, . . . includes a civil union partner.⁴³

It is important to note that South African law requires persons who want to secure legal recognition of their relationships to act proactively by either concluding a civil marriage, or, in apposite circumstances, concluding a customary marriage or a civil union. If the latter option is chosen, the parties are required to take the proactive step of concluding a *registered* civil union that complies with the requirements and formalities prescribed by the Civil Union Act before they can be assured of securing full legal recognition of their civil union. Failure to secure full legal recognition will result in the parties being regarded as mere cohabitants and the differentiation encountered between marriage and cohabitation (as explained in Part II.A *supra*) will apply.

III. INTERPRETATIVE DIFFICULTIES—WHAT THE MINISTER SAYS DOES NOT MIRROR WHAT THE CIVIL UNION ACT SAYS⁴⁴

By way of introduction, it must be stated that the Civil Union Act is fraught with interpretative difficulties.⁴⁵ One of the most glaring of these pertains to the scope and ambit of the Act in that, although there can be no doubt that the Act provides for persons of the same sex to conclude a civil union, the wording of the Civil Union Act is unclear as to whether persons of the *opposite sex* may do the same.

The answer to this question may not be of paramount importance as far as *marriage* is concerned, as the Marriage Act was not repealed by the Civil Union Act and is therefore still available to heterosexual couples. While heterosexual persons may therefore have little or no practical need for concluding a civil union in the form of *marriage*, the discussion in Part II.A shows that the same cannot be said regarding the conclusion of a heterosexual civil union in the form of a *civil partnership*—as the Civil Union Act is currently the only legislative vehicle by which cohabitants (who do not wish to marry one another) may secure comprehensive legal recognition of their relationships.

Prior to the adoption of the Bill in the National Assembly on

43. Civil Union Act 17 of 2006 § 13 (S. Afr.).

44. See generally Smith & Robinson, *supra* note ‡, at 1 A–D.

45. See, e.g., L. Neil van Schalkwyk, *Kommentaar op die “Civil Union Act” 17 van 2006*, 40 DE JURE 166, 168, 172 (2007). Van Schalkwyk states that the extent to which the Civil Union Act provides for “customary” civil unions is unclear. The author is of the opinion that the Act provides for two types of civil union, i.e., in terms of both civil law and customary law (which he describes as “civil’ civil unions” and “customary’ civil unions” respectively).

November 14, 2006,⁴⁶ the South African Minister of Home Affairs remarked that “[a]s noted in the memorandum on the objects of the Bill, this Bill makes provision for *opposite- and same-sex couples* of 18 years or older to solemnise and register a voluntary union by way of either a marriage or a civil partnership.”⁴⁷ Despite what the Minister says, the following observations about the Civil Union Act show that opposite- and same-sex couples are, in fact, treated differently under it.

First, not one single provision of the Civil Union Act contains any reference whatsoever to persons of the opposite sex. Sex is mentioned in sections 6 and 8(6), but these references are to same-sex couples only.⁴⁸

Second, section 8(6) of the Civil Union Act states that “[a] civil union may only be registered by prospective civil union partners who would, *apart from the fact that they are of the same sex*, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.”⁴⁹ Section 8(6) creates the impression that the Act only provides for persons of the same sex to conclude a civil union—if the Act had indeed envisioned civil unions between heterosexual couples this provision of the Act should have included wording such as “apart from the fact that they *may be* of the same sex.”⁵⁰

Third, the preamble to the Civil Union Act⁵¹ only refers to the necessity of providing legal protection for *same-sex* couples and does not contain a single reference to persons of the opposite sex.⁵²

46. Civil Union Bill B26-2006: Adoption by the H. Affairs Portfolio Comm. appendix (Nov. 9, 2006), available at <http://www.pmg.org.za/viewminute.php?id=8509>; see also *Same-sex Bill gets Parliament go-ahead*, MAIL AND GUARDIAN ONLINE, November 14, 2006, http://www.mg.co.za/articlePage.aspx?articleid=289936&area=/breaking_news/breaking_news__national/.

47. Introductory remarks by the Hon. NN Mapisa-Nqakula on the occasion of the Second Reading Debate on the Civil Union Bill (Nov 14, 2006), available at <http://home-affairs.pwv.gov.za/speeches.asp?id=181> (emphasis added).

48. Section 6 states that “[a] marriage officer, other than a marriage officer referred to in section 5 [a minister of religion or person attached to a religious denomination or organisation who has been designated as a marriage officer in terms of this Act], may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union *between persons of the same sex*, whereupon that marriage officer shall not be compelled to solemnise such civil union.” Civil Union Act 17 of 2006 § 6 (S. Afr.) (emphasis added).

49. Civil Union Act 17 of 2006 § 8(6) (S. Afr.) (emphasis added).

50. Smith & Robinson, *supra* note †, at 1.C.

51. Since 1994 the preambles to South African legislation have often been used by the Courts as an interpretative tool. See, e.g., Nat’l Dir. of Pub. Prosecutions and Another v Mohamed NO and Others 2002 (4) SA 843 (CC) ¶ 14 (S. Afr.); Nat’l Dir. of Pub. Prosecutions v RO Cook Props. (Pty) Ltd 2004 (2) All SA 491 (SCA) ¶ 6 (S. Afr.); Nat’l Dir. of Pub. Prosecutions v Parker 2006 (3) SA 198 (SCA) ¶ 1 n.4 (S. Afr.).

52. The following extract from the preamble highlights this point: “[T]he family law dispensation as it existed after the commencement of the Constitution did not provide for *same-sex couples* to enjoy the status and the benefits coupled with the responsibilities that marriage accords to *opposite-sex couples*” Civil Union Act 17 of 2006 pmb. (S. Afr.) (emphasis added); see also Smith & Robinson, *supra* note †, at 1.D.

Fourth, it is submitted that the section 1 definition of a civil union as being a “union of *two persons*” does also not necessarily imply that heterosexual persons are included within the ambit of the Act—when viewed in the light of points (i)–(iii) above it might be argued that the reference to “two persons” was inserted in order to provide for *intersexed or transgender* persons. Indeed, such persons may have been excluded if the Act had in fact defined a civil union as being between “two persons of the *same sex*.”⁵³

Fifth, despite the Minister’s reference to the “memorandum on the objects of the Bill,” the fact is that this memorandum does not form part of the official legislative text of the Act. Persons who obtain a copy of the Civil Union Act therefore do not also automatically gain access to the memorandum to which the Minister refers. The suggestion that the memorandum provides adequate guidance as to the scope of the Act is therefore not convincing.⁵⁴

Sixth, it is submitted that the saving grace of the Civil Union Act is found in section 39(2) of the Constitution of 1996 which requires all legislation to be interpreted to “promote the spirit, purport and objects of the Bill of Rights.”⁵⁵ This section might be *interpreted* to include heterosexual civil unions. However, the very need for interpretation about such an important issue creates unnecessary uncertainty; a situation that will prevail until this issue is clarified by the courts.⁵⁶

The question now presented is whether the Civil Union Act has been drafted to enable the average South African citizen or official to understand what is expected of him or her. In light of the above discussion it is submitted that it has not, and that the Legislature has fallen foul of its “duty to pass legislation that is reasonably clear and precise, enabling citizens to understand what is expected of them.”⁵⁷

53. See Smith & Robinson, *supra* note †, at 1.D.

54. *Id.* at 1.A.

55. S. AFR. CONST. 1996 § 39(c) (“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”).

56. See Smith & Robinson, *supra* note †, at 1.D.

57. Islamic Unity Convention v Indep. Broad. Auth. 2002 (4) SA 294 (CC) ¶ 40 (S. Afr.).

IV. ADDITIONAL DIFFICULTY: ANOMALIES CREATED BY THE COURTS
AND PERPETUATED BY THE CIVIL UNION ACT

In the decade that followed the advent of a democratic Constitutional dispensation in South Africa⁵⁸ it was expected that greater recognition would gradually be accorded to marriages that had previously not been recognized and to other relationships that may or may not have resembled family units. Using the broad range of powers granted to them by the Constitution,⁵⁹ the courts have been the primary mechanism driving recognition of these relationships. A recent judgment of the Constitutional Court illustrates this point. “It is a matter of our history . . . that [homosexual] relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease.”⁶⁰

Consequently, many cases involved requests to the judiciary for one or more of the personal consequences pertaining to marriage to be extended to relationships other than marriage. Very often, the petitioners were homosexual people living together permanently,⁶¹ and, in applying the constitutional principles elucidated above, the courts managed to adapt family law in such a way as to comply with the values underpinning the Constitution. However, the courts are limited to the facts of the dispute placed before them, and they are required to “decide no more than what is absolutely necessary for the adjudication of a case.”⁶² Consequently, such judicial pronouncements have sometimes had the anomalous effect of facilitating better legal protection for homosexual couples while leaving their heterosexual counterparts out in the cold.

58. See *supra* Part I (noting that 27 April 1994 marks the date of the constitutional dispensation).

59. See S. AFR. CONST. 2006 § 172 (“(1) When deciding a constitutional matter within its power, a court- (a) *must* declare that any law or conduct *that is inconsistent with the Constitution is invalid* to the extent of its inconsistency; . . . (2)(a) 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.”) (emphasis added). The Constitution also states that “[t]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.” *Id.* §. 173.

60. *Du Toit v Minister of Welfare & Population Dev.* 2003 (2) SA 198 (CC) ¶ 32 (S. Afr.).

61. See, e.g., *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) (S. Afr.); *Nat’l Coal. for Gay & Lesbian Equal. v Minister of Home Affairs* 2000 (2) SA 1 (CC) (S. Afr.).

62. GEORGE E. DEVENISH, *THE SOUTH AFRICAN CONSTITUTION* 209 (2005).

A. *Anomaly 1: Adoption*⁶³

Prior to the enactment of the Civil Union Act, the Constitutional Court was called to adjudicate the constitutionality of section 17 of the Child Care Act 74 of 1983 (“Child Care Act”) in the matter of *Du Toit v Minister of Welfare & Population Development and Others*.⁶⁴ Section 17 of the Child Care Act allowed for adoption in one of four ways: by a husband and wife jointly; by a widower or widow or unmarried or divorced person; by a married person whose spouse is the parent of the child; or by the natural father of a child born out of wedlock.⁶⁵

Writing for a full Court, Acting Judge Skweyiya held that this section discriminates unfairly against people living together in a same-sex life partnership. The Court also held that to prevent homosexual cohabitants who were suitable to do so from adopting children would be in conflict with the principle enunciated in section 28(2) of the Constitution, which states that “a child’s best interests are of paramount importance in every matter concerning the child.”⁶⁶ Lastly, the Court found that section 17 of the Child Care Act also infringed section 28(1)(b) of the Constitution, which guarantees children the right “to family care or parental care, or to appropriate alternative care when removed from the family environment.”⁶⁷

In consequence of the *Du Toit* decision, homosexual couples are now allowed to adopt children jointly. However, South African law does not yet allow heterosexual cohabitants to do the same. This situation will persist until the “new” Children’s Act 38 of 2005 is fully operational. Although 43 of the 315 sections of the Act came into operation on July 1, 2007, section 231 of this Act (which will remedy the situation) has not yet come into operation.⁶⁸ Section 231 stipulates that a child may be adopted jointly by “a husband and a wife, *partners in a permanent domestic life-partnership* or *by other persons sharing a common household and forming a permanent family unit . . .*”⁶⁹

63. Adapted from Smith & Robinson, *supra* note ‡, at 2.B.

64. *Du Toit*, 2003 (2) SA 198 (CC).

65. Child Care Act 74 of 1983 § 17 (S. Afr.).

66. *Du Toit*, 2003 (2) SA 198 (CC) at ¶ 20 (citing the Constitution).

67. *Id.* Incidentally, the Court interpreted section 28(1)(b) as guaranteeing the right of a child to a “loving and stable family life.” *Id.* at ¶ 22.

68. See Proclamation by the State President (GG June 29, 2007), available at http://search.sabinet.co.za/WebZ/FETCH?sessionId=01-41234-1415151403&recno=1&resultset=1&format=F&next=law/law_nffull.html&bad=law/law_badfetch.html&&entitytoprecno=1&entitycurrecno=1.

69. Children’s Act 38 of 2005 § 231 (S. Afr.) (emphasis added).

The adoption anomaly also illustrates the importance of determining whether or not heterosexual couples are competent to conclude civil unions. If they can conclude civil unions the application of section 13 of the Civil Union Act to section 17 of the Child Care Act would allow heterosexual couples to adopt.⁷⁰ If they are not, the position of heterosexual couples would become even more unfavourable, in that, over and above the anomaly that already exists in consequence of the *Du Toit* decision, it would imply that the couples would not be entitled to the application of section 13 of the Civil Union Act and its concomitant effects.

*B. Anomaly 2: Maintenance*⁷¹

In *Du Plessis v Road Accident Fund*, D and C were involved in a permanent same-sex life partnership.⁷² The parties had “married” one another in 1988 by participating in a marriage-like ceremony (that was obviously null and void at the time) and they had maintained and supported one another throughout their “marriage.”⁷³ D was medically boarded in 1994 and received a disability pension.⁷⁴ Because the disability pension was considerably less than C’s salary, C in effect maintained D.⁷⁵

After C was killed in a motor accident in 1999, D instituted action against the Road Accident Fund (“RAF”) for loss of support.⁷⁶ The Road Accident Fund Act 56 of 1996 requires common law liability before the RAF can be held statutorily liable for any claim arising from the negligent driving of a motor vehicle.⁷⁷ On that basis, the RAF argued that it could not be held liable for D’s claim because the common law action for loss of support did not include persons of the same sex. The RAF succeeded in the court *a quo*, but on appeal the Supreme Court of Appeal found that the extension of the common law sought by the plaintiff could be accommodated along the lines of legal precedent and, furthermore, that doing so would satisfy the “behests of the Constitution.”⁷⁸ Having found the common law deficient, the Court proceeded in terms of section

70. Section 13 of the Civil Union Act requires the words “husband” and “wife” in the Child Care Act to be interpreted in light of the Civil Union Act.

71. See Smith & Robinson, *supra* note †, at 2.C.

72. *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) ¶¶ 1, 3 (S. Afr.).

73. *Id.* at ¶ 3.

74. *Id.* at ¶ 4.

75. *Id.*

76. *Id.* at ¶¶ 1, 4.

77. Road Accident Fund Act 56 of 1996 § 19(a) (S. Afr.).

78. *Du Plessis*, 2004 (1) SA 359 (SCA) at ¶¶ 17–34.

173⁷⁹ of the Constitution which vests the Supreme Court of Appeal and the High Courts with the inherent power to develop the common law. It held as follows:

To extend the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, *who had a contractual duty to support one another*, would be an *incremental step* to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution⁸⁰

Cronjé and Heaton summarize the anomalous effect of the *Du Plessis* decision by stating that “even if heterosexual life partners contractually undertake a duty of support, the surviving heterosexual life partner does not have a claim for damages for loss of support, while a surviving same-sex life partner has such a claim.”⁸¹

Judicial intervention in the development of marriage-like relationships since 1994 has focused almost exclusively on same-sex relationships. However, heterosexual relationships have also been subjected to close scrutiny. In *Robinson and Another v Volks NO* the surviving party to a heterosexual life partnership requested that the Cape High Court extend certain privileges granted under the Maintenance of Surviving Spouses Act 27 of 1990 (“Surviving Spouses Act”) to her.⁸²

The facts were quite simple: S and R had been involved in a relationship since 1985.⁸³ They lived together from 1989 until S’s death in 2001.⁸⁴ During this time S supported and maintained R; she was registered as a dependant on his medical aid scheme and the couple’s family and friends accepted them as “husband and wife” despite the fact that they were never married.⁸⁵ After S passed away R instituted a claim against his estate in terms of the Surviving Spouses Act.⁸⁶ Section 2(1) of the Surviving Spouses Act states:

If a *marriage* is dissolved by death after the commencement of this Act [July 1, 1990] *the survivor* shall have a claim against the estate of the deceased *spouse* for the provision of his reasonable

79. See *supra* note 59.

80. *Du Plessis*, 2004 (1) SA 359 (SCA) at ¶ 37 (emphasis added).

81. CRONJÉ & HEATON, *supra* note 19, at 232.

82. *Robinson and Another v Volks NO*, 2004 (6) SA 288 (C) (S. Afr.).

83. *Id.* at 290.

84. *Id.*

85. *Id.* at 290–91.

86. *Id.* at 293–94.

maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.⁸⁷

The Surviving Spouses Act defines “survivor” as “the surviving spouse in a marriage dissolved by death.”⁸⁸

R’s claim was rejected by the executor of S’s estate, on the basis that S and R’s conscious election not to marry reflected “the choice not to have the automatic consequences of the laws of marriage appl[ied] to their relationship.”⁸⁹ R then instituted action in the Cape High Court, where the Surviving Spouses Act was found unconstitutional to the extent that it did not provide for persons in permanent life partnerships to receive maintenance from their partners’ deceased estates.⁹⁰

As discussed *supra*, section 172(2) of the Constitution states that a declaration of unconstitutionality of legislation by a South African Court has no validity until the order has been confirmed by the Constitutional Court.⁹¹ In what may appear to be a surprising move, the Constitutional Court refused to confirm the Cape High Court’s finding.⁹² The Court concluded that it would be impossible to interpret the Surviving Spouses Act so as to include permanent life partnerships as doing so would be “unduly strained” and “manifestly inconsistent” with the “context and structure” of the wording adopted by the Legislature.⁹³ The Court emphasized that “[m]arriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society.”⁹⁴ Thus, the Court concluded that the law could legitimately distinguish between married and unmarried people.⁹⁵

Comparing *Du Plessis* with *Volks* leads to an anomalous result—despite the fact that the law did not impose an *ex lege* duty of support in either case, it was clear that in both cases the parties had expressly or implicitly undertaken to maintain each other. Nevertheless, the Court was prepared to extend the common law to include homosexual domestic partners in *Du Plessis* but refused to adapt the law for heterosexual life

87. Maintenance of Surviving Spouses Act 27 of 1990 § 2(1) (emphasis added).

88. *Id.* (emphasis added).

89. *Volks NO*, 2004 (6) SA 288 (C) at 291.

90. *Id.* at 302.

91. S. AFR. CONST. 2006 § 172(2)(a).

92. *Volks NO*, 2005 (5) BCLR 446 (CC) at ¶ 70.

93. *Id.* at ¶¶ 40–45.

94. *Id.* at ¶ 52.

95. *See id.* at ¶ 54 (“In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with.” (quoting *Fraser v Children’s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) ¶ 26 (S. Afr.))).

partners in *Volks*.

It is noteworthy of mentioning that the issues before the Courts in *Du Plessis* and *Volks* also serve to highlight the impact of the Civil Union Act. This is because section 13 of the Act: (i) will have the immediate effect of extending the common law action for loss of support to civil union partners; and (ii) will also have the effect of entitling a civil union partner to claim maintenance from his or her deceased partner's estate.

It should be clear that the impact of section 13 once again highlights the importance of clarifying the issue as to whether or not the Civil Union Act provides for heterosexual civil unions. Notwithstanding the impact of section 13, the harsh reality remains that the *Du Plessis* case entitles same-sex life partnerships to claim for loss of support *without having to take the proactive step of concluding a civil union*. On the other hand, their heterosexual counterparts find themselves in a far less comfortable position.

C. Anomaly 3: Intestate succession⁹⁶

The Intestate Succession Act 81 of 1987 ("Intestate Succession Act") provides the surviving spouse and children of a person who dies either entirely or partially intestate to inherit the intestate portion of the estate.⁹⁷ Originally the Intestate Succession Act only catered to spouses who had concluded a valid civil marriage that had been solemnized and registered in accordance with the Marriage Act.⁹⁸ However, the advent of a human rights culture has necessitated a more inclusive and pluralistic approach towards intestate succession in South Africa. In this regard, the following three developments have recently occurred:

(1) Islamic marriages: Islamic marriages that have not been solemnized in accordance with the civil marriage laws of South Africa are not generally regarded as valid marriages.⁹⁹ However, in consequence of the 2004 decision in *Daniels v Campbell*, the surviving spouse of a *monogamous* Islamic marriage now qualifies as a "spouse" for the purposes of the Intestate Succession Act and can therefore inherit

96. Smith & Robinson, *supra* note †, at 2.D.

97. Intestate Succession Act 81 of 1987 § 1(1)(a)–(c) (S. Afr.).

98. *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) ¶¶ 1, 19 (S. Afr.); *Daniels v Campbell* 2004 (7) BCLR 735 (CC) ¶¶ 2, 3, 19 (S. Afr.).

99. Although such marriages are therefore invalid, they have, from time to time, been recognized under specific legislation such as the Domestic Violence Act 116 of 1998 § 1 (S. Afr.), where "domestic relationship" is defined as "including marriage according to any law, custom or religion," and the Criminal Procedure Act 51 of 1977 § 195(2) (S. Afr.). The Courts have also held that effect can be given to a *de facto* monogamous (purely religious) Islamic marriage. See *Ryland v Edros* 1997 (2) SA 690 (CC) at 707 (E/F)–(H); 709 (C/D)–(E) and 711 (C) (S. Afr.).

intestate.¹⁰⁰

(2) Customary marriages: In *Bhe and Others v Magistrate, Khayelitsha, and Others*, the Constitutional Court found the principle of male primogeniture (according to which customary law of succession has traditionally taken place) to be unconstitutional.¹⁰¹ It was held that the Intestate Succession Act would henceforth apply to both monogamous and polygamous customary marriages.¹⁰²

(3) Homosexual life partners: In *Gory v Kolver NO and Others* the Constitutional Court recently held that the failure of the Intestate Succession Act to allow for permanent *same-sex* cohabitants to inherit intestate from one another was unconstitutional.¹⁰³ The Court did, however, add a qualification to its order by requiring that such cohabitants must have undertaken reciprocal duties of support before they would be able to inherit in this fashion.¹⁰⁴

The upshot of the developments elucidated above is that the Intestate Succession Act currently applies to most marriage and marriage-like institutions encountered in South Africa. However, there is one important exception—heterosexual life partners are not included within the ambit of the Intestate Succession Act, irrespective of whether or not they have undertaken to maintain one another. Once again, this state of affairs amply illustrates the importance of clarifying whether or not the Civil Union Act allows for the conclusion of heterosexual civil unions. If it does, section 13 of the Intestate Succession Act will automatically allow the parties to such a union to inherit intestate and the only differentiation encountered would be that heterosexual cohabitants who are either unmarried or who have not concluded a civil union would not be allowed to inherit intestate (while their same-sex counterparts who had undertaken to maintain one another would, in light of the *Gory* case, be able to do so). However, should the Civil Union Act not provide for heterosexual civil unions to be included, the differentiation would be encountered on not one but two fronts as (i) the exclusion of heterosexual civil unions would obviously imply that section 13 of the Civil Union Act could not be applied to the Intestate Succession Act, and (ii) heterosexual couples also would not qualify for the protection provided by the *Gory* case as the case only applies to homosexual couples.

100. Daniels v Campbell, 2004 (5) SA 331 (CC) 350-51 (S. Afr.).

101. Bhe and Others v Magistrate, Khayelitsha, and Others 2005 (1) SA 580 (CC) 581 (S. Afr.).

102. *Id.*

103. Gory v Kolver NO and Others 2007 (4) SA 97 (CC) ¶ 66 (S. Afr.).

104. *Id.*

V. LEGISLATIVE HISTORY OF THE CIVIL UNION ACT

The passing of a Bill of Rights that included an express prohibition of unfair discrimination on the grounds of sexual orientation, coupled with a Constitutional Court that made it abundantly clear that its task was to uphold the Constitution even if it conflicted with the public opinion of the majority of South Africans,¹⁰⁵ made the recognition of same-sex marriage almost inevitable.

When viewed against the backdrop of post-1994 developments in South Africa, the fact that the impetus for this development was provided by the judiciary and not the legislature comes as no surprise. Having said this, one important aspect of the *Fourie* case cannot be overlooked—that the Constitutional Court was mindful of its function to state the law and not to make it.

This judgment serves to vindicate the rights of the applicants by declaring the manner in which the law at present fails to meet their equality claims. At the same time, it is my view that it would best serve those equality claims *by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter.*¹⁰⁶

One of the reasons for opting to give the legislature the task of ironing out the intricacies of same-sex marriage recognition was that substantial research regarding the question of same-sex marriage and the possibility of providing for marriage-like relationships in the form of domestic partnerships had already been conducted by the South African Law Reform Commission, to such an extent that the Commission “ha[d] reached a position to produce draft legislation.”¹⁰⁷ The Commission’s Report on Domestic Partnerships was the product of almost a decade of research, in which comprehensive proposals were contained for dealing with marriage (both same- and opposite-sex), and both registered and unregistered partnerships.¹⁰⁸

105. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 394–95 (S. Afr.) (“Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.”).

106. Minister of Home Affairs and Another v. *Fourie and Another* 2006 (1) SA 524 (CC) ¶ 139 (S. Afr.) (emphasis added).

107. *Id.* at ¶ 129.

108. See SOUTH AFRICAN LAW REFORM COMMISSION, *supra* note 13, at xi–xvi (summarizing the Commission’s proposals).

Despite the Court's order and the Commission's report, the legislature did not appear to be in too much of a hurry to give effect to the Constitutional Court's order. Indeed, the first Bill that was published in the Government Gazette appeared on August 31, 2006, a mere three months before the deadline of November 30.¹⁰⁹ This Bill was followed by a second Bill that was introduced to the Home Affairs Portfolio Committee on November 8, 2006.¹¹⁰ Nevertheless, this second Bill was adopted by the Portfolio Committee and was sent to the National Assembly where it was debated, voted on, and passed on November 14—approximately one week after having first been tabled to the Portfolio Committee.¹¹¹

VI. CONCLUSION

Despite being in a position to consider (and give effect to) the South African Law Reform Commission's research, the Civil Union Act that came into operation on November 30, 2006, makes it clear that Parliament did not do so. Instead, the legislation is poorly-drafted and is replete with inconsistencies. Just one example is the fact that the Civil Union Act makes provision for the conclusion of a so-called "civil partnership."¹¹² On November 8, 2006, the Home Affairs Portfolio Committee agreed with a proposal by the African National Congress to the effect that all references to "domestic partnerships" in the original Bill should be removed and that this issue should be dealt with in separate legislation.¹¹³ However, this proposal was clearly disregarded in the final bill. The new Bill (as adopted by the Portfolio Committee the very next day and which would be promulgated as the Civil Union Act a mere three weeks later) did in fact make provision for civil partnerships notwithstanding the original decision to deal with alternatives to marriage in future separate legislation.¹¹⁴

109. Civil Union Bill, 2006, Bill 26-2006 (GG) (S. Afr.).

110. Civil Union Bill B26-2006: Deliberations on B26-2006 and B26B-2006 Before the H. Affairs Portfolio Comm. (Nov. 8, 2006), <http://www.pmg.org.za/node/8504> (last visited May 17, 2008).

111. Civil Union Bill B26-2006: Adoption by the H. Affairs Portfolio Comm. (Nov. 9, 2006), <http://www.pmg.org.za/viewminute.php?id=8509>. This was not the final step in the process as the National Council of Provinces also had to vote on the Bill. Although the vote occurred two weeks later, the National Council of Provinces vote was described as "largely a formality" after which the Bill would be "rubberstamped by President Thabo Mbeki." *Green Light for Gay Marriages*, IAFRICA.COM, Nov. 15, 2006, <http://www.iafrica.com/news/sa/416904.htm>.

112. Civil Union Act 17 of 2006 § 1 (S. Afr.).

113. Civil Union Bill, *supra* note 110.

114. Civil Union Bill, 2006, Bill 26B-2006 (GG) § 1 (S. Afr.).

When all is said and done it becomes clear that the *Fourie* case involved something more than the sole issue of legalizing same-sex marriage. In his majority judgment, Sachs J stated that “whatever legislative remedy is chosen *must be as generous and accepting towards same-sex couples as it is to heterosexual couples*, both in terms of the intangibles as well as the tangibles involved.”¹¹⁵

The anomalies explained above highlight the fact that the drafters of the Civil Union Act paid mere lip service to this guideline, and, in so doing, promulgated legislation that has perpetuated the almost absurd situation of having a legal system that provides gay couples with far more comprehensive legal protection than their heterosexual counterparts.

In conclusion, it must be mentioned that the Civil Union Act has been described as an interim measure by the South African Minister of Home Affairs,¹¹⁶ and it is envisioned that South African matrimonial law may receive a complete overhaul in the near future. Nevertheless, the fact remains that the Civil Union Act has left many questions unanswered—a fact which will certainly make both the legislature and the judiciary’s future tasks even more arduous and which poses further challenging questions for the fledgling democracy to answer.

115. Minister of Home Affairs and Another v. Fourie and Another 2006 (1) SA 524 (CC) ¶ 153 (S. Afr.) (emphasis added).

116. *Mapisa-Nqakula Vouches for Same-Sex Marriages*, SABC NEWS, Nov. 18, 2006, http://www.sabcnews.com/south_africa/social/0,2172,139205,00.html.