

# Default matrimonial property regimes and the principles of European family law – a European–South African comparison (part 2)\*

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## 4 *South African default regimes*

As in Europe,<sup>108</sup> prospective spouses in South Africa have wide-ranging party autonomy and they may select the matrimonial property system they would like to make applicable to their marriage by entering into an antenuptial contract before their marriage.<sup>109</sup> If they do not exercise this freedom of contract, the default matrimonial property system of universal community of property will apply to their marriage.<sup>110</sup> There is, in fact, a rebuttable presumption that when a couple enters into a civil marriage the pair is marrying in community of property.<sup>111</sup> Community of property is therefore referred to as the primary matrimonial property system of South Africa.<sup>112</sup> If prospective spouses do enter into an antenuptial contract to exclude community of property, section 2 of the Matrimonial Property Act 88 of 1984 makes provision for the accrual system almost as a second default matrimonial property system. Spouses do not even need to state in their antenuptial contract that they would like to get married with the accrual system, as all marriages concluded out of community of property since the coming into operation of the Matrimonial Property Act on 1 November 1984 are subject to the accrual system, unless the parties expressly exclude this system. The accrual system can therefore be regarded as the secondary matrimonial property system in South Africa. Both these systems will be scrutinised as regards their operation firstly upon conclusion of the marriage and secondly upon dissolution through divorce. Attention will also be paid to specific problems experienced with these two systems in practice and certain areas of uncertainty.

\* See 2015 *TSAR* 363 for part 1.

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<sup>108</sup> See par 2.

<sup>109</sup> Sonnekus “Grense aan kontrakvryheid vir eggenote én voornemende eggenote? (deel 2)” 2010 *TSAR* 217 234; Sonnekus “Huweliksvoorwaardes én kontrakteervryheid onder druk” 2014 *TSAR* 580.

<sup>110</sup> Sonnekus “Grense aan kontrakvryheid vir eggenote én voornemende eggenote? (deel 1)” 2010 *TSAR* 53 56; Sonnekus (n 109 (2014)) 580. See also Barratt (ed) *Law of Persons and the Family* (2012) 279.

<sup>111</sup> *Edelstein v Edelstein* 1952 3 SA 1 (A) 10 referring to Voet 23 2 91; *Brummund v Brummund's Estate* 1993 2 SA 494 (NmHC) 498 quoting Hahlo *The South African Law of Husband and Wife* (1985) 157, where he says that “community comes into being as soon as the marriage is solemnized” and that “[e]very marriage is presumed to be in community until the contrary is proved”.

<sup>112</sup> Heaton *South African Family Law* (2010) 65.

## 4.1 Universal community of property

### 4.1.1 Concept

Where spouses get married in community of property their separate estates are merged into a single joint estate for the duration of the marriage.<sup>113</sup> As the system entails a universal community of property, the spouses share everything – all their assets and all their debts.<sup>114</sup>

As far as their assets are concerned, the spouses become tied co-owners in undivided and indivisible half-shares of all the assets they respectively have at the time of their marriage and all the assets which they acquire during the marriage.<sup>115</sup> Transfer of ownership is automatic and no delivery of movable property, registration of immovable property, cession of rights and so on, is necessary.<sup>116</sup> There are, however, some exceptions to the general rule that all assets of both spouses become joint assets. In terms of common law and legislation either spouse may also own separate property which is excluded from the joint estate.<sup>117</sup> Separate property comprises the following:<sup>118</sup> assets excluded from the joint estate by the spouses in an antenuptial contract;<sup>119</sup> testamentary bequests or donations made by a third party to a spouse subject to the express condition that the asset(s) are excluded from the joint estate of the spouses; property in which a spouse holds a limited or inalienable interest, such as a usufruct or a *fideicommissum*; engagement or wedding presents from a husband to his wife; benefits accruing to a wife in terms of the Friendly Societies Act 25 of 1956; delictual damages from third parties for non-patrimonial loss as provided for by section 18(a) of the Matrimonial Property Act 88 of 1984; delictual damages for personal injury inflicted by the other spouse as provided for by section 18(b) of the Matrimonial Property Act; costs awarded to a spouse in matrimonial proceedings which do not result in the marriage being dissolved; and property attained through an offence and the proceeds of unlawful activities excluded from the joint estate by the court in terms of the Prevention of Organised Crime Act 121 of 1998.

Although the fruits of separate property generally fall within the joint estate, assets replacing separate property, except assets replacing delictual damages for non-patrimonial loss from third parties and delictual damages for personal injury inflicted by the other spouse, are also excluded from the joint estate.<sup>120</sup>

<sup>113</sup> *Du Plessis v Pienaar NO* 2002 4 All SA 311 (SCA) 312g. See also Heaton (n 112) 66; Hahlo (n 111) 157-158.

<sup>114</sup> Barratt (n 110) 279; Sonnekus (n 109 (2014)) 580.

<sup>115</sup> *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 395-396; *De Wet v Jurgens* 1970 3 SA 38 (A) 46; *Ex parte Menzies et Uxor* 1993 3 SA 799 (C) 811E-G; the *Du Plessis* case (n 113) 312g; *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T) par 13; *Zulu v Zulu* 2008 4 SA 12 (D) 15G-H; *Mazibuko v National Director of Public Prosecutions* 2009 6 SA 479 (SCA) par 48.

<sup>116</sup> the *Menzies* case (n 115); the *Wiggill* case (n 115). See also Heaton (n 112) 67; Bakker “Nature of ownership in immovable property of the joint estate on divorce” 2007 *THRHR* 515 519; Hahlo (n 111) 162.

<sup>117</sup> Heaton (n 112) 67; Klopper “Domestic assault with a motor vehicle” 2007 *THRHR* 672 678; Sonnekus “Privé bates en sekwestrasie in huwelik in gemeenskap van goed” 1994 *TSAR* 143 144.

<sup>118</sup> Barratt (n 110) 282-283; Heaton (n 112) 67-70; Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (1999) 185-186; Hahlo (n 111) 164-169; Klopper (n 117) 678.

<sup>119</sup> Sonnekus (n 117) 143 points out that spouses cannot by any other agreement exclude assets from the joint estate and allot them to the separate property of one spouse.

<sup>120</sup> Heaton (n 112) 67-70.

Upon marriage all debts of the spouses, including their existing debts at the time of marriage, become part of the joint estate.<sup>121</sup> Section 17(5) of the Matrimonial Property Act provides that where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for household necessities, the spouses may be sued jointly or severally therefor. The spouses are nonetheless joint debtors for such joint debts.<sup>122</sup> Creditors of the spouses can look to the joint estate as well as the separate property of both spouses for recovery of a joint debt.<sup>123</sup>

Spouses could also incur separate debts. In this regard, section 19 of the Matrimonial Property Act determines that where a spouse is liable for the payment of damages by reason of a delict committed by him or her, such damages are recoverable, firstly, from that spouse's separate property, and secondly, if there is no or insufficient separate property, from the joint estate. In so far as the damages are recovered from the joint estate, an adjustment must be made in favour of the other spouse or his or her estate when the joint estate is divided. It is presently unclear whether the same rules as set out in section 19 would also apply to other separate debts of a spouse, such as criminal fines and a spouse's maintenance obligations towards his or her parents, siblings and children from a previous marriage or relationship, or whether the general rule that these debts become joint debts still applies.<sup>124</sup>

Although the spouses have equal independent powers to control or manage the joint estate and incur debts that bind the joint estate,<sup>125</sup> they have to obtain each other's consent for certain important transactions, such as the alienation or burdening of immovable property, entering into a suretyship, entering into certain contracts, purchasing a house, receiving credit under a credit agreement, selling shares or other assets held mainly as investments, withdrawing money from each other's bank accounts, instituting or defending legal proceedings and selling furniture or other household effects.<sup>126</sup> No consent is, however, necessary for some of the above transactions that a spouse performs in the ordinary course of his or her profession, trade or business.<sup>127</sup> Someone who is married in community of property may therefore in the ordinary course of his or her profession, trade or business conclude a contract to alienate immovable property, receive credit, alienate shares, purchase land, bind himself or herself as surety and institute or defend legal proceedings without spousal consent.<sup>128</sup>

<sup>121</sup> Barratt (n 110) 283; Heaton (n 112) 71; Hahlo (n 111) 170.

<sup>122</sup> *Nedbank Ltd v Van Zyl* 1990 2 SA 469 (A); the *Du Plessis* case (n 113).

<sup>123</sup> the *Du Plessis* case (n 113) 313i-j. Nugent JA stated that "[t]he fact that some of her [the wife's] property is separately owned is relevant to the manner in which the property may be dealt with by the spouses *inter se* and to their rights upon dissolution of the marriage but does not affect the ordinary right of a creditor to look to all the property of the debtor in satisfaction of a debt" 314a-b. See also Sonnekus "Insolvensie by huwelike in gemeenskap van goed" 1986 *TSAR* 92 97.

<sup>124</sup> See Heaton (n 112) 71-73.

<sup>125</sup> s 14 and 15(1) of the Matrimonial Property Act.

<sup>126</sup> s 15(2), 17(1) and 15(3) of the Matrimonial Property Act. Under the act, different kinds of consent, ranging from prior written consent attested by two competent witnesses to mere oral or tacit consent, are required for these transactions.

<sup>127</sup> s 15(6) of the Matrimonial Property Act.

<sup>128</sup> See *Strydom v Engen Petroleum Ltd* 2013 2 SA 187 (SCA) and Sonnekus "Beskerming vervat in die Wet op Huweliksgoedere 88 van 1984 – vir wie?" 2013 *TSAR* 544 558, who feels that the court in *Strydom* too easily found that the relevant transaction was performed in the ordinary course of the husband's profession, trade or business.

The effect of the consent requirements is that both spouses have limited capacity to transact in certain situations.<sup>129</sup> These requirements are, however, necessary to protect each spouse against maladministration by the other.<sup>130</sup> Section 15(9) of the Matrimonial Property Act deals partly with the effect of lack of consent. It protects *bona fide* third parties who transact with a spouse without knowing that the required consent has not been obtained by deeming the transaction as valid and concluded with the required consent.<sup>131</sup> It also protects the non-consenting spouse by providing that where the transacting spouse knows or ought reasonably to have known that he will probably not obtain the required consent and the joint estate suffers a loss as a result of the transaction, an adjustment must be effected in favour of the non-consenting spouse upon the division of the joint estate.<sup>132</sup> It has been pointed out that this protective measure is potentially a weak remedy, because the non-consenting spouse can recover only when the joint estate is divided, and there might be insufficient assets in the joint estate to effect full compensation.<sup>133</sup> Further, the act makes no provision for the effect of lack of consent where the third party was *mala fide*.<sup>134</sup> Although it appears from case law that transactions which violate the consent requirements are void<sup>135</sup> and that the non-consenting spouse may recover directly from the third party whatever he or she acquired, it is unclear what the particular legal mechanisms of recovery are.<sup>136</sup> It is also unclear whether the protective measures of the Matrimonial Property Act are primarily for the non-consenting spouse or primarily for third parties transacting with spouses married in community of property.<sup>137</sup> The act does, however, make provision for future protection against transactions which require the consent of both spouses but which have been performed by one spouse without the required consent. In this regard section 16(2) of the Matrimonial Property Act provides that the court may on application of the prejudiced spouse suspend any power of the other spouse in respect of the joint estate for a definite or indefinite period if the court is satisfied that the order is necessary for the protection of the prejudiced spouse's interests in the joint estate. A more drastic remedy which would also be available to a prejudiced spouse is an application for the immediate division of the joint estate in terms of section 20 of the Matrimonial Property Act.<sup>138</sup> A proviso to the approval of such an application is, however, that no other person will be prejudiced by the order.

<sup>129</sup> Barratt "Clarifying protection of spouses married in community of property?" 2011 *Stell LR* 272 274; Heaton (n 112) 75; Sonnekus "Huweliksvermoënsregtelike aspekte van egskeidings en verband-versekerde lenings" 2005 *TSAR* 372 373.

<sup>130</sup> Van Heerden, Cockrell and Keightley (n 118) 544.

<sup>131</sup> s 15(9)(a). See further Sonnekus (n 129) 377-379, who points out that in practice many of the acknowledged banks in South Africa are slack in complying with the consent requirements when further loan contracts for additional credit on existing bonds are concluded with spouses married in community of property and that these banks will be unable to rely on the protection of s 15(9)(a).

<sup>132</sup> s 15(9)(b).

<sup>133</sup> Barratt (n 129) 275.

<sup>134</sup> Barratt (n 129) 275; Heaton (n 112) 79.

<sup>135</sup> *Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste BK* 1995 3 SA 314 (T); *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (SCA); *Bopape v Moloto* 2000 1 SA 383 (T); *Visser v Hull* 2010 1 SA 521 (WCC).

<sup>136</sup> See Barratt (n 129) 277-283 for a discussion of the different possible legal mechanisms for recovery, *ie* the *rei vindicatio*, enrichment remedies, delictual remedies and the *actio Pauliana utilis*.

<sup>137</sup> See Sonnekus (n 128) 544 and his discussion of the *Strydom* case (n 128).

<sup>138</sup> There are also a few common law remedies which may be available to the prejudiced spouse under these circumstances, *ie* the interdict, the common law right of recourse upon dissolution of the joint estate, the *actio Pauliana utilis* and having the other spouse declared a prodigal.

#### 4.1.2 Liquidation and distribution upon dissolution through divorce

Upon the dissolution of a civil marriage or a civil union in community of property through divorce, the balance of the joint estate, after all liabilities have been paid, must be divided equally between the spouses,<sup>139</sup> unless a forfeiture order is granted against one of the parties<sup>140</sup> or an adjustment needs to be effected in favour of one of them.<sup>141</sup> Upon the dissolution of a customary marriage in community of property through divorce, the joint estate need not necessarily be divided equally between the parties, as in terms of the decision of the constitutional court in *Gumede v President of Republic of South Africa*<sup>142</sup> the power of the court to redistribute assets equitably upon divorce under section 8(4)(a) of the Recognition of Customary Marriages Act 120 of 1998 applies to all customary marriages. In customary marriages a general redistributive power therefore co-exists with the default system of universal community of property to ensure fairness between the parties upon divorce. No such discretion to redistribute assets exists for civil marriages or civil unions concluded in community of property, however. Certain legal scholars have advocated the introduction of a broad judicial discretion regarding the division of matrimonial property upon divorce, because it can no longer be assumed that dividing property in accordance with the matrimonial property regime applicable to a marriage would invariably lead to a fair and just distribution between divorcing spouses.<sup>143</sup>

The effective date for the division of the joint estate is the date of the divorce order. Until this date, the spouses, who may have separated months before and are possibly no longer on speaking terms, will still need to obtain each other's consent for the important transactions referred to above<sup>144</sup> and will be unable to acquire property solely in their own name.<sup>145</sup> The only exceptions are where an application in terms of section 20 of the Matrimonial Property Act for the immediate division of the joint estate or an application in terms of section 21 for the alteration of the matrimonial property system has been approved before the date of the divorce.<sup>146</sup>

In terms of section 7(1) of the Divorce Act 70 of 1979, the parties may agree on the division of the joint estate in any way that suits them. In such a case a settlement agreement will be drafted and incorporated in the divorce order.<sup>147</sup> It has been decided that a divorce order which incorporates such an agreement has the effect of immediately dissolving the joint estate and the parties' tied co-ownership of the

<sup>139</sup> Heaton (n 112) 66; Sonnekus (n 129) 384; Hahlo (n 111) 382.

<sup>140</sup> In terms of s 9 of the Divorce Act 70 of 1979. However, s 9 does not provide for the application of the principle of fairness in order to deviate from the nature of a marriage in community of property and very clear limitations are set for the courts' discretion in respect of forfeiture orders: *Wijker v Wijker* 1993 4 SA 720 (A) 731; Sonnekus "Verbeurdverklaring van voordele – welke voordele?" 2011 *TSAR* 787 788.

<sup>141</sup> In terms of s 15(9)(b) or s 19 of the Matrimonial Property Act.

<sup>142</sup> 2009 3 BCLR 24 (CC), 2009 3 SA 152 (CC).

<sup>143</sup> Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: an argument for change" 2014 *SALJ* 439 459; Barratt "'Whatever I acquire will be mine and mine alone': marital agreements not to share in constitutional South Africa" 2013 *SALJ* 688 704; Heaton "Striving for substantive gender equality in family law: selected issues" 2005 *SAJHR* 547 556, 562. Cf Sonnekus "Die onbehoorlike van huweliksvoordele en *pacta sunt servanda*" 1993 *TSAR* 774; Sonnekus (n 109 (2014)) 581.

<sup>144</sup> See par 4.1.1. See also Sonnekus (n 129) 383.

<sup>145</sup> See Brederveld "Het tijdstip van de ontbinding van de huwelijksgemeenschap bij echtscheiding" 2010 *Actuele Ontwikkelingen in het Familierecht* 53 57.

<sup>146</sup> See Sonnekus (n 129) 384.

<sup>147</sup> Nkosi "A receiver and liquidator in matrimonial affairs: a legal entitlement or a drastic measure?" 2011:11 *De Rebus* 22.

assets of the former joint estate, thereby automatically rendering each spouse sole owner of his or her share.<sup>148</sup> These decisions have, however, been criticised by legal scholars who point out that the divorce order does not automatically terminate the co-ownership of the parties.<sup>149</sup> It merely replaces the tied co-ownership with free co-ownership and individual ownership in shared assets can only vest after delivery of movable assets or registration of immovable assets.

Where the parties cannot agree on the manner in which the joint estate is to be divided, a prayer for the appointment of a receiver or liquidator to divide the joint estate may be included in the divorce summons or, as happens more frequently in practice, the parties may approach the court after the granting of the divorce order under a separate application for the appointment of a receiver or liquidator and possibly again for further directions in the course of such liquidation.<sup>150</sup> In these circumstances the actual division of the joint estate is postponed until after the divorce order has been granted and other ancillary matters such as maintenance for the spouses and the interests of children have been decided. This state of affairs may, however, have very detrimental consequences for the spouses, who might desperately need the capital that they will receive in terms of the actual division of the joint estate to pay a deposit on a new home or to finance their relocation costs after the divorce, for example.<sup>151</sup> It also gives spouses more opportunity to dissipate either the assets of the joint estate or their separate property so as to diminish the other party's share of the joint estate or frustrate the other party's right to a possible adjustment.<sup>152</sup> It has been pointed out that women are very often the disadvantaged spouse in this regard and both the postponement of the division of the joint estate and the dissipation of marital assets might be seen as a sex or gender issue.<sup>153</sup>

Antenuptial contractual debts which are outstanding after the dissolution of the joint estate can be recovered only from the original debtor and it is unclear whether the original debtor has a right of recourse against the other spouse.<sup>154</sup> Contractual debts incurred during the subsistence of the marriage and still outstanding upon dissolution of the joint estate can be claimed in full from the spouse who incurred the debt, or half the debt can be claimed from such spouse and the other half from the other spouse. If the spouse who incurred the debt pays the debt in full, he or she has a right of recourse for half from the other spouse.<sup>155</sup> Delictual and other separate debts which are outstanding after the dissolution of the marriage can be claimed only from the original debtor and he or she has no right of recourse against the other spouse.<sup>156</sup>

<sup>148</sup> the *Wiggill* case (n 115) 444-445; *Middleton v Middleton* 2010 1 SA 179 (D) 184A-B.

<sup>149</sup> Van Schalkwyk "Huwelik binne gemeenskap van goed: die effek van 'n egskeidingsbevel op 'n bateverdelingsooreenkoms" 2012 *LitNet Akademies* 167 172-176; Bakker (n 116) 519.

<sup>150</sup> Van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (RS 10 2008) 3-3-3-4. See also Nkosi (n 147) 25, who argues that the appointment of a receiver or liquidator is a legal entitlement for the parties where it is not possible for them to settle on an amicable division of their joint estate and the value of the joint estate is not of so trivial a nature or value that it does not justify such an appointment.

<sup>151</sup> See De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 225 230.

<sup>152</sup> See De Jong (n 151) 232-233.

<sup>153</sup> De Jong (n 151) 230, 232-233.

<sup>154</sup> Heaton (n 112) 73; Hahlo (n 111) 382.

<sup>155</sup> Heaton (n 112) 73.

<sup>156</sup> Heaton (n 112) 74; Hahlo (n 111) 382-383.

## 4.2 The accrual system

### 4.2.1 Concept

In terms of the accrual system the spouses share equally in the accrual or growth in their estates during the subsistence of the marriage. However, while the marriage lasts the spouses are basically in the same position as spouses who married out of community of property with complete separation of property.<sup>157</sup> Therefore, each spouse retains the estate he or she had before the marriage and everything which a spouse acquires during the subsistence of the marriage falls into his or her own estate. Each spouse controls his or her own estate. Except for being jointly and severally liable to third parties for debts incurred by either of them in respect of household necessities,<sup>158</sup> the spouses are not otherwise liable for each other's debts.<sup>159</sup> Accrual sharing takes place only at the dissolution of the marriage, at which time the spouses benefit equally from the gains or profits made during the marriage.<sup>160</sup> The accrual system is therefore described as a type of postponed community of profit or a deferred community of gains.<sup>161</sup>

During the subsistence of the marriage the spouses' interest in each other's estates is protected by section 8(1) of the Matrimonial Property Act. It provides that a court may, on application by a spouse whose right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct of the other spouse, order the immediate division of the accrual concerned on an equal or such other basis as the court deems just. It appears, however, that this provision does not provide adequate protection for spouses.<sup>162</sup> If the other spouse has already depleted his or her estate, this remedy will not be of any assistance to the prejudiced spouse.

In terms of section 4(1)(a), the accrual in a spouse's estate must be determined by firstly deducting the net value of the spouse's estate at the commencement of the marriage (the net initial value) from the net value of his or her estate upon the dissolution of the marriage (the net end value). In terms of section 6(1) of the act, a spouse may declare the net initial value of his or her estate in the antenuptial contract or in a separate statement either before or within six months of the wedding. If the net initial value was not so declared or if a spouse's liabilities exceeded his or her assets at the commencement of the marriage, his or her net initial value is deemed to be nil.<sup>163</sup> Section 4(1)(b)(iii) further makes provision for the indexation of the net initial value of a spouse's estate. As the depreciation of money is taken into account, the net initial values of the spouses' respective estates are adapted according to the weighted average of the consumer price index.<sup>164</sup>

Secondly, to determine the accrual in a spouse's estate the value of certain excluded assets as listed in sections 4 and 5 of the Matrimonial Property Act must also be deducted from the net end value of the spouse's estate. Such excluded assets

<sup>157</sup> Barratt (n 110) 307; Heaton (n 112) 94; Hahlo (n 111) 304.

<sup>158</sup> In terms of s 23(5) of the Matrimonial Property Act.

<sup>159</sup> See Sonnekus (n 109 (2014)) 587, who indicates that in an accrual sharing marriage debts are never shared commonly.

<sup>160</sup> In terms of s 3(1) and (2) of the Matrimonial Property Act. See also par 4.2.2 below.

<sup>161</sup> Heaton (n 112) 94; Hahlo (n 111) 304.

<sup>162</sup> Heaton (n 112) 99; Hahlo (n 111) 308.

<sup>163</sup> s 6(4)(a) and (b).

<sup>164</sup> As published from time to time in the *Government Gazette*. The spouses are, however, free to select another criterion, such as market value, in their antenuptial contract by which to determine the change in the value of all assets.

comprise the following: any non-patrimonial damages a spouse receives during the marriage,<sup>165</sup> assets specifically excluded from the accrual in the antenuptial contract,<sup>166</sup> any inheritance, legacy or donation which a spouse receives during the marriage<sup>167</sup> and donations *inter vivos* between the spouses.<sup>168</sup> Although some legal scholars are of the opinion that prizes which a spouse won in a lottery or competition should also be excluded from the accrual in a spouse's estate,<sup>169</sup> the Matrimonial Property Act makes no express provision for such prizes to be excluded. The act is further not consistent as to whether the proceeds of excluded assets and assets which replace such excluded assets are also excluded. With regard to assets excluded in the spouses' antenuptial contract and inheritances, legacies or donations from third parties, the act does provide that the proceeds of such assets and assets which replace such assets are excluded, but no similar provision is made in respect of non-patrimonial damages and donations between the spouses. The act is also silent on whether or not the value of excluded assets should be expressed in terms of the value of money at the dissolution of the marriage.<sup>170</sup>

#### 4.2.2 Accrual sharing upon dissolution through divorce

In terms of section 3(1) of the Matrimonial Property Act, the party whose estate shows the smaller accrual or no accrual at all upon divorce may claim from the other spouse an amount equal to half the difference between the accrual in the parties' respective estates. Since section 3(1) refers to the accrual claim as "an amount equal to half the difference between the accrual of the respective estates of the spouses" (my emphasis), it is clear that the accrual system gives rise to a monetary claim only and does not give the spouses rights in respect of each other's property. Furthermore, because of the wording of section 3(1), which stipulates that the accrual claim is only acquired upon the dissolution of the marriage by divorce (or the death of one or both of the spouses), some authors are of the opinion that a new and separate action needs to be instituted after the date of the divorce in order to enforce the accrual claim which was acquired on the date of the divorce.<sup>171</sup> This viewpoint was indeed followed in a few unreported cases.<sup>172</sup> These cases relied on the decision in *Reeder v Softline*,<sup>173</sup> where the court concluded that during the subsistence of the marriage one spouse merely has a contingent right to the accrual in the other spouse's estate and that the right becomes vested only when the marriage is dissolved, provided of course that there is an accrual. Fortunately, in *MB v NB*,<sup>174</sup> Brassey AJ pointed out that although the *Reeder* case established the date of

<sup>165</sup> s 4(1)(b)(i).

<sup>166</sup> s 4(1)(b)(ii). It appears from this section that assets excluded in an antenuptial contract may not also be taken into account as part of the net initial value of an estate. In *Bath v Bath* 2014 JOL 31724 (SCA) the supreme court of appeal declared an antenuptial contract void for vagueness where *inter alia* the excluded assets were also included in the initial estate of one of the spouses. Cf Sonnekus (n 109 (2014)) 580 ff, who argues that the decision in the *Bath* case is incorrect.

<sup>167</sup> s 5(1).

<sup>168</sup> s 5(2).

<sup>169</sup> See Sonnekus "Lotto-wengeld as meevallertjie en aanwasdeling by huweliksontbinding" 2004 *TSAR* 365 373; Sonnekus (n 109 (2014)) 583.

<sup>170</sup> *ie* no provision is made for the indexation of excluded assets.

<sup>171</sup> See *eg* Van Niekerk (n 150) 3–13.

<sup>172</sup> *Willemse v Willemse* case no 3600/2004 (OFPD) (unreported); *Le Roux v Le Roux* case no 1245/2008 (NCK) (unreported).

<sup>173</sup> 2000 4 All SA 105 (W), 2001 2 SA 844 (W).

<sup>174</sup> 2010 3 SA 220 (GSJ) 233C-D.



a divorce as the moment at which a party's contingent right to share in the accrual of the other party's estate becomes perfected, this decision did not establish the moment at which the respective estates of the parties are to be assessed for purposes of determining a party's accrual claim. The judge stated that for an accrual claim to become perfected or payable upon divorce, it has to be determined or quantified at an earlier stage. Although he initially proposed to the parties that the cut-off date for determining the plaintiff's accrual claim should be the date on which the parties separate, he finally ruled that the decisive date should be the time when pleadings close, that is *litis contestatio*.<sup>175</sup> This decision has recently also been followed in *MB v DB*.<sup>176</sup> Lopes J remarked that "... it is wholly impractical that parties to a divorce should go to the lengths of establishing a right to accrual in the divorce action and then have to embark upon a further litigious exercise in order to decide the extent of such accrual".<sup>177</sup> If, however, the approach of the unreported cases is followed and the adjudication of any accrual claims is postponed to a date after the granting of the divorce order, the same undesirable consequences may ensue for spouses, especially wives, as when the actual division of the joint estate is postponed to a later stage after the divorce order has been granted.<sup>178</sup> However, in the case of marriages with application of the accrual system, the dissipation of marital assets is an even bigger danger as each spouse has exclusive control over his or her estate and may deal with it as he or she thinks fit.<sup>179</sup>

The above rule that the accrual in the spouses' respective estates must be shared equally between the spouses upon divorce is strictly applied where the parties concluded a civil marriage or a civil union with application of the accrual system. Where the parties concluded a customary marriage with application of the accrual system, these rules also apply, but the court may nevertheless order an equitable redistribution of assets upon divorce in terms of section 8(4)(a) of the Recognition of Customary Marriages Act,<sup>180</sup> which may result in a deviation from the rule. As mentioned above, pleas have been sounded for a general judicial discretion regarding the division of matrimonial property upon divorce in all marriages.<sup>181</sup>

## 5 Comparison and recommendations

### 5.1 General

When examined from a comparative perspective, it appears that some of the rules of the primary matrimonial property system specifically, but also the secondary matrimonial property system in South Africa, are outdated and in need of reform. As there are further specific areas of uncertainty with regard to the primary matrimonial property system and furthermore certain problems are encountered with both the primary and the secondary matrimonial property systems in South Africa, it would be interesting and useful to note what the CEFL Principles determine regarding these issues. Since some of the problems encountered in South Africa might well result in a sex or gender issue,<sup>182</sup> section 39(1)(c) of the Constitution of the Republic

<sup>175</sup> 233D-E.

<sup>176</sup> 2013 6 SA 86 (KZD).

<sup>177</sup> 97E.

<sup>178</sup> See par 4.1.2. See also De Jong (n 151) 228-231.

<sup>179</sup> See De Jong (n 151) 232-233.

<sup>180</sup> according to the *Gumede* case (n 142).

<sup>181</sup> See n 143.

<sup>182</sup> See 4 1.2.

of South Africa, 1996, which expressly provides for such cognisance of foreign law, also comes into play.<sup>183</sup> It would therefore make a lot of sense for our legislature to take heed of how the Principles propose that similar problems with the default systems in European countries should be dealt with.

## 5.2 Position of the default and primary matrimonial property system

As regards our default and primary matrimonial property system, the most striking difference between it and the European default regime of community of acquisitions is that our system is an all-encompassing universal community<sup>184</sup> (as in the case of the Netherlands<sup>185</sup>), while their system entails only a limited or restricted community.<sup>186</sup> In other words, in South Africa joint assets include more or less all the assets of the spouses, including their respective prenuptial assets, while in Europe community property can comprise only property acquired during the community, which in most cases means during the marriage.<sup>187</sup> It is therefore clear that joint assets in South Africa are much more comprehensive than community assets in Europe and separate property is much more limited than personal property. The same applies to joint and separate debts in South Africa and community and personal debts in Europe. This gives rise to the question whether our default system of universal community of property is possibly too broad. It is arguably unfair to enforce a system with such far-reaching consequences against spouses who probably did not even give the specific matrimonial property system much thought before they got married. It would undoubtedly seem more reasonable only to allow those spouses to benefit from or be prejudiced by the default matrimonial property system while a marriage relationship (or marriage-like relationship<sup>188</sup>) is in existence between the spouses. If one keeps in mind that the South African default system is possibly too broad and is not in line with the common core of the European community systems, it is much easier to propose solutions for some of the uncertainties which currently exist in respect of our marriage in community of property.

Therefore, to broaden the scope of separate assets of spouses in South Africa, it is firstly proposed that all prenuptial assets of the spouses should become their separate property in keeping with Principle 4:36(a).<sup>189</sup> Secondly, consideration could be given to dealing with bequests and gifts as provided for in Principle 4:35(2) (c).<sup>190</sup> Such a change would ensure that bequests and gifts generally become the separate property of the benefited spouse unless the testator or donor provided that they should form part of the community between the spouses, unlike the current position in South Africa, where bequests and gifts generally form part of the joint estate unless the testator or donor provided that they should be excluded from the

<sup>183</sup> See also Sonnekus (n 169) 368-372 and (n 128) 556-557, who feels that even outside the narrow confines of the interpretation of the bill of rights, courts have the authority to take cognisance of comparable aspects from foreign legal systems. It is submitted that our legislature should also be encouraged to take cognisance of comparable aspects of the Principles.

<sup>184</sup> See par 4.1.1.

<sup>185</sup> See par 2.1.

<sup>186</sup> See par 2.1, 3.2.1. See also Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 220 (Comment 2).

<sup>187</sup> See Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 224.

<sup>188</sup> See Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 224, who indicate that in Hungary property acquired during pre-marital cohabitation becomes community property upon the parties' marriage. Such a provision would indeed seem fair.

<sup>189</sup> See par 3.2.1.

<sup>190</sup> See par 3.2.1.

community between the spouses.<sup>191</sup> Thirdly, consideration could also be given to making assets exclusively acquired for a spouse's profession his or her separate property, as is provided for in Principle 4:36(e).<sup>192</sup>

To broaden the scope of separate debts, the Matrimonial Property Act should contain a provision similar to the one in Principle 4:41(c),<sup>193</sup> namely that all debts related to a spouse's separate property should always be part of that spouse's separate debts. Furthermore, debts which are personal in nature, such as personal fines resulting from a criminal sentence or maintenance owed by a spouse to a parent or a child from a previous relationship, should also become a spouse's separate debts, in line with Principle 4:41(d). Other than providing that a spouse is liable for his or her own delictual damages, our law currently does not really acknowledge or make provision for separate debts of spouses married in community of property.<sup>194</sup> The proposals in this paragraph need to be given serious consideration.

Related to the aspect of separate debts is the current question of whether the provisions of section 19 of the Matrimonial Property Act regarding delictual damages would also apply to other separate debts of a spouse.<sup>195</sup> In the light of the fact that our default system is too broad and that a fair arrangement would be for the separate debts of a spouse first to be recovered from his or her separate property before turning to the joint estate, this question has to be answered in the affirmative. Such a provision would also be in line with Principle 4:43(1).<sup>196</sup> Section 19 could possibly be further amended so as to cap the amount which can be recovered for delictual damages from the joint estate to half of the net value of the joint estate, in a manner similar to Principle 4:43(2).<sup>197</sup> This would provide better protection for the other spouse and increase the likelihood of an adjustment with full compensation taking place in his or her favour upon divorce.

As regards a related point of uncertainty concerning the South African default system, namely whether or not a spouse who pays in full one of his or her antenuptial contractual debts, which is still outstanding after the dissolution of the marriage, would have a right of recourse against the other spouse,<sup>198</sup> for the reasons set out in the previous paragraph the answer should be in the negative.

As far as the administration of the joint estate is concerned, it appears from the discussion of the position in South Africa that the protection of third parties and the non-consenting spouse in circumstances where one spouse transacts without the required consent needs better regulation.<sup>199</sup> First, it would be a positive step if the Matrimonial Property Act were amended to determine in line with Principle 4:41(e) that debts incurred without the required consent of the other spouse should become the separate debts of the transacting spouse.<sup>200</sup> Secondly, the Act should contain a clear provision similar to the one set out in Principle 4:46 that transactions concluded without the required consent may be annulled by the court on application by the non-consenting spouse.<sup>201</sup> It appears from the comments on Principle 4:46

<sup>191</sup> See Sonnekus (n 140) 790.

<sup>192</sup> See par 3.2.1.

<sup>193</sup> See par 3.2.1.

<sup>194</sup> See par 4.1.1.

<sup>195</sup> See par 4.1.1.

<sup>196</sup> See par 3.2.1.

<sup>197</sup> See par 3.2.1.

<sup>198</sup> See par 4.1.2.

<sup>199</sup> See par 4.1.1.

<sup>200</sup> See par 3.2.1.

<sup>201</sup> See par 3.2.1.

that the protection of the spouses is predominant and that the protection of third parties is secondary.<sup>202</sup> This would to a certain extent answer some of the questions currently being debated in South Africa.<sup>203</sup> Unfortunately, Principle 4:46 does not address the consequences of lack of consent for the relationship with third parties and leaves this specific aspect to national law for determination. No pointers are therefore available as to what the particular legal mechanisms should be for the recovery of an asset from a *mala fide* third party.

As regards the rules applicable to the dissolution of the joint estate through divorce, there are various valuable lessons which South Africa could learn from the Principles. Very importantly, seeing that there is no real marriage relationship, solidarity or partnership between spouses from the moment when they separate, the effective date for the division of the joint estate between the spouses should, in accordance with Principles 4:50(b) and 4:52(1), be either the date of the service of the divorce summons, or, if the spouses separated earlier, the date of their separation.<sup>204</sup> Whatever assets are obtained or debts incurred by one spouse after the date of the service of the divorce summons or the separation of the spouses should have no effect on the other spouse. Such an acceleration of the effective date for the division of the joint estate would prevent some problems which might otherwise ensue when the actual division of the joint estate is postponed to a later stage after the divorce order has been granted.<sup>205</sup> It would also minimise the opportunity for spouses to dissipate the assets of the joint estate or their separate property.

If the proposals for the expansion of the scope of separate assets and separate debts of spouses are accepted in South Africa, more extensive provision needs to be made for compensation to and fro between the joint estate and the separate property of each spouse so as to avoid unjust enrichment in favour of any of the three proprietary masses.<sup>206</sup> Such a provision would be necessary as the joint estate and the separate property of the spouses are not always kept separate.<sup>207</sup>

Furthermore, Principle 4:51 could help to achieve clarity on the question of what happens to the spouses' tied co-ownership of joint assets upon the dissolution of the community of property. In terms hereof, the general rules of co-ownership apply after the dissolution of the community. No provision is made for any automatic acquisition of individual ownership, and it seems that the opinion of South African legal scholars on this matter should prevail.<sup>208</sup>

Lastly, as set out in Principle 4:57, it is important that courts should have the power to deviate from an equal division of the joint estate or a settlement agreement on the division of the joint estate in cases of exceptional hardship.<sup>209</sup> Although our courts already seem to have a similar power as far as customary marriages are concerned,<sup>210</sup> it is proposed that they should also have such power when dealing with the dissolution of civil marriages and civil unions through divorce. If we are to go by the example set in European countries, our courts should have the power to adjust the distribution (or modify a settlement agreement) where a rigorous equal division of the joint estate (or the terms of the agreement) will result in serious inequity

<sup>202</sup> Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 289-290 (Comments 1 and 2).

<sup>203</sup> See par 3.2.1. See also Sonnekus (n 128) 544.

<sup>204</sup> See par 3.2.2. See also De Jong (n 151) 235.

<sup>205</sup> See par 4.1.2.

<sup>206</sup> See Principle 4:53 as discussed in par 3.2.2.

<sup>207</sup> Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 326.

<sup>208</sup> See par 4.1.2.

<sup>209</sup> See par 3.2.2.

<sup>210</sup> See par 4.1.2.

between the spouses or be detrimental to the best interests of children involved in a matter, where a spouse has no income without a justified reason, or when a spouse has squandered property to the detriment of the family.<sup>211</sup> In some European countries, the courts are even allowed to deviate from an equal division by taking the contributions of each spouse into account.<sup>212</sup>

### 5.3 Position of the secondary matrimonial property system

It is apparent that our secondary matrimonial property system of accrual falls under the second model of participation systems in Europe, where spouses participate in each other's profits by way of a statutory compensation clause.<sup>213</sup> In a manner similar to the German system of *Zugewinnngemeinschaft*, our accrual system distinguishes between the net initial and the net end value of a spouse's estate and similarly to the position in Greek law provision is made for the exclusion of certain assets from the accrual in a spouse's estate.<sup>214</sup> Although we do not recognise the distinction between the two categories of property, namely acquisitions and reserved property (as provided for in Principle 4:18 and Principle 4:19),<sup>215</sup> there are nevertheless valuable lessons to be learnt from the Principles dealing with the European default system of participation in acquisitions.

Reserved property in terms of Principle 4:19 roughly coincides with both the net initial value of a spouse's estate and the excluded assets which have to be deducted from a spouse's net end value in terms of our accrual system. It appears from Principle 4:19(c) that all assets which replace reserved property are also regarded as reserved property, yet in South Africa there is no consistency in the rules on substitution as far as the different types of excluded assets are concerned.<sup>216</sup> It is therefore proposed that the Matrimonial Property Act be amended to make the rules with regard to substitution uniformly applicable to all excluded assets. Similarly, since Principle 4:19(f) makes provision for increases in the value of all reserved property, our act should also make provision for the indexation of all excluded assets, specifically where such assets consist of money.<sup>217</sup> We could possibly also consider categorising assets exclusively acquired for a spouse's profession<sup>218</sup> as excluded assets in accordance with Principle 4:19(e).<sup>219</sup>

It further appears that prizes which a spouse won in a lottery or competition are not regarded as reserved property, but form part of acquisitions, as such windfall assets are regarded as assets acquired by means of either spouse's gains in terms of Principle 4:18(b).<sup>220</sup> The argument of some South African legal scholars that such windfall assets should also be excluded from the accrual in a spouse's estate<sup>221</sup> is therefore not supported by the Principles.

With regard to the cut-off date for determining the accrual in each spouse's estate and a resultant accrual claim, the Principles indicate that the approach followed in

<sup>211</sup> Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 338.

<sup>212</sup> *eg* Poland.

<sup>213</sup> See par 2.2 and 3.1.1 as well as the discussion of s 3 of the Matrimonial Property Act in par 4.2.1.

<sup>214</sup> See par 3.1.1.

<sup>215</sup> See par 3.1.1.

<sup>216</sup> See par 4.2.1.

<sup>217</sup> See Heaton (n 112) 97 n 90, who notes that where an excluded asset is something other than money, indexation is probably unnecessary, as the entire asset is excluded.

<sup>218</sup> such as a dentist's special equipment or a handyman's tools.

<sup>219</sup> See par 4.2.1.

<sup>220</sup> See Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 154 (Comment 3). See also par 3.1.1 n 38.

<sup>221</sup> See par 4.2.1.

*MB v NB* and *MB v DB*, discussed above,<sup>222</sup> is to be preferred. The trend is clearly towards expediting this date. Once the solidarity between the spouses ends, the accrual system should also come to an end and accrual claims should be determined as soon as possible. Following the better-law approach, Principle 4:26(1) read with Principle 4:25(b)<sup>223</sup> endorses the date of the divorce application as the decisive date.<sup>224</sup> It is therefore proposed that the Matrimonial Property Act should similarly make the date of the service of the divorce summons the effective date for determining possible accrual claims.<sup>225</sup> Provision should also be made for recognising an earlier cut-off date as agreed upon by the spouses.<sup>226</sup> Besides being fair, such provisions would also minimise the opportunity for spouses to dissipate their assets upon the deterioration of their marriage relationship and in the heat of the moment after summons is served,<sup>227</sup> which seems to be a real problem for spouses, especially wives, who are married subject to the accrual system.<sup>228</sup>

Related to the matter of the dissipation of marital assets is the protection of a spouse whose right to share in the accrual of the other spouse's estate has been unduly reduced by the actions or omissions of the other spouse. In view of the fact that the protection provided by section 8 of the Matrimonial Property Act seems to be inadequate,<sup>229</sup> it is strongly suggested that a provision similar to Principle 4:27<sup>230</sup> should be included in the Matrimonial Property Act. When determining an accrual claim, the value of squandered or concealed assets and excessive donations should therefore be added to the net end value of the estate of a spouse who acted with the intention of diminishing the value of his or her estate to the detriment of his or her spouse.

Despite the fact that the accrual system does not make provision for different categories of property, it also happens that excluded assets of spouses often get intertwined with other assets in the estates of one or both spouses. Our law does not make provision for any form of compensation where a husband, for example, finances extensive improvements and alterations to a house which his wife inherited from her mother. When the accrual in each spouse's estate has to be determined, the house including the value of the improvements and alterations will fall outside the accrual of the wife's estate in terms of section 5(1) of the Matrimonial Property Act.<sup>231</sup> This situation is clearly unfair and untenable. It is therefore clear that we also need provisions for compensation as provided for in Principle 4:28 so as to avoid unjust enrichment by one of the spouses in circumstances such as those referred to above.<sup>232</sup>

Lastly, it is recommended here too<sup>233</sup> that our courts should have the power to deviate from an equal division of the accrual in the spouses' respective estates in cases of exceptional hardship. In terms of Principle 4:30,<sup>234</sup> such a deviation from an

<sup>222</sup> See par 4.2.2.

<sup>223</sup> See par 3.1.2.

<sup>224</sup> See Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 182-183 (Comment 3).

<sup>225</sup> See also De Jong (n 151) 233-235.

<sup>226</sup> See De Jong (n 151) 237, who notes that this date should be set for as soon as possible after the breakdown of the marriage relationship between the parties and the decision to get divorced.

<sup>227</sup> See De Jong 2012 (n 151) 234.

<sup>228</sup> See par 4.2.2.

<sup>229</sup> See par 4.2.1.

<sup>230</sup> See par 3.1.2.

<sup>231</sup> See 4.2.1. See also Heaton (n 112) 97 n 90.

<sup>232</sup> See par 3.1.2.

<sup>233</sup> As is also proposed above in par 5.2 in respect of marriage in community of property.

<sup>234</sup> See par 3.1.2.

equal split of acquisitions can mean that an equalisation claim is denied, reduced or increased by the court. Although our courts already appear to have a similar power as far as customary marriages are concerned,<sup>235</sup> it is proposed that they should also have the power to effect a redistribution when dealing with the dissolution of civil marriages and civil unions through divorce. The circumstances under which our courts may exercise such power ought to be similar to those under which it would be justified for our courts to deviate from an equal division of the joint estate in the case of marriages in community of property.<sup>236</sup> As already mentioned above,<sup>237</sup> such a deviation should *inter alia* be ordered where a rigorous equal division of the accrual in the spouses' respective estates would result in serious inequity between spouses or be detrimental to the best interests of children involved in a matter.

## 6 Conclusion

As was illustrated above, an exploration of the CEFL Principles made it possible to find and propose fair and equitable solutions for many of the problem areas relating to both the primary and the secondary matrimonial property systems in South Africa. It was also possible to identify areas where our systems, specifically the default system of universal community of property, are out of sync with modern trends.

There is indeed no reason why the CEFL Principles should be restricted to Europe as a source of inspiration for future family law reform. Furthermore, as equality between the spouses forms the basis of all the CEFL Principles<sup>238</sup> and as the best interests of children are acknowledged in many of the principles,<sup>239</sup> it is evident that the above proposals and recommendations would also be constitutionally valid. It is therefore sincerely hoped that our legislator will consider the above proposals and recommendations, which are based on the CEFL Principles, when future family law reforms are undertaken.

## SAMEVATTING

### VERSTEKHUWELIKSGOEDEREBEDELINGS EN DIE BEGINSLS VAN DIE EUROPESE FAMILIEREG – 'N EUROPEES-SUID-AFRIKAANSE VERGELYKING

Hierdie artikel verskaf 'n tipologie van die Europese verstekhuweliksgoederebedelings en bespreek die beginsels van die huweliksgoederereg vanuit 'n Europees-Suid-Afrikaanse perspektief.

Deel 1 begin met 'n breë agtergrondbespreking van die verskillende Europese verstekstelsels, synde die gemeenskapstelsels wat veral voorkom in die tradisioneel Romeinse regstelsels (insluitende België, Frankryk, Luxembour, Portugal, Italië, Spanje en Nederland), die aanwindestelsels wat geld in Noorweegse en Germaanse regstelsels (insluitende Oostenryk, Duitsland, Switserland en Griekeland) en die skeidingstelsels wat aanwending vind in sekere streke in Spanje.

Daarna word die Kommissie op Europese Familiereg se beginsels aangaande die twee hoof Europese verstekstelsels, te wete deelname in aanwinste en gemeenskap van aanwinste, in meer besonderhede bespreek. Hierdie beginsels volg die gemeenskaplike kern van die tersaaklike beginsels van die verskillende Europese regstelsels en by gebreke aan so 'n gemeenskaplike kern, die mees aangewese regsbenadering.

By die stelsel van deelname in aanwinste word verder onderskei tussen stelsels wat 'n onderskeid tref tussen twee kategorieë van eiendom, naamlik eksklusiewe eiendom en gemeenskaplike eiendom,

<sup>235</sup> See par 4.2.2.

<sup>236</sup> See par 5.2.

<sup>237</sup> See par 5.2.

<sup>238</sup> See Boele-Woelki, Ferrand, Beilfuss *et al* (n 13) 41.

<sup>239</sup> See Principles 4:4, 4:30, 4:32, 4:56 and 4:57(2).

en stelsels wat slegs voorsiening maak vir 'n monetêre eis by die ontbinding van die huwelik. Onder die stelsel van deelname in aanwinste tel ook die Anglo-gemeneregstelsels waar nie regtig sprake is van 'n verstekhuweliksgoederebedeling nie, maar wel voorsiening gemaak word vir 'n regterlike diskresie om bates by egskieding op 'n billike wyse tussen die partye te verdeel. By die stelsel van deelname in aanwinste ontstaan daar dus as't ware 'n uitgestelde gemeenskap van goed by ontbinding van die huwelik deur egskieding.

By die stelsel van gemeenskap van aanwinste bestaan daar by alle Europese regstelsels drie vermoensregtelike entiteite, naamlik die persoonlike eiendom van elke gade en die gemeenskaplike eiendom. Dit is belangrik om daarop te let dat met uitsondering van die posisie in Nederland, die gemeenskap van goed 'n beperkte gemeenskap is in die sin dat slegs die bates en laste wat gedurende die bestaan van die huwelik verkry of aangegaan is deel uitmaak van die gemeenskaplike eiendom wat by egskieding gelykop tussen die partye verdeel moet word. Daar bestaan gevolglik in die reël 'n veel groter poel van persoonlike bates en laste vir elke gade.

In deel 2 word die Suid-Afrikaanse verstekhuweliksgoederebedeling van algehele gemeenskap van goed en die aanwasbedeling as 'n soort tweede verstekstelsel ondersoek met klem op die probleemareas waar ons stelsels moontlik hersiening benodig.

By die huwelik binne gemeenskap van goed word ondersoek ingestel of ons universele gemeenskap moontlik te omvattend is. Verder word aandag geskenk aan probleme rondom die aanwendingsveld van artikel 19 van die Wet op Huweliksgoedere 88 van 1984, die hantering van voorhuwelikse kontraktuele skulde na die ontbinding van die gemeenskaplike boedel, die administrasie van die gemeenskaplike boedel met klem op die beskermingsmeganismes tussen gades onderling by die aangaan van transaksies sonder die nodige toestemming, die uitstel van die verdeling van die gemeenskaplike boedel tot 'n datum na egskieding, die effek van 'n egskiedingsbevel op gades se gebonde mede-eiendomsreg ten opsigte van bates van die voormalige gemeenskaplike boedel en die billikheid van 'n streng afdwinging van gemeenskap van goed by egskieding.

By die aanwasbedeling word onder andere gekyk na probleme aangaande die inkonsekwente hantering van bates wat uitgeslote bates vervang, die moontlike hantering van toevallige meevallers (soos prysgeld) as uitgeslote bates, die uitstel en afsonderlike hantering van gades se aanwaise by egskieding, die beskerming van 'n gade se *reg stante matrimonio* om by die ontbinding van die huwelik in die ander gade se aanwas te deel en die billikheid van 'n streng afdwinging van die aanwasbedeling by egskieding.

Daarna volg 'n vergelyking tussen die Europese stelsels en die Suid-Afrikaanse stelsels met die doel om moontlike oplossings vir die tersaaklike probleemareas te identifiseer en ander voorstelle ter verbetering van ons stelsel te maak. Aangesien die regsvergelykende metode ons in staat stel om te leer uit die ervaring in buitelandse jurisdiksies kan dit tot vernuwing, ontwikkeling en verbetering van die Suid-Afrikaanse stelsel lei. Daar bestaan trouens geen rede waarom die Kommissie op Europese Familiereg se beginsels as 'n bron van inspirasie vir toekomstige huweliksgoedereregshervorming tot Europa beperk moet word nie.