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**MATRIMONIAL PROPERTY REGIMES AND DAMAGES: THE FAR REACHES OF THE  
SOUTH AFRICAN CONSTITUTION**

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## MATRIMONIAL PROPERTY REGIMES AND DAMAGES: THE FAR REACHES OF THE SOUTH AFRICAN CONSTITUTION

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### 1 Introduction

The Bill of Rights enshrined in the South African Constitution<sup>1</sup> forbids unfair discrimination. Section 9(1) reads that everyone is equal before the law and has the right of equal protection and benefit of the law. Subsection (2) reads that equality includes the full and equal enjoyment of all rights and freedoms and that the promotion of equality may be achieved by legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. In terms of subsections (3) and (4) the state or a person may not unfairly discriminate directly or indirectly against anyone *inter alia* on the ground of marital status.

The notion of equality does not only include equality in the formal sense of the word, but also substantive equality.<sup>2</sup> Legal categories or differentiation for purposes of the law between such categories, are therefore not precluded. In fact the principle to be applied was encapsulated in the Aristotelian concept of distributive justice. Aristotle (384-322 BC) defined the principle of justice that ought to regulate the political distribution of honours, material goods and other similar objects as follows:

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1 *Constitution of the Republic of South Africa* 1996. Hereafter the Constitution.

2 Currie and De Waal *Bill of Rights Handbook* at 233. The authors point out that a purely formal understanding of equality risks neglecting the deepest commitments of the Constitution. S 9 must therefore be read as grounded on a substantive conception of equality. The Constitutional Court explained it as follows in *President of the RSA v Hugo* 1997 4 SA 1 (CC) in par 41: "We ... need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."

There will be the same equality between the persons and the shares (to be distributed): the ratio between the shares will be the same as that between the persons. If the persons are not equal, their (just) shares will not be equal; but this is the source of quarrels and recriminations, when equals have and are awarded unequal shares or unequal equal shares.<sup>3</sup>

This contribution will focus on the notion of equality as expounded above in respect of matrimonial property regimes against the background of a recent decision by the Constitutional Court in *Van der Merwe v Road Accident Fund*<sup>4</sup> (hereafter RAF). In its decision the court pronounced on the constitutional validity of claims for damages of parties against one another where they are married in community of property compared to where they are married out of community of property.

## **2 A brief overview over the matrimonial dispensations in South Africa**

In essence there are two matrimonial dispensations in South Africa – marriages in and marriages out of community of property. They differ substantially from one another.

### **2.1 *Marriage in community of property***

In the absence of an antenuptial contract providing otherwise, marriage *ex lege* creates community of property and of profit and loss – *communio bonorum*. Community comes into being by operation of law<sup>5</sup> as soon as the marriage is solemnised. It can be described as a universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions hold equal shares.<sup>6</sup> Various explanations have been offered with regard to the legal nature

<sup>3</sup> Van der Vyver Constitutional Protection at 289.

<sup>4</sup> *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC).

<sup>5</sup> See eg *Watt v Watt* 184 2 SA 455 (WLD).

<sup>6</sup> See *ia* Hahlo *Husband and Wife* 158; Visser and Potgieter *Family Law* 95; Robinson, Human and Boshoff *South African Family Law* 97.

of community<sup>7</sup> but the exposition of the Appellate Division in *Estate Sayle v CIR*<sup>8</sup> is the generally accepted view today. Spouses own the assets of the joint estate in equal undivided shares which means that no asset can physically be divided and no rights pertaining to the joint estate can accrue exclusively to one of the spouses – during the subsistence of the marriage the shares of the spouses are indissolubly tied up. Neither spouse may dispose of his or her ‘tied-up’ share in the joint estate by an act *inter vivos* but may do so, however, by will or other act *mortis causa*.<sup>9</sup> In *Ex parte Menzies et Uxor*<sup>10</sup> it was decided that co-ownership of the joint estate is a species of bounded co-ownership – the half share is not only undivided; it is also indivisible.<sup>11</sup>

The general rule is that all the assets that the spouses had before the marriage as well as assets they accumulate after entering into the marriage fall into the joint estate. At the moment of conclusion of the marriage, the ownership of the assets pass *ex lege* to the joint estate and the normal rules as to the passing of ownership do not apply. It is trite, however, that spouses may retain a separate estate in that certain exceptions do exist where assets do not fall into the joint estate. This would include, *inter alia*, assets excluded in a will or donation agreement, assets subject to a *fideicommissum*, non-patrimonial compensation, et cetera. As for liabilities, it is clear that pre-nuptial liabilities form part of the joint estate without any exception. With regard to post-nuptial liabilities a distinction needs to be drawn between contractual and delictual debts. In the case of contractual debts, a valid contract would bind the joint estate and the creditor can claim from the joint estate or from the spouse who has incurred the debt. It is important to note that the *Insolvency Act 24 of 1936*<sup>12</sup> does not make provision for the existence of separate estates as far as marriage in community of property is concerned and apparently no protection is

7 Eg that the creation of the joint estate is similar to the conclusion of a partnership; that the husband was the sole owner of the joint estate or that the joint estate constituted a separate legal *persona*. See eg Hahlo *Husband and Wife* 158 for a discussion of these theories.

8 *Estate Sayle v CIR* 1945 AD 388.

9 Hahlo *Husband and Wife* 159; Robinson, Human and Boshoff *South African Family Law* 97.

10 *Ex parte Menzies et Uxor* 1993 3 SA 799 (CPD).

11 See also Visser and Potgieter *Family Law* 95.

12 Hereafter the Insolvency Act.

afforded to the separate assets of the other spouse. As for delictual liability, section 19 of the *Matrimonial Property Act* 88 of 1984<sup>13</sup> now governs the legal position. It provides that where a spouse incurs delictual liability, the creditor must first claim compensation from the separate estate of the person who committed the delict. If there is no such separate estate or if the separate estate is too small to satisfy the claim, the amount of compensation may be claimed from the spouse's joint estate in which case adjustment in favour of the innocent spouse must take place at the time of dissolution of the joint estate.

At common law, there were no monetary or proprietary claims between spouses married in community of property. The reasoning was fairly simple and straightforward – where everything is owed or owned in common, there can be no room for debts or rights of property. In *Tomlin v London & Lancashire Insurance Co Ltd*<sup>14</sup> the court explained the position as follows:

In my judgment, not the husband's power of administration, but the existence by law of a joint estate was and is at common law the obstacle to an action between spouses married with community of property, an insuperable obstacle in so far as one claims from the other money or assets out of the joint estate, for, *ex hypothesi*, neither has a separate estate and *what he or she recovers from the other comes out of the joint estate and falls back instantly into the joint estate*.<sup>15</sup> (Italics added.)

An inroad into the common law position was created by the legislature with the *Matrimonial Property Act*, which provides that –

notwithstanding the fact that a spouse is married in community of property –

(a) any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of delict committed against him, does not fall into the joint estate, but becomes his separate property;

<sup>13</sup> Hereafter the *Matrimonial Property Act*.

<sup>14</sup> *Tomlin v London & Lancashire Insurance* 1962 2 SA 30 (D).

<sup>15</sup> Enforceable rights between spouses may arise in respect of assets excluded from the community; of the duty of support; (formerly) for damages other than damages for patrimonial loss flowing from bodily injuries (see text accompanying n 25 *et seq*) and for the *mandament van spolie* where peaceful possession is disturbed.

(b) he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse.<sup>16</sup>

It is clear that spouses can freely sue each other in contract or in delict for non-patrimonial loss suffered by the plaintiff and attributable either wholly or in part to the fault of the other spouse<sup>17</sup> as all non-patrimonial compensation a spouse receives during the marriage for a delict committed against him or her falls into his or her separate estate.<sup>18</sup> The compensation is not patrimonial in nature, but comprises satisfaction (*solatium* or *troosgeld*) for an infringement of the spouse's personality rights, for example for libel, and compensation for pain and suffering for personal injuries that the spouse has sustained.

## **2.2 Marriage out of community of property**

The other matrimonial system in South Africa is marriage out of community of property. A marriage will be out of community, *inter alia*, if the parties, prior to the conclusion of the marriage entered into a valid antenuptial contract whereby community of property is excluded.<sup>19</sup> The main characteristics of marriage out of community entail that no merging of estates takes place so that both spouses retain their own separate estates and that each spouse manages his or her estate independently of the other spouse. After entering into marriage, each spouse retains the assets he or she had prior to the marriage and assets acquired after the conclusion of the marriage fall into the separate estate of the spouse who acquired them. Contrary to marriage in community of property spouses married out of community of property are normal co-owners of property or property jointly acquired. Each party retains full capacity to act with respect to his or her own estate and spouses can contract independently. They

16 S 18 of the Matrimonial Property Act.

17 Hahlo *Husband and Wife* 255; Robinson, Human and Boshoff *South African Family Law* 99.

18 Robinson, Human and Boshoff *South African Family Law* 99.

19 Other instances are where, after conclusion of the marriage, the parties enter into s 21 of the Matrimonial Property Act into a valid post-nuptial contract; or where the legal system where the husband is domiciled directs that the marriage will be out of community of property.

may also contract with each other. Spouses are not responsible for each other's delicts and they may institute delictual claims against each other.

### **3 The decision in *Van der Merwe***

#### **3.1 Facts**

The facts of the case were simple. The wife (Applicant) instituted an action against the RAF, an insurer which was a statutory body that was liable to compensate her for bodily injuries caused by the driving of a motor vehicle. The RAF, however, would only be liable if Applicant could institute a lawful claim against the driver of the motor vehicle that caused her injuries. *In casu* the parties were married in community of property. Applicant sustained injuries when a motor vehicle driven by her husband collided with her. It was common cause between the parties that Applicant's husband had intentionally knocked her over. In fact, he went on to reverse over her while she was lying on the ground. The parties have since divorced.

Applicant sued for damages arising from the bodily injuries she sustained. The RAF raised a special plea to the claim in which it admitted that Applicant was entitled to claim non-patrimonial damages, but denied liability to compensate applicant for any patrimonial damages by reason of the provisions of section 18(a) and (b) read with section 19(a) which in effect prohibited claims for patrimonial damages between spouses married in community of property. Applicant replied that section 18 unfairly discriminated on the ground of marital status against spouses married in community of property as opposed to spouses married out of community of property.

### 3.2 *Decision*

The question before the court did not pertain to development of the common law, but rather the constitutional validity of section 18(b).<sup>20</sup> The Constitutional Court particularly considered whether the section discriminated unfairly against spouses married in community of property. The RAF contended that even if there was a differentiation based on marital status, it was not unfair, or alternatively, even if it was unfair, it was justifiable because Applicant had adopted the matrimonial regime out of her own choice. In that way, it was argued, she waived her right to claim patrimonial damages arising from the delict of her husband.<sup>21</sup> Even though the concern of the court was not the development of the common law, it nonetheless considered it beneficial to restate section 18(b)'s common law substratum. It confirmed the common law exposition that parties may not sue each other for delictual loss, patrimonial or non-patrimonial and continued that:

The rule in effect ousts legal redress for delictual loss of any kind arising from the wrongdoing of a spouse against another. The amicus (third respondent) argues, *and it must be right, that this rule owes its origin to the boundless patriarchy in a setting where the husband wielded marital power over the wife ... and was the exclusive administrator of the joint estate. As long as the marriage endured, the state was deemed to be one, indivisible and subject to one command.*<sup>22</sup> (Italics added.)

The court stated, however, that this rule of the common law soon fell foul of evolving societal notions of gender equality within marriage and the equal worth of spouses and legislation, of which section 18 is an example, made inroads into the theoretical unity and inviolability of the joint estate.<sup>23</sup> It is now possible to claim for delictual damages other than for patrimonial loss arising from bodily

<sup>20</sup> Par 20.

<sup>21</sup> Par 26.

<sup>22</sup> Par 29. Compare, however, the approach of the courts in *Tomlin v London & Lancashire Insurance* 1962 2 SA 30 (D) and *Estate v Sayle* 1945 AD 388 at 395-396. It would appear that the court in *Van der Merwe* does not distinguish between the marital power which the husband formerly possessed and the ownership of the estate.

<sup>23</sup> Par 30.



injury, and the amount so recovered does not fall into the joint estate but becomes the spouse's separate property in terms of section 18(a).<sup>24</sup>

Against this background the court turned to the question whether this piece of legislative reform that authorises legal redress for non-patrimonial loss, but not for patrimonial damages arising from bodily harm, discriminates against spouses married in community of property *vis-à-vis* spouses married out of community.<sup>25</sup> It addressed mainly two issues to come to a conclusion namely the difference between patrimonial and non-patrimonial damages and the constitutional prohibition against unfair discrimination.

As far as damages are concerned the court affirmed the general point of departure that patrimonial damages (special damages) are said to be the true equivalent of a person's loss. They are ordinarily calculable in money. Examples of such claims are past and future medical expenses, past and future loss of income, loss of earning capacity and loss of support. Non-patrimonial damages (general damages) on the other hand are utilised to redress the deterioration of a highly personal legal interest that attach to the body and personality of the claimant. Such claims therefore are illiquid and not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In fact, the court found, there is no real relationship between the money and the loss. Variants of general damages include claims for pain and suffering, disfigurement and loss of amenities of life.<sup>26</sup> The court concluded that:

... it is important to recognise that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to a claimant's patrimony. *After all, the primary object of general damages too, in the non-patrimonial sense, is to make good the loss; to amend the injury. Its*

24 Par 31.

25 Par 32.

26 Par 38-39.

*aim too is to place the plaintiff in the same position she or he would have been but for the wrongdoing.*<sup>27</sup> (Italics added.)

In the second place the question whether section 18(b) differentiates between spouses married in and out of community of property, the court has no hesitation to find that it does differentiate. The court held that the distinction created by section 18(b) is in essence between the different proprietary consequences of marriage in and out of community – the law denies one class of married people a protection or a right the other class enjoys. It must be distinguished from the situation where the law withholds from unmarried people a protection or a right which it grants to married people.<sup>28</sup> When the law therefore elects to make a differentiation between people or classes of people it will fall foul of the constitutional standard of equality if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection to the purpose advanced to validate a law, it will *prima facie* constitute unfair differentiation and infringe the right to equal protection.<sup>29</sup> In this sense, the court held, the impugned law would be inconsistent with the equality norm that the Constitution imposes, in as much as it breaches the rational differentiation standard set by the equality clause in the Constitution.

By refusing the physically brutalised spouse a claim for patrimonial loss, section 18(b) seeks to retain the notional purity of the community of property and to escape the futility of damages that would come from and return to the joint patrimony.<sup>30</sup> However, the government purpose for preserving the unity of the joint estate to avoid the futility of spousal claims for bodily injury has fallen away – sections 18, 19 and 20 which all have a bearing on claims for non-patrimonial loss arising from personal injury have irreversibly undermined that purpose.<sup>31</sup> In this respect the court concluded that:

<sup>27</sup> Par 41.

<sup>28</sup> Par 45-47. In *Volks v Robinson* 2005 5 BCLR 446 (CC) the specified ground of marital status was engaged because the impugned law accorded benefits to married people which it did not afford to unmarried people.

<sup>29</sup> Par 49.

<sup>30</sup> Par 51. <sup>31</sup> Par 52.

... there is no rational account why the scheme or purpose of the Act stops short of granting redress in the form of patrimonial damages resulting from spousal violence. *The claim would not be futile because the proceeds of the claim would not accrue to the common patrimony but become separate property of the battered spouse. In that event, clearly the guilty spouses will not benefit from their willful or negligent misdeeds.*<sup>32</sup>

Equally absurd is to withhold from spouses in joint estates patrimonial redress against physical abuse but to grant it to spouses married out of community of property.<sup>33</sup> (Italics added.)

The court then applied its exposition of section 18(b) to the nature of damages. It found that there was no rational divide between patrimonial and non-patrimonial damages under these circumstances and that the law of damages recognised both special and general damages to afford the fullest possible redress for delictual harm. By prohibiting recovery of patrimonial damages for personal injury, section 18(b) arbitrarily prevents the fullest possible compensation for spouses who are victims of violence or other wrongdoing that leads to bodily harm by their marriage partners.<sup>34</sup> A further indication of the arbitrariness is that whilst there are definitional differences between patrimonial and non-patrimonial damages, the distinction is often blurred in the case of bodily injury claims since the infringed personality interest often causes loss that affects both the person and the patrimony.<sup>35</sup>

The court rejected the argument of the RAF that the limitation of Applicant's right to equal protection and benefit of the law was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The argument of the RAF in essence was that marriage was a matter of choice

<sup>32</sup> Par 54.

<sup>33</sup> Par 55.

<sup>34</sup> Par 56. The court indicated in par 57 a further point of arbitrariness in that whilst there are definitional differences between patrimonial and non-patrimonial damages the distinction is often blurred in bodily injury claims because the infringed bodily interest often causes loss that affects both the person and the patrimony. Infringement of bodily integrity is therefore not a reliable predictor of the nature or class of damages that may flow. The absence of a reliable distinction between patrimonial and non-patrimonial damages in bodily injury suits therefore in itself demonstrates that the distinction made in s 18(b) is at best tenuous and it consequently falls foul of the requirement of a rational differentiation. <sup>35</sup> Par 57.

and so too were the proprietary consequences of marriage – Applicant chose marriage in community of property and it was only fair and reasonable that she be kept to the immutable consequences of her choice. The court found that this argument resolved itself into a waiver defence; it implies an undertaking by married people not to attack the legal validity of the laws that regulate their marriage.<sup>36</sup> This defence is not good in law as the constitutional validity of legislation does not derive from the personal preference of a person affected by a law, but rather the objective validity of a law stems from the Constitution itself. The constitutional obligation of a court to test the objective consistency of a law against the Constitution does not depend on, and cannot be frustrated by the conduct of litigants or holders of the specific rights.<sup>37</sup>

### **3.3 Evaluation**

Despite the decision in *Van der Merwe* satisfying one's immediate sense of justice, it drastically deviates from the common law and legislative prescripts. The court clearly applied its extensive powers under sections 172 read with section 8(1) of the Constitution.<sup>38</sup> Section 172(1)(a) provides that when deciding a constitutional matter a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. It may make any order that is just and equitable in terms of subsection (b) which may include an order limiting the retrospective effect of the declaration of invalidity and an order suspending the invalidity for any period and on any condition to allow the competent authority to remedy the defect. In terms of section 8(1) the Bill of Rights applies to all law and binds the

<sup>36</sup> Par 59. <sup>37</sup> Par 61.

<sup>38</sup> The court found that s 18(b) is inconsistent with the Constitution and therefore invalid. It ordered that the words "other than damages for patrimonial loss" be severed. This is a direct application of the Constitution. The court did not avail itself of the process commonly known as '*reading down*'. S 8(2) provides that a court must promote the spirit, purport and objects of the Bill of Rights when it interprets legislation or develops the common law. Before a court will resort to invalidation of legislation (direct application), it must first consider indirectly applying the Bill of Rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights (indirect application). With reference to the common law the principle requires the court to develop it in conformity with the Bill of Rights (indirect application) in preference to assessing whether the common law is in conflict with the Bill of Rights (direct application). See Currie and De Waal *Bill of Rights Handbook* at 64.

legislature, the executive, the judiciary and all organs of state. *In casu* the court directly applied the provisions of the Bill of Rights to the dispute<sup>39</sup> and justified its conclusion that section 18(b) discriminated unfairly against spouses married in community on the basis that the distinction between patrimonial and non-patrimonial damages is arbitrary.

It needs no elaboration that *Van der Merwe* serves as a clear example of the willingness of the Constitutional Court to superimpose the values of the Constitution on something as personal as the patrimonial consequences spouses wish to pertain to their marriage. However, the court's reasoning that Applicant could not waive her constitutional right to attack the validity of laws pertaining to her marriage tends to obscure the difference between the patrimonial consequences of marriages in and out of community of property. It is trite that in the case of marriage in community of property all assets become common by operation of law while the matrimonial property dispensation in the case of marriage out of community of property is set out in the antenuptial contract between the parties.<sup>40</sup> *Prima facie* it would appear that the court's exposition is correct,<sup>41</sup> yet it is a pity that the court did not consider the impact of its decision on commercial intercourse where it is normally of particular importance for creditors to know whether parties are married in or out of community of property. In this respect reference may be made to the insolvency of the joint estate.

In *Badenhorst v Bekker*<sup>42</sup> the joint estate of the spouses was sequestrated in 1985. In 1992 the wife inherited assets from her father which assets were specifically excluded from the joint estate in her father's will. The trustees of the joint insolvent estate, however, laid claim to these assets whereupon the wife approached the court for a declaratory order that the excluded assets formed part of her separate estate and could therefore not be utilised as part of the

39 Currie and De Waal *Bill of Rights Handbook* at 32.

40 Par 2.1 and 2.2 *supra*. See *Watt v Watt* 1984 2 SA 455 (W).

41 *Transnet v Goodman Brothers* 2001 1 SA 853 (SCA) par 48.

42 *Badenhorst v Bekker* 1994 2 SA 155 (N).

insolvent estate. The court took the view that the inheritance could indeed be used to pay the creditors of the joint estate.

The court decided the question on three arguments. In the first place, the court held, it is trite that a testator may not stipulate in his or her will that an inheritance may not be attached or in the event of the sequestration of an estate, that it will not form part of the insolvent estate.<sup>43</sup> In the second place the court referred to the provisions of the Insolvency Act and came to the conclusion that the act did not contain any provision specifically pertaining to the situation where one of the spouses inherits assets after the joint estate has been sequestrated. An interpretation of the provisions of the Insolvency Act made it clear that the exclusion of the wife's assets in the will of her father was not covered in any of the provisions of the act, which meant that the assets formed part of the joint estate. In the third place the court considered the position at common law and reiterated the position as described in the text accompanying note 5 *supra*. It concluded that husband and wife are actually co-debtors so that the excluded assets also fell into the joint (insolvent) estate.<sup>44</sup> The approach of the court was elaborated upon by the Supreme Court of Appeal in *Du Plessis v Pienaar*<sup>45</sup> where it was held that:

Once it is accepted that debts are incurred by persons, rather than by their estates, and that when the marriage is in community of property both spouses are generally liable for the payment of the debts that are incurred by one of them, it follows that a creditor may look to the estates of both the debtors for recovery of the debt. In the case of a spouse ... that estate comprises not only her individual interest in the joint estate but also her separate property that falls outside the joint estate. ... The fact that some of her 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 a debtor in satisfaction of a debt.*<sup>46</sup> (Italics added.)

43 At 159.

44 At 171.

45 *Du Plessis v Pienaar* 2003 1 SA 671 (SCA).

46 Par 5.

From the exposition set out above it is clear that insolvency of the joint estate of spouses married in community of property does not only differ from marriages out of community of property, but also creates serious negative consequences for spouses married in community of property *vis-à-vis* spouses married out of community of property. However, this is also a factor seriously contemplated by creditors in commercial intercourse with spouses as the very fact that spouses are married in or out of community of property may directly influence the issue of the security that they may offer. A particularly serious question raised by the decision in *Van der Merwe* is whether courts will tamper with this security on the basis that marriage in community of property also in this respect is to the detriment of spouses so married. The unbridled approach of the court certainly suggests that creditors may not hold as strong security as they might wish where debtors are married in community of property. It goes without saying that this result may not only impact negatively on commercial intercourse, but may also give rise to uncertainty.

Flowing from the argument above, and accepting that a spouse's argument under these circumstances prevails, it appears that a further problematic situation presents itself – would it be possible for a spouse to be an insolvent for purposes of the joint estate and a solvent for purposes of his or her separate estate? In *Du Plessis* the Supreme Court of Appeal confirmed the line of reasoning in *Badenhorst*, but also went on to make it clear that the spouses acquire the status of insolvents.<sup>47</sup> It is clear that situations not contemplated by the Constitutional Court will definitely be raised on the basis of *Van der Merwe* and one may be justified to think that the distinction between marriages in and out community of property may become less visible in the near future.

47 The court explains the position as follows: "The insolvent debtors are both the appellant and her husband, for when spouses are married to one another in community of property debts incurred by one spouse generally accrue to them both. ... Similarly, the remedies provided by the Insolvency Act 24 of 1936 are available against both spouses for recovery of the debt that is owed by both of them. ... When the estate is equestrated for recovery of the joint debts of the spouses, both spouses become 'insolvent debtors' for purposes of the Insolvency Act, with the consequence that the property of both of them (comprising their undivided interests in the joint estate as well as separately owned property) is available to meet the claims of creditors." (Par 4-7.)

Lastly, it appears that the court may have misdirected itself when it took as its point of departure that the true reason underlying the rule that parties may not sue each other is to be found in “the boundless patriarchy in a setting where the *husband wielded marital power over the wife.*”<sup>48</sup> This exposition can not be accepted. The court, it is suggested, failed to distinguish between the administration of the joint estate (marital power) and the nature of joint ownership. The real issue before the court related to the question whether a claim for damages is tenable given the unity of the estate. The administration of the estate was not at issue. Against this background, the court’s reference to the husband’s marital power, and evolving societal notions of gender equality within marriage and also of the equal worth of spouses may lead to a conclusion that the court reasoned along a line of argument that was not applicable in the circumstances.<sup>49</sup>

#### 4 Conclusion

*Prima facie* the decision in *Van der Merwe* serves as an example of the Constitutional Court’s zealous dedication to adhere to its constitutional obligation to develop the common and statutory law to comply with the norms and values of the Constitution. In this respect the approach of the court is in step with previous decisions:

The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the ‘spirit, purport and objects of the Bill of Rights’. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.<sup>50</sup>

48 See text accompanying n 22 *supra*.

49 See *Estate Sayle v CIR* 1945 AD at 396.

50 *Pharmaceutical MNFRS of SA: In re Ex parte President of the RSA* 2000 2 SA 674 (CC) par 49.



It is clear that in the South African dispensation where the courts have constitutional enforcement powers, they have the last word on the meaning of the constitutional text and its application to a specific area. They can consequently overrule legislation that is inconsistent with the Constitution as they have interpreted it.<sup>51</sup> In this respect constitutional interpretation sometimes gravitate towards the counter-majoritarian dilemma as the exercising of the power of judicial review to strike down acts of a democratically elected legislature may thwart the will of the people.<sup>52</sup> It certainly needs no elaboration that this is exactly what has happened in *Van der Merwe*.<sup>53</sup> However, it is suggested that the court should have considered the consequences of its decision as this decision bridges a fundamental difference between marriages in and out of community of property.

51 Currie and De Waal *Constitutional and Administrative Law* at 35.

52 *Ibid.* The authors convey the concern that the counter-majoritarian dilemma could diminish the legitimacy of South Africa's new constitutional order - borne out by the public response to the Constitutional Court's first major decision in which the death penalty was declared unconstitutional and invalid. The ruling of the court was attacked as out of step with public opinion. *In casu* the court held that the question is "not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence." (*S v Makwanyane* 1995 3 SA 391 (CC) par 87.) This approach was echoed in a series of decisions relating to issues in respect of gay and lesbian relationships (*Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *Satchwell v President of the RSA* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v DG, Department of Home Affairs* 2003 5 SA 621 (CC); *NCGLE v Minister of Home Affairs* 2000 2 SA 1 (CC); *LGEP v Minister of Home Affairs* 2006 1 SA 524 (CC); *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA)) and resulted in marriages of homosexuals being legally recognised in the *Civil Unions Act* 17 of 2006. In *Fourie* the court deals as follows with the 'majority of South Africans' argument: "The remaining justification sought to be advanced ... invokes the acknowledged fact that most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour. Six years ago, the Constitutional Court acknowledged that revoking the criminal prohibitions on private consensual homosexual acts touched 'deep convictions' and evoked 'strong emotions' ... We must do the same. *Our task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this our sole duty lies to the Constitution; but those we engage with most deeply in explaining what that duty entails is the nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.*" (Italics added.) (Par 20.)<sup>53</sup> No attention will be paid in this contribution to the counter-majoritarian dilemma. See however, Okpaluba 2003 *CILSA* 25-64; Roederer 1999 *SAJHR* 486-512; Hoexter 2000 *SALJ* 484-519.

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***List of abbreviations***

ch chapter(s)

etc et cetera

eg for example

ia inter alia

ito in terms of

NCGLE National Coalition for Gay and Lesbian Equality

LGEP Lesbian and Gay Equality Project

par paragraph(s)

RAF Road Accident Fund

s section(s)

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