DOMESTIC ASSAULT WITH A MOTOR VEHICLE

Van der Merwe v Road Accident Fund 2007 1 SA 176 (C); Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae) 2006 4 SA 230 (CC)

1 Facts

The plaintiff was married in community of property to the driver of a motor vehicle who intentionally knocked her down and then proceeded to intentionally drive over her where she lay on the ground. As a result she sustained a ruptured

bladder, fractures of the pelvis and the hip, severe contusions, soft tissue injury of her back, lacerations and permanent disfigurement of her buttocks and abdomen.

The plaintiff sought to recover patrimonial and non-patrimonial damages arising from her personal injuries from the Road Accident Fund.

2 Legal question

The Road Accident raised the defence that because claims between spouses married in community of property for patrimonial damages were excluded by section 18(b) of the Matrimonial Property Act 88 of 1984 (MPA), the RAF was, by virtue of the operation of section 19(a) of the RAF Act 56 of 1996, not liable for patrimonial damages. In response to this defence, the plaintiff challenged the constitutionality of section 18(a) and 18(b) of the MPA in that the particular provisions are in conflict with the right to dignity and equality contained in section 9 of the Constitution of the Republic of South Africa of 1996. The matter was then referred by the parties to the Cape Provincial High Court pursuant to the provisions of rule 33(1) of the Uniform Rules of Court.

3 Judgment

3 1 Court a quo

The court adopted the view that the provisions of the relevant sections relate to the marital status of the plaintiff as protected by section 9(3) of the Constitution (184B). In assessing the nature and impact of the discrimination, the court came to the conclusion that the restriction discriminates mainly against women (185H). The court then considered whether the common-law principle that delictual actions between spouses married in community of property are inadmissible because of the existence of only one estate from which such damages may be paid serves a legitimate purpose (185J). The court found that the accretion of funds to both spouses as a result of the community of property should not be a bar to an action for damages by an innocent spouse who has suffered damages as a result of the (in this case *intentional*) unlawful act of the other spouse. The court said the following: "What rational government purpose could be served by denying an injured party patrimonial loss by reason of being married in community of property? Clearly the prohibition violates the equality clause in s 9" (186C). In order to find that the limitation of rights is unjustified, the court relied on commissions of enquiry by the Law Commission of British Columbia and the Law Reform Commission of Saskatchewan where they investigated delictual immunity of spouses based on collusion (187A). The court held that section 18(b) was invalid as it was unconstitutional (188F) and remarked:

> "The fact that there is a possibility that the damages may redound to the benefit of the wrongdoing spouse through an increase of family funds should not stand in the way of providing compensation to the defendant for patrimonial loss arising from a delict committed against her, regardless of the marital regime [187D]. A further reason in the instant case why plaintiff should in my view, be able to institute a claim for patrimonial damages against the defendant as if she had been married out of community of property, it is common cause, is that the parties have divorced. In such a situation the reason for the prohibition automatically falls away" (187G–H).

Ultimately the court held that section 18(b) of the MPA unfairly discriminates against spouses married in community of property based on their marital status

and that such discrimination is not justifiable in terms of section 36 of the Constitution. It concluded that the wording of section 18(b) should be changed to include claims for patrimonial loss.

3 2 Constitutional Court

The order of the court *a quo* came under the scrutiny of the Constitutional Court mainly for two reasons:

- An application by the plaintiff in terms of section 172(2)(d) of the Constitution for confirmation of the order that the relevant sections were unconstitutional; and
- because of an appeal lodged by the RAF against the finding of the court *a quo*.

In considering the unconstitutionality of section 18(b) of the MPA, the court examined the underlying common-law principles relating to this section (249 [29]). It proceeded to consider whether a specific part of the scheme introduced by the MPA could be deemed to be unconstitutional based on the rationality of the distinction drawn by section 18(b) of the MPA Act between patrimonial and non-patrimonial damages. It found common ground between the relevant forms of damages by concluding that both patrimonial and non-patrimonial damages are always payable in money. In arriving at this conclusion the court assumed that, as is the case with patrimonial damages, non-patrimonial loss has a compensatory function (254 [41]).

The court then examined the equality issue. It accepted that section 18 of the MPA differentiates between two different marital regimes (255 [43]). The court concluded that marital status was not in issue but that the measure "merely regulates and distinguishes rights and duties that attach to different property regimes within marriage" (256 [46]) and that it was not necessary to make a finding on the basis of marital status (256 [47]).

On the aspect of a rational governmental purpose, the court referred to a 1982 Law Commission Report and came to the conclusion that section 18(b) is "a relic of the common law of marriage, which is simply not useful". It said that the legislator "displays a preoccupation with the conceptual cohesion of a joint estate" (258 [51]). The court continued to say that the MPA has undermined the purity of the concept by providing that non-patrimonial damages do not fall into the joint estate but accrue to the innocent spouse. Section 19 recognises the right of recourse against the separate estate of the spouse and in the absence of such estate against his/her half of the joint estate after division. Section 20 allows a court to order the division of a joint estate in appropriate circumstances. It concluded that on the basis of these sections, a delictual claim for patrimonial damages will not accrue to the joint estate (259 [54]). It continued to point out that it is absurd that spouses married out of community of property have a delictual claim resulting from physical abuse while persons married in community of property do not have the same right. The court concluded that there could be no legitimate reason for this (259 [55]).

The court then turned to the distinction between patrimonial and non-patrimonial damages. It concluded that the principal object of damages "whatever the kind, is to 'neutralise loss through a new patrimonial element'". Section 18(b) "arbitrarily prevents the fullest possible compensation for spouses who are the victims of violence, negligent driving or other wrongdoing that leads to bodily harm by their marriage partners" (260 [56]). It concluded that the distinction

between patrimonial and non-patrimonial loss "is at best tenuous and thus falls foul of the requirement of rational differentiation" (260 [57]).

The court concluded that the differentiation created by section 18(b) of the MPA is unjustifiable despite the fact that the claimant was afforded the choice of a matrimonial property regime in terms of the Act. The validity of an act cannot depend on choice. It referred to the Government's position that the particular section does not serve a legitimate governmental purpose. For this reason the limitation of section 18(b) is unjustifiable (261 [61]).

Turning to the submissions made by the *amicus curiae* regarding intrinsic and equal worth referred to in section 10 of the Constitution, the court held that section 18(b) immunises an abusive spouse from delictual claims where they are married in community of property but not if they are married out of community of property (262 [65]). The submission was that section 18(b) of the MPA discriminates unfairly against women. The court remarked that although the relevant provision is gender-neutral, it is likely to affect women more than men (263 [68]). Finally there was the submission that section 18(b) indemnifies persons who assault their marriage partners to whom they are married in community of property. The court did not have to express a view on this aspect (263 [69]).

The court then considered the appropriate remedy. It held that the method of severance and reading in would be appropriate. It consequently ordered:

"1. The Minister of Justice and Constitutional Development is joined as the second respondent in these proceedings.
2. The order of constitutional invalidity made by the Cape High Court on 13 September 2005 in respect of s 18(b) of the Matrimonial Property Act 88 of 1984 is confirmed subject to the variations set out in paras 4,5 and 6 below.
3. The order of the Cape High Court is varied to read as follows:
   (a) It is declared that the inclusion of the words 'other than damages for patrimonial loss' in s 18(b) of the Matrimonial Property Act 88 of 1984 is inconsistent with the Constitution and invalid.
   (b) The words 'other than damages for patrimonial loss' in s 18(b) of the Matrimonial Property Act 88 of 1984 is severed.
   (c) The omission from s 18(b) of the Matrimonial Property Act 88 of 1984 of the words '(s)uch damages do not fall into the joint estate but become the separate property of the injured spouse' after the words 'either wholly or in part to the fault of that spouse' is inconsistent with the Constitution and invalid.
   (d) The words '(s)uch damages do not fall into the joint estate but become the separate property of the injured spouse' shall be read in after the words 'either wholly or in part to the fault of that spouse' in s 18(b) of the Matrimonial Property Act 88 of 1984.
4. Paragraph 3(a) to (d) of this order shall operate retrospectively except only for claims under s 18 of the Matrimonial Property Act 88 of 1984 in which final judgments had been handed down on the date this order was made.
5. The Road Accident Fund is ordered to pay the costs of the applicant, Mrs van der Merwe, in the Cape High Court application under case No 1803/2002 and in the confirmation proceedings in this Court.
6. The appeal of the Road Accident Fund against the judgment and order of the Cape High Court handed down on 13 September 2005 in case No 1803/2002 is dismissed with costs."

4 Discussion

4 1 Introduction

There are a few aspects of the judgment and other considerations that deserve closer scrutiny. They are:

- Duties and rights created by marriage;
- the concept of community of property and the MPA;
- choice and discrimination;
- the distinction between patrimonial and non-patrimonial damages;
- applicable delictual principles; and
- the consequences of the judgment.

4 2 Duties and rights created by marriage

4 2 1 Consequences other than property rights

It is trite that marriage does not only have consequences in respect of the property rights of the parties, but also gives rise to certain rights and duties regarding the person of the spouses (see Hahlo *The South African law of husband and wife* (1985) 127–149). These are:

- *Consortium omnis vitae*;
- the husband as head of the family;
- support; and
- protection of the marriage relationship against third persons.

For purposes of this discussion, the right/duty to maintenance/support is of particular importance.

4 2 2 The duty of support/maintenance

> "One of the consequences of marriage, whether in or out of community of property, is that the spouses owe each other a reciprocal duty of maintenance according to their means" (*Jodaiken v Jodaiken* 1978 1 SA 784 (W) 788H; Hahlo 134)

The spouse who owes a duty to support is obliged to provide the following:

- A home/accommodation;
- food;
- clothes;
- medical and dental services;
- legal costs; and
- any other reasonable requirements.

In order to provide maintenance the supporting spouse must utilise his/her income and if needs be his/her capital. Where spouses are married in community of property maintenance is to be paid out of income and the capital assets of the joint estate (Hahlo 135; *Oberholzer v Oberholzer* 1947 3 SA 294 (O); *Hartman v Krog-Scheepers* 1950 4 SA 421 (W); *Jodaiken* 789C).

4 3 Community of property

4 3 1 Introduction

In his judgment Moseneke DCJ states the following regarding the concept of community of property and the joint estate created by such a marriage:

> "[30] On 1 November 1984, chs 2 and 3 of the Act jettisoned much of the gender differentiation found in the common law of marriage in community of property. The legislation made drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly. A few examples will suffice. The chapters abolished the marital power of the husband over the person and property of his wife, equalised the power of the wife to that of the husband to manage the joint estate, subjected juristic acts affecting the joint estate to the consent of the other spouse, and immunised and protected monetary and other financial receipts by a spouse from interference by the other.
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> [31] Importantly for the present purpose, the Act introduced 'separate property' which does not form part of the joint estate. Section 18(b) confers on a spouse a claim in delict against the other for damages other than for patrimonial loss arising from bodily injury. The amount so recovered does not fall into the joint estate but becomes her or his" (249–250).

It is submitted that the statement contained in paragraph 31 is an oversimplified view of the effect of the MPA on a marriage in community of property – especially in relation to the creation of "separate property" existing independently and concurrently with the joint estate. It is in particular doubtful whether the inclusion of a claim for non-patrimonial damages by the legislator in section 18(b) can sufficiently support an unqualified conclusion that the legislator is thereby deviating from the "theoretical unity and inviolability of the joint estate".

4 3 2 Legal nature of community of property and the joint estate

Community of property is a universal partnership between the spouses creating a joint estate. Hahlo states that "the joint estate consists of all the property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by them during the marriage" (158 161 162; *Peacock v Peacock* 1956 3 SA 136 (A)). The joint estate is owned by the spouses in equal undivided shares as co-owners. The essence of a marriage in community of property is that during the subsistence of the marriage none of the spouses in that marriage have any personal patrimony, such patrimony being merged into a joint estate. (For a comprehensive survey of the common-law marital property regimes see Sonnekus "Skadevergoedingseise by huwelike binne gemeenskap van goed" 2006 *TSAR* 849–851 and see also *De Wet v Jurgens NO* 1970 3 SA 38 (A).) The shares of spouses to their joint estate are tied up and cannot be separated except by means of a common-law claim of *boedelscheiding* or currently in terms of section 20 of the MPA (Hahlo 173).

The MPA brought about a radical change to the common-law concept of marriages in community of property but did not make "drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly" as suggested by Moseneke DCJ. As Sonnekus points out:

> "Die belangrikste verandering is waarskynlik die reëling ingevolge artikel 14 dat man en vrou (behoudens enkele uitsonderings) in sodanige huwelik in gemeenskap van goed gelyke handelings- en bestuursbevoegdhede ten aansien van die gemeenskaplike boedel verkry – die sogenaamde "twee kapteins op een skip"-benadering" ("Insolvensie by huwelike in gemeenskap van goed 1986 *TSAR* 92; *Du Toit v Du Toit* 1985 3 SA 1007 (T)).

In addition section 17(4) of the MPA provides for the citing of both spouses as applicants/respondents in surrender of estate/sequestration proceedings. This has the implied consequence that the joint estate of spouses is now more akin to a

partnership (see *Du Toit* 1008J). However, did it go as far as introducing "separate property" in the sense of a separate estate which exists independently and distinct from the joint estate belonging exclusively to a spouse in a marriage in community of property and which does not form part of the joint estate?

4 3 3 Notion of separate property

Before the promulgation of the MPA the common law allowed for the exclusion of certain property from the joint estate (Hahlo 164ff; *Erasmus v Erasmus* 1942 AD 265; *Cuming v Cuming* 1945 AD 201). Examples of such property are:

- testamentary or other dispositions made to a spouse subject to the express condition that it be excluded from the community of property and marital right of a spouse;
- fideicommissary and usufructuary property;
- costs awarded to a wife in matrimonial proceedings;
- damages for defamation or personal injury in case of insolvency of the joint estate;
- insurance policies;
- benefits accruing to a wife under the Friendly Societies Act; and
- non-patrimonial damages excluded by order of a court (*Potgieter v Potgieter* 1959 1 SA 194 (W) 196B) or by virtue of section 18 of the MPA.

Generally, separate property not forming part of the joint estate existed because it was excluded by virtue of the fact that the property or rights were of a personal nature. Ostensibly for the same reason property was also excluded by specific legislation. It is important to note that the common-law notion of separate property of a spouse married in community of property in relation to the joint estate only operates *inter coniuges* and has no legitimacy as far as third parties such as creditors are concerned (see Sonnekus 1986 *TSAR* 97 and Van Wyk *The power to dispose of the assets of the universal matrimonial community of property* (doctoral thesis Leiden 1976) 64; Hahlo 161; *Du Plessis v Pienaar NO* [2002] 4 All SA 311 (SCA); 2003 1 671 (SCA)). This means that as far as third parties such as creditors (and for that matter also plaintiffs/defendants in delictual actions) are concerned the universal unity and inviolability of the joint estate remains intact as the principal cornerstone of a marriage in community of property. It is not affected by the existence of "separate property" and the introduction of section 18(b) of the MPA. This unity is not theoretical but a legal fact which was confirmed in *Du Plessis v Pienaar NO* [2002] 4 All SA 311 (SCA) 314 [5] 315 [9]; 2003 1 SA 671 (SCA) where Nugent JA said the following:

> "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 the debtor in satisfaction of a debt . . . The appellant also submitted that the Matrimonial Property Act has had the effect of creating a separate estate comprising all property that is excluded from the joint estate, and that that estate is protected against the incursions of joint creditors of the spouses. The result, according to that submission, is that each estate (i.e. the joint estate and the separate estate) is capable of having its own discrete creditors. There are indeed various provisions of the Act that give recognition to the separate property of spouses who are married in community of property (see sections 17, 18, 19 and the definition of 'separate property') but I do not think that implies the creation of a

> novel entity that is capable of incurring discrete debts, or that is protected from the normal consequences of the spouses' indebtedness. Indeed, the existence of such an entity would give rise to startling anomalies for it would suggest that a debtor might be insolvent in relation to one estate and not insolvent in relation to the other. I do not think that the Act has brought about that result. It recognises the existence of separate property in the relationship between the spouses *inter se* but I do not think it affects the rights of third parties. For so long as a spouse is a debtor in my view his or her creditors may look to all the property of the debtor in satisfaction of the debt and similarly upon insolvency all the debtor's property is available to his or her creditors. In those circumstances I agree with the conclusion that was reached in *Badenhorst's* case (*Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N)) and in the court *a quo*. The appeal is dismissed with costs."

It follows that "separate property" is only of consequence when the joint estate is dissolved either by death or divorce and has no effect whatsoever on the concept of a joint estate as it existed before the introduction "separate property" and section 18(b) in the MPA (see also *Van der Berg v Van der Berg* 2003 6 SA 229 (T)) nor indeed, during the subsistence of a marriage in community of property. This view is also supported by the definition of separate property in section 1 of the MPA: "means property which does not form part of the joint estate". If the legislator intended that the common-law concept of "separate property" included the creation of a separate estate belonging to a spouse married in community of property existing independently and parallel to that of the joint estate, one would have expected a much more extensive definition clearly indicating a deviation from the common-law principle of a joint estate. Section 18(a), 18(b) and 19 only affirmed the existing common-law position regarding the claiming of non-patrimonial compensation for affected rights of personality where spouses are married in community of property and the principle of the law of damages stating that damages can only be awarded to that patrimony which in fact suffered damages and also not to a joint estate that (on the facts of the case being discussed) stands to benefit from the wrongdoing of one of its co-owners (see Sonnekus 2006 *TSAR* 856 and para 4 6 2 below).

Finally, it seems that the judgments were influenced by the fact that the plaintiff had divorced her wrongdoing husband. This is of no consequence because at the time of the wrongful and intentional vehicular assault, the parties were still married. This means that their joint estate still existed.

4 4 Choice and discrimination

In his judgment Moseneke DCJ (262 [59]–263 [63] stated the following:

> "[59] The Fund contends that the limitation of the applicant's right to equal protection and benefit of the law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. To that end, the Fund urged upon us that marriage is a matter of choice and so too are the proprietary consequences of marriage. The applicant chose marriage in community of property and, goes the argument, it is fair and reasonable that she be kept to the immutable consequences of her choice. It is now not open to her to challenge the constitutional validity of the law she opted to marry under.
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> [60] This argument resolves itself into a waiver defence. It implies an undertaking by married people not to attack the legal validity of the laws that regulate their marriages.
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> [61] This line of reasoning falters on two grounds. First, the constitutional validity or otherwise of legislation does not derive from the personal choice,

preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in s 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid. Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional State. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of State including the Judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, s 172(1) makes plain that, when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confer validity on a law that otherwise lacks a legitimate purpose has no merit.

[62] Second, ordinarily the starting point of a justification enquiry would be to examine the purpose the government articulates in support of the legislation under challenge. In this case the government did not proffer a purpose to validate the impugned provision. If anything, the government contends that the provision is inconsistent with the Constitution because it is irrational or unfairly discriminatory. It correctly, in my view, disavowed the existence of a legitimate purpose for withholding a right of recourse for patrimonial loss from physically brutalised spouses in marriages in community of property whilst granting the protection to spouses in other forms of marriages or indeed to parties in other domestic partnerships.

[63] Of course, the pursuit of a legitimate government purpose is central to a limitation analysis. The Court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose. However, in this case there is no legitimate purpose to validate the impugned law. The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable. I am satisfied that s 18(b) of the Act is inconsistent with the Constitution because it limits the equality provision of s 9(1) without any justification."

It is submitted that section 18(b) needs to be judged against the backdrop of the entire MPA. In addition, law by its very fundamental purpose of creating and ensuring order within society of necessity discriminates by affording some legal subjects rights and others duties while denying others. The only question is whether the discrimination is justified or fair. It is submitted that discrimination can only be unjustified if there are no other options open to a person whereby provisions which are discriminatory can be circumvented. If the MPA is considered in its entirety it is quite clear that the legislator intended to regulate the proprietary consequences of marriage and to that end created three different regimes. Firstly, the MPA retains marriages out of community of property and the consequences thereof. Secondly, it created a regime which allows spouses the freedom and rights arising from a marriage out of community of property and the benefits of a marriage in community of property (see the Accrual System governed by Chapter I of the MPA). Thirdly, it adjusts marriages in community of property to the extent that spouses become joint owners and administrators of their joint estate (see Chapters II and III) and contains section 21 which permits spouses to change their matrimonial property regime on application. Viewed from this perspective it is submitted that the legitimate governmental purpose

served by the MPA as a whole is to regulate the matrimonial property consequences of marriage. In doing so it adheres to the tenet that the legislator intends to alter the common law as little as possible and therefore includes section 18(b) and section 19 which confirm the common-law position relating to delictual claims between spouses married in community of property, make it unnecessary for a spouse married in community of property to apply to a court to have damages of a non-patrimonial nature declared separate property and respect the *nemo ex suo delicto* rule. This, in my view, constitutes a legitimate governmental purpose (see Sonnekus 2006 *TSAR* 853 and *Potgieter v Potgieter* 1959 1 SA 194 (W)). The criticism of Sonnekus (*idem* 859 with reference to Rautenbach "Overview of constitutional court decisions on the Bill of Rights" 2006 *TSAR* 367 373–374 and on the *nemo ex suo delicto* rule para 4 6 2 below) has to be noted where he states that the accurate determination of the object of a particular provision is indispensable in order to determine whether a rational connection exists between the object and the suspected discriminatory provision. If the object is incorrectly formulated no logical connection is capable of being established (2006 *TSAR* 856). Added to this, the fact that a government department or its legal representatives advance no legitimate governmental purpose or disavow such purpose does not mean that such purpose cannot and does not exist. The enquiry into a legitimate governmental purpose is an enquiry that the court is, in my view, duty-bound to make utilising all the available material and resources at its disposal precisely because incorrect formulation, or a complete lack of it, could have far-reaching consequences.

The court's view that the argument regarding choice constitutes a defence of waiver of rights is forced and artificial (see Sonnekus 2006 *TSAR* 862). The court is compelled to arrive at this conclusion in order to justify its view that the availability of choice does not affect the unconstitutionality of section 18(b) of the MPA. Choice does have an influence on the possible unconstitutionality of a particular legislative provision based on discrimination. In *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) it was held that because homosexual life partners were disqualified from marrying by the Marriage Act 25 of 1961, the latter act was unconstitutional and the relationship existing between the homosexual life partners were acknowledged as and given the consequences of a marriage. Heterosexual couples were not included in this dispensation because heterosexual couples have the option of marriage open to them and such exclusion is consequently not discriminatory (see in this regard Du Plessis J in *Henery v Santam Versekeringsmaatskappy Beperk* [1997] 3 All SA 100 (T) and cf Schwellnuss "The legal position of cohabitees in the South African law" 1995 *Obiter* 133; Hahlo "Law of concubinage" 1972 *SALJ* 89). It follows that where a party chooses a regime, any perceived discrimination that flows from such a choice is not the making of the legislature but the consequence of his/her choice in circumstances where the legislator provides other options which, if and when exercised, can avoid the perceived discriminatory consequences of a person's particular choice of marital property regime (see also Sonnekus 2006 *TSAR* 862).

Furthermore, the Constitutional Court's perception that parties to a marriage in community of property are fettered with a marital property regime without any choice is questionable as is the statement (294C) that "(t)he rule . . . ousts legal redress for delictual loss" (see *idem* 860). The court also loses sight of the fact that in the circumstances of this case, the absence of a delictual remedy for the perceived patrimonial loss the plaintiff sustained does not mean that Mrs Van der Merwe was without any legal recourse. As is the case with all married persons

and irrespective of their marital property regime, she is entitled to claim that his/her medical expenses and maintenance be paid by her spouse. She could, assuming that she was entitled to recover damages, also have availed herself of section 20 of the MPA (see *idem* 861).

4 5 Patrimonial and non-patrimonial damages

Damages are classified as patrimonial or non-patrimonial with reference to the interest prejudiced. Non-patrimonial damages are awarded where rights of a highly personal nature are compromised (see Joubert *Grondslae van die persoonlikheidsreg* (1953) 142; Klopper *Die beskerming van kredietwaardigheid in die Suid-Afrikaanse reg* (LLD thesis UFS (1986) 194; *Bredell v Pienaar* 1924 CPD 203; *Universiteit van Pretoria v Tommie Meyer Films* 1977 4 SA 376 (T)). In addition, rights arising from such a breach do not automatically transmit to the estate of the person whose personal rights have been infringed (see on the nature and concept of rights of personality Joubert 146ff; Neethling *Persoonlikheidsreg* (1985) 27 and regarding the transmissibility of such claims Visser and Potgieter *Law of damages* (1993) 221; *Potgieter v Sustein (Pty) Ltd; Potgieter v Rondalia Assurance Corporation* 1970 1 SA 705 (N); *Government of the Republic of SA v Ngubane* 1972 2 SA 601 (A); *Hoffa NO v SA Mutual Fire & General Insurance* 1965 2 SA 944 (C)). On the other hand, claims for patrimonial damages by their very nature accrue and transmit to the estate of the prejudiced person.

There is also a distinction regarding the purpose of an award of non-patrimonial and patrimonial damages, the manner in which such damages are assessed and the legal requirements that have to be met before non-patrimonial damages accrue. In the case of non-patrimonial damages an award *ex aequo et bono* is made to redress the wrong perpetrated on the personality rights of a person and has no actual bearing on the damage suffered; it is a monetary approximation of what society perceives an appropriate award to redress the wrong committed against the personality of a person, in so far as it is possible to do so by the payment of a sum of money. It does not seek to balance the balance sheet of the estate of an affected person. In the main the payment of money is the only manner in which society's sense of justice is satisfied and censure applied where a right of personality has been compromised or, alternatively, the method whereby the consequences resulting from a breach of personality rights is corrected (see Visser "Kompensasie van nie-vermoënskade" 1983 *THRHR* 43; Visser *Kompensasie en genoegdoening volgens die aksie vir pyn en leed* (LLD thesis Unisa (1980); *Sandler v Wholesale Coal Supplies* 1941 AD 194; *Bay Passenger Transport v Franzsen* 1975 1 SA 269 (A)). In the case of patrimonial damages, the reduction in the value of the estate of a person is determined – usually by mathematical calculation. The fact that money is received for an *iniuria* or pain and suffering ultimately ends up in the prejudiced person's bank account does not transform the amount paid as non-patrimonial damages into patrimonial damages (see also in this respect the comments of Sonnekus 2006 *TSAR* 860–861).

The distinction between patrimonial and non-patrimonial damages is also not voided by the phenomenon that one act can result in both patrimonial and non-patrimonial consequences (see Joubert 144; Neethling 76; Visser and Potgieter 259). Because of the very personal nature of the personality rights, it is more likely that where an act results in both patrimonial and non-patrimonial loss, another subjective (patrimonial) right other than a person's personality right was simultaneously prejudiced by the same act (see Visser and Potgieter 86 259;

Klopper 254). In the case of bodily injury, patrimonial loss is manifested in the form of medical expenses, loss of income and loss of earning capacity. In all probability the damages for loss of income and earning capacity results from the breach of a person's (personal) intellectual property (a patrimonial interest) in the form of his capacity to earn an income (see Neethling "Persoonlike immateriëlegoedereregte: 'n nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316, Die reg op die verdienvermoë en die reg op korrekte inligting as selfstandige subjektiewe regte" 1990 *THRHR* 101; *Hawker v Life Offices* 1987 3 SA 777 (C)) while the incursion of medical expenses is a direct patrimonial consequence of the bodily injury (see Visser and Potgieter 86ff). Non-patrimonial loss is suffered mainly in the form of pain and suffering and loss of amenities of life (see Visser and Potgieter 89ff).

The differentiation between patrimonial and non-patrimonial damages is by no means tenuous and serves an important and justified purpose. Sonnekus 2006 *TSAR* 852 points out that the distinction is important in the context of the existence of a joint estate. As spouses in a marriage in community of property have no separate estates (their estates are merged into one common joint estate) it is necessary to distinguish between patrimonial and non-patrimonial damages and to create measures to prevent damages awarded for the compromise of interests of a highly personal nature by virtue of the existence of a common joint estate accruing to a person who has not suffered such damages.

4 6 Delictual principles

4 6 1 Introduction

In the court *a quo* Ndita AJ said that "[t]he court holds that section 18(b) is invalid as it is unconstitutional" (188F) and remarked:

> "The fact that there is a possibility that the damages may redound to the benefit of the wrongdoing spouse through an increase of family funds should not stand in the way of providing compensation to the defendant for patrimonial loss arising from a delict committed against her, regardless of the marital regime" (187D).

This remark, which was not challenged or commented on by the Constitutional Court, as well as the consequences of the judgment, need closer inspection.

4 6 2 *Nemo ex suo delicto meliorem suam conditionem facere potest*

It is an established rule of the law of delict that no person may improve his/her own position by means of his own wrongdoing. It has its origins in *D* 50 17 134 1, is part of our law (see *Principal Immigration Officer v Bhula* 1931 AD 323; *Locke v Locke* 1951 1 SA 132 (N); *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T); *Weintraub v Joseph* 1964 1 SA 750 (W); *Parity Insurance Co v Marescia* 1965 3 SA 435 (A); *Adam v Latiff* 1970 3 SA 235 (N)) and excludes the awarding of delictual damages where the wrongdoer will benefit from such an award. In view of the fact that section 18(b) does not create a separate estate to which damages can accrue (see *Du Plessis v Pienaar NO* [2002] 4 All SA 311 (SCA); 2003 1 671 (SCA)), the RAF as substituted defendant (see s 21 of the RAF Act of 1996) is entitled to raise this defence as the effect of the payment of the damages in this case is that Mr van der Merwe (the wrongdoer) as co-owner of the joint estate benefits from the patrimonial damages paid by the RAF to Mrs van der Merwe in the form of medical costs and loss of income (see para 4 6 3 below). The existence of this principle in itself is rational justification for the distinction drawn by section 18(b) between patrimonial and non-

patrimonial damages and the exclusion of the recovery of patrimonial damages by spouses married in community of property.

4 6 3 Other principles

Sonnekus (2006 *TSAR* 861) emphasises that in a marriage in community of property there is only one legally protected joint estate common to the parties. Where the joint estate suffers damages, there is no question of one spouse having a legally protected interest for which no remedy exists. The patrimonial right affected falls into the joint estate and the enforcement of the delictual claim is delayed until the joint estate is dissolved. The damage simply accrues to the joint estate and if it is not paid to the joint estate but is designated as separate property, there is no compensation of damages to the entity who suffered the damage in the first place. This flies in the face of the basic principles of the law of delict where the object of an award of patrimonial damages is to rectify the negative consequences suffered by a person's estate by awarding damages to the estate that was affected by the unlawful conduct of a wrongdoer (see also Hahlo 161). Furthermore, the basic principle of *res perit domino* dictates that where a person causes his own damage, such person must bear the damages (see Neethling, Potgieter and Visser *The law of damages* (2001) 3; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468A). Applied to a joint estate the owners of the joint estate must bear any losses inflicted on the joint estate by anyone of them. The fact that one of the joint owners has inflicted damage on the joint estate is thus legally of no consequence until the joint estate is dissolved. Only then will the damage inflicted by a joint owner have an influence on how the joint estate is to be divided in order to rectify the imbalance which would be occasioned if the joint estate is divided equally.

4 7 Consequences of the judgment

4 7 1 Wrongdoer benefits

The one-dimensional approach of the court in relation to the legal problem raised by this matter and the judgment resulting from such an approach will give rise to peculiar and unwanted consequences in circumstances where domestic violence is perpetrated using a motor vehicle. Instead of holding the domestic abuser financially liable, he/she is as a result of this judgment virtually completely absolved from any financial consequences of his/her despicable deed as all his marital financial obligations arising from his duty to maintain his/her spouse will effectively be met by the Road Accident Fund which is funded by public money. In addition, the recovery of damages for loss of earning capacity by the plaintiff will on the facts of this case probably lighten or even dispense with any need for maintenance payable by a wrongdoing spouse.

4 7 2 Conflict

Moseneke DCJ regards the introduction of the concept "separate property" in the MPA as being indicative of a legislative deviation from the "theoretical unity and inviolability of the joint estate". It is by no means clear but it would seem that with "separate property" Moseneke DCJ (based on his statement that "(t)he legislation made drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly" and the implied acceptance of the fact that the claimant in fact suffered patrimonial loss) has in

mind a separate estate belonging to the plaintiff existing in tandem with and independently from the joint estate. Both his views regarding legislative deviation of and the inferred subliminal meaning ascribed by him to "separate property" are in direct conflict with the judgment of Nugent JA in *Du Plessis v Pienaar NO* (relevant section of judgment quoted in para 4 3 3 above). It is submitted that the judgment of Nugent JA reflects the true legal position in respect of "separate property" and the joint estate in marriages in community of property and that the unity and inviolability of the joint estate is unaffected by the MPA.

If it is accepted that by "separate property" the court in fact means "separate estate" which "separate estate" (as was indicated above) does not legally exist, then the order is based on an incorrect premise. Therefore, the order that the court makes that the patrimonial damages recovered will be the "separate property" of the affected spouse does not solve the legal problem relating to the recovery of patrimonial damages between spouses having a joint estate during the subsistence of a marriage in community of property (see *Tomlin v London and Lancashire Insurance* 1962 2 SA 30 (N)) and awards damages to a person who does not have separate patrimony/estate in stead of the joint estate. The order worded as it is does not and cannot create a separate estate which suffered damages and to which the damages accrue and which exists independently and in parallel with the joint estate. Nor does the wording of the current provisions relating to "separate property" in the MPA create such an estate. If this conclusion is correct, then the court has ordered (in my view with insufficient jurisprudential justification) a change of a legislative provision which in its amended form conflicts with the common law as the common-law position was not exhaustively considered nor is it affected by the order (see further para 4 7 5(a) below).

4 7 3 Violation of principles

The award of damages suffered by a joint estate as "separate property" to a spouse will violate the fundamental principles of the law of damages (see para 4 6 3). In addition, assuming that the order does not create a separate estate, then the effect of the order is not only that a person/estate which has not suffered damages will be compensated but also that such person will receive the full amount which should have legally accrued to the joint estate where he/she in normal circumstances will only be entitled to half of such an amount by virtue of his/her half of the joint estate.

4 7 4 *Nemo ex suo delicto*

If the principle as stated in the paragraph 4 7 2 holds true, the existence of one joint estate and the rights created by the order enabling spouses married in community of property to claim patrimonial damages from each other on similar facts as this case, will be nullified by the operation of the *nemo ex suo delicto* rule. The damages will accrue to the joint estate. The joint estate (and in time the wrongdoer) stands to benefit from an unlawful act perpetrated by one of its co-owners and should therefore be non-suited.

4 7 5 Limited legal and practical effect

(a) Legal effect

It was pointed out in paragraph 4 7 2 that the ordered amendment creates a conflict between section 18(b) of the MPA as amended by the order and the common law. Where there is a conflict between a statutory provision and the common law,

the common law normally has precedence (see *Johannesburg Municipality v Cohen's Trustees* 1909 TS 818; *R v Morris* 1 CCR 95; *Kleynhans v Yorkshire Insurance Co Ltd* 1957 3 SA 544 (A); *Consolidated Diamond Mines of South West Africa Ltd v Administrator SWA* 1958 4 SA 572 (A)). This in turn means that the MPA amended as ordered may well have no effect on the legal position relating to delictual claims between spouses married in community of property as it stood before the order was granted.

(b) Practical effect

As shown above (para 4 2 1), one of the consequences of marriage is that there is a reciprocal duty on spouses to support each other. Applied to the facts of this case Mr Van der Merwe was obliged to pay the medical expenses of his spouse occasioned by his intentional vehicular assault on her. He was also obliged to provide in her other needs if she was unable to work due to her injuries. If the need for medical attention and maintenance was occasioned by the wrongdoing of a third party, he would have been entitled to a delictual claim for damages against the wrongdoer (see *Van der Westhuizen v SA Liberal Insurance Company Ltd* 1949 3 SA 160 (C); *Workmen's Compensation Commissioner v Santam Beperk* 1949 4 SA 732 (C)). In the case where the medical expenses were paid as a consequence of Mr Van der Merwe's duty of support, a claim by Mrs Van der Merwe for medical expenses will not succeed as the payment of such medical expenses would constitute a deductible collateral benefit (see Visser and Potgieter 192; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A); *Serumela v SA Eagle Insurance* 1981 1 SA 391 (T); *Free State Consolidated Gold Mines v MMF* 1998 3 SA 213 (SCA); *Burger v President Versekeringsmaatskappy* 1994 3 SA 68 (T); *Santam Ltd v Gerdes* 1999 (1) SA 693 (A)).

Applied to other situations where the RAF will not be involved, and in view of what was said above, the order essentially confirms the common-law position as it existed before the order was made and will not alter the position of delictual claims for patrimonial loss between spouses married in community of property.

4 7 6 Anomaly

It must also be pointed out that where married persons who are social passengers are injured in a motor vehicle accident by the unlawful driving and sole fault of their spouse, their claim will be excluded by the operation of section 19(b)(ii) of the RAF Act of 1996. This has the anomalous result that a spouse who is intentionally or negligently injured as a pedestrian under the same circumstances will have a claim while such claim will be excluded if he/she is a passenger in a motor vehicle. This aspect has to be noted by the management of the Road Accident Fund and the Department of Transport and remedial legislative steps should be taken to rectify this anomaly. The reasons for the existence of section 19(b)(ii) equally apply to the facts of this case. From the perspective of policy considerations, the facts of this case and with specific reference to cases where the marriage relationship between spouses is tenuous and not irretrievably broken down, the quotation made by Sonnekus (2006 *TSAR* 853 taken from Larson 1940 *Wisconsin LR* 467 499) is pertinent:

> "The growth in liability insurance has to a great extent changed the effect of a lawsuit between relatives . . . from the traditional friction to the closest sort of amicable co-operation. Nothing draws two people together than the mutual desire to get something out of one's insurance carrier."

5 Conclusion

The Constitution serves as an indispensable mechanism to prevent unfair discrimination. However, this judgment illustrates that principles which have an essentially horizontal operation and which were developed over centuries and are based on extensive experience and wisdom gained over centuries should not be judged purely on the basis of their ostensible or perceived discriminatory effect. Despite any ostensible and/or perceived discrimination contained in established common-law legal principles and statutory measures based on such principles, such principles (and their attendant common-law principles) call for careful and meticulous examination and consideration, should be treated with respectful circumspection and not be lightly and unnecessarily tampered with in order to rectify a perceived *lacuna* or in order to achieve a laudable and equitable but casuistic result (see also Sonnekus 2006 *TSAR* 863). Failure to do so may have far-reaching, unexpected, unwanted and regrettable consequences.

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