REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 1803/2002

In the matter between:

VANESSA VAN DER MERWE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON THIS 13TH DAY OF SEPTEMBER 2005

NDITA AJ:

[1] On the 24th of October 1999, and at Pick ’n Pay in Goodwood on a public road, an accident occurred when a motor vehicle with registration number BXW 288F, then driven by one David van der Merwe (hereinafter referred to as “the insured driver”) collided with the plaintiff, Vanessa van der Merwe. At the time of the collision, plaintiff was married in community of property to the insured driver. The plaintiff has since been divorced from the insured driver the defendant.
[2] As a result of the aforesaid collision, plaintiff sustained bodily injuries for which she had to receive medical treatment. The plaintiff instituted action against the Road Accident Fund for patrimonial and non-patrimonial damages suffered as a result of injuries so sustained.

[3] It is common cause between the parties that the insured driver intentionally knocked the plaintiff over whilst driving forward and then proceeded to reverse his vehicle over her whilst she was lying on the road.

[4] At common law, a spouse married in community of property is not entitled to sue his/her co-spouse for patrimonial loss arising from a delict committed by the one spouse against the other. Sections 18 and 19 of the Matrimonial Property Act No 88 of 1984 (hereinafter referred to as “the Act”), read with section 19(a) of the Road Accident Fund Act No 56 of 1996, prohibit claims for patrimonial damages between spouses married in community of property.

[5] Mr. David appeared for the plaintiff whilst Mr. Salie appeared for the defendant.

Issues for determination

[6] At the commencement of the hearing, the parties agreed in terms of Rules 33(1) and (2) of the Uniform Rules that the only issue for determination by this court is the constitutional validity of the provisions of sections 18(a) and (b) of the Act. The parties agreed that the issues for adjudication are as follows:-

1. Whether Section 18(b) of the Act militates against sections 9 and 10 of the Bill of Rights by:

a) Infringing the injured spouse's right to equality contained in the Constitution of the Republic of South Africa;

b) Infringing the right to dignity;

c) Accordingly, whether the provisions of section 18(b), which prohibits the plaintiff from claiming damages for patrimonial loss differentiate between people or categories of people and, if so, whether it amounts to an unfair discrimination, which is therefore unconstitutional and invalid;

d) Whether the provisions of section 18(b), if found to be invalid, should be modified as to render them valid in terms of section 172(1) of the Constitution;

e) Whether section 18(b), if declared unconstitutional, is saved by the provisions

of section 36 of the Constitution;

f) Whether common law, as entrenched in section 18(a), is in conflict with sections 9 and 10 of the Constitution and can be developed in terms of sections 8(3)(c) and/or 8(3)(b) of the Constitution;

g) Whether section 18(b) of the Act, if in conflict with the Bill of Rights, should be read down so as to give effect to a structural interpretation which section 39(2) demands of every court (to avoid inconsistency between the law and the Constitution).

Legal Principles and Application thereof

[7] It is a well established common law principle that delictual claims cannot be made by one spouse against the other for either patrimonial or non-patrimonial damages. However, this prohibition does not apply to spouses married out of community of property. The rationale behind the common law rule, that the proceeds of any judgement obtained against the other spouse would fall back into the joint estate, is succinctly set out in **Tomlin v London & Lancashire Insurance Co Ltd** 1962 (2) SA (D) at 33 F-G and cited with approval in **Delport v**

Mutual and Federal 1984 (3) 191 (D) at 193 D-E where Broome J had the following to say:

> "*I cannot accept that the law's ingenuity would not have devised means to enable a wife to pursue a remedy if she had a right. In my judgement, 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 in 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*".

The injured spouse would therefore receive no benefit from a successful delictual action against the other spouse and instituting action would accordingly be pointless and a futile exercise.

[8] Before evaluating the constitutional challenge posed by sections 18(a) and (b) of the Act, it is necessary to examine its provision. Section 18 provides as follows:

> "*Certain damages excluded from the community and recoverable from the other spouse.*
>
> *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 a delict committed against him, does not fall into the joint estate but becomes his separate property;*

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*." (My underlining).

[9] The literal and purposive interpretation of the section is that certain damages would be excluded from the community of property and be retained by the spouse as his/her exclusive property and that certain damages may be recoverable from the other spouse in the event of a delict committed by the one spouse against the other. The words "*other than damages for patrimonial loss*" specifically prohibit spouses from recovering damages for patrimonial loss.

[10] Section 19 provides that:

"*When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable under the Apportionment of Damages Act No 34 of 1956, such damages or contribution and any costs awarded against him are*

recoverable from the separate property, if any, of that spouse, and only in so far as he has property from the joint estate: Provided that in so far such damages or contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be."

[11] The effect of section 19 is that the injured spouse must first attempt to recover his or her damages and costs from the defendant's separate estate (if any) and to the extent that these assets are insufficient to satisfy the judgment debt or should no such separate estate exist, then an adjustment is made upon the division of the joint estate in favour of the injured spouse or his/her estate (as the case may be). In my view the provisions of section 19 appear to address the rationale behind the common law objection to delictual claims between spouses married in community of property.

Possible Interpretation of the Act & "reading down"

[12] It was argued on behalf of the plaintiff that the relevant provisions of the Act are capable of two interpretations. Firstly, that the use of the words *"other than damages for patrimonial loss"* in sections 18(a) and 18(b) confirms and codifies the common law prohibition against recovery of damages (at least arising from bodily injuries).

Section 19 limits its application to the recovery of non-patrimonial damages in delict. (See the words *"including damages for non-patrimonial loss, by reason of delict committed by him"*). Clearly this interpretation necessitates an enquiry into the constitutionality of the provisions of sections 18(a) and (b) and 19 of the Act. In my view, the words *"other than damages for patrimonial loss"* are designed to prevent special damages falling into the joint estate of the perpetrator who commits the wrongful, intentional and/or fraudulent act.

[13] The second interpretation is that the relevant sections of the Act do not codify and confirm the common law position, but merely modifies the common law by permitting the recovery of non-patrimonial damages (i.e. simply creates an exception to the common law). According to Mr. David, this interpretation would require the development of common law. As regards this issue, the Constitutional Court said:

> "*There is, it is true, a principle of constitutional interpretation that, where it reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although reasonable, would give rise to such an inconsistency. Such a construction is, however, not a reasonable one, when it can be reached only by distorting the meaning of*

*the expression being considered***.**" (See **National Coalition for Gay & Lesbian Equality v Minister of Home Affairs** 2000 (2) SA (1) para 23.)

[14] Mr David submitted that the plaintiff seeks an order of constitutional invalidity of the relevant provisions of the Act if, and only if the first interpretation is preferred by the court. Clearly, it is permissible in terms of our Constitution to read words into a statute to remedy unconstitutionality, but I am not persuaded to adopt or prefer any interpretation over the other at this stage because, "reading in" words into a statute is a remedial measure that should be implemented after a finding of constitutional invalidity. To this end the Constitutional Court held that:

"*There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and object of the Bill of Rights' as required by section 39 (2) of the Constitution and the process of reading into or severing them from a statutory provision which is a remedial measure under section 172(1)(b), following upon a declaration of constitutional invalidity in terms of section 172 (1) (a)… The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding all interpretative aids, is*

found to be constitutionally invalid". (See **National Coalition for Gay & Lesbian Equality v Minister of Home Affairs**, supra, para 24).

The next logical step, therefore, necessitates an evaluation of the constitutionality challenged provisions in the light of sections 9 and 10 of the Bill of Rights.

Do the provisions of sections 18(a) and (b) of the Act violate sections 9 and 8 of the Constitution?

[15] The challenged provisions of the Act are said to be in conflict with the right to equality (section 9 of the Constitution) and the right to dignity (section 10). Section 9 of the Constitution of the Republic of South Africa provides as follows:-

"*(1) Everyone is equal before the law and has the right to the equal protection of the law.*

2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) No person may unfairly discriminate against anyone directly or indirectly on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4) *No person may unfairly discriminate directly or indirectly against the other on one or more grounds in terms of subsection (3). National legislation must be enacted to prohibit unfair discrimination.*

5) *Discrimination on one or more of the grounds listed is unfair unless it is established that the discrimination is fair*."

Section 10 provides that everyone has inherent dignity and the right to have that dignity respected and protected.

[16] The need for protection of the values of equality and dignity has been repeatedly emphasized in numerous Constitutional Court decisions. (See **Du Plessis v Road Accident Fund** 2004 (1**)** SA 372 G, and **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,** supra. The Constitutional Court affirmed that the rights of equality and dignity are closely related.

[17] In determining whether or not unfair discrimination has taken place, a two stage enquiry, as set out by Goldstone J in **Harksen v Lane NO and Others** 1998 (1) SA 324 paragraph 54:

"*At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance with s 8 of the interim Constitution. They are:*

a) Does the provision differentiate between people or categories of people? If so does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there's a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to unfair discrimination? This requires a two-staged analysis:

i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an

unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(iii) If the discrimination is found to be unfair then a determination will have to be made as to whether the provisions can be justified under the limitations clause (s33 of the interim Constitution)".

[18] It has been submitted, on behalf of the defendant, that in applying the **Harksen** test, the differentiation between spouses married in and out of community of property does not amount to unfair discrimination because a party is entitled to adopt any of the marital regimes. The right to freely marry is protected by the Constitution and the institution of marriage. The law does not prescribe what marital regime certain people should choose, but simply attaches legal consequences to particular marital regimes. A particular marital regime is the manifestation of that choice, including its legal

consequences. Spouses, who do not wish the consequences of a marriage in community to regulate their union, remain free to choose other marital regimes. At this point, it is necessary to set out various matrimonial regimes in our law as in **Lawsa** Volume 16 page 79:

(a) "*One of the following property law regimes pertains to marriages concluded since 1 November 1984;*

(b) community of property subject to joint administration;

(c) exclusion of community of property without exclusion of profit and loss; ante nuptial property is subject to the control of the spouse to whom it belongs and the post-nuptial estate is subject to joint administration;

(d) exclusion of community of profit and loss, where each party retains full control of his or her own estate, and exclusion of the so-called accrual system;

(e) *the same as in paragraph (c) above, but with retention of the accrual system which operates upon dissolution of the marriage*".

[19] Further, it has been contended that the plaintiff adopted the

regime of her choice and is therefore bound by the restriction of the right to claim patrimonial damages. Indeed, it may be that people involved in a relationship may choose which marital regime to govern their union, but the challenged provisions were enacted long before the democratic values of equality and dignity came into existence. The impact these values have on the challenged provisions clearly needs to be assessed.

Do sections 18(a) and (b) violate sections 9 and 10 of the Constitution?

[20] Family law touches most people at least once in their lives. When people reach adulthood, get married, have children, and dissolve a marriage they should be aware of how their legal status changes. That is why it is important that spouses be familiar with their rights and obligations within the marriage. The contention that people adopt a marriage regime of their choice presupposes that the average lay person will realise the full legal and proprietary consequences of a chosen marital regime.

[21] In my view, the problem does not lie in the choice of marriage, but whether the prohibition of claims for patrimonial damages between spouses married in community of property amounts to unfair discrimination in a society that upholds the values of equality and dignity. Surely, if the Constitution is to have some relevance at grassroot level, the starting point should not be “as you make your bed, so must you lie on it”. The crisp question is whether the legal convictions of the community which now inherit the norms and values

espoused by the constitution, which is the supreme law, call for a departure from the provision of sections 18(a) and (b). (See **Du Plessis v Road Accident Fund** supra).

[22] Section 9(3) lists certain grounds certain on which discrimination is prohibited, one of which is marital status. I presume that marital status means the status in marriage. **The South African Concise Oxford dictionary** 10th edition at p712 defines: "*marital*" as "*adj. of relating to marriage or the relations between husband and wife*" (and defines "*status*" as inter alia "*n. 1 relative social or professional standing, the official classification given to a person, country, etc, determining their rights or responsibilities 2 the position of affairs at a particular time*" (**Oxford** page 1147-1148). Should discrimination take place on one of these grounds, then, in terms section 9(5), it is unfair unless the contrary is established. When applying the first leg of the **Harksen** test, in my view, differentiation does occur between spouses married in and those married out of community of property, and therefore the provisions discriminate on the grounds of marital status.

[23] The approach to be adopted in interpreting the Bill of Rights is the one "*which whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution*". (See **S v Makwanyane** 1995

(3) SA 391 (CC). Having regard to the definitions, the inclusion of the type of matrimonial property regime in the definition of the term of "*marital status*" is reasonably permitted by the text. Because marital status is a specified ground, the plaintiff, in my view, has established unfair discrimination.

The nature and impact of the discrimination

[24] The question for determination is whether the exclusion of spouses married in community of property from claiming patrimonial damages constitutes unfair discrimination. This exercise requires an examination of the impact of the discrimination on the affected group. I shall now consider whether the exclusion of spouses married in community of property from claiming damages for patrimonial loss is unfair and the impact the discrimination has on the members of this group. The nature and the unfairness of discrimination was considered and stated by Kriegler J in **President of the Republic of South Africa v Hugo** 1997 (4) SA (CC) 1 at 23 para 41 and 43 as follows:

> "*The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of the disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.*"

[25] The plaintiff's argument was that, in prohibiting spouses married in community of property from claiming damages for patrimonial loss, the Act discriminates on the ground of marital status. In my view, the denial of such an opportunity to spouses married in community of property is sufficient to constitute discrimination as contemplated in Section 9(3) of the Constitution. The primary object of an award for damages is to compensate the person who has suffered harm. (See **J C Van der Walt, Principles of a Delict** at p 216 para 143). Put differently, the aim is to place the plaintiff, as far as money can, in the same position in which he/she would have been had the delict not been committed. In the instant case, it is common cause that the plaintiff suffered injuries as a result of the defendant's intentional or negligent act of running her over with a motor vehicle. Foreclosure of redress to plaintiff solely on the basis of a chosen marital regime, in my view, infringes upon her right to be treated equally in terms of the law as well as her right to dignity. If, at the heart of the prohibition of unfair discrimination, is the establishment of a society in which all human beings are accorded equal dignity, then the provision in the Act excluding spouses married in community of property from claiming damages for patrimonial loss, clearly constitutes unfair discrimination.

[26] I have stated in this judgment, that *prima facie*, the provisions of

the Act discriminates against spouses married in community of property. It cannot be denied that the discrimination adversely affects the rights of spouses married in community of property. The constitutional issue therefore is whether the exclusivity principle is compatible with the prohibition of discrimination on the grounds of marital status.

[27] I now turn to consider the impact and effect of the discrimination on the marginalized group. The procedure for this enquiry is out in **Hugo** supra (page 25 para 43) as follows:

> "*To determine whether the impact was unfair, it necessary to look not only at the group who has been advantaged but the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination*".

[28] Although the Act is linguistically gender neutral, it causes significant more harm to women than men. Using the contextual approach to equality, in my view, the provisions of the Act discriminate further on the basis of gender because it is a fact in our society that the proportion of men likely to seek damages for patrimonial loss arising out of a delict is considerably smaller than the proportion of women likely to seek such relief. The exclusion of spouses married in

community of property is therefore indirect discrimination against women.

Does the discrimination serve a legitimate governmental objective?

[29] The next point to consider is whether the differentiation bears a rational connection to a legitimate government purpose or a legitimate purpose in private law. Mr Salie submitted that the differentiation does bear a rational connection to a legitimate government purpose because if damages are paid into the joint estate the husband would also benefit as a result of his own delict. (See **Tomlin** supra). It is indeed an important governmental objective that the joint estate of spouses should not be fraudulently enriched, but the extent to which this could be done should in no way deprive or undermine the values enshrined in section 9 of the Constitution, i.e. right to equality. My qualm with this argument is that patrimonial damages would be awarded to compensate the injured plaintiff, and compensation should in my view not be denied merely on the basis that, as a fact of life, an accretion to the family funds benefits both spouses. This contention cannot in itself be sufficient justification for prohibiting patrimonial damages claims between spouses married in community of property. After all, this reasoning may have equal application to damages awards made, in analogous situations, to other family members. 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 section 9.

Limitation of Rights

[30] It was argued that, even if the court finds that the discrimination amounts to being unfair, it is justified under the limitation clause, section 36 of the Constitution. Section 36(1) provides that the rights in the Bill of Rights may be limited only in terms of the law of general application, to the extent that the law is reasonable and justifiable in

an open democratic society based on dignity, equality and freedom, taking into account all relevant factors, including:

a. the nature of the right;

b. the importance of the limitation;

c. the nature and extent of the limitation;

d. the relationship between the limitation and its purpose; and

e. less restrictive means to achieve this purpose.

[31] It was further contended that the limitation is not of an arbitrary nature, and that section 18 was designed to prevent the joint estate from being fraudulently enriched, and that sections 18(a) and (b) will limit the possibility of fraud against the Road Accident Fund when spouses collude and inflict damages and claim patrimonial loss, for example a huge amount in respect of loss of earnings which would enrich the perpetrator's estate. It is the Road Accident Fund's proper function to compensate casualties within the risk it assumes, and to take positive steps to prevent fraudulent claims. Fraudulent claims against the fund cannot justify limiting the right to equality and the right to dignity. In my view, where there is insurance, there is always a risk of collusion. This cannot, by itself justify limiting the defendant from claiming damages patrimonial loss. Even so, why would the risk apply to spouses married in community of property, for even those married out of community of property can easily collude and share the

proceeds, each depositing the proceeds in his or her own separate estate?

[32] On this point, The Law Commission of the British Columbia (**Report on Interspousal Immunity in Tort**, LRC 62, March, 1983) comments as follows:

> "*If the possibility of collusive claims, per se, justifies immunity between the spouses then a logical step is to create immunity to bar claims by children against parents and vice versa*".

[33] Even if the fear of insurance fraud is great, it does not justify excluding a particular group of people (spouses married in community of property) from claiming patrimonial damages. The Law Reform Commission of Saskatchewan ***(Proposals for Reform of the Law Affecting Liability between Husband and Wife and Related Insurance Contracts,*** *(1979 11)* succinctly summarizes as follows:

> "*Not only is this fear probably largely unwarranted, but in any event, to deal with a blanket exclusion from coverage is an example of legislative 'overkill'. It overcomes any problems of collusion at too great a price, namely, by barring insurance recovery in those cases where there is no negligence and no collusion.*"

[34] I am, in the circumstances, persuaded that the prohibition of claims for patrimonial loss by spouses married in community of property is constitutionally unjustified. The fact that there is a possibility that the patrimonial damages may redound to the benefit of the wrongdoing spouse through an increase in 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.

[35] It may be that, if the prohibition for claims patrimonial damages is removed, this will give rise to floodgates of frivolous actions but despite the upsurge in domestic violence matters where spouses intentionally and negligently inflict harm on each other, there has been no report of a rise in delictual claims between spouses.

[36] As I stated earlier, the common law prohibition of delictual claims made by one spouse against another does not apply to spouses married out of community of property. If the existence of a joint estate is, at common law the obstacle to an action between spouses married in community of property, then that obstacle is removed when there is no longer a joint estate. Any amount that may be recovered by the plaintiff by way of delictual remedies for patrimonial loss in respect of bodily injuries suffered by her, does not fall into a joint estate because

there no longer is a joint estate. 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.

Is Plaintiff entitled to a Remedy?

[37] I have expressed elsewhere in this judgment that I am persuaded that sections 18(a) and (b) of the Act violates the constitutional law right to dignity and equality. I now proceed to consider the remedy the plaintiff is entitled to.

[38] Section 173 of the Constitution provides that the Constitutional Court, the Supreme Court of Appeals and the High Court have the inherent power to develop common law, taking into account the interests of justice. In terms of section 8 of the Constitution, a Court, in order to give effect to a right in the Bill of Rights, must develop the common law to the extent that legislation does not give effect to the right. Accordingly, a court should, in terms of section 39(2), when developing common law, promote the spirit, purport, and objects of the Bill of Rights.

[39] The conclusion I have reached that sections 18(a) and (b) is unconstitutional in so far as it fails to include delictual action for patrimonial damages in respect of bodily injuries for spouses married in community of property clearly needs redress. In considering the appropriate relief I must keep in mind the principle of separation powers and the obligation in terms of section 172(1)(b) of the Constitution, which requires the court to make an order which is just and equitable.

[40] In **Du Plessis v RAF** supra, the Supreme Court of Appeal cautions that Judges should be mindful of the fact that the engine for law reform should be the legislature, not the judiciary. In **S v Lawrence**, 1997 (4) SA 1205 (CC) para 8011 Chaskalson CJ wrote:

> "*A court may strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution, but what it cannot do is to legislate…*"

[41] Since the declaration that section 18(b) is inconsistent with the Constitution to the extent that it prohibits spouses married in community of property from claiming damages for patrimonial loss in respect of bodily injuries suffered by him/her, and is attributable either

wholly or in part to the fault of that spouse, it stands to reason that whatever remedy is appropriate should not interfere with the rest of the section 18, which remains valid.

Summary

[42] By use of the words *"other than damages for patrimonial loss,"* section 18(b) of the Matrimonial Properties Act No 88 of 1984 unfairly discriminates on the ground of marital status against spouses married in community of property. Such discrimination limits the equality of rights between married spouses guaranteed in section 9(3) and the right to dignity referred to in section 10. This limitation is not justifiable in an open society based on dignity, equality and freedom, and accordingly does not satisfy the requirement of section 36, the limitation clause. It would not be appropriate in the circumstances, to declare the whole section invalid. Instead, it would be appropriate to substitute the words *"other than damages for patrimonial* loss" with the words *"including damages for patrimonial loss".*

[43] In the result the following order is made:

1. The inclusion of the words "*other than damages for patrimonial loss*" in section 18(b) of the Matrimonial Properties Act No 88 of 1984 is declared to be inconsistent with the Constitution.

2. The words "*other than damages for patrimonial loss*" in section 18(b) should be removed and substituted with "*including damages for patrimonial loss*".
3. The order in paragraph 2 only comes into effect from the moment of making this order.
4. This order shall have no effect on judgments that have already been handed down.
5. There is no order as to the costs of these proceedings.

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NDITA, AJ