IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6427/2010

In the matter between:

ANGELIQUE JANE STEYN **Plaintiff**

and

CHANTAL SHEREE STEYN **Defendant**

JUDGE	:	**P.A.L. Gamble**
FOR THE PLAINTIFF	:	**Adv. Pierre Rabie**
INSTRUCTED BY	:	**Hannes Pretorius, Bock and Isaacs c/o 59 Visagie Vos & Partners**
FOR THE DEFENDANT	:	**Not represented**
INSTRUCTED BY	:	
DATES OF HEARING	:	**7 July 2010**
REASONS DELIVERED	:	**27 October 2010**

REPORTABLE

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WESTERN CAPE HIGH COURT, CAPE TOWN

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In the matter between:

ANGELIQUE JANE STEYN **Appellant**

and

CHANTAL SHEREE STEYN **Respondent**

REASONS : 27 OCTOBER 2010

GAMBLE, J:

INTRODUCTION

[1] This matter came before me as an unopposed divorce in the Motion Court on 7 July 2010. After hearing the evidence of the Plaintiff and argument by her counsel, I granted an order of divorce incorporating the terms of the Settlement Agreement concluded between the parties on 7 July 2010. I undertook to file reasons for my order. Those reasons are set out hereunder.

[2] The plaintiff testified that in March 2005 she resided in Johannesburg. She then left South Africa to work and reside in the United Kingdom: as the holder of a British passport she was permitted to

do so. The Plaintiff said that it had always been her intention to return to South Africa and that the reason for taking up employment in the United Kingdom was to earn money in a foreign currency.

[3] The Plaintiff knew the Defendant before she left South Africa and they travelled to England together where they co-habited. On 9 August 2006 the parties entered into a civil partnership at the West Surrey Register Office in Guildford outside London. This partnership was validated by a certificate issued under the Civil Partnership Act 2004, the legislation in the United Kingdom which governs registered same-sex partnerships.

[4] The Plaintiff testified that her relationship with the Defendant soured and they separated in 2007. As the Plaintiff put it, *"she was more interested in my British passport than me."* The Plaintiff returned to Johannesburg in 2009 and then relocated to Gordon's Bay in the Western Cape which she now considers to be her permanent home.

[5] According to the Plaintiff, the Defendant too returned to South Africa and she currently resides in Kempton Park, Gauteng. At that stage the parties' relationship had clearly broken down irretrievably.

[6] On 30 March 2010 the Plaintiff issued summons out of this Court and made the following allegation in her particulars of claim:

"On 9 August 2006 and at Artington House, Guildford, England, the parties were married in community of property and the marriage still subsists."

[7] The relief sought includes prayers for a decree of divorce and division of the joint estate.

[8] The summons was duly served on the Defendant who did not oppose the action.

[9] When the matter came before the Motion Court on 1 June 2010, Justice Binns-Ward raised certain queries regarding this Court's jurisdiction to grant a decree of divorce in respect of a same-sex marriage, (or similar union) solemnised in a foreign jurisdiction. The matter was adjourned to enable counsel to consider the legal position.

[10] At the hearing before me Mr. Rabie, for the Plaintiff, produced a useful memorandum which has facilitated the preparation of this judgment. I am indebted to counsel for his assistance in this regard.

[11] Before considering this court's jurisdiction to dissolve foreign same-sex relationships it is apposite, first, to have regard to its jurisdiction in respect of the dissolution of same-sex partnerships concluded locally.

THE CIVIL UNION ACT NO. 17 OF 2006

[12] The Civil Union Act No. 17 of 2006 ("the Act") is a piece of legislation which has its genesis in various sections of the Constitution of the Republic of South Africa, 1996. It follows upon the decision in Minister of Home Affairs and Another v Fourie and Another [1] in which the Constitutional Court held that:

12.1 the common law definition of marriage was inconsistent with the Constitution in that it deprived same-sex couples of the status, benefits and responsibilities which the institution of marriage accorded to heterosexual couples;

12.2 the provisions of Section 30(1) of the Marriage Act, 25 of 1961 were *pari passu* inconsistent with the Constitution; and

12.3 Parliament was to address these defects within twelve months, failing which certain words were to be read into Section 30(1) of the Marriage Act.

[13] The Legislature was required to respond to the Constitutional Court's directive by 1 December 2006. It left matters rather late and the first draft of the relevant Bill was only considered by Parliament in September 2006. Substantial changes were effected to the first draft and the second draft was ultimately adopted by Parliament in November 2006 before it came into operation on the 30th of that month. Significantly,

[1] 2006 (1) SA 523 (CC)

Parliament did not amend the Marriage Act but sought to comply with the Constitutional Court's directions in the Fourie case by passing a separate Act. The resultant legislation has not achieved universal acclaim in South Africa and, as will be seen hereunder, unfortunately has the watermark of rushed legislation.

[14] There are to date no cases (either reported or unreported) in which the Act has been considered. It has however attracted comment from many quarters and has been criticised in a number of academic articles. [2]

[15] As de Vos and Barnard point out in their article in the South African Law Journal (*supra*), the principle aim of the Act was to address same-sex relationships and to afford them the same status as heterosexual relationships. Yet, they argue that the Legislature failed to achieve this and has created confusion in its attempts to categorise long-term relationships entered into between same-sex adults on the basis of love and commitment, to the exclusion of all others, for so long as they last.

[16] The preamble to the Act refers to Sections 9(1)(equality), 9(3) (unfair discrimination), 10(1)(dignity) and 15(1)(freedom of conscience, religion, thought, belief and opinion) of the Constitution and notes that:

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[2] Elsje Bonthuys, Race and Gender in the Civil Union Act (2007) SAJHR 526; Elsje Bonthuys, Possibilities Foreclosed: The Civil Union Act and Lesbian and Gay Identity in Southern Africa, Sexualities 2008 11: 726 (http://sex.sagepub.com/content/11/6/726); Pierre de Vos, The "Inevitability" of Same-sex Marriage in South Africa's Post-Apartheid State, (2007) SAJHR 432; Pierre de Vos and Jaco Barnard, Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga (2007) 124 SALJ 795; Bradley Smith and J.A. Robinson, the South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process vol 22 (2008) BYU Journal of Public Law 419.

> *"the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples."*

[17] In Section 1 of the Act a "**civil union**" is defined as:

> *"...the voluntary union of two persons who are both eighteen years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others..."*

[18] Curiously the phrase "civil partnership" is not defined in the Act, but it will be noted that the definition of a civil union does not limit its ambit to same-sex couples.

[19] The objectives of the Act are said, in Section 2 thereof, to address both the solemnisation and registration of civil unions and the legal consequences thereof

[20] Sections 4 to 12 of the Act then deal with a variety of procedural and related issues, including the solemnisation and registration of civil unions. Importantly, in terms of Section 8 of the Act a person may only be a spouse/partner in one civil union, and may not conclude either a marriage under the Marriage Act while being a partner in a civil union, or register a civil union while still being married under the Marriage Act.

[21] If a person wishing to enter into a civil partnership under the Act was previously married under the Marriage Act s/he must produce proof of dissolution of that marriage either through a divorce order or a death certificate of the other spouse. (Section 8(4)).

[22] Section 13 of The Act determines the legal consequences of a civil union as follows:

> *"13 Legal consequences of civil union*
>
> *(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.*
>
> *(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to -*
>
> *(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and*
>
> *(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."*

[23] Consequently, a civil union concluded in accordance with the provisions of the Act is intended to have all the ordinary consequences of a marriage otherwise concluded under the Marriage Act or Customary Marriages Act, save that it is not to be regarded as, or termed, a marriage under either of those Acts. So, for example, the reciprocal duty of

support which spouses owe each other at common law would apply equally to same-sex partners to a civil union.

A MARRIAGE PROPERLY SO CALLED?

[24] Somewhat paradoxically, the parties are given the choice under Sections 11(1) and (2) of the Act to choose whether to call their relationship a marriage or a civil partnership:

> *"11. Formula for solemnisation of marriage or civil partnership*
>
> *(1) A marriage officer must enquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed by solemnising the civil union in accordance with the provisions of this section.*
>
> *(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:*
>
> > *"Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?", and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:*

"I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership.""

[25] The paradox is that, firstly, the phrase "civil partnership" is not defined in an act which deals with civil unions, and, further, the word "marriage" is intended to refer to a state of matrimony which may not constitute a marriage under the Marriage Act notwithstanding the fact that the civil union is concluded before a marriage officer appointed under that Act. Nevertheless, the Legislature has determined that a civil union may be called either a civil partnership or a marriage: it is left up to the parties to decide on the preferred nomenclature.

[26] Despite the preamble, in which the Legislature commits itself to addressing the plight of same-sex couples, it appears that the Act contemplates the recognition of the following long term domestic co-habitation arrangements in South Africa:

(i) A marriage under the Marriage Act. This must *per force* be a heterosexual relationship.

(ii) A marriage under the Customary Marriages Act which would usually also involve heterosexual persons;

(iii) A marriage under the Act which can be between persons of either the same or opposite sexes; and

(iv) A civil partnership under the Act which can similarly be between persons of either the same or opposite sexes.

[27] Just why a heterosexual couple who are able to conclude a valid marriage under the Marriage Act, would chose to conclude a marriage under the Civil Union Act is not clear. Regrettably, it seems that inherent in Parliament's response to the Fourie case is the perpetuation of "otherness", or as some of the commentators referred to above point out, a retreat to the "separate but equal" philosophy which was a hallmark of the apartheid era.

DISSOLUTION OF A CIVIL UNION CONCLUDED UNDER THE ACT

[28] Marriages under the Marriage Act are dissolved either by the death of one of the spouses or by a divorce action initiated under the Divorce Act, 1979. But what of a marriage or civil partnership concluded under the Act? In light of the provisions of Section 8 to which I have referred above, it is imperative that a civil union be capable of lawful termination other than through the death of one of the partners in circumstances where it has broken down irretrievably.

[29] The Act itself contains no provisions which govern the dissolution of a civil union. The rationale behind this obvious omission is that the Legislature intended that the provisions of Section 13(2)(a) of the Act should incorporate the relevant provisions of the Divorce Act as the applicable statute for dissolving such partnerships. In this regard it will be noted that Section 13(2)(a) of the Act specifically incorporates a

reference to the word marriage in "any other law" as being a reference, also, to a civil union.

[30] Because the Divorce Act is regarded as "other law" for purposes of the application of Section 13(2)(a) of the Act, any reference in the Divorce Act to "marriage" will apply *pari passu* to both a marriage and a civil union concluded under the Act. The Divorce Act is then the appropriate procedural mechanism for the dissolution of either a marriage under the Marriage Act, a marriage under the Act or a civil partnership under the Act.

[31] That procedure is prescribed in the Divorce Act in the following circumstances:

> *"3. <u>Dissolution of marriage and grounds of divorce</u>*
>
> *A marriage may be dissolved by a court by a decree of divorce and the only grounds on which a decree may be granted are –*
>
> *(a) The irretrievable break-down of the marriage as contemplated in Section 4;*
> *(b) The mental illness or the continuous unconsciousness, as contemplated in Section 5, of a party to the marriage."*

[32] I conclude therefore that a same-sex marriage or same-sex civil partnership concluded under the Act is capable of dissolution under Section 3 of the Divorce Act. Similarly, given the extension of the

meaning of "husband, wife or spouse" in Section 13(2)(b) of the Act to civil union partners, any ancillary or *pendente lite* relief contemplated under the Divorce Act must be available to the same-sex partners to either such a marriage or civil partnership. This would include orders for maintenance under Section 7(2) of the Divorce Act and relief under Rule 43 of the Uniform Rules.

[33] Notwithstanding the obvious short-comings in the Act, I consider that it is correct to say that the present state of our law then is that a same-sex union concluded under the Act is fully cognizable as a marriage, whether the partners thereto choose to call it a marriage or a civil partnership, and that such union is capable of dissolution under the Divorce Act.

FOREIGN SAME-SEX PARTNERSHIPS

[34] What then is the status in South Africa of a same-sex marriage/partnership concluded outside of the Republic? In terms of our common law the validity of a foreign marriage is determined by application of the principle of *lex loci celebrationis.* [3] Accordingly, if the marriage is duly concluded in accordance with the legal requirements for a valid marriage in that foreign country, it will be recognised by a local Court which will be entitled to exercise its powers under the Divorce Act

[3] LAWSA (2nd Ed) Vol 2 Part 2 p26 para 307; Ngqobela v Sihele (1893) 10 SC 346 at 352; Seedat's Executors v The Master (Natal) 1917 AD 302 at 307; Pretorius v Pretorius 1948 (4) SA 144 (O at 147-9; Forsyth Private International Law pp 243-5.

provided that the ordinary residential jurisdictional requirements under Section 2 of the Divorce Act have otherwise been met. Indeed, this happens regularly in this Division where persons married in say England, Australia, Namibia or Zimbabwe and resident in South Africa are granted decrees of divorce from time to time.

[35] As noted above, in the United Kingdom same-sex partnerships are regulated by the Civil Partnership Act 2004 ("the English Act"). This statute is a formidable piece of legislation which consists of some 490 pages [4]. It has 264 sections with 30 schedules, with many of the schedules being made up of 5 or more parts. The Act itself and the schedules thereto deal individually with civil partnerships concluded in England and Wales, Scotland, Northern Ireland and abroad. Different provisions are made in respect of *inter alia* registration, dissolution, property and financial arrangements, children and ancillary relief in respect of each of the aforesaid geographical areas. For present purposes it is only necessary to have regard to Part 1 (Sections 1(1)-1(5) Part 2 (Sections 2-84) and Schedules 1-9 of the English Act. The latter relate exclusively to England and Wales, while Part 1 is a clause of general application.

[36] At the outset it must be said that in certain respects the English Act has many points of coincidence with the Act, while in other respects it is

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[4] It is accessible at http://www.opsi.gov.uk/acts2004/pdf/ukpg 20040033_en.pdf

far more extensive and detailed. For purposes of this judgment the following aspects are relevant:

36.1 An English civil partnership is reserved exclusively for same-sex partners (Section 1(1)).

36.2 It terminates only on death, dissolution or annulment (Section 1(3)).

36.3 It is subject to official registration (Section 2) and the conclusion of a separate civil partnership document (Section 7).

36.4 No religious service may be used when the civil partnership registrar is officiating at the signing of a civil partnership document (Section 2(5)).

36.5 The partners to such a partnership must be of the same sex, must be older than 16 years, may not already be civil partners or legally married, and must not be within prohibited degrees of relationship (Section 3).

36.6 The proposed civil partnership is publicly advertised and is subject to a 15 day waiting period (Sections 8, 10 and 11)).

36.7 The Chancellor of the Exchequer (i.e. The Minister of Finance) is given the power (subject to the approval of Parliament) to make amendments to the Act "*for the purpose of assimilating any provision connected with the formation or recording of civil partnerships in England and Wales to any provision made*

.... in relation to civil marriage in England and Wales." (Section 35(1)(a)).

36.8 *"Civil marriage"* is defined as a *"marriage solemnised otherwise than according to the rites of the Church of England or any other religious usages."* (Section 35(2)).

36.9 The High Court (or a County Court with appropriate family court jurisdiction) has the power to, *inter alia* –

36.9.1 grant a dissolution order in respect of a civil partnership on the grounds of irretrievable breakdown (Section 37(1)(a);

36.9.2 grant an order of nullity; (Section 37(1)(d)); or

36.9.3 make a separation order in respect of civil partners (Section 37(1)(d)).

36.10 Before a court may grant any order of dissolution, nullity or separation it must have regard to the interests of children in the family (Section 63).

36.11 There are also extensive provisions for care and contact, guardianship, residency and financial support for such children (Sections 75-78).

36.12 The rules in the law of evidence as to the non-compellability of spouses to testify against each other are preserved (Section 84).

[37] In the circumstances I am of the view that a civil partnership concluded under the English Act has all the hallmarks of a marriage save that it may not be termed so under that Act. Of particular significance is the power of the Chancellor of the Exchequer referred to in para 36.7 above to make the necessary amendments to the English Act so as to assimilate a civil partnership with a civil marriage.

[38] The English Act also makes provision for the recognition of foreign same-sex civil partnerships which are lawfully concluded in that other country, subject to certain "general conditions" and public policy considerations (Sections 212-218).

[39] These "general conditions" are worth mentioning in detail:

> *"214. The general conditions are that, under the relevant [foreign] law –*
>
> *(a) The relationships may not be entered into if either of the parties is already a party to a relationship of that kind or lawfully married,*
>
> *(b) The relationship is of indeterminate duration, and*
>
> *(c) The effect of entering into it is that the parties are –*
>
> *(i) treated as a couple generally or for specified purposes, or*
>
> *(ii) treated as married."*

[40] In terms of Chapter 3 of Part 5 of the English Act (Sections 219-224) the Family Courts in England and Wales have (or will assume) jurisdiction to grant orders of dissolution, separation or nullity in respect of recognised foreign same-sex partners and will also grant them ancillary relief.

[41] In the instant case, the parties' civil partnership is legally recognised in England and while it may not be called one in that country, it has all the hallmarks of a marriage between persons of the opposite sex. Most importantly, in England their civil partnership can only be dissolved by death or by an order of Court. Furthermore, having entered into such a partnership they may not enter into another civil partnership (or a heterosexual marriage) until such time as their civil partnership has been dissolved. I am therefore of the view that the parties' English civil partnership, having been lawfully concluded in that country, should be accepted as a valid and binding civil partnership in the Republic in accordance with the *lex loci celebrationis* principle, provided only that it does not otherwise offend South African public policy.[5]

[42] Furthermore, in light of the constitutionality of permanent same-sex relationships in our law, there can be no suggestion of legal repugnancy of an English same-sex civil partnership, or that it is *contra bonos mores*.

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[5] LAWSA *op cit* p 310 para 293

DISSOLUTION OF CIVIL UNION CONCLUDED ELSEWHERE

[43] Our Courts are now required to interpret the provisions of the Constitution and other legislative instruments purposively and with due regard to the constitutional context in which they are set [6]. This is particularly important in attempting to strike a clean break with past practices which were born out of discrimination and prejudice.

[44] I have shown above that the Divorce Act is the statute in terms of which South Africans who are spouses/partners to a marriage or civil union concluded in South Africa (regardless of whether their relationship is same-sex or heterosexual) must dissolve that relationship. That Act is also available to heterosexual couples who were lawfully married outside of the Republic of South Africa and who now wish to become divorced from each other while residing in this country.

[45] To exclude from that category of prospective divorcees, partners who have concluded a lawful and enforceable same-sex civil union outside of South Africa, would only entrench and perpetuate the discrimination to which gay men and lesbians have been subjected in the past. All the more so where the partners to that civil union are South African citizens who may have exchanged their vows outside of the Republic by force of circumstance, or because they chose to travel to some exotic location to celebrate such an important event in their lives. Since it is axiomatic that

[6] Du Plessis v De Klerk 1996 (3) SA 850 (CC) at 910 D-E para 123; Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development 2000 (1) SA 661 (CC) at 686 G-H

citizens of this country should have access to local courts to resolve their disputes, there is no reason why there would be any restriction in respect of family law disputes.

[46] In the present case, were the Court not to apply a purposive interpretation of the Divorce Act (and in particular the word "marriage" therein) so as to accommodate duly concluded foreign same-sex unions, South African partners to a lawful English same-sex union would have to travel to the United Kingdom and file for dissolution in a Family Court there, provided of course that they are able to otherwise meet that Court's jurisdictional requirements in relation to residency. The perversity of this requirement is only exacerbated when one has two parties who are in agreement as to the terms and conditions of the dissolution of their relationship and where neither of them is evidently financially well-off and readily able to bear the costs of such an excursion. This would simply add insult to injury.

[47] A purposive interpretation of the word "marriage" in the Divorce Act is aimed at giving a word in a pre-constitutional statute a meaning which accords with the prescripts of Section 39(2) of the Constitution –

> *"39(2) when interpreting any legislation every Court .... must promote the spirit, purport, and objects of the Bill of Rights."*

[48] To restrictively interpret the word "marriage" so as to exclude legally recognized foreign same-sex relationships, while allowing it to apply to lawful foreign marriages and lawful South African same-sex marriages or civil partnerships, would offend against the fundamental rights referred to in the preamble to the Act (as set out in para 16 above), as also the provisions of Section 34 of the Constitution which guarantee access to our Courts.

[49] In Govender v Minister of Safety and Security [7] Olivier JA set out the approach to be adopted in the interpretation of statutory provisions under the Constitution.

"This requires magistrates and judges:

(a) to examine the objects and purport of the Act or the section under consideration;
(b) to examine the ambit and meaning of the rights protected by the Constitution;
(c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution i.e. by protecting the rights therein protected;
(d) if such interpretation is possible, to give effect to it, and
(e) if it is not possible, to initiate steps leading to a declaration of Constitutional invalidity".

[7] 2001 (4) SA 273 (SCA) t p 280 H para 11.

The approach in Govender was endorsed by the Constitutional Court in Ex parte Minister of Safety and Security and Others: In re: S v Walters and Another[8].

[50] Accordingly, if the word "marriage" in Section 3 of the Divorce Act is read so as to include a reference to a lawful, registered same-sex union which has all the hallmarks of a heterosexual marriage under the common law, save that it is not called a marriage, such a reading would protect and advance the relevant fundamental rights in the Constitution to which reference has been made above. Given that the purpose of the Divorce Act is to provide a statutory mechanism for the dissolution of marriages, and further given that locally concluded and registered same-sex unions are capable of dissolution thereunder, there does not appear to be any basis for distinguishing and excluding similar unions concluded outside of the Republic.

[51] I am therefore of the view that the word "marriage" in Section 3 of the Divorce Act must be read so as to include registered foreign same-sex marriages or civil unions/partnerships which are lawful in the country in which they are concluded.

[52] The parties are, in my view, therefore entitled to assert in a South African court that they are lawfully "married" for purposes of the application of the Divorce Act and to request our courts to dissolve their

[8] 2002 (4) SA 613 (CC)

civil partnership in accordance with the provisions of Section 3 of the Divorce Act. For purposes of pleading though I think it would be preferable to describe the relationship with reference to the relevant statute under which it is concluded and to give it the name designated by such statute, or, in the case of a civil union concluded under the Act, the description thereof which the parties have been chosen under Section 11(1).

MATRIMONIAL PROPERTY REGIME

[53] As pointed out above, the Plaintiff alleged in her particulars of claim that the parties were married in community of property in England. They did not conclude any pre-nuptial agreement and accordingly the default position in that country would ordinarily apply *viz* that the parties would be married out of community of property.

[54] The allegation in the particulars of claim that the parties were married in community of property seems to be based on the fact that at the time that they were married, the Plaintiff was still domiciled in the Republic, and had not formed the necessary *animus non revertendi.* It is not clear from the Plaintiff's evidence what the Defendant's domicile was at the time that the parties entered into the civil union, but, judging from her subsequent return to South Africa, it is fair to infer that she too had probably not formed an *animus non revertendi.*

[55] Under the common law the matrimonial property regime of a foreign marriage is to be determined according to the law applicable in the husband's country of domicile at the time of the marriage, the so-called *lex domicilii matrimonii.* [9] Of course, that principle is incapable of application in same-sex marriages. Further, it is likely to fall foul of the equality provisions entrenched in Section 9 of the Constitution. [10]

[56] It is for the Legislature to address the position in relation to same-sex marriages/unions concluded by South Africans abroad, in order that there can be legal certainty as to which property regime is applicable to the parties marriage or civil partnership. There does not appear to be any problem in regard to such a relationship concluded locally since the common law position (to be regarded as "any other law" in terms of Section 13(2)(a) of the Act) of community of property would apply in the absence of an ante nuptial contract.

[57] To the extent that the parties *in casu* resolved the proprietary consequences of their relationship by concluding a written deed of settlement, it was not necessary to make any determination on the applicable proprietary regime. However, practitioners would be advised to plead the applicable regime with the necessary degree of accuracy in order that a court may properly adjudicate the proprietary claims before it.

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[9] Sperling v Sperling 1975 (3) SA 707(A)
[10] LAWSA op.cit.p328 para 309

P.A.L. GAMBLE