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National Report: The Republic of South Africa

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NATIONAL REPORT: THE REPUBLIC OF SOUTH AFRICA

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1. Legal framework

The Republic of South Africa has a typically mixed or hybrid legal system. Its common law is Roman-Dutch law (although no longer in its pure form), introduced by Dutch settlers at the Cape of Good Hope in the mid-1600s. The Dutch relinquished rule at the Cape to the English in 1806 and, although the English rulers retained Roman-Dutch law as the common law of its newly-acquired territory, an aggressive policy of Anglicization, particularly after 1820, occasioned an assimilation of English legislation, legal institutions, and legal terminology into the Civilian legal system at the Cape. Settlement by Whites in the Southern African hinterland from 1837 onward occasioned the coalesced legal system of Roman-Dutch and English law to become entrenched throughout modern-day South Africa. A third tier of the mixed South African legal system is African customary law, the legal system of the indigenous African (Black) peoples of South Africa. African customary law initially received limited recognition by the South African legislature and courts, but has assumed a more prominent role, both legislatively and judicially, since the advent of South Africa's democratic constitutional dispensation.

South Africa became a constitutional democracy in 1994. Its current Constitution, the Constitution of the Republic of South Africa of 1996, is, in terms of section 2 thereof, the supreme law of the Republic and any law or conduct inconsistent with the Constitution is invalid. The Constitution entrenches the *trias politica*: Parliament, comprising of the National Assembly and the National Council of Provinces, is regulated as the national legislative authority by Chapter 4 of the Constitution; the President and the National Executive are regulated as the executive authority by Chapter 5 of the Constitution; and the courts are regulated as the judicial authority by Chapter 8 of the Constitution. The Constitutional Court is, in terms of section 167(3)(a) of the Constitution, South Africa's highest court in all constitutional matters, which includes making a final decision on the

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constitutionality of any Act of Parliament, a provincial Act, or the conduct of the President; moreover, the Constitutional Court must, in terms of section 167(5) of the Constitution, confirm any order of constitutional invalidity made by the Supreme Court of Appeal or by a High Court.

Chapter 2 of the Constitution enacts the Bill of Rights, which, in terms of section 7(1) of the Constitution, is the cornerstone of democracy in South Africa. Section 8 of the Constitution determines that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state; moreover, it binds any natural or legal person. The Bill of Rights guarantees a number of fundamental rights, the most important of which for purposes of this report is the right to equality, guaranteed in section 9 of the Constitution, and the right to human dignity, entrenched in section 10 of the Constitution (see the further discussion below).

In terms of section 44(1)(a)(i) of the Constitution, the National Assembly can amend the Constitution. Bills amending the Constitution are regulated by section 74 thereof. For purposes of this report, section 74(2) is of particular importance—it stipulates that Chapter 2 of the Constitution (the Bill of Rights) may be amended by a Bill passed by the National Assembly with the supporting vote of at least two thirds of its members and the National Council of Provinces with a supporting vote of at least six provinces.

2. Constitutional regulations applicable to same-sex partnerships

As indicated above, two provisions of the South African Bill of Rights particularly support same-sex partnerships. Arguably, the foremost of the two is the right to equality (also termed the right to non-discrimination). Section 9(1) of the Constitution determines that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) lists a number of grounds upon which the state may not directly or indirectly discriminate against anyone. For purposes of this report, the following grounds listed in section 9(3) are pertinent: gender, sex, marital status, and sexual orientation. Section 10 of the Constitution stipulates that everyone has inherent dignity and the right to have their dignity respected and protected.

In *Minister of Home Affairs v. Fourie* (*Doctors for Life International and Others Amici Curiae*); *Lesbian and Gay Equality Project v. Minister of Home Affairs* 2006 1 SA 524 (CC), South African law's common-law definition of marriage and the provisions of South Africa's Marriage Act 25 of 1961—permitting marriage only between a man and a woman—was challenged. Justice Sachs remarked that the Constitutional Court, in a long line of cases—the majority of which were concerned with persons' inability to get married because of their sexual orientation—highlighted the

significance of the concepts and values of human dignity, equality and freedom for South Africa's equality jurisprudence; moreover that those cases had to serve as the compass in the challenge before the Court in the *Fourie* case. In a profound equality-analysis, Justice Sachs opined, *inter alia*, as follows regarding earlier South African constitutional jurisprudence regarding discrimination against same-sex couples (in paragraph 50 of the *Fourie* judgment):

[T]he conclusions regarding the minority status of gays and the patterns of discrimination to which they had been and continued to be subjected were also applicable to lesbians. The sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays. The Court went on to hold that it had recognised that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination would be held to be unfair. Vulnerability in turn depended to a very significant extent on past patterns of disadvantage, stereotyping and the like.

Justice Sachs' equality-analysis occasioned the conclusion (in paragraph 71 of the *Fourie* judgment) that the exclusion of same-sex couples from the benefits and responsibilities of marriage was not merely a small and tangential inconvenience resulting from a few surviving relics of societal prejudice; rather, it represented a harsh statement by the law that same-sex couples are outsiders and, moreover, that their need for the affirmation and protection of their intimate relations as human beings was somehow less than that of heterosexual couples. Furthermore, it reinforced the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society and as such do not qualify for the full moral concern and respect that the Constitution seeks to secure for everyone. Finally, it signified that their capacity for love, commitment, and accepting responsibility was, by definition, less worthy of regard than that of heterosexual couples.

In light of the foregoing, the Constitutional Court ordered (in paragraph

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162 of the *Fourie* judgment), first, that the South African common-law definition of marriage was inconsistent with the Constitution and invalid “to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples” and, secondly, that the omission from section 30(1) of the Marriage Act after the words “or husband”¹ of the words “or spouse” was inconsistent with the Constitution, with the result that the Marriage Act was declared invalid to the extent of this inconsistency. In the result, the Constitutional Court ordered Parliament to remedy this defect within one year of delivery of the *Fourie* judgment. Parliament consequently enacted the Civil Union Act 17 of 2006 (discussed below).

3. Legal statutes

3.1 A specific law allowing same-sex marriages

South Africa does not have a specific law catering exclusively for same-sex marriages, but the Civil Union Act (discussed below) permits the registration of a civil union, which can take the form of either a marriage or a civil partnership; i.e. heterosexual and same-sex couples have the choice to enter into a marriage (in terms of the formalities prescribed by the Civil Union Act, rather than those prescribed by the Marriage Act) or a civil partnership (in terms of the formalities prescribed by the Civil Union Act).

3.2 Civil union regulation

In consequence of the Constitutional Court’s order in the *Fourie* judgment that Parliament must cure the constitutional invalidity of the Marriage Act, the South African Law Reform Commission recommended that the Marriage Act be amended, *inter alia* by extending the definitions of “marriage” and “spouse” in the Act to be inclusive of same-sex couples. The Law Reform Commission proffered a second possibility, namely that of a dual act—an Orthodox Marriage Act to regulate “the voluntary union of a man and a woman” alongside a Reformed Marriage Act as a generic Act regulating marriage which would be open to everybody.² However,

1. In terms of s 30(1) of the Marriage Act marriage officers other than ministers of religion must put to each of the parties the following question: “Do you, A B, declare that as far as you know there is no lawful impediment to your proposed marriage with C D here present, and that you call all here present to witness that you take C D as your lawful wife (or husband)?” and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: “I declare that A B and C D here present have been lawfully married.”

2. See the discussion by 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 4) *South African Law Journal* 795, 806–807.

Parliament opted for the enactment of civil union regulation in the form of the Civil Union Act 17 of 2006, which Act commenced its operation on 30 November 2006. The Marriage Act, therefore, remains unchanged for the time being and caters only for marriages between heterosexual partners, whereas the Civil Union Act, co-existent with the Marriage Act, incorporates partners, who either cannot or do not want to enter into a marriage as prescribed by the Marriage Act, into a legally-recognized, gender-neutral, marriage-like structure.

Section 1 of the Civil Union Act defines “civil union” as “the voluntary union of two persons who are both 18 years of age or older, which is solemnized 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;” whereas “civil union partner” is defined as “a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act.” The Act, in terms of section 3 thereof, applies to civil union partners joined in a civil union.

The requirements for solemnization and registration of a civil union are laid down in section 8 of the Act:

- (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.
- (2) A person in a civil union may not conclude a marriage under the Marriage Act or the Recognition of Customary Marriages Act 120 of 1998.³
- (3) A person who is married under the Marriage Act or the Recognition of Customary Marriages Act may not register a civil union.
- (4) A prospective civil union partner, who has previously been married under the Marriage Act or Recognition of Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under the Civil Union Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.
- (5) The marriage officer may not proceed with the solemnization and registration of the civil union unless in possession of the relevant documentation referred to in (4) above.
- (6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of

3. The Recognition of Customary Marriages Act bestowed full legal recognition and validity on marriages concluded by Black South Africans in terms of the prescripts of African customary law.

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the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Recognition of Customary Marriages Act.

Section 12 of the Act regulates the registration of a civil union:

- (1) The prospective civil union partners must individually and in writing declare their willingness to enter into the civil union with one another by signing the prescribed document in the presence of two witnesses.
- (2) The marriage officer⁴ and the two witnesses must sign the prescribed document to certify that the declaration made in terms of section 11(2)⁵ was made in their presence.
- (3) The marriage officer must issue the partners to the civil union with a registration certificate stating that they have, under the Civil Union Act, entered into a marriage or a civil partnership, depending on the decision made by the parties in terms of section 11(1).
- (4) The certificate contemplated in (3) above is *prima facie* proof that a valid civil union exists between the partners referred to in the certificate.
- (5) Each marriage officer must keep a record of all civil unions conducted by him or her.
- (6) The marriage officer must transmit the civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.
- (7) Upon receipt of the said register the official referred to in (6) above must cause the particulars of the civil union concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act 68 of 1997.

Section 13 of the Act prescribes the legal consequences of a 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 Recognition of Customary Marriages Act, any reference to marriage in any other law, including the common law, includes, with such

4. Section 1 of the Act defines "marriage officer" as either a marriage officer *ex officio* or so designated by virtue of section 2 of the Marriage Act, any minister of religion, or any person holding a responsible position in any religious denomination or organization, designated as marriage officers under section 5 of the Civil Union Act.

5. Section 11 of the Act prescribes the formula for the solemnization of a marriage or civil union.

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changes as may be required by the context, a civil union; and “husband,” “wife” or “spouse” in any other law, including the common law, includes a civil union partner.

3 3 Is South African civil union regulation open to heterosexual couples or only to same-sex couples?

As indicated above, South African civil union regulation is open to heterosexual and same-sex couples.

3 4 Is there any formal differential treatment between heterosexual and same-sex couples within South Africa’s legal framework?

No. As indicated above, should a couple conclude a marriage in terms of the Civil Union Act, such marriage has the same legal consequences as a marriage concluded in terms of the Marriage Act. Should a couple not wish to enter into a marriage as such, they can still formalize their relationship by registering a civil partnership in terms of the Civil Union Act. A civil partnership occasions the same legal consequences as a “traditional” marriage, but is not called a marriage. A civil union, whether as a marriage or a civil partnership, is open to persons regardless of their gender.

The aforementioned notwithstanding, various South African commentators have questioned whether the enactment of the Civil Union Act resulted in truly non-differential treatment between heterosexual and same-sex couples. The foremost question raised by commentators in this regard pertains to the rationality of having two statutes that regulate essentially the same institution. By putting in place dual legislative regulation of essentially similar life-partnership arrangements, so the argument goes, the South African legislature established an untenable hierarchy of life-partnership arrangements that undermines the equality-based rationale underpinning the Civil Union Act. For example, Bakker⁶ argues that, despite the Constitutional Court’s finding on the invalidity of the common-law definition of marriage in the *Fourie* judgment, same-sex couples can conclude marriages only in terms of the Civil Union Act, whereas a choice between marriages under the Marriage Act or the Civil Union Act is open to heterosexual couples. The retention of the Marriage Act alongside the Civil Union Act (and irrespective of the similarity in the legal consequences of a marriage under either act) coupled with some bureaucratic differences, for example, that marriages concluded under the two acts are recorded in different registers, leads Bakker to conclude that a marriage in terms of the Marriage Act is still regarded as more important

6. Pieter Bakker “Die Civil Union Act, Draft Domestic Partnerships Bill en moontlike deregulering van die huwelik” 2009 (34 1) *Tydskrif vir Regswetenskap* 1 15.

than its counterpart concluded in terms of the Civil Union Act. Ntlama⁷ concurs with Bakker's view and states the proposition thus:

The creation of a separate institution of "marriage" has reduced the equal rights of couples in same-sex relationships to . . . a "back door" effort to undermine the general right to equality . . . The legal separateness of the [Civil Union] Act . . . discriminatorily classifies the legal relationship of same-sex couples as "unions," reducing them to nothing more than what the author would refer to as "so-called marriages" . . . It is noticeable that the Act denies same-sex couples the status of "marriage" enjoyed by heterosexual couples. It could therefore violate the principles of non-discrimination on the basis of sexual orientation.

4. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.

Aside from the statutory developments discussed above, the following statutory provisions regarding same-sex partnerships provide further examples of statutory regulation:

- (1) the Domestic Violence Act 116 of 1998 defines a "domestic relationship" for purposes of the Act as a relationship between a complainant and a respondent where, *inter alia*, they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (2) the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines "marital status" for purposes of the Act as inclusive of the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship;
- (3) the Income Tax Act 58 of 1962 (as amended) defines, for purposes of the Act, "spouse" in relation to any person to mean a person who is the partner of such person in, *inter alia*, a same-sex or heterosexual union which the Commissioner for the South African Revenue Services is satisfied is intended to be permanent (similar definitions are included in, *inter alia*, the Transfer Duty Act 40 of 1949 (as amended) and the Estate

7. Nomthandazo Ntlama "A brief overview of the Civil Union Act" 2010 (13 1) Potchefstroom Electronic Law Journal 191, 197-199.

- Duty Act 45 of 1955 (as amended)); and
- (4) the Sexual Offences and Regulation of Related Matters Act 32 of 2007 provides that, for purposes of Chapter 5 of the Act regarding services for victims of sexual offences and compulsory HIV testing of alleged sex offenders, “interested person” means any person who has a material interest in the well-being of a victim, including a spouse, same-sex, or heterosexual permanent life-partner, parent, guardian, family member, care giver, curator, counselor, medical practitioner, health service provider, social worker, or teacher of such victim.
 - (5) Chapter 15 of the Children’s Act 38 of 2005 regulates the adoption of children. Section 231 of the Act provides for a range of possible adoptive parents; for purposes of this report the following possibilities deserve mention:
 - a) a husband and wife;
 - b) partners in a permanent domestic life-partnership;⁸
 - c) other persons sharing a common household and forming a permanent family unit; and
 - d) a married person whose spouse is the parent of the child or a person whose permanent domestic life-partner is the parent of the child.

Whereas adoption by same-sex civil union partners was already possible in accordance with the Civil Union Act’s prescript that “‘husband,” “wife,” or “spouse” in any other law, including the common law, includes a civil union partner,’ (rendering possible adoption by same-sex civil union partners under the Children’s Act’s predecessor, the Child Care Act 74 of 1983⁹), the commencement of the Children’s Act’s adoption provisions in Chapter 15 render adoption, with all its legal implications and consequences, open also to same-sex domestic life-partners, i.e. cohabitating life-partners who, for whatever reason, choose not to enter into marriage or a civil partnership.

5. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and

8. The Children’s Act does not limit domestic life-partnerships for this purpose to heterosexual partners; therefore, same-sex permanent domestic life-partners will also be able to adopt.

9. The Child Care Act previously, like the Children’s Act currently, designated a husband and wife as persons who can adopt a child.

when.

Although not aimed at the future regulation of same-sex marriage *per se*, a draft Domestic Partnerships Bill [B-2008] was published in the *Government Gazette* of 14 January 2008. The draft Bill is designed to provide for the legal recognition of domestic partnerships and the enforcement of the legal consequences of domestic partnerships. The draft Bill provides for both registered and unregistered domestic partnerships, but excludes from registration as a domestic partner the following persons: persons married under the Marriage Act; persons married under the Recognition of Customary Marriages Act; and a spouse or a partner in a civil union.

Any two persons who are both 18 years of age or older may register their relationship as a domestic partnership and they may also conclude a registered domestic partnership agreement. The draft Bill also provides for, *inter alia*, maintenance and inheritance rights as between registered and unregistered domestic partners.

The draft Bill does not limit domestic partnerships to heterosexual partners and, should the draft Bill be enacted, the regulation and protection it affords will also extend to same-sex domestic partners.¹⁰

6. Is your country discussing future regulation on same-sex unions in a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the chances of being passed, and when.

Not applicable.

7. Non-legislative regulations

Not applicable.

8. Judicial construction of the law

10. The proposals for legal recognition of domestic partnerships were originally included in the Civil Union Bill, but were subsequently removed so that they can be dealt with in separate legislation. The draft Domestic Partnerships Bill affords registered domestic partners some of the benefits accorded to married couples. However, there is a possibility that the section on registered domestic partnerships may well be removed from future versions of the Bill precisely because of the availability of civil unions (in the form of civil partnerships) for couples who do not wish to enter into marriage, either under the Marriage Act or under the Civil Union Act. It is, therefore, possible that domestic partnership regulation will in future deal only with unregistered domestic partnerships, i.e. partnerships between cohabitating couples who, for whatever reason, do not wish to enter into marriage or a civil partnership. As the Bill is only at its draft stage at the time of writing of this report, the final format and extent of regulation in terms of it will become apparent only in future.

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The following are the principal judicial developments for purposes of this report:

- ❖ the South African Police Services (SAPS) were ordered to register a same-sex life-partner as a dependant on SAPS' medical aid scheme in *Langemaat v. Minister for Safety and Security* 1998 3 SA 312 (T);
- ❖ the common-law offence of sodomy (proscribing sodomy between men and men, even in private, as a criminal act) was declared inconsistent with the Constitution and invalid in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 1 SA 6 (CC);
- ❖ immigration benefits to foreign spouses of South African citizens were extended to same-sex life-partners of South African citizens in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 2 SA 1 (CC);
- ❖ a same-sex life-partner was held to be a family member of an insured for purposes of an exclusion clause in the insured's motor vehicle insurance contract with an insurance company in *Farr v. Mutual and Federal Insurance Co. Ltd.* 2000 3 SA 684 (C);
- ❖ a the Constitutional Court ordered in *Satchwell v. President of the Republic of South Africa* 2002 6 SA 1 (CC) the reading-in of the words "or partner in a permanent same-sex life-partnership in which the partners have undertaken reciprocal duties of support" after word "spouse" in sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989; thus extending pension benefits to such same-sex life-partner;
- ❖ in *Du Plessis v. Road Accident Fund* 2004 1 SA 359 (SCA) the Supreme Court of Appeal ordered that a surviving same-sex partner of the deceased in a partnership in which the deceased had undertaken a contractual duty of support to the surviving partner, was entitled to claim damages from the defendant for loss of that support; and
- ❖ in *Gory v. Kolver (Starke and Others Intervening)* 2007 4 SA 97 (CC) the Constitutional Court ruled that the omission after the word "spouse" wherever it appears in section 1(1) of the Intestate Succession Act of the words "or partner in a permanent same-sex life-partnership in which the partners have undertaken reciprocal duties of support" is unconstitutional and invalid; therefore, that section 1(1) of the Act is to be read as though the words "or partner in a permanent same-sex life-partnership in which the partners have undertaken reciprocal duties of support"

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appear after the word 'spouse' wherever the latter word appears in section 1(1) of the Intestate Succession Act, thereby ensuring inheritance on intestacy between same-sex life-partners.

9. Additional comments

It is perhaps apt to conclude with the following quote from an insightful article by De Vos and Barnard on the Civil Union Act:¹¹

It is indeed revolutionary that we have managed to enact legislation that affords same-sex couples the same rights, obligations and benefits previously only possible through marriage under the Marriage Act. It is indeed remarkable that we achieved this as the first country in Africa and that, in so doing, we have joined only a small number of countries in the international community. It is indeed astonishing that we achieved this so soon after our emergence from the dark past of apartheid.

However, despite the considerable and progressive achievement by the South African legislature in enacting the Civil Union Act (and indeed other statutory provisions inclusive of same-sex partnerships), such legislative activism is, as pointed out earlier, not without criticism. In addition to the criticism already highlighted, Bonthuys, for example, argues, firstly, that, in locating same-sex marriage irrevocably within the context of civil ('Western') marriage by adopting a civil marriage model, the Civil Union Act fails to acknowledge and engage with same-sex practices within certain African communities. Bonthuys secondly points to the legal-philosophical conundrum occasioned by the civil marriage model followed in the Civil Union Act, namely that it posits civil marriage as an ideal deserving of aspiration; yet it does not address the inadequacy of the marriage institution as such, particularly insofar as it fails to protect the interests of vulnerable marriage parties, often women and children.¹²

11. 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 4) *South African Law Journal* 795, 825.

12. Elsje Bonthuys "Race and gender in the Civil Union Act" 2007 (23) *South African Journal on Human Rights* 526, 541–542.