

## CHAPTER 3: THE LEGAL POSITION REGARDING DOMESTIC PARTNERSHIPS IN SOUTH AFRICA PRIOR TO THE INCEPTION OF THE INTERIM CONSTITUTION IN 1994

### 3.1 General: no specific family law protection for domestic partners

3.1.1. Marriage laws in South Africa have traditionally provided the parties to a marriage with a variety of legal protections.<sup>1</sup> These laws govern what happens to the property of the parties during the marriage and on its dissolution, either by divorce or death. Being married also means that many State and other benefits are automatically acquired, such as membership of medical aid funds, pensions etc.

3.1.2 A legal marriage, furthermore, has to be entered into in accordance with the Marriage Act, 1961.<sup>2</sup> Marriages under this Act, known as civil marriages, do not include Muslim and African customary marriages (partly because these marriages are potentially polygamous). No provision is made for partners in other kinds of intimate relationships.

3.1.3 Over the last few decades significant reforms of South Africa's marriage laws have taken account of the context of gender inequality and the need for a fair system for the control of marital property. However, the protections they offer are only benefiting some of the couples who need assistance.<sup>3</sup>

3.1.4 Domestic partnerships have never been prohibited by South African law, but equally they do not enjoy any noteworthy recognition or protection by the law.<sup>4</sup> Simply stated, a man and a woman living together do not have the rights and duties of a married couple.<sup>5</sup> The relationship is not recognised by law as a marriage with the concomitant and participatory rights and duties that marriage confers.<sup>6</sup> That is the case irrespective of the duration of the relationship.<sup>7</sup>

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<sup>1</sup> Barnard, Cronje and Olivier **Persons and Family Law**, at 164 *et seq.*

<sup>2</sup> Act No. 25 of 1961.

<sup>3</sup> Goldblatt *Living Together*, at 2.

<sup>4</sup> Report by Women's Legal Centre.

<sup>5</sup> Hutchings & Delport 1992 **De Rebus**, at 121.

<sup>6</sup> Singh 1996 **CILSA**, at 325.

<sup>7</sup> Sinclair & Heaton **Marriage Law**, at 274. See also Hahlo **Fiat iustitia**, at 246.

3.1.5 However, if one were to compare the situation with other countries, it would be evident that there is scarcely a country left in the world that does not afford some measure of recognition to a domestic partnership, always provided that the relationship is not of a casual or intermittent character.<sup>8</sup>

3.1.6 In so far as same-sex partnerships are concerned, South African society was, prior to 1994, characterised by a strong degree of hostility towards homosexuals and homosexual conduct.<sup>9</sup> The South African legislature and judiciary entrenched a system of "sexual policing" in terms of which homosexual conduct was prosecuted.<sup>10</sup> The treatment was historically founded<sup>11</sup> and did not generally include any explicit punishment for lesbian behaviour.<sup>12</sup>

3.1.7 In so far as the judiciary's attitude is concerned it should be noted that in 1956, 30 men were arrested on charges of indecent assault in Durban. In handing down sentences from six to fifteen months, the magistrate declared:<sup>13</sup>

your type is a menace to society and likely to corrupt and bring about degradation to innocent and unsuspecting, decent-living young men and so spell ruin to their future.

3.1.8 Even in 1990, in the case of **S v M**,<sup>14</sup> one still found reference to the term "normal heterosexual relationships".

3.1.9 The case of **Van Rooyen v Van Rooyen**<sup>15</sup> concerned the access rights of a lesbian mother to her two minor children. The court explicitly rejected the idea that "the relationship created on the basis of two females" could be called a family<sup>16</sup> and attacked a statement by

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<sup>8</sup> Hahlo **Fiat iustitia**, *ibid.*

<sup>9</sup> Steyn 1998 **TSAR**, at 97; Wildenboer 2000 **Codicillus**, at 58.

<sup>10</sup> In terms of the common law sodomy and other "unnatural offences" between men were punished. See also the 1969 amendment (Immorality Amendment Act, 1969 (Act No. 57 of 1969) to the Sexual Offences Act, 1957 (Act No. 23 of 1957) which criminalised behaviour between male persons at a party which is calculated to stimulate sexual passion to give sexual gratification. A "party" was defined as any occasion where more than two persons were present.

<sup>11</sup> See discussion above.

<sup>12</sup> The Immorality Amendment Act, 1988 (Act No. 2 of 1988) did, however, prohibit "immoral and indecent acts" between women and girls under 19. See also the discussion of **Van Rooyen v Van Rooyen** 1994 (2) SA 325 (W) below.

<sup>13</sup> Gevisser & Cameron, at 18 fn 6, referred to by Steyn 1998 **TSAR**, at 98.

<sup>14</sup> 1990 2 SACR 509 (E).

<sup>15</sup> 1994 (2) SA 325 (W).

<sup>16</sup> At 326J.

the family counsellor that homosexuality is no longer regarded as a mental illness or a sin; listing the "wrong signals" to which the children would be exposed in a lesbian household.<sup>17</sup> The outcome was an extremely intrusive order, effectively forcing the mother to choose between her lesbian lifestyle and unencumbered access to her children.<sup>18</sup>

3.1.10 It is therefore clear that since homosexuality was criminalised and lesbian behaviour was frowned upon, the recognition of a same-sex marriage or partnership of any kind would have been out of the question.

3.1.11 Gay rights formed part of the broader spectrum of human rights that were negated by the apartheid system. The government's divisive strategy that was so integral to the concept of apartheid would, however, prove to be a crucial link in the subsequent development of human rights and gay consciousness.<sup>19</sup>

### **3.2. Ordinary rules and remedies of the law**

3.2.1 No family-law consequences flowed automatically from domestic partnerships. Partners could not invoke any of the protective, adjustive and supportive measures available to spouses. In order to find protection, partners (mainly opposite-sex, but, to the extent that it was possible, same-sex partners as well) had to make use of the ordinary rules and remedies of the law, such as those relating to property and contract, unjustified enrichment and estoppel.<sup>20</sup> It is important to note that these remedies are still available to partners today, although they are not the sole remedies anymore. See the discussion on the post-constitutional developments in chapter 4 below.

#### **a) Contract**

3.2.2 Even though domestic partners do not have the rights and duties of a married couple, the South African courts have on occasion come to the assistance of such couples by deciding that an express or implied universal partnership proper (*societas universorum*

<sup>17</sup> At 329B-330B.

<sup>18</sup> At 329F-G; Steyn 2001 **TSAR**, at 346.

<sup>19</sup> Gevisser and Cameron **Gay & Lesbian Lives**, at 4-5 fn 4, referred to by Steyn 1998 **TSAR**, at 99 fn 17.

<sup>20</sup> Sinclair & Heaton **Marriage Law**, at 274 with references made therein.

*bonorum*) exists between the couple.<sup>21</sup>

3.2.3 The concept of universal partnership is found in the law of contract. A universal partnership can be defined as an agreement where the contracting parties agree to bring all their present and future goods, in which ever way it was accumulated, into the community of property.<sup>22</sup>

3.2.4 It was originally used in divorce cases, prior to the introduction of the judicial discretion to redistribute property in certain instances, to assist women married out of community of property to achieve a sharing of the assets accumulated by joint effort.<sup>23</sup>

3.2.5 The universal partnership can arise from an express or tacit agreement. Although evidence may present a problem, the court may find that a partnership exists between persons who cohabit and that each is entitled to share equally in the profits.<sup>24</sup>

#### (i) Implied contract

3.2.6 The leading precedent in South African Law on the proprietary consequences of domestic partnership is **Ally v Dinath**.<sup>25</sup> The parties in this case lived together as man and wife in an Islamic relationship for fifteen years before the relationship broke down.

3.2.7 The plaintiff, a female, alleged that they had shared a joint household, pooled their assets, income and labour for their joint benefit and, therefore, had tacitly, or alternatively by implication, entered into a universal partnership (a partnership *universorum bonorum*) in equal shares and accumulated a joint estate for the benefit of both parties. She also sought a half share in the immovable property which had been their common home but which was registered only in the name of the defendant.

<sup>21</sup> Schwellnus, at 6; See also De Bruyn & Snyman 1998 **SA Merc LJ**, at 10 where the case is argued that the universal partnership could be the answer.

<sup>22</sup> Bamford **Partnership**, at 18.

<sup>23</sup> Sinclair & Heaton **Marriage Law**, at 279 and the references therein.

<sup>24</sup> Hutchings & Delport 1992 **De Rebus**, at 122.

<sup>25</sup> 1984 (2) SA 451 (T); For a discussion of this case see Singh 1996 **CILSA**, at 325; Hutchings & Delport 1992 **De Rebus**, *ibid* at 122; Sinclair & Heaton **Marriage Law**, at 279; Labuschagne E 1985 **TSAR**, at 219; Other important case law in this regard: **Mograbi v Mograbi** 1921 AD 274; **Fink v Fink** 1945 WLD 226; **Isaacs v Isaacs** 1949 (1) SA 952 (C); **V (also known as L) v De Wet NO** 1953 (1) SA 612 (O) **Plum v Mazista Ltd** 1981 3 SA 152 A.

3.2.8 Relying on the decision in **Annabhay v Ramlall and Others**<sup>26</sup> the defendant raised two points in his defence. He stated that there were no allegations of an express agreement to enter into a universal partnership, and neither were there any allegations that the object of the partnership was to make a profit.

3.2.9 Eloff J dismissed the exceptions. He disagreed with the interpretation of Voet in **Annabhay's** case where it was stated "that a universal partnership of all present and future goods cannot be entered into by implied consent and circumstances."<sup>27</sup> He also disagreed with the Tudor translation of Pothier on Partnership which stated that 'partners are not considered, in the absence of express contract, to have entered into this kind of partnership'.<sup>28</sup>

3.2.10 He preferred to rely on Kotze's translation of Van Leeuwen's treatise on Roman Dutch Law where it states

....sometimes it happens that this (contracting of community of property) is also understood to have taken place tacitly, and the community is created by conduct. For it is considered that the existence of something may be established not only by express words but also by conduct.

3.2.11 He held that it would be contrary to well settled principles if it were to be said that a particular contract could not be created tacitly. The principle is firmly established that any contract can be brought about by conduct.<sup>29</sup>

3.2.12 In so far as the second point raised is concerned, namely that the object of the partnership was not to make a profit, Eloff J held that a purely pecuniary profit motive is not required. He stated that the achievement of other material gain, such as a joint exercise for the purpose of saving costs, will suffice. In the present case the objective of this accumulation of an appreciating joint estate is sufficient.

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<sup>26</sup> 1960 (3) SA 802 N.

<sup>27</sup> He stated that Voet was not laying down a principle of general application; he merely intended to convey that one does not readily infer from a tacit partnership that the partners intended to include all the assets in the community, but only such assets as they in fact dealt with. It has of course to be borne in mind that one cannot infer from the conduct of parties a contract with a greater scope than is intended by conduct.

<sup>28</sup> He held that this passage should not be interpreted to mean other than that a clear contract is required, not that a tacit agreement may not establish a universal partnership.

<sup>29</sup> At 454 F.

3.2.13 In **Muhlman v Muhlman**<sup>30</sup> the requirements for a partnership which had been set out in previous case law, were reiterated and confirmed on appeal.<sup>31</sup> They are that:

- (i) each party should bring something into the partnership, or bind himself or herself to bring something into it;
- (ii) the venture should be carried on for the joint benefit of the parties;
- (iii) the object should be to make a profit;
- (iv) the partnership contract should be valid.

3.2.14 Hoexter JA furthermore agreed that an express agreement was not a prerequisite and ruled that the proper enquiry was simply whether it was more probable or not that a tacit agreement had been reached.<sup>32</sup>

3.2.15 However, the court made it clear that it would be difficult to prove a tacit agreement. Where the claimant (wife) had been working in the husband's business without remuneration, unless she had rendered services manifestly exceeding those ordinarily expected of a wife in her situation, a court would not easily be persuaded to infer a tacit agreement of partnership.

3.2.16 Similarly, where a wife enters an established and flourishing business, it will be more difficult for her to establish that a partnership must be inferred. A mere agreement to pool assets does not satisfy the requirements for the creation of a partnership; nor does contribution by both parties to the purchase price of an asset owned by one of them satisfy the requirements.

3.2.17 Ironically, in a case of domestic partnership, it may be easier to show a contribution to a universal partnership as there may not be the same societal assumptions about the role of a woman as a dutiful wife.<sup>33</sup>

3.2.18 In **Fink v Fink and Another**<sup>34</sup> the parties were married out of community of property and had built up a dairy business together. On divorce, the defendant claimed that a partnership had existed between the parties in respect of the business and claimed a share

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<sup>30</sup> 1981 (4) SA 632 (W)

<sup>31</sup> **Muhlmann v Muhlmann** 1984 (1) SA 97 (A).

<sup>32</sup> At 124 C -D; See also **Plum v Mazista Ltd** *op cit*.

<sup>33</sup> Report by Women's Legal Centre, at 15.

<sup>34</sup> 1945 WLD 226, referred to in Hutchings & Delport 1992 **De Rebus**, at 122.

in the enterprise. The court indicated that in cases where an implied agreement is alleged, the intention of the parties must be ascertained by their words and conduct.

3.2.19 Although it is therefore possible to rely on an implied contract, there are problems<sup>35</sup> that can limit its effectiveness. As seen above, these kinds of contract are notoriously difficult to invoke and prove and the person relying upon the agreement bears the onus of proof, not only of the existence of the agreement itself, but also as to the terms of the agreement showing a universal partnership.<sup>36</sup>

3.2.20 The non-designee faces the difficult task of satisfying the court that, in equity, he or she contributed to the property. The notion of 'equity' in our law remains undefined save to say that it will be based upon the intentions of the parties which must be proved directly or inferred from their conduct.

3.2.21 Without any witnesses, oral agreements are difficult to prove - it is one person's word against another's; it is very difficult to prove the existence of a tacit universal partnership. It is therefore very risky to rely on a tacit universal partnership. The partner who feels that he or she has not been given a fair share will very often not be the better-off one in the couple, and may not be able to afford expensive lawyers to fight his or her case. It can also be very expensive to lose a court case.

## (ii) Express Contract

3.2.22 Domestic partners may also choose to regulate various aspects of their relationship by means of a contract.<sup>37</sup> The contract clarifies the expectations of the partners and it could also serve as an early warning of future possible problems.<sup>38</sup>

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<sup>35</sup> Sinclair & Heaton **Marriage Law**, at 278.

<sup>36</sup> Report by Women's Legal Centre, at 12; See also Singh 1996 **CILSA**, at 325: However, working together to accumulate assets will not automatically or easily imply the creation of a universal partnership. The test of a tacit universal partnership as set out in the cases is onerous and in absence of any other remedy, provides no definite protection for the cohabiting parties. As it is, the principle would work better where there has been a long-standing relationship, but it clearly falls short when one considers shorter (one/two year) relationships. In the latter cases, the claimant faces an uphill battle to prove the tacit agreement. In the absence of express agreement and because of the paucity of statutory protection, parties in a cohabitation relationship may find themselves in an extremely difficult position.

<sup>37</sup> Hutchings & Delport 1992 **De Rebus**, at 122.

<sup>38</sup> See Hutchings & Delport 1992 **De Rebus**, *ibid* for a discussion of clauses in the contract.

3.2.23 A contract (domestic partnership agreement) will determine what would happen to property and assets of the couple if they should separate. The agreement is, however, not enforceable in so far as third parties are concerned.

3.2.24 The contracts will often contain terms and provisions similar in intent to a nuptial agreement. To rely on the contract and ensure that it fulfils its purpose, the contract should ideally be reduced to writing, witnessed and signed, either by the parties acting on their own, or preferably with the assistance of a competent legal advisor.

3.2.25 The contract should cover liability and ultimate responsibility for the parties' reasonable and anticipated expenses and include consensus regarding, inter alia, payment of all daily household expenses together with allocating responsibility for other household costs, maintenance and repairs.

3.2.26 Parties to the relationship would be advised to stipulate their joint assets as separate and specific from their individual assets, in the absence of any further agreement, since the latter will remain the property of the initial owner.<sup>39</sup>

3.2.27 However, it is important to note that, especially in the past, unlike marriage, extra-marital relationships were not recognised as "social institutions". Therefore a major concern with advising reliance on a pre-cohabitation contract was that the courts would refuse to uphold it for being *contra bonos mores*.<sup>40</sup>

3.2.28 A conservative court might find the partnership contract to be tainted with immorality - the underlying idea being that a contract by which one person is compensated for sexual favours is null and void because it promotes immorality and is thus against public policy.

3.2.29 The basic rules are as follows:

- (a) in accordance with the *ex turpi causa non oritur actio* doctrine, an immoral contract will not be enforced; and
- (b) a "money for sex" contract falls within this category. The change in judicial attitudes that has occurred relates to the approach which the courts will adopt

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<sup>39</sup> Singh 1996 **CILSA**, at 321.

<sup>40</sup> Labuschagne E 1985 **TSAR**, at 222.

in determining whether that contract is a "money for sex" contract.<sup>41</sup>

3.2.30 It has been argued<sup>42</sup> that such contracts are so closely linked to the supposed 'immoral' character of the relationship between the cohabiting parties that the enforcement of the contract would violate public policy.

3.2.31 However, the counter-argument is simple: the fact that a man and a woman live together without marriage and engage in a sexual relationship, cannot and should not, in itself, invalidate agreements between them relating to their earnings, property or expenses.<sup>43</sup> Neither should such an agreement be invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it.<sup>44</sup>

3.2.32 It has therefore been suggested that by virtue of changed societal mores, and in line with the softening of the approach to this question in other jurisdictions, our courts should accept the view that express and implied contracts between partners should be enforced.<sup>45</sup>

3.2.33 The courts recognised that just as there is more to a legal marriage than sex - love, companionship, mutual support in sickness and health - so sex is only one element, and not necessarily the most important one, in a common-law union.<sup>46</sup>

3.2.34 Adults who live together in a consensual relationship and engage in sexual relations are as competent as any other persons to order their economic affairs by contract and no policy should preclude a court from enforcing such an agreement. An agreement between non-marital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.<sup>47</sup>

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<sup>41</sup> Hahlo **Fiat iustitia**, at 256 with references made therein.

<sup>42</sup> **Fender v St John-Mildmay** [1938] AC 1 (HL) at 42: "The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association." Referred to by Hahlo **Fiat iustitia**, *ibid*.

<sup>43</sup> Hahlo **Fiat iustitia**, at 247.

<sup>44</sup> Singh 1996 **CILSA**, at 324.

<sup>45</sup> Sinclair & Heaton **Marriage Law**, at 281.

<sup>46</sup> Hahlo **Fiat iustitia**, at 256 with references made therein.

<sup>47</sup> **Marvin v Marvin** 1976 18 Cal 3d 660, referred to by Singh 1996 **CILSA**, at 323.

3.2.35 Thomas<sup>48</sup> states that a contract of this nature is not *contra bonos mores* in the light of the decision in **Ally v Dinath** and that it could thus be enforced between the cohabitants (in the above case no reference was made to the question of *boni mores*).

3.2.36 In **Hewitt v Hewitt**,<sup>49</sup> on facts very similar to the British case of **Windeler v Whitehall**,<sup>50</sup> the Appeal Court held that based on the fact that the parties had outwardly lived a conventional married life the plaintiff's conduct had not "so affronted public policy that she should be denied any and all relief".

3.2.37 In the case of **Ismail v Ismail**<sup>51</sup> the court was precluded from enforcing the terms of the contractual agreement between the parties as it was void because of public policy (in this case because it could lead to polygamy).

3.2.38 Real problems do arise with the enforcement of a domestic partnership agreement - express or implied- where the partner being sued is still legally married to a third party. It has been argued that in such cases domestic partnership agreements violate public policy to the extent that they impair the community of property rights (where applicable) of the lawful married spouse.

3.2.39 This defence was raised in the **Marvin** case<sup>52</sup> where the defendant claimed that any alleged arrangement between himself and his cohabitating partner purporting to transfer to her a half interest in their community of property, could not be upheld on the ground that the arrangement was *contra bonos mores* since it infringed the property rights of his lawful wife.

3.2.40 The court decided that whether or not the defendant's contract with the plaintiff exceeded his rights in the community of property between himself and his wife, defendant's argument could not be upheld for the reason that an improper transfer of community of property is not void *ab initio* but merely voidable.

3.2.41 This argument would be equally acceptable in South African law as the provisions of

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<sup>48</sup> Thomas 1984 **THRHR**, at 456, referred to in Hutchings & Delpont 1992 **De Rebus**, at 122.

<sup>49</sup> 1979 77 III 2d 49, referred to by Singh 1996 **CILSA**, *ibid*.

<sup>50</sup> [1990] 2 FLR 505, referred to by Singh 1996 **CILSA**, *ibid*.

<sup>51</sup> 1983 (1) SA 1006(A).

<sup>52</sup> **Marvin v Marvin**, *ibid*.

section 15 of the Matrimonial Property Act, 1984<sup>53</sup> are similar in effect.

3.2.42 Consequently, it is possible for a domestic partner to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse.<sup>54</sup>

3.2.43 It should not be forgotten that drawing up a contract is not the panacea for the problem of regulating domestic partnership. Contractual regulation is reserved largely for the sophisticated, literate, middle class. It rarely caters effectively for the most vulnerable members of society. And even if partners do enter into a contract, it may turn out to be unsatisfactory.

3.2.44 Firstly, many couples who enter into domestic partnership agreements at an early stage of their relationship are unlikely or unwilling to think of the consequences of possible breakdown and choose to concentrate on governing an ongoing relationship.

3.2.45 Secondly, a contract concluded at the outset of a relationship may not make provision for changed circumstances, or may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children.

3.2.46 Furthermore, it is an unfortunate but persisting reality that partners in intimate relationships seldom bargain on an equal footing. Agreements between them are commonly used to insulate the position of the economically stronger partner (usually the man); women are often more risk-averse than men and often do not have the same access to legal representation and expertise.<sup>55</sup>

3.2.47 Owing to ignorance of the law, lack of access to lawyers, poverty and unequal power relations between the partners, contract law is not a practical solution to the existing problem.<sup>56</sup>

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<sup>53</sup> Act No. 88 of 1984.

<sup>54</sup> Singh 1996 **CILSA**, at 324.

<sup>55</sup> Sinclair & Heaton **Marriage Law**, at 283.

<sup>56</sup> CALS Report, at 11.

### b) Proprietary estoppel

3.2.48 Alternatively, a disadvantaged partner may rely on the doctrine of proprietary estoppel. Here again, he or she faces the onus of proving that the legal titleholder created a situation from which it could be reasonably inferred that some right or legal interest in or over the property had been accorded to the non-owner. Further, the party raising the defence bears the onus of proving precisely how he or she acted to his or her prejudice by relying on the alleged promise.<sup>57</sup>

3.2.49 If the opposite-sex couple held themselves out as husband and wife, they will be bound by each other's contracts for household necessities to the same extent as if they were legally married because they will be estopped from denying a contract of agency.<sup>58</sup> There exists an evidentiary presumption that parties who live openly together as man and wife are legally married.<sup>59</sup>

### c) Unjustified enrichment

3.2.50 Unjustified enrichment is the general principle that one person should not be able to benefit unfairly at the expense of another.

3.2.51 If the relationship of an unmarried couple breaks up during the parties' joint lives, an individual who has rendered him/herself financially dependent on her partner will only be entitled to a contribution for services rendered on the grounds of unjustified enrichment in order to achieve justice between the two of them. The latter remedy is available to a person unjustly impoverished at the expense of another person.

3.2.52 The same principle would apply if the partner had made a genuine financial contribution, for example, in the case where the owner of a house and his/her partner contributed jointly to the purchase of a house which is registered only in the owner's name.<sup>60</sup>

<sup>57</sup> Singh 1996 **CILSA**, at 319.

<sup>58</sup> Sinclair & Heaton **Marriage Law**, at 284.; **Thompson v Model Steam Laundry Ltd** 1926 (TPD) 674.

<sup>59</sup> Labuschagne 1989 **TSAR**, at 375 fn 38 and the references to **Ex parte Azar** 1932 OPD 107 at 109; **Ex parte L** 1947 (3) SA 50 (K) 55; **Ex parte Soobiah** 1948 (1) SA 873 (N) 881.

<sup>60</sup> Hutchings & Delport 1992 **De Rebus**, at 121.

3.2.53 For many years it was thought that the law on unjustified enrichment only applied to certain recognised categories and that the domestic partnership was not one of these. Our law had no general enrichment claim.<sup>61</sup>

3.2.54 This view was based on the judgment in **Nortje and Another v Pool NO**<sup>62</sup> in which the Appellate Division denied the existence of such a claim and held that a plaintiff had to bring his or her cause of action within the recognised *condictiones*.

3.2.55 In the decision of **Kommissaris van Binnelandse Inkomste v Willers**,<sup>63</sup> however, the Appellate Division decided that Nortje's case does not exclude extension of liability on the ground of unjustified enrichment cases where such liability has not existed in the past. Botha JA held that the decision in the Nortje case does not preclude the court from finding that there is enrichment in a particular case merely because liability has not previously been recognised in the same, or similar, circumstances. In each case the court will have to consider whether extension of liability on the grounds of enrichment is necessary or desirable.<sup>64</sup>

3.2.56 This decision augered well for domestic partners: although the Appellate Division did not overturn the decision in Nortje, it has clearly acknowledged the need for a general unjustified enrichment claim in our law and might well on particular facts recognise one.

3.2.57 The law is, however, still not clear - relying on these laws is risky and unpredictable. Courts are very concerned about certainty and if there is any doubt and a judge is unclear, he or she might be unwilling to make any decision.

#### **d) Constructive trust**

3.2.58 Significant is the readiness of English, American, Canadian and Australian courts to find a resultant or constructive trust in favour of a common-law wife who has contributed

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<sup>61</sup> Sinclair & Heaton **Marriage Law**, at 277.

<sup>62</sup> 1966 (3) SA 96 (A).

<sup>63</sup> 1994 (3) SA 283 (A).

<sup>64</sup> At 333 C-E.

money, money's worth or labour to the acquisition of property by her paramour.<sup>65</sup>

3.2.59 The South African law of trusts, for technical and historical reasons, is unlikely to be the vehicle for the results that have been achieved in other jurisdictions. In our law a trust<sup>66</sup>

exists when the creator of the trust [the founder], ... has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.

3.2.60 An intention on the part of the founder to create a trust is a central requirement. Normally the intention has to be express. The court will infer an intention to create a trust only if it is clear from all circumstances that this was the common intention of the founder and the trustee.

3.2.61 Thus, unlike in Anglo-American law, a trust cannot be created if the persons who are bound by it have no clear intention to create it. For these reasons there is little scope for the development in South African law of the resulting, implied or constructive trust of Anglo-American law.<sup>67</sup>

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<sup>65</sup> Hahlo **Fiat Iustitia**, at 259 and the references made therein.

<sup>66</sup> Sinclair & Heaton **Marriage Law**, at 277.

<sup>67</sup> Sinclair & Heaton **Marriage Law**, *ibid* and the references made therein.