CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/05

VANESSA MICHELLE VAN DER MERWE	Applicant
versus	
THE ROAD ACCIDENT FUND	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae

Heard on : 24 November 2005

Decided on : 30 March 2006

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] This case concerns the constitutional validity of legislative provisions that concern patrimonial arrangements between spouses married in community of property and of profit and loss. More pointedly, the provisions regulate the right of a spouse married in community of property to recover delictual patrimonial damages arising from bodily injury inflicted by the other spouse.

[2] The impugned provision is section 18(a) of the Matrimonial Property Act 88 of 1984 (the Act). It is however, convenient to set out sections 18(a) and (b):

> "[18] Certain damages excluded from the community and recoverable from the other spouse.
>
> Notwithstanding the fact that a spouse is married in community of property—
> (a) any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property;
> (b) he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse."

[3] The provisions are said to be bad because they unjustifiably intrude upon the dignity[1] and non-discrimination[2] guarantees our Constitution affords everyone. Ndita AJ sitting in the Cape High Court[3] (High Court) upheld this contention in relation only to section 18(b) of the Act and declared the provision to be inconsistent with the Constitution and invalid.

---

[1] Section 10 of the Constitution provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[2] Section 9(3) of the Constitution provides that:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[3] *Van der Merwe v RAF* (CPD) Case No 1803/02, 13 September 2005, unreported.

[4] In the result, the High Court made the following order:

> "(1) The inclusion of the words '*other than damages for patrimonial loss*' in section 18(b) of the Matrimonial Property Act No 88 of 1984 is declared to be inconsistent with the Constitution.
>
> (2) The words '*other than damages for patrimonial loss*' in section 18(b) should be removed and substituted with '*including damages for patrimonial loss*.'
>
> (3) The order in paragraph 2 only comes into effect from the moment of the making of this order.
>
> (4) This order shall have no effect on judgments that have already been handed down.
>
> (5) There is no order as to the costs of these proceedings."

[5] Before us are three matters. The first is an application brought by Mrs Vanessa van der Merwe ("applicant") in terms of section 172(2)(d)[4] of the Constitution for confirmation of the order of constitutional invalidity made by the High Court. She also seeks ancillary relief in the form of a variation of the court order to be confirmed. The second is a direct appeal by the Road Accident Fund ("the Fund") against the order of constitutional invalidity.[5] The third is an application for joinder of the Minister of Justice and Constitutional Development as a party to the proceedings. I propose to dispose of the joinder issue first.

---

[4] Section 172(2)(d) of the Constitution provides that:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[5] The first respondent has an automatic right of appeal to this Court because Section 172(2)(d) grants a party with sufficient interest the right to appeal directly to the Constitutional Court to confirm or vary an order of constitutional invalidity.

[6] For some obscure reason, the Minister was not a party to the proceedings before the High Court. In her papers, the applicant attributes the omission to "mutual error" of both parties. The judgment of the High Court is silent on the issue of joinder. Be that as it may, now before us is an application for the joinder of the Minister. The application appears to have been compelled by the complaint in the Fund's notice of appeal that the High Court improperly granted an order of constitutional invalidity in respect of an act of parliament in the absence of the responsible Minister. On receipt of the application, the Minister consented to the joinder. She also gave notice that she does not oppose the confirmation of the order of constitutional invalidity and that she will abide the decision of this Court.

[7] Wisely so, none of the other parties opposed her being made a party to these proceedings because the grievance of non-joinder of the Minister before the High Court is a good one. On a number of occasions this Court[6] has emphasised that when the constitutional validity of an act of parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason.

[6] *Mabaso v Law Society of the Northern Province, and Another* 2005 (2) BCLR 129 (CC); 2005 (2) SA 117 (CC) at paras 13-14; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) BCLR 139 (CC); 1999 (2) SA 1 (CC) at paras 6-8; *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) at para 5; *JT Publishing (Pty) Limited v Directorate of Publications and Another* 1995 (1) BCLR 70 (T); 1995 (1) SA 735 (T) at 73D-F.

When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the state organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the state organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity.

[8] Similar considerations apply in confirmation proceedings before this Court. Rule 5(1)[7] enjoins the joinder of the authority of state responsible for the administration of the law whose constitutional validity is at issue. Rule 5(2)[8] is explicit and peremptory in its terms. It provides that the Court shall not make an

[7] Rule 5(1) of the Rules of the Constitutional Court provides that:

> "In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings."

For a discussion of the rule see *Mabaso* above n 6 at paras 13-14; *Jooste* above n 6 at paras 6-8.

[8] Rule 5(2) of the Rules of the Constitutional Court provides that:

> "No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

For a discussion of this rule see *Mabaso* above n 6; *Jooste* above n 6.

order of constitutional invalidity of legislation unless the authority concerned is joined as a party to the proceedings. It is indeed trite that the contentions and evidence, if any, advanced by the state functionary charged with the administration of legislation under scrutiny are vital, if not indispensable, for proper ventilation and ultimate adjudication of the constitutional challenge to the validity of legislation.

[9] It is therefore appropriate and necessary to join the Minister as second respondent. I shall order so. Nothing more need to be said about the joinder.

[10] One observation may be made about the Minister's participation in these proceedings. Even though the Minister supports the confirmation of the declaration of invalidity of the legislation and abides the decision of this Court, rightly so, she has caused to be submitted written and oral argument on behalf of the government. Both were indeed helpful. Being charged with the administration of the legislation, it is salutary to hear the Minister on why the impugned provision is good or as in this case, on why and to what extent it falls short of the constitutional standard and on the remedy that might be appropriate.

The facts

[11] The facts are simple and sparse, yet disturbing. On 24 October 1999 and at Pick 'n Pay in Goodwood, on a public road, a vehicle with registration letters and

numbers BXW 288F then driven by Mr David van der Merwe (the insured driver) collided with Mrs Vanessa van der Merwe. At the time of the collision the applicant and the insured driver were married in community of property. It is common cause between the parties that the insured driver intentionally knocked his wife over with the motor vehicle and went on to reverse over her while she was lying on the ground. It comes as no surprise that their marriage has since been ended. They are divorced.

[12] Mrs Van der Merwe instituted action in the High Court against the Fund seeking to recover special and general damages arising from her bodily injuries. The Fund is the statutory body that is liable to compensate the applicant for damages arising from bodily injuries caused by the driving of a motor vehicle. However, the Fund is liable to compensate the applicant only if she could institute a lawful claim against the driver of the motor vehicle that caused her bodily harm.[9]

---

[9] Sections 17(1), 19(a) and 21 of the Road Accident Fund Act 56 of 1996.

Section 17(1) reads:

"(1)The Fund or an agent shall—

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the

[13] In her particulars of claim, Mrs Van der Merwe specifies her bodily injuries to include a ruptured bladder, a fractured pelvis including fractures of the right acetabulum, right superior and inferior pubic rami and left inferior pubic ramus, skeletal fracture, severe contusions, soft tissue injury to her back, lacerations and permanent disfigurement of her buttocks and stomach. All of these injuries resulted in her prolonged hospitalisation, suffering, pain and discomfort, loss of amenities of life, permanent disability and cosmetic disfigurement. On this account, she claims damages of nearly R500.000.00 consisting of special damages made up of past and future medical expenses and future loss of income earning capacity and general damages for pain and suffering, loss of amenities of life and disfigurement.

---

driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

Section 19(a) reads:

> "The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—
>
> > (a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21."

Section 21 reads:

> "When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation."

[14] The Fund has pleaded that it has no knowledge of the nature and extent of the bodily injuries or the related damages alleged but does not admit them. In addition, the Fund raised a special plea in which it admitted that the applicant is entitled to claim "non-patrimonial damages" such as "general damages", but denied liability to compensate the applicant for any "patrimonial damages" by reason of the provisions of section 18(a) and (b) of the Act read with section 19(a)[10] of the Act which in effect prohibit claims for patrimonial damages between spouses married in community of property.

[15] The applicant met the special plea with a replication that section 18(a) and (b)[11] of the Act unfairly discriminates on the ground of marital status[12] against persons married in community as opposed to persons married under other property regimes. She added that the legislative barrier to recover delictual patrimonial loss

[10] Section 19(a) above n 9.

[11] "[18] Certain damages excluded from the community and recoverable from the other spouse.
Notwithstanding the fact that a spouse is married in community of property-
(a) any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property;
(b) he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse."

[12] Section 9(3) of the Constitution prevents unfair discrimination on this ground. For full text of section 9(3) see above n 2.

also implicated her right to dignity[13] and constituted an arbitrary deprivation of property.[14]

In the High Court

[16] The High Court heard the matter as a stated case in terms of Uniform Rules 33(1)[15] and (2)[16] and on a terse set of agreed facts recounted in the preceding paragraphs. In essence, both parties invited the court to decide whether sections 18(a) and (b) had the effect of preventing spouses from claiming damages for patrimonial loss from each other, and if so whether taken together the provisions

[13] For the full text of section 10 see above n 1.

[14] Section 25 of the Constitution states that:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[15] Rule 33(1) reads:

> "Special cases and adjudication upon points of law—
>
> (1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court."

[16] Rule 33(2) reads:

> "(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.
>
> (b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.
>
> (c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true."

offend sections 9(3), 10 and 25(1) of the Constitution, and, if they do, to grant appropriate relief.

[17] The High Court found that section 18(b) does prevent a claim for delictual patrimonial loss and that the restriction unfairly discriminates against spouses married in community of property. It found that unlike spouses in other forms of marriages, they are forbidden from claiming patrimonial damages between themselves. The High Court found that the unfair discrimination was on marital status, as prohibited by section 9(3) and presumed unfair by section 9(5) of the Constitution.[17] It also found that the denial of a right of action to recover patrimonial loss arising from bodily injury must be seen in the context of the prevalence of domestic violence in this country. The Court found that the prohibition is likely to have a more adverse impact on women than men and thus constitutes indirect discrimination against women. The prohibition also impairs the dignity of spouses subject to it, especially women. The Court did not consider the constitutional validity of section 18(a) of the Act nor the claim based on arbitrary deprivation of property.

---

[17] See above n 12.

Section 9(5) of the Constitution provides that:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[18] The High Court found that the discrimination is not justifiable under section 36(1)[18] of the Constitution. As a consequence, it held section 18(b) of the Act to be invalid in so far as it includes the words "other than damages for patrimonial loss." The Court made an order that these words be struck out and replaced by the words "including damages for patrimonial loss." As we already know, this order is the object of the present proceedings.

Submissions

[19] In this Court, as in the High Court, the applicant urged upon us to hold that section 18(b) of the Act does not codify but merely varies the common law by creating an exception to its blanket exclusion of all claims for delictual damages between spouses married in community of property. The exception is said to permit recovery of non-patrimonial damages in respect of bodily injury. On this argument it is said that we need not enquire into the constitutional validity of the

[18] Section 36(1) of the Constitution provides that:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

provisions of section 18(b) or "read down"[19] the provisions. All we need to do is to develop the common law to remove the source of the constitutional grievance.

[20] This submission need not detain us. The High Court was right in refusing to be drawn into the debate whether the legislative provision codifies or merely creates an exception to the common law. Whatever the defects may be in the common law of marriage in community of property, section 18(b) drastically alters the position by permitting the injured spouse to recover damages for bodily injury attributable to the fault of the other spouse.[20] The rub however is that in doing so section 18(b) makes it clear that recoverable damages would be "other than damages for patrimonial loss." Whilst it does not exclude other forms of damages, it clearly prohibits recovery of damages directed at satisfying patrimonial loss in particular. It is that legislative bar which is the origin of the constitutional grievance before us and not the common law. Therefore, the constitutional challenge at hand does not necessitate the development of the common law[21] but pre-eminently concerns the constitutional validity of the impugned section.

---

[19] The term "reading down" ordinarily refers to an interpretation of legislation, where reasonably possible, in a manner which renders it consistent with rather than inimical to the Constitution. For enunciation of this interpretative rule see *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributers (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 24; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at 44H-J and 45A-E.

[20] Compare Van der Spuy *New Marriage Property Act 88 of 1984* (Cosmos Publication, 1984) at 59.

[21] As to when is it appropriate to develop the common law see *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC) at paras 16-17; *S v Thebus and Another* 2003 (10) BCLR 1100 (CC); 2003 (6) SA

[21] There is a more compelling consideration why we should decline the invitation to develop the common law only and not to enquire into the validity of the offending legislation. The High Court has made an order of constitutional invalidity of a section in an act of parliament. Under our Constitution, the order has no force unless this Court confirms it.[22] It seems to me self-evident that once an order of constitutional invalidity is made by the High Court and referred to this Court it is not open to us to refuse to enquire into the validity or otherwise of the legislation. The Court is obliged to pronounce upon the constitutional validity of the impugned provision and thereby confirm or refuse to confirm the order.[23] If it were otherwise, the order of constitutional invalidity of the High Court would languish in limbo and needlessly spawn public uncertainty.[24]

---

505 (CC); *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC).

[22] Section 172(2)(a) provides that:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Also see section 167(5) which reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[23] *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC); 2004 (6) SA 505 (CC) at paras 31-32; *Moseneke and Others v The Master of the High Court* 2001 (2) BCLR 103 (CC); 2001 (2) SA 18 (CC) at para 8; *Investigating Directorate: Serious Economic Offences and Others* above n 19 at para 3; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC); 2000 (3) SA 422 (CC) at para 4; *Parbhoo* above n 6 at paras 2 and 5.

[24] *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (11) BCLR 1219 (CC); 1999 (4) SA 682 (CC) at paras 14-15.

[22] Only in the alternative, does applicant seek confirmation of the order in respect of section 18(b) on the ground that it constitutes unfair discrimination based on marital status. However, she does not, rightly so in my view, seek an order of constitutional invalidity in respect of section 18(a) or section 19 of the Act. The High Court has not pronounced on these provisions and this Court has not been asked to do so. Nor are we minded to do so as we have not had the benefit of argument on the constitutional validity of these sections.

[23] Applicant also argued that the prohibition in section 18(b) amounts to an arbitrary deprivation of property in terms of section 25 of the Constitution. Given the conclusion I have come to on the applicant's main ground of attack based on equality, I need not reach the argument premised on arbitrary deprivation of property.

[24] Last, applicant asks that should the order of constitutional invalidity be confirmed, it ought to be tailored to claims for patrimonial loss arising from bodily injury committed with intent only. This argument has no merit. The mental element of "fault" is a requirement in section 18(b). Its dual meaning of "intent" or "negligence" is well entrenched in the common law of delict.[25] Nothing in the argument persuades me that in the context of domestic or marital bodily injury, it

[25] See Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 331; Boberg *Law of Delict* vol. I: *Aquilian Liability* 175.

ought to be restricted to the more onerous test of intent. Also, it should not be forgotten that the provisions of section 18(b) extend to bodily injury arising from road and other accidents, which ordinarily arise due to negligent rather than wilful conduct. I conclude that there is no good reason for restricting the reach of section 18(b) to claims for patrimonial loss arising from bodily injury inflicted with intent only.

[25] I turn to the submissions of the Fund. It opposes confirmation of the order of constitutional invalidity on several grounds. First, the Fund submits that the impugned provision does not amount to differentiation and that if it does, the differentiation bears a rational connection to a legitimate government purpose. The purpose is to regulate rights and obligations of different matrimonial property regimes. Second, it argues that the state did not unfairly discriminate against the applicant directly or indirectly on the ground of marital status or any other ground. The challenged provision does not make a differentiation on a ground listed in section 9(3) of the Constitution or on an "analogous ground".[26] The argument goes that properly understood, the specified ground of "marital status" in section 9(3) of the Constitution does not refer to differences between patrimonial

[26] On what an analogous ground is, see *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 48; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); 1997 (4) SA 1 (CC) at para 29; *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 46; *President of Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) at para 31.

consequences within marriage but refers to differentiation between people who are married and people who are not married.

[26] The Fund argues further that even if the differentiation is based on marital status, it is not unfair or even if it is unfair, it is justifiable under section 36 of the Constitution because the applicant had adopted the marital regime out of her own choice and in that way, it is argued, she has waived her right to claim patrimonial damages arising from the delict of her spouse.

[27] In another argument, the Fund submits that there is no factual basis to the High Court's conclusion that section 18(b) constituted indirect discrimination because it was more detrimental to women than men and for considering the constitutionality of the section in the context of an upsurge in domestic violence.

[28] At this point it is convenient to record that the Women's Legal Centre Trust applied for and was admitted as amicus curiae. The amicus introduced written and oral argument, which is not only different but also useful to the Court. The nub of its submission is that section 18(b) offends the equality, dignity, freedom and security of the person,[27] and access to courts[28] guarantees of our Constitution.

[27] The guarantee is provided for in sections 12(1)(c) and 12(1)(e) of the Constitution, which reads as follows:

> "Freedom and security of the person- (1) Everyone has the right to freedom and security of the person, which includes the right -

What stands out in the submissions of the amicus is the emphasis on the uneven power relations between men and women in marriages. The amicus argues that the constitutional validity of section 18(b) must be seen within the social context of the prevalence of domestic violence in South Africa and its gendered nature; the effect of physical abuse on women in particular and their economic vulnerability within marriage.

The common law and section 18(b) of the Act

[29] I have already held that the pre-eminent concern of this case is not the development of the common law but the constitutional validity of section 18(b). It is nonetheless beneficial to restate the impugned section's common law substratum that spouses who are fettered to a joint estate may not sue each other for delictual loss; be it patrimonial or non-patrimonial.[29] The rule in effect ousts legal redress for delictual loss of any kind arising from the wrongdoing of a spouse against another. The amicus argues, and it must be right, that this rule owes its origin to boundless patriarchy in a setting where the husband wielded marital

---

(c) to be free from all forms of violence from either public or private sources;

(e) not to be treated or punished in a cruel, inhuman or degrading way."

[28] This protection is provided for in section 34 of our Constitution. The ambit of this protection is set out in *Lesapo v North West Agricultural Bank and Another* 1999 (12) BCLR 1420 (CC); 2000 (1) SA 409 (CC) at paras 15-16 and 22.

[29] Cronje et al "Marriage" *LAWSA* vol 16, first re-issue para 78; *Tomlin v London Lancashire Insurance Co Ltd* 1962 (2) SA 30 (D) at 33F-G. Followed more than twenty years later in *Delport v Mutual & Federal Insurance* 1984 (3) 191 (D) at 193D-E.

power over the wife and children born of the marriage, and was the exclusive administrator of the joint estate.[30] As long as the marriage endured, the estate was deemed to be one, indivisible and subject to one command. Short of a divorce, a wife married in community of property dared not to sue her husband for any cause in delict[31] because it would be futile to do so:

> ". . . law of a joint estate was and is at common law the obstacle to an action between spouses married with community of property,…neither has a separate estate and what he or she recovers from the other comes out of the joint estate and falls back instantly into the joint estate."[32]

Equally trite is that in a marital property regime where each spouse has a separate estate, the common law restriction on claims in delict has no place. That explains why the bar to sue one's spouse does not extend to marriages out of community of property.[33]

---

[30] In this regard the amicus submitted that the justification of the barrier in section 18(b) may be derived from the view that marriages, during the sixteenth and seventeenth centuries in Holland, were "contracted in community of property". Within this framework, the rights of the husband were dominant over the rights of his wife, and the question of whether a wife might sue a husband in delict did not receive sufficient recognition by authorities. For an analysis of what the marital power of a husband entailed see Van Zyl "Section 13 of the Matrimonial Property Act─a historical relic?" *CILSA* XXIII 1990 at 229-233.

[31] See above n 29.

[32] See *Tomlin* above n 29 at 33C-D.

[33] *Tomlin* above n 29 at 33C-D; *Rohloff v Ocean Accident and Guarantee Corporation Ltd* 1960 (2) 291 (A) at 304A; *Young v Coleman* 1956 (4) SA 213 (D & CLD) at 216F-G; Cronje et al above n 29 at para 80.

[30] This onerous and dated rule of the common law was soon to fall foul of evolving societal notions of gender equality within marriage and the equal worth of spouses. On 1 November 1984, chapters II and III of the Act jettisoned much of the gender differentiation found in the common law of marriage in community of property. The legislation made drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly. A few examples will suffice. The chapters abolished the marital power of the husband over the person and property of his wife,[34] equalised the power of the wife to that of the husband to manage the joint estate,[35] subjected juristic acts affecting the joint estate to the consent of the other spouse,[36] and immunised and protected monetary and other financial receipts by a spouse from interference by the other.[37]

---

[34] See Matrimonial Property Act 88 of 1984 at section 11(1) which states that "[t]he common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed."

[35] See id at section 14 stating that "[s]ubject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act."

[36] See id at section 15(1) declaring that "[s]ubject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse."

[37] See id at section 15(3) stating that:

> "A spouse shall not without the consent of the other spouse-
>
> (a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
>
> (b) receive any money due or accruing to that other spouse or the joint estate by way of -

[31] Importantly for the present purpose, the Act introduced "separate property" which does not form part of the joint estate.[38] Section 18(b)[39] confers on a spouse a claim in delict against the other for damages other than for patrimonial loss arising from bodily injury. The amount so recovered does not fall into the joint estate but becomes her or his separate property in terms of 18(a). In turn, section 19[40] directs that an injured spouse must recover damages and costs from the separate estate of the guilty party absent which the damages and costs are

---

(i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;

(ii) damages for loss of income contemplated in subparagraph (i);

(iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;

(iv) income derived from the separate property of the other spouse;

(v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;

(vi) the proceeds of any insurance policy or annuity in favour of the other spouse;

(c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection."

Section 19 stating that:

"When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse under the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate . . . "

[38] See sections 1, 17(1)(a) and (b), 19 and 20.

[39] See full text above n 11.

[40] See section 19 above n 37.

recoverable by way of an appropriate adjustment on dissolution of the joint estate.[41]

[32] The question that must be asked is why did these far-reaching legislative reforms authorise legal redress for non-patrimonial loss, but not for patrimonial damages arising from bodily harm? Put otherwise, in the light of our constitutional setting, which legitimate purpose of government is advanced by the distinction in section 18(b) between claims for patrimonial and non-patrimonial damages and in turn between people in marriages in and in marriages out of community of property?

[33] In this Court, the Fund formulated the government purpose pursued by section 18(b) no higher than the need to regulate patrimonial consequences of marriage. It is indeed so that matrimonial property law, whether of common law or statutory variety, pursues at a generic level, the object of regulating proprietary consequences of marriage. That does not mean, however, that when the constitutional validity of a specific rule of the law of matrimonial property is in issue, the generic purpose overrides the specific purpose of the rule of law under

[41] In *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA); [2002] 4 All SA 311 (SCA) at para 9 the court held that whilst sections 17-19 of the Act authorise an estate separate from the joint estate it does not mean that either of the estates is protected from the incursions of joint creditors of the spouses. If that were so it would lead to the anomaly that a debtor might be insolvent in relation to one estate and not insolvent in relation to the other. The court concluded that the Act recognises the existence of separate property in the relationship between the spouses between each other but it does not affect the rights of third parties. For purposes of the present case, we are not called upon to decide on the rights of creditors of an insolvent estate in relation to a separate estate.

challenge. A court remains obliged to identify and examine the specific government object sought to be achieved by the impugned rule of law or provision. In other words, we are obliged to look at the specific purpose of section 18(b) even though the general purpose of regulating property arrangements in marriage may not in itself be open to constitutional doubt.[42] For present purposes, the question is not whether it is constitutionally authorised to regulate patrimonial consequences of marriage by law, but whether a specific part of the scheme is constitutionally tolerable.

[34] In my view the Minister is right when she contends that the purpose sought to be achieved by the differentiation in section 18(b) is to avoid the futility of spousal claims. Sinclair explains the purpose in clear terms:

> "Actions sounding in property or money between spouses married according to a system of universal community do not make sense, for everything is owed and owned in common. For this reason the common law did not provide for the possibility that the spouses might have an action in delict against each other for defamation, assault, bodily injury arising out of an accident, and so on." [43]

[42] See *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at paras 12-18 outlining the interpretation of legislation and Constitutional principles. See also *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another* 2002 (7) BCLR 663 (CC); 2002 (4) SA 613 (CC) at paras 34-39 explaining the importance of interpretation of legislation in accordance with the Constitution.

[43] Sinclair *An Introduction to the Matrimonial Property Act* (Juta & Co Ltd, Cape Town 1984) at 28-32; Boberg "Delictual actions between spouses: setting the record straight" (1984) 101 (4) *SALJ* 613. See also cases above n 29 and n 33.

[35] We know that section 18(b) permits claims in delict between spouses sharing a joint estate, arising from bodily injury provided the damages sought are non-patrimonial. What remains is to determine whether the distinction between patrimonial and non-patrimonial damages and between marriages in and out of community is rationally related to the purpose sought to be advanced.

Patrimonial and non-patrimonial damages

[36] A good starting point for probing the rationality of the distinction found in section 18(b) is the relationship in law between patrimonial and non-patrimonial damages. That understanding will inform the constitutional appropriateness of granting legal redress to one class of married couples and denying it to another.

[37] The Act does not define "damages" or "damages for patrimonial loss". Its meaning must be garnered from the common law. The notion of damages is best understood not by its nature but by its purpose. Damages are "a monetary equivalent" of loss "awarded to a person with the object of eliminating as fully as possible [her or] his past as well as future damage."[44] The primary purpose of awarding damages is to place, to the fullest possible extent, the injured party in the same position she or he would have been in, but for the wrongful conduct. Damages also represent "the process through which an impaired interest may be

[44] Visser et al *Visser en Potgieter's Law of Damages* 2 ed (Juta & Co Ltd, Lansdowne 2003) at 19.

restored through money."[45] To realise this purpose our law recognises patrimonial and non-patrimonial damages. Both seek to redress the diminution in the quality and usefulness of a legally protected interest. It seems clear that the notion of damages is sufficiently wide to include pecuniary and non-pecuniary loss and it is understood to do so ordinarily in practice.

[38] Thus patrimonial damages, which in practice are also called special damages, aim to redress, to the extent that money can, the actual or probable reduction of a person's patrimony as a result of the delict or breach of contract.[46] In this sense patrimonial damages are said to be a "true equivalent"[47] of the loss. Ordinarily they are calculable in money. Well-settled examples in bodily injury claims are past and future medical expenses, past and future loss of income, loss of earning capacity, and loss of support.

[39] On the other hand non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's

[45] See id.

[46] See Hutchinson "Back to Basics: Reliance Damages for Breach of Contract Revisited" (2004) 121 *SALJ* at 51; Erasmus and Gauntlett (updated by PJ Vissser) "Damages" *LAWSA* (2005) vol 7 2 ed at 27 para 25.

[47] See Visser et al above n 44 at 33.

estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money.[48] They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include "pain and suffering", "disfigurement", and "loss of amenities of life."

[40] Besides bodily integrity, our law recognises and protects other personality interests such as dignity,[49] mental integrity,[50] bodily freedom,[51] reputation,[52]

---

[48] See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (AD) at 838 recognising that pain and suffering which accompanies future medical treatment may be considered a part of damages for pain and suffering. See also *Solomon and Another, NN.O v De Waal* 1972 (1) SA 575 (AD); *Eggeling and Another v Law Union & Rock Insurance Co. Ltd* 1958 (3) SA 592 (D) for association with disfigurement. See generally *Administrator-General, South West Africa, v Kriel* 1988 (3) SA 275 (A); *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 380 for damages for loss of amenities of life.

[49] See *Brenner v Botha* 1956 (3) SA 257 (T) recognising that verbal injuries may constitute an impairment of an individual's dignity if such injury amounted to degrading and humiliating behaviour.

[50] See generally Neethling et al *Neethling's Law of Personality*. See also Du Plessis and De Ville "Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement" in Van Wyk et al (eds) *Rights and Constitutionalism: The New South African Legal Order*. See also *Christian Lawyers' Association v National Minister of Health and Others* 2004 (10) BCLR 1086 (T); 2004 (4) All SA 31 (T); *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC); *Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1994 (3) BCLR 80 (SE); 1994 (4) SA 899 (SE). See also eg *Coetzee v Government of the RSA* 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC).

[51] See above n 50 and also *In Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) recognising the right to human dignity and personal freedom.

[52] *National Media Ltd and Others v Bogoshi* 1999 (1) BCLR 1 (SCA); 1998 (4) SA 1196 (SCA) at 1216G-H; *O v O* 1995 (4) SA 482 (W) at 490H-J; *Gardener v Whitaker* 1994 (5) BCLR 19 (E); 1995 (2) SA 672 (E) at 690G-691A; *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W); 1996 (2) SA 588 (W) at 606F; cf *Potgieter v Kilian* 1995 (11) BCLR 1498 (N), 1996 (2) SA 276 (N).

privacy,[53] feeling,[54] and identity.[55] A wrongful reduction of the quality of these personality interests or rights entitles the victim to non-patrimonial damages.

[41] Yet, it is important to recognise that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable,[56] courts regularly assess and award to claimants general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant's patrimony. After all, the primary object of general damages too, in the non–patrimonial sense, is to make good the loss; to amend the injury. Its aim too is to place the plaintiff in the same position she or he would have been but for the wrongdoing.

---

[53] See *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) holding that the right to privacy is a valuable right and that the communications with respect to an individual's HIV status was unreasonable and unjustifiable.

[54] See above n 49. See also *S v Makwanyane* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC).

[55] See *Kidson & Others v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W) recognising that a non-consensual publication which defamed a married woman may constitute an infringement of identity and privacy.

[56] See Boberg on *Delict* above n 25 and Visser and Potgieter on *Damages* above n 44 contending that with respect to the law of delict, the object is to place the plaintiff in the position that the individual would have been in, had the delict not occurred, or where the plaintiff was prior to the breach. With respect to contract, the *prima facie* goal is to place the individual in the position that they would have been in, had the contract been performed. See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) outlining the standard of loss of earning capacity. See *Versfeld v South African Citrus Farms Ltd* 1930 AD 452 establishing that the measure of damages is determined by considering where the plaintiff would have been had the contract been performed. See *Coetzee v SA Railways & Harbours* 1934 CPD 221 allowing an action for prospective damages on the basis that the plaintiff could demonstrate a loss of future earnings as a result of his present injury.

Equality analysis

[42] I now turn to the equality analysis. To that end a good start would be to recite the equality and unfair discrimination test enunciated by this Court in *Harksen v Lane NO and Others*:[57]

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

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

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

    (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

[57] *Harksen* above n 26 at para 53; the test was confirmed in several subsequent decisions of this Court.

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

Does the section differentiate?

[43] Yes, section 18(b) does differentiate. On a plain reading it denies a spouse married in community of property the right to claim damages for patrimonial loss arising from bodily injury inflicted by the other spouse. However, in doing so the section, in effect, draws a distinction amongst different classes of domestic partnerships. For the present purpose, the differentiation operates between marriages in community of property and marriages out of community of property. More accurately, the differentiation is between the proprietary interests and protections, which the section attaches to the two marital regimes.

[44] Applicant, the Minister, and the amicus urged us to find that the distinction drawn by the section breaches the equality guarantee in two respects. It infringes the right to equal protection and benefit of the law under section 9(1) of the Constitution because it does not further a legitimate government purpose. In the second instance, it constitutes unfair discrimination under section 9(3) of the Constitution because it is based on "marital status", a ground prohibited by section 9(5) of the Constitution and it has not been shown that the discrimination is not unfair.

[45] I dispose of the submission on "marital status" first. To me it seems plain that the differentiation made by section 18(b) is not about a protectable interest or burden that attaches to married people but is denied unmarried people. The distinction created by section 18(b) is in essence between the different proprietary consequences of marriages in and out of community of property. This is not a case where the law withholds from unmarried people a protection or right which it grants to married people. This is a case in which the law denies one class of married people a protection that another class enjoys.

[46] The equality jurisprudence of this Court on the specified ground of "marital status" so far relates to protectable interests or disabilities of being married or not being married.[58] In advancing the argument that the differentiation is on the specified ground of marital status, the Minister sought refuge in the decision of this Court in *Daniels v Campbell NO.*[59] However this decision does not assist the cause of the Minister. In *Daniels* the Court held that the discrimination complained of had occurred in the past in respect of marital status precisely because legislative protection was withheld from Muslim spouses on the

[58] *Satchwell v President of the Republic of South Africa and Another* 2004 (1) BCLR 1 (CC); 2003 (4) SA 266 (CC); *Volks* above n 26; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2002 (10) BCLR 1006 (CC); 2003 (2) SA 198 (CC);; *National Coalition for Gay and Lesbian Equality (2000)* above n 19; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC); *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC); 1997 (2) SA 261 (CC); *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC). For a discussion of the ground of marital status as a form of discrimination see also Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta, Lansdowne 2005) at 254-256.

[59] *Daniels* above n 19.

unsustainable interpretive pretext that their marriages were not marriages at all. In that case, what the old and constitutionally unacceptable judicial interpretation of the word "spouse" had resulted in was in effect denial of the very legal status, official classification and formal recognition or standing of marriage. In *Volks NO v Robinson*[60] the specified ground of marital status was engaged because the impugned law accorded benefits to married people which it did not accord to unmarried people.[61] However the present case is different. The challenged measure merely regulates and distinguishes rights and duties that attach to different property regimes within marriage.

[47] The applicant urged upon us to adopt a generous and expansive meaning of "marital status" as required when giving effect to a right in the Bill of Rights.[62] For this proposition applicant referred to dictionary meaning of "marital" and "status".[63] None appear to support the meaning contended for. Be that as it may, it is open to doubt whether the specified ground of marital status is engaged by the impugned legislative differentiation. If that were so, it would imply that any difference in proprietary consequences of marital regimes prescribed by the common law or legislation is presumptively discriminatory and unfair unless

[60] *Volks* above n 26.

[61] Id at paras 51 and 56.

[62] See for example *S v Makwanyane* above n 54 at para 9.

[63] Judy *The Concise Oxford Dictionary* 10 ed (Oxford University Press, Oxford 1999) at 872 and 1403.

shown not to be. In my view such a generous and far-reaching understanding of "marital status" in section 9(3) of the Constitution may well be untenable. However, given the conclusion I have come to on the rationality requirement of equality under section 9(1) of the Constitution, I need not, in this case, reach a final conclusion on whether the differentiation is on the specified ground of marital status. For the same reason I need not reach the question whether the differentiation constitutes unfair discrimination on any other specified or "analogous" ground.[64]

Does the differentiation bear a rational connection to a legitimate government purpose?

[48] I am at the point of enquiring whether the differentiation brought into being by section 18(b) evinces a rational connection to the governmental purpose proffered to validate it. For the appropriate test I turn to *Prinsloo v Van der Linde and Another*[65] in which this Court explained that in the first leg of the equality test the constitutional state is bound to act in a rational manner:

[64] On what constitutes an analogous ground in unfair discrimination jurisprudence see n 26; *Prinsloo Volks* above n 26.

[65] *Prinsloo* above n 26. In that case the Court applied the equality provision in section 8 of the Interim Constitution. However, this Court has affirmed several times that the equality analysis under section 8 of the Interim Constitution applied equally to the equality provision found in section 9 of the Constitution. For examples see *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 52; *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC) at para 29; *National Coalition for Gay and Lesbian Equality (1998)* above n 58 at para 15.

> "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[66]

[49] It is so that laws rarely prescribe the same treatment for everyone. Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality, if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under section 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be, an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the "rational differentiation" standard set by section 9(1) thereof.[67]

---

[66] See *Prinsloo* above n 26 at para 25.

[67] Of course the constitutional requirement of a rational connection between a law and its avowed purpose has its source in section 2 of the Constitution which provides that it is the supreme law and that law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. On the rational connection requirement in all law, whether it differentiates or not, see *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (4) BCLR 347 (CC); 2005 (3) SA 589 (CC)

[50] The charge of the irrationality and inequity of section 18(b) is neither novel nor of recent origin.[68] In fact it well precedes our constitutional dispensation. The Minister and the amicus drew our attention to the 1982 SA Law Commission Report[69] that preceded the enactment of the Act. We were referred to an insightful critique of section 18 of the Act and its underlying common law rationale:

> "Contrary to the position in marriages out of community of property, one spouse cannot claim on the ground of delict against the person to whom he or she is married in community of property. Not only is this state of affairs clearly anomalous, but its injustice is also particularly striking where the actual defendant is a third party, for example an insurance company. Should a husband, for example, run his wife down and injure her, she could well succeed against the third-party insurer if they were married out of community of property, but would have no claim at all if they were married in community of property."[70]

[51] In my view the distinction made by section 18(b) on claims for patrimonial damages between spouses married in and out of community is a relic of the common law of marriage, which is simply not useful. The distinction drawn by section 18 displays a pre-occupation with the conceptual cohesion of a joint estate.

---

at para 90; *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (9) BCLR 891 (CC); 2002 (3) SA 265 (CC) at paras 41 and 45; *Pharmaceuticals Manufacturers Association of SA and Others: in Re Ex Parte Application of President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) at paras 84-86 and 90.

[68] See above n 43 for academic articles on the section written in the 1980s.

[69] The full title of the report is the "South African Law Commission Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married women, and the law of succession in so far as it affects spouses" (8th February 1982).

[70] Id at 42.

After all in theory "everything is owed and owned in common"[71] and "what he or she recovers from the other comes out of the joint estate and falls back instantly".[72] Thus by refusing the physically brutalised spouse a claim for patrimonial loss against the other spouse, the common law, so too section 18(b) seeks to retain the notional purity of the universal community and to escape the futility of damages that would come from and return to joint patrimony.

[52] But the rub is that the government purpose to preserve the unity of the joint estate and to avoid the futility of spousal claims for bodily injury has fallen away. That much the Minister charged with the administration of the impugned law acknowledges. She readily disavows the rationality or legitimacy of the government purpose now advanced by the section. It is so that the legislative scheme of the Act and in particular of sections 18(a) and (b), 19 and 20 which have a bearing on claims for non-patrimonial loss arising from personal injury, has irreversibly undermined that purpose. As we observed earlier, sections 18(a) and (b) confer on a spouse in community of property the right to recover damages other than patrimonial damages for bodily injury by reason of delict committed by the other spouse. The damages do not fall into the joint estate but become the separate property of the injured spouse.

[71] See *Sinclair* above n 43 at 1.

[72] See *Tomlin* above n 29 at 33C-D.

[53] Section 19 recognises a spousal right of recourse against the separate estate of the other spouse, or if there is none, against the joint estate upon its division. Significantly, spouses are no longer bound inexorably to a joint estate till death or divorce do them part. Section 20(1)[73] allows a court, on application of a spouse on specified grounds, to order the immediate division of the joint estate in equal shares or other equitable basis. This a court may do during the marriage to avoid serious prejudice by actual or threatening conduct of the other spouse. Indeed, section 20(2) also empowers a court to order, subject to conditions it sets, that the community of property be replaced by another property system whilst the marriage subsists.[74]

[54] There is no rational account why the scheme or purpose of the Act stops short of granting redress in the form of patrimonial damages resulting from spousal violence. The claim would not be futile because the proceeds of the claim would not accrue to the common patrimony but would become separate property of the battered spouse. In that event, clearly the guilty spouses will not benefit from their wilful or negligent misdeeds.

---

[73] Section 20(1) reads: "A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that the other person will not be prejudice thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just." See *Bopape and Another v Moloto* 2000 (1) SA 383 (T) at 387B; *Ex Parte Menzies et uxor* 1993 (3) SA 799 (C) at 811B-F.

[74] Section 20(2) reads: "A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit."

[55] Equally absurd is to withhold from spouses in joint estates patrimonial redress against physical abuse but to grant it to spouses married out of community of property. It does not seem to me that the risk of bodily harm at the hands of a spouse is an essential or defining difference between the two types of marital property regimes. Nothing suggests that spouses in the one class merit greater protection from wilful domestic battery or accidental bodily injury than spouses in the other. The anomaly and arbitrariness assumes even more startling proportions when the claim arising from spousal violence lies against a third party insurer. The insurer is not liable in the one instance of marriage in community of property but is liable in the case of marriage out of community of property. Why should the negligent driving of a spouse in the one class of marriage attract delictual relief and not under a different marital regime? In my view no legitimate end dictates this distinction.

[56] Another important consideration is that there is no rational divide between patrimonial and non-patrimonial damages for purposes of spousal claims against each other for delictual personal injury. As we have seen earlier,[75] the principal distinction between the two classes of damages is that non-patrimonial damages seek to redress the loss or reduction of a highly personalised interest, which does not affect the claimant's estate and is not readily calculable in monetary terms.

[75] See paras 36 to 41 above.

Whereas patrimonial loss ordinarily affects the patrimony and represents a true pecuniary equivalent of the damages.[76] What is crucial for the present purpose is that the law of damages recognises special and general damages to afford the fullest possible redress for delictual harm. Both classes of damages seek to redress the deterioration or reduction of the quality or usefulness of a legally protected interest. In both cases the injured party loses something and receives money as reparation. Stated differently, the principal object of damages, whatever the kind, is to "neutralise loss through the addition of a new patrimonial element".[77] By prohibiting recovery of patrimonial damages for personal injury, section 18(b) arbitrarily prevents the fullest possible compensation for spouses who are victims of violence, negligent driving or other wrongdoing that leads to bodily harm by their marriage partners.

[57] Another pointer to arbitrariness is that whilst there are definitional differences between patrimonial and non-patrimonial damages, in bodily injury claims the distinction is often blurred because the infringed personality interest often causes loss that affects both the person and the patrimony. For an example we need not look far. Mrs Van der Merwe, the applicant, was run over by her husband intentionally. On her version, she sustained grievous bodily injuries which have given rise to general damages in the form of pain and suffering,

[76] Erasmus and Gauntlett above n 46 at 26 and 27; Visser et al above n 44 at 32.

[77] Visser et al above n 44 at 165.

disfigurement and loss of amenities of life and to special or patrimonial damages for loss of earnings and earning capacity and hospital and medical expenses. Thus infringement of bodily integrity is not a reliable predictor of the nature or class of damages that may flow. The absence of a reliable distinction between patrimonial and non-patrimonial damages in bodily injury suits in itself demonstrates that the distinction made in section 18(b) is at best tenuous and thus falls foul of the requirement of a rational differentiation.

[58] The section draws an impermissible differentiation between spouses married in and out of community of property in respect of the right to recover patrimonial damages suffered from bodily injury attributable either wholly or in part to the fault of the other spouse. The differentiation is not legitimate because in itself it is arbitrary and furthermore it does not serve a legitimate public end. In doing so, section 18(b) limits the right to equal protection and benefit of the law guaranteed by section 9(1) of our Constitution. The question is whether such limitation is justifiable?

Justification

[59] The Fund contends that the limitation of the applicant's right to equal protection and benefit of the law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. To that end, the Fund urged upon us that marriage is a matter of choice and so too are the

proprietary consequences of marriage. The applicant chose marriage in community of property and, goes the argument, it is fair and reasonable that she be kept to the immutable consequences of her choice. It is now not open to her to challenge the constitutional validity of the law she opted to marry under.

[60] This argument resolves itself into a waiver defence.[78] It implies an undertaking by married people not to attack the legal validity of the laws that regulate their marriages.

[61] This line of reasoning falters on two grounds. First, the constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid.[79] Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional state. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary. Section 39(2) obliges courts to

[78] For a helpful discussion of waiver in constitutional litigation see also Currie and de Waal above n 58 at 39-43.

[79] See *Ferreira* above n 50 at para 26; see also *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC) at para 46 and 148; *Daniels* above n 19; *National Coalition for Gay and Lesbian Equality (2000)* above n 19 at para 69*; De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA) at paras 23-27.

interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, section 172(1) makes plain that when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confers validity to a law that otherwise lacks a legitimate purpose, has no merit.

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

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

Dignity, gender discrimination and domestic violence

[64] The amicus presented three compelling arguments on dignity, gender discrimination and domestic abuse to support the contention that the impugned provisions are constitutionally intolerable. The arguments are mutually re-enforcing and often seem to point to intersectional limitation of these vital constitutional protections.

[65] First, on their argument, the challenged section desecrates the intrinsic and equal worth promised by section 10 of the Constitution to everyone including victims of spousal brutality and of accidents attributable to the wilful or negligent wrongdoing by spouses. Yet section 18(b) immunises spouses married in community of property from all patrimonial claims, even those which arise from

degrading domestic battery. No one can credibly suggest that the domestic road rage Mrs Van der Merwe had to endure is not an affront to her self-worth and dignity. Yet the law refuses to hold fully accountable and liable its perpetrator. In other words her bodily harm is not actionable in a material respect, yet spouses, women in particular, situated in another form of marriage are worthy of full protection.

[66] Second, the amicus urged us to find that section 18(b) is problematic because it amounts to indirect and unfair discrimination against women. To this assertion, the Fund protested that the scantily stated facts does not permit a speculative foray into the conditions under which women married in community of property find themselves. It is so that ordinarily when a court is invited to decide a legal issue only on an agreed set of facts, it may not depart from the facts. However when the constitutional validity of a law or conduct is challenged by invoking one or more guarantees in the Bill of Rights, contextual analysis is often all important.[80] The validity or otherwise of a law has implications that go well beyond the parties before court. It is a matter of public concern.[81] For that reason a court is obliged, where appropriate, to consider the context, historical or social or textual, in which the guarantees should be understood and the impugned law

[80] See Currie and De Waal above n 58 at 156-157.

[81] *Bhe* above n 79 at para 91; *Minister of Finance and Another v Van Heerden* above n 65 at paras 22 and 139; *Ferreira* above n 50 at paras 170-174; *S v Makwanyane* above n 54 at para 10.

operates. It is however unnecessary to resolve the question whether the facts in the stated case provide ample platform to decide the challenge premised on indirect gender discrimination. This is so because I uphold the applicant's claim on another basis which disposes of the appeal.

[67] There is nonetheless much cogency in the submission of the amicus that despite its gender-neutral terms, the probable effect of section 18(b) on women married in community of property is likely to be more devastating than on their male counterparts. There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy. Women are more likely to fall victim to the battery, abuse or negligent driving of their domestic partner than otherwise and are therefore more likely to be non-suited for patrimonial damages than their husbands. Even more demeaning is that victims of domestic and other violence within marriages in community of property would have to solicit their abuser's consent to meet medical and other bills or to make up loss of earnings out of the joint estate. Moreover, in these circumstances third party insurers, if any, are not liable to reimburse the injured spouse or the joint estate. In this way, the burden of abuse and economic dependency becomes mutually reinforcing and most intolerable.

[68] The facts that impelled Mrs Van der Merwe to seek satisfaction illustrate this devastation. Not even a divorce from her abuser entitles her to escape the

adverse consequences of being rendered claimless under section 18(b) in time if needed. Although on its face the provision appears gender-neutral, there is much to be said for the inference that it is bound to work a more severe hardship on women married in community of property than men similarly situated.

[69] Third, the amicus and the applicant invited us to hold that section 18(b) omits to protect patrimonial loss derived from spousal bodily injury. Both submit that the omission by the state unjustifiably limits freedom from all forms of violence from either public or private resources as envisaged in section 12(1)(c) of the Constitution. It is so that section 18(b) attaches limited adverse patrimonial consequences to domestic violence, be it negligent or wilful. Spouse batterers and wrongdoers in delict are in effect immunised from making good patrimonial damages of their marriage partners. This ouster provision seems to be at odds with the constitutional protection extended to a person's bodily integrity.[82] However once again, given the conclusion I have reached on the equality provisions under section 9(1) I need not express a firm view on this contention.

Remedy

[70] I have found that section 18(b) of the Act is inconsistent with the equality provision of section 9(1) of the Constitution because it fails the rational

[82] *State v Baloyi* 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at paras 11-12. See also *Omar v Government of South Africa and Others* 2006 (2) BCLR 253 (CC); 2005 (12) SA 65 (CC) at paras 16-19.

differentiation test. The Fund urged that even if we were to find for her, Mrs Van der Merwe is not entitled to a remedy as she is effectively asking the Court to legislate in a complex area of matrimonial law on a narrow point only to preserve her claim against the Fund. On this argument, the major engine for law reform should be the legislature and not the judiciary.

[71] The submission has no merit on several accounts. First, the submission is out of sync with the express duty that sections 172(1)(a) and (b)[83] impose on this Court and other competent courts. If it finds so, this Court must declare that section 18(b) is inconsistent with the Constitution but only to the extent of the inconsistency. Thereafter it must make an order that is just and equitable and may limit the retrospective effect of the declaration of invalidity. Second, Mrs Van der Merwe and others similarly situated are entitled to a proper vindication of their constitutional rights violated by the legislation. Another compelling consideration is that the order we make must constitute immediate and effective relief. It must

[83] Section 172(1) reads:

> "When deciding a constitutional matter within its power, a court–
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including–
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

eliminate the source of the constitutional complaint in a way that provides a meaningful remedy.[84]

Severance and reading-in

[72] The applicant, the amicus, and the Minister were in agreement that a remedial order of severance and reading-in is appropriate and the least invasive of the legislative role of Parliament. They urged us to resort to severance and reading-in as the High Court did but subject to a modification that the patrimonial damages recovered under section 18(b) fall outside the joint estate and become the separate property of the injured spouse, something the High Court omitted to do.

[73] Severance of words from a legislative provision is appropriate where it is necessary to remove an offending portion from the provision. Reading words into a provision arises when it is necessary to add words in order to cure it of constitutional inconsistency. The cases set useful guidelines.[85] The "cured" provision must be consistent with the Constitution and its basic values. The result of the curative process must interfere with the statute as little as possible. The

[84] *National Coalition for Gay and Lesbian Equality and Others (2000)* above n 19 at para 65; *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 32; see also *Satchwell* above n 58 at para 34 for the proposition that reading in is more preferable than striking down an order and suspending a declaration that may not provide the desired relief.

[85] See *Mabaso* above n 6 at para 47; *Daniels* above n 19 at para 34; *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another* above n 42; *Satchwell* above n 58 at paras 27 and 34; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC); 2000 (3) SA 1 (CC) at para 56; *National Coalition for Gay and Lesbian Equality (2000)* above n 19 at paras 74-76.

remedial step should be capable of sufficient precision and should be as faithful as possible to the legislative scheme at hand. Lastly, the resort to the surgical remedies of severance and reading-in should not be preferred if they are likely to lead to an "unsupportable budgetary intrusion".

[74] Having weighed the applicable guidelines on the remedy of severance and reading-in, I am persuaded that the inclusion of the words "other than damages for patrimonial loss" in section 18(b) of the Act is inconsistent with the Constitution and should be so declared. I have come to the conclusion that it would be just and equitable that the offending words should be severed from the provision.

[75] I also find that the omission from section 18(b) of the Act of the words "[s]uch damages do not fall into the joint estate but become the separate property of the injured spouse" after the words "either wholly or in part to the fault of that spouse" is inconsistent with the Constitution and invalid. In the order I will make, the declaration of constitutional invalidity will be accompanied by an appropriate reading-in order to that effect. This approach to the order will resolve the obvious omission in the order of the High Court. As the order presently stands, patrimonial damages recovered under section 18(b) would nonetheless revert to the joint estate. The words inserted to the order I propose to make, make it clear that patrimonial damages will accrue to the separate estate of the injured spouse.

[76] I need only add that the proposed severance and reading-in do not seem to cause any budgetary intrusion. Neither the Minister nor the Fund suggested otherwise. In any event, it is not improbable that, as a result of this judgment, claims to the Fund from spouses married in community of property will increase. That outcome would, in my view, be salutary because the relief granted by this Court would be serving a purpose that the Constitution authorises.

Retrospective effect

[77] I am now called upon to decide whether the order I make should limit the retrospective effect of the declaration of invalidity. In authorising an order limiting the retrospective effect of constitutional invalidity, section 172(1)(b)(i) of the Constitution in effect implies that ordinarily the order has retrospective consequences.[86] Ordinarily parties concerned about the likely retrospective effect of an order of invalidity bear the burden to advance grounds for limiting its effect.[87] The Minister supported the order of the High Court to the effect that it shall have no effect on judgments that have already been handed down. The Fund made no submission on this issue. I think that the interest of justice requires that Mrs Van der Merwe and people similarly situated should get effective relief immediately from this order. I have not been referred to any major administrative

[86] *National Coalition for Gay and Lesbian Equality (1998)* above n 58 at paras 83-84.

[87] Id at paras 83-89. See also *S v Mello and Another* 1998 (7) BCLR 908 (CC); 1998 (3) SA 712 (CC) at para 14.

dislocation or other consideration that militates against making the order retrospective. I have not been pointed to any prejudice; nor can I find any. I plan to limit the operation of the order to claims in which a final court order has not been made.[88]

Costs

[78] The High Court made no costs order. It did not furnish reasons for making the applicant bear costs of her application in that court. In this Court, the Fund, the Minister and the amicus do not seek costs. The applicant has advanced several grounds why she should be awarded costs in the High Court and in this Court. It is indeed so that she challenged in the High Court and in this Court, the constitutional validity of a statute and in the process raised and ventilated important constitutional principles that will redound to the benefit of many affected spouses. Mrs Van der Merwe is an immediate beneficiary of the outcome of the case; but it is also true that there are similarly situated people who are not before us. The outcome of this litigation has a wide reach and is clearly in the public interest.

[88] Compare *S v Bhulwana; S v Gwadiso* above n 84 at 32; see also *S v Ntsele* 1997 (11) BCLR 1543 (CC) at para 14.

[79] On the other hand, the Fund is a juristic entity created by statute and funded by the state. It operates under the control of the Minister of Transport.[89] It opposed the initial application in the High Court and mounted an appeal to this Court against that order. It did so even in the face of the stance of another minister of state that the law impugned is bad and constitutionally insupportable. I know no good reason why a private citizen in the position of Mrs Van der Merwe should forfeit the opportunity to recover onerous costs in two courts only to the benefit of a state organ, which failed to say why it should not be ordered to pay costs. All things considered, it is just and equitable that the Fund should pay the costs of the applicant in the High Court and in this Court.

The order

[80] In the result I make the following order:

1. The Minister of Justice and Constitutional Development is joined as the second respondent in these proceedings.
2. The order of constitutional invalidity made by the Cape High Court on 13 September 2005 in respect of section 18(b) of the Matrimonial Property Act 88 of 1984 is confirmed subject to the variations set out in paragraphs 4, 5 and 6 below.
3. The order of the Cape High Court is varied to read as follows:

[89] See section 10(1) of the Road Accident Fund Act 56 of 1996.

(a) It is declared that the inclusion of the words "other than damages for patrimonial loss" in section 18(b) of the Matrimonial Property Act 88 of 1984 is inconsistent with the Constitution and invalid.

(b) The words "other than damages for patrimonial loss" in section 18(b) of the Matrimonial Property Act 88 of 1984 are severed.

(c) The omission from section 18(b) of Matrimonial Property Act 88 of 1984 of the words "[s]uch damages do not fall into the joint estate but become the separate property of the injured spouse" after the words "either wholly or in part to the fault of that spouse" is inconsistent with the Constitution and invalid.

(d) The words "[s]uch damages do not fall into the joint estate but become the separate property of the injured spouse" shall be read in after the words "either wholly or in part to the fault of that spouse" in section 18(b) of Matrimonial Property Act 88 of 1984.

4. Paragraphs 3(a) to 3(d) of this order shall operate retrospectively except only for claims under section 18 of the Matrimonial Property Act 88 of 1984 in which final judgments had been handed down on the date this order was made.

5. The Road Accident Fund is ordered to pay the costs of the applicant, Mrs Van der Merwe, in the Cape High Court application under case no 1803/2002 and in the confirmation proceedings in this Court.

6. The appeal of the Road Accident Fund against the judgment and order of the Cape High Court handed down on 13 September 2005 in case no 1803/2002 is dismissed with costs.

Langa CJ; Mokgoro J, Ngcobo J; Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke DCJ.

YACOOB J:

[81] I have read the judgment prepared by Moseneke DCJ in this matter. I agree with all of it except for paragraph 61.

[82] In my view, the choice argument may well have been relevant to the justification analysis if, there had, at the very least, been a legitimate governmental purpose. I agree with the finding that there is no legitimate governmental purpose present to support any justification of the law under attack in this case. In this event, the justification analysis fails on that ground and that ground alone.

For the applicant:	B David instructed by J L Martinson & Co.
For the amicus curiae:	O Mooki instructed by the Women's Legal Centre.
For the first respondent:	Theoniel Potgieter SC and Mohamed Salie instructed by Ebrahims Incorporated.
For the second respondent:	Karrisha Pillay instructed by the State Attorney.