

## BOOK REVIEW

# *The law of divorce and dissolution of life partnerships in South Africa*

Jacqueline Heaton (Editor)

Cape Town, South Africa: Juta. 2015, 800 p. ISBN 9781485107347, R950

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Jackie Heaton's latest contribution to the family law domain is formidable – 777 pages of carefully crafted opinions and discussions of the law affecting divorce and dissolution of life partnerships. Given the range, diversity and depth of issues in this area, it is no wonder that she calls on those being among the best in their field to assist her in writing up the book. The book consists of five parts. Part 1 deals with the dissolution of a civil marriage or civil union by divorce (with contributions by JA Robinson, JC Sonnekus, J Heaton, T Boezaart and M de Jong). Parts 2 and 3 explore the dissolution of a customary marriage and religious (Muslim and Hindu) marriages by divorce written by C Himonga (Part 2) and N Moosa and C Rautenbach (Part 3), respectively. In Part 4, B Smith discusses the dissolution of a life or domestic partnership, and Part 5 covers a miscellany of issues from domestic violence (E Bonthuys) to jurisdiction, procedure and costs (A Catto) to mediation and other appropriate forms of alternative dispute resolution upon divorce (M de Jong) and conflict of laws (C Schulze).

In reviewing the book, I am cognisant of the fact that Heaton mainly dominated the (English-reading) family law education domain – and for good reason: Heaton, first with Sinclair, then with Cronje, and then on her own, has that uncanny ability to combine the structure and rigour of private law principles and doctrine, and meld these concepts' important influences of constitutional precepts.<sup>1</sup> Her attention to detail is second to none. This attention is obvious when one peruses the book – I searched for spelling errors and referencing inconsistencies (as one does!), but found none. This is also probably due to a good relationship with the editors of the publishing house Juta (as the author acknowledges in her preface).

When I heard about the book, my concerns were twofold. First, I wondered whether the book was a compromise between the seemingly impossible task of updating *Boberg's Law of persons and family*<sup>2</sup> and

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1 This led me to ask her in 2009 to be the guest editor of a special family law issue of *Speculum Juris* (at a time when I was a technical editor there).

2 B van Heerden, A Cockrell and R Keightley (eds) *Boberg's Law of persons and the family*, 2<sup>nd</sup> ed. (1999). Farlam JA is now known for his 'dig' at Heerden JA

producing a text with which practitioners and specialists could work. I shall reflect on this issue in the conclusion. Secondly, I was concerned that a large number of authors would create challenges in the book's clarity of thought, consistency and general readability. This has certainly become an issue in legal education literature where a large group of academics 'divvy' up the work in an attempt to balance teaching, research and community engagement in their own law schools. However, I have been pleasantly surprised: most of the chapters are well cross-referenced, and run seamlessly on from one another. Moreover, I enjoyed the different styles (and subsequent different types of contributions) that authors brought to the book. I mention but three authors as an example.

First, Sonnekus's writing is easily recognisable in the chapter on the personal consequences of divorce (Chapter 3). He writes with precision and an eye always on the Roman-Dutch and statutory implications of the topic. More so, he turns to the continent and Germany for comparative inspiration. As a result, he provides a fascinating account, and suggestions, to resolve issues arising out of claims for continued occupation of the former matrimonial home, and co-ownership of the matrimonial home. I was happy to see mention of *Afzal v Kalim*<sup>3</sup> – albeit in a footnote – for reasons of its bizarre facts and its origin in the Eastern Cape.<sup>4</sup>

Secondly, Heaton's choice of Smith to author on the chapter on the dissolution of a life or domestic partnership is a well-considered one. Having (relatively) recently completed his LLD on the topic,<sup>5</sup> he is able to utilise much of his in-depth research for the chapter. Smith does well in setting out the societal circumstances that have led to many couples eschewing the formal marriage framework and simply cohabiting. In this, I enjoyed his references to statistics on the realities of life relationships in South Africa,<sup>6</sup> even if it meant recalling that fatal moment in *Volks v Robinson*<sup>7</sup> where the court refused to hear evidence of surveyed power dynamics in these partnerships.<sup>8</sup> Smith's discussion of the jurisprudence that has resulted

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when he noted that the book she edited had "presumably the longest footnote in South African legal history", referring to footnote 15, 33-38. See *RAF v Mtati* [2005] 3 All SA 340 (SCA) paragraph 6.

3 2013 (6) 2013 SA 176 (ECP).

4 Chapter 3, footnote 65.

5 B Smith, *The development of South African matrimonial law with specific reference to the need for and application of a domestic partnerships rubric* (2009). Unpublished LLD thesis, University of the Free State.

6 Captured in Chapter 10, footnote 32.

7 2005 (5) BCLR 446 (CC).

8 It will be recalled that the Centre for Applied Legal Studies presented the court with its social science study, which dealt with the impact that unmarried cohabitation was likely to have on women. Skweyiya J found the study to be "controversial" and "not incontrovertible" and, therefore, refused for it to be admitted into evidence. See *Volks v Robinson* paragraphs 31-35. See C Lind, Domestic partnerships and marital status discrimination, *Acta Juridica* (2005):108, 119. Lind argues that the evidence should have been admitted in terms of Rule 31 of the Rules of the Constitutional Court.

in a legal differentiation between same-sex and opposite-sex couples is excellent, and he is able to explain and expand on the debate as to whether such distinction remains tenable in our law. However, the section on dissolution of universal partnerships deserves more coverage (see below) and the discussion of the Domestic Partnerships Bill is somewhat laboured, it being the product of circumstance. Having been a Bill now for 7 years, with no sign of the situation changing, it is hard to know how much emphasis to place on the Bill's provisions and its effect. The result is a section that mainly reproduces the Act's contents with little scope for critique.

Thirdly, Bonthuys's chapter on domestic violence is more than simply a discussion of the law. As has become customary in her writing, she pushes a perspective that "legal rules must be evaluated in the light of real social and economic circumstances of those who invoke the law to protect their interests".<sup>9</sup> Her argument, broadly, is that the legal processes surrounding the dissolution of life partnerships should take domestic violence into account, and that the existence of domestic violence should have financial implications on divorce. As usual, she asks hard questions. In this context, she leaves the reader with the following question: Should a woman be able to institute a delictual claim against the state for domestic violence injuries to which the divorce or mediation process exposed her or failed to protect her against, similar to the successful claims in *Carmichele*<sup>10</sup> and *K?*<sup>11</sup> This is a hard question indeed, but one that can give food for thought for the subject specialists out there, who view domestic violence more often than that we, in academia, would like to admit.

Turning to the major part of the book, namely the patrimonial consequences of divorce (Heaton's Chapter 4), many specialists and academics will appreciate the careful analysis of recent issues that impact on strategies and practical matters relating to the summons and the settlement agreement upon divorce. In particular, the detailed coverage of pension interests is a welcome addition to the education literature, specifically concerning the error of the court in *JW v SW*,<sup>12</sup> which has set the cat among the pigeons with pension administrators. In addition, Heaton provides a short, but interesting discussion on the recent debate on the constitutionality of section 7(3) (the provision dealing with the discretion of the court to redistribute assets). Calling on various sources to assert the provision's unconstitutionality, including the discretion of the courts introduced by the *Gumede* judgement,<sup>13</sup> it is only a matter of time that this issue will come before the courts for a decision either way.

There are excellent features of this book, as set out above. There are also chapters that contribute substantially to alternative/nuanced views

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9 At 479.

10 *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC).

11 *K v Minister of Safety and Security* 2005 (6) SA 416 (CC).

12 2011 (1) SA 545 (GNP).

13 2009 (3) SA 152 (CC).

of the adversarial divorce process – De Jong’s chapter on mediation,<sup>14</sup> as well as Schultz’s informative views on resolving conflict of laws in divorce proceedings.<sup>15</sup> However, some features are disappointing or not quite clear as to how they cohere with the remainder of the book. I comment on three such features: the procedural section, the canvassing of universal partnerships, and the lack of details in relation to ‘dual’ marriages in the customary law sphere.

First, parts of the chapter on jurisdiction, procedure and costs by Catto, while useful, do not appear to fit well with the remainder of the book. The chapter is meant to assist family law practitioners in the field of procedure.<sup>16</sup> It does this well in the first few pages, but disappoints as from section 5ff. Having covered the specific *capita selecta* of family law proceedings, the chapter then defaults into a general exposition of the civil procedure rules. The problem, in my opinion, is the general nature of the exposition: it seems strange to have general rules set out in this way, given that a practitioner can just as well turn to their Jones and Buckle<sup>17</sup> or Herbstein and Winsen<sup>18</sup> for general advice. While one can opine that the authors saw this as useful in its ‘one-stop-shop’ reference facility, there is nothing particularly ‘family law’-related to certain sections of the chapter. For example, the chapter deals with the use of motion proceedings with a well-known rendition of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*.<sup>19</sup> It would have been useful to note how motion proceedings have been used in family law;<sup>20</sup> yet no such activity is undertaken. In the same vein, the exception procedure is described in general terms, with little said of its increasing use in family law procedures, where claims are challenged on the basis of a failure to disclose a cause of action. For example, the procedure has been utilised in the case of the claim for adultery,<sup>21</sup> and case law on the existence of universal partnership despite an antenuptial contract.<sup>22</sup> I thought the coverage of the *mandament van spolie* suffers the same ‘lack of context’ fate: having read Sonnekus’s excursus on the

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14 Chapter 13. Boniface (2015:679-688) comments favourably on this section of the book in her book review in *TSAR* as follows: “This chapter is of practical importance to legal practitioners, since the role of mediation in family law has become increasingly important in South Africa in recent years.”

15 Chapter 14.

16 I wondered whether the chapter was meant to replicate the Family Law Service division dedicated to ‘Family Law Procedures’ in B Clark (ed) *Family law service* (October 2015).

17 DE van Loggerenberg, *Jones and Buckle The civil practice of the Magistrates’ Courts in South Africa*. 10th ed (2011).

18 A Cilliers, C Loots & H Nel (eds), *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa*. 5<sup>th</sup> ed. (2009).

19 1949 (3) SA 1155 (T).

20 For example, applications for the variation of an order as to the custody and care of contact with, and maintenance of the children of a former marriage; applications for leave to change a matrimonial property system; applications to divide a joint estate or for the division of the accrual.

21 *Wiese v Moolman* 2009 (3) SA 122 (T).

22 For example, *D v D* 2014 (4) SA 200 (GP).

substantive family law-related issues in respect of this application, one would have expected to see a cross reference to this discussion, or at least some explanation of how the application has been successful (or not) in family law-related matters. This is lacking, and disappointing. The chapter does, however, make up for its general nature by excellent coverage of the practical nuances in the Uniform Rule 43 and Magistrate's Court Rule 58 (dealing with costs and children *pendente lite*).

Secondly, parties have increasingly used the avenue of universal partnership to protect them – whether in a life partnership or in a marriage. One can opine that this avenue will be increasingly utilised by parties upon dissolution of their cohabitation arrangements, given the loss of the breach of promise-to-marry claim.<sup>23</sup> In these circumstances, I am of the opinion that the use of universal partnership is under-emphasised in Chapter 5. While the other legal avenues such as estoppel, unjustified enrichment, etc. explored might be of relevance, universal partnership is increasingly deemed to be the primary remedy available to cohabitants and encompasses the majority of other areas of law. It is arguable that the chapter does not explore universal partnerships sufficiently – specifically as far as the distinction between the two types of universal partnership (*societas universorum bonorum* and *societas quae ex quaestu veniunt*) are concerned. Finally, there is a lasting impression that there is no sufficient appreciation of the fact that a universal partnership is a subset of business partnerships. As far back as 2007, Clark and Goldblatt raised the sobering reality that universal partnership could prove to be a double-edged sword in that a spendthrift male might use it to make his female partner help pay his business debts.<sup>24</sup> So, while universal partnerships have assisted many women when their cohabitation arrangements are dissolved, literature, in general (and in this chapter), has not paid sufficient attention to the negative consequences of attaching business-law concepts to personal relationships.

Thirdly, the media reporting on the civil and customary marriages of Mandla-Mandela<sup>25</sup> and, more recently, on Madikizela-Mandela's claim to Qunu<sup>26</sup> has raised all kinds of interesting questions relating to customary marriages. Himonga wrote the chapter on the dissolution of customary marriages. The chapter makes for very interesting reading, and her argument about the incorporation of the guidelines of the *Divorce Act*<sup>27</sup> is certainly convincing. In this instance, she argues that the interpretation of

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23 See *Cloete v Maritz* 2013 (5) SA 448 (WCC). While this is only a Western Cape decision, it follows a strong *obiter dicta* in the SCA (*Van Jaarsveld* 2010 (4) SA 558 (SCA)), which will be difficult to overcome.

24 B Clarke & B Goldblatt, *Gender and family law*. In E Bonthuis & C Albertyn (eds) *Gender, law and justice* (2007):195 at 210.

25 For example, 'Confusion in the Mandla-Mandela bigamy case' *News24*, 20 February 2012, <http://www.news24.com/SouthAfrica/News/Confusion-in-Mandla-Mandela-bigamy-case-20120220>.

26 For example, 'Winnie claims Mandela Qunu home', *Daily Dispatch*, 5 August 2014 <http://www.dispatchlive.co.za/news/winnie-claims-mandela-qunu-home/>.

27 *Divorce Act* 70/1979.

‘irretrievable breakdown’ in the *Divorce Act* will be interpreted and applied in customary-law marriages differently to the application and interpretation commonly applied to civil marriages in terms of the *Divorce Act*. However, in the light of high profile contemporary claims referred to earlier, the consideration of the dissolution of dual marriages<sup>28</sup> and a discussion of section 7(6) of the *Act*, are disappointing. Can it be said that (according to Madikezela’s claims) a customary marriage can continue despite a civil marriage being dissolved?

In conclusion, I believe that Heaton’s book represents the most comprehensive coverage of family-law issues since *Boberg* in 1999. The book is sufficiently expansive for subject specialists, but can also be used to great effect in the teaching of the LLB. It provides advanced knowledge of family law, and contends with the Family Law Service in terms of its contemporary arguments and up-to-date coverage. Is it a *Boberg-Lite*? I do not think so. It is a great companion and an essential book to have in any practice or academic setting.

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28 It seems that the definition ‘doubledecker’ marriages has been used to define customary marriages and civil marriages – particularly in Nigeria.