Recognition and proprietary consequences of a UK civil partnership in South Africa

The decision in AC v CS 2011 2 SA 360 (WCC) (Western Cape High Court, Cape Town) deals with the recognition in South Africa of a civil partnership registered in the United Kingdom under the Civil Partnership Act, 2004. Gamble J obiter referred to the proprietary consequences of such partnership in South Africa.

The South African Civil Union Act 17 of 2006 makes provision for civil unions between couples of the same or different sex. The parties may choose whether their civil union must be known as a marriage or a civil partnership (section 11 of the act). The UK Civil Partnership Act, 2004, makes provision for same-sex couples only and a civil partnership is not known as a marriage. Notwithstanding these differences, the court recognises the UK civil partnership as a civil union for the purposes of South African (private international) law. Although the court does not refer to the process of classification, the decision attests to an enlightened lex fori approach to characterisation. (On classification in South(ern) African private international law, see Forsyth Private International Law (2003) 68-81 and Neels "Falconbridge in Africa" 2008 Journal of Private International Law 167.)

In South African private international law, both the formal and the inherent validity of a marriage are governed by the law of the place of the conclusion of the marriage (the lex loci celebrationis). (See Forsyth 263-265.) This decision is the first in South Africa in which the same conflicts rule is applied in respect of the inherent validity of a foreign civil partnership. As the partnership is inherently valid in terms of English law, it is valid for the purposes of South African (private international) law.

The court finds that the grounds for divorce and payment of maintenance inter partes are governed by the relevant provisions in the Civil Union Act, which refer to the arrangements in the Divorce Act 70 of 1979. This is not the position, at least not in the first place, because the word "marriage" in the Divorce Act may be interpreted to include foreign partnerships, as the court implies, but because these issues are governed by the lex fori (namely the Civil Union Act referring to

the Divorce Act) (see Forsyth 286).

The parties were probably both domiciled in South Africa at the time that the partnership was registered in the UK (although one party was a UK citizen). As they did not conclude an ante-nuptial contract, the partnership/civil union would according to South African law have been concluded in community of property. It was unnecessary for the court to determine which law applied in respect of the proprietary consequences of the partnership/civil union as the parties concluded a deed of settlement in this regard.

The Roman-Dutch rule referred the proprietary consequences of a marriage to the law of the domicile of the husband at the time of the conclusion of the marriage (see Sperling v Sperling 1975 3 SA 707 (A)). This rule is today unconstitutional on the basis of the equality principle and also because it does not make provision for same-sex marriages/civil unions/civil partnerships. The court in casu comes to the same conclusion but does not refer to other case law where the same point was already made: see Fourie v Minister of Home Affairs 2005 1 All SA 273 (SCA) par 125 n 112; Sadiku v Sadiku case no 30498/06 (26 January 2007) (T) per www.saflii.org, discussed by Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the lex causae proprietatis matrimonii" 2008 TSAR 587.

Gamble J suggests that the legislature address the position in respect of the patrimonial consequences of same-sex marriages/civil unions/partnerships. This does not seem to be necessary. The courts have the inherent power to develop the common law in conformity with constitutional values (sec 8(3)(a), 39(2) and 173 of the Constitution of the Republic of South Africa of 1996). In this regard they should take note of the relevant academic opinion: see Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 De Jure 330; Schoeman "The connecting factor for proprietary consequences of marriage" 2001 TSAR 72; Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 TSAR 115; Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 IPRax 65; Neels "Revocation of wills in South African private international law" 2007 ICLQ 613; and Neels and Wethmar-Lemmer supra.

We have indicated before that we support the five-step model proposed by Stoll

and Visser supra (Neels and Wethmar-Lemmer supra). The proposal ends the infringement of the equality principle and also provides a solution for same-sex marriages/civil unions/partnerships. Here it follows, adapted to make provision for civil unions and similar institutions:

> *In the absence of an express or tacit choice of law in an ante-nuptial contract, the proprietary consequences of a marriage, a civil union or similar institution (eg a civil partnership) must be governed by the law of the country of the common domicile of the parties at the time of the conclusion of the marriage, civil union or similar institution. If they did not have such a common domicile, the law of the country of the common habitual residence of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common habitual residence, the law of the country of the common nationality of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common nationality, the law of the country with which both spouses were most closely connected at the time of the marriage must apply.*