

REPUBLIC OF SOUTH AFRICA

CIVIL UNION BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 29169 of 31 August 2006). (The English text is the official text of the Bill)

(MINISTER OF HOME AFFAIRS)

[B 26—2006]

ISBN 0-9802545-0-7

No. of copies printed 1 800

BILL

To provide for the solemnisation of civil partnerships; the legal consequences of civil partnerships; the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto.

PREAMBLE

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

AND WHEREAS 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;

AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

AND NOTING that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples;

AND NOTING that there is no legal recognition or protection for same-sex and opposite-sex couples in permanent domestic partnerships,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,
 as follows:—

CHAPTER 1

INTRODUCTORY PROVISIONS

5

Definitions

1. In this Act, unless the context otherwise indicates—

“**Administration of Estates Act**” means the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“**child of a domestic partnership**” includes— 10

(a) any child born as a result of sexual relations between the domestic partners; or

(b) any child of either domestic partner; or

(c) any child adopted by the domestic partners jointly; or

(d) any other child who was a dependant of the domestic partners—

(i) at the time when the domestic partners ceased to live together; or 15

(ii) if at that time the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or

(iii) at the date of the death of one of the domestic partners;

“**civil partner**” means a partner in a civil partnership concluded in terms of this Act; 20

“**civil partnership**” means the voluntary union of two adult persons of the same sex that is solemnised and registered in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others;

“**civil union**” means a civil partnership or a domestic partnership;

“**Compensation for Occupational Injuries and Diseases Act**” means the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); 25

“**contribution**” means—

(a) the financial and non-financial contributions made directly or indirectly by the domestic partners— 30

(i) to the acquisition, maintenance or improvement of any joint property, or separate property of either of the domestic partners or to the financial resources of either or both of them; or

(ii) in terms of a registered partnership agreement; and

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either domestic partner to the welfare of the other domestic partner or to the welfare of the family constituted by them and a child of the domestic partners; 35

Provided that there is no presumption that a contribution referred to in paragraph (a) is of greater value than a contribution referred to in paragraph (b); 40

“**court**” means, for purposes of Chapter 3 of this Act, a High Court or a family court established under section 2(k) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“**domestic partner**” means a partner in a domestic partnership and includes a former domestic partner; 45

“**domestic partnership**” means a registered domestic partnership or unregistered domestic partnership and includes a former domestic partnership;

“**duty of support**” means the responsibility of each registered domestic partner to provide for the other partner’s basic living expenses while the registered partnership exists; 50

“**family**” includes partners in a domestic partnership and their dependants;

“**family home**” means the dwelling used by either or both domestic partners as the only or principal family residence, together with any land, buildings, or improvements attached to that dwelling and used wholly or principally for the purposes of the domestic partnership household; 55

“**financial matters**”, in relation to parties to a registered partnership agreement, means matters with respect to—

(a) the property of either or both of the parties; or

(b) the financial resources of either or both of the parties;

- “financial resources”**, in relation to either or both of the domestic partners, includes—
- (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;
 - (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the partners or either of them; 5
 - (c) property, the alienation or disposal of which is wholly or partly under the control of the partners or of either of them and which is lawfully capable of being used or applied by or on behalf of the partners or by either of them in or towards their or his or her own purposes; and 10
 - (d) any other benefit with a value;
- “household goods”** means corporeal property, owned separately or jointly by the domestic partners, intended and used for the joint household—
- (a) and includes the following movable goods: 15
 - (i) household furniture;
 - (ii) household appliances, effects, or equipment;
 - (iii) household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;
 - (iv) motor vehicles, caravans, trailers or boats, used wholly or principally, in each case, for family purposes; 20
 - (v) accessories of goods to which subparagraph (iv) applies;
 - (vi) household pets; and
 - (b) includes any of the goods mentioned in paragraph (a) that are in the possession of either or both domestic partners under a credit agreement or conditional sale agreement or an agreement for lease or hire; but 25
 - (c) does not include—
 - (i) movable goods used wholly or principally for business purposes;
 - (ii) money or securities for money; and
 - (iii) heirlooms; 30
- “Identification Act”** means the Identification Act, 1997 (Act No. 68 of 1997);
- “interested party”** means any party with an interest, or who could reasonably be expected to have an interest, in the joint property of the domestic partners or the separate property of either of the domestic partners or in a partnership debt;
- “Intestate Succession Act”** means the Intestate Succession Act, 1987 (Act No. 81 of 1987); 35
- “joint property”** means household goods and property owned jointly in equal or unequal shares by the domestic partners;
- “Maintenance of Surviving Spouses Act”** means the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990); 40
- “maintenance order”** means an order for the payment, including the periodical payment, by a domestic partner of sums of money towards the maintenance of the other domestic partner;
- “Marriage Act”** means the Marriage Act, 1961 (Act No. 25 of 1961);
- “marriage officer”** means— 45
- (a) a marriage officer ex officio or so designated by virtue of section 2 of the Marriage Act; or
 - (b) any minister of religion, or any person holding a responsible position in, any religious denomination or organisation designated as a marriage officer under section 5 of this Act; 50
- “Mediation in Certain Divorce Matters Act”** means the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987);
- “Minister”** means the Cabinet member responsible for the administration of Home Affairs;
- “partnership debt”** means a debt that has been incurred, or to the extent that it has been incurred— 55
- (a) by the domestic partners jointly; or
 - (b) in the course of a common enterprise of the domestic partnership carried on by the partners, whether individually, together or with another person; or
 - (c) for the purpose of acquiring, improving, or maintaining joint property of the domestic partners; or 60
 - (d) for the benefit of both domestic partners in the course of managing the affairs of the common household; or

- (e) for the purpose of bringing up any child of a domestic partnership;
- “**periodic maintenance order**” means an order for the payment of periodic sums of money by a domestic partner towards the maintenance of the other domestic partner;
- “**prescribed**” means prescribed by this Act or by regulation made under this Act; 5
- “**property**” includes any present, future or contingent right or interest in or to movable or immovable, corporeal or incorporeal property, money, a debt and a cause of action;
- “**registered domestic partnership**” means a relationship that has been registered as a domestic partnership under Chapter 3 of this Act; 10
- “**registered partnership agreement**” means a written agreement concluded between and undersigned by prospective registered domestic partners to regulate the financial matters pertaining to their partnership;
- “**registration officer**” means any person who has been designated to be a registration officer under section 17 of this Act; 15
- “**separate property**” means property of domestic partners that is not joint property;
- “**termination certificate**” means a certificate issued by a registration officer to the effect that a registered domestic partnership has been terminated in the manner provided for in Chapter 3 of this Act; 20
- “**unregistered domestic partnership**” means a relationship between two adult persons who live as a couple and who are not related by family.

CHAPTER 2

CIVIL PARTNERSHIPS

Objectives of Chapter 25

2. The objectives of this Chapter are—
- to regulate the solemnisation and registration of civil partnerships; and
 - to provide for the legal consequences of the solemnisation and registration of civil partnerships.

Relationships to which Chapter applies 30

3. This Chapter applies to civil partners joined in a civil partnership.

Solemnisation of civil partnership

4. (1) A marriage officer may solemnise a union between two adult persons of the same sex in accordance with the provisions of this Chapter.
- (2) Subject to this Chapter, a marriage officer has all the powers as conferred upon him or her by the Marriage Act to solemnise a civil partnership in terms of this Chapter. 35

Designation of ministers of religion and other persons attached to churches as marriage officers

5. (1) Any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise civil partnerships. 40
- (2) The Minister may designate such a religious denomination or organisation as a religious institution that may solemnise civil partnerships under this Act, and must, from time to time, publish particulars of all religious institutions so designated in the *Gazette*.
- (3) The Minister may, on request of any designated religious institution referred to in subsection (2), revoke the designation under that subsection and must publish such revocation in the *Gazette*. 45
- (4) The Minister and any officer in the public service authorised thereto by him or her may designate, upon receiving a written request from any minister of religion or any person holding a responsible position in any designated religious institution to be, as long as he or she is such a minister or occupies such position, a marriage officer for the purpose of solemnising civil partnerships in accordance with this Chapter and according to the rites of that religion. 50

(5) Every designation of a person as a marriage officer under subsection (4) shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

(6) The Minister and any officer in the public service authorised thereto by him or her may, upon receiving a written request from a person designated as a marriage officer under subsection (4), revoke in writing the designation of such person as a marriage officer for purposes of solemnising civil partnerships under this Chapter. 5

Marriage officers may refuse to solemnise civil partnership

6. (1) This Chapter does not, subject to subsection (2), compel a marriage officer to solemnise a civil partnership: Provided that such marriage officer has informed the Minister in writing that he or she objects on grounds of conscience to solemnising civil partnerships in terms of this Chapter. 10

(2) Subsection (1) does not apply to marriage officers designated under sections of this Chapter.

Prohibition of solemnisation of civil partnership without production of identity document or prescribed declaration 15

7. No marriage officer may solemnise any civil partnership unless—

- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act; or
- (b) each of such parties furnishes to the marriage officer the prescribed affidavit; 20
or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

Requirements for solemnisation and registration of civil partnership 25

8. (1) A person may only be a partner in one civil partnership at any given time.

(2) A married person may not register a civil partnership.

(3) A prospective civil partner who has previously been married or registered as a partner in a civil partnership must present a certified copy of the divorce order or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous civil partnership or marriage has been terminated. 30

(4) The marriage officer may not proceed with the solemnisation and registration of the civil partnership unless in possession of the relevant documentation referred to in subsection (3).

(5) A civil partnership may only be registered by prospective civil partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage. 35

Objections to civil partnership

9. (1) Any person desiring to raise any objection to any proposed civil partnership shall lodge such objection in writing with the marriage officer who is to solemnise such civil partnership. 40

(2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed civil partnership, he or she may solemnise the civil partnership. 45

(3) If he or she is not so satisfied he or she must refuse to solemnise the civil partnership and record the reasons for such refusal in writing.

Time and place for and presence of parties and witnesses at solemnisation and registration of civil partnership

10. (1) A marriage officer may solemnise and register a civil partnership at any time on any day of the week, but is not obliged to solemnise a civil partnership at any other time than between the hours of eight in the morning and four in the afternoon. 50

(2) A marriage officer must solemnise and register a civil partnership in a public office or private dwelling-house or on the premises used for such purposes by the marriage officer, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection do not prohibit a marriage officer to solemnise a civil partnership in any place other than a place mentioned herein, if the civil partnership must be solemnised in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties. 5

(3) No person is competent to enter a civil partnership in terms of this Chapter through any other person acting as his or her representative. 10

Civil partnership formula

11. (1) A marriage officer must inquire as to whether the parties appearing before him or her would prefer their civil partnership to be referred to as a civil partnership or a marriage during the solemnisation ceremony and must thereupon proceed by solemnising the civil partnership in accordance with the provisions of this section and in accordance with the wishes of both parties, if they are in agreement, referring to either a civil partnership or a marriage in reading the formula. If the parties are not in agreement, the marriage officer must, in reading the formula, refer to a civil partnership. 15

(2) In solemnising any civil partnership/marriage, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative: 20

‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed civil partnership/marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful civil partner/spouse?’, and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the civil partnership/marriage solemnised in the following words: 25

‘I declare that A.B. and C.D. here present have been lawfully joined in a civil partnership/marriage.’.

(3) If the provisions of this section relating to the questions to be put to each of the parties separately or to the declaration whereby the civil partnership/marriage shall be declared to be solemnised or to the requirement that the parties must give each other the right hand have not been strictly complied with owing to— 30

(a) an error, omission or oversight committed in good faith by the marriage officer; or 35

(b) an error, omission or oversight committed in good faith by the parties; or

(c) the physical disability of one or both of the parties,

and such civil partnership/marriage has in every other respect been solemnised in accordance with the provisions of this Chapter, that civil partnership/marriage shall, provided there was no other lawful impediment thereto, be valid and binding. 40

Registration of civil partnership

12. (1) The prospective partners must individually and in writing declare their willingness to enter into the civil partnership with one another by signing the prescribed document in the presence of two witnesses.

(2) The marriage officer and the two witnesses must sign the prescribed document to certify that the declaration made under section 11(2) was made in their presence. 45

(3) The marriage officer must issue the partners to the civil partnership with a registration certificate stating that they have entered into a civil partnership.

(4) This certificate is prima facie proof that a valid civil partnership exists between the parties referred to in the certificate. 50

(5) Each marriage officer must keep a record of all civil partnerships solemnised by him or her.

(6) The marriage officer must forthwith transmit the civil partnership register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question. 55

(7) Upon receipt of the said register the official referred to in subsection (6) must cause the particulars of the civil partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act.

Legal consequences of civil partnerships

- 13.** (1) The legal consequences of a marriage apply, with such changes as may be required by the context, to a civil partnership.
- (2) With the exception of the Marriage Act, any reference to—
- (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil partnership as defined in this Act; and
 - (b) husband, wife or spouse in any other law, including the common law, includes a civil partner as defined in this Act.

CHAPTER 3 10

DOMESTIC PARTNERSHIPS

Objectives of Chapter

- 14.** The objectives of this Chapter are to ensure the rights of equality and dignity of the partners in domestic partnerships and to reform family law to comply with the applicable provisions of the Bill of Rights, through the— 15
- (a) recognition of the legal status of domestic partners;
 - (b) regulation of the rights and obligations of domestic partners;
 - (c) protection of the interests of both domestic partners and interested parties on the termination of domestic partnerships; and
 - (d) final determination of the financial relationships between domestic partners and between domestic partners and interested parties when domestic partnerships terminate. 20

Relationships to which Chapter applies

- 15.** This Chapter applies to relationships between domestic partners and between either one or both domestic partners and another party or other parties. 25

Part I

Registered domestic partnerships: Registration procedure

Partners in registered domestic partnership

- 16.** (1) A person may be a partner in only one registered domestic partnership at any given time. 30
- (2) A person who is married, a partner in a civil partnership or a partner in any other registered domestic partnership may not register a domestic partnership.
- (3) A registration officer may not proceed with the registration process of a prospective partner who has previously been married, a partner in a civil partnership or a partner in a registered domestic partnership unless presented with a certified copy of the— 35
- (a) divorce order;
 - (b) termination certificate; or
 - (c) death certificate of the former spouse or registered partner,
- as proof that the previous marriage, civil partnership or registered domestic partnership has been terminated. 40
- (4) Persons who would be prohibited by law from concluding a marriage on the basis of consanguinity may not register a domestic partnership.
- (5) A relationship may only be registered as a domestic partnership if at least one of the prospective partners is a South African citizen. 45

Registration officers

- 17.** (1) The Minister and any officer in the public service authorised thereto by him or her may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be a registration officer, either generally or for any specified area, by virtue of his or her office and so long as he or she holds such office. 50

(2) Every designation of a person as a registration officer must be in writing and the date as from which it will have effect and any limitation to which it is subject must be specified in such a written document.

Registration of domestic partnerships

18. (1) Subject to section 16, any two persons may register their relationship as a domestic partnership as provided for in this section. 5

(2) A registration officer must conduct the registration procedure on the official premises designated for that purpose and in the manner provided for in this section.

(3) The prospective partners must individually and in writing declare their willingness to register their domestic partnership by signing the prescribed document in the presence of the registration officer. 10

(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence.

(5) The registration officer must make notification of the existence of a registered domestic partnership agreement, where applicable, on the registration certificate. 15

(6) The registration officer must issue the partners with a registration certificate stating that they have registered their domestic partnership and, where applicable, attach a certified copy of the registered domestic partnership agreement to the registration certificate.

(7) The registration certificate issued by the registration officer is prima facie proof of the existence of a registered domestic partnership between the partners. 20

(8) Each registration officer must keep a register of all registrations of domestic partnerships conducted by him or her and make a notification of the existence of a registered domestic partnership agreement, where applicable, in the register.

(9) The registration officer must forthwith transmit the said register to the officer in the public service with the delegated responsibility for the population register in his or her district of responsibility. 25

(10) Upon receipt of the said register the delegate must cause the particulars of the registered domestic partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act. 30

Property regime

19. (1) Except as provided in this section, there is no general community of property between partners in a registered domestic partnership.

(2) In the event of a dispute regarding the division of property after a registered domestic partnership has ended, section 34 applies. 35

(3) Registered partners may conclude a registered domestic partnership agreement.

(4) Where no notification of the existence of a registered domestic partnership agreement has been effected on or no copy of such registered domestic partnership agreement has been attached to a registration certificate as required in section 18(5) and (6), and where no notification of the existence of such a registered domestic partnership agreement has been made as required in section 18(8), such agreement binds only the parties to the agreement. 40

Registered domestic partnership agreement

20. (1) In proceedings regarding the division of property between registered partners under this Chapter, a court may consider the fact that the parties have concluded a registered domestic partnership agreement and the terms thereof, provided that the registered domestic partnership agreement has been noted on and attached to the registration certificate. 45

(2) If the court, having regard to all the circumstances, is satisfied that giving effect to a registered domestic partnership agreement would cause serious injustice, it may set aside the registered domestic partnership agreement or parts thereof. 50

(3) In deciding under subsection (2) whether giving effect to a registered domestic partnership agreement would cause serious injustice, the court may have regard to—

(a) the terms of the registered domestic partnership agreement;

(b) the time that has elapsed since the registered domestic partnership agreement was concluded; 55

- (c) whether the registered domestic partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
 - (d) whether the registered domestic partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made, and whether those changes were foreseen by the parties, or not; 5
 - (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the registered domestic partnership agreement;
 - (f) the contributions of the parties to the registered domestic partnership; and
 - (g) any other matter that the court considers relevant. 10
- (4) A court may make an order under this section notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the court to make that order.
- (5) A court must decide any other matter regarding a registered domestic partnership agreement on the applicable principles of the law of contract. 15

Part II

Legal consequences of registered domestic partnerships

Duty of support

21. Registered partners owe each other a duty of support in accordance with each partner's financial means and needs. 20

Limitation on disposal of joint property

22. A registered partner may not without the consent of the other registered partner sell, donate, mortgage, let, lease or otherwise dispose of joint property.

Right of occupation of family home

23. (1) Both registered partners are entitled to occupy the family home during the existence of the registered domestic partnership, irrespective of which of the registered partners owns or rents the property. 25

(2) The registered partner who owns or rents the family home may not evict the other registered partner from the family home during the existence of the registered domestic partnership without providing him or her with suitable alternative accommodation. 30

Part III

Termination of registered domestic partnership

Termination of registered domestic partnerships

24. (1) A registered domestic partnership terminates upon— 35

- (a) the death of one or both registered partners;
- (b) agreement by the partners; or
- (c) a court order to terminate the registered domestic partnership, as provided for in this Chapter.

(2) A death certificate, termination certificate issued under this Chapter or a termination order made by the court under this Chapter is prima facie proof that such a registered domestic partnership has ended. 40

Termination by agreement

25. (1) A registration officer must conduct the termination procedure on the official premises used for that purpose and in the manner provided for in this section.

(2) Registered partners who intend to terminate their domestic partnership must present the registration officer with a certified copy of the registration certificate as proof that a registered domestic partnership exists between them. 45

(3) Registered partners must individually and in writing declare their desire to terminate the registered domestic partnership by signing the prescribed document in the presence of a registration officer.

(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence. 5

(5) The registration officer must issue the registered partners with a certificate stating that their domestic partnership has been terminated and make a notification of the existence of a termination agreement, where applicable, on the certificate.

(6) Each registration officer must keep a register of all registered domestic partnerships terminated by him or her and make a notification of the existence of a termination agreement, where applicable, in the register. 10

(7) The registration officer must forthwith transmit the said register and documents concerned to the officer in the public service with the delegated responsibility for the population register in his or her district of responsibility.

(8) Upon receipt of the said register the delegate must cause the particulars of the terminated domestic partnership to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act. 15

Termination agreement

26. (1) Registered partners who want to terminate their registered domestic partnership as provided for in section 25, may conclude a termination agreement to regulate the financial consequences of the termination of their registered domestic partnership. 20

(2) A termination agreement must be in writing, signed by both registered partners and must declare that it is entered into voluntarily by both partners.

(3) A termination agreement may provide for— 25

(a) the division of joint and separate property;

(b) one registered partner to pay maintenance to the other registered partner;

(c) arrangements regarding the family home; and

(d) any other matter relevant to the financial consequences of the termination of the registered domestic partnership. 30

Termination by court order

27. (1) Registered partners who have minor children from the registered domestic partnership and who intend to terminate the registered domestic partnership must apply to the court for a termination order.

(2) An application for the termination of a registered domestic partnership must be made to the court in accordance with the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959). 35

Welfare of minor children

28. (1) A court may not order the termination of a registered domestic partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child or dependent child of the registered domestic partnership are in the best interests of such child. 40

(2) In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4 of the Mediation in Certain Divorce Matters Act apply, with the changes required by the context. 45

(3) Before making the termination order, the court must consider the report and recommendations referred to in section 4(1) of the Mediation in Certain Divorce Matters Act.

(4) In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered partners to pay the costs of an investigation and appearance. 50

(5) A court granting an order to terminate a registered domestic partnership may, in regard to the maintenance and education of a dependent child of the registered domestic partnership or the custody or guardianship of, or access to, a minor child of the registered domestic partnership, make any order which it deems fit and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant 55

to either parent the sole guardianship or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent must be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(6) Unless otherwise ordered by a court, the rights of and obligations towards children of a registered partner under any other law are not affected by the termination of the registered domestic partnership. 5

(7) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation. 10

Children of registered partners of opposite sex

29. Where a child is born into a registered domestic partnership between persons of the opposite sex, the male partner in the registered domestic partnership is deemed to be the biological father of that child and has the legal rights and responsibilities in respect of that child that would have been conferred upon him if he had been married to the biological mother of the child. 15

Part IV

Maintenance after termination of registered domestic partnership

Maintenance after termination

30. (1) In the absence of an agreement, a court may, after termination of a registered domestic partnership as provided in section 24(1)(b) and (c), upon application, make an order which is just and equitable in respect of the payment of maintenance by one registered partner to the other for any specified period or until the registered partner in whose favour the order is given— 20

- (a) dies; 25
- (b) marries;
- (c) enters into a civil partnership; or
- (d) enters into a registered domestic partnership, whichever event occurs first.

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the— 30

- (a) respective contributions of each partner to the registered domestic partnership;
- (b) existing and prospective means of each of the registered partners;
- (c) respective earning capacities, future financial needs and obligations of each of the registered partners; 35
- (d) age of the registered partners;
- (e) duration of the registered domestic partnership;
- (f) standard of living of the registered partners prior to the termination of the registered domestic partnership; and
- (g) any other factor which in the opinion of the court should be taken into account. 40

Maintenance after death

31. For purposes of this Chapter, a reference to “spouse” in the Maintenance of Surviving Spouses Act must be construed to include a registered partner.

Intestate succession

32. For purposes of this Chapter, a reference to “spouse” in the Intestate Succession Act must be construed to include a registered partner. 45

Delictual claims

33. (1) For the purpose of claiming damages in a delictual claim, partners in a registered domestic partnership are deemed to be spouses in a legally valid marriage.

(2) A partner in a registered domestic partnership is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.

(3) A partner in a registered domestic partnership is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act. 5

Part V

Property division after termination of registered domestic partnership

Property division

34. (1) In the event of a dispute regarding the division of property after a registered domestic partnership has ended, one or both registered partners may apply to a court for an order to divide their joint property or the separate property, or part of the separate property of the other registered partner. 10

(2) Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors. 15

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or part of the separate property of the other registered partner as the court regards just and equitable be transferred to the applicant.

(4) A court considering an order as contemplated in subsections (2) and (3) must take into account— 20

- (a) the existing means and obligations of the registered partners;
- (b) any donation made by one partner to the other during the subsistence of the registered domestic partnership;
- (c) the circumstances of the registered domestic partnership; 25
- (d) the vested rights of interested parties in joint and separate property;
- (e) the existence and terms of a registered domestic partnership agreement, if any; and
- (f) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the registered partner in whose favour the order is granted made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other registered partner during the subsistence of the registered domestic partnership. 30

(6) A court granting an order contemplated in subsection (3) may, on application by the registered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments and the delivery or transfer of specified assets, as the court regards just and equitable. 35

Application to be made within two years after termination of registered domestic partnership 40

35. (1) Except as otherwise provided by this section, an application to a court for an order under section 34 must be made not later than two years after the termination of the registered domestic partnership.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under section 33, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave were not granted than would be caused to the respondent if the leave were granted. 45

Notification of termination of a registered domestic partnership 50

36. (1) When a registered domestic partnership is terminated, both registered partners are liable to give written notice of the termination to interested parties.

(2) When one or both registered partners die, the surviving registered partner or the executor of the estate of either registered partner is liable to give written notice of the termination of the registered domestic partnership to interested parties. 55

Interests of other parties

37. (1) A court considering an application under this Chapter must have regard to the interests of a bona fide purchaser of, or other person with an interest or vested right in, property concerned.

(2) A court may make any order proper for the protection of the rights of interested parties. 5

Part VI

Unregistered domestic partnerships

Court application

38. (1) One or both unregistered partners may, after the unregistered domestic partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order. 10

(2) When deciding an application for an order under this Chapter, a court must have regard to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case— 15

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered partners;
- (d) the ownership, use and acquisition of property; 20
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children of the domestic partnership;
- (g) the performance of household duties;
- (h) the reputation and public aspects of the relationship; and
- (i) the relationship status of the unregistered partners with third parties. 25

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Chapter, and regard may be had to further matters and weight be attached to such matters as may seem appropriate in the circumstances of the case.

(4) A court may not make an order under this Chapter regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage, civil partnership or registered domestic partnership with a third party. 30

(5) A court may only make an order under this Chapter regarding a relationship where at least one of the parties to the relationship is a South African citizen or has a certificate of naturalisation in respect of South Africa. 35

Maintenance

39. Unregistered partners are not liable to maintain one another and neither partner is entitled to claim maintenance from the other, except as provided in this Chapter.

Application for maintenance order after separation

40. (1) A court may, after the separation of unregistered partners upon application of one or both of them, make an order which is just and equitable in respect of the payment of maintenance by one unregistered partner to the other for a specified period. 40

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the age of the unregistered partners, the duration of the unregistered domestic partnership and the standard of living of the unregistered partners prior to separation, as well as the following matters— 45

- (a) the ability of the applicant to support himself or herself adequately in view of him or her having custody of a minor child of the domestic partnership;
- (b) the respective contributions of each unregistered partner to the domestic partnership; 50
- (c) the existing and prospective means of each unregistered partner;
- (d) the respective earning capacities, future financial needs and obligations of each unregistered partner;

(e) the relevant circumstances of another unregistered domestic partnership or customary marriage of one or both unregistered partners, where applicable, in so far as they are connected to the existence and circumstances of the unregistered domestic partnership, and any other factor which in the opinion of the court should be taken into account. 5

Application for a maintenance order after death of unregistered partner

41. (1) A surviving unregistered partner may after the death of the other unregistered partner, bring an application to a court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased until his or her death, remarriage or registration of a registered domestic partnership, in so far as he or she is not able to provide therefor from his or her own means and earnings. 10

(2) The surviving unregistered partner does not, in respect of a claim for maintenance, have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34(11) or 35(12) of the Administration of Estates Act, or pursuant to an instruction of the Master in terms of section 18(3) or 25(1)(a)(ii) of that Act. 15

(3) The provisions of the Administration of Estates Act apply with the changes required by the context to a claim for maintenance of a surviving unregistered partner, subject to the following:

- (a) The claim for maintenance of the surviving unregistered partner must have the same order of preference in respect of other claims against the estate of the deceased as a claim for maintenance of a dependent child of the deceased has or would have against the estate if there were such a claim; 20
- (b) in the event of competing claims of the surviving unregistered partner and that of a dependent child of the deceased the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered domestic partnership; 25
- (c) in the event of competing claims of an unregistered partner and that of a surviving customary spouse, the court must make an order that it regards just and equitable with reference to the existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse; 30
- (d) in the event of a conflict between the interests of the surviving unregistered partner in his or her capacity as claimant against the estate of the deceased and the interests in his or her capacity as guardian of a minor dependent child of the domestic partnership, the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered domestic partnership; and 35
- (e) the executor of the estate of a deceased spouse has the power to enter into an agreement with the surviving unregistered partner and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate or a right in the assets to the surviving unregistered partner or to impose an obligation on an heir or legatee in settlement of the claim of the surviving unregistered partner or part thereof. 40 45

Determination of reasonable maintenance needs of surviving unregistered partner

42. When determining the reasonable maintenance needs of the surviving unregistered partner, the court must consider—

- (a) the amount in the estate of the deceased available for distribution to heirs and legatees; 50
- (b) the existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered partner;
- (c) the standard of living of the surviving unregistered partner during the subsistence of the unregistered domestic partnership and his or her age at the death of the deceased; 55
- (d) the existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse; and
- (e) any other factor that it regards relevant.

Intestate succession

43. (1) Where an unregistered partner dies intestate, his or her surviving unregistered partner may bring an application to a court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate.

(2) Where the deceased is survived by an unregistered partner as well as a descendant, such unregistered partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette*, whichever is the greater, as provided for in the Intestate Succession Act. 5

(3) In the event of a dispute between a surviving unregistered partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon an application by either the unregistered partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships. 10

Property division

15

44. (1) In the absence of agreement, one or both unregistered partners may apply to court for an order to divide their joint property or the separate property, or part of the separate property of the other unregistered partner.

(2) Upon an application for the division of joint property, a court must order the division of that property which it deems just and equitable with due regard to all relevant factors. 20

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered partner as the court regards just and equitable be transferred to the applicant. 25

(4) A court considering an order contemplated in subsections (2) and (3) must take into account—

- (a) the existing means and obligations of the partners;
- (b) any donation made by one partner to the other during the subsistence of the unregistered domestic partnership; 30
- (c) the circumstances of the unregistered domestic partnership;
- (d) the vested rights of interested parties in joint and separate property; and
- (e) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other party during the existence of the unregistered domestic partnership. 35

(6) A court granting an order contemplated in subsection (3) may, on application by the unregistered partner against whom the order is granted order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments and the delivery or transfer of specified assets, as the court regards just and equitable. 40

(7) A court may make any order proper for the protection of the rights of interested parties. 45

Application to be made within two years after termination of relationship

45. (1) Except as otherwise provided by this section, an application to a court for an order under this Chapter must be made not later than two years after the date on which an unregistered domestic partnership has been terminated through separation or death.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under this Chapter, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave were granted. 50

CHAPTER 4

MISCELLANEOUS

Offences and penalties

46. (1) Any marriage officer who purports to solemnise a civil partnership which he or she is not authorised under this Act to solemnise or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnise a civil partnership, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding twelve months. 5

(2) Any marriage officer who demands or receives any fee, gift or reward for or by reason of anything done by him or her as marriage officer in terms of this Act shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months. 10

(3) Any—

(a) marriage officer who knowingly solemnises a civil partnership; or 15

(b) registration officer who knowingly registers a domestic partnership, in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.

(4) Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury. 20

Regulations

47. (1) The Minister may make regulations as to—

(a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act; 25

(b) the fees payable for any certificate issued or any act performed in terms of this Act; and

(c) generally, any matter which by this Act is required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered. 30

(2) Such regulations may prescribe penalties for a contravention thereof—

(a) of a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or 35

(b) in lieu of payment of a fine referred to in paragraph (a), of imprisonment for a period not exceeding six months.

Short title and commencement

48. This Act is called the Civil Union Act, 2006, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 40

MEMORANDUM ON THE OBJECTS OF THE CIVIL UNION BILL, 2006

1. BACKGROUND

The Constitutional Court, in the matters of *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006(1) SA 524 (CC) (the Fourie-case), declared that the definition of marriage under the common law and the marriage formula as set out in section 30(1) of the Marriage Act, 1961 (Act No. 25 of 1961), were inconsistent with the Constitution and invalid to the extent that they failed to provide the means whereby same-sex couples could enjoy the status and the benefits coupled with the responsibilities that marriage accorded to heterosexual couples. The Court ordered Parliament to correct these defects in the law by 1 December 2006, failing which section 30(1) of the Marriage Act, 1961 (Act No. 25 of 1961), will be read as including the words “or spouse” after the words “or husband”. In arriving at its decision the Court considered the two options proposed by the South African Law Reform Commission and concluded that these were two firm proposals for legislative action, but it stated further that this does “not, however, necessarily exhaust the legislative paths which could be followed to correct the defect”. The Bill was drafted in response to the Constitutional Court’s judgment in the Fourie-case.

2. OBJECTS OF THE BILL

The object of the Civil Union Bill, 2006 is twofold, in that it provides for the conclusion of—

- (a) a civil union or marriage between persons of the same sex solemnised before the State with all legal consequences of a marriage;
- (b) a domestic partnership between partners in a permanent relationship, whether of a heterosexual or homosexual nature, who do not wish to marry or enter into a civil partnership or marriage, but with legal consequences provided for in the Bill.

3. DEPARTMENTS/BODIES CONSULTED

- Department of Justice and Constitutional Development; and
- The South African Law Reform Commission consulted extensively before completing their report.

4. FINANCIAL IMPLICATIONS FOR STATE

There will be financial implications with regard to the solemnisation (i.e. designation and training of registration officers) and registration (i.e. development of new registration systems and forms) of civil unions and domestic partnerships.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Home Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 0-9802545-0-7