REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: 78173/2014

23/9/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

23/09/2016 Siwendu

In the matter between:

MARTHA LOUISE DU TOIT Respondent / Plaintiff

and

LAUREN GREYLING NO Excipient / Defendant

J U D G M E N T

SIWENDU, AJ:

[1] Can a cohabitee in a heterosexual partnership or domestic partnership claim maintenance against the deceased estate of an erstwhile partner? This

question came before me for a consideration of an exception raised by the defendant against the plaintiff's claim in terms of Rule 23(1) of the Uniform Rules of Court. It was submitted that on all possible readings of the claim, there no is legal basis to sustain it as there is no duty to maintain a heterosexual domestic partner beyond the life time of a partner, therefore, the claim must be dismissed with costs.

[2] The plaintiff had instituted a claim for payment in the amount of R 5 276 983.00 against the Executor of the deceased estate ('the estate") of her erstwhile partner, Mr John Charles Maizey. The amount claimed is based on an actuarial calculation by Gerard Jacobson Consulting Actuaries.[1] The claim is framed as one based on maintenance[2] on the one hand as well as one of a creditor of the deceased estate on the other.

[3] The facts which are common cause, are that:

[3.1] The plaintiff and the deceased lived together from September 2004 to August 2011.

[3.2] At the time of cohabitation, the deceased was estranged from his wife. He had been married in community of property and the marriage subsisted until he died (they had not divorced).

[3.3] At the time of his death, the deceased had bequeathed the property in which he and the plaintiff lived to the plaintiff.[3]

[4] The plaintiff states that she and the deceased had lived together as husband and wife. The deceased had fully maintained her as if she was wholly dependent on him albeit that she was employed as account executive at

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[1] Actuarial Report

[2] Based on a duty to maintain the claimant

[3] Testamentary Will of the deceased, annexure "**BDO 1.1**"

Maizey's Plastics (Pty) (Ltd).[4]

[5] The plaintiff alleges that the executor of the estate has failed and/ or refuses and neglects to admit and/ or confirm the claim on the grounds that it is late and invalid. In her amended particulars of claim, she states that the deceased had made an undertaking to her that there would be more than enough money in his part of the joint estate to care for her until she dies.[5] She claims that the deceased was aware that the plaintiff did not have the means or ability to compensate the deceased's wife for her undivided half-share in the property bequeathed to the plaintiff.

[6] In defence of the claim, the defendant submits that the plaintiff's claim can only be based on the provisions of the Maintenance of Surviving Spouses Act 27 of 1990 ("the Act"). The act, defines a "*survivor*" to mean the surviving spouse in a marriage dissolved by death. Thus, a cohabitee is excluded from this definition. The defendant states that the deceased and the plaintiff had co-habited in a heterosexual relationship, and, there is no legal duty to maintain a life partner in a heterosexual relationship. If there was, such a duty, it terminates upon the death of the life partner.

[7] The defendant premised her defence on the decision of the Constitutional Court in *Volks v Robinson.*[6] In this case, Davis J, sitting as the court of the first instance had ruled that the definition of "*survivor*" in the act was unconstitutional and invalid in that it omitted permanent life partnerships.[7] The Constitutional Court, in a majority judgment by Skweyiya J. however

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[4] Particulars of Claim, paragraph 5 ; Amended Particulars of Claim Paragraph 5

[5] Amended Particulars of Claim, paragraph 4.5, page 45

[6] Volks NO v Robinson and Others (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005)

[7] See Volks NO v Robinson supra at paragraph 24

held that the meaning of "*surviving spouse*" must be construed to mean and be limited to a party to a ***legally*** recognised marriage. It does not extend to life partners.[8]

[8] The significance of the Constitutional Court decision in relation to the matter before me is that it held that the law may distinguish by conferring legal duties, obligations and benefits between married and unmarried people, and that such a distinction does not offend the right to equality and is thus not unfair.[9]

[9] Mr South SC argued on behalf of the defendant that what defeats the plaintiff's claim is that prior to 1990, a surviving spouse had no claim for maintenance. The legislature saw a need for a change, and it intervened by enacting the act (Maintenance of Surviving Spouses Act 27 of 1990) relied upon. The only way to remedy the position is for Parliament to enact a new law.

[10] Mr De Klerk SC, while conceding that the existing legislation is against the plaintiff, argued that I should come to the aid of the plaintiff on two grounds. The first ground is that Parliament had neglected its duty and had failed to pass. The Domestic Partnership Bill ("the Bill") which was published for public comment in 2008.[10] .When invited to clarify the basis upon which I can intervene in what would be a trespass into the domain of Parliament, he conceded that the doctrine of separation of powers prevents the trespass contended for.

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[8] See page 21 at paragraph 45

[9] **(footnote the paragraph and reference in the page)**

[10] No. 30663 Government Gazette, 14 January 2008, Notice 36 of 2008, Department of Home Affairs Domestic Partnerships Bill, 2008

[11] This concession was correctly made. The most important consideration is that a determination of whether or not Parliament failed and/or neglected its duty lies within the exclusive jurisdiction of the Constitutional Court in terms of Section **167 (4)(e)**.[11] This was confirmed in the decision of the Constitutional Court, *My Vote Counts v The Speaker of the National Assembly and Others 2015 (12) BLRC 1407 CC.,* namely, that where the validity of the existing legislation is not challenged, the constitutional court has exclusive jurisdiction in respect thereof.

[12] As a second ground, Mr De Klerk SC, premised his argument on the minority judgment of the Constitutional Court in *Volks* to support the contention that I have a general obligation to develop common law in terms of Section 39(2) read with Section 173 of the Constitution. In response to the question of the precedent setting and binding nature of *Volk,* submitted that when reliance is placed on *Paulsen v Slip Knot Investment 777 (Pty) (Ltd) 2015(3) 479 (CC) 523*, the basis for the intervention would be that common law is deficient. In *Paulsen*, the Constitutional Court held that "*the authority imposed upon the courts in Section 39 (2) of the Constitution is extensive, requiring the courts to be alert to the normative framework of the Constitution not only when some startling new development of common law is in issue,*

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[11] Section 167 of the Constitution of South Africa Act 108 of 1996:
(4) Only the Constitutional Court may -
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) decide applications envisaged in section 80 or 122;
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
(f) certify a provincial constitution in terms of section 144.

but in all cases where the incremental development of the rule is in issue"[12]. He referred me to the article by Smith. This article shows that the incremental recognition of rights of cohabiting partners has resulted in an anomalous legal position where unmarried heterosexual couples have less protection than unmarried same sex couples.[13] He submitted that there is now discrimination on the grounds of "marital choice"; "sexual orientation" and "the right to dignity" is infringed upon as the Bill has not been passed.[14] He argued that the decision in *Volks* ought to have been revisited as a result.

[13] The differing approaches and value choices[15] made by the constitutional court to determine the issue is evident from the dissenting judgments of Mokgoro, and O' Regan where the Justices state that:

"However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another".[16]

[14] And Sachs J where he states that:

"if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them"[17]

[15] The judgment of Sachs J also refers to representations made by the

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[12] See *Paulsen and Another v Slip Knot Investment 777 (Pty) Ltd* 2015 (3) 479 (CC) 523 at paragraph 116

[13] "Married–Unmarried :Unmarried same-sex couples more favourable legal position than heterosexual counterparts"; De Rebus July 2016

[14] The Civil Union Act 17 of 2006 protects same sex-marriages, the Domestic Partnerships Bill 2008 (GN36 GG30663/14-1-2008)

[15] Skweyiya seems to uphold the freedom of contract while the dissenting judgment Makgoro and O'Regan adopt a contextual approach to the freedom of contract

[16] See Volks NO v Robinson and Others (CCT12/04) [2005] at paragraph 106

[17] See *Volks NO vs Robinson* supra at paragraph 156

Department of Justice and Constitutional Development at the time, and observes that over- ambitious judicial prescription could impede comprehensive legislative reform and retard rather than advance the achievement of fairness in the field.[18]

[16] Mr South SC contended that *Volks* was premised on the view that unmarried heterosexual partners choose not to marry. I am in agreement with Mr de Klerk SC, that the delay in regulation has resulted in a gap between the developments in common law on the one hand and the legal reform through the legislative process on the other. There is unequal protection afforded between heterosexual and same-sex unmarried persons subsequent to the decision in *Volk*s following the enactment of the Civil Union Act 17 of 2006. It is imperative that I observe in this judgment that the protections afforded to same-sex unmarried persons were rightfully asserted and hard won over time resulting in the enactment of the Civil Union Act.

[17] Notwithstanding, I am bound by the decisions of the Constitutional Court and do not read the court's reasoning and interpretation of Section 39(2) to grant extensive authority to overrule that Court's decisions under the ambit of the general obligation to develop common law, nor can I develop common law where the common law position has been legislated upon.

[18] This brings me to the remedies available to the plaintiff and whether the issues raised in argument can appropriately be dealt with by this court in these proceedings as currently framed. Mr South SC on behalf of the defendant conceded that there is unequal protection between unmarried

[18] Volks NO v Robinson supra at 238

heterosexual and unmarried same sex couples. He however submitted that the only basis upon which the court can intervene is "by attacking the legislation in its entirety or a provision thereof".

[19] This argument invokes the principle of subsidiarity which underpins the jurisprudence developed by the constitutional court. The principle stated by O'Regan J in Mazibuko[19], is that:

"where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".

[20] This principle finds application in the present case, and has recently been confirmed in the decision *My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14) [2015] ZACC 31 (30 September 2015)* that:

"The principle of subsidiarity enjoins a litigant who complains about shortcomings in legislation enacted to give effect to a constitutional right to challenge the constitutional validity of that legislation instead of relying directly on the constitutional right"

[21] The constitutional challenge to the act is not a case before me, and as stated, am also bound by the decision in *Volks*, and the matter is not simply one of developing common law as argued.

[22] In view of the developments since the decision in *Volks*, and the unintended consequence which has resulted in an inconsistency in the constitutional protection afforded to unmarried heterosexual partners, a second opportunity to mount a full frontal attack on the legislation is available to the plaintiff on any and/or all of the grounds advanced in argument. In this sense, the

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[19] Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009)

plaintiff can approach the Constitutional Court by either invoking its exclusive jurisdiction in terms of section 167(4)(e)[20] or by seeking direct access in terms of section 167(6)[21] of the constitution.

[23] In this regard, the exception raised in respect of the claim for maintenance arising from the Plaintiff's position as a cohabitee of the deceased must be upheld.

[24] The particulars of claim disclose that the plaintiff had also instituted proceedings in the capacity of a creditor of the deceased estate. Mr South SC agreed that an adverse finding on the exception does not preclude the plaintiff's claim in terms of the will.

[25] The question of costs was not strenuously argued albeit that Mr South SC sought an order as to cost. It is the principle that a successful party is entitled to its costs albeit that such costs are at the discretion of the court. The matter before me raises important legal questions in the development of Private/ Family Law. In this regard, I deem it not appropriate to award costs against the plaintiff.

[26] In the circumstances, I make the following order:

[26.1] The exception raised in respect of the maintenance claim is upheld;

[26.2] Each party is to pay its own costs

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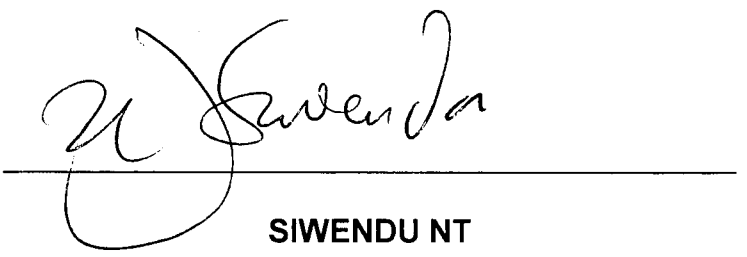
[20] Section 167 – (4) "Only the Constitutional Court may—(e) decide that Parliament or the President has failed to fulfil a constitutional obligation..."

[21] Section 167(6) - "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court"



SIWENDU NT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.	: 78173/2014
HEARD ON	: 14 SEPTEMBER 2016
COUNSEL FOR THE PLAINTIFF/ RESPONDENT	: ADV L.S. DE KLERK, SC
ATTORNEYS FOR PLAINTIFF/ RESPONDENT	: RYNHART KRUGER ATTORNEYS
COUNSEL FOR THE DEFENDANT/ EXCIPIENT	: ADV. SOUTH, SC
ATTORNEYS FOR THE DEFENDANT/ EXCIPIENT	: TIAAN SMUTS ATTORNEYS
DATE OF JUDGMENT	: 23 SEPTEMBER 2016