

RECENT AMENDMENTS TO THE DEFINITION OF SPOUSE IN THE INTESTATE SUCCESSION ACT AND THE MAINTENANCE OF SURVIVING SPOUSES ACT

WHY, WHEN, WHO AND HOW?

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A FAMILY LAW PRACTICE

3.2m South Africans cohabit outside
of marriage and the number is
increasing.

Judicial Matters Amendment Bill 2023

- Passed by Parliament
- Not yet signed into law by the President

Amendment of section 1 of Act 81 of 1987, as amended by section 14 of Act 43 of 1992 and section 8 of Act 11 of 2009

14. Section 1 of the **Intestate Succession Act**, 1987, is hereby amended by the addition of the following subsection:

“(1A) The word ‘**spouse**’, wherever it appears in this section, **includes a partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support.**”.

Amendment of section 1 of Act 27 of 1990, as amended by section 8 of Act 11 of 2009

15. Section 1 of the Maintenance of Surviving Spouses Act, 1990, is hereby amended—

(a) by the insertion in subsection (1) of the following definition, after the definition of “executor”:

“ ‘**marriage**’ for the purposes of this Act includes a permanent life partnership in which the partners undertook reciprocal duties of support;”;

(b) by the insertion in subsection (1) of the following definition, after the definition of “own means”:

“ ‘**spouse**’ for the purposes of this Act, includes a person in a permanent life partnership in which the partners undertook reciprocal duties of support;”;

(c) by the substitution in subsection (1) for the definition of “survivor” of the following definition:

“ ‘**survivor**’ means the surviving spouse in a marriage dissolved by death, and includes—

(a) the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate;

- The sacrifice of clarity and certainty at the altar of constitutionality.
- SALRC: Although there are difficulties in defining domestic partnerships “*the problems are not insuperable*”.
- Constitutional Court: Considering evidence of these relationships would not present as an “*insurmountable*” challenge.

History and timeline of relevant law changes and case law

Common law and pre-constitution

- Common law definition of marriage: the voluntary union for life of one man and one woman to the exclusion of all others.
- No such thing as a “common law spouse”.
- *Ismail v Ismail* 1983 (1) SA 1006 (A)
 - CSA refuses to recognise Muslim marriage
 - Potentially polygamous
 - Contrary to public policy
 - *Contra bonos mores* (against good morals)

Initial constitutional challenges: two broad reasons

- Discrimination against same sex partners
- Discrimination against religious marriages

Year	Name of Case	Successful challenge?
1998	Langemaat v Minister of Safety and Security 1998 (3) SA 312 (T)	✓
	• Same sex	
	• Police medical aid scheme	
2000	National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17	✓
	• Same sex	
	• Aliens Control Act	
2003	Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC)	✓
	• Same sex	
	• Judges Remuneration Act	
2004	Daniels v Campbell Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)	✓
	• Monogamous Muslim marriage	
	• MSSA	
2004	Robinson v Volks 2004 6 SA 288 (C) (High Court)	✓
	• "surviving partner of a life partnership"	
	• MSSA	
2005	Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC) (Constitutional Court)	X
	• Opposite sex life partner	
	• MSSA	
2006	Gory v Kolver NO and Others 2007 (3) BCLR 249 (CC)	✓
	• Same sex	
	• ISA	
2006	Civil Union Act 17 of 2006	

2008	Domestic Partnerships Bill 2008	
	<ul style="list-style-type: none"> • Never passed or adopted 	
2009	Hassam v Jacobs NO and Others 2009 (11) BCLR 1148 (CC)	✓
	<ul style="list-style-type: none"> • Polygamous Muslim marriage 	
	<ul style="list-style-type: none"> • ISA 	
2009	Govender v Ray 2009 (3) SA 178 (D)	✓
	<ul style="list-style-type: none"> • Monogamous Hindu marriage 	
	<ul style="list-style-type: none"> • ISA 	
2012	Paixão and Another v Road Accident Fund 2012 (6) SA 377 (SCA)	✓
	<ul style="list-style-type: none"> • Permanent heterosexual life partner 	
	<ul style="list-style-type: none"> • RAF 	
2016	Laubscher N.O. v Duplan and Another [2016] ZACC 44	✓
	<ul style="list-style-type: none"> • Post Civil Union Act 	
	<ul style="list-style-type: none"> • Same sex 	
	<ul style="list-style-type: none"> • Unmarried 	
	<ul style="list-style-type: none"> • ISA 	
2022	Bwanya v Master of the High Court and Others 2022 (3) SA 250 (CC)	✓
	<ul style="list-style-type: none"> • Opposite sex 	
	<ul style="list-style-type: none"> • Unmarried 	
	<ul style="list-style-type: none"> • ISA 	
	<ul style="list-style-type: none"> • MSSA 	

- In Langemaat and the High Court in Satchwell, the courts suggested that the duty of support arose automatically as a result of the same sex partners having lived together for a long period.
- The Constitutional Court in Satchwell held that:
 - some form of contractual undertaking of reciprocal support was required.
 - such contractual undertaking could however be inferred and could be a tacit contract.
- This was important and continues to be so because the wording in the Satchwell order has been carried forward in the subsequent case law.
- The Satchwell order extended benefits to “*a partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*”
- The court stated however that the constitution “... cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations.”
- In subsequent cases challenging the ISA (including Gory, Laubscher and Bwanya) this exact phrase was used by the challengers and included by the courts in their orders

**Former domestic worker to inherit Camps
Bay guest house and Sea Point flat**

**Former domestic worker seeks rights
under millionaire lover's will**

**Update On Former Domestic Worker Who
Sought To Inherit Wealthy Lover's Estate**

Domestic Worker Beats Law to Inherit Property

BWANYA

High Court

- Bound by the Volks precedent in respect of MSSA
- Finds that ISA unconstitutional in discriminating against opposite-sex life partners

BWANYA

Constitutional Court

- ISA: punch drunk
- MSSA: far tougher opponent, some fancy footwork required

Precedent precedent

- Unable to distinguish
- Constitutional Court bound by Volks precedent unless it can show that the judgment was “*clearly wrong*”

- In Volks the CC found that discrimination between married and unmarried life partners was not unfair:
 - Because unmarried life partners have a choice to marry; and
 - The MSSA didn't create new obligations, it simply extended an existing one, namely the automatic reciprocal duty of support between spouses:
 - There is no similar automatic duty of support between unmarried life partners and the extended duty in the MSSA was “*uniquely attached to marriage*”

CC in Bwanya hurdling “choice”

- *“To suggest that everybody does have a choice is out of touch with reality”*
- *“The question is not whether absolutely there is no choice. It is whether realistically choice may be exercised.”*

CC in Bwanya side-stepping the lack of an automatic, existing reciprocal obligation of support

- The reasoning in Volks must be considered in light of subsequent legal developments, particularly the Paixao case
- In Paixao the SCA found that a reciprocal duty of support arose from a tacit contract, which could be inferred from the couple's conduct and surrounding circumstances
 - The SCA was very careful to base its finding on contract in order to circumvent the otherwise binding Volks precedent
- The CC in Bwanya comes along and says, no, actually Paixao was not based on contract but whether the “...facts establish a legally enforceable duty of support out of a relationship akin to marriage.”

and
- “The fact that the duty of support arose from an agreement took a back seat”.
- The CC in Bwanya found that it was no longer correct to distinguish between reciprocal support duties arising automatically and those arising by agreement in permanent life partnerships.

- Having hurdled and side-stepped the reasoning in Volks the CC found that Volks was “*clearly wrong*” and found that the MSSA was unconstitutional and parliament was given 18 months to change the definitions accordingly

INTERPRETATION AND APPLICATION

What it isn't

- SALRC: Domestic partnerships are not:
 - casual uncommitted relationships without interdependency
 - mistress-patron relationships
- EW v DH 2023 (4) SA 123 (WCC)
 - *“In addition, a 'permanent romantic relationship' is not synonymous with a permanent life partnership wherein the parties undertook reciprocal duties of support to one another within the context of a familial setting. Our understanding of the case law referred to herein is that a 'permanent romantic relationship' does not per se equate with proof of the assumption of a reciprocal duty of support in a familial setting”*

SALRC in considering unregistered domestic partnerships

- Dependence does not arise only upon need and the Applicant *“should not have to prove that without the support of his or her partner during the period of cohabitation he or she would have been seriously deprived or even destitute.”*
- The language *“should be interpreted so as to give effect to the realities of our current society.”*
- *“It is therefore enough if the couple co-operate in assisting each other so that they are dependent one upon the other in the improvement of their life.”*
- Definition must be *“liberally interpreted”* and the question is whether *“the applicant’s lifestyle was ‘substantially enhanced’ by reason of his or her relationship with the other partner.”*

SARS guidelines in proof of a “*life partnership*”

- An affidavit in which neighbours, relatives or professional people confirm that the deceased and his or her partner had such a relationship.
- A cohabitation agreement.
- A joint bank account.
- The will of the deceased in which the partner is appointed as a beneficiary.
- Proof of joint ownership of immovable property or other assets.
- Life policies, retirement annuity fund (RAF) or pension fund benefits of which the partner is a beneficiary.
- Membership of a medical scheme reflecting the partner as a dependant.
- The period of such relationship.

National Coalition guidelines

- Respective ages
- Duration of partnership
- Whether they took part in a ceremony
- Nature of ceremony and who attended
- How partnership is viewed by friends and family
- Whether they shared a common abode
- Whether they own/lease the common abode jointly
- Whether and to what extent they share responsibility for living expense and upkeep of joint home
- Whether and to what extent one partner provides financial support to the other
- Whether and to what extent they have made provision for one another in relation to medical, pension and related benefits
- Whether there is a partnership agreement and what it says
- Whether and to what extent they have made provision for each other in their respective wills

Gory guidelines

- Common home
- Joint household
- Both involved in purchases of home and renovations
- The contribution to a bond and rates of a property registered in the deceased's name
- Contribution to household necessitates
- Outward display to third parties of relationship and commitment to each other
- Relationship regarded by the parties thereto as a very special relationship

Paper by A Barratt

“In Which the Partners Undertook Reciprocal Duties of Support” **– A Discussion of the Phrases as Used in Bwanya v Master of the High Court, Cape Town**

- Refers to some commentators who suggest that reciprocal support in the common law is not confined to a financial contribution but also extends to other factors such as caregiving
- Compares “*status-relationship model*” and the “*contract-based models*”
 - Concludes that there will be very little difference in practice, particularly where the contract is tacitly inferred from the relationship as a whole
- Refers to “*relationship-induced dependence*” which was a phrase used by the minority in the Volks judgement
 - Those who assume traditionally female gender roles and devote their time to caring for the young, sick and elderly and who play caring and nurturing roles, are less able to earn, to accumulate wealth and education or work experiences

- Eventually, as a result they might be left poor and dependent
- Section 7(2) of the Divorce Act was enacted to respond to vulnerability and need post-divorce
- The MSSA was similarly enacted to respond to vulnerability and need post the death of a spouse
- In light of the core objective of the MSSA, Barratt suggests that it would be more useful to focus on the claimant's needs, dependence and vulnerability than searching for a contract

MSSA

*“3. **Determination of reasonable maintenance needs.**- In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account-”*

- (a) the amount in the estate of the deceased spouse available for distribution to heirs and legatees;*
- (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and*
- (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.”*

Conclusion

- In determining whether or not a permanent life partnership in which the partners undertook reciprocal duties of support existed in respect of unmarried couples, regard should be had to:
 - the factors referred to in National Coalition and Gory
 - the lack however, of those factors pointing to a ceremony or any form of formality should not preclude the existence of such relationship but may very well assist in proving it in cases where they are found
 - the factors set out in the SARS guideline
 - the factors set out by the SALRC
- Particularly in respect of the MSSA however there should be an overriding focus on the claimants needs, financial dependence and vulnerability
- One need not look for, nor be required to find, an express and/or clear undertaking, rather a tacit undertaking can be inferred by looking collectively at all the factors and the relationship as a whole