

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/24876

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. YES/NO |

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W G LA GRANGE
2023

09 OCTOBER

In the matter between:

MAYURI KEAOMONTRI

Plaintiff

and

ANNIE ELIZABETH DAVIDS N.O.

Defendant

JUDGMENT

LA GRANGE AJ

[1] On 7 May 2021 the Plaintiff brought an action against the Defendant, the executrix in the estate of the late Robert Frank Clive Beauchamp-Proctor (the deceased), for the payment of maintenance in the sum of R8 844 822.00. On 30 August 2021, having entered an appearance to defend, the Defendant filed an exception in terms of Rule 23(1) to the Plaintiff's claim on the basis that it lacked the averments necessary to

sustain a cause of action. The exception proceeded on an opposed basis and remained opposed in the hearing before me.

[2] Essentially two grounds in support of the exception were recorded in the Defendant's notice in terms of Rule 23(1):

2.1 The first was that the Plaintiff had no legally recognized basis to sustain a claim for maintenance on her pleaded case; and

2.2 The second was that the relief sought by the Plaintiff was in direct contravention of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Maintenance Act).

[3] There was no dispute at the hearing of the exception that the second ground was no longer available to the Defendant in consequence of the Constitutional Court's judgment regarding the reach of the Maintenance Act. As such, the exception turned on a narrow point, viz. whether the allegation in the particulars of claim that the Plaintiff and the deceased "*lived together as husband and wife*" and that the Plaintiff "*never worked during this period and was fully maintained by the deceased*" was adequate to sustain a claim for maintenance under the Maintenance Act.

[4] The background to the claim and the exception was not in dispute before me and I outline it briefly:

4.1 The Plaintiff and the deceased commenced a relationship during or about 2000. On 28 May 2007 a minor child was born from the relationship. On 21 September 2009 the deceased passed away.

4.2 The deceased left several of his assets to the Plaintiff and his children in an uncontested will.

4.3 On 7 May 2021 the Plaintiff brought an action against the Defendant, contending as follows:

4.3.1 Due to the delay in dealing with the properties and assets left to the Plaintiff in the deceased's will, the Plaintiff remained liable for (and

suffered damages in respect of) the expenses, interest, penalties, municipal fees and legal costs caused by the delay in dealing with the assets as a result whereof she “*will not inherit anything worthwhile to maintain herself*”.

4.3.2 The Plaintiff was entitled to maintenance from the deceased estate, including future maintenance, by virtue of the fact that she lived with the deceased “*as husband and wife*” and that she “*never worked during this period and was fully maintained by the deceased*”.

4.4 The Defendant filed her notice of exception to the claim on 30 August 2021, contending for the two grounds that I have referred to.

[5] At the time of filing the exception, both grounds were good in law. Section 2(1) of the Maintenance Act provided that, if a marriage was dissolved by death after the commencement of the act, the survivor shall have a claim against the estate of the deceased spouse for the provision of “*reasonable maintenance needs*” until the death or remarriage of the surviving spouse “*in so far as [the surviving spouse] is not able to provide therefor from [his/her] own means and earnings*”. The Maintenance Act did not cater for a maintenance claim by a life partner that was not married. Moreover, in *Volks NO v Robinson 2005 (5) BCLR 446 (CC)*, the Constitutional Court held that the word “*spouse*” related “*to a marriage that is recognised as valid in law and not beyond that*”; the Court concluded that an interpretation that includes permanent life partnerships strained the language of section 2(1) of the Maintenance Act. Following from this interpretation, the Court held that the omission of heterosexual life partnership from the Maintenance Act was discriminatory. The Court held, however, for a variety of reasons that are not relevant here that the discrimination was not unfairly so and declined to interfere with the provisions of the Maintenance Act.

[6] This issue went to the heart of the exception, and was captured as follows in the heads of argument delivered on behalf of the Defendant on 19 October 2021:

- “9.1 It may therefore be argued that, in light of the duration of the Plaintiffs relationship with the deceased, and the fact that they cohabitated, she should be considered to be similar to a spouse as defined in the Act.
- 9.2 However, the Constitutional Court definitively disposed of the question in the matter of *Volks v Robinson* 2005 5 BCLR 446 (CC).
- 9.3 In that matter it was sought that the Maintenance of Surviving Spouses Act be declared unconstitutional, because it allegedly discriminated against opposite-sex life partners.
- 9.4 The Constitutional Court rejected the argument and upheld the exclusion of opposite-sex life partners from the statutory right to maintenance contained in the Act.”

[7] Thus far the Defendant could not be faulted for the approach it adopted.

[8] The issue of maintenance by heterosexual life partners, however, again served before the Constitutional Court at the end of 2021. On that occasion the Court reversed the approach adopted in *Volks*. In a judgment handed down on 31 December 2021 and reported as *Bwanya v The Master of the High Court and others* 2022 (3) SA 250 (CC), the Constitutional Court declared, amongst others, as follows:

- 8.1 The omission from the definition of “*survivor*” in section 1 of the Maintenance Act of the words “*and includes 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*” at the end of the existing definition is unconstitutional and invalid; and
- 8.2 The definition of “*survivor*” in s 1 of the Maintenance Act is to be read as if to include, after the words “*dissolved by death*”, the words “*and includes 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".

- [9] In consequence of the foregoing, at the hearing before me, counsel for the Defendant conceded that the Defendant could no longer advance the proposition that the Plaintiff's claim was in direct contravention of the Maintenance Act. Counsel for the Defendant advised, however, that the Defendant persists with the exception on the remaining ground, viz. that the Plaintiff has no legally recognisable basis to sustain a claim for maintenance on her pleaded case. He did so on the basis that the language of reciprocity referred to in the *Bwanya* judgment was not contained in the particulars of claim.
- [10] The language of reciprocity was derived from the notion expressed in *Volks* that one of the invariable consequences of marriage is the "*reciprocal duty of support*". *Volks* concluded that no such a duty of support arose "*by operation of law in the case of unmarried cohabitants*". That position, however, was reversed in *Bwanya*; there it was held that a life partnership that was akin to a marriage (i.e. a relationship in which there were reciprocal duties of support) and that, as such, it should attract the benefits under section 2(1) of the Maintenance Act. It follows that the language of 'reciprocal duties of support' was intended to invoke a relationship that was akin to a marriage, without the parties having subjected themselves to the legal bonds of marriage.
- [11] Counsel for the Defendant conceded as much when this proposition was put to him during argument. He maintained, however, that it was insufficient for the Plaintiff to allege that she and the deceased "*lived together as husband and wife*" and that the Plaintiff "*never worked during this period and was fully maintained by the deceased*". Counsel for the Defendant argued that a reciprocal duty of support could not be inferred from these allegations. I do not agree. The very essence of such a duty is inherent in the allegation that the Plaintiff and the deceased lived together as husband and wife and that the deceased maintained the Plaintiff. It is not necessary for the Plaintiff additionally to allege reciprocal duties of support or specifically to invoke the provisions of section 2(1) of the Maintenance Act.

[12] Accordingly I conclude that the Defendant's exception ought to be dismissed. An ordinary award of costs in favour of the Plaintiff does not, however, follow from this. The exception was good until, at least, 31 December 2021. Counsel for the Defendant argued that, since the order in *Bwanya* was suspended for 18 months from the date thereof to enable Parliament to take steps to cure the constitutional defects in the Maintenance Act, that I ought only to consider an adverse costs order with effect from mid-2023. That, in my view, takes the exclusion of costs too far. I consider that it would be appropriate to exclude all costs preceding the handing down of *Bwanya* on 31 December 2021, but not thereafter.

[13] Accordingly I grant the following order:

- 1 The exception is dismissed.
- 2 The Plaintiff is entitled to be paid all costs incurred in relation to this matter from 1 January 2022 to the date of the hearing of the exception.

W G LA GRANGE
Acting Judge of the High Court
Gauteng Division, Johannesburg.

The judgment was handed down electronically by circulation to the parties and or parties representatives by email and by being uploaded to Caselines. The date for the hand down is deemed to be the 09 October 2023.

Heard: 04 October 2023
Judgment: 09 October 2023

Appearances

For Plaintiff: Adv K Potgieter
Instructed by: Riekie Erasmus Attorneys

For Defendant: Adv A Coertze
Instructed by: W F Bouwer Attorneys Incorporated