

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Richard Gordon Volks NO v Ethel Robinson and Others

CCT 12/04

Decided on 21 February 2005

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Mrs Robinson was in a permanent life partnership with Mr Shandling from 1985 until his death in 2001. They did not marry although there was no legal obstacle to marriage. She submitted a maintenance claim against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act). The executor of the estate, Mr Volks, refused her claim because she was not a “survivor” entitled to maintenance in terms of the Act. As a result, she launched proceedings in the High Court and successfully challenged the definition of the term “survivor” in the Act. She was assisted in this application by the Women’s Legal Centre Trust (the Trust), which was admitted as the second applicant in the proceedings. The claim was upheld because her relationship with Mr Shandling was a “monogamous permanent partnership” substantially similar to a marriage. The exclusion of permanent life partners was found to be in violation of the rights to equality and dignity and therefore unconstitutional. The court read in words to cure the under-inclusiveness of the Act.

Mr. Volks appealed the decision and relief granted by the High Court, while Mrs Robinson and the Trust sought confirmation of the relief. The Minister of Justice and Constitutional Development and the Master of the High Court opposed the confirmation of the remedy. They argued that the order should not apply retrospectively so as to alleviate the administrative burden that would be placed on the Master’s Office. The Centre for Applied Legal Studies, the amicus curiae, supported confirmation and drew this Court’s attention to the vulnerability of women in cohabitation relationships. Mr. Volks argued that reading-in was inappropriate because the entire structure of the Act was based on the concept of marriage and protected surviving spouses of marriages. Mrs Robinson and the Trust argued that to differentiate between surviving partners of life partnerships and surviving spouses amounts to unfair discrimination on the basis of marital status, and violates the right to dignity.

Skweyiya J wrote the majority judgment with which Chaskalson CJ, Langa DCJ, Moseneke, Ngcobo, Van der Westhuizen and Yacoob JJ concurred. A separate concurring judgment was written by Ngcobo J, in which Chaskalson CJ, Langa DCJ, Moseneke, Van der Westhuizen and Yacoob JJ also concurred. Sachs J prepared a dissenting judgment and Mokgoro and O’Regan JJ prepared a joint dissenting judgment.

Skweyiya J holds that the purpose of the Act, viewed in light of its history, is to extend an invariable consequence of marriage beyond the death of one of the spouses. Parties to a marriage are legally obliged to maintain each other during its subsistence. The Act is intended to deal with the perceived unfairness arising from the fact that maintenance

obligations of spouses cease upon death. The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. To extend the provisions of the Act to the estate of a deceased person who was not obliged during his lifetime to maintain his partner would amount to imposing a duty after death where none existed during his lifetime. Thus the differentiation in relation to the provision of maintenance in terms of the Act does not amount to unfair discrimination; neither does it violate the dignity of surviving partners of life partnerships. The High Court order is not confirmed, and the appeal is upheld.

In a separate judgment, Ngcobo J finds that, although the challenged provisions of the Act discriminate against the survivors of heterosexual permanent life partnerships, such discrimination is not unfair. He holds that the starting point in determining the fairness of such discrimination is the Constitution. He finds that the Constitution protects the right freely to marry and the institution of marriage. This constitutional recognition of marriage is consistent with South Africa's obligations under international and regional human rights instruments, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. These instruments impose an obligation on South Africa to respect and protect marriage. He holds that in view of this constitutional recognition of marriage, the protection of the institution of marriage is a legitimate area for the law to concern itself with. In appropriate circumstances, therefore, the law may afford protection to married people which it does not accord to unmarried people.

In addition, Ngcobo J finds that there are other considerations which are relevant to the determination of the fairness of discrimination against heterosexual couples. Firstly, the purpose of the challenged provisions is manifestly not directed at impairing the dignity of the survivors of life partnerships. It is primarily directed at ensuring that the survivors of marriages who are in need of maintenance and who are unable to support themselves do get maintenance. Secondly, the law places no legal impediment to heterosexual couples involved in permanent life partnerships getting married. All that the law does is to put in place a legal regime that regulates the rights and obligations of those heterosexual couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends upon their decision whether to marry or not.

Thirdly, the challenged provisions do not say who may enter into a marriage relationship. They simply attach certain legal consequences to people who choose marriage as their contract. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

Finally, people involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of marriage to follow from their relationships. In such a situation, to impose the legal consequences of a marriage would be to undermine the right freely to marry and the nature of the agreement inherent in a marriage. For all these reasons, Ngcobo J concludes that the challenged provisions do not unfairly discriminate against heterosexual couples

involved in a permanent life partnership and accordingly the challenged provisions are not unconstitutional.

Sachs J holds that where a woman has given her all for the family and the father of her children, it is not only socially but legally unfair to leave her without means of subsistence just because she had no marriage certificate. The critical question is whether there was a family relationship of such proximity and intensity between an intimate life-partnership survivor and the deceased, as to render it unfair to deny her the right to claim maintenance after his death. The pre-democratic statute has to be interpreted in the light of new constitutional values which recognise the diverse ways in which families have been constituted in our country. Looked at from the wider perspective of family law rather than within the rigid confines of matrimonial law, the Act discriminates unfairly in respect of at least two classes of surviving cohabitants. The first is where the parties had freely and seriously committed themselves to a life of interdependence, marked by express or tacit undertakings to provide each other with emotional and material support. The second is where the relationship had produced dependency for the party who, in material terms at least, was the more vulnerable one and who, in all probability would have been unable to insist that the deceased formally marry her. What matters is the nature of the relationship and the condition of need of the survivor, particularly when that need arises precisely because of her position in the family.

Mokgoro and O'Regan JJ emphasise that the Constitution prohibits unfair discrimination on the ground of marital status. They conclude that where relationships that serve a similar social function to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status arises. Thereafter, a court must consider whether that discrimination is unfair. In this case, they conclude that some forms of cohabitation relationship, including the relationship of Mrs Robinson and Mr Shandling, do serve a similar social function to marriage. As section 2(1) of the Act only makes provision for maintenance for surviving spouses and not for cohabitants, they conclude that it constitutes discrimination on the grounds of marital status. They make it clear that not all discriminatory provisions will necessarily be unfair. They note that cohabiting couples have been stigmatised in the past, and that the discriminatory provision in this case leaves all survivors of a cohabitation relationship without any protection even where they have entered into reciprocal duties of support during the relationship and they are financially vulnerable on the death of their partner. They note also that the common law does not recognise contracts concluded by partners to cohabitation in terms of which they purport to provide posthumous maintenance to one another. They accordingly find the provisions to constitute unfair discrimination and hold them to be unconstitutional to the extent that the definition of "spouse" does not include surviving partners of a permanent heterosexual life partnership terminated by death where partners have undertaken a reciprocal duty of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate. They propose the suspension of this order for a period of two years to enable the Legislature to rectify the constitutional defect. They emphasise that there are several ways in which the unfair discrimination could be cured by the Legislature and would leave it to the Legislature to determine the most appropriate mechanism.