

'n bepaalde aangeleentheid aan te hoor nie, veral inaggenome die ongrondwetlikheid van die ou bepaling.

3 2 2 2 Aanstellingsvereistes

Die enigste vereiste is dat die kandidaat "bevoeg" moet wees. Dit is dieselfde vereiste wat ingevolge die ou bepaling gestel is. Daar is egter geen spesifieke vereiste dat die persoon toepaslik gekwalifiseerd en 'n geskikte en gepaste persoon moet wees soos in geval van waarnemende landdroste nie. Daar word egter aan die hand gedoen dat enige kandidaat vir aanstelling as 'n tydelike landdros aan hierdie vereistes ook moet voldoen omrede die vereistes algemene vereistes is ingevolge die Grondwet waaraan alle regterlike beamptes moet voldoen (sien a 175(1)). Die verskillende aanstellingsvereistes wat deur die wetgewer gestel word vir onderskeidelik tydelike en waarnemende landdroste is egter problematies. Daar word aan die hand gedoen dat daar geen regverdiging vir sodanige onderskeid bestaan nie, veral in die lig van die uitspraak in *Piedt*.

3 2 2 3 Tydsduur van aanstelling

Daar word aan die hand gedoen dat die gewysigde bepaling 'n verbetering is op die ou bepaling. Waar voorheen geen maksimum periode vir die aanstelling gestel is nie, mag die aanstelling nou nie langer wees as die tydperk van afwesigheid van die betrokke landdros in wie se plek die tydelike landdros aangestel is nie, of vyf agtereënlopende hofdae, watter ook al die kortste is. Voorsiening word gemaak vir die eenmalige heraanstelling van 'n tydelike landdros indien die landdros in wie se plek die tydelike landdros aangestel is nog nie beskikbaar is om sy werksaamhede te verrig nie.

4 Slot

In hierdie aantekening is daar gepoog om kortliks 'n vergelyking te tref tussen die ou en nuwe bepalings van die Wet op Landdroshowe insake die aanstelling van landdroste in 'n waarnemende of tydelike hoedanigheid. Verskeie verbeterings is aangedui, maar die aandag is ook gevestig op tekortkominge wat aangespreek moet word. Op die keper beskou, is die wysigings egter 'n positiewe ontwikkeling wat hopelik tot verbeterde regspleging sal lei.

MORNÉ OLIVIER

Nelson Mandela Metropolitaanse Universiteit

AN OVERVIEW OF THE CURRENT LEGAL POSITION REGARDING HETEROSEXUAL LIFE PARTNERSHIPS

1 Introduction

None of the *ex lege* consequences of marriage ensue if a man and a woman live together outside marriage. This is the case regardless of whether or not the couple are legally permitted to marry each other. They may, however, use the normal rules of the law to achieve a degree of protection for their relationship

and/or for themselves within the relationship. They also enjoy recognition in terms of certain Acts.

This note focuses solely on life partnerships of people of the opposite sex; in other words, heterosexual life partnerships. Purely for the sake of simplicity, the note is limited to monogamous heterosexual life partnerships. Below, examples of statutory recognition of heterosexual life partnerships are given. Next, the Constitutional Court's only decision on these life partnerships is set out. The protection of heterosexual life partnerships by means of the ordinary rules of the law is discussed. Finally, the South African Law Reform Commission's proposals for statutory regulation of heterosexual life partnerships are set out.

2 Limited statutory recognition of heterosexual life partnerships

Several Acts treat life partners and spouses alike, even if one of the life partners is still married. For example: Section 4(q), read with section 1 of the Estate Duty Act 45 of 1955, exempts property which accrues to a surviving life partner from his or her deceased life partner's estate from estate duty, and section 56(1)(b) read with section 1 of the Income Tax Act 58 of 1962 exempts donations between life partners from donations tax. Some Acts treat heterosexual life partners and spouses alike only in the absence of an existing marriage. For example: The Compensation for Occupational Injuries and Diseases Act 130 of 1993 enables someone who was living with an employee as "wife and husband" and who was wholly or partly financially dependent on the employee, to claim compensation as the employee's dependant if the employee was killed in the course of his or her employment. However, this applies only if the employee did not also have a spouse (s 22(1) read with s 1).

3 Judicial recognition of heterosexual life partnerships: The Constitutional Court's view

Thus far, the Constitutional Court has refused to extend spousal benefits to heterosexual life partners. *Volks v Robinson* 2005 5 BCLR 446 (CC) is the only case in which the Constitutional Court has been squarely confronted with the issue of the constitutionality of the denial of statutory spousal benefits to heterosexual life partners. Prior to this decision, the Constitutional Court has had several opportunities to deal with the position of heterosexual life partners in the context of cases relating to same-sex life partners. However, each time it had refused to do so and had warned that heterosexual and same-sex life partners are not necessarily in the same position (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC), 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC), 2002 6 SA 1 (CC); see also *J v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC)).

In *Volks v Robinson* the court considered the constitutionality of the exclusion of heterosexual life partners from the ambit of the Maintenance of Surviving Spouses Act 27 of 1990. This Act grants a maintenance claim to the "survivor" (ie the surviving spouse: s 1) of a marriage which is dissolved by death after 1 July 1990. The maintenance claim arises against the deceased spouse's estate to the extent that the survivor cannot provide for his or her reasonable maintenance needs from his or her own means and earnings (s 2(1)). On behalf of the defendant it was argued that a surviving heterosexual life partner qualifies as a survivor in terms of the Act. Alternatively, the defendant sought an order declaring the

exclusion of the surviving heterosexual life partner from the ambit of the Act unconstitutional on the grounds that it constituted unfair discrimination and also violated the right to dignity. (Ss 9(3) and (4) and s 10 of the Constitution of the Republic of South Africa 108 of 1996 respectively entrench the right to be free from unfair discrimination, and the right to dignity.) The Cape Provincial Division of the High Court accepted the second contention and declared section 1 of the Maintenance of Surviving Spouses Act unconstitutional to the extent that it fails to include permanent life partners within the ambit of the Act (*Robinson v Volks* 2004 1 All SA 61 (C), 2004 6 BCLR 671 (C)).

The majority of the judges of the Constitutional Court upheld an appeal against the High Court's decision. They held that differentiating between a spouse and a heterosexual life partner by excluding the life partner from a statutory maintenance claim against the estate of his or her deceased life partner, in circumstances where a spouse would have had such a claim, does not constitute unfair discrimination. They pointed out that, although the Bill of Rights (ch 2 of the Constitution) does not contain the right to marry and to found a family, section 15(3)(a)(i) of the Constitution recognises marriage as an institution. (S 15(3)(a)(i) permits legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.) The majority further pointed out that in past decisions the Constitutional Court had recognised that marriage and family are important social institutions in our society (*Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC), 2000 3 SA 936 (CC) paras 30 and 31; *Du Toit v Minister for Welfare and Population Development* 2002 10 BCLR 1006 (CC), 2003 2 SA 198 (CC) para 19). Furthermore, marriage is recognised internationally. In view of this recognition, the majority concluded that the law may distinguish between married and unmarried people and may accord benefits to married people, which it denies to unmarried people. They held that, in the present case, the distinction between married and unmarried people was not unfair when viewed in the larger context of the rights and duties which are uniquely attached to marriage. They pointed out that in the case of heterosexual life partnerships the law does not impose an *ex lege* duty of support upon the parties. In the case of marriage, on the other hand, an *ex lege* reciprocal duty of support operates between the spouses. The majority held that the Constitution does not require the imposition of an obligation on the estate of a deceased person in circumstances where the law does not impose an *ex lege* duty during the deceased's lifetime. They accordingly held that in this context it is not unfair to distinguish between surviving spouses and surviving heterosexual life partners. They further held that the denial of the statutory right to claim maintenance does not violate the surviving life partner's right to dignity, as a life partner's dignity is not impaired by "simply [being] told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance" (para 62). The court thus concluded that it was inappropriate posthumously to impose an obligation that did not exist before death. (On the constitutional arguments regarding the recognition of heterosexual life partnerships see further *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C) 690EG; Heaton "Family law and the Bill of Rights" in *Bill of Rights compendium* (loose-leaf) (1996) para 3J40; Clark (ed) *Family law service* (loose-leaf) (1988) para N21; Cronjé and Heaton *South African family law* (2004) 237; Sinclair assisted by Heaton *The law of marriage* (1996) 300; South African Law Reform Commission *Discussion paper 104 Project 118 Domestic partnerships* (2003) paras 4.1.22 4.1.46–

4.1.48 7.1.71; Silver “‘Till deportation do us part’: The extension of spousal recognition to same-sex partnerships” 1996 *SAJHR* 575; Goldblatt “Regulating domestic partnerships – A necessary step in the development of South African family law” 2003 *SALJ* 619; Bonthuys “Family contracts” 2004 *SALJ* 901.)

4 Protection of life partnerships by means of the ordinary rules of the law

Life partners may use any of the ordinary legal mechanisms to achieve some protection for their relationship and for themselves, and they may invoke any of the ordinary legal remedies which are available as between third parties. Below, some of these mechanisms and remedies are discussed.

4.1 Contract

Life partners may enter into contracts with each other. Thus they may, for example, enter into a universal partnership and/or life partnership agreement, or one of them may appoint the other as his or her agent and, for example, confer the power to buy household necessities or to buy assets in their joint name on that partner (*Thompson v Model Steam Laundry Ltd* 1926 TPD 674; see also Van Heerden *et al* (eds) *Boberg’s law of persons and the family* (1999) 254–255; Sinclair assisted by Heaton *The law of marriage* 284 fn 64; Hahlo “The law of concubinage” 1972 *SALJ* 324).

Life partners may also jointly enter into contracts with third parties. Thus they may, for example, purchase or lease assets jointly, rent accommodation jointly, and so forth.

The terms of each contract obviously determine each life partner’s rights and duties.

4.1.1 Universal partnership

Life partners may expressly or tacitly enter into a universal partnership. The requirements for the formation of such a partnership are the following (*Rhodesia Railways v Commissioner of Taxes* 1925 AD 438; *Mühlmann v Mühlmann* 1981 4 SA 632 (T) [confirmed: 1984 3 SA 102 (A)]; *Pezzutto v Dreyer* 1992 3 SA 379 (A)):

- (a) Each party must bring something into the partnership or bind him or her to bring something into it.
- (b) The venture must be carried on for the parties’ joint benefit.
- (c) The aim must be to make a profit.
- (d) The partnership contract must be valid/legal.

Two reported decisions have dealt with universal partnerships between heterosexual life partners. In the first of these, *V (also known as L) v De Wet* 1953 1 SA 613 (O), an unmarried woman and a married man cohabited for 21 years prior to the man’s death. During this time the woman worked in the man’s painting and decorating business and performed all domestic duties attendant on raising the couple’s two children. She claimed that a universal partnership existed between her and her life partner. The court held that a universal partnership can be formed between people who live together as husband and wife. On the facts, the court found that a universal partnership had indeed been formed and that the woman was entitled to half the parties’ combined assets.

In *Ally v Dinath* 1984 2 SA 451 (T) a woman who lived with a man for 15 years claimed half the parties' combined assets. She alleged that by their conduct they had tacitly, or alternatively impliedly, entered into a universal partnership, as they had shared a joint household and had pooled their assets, income and labour for their joint benefit. In deciding on an exception to the woman's particulars of claim, Eloff J held that a universal partnership need not be formed expressly. He further considered the objective of accumulating a growing joint estate sufficient to found an allegation (at least for purposes of pleading) that the life partners had intended to make a profit. He stated that "a pure pecuniary profit motive is not required" (455). The achievement of "another material gain such as a joint exercise for the purpose of saving costs" suffices (*ibid*).

If the life partners indeed formed a universal partnership, they jointly own the partnership property in undivided, but not necessarily equal, shares. The proportion in which they own the property is determined by the partnership agreement. In the absence of an express provision, each partner's contribution determines his or her share (*Isaacs v Isaacs* 1949 1 SA 952 (C); *Mühlmann v Mühlmann* 1981 4 SA 632 (T); *Mühlmann v Mühlmann* 1984 3 SA 102 (A)).

Which assets fall into the partnership is likewise determined by the partnership agreement. In the absence of a clear agreement, the partnership assets encompass all property acquired during the subsistence of the partnership. In certain circumstances, property that a life partner owned prior to the inception of the partnership may fall within the partnership. (On the extent of the property falling within the partnership see *V (also known as L) v De Wet*; *Ally v Dinath*; Clark (ed) *Family Law Service* paras N5 N6; Schweltnus *The legal implications of cohabitation in South Africa* (Thesis Leiden (1994) 8–10); De Bruin en Snyman "Universele vennootskap: Oplossing vir Ryland v Edros" 1998 SA Merc LJ 369–370.)

4 1 2 Life partnership contract

Life partners may regulate their rights and duties as against each other by means of a life partnership/domestic partnership/cohabitation contract. A life partnership contract may contain any provision that is not impossible, illegal or immoral. Thus the parties may, for example, regulate their liability for each other's maintenance during the subsistence of the life partnership and after its termination, govern occupation of the common home during the subsistence of the life partnership and after its termination, deal with ownership of assets acquired before the inception of the life partnership and during its subsistence, and so forth. (On the contents of a life partnership contract see Clark (ed) *Family law service* para N22; Schweltnus *The legal implications of cohabitation in South Africa* 43–46; Sinclair assisted by Heaton *The law of marriage* 281 fn 54; South African Law Reform Commission *Discussion paper 104* paras 3.2.25 3.2.26; Thomas "Konkubinaat" 1984 *THRHR* 457–459; Hutchings and Delpont "Cohabitation: A responsible approach" 1992 *De Rebus* 125; Singh "Cohabitation relationships revisited: Is it not time for acceptance?" 1996 *CILSA* 321.)

In the past there was some uncertainty as to whether life partnership contracts were valid. It was argued that such contracts might be void for being *contra bonos mores* and contrary to public policy because they further sexual immorality, reward extramarital sex and/or undermine marriage. Clearly, in view of the growing recognition of life partnerships it can no longer be contended that contracts in which life partners merely regulate the consequences of their life partnership as against each other are *contra bonos mores* or contrary to public policy.

Moreover, it should be borne in mind that in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) the Appellate Division held that the power to declare a contract contrary to public policy should be exercised sparingly.

4.2 Estoppel

If life partners hold themselves out to third parties as being married, estoppel can be used to prevent one of them from alleging that he or she is not liable for household necessities the other life partner purchased (Sinclair assisted by Heaton *The law of marriage* 447; Van der Vyver and Joubert *Persone- en familiereg* (1991) 550–551; Hahlo 1972 *SALJ* 324 submits that the *exceptio doli*, rather than estoppel, may be the legal basis for liability in such instances).

Singh 1996 *CILSA* 319 states that one life partner may rely on proprietary estoppel to acquire ownership of the other life partner's property. This is true of some foreign systems, such as English law (see eg Sinclair assisted by Heaton *The law of marriage* 275 fn 26). South African law, however, does not recognise estoppel as a means of acquiring ownership (Sonnekus *Rabie en Sonnekus: Die estoppelleerstuk in die Suid-Afrikaanse reg* (2000) 209–216). Therefore, Singh's view is not supported.

4.3 Will

Life partners may appoint one another as heirs in their respective wills or in a joint will.

4.4 Unjustified enrichment

If one life partner has been enriched at the other's expense, the impoverished life partner can, in certain circumstances, institute an enrichment claim. However, as our law does not yet recognise a general enrichment claim (*Nortjé v Pool* 1966 3 SA 96 (A)), enrichment liability is usually of limited use to life partners.

5 Proposed statutory regulation of life partnerships

The South African Law Reform Commission is currently investigating the recognition of life partnerships. It has already published *Discussion paper 104*, setting out various options for statutory reform and has drafted Bills reflecting the various options. The Commission proposes that a combination of these options should be used to regulate life partnerships.

Two of the proposed draft Bills deal solely with amendments to the Marriage Act 25 of 1961 which will enable same-sex couples to marry. They are therefore not discussed in this note.

The third and fourth draft Bills, both of which are entitled the Civil Unions Bill, enable unmarried couples to enter into a civil union. In terms of one version of the draft Bill (embodied in Option 3.2 of Annexure C of the *Discussion paper*), civil unions will be open to heterosexual and same-sex couples, while another version (Option 3.1) restricts civil unions to same-sex couples. Civil unions will be monogamous, and a spouse or partner in a registered partnership will not be allowed to enter into a civil union until his or her marriage or registered partnership has been terminated (clause 2(2)–(4) of both options). A civil union will have the same consequences as a marriage, although the process for the termination of the union will be governed by the rules that apply to the termination of a registered partnership (clauses 3 and 4 of both options).

The proposed regulation of registered partnerships is set out in the draft Registered Partnerships Bill (Annexure D of the discussion paper). Registered partnerships will be open to heterosexual and same-sex couples (clause 1). They will be monogamous and neither partner will be permitted to be a party to a marriage or civil union (clause 4(1)–(3)). A registered partnership will confer some of the consequences of marriage, such as the reciprocal duty of support, the right to occupy the family home, and the right to succeed to each other's estate *ab intestato*, on the life partners (clauses 8(1), 18(1) and 19). However, the proprietary consequences of a registered partnership will differ from those that apply in a marriage. Instead of community of property being the primary proprietary system, the accrual system will operate in a registered partnership unless the partners select a different system by means of a pre-registration agreement (clauses 9 and 10(1)). If a child is born of a heterosexual registered partnership, the male partner will be deemed to be the child's father and he will be in the same position as if he were married to the child's mother (clause 25(1)). If the partners are childless, they will be able to terminate their partnership merely by registering a termination agreement (clauses 29(1), 30(1) and 31(1)). However, if they do have children or are unable to reach agreement on the termination of the partnership or the division of their property, they will have to obtain a court order terminating the partnership (clause 31(1)). The court will have the power to order redistribution of assets and to make a maintenance order in favour of one of the partners (clauses 34(1) and 35(3)). In respect of the children, the court will have similar powers to those it has when it grants a divorce order (clause 32).

Finally, the discussion paper contains two draft Bills which attach automatic consequences to a life partnership without the partnership ever having to be registered. One version of the draft Unregistered Partnerships Bill deals only with people who live together in an intimate partnership, while another also includes people who live together in a care partnership (Annexure E of the *Discussion paper* Options 1 and 2). An intimate partnership is a relationship other than a marriage, civil union or registered partnership between two adults who live together as a couple (clause 1 of option 1, clauses 1 and 4 of option 2). A care partnership, on the other hand, is a close personal relationship other than a marriage, registered partnership or intimate relationship between two adults in which either partner provides the other with domestic support and personal care, regardless of whether or not the partners are family or live together (clauses 1 and 5(1) of option 2). Thus, for example, two friends or siblings who live together as companions would be in a care partnership. When determining whether an unregistered partnership exists or existed, factors such as the duration of the relationship, whether and to what extent the parties shared a common residence, whether they had a sexual relationship, their financial dependence or interdependence, the ownership, use and acquisition of property, their mutual commitment to a shared life, the care and support of children, the performance of household duties, and the reputation "and public aspects" of the relationship will be taken into account (clause 4(1) of option 1, clause 6(2) of option 2).

The version of the draft Unregistered Partnerships Bill which is restricted to intimate partners, that is option 1, regulates the position during the subsistence of the partnership and at its termination. In terms of this draft Bill, limited consequences will automatically flow from an unregistered partnership, unless the partners opt out of those consequences (clause 37(1)). If they do not opt out, the partners will *inter alia* be prohibited from selling, donating, mortgaging, letting, leasing or otherwise disposing of partnership property without each other's

consent (clause 11). During the subsistence of the partnership, the partners will be jointly liable for household expenses, but they will not be obliged to support one another (clause 6(1) and (2)). The partnership will terminate if one of the partners dies or the partners cease living as a couple (clause 12). Upon termination of the partnership the partners will be allowed to regulate the division of partnership property by agreement, and they will be able to approach the court for an order making their agreement an order of court (clause 14). If they cannot come to an agreement, they will have to seek a court order within two years of the termination of the partnership (clauses 15 and 23(1)). The starting point in dividing partnership property will be that each partner is entitled to an equal share (clause 19(1)). The court will however be empowered to order an adjustment of the partners' interests in partnership property on the grounds of contributions made towards the acquisition, conservation or improvement of partnership property or towards both partners' or either partner's financial resources, and each partner's contributions to the other partner's or the family's welfare (clause 20(1)). If, despite the division of the partnership property and/or the adjustment of interests in partnership property, there will be a significant disparity between the partners' income and living standard as a result of the consequences of the division of functions within the partnership while it existed, the court will also be able to make a further adjustment order; that is, it will have the power to award lump sums or order transfer of (additional) property (clause 21(1)). Neither partner will be entitled to a maintenance order, unless he or she cannot support himself or herself adequately because of having custody of a minor or disabled child who was born of the partnership, or because his or her earning capacity was adversely affected by the circumstances of the partnership. In the latter case a maintenance order will be made only if the court is of the view that the order will increase the applicant's earning capacity by enabling him or her to be trained or educated, and the order is reasonable in the circumstances of the case (clauses 28 and 29(1)). The court will also have the power to make an order regarding the couple's children (clause 36).

The second version of the draft Unregistered Partnerships Bill relates only to the position upon termination of an unregistered partnership. In terms of this version, that is Option 2, a former partner will be able to approach the court, within two years of the termination of the partnership, for an order declaring the terminated relationship to have been an unregistered partnership (clauses 6(1) and 17(1)). In these proceedings the court will have the power to make a declaration on the status of the partners' property and either partner's rights in respect of partnership property (clause 8). As a rule, the court will not be permitted to make an order if the partnership existed for less than two years (clause 15(1)). The Bill permits deviation from this rule only if the partners have a child, the applicant made substantial contributions for which he or she would not be adequately compensated in the absence of an order in terms of the Bill, or the applicant has custody of the respondent's child, and failure to make an order would result in serious injustice to the applicant (clause 15(2)). Insofar as the grounds for the termination of an intimate partnership, the division of partnership property and post-separation maintenance are concerned, the provisions of this version of the draft Bill broadly correspond to those of option 1. However, option 2 does not allow the partners to opt out of the statutory provisions. If the partners enter into a domestic partnership agreement, the agreement will not necessarily be invalid. The court will have the power to take the terms of the agreement into account, but if it is satisfied that giving effect to the agreement will cause serious injustice,

it will have the power to set the agreement aside (clause 31(1) and (2)). The partners will not be allowed to exclude the court's jurisdiction (clause 31(5)).

6 Conclusion

Piecemeal extension of statutory rights and duties to life partners, and self-regulation by means of contracts, wills, and so forth are unsatisfactory means for governing life partnerships. (On the problems with regulating life partnerships by means of contract, agency and/or wills see Sinclair assisted by Heaton *The law of marriage* 279–283; South African Law Reform Commission *Discussion paper 104* paras 3.2.43–3.2.47; Clark “Families and domestic partnerships” 2002 *SALJ* 639. Generally on the unsuitability of contracts as a mechanism for regulating family relationships see Bonthuys 2004 *SALJ* 879.) It is therefore hoped that the Law Reform Commission's report will be published soon and that legislation will be speedily enacted. It is hoped further that the commission's proposal that a combination of options should be used to regulate life partnerships will be retained in its report. To maximise the options available to life partners, civil unions should be open to heterosexual and same-sex couples. Furthermore, option 1 of the draft Unregistered Partnerships Bill should be extended to cover care relationships.

JACQUELINE HEATON
University of South Africa

[I]t is necessary to say a few words about the quality of evidence of Coombes. I found him to be an unsatisfactory witness. He was evasive in the extreme. He was reluctant to make concessions when concessions had to be made and each concession had to be wrung out of him. He displayed a marked reluctance to answer questions in a straightforward and forthright manner. In other instances . . . his explanation was so improbable that the conclusion was inescapable that he was lying. He was most ill at ease in the witness-box.

Plasket J in Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry [2005] 3 All SA 583 (SE) para 39.