
Recent case law

Dawn of a new era for permanent life partners: from *Volks v Robinson* to *Bwanya v Master of the High Court*

SUMMARY

The laws in South Africa pertaining to marital affairs have for a long time developed from a conservative form to a non-conservative one. This can be denoted from the passing of legislation such as the Recognition of Customary Marriages Act 120 of 1998, affording women in customary marriages the same protection as those in civil marriages as well as the Civil Union Act 17 of 2006, allowing same-sex partners to formalise their union. Since the advent of the Constitution it can therefore be concluded that the courts and legislature have worked relentlessly to ensure the equal enjoyment of rights to all South African people. Regardless of the immense efforts to develop this area of law, certain groups still remain unprotected and often rely on piece-meal protection often derived from court decisions. Such groups include heterosexual parties to a permanent life partnership. Although such permanent life partnerships are acknowledged in South Africa, there is no legislative protection with regards to maintenance or inheritance at the dissolution of the union. This is different to formalised unions such as marriage and civil unions with extensive legislation concerning the aftermath of such unions. A plethora of cases suggests that, this position has been challenged many times to no avail. In 2005, the Constitutional Court in *Volks v Robinson*, held that the distinction between married and unmarried couples could not be held to be unfair as a marriage encompassed legal reciprocal duties which were not present in a non-marital union. Effectively, permanent life partners could not claim maintenance or inheritance from the estate of their deceased partner. In a recent welcomed decision by the High Court, a heterosexual permanent life partner was permitted to inherit from the estate of her deceased partner. This article discusses the Constitutional Court case and the recent High Court case to elicit that South Africa is headed towards positive development with regard to marital unions and those akin to such unions.

1 Introduction

In 2006, it was decided that permanent same-sex life partners were permitted to inherit from the estate of their deceased partner.¹

1 *Gory v Kolver* 2006 ZACC 20; The court held that the Intestate Succession Act unfairly discriminated against same-sex couples on the grounds of sexual orientation in that it only granted the right to intestate succession to spouses and not also to the former. As a result, section 1 of the Act was found to be invalid because of its violation of section 9 of the Constitution

Therefore, this meant that same-sex partners were protected under section 1 of the Intestate Succession Act 81 of 1987 (hereafter referred to as the ISA), however, heterosexual life partners were left out from this decision. Furthermore, when the Civil Union Act 17 of 2006 came into force granting both same-sex and heterosexual couples the right to a union the ISA was not amended to recognise intestate succession for heterosexual life partners.² According to Magona AJ, this created an unintended injustice whereby heterosexual life partners were unable to inherit intestate unlike the unmarried same-sex life partners who could.³ In the previous year, the Constitutional Court had also ruled that heterosexual life partners could not claim for maintenance from the estate of their deceased partner.⁴ Heterosexual life partners have for a long period continued to battle with these injustices and until very recently they had been unable to attain a favourable judgment. The purpose of this article is to reveal the new and more positive reasoning being taken by the courts in line with this issue, signifying that the non-recognised status of heterosexual permanent life partners could soon change.

The position of opposite-sex permanent life partners at the dissolution of their union is discussed herein. This shall be with reference to two court cases namely, *Volks v Robinson*,⁵ which asserted that heterosexual partners cannot claim for maintenance from the estate of the other at dissolution of the union; and *Bwanya v Master of the High Court*,⁶ a recent decision holding that a heterosexual partner may inherit from the estate of their deceased partner. The recent case reveals the Court's willingness to move from a previous position where heterosexual partners were disadvantaged from exercising their rights during and at the end of their partnership, and depicts a clear intention to grant the inalienable Constitutional rights of equality and human dignity to all persons.

The meaning of a permanent life partnership shall primarily be discussed, whereafter, the possible Constitutional rights afforded to such a partnership shall be considered. This shall be followed by a discussion of the legal position concerning heterosexual permanent life partners as well as an analysis of the recent court decision on the matter. After discussing, both, the rights granted and denied to heterosexual partners upon the dissolution of their union, this paper will provide the necessary recommendations and a conclusion will thereafter be drawn.

of the Republic of South Africa which grants everyone the right to equality. Words including permanent same-sex partners were read into the section in order to rectify the invalidity.

2 *Bwanya v Master of the High Court*. Cape Town 2020 ZAWCH 111 para 153.

3 *Bwanya v Master of the High Court supra*.

4 *Volks v Robinson* 2005 ZACC 2.

5 2005 ZACC 2.

6 2020 ZAWCH 111.

2 Background

The notion of heterosexual domestic life partners in South Africa not being afforded legal and formal protection is widely associated with the choice not to marry.⁷ The so called choice argument, which was formulated through case law has resulted in a growing trend by the courts of negatively entertaining cases relating to the protection of partners in heterosexual partnerships. In *Volks v Robinson*, the court took the approach that there was no unfair differentiation between married couples and permanent life partners in terms of rights as marriage came with rights and obligations which do not exist in a permanent life partnership.⁸ In a different judgement, in *Gory v Kolver*, the court held that same-sex partners in a permanent life partnership could inherit from each other but did not deal with those in a heterosexual partnership.⁹ In *Butters v Mncora*, the court set out the principles to be proven if partners intended to share assets in terms of a tacit universal partnership, they did not, however, deal with matters such as inheritance or maintenance.¹⁰ Although avoiding the matter, the court in *Laubscher v Duplan* signified an intention to deal with the matter if it ever came up but did not address the matter further as such an issue was not before them.¹¹ In general, and as appears from case law, the courts appear to be unwilling to grant protection to heterosexual partners, to adequately deal with the matter or to move from their old position of the choice argument. However, the case of *Bwanya v Master of the High Court* brings new reasoning to the issue on the basis of equality.¹²

In an era of rapidly changing societal norms, the paradigm of lack of protection based on the choice of not wanting to marry is no longer sustainable. This is because when assessing development of laws relating to intimacy, there is evidence to show that other forms of intimate relationships have been granted legal protection. These are, among others, same sex partners as shown in the *Laubscher* judgment and Islamic polygamous marriages as shown in *Hassam v Jacobs*.¹³ Therefore, research illustrates that only heterosexual domestic partners are not legally recognised. The lack of legal recognition to such a relationship does not align with the growing social trends characterised by the rapidly growing number of South Africans in heterosexual domestic partnerships. The findings of statics show that in 2001, over 2.3 million

7 *Volks v Robinson* para 154.

8 *Volks v Robinson* para 60.

9 *Gory v Kolver* 2006 ZACC 20.

10 *Butters v Mncora* 2011 ZASCA 29.

11 *Laubscher v Duplan* 2017 (2) SA 264 (CC).

12 *Bwanya v Master of the High Court*, Cape Town 2020 ZAWCH 111.

13 *Laubscher v Duplan* supra.

South Africans were involved in domestic partnerships and by 2011 the number had moved to 3 million.¹⁴ Therefore, in view of this rapid growth and lack of legal reform, it appears that the current position regarding domestic partnerships is one which addresses new trends or new problems with old solutions.

There is a growing consensus among scholars that the position of heterosexual partners has reached a point requiring urgent changes. Bonthuys suggests that this area of law must be urgently harmonised with the Bill of Rights and the values of the Constitution such as equality and human dignity.¹⁵ Manthwa calls for a move from seeing domestic partnerships as threats to the institution of marriage but as relationships in need of legal protection.¹⁶ Smith and Robinson identify that the only way to close the gap in law created by the non-recognition of heterosexual partners is to enact legislation in recognition of such partnerships.¹⁷ Therefore, the aim of this article is to reconcile the reasoning of the court with that of various scholars who are proponents for legal recognition of heterosexual domestic partners. The matter has already been elevated by the recent case of *Bwanya v Master of the High Court* which sought to grant rights to a surviving partner.

3 The meaning of a permanent life partnership

3.1 General

A permanent life partnership which is often referred to as a domestic partnership can be defined as an intimate relationship between two people living together without formalising their union through marriage.¹⁸ Part of the origins of domestic partnerships in South Africa can be attributed to the apartheid era.¹⁹ This era was strongly characterised by men migrating to the cities to search for employment

14 *Volks v Robinson* para 119: AED Attorneys “Domestic partnerships and the Intestate Succession Act” <https://adattorneys.co.za/domestic-partnerships-and-the-intestate-successionact/#:~:text=Domestic%20partnerships%20and%20the%20Intestate%20Succession%20Act&text=A%20domestic%20partnership%20or%20cohabitation,increasingly%20popular%20in%20South%20Africa> (2020-10-11).

15 Bonthuys “A duty of support for all South African unmarried intimate partners part 1: The limits of the cohabitation and marriage-based models” 2018 *PER* 2.

16 Manthwa “Recognition of Domestic Partnerships in South African Law” (LLM dissertation 2015 UNISA) 3.

17 Smith and Robinson “An embarrassment of riches or profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective Domestic Partnerships Legislation in South Africa 2010 *PER* 30.

18 “According to a more evolving definition, the term ‘domestic partnership’ connotes an established intimate relationship of a permanent nature between two people of the same or opposite sex who live together without concluding a marriage ceremony” Manthwa 3.

19 Meyersfeld “If You Can See, Look: Domestic Partnerships and the Law” 2010 *Constitutional Law Review* 275.

particularly in mines. One of the outcomes of the migration was that married men, staying for long periods of time in urban centres, would then form non-marital families in the cities.²⁰ Other reasons for such partnerships include the rejection of the formal nature of a marriage as well as the expenses associated therein²¹ and other reasons are simply owing to the choice of not wanting to be committed in a formalised manner. In terms of the 2011 census more than three million, or 8.6 percent of the South African population, were participating in such relationships.²² However, a domestic partnership, regardless of its duration, is not considered to be a “common-law union” and South Africa has no dedicated domestic partnership legislation despite several proposals and the publication of a draft Domestic Partnerships Bill in 2008. As a result, the laws protecting persons in a marriage do not extend to people who are in a domestic partnership.²³

3 2 The difference between marriage and a life partnership

The primary difference between a marriage and a permanent life partnership is that couples in a permanent life partnership do not have the rights, duties and obligations that married couples have.²⁴ This is mainly because marriage is a formalised and legally recognised union in South Africa, whilst a domestic partnership is not legally recognised. Protection such as the right to maintenance at the dissolution of the partnership is non-existent for domestic partners. The non-existence of such protection is according to case law based on the choice not to get married.²⁵ In the *Volks* case Skweyiya JA formulated the choice argument as follows:

20 Meyersfeld 2010 *Constitutional Law Review* 275 *supra*: Furthermore, “Apart from the profound religious significance attached to the institution of marriage, there are important definitional differences. For example, upon the conclusion of a marriage ceremony, the relationship between the two parties has immediate legal significance. In the case of a domestic life partnership, the determination of the nature of the relationship can only take place after a lengthy period of time” Goldblatt [2003 (120) *SALJ* 610- 625.

21 Meyersfeld 2010 *Constitutional Law Review* 275; *Volks v Robinson* para 93.

22 AED Attorneys “Domestic partnerships and the Intestate Succession Act” <https://adattorneys.co.za/domestic-partnerships-and-the-intestate-succession-act/#:~:text=Domestic%20partnerships%20and%20the%20Intestate%20Succession%20Act&text=A%20domestic%20partnership%20or%20cohabitation,increasingly%20popular%20in%20South%20Africa> (accessed 2020-10-11).

23 Bonthuys 2018 *PER* 2.

24 Maurice Philips Attorneys “Cohabitation and the law in South Africa” <https://www.divorcelaws.co.za/the-law-on-cohabitation.html> (accessed 2020-10-10).

25 *Volks v Robinson* para 154; Manthwa also states that “The lack of recognition of domestic partnerships has to do with the fact that marriage is accepted as a cornerstone of society, a better environment for raising children and an integral social institution, while domestic partnerships are seen as a threat to the institution of marriage.”

“By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she has to bear the consequences. Just as the choice to marry is one of life’s defining moments, so, it is contended, the choice not to marry must be a determinative feature of one’s life.”²⁶

It is submitted that, what can be denoted from the choice argument is that the main differences between married couples and those in domestic partnerships are fenced around recognition and non-recognition of the union. Consequently, this creates a situation whereby if one chooses to marry they attain recognised status with rights and duties flowing from it and if one chooses not to marry, they forfeit recognition and the rights that would have accompanied such recognition. The article now turns to the possible Constitutional rights that affect parties to a permanent life partnership.

4 Constitutional rights

The South African Constitution is the Supreme law of the Republic and any law or conduct which is not consistent with it is invalid.²⁷ In addition, the obligations imposed by the Constitution must be fulfilled.²⁸ This applies to all branches of law including that of civil unions and marriages. Section 9 of the Constitution states that everyone is equal before the law and it affords the right to equal protection and benefit of the law.²⁹ Furthermore, section 9(3), forbids discrimination on the grounds of marital status and sexual orientation.³⁰ However, this provision is not absolute as it may be limited in terms of section 36 of the Constitution, if the limitation is found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³¹ The test used to determine whether discrimination has occurred was derived from *Harksen v Lane*,³² in which test the courts assess whether there has been differentiation. If there is differentiation, it is then

26 *Volks v Robinson* para 154 *supra*; “Until now, the non-recognition of domestic partnerships has been justified by what is commonly referred to as ‘the choice argument’. Simply put, the choice argument dictates that unmarried partners cannot claim spousal benefits because they choose not to ‘marry.’” Bester and Louw “Domestic partners and The choice argument: *Quo vadis?*” 2015 *PER* 1.

27 S 2 of the Constitution.

28 S 2 of the Constitution *supra*.

29 S 9 of the Constitution.

30 S 9(3) of the Constitution.

31 S 36 of the Constitution.

32 *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 54; (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified

considered whether the differentiation amounts to unfair discrimination.³³ When considering fairness, the courts examine whether the differentiation is based on a legitimate government purpose or on justifiable grounds. If no such legitimate purpose exists, it can thereafter be concluded that unfair discrimination will be present.

Section 39(2) of the Constitution obliges courts to develop the law in order to “promote the spirit, purport and objects of the Bill of Rights” in instances where the common or customary law unfairly discriminates.³⁴ In addition to the right to equality, section 10 of the Constitution, affords everyone the right to inherent dignity, which such dignity should be respected and protected.³⁵ Discrimination in terms of the rights of opposite-sex life partners upon dissolution of the partnership was first challenged in *Volks v Robinson* where the Constitutional Court held that the discrimination in question was permissible, and that Mrs Robinson’s dignity had not been infringed as explained elsewhere in this article.³⁶

5 Legal position

5.1 General

The legal position of parties cohabitating without legally formalising their relationship is characterised by Smith and Robinson as complex.³⁷ An opposite-sex domestic partnership in South Africa falls short of a common law marriage and is subsequently not recognised under any legislation. As a result of this, the consequences of a marriage do not automatically attach to such a relationship.³⁸ What makes the position even more complex is that same-sex permanent partners are legally recognised and afforded rights and protection whilst opposite-sex

33 ground. then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to “discrimination, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).”

33 *Harksen v Lane supra*.

34 S 39(2) of the Constitution.

35 S 10 of the Constitution.

36 *Volks v Robinson*- Maintenance para 42.

37 Smith and Robinson “An embarrassment of riches or profusion of confusion? an evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective Domestic Partnerships Legislation in South Africa” 2010 *PER* 30.

38 Smith and Robinson 2010 *PER* 31.

domestic partnerships are not. Reliance by parties to a heterosexual domestic partnership for protection is often placed on piecemeal legislation and declarations in judicial precedent or through challenging certain practices that appear discriminatory.³⁹ Of note in this regard are two cases. The first case, *Volks v Robinson* holding that reciprocal duties of support do not exist during the existence of heterosexual partnership and can consequently not start existing after the dissolution of that relationship. The second decision, *Bwanya v Master of the High Court*, in contrast considered the vulnerability of such partners who are often disadvantaged at the dissolution of the relationship and permitted a heterosexual partner to inherit from the estate of her deceased partner. However, it should be noted that although this decision is of immense significance to the development of marital and civil union laws, it is still to be confirmed by the Constitutional Court.⁴⁰

Whilst the number of heterosexual domestic partnerships has dramatically increased, the legal position concerning this matter has for a long period remained stagnant. This is particularly evident in view of the Domestic Partnerships Bill which was published in 2008 with an aim to legally recognise such partnerships yet twelve years later no legislation has been passed towards that end.⁴¹ Smith and Robinson submit that until there is legislation governing the aspect of domestic partnerships,

39 Some examples of the piecemeal legislation and other protection are: The Domestic Violence Act 116 of 1998 which recognises cohabitation. The definition of a dependent in the Medical Schemes Act 131 of 1998 includes a “partner.” Cohabitants are also considered as spouses in terms of legislation with the definition of the word spouse including permanent heterosexual or same-sex relationships under the Income Tax 58 of 1962 and the Estate Duty Act 45 of 1955. In terms of life insurance either partner may name the other as a beneficiary however this nomination must be made noticeably clear. With regards to the maintenance of children there is no distinction between married and unmarried persons as decisions concerning the care and contact of children are founded on the best interests of the child. Children are therefore protected if the couple is not married since both biological parents are responsible of taking care of their children. This therefore applies to domestic partnerships as well. A domestic partner may receive pension fund benefits as a nominee if they qualify as a dependant under the Pension Funds Act. However, they will not be entitled to their partner’s pension interest when the relationship is terminated. In terms of the Compensation for Occupational Diseases Act, 130 of 1993, a surviving domestic partner can claim for compensation if their partner died because of injuries sustained during the course of work, if at the time of the employee’s death date if they were living as “husband and wife.” In *Volks Robinson*, Sachs J, held that “The increased legislative recognition being given to cohabitation suggests that cohabitation has a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage” para 179.

40 *Bwanya v Master of the High Court* para 215; The court held that it would be a just and suitable remedy if the operation of the declaration of invalidity became effective from the date the Constitutional Court confirms the order if the applicant succeeded.

41 Domestic Partnerships Bill of 2008.

the legal position remains inconsistent, fragmented, and filled with uncertainty.⁴² However, despite this uncertainty, a positive light is shown through the *Bwanyana* case with the Court's preparedness to extend protection to heterosexual domestic partners.

5 2 *Volks v Robinson* – Maintenance

In *Volks v Robinson*, Mrs Robinson and Mr Shandling had been in a permanent life partnership from 1985 until 2011, the year in which Mr Shandling died. The two parties had not formalised their union through marriage although there had been no obstacle of a legal nature to stop them from getting married. After the death of Mr Shandling, Mrs Robinson submitted a maintenance claim in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (hereafter referred to as the MSSA) against the estate of Mr Shandling. Mr Volks, who was the executor of the estate denied Mrs Robinson's claim on the basis that she was not a surviving spouse as defined by the MSSA. Mrs Robinson then launched proceedings in the High Court to challenge this decision. She successfully challenged the meaning of the term survivor as defined in the Act.⁴³ The basis of her litigation success in the High Court as held by the court was that she had been in a "monogamous permanent life partnership," which is akin to a marriage. The High Court found the exclusion of permanent life partners from that Act to be a violation of the Constitutional rights to equality and dignity.⁴⁴ They read in words to remedy the exclusion of permanent life partners from the Act. Mr Volks appealed the decision of the High Court whilst Mrs Robinson sought confirmation of the judgment.

The complexity of this matter can easily be denoted from the way the Judges were divided in their ruling with four separate judgments being written on the same issue.

Skweyiya J, writing for the majority held that the distinction between married and unmarried persons was not unfair because there is a mutual duty of support between married persons, and no such duty is imposed on unmarried persons by statute.⁴⁵ It was stated that the aim of the MSSA was to provide for the maintenance of the surviving spouse and that the ultimate goal was to extend the invariable effect of marriage, which is that of support, beyond either party's death.⁴⁶ He concluded that the distinction did not amount to unfair discrimination and did not violate inherent dignity.⁴⁷ The majority considered that marriage is an important social institution and the law requires married and unmarried individuals to be differentiated. For that reason, they held that the MSSA was incapable of an interpretation including permanent life partners in

42 Smith and Robinson 2010 *PER* 31.

43 *Volks v Robinson* paras 3-10.

44 *Volks v Robinson* para 24.

45 *Volks v Robinson* para 55.

46 *Volks v Robinson* para 38.

47 *Volks v Robinson* para 60 *supra*.

the definition of a “spouse.”⁴⁸ The aim of the legislation was not to include unmarried people. Consequently, where there is no responsibility to maintain a partner on the deceased while he is alive, the court could not mandate the imposition of an obligation on the estate of the deceased person.

Ngcobo J writing for a separate but concurring judgment held that the provisions of the MSSA did deny the surviving partners of permanent life partnerships the protection it affords to surviving spouses, but it could not be said that it fundamentally impaired their rights of dignity or sense of equal worth because there was a legitimate reason for the differentiation.⁴⁹ Therefore, he held that the provisions of the MSSA were not inconsistent with sections 9 and 10 of the Constitution.⁵⁰ Sachs J in a dissenting judgment found that the crucial question was whether there was a family relationship of such closeness and strength that refusing the right to demand maintenance after death was unjust.⁵¹ In a joint dissent, Mokgoro J and O’Regan J found the provisions to constitute unjust discrimination on the basis of marital status.⁵²

The effect of the majority judgment is that without being eligible to certain rights and protection, heterosexual domestic partners continue to be disadvantaged at the termination of their relationships either by death or other circumstances for the sole reason that they made a choice not to formalise their union through marriage. This entails that the choice not to marry is intrinsically bound with a forfeiture of protection and rights similar to those granted in a marriage. This is ironic when considering section 7 of the Constitution stating that the Bill of rights affirms the South African people’s freedoms, which begs the question whether making a choice not to marry but to be in a domestic partnership is excluded from the ambit of such stipulated freedoms.⁵³ It is submitted that the approach by the majority is inconsistent with the developing social trends in intimate relationships in South Africa in light of the rise in the number of domestic partners.

5 3 *Bwanya v Master of the High Court – Inheritance*

The applicant and the deceased met in February 2014 while the applicant was waiting for a taxi to transport her from Camps Bay to Cape Town Bus Station. The deceased escorted her to the Station, and they had their first date on the same day. The two progressively spent more time together in the months following their first meeting. In June 2014 they moved in together on a permanent basis and they lived together since then. Thereafter, the deceased died intestate in April 2016 at the age of 57. The applicant filed a claim against the estate of the deceased – which was

48 *Volks v Robinson* para 68.

49 *Volks v Robinson* para 95.

50 *Volks v Robinson* para 95 *supra*.

51 *Volks v Robinson* para 195.

52 *Volks v Robinson* para 144.

53 S 7 of the Constitution.

denied by the executor of the deceased estate. As a result of this refusal, the applicant launched a claim in the High Court. She averred that certain provisions of the ISA and the MSSA did not recognise her claims for a share of the estate of the deceased and maintenance thereof. On that basis she argued that the provisions should be declared unconstitutional as they discriminated against her on the basis of marital status.⁵⁴ She also sought an order reading in the words “partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support and are contemplating marriage” wherever the word spouse was mentioned in the Acts.⁵⁵

The court, held that traditionally it is women who tend to suffer after years of dedication and support to the livelihood of a permanent life partnership as they end up being left with nothing which consequently strips them of their dignity whilst the same-sex life partners in similar situations tend to benefit instead of suffering a similar detriment.⁵⁶ It was held that this amounts to an infringement of the right to equality of the heterosexual life partnership. Furthermore, it was found that there was infringement of the Applicant's right to equality and dignity as there was differential treatment to their same-sex life partnership counterparts who do inherit even if they are not married.⁵⁷

This discrimination was held to be on the specified grounds of marital status, sexual orientation, sex, and gender. In addition to this finding, the court held that, although this group in question may not have suffered in the past from patterns of disadvantage such as those suffered by their same-sex counterparts, “the impact of the end of the relationship is severe, affecting the dignity, personhood and identity of heterosexual permanent life partners deeply. It occurs at many levels and in many ways and is often difficult to eradicate.”⁵⁸ The court concluded that the failure to include the heterosexual partnerships within s 1(1) of the ISA is in contravention of the applicant's rights and the rights of all parties in similar circumstances, particularly, their rights to equality and dignity in terms of sections 9 and 10 of the Constitution.⁵⁹ The impact of the impugned provision unfairly discriminates and cannot be justified in the South African Constitutional order.⁶⁰ In order to remedy the unconstitutionality of the ISA, the court ordered a reading in of the words or “a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support.”⁶¹

With regards to the provisions of the MSSA, the court held that they were bound by the *stare decisis* rule and could not depart from the ruling

54 *Bwanya v Master of the High Court* paras 5-26.

55 *Bwanya v Master of the High Court* para 53.

56 *Bwanya v Master of the High Court* para 171.

57 *Bwanya v Master of the High Court* para 181.

58 *Bwanya v Master of the High Court* para 181 *supra*.

59 *Bwanya v Master of the High Court* para 191.

60 *Bwanya v Master of the High Court* para 191 *supra*.

61 *Bwanya v Master of the High Court* para 225.

in *Volks*.⁶² In that instance, *Volks* continues to apply in full force when it comes to maintenance issues involving heterosexual domestic partners.

6 Analysis

6.1 General

Bonthuys submits that the number of people living in permanent life partnership relationships has universally increased, and South Africa is not an exception.⁶³ He states that the need to harmonise family law with the provisions of the Bill of Rights and the Constitutional values of equality and dignity has become a necessity.⁶⁴ This submission echoes Mokgoro and O'Regan JJ's statement in their dissenting judgment in the *Volks* case whereby they highlighted that it has become apparent that more and more people in South Africa live together without formally being married.⁶⁵ Despite the large number of people living this way, there is still no legislation protecting those cohabitating in a marriage like relationship. The analysis herein evaluates the effects and positive impact the *Bwanya* case will potentially have on the dissolution consequences of an opposite sex permanent life partnership as well as the gaps that still remain in the current position.

6.2 Effect and implications of *Bwanya*

The effect of the *Bwanya* decision, if confirmed by the Constitutional Court is that parties to a domestic partnership would have been elevated in terms of rights. Previously they were not entitled to either maintenance or inheritance at the end of a partnership; however, in light of the *Bwanya* decision, they will possibly now claim for inheritance. Although this is only one side of the coin, when considering that prior to this decision nothing was offered on the table at all, the ruling is of significant importance towards the development on laws concerning heterosexual permanent life partners. It is submitted that a decision of this matter has been highly anticipated when considering that parties to a polygamous Islamic marriage as well as same-sex couples have already been granted immense protection related to the same issues.⁶⁶ As the court held that women are the most affected group when it comes to dissolution of intimate relationships, it can be concluded that the case

62 *Bwanya v Master of the High Court* para 56.

63 Bonthuys 2018 PER 2.

64 Bonthuys 2018 PER 2 *supra*.

65 *Volks v Robinson* para 119.

66 *Hassam v Jacobs* 2009 11 BCLR 1148 (CC); The court had to decide if a widow from a polygynous Islamic marriage was entitled to be viewed as an heir of the instate estate of the deceased husband. The court decided that the widow should be entitled to receive maintenance from the estate of the deceased husband: *Laubscher v Duplan* 2017 (2) SA 264 (CC); The court held that same-sex partners would continue to enjoy rights concerning intestate succession under the Intestate Succession Act as had been held in *Gory v Kolver* until the legislature specifically makes an amendment to the Act regarding that issue.

will largely impact on the development and advancement of women's rights, particularly, equality and human dignity in intimate relationships.

6.3 *Lacunae in current position*

In view of the fact that same-sex partners are awarded the same rights and protection which heterosexual domestic partners consistently seek for, it can be stated that the law is inconsistent in this regard, in affording one group protection whilst denying the same protection to a similar group. In his dissenting judgment in the *Volks* case, Sachs J could not find the legitimate basis for this differentiation as he placed more emphasis on the importance of family instead of the importance of marriage.⁶⁷ Despite the *Bwanya* case, this gap, although narrowed, still remains in that heterosexual domestic partners still cannot claim for maintenance from the estate of a deceased partner. Therefore, when it comes to maintenance issues, *Bwanya* will have no impact on the matter.

Whilst the High Court can be rightly understood in that they could not touch upon the matter as it is a decision of a higher court, there appears no justifiable excuse on the part of the legislature in taking measures to ensure the recognition of domestic partnerships in South Africa. In further assessing the effects of the *Bwanya* case, another gap created by the two above cases is that it will be difficult to align the *Bwanya* case to *Volks*, because one case allows for protection whilst the other denies protection. This appears to be a situation which can only be remedied by legislative intervention.

7 Recommendations

It is submitted that although the *Bwanya* case is a very welcomed decision by many, the piecemeal recognition and forms of protection afforded to domestic partnerships remain largely insufficient. For this reason, it is suggested that the legislature takes measures to enact legislation that recognises domestic partnerships for heterosexual couples, to achieve the aim of the Constitution to afford the rights to equality and human dignity to all people in South Africa. The continued piecemeal protection only creates a facade that everyone is treated equally before the law when in reality they are deep inequalities embedded in the way some people in the same situation are treated differently to others for no justifiable reason.

In the *Laubscher* case Mbha AJ held that “there has never been a [C]onstitutional challenge for the right of opposite-sex permanent

67 *Volks v Robinson* para 181; He held that “The emphasis shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships.” Such an approach would the allow for a wider interpretation with enough room to cater for the social developments in South Africa concerning inequality and protection in intimate relationships.

partners to be included within the ambit of section 1(1) of the ISA. An actual cause of action and a plea of unfair discrimination are thus required before crossing this bridge.”⁶⁸ It is suggested that as such a case has now presented itself, the courts and legislature may now deal with the matter once and for all to the ends of reaching legal certainty. Furthermore, it is submitted that one position should be adopted when it comes to the rights and benefits of domestic partners when looking at the fact that *Bwanya* favours the protection of rights whilst *Volks* denies maintenance rights, a situation that creates confusion. A position which favours the enhancement of equality and human dignity as in *Bwanya* would consequently be favourable. However, the matter now rests in the hands of the Constitutional Court.

8 Conclusion

Volks v Robinson and *Bwanya v Master of the High Court*, bare striking resemblances as they both deal with the rights of surviving partners in a heterosexual permanent life partnership, however, as *Volks* is a Constitutional Court case it remains precedent on the issue of domestic life partners not being able to claim maintenance from the estate of a deceased partner. When assessing the matter from the viewpoint that previously heterosexual partners were not eligible to claim for both maintenance and inheritance, it can be said that the *Bwanya* decision is a drastic development on the reasoning of the courts towards this issue.

Bearing in mind that Mrs Robinson too, like Ms Bwanya successfully challenged legislative provisions which excluded her from claiming maintenance in the High Court but which decision was later overturned by the Constitutional Court, it is hoped that the Constitutional Court will confirm the decision of the High Court in *Bwanya* as overturning it might result in a hinderance on the development of equality with regards to civil unions and marriage related laws.

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68 *Laubscher v Duplan supra*.