

Pro Bono & Human Rights ALERT

24 MARCH 2023



INCORPORATING
KIETI LAW LLP, KENYA

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Opposite-sex life partnerships: Is there protection?

Our constitutional democracy demands that where our common law offends the spirit, purport and objects of the Bill of Rights, it must be developed to cure this offence. As a result, our courts have, over the years, had to grapple with several matters that required the adjustment of our law to properly recognise and protect the rights and lived realities of our society.



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This legal adjustment has contributed to the transformation of what is understood as the 'traditional' nuclear family, and indeed our understanding of relationships and their dynamics. More and more we are seeing legal recognition of the different forms of committed relationships found in our society – we have seen inclusion in the context of the Recognition of Customary Marriages Act 120 of 1998, as well as in the Civil Unions Act 17 of 2006 to recognise and regulate same-sex partnerships. Currently, the recognition of marriages concluded in terms of Islam is before our courts.

The case of *E.W v V.H* (12272/2022) [2023] ZAWCHC 58, heard before a full bench of the Western Cape High Court in February 2023, is another matter that brings to the fore the question of legal consequences which flow from a particular category of romantic relationships: life partnerships. The Women's Legal Centre joined the matter as amicus curiae, and judgment was handed down on 17 March 2023, with Judges Cloete and Slingers in the majority, and Judge Wille dissenting.

The issue in the matter was whether a duty of support exists between life partners after the termination of their relationship. The applicant and respondent were in a long-term romantic relationship for 8 or 9 years, during which three children were born. The applicant (i) did not earn an independent income; (ii) had no assets of her own; (iii) attended to raising the children born of their relationship; and (iv) was entirely financially dependent on the respondent. When the applicant terminated the relationship, the respondent significantly reduced his financial support, launched an application threatening to take the children away from the applicant, and threatened to terminate the lease of their family home.

Relief sought

The applicant, having in the first instance launched action proceedings against the respondent, in these interlocutory application proceedings requested the court to declare that the common law recognise a duty of support between partners in unmarried opposite-sex permanent life partnerships, such that the parties



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are entitled to claim maintenance from one another following the termination of their relationship. Alternatively, that the common law be developed, in line with the Bill of Rights, to achieve this recognition.

The applicant in these proceedings sought interim maintenance of R56,000 per month and payment of her medical and motor vehicle expenses. She also sought payment of R1 million from the respondent as an initial contribution towards her costs in the pending action.

Analysis

The issues for determination before the court were threefold:

1. Whether the applicant was entitled to the relief which would result in the development of the common law and ground a claim for interim maintenance, when substantially the same final relief was being sought in pending action proceedings.

2. Whether the development of the common law is required and appropriate.
3. Whether the applicant should succeed in her claim for interim maintenance.

In deciding whether the applicant was entitled to relief in interlocutory proceedings, where substantially the same relief was being sought in the main action, the majority court found two difficulties with this approach:

1. The applicant elected to institute action proceedings to remedy her situation; and that she did not institute application proceedings in the first instance was telling. The court understood this approach to reflect the applicant pre-empting a dispute of fact regarding the existence of the permanent life partnership.

2. The approach taken prejudiced the applicant, because should the final relief not be granted, she may be non-suited to continue to prove an entitlement to maintenance.

However, neither the respondent nor amicus took issue with this approach, and so the court could take the point no further.

The court then turned to consider whether the development of the common law was required and appropriate. The applicant argued that the lack of legal recourse for life partners to claim maintenance following the termination of the partnership was constitutionally unacceptable, as it discriminated on the basis of the listed grounds of marital status and gender and constituted unequal protection before the law. Further, that where the common law duty of support between spouses terminates upon divorce or death in a marriage, such



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spouses find a remedy in legislation. The court was not persuaded. It found that Constitutional Court case law indeed provided the applicant with legal recourse – she would, however, have to prove that the duty of support existed as a consequence of their relationship, and that it existed in a familial setting. Importantly, the court found that the appropriate forum in which to resolve this was the pending action and saw no need to develop the common law as proposed.

The consequence of these findings was that the court could not find in favour of the applicant's claim for interim maintenance, as granting interim relief would amount to finding favour for the final relief sought in the action.

Minority finding

The lone dissenting judge agreed with the reasoning of the majority court but would have granted a different order in the result. The judge explained that when dealing with issues with a constitutional flavour – such as in the present case – a court must guard against applying “*black-letter*” law, and the focus should instead be on the actual wrong that needs to be remedied.

The judge carefully set out the financial and support dynamics between the parties during their 8 or 9 year relationship and found that what was squarely before the court was a question of prejudice. The minority found that the prejudice the applicant would suffer significantly outweighed the prejudice the respondent would suffer if the interim financial relief was granted, and thus, irreparable harm was established.

The minority further found that when dealing with the development of the common law within a constitutional context, regard should be given to all the provisions of our constitution that may find application, and the enquiry should be holistically addressed. The issue was whether the interpretation contended for by the applicant would serve the nature of equality as envisaged by our constitution, and the dissenting judge found that it would.

The minority court finally referred to the invaluable case studies produced by the amicus showing the different faces of women who may need to approach the courts for similar relief. It was submitted that providing redress to the applicant would significantly impact the plight of these many faceless women in our society, and thus the case between the applicant and the respondent could not be viewed in isolation. The minority judge found that he would have granted the applicant interim maintenance in the circumstances.



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Conclusion

Ultimately, the court dismissed the application and held that a “*permanent romantic relationship*” is not synonymous with a permanent life partnership wherein the parties undertook reciprocal duties of support to one another within the context of a familial setting, and therefore dismissed the application, but with no order as to costs.

What stands out is the minority judge’s appropriate weighting of the prejudice to be suffered by the parties, and the importance of redressing **that** issue. Also of great importance was the impact that a successful outcome could have had for many women who are similarly placed. The majority judgment is disappointing and brings into sharp focus the significant legal challenges endured by women in the context of relationships.

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