

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Van der Merwe v The Road Accident Fund and Another

CCT 48/05

Decided on 30 of March 2006

MEDIA SUMMARY

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

Today the Constitutional Court handed down a unanimous judgment confirming an order of the Cape High Court that declared section 18(b) of the Matrimonial Property Act, 1984 (The Act) to be inconsistent with the Constitution and therefore invalid.

On 24 October 1999, at a Pick n' Pay in Goodwood, Cape Town, Mr David Van der Merwe intentionally drove his motor vehicle into his wife, the applicant. As a result of the collision, she sustained severe bodily injuries requiring extensive medical treatment. At the time of the collision, the Van der Merwes were married in community of property. They have since been divorced. The applicant instituted action against the Road Accident Fund, and successfully challenged the constitutional validity of section 18(b) of the Act that barred her from recovering patrimonial damages for bodily injury caused to her by her spouse because they were married in community of property. The Cape High Court declared the provision to be inconsistent with the Constitution and invalid because it undermined the dignity of applicant and unfairly discriminated against her on the ground of her marital status.

Before this Court, the applicant requested a confirmation of the order of constitutional invalidity made by the High Court. In addition the applicant requested that the Minister of Justice and Constitutional Development be joined as a party to the proceedings. The Court granted the request and the Minister filed written argument and made oral submissions in which she supported the confirmation of the order of constitutional invalidity. The Fund appealed against the order and opposed confirmation on several grounds. The Women's Legal Centre Trust was admitted as amicus curiae and argued that although the section appeared to be gender neutral, it disproportionately affected women who were married in violent and abusive relationships.

The Constitutional Court, in a unanimous judgment written by Deputy Chief Justice Moseneke, state that the common law rule that spouses who share a joint estate may not sue each other for either patrimonial or non-patrimonial delictual loss was a product of a dated patriarchal society. The fact that claims for patrimonial loss, by one spouse against the other where they are married in community of property, were still excluded was a remnant of this rule which had not been changed by the drastic legislative evolutions which took place in this area. The Court notes that the common law objective of preserving the oneness and indivisibility of the joint estate has been surpassed by the legislative scheme that equalised the proprietary power of wives and husbands and introduced separate estates for spouses in a marriage in community of property. However, the Court finds that the present case concerned the constitutional validity of section 18(b), and accordingly declines an invitation to develop the common law.

The Court holds that section 18(b), when read in light of section 9(1) of the Constitution is invalid because it denies the affected spouses equal protection and benefit of the law. The section differentiates spouses who are married in community of property from spouses married out of community of property and denies such spouses the right to claim damages for patrimonial loss arising from bodily injuries inflicted by the other spouse, without a rational purpose. The result of the current regime is that an insurer is not liable where the individuals are married in community of property, but may be liable where they are married out of community of property.

In order to understand the differentiation made by section 18(b), the Court probed the underlying common law relationship between patrimonial and non-patrimonial damages. The Court observes that ordinarily damages provide a method by which the injured party is placed in the position she or he would have been in, but for the wrongful conduct, and a method by which an impaired interest may be restored through money. In this regard, the Court observes that patrimonial damages are considered to be “true equivalents” of the loss, and calculable in money, and non-patrimonial damages or general damages are designed to redress the deterioration of highly personalised legal interest that attach to the body or personality of the claimant; they do not have a direct or instant money value. Yet it is important to recognise that general damages like special damages ultimately assume the form of a monetary award and accrue to the estate of the claimant. Furthermore, the primary object of both types of damages is to make good the loss; to amend the injury. This, the Court finds, leads to the conclusion that there is no rational divide between patrimonial and non-patrimonial damages for purposes of one spouse claiming from the other in delict for personal injury. Where there is a distinction, it is blurred because the loss often affects both the person and the patrimony.

The Court finds that in light of our constitutional setting, particularly section 9(1), there is no legitimate government interest advanced by distinguishing between claims for patrimonial and non-patrimonial losses for injuries between spouses married in community of property, and that such a distinction arbitrarily limits the equality provisions of the Constitution. Absent a legitimate purpose for the limitation of the right, it must follow that the distinction drawn by section 18(b) cannot be justified.

The argument that the section is otherwise justifiable because the applicant chose to marry in community of property and therefore waived her right to attack the validity of the laws that regulate such marriage, is dismissed on the basis that whether or not a law is valid depends on whether, objectively, it is consistent with the Constitution, and this inquiry cannot be frustrated by the conduct of the holder of the right.

Having decided the case on the premise that the impugned section unjustifiably limits the right to equal protection and benefit of the law, the Court finds it unnecessary to decide the balance of the grounds of attack against the section. However, the Court finds much to be said for the submissions of the Women’s Legal Centre Trust that the challenged section desecrates the rights of dignity and equal worth promised under section 10 of the Constitution and invades the freedom from all forms of violence protected by section 12(1)(c) of the Constitution because a spouse married in community of property is immunised from any patrimonial claims, arising from personal injury including domestic abuse. In addition, that despite the gender-neutrality of section 18(b), the legislation would have a more adverse effect on women than men because women are more likely to fall prey to domestic abuse at the hands of their husband, and yet the section renders them claimless.

By way of remedy this Court finds that that severance of the offending language and the reading-in of remedial words into the challenged section are appropriate. The remedy chosen is the least

invasive of the legislative role of Parliament; it preserves the integrity of the rest of the legislation and affords the claimant an effective remedy. In the result, the Court confirms the order of constitutional invalidity of section 18(b); dismisses the appeal with costs and orders that the Road Accident Fund pay costs of Mrs Van der Merwe in the High Court and in this Court.

In a brief, concurring judgment Yacoob J points out that that the choice argument may have only been relevant to the justification analysis to the extent that the Court determined the existence of a legitimate government purpose for the impugned section.