

MARRIAGE ACT [CHAPTER 5: 15]: DEMYSTIFYING THE MEANING OF ‘CIVIL PARTNERSHIP’ IN TERMS OF SECTION 41 OF THE ACT¹

Introduction

It is or has been common for quite a period of time in Zimbabwe that couples live together without entering into a recognised marriage by law. At instance the term “kuchaya mapoto” has been given to these types of relationships. These are relationships where two people live together as if they were married but do not have a registered union that is recognised at law, this is either, a civil marriage or a registered customary union.

In May of 2022 the Legislature ushered into law the **Marriage Act [Cap 5:15]** (hereinafter “*the Act*”) and **section 41 of the Act** introduced the “civil partnership” effectively putting recognition of these relationships in our law.

It is clear that the Legislature’s intention was to clarify the questions of justice and fairness that come in the event of dissolution of these types of relationships.

What is a “Civil Partnership”?

In a nutshell the Act defines a civil partnership as follows:

“A relationship between a man and a woman who are both over the age of eighteen years; and have lived together without legally being married to each other; and are within the degrees of affinity or consanguinity as provided in section 7; and having regard to all the circumstances of their relationship, have a relationship as a couple living together on a genuine domestic basis.”²

In basic terms a civil partnership is a relationship between two people who are not related such that they are not allowed to marry who live together as if there were husband and wife.

This term is new in our law and has not been defined effectively and for this reason, this paper will consider South African law which is of persuasive value to our courts and where the term has been defined. Although in South Africa they use different terms like “Life Partnership and Universal Partnerships” the import is the same and the reference might give us a persuasive direction as to the consequences of our civil partnership.

¹ **Disclaimer: this information should not be construed as legal advice. For legal advice please contact a registered legal practitioner.**

² Section 41 (1)(a) -(d) of the Marriage Act [Chapter 5:15]

The Existence of a Civil Partnership

Since a civil partnership is not a registered union, it is up to the party who alleges the union to prove that there is such a union. **Section 41 (2) of the Act** provides for circumstances that can be considered when determining the existence of a civil partnership.

The circumstances are as follows:

“the duration of the relationship; the nature and extent of their common residence; whether a sexual relationship exists; the degree of financial dependence or interdependence, and any arrangements for financial support, between them; the ownership, use and acquisition of their property; the degree of mutual commitment to a shared life; the care and support of children; the reputation and public aspects of the relationship.”

Therefore that, before any dissolution of such a relationship there must first be a relationship to dissolve. If, one has been living with someone that does not give them the right to claim they had such a relationship, and it does not give them right to any property or to elect to use any of the provisions of the **Matrimonial Causes Act [Chapter 5:13]** (hereinafter “*Matrimonial Act*”) especially **section 7 to section 11 of that Act** to regulate the dissolution of such a relationship.

In South Africa, a partner proving the existence of a “Life Partnership” may use any of the ordinary legal mechanisms used in establishing a partnership.³ That is to say, to a certain extent a “civil partnership” may be regulated the same way as a business partnership.

Primarily and in addition to the requirements of a partnership South African courts have made a list of other requirements that may be used in proving the existence of a “Civil Partnership”. These requirements are summarised as follows:

1. Parties to the partnership must make a contribution to the partnership. A universal partnership between life partners is not confined to a commercial undertaking, therefore logic dictates that a life partner who fulfils child-care and domestic responsibilities makes the requisite contribution even if he/she does not contribute financially to the partnership.⁴
2. The partnership must be carried out for joint benefit. In **Butters**⁵ the court stated that this requirement is satisfied if the parties intended to share everything, and one life partner shared in the benefits of the other’s financial contribution while the latter life partner shared in the benefits of the former’s fulfilment of domestic and child-care responsibilities.

³ Heaton J and Kruger JM South African Family Law 4th ed (2015) LexisNexis Durban pg 259

⁴ Butters v Mncora (181/2011) [2012] ZASCA 29 “in this matter an unmarried couple had lived together as husband and wife for almost 20 years and the claim was based on tacit universal partnership”

⁵ Butters v Mncora (181/2011) [2012] ZASCA 29

3. The objective of the partnership should be to make a profit, but the profit need not be commercial.⁶ An objective of accumulating a joint estate is sufficient enough to found an allegation that the life partners intended to make a profit, a pure pecuniary profit motive is not required and another material gain such as a joint exercise for the purpose of saving costs is enough.⁷

A very big part of South African law is that a universal partnership can be created expressly or tacitly, in the case of a tacit universal.

In the context of Zimbabwean law, the term and concept of a “Civil Partnership” is new, the courts have not pronounced on the parameters that are considered in proving the existence of a Civil Partnership.

Questions that may arise from the circumstances provided in **section 41 (2) of the Act** may be as follows:

- i. In terms of duration of the relationship, how long is a reasonable time for the relationship to be considered a “civil partnership”?
- ii. In terms of common residence, does the couple need to stay at the same abode daily for the duration of the period considered to be reasonable or do visits count and what type of visits?
- iii. In terms of mutual commitment to a shared life, does the couple need to reach a consensus on the parameters that govern the shared life or can conduct be taken as sufficient evidence to prove a shared life.
- iv. In terms of reputation and public aspects of the relationship, which people are viable witnesses to give evidence on the relationship, is a secret relationship one that's not in the public eye considered?

These are but a few questions that arise from the circumstances that the Act has provided in terms establishing or proving the existence of a Civil Partnership.

Therefore, it is without doubt that in terms of civil partnerships our Courts need to define clearly how a civil partnership comes about. From the definition itself as given by the Act there are forms of relationship that will necessarily not be viewed as civil partnership.

Extra-marital affairs would have to be examined in view of the definition in order to establish whether they meet the requirements of a Civil Partnership.

For the aspect of dissolution, an unregistered customary marriage had to be dissolved in terms of custom. After the promulgation of the Act it seems that an unregistered customary union is on all fours with the definition of a civil partnership,

⁶ Heaton J and Kruger JM South African Family Law 4th ed (2015) LexisNexis Durban pg 259

⁷ Ally v Dinath 1984 (2) SA 451 (T) “this matter set out the essentials of universal partnership and pay due regard to what would suffice as “carrying on business for a profit” in relation to a universal partnership.

a couple to an unregistered customary union may approach the Court in terms of the Matrimonial Act to dissolve their union.

Protection of a Partner in a Civil Partnership.

One major aspect of a civil partnership is that it may only be made by people who are not legally married, in essence it is up to them to prove the existence of the partnership.

In many cases people fail to do this. However, South African Law as aforementioned states that the ordinary principles of a partnership may be used to determine the existence of such a relationship.

In such a case, partners may use a contract to obtain a degree of recognition of their relationship. For example, they may purchase assets jointly, jointly enter into lease agreements. Usually, the life partners will be joint owners of assets and joint debtors in respect of obligations incurred under such a contract.⁸

There are two types of contracts that couples may enter which are recognised under Zimbabwean law, first, a *societas universorum bonorum* (that is, a universal partnership relating to present and future assets, liabilities, profits and losses) or a *societas universorum quae ex quastu veniunt* (that is, a universal partnership that is limited to the sharing of present and future assets, liabilities, profits and losses acquired from commercial undertakings).⁹ The parameters of such a contract must be clearly explained.¹⁰

If the above is apparent from the relationship, then one can upon dissolution of the relationship apply to the court in terms of the Matrimonial Act for an order for the division of assets or maintenance for themselves or any children born of that relationship.

Conclusion

It is not every relationship where two people live together that can be qualified as a civil partnership. The law has put a strict definition as to what can be seen as a civil partnership. It is also clear that the legislature intended to address the issue of what happens in the event of the dissolution of relationships that are not recognised at law. However, our Courts still have the duty of interpreting and defining this law.

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⁸ Heaton J and Kruger JM South African Family Law 4th ed (2015) LexisNexis Durban pg 259

⁹ Mautsa v Kurebgaseka HH-106-17 in this matter the couple had been living together under an unregistered customary marriage which then ended, the other party made an application to the court in terms of a tacit universal partnership.

¹⁰ Sepheri v Scanlan 2008 (1) SA 322 (C) "a woman who lived with her fiancé for some five years claimed that a universal partnership had existed between them. She alleged that the partnership came about because the defendant stated that everything was "ours". The defendant replied that his intention was that everything would be shared only once the couple had been married. The court found that the defendant never intended to get into a universal partnership and that the parties therefore did not agree to create a universal partnership.