



SUMMARY OF TWO CONSTITUTIONAL COURT CASES – JUDICIAL MATTERS AMENDMENT BILL [B48-2008]

With reference to Clause 22:

1. Gory v Kolver NO and Others (Starke and Others Intervening) 2007 (4) SA 97 (CC)

Mark Gory claimed to be the sole heir of his long-time domestic partner, Henry Harrison Brooks. When Mr. Brooks died intestate in 2005 his parents petitioned the court to appoint Daniel Kolver as executor and claimed to be their son's heirs. Kolver rejected Gory's claim to be the sole heir. Consequently, Gory filed suit against Kolver and Brooks's parents in the Pretoria High Court.

Pretoria High Court

The High Court ruled that section 1(1) of the Intestate Succession Act 81 of 1987 was unconstitutional to the extent that it referred to a 'spouse' inheriting from an intestate estate, excluding surviving same-sex partners. This amounted to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution. However, the judgment was suspended pending an appeal to the Constitutional Court.

Constitutional Court

The Constitutional Court also found in favour of Mr Gory. The failure of section 1 (1) to include within its ambit surviving partners to permanent same sex life partnerships, in which the parties have undertaken reciprocal duties of support, is inconsistent with Mr Gory's rights to equality and dignity. Since Parliament had failed to respond to the Court's repeated orders to revise South Africa's laws to respect the rights of same-sex partners, it would be appropriate to "read in" to the intestate succession law the following words after every mention of "spouse":

"Or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support."

Matters of concern



The issue that consumed most of the Court's attention in this case was the question of retro activity. Logically, if the Intestate Succession Act was unconstitutional due to the constitutional ban on sexual orientation discrimination, then it was unconstitutional from the date the post-apartheid interim Constitution went into effect in 1994. The fear was this would result in opening the floodgates of litigation, as slighted surviving same-sex partners moved to reopen intestate estate settlements going back a decade or more.

The Court considered various solutions to this problem, including making the matter only retroactive for estates in which no executor had yet been appointed, or retroactive for all estates that had not yet been settled. Ultimately, however, the Court decided on a different course, declaring that the limitation to surviving spouses was unconstitutional with effect from April 27, 1994, but that its decision;

"shall not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present applicant."

Practically translated, this appears to mean that if somebody acquired title to property under an intestate estate distribution knowing that there was a surviving same-sex partner with a claim to the property, they might be compelled to give it back.

Another question remained, which was not directly addressed by the Court. What of the impact of this ruling after marriage becomes available to same-sex couples? At the time of the Gory judgement Parliament was in the final steps of enacting the Civil Unions Bill under which same-sex couples can marry or contract civil unions having all the rights of marriage, which would of course include rights of intestate succession. Since the main logical ground for "reading in" rights for surviving partners in the Intestate Succession Law was that same-sex couples could not marry, the logical underpinning for the decision would disappear once marriage became available.

Once marriage is open to all, why should unmarried same-sex survivors have any greater rights than surviving unmarried opposite-sex surviving partners? As no legislation had yet been enacted, the Constitutional Court was not willing to predict what might happen. For instance, arising from the Gory decision, a party to a same-sex relationship may in future be the intestate heir of their life partner. This could be the case within a week of setting up home together in a permanent same-sex relationship with reciprocal duties of support even though they decide not to form a civil union. A heterosexual couple who have been together for 30 years in a similar relationship but who for various reasons have decided not to marry will have no such rights of intestate succession.



2. Volks v Robinson 2005 5 BCLR 446 (CC)

Mrs Robinson was in a permanent life partnership with Mr Shandling from 1985 until his death in 2001. They did not marry, although there was no legal obstacle to marriage. She submitted a maintenance claim against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act). The executor of the estate, Mr Volks, refused her claim because she was not a "survivor" entitled to maintenance in terms of the Act. The Maintenance Act gives the survivor the right to claim maintenance from the deceased estate. If the couple isn't married, the survivor has no such right. The constitutional question raised in Volks was whether the law discriminates against Mrs Robinson on the grounds that she is unmarried.

Cape High Court

In the Cape High Court, section 2(1)¹ of the Maintenance of Surviving Spouses Act read with the definition of 'survivor' in section 1 was declared unconstitutional to the extent that it failed to include permanent life partners within the ambit of the Act. The court found that this violated section 9 of the Constitution and amounted to unfair discrimination on the grounds of marital status and infringed the right to dignity. The High Court made an order reading in the following words to the definition of survivor in section 1 –

"and includes the surviving spouse of a life partnership."

Constitutional Court

However, when the matter was taken on appeal, the Constitutional Court, in a majority decision written by Skweyiya J (and concurred in by six justices),² disagreed with the Cape High Court and held that the distinction between married and unmarried people cannot be said to be unfair, when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. To extend the provisions of the Act in the way Robinson was asking the court would amount to imposing a duty after death where none existed during the deceased's lifetime. The

¹ Section 2(1) provides that: "if a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefore from his own means and earnings."

Survivor is defined as surviving spouse in a marriage dissolved by death.

² Chaskolson CJ, Langa DCJ, Moseneke J, Ngcobo J, Van der Westerhuizen J and Yacoob J.



differentiation in relation to the provision of maintenance in terms of the Act did not amount to unfair discrimination; and neither did it violate the dignity of surviving partners of life partnerships.

In a separate concurring judgment Ngcobo J, reasoned that the distinction drawn in the Maintenance Act between married and unmarried couples was not unfair, but rather a logical extension of the reciprocal duty of support owed by spouses to each other during marriage. He referred to regional and international instruments, which underscored the importance of marriage as an institution, and argued that South Africa has a constitutional obligation to protect marriage. It does not frown on other forms of union, but it protects marriage. The problem was the absence of a law which placed rights and obligations on cohabitation relationships. To impose the legal consequences of marriage on those who have not chosen it is to "undermine ... the nature of the agreement inherent in marriage", indeed, it is to "undermine the right freely to marry".

Dissenting judgements

Sachs J in one dissenting judgment, and O'Regan and Mokgoro JJ in another, disagreed with the majority, finding that cohabitation relationships may serve a similar social function to marriage, and as such, were deserving of equal treatment. They were of the view that the absence of a legal remedy, coupled with the discriminatory impact of section 2(1), will mean that surviving co-habiting spouses will be left vulnerable and unprotected upon the death of their partner. They were particularly concerned about the survivor of a cohabitation relationship where the partners have undertaken reciprocal duties of support and the surviving partner is in financial need. If there was some existing regulation to provide for equitable protection to cohabitants who had been in dependent long term relationships the provisions of section 2 (1) may not have constituted unfair discrimination. However, there was no such regulation.

The two judges emphasised that they did not believe that the Legislature was required to regulate cohabitation relationships in the same way it regulates marriage, such as by extending the provisions of section 2(1). Nonetheless, cohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability, which in light of the increasing number of people in such relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on grounds of marital status.

O'Regan and Mokgoro found that the parties had lived together for 16 years, supporting one another financially and emotionally and both considered the relationship a permanent one. In determining whether it was a life partnership they looked at the seriousness of the mutual commitment – which



may be inferred from conduct. In effect, did the relationship produce dependency for the party who in material terms was weaker and more vulnerable? The following was considered³ -

- The length of period of cohabitation
- The fact an allowance was paid to cover expenses
- Robinson was declared a dependent on his medical aid
- Undisputed and close relationship between them
- And she nursed him through bouts of ill-health; and
- Found that it was a permanent life partnership in which they undertook duties of mutual support and care for one another.⁴

Sachs pointed to a number of pieces of legislation which had given recognition to domestic partnerships outside of marriage, including, Compensation for Occupational Injuries and Diseases Amendment Act 130 of 1994, Medical Schemes Act 131 of 1998, the Housing Act 107 of 1997 and Employment Equity Act of 1998. The increased legislative recognition given to cohabitation suggests it has achieved a particular status of its own.

To cure the unfairness of the discrimination the legislature should make provision to ensure that on the termination of a longstanding co-habitation relationship by death, an equitable arrangement is reached in relation to the financial position of the survivor, so the dependence or vulnerability of the survivor is appropriately addressed. This equitable arrangement could be achieved either by an equitable distribution of the property of the co-habitants or by rules relating to maintenance. It was contended that the unconstitutionality in section 2(1) lay in the definition given to spouse in section 1 of the Act. If the definition was read to include;

"and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in

³ Property Relationships Act 1984 of New South Wales – defines de facto relationships as a relationship between two adult persons who live together as a couple and are not married; to determine such a relationship can consider – the duration of the relationship, nature and extent of the common residence whether or not a sexual relationship exists, the degree of financial dependence or interdependence; degree of mutual commitment, care and support of children; ownership, use and acquisition of property.

⁴ Effectively though because Ms Robinson was provided for in Mr Shandling's will they did not feel it was necessary to make an order for interim relief.



circumstances where the surviving partner has not received an equitable share in the deceased partners estate.”⁵

This in the view of the court would limit the scope of the relief to a narrow class of co-habitation agreements, namely permanent heterosexual life partnerships in which the parties have undertaken reciprocal duties of support. The order given by the dissenting justices was to be suspended for two years to give the legislature take the necessary time to cure the constitutional defects identified in the legislation.

Domestic Partnerships Bill

The Domestic Partnership Bill is intended to address some of the hardships which flowed from the relationship in the Volks case. Once promulgated, it will have the effect that both parties to a domestic partnership will have rights as if they were married. However, although the Bill was due to come before the Portfolio Committee on Home Affairs earlier in the year there were deliberations within the Department which prevented the Department from submitting the Bill on time. Consequently, the Bill is only likely to be processed after the next elections given the busy period of oversight and campaigning by the Portfolio Committee until then.

⁵ Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the definition - spouse - for the purposes of this Act shall include a person in a permanent heterosexual like partnership and – marriage for the purposes of this Act shall include a person in a permanent heterosexual like partnership.