IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 20357/18

In the application of:

JANE BWANYA	Applicant
and	
THE MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
AVROM IAN ALLEN KAPLAN N.O (in his capacity as executor in the estate of the late A.S Ruch, Master's reference no. 007400/2016)	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
ODETTE GILLIAN MENDELSOHN	Fourth Respondent
JEREMY VICTOR RESNICK	Fifth Respondent
JONATHAN MAURICE RESNICK	Sixth Respondent
CHARMAIN SUSAN SILOVE	Seventh Respondent
LOUISE GERSHON HERMAN	Eight Respondent
DAVID LEON RABINOWITZ	Ninth Respondent
JOEL SIMON RABINOWITZ	Tenth Respondent
and	
WOMEN'S LEGAL CENTRE TRUST	First *Amicus Curiae*

COMMISSION FOR GENDER EQUALITY Second *Amicus Curiae*

JUDGMENT: HANDED DOWN ELECTRONICALLY ON 28 SEPTEMBER 2020

MAGONA, AJ

Introduction

The Applicant

[1] The Applicant seeks an order that is premised on certain provisions of the Intestate Succession Act 81 of 1987 (ISA) and the Maintenance of Surviving Spouse Act 27 of 1990 (MOSSA), being declared unconstitutional in that her claims for a share of the estate of the late Anthony Ruch ("the deceased") and / or maintenance from his estate are currently not recognised nor provided for under these Acts.

[2] The relief sought is couched in the following terms:

1. Condoning the Applicant's failure to launch this application within 30 days of the First Respondent's notification dated 20 July 2018 in terms of which it was recorded that the Second Respondent was not prepared to accept the Applicant's claim of an "alleged universal partnership" with the late AS Ruch, hereafter to as "the deceased", and the Applicant was granted 30 days to establish her claim;
2. Declaring that:
    2.1. the Applicant and the deceased were, at the time of the deceased's death, partners in a permanent opposite-sex life partnership, with the same or similar

characteristics as a marriage, in which they had undertaken reciprocal duties of support and had committed themselves to marrying each other;

2.2. Section 1(1) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes the surviving life partner in a permanent opposite-sex life partnership from inheriting in terms of this Act;

2.3. the omission in Section 1(1) of the Intestate Succession Act 81 of 1987 after the words "spouse", wherever it appears in the section, of the words "*or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other*", is unconstitutional and invalid;

2.4. the Intestate Succession Act is to be read as though the following words appear after the word spouse, wherever it appears in the section – "*or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other*":

3. In the alternative to 2.3 and 2.1 above, declaring that:

3.1. the omission in section 1(1) of the Intestate Succession Act, wherever the words "*same-sex life partnership*" have been read into that section by the Constitutional Court of the words "*or opposite-sex life partnership*", wherever they may have been read into that section by the Constitutional Court;

4. Declaring that:

4.1 the definitions of "survivor", "spouse" and "marriage" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 are unconstitutional and invalid insofar as they exclude partners in permanent opposite-sex life partnerships from claiming maintenance in terms of this Act;

4.2. the definition of "survivor" in the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as including the words "*and include the surviving partner in a permanent opposite-sex life partnership in which the partners had*

undertaken reciprocal duties of support and had been committed to marrying each other";

4.3. the definition of *'spouse'* in the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as including the words "*a person in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other*";

4.4. the definition of 'marriage' in the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as including the words "*a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other*";

4.5. the Applicant is entitled to lodge a claim for maintenance against the deceased's estate under the Maintenance of Surviving Spouses Act 27 of 1990;

5. Directing that until the aforesaid defects are corrected by the legislature to provide for the above, effect is to be given to the terms of the Notice of Motion in respect of the Applicant by the First and the Second Respondents;

6. Declaring that the Applicant is entitled to the same benefits bestowed on spouses in terms of the aforesaid Acts;

7. Directing Second Respondent to comply with the aforesaid terms of the Notice of Motion in the winding up of the estate of the late A.S. Ruch No. 007400/2016 under the auspices and control of the First Respondent;

8. Authorising and directing the First Respondent to ensure that effect is given to the terms of this Order in the liquidation and distribution of the said estate of the late A.S. Ruch No. 007400/2016;

10. Ordering the Third Respondent to pay the costs of the application.

11. In the alternative to the aforesaid and in the event that the Applicant is only successful in respect of the relief sought in respect of the Maintenance of Surviving Spouses Act,

ordering the Second Respondent and those of the Respondents who oppose this application to pay the costs of this application jointly and severally, the one paying, the others to be absolved;

12. In the further alternative, and in the event that the Applicant is not successful with both her claims for a declaratory is to her entitlement to an inheritance under the Intestate Succession Act and maintenance under the Maintenance of Surviving Spouses Act, ordering each party to pay its own costs in the application;

13. Directing that the costs in paragraphs alternatively 11 are to include the costs to of three counsel, where so employed;

[3] I turn to look at the factual matrix of this case which will hopefully direct the path that led to this application.

[4] The details of the relationship in this case between the Applicant and the deceased remain uncontroverted, the Applicant narrates the chronicles of this love story from its beginning up to and until the tragic and sudden death of the deceased.

The Factual Matrix

[5] The Applicant and the deceased met in February of 2014 when she was waiting for a taxi in Camps Bay to take her to Cape Town train station to send goods to her family in Zimbabwe, the deceased "swept her off her feet" by taking her to the station in his car, waiting for her to drive her back to Camps Bay and taking her on a first date to Caprice restaurant later that same evening.

[6] They spent progressively more time together in the months that followed, she often slept over at the deceased's property in Camps Bay ("the Rottingdean property"), in her own room at first, with their initial emotional bond developing into a close and affectionate relationship.

[7] During June 2014, four months after they had first met, the deceased told her that he loved her and asked her to move in with him at his Rottingdean property on a permanent basis, a request to which she happily obliged.[1] On days when the Rottingdean property was fully occupied with guests, they slept at the deceased's flat in Seaways, Mouille Point ("the Seaways flat").

[8] The Applicant admits that she retained her room in the servants' quarters at The Meadows, being the home of the Solomon family where she works as a domestic worker, and states that her employer, Mrs Alinda Solomon (Mrs Solomon), was aware of her moving in with the deceased, but allowed her to retain her room so she could conveniently stay over on nights that she worked late due to Shabbat dinner or when she was looking after the children when Mrs Solomon was out.

[9] The Applicant's version is confirmed by Mrs Solomon in her supporting affidavit and supported by the diary entries of the deceased. The Applicant often went out with two of his friends, Harold Nakan and Joe Galante.

[10] The uncontested allegations by Mr Nakan and Mr Galante in their respective confirmatory affidavits setting out how they came to be friends with the deceased from around

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[1] Record p 11 and p 724 AFA par 18 – 19 page 4; ARA par 8 page 3

2006, that they socialised with the deceased at least once a month, that they met the Applicant on or about February 2014, and that the Applicant thereafter often accompanied the deceased socially. They also confirm that it was clear to them that the deceased and the Applicant were in a serious and affectionate relationship. Mr Nakan states that the couple often *"hugged and kissed each other"* in his presence and Mr Galante states that the deceased *"treated the Applicant like a princess"*; The Applicant accompanied the deceased to his friend, Mr McGillewie's 60th birthday party.

[11] The undisputed allegations by Ms Tariro Chiyangwe, a close friend of the Applicant, confirm that the Applicant and the deceased lived together. Ms Chiyangwe set out various occasions on which she and her husband socialised with the deceased and the Applicant, with specific reference to the Applicant and the deceased visiting them at their home in February 2016 to congratulate them on the birth of their baby.

[12] The Applicant further avers that the deceased treated her brother as a brother in-law, that the deceased's treatment of the Applicant's brother, Givemore, when he arrived in Cape Town in November 2015 evidences the nature of their relationship. The Applicant alleges that the deceased was excited about the arrival of her brother and that he gave her "a box of gifts and food to give to Givemore on which he had written 'welcome brother-in-law'". This occasion was recorded by the deceased in his diary in entry on 3 November 2015, where he *wrote "Jane's bro! Givemore arrives! 2day by bus from Zim."* and further supported by the deceased's bank statements which indicate that he spent R 2 695.20 at Pick n Pay and Woolworths on groceries for Givemore.

[13] The Applicant's contention that she and the deceased were in a permanent life partnership is also supported by the allegations that they intended on starting a domestic cleaning business together.

[14] That the deceased was assisting her in obtaining a driver's license, that he was going to pay for her driving lessons and buy her a car to use in the operation of the business.

[15] The Applicant refers to an entry in the deceased's notebook stating "*Get mini with #plate GI JANE*" as evidence of their conversations about getting a minibus for the cleaning business and making the number plate 'GI Jane'

Attempts at starting a family

[16] Applicant alleges, and it remains undisputed that she and the deceased contemplated having a baby together.

[17] This, she indicates is evidenced by the various entries in the deceased's diary, as set out in her replying affidavit. In particular an entry dated 15 October 2015, where the deceased made an entry about "*cementing relationship with a baby*".

Reciprocal duties of support

[18] The Applicant avers that she and the deceased had a very traditional arrangement pertaining to the management of their household. He took care of all of the expenses relating to the Rottingdean property and his flat in Seaways where they occasionally stayed over.

[19] The deceased also bought all their groceries and other household necessities while she cooked and cleaned for them. She alleges that the deceased did not expect her to contribute financially to their shared household expenses as he knew that her financial circumstances were dire and that she sent money to her daughter in Zimbabwe. The deceased acknowledged the Applicant's contribution of love, care, emotional support and companionship to their permanent domestic partnership.

[20] The Applicant sets out their household expenses with reference to the deceased's bank statements, which according to her such expenses clearly indicate that the deceased paid for all their household expenses.

[21] She further she sets out, with reference to the deceased's bank statements and diary, various occasions on which the deceased took her out for a meal and paid for both.

[22] That she and the deceased regarded each other as family and relied upon each other as such, which allegations are supported by the fact that the deceased phoned the Applicant more than anyone else - approximately 81 times during the two-month period dating from 14 January 2016 to 26 March 2016, which is the only period for which the Applicant has the deceased's MTN cell phone records in her possession.

Commitment to marrying each other and challenges faced

[23] The Applicant further avers that in November 2015, the deceased asked her to marry him and that they had every intention of getting married. She states that the deceased knew that he would have to travel to Zimbabwe to meet her family and pay lobola and that he was

setting plans in motion to make such a trip possible, such as selling his Seaways flat and using some of the proceeds for lobolo and to buy a Land Rover for the drive.

[24] That the people who were close to her and the deceased knew about their commitment to get married and their plans to travel to Zimbabwe for the deceased to meet her family, as is evidenced and confirmed by the following:

24.1 Mr Galante and Mr Nakan, Ms Chiyangwe, who was to be the "best girl";

24.2 The fact that Mr Arturo Sotnikow ("Arturo"), the deceased's driver, had assisted the deceased in contacting dealers to purchase the Land Rover, the details of which are evidenced by a printout from an online advertisement dated 4 January 2016,

[25] In essence one can summarise the Applicant's case based on the following, succinctly put by Mr Stelzner as follows:

25.1 the deceased was her life partner and fiancé;

25.2 they had been living in a permanent, stable intimate relationship with each other over a period of close to two years at the time of his unexpected death;

25.3 they were engaged to be married to each other at a determinable future date and within a reasonable time, as soon as the lobolo negotiations between the deceased and the Applicant's family had been concluded;

25.4 they were living together, outside of marriage whilst preparing for their marriage, in a relationship which was closely analogous to; and had most of the characteristics of marriage;

25.5 during this time, the deceased supported the Applicant financially and emotionally, introducing her to friends as his wife;

25.6 they had undertaken reciprocal duties of support, with the deceased providing financial support and Applicant providing love, care, emotional support and companionship;

25.7 they were starting a family together;

25.8 they were committed to marrying each other and would have been so married, had it not been for the practical challenges regarding the negotiation and payment of lobolo to the Applicant's family in Zimbabwe;

25.9 the deceased passed away unexpectedly on 23 April 2016, some two months before he and the Applicant were to travel to Zimbabwe to finalise these lobolo arrangements with the Applicant's family after which they would have been married;

[26] The above in essence encapsulates those relevant facts linking the Applicant and the deceased.

[27] It was submitted on behalf of the applicant in essence that there was a contractual duty of support – whether on the basis of an express or tacit agreement to that effect, whether through conduct;

[28] That a distinction is to be drawn between a life-partner's right to support and her right to share in her life-partner's estate in a case of intestacy;

[29] That there is no principled or rational basis for affording same sex partners similar relief and refusing the Applicant the same relief simply on the basis of the option of marriage having theoretically been available to the Applicant and the deceased, given that that option

would also have been available to same sex partners and on the facts in the present case, the Applicant and the deceased were in the process of formalising their life partnership;

The Parties In Court

[30] The Application at one stage was only opposed by the Second, Fourth to Tenth Respondent who are no longer before this Court due to a settlement agreement that was entered into between them, I will deal with this settlement agreement below.

[31] The First and Third Respondent were represented by the State Attorney's office indicated that they will abide with the order of this Court.

[32] The Amiciis, admitted in terms of Rule 16A of this Court having been no opposition to their application to join in the proceedings, the Women Legal Centre Trust (the WLCT) filed an affidavit and made submissions whilst the Commission for Gender Equality (the CGE) made their submissions to which I will deal with further below.

[33] As indicated the Second, Fourth to Tenth Respondent initially opposed the application but have since entered in a settlement agreement with the Applicant.

[34] I turn now to look at the settlement agreement first.

The Settlement Agreement

[35] On the morning when the matter was to be heard in this court, the Court was advised that the Applicant and the Second, Fourth to Tenth Respondents intend on engaging in a settlement agreement, the matter had to stand down so that the parties can engage in some negotiations where further conduct of the matter will also be decided.

[36] Just before the afternoon, the Court resumed and whilst being addressed by Counsel for the Applicant, Mr Stelzner who appeared with Mr P Rabie and Ms A Thiart, and for the Second, Fourth to Tenth Respondent's Ms Bawa appearing with Ms Van Zyl addressed the Court regarding the content of the order.

[37] Ultimately, the order was granted, and the settlement agreement formed part of the Court order as far as those parties are concerned. The terms of the settlement agreement are extensive I shall refer to paragraph 4 thereof, which reads as follows:

> "The Applicant…persists in seeking the declaratory relief as set out in her Notice of Motion. The second and fourth to tenth respondents have no interest in the relief being sought and will withdraw from the further conduct of the matter."

[38] This indeed took place, as it was indicated by the Second, Fourth to Tenth Respondent as a result of the settlement agreement and had no interest in the declaratory relief sought by the Applicant and withdrew from the proceedings, Counsel for those Respondents were then excused."

[39] The issue that then immediately arose was what was too happened to the case now that there is no formal opposition to the proceedings and what the impact of the settlement agreement would be to the rest of the issues before this Court.

[40] Mr Stelzner argued that the issues remain alive, the points raised in Applicant's papers supported by the Amici needed to be heard and for this Court to decide on. That the Applicant might have settled with the Third Respondent, but the issues are not moot.

[41] I shall deal with this point further below in this judgment. I turn to look at the various amici submission relevant in the issues before me.

The Applicant's Case continues

[42] The deceased died on 23 April 2016 at the age of 57, he was never married. He had a will, but the heir appointed was his mother Lorna Ruch, who died in 2013 intestate. The deceased was also his mother's only heir having been the only child. The deceased estate according to the liquidation and distribution account comprised of the following:

42.1 a claim of R6 734 964,36 against the estate of Mrs Ruch in relation to the value of the immovable property located at 60 Rottingdean Road, Camps Bay, which had been sold by the Executor;

42.2 A flat at 31 Beach Road, Mouille Point (in the Seaways Building) sold prior to the Deceased's death for R2 570 000,00 but was finalised after his death; and

42.3 The remaining value in the estate related to movable property of to the value of R5 500,00, a further claim against Mrs Ruch's estate in the

sum of R121 968,69; a PSG Investment in the sum of R192 659,55; an Old Mutual investment in the sum of R657 349,32 and cash in an FNB account to the value of R7 249,43.

[43] On the facts, the claims of the Applicant and that of the deceased's chauffeur, Mr Artiro filed in terms of the Administration of Estates Act 66 of 1965 were both rejected by the Executor on the basis of law and according to the Executor, also on material facts he found to not support the claim made against the estate.

[44] It is this refusal that led to the Applicant launching this Application to this Court. The Applicant's claims as indicated are premised on certain provisions of the ISA and the MSSA being declared unconstitutional in that her claims for a share of the estate of the late Anthony Ruch ("the deceased") and / or maintenance from his estate are currently not recognised nor provided for under these Acts.

[45] In the area of discrimination on the ground of marital status, some of the differences between married and unmarried people and permanent life partners have already been abolished,[2] but many remain – particularly in the area of opposite-sex life partners. That which forms the subject of this application is one of them.

[46] That Section 1(1) of the Intestate Succession Act 81 of 1987 ("the ISA") excludes life partners in permanent opposite-sex life partnerships from inheriting in terms of this Act. The Applicant's claim is premised on her exclusion being invalid and unconstitutional. She seeks a reading in of the words "or a partner in a permanent opposite-sex life partnership in which

[2] See in this regard LAWSA Marriage Vol 23(2) Third Edition paragraphs 14 and 17.

the partners had undertaken reciprocal duties of support and had been committed to marrying each other" wherever the word "spouse" appears in the section.

[47] That in sofar as it may be necessary and insofar as legislative changes are required to effect this, under the rubric "Further and / or Alternative Relief", the Applicant will be seeking an order similar to that of the Constitutional Court (and the Court *a quo* in that matter) in *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC).*

[48] Similarly, the definitions of "survivor", "spouse" and "marriage" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 ("the MOSSA") excludes partners in permanent opposite-sex life partnerships from claiming maintenance in terms of this Act.

[49] Here too, the argument is that this exclusion is invalid and unconstitutional, particularly on the facts of the present matter.

[50] That these pieces of legislation as they are therefore, discriminate against her relying on her Constitutional right to, inter alia, human dignity and equality as she should be permitted to inherit from the estate of the deceased in terms of the ISA and /or that she should be entitled to claim maintenance from his estate in terms of the MSSA.

[51] Mr Stelzner further argued that she is being discriminated unfairly within the meaning of Section 9(3) of the Constitution on inter alia the ground of sex, gender, marital status, sexual orientation. That the Applicant's constitutional rights to equality and dignity are not recognised in the legislation

[52] Applicant similarly seeks a declarator that the MOSSA be read to include in the definitions of "survivor", "spouse" and "marriage" "partners in permanent opposite-sex life partnerships in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other", alternatively an order such as the one granted in *Bhe*.

[53] In essence, the Applicant submits that she is being discriminated against and that her Constitutional rights are being infringed, her right to human dignity and equality. She claims that on the facts of her particular case, she should be permitted to inherit from the estate of the deceased in terms of the ISA and / or that she should be entitled to claim maintenance from the estate in terms of the MOSSA.

Submissions by the Third Respondent

[54] The Third Respondent, through Mr Golding had indicated on record that the Minister will abide by the decision of the Court. An explanatory note had prior to that, been filed on behalf of the Minister and the following issues were raised:

[55] That the law as it stands now, considers both section 1(1) of the ISA and Section 1 of the MSSA Constitutional. That the Constitutional Court already pronounced on both Applicant's claims in respect of the ISA and the MSSA. The only way the Applicant can succeed would be if the Constitutional Court reverses its decision in *Volks NO v Robinson 2005(5) BCLR 446 (CC) and Laubscher v Duplan and Others 2017 (2) SA 264 (CC).* The Court has already pronounced on situation which cases are considered as locus classicus on the subject matter.

[56] That *stare decisis* principle binds this Division and therefore this Court is bound by the Volks and Laubscher decisions.

[57] It bares to mention that in Court, Mr Golding then after making submission on the issue relating to mootness, he ultimately confirmed that the Third Respondent will abide by the decision of the court.

Amici Curiae

[58] In terms of the Rule 16A (1) of the Uniform Rules of this Court, notices were filed prior to the hearing of the matter by the Amici Curiae: the Women's Legal Centre ("WLCT") and the Commission for Gender Equality ("CGE") and by written consent of the parties; Amici intervened.

[59] In this application, the Women's Legal Centre Trust and the Commission for Gender Equality were acting in the interest of a group or a class of people as well as in the public interest respectively.[3]

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[3] Section 38 of the Constitution provides that:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

The WLCT's main Argument

[60] The WLCT was introduced as having established the Women's Legal Centre (the centre) as a feminist African public interest law centre that conducts constitutional litigation with a view to challenging laws and practices that adversely impact on women and that act as barriers for women which laws and practices ultimately prevent women from attaining substantive equality.

[61] That WLCT filed an affidavit and made submissions agreeing with the Applicant that insofar as the ISA and MSSA excludes partners in a permanent opposite-sex life partnership who have undertaken reciprocal duties of support to it, these Acts are impermissibly under inclusive, unconstitutional and invalid.[4]

[62] The argument goes further supporting the argument made on behalf of the applicant that "an intention'' by partners in a domestic partnership 'to marry'', provides proof of the existence of a domestic partnership but should not be a requirement. The WLCT therefore seeks the relief to be made wider to not only include persons who are in a domestic partnership where the parties have undertaken a reciprocal duty of support, as it would not be just and equitable to limit the relief to parties who had been committed to marrying each other.[5]

(d) anyone acting in the public interest".

[4] Record 642: WLCT Affidavit para 8
[5] Record 642: WLCT Affidavit para 9

[63] That, it disagrees with the relief sought by the Applicant seeking a reading in of the relevant provisions of the MSSA only in the alternative to a reading in of the relevant provisions of the ISA. To the WLCT, both Acts are unconstitutional and invalid to the extent that they do not extend rights to persons who were in domestic partnerships and where one partner is deceased.

[64] The WLCT's submissions were based on the issues faced by women who approach the centre, almost on a daily basis who enter what they perceived as a permanent life partnership are left destitute when those relationships terminate. That couples live together without getting married for various reasons which then results in devastating situations when it comes to an end and those who stand to suffer most include women and children.

[65] The WLCT relies heavily on the findings of an investigation undertaken by it, which forms part of the South African Law Reform Commission of 2006, in particular the Community Survey by Stats South Africa.

[66] That while domestic partnership was largely unheard of some fifty years ago, there has, in recent years, been a global increase in people publicly cohabiting including in South Africa. A census conducted in 1996, more than 1.2 million people reported themselves as unmarried but living together. In 2001, the number increased to 2.4 million. In 2011, a further increase to over 3.5 million. Over this period in each census, more women were living together than men, the percentage of cohabiting respondents among the African/Black population has increased, and they made more than 10% of the 2011 census mentioned above.

[67] To the WLCT, the inescapable fact is that women, particularly black women are most vulnerable to the adverse effects of the no-recognition of domestic partnerships.

The CGE's submissions

[68] The Commission for Gender Equality (the CGE) is introduced as a state institution established in terms of Chapter 9 of the Constitution. It is a juristic person capable of instituting legal proceedings as reflected in s17(1) of the Commission on Gender Equality Act 39 of 1996.

[69] The CGE avers that whilst supporting the claim by the Applicant, that s1 of the ISA read with the judgment of *Gory v Kolver NO 2007 (4) SA 97 (CC),* is unconstitutional, primarily on the basis that it unfairly discriminates on the basis of sexual orientation, but also on the basis of marital status, sex and gender.

[70] The CGE makes a further case that s 2(1) of the MSSA also unfairly discriminates on the basis of sex, gender and marital status on the basis that the MSSA only provides for the enforcement of particular maintenance obligations after death. The MSSA must recognise all maintenance obligations that exist immediately prior to death, irrespective of the source of such obligation.

[71] The CGE makes submissions that the current content of common law maintenance obligations for non-married life partners should be developed.

[72] That the question of whether the Applicant has a claim for maintenance against the deceased estate depends on whether or not the deceased had an obligation to maintain her

prior to his death (this they indicate they make without arguing whether or not the Applicant meets the applicable common law standard, but only about what that standard should be).

[73] Before I turn to the issues, perhaps it is best I confirm that the Application ended up not being opposed any longer, the Second, Fourth to Tenth Respondent settled the matter with the Applicant, they were not interested in opposing the declaratory orders sought.

[74] The parties were represented as follows: Mr Stelzner with Mr Rabie and Ms Thiart appeared for the Applicant; Mr Golding appeared for the Minister (more on a watching brief); Ms Christians appeared for the WLCT; Ms Adhikari appeared with Mr Bishop for the CGE. The Court is indebted to Counsel for their comprehensive papers and heads of argument that were submitted.

[75] I turn now to the issues that I understand are for this Court to decide on.

THE ISSUES

[76] Whether condonation for the late filing of this application should be granted;

[77] Whether the issues have become Moot because of the settlement agreement; if not.

[78] Whether some provisions of the ISA and the MSSA are Constitutional and invalid or not; if they are.

[79] Whether the principles of stare decisis and the separation of powers have any impact to the issues *in casu*; and if not;

[80] Whether what would be a just and equitable remedy in this case.

I first turn to look at the law on the issues raised.

The Relevant Legislative Framework

The Condonation application

[81] In terms of the Administration of Estates Act (Estates Act), Applicant ought to have filed this application within a specified time frame, the Estates Act provides as follows:

> Section 35 (10) thereof
>
> "Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit."[6]

[82] The arguments on this point will be dealt with further below in this judgment.

The Constitutional provisions

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[6] Administration of Estate Act 66 of 1965.

[83] The relevant provisions of the Constitution claimed to be relevant are:

Section 9 (1) of the Constitution[7] provides:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[84] Section 10 Right to Human Dignity

"Everyone has inherent dignity and the right to have their dignity respected and protected."

[85] The Legislative framework under challenge and claimed to be unconstitutional include:

Section 1 of the Intestate Succession Act which provides that:

[7] Republic of South Africa Constitution Act 108,1996

(i) If after the commencement of this Act, a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and-

(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;

(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;

(c) is survived by a spouse as well as a descendant-

(i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and

(ii) such descendant shall inherit the residue (if any) of the intestate estate;

(d) is not survived by a spouse or descendant, but is survived-

(i) by both his parents, his parents shall inherit the in- 20 testate estate in equal shares; or

(ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or

(e) is not survived by a spouse or descendant or parent, but is survived-

(i) by-

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or · ·

(bb) descendants of his deceased parents who' are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.

[86] The Maintenance of Surviving Spouses Act

Defines a 'survivor' as:

'..the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in a customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections

22 and 23 of the Black Administration Act,1927 (Act 38 of 1927)), Property Law Amendment ACT, 1988 (Act 3 of 1988).'

The Limitation Clause provides:

[87] Section 36 of the Constitution requires that a provision that limits rights should be a law of general application and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity and freedom.

The test for constitutional invalidity

[88] In *Harksen v Lane and Others 1998 (1) SA (CC) (1997(11) BCLR 1489, at para 54* the Constitutional Court multi stage enquiry was postulated as being necessary when an attack of constitutional invalidity based on violation of a right equality.

'(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 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)."

[89] In the National Coalition Case[8] Ackerman J at para 19 citing and following the Harksen case by Goldstone J as he held that:[9]

"In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important

[8] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others; (CCT11/98) [1998] ZACC 15, 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)
[9] Para 41, Harksen supra

societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair."[22] (Footnotes omitted).

[90] This would be the test to be applied if this Court finds that the Applicant has proven that the impugned provisions of the ISA and/or the MSSA are unconstitutional. Before I apply the law to the facts at issue it is best at this juncture to look at the reformed law when it comes to the lives of other types of relationships, the married and same-sex life partners, and dependents compared to the heterosexual permanent life partners.

The Legal Development over the years on related issues

[91] There is a plethora of cases which show the development of the law and inclusivity approach for the relationships as is cited below which in my view may be considered towards what ought to be the outcome of the relief sought by the Applicant.

Medical Aid Schemes-dependents

[92] Prior to the advent of the Constitution and the coming into operation of the Medical Schemes Act, the constitutionality of the rules and regulations of the police medical scheme, which allowed only the legal spouse, widow, widower and child of a member of the police force to be registered as the member's dependant, arose in *Langemaat v Minister of Safety & Security* 1998 2 All SA 259 (T); 1998 4 BCLR 444 (T); 1998 8 BLLR 880 (T),1998 3 SA 312 (T).The court held that a dependant was someone who relied upon another for maintenance. It concluded that the effect of the scheme's rules and regulations was to exclude many *de facto* dependants of members of the police force. This amounted to discrimination against those dependants and members who had to find the financial means to pay for their excluded dependants' medical care. The court declared this state of affairs unconstitutional and ordered the chairperson of the medical scheme to reconsider the application for registration of the police officer's lesbian life partner as her dependant.

Muslim Rite marriages

[93] During 2004 the Constitutional Court held in *Daniels v Campbell & Others* [10] that persons married according to Muslim rites (and in monogamous relationships) are spouses for

[10] 2004 (5) SA 331 (CC).

the purposes of inheriting or claiming from estates where the deceased died without leaving a will. [11]

[94] The Constitutional Court in *Daniels* interpreted the definition of "spouse" in the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to include spouses married in terms of Muslim rites.

[95] Importantly, the Constitutional Court stated that the issue is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of *"common sense and justice"* and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided. [12]

The amended legislation

[96] Same-sex partners who have not married or entered a civil partnership are included in the definition of "spouse" employed in the Immigration Act, [13] drafted in the light of the Constitutional Court's judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*. [14] This definition makes reference to a "permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support".

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[11] Daniels v Campbell & Others 2004 (5) SA 331 (CC) at paragraph 37

[12] 2004 (5) SA 331 (CC) at paragraph 25

[13] 13 of 2002. See s 1(1) sv "spouse"

[14] See also *Minister of Home Affairs v Fourie; Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC)

Recognition to same-sex life partners and the development of the law.

[97] In *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C), the court held that the phrase "a member of the policy holder's family" in an insurance policy included the policyholder's long-standing same-sex life partner.

[98] In *Du Plessis v Road Accident Fund* 2003 (11) BCLR 1220 (SCA) the Supreme Court of Appeal extended the common-law action for damages for loss of support to a surviving same-sex life partner whose deceased life partner had undertaken to maintain him.

[99] In *Satchwell v President of the Republic of South Africa* 2003 11 BCLR 1220 (SCA); 2004 1 SA 359 (SCA), the Constitutional Court declared certain sections of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (now repealed) unconstitutional and invalid in so far as they denied benefits that were afforded to a judge's spouse to a judge's same-sex life partner. It held that the sections should be read as though they confer benefits on a judge and his or her spouse or "partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support".

Acceptance of the term same sex life partnership

[100] The concept of a same-sex life partnership was recognised by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 SA BCLR 39 (CC); 2000 2 SA 1 (CC) at para [17] in which the concept was applied to six relationships that were "intimate and mutually interdependent. "Same-sex life partnership" subsequently gained acceptance as a term of art, usually qualified by what Schafer in Clark (ed) *Family Law Service* part R calls the superfluous adjective "permanent".

[101] According to LAWSA *op cit* para 16 a persistent difficulty presented by the concept of "life partnership" stems from the failure of the Constitutional Court to give it a comprehensive definition. In consequence, legislation (apart from the Civil Union Act 17 of 2006) which extends rights to same-sex partners does so in an inconsistent and confusing manner, employing a variety of definitions.

[102] In *National Coalition for Gay and Lesbian Equality* Ackermann J articulated marriage as one form of a legally recognised "life partnership", and a "same-sex life partnership" as another. This *dictum* marked a most significant shift away from marriage as the fundamental unit by which interpersonal relationships acquire legal protection.

[103] It also deliberately left the way open for the extension of this category to other forms of life partnerships as developed in *Robinson v Volks* 2004 6 BCLR 671 (CC); 2004 6 SA 288 (C) in relation to unmarried heterosexual cohabitants.

[104] In *Gory v Kolver*[15], in the context of a same-sex life partnership the unconstitutionality of section 1(1) of the Intestate Succession Act 81 of 1987 was confirmed and the Court ordered the reading in after the word "spouse", wherever it appears in that section, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".

[105] The difficulties which it was argued had arisen in *Gory* on the facts of that matter, namely that of establishing the precise moment at which an unformalised same-sex relationship (which, in general, attracts no rights and duties) becomes a "same-sex life

[15] 2007 (4) SA 97 (CC)

partnership" (which attracts most of the rights and duties associated with marriage) do not present themselves in the present matter. As was the case in most of the judgments in which constitutional protection was extended by a court, the relationship at issue *in casu* it was submitted had already endured for a significant period and all (or at least most of) the requirements for a life partnership are present in this application.

Reading in process of the then Aliens Control Act 96 of 1991 (repealed by the Immigration Act 13 of 2002))

[106] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,* the denial of exemptions regarding immigration permits to foreigners who are same-sex partners of permanent South African residents was declared unconstitutional. The Constitutional Court corrected the defect in the legislation by reading in words – in this case, "partner, in a permanent same-sex partnership".

[107] Schafer in Clark (ed) *Family Law Service* part R24 argues that the jurisprudence of the courts appears to have constructed two tiers of same sex life partnership. By requiring the voluntary assumption of a contractual duty of support in some cases but not others, the courts appear to have created (at least) two tiers of same-sex life partnerships to which (at least) two differing sets of rights and duties might be attached. [16]

[16] See Du Plessis v Road Accident Fund 2003 11 BCLR 1220 (SCA); 2004 1 SA 359 (SCA) and cf National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 1 BCLR 39 (CC); 2000 2 SA 1 (CC).

[108] In relation to immigration rights and the parent-child relationship it would appear that the assumption of a duty of support is not a prerequisite. [17]

[109] However, in relation to pension benefits a dependant's action and spousal rights under the Intestate Succession Act 81 of 1987 such a duty is necessary.[18]

[110] The argument was that in the light of the above and the further legal / jurisprudential developments referred to hereafter, no justification for treating the Applicant in cassu any differently to a life partner in a same – sex permanent relationship. To do so is to unfairly discriminate against heterosexual partners in favour of same – sex partners, particularly given that marriage / a civil union is now open to all.

[111] With all the above set as the foundation I now look at the issues before this court in turn.

DISCUSSION OF THE MAIN ISSUES IN THIS MATTER

In Limine-Amendment of the relief sought

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[17] Du Toit v Minister of Welfare & Population Development 2002 10 BCLR 1006 (CC); 2003 2 SA 198 (CC); J v Director-General, Department of Home Affairs 2003 5 BCLR 463 (CC); 2003 5 SA 621 (CC)

[18] See Satchwell v President of the Republic of SA 2002 9 BCLR 986 (CC); 2002 6 SA 1 (CC); Satchwell v President of the Republic of SA 2004 1 BCLR 1 (CC); 2003 4 SA 266 (CC).

[112] Applicant had filed a notice to amend her notice of application and an amendment of the notice in terms of Rule 28, amending the notice of motion.

[113] The amendment was not opposed and was affected, the new details of the amended notice of motion are cited somewhere above in this judgment as the relief sought by the Applicant.

[114] The Court confirmed the amendment and the Applicant sought to proceed with her application on the basis of the Notice of Motion as Amended.

[115] I turn now to look at the next point the Applicant addressed this Court on prior to dealing with the issues in the Application, that of condonation.

Condonation

[116] The Applicant having filed her claim against the estate of the deceased with the Master on 16 October 2017.

[117] The papers reflect that on 25 May 2018 First Respondent responded with a decision not accepting the claim of the claimed Universal partnership, and Applicant was granted 30 days to establish her claim in a Court of law. The Applicant avers that her attorneys never received this correspondence on time but only a certified copy of it dated 17 August 2018 was obtained.

[118] On 20 July 2020 the Master had also rejected the Applicant's co-claimant's claim, Mr Arturo Sotnikow at the time.

[119] The Applicant then gave a comprehensive explanation in her affidavit which in my view reflect that most of the cause for the delays were not of her doing neither were they *mala fide* nor wilful. I will not go the details of these save to state at all times there was constant communication between the parties explaining the cause for the delays and the Applicant seeking an indulgence all of this was attached to the founding papers.

[120] I considered *Reed and Others v Master of the High Court of South Africa and Others*[19] where it was held that:

> "The first point can be dealt with briefly. If s35(10) is interpreted to mean that it creates an expiry period, it would be an unconstitutional infringement of the right of access to court because 30 days is an unreasonably and unjustifiably short period within which to expect a person to institute proceedings (in the absence of a condonation provision).[20] Interpreting s35(10) to be a provision that creates a time period that is subject to condonation in the event of non-compliance could render it a reasonable and justifiable limitation of the right of access to court."[21]

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[19] 2005(2) All SA 429 (E)
[20] *Mhlomi v Minister of D efence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 159 (CC)
[21] See *Mhlomi v Minister of Defence* supra, paras 17-18 in which Didcott J considered the effect on an expiry period of a condonation provision. The mere fact that the possibility of condonation is provided for does not, on its own, mean that a provision providing for a time period for the institution of proceedings is a reasonable and justifiable limitation of the right of access to court. See in this regard *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC), para 15.

[121] In my view, the delays were reasonable further there was a lot of preparation put to the papers before this court which must have needed time beyond the 30-day period stipulated in Section 35(10). In my view, it would be limiting the right of access to court if one would strictly apply the 3 0day time limit in the circumstances.

[122] As indicated, the Applicant has detailed on paper the reasons for the delay most were either beyond her control or it was issues that it humanly impossible to escape from by either herself or her legal representatives. I further considered that there never was opposition to the late filing of this application and no prejudice was shown to exist by any of the parties. I am of the view that failure to grant the condonation thereof would lead to injustice especially in the nature of the issues brought in this matter.

[123] In my view the Application for condonation stands to be granted.

[124] I turn now to look at the next hurdle in this matter, which involved whether since the settlement agreement entered into by the Applicant with the other Respondent's has the issues raised by the Applicant become moot.

Mootness of the proceedings

[125] I dealt with what unfolded on the first day of the hearing of this matter where ultimately a settlement agreement was entered into between Applicant and the Second, Fourth to Tenth Respondents. I understand all the parties who were in court that morning was caught by surprise of this development.

[126] Mr Stelzner, Ms Christians and Ms Adhikari made submissions as they were of the view that the issues in the application have not become moot. That it was only the monetary claim that had been settled and that same does not dispose of the whole matter. They argued further that a declarator to the Constitutionality of the two pieces of legislation remains alive with specific reference to the Applicant and the public including those in similar position as the Applicant with slight differentiation.

[127] The Third Respondent after making a few submissions on this claiming mootness after the lunch break Mr Golding returned with an instruction that the Minister will abide by the decision of the Court and did not continue with his argument.

[128] In the Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC)* at para 21 footnote, 18 Ackermann J remarked:

> 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case *in JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599)*, where Didcott J said the following at para [17]:
>
> "(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is wanted have now become."

[129] There are instances where there have been exceptions to the provision, (initially of s 21A of Act 59 of 1959) presently s 16(2)(a)(i) of the Superior Courts Act 10 of 2013. The courts have exercised a discretion to hear a matter even where it was moot. This discretion has been applied in a limited number of cases, where the appeal, though moot, raised a discrete legal point which required no merits or factual matrix to resolve.[22]

[130] In this regard, the *Constitutional Court in Independent Electoral Commission v Langeberg Municipality 2001* (3) SA 925 (CC), in paragraph 11 held:

> '... A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others.' The question is thus whether such a discretion should be exercised in this case... " The following factors have been held to be potentially relevant:
>
> - the nature and extent of the practical effect that any possible order might have;
> - the importance of the issue;
> - the complexity of the issue;
> - the fullness or otherwise of the argument advanced; and
> - resolving disputes between different courts.[23]

[131] In my view, it seems the legal points whether the Applicant ought to be recognised as the deceased's opposite sex permanent life partner, the constitutional challenge involving

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[22] See Natal Rugby Union v Gould 1999 (1) SA 432 (SCA)
[23] See also AAA Investments Pty (Ltd) v Micro Finance Regulatory Council and Another [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27.

whether there should be a reading in and a different interpretation that is required to the ISA or MSSA remains alive and not merely academic question.

[132] In my view further, having considered the above case law and taking into account that even if a *legal point* remains controversial, that does not save a *matter* from being moot. Also the fact that the issues between the parties who opposed the application have been resolved, as *in casu,* such does not leave the pertinent issues of law academic in my view.

[133] In that regard, I am of the view that the controversies raised by the Applicant remain alive and therefore, are not moot irrespective of the settlement agreement between the Applicant and other Respondents. This is clear on the content of the settlement agreement as it cannot cater for the applicant being recognised as a permanent life partner/a spouse and having a right to inherit and the right to claim in terms of ISA or MOSSA.

[134] I turn now to deal with the merits before me, the issue of whether there is a permanent relationship between the Applicant and the deceased should be a starting point in my view.

Was there a Permanent life-partnership relationship?

[135] The facts placed by the Applicant as stated above are no longer refuted, in fact they are one way or the other, supported by many witnesses, most importantly of which are the only other persons who spent almost every day with the deceased and the Applicant, they are : the deceased's driver Mr Artiro, the Applicant's employer-Mrs Solomons, the deceased's close friends whom the Applicant and the deceased frequently confirmed that the two were in a

"serious and affectionate relationship" in the manner they were with each other in their presence.

[136] Further, the relationship that the deceased established with the Applicant's brother, Givemore, on his arrival in Cape Town in November 2015, the gift the deceased prepared and had given to her for him with a note welcoming him as a "brother in law".

[137] In my view, taking into account all the above as well as the content of some of the entries in the diaries of the deceased during the period of their relationship, read in context, confirms the version of the Applicant and the long term plans (inter alia attempts at having a baby, buying a car for the Applicant, the expenses on his banking account for them). Further, there were confirmation of them about to be married, once lobolo was honoured.

[138] I understand that a life partnership does not in itself give rise to an *ex-lege* reciprocal duty of support[24]. That there must be in addition a contractually agreed reciprocal duty of support.[25] This is because, given the purposes of the impugned statutes, there is a causal link between this duty and the specific claims sought in respect of MSSA and the ISA. The contractually created reciprocal support obligations may be agreed expressly or tacitly and, in the case of the latter may be inferred from the facts of a case.[26] The Applicant and the deceased's relationship will also have to pass this requirement.

[139] In *Gory* case, the brief facts may be helpful: the parties met in May 2003 and by August 2003 were in a committed monogamous relationship and lived together from October

[24] See MacDonald v Young 2012 (3) SA 1 (SCA) paras 17 to 19
[25] See Paixao v RAF 2012 (6) SA 377 (SCA) Smith Dissolution pp 413, 418 and 422 to 426
[26] Smith, Dissolution (supra)

2004 until the deceased's passing in April 2005. The High Court made a finding that they were in a permanent same-sex life partnership which they had undertaken reciprocal duties of support, this finding was endorsed by the Constitutional Court.[27]

[140] In Paxiao *(supra)*

At para [29]

"...Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty of support – to a marriage.[28] Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other. The implied inference to be drawn from these proven facts must be that the parties, in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments – ie a duty to support – to each other. Courts frequently undertake this exercise without much difficulty – as this and other cases such as *Amod*, *Satchwell* and *Du Plessis* demonstrate. Life partnerships therefore do not present exceptional evidential difficulties for defendants."[47][29]

[141] In my view, the facts of this case remain unrefuted, the evidence is there which the inference can be drawn to that the Applicant and the deceased tacitly agreed they were in a permanent life partnership by, 'demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty of support – akin to a marriage". Further and in favour of the Applicant *in casu* part of the evidence includes that they were planning to get married.

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[27] Gory v Kolver NO and Others 2007 (4) SA 97 (CC) para 51

[28] *Du Plessis v Road Accident Fund* 2004 (1) 359 (SCA) para 43. It follows too that to the extent that the court in *Susara Meyer v Road Accident Fund (*Unreported) Case No: 29950/2004 28/3/2006, found that *Volks* supported its rejection of a dependant's claim of a permanent life partnership, it erred.

[29] McDonald v Young 2012 (3) SA 1 (SCA) para 14.

[142] In my view therefore, based on all the above stated facts, I find that the Applicant and the deceased were permanent life partners who had undertaken reciprocal duties of support to one another.

[143] I turn to look at the impugned provisions challenged. I will begin with the ISA.

The challenge to the Intestate Succession Act

[144] Mr Stelzner argued and the facts reflect that the deceased died intestate. Section 1(1) of the Intestate Succession Act 81 of 1987 ("the ISA") excludes life partners in permanent opposite-sex life partnerships from inheriting in terms of this Act. The Applicant's claim is premised on her exclusion being invalid and unconstitutional.

[145] That the Applicant seeks an order similar to that of *Bhe and Others*[30] order that the prevailing legal position in respect of ISA and MSSA unfairly discriminates against her based on: gender, alternatively sex; and marital status and sexual orientation, and it violates her right to dignity as a surviving opposite sex-life partner, who but for the death of the deceased would have been married to him. (*Bhe and Others,* this was a majority decision. [31]).

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[30] Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC)

[31] Chaskalson CJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of concur in the judgment of Langa DCJ

[146] That, Applicant seeks 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 and had been committed to marrying each other"* wherever the word *"spouse"* appears in the section.

[147] I am of the view that the issue of the constitutionality or not of the impugned provisions can only be tested to see whether it applies to the Applicant or other parties relating to her as argued by the WLCT are discriminated against, unfairly without any justification or not.

The issue of Discrimination levelled against the ISA

[148] The essence of the Applicant's case is that she is discriminated against by the provisions of section 1(1) of the ISA as it stands currently, as it excludes her from inheriting from the deceased's estate.

[149] Section 9 (3) of the Constitution provides that:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[150] I understand that *the* exclusionary nature of the ISA dates as far back as December 2005, where the Constitutional Court had declared in *Fourie*[32] that the failure to allow same sex couples to marry was unconstitutional and unlawful. It suspended its order of invalidity for

[32] Minister of Home Affairs & Another v Fourie & Another (2005) ZACC 19; 2006 (3) BCLR 355 (CC) 2006 (1) SA 524 (CC)

12 months to allow Parliament to enact legislation to show the defect. Just days before the suspension period was granted in that matter, the matter of *Gory* was decided.

[151] The issue in *Gory* was whether a same sex life partner could inherit from his deceased partner's intestate estate. It was a direct attack on Section 1(1) of the ISA, as *in casu* it was held that the stated section was unconstitutional and invalid to the extent that it excluded a "*partner in permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support*" from inheriting from their partner's estate. To cure the constitutional defect, the Constitutional Court read in "*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*" "*spouse*" wherever it occurred in Section 1(1). In that decision therefore, permanent same-sex life partners were protected under ISA. The heterosexual life partners were however left out.

[152] I understand further that a few days after, on 28 November 2006, Parliament passed their Civil Union Act 17 of 2006; (CUA) and it was signed a day later by the President of the country. The CUA enabled same-sex couples to legally marry and it permitted both same-sex and heterosexual couples to conclude Civil Unions which avoided the language of marriage but conferred all the rights and obligations.

[153] The unintended injustice was that whilst CUA allowed both same-sex and heterosexual couples to marry, the ISA was not amended to either undo the *Gory* decision, or to recognise intestate succession for heterosexual life partners. This left them unable to inherit intestate like the unmarried same-sex life partners who could. Once more the heterosexual life partners were left out.

[154] The accidental injustice led to the litigation in the case of *Laubscher NO v Duplan*[33], where a dispute had arisen between the same-sex life partner and a sibling about who should inherit from the deceased estate due to the effect that this was after the *Gory* decision which had granted the right to inherit to the partner, the brother who was also the executor argued that *Gory* reading in, should now be amended in light of the passing of the CUA to allow him to inherit the entire estate. Therefore, the issue was whether same-sex life partners should retain the benefit of the *Gory* reading in considering the recognition of their right to marry.

[155] The Constitutional Court held their reading in *Gory* was issued on an indefinite basis, subject to the amendment or repeal of the ISA by Parliament. That, Van Heerden AJ in *Gory* was well aware that same-sex couples would shortly be unentitled to marry (either under new legislation, or if the *Fourie* suspension period lapsed). Therefore, without amendment or repeal, the reading in order of the court will not change.

[156] This is where it started to get interesting in that the court in *Laubscher,* even though the issue was not directly before it, Mbha AJ recognised that (an inequality may exist between the opposite-sex permanent partners and their same-sex counterparts by virtue of the *Gory* order.):

> "[31] I agree that an inequality may exist between opposite-sex permanent partners and their same-sex counterparts by virtue of the *Gory* order. **[28]** The question is whether same-sex permanent partners ought to be deprived of the *Gory* benefit or whether the benefit should be extended to include opposite-sex permanent partners. The respondent refers to this process as "equalising up" versus "equalising down" and contends that it is a task perhaps best left to

[33] (supra)

Parliament. In my view, the Legislature is competent to adopt either a generous or a more restrictive approach to its recognition of permanent relationships, which it has done in the past. The legislative developments pursuant to *Satchwell* are instructive.**[29]**[34] In that case, this Court declared the omission of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" from sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act,**[30]**[35]to be inconsistent with the Constitution.**[31]**[36] (Underlining my emphasis)

[32] Although this Court had specifically ordered that the benefit be extended to permanent same-sex partners,**[32]**[37]the Legislature, within its rightful discretion, widened the ambit of protection to include both same-sex and opposite-sex unmarried partners.**[33]**[38] The result is an apt example of the Legislature "equalising up" while giving effect to the rights prescribed by this Court's order. In my view, the Court in *Gory* had clearly foreseen the enactment of CUA and had envisioned that same-sex permanent partners would continue to be protected despite not concluding a "marriage" (or union as it turned out to be), under the new dispensation. Any indication to the contrary is best left to Parliament to decipher.

[157] Mbha AJ also held further that:

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[34] *Satchwell v President of the Republic of South Africa* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) (*Satchwell 1*).
[35] 88 of 1989
[36] *Satchwell 1* at para 37
[37] National Coalition case at para 76
[38] See the definition of "partner" in section 1 of the Judge's Remuneration and Conditions of Employment Act 47 of 2001.See also the effect of the reading-in order in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17;2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 98 on the definition of "spouse" in section 1 of the Immigration Act 13 of 2002 (previously the Aliens Control Act 96 of 1991).

> "there has never been a Constitutional challenge for the right of opposite-sex permanent partners to be included within the ambit of s1(1) of ISA. An actual cause of action and a plea of unfair discrimination are thus required before crossing this bridge."

[158] I understand *in casu*, the argument before this court centres around this, in my view, Applicant's cause of action has certainly reached that bridge, the test is whether there has been unfair discrimination or not, before it can be crossed.

[159] It was contended that the time has come that the heterosexual permanent life partners be included within the ambit of Section 1(1) of ISA as was alluded to in the *Laubscher* judgment, that such a time would come falls for this court to look into the constitutionality or not of the said provision.

[160] I now turn to look at the constitutionality of Section 1(1) of ISA.

Are there Constitutional rights infringed?

[161] The Applicant avers that her right to equality and dignity are being infringed upon by the ISA alternatively the MSSA based on gender alternatively sex, marital status, sexual orientation as a surviving opposite sex life partner who would have been married to the deceased had he not died.

[162] In Laubscher, the inequality that may exists between the same-sex and opposite-sex life partnerships was already anticipated, in my view what merely needs to be tested is whether is unfair and/or it can be justified, amongst others.

[163] I turn now to and apply the Harksen test to the impugned provision of the ISA.

Does the ISA provision differentiate between people?

[164] As indicated before the *Gory* order included that s1(1) of the ISA was unconstitutional and invalid to the extent that it excluded a "partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" from inheriting from their partner's estate. To cure the Constitutional defect, the Constitutional Court read-in words "or partner in a permanent same sex-life partnership in which the partners have undertaken reciprocal duties of support" after the word "spouse" wherever it occurs in s1(1)". This decision was before the Civil Union Act (CUA), which allowed same -sex couples to marry.

[165] Submissions were made that the impugned provisions are infringing on Applicant's Constitutional right and of those women similar to her as described by the WLCT, that their rights to human dignity and equality are being infringed upon and the provisions are discriminatory based on the listed grounds (of the Constitution) in particular sex, gender, marital status and sexual orientation.

[166] Ms Christians whilst supporting the Applicant's contentions argued further and had shown in my view that there are other women similar to the Applicant who have no commitment to marry, whose rights to equality and dignity are also infringed and at in the receiving end of the discrimination even though their circumstances are different to the Applicant, they all suffer the same fate, the discrimination is unfair based on the listed grounds.

[167] Ms Adhikari had argued that ISA read with Gory is certainly unconstitutional on basis of the listed grounds as claimed, further that, in this case there is no need to prove any permanent life partnership relationship as the provision(s) are unconstitutional as they stand.

[168] Applying the Harksen test stated above in my view there is different treatment for the same-sex couples in that they stand to benefit from ISA even if they are not married *Gory*, there is no legitimate purpose why the heterosexual permanent life partnerships are not having a similar benefit, this is tantamount to different treatment. There is no reason put forward why the same treatment should not be given to heterosexual permanent life partnership couples also.

[169] In my view this is differentiation which manifests itself based in the listed grounds in the following manner in c*asu*:

169.1 marital status – it treats male-female couples differently based solely on the nature of their relationship whether they are married or not;

169.2 sexual orientation- the law provides for greater rights and benefits to those is same-sex life partnership that those in heterosexual life partnerships; same-sex partners can inherit (whether they are married or not), whereas heterosexual couples (who are not married) cannot, this is differentiation (and is discriminatory).

169.3 Sex and Gender-mostly (it is women who suffer in these relationships s1(1) therefore "indirectly" leaves them receiving the different treatment (indirectly)this impacts them as a group.[39]

[170] The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of heterosexual permanent life partners where the parties depended on each other for support

[39] See also City Council of Pretoria v Walker [1998] ZACC 1;1998 (2) SA 363 (CC);1998 (3) BCLR 257 (CC) at para 31

hence the issues before this Court the Applicant has reflected on this above, as well as the WLCT for those who are in circumstances similar to the Applicant's. There is no legitimate government purpose shown to exist for this differentiation.

[171] I am convinced and it is my view that traditionally it is women who stand to suffer after years of dedication and support to the livelihood of a permanent life partnership they end up being left in the cold, stripping them of their dignity whilst the same-sex life partnership in the same boat as them stand to benefit, that is an infringement of the right to equality too of the heterosexual life partnership.

[172] In my view a finding should follow that there is infringement of the Applicant's right to equality(s9) and dignity(s10) as they are being treated differently to their same-sex life partnership, the latter do inherit even if they are not married. This discrimination is on specified grounds of marital status, sexual orientation, sex and gender to which I will elaborate more on below.

[173] The Harksen Test continues with next point:

Does the differentiation amount to unfair discrimination?

Firstly, does the differentiation amount to discrimination?

[174] It was argued that as the impugned legislation the ISA discriminated on listed grounds, including gender, sex, marital status, sexual orientation, in *casu* therefore discrimination ought to be presumed unless it is established that the discrimination was fair.

[175] Submissions were made that ISA discriminates against the Applicant as well as those in similar circumstances as stipulated by the WLCT on the basis of gender, sex, marital status,

sexual-orientation. There is evidence above that has shown to support this including the various legal developments in favour of the same-sex life partnership to which the opposite-sex life partnerships like the Applicant and those similar to her situation described by the WCLT cannot benefit from.

[176] There has been no evidence placed before this Court that this differential treatment has been fair. In my view a finding should follow that the ISA's different treatment of the Applicant and those like her as described by the WLCT is discriminatory on listed grounds the presumption of discrimination is established.

Secondly, does it amount to unfair discrimination?

[177] Section 9(3) of the Constitution states that:

> "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds.., including "gender, sex and sexual orientation, marital status "[40].

[178] In my view as the approach is that the ISA differentiated on listed grounds as stated above, unfair discrimination is presumed until it is established that it is fair. This is supported by Section 9(5) of the Constitution which provides as follows:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

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[40] (supra)

[179] There was no evidence placed before this Court to rebut the presumption. In my view a finding should then follow that the based in the presumption the discrimination amounts to unfair discrimination.

The impact of the discrimination

[180] There is no doubt that there is differentiation on one of the listed grounds in a way that it has the characteristics to impair the human dignity of women since in majority of cases they stand to suffer. Applicant represent one of this group of women those who carry with them a promise to marry, there is also a group of the unmarried who have waited with no sight of such a proposal in the horizon they however have dedicated their lives to the permanent life partnership and both these kind of women and more have ended up being marginalised and discriminated against over the years. I state this because traditionally mostly male partners dictate the nature of the relationship who then enjoy all the benefits of a "vat en sit"[41] relationship with no worry nor desire or feel obliged to take it to another level for various reasons to be fair. In my view we ought to be careful of another form or a pattern of disadvantage this brings forth.[42]

[181] This group may not have suffered in the past from patterns of disadvantage like their same-sex counterparts but the impact of the end of the relationship is severe, affecting the dignity,

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[41] Township term sometimes used for those in a cohabitation relationship (Afrikaans language)

[42] Brink v Kitshoff. NO (CCT15/95) [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 (15 May 1996) where Chaskalson J) held at para [?] Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution."

personhood and identity of heterosexual permanent life partners deeply. It occurs at many levels and in many ways and is often difficult to eradicate, this includes the Applicant's circumstances and some of the women described and referred to by the WLCT.

[182] In my view based on all the above the discrimination is found to be unfair. There is nothing which was placed on the other side to balance the scale. The inevitable conclusion is that the discrimination in ISA is unfair and therefore in breach of section 9 and 10 of the Constitution.

Is there justification to the discrimination?

[183] Section 36 of the Constitution requires that a provision that limits rights should be a law of general application and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

para [58] In the National Coalition case[43]

Ackermann J for the majority held

'I now apply the section 36(1) justification analysis, incorporating that of proportionality applied to the balancing of different interests, as enunciated in *S v Makwanyane and Another* and as adapted for the 1996 Constitution in the *Sodomy* case.

The rights limited, namely equality and dignity, are important rights going to the core of our constitutional

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[43] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

democratic values of human dignity, equality and freedom. The forming and sustaining of intimate personal relationships of the nature here in issue are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities. Although expressed in a different context and when marital status was not a ground specified in section 8(2) of the interim Constitution…

[184] The has been no evidence produced to show any possible justification.

[185] The following remarks of O'Regan J in *Harksen*, are apposite [footnotes omitted]

"I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one."

The effect of omitting same-sex life partnerships from section 25(5) limits the above rights at a deep and serious level.

[59] There is no interest on the other side that enters the balancing process. It is true, as previously stated, that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life partners were appropriately included under the protection of section 25(5). There is in my view no justification for the limitation in the present case and it therefore follows that the provisions of section 25(5) are inconsistent with the Constitution and invalid.

[60] It is important to indicate and emphasise the precise ambit of the above holding. The Court is in the present case concerned only with partners in permanent same-sex life partnerships. The position of unmarried partners in permanent heterosexual partnerships and their omission from the provisions of section 25(5) was never an issue in the case nor was any argument addressed thereon. The Court does not reach the latter issue in this case and I express

no view thereon, leaving it completely open. Nor does the Court in this case reach the issue of whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships and this issue is similarly left open.

[186] In *casu* there has been no justification put forward for the unfair discrimination which has led to the infringement of the right to equality and dignity.

Importance of the Right to Equality and Dignity

[187] The right to equality and dignity are important in our Constitutional dispensation due to the history of this Country, unfair discrimination which is unjustifiable ought to be eradicated. In *Bhe*, Langa DCJ (as he then was) looking at these two Constitutional rights stated as follows:

> *"(1) Human dignity (section 10 of the Constitution)*
>
> [48] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." This Court has repeatedly emphasised the importance of human dignity in our constitutional order. In *S v Makwanyane*[50][44] Chaskalson P stated that the right to human dignity was, together with the right to life, the source of all other rights. Elsewhere, Ackermann J stated that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." **[51]**[45] As a value, Kriegler J referred to human dignity as one of three "conjoined,

[44] [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC);
[45] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 28.

reciprocal and covalent values" which are foundational to this country.**[52]**[46] In *Dawood and Another v Minister of Home Affairs and Others*, the Court asserted:

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected." [some footnotes omitted]

(2) The right to equality and the prohibition of discrimination (section 9 of the Constitution)

[49] The importance of the right to equality has frequently been emphasised in the judgments of this Court. In *Fraser v Children's Court, Pretoria North, and Others*, Mahomed DP had the following to say:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '. . . need to create a new order . . . in which there is equality between men and women and

[46] S v Mamabolo (E TV and Others Intervening) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41

> people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'." [55][47]

[188] The question of whether an infringement of a right is justifiably and legitimately limited frequently involves a more factual enquiry, there must be evidence led to justify such limitation even though the Court will have to apply its mind to the law challenged. Although there has been no opposition on the issues and the Third Respondent having decided to abide, based on all the above stated I cannot find anything to be said in favour of the relevant provisions of the ISA. In my view, the current societal demands, the statistics regarding cohabitants increasing numbers and the restrictions the ISA on the one side to the purpose of the provision on the other side of the scale certainly the former outweighs any justification there may have been before to the current limitations of the rights infringed upon.

[189] In Gory quite remarkably Under the heading "The unconstitutionality of section 1(1) of the Act" Van Heerden AJ, states:

> "Section 1(1) of the Act confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. *As these partners are not legally entitled to marry, this amounts to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution*, which discrimination is in terms of section 9(5) presumed to be unfair unless the contrary is established. Given the recent jurisprudence of South African courts in relation to permanent same-sex life partnerships, the failure of section 1(1) to include within its ambit

[47] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20. This judgment dealt with section 8 of the interim Constitution but the remarks remain apposite to section 9 of the final Constitution. See also Makwanyane above n 49 at paras 155-66 and 262; Shabalala and Others v Attorney-General of Transvaal, and Another [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26; Brink above n 34 at para 33; Satchwell v President of the Republic of South Africa and Another [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 at para 18.

surviving partners to permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support is inconsistent with Mr Gory's rights to equality and dignity in terms of sections 9 and 10 of the Constitution. There was no attempt by the respondents either in the High Court or in this Court to justify the limitation of Mr Gory's rights in terms of section 36 and, in my view, there is no such justification. It follows that the High Court correctly found section 1(1) of the Act to be unconstitutional and invalid to the extent alleged by Mr Gory and that paragraph 1 of the order of the High Court must be confirmed." (underlining my emphasis)

[190] Similarly and in my view having stated all the above I can find no reason why this same principle should not be applied to heterosexual life partnership. Put differently there is no constitutionally justifiable reason why section 1(1) of the ISA fails to include within its ambit surviving partners to 'permanent opposite -sex life partnerships in which the partners have undertaken reciprocal duties of support'.

[191] In my view and based from all the above I find that the failure to include the heterosexual partnerships within s1(1) of the ISA is unconstitutional to Ms Bwanya's rights and the rights of all those similar in her circumstances as described by the WLCT, particularly their rights to equality and dignity in terms of sections 9 and 10 of the Constitution. The impact of the impugned provision unfairly discriminates and cannot be justified in our constitutional order.

[192] In that regard and in my view Section 1(1) of the Intestate Succession Act 81 of 1987 should be declared unconstitutional and invalid and insofar as it excludes the life partners in permanent opposite-sex life partnerships who have undertaken reciprocal duties of support from inheriting in terms of this Act. I shall deal with proposed remedies further below.

[193] I turn now to look at the further challenged provisions, the MSSA.

The challenge against the Maintenance of Surviving Spouse's Act

[194] In *Volks v Robinson* the Constitutional Court did not endorse the reading-in of "opposite sex permanent life partner" into the MSSA, it rejected it even though it sympathise with the differential treatment of married persons on the one hand and those living together as permanent life partners.

[195] I understand the decision in Paxiao[48] as that the common law duty of support was extended to a claim against third parties (the RAF). The main issue in that appeal concerned whether the common law should be developed to extend the dependants' action to permanent heterosexual relationships.

[196] It was held that the dependent's action is only available to dependents to whom the deceased owed a legally enforceable duty to maintain and support while he or she was alive. Traditionally this was only available to persons married in accordance with the Marriage Act, No. 25 of 1961 and later to persons who concluded and registered a civil union in terms of section 13 of the Civil Union Act No.17 of 2006.

[197] The court made a finding that Volks as it held that the right it dealt with was that of a dependant to sue for this loss arises because the wrongdoer unlawfully caused the termination

[48]UPRME Court of Appeal, mentioned supra

of a legally enforceable duty of support – it is not a spousal benefit that accrues to a dependant only by virtue of a formally recognised marriage.[44][49]

[198] At para [27] Cachalia JA held:

> *"Volks*, therefore, does not stand in the way of the appellants' submission that the common law may be developed to extend the dependants' action generally to unmarried parties in heterosexual relationships or to any other relationships"

[199] In that regard in Paxiao, Volks was distinguished as the court extended to the permanent life partner in that case see also in Laubsher, Mbha AJ:

> "[50] *Volks* is distinguishable not just from the facts, but from the legal mechanism being used. *Volks* continues to apply with full precedential force within the context of maintenance of surviving spouses. To say, as the applicant suggested, that we are called upon to decide whether to apply or to roll back on the *Volks* decision, is to mischaracterise the issue.''

[200] In my view it would be to mischaracterise the issue if this Court rolls back on *Volks* even though the fats are distinguishable, there is no legal mechanism available to depart from *Volks* as the doctrine of *stare decisis*, the Majority decision in *Volks* remains binding to the lower courts and therefore this Court is bound by the decision of *Volks* since the law remains the same. The key is there must be a duty of support by ''operation of law'' before and not a mere contractual one, which at this stage the Applicant's case falls I have found under the

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[49] Smith and J Heaton 'Extension of the dependant's action to heterosexual life partners after Volks NO v Robinson and the coming into operation of the Civil Union Act – thus far and no further?' (2012) THRHR 472 at 479.

latter in my view. The circumstances may be looked differently should the ISA finding above be confirmed.

[201] I now turn and summarise the basis for the *stare decisis* and apply it to both the ISA and MSSA

Applying the *stare decisis* principle (Doctrine of Precedent) to the ISA and MSSA?

[202] This issue was raised by the Third Respondent in its submissions prior to recording a notice to abide was that *Gory* and *Volks* were binding to the issues at hand of unconstitutionality of the ISA and MSSA provision respectively. I do not agree with in full this argument I explain this in the following paragraphs.

[203] I am mindful of the following *dictum* of the Constitutional Court in *Camps Bay Ratepayers' and Residents' Association v Harrison 2011 (4) SA 42 (CC)* paras 28 – 30 (footnotes omitted) which would find application:

> [28] Considerations underlying the doctrine [of precedent] were formulated extensively by Hahlo & Kahn. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law

itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.

[29] I am mindful of the proposition that, when strictly applied, the doctrine of precedent may inhibit judges in lower courts from performing their constitutional duty under s 39(2) of the Constitution. ... As to the influence of s 39(2) on post-constitutional decisions of higher tribunals, this court expressed itself in no uncertain terms when it said: 'It does not matter . . . that the Constitution enjoins all courts to interpret legislation and to develop the common-law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals. . . .High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue.'

[30] Of course, it is trite that the binding authority of precedent is limited to the *ratio decidendi* (rationale or basis of deciding), and that it does not extend to *obiter dicta* or what was said 'by the way'. But the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow. It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good

> reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect, not only because it relates to a higher court, but because collegiality and mutual respect are owed to all judicial officers, whatever their standing in the judicial hierarchy."

Doctrine of Precedent -with regards to ISA

[204] In my view therefore in Gory (decided before the CUA) the Constitutional Court found s1(1) of the ISA to be unconstitutional for its failure to permit the life partner in a same-sex permanent life partnership to be the only intestate heir. The decision established intestate succession rights for surviving partners in a permanent same-sex life partnership.

[205] The case therefore cannot precedent to heterosexual permanent life partnership it is distinguishable.

[206] In *Laubscher* case (decided after the CUA) held even though CUA was enacted allowing for same-sex partners to marry, the purposive interpretation of the Gory order demanded maximising the protection of same-sex couples who choose not to marry.

[207] The case also though closer to the issues before this Court the fact that the issue was of constitutionality for the heterosexual life partnerships makes it distinguishable.

[208] It is my view further that granting the reading in order in terms of the ISA that may need to be read in conjunction with or even slightly alter the reading-in order granted by the Constitutional Court in *Gory*, will also not constitute non-adherence with the doctrine of precedent.[50]

Doctrine of Precedent with regards to the MSSA

[209] In my view further the relief sought against the MSSA cannot stand based on the principle of Stare decisis, Paxaio decision remains distinguishable, the *Volks* laid principles and decision still stands as authority to this Court the legal mechanism has not changed, that the permanent life partnership with reciprocal duty of support must have been by operation of law. In *casu*, in my view on facts such a hurdle was not successfully overcome, may be in the future. The doctrine of Precedent takes authority.

[210] I turn now to consider what should the remedy be.

The Remedy

Separation Of Powers Doctrine

[211] In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs[51]

> *In Smit v Minister of Justice and Correctional Services and Others 2019(2) SACR 516(WCC); [2019]4 All SA 542(WCC)*

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[50] For a comprehensive discussion of this issue, see Smith 2016 SAJHR 144 – 153.

[51] [1999]ZACC 17;2000(2)SA 1(CC);2000(1)BCLR 39 (CC)

'22. South Africa is a constitutional State predicated on the separation of powers and a recognition of the functional independence of the branches of government. Simply stated, the separation of powers doctrine is to the effect that unless constitutionally mandated or incidental to the powers conferred, parliament enacts, amends and repeals laws, the executive executes and enforces laws, and the judicial branch interprets the laws and settles disputes of law. As noted by the Constitutional Court in the First Certification Judgement, the distribution of power between, and the functional independence of, the branches of government ensures accountability, responsiveness and openness, and prevents the branches of government from usurping power from each other. Although the distribution of power between the different branches of government is not fixed and immutable, there are certain powers that cannot be delegated. In the ***Minister of Health***[19] case, the court stated the position thus:

"Although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation." (emphasis added). [Footnotes omitted]

[212] In my view the issues dealt with here have been long outstanding the Legislature has been a waited on to remedy the hardships that heterosexual permanent life partnerships go through, the SALRC report and the Bill as presented by the WLCT remain with the Legislature giving all the details and proposals made, but, it is almost two decades and there is absence of protection for the cohabitants or opposite sex permanent-life partnerships.

RELIEF SOUGHT

[213] In terms of section 172(1)(a) of the Constitution, a court must declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency.

[214] The Act provides that

"172. (1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a)....

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. (underling emphasised for in *casu*)

[215] I have indicated that, in my view, S 1(1) of ISA is inconsistent with the Constitution and invalid. It was argued that the operation of the declaration of invalidity be effective from the date the Constitutional Court confirms the order if Applicant succeeds. I am of the view that would be a just and suitable remedy when it comes to the order to be made.

The approach to a remedy

Reading in :

(1) A cautionary remark was given in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [52]

'[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion.'

[70] I accordingly conclude that reading in is, depending on all the circumstances, an appropriate form of relief under section 38 of the Constitution and that

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[52] (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

". . . whether a court 'reads in' or 'strikes out' words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result."[141]

[216] The real question is whether, in the circumstances of the present matter, reading in would be just and equitable and an appropriate remedy.

[217] The court also considered international jurisdiction, including Canada, USA, Israeli, Germany where courts have held that they do possess the power to read words in a statute where appropriate.[53]

[218] *In casu* it was contended that reading into the relevant legislation would be an appropriate order. The difference between the Applicant and WLCT proposal to that of the CGE is the wording to be used, the Applicant and WLCT are more for section 1(1) of the ISA wherever the words "*spouse*" is found in the section it be read in that "*or partner in a permanent opposite-sex life partnership in which the partners has undertaken reciprocal duties of support.* Similarly, to the *Bhe* order.

[219] The last portion which reads *'and had been committed to marrying each other''* Mr Stelzner made submissions that even though it formed part of the notice of motion it will be left to the court to decide on whether it should form part of the insertion, since in any case it was conceded that it is merely proof to demonstrate permanent life-partnership.

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[53] National Coalition at para [71]

[220] The proposed insertion by the CGE is for the inclusion of both male and female and the proposed reading in is as follows: in section 1(1) of ISA the words '*same sex*' be deleted from the Gory reading-in, and include after the word "*spouse*": '*or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support*"

[221] In my view the Applicant's proposal should be accepted however the last portion *'and had been committed to marrying each other''* should not form part of the insertion. I state so because I have identified somewhere in the judgment that the unfair discrimination is not to the Applicant only but to all other women in similar circumstances including those who do not have a commitment to marry *inter alia* those described by the WLCT. Including this portion to the insertion would be to limit the application of the relevant proposed insertion. Further in my view it will be exclusionary as if it is forming a new kind or form of opposite-sex permanent life partnership-and therefore a potential unfair discrimination on its own.

[222] In that regard and in my view an insertion to the ISA should be affected in as indicated above that would be a just and equitable remedy.

[223] Mr Stelzner also proposed that the order should take into account the settlement agreement that was reached by the parties. I understand this would avoid any confusion or living a *lacunae* regarding that portion of the issues that was before this Court when the estate of the deceased will have to be dealt with in terms of the Estates Act. I agree with this approach.[54]

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[54] S172(2)(b) of the Constitution

[224] In my view to avoid creating practical difficulties the remedy should not apply retrospectively but from the date the Constitutional Court rules in favour of the order, if it so persuaded.[55]

[225] In my view for the reasons set out above there is no reason why, in section 1(1) of the ISA wherever the words "*spouse*" is found he words "*or partner in a permanent opposite-sex life partnership in which the partners has undertaken reciprocal duties of support''* should not be read into the Act giving substantive relief to the Applicant and to those in similar circumstances and as described by the WLCT.

[226] Now remains the issue of costs. I now turn to address it.

Costs

[227] It was contended should the Applicant succeed with her claim the costs of the application should be borne by the Third Respondent.

[228] The further submission made were that it be included that the applicant should not be held liable for the costs incurred by the estate or by the state or by any other party to this application. I agree.

[229] The rejected claim against the deceased' estate by the Applicant was the reason this matter came before this Court. There is no legislation available for her to pursue the claim

[55] S172(2)(a) of the Constitution

against the deceased's estate, the only remedy was to seek a Constitutional remedy. The estate was therefore dragged to this Court as it correctly done so to protect its interest.

[230] Since the Applicant brought this Application due to the variances in the ISA and MSSA which has been an outstanding issue that have required the attention of the state for some time now, she ought to be covered for her costs.

[231] The Applicant has raised important issues of law, especially in relation to the ISA and MSA Act. I am persuaded that the scope and complexity of the matter needed the employment of three counsel.

[232] In my view and based on the above the Third Respondent should bear the costs of the application.

In Conclusion

[233] In my view and in the circumstances the application should partly succeed in the and the following order is made:

1. The Applicant's failure to launch this application within 30 days of the First Respondent's notification dated 20 July 2018 in terms of which it was recorded that the Second Respondent was not prepared to accept the Applicant's claim of an "alleged universal partnership" with the late AS Ruch,

hereafter referred to as "the deceased", and the Applicant was granted 30 days to establish her claim, is condoned;

2. It is declared that:

2.1. the Applicant and the deceased were, at the time of the deceased's death, partners in a permanent opposite-sex life partnership, with the same or similar characteristics as a marriage, in which they had undertaken reciprocal duties of support;

2.2. Section 1(1) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes the surviving life partner in a permanent opposite-sex life partnership from inheriting in terms of this Act;

2.3. the omission in Section 1(1) of the Intestate Succession Act 81 of 1987 after the words "spouse", wherever it appears in the section, of the words "*or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support*, is unconstitutional and invalid;

2.4. the Intestate Succession Act is to be read as though the following words appear after the word spouse, wherever it appears in the section -" *or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support.*

3. Until the aforesaid defects are corrected by the legislature to provide for the above, the First *and Second* Respondents are directed to give effect to the terms of this order in respect of the Applicant to the extent of the settlement which

was reached between the Applicant Second, Fourth to Tenth Respondent which settlement agreement was made an order of this Court];

4. It is recorded that the Second Respondent has undertaken to comply with the aforesaid settlement agreement and order in the winding up of the estate of the late A.S. Ruch No. 007400 / 2016 under the auspices and control of the First Respondent;

5. The First Respondent is authorised and directed to ensure that effect is given to the terms of this Order in the liquidation and distribution of the said estate of the late A.S. Ruch No. 007400 / 2016, to the extent of the settlement which was reached between the Applicant and the Second Respondent, which settlement agreement was made an order of this Court;

10. The Third Respondent is ordered to pay the costs of the application, which costs are to include the costs of three counsel where so employed.

P MAGONA

Acting Judge of the High Court

APPEARANCES:

For the Applicant	:	Adv. R G Stelzner SC
	:	Adv P J Rabie
	:	Adv A Thiart
Instructed by	:	Martin Bey STBB
For the First Amicus Curiae	:	Adv A Christians
Instructed by	:	C May
For the Second Amicus Curiae	:	Adv M Adhikari Adv M Bishop
Instructed by	:	A L Payne Legal Resources Centre
For the First and Third Respondents	:	Mr L Golding State Attorney's Office
For the Second and Fourth to Tenth Respondents	:	Adv N Bawa SC Adv S van Zyl
Instructed by	:	P Le Roux Herold Gie Attorneys