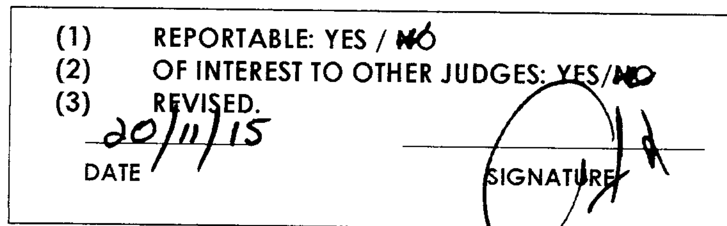
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NUMBER: 24589/2015
DATE DELIVERED: 23/11/2015



(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

20/11/15
DATE

SIGNATURE

In the matter between:

ERIC JUAN SPIRIDION DUPLAN	APPLICANT

and

RASMUS ELARDUS ERASMUS LOUBSER NO	1ST RESPONDENT
GERHARDUS JANSEN VAN VUUREN	2ND RESPONDENT
ABSA BANK LIMITED	3RD RESPONDENT
THE MASTER OF THE HIGH COURT	4TH RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	5TH RESPONDENT

JUDGMENT

MULLER AJ

[1] The applicant and the deceased lived since 2003 in what can best be described as a permanent same sex life partnership to which they had undertaken reciprocal duties of support.[1] The same sex partnership was neither solemnised nor registered in terms of the Civil Union Act, Act 17 of 2006.[2]

[2] The deceased died intestate on 13 February 2015, and had no descendants and no adopted children. The first respondent who is the executor of the deceased estate is also the brother of the deceased and is the only surviving child of their parents.

[3] Tuchten J, previously ordered that the dispute be heard in the motion court as a stated case. He also granted certain ancillary relief which, for present purposes, is of no relevance.

[4] The crisp issue is whether the applicant is entitled to inherit intestate from the deceased. The contention of the applicant is, relying upon the judgment of the Constitutional Court in *Gory v*

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[1] I will refer to such a partnership as a "same sex partnership".
[2] Hereinafter "the Act".

Kolver NO and Others, (Starke & Others Intervening)[3] that applicant is the spouse of the deceased and is, as a consequence, entitled to inherit the entire intestate estate of the deceased by virtue of their same sex partnership, regardless of it not being solemnised and registered as a civil union in terms of the Act.[4]

[5] The first respondent maintains that the applicant is not a "spouse" within the meaning of s 1(1)(a) of the Intestate Succession Act, Act 81 of 1987.[5] He asserts that only a spouse in a same sex partnership which is solemnised and registered as a civil union is entitled to inherit in terms of the provisions of s 1(1)(a).

[6] The recognition of same sex marriages has a long history of prejudice, discrimination by family, friends, the public at large, and the law in general, not only in this country, but also elsewhere.[6]

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[3] 2007 (4) SA 97 (CC).

[4] A "civil union" is defined by the Act as: "The voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others". A "civil union partner" means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of the Act; "Civil partnership" is not defined in the Act.

[5] s 1(1)(a) and (b) states: "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 a spouse shall inherit the intestate estate;
(b) is survived by a descendant but not by a spouse, such descendant shall inherit the intestate estate;"

[6] The Supreme Court of the United States only recently in *Obergefell v Hodges* ruled that bans on same sex marriages by certain states are contrary to the Fourteenth Amendment which requires a state to license a marriage between two people of the same sex when the

The need for legislation to regulate the position of gays and lesbians who wanted to marry was long overdue when the Act came into effect on 30 November 2006.[7]

[7] The objectives of the Act are to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership and to provide for the legal consequences of the solemnisation and registration of civil unions.[8] The legal consequences that flow from such a civil union are similar to those accorded to heterosexuals who married in terms of the Marriage Act.[9] The Act has made it possible, for the first time, for gays and lesbians to be afforded a choice to enter into a formal relationship, recognised by law, which

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marriage was lawfully licensed and performed out of state. < http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>.

[7] *J v Director-General of Home Affairs and Others* 2003 (5) SA 621 (CC) at para 23; *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 155. The preamble of the Act states: "WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
AND WHEREAS 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;
AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;
AND WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;
AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;"

[8] s 2 of the Act.

[9] s 13 states: "(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to-
(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

enjoys the same status and privileges together with the responsibilities that heterosexual couples enjoy who enter into a marriage relationship.[10]

[8] Marriage, as an institution, takes a very special place in the fabric of our society and is of profound importance for a variety of reasons locally as well as internationally.[11]

[9] Our common and statutory law, before and after the coming into existence of our constitutional democracy, traditionally distinguished between married people and unmarried people by according certain benefits to married people which the law did not accord unmarried people.[12] The Act, when it came into effect, did not materially alter that distinction. The Act accomplishes to bring same sex partnerships, which are solemnized and registered in terms of the Act in line with the status accorded to heterosexual couples who enter into a marriage relationship as well as eradicating discrimination and restoring the dignity of gays and lesbians. Sachs J in *Minister of Home Affairs and Another v Fourie and Another supra* put it thus:

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[10] *Daniels v Daniels; Mackay v Mackay* 1958 (1) SA 513 AD at 532E. *Belfort v Belfort* 1961 (1) SA 257 AD at 259H. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 30-31.

[11] Hahlo H.R. *The South African Law of Husband and Wife* 4th ed Juta & Co Ltd Cape Town (1975) 1-27. *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC) at para 12; *Minister of Home Affairs and Another v Fourie and Another supra* at para 63-68.

[12] *Frazer v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC) at para 26; *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 54. *Minister of Home Affairs and Another v Fourie and Another* at para 3,32.

"What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples."[13]

[10] The Act does not aim to alter the position of heterosexual couples who have elected not to marry nor does it aim to alter the position of gay and lesbian couples who have elected not to solemnise and register their same sex partnerships.

[11] The non-recognition of same sex partnerships and issues incidental thereto were addressed by the Constitutional Court on a case-by-case basis before the Act came into effect.[14]

[12] The Constitutional Court in *Gory v Kolver NO supra,* on which the applicant relies, employed the so-called reading-in method to cure the unconstitutionality of s1(1) of the Intestate Succession Act 1987 by making the following declaratory order:

"(e) *The order handed down by the Pretoria High Court on 31 March is set aside.*

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[13] Id para 158.

[14] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others supra; Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC); *J v Director-General of Home Affairs and Others* supra; *Daniels v Cambell NO and Others* 2004 (5) SA 331 (CC); *Volks NO v Robinson and Others supra*; *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC); *Gory v Kolver NO and Another supra.*

(f) 1. *It is declared that, with effect from 27 April 1994, the omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the word "spouse", wherever it appears in the section, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" is unconstitutional and invalid.*

2. *It is declared that, with effect from 27 April 1994, section 1(1) of the Intestate Succession Act is to be read as though the following words appear therein after the word "spouse", wherever it appears in the section: "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".* [15]

[13] The order was, no doubt, aimed at permanent same sex life partnerships in which the partners have undertaken reciprocal duties of support to inherit intestate in the absence of legislation recognising same sex marriages. However, Van Heerden AJ (on behalf of a unanimous court) reiterated the following:

"It is true that, should this Court confirm paragraph 2 of the High Court order, the position after 1 December 2006 will be that section 1(1) of the Act will apply to both heterosexual spouses and same-sex spouses who "marry" after that date, if Parliament either fails to respond before the Fourie deadline or if it does enact legislation permitting same-sex couples to "enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples."

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[15] Id para 66 (Only the portion of the order relevant to the dispute is quoted.) Paragraph 2 of the order of Hartzenberg J in the High Court was, with a slight amendment, confirmed.

Unless specifically amended, section 1(1) will then also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not "marry" under any new dispensation. Depending on the nature and content of the new statutory dispensation (if any), there is the possibility that unmarried heterosexual couples will continue to be excluded from the ambit of section 1(1) of the Act. As was argued by the Starke sisters, the rationale in previous court decisions for using reading-in to extend the ambit of statutory provisions applicable to spouses/married couples so as to include permanent same-sex life partners was that same-sex couples are unable legally to marry and hence to bring themselves within the ambit of the relevant statutory provision. Once this impediment is removed, then there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession."

[14] At the time the judgment was handed down the Act had not been promulgated.[16] The law in the interim has undergone a significant change due to the Act coming into operation. Same sex civil unions are now recognised as equivalent to heterosexual marriages. That being the case a distinction has to be drawn between same sex partnerships which are solemnised and registered and those which are not. The former is recognized by law and the latter together with heterosexuals who have elected not to marry, are not.

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[16] Id para 65.

[15] In *Johncom Media Investments Limited v M and Others* [17] it was held that a temporary reading-in is permissible and is just and equitable.[18] But, the Court reiterated that reading-in should be resorted to sparingly because it may constitute an encroachment by the judiciary on the terrain of the legislature in violation of the doctrine of separation of powers.[19]

[16] In *C and Others v Department of Health and Social Development, Gauteng and Others*[20] the Court said:

"Indeed, a final order of reading-in does not give the judiciary the ultimate word on pronouncing on the law. Instead it initiates a conversation between the Legislature and the courts, for Parliament's legislative power to amend the remedy continues to subsist beyond the granting of the relief, and may be exercised within constitutionally permissible limits at any future time".[21]

[17] The court in *Gaertner and Others v Minister of Finance and Others*[22] stated that:

"Depending on its nature and extent, the remedy thus does not intrude unduly into the lawmaker's sphere. With interim reading-in, there is recognition of the Legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the Court recognises that there may be

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[17] 2009 (4) SA 7 (CC).

[18] Id para 40.

[19] 2014 (1) SA 442 (CC) at para 82.

[20] 2012 (2) SA 208 (CC).

[21] Id para 57. *Provincial Minister of Local Government etc. Western Cape v Oudthoorn Municipal Council and Others* 2015 (6) SA 115 (CC) at para 27.

[22] 2014 (1) SA 442 (CC)

other legislative solutions. And those are best left to Parliament to contend with.'[23]

[18] The order granted by the Constitutional Court in *Gory v Kolver NO supra* was intended to include in s 1(1) of the Intestate Succession Act, 1987 permanent same sex life partners who have undertaken reciprocal duties of support, together with "spouses" until the provisions of s 1(1) are specifically amended to exclude them from the ambit of the Intestate Succession Act, of 1987.

[19] The non-recognition of same sex marriages was at the root of the complaint that s 1(1) is unconstitutional. Parliament removed the impediment that the law imposed on same sex marriages, by the introduction of the Act which declares partners in a civil union to be "spouses". It cured the unconstitutionality of the non-recognition of same sex marriages only. The reading-in order has thus not run its course and still serves to include after the word "spouse" the words:

"or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".[24]

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[23] Id para 84.

[24] Wood-Bodley M.C. "*Intestate Succession and Gay and Lesbian Couples"* 2008 South African Law Journal 52. De Vos "*The 'Inevitability' of Same-sex Marriage in South Africas Post-Apartheid State*" 2007 Journal on Human Rights 462.

[20] This court, in my respectful view, is not at liberty to deviate from a reading-in of those words. I am obliged to do so. The principle associated with the doctrine of *stare decisis* is a manifestation of the rule of law which is a founding value of the Constitution.[25] The doctrine requires that lower courts follow the decisions of higher courts in the judicial hierarchy to ensure predictability, reliability, uniformity, equality certainty and convenience.[26]

[21] However, a court will in my view not violate the *stare decisis* principle when a provision which is declared unconstitutional, has been amended and has undergone a material change through legislative intervention, provided of course, that the consequential amendment or introduction of an Act which removes the constitutional complaint within constitutional constraints is not open to attack. The Constitutional Court was at pains to make that clear in *Gory v Kolver NO supra.*[27]

[22] A partner in same sex partnership solemnised and registered in terms of the Act is for all intents and purposes a "spouse" as envisaged by s 1(1)(a) of the Intestate Succession Act, 1987.[28]

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[25] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 28.

[26] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as Amici Curae)* 2011 (5) SA 329 (SCA) at para 34

[27] Id para 30.

[28] s 13(1)(b) of the Act as well as the definition of "civil union".

However, be that as it may, I am nevertheless obliged to "read-in" in s 1(1)(a) the following words after the word "spouse":

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

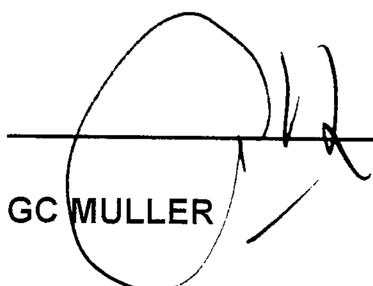
[23] It is not open to me to consider whether there are specific reasons why the applicant and the deceased elected not to solemnise and register their same sex partnership in terms of the Civil Union Act, 2006. Similarly, it is also not open to me to find that the Act cured the constitutional defect in s 1(1)(a) of the Intestate Succession Act, of 1987, in the absence of a specific amendment to that effect, save to state, in passing, that the "reading-in", in my respectful view, leads to discrimination against unmarried heterosexual couples.

[24] I wish, in conclusion, to state that I am, in exercising my discretion, loath to grant a costs order as the dispute must be highly emotional for obvious reasons. In addition, important constitutional issues were raised.

[25] In the result, I find in the favour of the applicant. I make the following order:

ORDER:

1. That it is declared that the applicant is the only intestate heir of the estate of Cornelius Daniel Loubser who died on 13 February 2015.
2. That first respondent is removed as the appointed executor of the deceased estate of the late Cornelius Daniel Loubser.
3. That no order as to costs is made.



GC MULLER

ACTING JUDGE GAUTENG DIVISION PRETORIA

Date Heard:	5 October 2015
For Applicant:	Adv D B du Preez SC (with Adv I P Ngobese) Ross & Jacobsz Inc Pretoria
For First Respondent:	Adv J G Bergenthuin SC Els Attorneys Pretoria