CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 28/06

MARK GORY	Applicant
versus	
DANIEL GERHARDUS KOLVER NO	First Respondent
HENRY HARRISON BROOKS	Second Respondent
MARYKE BROOKS	Third Respondent
MASTER OF THE HIGH COURT, PRETORIA	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
and	
ERILDA STARKE AND OTHERS	First to Fourth Applicants for Intervention
and	
BOBBY LEE BELL	Conditional Applicant for Intervention

Heard on : 24 August 2006

Decided on : 23 November 2006

JUDGMENT

VAN HEERDEN AJ:

[1] This case concerns the constitutional validity of section 1(1) of the Intestate Succession Act 81 of 1987 (the Act) to the extent that it confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners, as well as the appropriate remedy should this Court confirm the order of constitutional invalidity made by the Pretoria High Court.

Background

[2] The applicant, Mr Mark Gory, and the late Henry Harrison Brooks (the deceased) were, at the time of the latter's death, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support. The factual background of the relationship between Mr Gory and Mr Brooks is set out fully in the reported judgment of the High Court.[1] As the factual findings of the High Court in this regard have not been challenged, it is not necessary to repeat the facts in any detail.

[3] When Mr Brooks died intestate on 30 April 2005, his parents, who were the second and third respondents in the court below, nominated the first respondent, Mr Daniel Gerhardus Kolver, to be appointed by the Master of the High Court, Pretoria (the sixth respondent in the court below), as the executor of their son's estate. They claimed to be the deceased's intestate heirs[2] and entitled to his estate. The resulting

[1] *Gory v Kolver NO and Others* 2006 (7) BCLR 775 (T).

[2] In terms of section 1(1)(d)(i) of the Act, which provides that –

dispute with Mr Gory, who also claimed to be the deceased's sole intestate heir,[3] ultimately resulted in motion proceedings being instituted by Mr Gory in the Pretoria High Court in October 2005.

[4] On 31 March 2006, Hartzenberg J made the following order:

> "1. It is declared that 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 inconsistent with the Constitution of the Republic of South Africa.
>
> 2. It is declared that 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'.
>
> 3. The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by date of this order.
>
> 4. It is declared that the applicant and the late Henry Harrison Brooks were, at the time of the death of the deceased, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support.
>
> 5. It is declared that the applicant is the sole heir of the late Henry Harrison Brooks.
>
> 6. The agreement, dated 9 September 2005 in which the property situated at 152 First Avenue, Bezuidenhout Valley, Johannesburg was purportedly sold to the fourth and/or fifth respondents is declared to be of no force and effect. This particular order has immediate effect.

> "[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and – . . . (d) is not survived by a spouse or descendant, but is survived – (i) by both his parents, his parents shall inherit the intestate estate in equal shares".

[3] In terms of section 1(1)(a) of the Act, which provides that –

> "[i]f 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".

7. The applicant is entitled to occupation of the property mentioned in 6 above, on condition that he pays the monthly bond instalments and the municipal account for rates, taxes, water and electricity.

8. The first second and third respondents jointly and severally, the one complying the other to be absolved, are directed to return the items on X2, as amended by me,[4] to the applicant. This order has immediate effect.

9.1[5] The first respondent is removed as executor from the estate of the late Henry Harrison Brooks. This order is suspended pending confirmation of the orders in 1, 2 and 3 above.

9.2 Save as specifically dealt with in this order the administration of the estate of the late Henry Harrison Brooks is suspended pending confirmation of the order in 1, 2, 3 and 4[6] above.

10. The first respondent is not entitled to remuneration for his services in connection with the administration of the aforesaid estate or to be reimbursed for expenses. This order is suspended pending confirmation of 1, 2, 3 and 4[7] above.

11. The first respondent is ordered *de bonis propriis* to pay half of the costs of the applicant and the second and third respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the other half of the costs of the applicant. This order is suspended pending confirmation of the orders in 1, 2, 3 and 4[8] above."

[5] The Minister of Justice and Constitutional Development, the seventh respondent in the court a quo, caused an answering affidavit to be filed in that court stating that the application was moot because of the decision of this Court in *Minister*

[4] X2, as amended by Hartzenberg J, is a list of movables belonging to the deceased and/or to Mr Gory which were removed from Mr Gory's possession after the deceased's death by the first, second and third respondents and members of the deceased's family. These movable assets were still in the possession of the first, second and/or third respondents at the time the court order was made.

[5] Both this paragraph and the next one were numbered 9 in the order of the High Court. I have numbered them 9.1 and 9.2 to avoid confusion.

[6] In terms of section 172(2)(a) of the Constitution, para 4 of the order of the High Court does not need to be "confirmed", whereas paras 1, 2 and 3 have no force unless they are confirmed by this Court. The same applies to the reference to para 4 of the order of the High Court in paras 10 and 11 of that order.

[7] Id.

[8] Id.

of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.[9] In addition, it was contended that, while Mr Gory had made out a case for prospective relief, practical difficulties in connection with the administration of relevant deceased estates would result from retrospectivity of an order of constitutional invalidity. Thus, it was argued that any such order should be made to operate only prospectively, alternatively should not apply to those estates in which an executor has already been appointed.[10] The Minister did not, however, formally oppose Mr Gory's application in the High Court. Nonetheless, the answering affidavit deposed to on her behalf in substance constituted submissions in opposition to the order sought by Mr Gory.

[6] The fourth and fifth respondents in the court below were a married couple to whom the executor had purported to sell the late Mr Brooks' house in which he and the deceased were living at the time of his death. They did not oppose Mr Gory's application and, as they also do not oppose the application for confirmation before this Court, they are not cited as respondents in these proceedings.

Proceedings before this Court

[9] 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[10] In the absence of a testamentary executor, or if a person nominated to be a testamentary executor cannot be found, is dead, refuses or is incapacitated to act as executor, then an executor is appointed in accordance with the provisions of sections 18 and 19 of the Administration of Estates Act 66 of 1965.

[7] Mr Gory applies to this Court in terms of section 172(2)(d) of the Constitution for confirmation of paragraphs 1, 2 and 3 of the High Court order and a costs order against the Minister. Neither Mr Kolver nor the Minister opposes the application for confirmation. Mr Kolver has, however, brought an application for leave to appeal against paragraphs 9, 10 and 11 of the High Court order. The application was heard simultaneously with the application for confirmation. The Minister appeared before this Court only to oppose Mr Gory's prayer for a costs order against her.

[8] There is also an application to intervene in the matter by Ms Erilda Starke and her three sisters. Their late brother, Mr William Starke, was at the time of his death allegedly a partner in a permanent same-sex life partnership with Mr Bobby Lee Bell. Mr Starke died intestate on 21 November 2005 and his sisters nominated an attorney, Mr Myer Mervyn Smith, to be appointed by the Master of the Cape High Court as the executor of their brother's estate. There is a dispute between the four sisters and Mr Smith, on the one hand, and Mr Bell, on the other, concerning Mr Bell's claim against Mr Starke's intestate estate. The applicants for intervention (the Starke sisters) deny that the relationship between their late brother and Mr Bell was a permanent life partnership and also deny that their brother and Mr Bell were "totally dependent on each other for reciprocal support in every sense of the word", as alleged by Mr Bell. This factual dispute will obviously have to be addressed in proceedings before the relevant High Court, should Mr Gory's application for confirmation be successful.

[9] The Starke sisters argue that, should the High Court order be confirmed, they will suffer prejudice by being deprived of their vested rights as their late brother's intestate heirs.[11] While they make no specific submissions in respect of paragraph 1 of the High Court order, they contend that paragraphs 2 and 3 of the order should not be confirmed, that reading-in is not the appropriate remedy and that any order made by this Court should apply only to the intestate estates of persons who die after the order is handed down. The Starke sisters do not seek costs from any party in this matter.

[10] While Mr Bell does not oppose the Starke sisters' application for intervention, he opposes the relief sought by them. He also applies to intervene should their application be granted. Like the Starke sisters, Mr Bell does not seek costs. Neither Mr Kolver nor the Minister opposes the application for intervention by the Starke sisters, or the conditional application to intervene by Mr Bell. Mr Gory, on the other hand, takes the view that there is no merit in the Starke sisters' application and that it should be dismissed with costs.

Applications for leave to intervene

[11] In terms of section 1(1)(e)(i) of the Act, which provides that –

> "[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and – . . . (e) is not survived by a spouse or descendant or parent, but is survived – (i) by – . . . (bb) descendants of his deceased parents who are related to the deceased through both such parents . . . 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".

[11] The Starke sisters cite Rule 8 of this Court's Rules which deals with the intervention of parties in proceedings, providing that –

> "(1) Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."

They acknowledge that Rule 12 of the Uniform Rules of the High Court is not expressly listed in Constitutional Court Rule 29 as one of the Uniform Rules which apply to the proceedings in this Court. They submit, however, that the considerations applicable to Uniform Rule 12 as developed by the courts should be followed by this Court in construing Constitutional Court Rule 8 and the effect thereof.[12] This being so, the decisive criterion for a court in exercising its discretion whether or not to grant leave to intervene is whether the applicant for intervention has a direct and substantial interest in the subject matter of the litigation.[13]

[12] As was pointed out on behalf of Mr Bell, the considerations applicable to Uniform Rule 12 are not necessarily wholly appropriate to a case involving an order of constitutional invalidity of a statute in terms of section 172 of the Constitution. The common law principles relating to intervention of parties applied by the courts in respect of Uniform Rule 12 deal primarily with disputes *in personam*, whereas an

[12] See in this regard Erasmus *Superior Court Practice* (Service 22, 2004) C4-16, commenting on CC Rule 8.

[13] See for example *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415C-416C.

order under section 172 is an order *in rem*.[14] In disputes concerning the constitutional validity of a statute, it would – so it was submitted – be impractical if "the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the *decisive* criterion" (emphasis added).[15] This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.

[13] This submission is a convincing one. In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a *necessary* requirement to be met by an applicant for intervention, it will not always be *sufficient* for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question

[14] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26; *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 58.

[15] *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* above n 13 at 416C.

whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.[16]

[14] The Starke sisters submit that the relief sought by Mr Gory in his application for confirmation has a direct and substantial effect on their rights as well as on the rights of Mr Bell. If the confirmation application were to succeed and it were later to be determined that Mr Bell and their late brother were, at the time of the latter's death, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support, then the Starke sisters would retrospectively lose the rights to their brother's estate which vested in them as intestate heirs in November 2005 when their brother died.

[15] Mr Gory takes issue with the contention by the Starke sisters that their right to inherit the estate of their late brother vested in them upon his death. According to Mr Gory, as any legislation which is inconsistent with the Constitution became invalid from the moment the relevant provisions of the Constitution or of the legislation came into effect (whichever is the later date) and not from the moment of the court's order,[17] the challenged provisions of section 1(1) of the Act became invalid, at the

[16] See the approach of this Court to the underlying principles governing the admission of an *amicus curiae* in any given case, apart from the interest of the prospective *amicus* in the proceedings, as articulated in cases such as *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 9 and *In re certain amicus curiae applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at paras 3-5.

[17] See for example *Ferreira v Levin NO* above n 14 at paras 27-28 and *Fose v Minister of Safety and Security* above n 16 at para 94. See further the discussion in paras [37]-[39] below.

latest, on 4 February 1997 when the Constitution came into operation.[18] Thus, so Mr Gory submitted, if a trial court were to resolve the factual dispute existing between the Starke sisters and Mr Bell in favour of the latter, no intestate succession rights would have vested in the Starke sisters on their late brother's death. It is accordingly not correct that the Starke sisters will be prejudiced if this Court were to confirm paragraphs 2 and 3 of the order of the High Court.

[16] In my view, the Starke sisters are correct in their contention that they do have the requisite direct and substantial interest in the subject matter of Mr Gory's confirmation application. Until such time as this Court confirms the order of constitutional invalidity of section 1(1) of the Act made by the High Court, such order has no force. When Mr Starke died intestate in November 2005, there was at that time no confirmed order of constitutional invalidity in respect of section 1(1) of the Act, and the rights of intestate succession to Mr Starke's estate thus vested in his four sisters. They will cease to have these rights if the High Court's order of constitutional invalidity is confirmed by this Court and if the factual dispute between them and Mr Bell regarding the nature of his relationship with their late brother is resolved in Mr

[18] Both the interim Constitution (Act 200 of 1993, date of operation 27 April 1994) and the 1996 Constitution (Constitution of the Republic of South Africa, 1996, date of operation 4 February 1997) prohibit unfair discrimination on the (specified) ground of sexual orientation and provide that discrimination on any specified ground is presumed to be unfair unless the contrary is established (sections 8(2) and 8(4) of the interim Constitution, sections 9(3) and 9(5) of the final Constitution). Furthermore, both Constitutions protect the right to dignity in substantially identical terms (section 10 of both the interim and the final Constitutions). The Act came into operation on 18 March 1988. Thus, as will be discussed further below, *if* this Court agrees with the High Court that section 1(1) of the Act unjustifiably violates the applicant's fundamental rights to equality and dignity, then this section is unconstitutional and invalid with effect from 27 April 1994 and must be declared to be so, unless an order limiting the retrospective effect of the declaration of invalidity in terms of section 172(1)(b)(i) is required in the interests of justice and equity.

Bell's favour. The Starke sisters do therefore have a direct and substantial interest in the confirmation application.

[17] The Starke sisters' application for intervention was brought as soon as reasonably possible after they became aware of the fact that Mr Bell, in correspondence with the executor of their late brother's estate, claimed to be the latter's sole intestate heir. Neither Mr Kolver nor the Minister opposes their application, although Mr Gory takes the view, for the reasons outlined above, that the application has no merit and should be dismissed with costs. The submissions advanced by the Starke sisters on the issues of reading-in and retrospectivity are indeed substantially new contentions not canvassed in any detail (if at all) by the other parties in this matter. As such, these submissions are of considerable assistance to this Court. It would to my mind be unfair not to allow the Starke sisters to participate in the proceedings and the interests of justice require that their application for leave to intervene be granted.

[18] Once the Starke sisters are allowed to intervene, Mr Bell should also be allowed to do so. Like the Starke sisters, he has a direct and substantial interest in the subject matter of the confirmation application, his application was also timeously brought and his submissions countering those made by the Starke sisters are certainly cogent and helpful to this Court. There can be no question that the interests of justice require his application for intervention to be granted.

The unconstitutionality of section 1(1) of the Act

[19] 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.[19] Given the recent jurisprudence of South African courts in relation to permanent same-sex life partnerships,[20] the failure of section 1(1) to include within its ambit 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.[21] 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 term 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.

The appropriate remedy

[19] For the relevant provisions of the interim Constitution, see preceding note.

[20] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 37 n 41; 2000 (1) BCLR 39 (CC) at para 37 n 42; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at para 32 n 27; 2002 (9) BCLR 986 (CC) at para 32 n 22; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 32 n 33.

[21] See n 18 above for the relevant provisions of the interim Constitution.

[20] In terms of section 172(1)(b) of the Constitution, a court which has declared a statutory provision to be unconstitutional and invalid may make any order that is just and equitable, including "an order limiting the retrospective effect of the declaration of invalidity" and "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

Appropriate relief – "reading-in"

[21] The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case. With reference to the principles which should guide a court in deciding when an order of reading-in is appropriate, as articulated by this Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[22] they emphasise the need to ensure "that the result achieved would interfere with the laws adopted by the Legislature as little as possible"[23] and that –

> "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."[24]

[22] Above n 20 at paras 64-67, 70 and 73-75.

[23] Id at para 74.

[24] Id at para 75.

[22] The Starke sisters point out that this Court in the *Fourie* judgment declared the common law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples. It also declared the omission from section 30(1) of the Marriage Act 25 of 1961 after the words "or husband" of the words "or spouse" to be unconstitutional and the Marriage Act invalid to the extent of this inconsistency. However, the majority of the Court suspended these declarations of invalidity for a period of 12 months from the date of the judgment (1 December 2005) to allow Parliament to correct the defects. Reading-in will occur and section 30(1) of the Marriage Act will be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula only if Parliament should fail to correct the identified defects within this twelve month period (ie by 1 December 2006). If this happens, they submit, the unconstitutionality that has been identified in the Act would cease to exist because the word "spouse" as contained in section 1(1) of the Act would then include persons of the same sex who elect to marry.

[23] As regards the previous cases in which the remedy of reading-in has been utilised by this Court in the context of discrimination on the ground of sexual orientation, the Starke sisters point out that an important point of distinction between those cases and the present is that the previous cases concerned situations in which the same-sex couple jointly sought relief in respect of rights that they would have had

against a governmental agency but for the unconstitutional legislation.[25] By contrast, in the present matter, it is not a same-sex couple seeking relief, but rather a person who claims to be the surviving partner of an alleged permanent same-sex life partnership – different considerations apply to this kind of situation.

[24] Mr Bell contends that the Starke sisters' invocation of the *Fourie* decision in support of their argument against reading-in is misplaced. He points out that there are two fundamental differences between the *Fourie* case and the present case when it comes to the exercise by this Court of its remedial discretion. First, the right to marry is a right which can be exercised only prospectively, while the right to inherit intestate is a right which can be asserted only retrospectively. By suspending the order of invalidity in *Fourie*'s case, this Court did not deprive the successful litigants of their rights – it merely required them to wait for a period of one year for their relief. However, if the order of constitutional validity in the present case is suspended or not given retrospective effect, this will permanently deprive Mr Gory, Mr Bell and other

[25] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* above n 20 (unconstitutionality of provision of immigration statute which gave special benefits to foreigners married to South African citizens or permanent residents, but did not confer such benefits on permanent same-sex life partners); *Satchwell* above n 20 (unconstitutionality of provisions of statute and of certain regulations issued in terms thereof which accorded financial benefits to the surviving "spouse" of a deceased judge, but not to a deceased judge's surviving permanent same-sex life partner); *Du Toit* above n 20 (unconstitutionality of provision in child care legislation which allowed married persons to adopt children jointly, but did not allow permanent same-sex life partners to do so); *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) (unconstitutionality of statutory provision providing for the parental rights of a husband in cases where the child in question had been conceived through the artificial insemination of his wife, but not for the parental rights of permanent same-sex life partners in similar cases). See also *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T); 1998 (4) BCLR 444 (T) (unconstitutionality of medical scheme regulations not allowing for the registration of a permanent same-sex life partner as a dependant under the scheme); *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C) (an exclusion of liability by the insurer in respect of "a member of the policy holder's family normally resident with him" held to apply to a person who shared the insured's home and had been in a same-sex relationship with him for a period of ten years preceding the accident in which such person had been injured); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) (extension of third party action for damages for loss of support and for funeral expenses to partners in a permanent same-sex life partnership who had undertaken a contractual duty to support each other).

similarly situated persons of the relief to which they are entitled under the Constitution. Second, the remedial question in the present case does not have the complexity of the remedial question in the *Fourie* case, nor does it present the kind of concerns which militated in favour of a remedy in *Fourie* which required Parliamentary consideration.

[25] Mr Gory counters the Starke sisters' argument on the question of reading-in by pointing out that, despite repeated dicta of this Court to the effect that the legislative framework must be changed so as to accommodate same-sex life partnerships in a constitutionally acceptable manner,[26] Parliament has continued to deal with unfair discrimination against gays and lesbians on a piecemeal basis, often in response to court decisions. It thus remains to be seen whether Parliament will in fact enact any legislation by the *Fourie* deadline of 1 December 2006. Moreover, it is possible that any legislation which Parliament *does* enact in this regard may be susceptible to a court challenge. Any such legislation will not, as enacted, necessarily deal with the law of intestate succession. In any event, any change in the law pursuant to *Fourie* will not protect or vindicate the rights of Mr Gory and others in a similar situation, namely those gay and lesbian people whose permanent same-sex life partners have

[26] Thus, in *J and Another v Director General, Department of Home Affairs, and Others* above n 25 at para 23, this Court stated that –

> "[c]omprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation."

Further at para 25, that "[t]he executive and the legislature are . . . obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians."

already died or who die before the law is changed or before they have the opportunity to make use of any new dispensation.

[26] In my view, paragraph 2 of the High Court order should be confirmed for the reasons that follow.

[27] As was stated by Sachs J in *Fourie*,[27] the judgment in that case –

> ". . . [left] open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties) of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC[28] has indicated, there are a great range of issues that call for legislative attention." (footnote omitted).

[28] Any change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect on these statutes of

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[27] Above n 9 at para 160.

[28] South African Law Reform Commission, in its Project 118 on *Domestic Partnerships*, discussed by Sachs J in *Fourie* at paras 125-131. In 1998, a Project Committee under the chairmanship of Howie P of the Supreme Court of Appeal was appointed by the Minister of Justice and Constitutional Development to assist the SALRC in this Project 118, an investigation into domestic partnerships (heterosexual and same-sex). In October 2001, the Commission published an issue paper in the form of a questionnaire (Issue Paper No 17). This elicited a lively and widespread response and, in August 2003, a discussion paper (Discussion Paper No 104) was published for general information and comment (see further in this regard the judgment of Sachs J in *Fourie* at paras 28 and 126-128). In March 2006, the Commission handed its final *Report on Domestic Partnerships*, with draft legislation attached, to the Minister for her consideration and this report was subsequently released in October 2006.

decisions of this Court in cases like *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[29] *Satchwell*,[30] *Du Toit*[31] and *J v Director-General, Department of Home Affairs*[32] will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships.[33] In the interim, there would seem to be no valid reason for treating section 1(1) of the Act differently from legislation previously dealt with by this Court by, inter alia, utilising the remedy of reading-in where it has found that such legislation unfairly discriminates against permanent same-sex life partners by not including them in the ambit of its application.

[29] 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." 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

[29] Above n 20.

[30] Above n 20.

[31] Above n 20.

[32] Above n 25.

[33] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* above n 20 at para 37 n 41; para 37 n 42; *Satchwell v President of the Republic of South Africa and Another* above n 20 at para 32 n 27; para 32 n 22; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* above n 20 at para 32 n 33.

(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.[34] 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.

[30] In this regard, it is useful to reiterate the following dictum of this Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*:[35]

> "It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits." (footnotes omitted).

[31] As contended by Mr Bell, questions like what status to accord pre-existing same-sex life partnerships after the expiry of the *Fourie* deadline, whether to provide a "transitional" period in which partners to pre-existing same-sex life partnerships will be expected to marry or to register their pre-existing partnerships to continue to

[34] Cf the majority decision of this Court in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

[35] Above n 20 at para 76.

qualify for the benefits conferred by law on "spouses", and if so, the length of such a transitional period are pre-eminently legislative decisions. This kind of decision ought to be taken by Parliament when it enacts the legislation contemplated in the *Fourie* case, and ought not to be anticipated by this Court. It is clearly the task of the legislature to enact legislation that deals with the whole gamut of different types of marital and non-marital domestic partnerships in a sufficiently detailed and comprehensive manner. The primary responsibility of this Court in the present matter is to cure the existing and historical unconstitutionality of section 1(1) of the Act, the fulfilment of which responsibility clearly requires the reading-in ordered by the High Court.

Appropriate relief – retrospectivity

[32] The Starke sisters contend that, if this Court declares section 1(1) of the Act to be unconstitutional and also finds that the remedy of reading-in is appropriate, then the Court should limit the retrospectivity of the order of constitutional invalidity in terms of section 172(1)(b)(i) of the Constitution so that it has only prospective effect (ie that it applies only to the estates of persons who die after the date of the order).

[33] Citing *S v Ntsele*[36] in support of the contention that questions of retrospectivity often depend on factors in respect of which evidence is necessary, the Starke sisters argue that the only evidence that was adduced concerning the issue of retrospectivity

[36] 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC).

is that contained in the answering affidavit filed in the court below on behalf of the Minister. The deponent to this affidavit, Ms Theresia Bezuidenhout, canvassed various practical difficulties in respect of the administration of affected deceased estates that would result from a retrospective order, including delays in the finalisation of such estates, and complications and additional costs arising from the "effective nullification" of the appointment of the executor and the appointment of a new executor. Ms Bezuidenhout concluded that any order made by the Court "should operate prospectively; alternatively should not apply to estates in which an executor has already been appointed". In view of the fact that an order with retrospective effect would cause uncertainty and, in addition, would ignore the wishes of those deceased persons who had consciously and deliberately decided *not* to make a will but to let their estates devolve in accordance with the scheme of intestate succession set out in the Act, any declaration of constitutional invalidity and reading-in order should be limited so that they apply only prospectively.

[34] In response, Mr Gory submits that limiting the retrospective effect of the declaration of invalidity and reading-in to those intestate estates of persons who die after the date of this Court's order would deny relief to him and others who are similarly situated. This would not be just and equitable.

[35] As regards the argument that a reading-in would interfere with the autonomy interest of intestate same-sex life partners who elect not to make a will, Mr Bell points out that the purpose of the Act is to provide normative standards and not to protect the

autonomy of testators.[37] Testators who wanted to protect their autonomy would have executed wills. Moreover, according to Mr Gory, this argument itself amounts to discrimination on the grounds of sexual orientation in that, irrespective of any deliberate intention of a heterosexual spouse in not making a will (whatever such intention may be), his or her surviving spouse is nonetheless an intestate heir of the deceased estate.

[36] It is submitted further that there is really no evidence to support the contention that the confirmation of paragraph 3 of the order of the High Court would cause any significant disruption to or dislocation in the administration of deceased estates that had not been finally wound up by the date of the confirmation order. The retrospective operation of an order of reading-in will not, of itself, affect the validity of the appointment of an executor. In circumstances where a surviving same-sex life partner can persuade a court to remove an executor under section 54 of the Administration of Estates Act 66 of 1965,[38] it would be contrary to the interests of justice to allow that executor to continue in his or her office. To deprive the order of any retrospective effect would also be inconsistent with the orders made in the cases previously decided by this Court in matters affecting substantive rights of inheritance.[39] In any event, it would be neither just nor equitable to deny the applicant and those in a similar situation to him effective relief because of any inconvenience

[37] This is evident from both of the other decisions of this Court on the constitutionality of section 1(1) of the Act, in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) and *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[38] See para [56] below.

[39] See the cases cited in n 37 above.

and delay that might result from the recognition and vindication of their constitutional rights. Any residual concerns about potential dislocation that may be caused by the retrospective effect of the order can be accommodated in the manner in which this Court has previously addressed these concerns in similar cases, namely by making provision for variation of the order on application by any interested party who can show that serious administrative or practical difficulties necessitate any variation.[40]

[37] In response to the argument that a retrospective declaration of invalidity would deprive third parties of vested rights, Mr Gory repeats that, in the absence of a court order limiting the retrospective effect of a declaration of invalidity, the law which is the subject of the declaration is regarded as having become invalid from the moment the relevant provisions of the Constitution came into force.[41] This means that unless the Starke sisters can satisfy the Court that the interests of justice and equity require an order of prospective invalidity to be made, the challenged provisions of section 1(1) of the Act would have become invalid long before the date of death of the deceased in both the matters before this Court. If this Court confirms paragraphs 1, 2 and 3 of the High Court order, then Mr Gory will be regarded as having been Mr Brooks' intestate heir from the date of the latter's death and the rights in respect of intestate succession which vested in Mr Brooks' parents at the date of his death would retrospectively cease to exist. The same would apply to the rights to inherit their late brother's deceased estate which vested in the Starke sisters on the date of his death if a

[40] See, for example, the *Bhe* case above n 37 at para 132 and para 136 order 10; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 30 and para 31 order 5.

[41] See para [15] above and the authorities there cited.

trial court were, at a later date, to resolve the factual dispute between them and Mr Bell in favour of the latter.

[38] It is important to note that, as pointed out on behalf of the Starke sisters, this is the first case dealing with the recognition of the entitlements of permanent same-sex life partners in which the effect of such recognition will be to deprive third parties of vested claims.[42] However, a not dissimilar situation confronted this Court in the *Bhe* and *Shibi* cases,[43] in which (inter alia) the rule of male primogeniture as it applies in customary law to the inheritance of property was declared to be inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. This Court also held that section 1 of the Act is, subject to certain modifications to accommodate polygynous unions, applicable to intestate deceased estates that would formerly have been governed by section 23 of the Black Administration Act 38 of 1927.[44] In terms of these statutory provisions and "Black law and custom" as it applied at the time of the deceased's death in both *Bhe* and *Shibi*, a "third party"[45] acquired vested rights to inherit upon the death of the relevant deceased. The effect of the declarations of constitutional invalidity made by the Court was that such rights ceased to exist and the applicants were declared to be the deceased's intestate heirs, their rights in this regard obviously dating from the date of death of the relevant deceased.

[42] See para [23] above, in particular the cases referred to in n 25 above.

[43] Above n 37.

[44] That section, together with the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in *Government Gazette* No 10601 dated 6 February 1987, were also declared to be unconstitutional and invalid.

[45] The deceased's father in *Bhe* and the deceased's two male cousins in *Shibi*.

[39] As already discussed, a pre-existing law or provision of a law which is unconstitutional became invalid at the moment the Constitution took effect. This is the effect of the so-called "supremacy clause" of the Constitution (section 2), in terms of which the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid.[46] Item 2(1) of Schedule 6 to the Constitution provides that all law that was in force when the Constitution took effect, continues in force until amended or repealed, but only to the extent that it is consistent with the new Constitution.[47] When making a declaration of invalidity, a court simply declares invalid what has already been invalidated by the Constitution. This doctrine, known as "objective constitutional invalidity", means that an unconstitutional law in force at the time of the commencement of the interim Constitution might be invalidated by that Constitution with effect from 27 April 1994, even if the applicant's cause of action arose after the coming into force of the 1996 Constitution on 4 February 1997.[48] Thus, in terms of section 172(1)(a) of the Constitution, a court deciding a constitutional matter *must* declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. However, as indicated

[46] Section 4(1) of the interim Constitution likewise provided that –

> "[t]his Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

[47] See in this regard section 229 of the interim Constitution, as also *Zantsi v The Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 27 and *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 8.

[48] See *Bhe* above n 37 at para 128 and para [15] above, especially n 18 above. See further *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* above n 14 at paras 26-28 and 30; *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at paras 35-38 and, generally, Currie & De Waal *The Bill of Rights Handbook* 5 ed (Juta, Cape Town 2005) at 55-57; Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (Butterworths, Durban 1998, with looseleaf updates) para 1A6 at 1A-11–1A-12.

above, the operation of the doctrine of objective constitutional invalidity is subject to the possibility that the court making the declaration of invalidity may, in the interests of justice and equity, limit the retrospective effect of such declaration in terms of section 172(1)(b)(i) of the Constitution.[49]

[40] This Court has consistently emphasised that, where a litigant does establish that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated.[50] In this case, on the factual findings of the High Court, which are not challenged before us, Mr Gory and Mr Brooks were permanent same-sex life partners who had undertaken reciprocal duties of support. Mr Gory has established that the failure of section 1(1) of the Act to include him and others similarly situated to him within its ambit *does* violate his rights to equality and dignity. Bearing in mind the significant pre-existing disadvantage and vulnerability of same-sex life partners resulting from "the long history in our country and abroad of marginalisation and persecution of gays and lesbians",[51] it would not in my view be just and equitable to deny Mr Gory any effective constitutional relief by making the declaration of invalidity of section 1(1) fully prospective, despite the effect of such declaration of invalidity on the interests of third parties (such as Mr Brooks' parents).[52]

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[49] See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32; *S v Ntsele* above n 36 at para 14; see further Currie & De Waal above n 48 at 206-209; Rautenbach above n 48 para 1A98.5 at 1A-202–1A-203 and the other authorities there cited.

[50] See for example *Fose v Minister of Safety and Security* above n 16 at para 69.

[51] *Fourie* above n 9 at para 59; see also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* above n 20 at paras 42-54.

[52] See the *Bhe* case above n 37 at para 126.

[41] In order to protect the public interest in the finality of completed acts, the High Court framed paragraph 3 of its order to exclude the retrospective effect of the order of constitutional invalidity contained in paragraphs 1 and 2 of its order on "any acts performed in respect of the administration of an intestate estate that [had] been finally wound up by date of [the] order." I agree with the argument advanced by Mr Bell that, for the reasons set out by this Court in the *Bhe* case,[53] a limiting order framed in these terms goes too far. In the words of Langa DCJ (as he then was) in the majority judgment in *Bhe*,[54] such an order –

> ". . . would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court . . .
> To limit the order of retrospectivity to cases in which transfer of ownership [had] not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible. What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted."

[42] It is necessary to balance the potentially disruptive effects of an order of retrospective invalidity of section 1(1) of the Act and the effect of such an order on the vested rights of third parties, on the one hand, with the need to give effective relief to Mr Gory and similarly situated persons, on the other. The most appropriate way to

[53] Above n 37.

[54] Id at paras 126-127.

achieve this balance is to fashion a limiting order along the lines of the relevant part of this Court's order in *Bhe*[55] and also to make provision[56] for a variation of its order on application by an interested party who can show that serious administrative and practical difficulties require such variation.

[43] To summarise my conclusions thus far: first, I am of the view that the High Court correctly found section 1(1) of the Act to be unconstitutional and invalid to the extent that it confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. Second, the most fitting way to cure this unconstitutionality is by reading in after the word "spouse", wherever it appears in section 1(1), the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support", as was ordered by the High Court. Third, this order of constitutional invalidity should in the main operate retrospectively, but this Court should, in the exercise of its powers in terms of section 172(1)(b)(i) of the Constitution, fashion an order limiting the retrospective effect of the order of constitutionality so as to reduce the risk of disruption in the administration of deceased estates and to protect the position of bona fide third parties as best possible.

The first respondent's application for leave to appeal

[55] Id at para 136 order 8.

[56] As was done in both *Bhe* above n 37 at para 132 and para 136 order 10 and *Moseneke and Others v The Master and Another* above n 40 at para 30 and para 31 order 5.

[44] Appeals can only be made to this Court on constitutional matters or issues connected with decisions on constitutional matters.[57] At the hearing, both Mr Gory and Mr Kolver accepted, without any argument on the point, that the issues raised by the latter in his application for leave to appeal against paragraphs 9.1, 9.2, 10 and 11 of the High Court order are not constitutional matters, but are issues connected with the decisions to be made by this Court on the constitutional matters raised in the application for confirmation. Is this premise correct?

[45] In *Alexkor Ltd and Another v The Richtersveld Community and Others*,[58] an important case on the interpretation of section 167(3)(b) of the Constitution, this Court held[59] that the phrase "issues connected with decisions on constitutional matters" was intended –

> ". . . to extend the jurisdiction of this Court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction. The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any *factum probandum* of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue 'connected with a decision on a constitutional matter'." (footnote omitted)

[57] Section 167(3)(b) of the Constitution.

[58] 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

[59] Id at para 30.

[46] *Alexkor* dealt with the question whether various questions of fact bearing on or related to the establishment of the existence of the constitutional matters before the Court (such constitutional matters including issues relating to the interpretation and application of legislation enacted to give effect to constitutional rights) constituted "issues connected with decisions on constitutional matters". This Court answered the question in the affirmative. The question in the application for leave to appeal currently before us is, however, quite a different one. Paragraphs 9.1, 9.2, 10 and 11 of the order made by the High Court in this case are ancillary to and dependent on the order of constitutional invalidity contained in paragraphs 1, 2 and 3 of the High Court order. The orders contained in these paragraphs were expressly suspended by the High Court pending confirmation by this Court of the order of constitutional invalidity contained in paragraphs 1, 2 and 3. If the High Court order of constitutional invalidity were to be varied or confirmation thereof were to be refused, then these ancillary orders would of necessity have to be revisited.

[47] Whatever the precise meaning of the word "connected" in the phrase "issues connected with decisions on constitutional matters", it must include a relationship of dependence between a primary order on a constitutional matter and an ancillary order. What constitutes "dependence" must be understood in a broad sense. There are important policy reasons for such an approach: if a party may not approach this Court for leave to appeal on these ancillary matters, this would give rise to a bifurcated appeal and confirmation procedure in which the appeal on the ancillary matters could not be resolved before this Court together with the confirmation application, but

would have to be heard and resolved in separate proceedings before another court. This would obviously be a most undesirable state of affairs, undermining the achievement of finality for the parties and resulting in an unnecessary waste of judicial resources.

[48] It follows that the issues raised by Mr Kolver in his application for leave to appeal against the ancillary orders made by the High Court contained in paragraphs 9.1, 9.2, 10 and 11 of the High Court order are, at the very least, "issues connected with decisions on constitutional matters", in terms of section 167(3)(b) of the Constitution and fall within the jurisdiction of this Court. The same would of course apply to the orders contained in paragraphs 4, 5, 6, 7 and 8 of the High Court order.

[49] It may well be that the matters to which the orders set out in paragraphs 4 to 11 of the High Court order relate fall within the jurisdiction of this Court as "constitutional matters" in terms of section 167(3)(b). These orders were made by the High Court, in the exercise of its powers in terms of section 172(1) of the Constitution, as a direct consequence of the declaration of invalidity made in respect of section 1(1) of the Act and in the interests of justice and equity. In making these orders, the High Court was in every sense controlling the consequences of the declaration of invalidity. As was stated by this Court in *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others*:

> "[I]t is not only the direct order of unconstitutionality itself that must be confirmed but all the orders made by the High Court that flowed from that finding of unconstitutionality . . . All of these orders granted relief consequent upon the finding

> of unconstitutionality and are accordingly before this Court as part of the confirmation proceedings."[60]

[50] If one accepts this reasoning, then Mr Kolver might not require our leave to appeal against any of the ancillary orders contained in paragraphs 4 to 11 of the High Court order, but might have a right of appeal pursuant to section 172(2)(d) of the Constitution. In terms of this section –

> "[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

It could be argued that the phrase "order of constitutional invalidity" should be read broadly to include any ancillary order that is dependent upon the declaration of constitutional invalidity and that was made pursuant to such declaration in the interests of justice and equity. However, in view of the conclusion reached in paragraph [48] above, it is not necessary to decide this question for the purposes of the present proceedings and, in the absence of any argument on this point, I would prefer not to do so. I am satisfied that, once this Court decides to confirm the declaration of invalidity in terms of section 172(2)(a) of the Constitution, then it should logically also re-examine all the ancillary orders made by the High Court, including the orders forming the subject of Mr Kolver's application for leave to appeal, to determine whether these orders are just and equitable.

[60] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 18.

[51] Paragraphs 4 and 5 of the order made by the High Court can be dealt with briefly. As already stated, the factual finding of the High Court to the effect that Mr Gory and the late Mr Brooks were, at the time of the latter's death, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support was not challenged before this Court and is in my view clearly correct. Paragraph 4 of the High Court order simply encapsulates this factual finding and is certainly just and equitable. So too, once this Court confirms the declaration of invalidity of section 1(1) of the Act and the reading-in order made by the High Court, then paragraph 5 of the High Court order – which declares Mr Gory to be the sole heir of the late Mr Brooks – clearly follows.

[52] As regards paragraph 6 of the High Court order, it was in my view equitable for the agreement of purchase and sale in terms of which Mr Kolver purportedly sold the deceased's house to be set aside. Mr Gory and the deceased were living in the house at the time of the latter's death. The agreement was entered into at a time when the constitutionality of section 1(1) of the Act had not yet been determined. Had it been clear that Mr Gory was the sole intestate heir of the deceased, the property would in all probability not have been sold at that stage. The agreement of sale has not been approved by the Master and the purchasers do not oppose the setting aside of the agreement (concluded more than a year ago). Indeed, as indicated above, the purchasers are not even cited as respondents in the present proceedings. On the other hand, Mr Gory is currently living on the property, paying the monthly bond instalments and the municipal account for rates, taxes, water and electricity. He is the

sole heir of the deceased estate and will inherit whatever remains of the estate after the debts have been paid. In my view, paragraph 6 of the High Court order is in all the circumstances just and equitable and should be confirmed by this Court.

[53] However, once the setting aside of the agreement is confirmed, paragraph 7 of the High Court order becomes unnecessary: it is up to the executor of the deceased estate, whoever he or she may be, to decide how the property is to be dealt with in the execution of his or her duty properly to administer the estate. I do not think it desirable that the executor be fettered in the fulfilment of this duty by a court order dealing with conditional entitlement to occupation of the property. Paragraph 7 of the High Court order should thus be set aside.

[54] Paragraph 8 of the High Court order should, in my view, be confirmed by this Court. The circumstances in which the movable assets belonging to Mr Gory and/or the deceased referred to in paragraph 8 of the High Court order were removed from the former's possession after the deceased's death by the first, second and third respondents and members of the deceased's family are sketched in the reported High Court judgment.[61] Understandably, the emotions of the deceased's parents and other members of his family seem to have been running high during this period and the manner in which many of these assets were removed from Mr Gory's possession was regrettably somewhat high-handed and insensitive to the grief and confusion which he was also suffering. Most, if not all, of these assets are apparently still in the

[61] Above n 1 at paras 9-13 and 25.

possession of the second and third respondents (the deceased's parents). Once Mr Gory is declared to be the sole intestate heir of the deceased, there is no reason whatsoever for any of these assets to remain in the possession of the respondents.

[55] I turn now to paragraphs 9.1, 9.2, 10 and 11 of the High Court order. These orders removed Mr Kolver from the position of executor (paragraph 9.1), suspended the administration of the deceased estate (paragraph 9.2), deprived him of entitlement to remuneration for services rendered in connection with the administration of the deceased estate and to reimbursement for expenses incurred in this regard (paragraph 10), and ordered costs *de bonis propriis* against him (paragraph 11). Mr Kolver contended that the High Court failed to exercise its discretion properly and appropriately in coming to the conclusion that his conduct in his capacity as executor of the late Mr Brooks' deceased estate was so unreasonable that the court was justified in making these orders.

[56] In terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965, an executor may at any time be removed from his office by the Court if for any reason other than those set out in the rest of section 54(1)(a),[62] "the Court is satisfied that it is undesirable that he should act as executor of the estate concerned". In *Die Meester v Meyer en Andere*,[63] Margo J (with whom Davidson J and Franklin J concurred),

[62] None of which is applicable to the present case.

[63] 1975 (2) SA 1 (T).

dealing with the approach to be followed by a court in exercising its discretion under this section, held as follows:[64]

> "Hoe dit ook al sy onder die gemenereg en ingevolge die gewysdes onder die ou Boedelwet, 24 van 1913, is die Hof nou gemagtig kragtens art. 54(1)(a)(v) van die huidige Boedelwet om 'n eksekuteur te verwyder indien dit onwenslik is dat hy as eksekuteur van die betrokke boedel optree. Die Hof het hier 'n diskresie en myns insiens bly die oorheersende oorweging die belange van die boedel en van die begunstigdes."[65]

[57] It seems clear that there has been a complete breakdown of trust between Mr Gory and Mr Kolver and that the former has lost all faith in the latter as executor. On the other hand, as will be discussed in greater detail below, it cannot in my view be said that Mr Kolver has been guilty of any maladministration or any other form of misconduct in respect of Mr Brooks' deceased estate.[66] The question whether it is just and equitable that Mr Kolver be removed from his office as executor is thus a difficult one. The discretion vested in the High Court by section 54(1)(a)(v) is a discretion in the strict sense and an appellate court will ordinarily only interfere with the exercise of that discretion in limited circumstances; for example if it is shown that the High Court did not act judicially in exercising its discretion, or based the exercise of that

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[64] Id at 17E-F.

[65] "[Whatever the position may be] [u]nder the common law and according to the authorities under the old Administration of Estates Act, 24 of 1913, the Court is now empowered in terms of section 54(1)(a)(v) of the present Administration of Estates Act, 66 of 1965, to remove an executor from office if it is undesirable that he should act as executor of the estate concerned. The Court has a discretion and the predominating consideration remains the interests of the estate and of the beneficiaries." (Translation taken from the headnote to the reported judgment at 2E-F.)

[66] On the removal by the court of an executor in terms of section 54(1)(a)(v), see generally Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* 2004 ed (The Taxpayer CC, Cape Town) at 11-1–11-5 and the authorities there cited.

discretion on a misdirection on the material facts or on wrong principles of law.[67] Following this approach, I am of the view that this Court should not interfere with the exercise by the High Court of its discretion in this regard. The estate is a small one and much of the work of administration has already been done by Mr Kolver and will not have to be repeated. It is also quite possible that Mr Gory himself may be appointed as executor, thereby keeping the additional costs to a minimum. On balance, therefore, it would seem that the interests of the estate and the beneficiaries will be served by the removal of Mr Kolver as executor. This will render it necessary to reformulate paragraphs 9.1 and 9.2 of the High Court order so as to suspend the administration of the deceased estate pending the appointment of a new executor by the Master.

[58] Paragraph 10 of the High Court order deprived Mr Kolver of entitlement to remuneration for his services in connection with the administration of the deceased estate and to reimbursement for expenses incurred. In my opinion, the High Court did exercise its discretion unjudicially in this regard in that its decision was not based on substantial reasons.[68] Mr Kolver may have been insensitive, lacking in tact and closed-minded in his dealings with Mr Gory. Nonetheless, the High Court's conclusion that he was "obstructive and tried his best to steamroller the administration of the estate through on a basis that the applicant's claim be negated" failed to give

[67] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* above n 20 at para 11; *Mabaso v Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20; *S v Basson* 2005 (12) BCLR 1192 (CC) at para 110; *Giddey NO v JC Barnard and Partners* CCT 65/05, 1 September 2006, as yet unreported at para 19; *South African Broadcasting Corporation Limited v The National Director of Public Prosecutions and Others* CCT 58/06, 21 September 2006, as yet unreported at paras 39 and 41.

[68] See for example *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335D-E.

proper weight to the fact that he could not recognise Mr Gory's claim given the law in existence at the time. In fact, Mr Kolver would have been acting unlawfully had he recognised Mr Gory as the surviving spouse of the deceased Mr Brooks for the purposes of section 1(1) of the Act. Before he was legally able to do so, the constitutionality of this section had to be challenged in legal proceedings, a court had to declare the section to be unconstitutional and such a declaration of invalidity had to be confirmed by this Court. This being so, the High Court's statement that Mr Kolver "bluntly refused to consider the applicant's claim" is based on an incorrect principle.

[59] Mr Kolver advised Mr Gory at an early stage that the immovable property would in his view have to be sold to generate cash to settle the debts of the deceased estate. Notwithstanding Mr Gory having legal representation from shortly after the death of the deceased on 30 April 2005, he made contradictory claims against the estate without furnishing Mr Kolver with sufficient facts in support of these claims. He also failed to institute proceedings for a declaration of constitutional invalidity until early in October 2005. In the meantime, Mr Kolver was obliged to take the movable assets of the estate into his custody[69] and to take steps to sell the immovable property to defray the debts of the estate which were increasing continually as no income was being received from the property or from any other source. In view of the small size of the estate, he could not realistically be expected to suspend winding-up the estate until such time as Mr Gory had formally challenged the legislation in question. Had Mr Gory acted more expeditiously in challenging the constitutional

[69] Section 26(1) of the Administration of Estates Act 66 of 1965.

validity of section 1(1) of the Act, certain of the problems which later arose between the parties in relation to the assets of the intestate estate might well have been avoided. In the light of these circumstances, paragraph 10 of the High Court order must be set aside.

Costs

[60] In terms of paragraph 11 of the High Court order, Mr Kolver was ordered *de bonis propriis* to pay one half of Mr Gory's costs, the other half of such costs to be paid by the second and third respondents jointly and severally. In this regard, it is important to note that Mr Kolver did not oppose the declaration of constitutional invalidity of section 1(1) sought. He opposed only the costs order sought against him in his capacity as executor. Contrary to what was said by the High Court in its judgment, Mr Gory did *not* in his notice of motion ask for costs against Mr Kolver in his personal capacity. Counsel for Mr Gory eventually conceded before us that it was only in argument before Hartzenberg J that reference was made to a *de bonis propriis* costs order against Mr Kolver and that the notice of motion was not amended in this regard. This being so, and in the light of the circumstances set out in the preceding two paragraphs of this judgment, it was neither just nor equitable for Mr Kolver to have been burdened by the High Court with a costs order in his personal capacity and paragraph 11 of the High Court order must be set aside.

[61] Who then should, as a matter of justice and equity, pay Mr Gory's costs in the court below? The reason why Hartzenberg J ordered the second and third respondents to pay one half of such costs was that, in his view, Mr Kolver "was aided and abetted [in what Hartzenberg J regarded as his 'obstructive' conduct[70]] by the second and third respondents" and that their denial of a permanent life partnership with reciprocal duties of support between Mr Gory and their son could not "be justified".[71] To my mind, it is apparent from the affidavits filed in the court below that, while the second and third respondents treated Mr Gory, in the period after their son's sudden death, in a manner that was insensitive to Mr Gory's shock and grief, they had nevertheless gone some way during their son's life towards acknowledging Mr Gory as their son's life partner and overcoming such prejudices as they may have had based on their son's sexual orientation. As with all inheritance disputes, it is distressing to see people who apparently cared deeply for the deceased in their own ways set at loggerheads over the question of entitlement to the deceased's estate. I do not consider it to be in the interests of justice and equity that the second and third respondents be mulcted in costs. For reasons on which I will elaborate below, I am of the view that the fairest solution would be to order the fifth respondent (the Minister) to pay the costs incurred by Mr Gory in the High Court.

[62] As indicated above, apart from filing an answering affidavit dealing in the main with the question of retrospectivity of the declaration of constitutional invalidity of section 1(1) of the Act, the Minister did not *formally* oppose Mr Gory's application in

[70] See para [52] above.

[71] See the reported judgment, above n 1 at para 30.

the High Court.[72] In his application for confirmation of the relevant paragraphs of the order of the High Court, however, Mr Gory asked that the Minister be ordered to pay his costs in the proceedings in this Court.

[63] The Minister relied on a number of judgments of this Court in support of the proposition that government departments should provide assistance to the courts by providing them with sufficient information in order to enable them to consider matters involving a constitutional challenge to legislation on full facts.[73] The Minister submitted that, as she had raised valid constitutional concerns in the High Court on the issue of retrospectivity, she had "done her duty" by assisting the High Court in arriving at a just and fair conclusion.

[64] The problem with this argument is that, despite the fact that the High Court did not limit its declaration of constitutional invalidity of section 1(1) of the Act in the manner suggested by the Minister in her affidavit, the Minister opposed Mr Gory's application to this Court for confirmation of such declaration on the sole basis that Mr Gory had also asked for a costs order against her in this Court. Despite some initial confusion and uncertainty in argument before us, it was ultimately made clear that the Minister still abided by the concerns expressed in the answering affidavit on the

[72] Nevertheless, as pointed out above, the submissions made in the Minister's answering affidavit did, in substance, constitute opposition to the relief sought by Mr Gory.

[73] See *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 41; *Khosa and Others v Minister of Social Development; Mahlaule v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at paras 13, 14, 19 and 25, *S v Ntsele* above n 36 at para 13; *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5; *S v Mello and Another* 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 11; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* above n 20 at para 7.

question of retrospectivity and that these concerns had *not* been addressed by the order made by the High Court. This notwithstanding, the Minister did not see fit to oppose Mr Gory's application to this Court for confirmation of, inter alia, paragraph 3 of the High Court order dealing with retrospectivity. To my mind, something more substantive is required when a state official is called upon to deal with the constitutionality of a statutory provision falling under his or her administration and with the formulation of an appropriate remedy in the event that such provision is held to be constitutionally invalid is under consideration by a court.

[65] The State is under an ongoing constitutional obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights"[74] by ensuring (inter alia) that legislation which violates constitutional rights is amended or replaced. Despite this obligation, and despite dicta of this Court to the effect that comprehensive legislation accommodating same-sex life partnerships in a constitutionally acceptable manner is necessary,[75] such legislation has not yet been forthcoming. Members of the gay and lesbian community have continued to have to approach the courts to challenge legislation violating their constitutional rights and, in this way, to achieve piecemeal reform of the law. This is illustrated yet again by the present proceedings. In the final analysis, it is the State which is responsible for section 1(1) of the Act still remaining on the statute books in its unconstitutional form. The estate is a small one, but the principle involved is important. The effect of ordering Mr Gory, Mr Brooks' parents

[74] Section 7(2) of the Constitution.

[75] See *J and Another v Director General, Department of Home Affairs, and Others* above n 25 at paras 23 and 25; *Minister of Home Affairs and Another v Fourie and Others* above n 9 at paras 58 and 116.

or Mr Kolver in his capacity as executor to pay costs would be to burden those ill-resourced to do so with the costs of asserting important constitutional rights in the interests of the broader society. The exceptional circumstances of this case call for an exceptional costs order. Justice and equity thus require that the Minister should be ordered to pay Mr Gory's costs, not only in this Court, but also in the court below, as well as the costs of the first respondent in both courts.

Order

[66] In the circumstances, the following order is made:

(a) The application for leave to intervene by the first to the fourth intervening parties is granted, with no order being made as to costs.

(b) The conditional application for leave to intervene by Mr Bobby Lee Bell is granted, with no order being made as to costs.

(c) The first respondent's application for leave to appeal is granted, the appeal succeeds in part and is dismissed in part, as appears from paragraph **(f)** below.

(d) The application for confirmation is granted to the extent set out in paragraph **(f)** below.

(e) The order handed down by the Pretoria High Court on 31 March 2006 is set aside.

(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".

3. In terms of section 172(1)(b) of the Constitution, the orders in the preceding two paragraphs of this order shall not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

4. If serious administrative or practical problems are experienced, any interested person may approach this Court for a variation of this order.

5. It is declared that the applicant and the late Henry Harrison Brooks were, at the time of the death of Mr Brooks, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support.

6. It is declared that the applicant is the sole intestate heir of the late Henry Harrison Brooks.

7. The agreement, dated 9 September 2005, in which the property situated at 152 First Avenue, Bezuidenhout Valley, Johannesburg was purportedly sold to the fourth and/or fifth respondents in the Pretoria High Court is declared to be of no force and effect.

8. The first, second and third respondents jointly and severally, the one complying the other to be absolved, are directed to return the items on X2, as amended by the Pretoria High Court, to the applicant within seven days of the date of this order.

9. The first respondent is removed from his office as executor of the estate of the late Henry Harrison Brooks and the administration of this estate is suspended pending the appointment of a new executor by the Master of the High Court, Pretoria.

(g) The fifth respondent is ordered to pay the applicant's and the first respondent's costs in this Court and in the Pretoria High Court, including the costs of two counsel in the case of the applicant where applicable.

Langa CJ, Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Van Heerden AJ.

For the Applicant:	Advocate DI Berger SC and Advocate PL Mokoena instructed by Nicholls, Cambanis & Associates.
For the First Respondent:	Advocate E Prinsloo instructed by Danie Kolver Inc.
For the Seventh Respondent:	Advocate S Nthai and Advocate M Mokadikoa instructed by The State Attorney, Pretoria.
For the Intervening Parties:	Advocate P Hodes SC and Advocate A Katz instructed by Smith, Tabata, Buchanan Boyes Attorneys.
For the Counter-intervening Party:	Advocate M Chaskalson and Advocate M Sikhakhane instructed by Morkel & De Villiers.