

THE RIGHT TO EQUALITY AND INTESTATE SUCCESSION - LAUBSCHER N.O. V DUPLAN AND ANOTHER

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The Constitutional Court confirmed in *Laubscher N.O. v Duplan and Another*, the constitutionally enshrined right to equality and freedom from unfair discrimination on grounds such as gender and sexual orientation. The matter concerned the right of a permanent same-sex life partner to inherit intestate from the deceased's estate. It sheds light on the rights of unmarried same-sex partners in a permanent same-sex partnership in which reciprocal duties of support have been undertaken.

The point of contention is whether the applicant, Dr Laubscher, the deceased's brother, or the respondent, Mr Duplan, the deceased's permanent same-sex partner, is entitled to inherit from the intestate estate of the deceased. The Commission for Gender Equality (CGE) was granted access as a friend of the court as part of its mandate to promote respect for gender equality.

The facts briefly are that the respondent and the deceased neither solemnised nor registered their partnership in terms of the *Civil Unions Act* (CUA). At the passing of the deceased, no children had been adopted to whom his estate could pass. In the High Court, the respondent relied on *Gory v Kolver NO*, previously heard by the Constitutional Court prior to the enactment of the CUA in 2006. In that case, section 1(1) of the *Intestate Succession Act* (ISA) was declared unconstitutional because it did not permit individuals in same-sex permanent partnerships to inherit intestate. To remedy this constitutional defect, the Constitutional Court read in the words "*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*" after each appearance of the term "spouse". This ensured that permanent same-sex life partners were protected. Based on the above, the respondent argued that regardless of the absence of legal formalities in terms of the CUA, he was entitled to inherit intestate from the deceased's estate.

The applicant averred that regardless of the judgment in *Gory*, that the non-registration of the union disqualified the respondent from inheriting. The High Court held that it could not deviate from the decision in *Gory* and that the only permitted deviation would be where the provision declared unconstitutional had been amended, or there occurred a material change by legislative intervention. The High Court further noted that the CUA did not aim to alter the position of heterosexual couples who have elected not to marry nor did it aim to alter the position of same-sex couples who likewise elected not to solemnise and register their same-sex partnerships.

In the Constitutional Court, the appellant argued that the CUA in effect repealed or nullified the findings in *Gory*. He said that the judgment was an interim measure for a time when same-sex couples could not enter into marriage. This was rectified by Parliament in the CUA

which allows for same-sex marriage and thus for the inheritance by, for all intents and purposes, a spouse. He also relied on *Volks v Robinson* which found that heterosexual couples have the choice to enter into marriages and thus gain the legal protection that attaches. In the same breath, if there is legislation which governs same-sex marriages, it would be illogical to extend the same protection to unmarried same sex-couples, especially when that protection is not extended to their heterosexual peers.

The respondent argued that the CUA and the *Gory* judgment can and do exist side by side. The reasoning behind *Gory* was to permit same-sex permanent partners to inherit despite being unmarried. The CGE further argued that *Gory* gives effect to the spirit, purport and objects of the Bill of Rights because it made it clear that there is no room for preference in protection when it comes to different family structures.

The Constitutional Court held that the ruling in *Gory* was not an interim measure as the deciding court was aware of the imminent enactment of the CUA and regardless, made provision for intestate succession in the specific circumstance of same-sex permanent partners. The Bench emphasised that the enactment of the CUA did not specifically amend section 1(1) of *ISA* as was required by *Gory* and therefore, *Gory* remains valid as protection for same-sex permanent partners.

The Constitutional Court astutely noted that suggesting that the protection offered by *Gory* unfairly discriminated against opposite sex permanent partners who were not equally protected was neither here nor there. This is because there has yet to be a constitutional challenge from that category of people. *Gory* addressed intestate succession of permanent same-sex partners, whilst the CUA addressed same-sex marriage - two different intimate relationships.

This judgment underlines the need to guard against unfair discrimination based on seemingly sound grounds. The existence of legislation governing marriage, same-sex or otherwise, does not make it mandatory for couples to enter into such unions for the purposes of the *ISA*. It is not the place of the law to instruct citizens on how to conduct their intimate relationships. Neither should the law threaten to withhold protection for failure to enter into legislated unions.