



CONSTITUTIONAL COURT OF SOUTH AFRICA

Jane Bwanya v Master of the High Court, Cape Town and Others

CCT 241/20

Date of hearing: 16 February 2021
Date of judgment: 31 December 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 31 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity of section 1(1) of the Intestate Succession Act made by the Western Cape Division of the High Court. The judgment also encompasses an application for a direct appeal against the High Court's dismissal of a challenge to the constitutional validity of the definition of "survivor" under section 1 of the Maintenance of Surviving Spouses Act.

The applicant and the deceased lived together in a committed romantic relationship. Two months before they were to commence lobola negotiations, the deceased passed away. The deceased died testate having nominated his mother as the only heir to his estate. His mother, however, had predeceased him.

The applicant lodged two claims in terms of the Administration of Estates Act against the deceased's estate. One claim, founded on the Intestate Succession Act, was for inheritance. The other, pegged on the Maintenance of Surviving Spouses Act, was for maintenance. The basis of the claims was the following: the deceased was her life partner; they had been living together in a permanent, stable and intimate relationship; they were engaged to be married; their partnership was analogous to, or had most of the characteristics of a marriage; the deceased supported her financially, emotionally and introduced her to friends as his wife; they had undertaken reciprocal duties of support; and were to start a family together. The executor of the deceased's estate rejected both claims on the basis that the Intestate Succession Act and Maintenance of Surviving Spouses Act conferred benefits only on married couples, not partners in permanent life partnerships.

The applicant challenged the constitutionality of both Acts before the High Court. That Court declared section 1(1) of the Intestate Succession Act unconstitutional, but rejected the challenge to the constitutionality of section 1 of the Maintenance of Surviving Spouses Act.

Before the Constitutional Court, the applicant contended that section 1(1) of the Intestate Succession Act discriminates against her and women similarly placed on the grounds of gender, sexual orientation and marital status. This constituted unfair discrimination. It also violated their rights to dignity and equality. The applicant also argued that the Intestate Succession Act treats surviving opposite-sex life partners differently to surviving same-sex life partners and affords same-sex life partners greater rights than opposite-sex life partners, despite both having the ability to marry. The applicant urged the Constitutional to confirm the High Court's declaration of constitutional invalidity of section 1(1) of the Intestate Succession Act. Regarding section 1 of the Maintenance of Surviving Spouses Act, the applicant argued that the Constitution requires the extension of maintenance under this Act to survivors in other forms of relationships, including permanent heterosexual life partnerships, where partners have undertaken reciprocal duties of support. The applicant argued that the exclusion of this category deprives her and those similarly placed of their right to equal protection and benefit of the law, constituted unfair discrimination on the grounds relied upon in relation to the succession claim and violated their right to dignity.

The Minister of Justice and Correctional Services submitted that should this Court find that rights have been infringed, he would make no attempt to justify such infringement. On section 1(1) of the Intestate Succession Act, the Minister explained that no legislative amendments have been made to ensure sameness of treatment between same- and opposite-sex life partners due to the particular disadvantage and vulnerability experienced by same-sex couples. In relation to the Maintenance of Surviving Spouses Act, the Minister argues that the State's approach to maintenance in opposite-sex life partnerships is consistent with the Constitutional Court's judgment in *Volks v Robinson*.

The majority judgment penned by Madlanga J stressed that permanent life partnerships are a legitimate family structure and are deserving of respect and, given recent developments of the common law, entitled to legal protection. The judgment held that the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is unconstitutional and invalid insofar as it omits the words "and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate". The judgment ordered that these words be read into the definition. "Spouse" and "marriage" are also declared to include a person in a permanent life partnership. The declaration of invalidity was suspended for 18 months to afford Parliament an opportunity to cure the constitutional defect.

Additionally, the majority judgment confirmed the declaration of invalidity of section 1(1) of the Intestate Succession Act made by the High Court. Likewise, this declaration of invalidity was suspended for 18 months for the same reason as above.

In a dissenting judgment, Mogoeng CJ parted ways with the majority judgment and third judgment penned by Jafta J on the reasoning and outcome. He said that it would be unconscionable, unjust and most insensitive to the plight of unmarried heterosexual couples to adopt a legal posture that seeks to preclude them from ever being entitled to be beneficiaries of maintenance and inheritance from their permanent life partners, regardless of the explicit or implicit terms of their partnership. And he accepted, without deciding, that the different treatment given to married couples and permanent life partners by the assailed provisions amounts to discrimination.

He also held that the fundamental differences between marriage and permanent life partnerships necessitate the existence of different regimes for each with regard to maintenance and inheritance. Furthermore, the Chief Justice said that a familial or spousal relationship, except for the operation of law as correctly articulated by the majority in *Volks*, does not inevitably give rise to a legally enforceable duty of support or the entitlement to inherit, in disregard for the proprietary regime opted for by the parties. This should, in his view, apply with equal force to a permanent life partnership. He further said that the examples cited in the main judgment as support for the equal treatment of marriage and permanent life partnerships are not drawn from cases relating to permanent life partnerships of heterosexuals as they are all about people who actually wanted to and were planning to get married soon, when tragedy struck. Thus, we do not have any permanent life partnerships of heterosexuals to draw from in support of what is being pursued on their behalf, here. And relevant as these examples are, they are far from conclusive in determining the existence of a legally enforceable duty of support or the entitlement to inherit.

Moreover, he found that to say that there is a choice to stay married just as there is a choice to cohabit does not necessarily mean that it is or will always be an easy choice to make, as it may at times be a very difficult judgement call to make. But, a choice it remains to be, however tough. He went on to say that the common law is well able, subject to development, to provide permanent life partners with a just, equitable and effective remedy under deserving circumstances.

The majority in *Volks* held that discrimination on the basis of marital status in relation to intestate succession against unmarried heterosexual partners is not unfair. This binding decision may, according to our jurisprudence, only be departed from if it is shown to be clearly wrong. The majority in this matter says that it is unable to arrive at that conclusion and should, in his view, not depart from *Volks* since there is no other legal basis to do so.

He would therefore set aside the declaration of unconstitutionality by the High Court since there is a reasonable justification for the limitation of the right to equality, in an open and democratic society based on freedom, equality and dignity. As such, the discrimination is fair, and the impugned provisions are therefore constitutionally valid.

The third judgment penned by Jafta J (Mhlantla J and Tshiqi J concurring), agreed with the first judgment that the declaration of invalidity of section 1(1) of the Intestate Succession Act made by the High Court should be confirmed, and that leave to appeal should be

granted despite the fact that the matter is moot. However, it disagreed that the appeal should succeed. The third judgment found that the High Court was right in concluding that the decision of the Constitutional Court in *Volks*, in which this Court held that section 2(1) of the Maintenance of Surviving Spouses Act did not constitute unfair discrimination and was therefore constitutionally compliant, stands in the way of the claim for invalidity in this matter. In terms of the principle of judicial precedent, the High Court was bound by the interpretation in *Volks*, a decision of a court higher than the High Court in the court hierarchy. The Constitutional Court was also bound by *Volks* as courts were obliged to follow their previous decisions and may depart from them only if they were clearly wrong. The third judgment proceeded to consider *Volks*' first and second majority judgments as well as the first and second minority judgments in establishing whether such decision was in fact clearly wrong. The third judgment suggested that the real problem did not lie in how section 2(1) of the Maintenance of Surviving Spouses Act itself regulated its subject matter, but rather the problem was in Parliament's failure to pass legislation that regulated the affairs of millions of people in permanent life partnerships. Therefore, the collective focus should be directed to once more nudge Parliament to pass the necessary legislation, and such recommendation cannot constitute a breach of the principle of separation of powers. In light of all these reasons, the third judgment was not persuaded that *Volks* was wrongly decided and consequently, it was unable to conclude that the decision that section 2(1) does not constitute unfair discrimination is clearly wrong. In the result, the third judgment held that it was appropriate to refer the matter to Parliament to consider passing legislation to address the affairs of permanent life partnerships.