



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Rasmus Elardus Erasmus Laubscher N.O. v Eric Jean Spiridion Duplan and Another**

**CCT 234/15**

**Date of hearing: 18 August 2016**

**Date of judgment: 29 November 2016**

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### MEDIA SUMMARY

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*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 30 November 2016, the Constitutional Court handed down judgment in a matter concerning the continued recognition of intestate inheritance rights for same-sex permanent partners in light of the enactment of the Civil Union Act 17 of 2006.

The applicant (Mr Laubscher) is the brother of the late Cornelius Daniël Laubscher (deceased) and the executor of the deceased's estate. The respondent (Mr Duplan) had lived in a same-sex permanent partnership with the deceased from 2003 until the deceased passed away in 2015. They had undertaken reciprocal duties of support. However, Mr Duplan and the deceased never solemnised and registered their same-sex permanent partnership under the Civil Union Act. The deceased passed away without leaving a will.

The High Court had to determine whether Mr Duplan was entitled to intestate inheritance of the deceased estate. In November 2006, one week before the Civil Union Act came into effect, the Constitutional Court in *Gory v Kolver (Gory)* extended the definition of "spouse" in the Intestate Succession Act to include permanent same-sex partners who had undertaken reciprocal duties of support. The question was whether the enactment of the Civil Union Act, enabling same-sex partners to enter into civil unions, had the effect of replacing the Court's extended definition of "spouse" in *Gory*. The High Court found that it was still bound to the *Gory* decision and proceeded to remove Mr Laubscher as the appointed executor of the deceased estate.

The majority judgment by Mbha AJ (Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring) found that the enactment of the Civil Union Act did not have the effect of specifically amending section 1(1) of the Intestate Succession Act. The majority held that the Civil Union Act created a new category of

beneficiaries, namely same-sex partners who had entered into registered civil unions. As a result, the Court's earlier inclusion of permanent same-sex partners within the definition of "spouse" was still operative.

The majority assessed this Court's earlier decision in *Volks NO v Robinson (Volks)*, where an opposite sex permanent partner was refused the right to claim for maintenance from the intestate estate of her deceased partner. In finding that the right to claim maintenance and the right to inherit from an intestate estate each warranted different considerations, the majority held that the facts did not call for a reconsideration of *Volks* because the legal mechanism was distinguishable. The majority found that overturning *Volks* would not offer relief to the same-sex permanent partners in the case before it, nor would it afford opposite-sex partners the right to inherit intestate – therefore it was an immaterial consideration. The majority noted that an inequality may exist, in that heterosexual partners currently do not benefit under the Intestate Succession Act, but held that it was for the Legislature to decide whether to afford heterosexual partners the same rights or to limit the rights of same-sex permanent partners under the Intestate Succession Act. The appeal was dismissed.

In a separate concurring judgment, Froneman J differed from the reasoning of the majority judgment on two accounts: first, the reach of the order made by this Court in *Gory* and second, the import of this Court's decision in *Volks*. As to the reach of *Gory*, Froneman J came to the conclusion that it must be restricted to the discriminatory mischief it was called upon to remedy, namely to remove the impediment suffered by permanent same-sex life partners of not being legally entitled to marry. *Volks* established the general principle that to remove the impediment to marry for same-sex partners was a legitimate choice for the legislature to make in remedying gender discrimination. Logically, one must directly confront the obstacle that this principle, as laid down in *Volks*, presented to the success of Mr Duplan's claim to intestate inheritance. The Civil Union Act had now removed the impediment to "marry" for same-sex couples.

When the Court departs from a previous decision it must be satisfied that the previous precedent is clearly wrong. Froneman J held that with the benefit of hindsight it was clearly wrong to attempt to eradicate unfair discrimination by creating another form of unfair discrimination as was done in *Volks*. Unshackled from *Volks*, section 13(2)(b) of the Civil Union Act ought to be interpreted in a manner that best conformed and least infringed the fundamental right to equality in the Bill of Rights. Apart from those who chose to accept its benefits by marriage formalisation, there remained a residual category of unmarried same-sex and heterosexual partners with reciprocal support duties that were not excluded on a literal reading of the section. They remained entitled to inherit intestate. Mr Duplan fell within that category. For that reason Froneman J supported the order made in the first judgment.