INTESTATE SUCCESSION AND THE SURVIVOR OF AN UNFORMALISED SAME-SEX CONJUGAL RELATIONSHIP:

Laubscher No v Duplan 2017 (2) SA 264 (CC)

1 Introduction

When a person dies intestate his or her heirs are determined by the provisions of section 1(1) and (2) of the Intestate Succession Act 81 of 1987 (hereinafter "the Intestate Succession Act"). Included amongst the heirs is the deceased's surviving spouse, who either takes the entire estate or shares it with the deceased's descendants (if any) (s 1(1)(a) and (c) of the Act; for a detailed exposition of the rules of intestate succession see Corbett, Hofmeyr, and Kahn *The Law of Succession in South Africa* 2ed (2001) 562–577; De Waal and Schoeman-Malan *Law of Succession* 5ed (2015) 13–35). Historically, the reference to "spouse" in the Act was taken to mean a person to whom the deceased was married in terms of the Marriage Act 25 of 1961 (hereinafter "the Marriage Act"). Accordingly, persons who were married to the deceased merely by religious rites and persons with whom the deceased was in a long-term conjugal relationship that was unformalised by marriage were excluded.

The advent of constitutional democracy in South Africa resulted in a number of challenges to this status quo through reliance on the equality clause of the Bill of Rights (s 9 of The Constitution of the Republic of South Africa, 1996). As a result of these challenges it has now been recognised that the survivor of a Hindu marriage (*Govender v Ragavayah* NO 2009 (3) SA 178 (D)), a monogamous Muslim marriage (*Daniels v Campbell NO* 2004 (5) SA 331 (CC)), and a polygynous Muslim marriage (*Hassam v Jacobs NO* 2009 (5) SA 572 (CC)) all have the right to inherit on intestacy as a "spouse". Furthermore, in a groundbreaking decision in *Gory v Kolver NO (Starke and others intervening)* (2007 (4) SA 97 (CC)) (hereinafter "*Gory*") the Constitutional Court recognised that the exclusion of the surviving partner of a gay or lesbian relationship from the right to inherit on intestacy was unconstitutional, and directed that the relevant sections of the Intestate Succession Act be amended by a reading-in of additional words to remedy the unconstitutionality. These words conferred the right to inherit on intestacy on the survivor of a monogamous permanent same-sex partnership in which the partners undertook reciprocal duties of support (*Gory* par 66(f)2).

The decision in *Gory* was preceded by the Constitutional Court's judgment in *Minister of Home Affairs v Fourie* (2006 (1) SA 524 (CC)) (hereinafter

"*Fourie*") in which that court had recognised that the exclusion of gay and lesbian couples from the institution of marriage was unconstitutional (*Fourie* par 162(1)(c)(i) and par 162(2)(c)), and directed Parliament to remedy this defect within twelve months, failing which an appropriate amendment to the Marriage Act would automatically take effect so as to facilitate same-sex marriage (*Fourie* par 162(1)(c)(ii) read with par 162(2)(d) and (e)). In the event, Parliament enacted the Civil Union Act 17 of 2006 (hereinafter "the Civil Union Act") which provides for same-sex and opposite-sex couples to enter into a marriage or civil partnership (s 11(1)) that has the same consequences as a marriage under the Marriage Act (s 13). Although it was clear from the Constitutional Court's order in *Fourie* that the exclusion of same-sex couples from the institution of marriage would be remedied in due course, either by legislation or by the court's order, the terms of the order issued in *Gory* did not state that its application was limited to deaths occurring during the period preceding the introduction of same-sex marriage. Following the enactment of the Civil Union Act it has consequently been possible – on a literal interpretation of the reading-in – for the survivors of both formalised and unformalised same-sex conjugal relationships to inherit on intestacy. This differs from the treatment of opposite-sex conjugal relationships whose survivors have no right to inherit on intestacy unless they have married or entered into a civil partnership in terms of the Marriage Act or Civil Union Act or have married in terms of Hindu or Muslim rites. Conjugal relationships whose parties have not entered into such a marriage or civil partnership will hereinafter be described for convenience sake as "unformalised".

At the time of writing no survivor of an unformalised opposite-sex relationship has challenged his or her exclusion from intestate succession. Possibly this reticence has been influenced by the decision in *Volks NO v Robinson* (2005 (5) BCLR 446 (CC)) (hereinafter "*Volks*"). In *Volks* the Constitutional Court held that it is not unconstitutional for the Maintenance of Surviving Spouses Act 27 of 1990 (hereinafter "the Maintenance of Surviving Spouses Act") to distinguish between married and unmarried persons by giving the survivor of a marriage a claim for reasonable maintenance against the estate of the deceased spouse but not giving a similar claim to the survivor of a relationship in which the parties did not marry.

Paleker has raised the question whether the *Gory* order "must still be applied in light of the Civil Union Act" but he comes to no firm conclusion, and states tentatively that "if marriage … is a precondition for inheriting, persons in same-sex unions who have not solemnised their relationship after the coming into force of the Civil Union Act … may be precluded from inheriting intestate from each other" (Jamneck, Rautenbach, Paleker, van der Linde, and Wood-Bodley *The Law of Succession in South Africa* 3ed (2017) 33). On the other hand De Waal and Schoeman-Malan are clearly of the view that the order in the *Gory* case still operates and – whilst regarding the current position as "anomalous" – they state that it "will probably continue until the Domestic Partnerships Bill [GN36 in *GG* 30663 of 2008-1-14] eventually does become law" (De Waal and Schoeman-Malan *Law of Succession* 19). This has also been the interpretation accepted by the Master's office acting on advice from the Senior State Law Advisor (see

"Chief Master's Directive 2 of 2015" note 16 2015-08-03 http://www.justice.gov.za/master/m_docs/2015-02_chm-directive.pdf (accessed 2017-12-04). The different treatment accorded same-sex couples by the continued retention of the benefits conferred by *Gory* has been defended on the grounds of substantive equality, since many practical obstacles still stand in the way of same-sex couples formalising their relationships (Wood-Bodley "Intestate Succession and Gay and Lesbian Couples" 2008 125 *SALJ* 46 54–60).

The question of the continued applicability of the reading-in order in *Gory* has now come before the Constitutional Court in *Laubscher NO v Duplan* (2017 (2) SA 264 (CC)) (hereinafter "*Laubscher*") and it is this case which is the focus of this note.

2 The facts and judgment

Laubscher concerned the question as to who was entitled to inherit the estate of the late Cornelius Daniel Laubscher (hereinafter "the deceased") who died intestate on 13 February 2015 (*Laubscher* par 1 read with par 3). The sole contestants for the inheritance were the deceased's brother (hereinafter "the applicant") who was his closest surviving blood relation (*Laubscher* par 1 read with par 3) and the deceased's surviving partner (hereinafter "the respondent") who had lived with the deceased until his death in a permanent same-sex conjugal relationship in which the parties had undertaken reciprocal duties of support (*Laubscher* par 1 read with par 3). The deceased and respondent had not entered into a marriage or partnership pursuant to the provisions of the Civil Union Act (*Laubscher* par 3).

Relying on the *Gory* reading-in, the respondent successfully applied to the High Court of South Africa, Gauteng Division, Pretoria for an order declaring him to be the deceased's intestate heir, and removing the applicant as executor (par 9), and in due course the matter came before the Constitutional Court by way of an application for leave to appeal (par 1). (The judgment in the *court a quo* is *Duplan v Loubser* [sic] NO ((24589/2015) [2015] ZAGPPHC 849 (2015-11-23)). In the event leave to appeal was granted but the appeal itself was dismissed (par 57).

The judgment of the Constitutional Court was delivered by Mbha AJ with eight of his fellow judges concurring (hereinafter "the judgment" or "the majority judgment"). Froneman J delivered a separate judgment in which he concurred in the order of the majority of the court but dissented from its reasons, and set forth entirely different reasons of his own (hereinafter "the dissenting judgment"). In the discussion that follows the main focus will be on the majority judgment. For reasons that will become clearer in due course, much of the dissenting judgment focussed on a reappraisal of the decision of the Constitutional Court in *Volks*. Insofar as the dissenting judgment relates to the correctness of the Constitutional Court's refusal to recognise a maintenance claim for the survivor of an unformalised opposite-sex relationship in *Volks* it is beyond the scope of this note, and

consequently these arguments will not be critiqued or referred to in any detail.

The applicant rested his case on a five-fold argument, the elements of which are to some extent overlapping. First, he argued that the order made in the *Gory* case was an interim measure that was only intended to hold good until Parliament resolved the underlying mischief (par 11). He argued that this mischief was the exclusion of same-sex partners from the institution of marriage and that it has been addressed by the Civil Union Act insofar as it gives a partner in a civil union the status of a spouse (par 11). Secondly, he relied on the maxim *cessante ratione legis cessat ipsa lex* (once the reason for a law falls away, the law itself ceases to exist) (par 11). Thirdly, he argued that the Civil Union Act amended the law contained in *Gory* and thereby impliedly repealed the *Gory* order (par 11). Fourthly, the applicant argued that to allow the respondent to inherit would be inconsistent with the approach adopted in *Volks*, namely, that a claimant could not complain about being excluded from the benefits of marriage if he or she chose not to marry (par 51). Finally, he argued that it is unfairly discriminatory to allow same-sex partners who have not entered into a civil union to inherit when their opposite-sex counterparts do not (par 12).

2 1 Was the reading-in order an interim measure?

Regarding the issue whether the *Gory* order was an interim measure that fell away once it became possible for same-sex couples to marry, the court (par 21) referred to the following critical passage from the *Gory* judgment (*Gory* par 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 decisions of this Court … will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships. In the interim, there would seem to be no valid reason for treating section 1(1) of the [Intestate Succession] 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."

The *Gory* judgment went on to add (par 29) that

> Once [the] impediment [to same-sex marriage] 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."

It was on the basis of the first passage that the applicant argued that the *Gory* order was intended to be merely an interim order (par 22). The precise basis of the applicant's contention in this respect is not clear, but is possible that it arose from the *Gory* court's use of the term "interim" in the last sentence of the passage. In the event, the court rejected this contention, holding that although the *Gory* order was an "interim" one – because it would

cease to have effect if Parliament should remove it from the Intestate Succession Act (par 24) – this did not mean that the period during which the order would operate was curtailed in any way (par 24).

2 2 Did the Gory reading-in fall away in accordance with the maxim cessante ratione legis cessat ipsa lex?

The court held that even if this "tool of statutory interpretation" is appropriate to constitutional interpretation – a point it left undecided – it was not applicable (par 36). This was because the remedies that the *Gory* and *Fourie* cases had each sought to remedy differed from one another (par 36). In particular, the *Gory* case sought to remedy the exclusion of same-sex partners from inheritance on intestacy whereas the *Fourie* case sought to remedy the mischief that they were not permitted to marry one another (par 36).

2 3 Did the Civil Union Act impliedly repeal the Gory reading-in?

The court held that implied repeal only takes place where the relevant laws are irreconcilable (par 39), and that there is no irreconcilable conflict between the Civil Union Act and the Intestate Succession Act as modified by the *Gory* reading-in (par 39). It added that since the Civil Union Act was enacted a week after the *Gory* judgment it was "highly unlikely, if not impossible" that Parliament had considered the amended Intestate Succession Act when it enacted the Civil Union Act (par 39).

2 4 Would it be inconsistent with the rationale of the Volks case to allow the respondent to inherit?

As mentioned earlier, *Volks* dealt with the question whether the failure of the Maintenance of Surviving Spouses Act to confer on a surviving partner in an unformalised opposite-sex relationship the right to claim maintenance from her deceased partner's estate was unfairly discriminatory, on the ground of marital status, because such a claim would have existed if the partners had married. The *Volks* court had concluded that it was not unfair to distinguish between the survivor of a marriage and the survivor of an unmarried heterosexual relationship in this way because in the case of the unmarried partners such a right of support did not exist during the deceased's lifetime, whereas the married couple had undertaken a duty of support to one another when they married (*Laubscher* judgment par 44, summarising *Volks*). The applicant in *Laubscher* contended that to allow partners in an unformalised same-sex relationship to inherit on intestacy would be inconsistent with this approach – they should not be allowed to avail themselves of the benefits of a formalised relationship if they chose not to enter into a civil union (par 51).

In the event, the majority in *Laubscher* decided that it was inappropriate to apply the reasoning in *Volks* to the situation in *Laubscher* because the situations were not analogous. The court distinguished the two cases on a number of grounds. First, *Volks* concerned rights to maintenance where the deceased had died testate whereas *Laubscher* was concerned with the right to inherit when the deceased died intestate (par 46(1)). This difference was significant, the court held, because "maintenance and intestate succession are different systems" which involve different needs and "elicit different considerations" (par 48). Secondly, there was a will in *Volks* whereas in *Laubscher* the deceased died intestate so, unlike *Volks*, there was no question of interfering with the deceased's freedom of testation (par 46(ii) read with par 47). Thirdly, *Laubscher* involved the application of an existing order conferring inheritance rights and an interpretation thereof in light of legislative changes whereas *Volks* had involved an equality challenge (par 46(iii)).

As an indication that the approach in *Volks* cannot always be transposed into different spheres the court drew attention to the case of *Paixäo v Road Accident Fund* (2012 (6) SA 377 (SCA)) (hereinafter "*Paixäo*") in which the Supreme Court of Appeal extended a dependant's claim to the unmarried partner of a deceased whose death in a motor accident had deprived the partner and her children of the support that he had undertaken to give them (*Laubscher* par 49 and par 50).

The court went on to point out that *Gory* effectively legislated a right to inherit in favour of the survivor of an unformalised same-sex relationship and that Parliament has not seen fit to amend this reading-in in the ten years that have passed since the enactment of the Civil Union Act (*Laubscher* par 51). In all the circumstances the court concluded that the "choice to marry" principle employed in *Volks* was not equally applicable to the *Laubscher* case (par 51).

2 5 Does the continued application of the Gory order unfairly discriminate against opposite-sex permanent partners?

The court held that this question was irrelevant because there has never been a constitutional challenge by an opposite-sex partner challenging his or her exclusion from intestate succession (par 52). In other words, the issue of equality was not properly engaged by the circumstances or pleadings in *Laubscher*.

2 6 The court's conclusion

The majority judgment concluded that the *Gory* order still stands and that same-sex partners in unformalised relationships will accordingly continue to enjoy intestate succession rights unless and until Parliament specifically amends the Intestate Succession Act, as amended by the *Gory* order (par 55).

2 7 The dissenting judgment

The dissenting judgment found that, although the *Gory* order was not restrictively framed, it "must be restricted to the discriminatory relief it was called upon to remedy" (par 59). (This is a peculiar statement because one does not remedy "relief"; presumably what was meant is the discriminatory situation that the *Gory* court was called upon to remedy). This, in Froneman J's view, was the removal of the impediment to marriage then experienced by same-sex partners (par 59). Since the Civil Union Act removed this impediment (so the argument went) Froneman J was of the view that the respondent could not rely on the *Gory* reading-in to inherit on intestacy (see the arguments par 61 − par 71).

Froneman J accepted that the *Gory* court's comments suggested that it intended the reading-in order to remain in place following the introduction of some form of same-sex marriage (par 63 − par 65, where he discusses *Gory's* par 29). He was, however, of the view that these comments were not necessary for the *Gory* court's reasoning and were "not based on any substantive reasoning justifying the conclusions expressed in them" (par 67). In his view this may justify not regarding the *Gory* court's comments as a necessary part of understanding the *Gory* order (par 67). He also argued that not cutting down the *Gory* order by restrictively interpreting it to only apply pending the introduction of same-sex marriage would mean the *Gory* court had erred in "'legislating' too widely when fashioning a reading-in remedy" (par 70).

Furthermore, he viewed the "choice to marry" principle that was applied in *Volks* as being an obstacle to allowing the respondent to inherit insofar as he could – so the argument went – have chosen to marry in terms of the Civil Union Act and have thereby acquired the right to inherit on intestacy (par 59). However, in Froneman J's view this obstacle to the respondent's claim to inherit was not an insuperable one because he proceeded to reappraise the *Volks* judgment (par 73 − par 86) and found that it cannot stand (par 60).

Thus far in Froneman J's judgment there was not yet any basis for him to support the order of the majority of the court that the respondent was entitled to inherit because, as mentioned above, Froneman J took the view that the *Gory* reading-in fell away when the Civil Union Act provided for the formalising of same-sex relationships. In a single concluding paragraph, however, he made the following assertion (par 87):

> "[S]ection 13(2)(b) of the [Civil Union Act] must be interpreted in a manner that best conforms and least infringes the fundamental right to equality in the Bill of Rights. Apart from those who chose to accept its benefits by marriage formalisation, there remains a residual category of unmarried same-sex and heterosexual partners with reciprocal support duties that are not excluded on a literal reading of the section. They remain entitled to inherit from the intestate estate."

Froneman J went on to find that the respondent falls within the abovementioned "residual category", and accordingly he supported the order of the majority of the court that the respondent was entitled to inherit on the

intestacy of his late partner (par 87). Froneman J's reasoning at this point is far from clear and it will be discussed further in the evaluation that follows.

3 Evaluation

The author agrees with the court's conclusion that the *Gory* reading-in was not of temporary duration. However, the court's labelling of the order as an interim one seems inappropriate and misleading. Whilst it is true that Parliament could remove or amend the reading-in at any time in any constitutionally permissible way, the same is true of any judgment and of any Act of Parliament, yet it would be inappropriate to describe all judgments or Acts as interim. The term "interim", apart from indicating "[a] thing done in an interval", carries the suggestion that it is "[a] temporary or provisional arrangement" (Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* (1993) 4ed vol 1 sv "interim"), and it is clear from the *Gory* judgment that its order was not intended to be of temporary duration, as the judgment in *Laubscher* indeed ruled.

That minor quibble aside, the court's ruling on this point is in the author's view correct. What the *Gory* court seems to be saying in the passage quoted earlier (viz. *Gory* par 28 referred to in *Laubscher* par 21) is that, whilst it recognises that a reading-in ordered by it may need to be adjusted by Parliament once provision is made for same-sex couples to marry, the order was no different in that respect to any other reading-in and that this was not a good reason not to order a reading-in. If the right of the survivor of an unformalised same-sex relationship to inherit on intestacy was to be removed following the introduction of some form of same-sex marriage then nuanced transitional arrangements would have been appropriate. It could not be expected of same-sex couples to adapt to the changed legal landscape immediately, and it would in any event not have been logistically possible for all same-sex couples to marry the very moment marriage became legally possible. For this reason – contrary to Froneman J's view – it would have been undesirable for the *Gory* court to have ordered that the reading-in would only apply to same-sex partners "who are not legally entitled to marry" (see Froneman J's suggestion par 70). If the reading-in fell away immediately after the passing of the Civil Union Act and a death occurred shortly after the passing of the Act it may well have been unconstitutional for the surviving same-sex partner, who had not yet formalised his relationship in terms of the Civil Union Act, to been excluded from the right to inherit on intestacy. It would certainly have been an unjust outcome. Furthermore, modifying the reading-in order would have involved the court in making choices that it considered more appropriate for the legislature to make (par 31 of the *Gory* judgment). Accordingly, in the author's view Froneman J's criticisms of the *Gory* reading-in order in his dissenting judgment (par 65 − par 67) are not justified.

Furthermore, if one takes a substantive view of equality then the obstacle to same-sex marriage has not been fully removed, which undermines Froneman J's argument (par 69) which is premised on its removal. For a striking example of a couple for whom formal equality is not enough see *Ex parte CJD* ((53101/2017) [2017] ZAGPPHC 717 (2017-11-17)). A final

objection to Froneman J's approach is that he is essentially attempting to alter the order of the court in *Gory* ex post facto by interpreting it in a way that is clearly inconsistent with the *Gory* judgment (see especially his comments par 67).

The author agrees with the court's conclusion that the *Gory* reading-in did not fall away as a result of the principle *cessante ratione legis cessat ipsa lex*. Whilst it may seem to be a distinction without a difference to say that the *Gory* case was about the right to inherit whereas the Civil Union Act was about the right to marry, the author believes that the distinction is a valid one. This is because, as indicated above, any statutory measure dealing in a fair and equitable way with the right to inherit would have had to take into account the need for transitional arrangements if the right conferred by the reading-in was to be scrapped. In enacting legislation providing for same-sex marriage Parliament was not specifically applying its mind to issues of inheritance which, as indicated, required a nuanced approach. There is also the issue of substantive equality referred to earlier to consider.

In any event, irrespective of how one characterises the issues, it is clear from what has gone before that the *Gory* order was not intended to be a temporary one. The reading-in was to remain in place until specifically removed or modified by Parliament. Accordingly, there was no room for the maxim to operate.

In the author's view the court was correct in finding that the Civil Union Act did not impliedly repeal the *Gory* reading-in. The Act was passed as a direct response to the order of the Constitutional Court in *Fourie* and was not intended to regulate, and did not mention, the rights of persons in unformalised relationships, whether same-sex or opposite-sex. The Act is not irreconcilable with the reading-in and in view of the chronology of events it could not have been a response to the reading-in. As stated in *Joseph v City of Johannesburg* (2010 (4) SA 55 (CC)) (hereinafter "*Joseph*") par 67:

> "It should … not readily be inferred that a law has been impliedly repealed. This is important for certainty in our law."

In *Joseph* the court went on to indicate (*Joseph* par 67) that what is required is a "clear and unequivocal legislative intention to repeal". This intention was not present with respect to the *Gory* reading-in.

The court's application of the "choice to marry" principle in the *Volks* case has quite possibly discouraged any survivor of an opposite-sex relationship from attempting to assert an equality-based claim to inherit on intestacy. The court is, however, correct in finding that the *Volks* case was not binding on it with respect to the use of the "choice to marry" principle, because the intestate succession and maintenance systems are indeed different systems and the relevant policy considerations could be different. By way of illustration, the avoidance of the financial destitution that would otherwise be experienced by the survivor of a conjugal relationship could conceivably be a legitimate policy consideration in deciding whether to recognise a claim to reasonable maintenance, whereas the same consideration does not require that a survivor who is adequately provided for by his or her own means, or by a maintenance claim, should necessarily also have the right to be an

intestate heir. (The author is not saying that the need for maintenance provides sufficient justification for recognising the legal existence of such a claim but merely that it could conceivably be a consideration of policy that a court might take into account). Furthermore, the non-application of the "right to marry" principle is in the author's view further justified by the issues of substantive equality affecting gay and lesbian couples referred to earlier. For many gay and lesbian couples the right to marry is at present an illusory one because it involves "outing" themselves in what is still for the most part a homophobic society (Wood-Bodley 2008 125 *SALJ* 54–55).

The court has correctly left open the question whether the current regime involves unfair discrimination against opposite-sex couples who are in unformalised relationships (par 52). It would clearly prefer that this issue be addressed by Parliament (par 55). It is, however, interesting to note that if it were left to the court it would seem to prefer that any unfair discrimination (if such exists) should be resolved by "equalising up", by extending the category of intestate heirs, rather than by "equalising down", by removing now established rights to inherit on intestacy (par 35 and 55). One should, however, be cautious not to read too much into the court's comments since neither the question whether unfair discrimination does exist, nor the appropriate response if it is present, were fully engaged in the *Laubscher* proceedings.

As indicated earlier, the author believes that the majority judgment was correct in distinguishing *Volks* and finding that it was unnecessary to reappraise it at this stage. It is interesting to note, however, that the majority described Froneman J's argument that *Volks* cannot stand as "stimulating and persuasive" (par 53). In the circumstances, however, an evaluation of Froneman J's views on *Volks* is beyond the scope of this note.

Froneman J's rejection of the "right to marry" principle in the *Volks* case was not sufficient to confer on the respondent a right to inherit because, as we have seen, he also found that the reading-in order in *Gory* was impliedly limited to the period pending the introduction of same-sex marriage. It would seem that the final paragraph of his argument, in which he supports the order of the majority, is intended to provide the missing link, but it is difficult to fathom.

He appears to be saying that section 13(2)(b) of the Civil Union Act, properly interpreted, provides for intestate succession by the survivors of unformalised same-sex and heterosexual relationships who have undertaken reciprocal duties of support (par 87). This meaning would seem to follow from his statement (par 87) that:

> "Unshackled from *Volks*, section 13(2)(b) of [the Civil Union Act] must be interpreted in a manner that best conforms and least infringes the fundamental right to equality in the Bill of Rights."

and that

> "there remains a residual category of unmarried same-sex and heterosexual partners with reciprocal support duties *that are not excluded on a literal reading of the section*" (par 87 emphasis added).

Indeed, this appears to be how the majority interpreted this assertion when they dismissed his argument, because they stated (par 54, emphasis added):

> "Needless to say, there are statutes in which permanent life partners who have undertaken a reciprocal duty of care are considered, for all intents and purposes, as being husbands, wives, or spouses. *However, it does not follow that where Volks is overturned ... such partners are now considered as 'husband, wife, or spouse' on a literal reading of [the Civil Union Act]* – and remain entitled to inherit."

It will be useful at this point to recall the wording of section 13(2), which reads as follows:

> "(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to –
> (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
> (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

There is nothing in the wording of the section that relates to partners in unformalised relationships. Accordingly, if the majority was correct in its (apparent) understanding of Froneman J's argument then it was correct to dismiss it. His argument in that form is untenable.

Could it be, however, that Froneman J meant something else? Possibly he was arguing that – having dismissed the "right to marry" principle introduced in *Volks* – it followed that the discrimination against same-sex couples in unformalised relationships who undertook reciprocal duties of support that was recognised in *Gory* still stood as part of a larger discrimination against all those in unformalised relationships, even though the reading-in order in *Gory* (according to his view) only covered the period up to the introduction of same-sex marriage. On that basis an order that the respondent was entitled to inherit on his partner dying intestate would be justified. The failure of the Intestate Succession Act, as originally enacted, to provide for a person in the position of the respondent had already been declared unconstitutional in *Gory* so possibly no new declaration of unconstitutionality would be required in the court's order. According to this interpretation of Froneman J's argument it would follow that the survivor of an opposite-sex relationship (with reciprocal undertakings of support) is also unfairly discriminated against, but the rights of such a survivor were not actually engaged in *Gory*.

This alternative interpretation of Froneman J's comments makes more sense than the first interpretation. However, it is difficult to square with his statement, referred to above, that section 13(2)(b) of the Civil Union Act must be interpreted conformably with the Bill of Rights and that unmarried same-sex partners "are not excluded on a literal reading of the section" (par 87). Insofar as these statements suggest that the source of the respondent's right to inherit as a spouse lies in a constitutionally correct interpretation of the Civil Union Act they are untenable. Accordingly, the precise nature of Froneman J's argument supporting the order of the court remains unclear.

4 Conclusion

In the author's view the court's interpretation of the *Gory* reading-in order, and its finding that the reading-in was not impliedly revoked by the enactment of the Civil Union Act, is correct for the reasons given above. Although the *Loubscher* judgment does not consider the issues of substantive equality that confront gay and lesbian couples because of pervasive homophobia in society, its order has the welcome outcome that same-sex couples for whom entering into a civil union is impracticable because of lack of acceptance of such relationships will continue to benefit from the *Gory* reading-in, unless the status quo is altered in future by legislation or as a result of a Bill of Rights based challenge.

It is possible that, properly seized of the issue in future litigation, the court might find that the current different treatment of same-sex and opposite-sex unformalised relationships is unconstitutional (see the court's comments par 31). It is not clear whether in such an event the court would suspend the order of unconstitutionality to permit Parliament time to remedy the unconstitutionality or whether it would make an immediately effective order by either "equalising up" or "equalising down" (par 35). The tone of the court's comments suggest that it might favour "equalising up" (par 35). Suspending the order would leave the successful litigant with a poor victory. In view of continued uncertainty of this nature it would be wise for same-sex couples to ensure that they execute valid wills. They should not rely on the long term recognition of their current right to inherit on intestacy from one another.

The judgment also provides judicial recognition – if such were needed – that the effect of section 13 of the Civil Union Act is that the survivor of a civil union – whether contracted as a marriage or as a civil partnership – is entitled to inherit on intestacy as a "spouse" pursuant to the provisions of section 1 of the Intestate Succession Act (par 33). The court's statement to that effect is, however, obiter because the matter was not actually in issue.

Comments in the majority judgment relating to the Constitutional Court's decision in *Volks* suggest that the court may indeed reappraise the *Volks* judgment in future if an appropriate occasion arises (par 53). The comments are, however, obiter because they did not form part of the necessary reasoning of the majority. A full consideration of the *Volks* case is beyond the scope of this note.

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