



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 22/3185

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28 March 2024

EJ FRANCIS

In the matter between:

MILDRED THOBISILE GASA N.O.

Applicant

and

MASTER OF THE HIGH COURT, JOHANNESBURG **First Respondent**

PHELISA LYNETTE MBANJWA N.O.

Second Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Third Respondent

JUDGMENT

FRANCIS J

1. The applicant Mildred Thobisile Gasa who is the executrix of the estate of late Sindile Ayanda Dladla (Sindile) brought an application for the following relief:
 - 1.1 That Sindile be regarded as the permanent surviving life partner of Ndumiso Sizo Mthembeni Mbanjwa (Ndumiso) in terms of section 1 of the Intestate Succession Act 81 of 1987 (the Act);
 - 1.2 The estate of Sindile be permitted to claim inheritance in terms of section 1(1) of the Act despite Ndumiso having a subsisting marriage with Phelisa Lynette Mbanjwa at the time of his death;
 - 1.3 Sindile's estate be permitted to claim a child share portion in the estate, or an appropriate share as determined by this Court, given that Ndumiso had a subsisting marriage with Phelisa at the time of his death;
 - 1.4 That the first respondent (Master of the High Court, Johannesburg) is authorised to accept the claim of Sindile's estate;
 - 1.5 That the costs of this application be borne by the applicant alternatively by the respondents should they oppose the application.
2. The application was opposed by the second respondent, Phelisa Lynette Mbanjwa N.O. who is cited in her official capacity as the executrix of the estate of the late Ndumiso with reference number 013235/2021, on the grounds that by virtue of her civil union marital relationship between herself and the late Ndumiso, there are no grounds to declare Sindile the surviving spouse or life partner. Further that there is no life or permanent partnership that could have existed between her Civil Union spouse, the late Ndumiso and the late Sindile. She sought an order dismissing the application with costs.
3. The first respondent who is the Master of the High Court in Johannesburg who oversees the administration of the deceased

estates and the estate of Ndumiso which is administered under reference number 013235/2021, did not oppose the application. The third respondent who is the Minister of Justice and Correctional Service also did not oppose the application.

4. The issue before this court is whether Sindile and Ndumiso lived together as lovers, and if their relationship qualified as life partners and whether the estate of Sindile is entitled to have a claim from the estate of Ndumiso in terms of section 1 of the Act since Ndumiso died without a will and had been married to the second respondent at the time of his death. Since the second respondent was married to Ndumiso in community of property she is entitled to half of his share by virtue of their marriage.

5. It is trite that the key factors that a court must take into account when determining the existence of a life partnership are the following:
 - 5.1 Partners express life commitments to each other;
 - 5.2 The commitments, if any, made regarding maintenance and the partner's stake or entitlements in each other's property?
 - 5.3 The fact or presumption of the existence of a permanent life partnership as a consequence of the partners having been together for some time;
 - 5.4 Whether there is a prescribed or acceptable age requirement?
 - 5.5 Is a ceremony, attended by relations and friends, required or merely advisable?
 - 5.6 Is there a written partnership agreement that outlines its terms, necessary or merely recommended?
 - 5.7 In the absence of a written agreement and a ceremony, how is the evidential material concerning a permanent life partnership to be gathered and approached? Will the word of one in the absence or death of the other suffice?

6. It is common cause that the second respondent and Ndumiso were married to each other in community of property on 27 June 2003. That

marriage was concluded in terms of the Civil Union Act 17 of 2006 (Civil Union Act) as amended. Three minor children were born out of their relationship and they are still alive. The marital relationship between the second respondent and Ndumiso lasted until Ndumiso's death namely 5 May 2021. Sindile passed away on 22 May 2021.

7. The applicant's case is simply that the estate of Sindile should be permitted to inherit in terms of section 1(1) of the Act from the estate of Ndumiso. This is so because Sindile's permanent life partnership with Ndumiso was akin to a marriage and they had reciprocal duties of support towards each other. She had met Ndumiso during February 2010 and one child was born on 16 July 2016. Sindile therefore qualifies as Ndumiso's permanent life partner and enjoys the same benefits under section 1(1) of the Act. She is seeking an order confirming that Sindile's relationship with Ndumiso prior to his death being one of a permanent life partnership. Her estate should be allowed to claim a child's share portion of the estate, or an appropriate share as determined by this court, given that Ndumiso had a subsisting marriage with the second respondent at the time of his death.
8. It is the applicant's case that Sindile should be regarded as the permanent surviving life partner of Ndumiso in terms of section 1(1) of the Act despite Ndumiso being married to the second respondent at the time of his death. The second respondent denied this and contended that Ndumiso was married to her and that whoever had stayed with him as his wife was in an adulterous relationship with him. She denied that she was no longer residing with Ndumiso and were not on speaking terms and not involved in a loving marital relationship prior to his date of death. She denied that Sindile had a personal relationship with Ndumiso to the extent that she would know the desires of his heart.
9. The second respondent however admitted that she and Ndumiso were no longer staying together. She admitted that Ndumiso and Sindile had one child who was born on 16 July 2016 but denied that it was a

permanent life partnership and involved reciprocal duties of support towards one another, they both took care of each other including their minor child as couples do in a marital relationship during the existence of their life partnership and lived together until his death.

10. There is no real dispute that on 16 June 2017 Ndumiso and Sindile celebrated their white wedding. They had attempted to register their marriage at Home Affairs in Pietermaritzburg but were advised that they could not register their marriage due to the fact that Ndumiso's marriage was still in existence with the second respondent.
11. It is further common cause that despite the rejection of Home Affairs to register their marriage, Ndumiso and Sindile remained committed to their relationship and resided together to such an extent that family members, friends and Ndumiso's work colleagues considered them to be a married couple. Where Ndumiso was employed, his colleagues knew Sindile as his wife. When he became terminally ill and was diagnosed with diabetes, Ndumiso's employers booked a flight ticket for Sindile to go and see him in Switzerland. They remained together even until Ndumiso's death and Sindile took great care of him whilst he was on his death bed.
12. When Ndumiso passed away he had no will and his estate will be distributed in terms of the intestate succession laws. He is survived by the second respondent, his three minor children that he had with the second respondent and his one minor child he had with Sindile who currently resides with the applicant.
13. The applicant relies on the decisions of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) and *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51 in support of the proposition that Sindile is entitled to a child share since she was involved in a life partnership with Ndumiso.

14. The Constitutional Court in the *Bwanya* matter held that section 1(1) of the Act was unconstitutional and invalid insofar as it excludes the surviving life partner in a permanent opposite-sex life partnership from inheriting in terms of the Act and that the word spouse includes a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support. A surviving life partner in a permanent opposite-sex life partnership can inherit or claim maintenance if the partners undertook reciprocal duties of support to each other in terms of the Maintenance of Surviving Spouse Act and Intestate Succession Act.
15. In the *Bwanya* matter 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 that 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 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 life partnerships. The majority judgment 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 court 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's partner's estate. The court 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.

16. The applicant contended that Sindile was not only Ndumiso's permanent life partner, but she was considered as Ndumiso's wife. In line with the Constitutional Court judgment in *Bwanya*, her relationship with Ndumiso qualifies as a permanent life partnership despite Ndumiso being married at the time of his death.
17. The applicant further contended that in terms of *Bwanya* it was held that the exclusion of surviving permanent opposite-sex life partners from enjoying benefits under section 1(1) of the Act amounts to unfair discrimination and is invalid. The court considered it appropriate to refer the matter to Parliament for it to consider passing legislation to address the affairs of the permanent life partnerships which involves more than 3.2 million South Africans.
18. The applicant contended further that Sindile was the surviving permanent life partner of Ndumiso and requested the court to grant the order permitting Sindile's estate to enjoy the benefits afforded under section 1(1) of the Act as a permanent life partner of Ndumiso.
19. The applicant contended that since Ndumiso was married at the time of his death and survived by the second respondent, a spouse as defined in section 1(1) of the Act, is entitled to claim their inheritance in addition to her half share of the estate as per their marital regime.

20. The application was opposed by the second respondent who is the wife of Ndumiso. She said that the applicant does not state under what category Sindile falls under section 1(1) of the Act which is the category that would allow her to inherit intestate under the Act. Ndumiso was married to her on 27 June 2003 and their marriage subsisted until the time of his death. Whoever stayed with her husband as his wife during the subsistence of their marriage was in an adulterous relationship with him. The applicant was therefore in an adulterous relationship with her late husband the whole time that he stayed with her husband as his wife during the subsistence of their marriage.
21. The second respondent stated that the marriage between herself and Ndumiso was a civil union concluded in terms of the Civil Union Act as amended. Section 2 of the Act defines a civil marriage as a voluntary union between two people, to the exclusion of all others whilst it lasts. As indicated by the applicant that the marriage between the second respondent and Ndumiso subsisted until the passing away of Ndumiso, their marriage was to the exclusion of Sindile as seen from the marriage certificate.
22. The applicant is not challenging the second respondent's marital status or benefits under section 1(1) of the Act. The applicant requested that since the benefits of life partners under section 1(1) of the Act are yet to be determined by Parliament, Sindile's estate be permitted to claim for an appropriate share to be determined by this Court or a child share.
23. The facts in the aforesaid judgments that the applicant is relying on are completely different to the present facts since Ndumiso was still married at the time of his death and was also advised that he could not register his "white wedding" with Sindile since he was still married and he took no steps to apply for a decree of divorce.

24. I also need to indicate that this matter does not involve a case where it is contended that section 1(1) of the Act is discriminatory in that it does not recognise the life partnership arrangement between two parties. It also does not involve a matter of discrimination based on gender or sexual orientation. It involves a matter where Ndumiso and Sindile were informed by Home Affairs that they could not get married to each other due to the fact that they were still involved in a Civil Union. The simple solution that they faced was for Ndumiso to have instituted divorce proceedings. The applicant is now seeking to get the relief that it would have obtained if the divorce was instituted or in terms of the Recognition of Customary Marriages Act 120 of 1998 which however would not be applicable bearing in mind that the relationship arose after the aforesaid Act had already been promulgated. The applicant is seeking to rely on the aforesaid Act through the back door.
25. Section 1 of the Act provides *inter alia* that:
- "If after the commencement of this Act a person (hereafter referred to as "the deceased"), dies intestate succession, either wholly or in part, and –*
- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;*
- (b) is survived by a descendant, but not a spouse, such descendant shall inherit the intestate estate;*
- (c) is survived by a spouse as well as a descendant –*
- (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value an amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and*
- (ii) such descendant shall inherit the residue (if any) of the intestate estate."*
26. Section 1(1) of the Act is quite clear and it refers to a spouse and what the spouse would be entitled to. It is clear from the provisions of

section 1(1)(c) of the Act that a surviving spouse of a deceased person who died intestate succession would be entitled to a child's share of the deceased estate. It does not deal with a life partnership. The applicant did not bring an application to challenge the constitutionality of the aforesaid section. She wants this court to read into the Act words that are not there. The decisions that she relied on does not support her and those decisions were based on the specific facts that were placed before those courts. In none of those cases was it an issue of a spouse like in the present case. Ndumiso and Sindile had remedies available to them. As stated earlier he could have applied to court for a decree of divorce but did not do so. He was advised that he could not get married to Sindile whilst he was still married in terms of the Civil Union Act. He did nothing about it.

27. The wording of section 1(1) of the Act is clear. This matter does not involve a person who had more than one customary wives who would be entitled to a child's share in the event of the death of her husband. It also does not involve same sex relationship but whether a girlfriend would be entitled to a child's share since she is a spouse. The Act does not recognise a life partner but refers specifically to spouse or a descendant.
28. Section 3 of the Civil Union Act provides that a person who is married under the Marriage Act or the Customary Marriage Act may not register a civil union.
29. Section 8 of the Civil Union Act *inter alia* states that a person may only be a spouse or partner in one marriage or civil partnership as the case may be at any given time. It prohibits such a person to conclude a marriage under the Marriage Act or Customary Marriages Act. In terms of section 8 of the Civil Union Act Ndumiso could only be involved in one marriage or civil partnership and not both in one marriage and one civil partnership. When he entered into his partnership arrangement with Sindile he had acted against the

provisions of section 8 of the Civil Union Act. There is no challenge brought to declare the provisions of section 8 of the Civil Union Act as unconstitutional.

30. It is clear from the facts that Sindile and Ndumiso were involved in a life partnership arrangement which offended the provisions of section 8 of the Civil Union Act.
31. There is no dispute that four of the minor children of Ndumiso do have the right to inherit from the estate of Ndumiso in terms of section 1 of the Act.
32. To summarise I am satisfied that it is clear from the facts placed before this court that Sindile was a permanent surviving life partner of Ndumiso but since Ndumiso was married at the time of his death Sindile cannot be regarded as a spouse of Ndumiso and can therefore not lodge a claim against the estate of Ndumiso on the basis that she was a life partner. Section 8 of the Civil Union Act prohibits such a partnership.
33. The application stands to be dismissed.
34. I do not believe that this is a matter where costs should follow the result. Each party is to pay their own costs.
35. In the circumstances the following order is made:
 - 35.1 The application is dismissed.
 - 35.2 Each party is to pay their own costs.



FRANCIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCE

**FOR APPLICANT : W M SITHOLE E INSTRUCTED BY Z & M
SHABALALA ATTORNEYS**

**FOR 2ND RESPONDENT : N C NKOSI OF NKOSI NHLANHLA
ATTORNEYS**

DATE OF HEARING : 14 AUGUST 2023

DATE OF JUDGMENT : 28 MARCH 2024

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 28 March 2024.