CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 234/15

In the matter between:

RASMUS ELARDUS ERASMUS LAUBSCHER N.O. Applicant

and

ERIC JEAN SPIRIDION DUPLAN First Respondent

MASTER OF THE HIGH COURT PRETORIA Second Respondent

and

COMMISSION FOR GENDER EQUALITY Amicus Curiae

Neutral citation:	*Laubscher N.O. v Duplan and Another* [2016] ZACC 44
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgments:	Mbha AJ (majority): [1] to [57] Froneman J (concurring): [58] to [87]
Heard on:	18 August 2016
Decided on:	30 November 2016
Summary:	same-sex permanent partners — reciprocal duty of support — right to inherit — intestate succession Section 1(1) of the Intestate Succession Act — Section 13(2)(b) of the Civil Union Act — effect of reading-in remedy — interplay between *Gory* and the Civil Union Act

ORDER

On direct appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

MBHA AJ (Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

[1] The applicant seeks leave to appeal directly to this Court in terms of section 167(6)(b) of the Constitution[1] read with rule 19 of the Rules of this Court,[2] against an order of Muller AJ in the Gauteng Division of the High Court, Pretoria (High Court). The primary issue for determination is whether Dr Rasmus Laubscher (applicant), in his personal capacity, or Mr Eric Duplan (respondent),[3] who had lived

[1] Section 167(6) of the Constitution, in relevant part, provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
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> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

[2] This rule sets out the procedure to be followed in an application for leave to appeal to this Court. The appeal must concern a decision on a constitutional matter, not including an order of constitutional invalidity in terms of section 172(2)(a) of the Constitution, which has been given by any other court.

[3] The second respondent is the Master of the High Court, Pretoria. The Master did not participate in these proceedings. For simplicity's sake, the first respondent will be referred to throughout the judgment as the respondent.

with Mr Cornelius Daniel Laubscher (deceased) in a permanent same-sex partnership until the latter's death, is entitled to inherit from the intestate estate of the deceased.

[2] This matter concerns the intestate succession rights of unmarried same-sex partners in a permanent same-sex partnership, in which the partners have undertaken reciprocal duties of support. It accordingly requires a consideration of the interplay between the "reading-in" order by this Court in the case of *Gory*[4] into the provisions of section 1(1) of the Intestate Succession Act (ISA),[5] after this Act had been found to

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[4] *Gory v Kolver NO* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC). The order, in relevant part, reads as follows:

> "*(f)* 1. It is declared that, with effect from 27 April 1994, the omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the word 'spouse', wherever it appears in the section, of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' is unconstitutional and invalid.
>
> 2. It is declared that, with effect from 27 April 1994, section 1(1) of the Intestate Succession Act is to be read as though the following words appear therein after the word 'spouse', wherever it appears in the section: 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support'."

[5] 81 of 1987. Prior to reading-in following the *Gory* order, section 1(1) of ISA read as follows:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and—
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> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
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> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
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> (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 the 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;
>
> (d) is not survived by a spouse or descendant, but is survived—
>
> (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
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> (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
>
> (e) is not survived by a spouse or descendant or parent, but is survived—
>
> (i) by—

be unconstitutional, and the Civil Union Act (CUA).[6] The latter makes provision for the registration and solemnisation of civil unions between same-sex couples.

Background

[3] The deceased and the respondent had lived together since 2003 and during this time had undertaken reciprocal duties of support. Their partnership was neither solemnised nor registered in terms of CUA. On 13 February 2015, the deceased died intestate leaving behind no descendants or adopted children. The deceased's parents had predeceased him. The applicant, the brother of the deceased and the only surviving child of their parents, is the executor of the deceased estate. The dispute is about whether the respondent is entitled to inherit the intestate estate notwithstanding the fact that there was never a formal solemnisation or registration of their partnership.

[4] The Commission for Gender Equality (CGE), a Chapter 9 institution whose mandate is to promote respect for gender equality and to protect, develop and attain gender equality, was admitted as an *amicus curiae* (friend of the court).

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or

(bb) descendants of his deceased parents who are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."

[6] 17 of 2006.

Litigation history

[5] The issue before the High Court, which by agreement would be adjudicated as a stated case, was whether the respondent was entitled to inherit the intestate estate of the deceased. Relying on *Gory*, the respondent contended that, notwithstanding the non-solemnisation and non-registration of the civil partnership between them in terms of CUA,[7] he was entitled to inherit.

[6] The applicant contended that, notwithstanding *Gory*, the implication of CUA's commencement was that only same-sex partners who have solemnised and registered a civil union in terms of CUA qualify to inherit the intestate estate of a partner. Accordingly, the applicant contended that the respondent is not a "spouse" of the deceased within the meaning of section 1(1)(a) of ISA and is therefore disentitled to inherit from the intestate estate.

[7] The High Court rightly noted that the recognition of same-sex marriages in South Africa and across the globe has a long history of discrimination and prejudice. Accordingly, the need to recognise same-sex marriages when CUA came into effect on 30 November 2006 was long overdue. The legal consequences that flow from a civil union concluded in terms of CUA are similar to those accorded to opposite-sex couples who are married in terms of the Marriage Act.[8] The High Court noted, however, that CUA did not aim to alter the position of opposite-sex 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.

[8] The High Court observed that prior to the enactment of CUA, this Court had addressed the non-recognition of same-sex partnerships and incidental issues, on a case-by-case basis. Accordingly, in *Gory* this Court held that section 1(1) of ISA was unconstitutional and invalid to the extent that the words "or partner in a permanent

[7] See section 4 (solemnisation of civil union), section 8 (requirements for solemnisation and registration of civil union) and section 12 (registration of civil union).

[8] 25 of 1961.

same-sex partnership in which the partners have undertaken reciprocal duties of support" were excluded after the word "spouse".[9] These words were then read-in by this Court retrospectively with effect from 27 April 1994.[10] At the time *Gory* was handed down, CUA had not yet come into operation.

[9] The High Court found that it was not at liberty to deviate from a reading-in of those words owing to the principle associated with the doctrine of *stare decisis* which requires lower courts to follow the decisions of higher courts in the judicial hierarchy to ensure predictability, reliability, uniformity, equality, certainty and convenience.[11] It observed that a deviation may be possible in instances where a provision that is declared unconstitutional has been amended and has undergone a material change by way of legislative intervention – provided that the subsequent amendment or introduction of a statute that removes the constitutional complaint is not open to attack. The High Court noted, albeit *obiter*, that the "reading-in" led to discrimination against unmarried heterosexual couples. It then granted an order declaring the respondent to be the only intestate heir to the estate of the deceased. Furthermore, the applicant was removed as the appointed executor of the deceased estate. It is that decision that the applicant seeks to assail in the present proceedings.

In this Court

Applicant's submissions

[10] The applicant submitted that the entire dispute is based on the order in *Gory* and the effect that the subsequent enactment of CUA had on that order. According to the applicant, the High Court incorrectly confined itself to the principle of *stare decisis* in finding that it could not interfere with *Gory*. In doing so the High Court failed to appreciate the Legislature's power to amend the law (as contained in *Gory*) and substitute the decisions of this Court.

[9] *Gory* above n 4 at para 43.

[10] Id at para 66.

[11] See *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 54.

[11] The applicant submitted further that *Gory* was an interim measure only until Parliament resolved the underlying mischief. His contention was that the mischief was the inability of permanent same-sex partners to enter into legally recognised unions, such as civil marriages. This contention was based on the notion that the finding in *Fourie*[12] spurred on a series of "piecemeal" judgments relating to specific statutes. In his view, the enactment of section 13(2)(b) of CUA ensured that same-sex couples were brought in from the legal cold.[13] The section remedied the constitutional defect that *Gory* sought to cure because, according to the provision, same-sex partners who enter into civil unions under CUA would now automatically be included within the definition of "spouse" in section 1(1) of ISA. The applicant accordingly submitted that CUA had repealed the *Gory* order. Reliance was also placed on the interpretational maxim *cessante ratione legis cessat ipsa lex* (meaning that once the reason for a law falls away, the law itself ceases to exist) to contend that section 13(2)(b) of CUA had indeed replaced the law that was created through reading-in by *Gory*.

[12] The applicant sought to rely on this Court's decision in *Volks*,[14] and contended that permanent same-sex partners have a choice to enter into civil unions and are afforded the same legal protection as opposite-sex partners. Furthermore, to continue

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[12] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR (CC) (*Fourie*) at para 162 (1)(c)(i) and (ii), where this Court declared the common law and statutory definitions of marriage invalid but suspended the declaration of invalidity for 12 months in order to allow Parliament to remedy the defect. If Parliament failed to do so, this Court ordered that words would be read into the definitions to allow for same-sex marriages.

[13] Section 13(2)(b) of CUA reads as follows:

> "13. Legal consequences of civil union
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> . . .
>
> (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—
>
> . . .
>
> (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

[14] *Volks NO v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (*Volks*).

enforcing *Gory* when the same protection does not extend to permanent opposite-sex partners, would be unfairly discriminatory.

Respondent's submissions

[13] The respondent refuted the applicant's case on three bases. First, he submitted that the *Gory* order was not an "interim remedy" that expired when CUA came into force. In his contention, *Gory* amended section 1(1) of ISA and the amendment endures indefinitely until Parliament amends or repeals it. Secondly, CUA did not repeal *Gory*. The two positions, stemming from *Gory* and CUA, are not incompatible and they can and do live side by side. Thirdly, the argument that *Gory* had fallen away under the *cessante ratione legis cessat ipsa lex* rule was incorrect. The reason being that the purpose of *Gory* was to qualify same-sex permanent partners to inherit from one another intestate despite not being "married". The respondent accordingly submitted that the purpose had not fallen away, since only some of the people protected by *Gory* are now also protected under CUA. In his view, the question whether same-sex permanent partners who are not partners in a civil union should continue to be protected was a choice that this Court left to the Legislature.

Amicus Curiae's submissions

[14] CGE contended that there were no sound policy reasons to undo the protections provided by *Gory*, particularly in view of the fact that the wording of section 1(1) of ISA, as amended by *Gory*, has been left untouched by the Legislature for over a decade. CGE also submitted that *Gory* better gives effect to the spirit, purport and objects of the Bill of Rights because it makes clear that this Court does not prescribe or prefer one form of family relationship over another. To highlight the changing societal tendencies, CGE submitted statistics to show that, generally, the prevalence of permanent life partnerships was on the increase.

Direct leave to appeal

[15] As mentioned earlier, the applicant seeks to appeal the High Court's decision directly to this Court. The effect of doing so is that the Supreme Court of Appeal (SCA) will be bypassed. However, an adequate explanation has to justify that it is in the interests of justice to circumvent the SCA.

[16] The main reasons for seeking direct leave to appeal, as motivated by the applicant, are twofold. First, because the dispute concerns the interplay between a judgment of this Court and the effect of subsequently enacted legislation, it is most appropriate for this Court to deal with an interpretation of its own judgment. Secondly, as the High Court primarily relied on the principle of *stare decisis* to find in favour of the respondent, an appeal to the SCA would present the same challenge. Thus, the applicant submitted that the interests of finality dictate that the matter should be heard by this Court directly.

[17] A constitutional issue is raised as this matter concerns the unequal enjoyment of inheritance rights of permanent same-sex partners who have not solemnised their partnership in terms of CUA. This is specifically in light of the reading-in order of this Court in *Gory*.[15] However, the mere fact that the existence of a constitutional issue is established does not automatically mean that leave to appeal will be granted.[16] The applicant must also show that the interests of justice require that this Court hears the matter.[17]

[18] For the reasons set out by the applicant, I am of the view that the interests of justice require this matter to be heard on direct appeal. As the question before this Court requires an interpretation of the interplay between the *Gory* order and CUA, this Court is best placed to properly interpret its own order.

[15] *Gory* above n 4 at para 66(f)(2).

[16] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 29.

[17] Id.

Aspects to be considered

[19] In determining whether the respondent qualifies as the intestate successor to the deceased estate, the following aspects must be considered:

1. Was the reading-in remedy in *Gory* an interim measure?
2. The interplay between the *Gory* order and CUA.
3. Are the principles stemming from *Volks* applicable to this matter?

[20] I must at this stage make mention of the judgment by my colleague, Froneman J (second judgment), which raises challenging questions in relation to the reach of *Gory* and the effect of *Volks*. It is commonplace for cases similar to this one to give rise to viable interpretative differences. However, enticing as the second judgment's interpretation may be, I take a different route.

The reading-in remedy in Gory as an "interim" measure

[21] It is clear that in exercising its powers under section 172 of the Constitution, this Court found that section 1(1) of ISA was invalid, but sought to cure its invalidity by virtue of a "reading-in" order.[18] To this effect, this Court stated:

> "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. . . . In the interim, there would seem to be no valid reason for treating section 1(1) of [ISA] 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."[19]

[18] *Gory* above n 4 at paras 20-31.

[19] Id at para 28.

[22] The applicant relied on this paragraph in *Gory* to contend that the reading-in order was merely an interim measure that fell away once CUA had been enacted. I do not agree. A reading of *Gory* reveals that the Court was alive to the fact that legislation allowing same-sex couples to enter into a civil union with the same consequences as a marriage was soon to be enacted. Thus the Court reasoned that "there would [then] appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession".[20]

[23] The Court thus acknowledged the imminent legislation that would be enacted subsequent to *Fourie*, but nevertheless employed the remedy of reading-in to cure the constitutional invalidity of section 1(1) in the same way in which reading-in has been adopted to cure defects in other statutory provisions.[21] This was based on the premise that the envisaged legislation would not necessarily amend section 1(1) of ISA, as amended by the *Gory* order.

[24] This Court in *Gory* made it clear that its reading-in order was of indefinite duration albeit subject to amendment or repeal by Parliament. To this effect, it stated that "[i]n the absence of legislation amending the relevant statutes, the effect on these statutes of decisions of this Court . . . will not change".[22] Clearly, the Court did not curtail the life of the order in any way. The meaning of "interim", according to Black's Law Dictionary, is "[i]n the meantime; meanwhile; temporary; between".[23] There is little to support the notion that "interim" means that the period should be shorter rather than longer. The fact that Parliament has not specifically amended section 1(1) of ISA in over 10 years does not affect the nature of the order. The *Gory* order remains an interim one and is operative from 27 April 1994 until such time as the Legislature chooses to specifically amend it.

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[20] Id at para 29.

[21] Id at para 43.

[22] Id at para 28.

[23] Black *Black's Law Dictionary* 6 ed (West Publishing Co, St. Paul MN 1991) at 562.

The interplay between the Gory order and CUA

[25] There is a twofold approach that must be adopted in considering the interplay between the *Gory* order and CUA. In the first instance, a contextual approach requires an assessment of whether the enactment of CUA addressed the mischief that the reading-in in the *Gory* order sought to address. In the second instance, the interpretative approach prescribes an interpretation of section 1(1) of ISA (as amended by the *Gory* order) and whether it has been specifically amended by CUA. A discussion on both approaches follows.

The contextual approach: addressing the mischief

[26] The contextual approach requires that we interrogate *Gory* so as to assess whether the mischief, which the *Gory* order sought to address, has since been resolved by the enactment of CUA. Although it may be tempting to circumvent the reasoning in *Gory* (since the litigants' divergent stances suggest the reasoning may be open to multiple interpretations), I am of the view that the reasoning must be confronted to provide legal certainty.

[27] In *Gory*, this Court stated:

> "As these partners are not legally entitled to marry, this amounts to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution, which discrimination is in terms of section 9(5) presumed to be unfair unless the contrary is established."[24]

[28] In paragraph 29, on which both parties rely, this Court expressed that—

> "[i]t is true that, should this Court confirm paragraph 2 of the High Court order, the position after 1 December 2006 will be that section 1(1) of the Act will apply to both heterosexual spouses and same-sex spouses who 'marry' after that date, if Parliament

[24] *Gory* above n 4 at para 19.

> either fails to respond before the *Fourie* deadline or if it does enact legislation permitting same-sex couples to 'enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples'. *Unless specifically amended, section 1(1) will then also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not 'marry' under any new dispensation. Depending on the nature and content of the new statutory dispensation (if any), there is the possibility that unmarried heterosexual couples will continue to be excluded from the ambit of section 1(1) of the Act.* As was argued by the Starke sisters, the rationale in previous court decisions for using reading-in to extend the ambit of statutory provisions applicable to spouses/married couples so as to include permanent same-sex life partners was that *same-sex couples are unable legally to marry and hence to bring themselves within the ambit of the relevant statutory provision. Once this impediment 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.*"

[29] This paragraph is arguably the main source of the disquiet between the parties. In the first part, the Court indicates that if Parliament fails to respond to the *Fourie* deadline *or* if it enacts legislation that allows permanent same-sex partners to enjoy the status and benefits of opposite-sex couples (the latter being what the enactment of CUA did), then the section will still apply to permanent same-sex partners who have undertaken reciprocal duties of support but who do not "marry" under the new dispensation. Since the legislation passed by Parliament (CUA) fell within the second condition set by this Court, an argument can be made that a specific amendment of section 1(1) of ISA by Parliament is still required to remove the reading-in. In my view, the general amendment brought about by section 13(2)(b) of CUA did not achieve this goal.

[30] In the latter part of the same paragraph, the Court then expressed an *obiter* view in light of the submissions of the Starke sisters,[25] namely that if the impediment were to be removed, then there would be no good reason for distinguishing between unmarried opposite-sex couples and unmarried same-sex couples in respect of

[25] The Starke sisters were intervening parties in *Gory* above n 4 at para 8.

intestate succession.[26] However this does not necessarily justify the applicant's position that the enactment of CUA cured the mischief behind the reading-in in the *Gory* order as: (i) this view was expressed by this Court *obiter* and therefore was not binding, and (ii) to the extent that section 13(2)(b) of CUA amended the relevant provisions of ISA, the amendment was indirect at best.[27]

[31] I agree that an inequality may exist between opposite-sex permanent partners and their same-sex counterparts by virtue of the *Gory* order.[28] The question is whether same-sex permanent partners ought to be deprived of the *Gory* benefit or whether the benefit should be extended to include opposite-sex permanent partners. The respondent refers to this process as "equalising up" versus "equalising down" and contends that it is a task perhaps best left to Parliament. In my view, the Legislature is competent to adopt either a generous or a more restrictive approach to its recognition of permanent relationships, which it has done in the past. The legislative developments pursuant to *Satchwell 1* are instructive.[29] In that case, this Court declared the omission of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" from

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[26] See *Turnbull-Jackson* above n 11 at paras 61-71 for a powerful excursus on the distinction between *ratio* and *obiter* remarks. At para 61, Madlanga J observed:

> "Literally, *obiter dicta* are things said by the way or in passing by a court. They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be contrasted with the *ratio decidendi* of a judgment, which is binding."

[27] From the internal question paper [No 3-2006] published by the National Assembly on its website and available at http://www.parliament.gov.za/live/commonrepository/Processed/20140411/52830_1.pdf (accessed on 30 September 2016), it appears to be quite unlikely that the Legislature contemplated the *Gory* order when it enacted CUA (in this regard see the question 133 of the internal question paper which was circulated on 17 February 2006, where the Legislature considered the order and deadline imposed by this Court in *Fourie* – in particular what action the Department of Home Affairs would take pursuant to *Fourie*). No internal question papers of the Legislature after the abovementioned internal question paper were published until 19 December 2006, which was after CUA was enacted.

Interestingly, the Civil Union Bill (Bill), which was published in September 2006 for comment, made provision for registered and unregistered domestic partnerships. Whilst section 32 provided that a partner in a registered domestic partnership would constitute a "spouse" for purposes of section 1(1) of ISA; section 43 of the Bill provided for a court procedure to be followed by a partner in an unregistered domestic partnership for purposes of intestate succession. Nevertheless, CUA makes no mention of an amendment to ISA and does not contemplate domestic partners at all.

[28] Opposite-sex permanent partners were not included within the ambit of the *Gory* order and, as ISA currently stands, cannot inherit from a partner who dies intestate.

[29] *Satchwell v President of the Republic of South Africa* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) (*Satchwell 1*).

sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act,[30] to be inconsistent with the Constitution.[31]

[32] Although this Court had specifically ordered that the benefit be extended to permanent same-sex partners,[32] the Legislature, within its rightful discretion, widened the ambit of protection to include both same-sex and opposite-sex unmarried partners.[33] The result is an apt example of the Legislature "equalising up" while giving effect to the rights prescribed by this Court's order. In my view, the Court in *Gory* had clearly foreseen the enactment of CUA and had envisioned that same-sex permanent partners would continue to be protected despite not concluding a "marriage" (or union as it turned out to be), under the new dispensation. Any indication to the contrary is best left to Parliament to decipher.

[33] In terms of section 13(2)(b) of CUA, a partner who registers a union in terms of this Act is deemed to be a "spouse" for purposes of all law other than legislation expressly dealing with civil and customary marriages. CUA's impact on the extended definition of spouse is that registered civil union partners are protected by section 1(1) of ISA. However, the *Gory* order contemplated the inclusion of *all permanent same-sex partners* within the ambit of section 1(1) of ISA. Accordingly, CUA gave birth to an additional category of beneficiaries (those permanent same-sex partners who register their union). I am therefore minded to follow the interpretation that registered civil union partners are protected in their own right by CUA – whereas same-sex permanent partners who have undertaken reciprocal duties of support but have not registered under CUA, enjoy protection through the *Gory* order. A same-sex partner's option to conclude a civil union or to remain in a permanent same-sex life

[30] 88 of 1989.

[31] *Satchwell 1* above n 29 at para 37.

[32] Id at para 37.

[33] See the definition of "partner" in section 1 of the Judge's Remuneration and Conditions of Employment Act 47 of 2001. See also the effect of the reading-in order in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 98 on the definition of "spouse" in section 1 of the Immigration Act 13 of 2002 (previously the Aliens Control Act 96 of 1991).

partnership (and qualify as an intestate beneficiary in terms of section 1(1) of ISA either way) may be perceived as offering double protection to same-sex permanent partners.

[34] It needs to be emphasised that when *Gory* was handed down, the Court was well aware of the deadline imposed as a result of the matter of *Fourie* which would result in the protection of same-sex partners who register their unions, whether or not legislation was enacted. For this reason, several paragraphs within its judgment address the operation of its order notwithstanding the introduction of a new regime that gives same-sex permanent partners the right to "marry".[34]

[35] Despite the applicant's contentions to the contrary, my view is that a contextual or purposive approach would be more appropriate in this case. It will allow us to afford as much protection as we can to permanent same-sex partners who choose not to "marry" on the strength of *Gory*, read together with similar equality cases and legislation. This will also allow us to defer to the Legislature as to whether the correct approach is to "equalise up" or "equalise down".

[36] The applicant, relying on the *cessante ratione legis cessat ipsa lex* maxim, contended that section 13 of CUA was intended to cure the constitutional defects brought about by the limited definition of "spouse" under section 1(1) of ISA. The maxim, as already explained, is a tool of statutory interpretation and suggests that once the reason for the law ceases, the law itself ceases too. According to the applicant, because CUA enables same-sex permanent partners to "marry", there is no longer a reason for the *Gory* order to exist. Without deciding whether this tool of statutory interpretation is appropriate in cases of constitutional interpretation, it does not advance the applicant's case. A proper reading of *Gory* makes clear that the order sought to remedy the fact that same-sex permanent partners could not inherit from an intestate estate under section 1(1) of ISA. Whereas in *Fourie*, the mischief underlying

[34] *Gory* above n 4 at paras 22, 25 and 29.

the order was that same-sex permanent partners could not "marry". I am accordingly of the view that the reason for *Gory* did not fall away with the enactment of CUA.

The interpretative approach: section 1(1) of ISA

[37] An alternative approach that may be adopted is a purely interpretative approach in terms of which this Court is required to interpret section 1(1) of ISA in order to assess whether or not the respondent is entitled to inherit as the intestate heir of the deceased estate. Section 1(1) of ISA, as amended by the *Gory* reading-in, now reads as follows:

> "If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and—
>
> (a) is survived by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*], but not by a descendant, such spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*] shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*], such descendant shall inherit the intestate estate;
>
> (c) is survived by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*] as well as a descendant—
>
> (i) such spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*] shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the 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;

(d) is not survived by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*] or descendant, but is survived—

(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or

(ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or

(e) is not survived by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*] or descendant or parent, but is survived—

(i) by—

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or

(bb) descendants of his deceased parents who are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),

the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by a spouse [*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*], descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."

[38] The question that arises is whether CUA has specifically amended ISA. It bears repeating that *Gory* stated that "unless *specifically amended*, section 1(1) will then also apply to permanent same-sex partners who have undertaken reciprocal duties of support but who do not 'marry' under any new dispensation".[35]

[39] Based on the presumption that the Legislature does not intend to alter existing law more than necessary, this Court in *Joseph*[36] cautioned against inferring that the law has been impliedly repealed. The Court pointed out that the common law test is that implied repeal can be present only where the laws are irreconcilable. The applicant was unable to demonstrate how the position in terms of CUA and the position as a result of the *Gory* order resulted in an irreconcilable conflict. Furthermore, considering that CUA was enacted a week after the *Gory* order, it is highly unlikely, if not impossible, that the Legislature considered the effect of the *Gory* order and that the enactment of CUA repealed it.

[40] In *Gory*, the Court emphasised that its proposed reading-in would not unnecessarily encroach on the separation of powers and it was strengthened by restating the dictum of this Court in *National Coalition*:[37]

> "It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits."[38]

[35] *Gory* above n 4 at para 29.

[36] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[37] *National Coalition* above n 33 at para 76.

[38] *Gory* above n 4 at para 30.

The amendment of the word "spouse" in ISA was nothing more than a "cut and paste" exercise. The Legislature did not, in CUA, specifically grapple with the issue of whether it was prudent to limit the right that was extended to same-sex partners as a consequence of the *Gory* order. Therefore I conclude that, to date, the Legislature never intended to and has not interfered with ISA. Accordingly, it is for the Legislature to specifically amend the reading-in prescribed by the *Gory* order.

[41] The second judgment cautions against going beyond remedying the constitutional wrong – out of deference to the separation of powers principle. It points out that this deference should also be observed when interpreting reading-in orders.[39] While I hold no issue with this proposition, this Court's reasoning in paragraph 29 of *Gory* cannot be so easily avoided. The Court said no more than what it deemed was necessary to vindicate the equality rights of same-sex permanent partners. Without entering into a protracted excursus on the distinction between *ratio* and *obiter* statements,[40] this Court's awareness of the imminent *Fourie* deadline suggests that the paragraph's inclusion was not only sensible but also necessary.

[42] Since I find that paragraph 29 of *Gory* cannot be avoided, I stand by the interpretation that the enactment of CUA did not specifically amend section 1(1) of ISA. The implication that the reading-in order has survived for almost over a decade is not contentious and certainly not tantamount to interpretative legislating.

Volks

[43] The applicant contended that this Court's decision in *Volks* is analogous to the facts before us because both cases address: (i) the right to claim against the deceased estate; and (ii) whether rights conferred on married couples can also be conferred on unmarried couples.

[39] Second judgment at [67] to [70].

[40] See above n 26.

[44] The central question was whether the protection the Maintenance of Surviving Spouses Act afforded to a "survivor" could be extended to a surviving permanent life partner. The deceased had left a will in terms of which part of his estate was bequeathed to his permanent life partner, Mrs Robinson, with the remainder of estate being bequeathed to, among others, his children.[41] The majority drew strongly on the fact that Mrs Robinson's right to claim maintenance would unduly limit freedom of testation. Particularly because it would, by operation of law, create a posthumous duty to maintain cohabitants when no such right existed during the lifetime of the deceased.[42] The conclusion of the Court was that—

> "it is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable."[43]

[45] The appeal was upheld and this Court did not confirm the order of the High Court which declared that section 1 of the Maintenance of the Surviving Spouses Act was inconsistent with the Constitution.

[46] In my view, *Volks* concerned the right of a permanent opposite-sex partner to claim maintenance from a deceased estate in terms of the Maintenance of Surviving Spouses Act – a benefit that is given effect to before succession takes place.[44] However, I am not convinced that *Volks* is drawn directly into question based on the facts and the law in this case. *Volks* is distinguishable for the following reasons—

[41] *Volks* above n 14 at para 7.

[42] Id at para 57.

[43] Id at para 60.

[44] Id at para 39.

(i) *Volks* concerned a surviving permanent life partner's right to benefit from maintenance under section 2(1) of the Maintenance of Surviving Spouses Act, whilst the present matter before this Court concerns a right to benefit in terms of section 1(1) of ISA;

(ii) there was a will in *Volks*, whereas the deceased in this case died intestate; and

(iii) the *Gory* order expressly provides for the protection of same-sex permanent partners' intestate succession rights. Furthermore, this case is not concerned with an equality challenge, but is based on the interpretation of the *Gory* order in light of the subsequent enactment of CUA.

[47] As can be seen, Mrs Robinson had sought to claim maintenance over and above the benefit that she was to receive in terms of the will. Her claim for maintenance would proportionally reduce the size of the beneficiaries' share and frustrate the testator's wishes. The majority's reluctance to grant a right for a permanent partner to claim maintenance against a deceased estate was brought on by the fact that the right to claim maintenance would never have arisen by operation of law during the lifetime of the deceased. To this effect, Skweyiya J stated:

> "[I]t is not the under-inclusiveness of section 2(1) which is the cause of their misery. The plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind *during their lifetimes*."[45]

[48] Clearly, the case before us is not a comparable situation. Conceptually, the law of intestate succession applies only where a deceased has not taken steps to dispose of her property in terms of a will.[46] Importantly, the gears of succession only begin to turn upon the death of one of the parties. One cannot place intestate succession rights

[45] Id at para 65.

[46] Section 4(b) of ISA explains that "'intestate estate' includes any part of an estate which does not devolve by virtue of a will".

of permanent partners on the same footing as maintenance claims against a deceased estate, because there is never an obligation to dispose of one's estate during her lifetime. In contrast, the existence of a maintenance claim in terms of the Maintenance of Surviving Spouses Act does not depend on the existence or absence of a will. Generally, maintenance exists in the course of life and, by virtue of the Maintenance of Surviving Spouses Act, passes on to the deceased estate as well. The difference is not arbitrary: maintenance and intestate succession are different systems, meant to address different needs and they each elicit different considerations. Unlike *Volks*, there can be no impinging on the freedom of testation in this case because there is no testator.

[49] In *Paixão,*[47] the SCA expressed the view that although the Court in *Volks* held that no reciprocal duty of support arises by operation of law in the case of unmarried cohabitants, such duty is not precluded from being fixed by agreement.[48] The SCA also distinguished the rationale behind the Maintenance of Surviving Spouses Act *vis-a-vis* that of the dependents action at common law, which the SCA stated was *sui generis* (of its own class).[49] The SCA found that section 2(1) of the Maintenance of Surviving Spouses Act addresses the question of whether a spousal benefit arising from a legally recognised marriage should be extended to a surviving partner of a life partnership.[50] On the other hand, the object of the dependant's action remedy is to place the dependants of the deceased to whom the deceased owed a legally enforceable duty to support or maintain in the same position as they would have been, as regards support and maintenance, had the deceased not been unlawfully killed by a wrongdoer.[51] On this basis, the SCA in *Paixão* distinguished *Volks* and the dependant's action was extended to the permanent life partner in that case.

[47] *Paixão v Road Accident Fund* [2012] ZASCA 130; 2012 (6) SA 377 (SCA).

[48] Id at para 26.

[49] Id.

[50] Id.

[51] Id.

[50] *Volks* is thus distinguishable not just from the facts, but from the legal mechanism being used. *Volks* continues to apply with full precedential force within the context of maintenance of surviving spouses. To say, as the applicant suggested, that we are called upon to decide whether to apply or to roll-back on the *Volks* decision, is to mischaracterise the issue.

[51] Moreover, and as discussed above, the *Gory* order effectively legislated an amendment of section 1(1) of ISA. Despite having had an opportunity for over 10 years, the Legislature has not specifically amended the effect of the *Gory* order. Hence the position stands – alongside and notwithstanding *Volks*. The applicant's submission that the principle of choice to "marry" (or conclude a civil union as it were) is equally applicable to this case, is unpersuasive.

[52] The applicant also contended that continuing to enforce *Gory* would have the effect of unfairly discriminating against opposite-sex permanent partners – since they are not entitled to the same benefit. This contention is neither here nor there. To wit, there has never been a constitutional challenge for the right of opposite-sex permanent partners to be included within the ambit of section 1(1) of ISA. An actual cause of action and a plea of unfair discrimination are thus required before crossing this bridge.[52]

[53] The second judgment suggests that the approach followed above "avoids [the] confrontation" of *Volks* by: (i) "interpreting the *Gory* order broadly"; and (ii) "distinguishing *Volks* on a number of grounds".[53] However, this Court should be reluctant to revisit principles that are not directly within the purview of the facts of a case. The reasons put forward in the second judgment as to why the judgment of *Volks* cannot stand are stimulating and persuasive. Nevertheless, for the reasons mentioned above, this is not directly within the purview of the facts of this case. To

[52] See *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) at 521F.

[53] Second judgment at [60].

overturn *Volks* on these facts would be undesirable. There may be an appropriate time when this Court is called upon to revisit the principles in *Volks*. Now is not that time.

[54] The second judgment concludes that "apart from those who choose to accept [CUA's] benefits by marriage formalisation, there is 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".[54] I do not agree. Save for the Marriage Act and the Recognition of Customary Marriages Act,[55] section 13(2)(b) of CUA extends the definition of the words "husband, wife or spouse in any other law, including the common law" to include a civil union partner. 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.[56] However, it does not follow that where *Volks* is overturned (which, as I have stated, is not appropriate on these facts) such partners are now considered as "husband, wife or spouse" on a literal reading of CUA – and remain entitled to inherit.

Conclusion

[55] For the reasons set out above, I am of the view that the enactment of CUA, particularly section 13(2)(b), did not specifically amend section 1(1) of ISA as was required by *Gory*. Civil unions concluded under CUA constitute a new category of beneficiary for purposes of ISA and are distinguishable from same-sex permanent life partnerships. As a result, same-sex permanent partners will continue to enjoy intestate succession rights under section 1(1) of ISA, as per the *Gory* order, until such time that the Legislature specifically amends the section. It is not for this Court to proscribe protections it previously extended when there is no clear legislative indication that the

[54] Second judgment at [87].

[55] 120 of 1998.

[56] See above n 33.

proscription is mandated. To do so would undermine the aspirations of the human rights culture that we seek to cultivate. Whether to provide "equality of the graveyard or the vineyard"[57] to permanent same-sex partners, is a matter best left to the competencies of the Legislature.

Costs

[56] The applicant contended that the costs should be costs in the deceased estate. The respondent submitted that the ordinary rules relating to costs should apply. I am of the view that for costs to come from the deceased estate would be unfairly punitive towards the successful party. Both parties made cogent submissions and the losing party's argument had substance – which warranted the applicant's persistence through to this Court. Accordingly, the interests of justice dictate that each party should bear their own costs.

Order

[57] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

FRONEMAN J:

Introduction

[58] I have had the privilege of reading the judgment by my colleague Mbha AJ (first judgment). I agree with the conclusion he reaches. The reasoning too, is temptingly persuasive. Regretfully though, not sufficiently so. We differ on (1) the

[57] *Fourie* above n 12 at para 149.

reach of the order made by this Court in *Gory* and (2) the import of the majority judgment of this Court in *Volks*.

[59] As to the reach of *Gory*, I come 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 is a legitimate choice for the Legislature to make in remedying gender discrimination. The logic of these holdings forces one to confront directly the obstacle that the principle, as laid down in *Volks*, presents to the success of the respondent's claim to inherit from the intestate estate. CUA has now removed the impediment to marry for same-sex couples. The discriminatory mischief of *Gory* appears to have been addressed.

[60] The first judgment avoids this confrontation by first, interpreting the *Gory* order broadly, as in effect legislating for the rights of unmarried same-sex partners to intestate succession and, second, distinguishing *Volks* on a number of grounds.[58] It is a tempting path, but in respect of each choice I consider there to be difficulties. So this judgment meets *Volks* head-on, something I regard as inevitable. And it concludes that *Volks* cannot stand. That is a huge statement to make and I will attempt to justify the grounds for doing so as responsibly as possible, as is required when previous decisions of this Court are revisited.[59] It may be necessary for this Court to consider a legal issue raised by the facts, even if the parties themselves did not rely on it, as long as there is no prejudice involved.[60]

[58] First judgment at [43] to [54].

[59] *Turnbull-Jackson* above n 11 at paras 54-6.

[60] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

The reach of Gory

[61] What discriminatory mischief did *Gory* seek to address? We need not speculate. Under the heading "The unconstitutionality of section 1(1) of the Act" Van Heerden AJ, writing for the Court, states:

> "Section 1(1) of the Act confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. *As these partners are not legally entitled to marry, this amounts to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution*, which discrimination is in terms of section 9(5) presumed to be unfair unless the contrary is established. Given the recent jurisprudence of South African courts in relation to permanent same-sex life partnerships, the failure of section 1(1) to include within its ambit surviving partners to permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support is inconsistent with Mr Gory's rights to equality and dignity in terms of sections 9 and 10 of the Constitution. There was no attempt by the respondents either in the High Court or in this Court to justify the limitation of Mr Gory's rights in terms of section 36 and, in my view, there is no such justification. It follows that the High Court correctly found section 1(1) of the Act to be unconstitutional and invalid to the extent alleged by Mr Gory and that paragraph 1 of the order of the High Court must be confirmed."[61]

[62] How did the Court see its function in regard to the chosen remedy of "reading-in"? Again no speculation is necessary:

> "As contended by Mr Bell, questions like what status to accord pre-existing same-sex life partnerships after the expiry of the *Fourie* deadline, whether to provide a 'transitional' period in which partners to pre-existing same-sex life partnerships will be expected to marry or to register their pre-existing partnerships to continue to qualify for the benefits conferred by law on 'spouses', and if so, the length of such a transitional period are pre-eminently legislative decisions. This kind of decision ought to be taken by Parliament when it enacts the legislation contemplated in the *Fourie* case, and ought not to be anticipated by this Court. It is clearly the task of the [L]egislature to enact legislation that deals with the whole gamut of different types of

[61] *Gory* above n 4 at para 19.

> marital and non-marital domestic partnerships in a sufficiently detailed and comprehensive manner. *The primary responsibility of this Court in the present matter is to cure the existing and historical unconstitutionality of section 1(1) of the Act, the fulfilment of which responsibility clearly requires the reading-in ordered by the High Court.*"[62]

[63] If this was all, there would have been little to quibble about. The order would then have to be read in the context of being restricted to cure the "existing and historical unconstitutionality of section 1(1) of the Act", which lay in the fact that same-sex partners "[were] not legally entitled to marry".[63]

[64] But in between these statements there is another paragraph, which formed the subject of intense debate during argument:

> "It is true that, should this Court confirm paragraph 2 of the High Court order, the position after 1 December 2006 will be that section 1(1) of the Act will apply to both heterosexual spouses and same-sex spouses who 'marry' after that date, if Parliament either fails to respond before the *Fourie* deadline or if it does enact legislation permitting same-sex couples to 'enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.' Unless specifically amended, section 1(1) will then also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not 'marry' under any new dispensation. Depending on the nature and content of the new statutory dispensation (if any), there is the possibility that unmarried heterosexual couples will continue to be excluded from the ambit of section 1(1) of the Act. As was argued by the Starke sisters, the rationale in previous court decisions for using reading-in to extend the ambit of statutory provisions applicable to spouses/married couples so as to include permanent same-sex life partners was that same-sex couples are unable legally to marry and hence to bring themselves within the ambit of the relevant statutory provision. Once this impediment is removed, then there would appear to be no good

[62] Id at para 31.

[63] The same approach was adopted in the High Court: *Gory v Kolver NO* [2006] ZAGPHC 28; 2006 (7) BCLR 775 (T) at paras 19 and 21.

> reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession."[64]

[65] What this paragraph appears to be dealing with is what the possible consequences would be if the deadline for amending legislation following upon this Court's decision in *Fourie* was not met or, if it was met, to "legislate" for same-sex couples to enjoy the same status, benefits and responsibilities accorded to heterosexual couples. It is not clear to me why this was necessary to expound upon if the constitutional issue at stake was the constitutionality of the existing and historic discriminatory mischief of not allowing same-sex couples the same benefit of marriage afforded to heterosexual couples and how to remedy it.

[66] It does not logically follow that removal of the obstacle to marry will nevertheless also entail the protection of permanent same-sex life partners who have undertaken reciprocal duties of support but who do not "marry" under any new dispensation. That assertion requires further and different justification, which is not given. And the further statement that the reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples should also disappear, is also not a logical consequence of the removal of the obstacle to marry. It is dependent on the prior assertion that unmarried same-sex couples who have undertaken reciprocal duties of support are entitled to continuing protection insofar as intestate succession is concerned and, implicitly, that it would amount to unfair discrimination to make a distinction between same-sex and heterosexual couples. But again the underlying reasoning is absent.

[67] So it appears that these statements were, first of all, not necessary for the reasoning on the issue at stake in *Gory* and were, in any event, not based on any substantive reasoning justifying the conclusions expressed in them. That may be sufficient reason not to give them the status as a necessary part of understanding the

[64] *Gory* above n 4 at para 29. The paragraph number has entered academic writing; see Kruuse "'Here's to you, Mrs Robinson': Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships" (2009) 25 *SAJHR* 380.

order made in *Gory*, but there is another. That reason flows from the separation of powers principle. When the Court "legislates" by a reading-in-remedy it must tread cautiously.[65]

[68] In *Satchwell 1*, Madala J warned against going beyond remedying the constitutional wrong in the impugned provisions:

> "This Court is not at large to grant any relief under its power to grant 'appropriate relief' – it cannot import matters that are remote to the case in question – otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case."[66]

[69] A similar caution applies to interpreting the order in *Gory* as "legislating" for a situation beyond the constitutional wrong in the case, namely the obstacle to marriage for same-sex couples. The issue of what should happen when that obstacle is removed was not in issue in *Gory*, nor was the issue of differentiation or discrimination between unmarried same-sex and heterosexual couples.

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[65] While a fluid mechanism is encouraged and indeed necessary in a transformative sense in order to facilitate dialogue with the State, the Court must always be cautious to interfere with legislation through reading-in. See Ngcobo J in *Director of Public Prosecutions Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC), 2009 (7) BCLR 637 (CC) at para 183; *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 60; and *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*TAC*) at paras 37-8. In *TAC* at para 38, this Court noted that "[t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations. . . . In this way the judicial, legislative and executive functions achieve appropriate constitutional balance". In *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 183, Chaskalson P stated that "[i]t is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature". See also *National Coalition* above n 33 at paras 75, 66-88. In *National Coalition* above n33 at para 75, this Court stated that "[i]n deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution." Much has been written about the role of the Constitutional Court in facilitating transformative measures through a fluid notion of separation of powers. See Liebenberg *A Transformative Jurisprudence on Socio-Economic Rights* (Juta & Co Ltd, Cape Town 2010) at 66-75; Calland and Taylor "Parliament and the Socio-economic Imperative – What is the Role of the National Legislature?" (1997) 1 *Law Democracy & Development* 193; Moseneke "Transformative Adjudication" (2002) 18 *SAJHR* 309 at 316; Gloppen *South Africa: The Battle Over the Constitution* (Dartmouth Publishing Co Ltd, Dartmouth 1997) 218-26; and Davis "The Relationship Between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?" (2012) 15 *PER/PELJ* 7. Our jurisprudence has noted the careful balance that must be struck between ensuring an adequate diffusion of power from any one source of the branches of state and – while allowing for overlap – avoiding a transgression of the mutually-defined boundaries between each.

[66] *Satchwell 1* above n 29 at para 33.

[70] The *Gory* order thus relates to same-sex partners who "are not legally entitled to marry".[67] Even if this is not the only possible interpretation it is nevertheless a reasonable one. The caution against "legislating" too widely when fashioning a reading-in remedy implies that the more restrictive of alternative reasonable interpretations of the *Gory* order should carry the day.

[71] CUA removed the impediment to "marry" for same-sex couples. If that was a legitimate choice for the Legislature to make, then those same-sex life partners with reciprocal duties of support who did not take advantage of the removal of the obstacle to marriage would seemingly still be excluded from intestate inheritance.

[72] This is where the significance of *Volks* comes to the fore.

The import of Volks

[73] The first judgment states that the central question in *Volks* was whether the protection which the Maintenance of Surviving Spouses Act afforded to a "survivor" in terms of that Act could be extended to a surviving permanent life partner.[68] It then goes on:

> "*Volks* concerned the right of a permanent opposite-sex partner to claim maintenance from a deceased estate in terms of the Maintenance of Surviving Spouses Act – a benefit that is given effect to before succession takes place. However, I am not convinced that *Volks* is drawn into question based on the facts and the law in this case. *Volks* is distinguishable for the following reasons—
>
> (i) *Volks* concerned a surviving permanent life partner's right to benefit from maintenance under section 1(1) of the Maintenance of Surviving Spouses Act; whilst the matter before the court at present concerns a right to benefit in terms of section 1(1) of ISA;

[67] The words used in *Gory* above n 4 at para 19.

[68] First judgment at [44].

(ii) there was a will in *Volks*, whereas the deceased in this case died intestate, and;

(iii) the *Gory* order expressly provides for the protection of same-sex permanent partners' intestate succession rights. Furthermore, this case is not concerned with an equality challenge, but is based on the interpretation of the *Gory* order in light of the subsequent enactment of CUA."

[74] In view of the fact that the *Gory* order cannot be read as a general "legislative" kind of protection for same-sex partners' intestate succession rights, the last ground for distinguishing *Volks* is not open to me. It is tempting to follow the first judgment in accepting the difference between maintenance and intestate succession as sufficient reason for distinguishing *Volks*, but I am not sure that the distinction withstands critical scrutiny.

[75] The majority in *Volks* relied on a general principle:

"From this recognition, it follows that the law may distinguish between married people and unmarried people. Indeed, this Court in *Fraser*[69] noted:

> 'In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with.'

The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people."[70]

[76] Implicit in the acceptance of the principle that it is a legitimate choice for the Legislature to accord benefits to married people in appropriate circumstances, is its underlying corollary: that those who wish to taste the fruits of the benefits have the choice to marry. If they do not, they cannot complain.[71]

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[69] *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 218 (CC); 1996 (8) BCLR 1085 (CC).

[70] *Volks* above n 14 at para 54.

[71] This point is made explicitly in the judgment of Ngcobo J in *Volks* above n 14, but it also forms part of the majority judgment of Skweyiya J at para 55:

[77] It seems to me that the difference between the subject-matter of intestate succession and post-death maintenance of spouses does not adequately explain why this principle of legitimate legislative choice, preferring the formality of marriage, should apply in one case but not the other. Both are predicated on the existence of a reciprocal duty of support. In *Volks* a crucial point of distinction was that marriage created a legal duty of support, unlike the possible factual duty in the unmarried relationship at stake there. In *Gory* the existence of a factual duty of support was the justification for removing the formal impediment of marriage in order to attain the blessing of legal validation of that factual duty.

[78] So the crucial question to ask is this: if our law recognises, as *Volks* does, that it is a legitimate choice for the Legislature to accord benefits to married people, which it does not accord to unmarried people, why should the amended section 13(2)(b) of CUA[72] not be read as making that choice? If the *Gory* order does not amount to a "legislative" exception, created by this Court as a permanent default position that survives the amendment, is there any way out?

Beyond Volks

[79] Why, though, should we even be talking of a way out? What is it that compelled this Court to pen paragraph 29 in *Gory*, and what compels us to want to uphold the propositions made therein?

> "Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities…"

[72] Section 13(2)(b) provides that "with exception of the Marriages Act or Customary Marriages Act any reference to . . . husband, wife or spouse in any other law, including the common law, includes a civil union partner."

[80] The majority judgment in *Volks* has been subjected to academic criticism.[73] For the present it is necessary to consider only two main related points of that criticism. The first is that *Volks* represents one of the instances where this Court has "contrive[d] to avoid the issue of discrimination against the unmarried".[74] The second, related point is that it was wrong in excluding a factual reciprocal duty of support between unmarried couples as worthy of protection, as opposed to the immediate legal duty of reciprocal support created by marriage.[75] These points of criticism are two sides of the same coin.

[81] The Bill of Rights prohibits unfair discrimination on the ground of marital status.[76] The jurisprudence of this Court has given recognition to this in two different ways that are not always easily reconcilable with each other. The one, as exemplified by the initial reasoning in *Gory*, has been to characterise the unfair sting in the discrimination to lie in the lack of entitlement to marry and to remedy it by removing the disentitlement.[77] The other has been to recognise the many forms of co-habitation and reciprocal duties of support outside of formal marriage institutions.[78] On the

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[73] Wood Bodley "Intestate Succession and Gay and Lesbian Couples" (2008) 125 *SALJ* 46; De Vos "Still out in the Cold? The Domestic Partnerships Bill and the (Non)protection of Marginalised Woman" (sic) in Sloth-Nielson and Du Toit (eds) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (Juta & Co Ltd, Cape Town 2008) 129; De Vos and Barnard "Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga" (2007) 124 *SALJ* 795; Picarra "*Gory v Kolver NO* 2007 (4) SA 97 (CC)" (2007) 23 *SAJHR* 563; Bonthuys "Race and Gender in the Civil Union Act" (2007) 23 *SAJHR* 526; Schäfer "Marriage and Marriage-like Relationships: Constructing a New Hierarchy of Life Partnerships" (2006) 123 *SALJ* 626; Lind "Domestic Partnerships and Marital Status Discrimination" (2005) *Acta Juridica* 108; Wildenboer "Marrying Domestic Partnerships and the Constitution: A Discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC)" (2005) 20 *SA Public Law* 459.

[74] Meyerson "Who's In and Who's Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa" (2010) 3 *Constitutional Court Review* 295 at 297.

[75] Smith "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnerships Legislation" (2010) 13 *PER/PELJ* 238 at 247-57.

[76] Section 9(3) reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[77] *Daniels v Campbell NO* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC); *Satchwell v President of Republic of South Africa* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at paras 10, 16 and 22; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 37; *National Coalition* above n 33 at para 47.

[78] Consider for example *National Coalition* id at para 47.

surface this seemed to be in line with a change from a formal approach to life partnerships to a functional one, with the focus "on the substance of different relationships and the needs of the parties to them, rather than their form or official status".[79]

[82] These two strands of the Court's jurisprudence are in some tension with each other. On the one hand the jurisprudence recognises that discrimination based on marital status exists between married and unmarried couples, be they same-sex couples who could not marry or heterosexual couples whose "marriage" was not legally recognised. In general, however, critics say, this is remedied by allowing, and requiring, unmarried couples to formalise their unmarried status by marrying in the formal legal manner. This "marriage-centric" approach[80] is the "bad" part, at least for some critics. It is bad because the reason for being "marriage-centric" is unarticulated, and the unarticulated preference lies in moral choices not countenanced by the Constitution.[81] The decision in *Volks* is said to be an example of this unreasoned moral preference.

[83] Before dealing further with this aspect it is necessary to refer to the other main point of criticism, namely that the majority in *Volks* failed to give proper recognition to the factual reality of reciprocal support between the unmarried partners. Had proper recognition been given to that, the rationale for preferring the marriage

[79] Meyerson above n 74 at 295.

[80] I borrow the term from Meyerson id at 298.

[81] Id:

> "The Court makes no attempt to explain the reasoning behind this concession, which only makes sense on the supposition that the Court regards marriage in terms of religious law as morally superior to other kinds of informal partnerships: religious marriage, it appears, is better than no marriage. It seems that it is this unarticulated moralistic belief that leads the Court to resort to a one-off expansion of the concept of 'marriage' beyond the *de jure* concept so as to favour religious unions. I will argue that while it is desirable to extend the protections of marriage more generously, to do so in favour of only religious unions is unprincipled. Furthermore, the Court's special solicitude towards religious unions serves to aggravate the unfairness of the Court's moralistic and exclusionary approach to other functionally equivalent relationships."

validated legal duty of support would have been severely undermined.[82] It is a feature of this Court's jurisprudence that the existence of factual reciprocal duties of support in unmarried relationships underlies the reasoning that it is unfair to discriminate between married legal duties of support and unmarried factual duties of support. Formally they may be different, but functionally they are similar.[83]

[84] These criticisms of *Volks* – of being "marriage-centric", and disregarding this Court's previous acceptance of factually-existing reciprocal duties of support as the crucial functional feature of discrimination based on marital status – suggest an answer to the question posed earlier; why do we seek a way out from *Volks*? We seek a way out, even though we do not articulate it in that way, because, first, the criticisms appear to be valid and, second, *Volks* reflected views of its time, not inclusive enough in the present social context. It is either time to articulate the underlying preference for equalisation by way of the formalisation of marriage route, or to recognise that its justification is wanting.

[85] The by now famous paragraph 29 of *Gory*, suggesting that there is no reason for both same-sex and heterosexual unmarried partners who owed reciprocal duties of support not to inherit from the intestate estate, is also better understood in this light. The paragraph itself does not articulate the premises for the propositions it makes, and we need to recognise that too. But we can flesh out the premises. And I suggest that part of them is this. The initial obvious way to change our society's views on

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[82] Smith "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnerships Legislation" (2010) 13 *PER/PELJ* 238 at 247-257. Courts in South Africa have extended recognition of a common law duty of support based on factual existence in a long line of cases. In *Union Government v Warneke* 1911 AD 657 (*Warneke*) the action was extended so as to give an action to a husband who had suffered patrimonial loss through the death of his wife. In *Abbott v Bergman* 1922 AD 53 the principle laid down in *Warneke* was applied to enable a husband to sue for patrimonial loss sustained by him through non-fatal injury to his wife. In *Santam Beperk v Henery* [1999] ZASCA 5; 1999 (3) SA 421 (SCA) the action was extended to cover a divorced woman entitled to maintenance from the deceased in terms of an order of court granted in terms of section 7(2) of the Divorce Act 70 of 1979. A contractual right to support arising out of a marriage in terms of Islamic law was, within defined parameters, recognised for purposes of the dependant's action in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* [1999] ZASCA 76; 1999 (4) SA 1319 (SCA). In *Paixão* above n 47 it was held that the dependants' action is to be extended to unmarried persons in heterosexual relationships who have established a contractual reciprocal duty of support.

[83] Consider for example *Satchwell 1* above n 29 at para 23; *Fourie* above n 12 at para 54.

unmarried partnerships was to show that they exhibited the same characteristics as married partnerships. Central to this was the existence of reciprocal duties of support between partners in both married and unmarried relationships. The most comfortable way to ease the road to equality was to remove the impediment of formal marriage to previous unmarried partners. But that was only a pragmatic start on the road we need to travel. The logic of similar reciprocal duties of support does not necessitate equalisation in that particular way. To the contrary, it creates a new form of unfair discrimination against unmarried couples who do not wish to marry. The same reciprocal duties of support remain, but some are protected, others still not. That residual unfair discrimination cannot be allowed to stand.

[86] When we depart from a previous decision we must be satisfied that it is clearly wrong. With hindsight I think we can now acknowledge that it is clearly wrong to attempt to eradicate unfair discrimination by creating another form of unfair discrimination. Because it is hindsight that helps us to this conclusion we remain respectful of the earlier start along the road to eradicate discrimination in our society. But the application of our Constitution to changing circumstances can never be static. Our law of precedent recognises the possibility of change and I have attempted to justify this change within those substantive parameters.[84]

Conclusion

[87] Unshackled from *Volks*, section 13(2)(b) of CUA 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. The

[84] See *Turnbull-Jackson* above n 11 at para 54. See also Kruuse above n 64 at 386; Rycroft "The Doctrine of Stare Decisis in Constitutional Court Cases" (1995) 11 *SAJHR* 587; Devenish "The Doctrine of Precedent in South Africa" (2007) 28 *Obiter* 1.

respondent falls within that category. For that reason I support the order made in the first judgment.

For the Applicants:	J G Bergenthuin SC and B Bergenthuin instructed by Els Attorneys
For the First Respondent:	W Trengove SC and L Kellermann instructed by Ross & Jacobz Inc
For the Amicus Curiae:	K Pillay SC and U Dayanand-Jugroop instructed by Legal Resources Centre