



UNMARRIED COUPLES AND INTESTATE SUCCESSION

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When unmarried couples who are cohabitating as “husband and wife” in a permanent life partnership is terminated by the death of one partner, in which the partners undertook reciprocal duties of support, in terms of the laws of intestate succession, the surviving partner had no claim whatsoever, whether in terms of the Maintenance of Surviving Spouses Act, No. 27 of 1990 or the Intestate Succession Act, No 81 of 1987.

However, this position has subsequently changed in terms of a judgment of the Constitutional Court of South Africa in the matter of Jane Bwanya v Master of the High Court, Cape Town and others, Case CCT241/20, (“the Bwanya case”).

In this matter Ms Bwanya lodged two claims against the deceased party’s estate in terms of the Administration of Estates Act, No. 66 of 1965. These were for maintenance in terms of the Maintenance of Surviving Spouses Act, and for an inheritance in terms of the Intestate Succession Act.

She based her claims on the fact that she was in a relationship of permanent life partnership with the deceased, which relationship was akin to a marriage, and they had undertaken reciprocal duties of support towards each other during the relationship.

The Executor of the deceased's estate correctly rejected both claims based on the fact that under the above two Acts, Ms Bwanya did not qualify for the claimed benefits. Ms Bwanya challenged the constitutionality of section 2(1) of the Maintenance of Surviving Spouses Act and section 1(1) of the Intestate Succession Act.

Her argument to the Court was that the referred to sections in the two Acts are unconstitutional to the extent that they exclude surviving partners in permanent heterosexual life partnerships, (where the partners had undertaken reciprocal duties of support), from claiming maintenance and inheritance from the estates of their deceased partners.

The basis of the claim was that the exclusions under the two Acts were violative of Ms Bwanya's rights of equality and dignity. (Refer section 9 of the Constitution of South Africa).

Although the matter was settled between the parties, being Ms Bwanya and the Executor, who entered into a Settlement Agreement, notwithstanding, Ms Bwanya persisted in seeking an order in terms of the two Acts.

After the High Court considered the question of mootness, the High Court decided to entertain the issue and dismissed the challenge as to the constitutionality of the two Acts.

The matter was then referred to the Constitutional Court for adjudication.

The Constitutional Court again considered the aspect of mootness, but was inclined to hear the matter.

After consideration of the matter, the Constitutional Court made an order by including in the definition of "survivor" in terms of section 1 of the Maintenance of Surviving Spouses Act the words "... and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate." It accordingly found that the aforesaid should be included in the definition of "survivor".

In regard to the Maintenance of Surviving Spouses Act, it found that the definition of "spouse" for purposes of the Act must include a person in a permanent life partnership in which the partners undertook reciprocal duties of support and that the definition of "marriage" for the purposes of that Act, must include a permanent life partnership in which the partners undertook reciprocal duties of support.

The Orders made were suspended for a period of 18 months to enable Parliament to take steps to cure the constitutional defects identified in the judgment. Should Parliament not enact legislation amending the two Acts then the judgments would become operational 18 months after the date of the Order. It would have no effect on the validity of any acts performed in respect of the administration of a deceased's estate that has been finally wound up by the date upon which the order of invalidity came into effect.

As the Order was granted on 31 December 2021 and, as there has been no amendments to the two Acts yet by Parliament, the Order has come into effect as set out in the judgment of the Constitutional Court.

There were dissenting judgments by Jafta J (Mhlantla J and Tshiqi J concurring with Jafta).

The full case can be read under Case CCT241/20.

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