

## Court rules life partners are spouses for intestate succession

[Bwanya v Master of the High Court, Cape Town and Others](#) [2020] ZAWCHC 111

The applicant (B) and R met in February 2014 and they started living together in his house in June 2014. The undisputed evidence before the court was that R treated B as his wife. To friends, with whom they mixed socially, their relationship at all times appeared to be that of a loving couple.

R made several preparations for the two of them to travel to Zimbabwe to meet B's family, negotiate lobola and prepare for a wedding. R died unexpectedly in April 2016. B lodged claims against the estate as intestate heir as R's spouse, and under section 2 of the Maintenance of Surviving Spouses Act, 27 of 1990 (MSSA).

The second respondent, the executor of R's estate, rejected both claims, which rejections were upheld by the Master. This led to B bringing the application that both section 1(1) of the Intestate Succession Act, 81 of 1987 (ISA), and certain provisions of the MSSA are unconstitutional and invalid.

The court (Magona AJ) dealt firstly with section 35(10) of the Administration of Estates Act, 66 of 1965 (AEA) which requires aggrieved parties to lodge an application to review the Master's decision within thirty days. The court held that this is not a term after which the aggrieved party's right to bring the application will expire, but merely a time period after which the applicant must seek condonation for the late filing of the application.

The court considered the anomaly that arose in South African law after the decision of the Constitutional Court in [Gory v Kolver NO and Others](#) [2006] ZACC 20 in that life partners in a permanent same-sex relationship are regarded as spouses for purposes of section 1 of the ISA, but not life partners in a permanent opposite-sex relationship.

The court held that this constituted unfair discrimination on the basis of gender and sexual orientation and that it is presumed to be unfair under section 9 of the Constitution, 1996. The court found nothing to support a finding that the discrimination is nonetheless fair in the circumstances and ruled that section 1(1) should therefore be read to include the words "or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support" after the word "spouse" wherever it appears. The court also held that as it stands, section 1(1) also impairs the dignity of such an opposite-sex life partner.

Dealing with the MSSA, the court held that it is bound by the precedent set by the Constitutional Court in [Volks NO v Robinson and Others](#) [2005] ZACC 2 in which the latter court held that the limitation of a claim under the MSSA to cases where a legal duty of maintenance existed is not unconstitutional.

The court ordered the Minister of Justice (the third respondent) to pay the costs of the application.

The judgement of Magona AJ is now subject to confirmation by the Constitutional Court under section 172(2)(a) of the Constitution.