

**Decided on 23 November 2006**

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**MEDIA SUMMARY**

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*The following explanation is provided to assist the media in reporting this application and is not binding on the constitutional court or any member of the court.*

On 24 August 2006 this Court heard an application for confirmation of an order made by the Pretoria High Court declaring section 1(1) of the Intestate Succession Act 81 of 1987 (the Act) to be unconstitutional in so far as it does not provide for a permanent same-sex life partner to inherit automatically, as a spouse would, when the other partner dies without a will.

In the main application Henry Harrison Brooks (the deceased) and Mark Gory (the applicant) were, at the time of Henry's death, allegedly partners in a permanent, same-sex life partnership. When Henry died intestate, his parents nominated the first respondent (Daniel Kolver) to be appointed by the Master as the executor of their son's estate, and claimed to be entitled to his assets as his intestate heirs. This resulted in a dispute with the applicant as to who the lawful intestate heir was. The High Court found that the deceased and the applicant had indeed been involved in a permanent same-sex life partnership and had assumed reciprocal duties of support. It found the exclusion of same-sex life partners from the provisions of section 1(1) of the Act to be unconstitutional and ordered the reading of certain words into the section. In this Court the issue is whether section 1(1) is unconstitutional and if so, what the appropriate remedy should be. The applicant submits that the High Court order in respect of the section should be confirmed as it stands.

Daniel Kolver applied for leave to appeal against the High Court order that he (a) be removed as an executor of the estate; (b) not be entitled to remuneration for his services in connection with the estate; and (c) in his personal capacity, pay half the costs of the applicant. The applicant opposed this application. The Minister of Justice and Constitutional Development did not oppose the confirmation of the High Court order, but did oppose the order of costs against her sought in this Court by Mark Gory.

There was an application to intervene in the matter by Elrida Starke and her three sisters whose late brother was allegedly a partner in another same-sex life partnership. There is a dispute between the four sisters and their late brother's alleged same-sex life partner as to who the lawful heir of the intestate estate is. They argued that, should the High Court order be confirmed, they will suffer prejudice by being deprived of their vested rights as intestate heirs. They sought to present argument to the effect that "reading-in" is not the appropriate remedy, and that any order made by this Court should apply only to the estates of people who die after the order is handed down. Their late brother's alleged

same-sex life partner, Bobby Lee Bell, also applied to intervene should the sisters' application be granted. He submitted that the High Court order should be confirmed as is.

Writing for a unanimous court, Van Heerden AJ granted the applications to intervene by the Starke sisters and Bobby Lee Bell, on the basis that the intervening parties have a direct and substantial interest in the confirmation application, and it is in the interests of justice to allow the intervention.

The Court upheld the High Court's finding regarding the unconstitutionality of section 1(1) and the reading in after the word "spouse", wherever it appears in that section, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support". It was held that the order of constitutional invalidity should in the main operate retrospectively, but with limitations so as to reduce the risk of disruption in the administration of deceased estates and to protect the position of bona fide third parties as best possible.

The Court confirmed the order removing Mr Kolver as executor of the estate, and suspended administration of the estate until such time as a new executor is appointed. The Court found, however, that the High Court had exercised its discretion unjudicially in ordering that Mr Kolver not be remunerated for his services and expenses, as its decision in this regard was not based on substantial reasons. This order was therefore set aside.

On costs, this Court held that, despite statements of this Court to the effect that comprehensive legislation accommodating same-sex life partnerships in a constitutionally acceptable manner is necessary, such legislation has not yet been forthcoming. Members of the gay and lesbian community have continued to have to approach the courts to challenge legislation violating their constitutional rights and, in this way, to achieve piecemeal reform of the law. In the final analysis, the State is responsible for section 1(1) of the Act remaining on the statute books in its unconstitutional form. Accordingly it was held that justice and equity require that the Minister should be ordered to pay Mr Gory's costs in this Court and in the court below, as well as the costs of Mr Kolver in both courts.