

[REPORTABLE]

**IN THE HIGH COURT OF SOUTH AFRICA  
(Cape Provincial Division)**

**Case No. 7178/03**

**ETHEL ROBINSON  
WOMEN'S LEGAL CENTRE TRUST**

**First Applicant  
Second Applicant**

**And**

**RICHARD GORDON VOLKS N.O.  
THE MASTER OF THE HIGH COURT  
ADRIAN HARRY SHANDLING  
LAUREN JUNE GOLDNER  
MARTIN ROY SHANDLING  
MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

**First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent**

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**JUDGMENT:**

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**DAVIS J.**

**Introduction:**

First applicant was involved in a relationship with the late Archie Shandling from mid 1985 until the latter's death on 14 December 2001. Together, first applicant and Mr Shandling occupied certain immovable property situated at 301 Lochinvar, Quarry Hill Road, Kloofnek Cape Town ('the property') continuously from early 1989 until Mr Shandling's death when applicant remained in occupation of the property until end of December 2002.

Applicant has characterised the relationship ‘as a permanent life or domestic partnership’ or as a ‘de facto monogamous relationship, also known as and referred to herein as a permanent life partnership or domestic partnership’.

First respondent did not expressly object to the use of the term ‘permanent life partnership and accepted that first applicant lived with Mr Shandling as his exclusive companion during the period 1985 until 2001.

During this period first applicant and Mr Shandling did not enter into marriage in accordance with the laws of South Africa or the laws of any other country. It was common cause that there was no legal impediment to the solemnisation of a civil marriage between them.

On 24 December 1999, Mr Shandling executed a will which was accepted by the Master. In his will he bequeathed certain of his assets (making up approximately one third of his estate) to Mrs Robinson to whom he referred to in the will as ‘his friend’. The residue of the estate devolved upon his three children in different proportions. On 19 August 2003, first applicant submitted a claim for maintenance against Mr Shandling’s estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (‘the Act’). On 27 August 2003 the Executor of Mr Shandling’s estate, first respondent, refused applicant’s claim for maintenance. In a letter of refusal addressed to second applicant it was pointed out, “.....**prima facie**, it would appear that the deceased and your client considered their position during the life time of the deceased and elected not to enter into a marriage in

accordance with the laws of South Africa. That election included implicitly, if not expressly, the choice not to have the automatic consequences of the laws of marriage applied to their relationship. The provisions contained in the Last Will of the deceased dated 24 December 1999 are consistent with that election”.

Following the adoption of this approach by respondent, first applicant launched the present application in which she seeks an order declaring that she is entitled to lodge a claim for maintenance in the estate of the late Mr Shandling in terms of the Act. In the alternative she seeks an order declaring that the Act is unconstitutional and invalid and that this unconstitutionality should be cured by a directive that section 1 thereof be read as if certain phrases and definitions were included.

In particular she has applied for declaration, in the alternative, (1) that the omission from the definition of ‘survivor’ in section 1 of the Act of the words ‘and include the surviving partner of the life partnership’ at the end of the existing definition is unconstitutional and invalid, (2) a declaration that the definition of ‘survivor’ in section 1 of the Act is be read as if it included the following words after the words ‘dissolved by death’: ‘And includes the surviving partner of the life partnership’, (3) a declaration that the omission from the definition of section 1 of the Act of the following at the end of the existing definition is unconstitutional and invalid. ‘spouse’ for the purposes of this Act shall include a person in a permanent life partnership; ‘marriage for the purposes of the Act shall include a permanent life partnership’, (4) a declaration that section 1 of the Act is to be read as though it included the following at the end of the existing definition: ‘Spouse’ for the

purposes of the Act shall include a person in a permanent life partnership; marriage for the purposes of the Act shall include a permanent life partnership’.

**Essential Facts.**

Much of the factual matrix around which the present dispute revolves can be accepted as common cause. Applicant and Mr Shandling were accepted as a couple. They were involved in a monogamous permanent life relationship and supported each other emotionally and financially throughout their relationship **inter alia** in that they were involved in an exclusive life relationship for more than sixteen years. They shared a home for approximately twelve years until Mr Shandling’s death. Mr Shandling supported the applicant financially. First applicant purchased groceries and household necessities, was a dependent of Mr Shandling’s medical aid scheme. Mr Shandling paid for their entertainment and other extraordinary expenses. Mr Shandling provided first applicant with petrol on his firm of attorneys account and paid for the car’s maintenance. First applicant cared for Mr Shandling, nursed him through his illness and stood by him throughout his bouts of bi-polar mood disorder. They were accepted as a couple and accompanied each other to work-related events and social functions. They shared family responsibilities.

To the extent that there is a factual dispute, it turns on the interpretation of certain of the facts which have been outlined. First respondent in his capacity as executor of the deceased estate refers at some length to his relationship with Mr Shandling and the difficulty which Mr Shandling encountered in his marriage to his wife Edith. She died

prior to the commencement of the relationship between Shandling and first applicant. As first respondent states in his answering affidavit, Mr Shandling 'frequently complained to me that his wife was often unsympathetic which led on occasion to quarrels and tension between them. On many occasions he told me with considerable emphasis that if he were ever single again that he would never again marry'. In short, the interpretation placed by first respondent on the agreed facts was that no legal impediment existed to a marriage between Mr Shandling and first applicant, that Mr Shandling had chosen not to enter into a marriage relationship and that 'it would be an infringement of Archie and Archie's estates, freedom and dignity to have the consequences of marriage imposed in circumstances when there was a clear choice not to enter into a marriage relationship'.

To the extent that it is relevant, first applicant states in reply 'Insofar as it is alleged that Archie did not want to get married, I state that I was at all times prepared to marry him as referred to herein above. His children did not want him to remarry and he was influenced by them in this regard. When he was nearing the end of his life we intended to marry before a Rabbi but this did not happen as set out herein above. At Archie's request I contacted the Rabbi and First Respondent who was not well at the time but told me to send for a marriage officer if the Rabbi does not respond to our request. At the time of his death, Archie was very concerned about my financial situation and my future'.

### **The Applicable Law.**

Section 2(1) of the Act reads thus:

‘If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings.

A survivor is defined in section 1 of the Act as ‘the surviving spouse in a marriage dissolved by death’. The Act does not define spouse or marriage.

Mr Marcus, who appeared with Ms Dicker on behalf of applicants, submitted that the provisions of the Act were contrary to the constitutional rights of applicant, particularly those contained in section 9 of the Republic of South Africa Constitution Act 108 of 1996 (‘the Constitution’). Section 9 provides thus:

“Equality

- 9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) 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.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In addition Mr Marcus referred section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected.

The approach to the interpretation of the right of equality has been formulated by the Constitutional Court in the form of a series of inquiries which a court is required to undertake in any matter involving an alleged violation of the right to equality. In **Harksen v Lane N.O. and Others** 1998(1) SA 300 (CC) at para 45 the Constitutional Court set out this process of inquiry thus:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of Section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and

characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

- (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of Section 8(2).

- (c) If the differentiation is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).”

The approach adopted in the Harksen case has been confirmed in a number of subsequent decisions of the Constitutional Court; see in particular **Hoffman v South African Airways** 2001(1) SA 1 (CC) at para 24 and the cases cited therein.

Mr Marcus submitted that, as the Act differentiated on a listed ground, being marital status (section 9(3)) of the Constitution, unfair discrimination was to be presumed in the present dispute. Accordingly in terms of the test as laid down in the Harksen case, supra, a determination ‘will have to be made as to whether the provision can be justified under the limitations clause.

It should be noted that in the present dispute, the Minister of Justice and Constitutional Development, the sixth respondent, abides the decision of this Court.

**Recognition given to relationships other than marriage.**

Since the inception of Constitutional democracy, the courts have recognised, in the context of two particular sets of relationships, privileging of marriage is unfair as that term has been given meaning within the context of section 9 of the Constitution. Thus, the Constitutional Court has recognised that there are different forms of life partnership and that marriage represents but one form of life partnership and that where same sex partners have established a permanent life relationship, the courts have given significant legal recognition must be given to such relationships See, for example, **Satchwell v President of the Republic of South Africa and Another** 2002(9) BCLR 986 (CC) at paras 22-25.

Similarly, in **Daniels v Campbell N.O. and Others** 2003(9) BCLR 969(C) at 991 F-H **Van Heerden J** held that to privilege a civil marriage over a marriage according to Muslim rights was to act in a constitutionally unfair manner.

The present dispute involved a debate about the applicability of these applications to a life partnership between two hetro-sexual adults to date, the question of hetro-sexual cohabitation has not been canvassed by our courts. Indeed in Satchwell supra **Madala J** was careful to distance of the implications of his judgment from the question of hetro-

sexual cohabitation. Thus he said ‘Same-sex partners cannot be lumped together with unmarried hetro-sexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage.... In my view it is unnecessary to consider the position of hetro-sexual partners in this case’.

Viewed accordingly, the present dispute turns on the answer to the question as to whether there is any justification for distinguishing between the approach adopted to muslim marriages and same sex cohabitation and the kind of life partnership between first applicant and Mr Shandling. Mr Katz who appeared together with Mr Farlam on behalf of first respondent based his submission on an argument concerning choice. At the outset, it should be noted that insofar as gay and lesbians are concerned this argument was rejected by the Constitutional Court in **National Coalition v Home Affairs for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000(2) SA 1(CC) at para 38; ‘The submission that ‘gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex. If true only as a meaningless abstraction’.

Mr Katz submitted that in the case of a hetro-sexual cohabitation this proposition was not a meaningless abstraction. In short, when Mr Schandling, who was free to marry first applicant chose not to do so, that choice should be respected and the jurisprudence which

had been developed with regard to same sex partners was inapplicable to this relationship born out of a clear choice.

In support of the submission that a clear distinction should be drawn within recognition granted to same sex life partners and Muslim marriages on the one hand and heterosexual life partnerships on the other, Mr Katz referred to a decision of the Canadian Supreme Court in **Nova Scotia (Attorney General) v Walsh** 2002 SCC 83. Given the importance placed by Mr Katz on this judgment, it is necessary to examine it in some detail.

Susan Walsh and Wayne Bona had lived together for some ten years. Two children were born out of their relationship. They owned a home as joint tenants in which Bona continued to reside after the separation. After the relationship terminated, Walsh claimed support for herself and the two children. She also sought a declaration that the Nova Scotia Matrimonial Property Act 1989 (MPA) was in conflict with the guarantee of equality contained in section 15(1) of the Canadian Charter of Rights and Freedoms of 1983. The argument was to the effect that the Act was unconstitutional because it failed to provide her with the benefit of the presumption applicable to married spouses, of an equal division of matrimonial property. In rejecting Walsh's challenge, **Basatrache J**, writing for the majority of the court said 'Treating all common-law relationships like legal marriages in terms of support obligations and property division ignores the very different circumstances under which people may enter into common-law union. If they choose to marry, then, they make a positive choice to live under one type of regime. If

they had chosen not to marry, is it the State's task to impose a marriage-like regime on them retroactively (at para 43). Bastarache J then went on to say: 'In the present case, however, the MPA's is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bears this out. It does not necessarily follow however that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the others assets and liabilities following the end of the relationship.' (at para 54).

Mr Katz submitted that, were these principles to be applied to the provisions of the Act, it would lead to the conclusion that no unfair discrimination had taken place between the comparative groups, namely spouses and cohabitants. The dignity of cohabitants was not violated by any differentiation in the Act. In Mr Katz's view, by acknowledging the virtue of the choices made by cohabiting partners and the implications thereof, the approach adopted in **Walsh, supra** had given effect to the dignity of the parties. In this connection Mr Katz also cited the following **dictum** from **Bastarache J's** judgment: 'One of the essential values (of the Charter) is liberty, basically defined as the absence of

coersion and the ability to make fundamental choices with regard to one's life.... Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships will be contrary to our notions of liberty' (at para 63).

Seeking to offer a different interpretation of the Canadian jurisprudence, Mr Marcus referred to the earlier Canadian decision in **Miron v Trudel** (1995)(2) CR 418. In this case the majority of the Supreme Court Canada held that the exclusion of unmarried partners from accident benefits available to married partners under an insurance policy violated section 15(1) of the Charter being a denial of equal benefit from the basis of marital status. - In Walsh the majority of the court distinguished the facts from those of **Miron** on the basis that a denial of legislative insurance benefits to unmarried spouses 'concerned the relationship of the couple as a unit, to third parties' (Wwalsh at para 53). In Miron the couple had no means short of marriage to control the availability to each other of the benefits and... the extension or denial of these benefits had no impact on the rightful obligations of the spouses **vis a vis** each other' (at para 53). The majority of the court thus held that **Miron's** case was distinguishable, particularly because Walsh's case concerned an attack on legislation which was primarily directed at regulating the relationship between the parties to the marriage itself.

Mr Marcus submitted that the present dispute concerned a set of facts which fell somewhere between those in **Miron** and **Walsh**. A claim for maintenance against the deceased estate did not merely concern the parties to the relationship, as one of the parties was dead, other respondents were involved and one, the State had elected to pass

legislation to grant a claim for maintenance to married persons upon the death of a spouse. Whereas the court in **Walsh** supra had said of the applicable legislation that it 'is not concerned with the support of spouses on marriage break-down, nor with the maintenance of children. Its concern is exclusively the division of wealth which one of the parties has acquired, either before or during the marriage and sets out guidelines to assist in determining that wealth continues to be separate properties or whether it becomes common property of the parties' (at para 15). By contrast, the purpose of the Act was to provide for a maintenance claim on the basis of need if a surviving spouse and not to morally privilege marriage.

Mr Marcus also referred to the minority judgment in **Walsh's** case of **L'Heureux-Dube J.** and in particular her rejection of the approach that the legal consequences associated with marriage constitute evidence of a choice made by parties who have the legal capacity to marry. In this regard **L'Heureux-Dube J** said 'I believe it to be highly problematic to conceive of marriage as a type of arrangement people enter into with the legal consequences of its demise taken into account. In the first place, most people are not lawyers. They are often not aware of the state of the law. Worse, many maintain positive misconceptions as to what obligations and rights exist in association with marriage and other relationships....Even assuming that people contemplating marriage are, as a whole, fully aware of their legal rights obligations as married people, it is a mistake to base the obligations imposed by the MPA on the partner's perceived consensus to be bound by these obligations through marriage' (at paras 143-144). **L'Heureux-Dube J** then refers as follows to the reasons why people choose to cohabit:

‘An excellent list is found in Payne and Payne, supra, at p.50. These authors list eight potential reasons why parties choose to cohabit, reasons which I would say are not mutually exclusive:

- the existence of a legal impediment to marriage;
- the existence of some religious obstacle to marriage;
- the perception by one or both of the potential cohabitants that marriage constitutes a relic of patriarchy with its assumed roles of male domination and female subordination;
- the wish to avoid some or all of the legal rights and obligations associated with marriage;
- the removal of the stigma associated with unmarried cohabitation due to the weakening of religious influence;
- the desire to enter into a “trial marriage”,
- the wish to maintain entitlements to particular benefits that would be lost in marrying; and,
- simple convenience.’ (at para 149).

### **Evaluation**

While use of comparative law can prove to be extremely helpful in unraveling the constitutional difficulties posed by a dispute of this kind, judgment of courts in foreign jurisdictions must be evaluated in terms of the particular context of South Africa within which the problem is ultimately to be located. In an instructive analysis of the problems of cohabitation, Beth Goldblatt 2003 (120) SALJ 610 at 619 observes ‘Courts may say,

in response to heterosexual cohabitants, that they choose not to marry and cannot ask for assistance from the courts once they exercise this choice. One response to this is that a 'choice' must be understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people especially poor women'. **Goldblatt** submits that domestic partnerships constitute a common form of family arrangement which a statistically significant number of people have chosen to adopt. This submission is supported by figures supplied by the South African Law Reform Commission: Discussion paper 104 at 17 in which it is suggested that a large number of people live in domestic partnerships and only about 40% of Africans and Coloured women are married. The Law Commission figures demonstrate a rising trend in domestic partnerships. According to a 1996 census cited by the Law Reform Commission, 1,268,964 people describe themselves as living together with a partner. The Law Commission suggests this figure is probably a significant undercount of the true total of those living in domestic partnerships.

Following the approach of **L'Heuveaux-Dube J Goldblatt** contends that a court should consider whether the parties have shown their commitment to a shared household, and the existence a significant period of cohabitation, the nature of financial and other dependency between the parties including significant mutual financial arrangements in respect of the household, the existence of the children of the relationship and the role of the partners in the maintenance of the household and in the care of the children, in

arriving at an assessment of whether the arrangements that do exist constitute a permanent intimate life partnership between two adults.

A similar argument is advanced by **Sinclair The Law of Marriage vol. 1** at 293: 'A better argument for intervention is that marriage is most often distinguishable from cohabitation only by the piece of paper that testifies to its existence. The nature of this human relationship is ubiquitously identical; children are often the result; and women are notoriously left financially at risk when the relationship fails. Marriage and cohabitation create similar emotional involvements, dependencies and complex issues of finance and property. A concern for the victims of the breakdown of all intimate relationships suggest that non-interference is unjust, callous. Thus the issue whether the legal intervention is justified should not be restricted solely to whether the cohabitation **per se** deserves special protection by the law; the real issue is whether the victim in the breakdown of intimate relationships deserve protection'.

These persuasive arguments notwithstanding, it must be acknowledged that there are noteworthy differences between marriage and a domestic partnership. Apart from the profound religious significance attached to the institution of marriage, there are important definitional differences. For example, upon the conclusion of a marriage ceremony, the relationship between the two parties has immediate legal significance. In the case of a domestic life partnership, the determination of the nature of the relationship can only take place after a lengthy period of time only after such a period can the criteria enunciated above by both Goldblatt and L'Heavreux-Dube J be shown to exist in which case at a

particular stage and, only at that stage, can it be suggested that the parties are involved in a domestic life partnership.

In the present case, it is almost impossible to determine precisely what the intention of Mr Shandling and first applicant were at the time that they commenced their relationship. For this reason the emphasis placed by Mr Katz on the element of choice is somewhat unhelpful. Admittedly, it could well be that for the first few years of their relationship first applicant and Mr Shandling might not have known nor may the objective facts been able to show that the relationship 'was to death do us part'. There is no opposition from first respondent to the following description of first applicant of her life with Mr Shandling:

'To the best of my knowledge Archie was prior to our relationship diagnosed as suffering from a bi-polar disorder/manic depression. He often suffered from terrible moodswings and his disorder, together with the conflicting medication that was prescribed by various doctors sometimes resulted in extreme aggression and abuse directed mainly towards me. Over the years I nursed him through illness and took him to hospital when necessary. I stood by him through his bouts of bi-polar mood disorder, which our relationship was strong enough to withstand. The previous reference to Lithium in isolation was typed in error.'

It is therefore clear on the facts available that well before Mr Shandling's death, a life partnership existed between the two and that they regarded themselves as being involved in a permanent and intimate life partnership.

In summary, the first applicant has been discriminated on the basis of her marital status in that she is excluded from obtaining the benefits of section 2(1) of the Act in circumstances where a married person in her position would so benefit. There is accordingly a presumption that this discrimination is unfair. Absent justificatory grounds as to the existence of this unfair discrimination, it must be concluded that first applicant's constitutional rights have been unfairly eroded. No evidence was provided by sixth respondent as to any possible justification. The only viable argument to the contrary is the one advanced by Mr Katz on behalf of first respondent namely that Mr Shandling had exercised a choice not to marry in circumstances where it would have been possible for him to have married first applicant. For this reasons, the choice of Mr Shandling to dispose of his estate in the manner in which he so chose, which included providing for first applicant should be respected.

It is surely trite to claim that our constitutional society recognises the dignity of difference. It accords respect for the existence of a domestic life partnership and those who live within this arrangement. If there was clear evidence that parties expressly, by choice, decided to eschew any possible financial benefits which flowed from a marriage and for this reason (or notwithstanding this position) chose to live within the context of a domestic life partnership, there may be an argument, on which I express no firm view, that a surviving partner as first applicant could not successfully launch a constitutional challenge to the Act.

Absent such evidence, there is in my view compelling evidence which would justify the conclusion that a breach of the constitutional guarantee of equality has indeed taken place. As Prof. Sinclair has observed, when a breakdown of an intimate relationship takes place it would be unjust and perhaps callous to ignore complex issues of financial dependence which a surviving spouse might make on the deceased partner. For a vast range of reasons (as set out by **Goldblatt** at 614), domestic partnerships are a significant part of the South African family life. To ignore them and to impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned.

For these reasons, I find that the provisions of section 2(1) of the Act read together with the definition of ‘survivor’ in section 1 is unconstitutional in that it contravenes sections 9 and 10 of the Constitution.

**The approach to a remedy.**

Section 172 of the Constitution provides that when deciding a constitutional matter within its power, a court-

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make an order that is just and equitable, including –
  - (i) an order limiting the retrospective effect of a declaration of invalidity; and

- (ii) an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect.

Mr Marcus submitted that before a court is required to invite powers under section 172 of the Constitution it is required to attempt to construe the Act to be consistent with the Constitution. See **Van Rooyen and Others v The State and Others** 2002(5) SA 246 (CC) at para 88. Having regard to the social and economic context in which domestic partnerships arise, and the need to protect such relationships and afford them equal concern and respect, Mr Marcus contended that it was competent to interpret 'spouse' to include a partner in life partnerships.

In this connection the cautionary remark of **Langa DP** in **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others** 2001(1) SA 545 (CC) at para 24 must be considered. 'On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved in considering the constitutionality of legislation. There will be occasions where a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in

conformity with the Constitution’. Such an interpretation should not, however, be unduly strained’.

In dealing with the Act as well as the meaning of spouse in the Intestate Succession Act of 1987 **Van Heerden J** in **Daniels v Campbell N.O. and Others** 2003(9) BCLR 969 (C) at 985 G-H said that ‘Far from supporting the argument that, on ordinary principles of statutory interpretation, the word ‘spouse’ in either of these two Acts includes any person other than a party to a marriage recognised as valid in South African law, the deeming and interpretive provisions referred to in fact point in the opposite direction. By explicitly creating exceptions to the general rule that the only marriages to which legal consequences are attached in South African law are marriages solemnised in accordance with the provisions of the Marriage Act 25 of 1961 and, as such, recognised as valid marriages in this country, the said statutory provisions support for the view that, in the absence of any such deeming or interpretative provision the word ‘spouse’ in a statute must be given its ‘traditional’ limited meaning.

In my view, the approach taken by **Van Heerden J** can not be considered to be incorrect. Its considered and reasoned approach follows the **dictum** of **Langa DP** (as he then was) in the **Hyundai** case, **supra** namely that the legislation must be reasonably capable of being read in conformity with the Constitution. I see no reason to depart from the approach taken by **Van Heerden J** in her considered careful judgment and accordingly, in my view, it is not open for me to ‘read in’ the words ‘life partnership’ so as to render the Act constitutional.

The question of an appropriate remedy can now be considered. In **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000(2) SA 1 (CC) at para 75 **Ackermann J** said ‘In deciding to read words into a statute, the 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. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to a legislative scheme within the constraints of the Constitution. Even where the remedy of reading in otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion’. In the **National Coalition** case supra, the Court read in to section 25(5) of the Aliens Control Act 96 of 91 the words ‘or partner, in a permanent same-sex life partnership’.

Following this approach, **Van Heerden J** in Daniels, supra held that the definition of ‘survivor’ in section 1 of the Act was to be read as if it included the following words after the words ‘dissolved by death’: ‘and includes a surviving husband or wife of a **de facto** monogamous union solemnised in accordance with Muslim rights’. In my view, there is no reason why after the words ‘dissolved by death’ in the definition of survivor in section 1 of the Act the words ‘and includes the surviving partner of a permanent life partnership’ should not similarly be read in to the Act so as to provide substantive relief to first applicant who has discharged the onus of showing that section 2 of the Act read with section 1 thereof is unconstitutional.

**The Order.**

For these reasons set out, the following order is made:

1. It is declared that: the omission from the definition of “survivor” in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the words “and includes the surviving partner of a life partnership” at the end of the existing definition is unconstitutional and invalid.
2. The definition of “survivor” in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, is to be read as if it included the following words after the words “dissolved by death”;  
 “and includes the surviving partner of a life partnership.”
3. The omission from the definition in Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:  
 “Spouse” for the purposes of this Act shall include a person in a permanent life partnership;  
 “Marriage” for the purposes of this Act shall include a permanent life partnership”.
4. Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the existing definition;  
 “Spouse for the purposes of this Act shall include a person in a permanent life partnership;  
 “Marriage” for the purposes of this Act shall include a permanent life partnership.”

4. The order is paragraphs 1,, 2, 3 and 4 above shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date of this order.

It was agreed between the parties that there would be no order as to costs.

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**DAVIS J**