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CONSTITUTIONAL BREAKTHROUGH FOR PERMANENT LIFE PARTNERSHIPS

1. Introduction

In modern times, it is difficult to believe that permanent life partners do not receive more rights, as J Madlanga stated; they are seen as "legal strangers" considering laws of Maintenance and Inheritance.¹ A permanent life partnership refers to either heterosexual or homosexual peoples who live together, but fail to formally arrange their relationship. During the 2016 census, it was calculated that approximately 3.2 million South Africans cohabit outside of marriage, affecting millions of South Africans and leaving them legal strangers.² The Constitutional validity of certain laws with regard to permanent life partners has however recently been challenged in a Constitutional Court matter considering the rights of such persons.

¹ *Jane Bwanya v Master of the High Court and Others*(unreported) case number: CCT 241/20 of 31 December 2021.

² *Jane Bwanya v Master of the High Court and Others*(unreported) case number: CCT 241/20 of 31 December 2021 par 1.

2. Brief history

The history of permanent life partners would be the best point of departure. Up until now permanent life partners have received little to no legal protection pertaining to maintenance and inheritance. In terms of section 1 of the *Maintenance of Surviving Spouses Act*³, the definition of "survivor" did not include the survivor of a permanent life partnership, likewise section 1 of the *Intestate Succession Act*'s⁴ definition of "spouse" did not include the survivor of a permanent life partnership. Consequently, when a party in a permanent life partnership died, it would leave the other surviving party with no claim whatsoever with regards the deceased's estate.

3. Current position

The omission of permanent life partnerships being included in the abovementioned definitions has however recently been challenged in an unreported Constitutional Court case, where the surviving partner of a permanent life partnership made a maintenance and inheritance claim against her deceased permanent life partner's estate, claiming that the abovementioned definitions violated her right to equality and dignity.⁵ The court ruled in favour of the Applicant (the surviving permanent life partner), leaving the Parliament with 18 months to take steps to cure the Constitutional

³ *Maintenance of Surviving Spouses Act* 27 of 1990.

⁴ *Intestate Succession Act* 81 of 1987.

⁵ *Jane Bwanya v Master of the High Court and Others*(unreported) case number CCT 241/20 of 31 December 2021 par 9.

defects in these definitions and until then permanent life partnerships would be read into these definitions.⁶

4. Application

This does not necessarily mean any partnership would be applicable to the definition. The court ordered that the definition of "surviving spouse" in the *Maintenance of a Surviving Spouse Act* and *Intestate Succession Act* should include surviving partners of permanent life partnerships which had been terminated by death, specifically in the case where the partners took a) reciprocal duties of support and b) where the surviving partner did not receive an equitable share of the deceased partner's estate. What is to be considered by a court when determining whether a partnership qualifies as a permanent life partnership, include factors as the respective age of the parties, the duration of the partnership, how the partnership is viewed by the relations and friends of the partners, whether the partners share a common abode, whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home, whether and to what extent the partner provides financial support to the other, etc.⁷

5. Conclusion

One could wonder whether there is at all a difference between marriage and permanent life partnerships, but J Madlanga stated that families come in

⁶ *Jane Bwanya v Master of the High Court and Others*(unreported) case number: CCT 241/20 of 31 December 2021 par 95.

⁷ *Jane Bwanya v Master of the High Court and Others*(unreported) case number: CCT 241/20 of 31 December 2021 par 76.

all shapes and sizes and we should not entrench particular forms of family at the expense of other forms.⁸ Permanent life partners are no longer strangers to the law, exactly to what extent these rights will be applicable - only time will tell - but it can definitely be seen as a step in the right direction.

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⁸ *Jane Bwanya v Master of the High Court and Others*(unreported) case number: CCT 241/20 of 31 December 2021 par 52.