IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No. 4928/2005
Date: 31/3/06

In the matter between

MARK GORY Applicant

and

DANIEL GERHARDUS KOLVER, N.O. First Respondent
HENRY HARRISON BROOKS Second Respondent
MARYKE BROOKS Third Respondent
LAEEQU EYSSEN Fourth Respondent
MOGAMAT SEDICK EYSSEN Fifth Respondent

MASTER OF THE HIGH COURT, PRETORIA Sixth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Seventh Respondent

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JUDGMENT

HARTZENBERG J:

[1] The applicant questions the constitutionality of section 1(1)[1] of the Intestate Succession Act, No 81 of 1987 ("the Act"). The applicant alleges that he was involved in a same-sex life partnership with the late son of the second- and third respondents ("the deceased"). He maintains that he and the deceased undertook reciprocal duties of support

[1] It reads: "(1) *If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, , either wholly or in part, and*
(a) is *survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;* "

to each other. The deceased did not have children. He claims to be the sole heir of the deceased.

[2] The first respondent is the executor, duly appointed to liquidate the estate of the deceased, in his official capacity as executor of the estate. The fourth and fifth respondents are a married couple. The fourth respondent signed an offer to purchase the property situated at 152 First A venue, Bezuidenhout Valley, Johannesburg, registered in the name of the deceased, ("the property) on 3 September 2005 and the first respondent accepted the offer, conditionally, on 9 September 2005. The Master of the high court is the sixth respondent and the Minister of Justice and Constitutional Development is the seventh respondent. The first respondent regards the second- and third respondents as the lawful heirs of the deceased in terms of section 1 of the Act.

[3] The applicant prays for a declaratory order that section] (I) of the Act is inconsistent with the Constitution, and that the words "or partner in a same-sex partnership in which the partners have undertaken reciprocal duties of support" are to be read into the section, after the word "spouse" wherever it appears. Prayers 3 and 4 are for declaratory orders that that the applicant and the deceased were, at the time of death of the deceased, partners in a same-sex life partnership in which they had undertaken reciprocal duties of support and that the applicant is the sole heir and beneficiary of deceased's estate. Prayers 5 and 6 are for a declaratory order that the sale of the property is of no force and effect and for an order against the fourth and fifth respondents interdicting them from proceeding with the purchase of the property. The applicant also applies for a declaratory order that he is entitled to immediate occupation of the property, for an order for the return of movable items, which were removed from the property, for the removal of the first respondent as executor of the estate and for costs against the first three respondents.

[4] The first three respondents oppose the application. The first respondent says that he was forced to oppose the application because an order as to costs is sought against him, personally. He says that he did not act on behalf of the second- and third

respondents when he took steps to finalize the estate. He acted as an independent executor. He abides the court's decision on the constitutionality of section 1(1) of the Act but denies that the applicant and the deceased were partners in a life same-sex partnership who had undertaken reciprocal duties of support. The second- and third respondents deny that the first respondent acted on their behalf. They also deny that the applicant and the deceased were partners in a life same-sex partnership who had undertaken reciprocal duties of support. The fourth- and fifth respondents do not oppose the application. The Master does not oppose the application but the Minister of Justice has caused an affidavit to be made in which it is stated that the application is moot because of the decision in *Minister of Home Affairs and Another* v *Fourie and Another (Doctors for Life International and Others,* ***Amici Curiae****): Lesbian and Gay Equality Project and Others* v *Minister of Home Affairs and Others,* 2006 (1) SA 524 (CC) and that the application ought not to succeed because of the complications that will result, in connection with the removal of appointed executors and the administration of relevant deceased estates, if a retrospective order is made. Apart from the affidavit the Minister did not oppose the application.

[5] The applicant states that he and the deceased started going out during May 2003. By August 2003 they committed to a monogamous relationship. At that time each had a home of his own. They spent almost every night together and were known to their friends as a couple. During December 2003 they went to Cape Town together. The deceased was introduced to the applicant's friends as his new partner. In January 2004 they decided to set up a home of their own. They bought the property from a friend of the applicant. The house was bought in the name of the deceased. . They feared that the applicant's HIV positive status may jeopardize the application for a bond. They moved into the house during June 2004. They used available money to do repair work and alterations to the property. In October 2004 the property was transferred into the deceased's name. They agreed to have an agreement drawn up to record the applicant's half share in the property, but by the time of the deceased’s death, on 30 April 2004, they had not yet done so.

[6] They shared the expenses related to the common home. The applicant gave the deceased R2 000 per month for the bond payment, water and lights, rates and taxes and armed response. . They divided other expenses and the applicant paid the domestic worker and garden service. Household necessaries were bought jointly. The applicant attached his bank statements from June 2004 until 30 April 2005. They indicate clearly that regular payments were made by the applicant to the deceased and confirm in general his allegations about the way in which the household and other expenses were paid. It is clear that they had a common home and a joint household to which both of them contributed.

[7] The applicant states that on 2 December 2004 the deceased gave him a box of gifts for his 43rd birthday the next day. One of the items in the box was a very expensive platinum ring. The deceased told him that he had saved for months to buy the ring and that it was the applicant's wedding band. They held a birthday party for the applicant on 5 December 2004. There were 32 guests including the second- and third respondents and other members of the deceased's family. The applicant states that they showed the ring to the guests and that he talked of it as "die ring wat my man vir my gekoop het". They announced to the guests that their relationship was the real thing. He states they were congratulated by the guests who accepted that he and the deceased were, for all intents and purposes, married.

[8] The second- and third respondents do not deny that they were at the party. They allege that they left early and were not present when the announcement was made and when the ring was shown. They admit that the deceased and the applicant had their photograph taken, on 15 December 2004, when the ring was resized, standing close to one another, the deceased holding the applicant's hand, displaying the ring on the applicant's ring finger. A number of the guests confirmed the applicant's allegation of what happened at the party and what they thought the nature of the relationship was.

[9] The deceased died on 30 April 2005. During the days following the demise of the deceased the second- and third respondents and their family removed a number of the

movables, including the motor car of the deceased, from the property. On the 6th May 2005 the first respondent telephoned the applicant and informed him that he had been nominated by the second- and third respondents as executor of the estate. He asked for an inventory of the movable assets on the property and for an indication from the applicant as to whom they belonged to. He followed it up with a letter on the same day repeating the request.

[10] On 25 May 2005 the attorneys of the applicant respondent to the letter of 6 May. It was stated that the applicant and the deceased were same-sex life partners, that the deceased died intestate and that as the deceased did not have children the applicant was the sole heir of the estate. It was stated that assets had been removed but that the applicant did not want to act unreasonably. It was suggested that the parties get together and settle the matter amicably.

[11] In the reply of 30 May 2005 the first respondent agreed that the applicant and the deceased had' been same-sex partners but denied that he is the intestate heir. The attorneys were invited to inform the first respondent of the legal authority on which they based their claim. On 7 June the attorneys undertook to compile a dossier of case law. On 8 June they again informed the first respondent that there is a dispute about who the lawful heir is. They also stated that the first respondent's clients, the second- and third respondents, were not entitled to believe that they were the intestate heirs and that they had the right to appoint the executor. On 10 June the applicant's attorneys sent an index of case law dealing with the rights of same-sex life partners to the first respondent and it was stated that in the light of the development of the rights of same-sex partners over the previous eleven years the provisions of the Act were unconstitutional. On the same date notice was given to the Master that the applicant intended to lodge a claim.

[12] On 7 July another firm of attorneys came on record as attorneys for the applicant. They requested the first respondent to resign as executor. They referred to the dispute, voiced a concern about the safekeeping of the assets and threatened with an

urgent application. The first respondent's reply was one of surprise and an enquiry as to the basis upon which he can be asked to resign. He asked for the applicant's permission to compile an inventory. He threatened with an urgent application. On 12 July the new attorneys, Bezuidenhouts Hepple Botha Inc;, informed the first respondent that the applicant agreed that he could compile an inventory. In letters of 12 and 13 July the first respondent indicated that he planned to remove the hard disc from the property and he accused the applicant of dishonesty and malice. He insisted that the applicant pays rental for his occupation of the property. In a letter of 15 July he indicated that he planned to remove the assets to Pretoria. On 21 July he insisted that software be made available so that he can activate the hardware. On 25 July Bezuidenhouts attorneys answered a number of queries raised by the first respondent and indicated that the deceased and the applicant had an agreement that in case the deceased predeceased the applicant, the applicant would be entitled to half of the property due to his contribution to the household and the universal partnership and that he was prepared to buy the property on that basis. He was informed that he was to reply urgently because if he failed to recognize the claim the applicant would contemplate to take alternative steps. On 29 July he denied the claim and informed the applicant that he must lodge a claim. He indicated that he planned to sell the house and that the applicant was welcome to make an offer, obviously as an outside buyer. On 29 July the first respondent enquired about the occupation of the house and municipal accounts.

[13] On 16 August Bezuidenhouts Attorneys lodged a claim for the whole estate with the first respondent. On 18 August and possibly unaware of the claim of 16 August the first respondent again raised the question of occupation of the property and the municipal account. He also insisted that the applicant did not make all the assets available for removal and indicated that there were items still outstanding like a microwave oven, a tumble drier etc. Nine items were mentioned. It was stated that a bed made available by the applicant was not the deceased's bed. On 30 August Bezuidenhouts Attorneys confirmed that the first respondent refused to recognize the applicants claim and gave notice that the applicant will institute a court application On 31 August Bezuidenhouts Attorneys indicated that the applicant had vacated the property

and that he claimed that all the items that had been removed were his. The first respondent invited a court application on 31 August.

[14] On 16 September the applicant's first attorneys informed the first respondent that they were again acting for the applicant. They asked him for reasons for rejecting the applicant's claim. He asked for an affidavit. On 23 September he was informed that he was to indicate exactly what details of the applicant's claim he required. H~ was also informed that despite a request not to sell the property the applicant's attorneys learnt on 23 September that he had sold the property. He was asked to supply a copy of the document to the attorneys but he bluntly refused to do so, stating that the applicant was not entitled thereto. He put the applicant's attorneys on terms as to when an application was to be brought and denied the claim on the basis that the applicant and the deceased never undertook reciprocal duties of support. For some reason, only known to himself, he refused to supply the applicant's attorneys with a copy of the contract of sale, despite requests to do so, until; at his request, he was supplied of what can virtually be called a precursor of the notice of motion.

[15] The first respondent states that he was appointed as executor after the sister of the deceased and daughter of the second- and third respondents, a client of his, had arranged that the necessary notice of death be given to the Master in terms of the Administration of Estates Act. Before he got involved in the administration of the estate he did not know the second- and third respondents. He only tried to administer the estate to the best of his ability and tried to preserve the assets for the benefit of the heirs. He does not oppose prayers 1-42. He states that after the applicant started to claim to be the sole heir of the estate he got an opinion from counsel about the validity of the applicant's claim. He states that the opinion indicated that at that stage the applicant could not be regarded as in intestate heir3. He accordingly regarded himself as legally obliged to recognize the second- and third respondents as the heirs and arranged for them to take

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[2] The prayers are for declaratory orders that section 1 (I) of the Act is inconsistent with the Constitution, that words are to be read into the section, that the applicant and the deceased were permanent same-sex partners with a reciprocal duty of support and that the applicant is the sole heir of the estate.

[3] "Voormelde opinie was dat die Applikant huidiglik nie as 'n intestate erfgenaam beskou kan word nie.

possession of the movables. He was of the view that the property was to be sold as soon as possible because of debts and the illiquidity of the estate and he therefore sold it for a good price. He indicates that the fourth and fifth respondents told him that they do not want to get involved in the application but do want to carry on with the purchase of the property. He confirms that he allowed the applicant to retake possession of the property on the basis that he pays the bond installments and the municipal account for rates, taxes, water and electricity. He denies that the applicant makes out a case that the sale of the property was invalid and indicates that the Master will not allow him to proceed with the sale until finalization of this matter. As to the applicant's claim for immediate occupation of the property his attitude is that the property was registered in the name of the deceased and that the applicant does not have such a right. As to the return of the movables his attitude is that he had to preserve them for the heirs.

[16] In respect of the prayer for his removal as executor his attitude is that no grounds have been raised for such relief. He says that the applicant's attorneys referred, in a letter of 8 June, to the second- and third respondents as his clients but he denies that they were ever his clients. He says that he does not represent them with their opposition to the application. The second- and third respondents are at present the legitimate intestate heirs until a court finds otherwise. He claims to be independent and undertakes to abide any decision of the court. He interprets prayer 10, which is for costs against him and the second- and third respondents as a prayer for costs against the estate. He states that the deceased's family informed him that the deceased and the applicant had a same sex relationship but not a same-sex partnership. He states:

> *"As ekseketeur van die boedel moet ek die boedel beredder tot voordeel van die erfgenaam/erfgename en het die applikant se konstitusionele regte wat nog nie deur 'n hof bepaal is nie niks met die eksekuteur te doen nie. lndien Applikant se bede 4 sou slaag sou ek as eksekuteur verplig wees om die restant van die boedel wat oorbly nadat skulde betaal is aan hom te betaal. Soos wat die regsposisie tans is, is Tweede en Derde Respondente die regmatige erfgename."*

His attitude is that the applicant's wish to retain the property is practically not workable, and that if the applicant has lost his faith in him as executor, it was without any foundation.

[17] The second- and third respondents deny that there was a lifelong same-sex partnership because the deceased never mentioned it to his family. They also rely on the opinion on which the first respondent relies. The first respondent assisted them to fill out the forms to give notice of death to the Master. They deny that the deceased and the applicant were lifelong same-sex partners because they could not get married legally and did not go through a marriage ceremony. They contend that even if the deceased and the applicant committed themselves to one another the relationship was not necessarily a marriage but could have been an engagement. They further contend that it is unnecessary to read words into section 1 (1) of the Act as the partners could have entered into a written partnership agreement and could have appointed each other as heirs in wills.

[18] The evidence tendered by the applicant that there was a permanent partnership in which the partners had undertaken reciprocal duties of support is convincing and is corroborated in many ways. There was a common home and a joint household. Both parties were involved in the purchase of the house and the renovation thereof. There is no reason not to accept the applicant's evidence why they decided to buy the house in the name of the deceased only. The applicant contributed to the repayment of the bond and the rates and taxes. He also contributed to the purchase of the household necessaries. Moreover it is clear that the relationship was regarded by the parties thereto as a very special relationship. The deceased gave the applicant a wedding band and he told people that it was the ring bought for him by his husband. That they wanted people to know that they were committed to each other in this way is corroborated by a number of witnesses. The arguments by the second- and third respondents, adopted by the first respondent, why that evidence must not be accepted do not in my view detract from the cogency of that evidence. They do not deny the public announcement of commitment. Their argument that the giving of the ring may just as well have been an engagement does not make sense. In the case of heterosexuals an engagement is a mutual promise to get

married. In December 2004 homosexual people could not legally get married. Why would they get engaged? Their argument that the applicant's offer to buy the property on the basis that he is the owner of an undivided half share thereof contradicts his allegation that he is the heir is not correct. He claimed all along that he was the heir. Although he acceded to the first respondent's demands to hand over the movables and to move out of the property it was never accepted by him that he is not the heir. If he owned half of the property and he is the heir he inherits half of the property. If the property belonged to the deceased alone and he is the heir he inherits the whole property. How his offer to buy the property on the basis that he owns half thereof detracts from his claim to be the heir I do not understand. The result in my view is that it is evident that, if it was possible for the applicant and the deceased to get married, they would have got married. They could not get married. From their point of view the birthday party of 5 December 2004 was their public announcement of their commitment to one another. I have no hesitation to find that they assumed reciprocal duties of support.

Is section 1(1) of the Act inconsistent with the Constitution.

[19] Before the judgment in *Minister of Home Affairs* v *Fourie; Lesbian and Gay Equality Project, supra* there were quite a number of judgments in various courts, in which the constitutional right to equality[4] and the right not to be discriminated against[5] were interpreted. The right not to be discriminated against on the ground of sexual orientation in particular was the central issue in a number of judgments. In all those judgments existing statutory or regulatory provisions were found to be inconsistent with the Constitution and relief was granted to the successful applicants. See *Langemaat* v *Minister of Safety and Security,* 1998(3) SA 312 (T) [6]; *National Coalition for Gay and Lesbian Equality* v *Minister of Home Affairs,* 2000 (2) SA 1 (CC) [7]; *Satchwell* v *President of the Republic of South Africa,* 2002 (1) SA 6 (CC)8; *Du Toil* v *Minister of Welfare and*

[4] Section 9(1)

[5] Section 9(3) and Section 9(5)

[6] Medical fund regulations not allowing for the inclusion of a same-sex partner as a dependant.

[7] Section 25(5) of the Aliens Control Act, No. 96 of 1991 only allowing for the issue of immigration permits to the spouses of lawful residents and not to same-sex partners.

[8] Judges Remuneration Act and Regulations providing that judge's spouse entitled to pension after judge's death but not providing that same-sex partner equally entitled to pension.

Population Development, 2003 (2) SA 198 (CC) [9]; *J* v *Director-General, Department of Home Affairs,* 2003 (5) SA 621 (CC) [10]. In *Farr* v *Mutual and Federal Insurance Co. Ltd,* 2000 (3) SA 684 (C) a same-sex partner was held to be "family" of his partner in terms of an insurance policy. In *Du Plessisv Road Accident Fund,* 2004 (1) SA 359 (SCA) the court recognized a claim for damages for loss of support and funeral damages of a same-sex partner as a result of the death of his partner in a third party matter. In *Minister of Home Affairs* v *Fourie; Lesbian and Gay Equality Project* v *Minister of Home Affairs, supra* the Constitutional Court held that the Marriage Act is inconsistent with the Constitution in that it discriminated against homosexuals. It suspended its order for a year to afford the Legislature an opportunity to amend the existing legislation in such a way that discriminating provisions be done away with. It is evident from all these decisions that by 30 April 2005, already, it was generally accepted that lifelong same-sex relationships deserved the same protection as hetero-sexual marriages[11]. Insofar as statutory provisions did not afford such relationships the same protection those provisions were held to be inconsistent with the Constitution.

[20] In *Daniels* v *Campbell NO,* 2004 (5) SA 331 (CC) the constitutionality of section 1 (1) of the Act was challenged. The surviving spouse of a *de facto* monogamous union according to Muslim rites contended that the section discriminated against her in that she was not recognized as the intestate heir. In terms of the case law Muslim unions were not recognized as valid marriages in terms of the common law definition of a marriage and in terms of the Marriage Act. Van Heerden J in the Cape Provincial Division upheld her challenge and declared that the omission from the definition section of the Act of a definition of "spouse" to include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union, was unconstitutional and invalid and declared further that such a definition was to be read into the Act. The court curtailed the retrospectivity of the order by ordering that its order was not to affect the validity of any

[9] Child Care Act allowing for adoption of children by married couples but not by same-sex couples and the Guardianship Act not allowing for joint guardianship in the case of same-sex couples.

[10] The Children's Status Act allowing for the registration of the husband of a woman, who has been artificially inseminated with outside gametes, as parent of the child, when born, but not for a same-sex partner to be so registered.

[11] See paragraph [21] *infra.*

acts performed in respect of the administration of an intestate estate that had been finally wound up by the date of its order.

[21] The matter came before the Constitutional Court for confirmation in terms of section 172(2)(d) of the Constitution. The majority of the court found that the unconstitutionality could be avoided by including in the definition of spouse a partner in monogamous Muslim marriage union. Moseneke J with whom Madala J agreed followed the same approach as the Cape Provincial Division and found that the thus far accepted definition of "spouse" excluded partners to a Muslim marriage union. Sachs J in paragraph [34] compared the different approaches in previous judgments:

> "*[34] The fact that permanent same-sex life partnerships could not be included in the term 'spouse' affected the manner in "which the resulting discriminatory impact of the statutes under consideration was remedied in National Coalition and Satchwell.* <u>*Once it was established that members of permanent same-sex life partnerships, although not classifiable as married people. merited the same recognition as is accorded by the law to married persons,*</u> *the indicated remedy was to declare the unconstitutionality and read-in a provision to cure the defect. Thus, recognition of the right to equality and dignity of permanent same-sex life partners was achieved not by means of imposing undue strain on the word 'spouse', but by pointing to the constitutionally unacceptable manner in which the statutes fail to treat them on a par with married people. Such partners were accordingly equated with, rather than subsumed into the concept of spouses. The under-inclusiveness in their regard was cured by adding to the category of entitlement so as to avoid unconstitutionality. In the present matter the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation."* (My emphasis)

[22] It has now been held over and over in our courts that in our present society same-sex life partnerships deserve the same considerations than hetero-sexual marriages. For the purposes of prayers 1 and 2 it has only to be considered whether Section 1(1) of

the Act discriminates against the applicant. That it does was graphically illustrated in the second- and third respondents' answering affidavit. They suggested that the section is not unconstitutional because the applicant and the deceased could have made wills in favour of each other and could have entered into a written universal partnership agreement. The deceased was 34 years old when he died. At that age the making of a will is not a high priority. If the applicant and the deceased were a hetero-sexual couple, section 1(1) would have been applicable. The mere fact that it does not apply in their case means that they have been discriminated against.

[23] Section 172(1)(b)(i) of the Constitution provides that a court can make an order limiting the retrospective effect of a declaration of invalidity that is just and equitable. It is obvious that if that if there is no limitation of the retrospective effect, of an order in terms of prayers 1 and 2, it may affect already finalized estates. On the other hand it will by grossly unfair not to come to the assistance of the applicant. In my view it will be fair if an order is made like the one made by van Heerden J in the *Daniels* matter[12], before the majority of the Constitutional Court broadened the interpretation of 'spouse'. Finalized estates will not be affected. The applicant will get relief. In the case of pending estates executors will have to take notice of the order.

[24] Before dealing with the prayers that flow naturally from a declaration of unconstitutionality like prayers 4, 7 and 8, it is necessary to consider the applicant's claim for the removal of the first respondent as executor of the estate. The first respondent maintained that he was independent, objective and in possession of counsel's opinion to the effect that the applicant had no claim.

[25] It is so that the firm of attorneys who represented the first respondent in the application was his own firm and that another firm filed the affidavits on behalf of the second- and third respondents. I do not regard that as particularly convincing to indicate that the first respondent did not have the interests of the second- and third respondents at heart during his administration of the estate. Although they did not know him before,

[12] See para [12] of the Constitutional Court's judgment.

their daughter was the client of the first respondent. They nominated him as executor.

Before his appointment by the Master he wrote a letter to the applicant informing him of his nomination. At that stage his main object was to get as many of the assets away from the applicant and in the hands of the second- and third respondents. There was obviously liaison between him and the second- and third respondents with his effort to get all the movables into the hands of the second- and third respondents. I agree with the applicant that if he was the surviving spouse of a hetero-sexual marriage the assets would not have been carted away in loads and that there would have been an investigation whether the surviving spouse could not possibly keep the house. The fact that the first respondent's firm will do the transfer of the house makes it more attractive for him to have the house sold. His failure to give the applicant's attorneys a copy of the purchase agreement does not speak of objectivity or goodwill.

[26] What I find very disturbing, however, is that he failed to consider the applicant's claim that he is the heir. He was aware of the claim since 23 May 2005. He was invited to have a discussion and settle the matter. . He bluntly refused to consider the applicant's claim. I am not impressed by his reliance on counsel's opinion. One does not know what his instructions to counsel were when he asked the opinion. One does not know what was said in the opinion. One thing is clear and that is that if counsel had been asked if there was a prospect that section 1 (1) of the Act may be declared unconstitutional, in the light of the then existing jurisprudence, it is highly unlikely that counsel would have brushed all the cases, referred to herein, aside. It is unthinkable that counsel would have come to the conclusion that there is no prospect that the section may be declared inconsistent with the Constitution. That was the aspect that had to be investigated by counsel, because that was the attitude of the applicant all along.

[27] The applicant has the perception that the first respondent does not want to administer the estate to achieve his best interests. As must be clear he has reason to think so. If the applicant was the heir from the outset he would have nominated an executor. Section 54 of the Administration of Estates Act deals with circumstances under which an executor may be removed from office. In terms of subsection 2(b)(i) the Master may

remove an executor who has been nominated by will after the will has been declared

void. The first respondent was not nominated by will but he was nominated by intestate heirs who were not heirs. In my view that is one factor pointing to his removal. Because of the way in which he treated the applicant I am of the view that it is desirable that he be removed in terms of section 54(l)(a)(v).

[28] The applicant is at present in the property and he pays the bond payments and the municipal account for rates, taxes, water and lights. In my view that position must be maintained, pending finalization of this matter. The sale of the property has not been approved by the Master. I do not think that there is any good reason why the sale shall not be declared as of no force and effect. If, the order which I plan to make, is not confirmed the first respondent may very well enter into a new agreement with the fourth and fifth respondents. As far as the movables are concerned Mr. Prinsloo indicated that the second- and third respondents deny that X2 is a correct reflection of what they received. On the first page they deny having received item 2, the speedo costume, under item 5 a cash amount of R180,00 and they are not able to identify item 7, which is very vague. On the second page they say that Mr. Brooks, the second respondent's name should not appear in the eighth line. They also deny having received item 44, a green mat. The applicant did not make an issue of it. I have accordingly deleted those items from X2 and initialed the amendments.

[29] In terms of section 172(2)(b) of the Constitution, a court may make interim orders pending the confirmation or otherwise of its order, by the Constitutional Court. In my view the administration of the estate must be suspended, the movables must be returned to the applicant and the contract of sale of the property must be declared of no force and effect. The removal of the first respondent as executor will only become final on confirmation of prayers 1 and 2.

[30] As far as costs are concerned it is my view that the first respondent was obstructive and tried his best to steamroller the administration of the estate through on a basis that the applicant's claim be negated. He was aided and abetted by the second- and

the third respondents. The estate is a modest one. It will be wrong to mulct the estate

with the cocts of this application. As far as the first respondent is concerned he ought not to be remunerated for his services with the administration of the estate or reimbursed for expenses. It is my view that his conduct led to the application in the present form. His stance not to admit that the applicant and the deceased had a same-sex life partnership just as the second- and third respondents' denial of such a partnership, after the application was served, cannot be justified. If the first respondent had done the proper thing namely to enquire why the applicant claims that there was a same-sex life partnership, and after having been given all the relevant facts he could have suspended his activities and could have put the applicant on terms to bring an application for an unopposed declaratory order. He should have informed the second- and third respondents that there is a probability that the section be declared unconstitutional. In my view he must be held responsible for a portion of the costs in this matter *de bonis propriis.* The second- and third respondents must also pay a portion of the costs.

The following order is made:

1. It is declared that the omission in section 1 (l) of the Intestate Succession Act, 81 of 1987 after the word "spouse", wherever it appears in the section, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the Constitution of the Republic of South Africa.

2.1t is declared that section I (l) of the Intestate Succession Act is to be read as though the following words appear therein, after the word "spouse", wherever it appears in the section - "or partner in a permanent same-sex life partnership in which the partnenrs have undertaken reciprocal duties of support".

3.The orders in paragraphs I an 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by date of this order.

4. It is declared that the applicant and the late Henry Harrison Brooks were, at the time of the death of the deceased, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support.

5. It is declared that the applicant is the sole heir of the late Henry Harrison Brooks.

6. The agreement, dated 9 September 2005 in which the property situated at

152 First Avenue, Bezuidenhout Valley, Johannesburg was purportedly sold to the fourth and/or fifth respondents is declared to be of no force and effect. This particular order has immediate effect.

7. The applicant is entitled to occupation of the property mentioned in 6 above, on condition that he pays the monthly bond installments and the municipal account for rates, taxes, water and electricity.

8. The first- second- and third respondents jointly and severally, the one complying the other to be absolved, are directed to return the items on X2, as amended by me, to the applicant. This order has immediate effect.

9 The first respondent is removed as executor from the estate of the late Henry Harrison Brooks. This order is suspended pending confirmation of the orders in 1, 2 and 3 above.

9. Save as specifically dealt with in this order the administration of the estate of the late Henry Harrison Brooks is suspended pending confirmation of the order in 1,2, 3and 4 above.

10. The first respondent is not entitled to remuneration for his services in connection with the administration of the aforesaid estate or to be reimbursed for expenses. This order is suspended pending confirmation of 1, 2, 3 and 4 above.

11. The first respondent is ordered *de bonis propriis* to pay half of the costs of the applicant and the second- and third respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the other .half of the costs of the applicant. This order is suspended pending confirmation of the orders in 1, 2, 3 an 4 above.

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W J HARTZENBERG

JUDGE OF THE HIGH COURT