

Can an extra-marital lover of an unfaithful spouse claim maintenance?

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Not too long ago, if you weren't legally married, you were not regarded as a spouse. This resulted in you being unable to claim maintenance in terms of the *Maintenance of Surviving Spouses Act* or inherit as a spouse in terms of the *Intestate Succession Act*.

Over the last few years, the legal position was changed by some iconic judgments of the Constitutional Court of South Africa.

In 2006, in the matter of *Gory v Kolver*, as well as *Laubscher N.O. v Duplan and Another* in 2016, the Constitutional Court ordered that partners in same-sex / homosexual relationships, who undertook reciprocal duties of support towards one another, qualified as a spouse for purposes of the *Intestate Succession Act*. However, there was no similar right accredited to partners in opposite sex / heterosexual relationships.

Then, in 2020, the Constitutional Court ruled in the matter of *Bwanya v Master of the High Court Cape Town and Others* that partners in a permanent life partnership in which the partners have undertaken reciprocal duties of support, qualified as a spouse for both the *Intestate Succession Act*, as well as the *Maintenance of Surviving Spouses Act*.

The Bwanya judgment therefore brought about two important changes:

1. There was no longer differentiation between homosexual and heterosexual partners; and
2. Partners could qualify as a 'spouse' for purposes of both the *Intestate Succession Act*, as well as the *Maintenance of Surviving Spouses Act*.

However, recently a new issue came before the Johannesburg High Court, made possible by the legal principles evolved by the *Bwanya-judgement*: If a married person has a long-term affair, can it be argued that the 'side partner' also

qualifies as a 'spouse' if there were reciprocal duties of support between the partner and the married person? Put differently, can the 'side partner' claim maintenance or inherit based on the legal principle stemming from the *Bwanya-judgement*.

The High Court in *Lindeni v Master of the High Court, Johannesburg and Others* held that a permanent life partnership is akin to a marriage. Therefore, an unmarried partner in a permanent life partnership is 'upgraded' to a 'spouse' in terms of the *Maintenance of Surviving Spouses Act*, and *Intestate Succession Act*. However, the court therefore held that, just as a married person cannot conclude a second marriage whilst being married, likewise a married person cannot conclude a permanent life partnership with a third party, whilst being married. The court held that, as long as a person is married, he or she is not competent to conclude any marriage or familial relationship, including a permanent life partnership.

Therefore, in our opinion, the effect of the *Lindeni-judgement* is that the 'side partner,' or 'skelmpie' of a married person cannot be a spouse for purposes of the *Maintenance of Surviving Spouses Act*, or *Intestate Succession Act*.

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