CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 46/02

J	First Applicant
B	Second Applicant
versus	
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

Heard on : 27 February 2003

Decided on : 28 March 2003

JUDGMENT

GOLDSTONE J:

Introduction

[1] The Children's Status Act of 1987[1] (the Status Act) deals with, amongst other matters, the status of children conceived by artificial insemination. The challenged

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[1] Act 82 of 1987.

provisions apply to children so conceived within the context of a heterosexual marriage.

[2] Since 1995, the two applicants have been partners in a same-sex life partnership. In August 2001 the second applicant gave birth to twins, a girl and a boy. They were conceived by artificial insemination. The male sperm was obtained from an anonymous donor. The female ova were obtained from the first applicant. In order to protect the identity of the twins, the applicants have been referred to in these proceedings only as "J" and "B".

[3] It is the wish of both applicants that they be registered and recognised as the parents of the twins. There was no legal impediment with regard to the second applicant, as the "birth-mother", being registered as the mother of the children under the regulations made in terms of section 32 of the Births and Deaths Registration Act of 1992[2] (the regulations). However, the regulations and the forms annexed to them make provision for the registration only of one male and one female parent.

[4] When the first applicant was unsuccessful in her attempt to be registered as a parent of the children, the applicants approached the Durban High Court for appropriate constitutional relief. They sought an order requiring the first respondent (the Director General in the Department of Home Affairs) to issue to both of the applicants birth certificates in respect of each of the children and to register their

[2] Act 51 of 1992.

births reflecting the second applicant as their mother and the first applicant as their parent. They also sought an order requiring the second respondent to amend the form annexed to the regulations to allow for the recordal of a person in the position of the first applicant as the parent of the child, i.e. where such person is the donor of a gamete used in the conception of the child.

[5] The applicants also sought to have section 5 of the Status Act declared constitutionally invalid on the grounds that it was inconsistent with rights entrenched in the Bill of Rights. Section 5 reads as follows:

> "(1) (a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.
>
> (b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.
>
> (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where –
>
> (a) that person is the woman who gave birth to that child; or
>
> (b) that person is the husband of such a woman at the time of such artificial insemination.
>
> (3) For the purposes of this section –
>
> 'artificial insemination', in relation to a woman –
>
> (a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or

(b) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman,

for the purpose of human reproduction;

'gamete' means either of the two generative cells essential for human reproduction."

[6] At the request of the applicants, the High Court appointed Advocate A.A. Gabriel as the *curatrix ad litem* to represent the interests of the children. She prepared a full and helpful report for the High Court. This Court also had the benefit of that report. We are additionally grateful to Advocate Gabriel for the oral submissions she made in this Court.

[7] The High Court made the following order:[3]

"1 THAT the first respondent is ordered to:

(a) issue to the applicants a birth certificate for each of the minor children . . . ; and

(b) register the birth of each of the said minor children in the population register reflecting:

(i) the second applicant as their mother;

(ii) the first applicant as their parent;

(iii) their surname as being the surname of the second applicant.

2 THAT the second respondent is ordered to cause annexure 1A of the Regulations in terms of section 32 of the Births and Deaths Registration Act 51 of 1992 to be amended so as to allow for the recordal of a non-anonymous donor of a gamete used in artificial insemination as contemplated in section 5 of the Children's Status Act 82 of 1987 from which a child is born, as a parent of that child.

3 THAT it is declared that for all relevant purposes the first applicant is a natural parent and guardian of the aforesaid minor children.

[3] The judgment of Magid J was delivered on 31 October 2002 and is as yet unreported.

> 4 THAT in section 5 of the Children's Status Act 82 of 1987 the word "married" be struck out wherever it appears as being constitutionally invalid and that the section be read as including the words "or permanent same-sex life partner" after the word "husband" wherever it appears, save that the relief in this paragraph is suspended pending confirmation thereof by the Constitutional Court.
>
> 5 THAT the respondents, jointly and severally, pay the costs of the application.
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> 6 THAT the rule *nisi* in the first order prayed be confirmed."

[8] The applicants have approached this Court for confirmation of the order relating to section 5 of the Status Act. This application is made under the provisions of section 172(2)(a) of the Constitution which, insofar as now relevant, provides that:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament . . . but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

The relief granted in paragraph 2 of the order of Magid J ordering the second respondent to cause annexure 1A of the regulations to be amended is not an issue before us. The extent to which the relief granted in respect of the regulations is appropriate in the light of the relief granted in terms of section 5 is also not an issue in this appeal. Those issues were not raised in argument in this Court, and I express no opinion on their constitutionality or appropriateness.

The judgment of the High Court

[9] In the High Court, Magid J held that the provisions of section 5 of the Status Act constitute discrimination on the ground of marital status "and probably sexual orientation". As far as the children are concerned, the learned Judge held that the statutory provision amounts to discrimination on the listed grounds of social origin and birth. He went on to hold that the presumption of unfair discrimination created by section 9(5) of the Constitution[4] applies. Because the government did not seek to justify the discrimination under section 36 of the Constitution,[5] Magid J held the section to be constitutionally invalid.

[10] With regard to appropriate relief, Magid J found this to be a proper case for both striking out and reading in to cure the unconstitutionality of section 5. He struck out the word "married" where it appears in subsections (1)(a) and (b). And he read in the words "or permanent same-sex life partner" after the word "husband" where it appears in subsections (1)(a) and (b) and (2)(b) of section 5. Treated in this way, subsections (1) and (2) of section 5 read as follows:

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[4] Section 9(5) provides that:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[5] Section 36 provides that:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

"(1) (a) Whenever the gamete or gametes of any person other than a ~~married~~ woman or her husband **or permanent same-sex life partner** have been used with the consent of both that woman and her husband **or permanent same-sex life partner** for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband **or permanent same-sex life partner** as if the gamete or gametes of that woman or her husband **or permanent same-sex life partner** were used for such artificial insemination.

(b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the ~~married~~ woman and her husband **or permanent same-sex life partner** have granted the relevant consent.

(2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where –

(a) that person is the woman who gave birth to that child; or

(b) that person is the husband **or permanent same-sex life partner** of such a woman at the time of such artificial insemination."

The attitude of the respondents

[11] The respondents are not opposing the confirmation of the order of constitutional invalidity granted by Magid J with regard to section 5 of the Status Act. They have not appealed against the orders he made relating to the regulations. On behalf of the respondents it was submitted that:

(a) in order not to discriminate unfairly against unmarried heterosexual couples, the words "or permanent life partner" should be read into section 5 of the Status Act rather than the words "or permanent same-sex life partner";

(b) the order of invalidity should be suspended for one year in order to allow the legislature to amend the statute.

The issues in this Court

[12] The issues in this Court are thus the following:

(a) whether this Court should confirm the order of invalidity, striking out and reading in made by the High Court;

(b) whether the terms of the order should also include unmarried heterosexual permanent life partners;

(c) whether the order of suspension sought by the respondents should be granted.

Confirmation of the order

[13] The provisions of section 5 of the Status Act do not permit the first applicant to become a legitimate parent of the children. This unfairly discriminates between married persons and the applicants as permanent same-sex life partners. The section is accordingly inconsistent with section 9(3) of the Constitution[6] which prohibits the state from discriminating directly or indirectly against anyone on the ground of sexual orientation.

[14] An analogous differentiation was held by this Court to be unconstitutional in *Du Toit and Another v Minister of Welfare and Population Development and Others.*[7]

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[6] Section 9(3) provides that:

> "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."

[7] 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

The Child Care Act[8] (the Child Care Act) precluded partners in a permanent same-sex life partnership from adopting children. Skweyiya AJ pointed out that "the applicants' status as unmarried persons which currently precludes them from joint adoption of the siblings is inextricably linked to their sexual orientation."[9] The same applies in the present case with regard to the inability of the first applicant to be recognised as a parent and legal guardian of the children. It is unfairly discriminatory to deprive the first applicant of such recognition. In my opinion, the provisions of section 5 of the Status Act are clearly in conflict with the provisions of section 9(3) of the Constitution.

[15] Because the respondents did not attempt to justify the limitation of the applicants' rights in section 5 of the Status Act, Magid J did not embark upon a limitations inquiry under the provisions of section 36 of the Constitution.[10] As Skweyiya AJ pointed out in the *Du Toit* case[11] the failure by the government to support the limitation of a right contained in the Bill of Rights does not relieve a Court from considering whether such a limitation is justifiable.[12] In my opinion it cannot be justified. An effect of section 5 of the Status Act is to legitimate children born to married couples in consequence of artificial insemination. It does not do so in respect

[8] Act 74 of 1983.

[9] Para 26.

[10] Above n 5.

[11] Above n 7.

[12] Id para 31 and the cases cited in n 32 of that judgment.

of permanent same-sex life partners. In the *Du Toit* case,[13] Skweyiya AJ said the following with regard to the impugned provisions of the Child Care Act:

> "In this regard, they are not the only legislative provisions which do not acknowledge the legitimacy and value of same-sex permanent life partnerships. It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease. It is significant that there have been a number of recent cases, statutes and government consultation documents in South Africa which broaden the scope of concepts such as "family", "spouse" and "domestic relationship", to include same-sex life partners. These legislative and jurisprudential developments indicate the growing recognition afforded to same-sex relationships." [Footnotes omitted]

The same considerations apply in the present case. Given that section 5 is unconstitutional on these grounds, it is not necessary to consider the other grounds raised by the applicants.

[16] The finding by the High Court that the impugned provisions of the Status Act are unconstitutional must be upheld. As far as the remedy is concerned, I am of the view that the approach of Magid J is fully in accord with that adopted by Ackermann J on behalf of a unanimous court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*.[14] It was not suggested to the contrary on behalf of the respondents. It is clear from the report of the *curatrix ad*

[13] Above n 7, para 32.

[14] 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), paras 61 – 88.

litem, that the order made by Magid J also meets the interests of the two children of the applicants in this case as section 28(2) of the Constitution requires.[15]

[17] During argument the Court's attention was drawn to the concluding words of section 5(1)(a) of the Status Act. Prior to any order requiring words to be read into the statute, the clause reads as follows:

> ". . . as if the gamete or gametes of that woman or her husband were used for such artificial insemination."

The effect of these words in section 5(1)(a) is merely clarificatory. They make plain that if a husband consents to the process of artificial insemination, it does not matter whose gametes are used to conceive the child, the child will nevertheless be the legitimate child of the woman bearing the child and her husband. The applicants propose that the words "or permanent same-sex life partner" be read in after the word "husband" in this portion of this section as elsewhere. If such words were to be introduced into the subsection, it would read as follows:

> ". . . as if the gamete or gametes of that woman or her husband or her permanent same-sex life partner were used for such artificial insemination."

The deeming provision has reference to the legitimacy of a child born to a married couple. A child born by artificial insemination is deemed to be legitimate in a situation where the common law would not recognise such legitimacy. In the case of a child born by artificial insemination in the context of a permanent same-sex life

[15] Section 28(2) provides that:

> "A child's best interests are of paramount importance in every matter concerning the child."

partnership, the deeming provision is inappropriate as a child could not be conceived using the gametes only of the same-sex life partners. Furthermore, the legitimacy of such a child at common law could not arise.

[18] This Court set out the principles that should be followed when reading words into a statute in the case of *National Council for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*.[16] One of those principles is that the Court should interfere with the laws adopted by the legislature as little as possible. However in this case, were words to be read into the concluding words of section 5(1)(a) as the applicants proposed, the effect would be inappropriate; as mentioned in the preceding paragraph, it would incorrectly assume the common law legitimacy of a child of same-sex partners. It seems to me that given that the concluding words of section 5(1)(a) play no substantive role in themselves, but merely repeat or clarify the earlier substantive portions of the subsection, it would be proper for this Court to sever the concluding words. In so doing, I acknowledge that at times where either the tools of severance or reading in are employed to achieve a constitutional result, a consequential severance may be required to ensure that the statutory provision is clear and achieves its purpose. In such circumstances, the Court will always be astute to ensure, on the one hand, that the laws adopted by the legislature are interfered with as little as possible, and on the other, that a constitutional result is achieved.

[16] Above n 14, paras 62 – 76.

Should the order include permanent heterosexual life partners?

[19] The submission on behalf of the respondents is that, in the form it was made by Magid J, the order unfairly discriminates against permanent heterosexual life partners. The provisions of section 5 of the Status Act would have the same consequences for such partners as they have for same-sex partners. It was submitted that the words "permanent life partner" should be read into section 5 rather than the words "permanent same-sex life partner". A similar submission was made in this Court in *Satchwell v President of the Republic of South Africa and Another*.[17] It was disposed of as follows by Madala J:

> "This Court is not at large to grant any relief under its power to grant 'appropriate relief' – it cannot import matters that are remote to the case in question – otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved."[18]

The same applies in the present case and the respondents' submission must be rejected.

Should the order be suspended?

[20] The respondents' further submission was that this Court should suspend the confirmation of the whole order of constitutional invalidity for a period of one year to enable Parliament to pass legislation to cure the constitutional deficiencies in section 5

[17] 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[18] Id para 33. See too *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 14, para 87.

of the Status Act. This submission was based upon the "wide-ranging" issues involved and the current investigation of these and related issues by the South African Law Reform Commission.[19] In my opinion this submission is also without merit for the reasons which follow.

[21] The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the legislature an opportunity "to correct the defect".[20] It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants.

[22] Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If

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[19] Project Number 118.

[20] Section 172(1)(b)(ii) provides that:

> "(1) When deciding a constitutional matter within its power, a court –
> . . .
> (b) may make any order that is just and equitable, including –
> . . .
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the legislature need not be given an opportunity to remedy the defect, which has by definition been cured.[21] In the present case, the effect of the order is not to leave a lacuna but to remedy the constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended.

[23] Comprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. The legal consequences of marriage are many and complex. This Court[22] has previously referred to a South African common law marriage as creating "a *consortium omnis vitae*" which was described in the following passage from *Peter v Minister of Law and Order*[23] as

> ". . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage . . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of

[21] As mentioned in para 26 below the legislature is free thereafter to amend such a statutory provision in any way consistent with the Constitution.

[22] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 14, para 46.

[23] 1990 (4) SA 6 (E) at 9G-H.

> services in the running of the common household or in a support-generating business . . .".

Similarly, the mutual relationship between parent and child is complex, valuable and multi-faceted. There is also the relationship between children and members of their extended family which merits consideration.

[24] Where a statute is challenged on the ground that it is under inclusive and for that reason discriminates unfairly against gays and lesbians on the grounds of their sexual orientation, difficult questions may arise in relation to the determination of the particular relationships entitled to protection, and the appropriate relief. The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute. For instance in *Satchwell*[24] where the issue was pensions and related benefits, a mutual duty of support was an essential element. In the present case, where the rights of children are implicated, this was not an essential element, though it might have been an appropriate one.

[25] The state is required by section 7(2) of the Constitution to "respect, protect, promote and fulfil the rights in the Bill of Rights." And, by section 8(1) of the Constitution, "[t]he Bill of Rights . . . binds the legislature, the executive, the judiciary and all organs of state." The executive and legislature are therefore obliged to deal comprehensively and timeously with existing unfair discrimination against gays and

[24] Above n 17.

lesbians.[25] Moreover, courts considering unfair discrimination cases of this sort need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully tailored to that context.

[26] It is not appropriate for courts to determine the details of the relationship between partners to same-sex (or for that matter heterosexual) partnerships. So, too, it is not for the courts to work out the details of the relationship between any such partners and their children. In the present case, for example, this Court has heard no argument and has not considered the respective duties which might arise between the applicants in respect of the children. Those are matters for the legislature to consider when drafting comprehensive legislation to regulate such relationships. I would also add that the nature and detail of remedies which the courts fashion in cases of unfair discrimination do not bind the legislature. It is at large to fashion what it considers to be appropriate consequences of personal relationships in any way consistent with the provisions of the Constitution.

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[25] See the remarks of Madala J in *Satchwell v President of the Republic of South Africa and Another*, above n 17, para 29, and of Skweyiya AJ in the passage from the *Du Toit* judgment quoted in para 15 above. Numerous European countries have passed comprehensive legislation granting legal recognition to same-sex partnerships. Denmark was the pioneer in this area, passing the first law permitting same-sex couples to legally register their partnerships in 1989, Registered Partnership Act, 7 June 1989, no. 372. Several other Scandinavian countries have followed suit and passed legislation based on Denmark's example. See Registered Partnership Act, 30 April 1993, no. 40 (Norway); Registered Partnership Act, 23 June 1994, SFS 1994:1117 (Sweden); Confirmed Cohabitation Act, 12 June 1996, no. 87 (Iceland). More recently, Germany joined this trend passing the Law of 16 February 2001 on Ending Discrimination Against Same-Sex Associations: Life Partnerships, [2001] 9 *Bundesgesetzblatt* 266. In addition to establishing a separate legal category for same-sex partnerships, as these countries have done, Belgium has passed legislation offering the status of legal marriage to same-sex couples: Act of 13 February 2003, *Moniteur Belge*, Ed. 3 at 9880. The Netherlands has achieved the same result in a series of statutes: Act of 21 December 2000 authorising marriage for same-sex partners, *Staatsblad* 2001, no. 9; Act of 21 December 2000 on adoption by same-sex partners, *Staatsblad* 2001, no. 10; Act of 13 December 2000 on various matters including the further equality between marriage and partnership registration, *Staatsblad* 2001, no. 11; Act of 8 March 2001 adjusting various other laws as a result of authorising marriage and adoption, *Staatsblad* 2001, no. 128.

Costs

[27] There is no reason to deprive the applicants of the costs of the confirmation proceedings. They were successful in the High Court and had no option but to approach this Court for confirmation of the order made by it.

The Order

[28] The following order is made:

(a) Paragraph 4 of the order of the High Court is set aside.

(b) (i) Section 5 of the Children's Status Act 82 of 1987 is declared to be inconsistent with the Constitution to the extent that the word "married" appears in that section and to the extent that the section does not include the words "or permanent same-sex life partner" after the word "husband" wherever it appears in that section.

(ii) In section 5 of the Children's Status Act 82 of 1987 the word "married" is struck out wherever it appears in that section.

(iii) In section 5 of the Children's Status Act 82 of 1987 the words "or permanent same-sex life partner" are read in after the word "husband" wherever it appears in that section.

(iv) The words in subsection 5(1)(a) "as if the gamete or gametes of that woman or her husband were used for such artificial insemination" are struck out.

(c) The respondents are ordered, jointly and severally, to pay the costs of the confirmation proceedings including the costs of the *curatrix ad litem*.

Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, Moseneke J, O'Regan J and Yacoob J concur in the judgment of Goldstone J.

For the Applicants:	A.M. Stewart instructed by the Legal Resources Centre, Durban.
For the Respondents:	T.G. Madonsela instructed by the State Attorney, Durban.
Curatrix ad Litem:	A.A. Gabriel.