CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/01

KATHLEEN MARGARET SATCHWELL — Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

Heard on : 26 February 2002

Decided on : 25 July 2002

JUDGMENT

MADALA J:

Introduction

[1] Sitting in the Pretoria High Court, Kgomo J made the following order in favour of the applicant:[1]

> "1. Declaring the omission from sections 8 and 9 of the Judges Remuneration and

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[1] The matter is reported as *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T).

Conditions of Employment Act 88 of 1989 after the word 'spouse' of the words 'or partner, in a permanent same-sex life partnership' to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996.

2. Declaring the omission from Regulation 9(2)(b) and Regulation 9(3)(a) of the Regulations in respect of 'Judges, Administrative Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence' (GNR839, 6 June 1995) after the word 'spouse' of the words 'or partner, in a permanent same-sex life partnership' to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996.

3. It is ordered that sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 is to be read as though the following words appear therein after the word 'spouse': 'or partner, in a permanent same-sex life partnership'.

1. It is ordered that Regulation 9(2)(b) and Regulation 9(3)(a) of the Regulations in respect of 'Judges, Administrative Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence' (GNR839, 6 June 1995) is to be read as though the following words appear therein after the word 'spouse': 'or partner, in a permanent same-sex life partnership'.

4. It is ordered that the respondents pay the costs of the application jointly and severally."

[2] In terms of section 172(2)(a)[2] of the Constitution, an order of constitutional invalidity in the High Court has no force and effect unless it has been confirmed by this Court. It is the confirmation of that order which is sought by the applicant in these proceedings. Sections

[2] Section 172(2)(a) states:

"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, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

172(2)(a) and 167(5)[3] mandate this Court to make orders in relation to the constitutional validity of an "Act of Parliament, a provincial Act or any conduct of the President." This court is directly concerned only with the validity of paragraphs 1 and 3 thereof. As paragraphs 2 and 4 relate to regulations, confirmation of the declaration of invalidity in relation to them is not required.[4]

Factual Background

[3] The applicant, a judge, challenged the constitutional validity of the provisions of sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (the Act) and Regulations 9(2)(b) and 9(3)(a) of the Regulations in respect of Judges Administrative

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3 Section 167(5) states:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

4 *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC). See below para 41.

Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence (the regulations).[5]

[4] The applicant stated that she and Ms Lesley Louise Carnelley (Ms Carnelley) have been involved in an intimate, committed, exclusive and permanent relationship since about 1986. Although not married (in terms of South African law they are unable to enter into a valid marriage), they live in every respect as a married couple and are acknowledged as such by their respective families and friends.

[5] As evidence of their emotional and financial inter-dependence, the applicant stated that:

1. She and Ms Carnelley had completed last wills and testaments in each other's favour.
2. In May 1990 they jointly purchased the property on which they currently reside and which is registered in their names;
3. They live together on this property and consider it to be a family residence;
4. Ms Carnelley is listed as the beneficiary in all the applicants' insurance and other investment policies; and
5. Ms Carnelley is also listed as the applicants' dependant on Parmed, the Parliamentary Medical Aid Scheme, to which judges subscribe.

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5 The regulations were promulgated in Government Notice No. R839 of 6 June 1995.

[6] The applicant's conditions of service as a judge are governed by:

1. the provisions of the Constitution;

2. the provisions of the Act;

3. the regulations; and

4. the Parliamentary and Provincial Medical Aid Scheme Act 28 of 1975.

[7] The challenged provisions are as follows:

1. Section 8[6] of the Act provides for the payment to the surviving spouse of

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[6] Section 8 provides:

"(1) Subject to the provisions of subsection (2) the surviving spouse of a judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he dies an amount –

(a) in the case of a surviving spouse of a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that judge;

(b) in the case of a surviving spouse of a judge who died while performing active service as a judge, equal to two thirds of the amount to which that judge would have been entitled if he or she was discharged from active service in terms of section 3(1)(a) on the date of his or her death.

(2) For the purposes of subsection (1) the amount payable to a surviving spouse shall be adjusted whenever the salary applicable to the office held by the judge concerned on his

a deceased judge two-thirds of the salary that would have been payable to that judge in terms either section 5 or section 3(1)(a) of the Act until the death of such spouse.

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discharge or at his death, is increased.

(3) The amount payable to the surviving spouse of a judge in terms of sub-section (1) shall be payable with effect from the first day of the month immediately succeeding the day on which he died, and shall be payable until the death of such spouse."

2. Section 9[7] of the Act provides for the payment of the gratuity contemplated in section 6 of the Act to the surviving spouse of a deceased judge or to the estate of the said judge if he or she is not survived by a spouse.

[8] The applicant engaged in lengthy correspondence dating from 1997 with the second respondent in an attempt to have the Act and the regulations amended so that her partner could be entitled to the benefits that spouses of judges receive. The second respondent conceded that the provisions under attack were discriminatory, and said that he was committed to upholding "the principles and values of the Constitution" and to removing the discrimination complained of by the applicant. The second respondent implored the applicant to be patient as he intended to redress the situation and to effect the necessary changes. After waiting for two years the applicant decided to launch an application in the Pretoria High Court, the culmination of which are the present proceedings.

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[7] Section 9 provides:
"If a gratuity referred to in section 6 would have been payable to a judge who died or dies on or after the fixed date had he not died but, on the date of his death, was discharged from active service in terms of section 3 or 4, there shall –
(a) if such judge is survived by a surviving spouse, be payable to such surviving spouse, in addition to any amount payable to that spouse in terms of section 8; or
(b) if such judge is not survived by a spouse, be payable to the estate of such judge,
a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such judge had he not died but was, on the date of his death, discharged from active service as aforesaid."

The Constitutional Issue

[9] At issue in this case is the question whether the claim by the applicant that Ms Carnelley should be entitled to the benefits enjoyed by the spouses of judges under the Act should be sustained. The Act restricts the provision of certain benefits to spouses only. There is no definition of the word "spouse" in the provisions under attack. In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. This matter was dealt with in the *National Coalition v Home Affairs*[8] case where this Court held that the word "spouse" cannot be read to include a same-sex partner. The context in which "spouse" is used in the impugned provisions does not suggest a wider meaning, nor do I know of one. Accordingly, a number of relationships are excluded, such as same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants.

[10] The legislation has effectively excluded all those in relationships other than heterosexual marriages from the benefits it accords to spouses. The question that arises is whether to the extent that the Act restricts benefits to spouses, and does not afford them to same-sex life partners, it is inconsistent with the Constitution.

[11] In this regard the applicant argued that the concept of family underlying the legislation was inconsistent with the values espoused by the Constitution. Reliance was placed on the

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[8] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (per Ackermann J).

judgment of L'Heureux-Dubé J in the Canadian Supreme Court case of *Miron v Trudel*[9] that:

> "Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law."

9 (1995) 124 DLR (4th) 693 at para 102.

[12] That there are different forms of life partnership has been recognised by this Court. In the *National Coalition v Home Affairs*[10] case this Court stated that:

> " . . . marriage represents but one form of life partnership. The law currently only recognises marriages that are conjugal relationships between people of the opposite sex. It is not necessary, for purposes of this judgment, to investigate other forms of life partnership. Suffice it to say that there is another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same-sex. The law currently does not recognise permanent same-sex life partnerships as marriages. It follows that s 25(5) affords protection only to conjugal relationships between heterosexuals and excludes any protection to a life partnership which entails a conjugal same-sex relationship, which is the only form of conjugal relationship open to gays and lesbians in harmony with their sexual orientation."[11]

In certain African traditional societies woman-to-woman marriages are not unknown, this being prevalent in families that are childless because the woman is barren or where the woman is in a powerful position in her community, like being a queen or a chieftainness, or where she is very wealthy.[12]

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10 Above n 8 at para 36.

11 See also *Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658.

12 B Oomen *Traditional Woman-to-Woman Marriages, and the Recognition of Customary Marriages Act*

[13] In respect of the family, this Court[13] has stated that:

(2000) 63 *THRHR* 274.

13 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 31.

> "The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change.[14] In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."

This observation was prefaced by the following important comment:

> "The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."

[14] The challenged provisions, the applicant contended, violated her right to equality in terms of section 9 of the Constitution because they denied her and Ms Carnelley certain specified benefits that are generally afforded to judges and their spouses. The basis of the alleged unconstitutionality, she further argued, was the omission from the impugned provisions of the words "or partner in a permanent, same-sex life partnership." In the High Court she contended that the impugned provisions should be declared to be inconsistent with the Constitution and invalid and in the alternative that words should be read in to bring the provisions into conformity

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14 See *National Coalition v Home Affairs* above n 8.

with the Constitution. In this Court however she sought confirmation of the order made by the High Court which was limited to reading in the words that have been referred to us. It was argued on behalf of the applicant both in the High Court and before us that the provisions under attack discriminated unfairly against gay and lesbian couples involved in committed relationships who may not marry.

[15] In this Court the respondents' counsel conceded without qualification, correctly in my view, that permanent same-sex life partners are entitled to found their relationships in a manner which accords with their sexual orientation and further that such relationships ought not to be the subject of unfair discrimination. But the respondents submitted that the order recognising only the rights of permanent same-sex life partners was itself invalid because it failed to make provision for unmarried heterosexuals in permanent relationships. This submission has no merit in this case. Here we are concerned with same-sex relationships.

[16] Same-sex partners cannot be lumped together with unmarried heterosexual 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 heterosexual partners in this case. As was stated by this Court in the *National Coalition v Home Affairs*[15] case, the submission by the respondents that:

> " . . . gays and lesbians are free to marry in the sense that nothing prohibits them from

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15 Id at para 38.

> marrying persons of the opposite sex, is true only as a meaningless abstraction."

It is quite inappropriate in these confirmation proceedings for this Court to decide on the rights of unmarried heterosexual life partners which raise quite different legal and factual issues. This matter was raised by the respondents in this Court for the first time in their written submissions and it is, therefore, not appropriate for the Court to consider it.

The Fundamental Rights Affected by the Challenged provisions

[17] I now turn to consider the specific rights which are affected by the impugned provisions. The applicant's challenge is based on the equality clause in the Constitution. Throughout the Constitution there is a constant refrain that the achievement of equality for all South Africans and the advancement of human rights are important values to strive towards. As this Court stated it in the *President of the Republic of South Africa and Another v Hugo*:[16]

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."

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16 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41 (per Goldstone J).

[18] In *Fraser v Children's Court, Pretoria North and Others*,[17] this Court further emphasized that:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."[18]

[19] Section 9 (the equality clause) states the following:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) . . . .
>
> (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,

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17 *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20 (per Mohamed DP).

18 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 at para 33; *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (2) SACR 761 (CC); 1995 (12) BCLR 1593 (CC) at para 26; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 at paras 155-66 (per Ackermann J) and 262 (per Mahomed J).

conscience, belief, culture, language and birth.

(4) . . . .

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

[20] In *Harksen v Lane*[19] this Court set out the stages of enquiry in a case involving the fundamental right to equality and which bear repeating here, that:

> "it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:
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> (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:
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> (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.
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> (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

19 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 at para 54 (per Goldstone J).

> of the enquiry, the differentiation is found not to be unfair, then there will be no violation of seciton 8(2).
>
> (c) If the discrimination 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 (section 33 of the interim Constitution)."

[21] This Court has now confirmed this approach to the stages of equality analysis on several occasions.[20] Applying the Harksen test to the facts of the present case it becomes clear that the denial of benefits to same-sex partners while affording them to married judges is, in effect, a differentiation on the grounds of sexual orientation which is a listed ground in section 9. That denial accordingly amounts to discrimination which is presumed, in terms of section 9(5), to be unfair unless the contrary is shown. It was not suggested by the respondent that this discrimination is not unfair.

[22] The benefits accorded to spouses of judges by the legislation are accorded to them because of the importance of marriage in our society and because judges owe a legal duty of support to their spouses. In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to

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20 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 16; *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 17; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 22.

their families and is of great social value and significance. However, as I have indicated above, historically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value.

[23] Inasmuch as the provisions in question afford benefits to spouses but not to same-sex partners who have established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions constitute unfair discrimination.

[24] I should emphasise however that section 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken. The Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations.

[25] The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death.

It appears probable that they have undertaken reciprocal duties of support. However, that is a question we need not decide now. The applicant's challenge is to the legislation. For the reasons given, the legislation does discriminate against persons such as the applicant on the basis of sexual orientation.

Justification

[26] The question here is whether the challenged provisions, having been found to be inconsistent with the Constitution can nevertheless be saved by the limitation clause.[21] The respondents who bear the onus of establishing that the said provisions are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom did not seek to justify such discrimination. In this Court indeed they correctly conceded that the discrimination was unfair and unjustifiable.

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[21] Section 36 provides:

"(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."

Remedy

[27] Having come to the conclusion that the impugned provisions are inconsistent with and cannot be saved in terms of section 36 of the Constitution, I must now consider whether the terms of the order made by the High Court were appropriate and should be confirmed. Section 172(1)(b)[22] requires that this Court, when deciding a constitutional matter within its power, may make any order that is just and equitable. The High Court made an order reading in the following words "or partner in a permanent same-sex life partnership" after the word "spouse" in sections 8 and 9 of the Act and in Regulations 9(2)(b) and 9(3)(a). Reading in is a competent constitutional order as found in *National Coalition v Home Affairs* case.[23]

[28] The respondents submitted that the proper remedy, regard being had to the intention of the legislature, was as follows:

> "It is hereby declared that the word 'spouse' in the challenged provisions is unconstitutional to the extent that it excludes partners in heterosexual or same-sex relationships that are intended to be lasting as in marriage relationships."

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[22] Section 172 provides:

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

[23] Above n 8.

We were advised that the legislature intends to amend the challenged provisions[24] and that the text of the Amendment Bill provides that:

> -the benefit covers same-sex partners and heterosexual partners;
>
> -to be afforded benefits, the partnership must be intended to be lasting relationships as is the case with a marriage relationship; and
>
> -the relationship must be registered with the Director-General: Justice and Constitutional Development.

It was submitted by the respondents that the order of the court a quo did not reflect the clear intention of the legislature. As the order reads, so it was argued, it does not address like-placed unmarried heterosexuals and does not require registration, as is intended in the Amendment Bill. However, in determining the appropriate remedy, we cannot have regard to the contents of a bill.

[29] The move to amend the legislation is to be welcomed as a step to ameliorate the position of same-sex life partners. It is also an acceptance that times have changed as has society's attitude which once was hostile to the gay and lesbian community generally and frowned upon them and considered them to be deviant members of society not worthy of protection and respect

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24 The Judicial Officers Amendment Bill 72 of 2001, published in Government Gazette No 22 681 of 18 September 2001.

under the law.

[30] The respondents claimed that the relief granted by the court a quo to the applicant is constitutionally impermissible in that the order does not respect the guidelines spelt out in the *National Coalition v Home Affairs*[25] case. The order, it was submitted, is itself unconstitutional because it excludes heterosexual partners. Accordingly the order of the court a quo offends the equality principles in section 9, read with sections 2 and 8 of the Constitution. We have already rejected this submission above.[26]

[31] According to the second respondent the basic reason for the failure to make the necessary amendments is the complexity of the matters involved and the fact that he did not want to deal piecemeal with the amendments but wanted to include persons in other partnerships such as heterosexual partners who were not married. The fact that there is at present no enforceable reciprocal duty of support between heterosexual unmarried couples and people in same-sex partnerships was another issue. Added to these problems was the as yet unsettled question of when and how to regard a partnership as permanent and when it began and ceased. All in all, the respondents sought to resolve, once and for all, not only the applicant's problem but to bring into

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25 Id at 39.

26 See para 16.

the fold heterosexual unmarried partnerships.

[32] It is significant that while these difficulties are put forward as accounting for the failure to effect the required amendments there is a growing number of statutes[27] which, acknowledging the social realities of our changing times now account for "partners" and address precisely the type of problem faced and the relief claimed by the applicant in this case.

[33] 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.

[34] In my view the order by the High Court reading in the words "or partner in a permanent same-sex life partnership" to remedy the constitutional wrong that is in the impugned provisions, omits an important requirement. It fails to have regard to the requirement of a reciprocal duty of support. That is addressed in the order I make. Such partners must

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27 See for example, section 6(1)(f) of the Independent Media Commission Act 148 of 1993, section 5(1)(e) and (f) of the Independent Broadcasting Authority Act 153 of 1993 (now repealed), sections 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act 57 of 1997, section 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997, section 31(2)(a) of the Special Pension Act 69 of 1996, section 1 of the Employment Equity Act 55 of 1998, section 8(6)(e)(iii)(aa) of the Housing Act 107 of 1997, and sections 10(2) and 15(9) of the Road Traffic Management Corporation Act 20 of 1999.

have undertaken and committed themselves to reciprocal duties of support. The remedy of reading in is far more preferable to an order striking down and suspending such declaration which would not afford the applicant the relief she seeks.

[35] As mentioned above, regulations are not ordinarily the subject of confirmation proceedings. However, in this case the regulations are intricately linked to the impugned provisions which are the subject of these confirmation proceedigns. The remedial order that was made by the High Court in respect of such regulations mirrored the order made in respect of the Act and was based on the same legal conclusions. It is appropriate relief therefore that the High Court's order in respect of the regulations also be amended to bring it into line with the order we make in respect of the Act.

[36] The appellant asked for costs if her application for confirmation was opposed. As she is, in my view, the successful party, I can see no reason why she should not be awarded costs as prayed.

[37] I accordingly make the following order:

1. The whole order granted in the High Court by Kgomo J is hereby set aside.

2. The following order is substituted therefor:

2.1. With effect from the date of this order it is declared that the omission from sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 after the word "spouse" 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;

2.2. With effect from the date of this order, sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act, 88 of 1989 are to be read as though the following words appear therein after the word "spouse" – "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support."

2.3 With effect from the date of this order, it is declared that the omission from regulations 9(2)(b) and 9(3)(a) of the Judges' Remuneration and Conditions of Employment Act, 88 of 1989 after the word "spouse" of the words "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the Constitution.

2.4. With effect from the date of this order, Regulations 9(2)(b) and 9(3)(a) of the Judges' Remuneration and Conditions of Employment Act, 88 of 1989 are to be read as though the following words appear therein after the word "spouse" – "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support".

2.5 The respondents are ordered to pay the costs of the application in both courts.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Kriegler J, Ngcobo J, O'Regan J, Du

MADALA J

Plessis AJ and Skweyiya AJ concur in the judgment of Madala J.

For the Applicant: Advocate P R Jammy instructed by Attorney Raymond Tucker, Johannesburg.

For the Respondents: Advocate I A M Semenya and Advocate L T Sibeko instructed by the State Attorney, Pretoria.