IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Home Affairs and Another v Fourie and Another, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)

CCT 60/04

Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others

CCT 10/05

Decided on 1 December 2005

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Ms Marié Adriaana Fourie and Ms Cecelia Johanna Bonthuys, of Pretoria, are the applicants in the first of two cases (the *Fourie* case) that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. They contend that the exclusion comes from the common law definition which states that marriage in South Africa is a union of one man with one woman, to the exclusion, while it lasts, of all others. In the second case, (the *Equality Project* case) the Gay and Lesbian Equality Project challenge section 30(1) of the Marriage Act, which provides that marriage officers must put to each of the parties the following question: "Do you AB…call all here present to witness that you take CD as your lawful wife (or husband)?" The reference to wife (or husband), they contend, unconstitutionally excludes same-sex couples.

The two cases raised the question whether the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amounts to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation, contrary to the provision of the Constitution guaranteeing the right to equality and dignity. And if it does, what is the appropriate remedy that this Court should order?

In the *Fourie* case the High Court held that the applicants were barred from getting an order allowing them to marry because they had not challenged the constitutionality of the Marriage Act. The majority in the Supreme Court of Appeal held that the right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act; in the meanwhile the common law definition of marriage should be developed so as to embrace same-sex couples. The minority judgment held both that the common law should be developed and that the Marriage Act could and should be read there and then in updated form so as to permit same-sex couples to pronounce the vows. It held further, however, that the development of the common law to bring it into line with the Constitution should be suspended to enable Parliament to enact appropriate legislation.

The *Equality Project* case in the meantime was brought as a challenge to the Marriage Act vow as well as to the common law definition. Originally due to be heard in the High Court in October this year, it was eventually set down for January next year. The Equality Project then applied for direct access to this Court to enable their case to be heard together with the appeal and the cross-appeal noted in the *Fourie* case.

The state contended that the Equality Project was incorrect in seeking an order from this Court declaring the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act to be unconstitutional. It argued further that if the Court ruled otherwise, any declaration of invalidity should be suspended to enable Parliament to correct the defect.

Doctors for Life and their legal representative Mr John Smyth, were admitted as amicus curiae, and made written and oral submissions to this Court, as did the Marriage Alliance of South Africa, supported on affidavit by Cardinal Wilfred Napier.

Writing for a Court that was unanimous on all matters except in relation to the remedy, Sachs J held that it was clearly in the interests of justice that the *Fourie* and the *Equality Project* matters be heard together. He observed that this Court had in five consecutive decisions highlighted that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one; there was an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians although a number of breakthroughs have been made in particular areas; there is no comprehensive legal regulation of the family law rights of gays and lesbians; and finally, our Constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. He pointed out that at issue was the need to affirm the character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.

The exclusion of same-sex couples from the benefits and responsibilities of marriage was not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represented a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples. The intangible damage to same-sex couples is as severe as the material deprivation. They are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture.

If heterosexual couples have the option of deciding whether to marry or not, the judgment continued, so should same-sex couples have the choice as to whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. By both drawing on and reinforcing discriminatory social practices, the law has failed to secure for same-sex coupes the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation and by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation.

Sachs J stated that Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies. In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

Acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples, is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity. Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion.

The silent obliteration of same-sex couples from the reach of the law, together with the utilisation of gender-specific language in the marriage vow, presupposes that only heterosexual couples were

contemplated. The common law and section 30(1) of the Marriage Act are accordingly inconsistent with sections 9(1) and 9(3) [equality] and 10 [dignity] of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples.

Dealing with the remedy to be provided, Sachs J stated that legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common law definition standing on its own. The effect would be that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage. It was accordingly not necessary to decide whether the Court could or should develop the common law standing alone.

A notable and significant development in our statute law in recent years has been the extent of express and implied recognition that the legislature has accorded to same-sex partnerships. Yet there was still no appropriate recognition in our law of same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.

The claim by the applicants in *Fourie* of the right to get married should be seen as part of a comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signified far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represented a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly would it and other such unions be rescued from legal oblivion, and the more tranquil and enduring would such unions ultimately turn out to be.

The matter touched on deep public and private sensibilities. Parliament was well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law. Provided that the basic principles of equality as enshrined in the Constitution are not trimmed in the process, the greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.

There were at least two different ways in which the legislature could possibly deal with the gap that exists in the law. The first was to follow the simple proposal of the Equality Project to read in the words ‘or spouse’ after the words ‘or husband’ in the Marriage Act.

The second possibility was a more complex and comprehensive proposal put forward in a memorandum by the South African Law Reform Commission. Arrived at after extensive public consultation over several years, this would embody a single comprehensive legislative scheme and not set out a range of options for the Legislature. It calls for a new generic marriage act (to be called the Reformed Marriage Act) that would be enacted to give legal recognition to all marriages, including those of same and opposite-sex couples and irrespective of the religion, race or culture of a couple. However, the current Marriage Act would not be repealed, but renamed only (to be called the Conventional Marriage Act). For the purposes of this Act, the status quo would be retained in all respects and legal recognition in terms of this Act would only be available to opposite-sex couples. It would entail no separation of the religious and civil aspects of marriage, and ministers of religion (or religious institutions) would have the choice to decide in terms of which Act they wish to be designated as marriage officers. The state would designate its marriage officers in terms of the Reformed Marriage Act.

According to the SALRC the family law dispensation in South Africa would therefore make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex specific marriages.

Sachs J held that given the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it was appropriate that the legislature be given an opportunity to map out what it considers to be the best way forward.

Whatever legislative remedy is chosen, however, must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.

Parliament has already undertaken a number of legislative initiatives which demonstrate its concern to end discrimination on ground of sexual orientation. Aided by the extensive research and specific proposals made by the SALRC, there was no reason to believe that Parliament would not be able to fulfil its responsibilities in the light of the judgment within a relatively short time. What was in issue was not a fundamental new start in legislation but the culmination of a process that had been underway for many years. In the circumstances it would be appropriate to give Parliament one year from the date of the delivery of this judgment to cure the defect.

If, however, Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.

The order of the Supreme Court of Appeal has accordingly been set aside and replaced by orders stating that:

- The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.
- The omission from section 30(1) of the Marriage Act 25 of 1961 after the words "or husband" of the words "or spouse" is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.
- These declarations of invalidity are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.
- Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.
- The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional Development must pay the applicants' costs.

This judgment was concurred in by Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Skweyiya J, Van der Westhuizen J, Yacoob J

In a separate judgment O'Regan J expresses her agreement with the findings of the main judgment on unconstitutionality, but dissents on the remedy. She states that this Court should develop the common-law

rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion). Such an order would mean simply that there would be gay and lesbian married couples at common law, which marriages would have to be regulated by any new marital regime the legislature chooses to adopt. The fact that Parliament faces choices does not, in this case, seem to be sufficient for this Court to refuse to develop the common law and remedy a statutory provision which is also unconstitutional.

She further states that the doctrine of the separation of powers is an important one in our Constitution but it cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint. The importance of the principle that a successful litigant should obtain the relief sought has been acknowledged by this Court through the grant of interim relief where an order of suspension is made to ensure that constitutional rights are infringed as little as possible in the period of suspension.

She concludes that the power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of the Court's order does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution. Permitting those who have been excluded from marrying to marry, can only foster a society based on respect for human dignity and human difference.