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Explanatory Note

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

This case was referred to the Constitutional Court by the Cape of Good Hope High Court, which declared section 25(5) of the Aliens Control Act 96 of 1991 unconstitutional. Section 25(5) of the Aliens Control Act 96 of 1991 omits to give persons, who are partners in permanent same-sex life partnerships, the benefits it extends to “spouses” under this section.

The case raises two important questions: the first is whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the foreign national spouses of permanent South African residents but not to afford the same benefits to South African gays and lesbians in permanent same-sex life partnerships with foreign nationals. The second is whether, when it concludes that provisions in a statute are unconstitutional, the Court may insert words into the statute (read in words) to remedy the unconstitutionality of the section, something this Court has not previously done.

In this case the Court only dealt with the position of gays and lesbians who are permanent South African residents who have foreign national same-sex life partners. The Court did not deal with unmarried partners in permanent heterosexual partnerships and the fact that the section also omitted to provide for these couples. Nor did the Court deal with whether gay and lesbian relationships should formally be recognised .

The Court rejected the argument that the word “spouse” could be interpreted so as to include a permanent South African resident who was in a permanent same-sex life partnership with a foreign national. It therefore became necessary for the Court to consider the constitutional validity of section 25(5).

The rights of equality and dignity were found to be closely related in the present case and it was held that section 25(5) reinforced harmful stereotypes of gays and lesbians. This conveyed the message that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity. Section 25(5) was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. It did so in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Court accordingly

held that the omission from section 25(5) of partners in permanent same-sex life partnerships was inconsistent with the Constitution. Having come to this conclusion it was unnecessary to consider whether any of the freedom of movement rights were in any way limited by section 25(5).

Having found such inconsistency, the Court was of the view that there were only two ways to remedy it in the present case: by declaring the whole of section 25(5) to be invalid or by reading words into the section to cure such inconsistency.

Striking down section 25(5) would have deprived spouses, as presently defined, from the benefits conferred by the section. This could also create the impression that achieving equality by removing the benefits which spouses presently enjoy would be a constitutionally permissible result.

The following principles were set out to guide courts in determining whether reading in would constitute an appropriate remedy:

1. reading words into a statute should be consistent with the Constitution and its fundamental values;
2. the result achieved should interfere with the laws adopted by the legislature as little as possible;
3. the court must be able to define with sufficient precision how the statute ought to be extended in order to comply with the Constitution;
4. a court should try to give effect to what the law makers intended within the constraints of the Constitution;
5. even where the remedy of reading words into a provision is otherwise justified, it ought not to be done where it would compel the State to undergo unwarranted additional expenditure;
6. where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.

In order to remedy the constitutional defect the Court decided the words “or partner in a permanent same-sex life partnership” should be added to the section. Permanent life partners are ones who have an established intention to cohabit with one another permanently.” The Court emphasised that the Legislature can refine and alter the remedy of the court within constitutional limits.

The remedy takes effect immediately but does not have retrospective effect. The costs of the proceedings in this Court, including the costs of two counsel, are to be paid by the respondents, jointly and severally.

2 DECEMBER 1999