CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/99

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY	First Appellant/Applicant
SVEN PATRIK ALBERDING	Second Appellant/Applicant
FIONA JANE LIEBE SAUNDERS WATSON	Third Appellant/Applicant
MALCOLM CLIVE NORTH	Fourth Appellant/Applicant
FRANCK ANDRÉ CHARLES JOLY	Fifth Appellant/Applicant
LINDA AOUDIA	Sixth Appellant/Applicant
ARGYRIS SOTIRIS ARGYROU	Seventh Appellant/Applicant
CLINT LEWIS TATCHELL	Eighth Appellant/Applicant
LUCINDA SLINGSBY	Ninth Appellant/Applicant
STEVEN MARK LE GRANGE	Tenth Appellant/Applicant
HILTON MARC KAPLAN	Eleventh Appellant/Applicant
CHRISTINE HAZEBROUCQ	Twelfth Appellant/Applicant
JACOBUS JOHANNES DE WET STEYN	Thirteenth Appellant/Applicant
THE COMMISSION FOR GENDER EQUALITY	Fourteenth Appellant/Applicant

versus

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DEPUTY MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Third Respondent

Heard on : 17 August 1999

Decided on : 2 December 1999

JUDGMENT

ACKERMANN J:

Introduction

[1] This matter raises two important questions. The first is whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents. The second is whether, when it concludes that provisions in a statute are unconstitutional, the Court may read words into the statute to remedy the unconstitutionality. These questions arise from the provisions of section 25(5) ("section 25(5)") of the Aliens Control Act 96 of 1991 (the "Act") and the application of the provisions of section 172(1)(b) of the 1996 Constitution (the "Constitution") should section 25(5) be found to be inconsistent with the Constitution. Section 25(5) reads:

> "Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit."

[2] Section 25(5) was declared constitutionally invalid and consequential relief granted by

the Cape of Good Hope High Court (the "High Court")[1] (per Davis J, Conradie J and Knoll AJ concurring) in the form of the following order:

> "1. That Section 25(5) of the Aliens Control Act 96 of 1991 is declared invalid to the extent that the benefit conferred exclusively on spouses is inconsistent with section 9(3) in that on the grounds of sexual orientation it discriminates against same sex life partners.
>
> 2. That the declaration of invalidity of section 25(5) is suspended for a period of twelve months from the date of confirmation of this order to enable parliament to correct the inconsistency.
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> 3. That the exclusion of same sex life partners from the benefits conferred by section 25(5) of the [Act] constitute[s] special circumstances requiring the grant of an application for exemption made in terms of section 28(2) of the Act by a same sex life partner of a person permanently and lawfully resident in the Republic. This part of the order shall remain in force for as long as it takes parliament to correct the inconsistency.
>
> 4. That under section 172(2)(b) of the Constitution second and further applicants are exempted, in terms of section 28(2) of the Act, from the provisions of section 23 thereof.
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> 5. No action may be taken against them in terms of the Act arising out of their living working or studying in the Republic.
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> That Respondents are to pay, jointly and severally the applicants' costs including

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[1] The judgment is reported as *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C); 1999 (3) SA 173 (C). Subsequent references to this judgment will be to the BCLR report only.

the cost of two counsel."

[3] This order was made pursuant to an application by the fourteen appellants/applicants (hereinafter referred to as the "applicants") against the three respondents, namely the Minister, the Deputy Minister and the Director-General of Home Affairs (hereinafter referred to collectively as the "respondents" and individually as the "Minister", the "Deputy Minister" and the "DG" respectively) in which the applicants sought an order in the following terms:

> "1 Reviewing and setting aside or correcting the decision of the First Respondent to deny the Seventh Applicant an extension of the exemption granted on 23 April 1997 in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991, as amended, in consequence of his abiding same-sex relationship with the Thirteenth Applicant; and
>
> 2 Reviewing and setting aside or correcting the decision of the First Respondent to deny the Second to Sixth Applicants an exemption in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991, as amended, in consequence of their abiding same-sex relationships with the Eighth to Twelfth Applicants respectively; and
>
> 3 Reviewing and setting aside or correcting the decision of the First Respondent, alternatively the Third Respondent, that special circumstances no longer exist in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, to accommodate the same-sex life partners of South African citizens involved in committed relationships; and
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> 4 Directing the Third Respondent to accept, process and refer the applications of the Second to Seventh Applicants for an immigration permit in terms of section 25(2) of the Aliens Control Act, Act 96 of 1991 as amended on terms no less favourable than those applicable to married couples under Section 25 of the Act, to the appropriate Immigrants Selection Board for consideration;
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> 5 Declaring section 25 of the Aliens Control Act, Act 96 of 1991 as amended, to be inconsistent with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996, and therefore invalid to the extent of its

inconsistency;

6 Directing the First Respondent to extend the exemptions already granted to the Seventh Applicant in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, pending any amendment to the Aliens Control Act to comply with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996;

7 Directing the First Respondent to grant to the Second to Sixth Applicants exemptions in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, pending any amendment to the Aliens Control Act to comply with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996;

(8) Declaring that the failure of the First Respondent to recognise committed same-sex relationships as a special circumstance in terms of section 28(2) of the Act [is] unconstitutional.

. . . ."

[4] The applicants have appealed to this Court under the provisions of section 172(2)(d) of the Constitution[2] seeking a variation of the order granted by the High Court. They have simultaneously applied for confirmation[3] of the whole order, except those parts against which the appeal is brought and "those parts of the order, if any, which are not subject to confirmation by this court in terms of sections 167(5) and 172(2) of the Constitution." The respondents then appealed against the entire judgment and order of the High Court.

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2 Read with section 8(1)(b) of the Constitutional Court Complementary Act 13 of 1995 (the "CCC Act") and Rule 15(2) of this Court.

3 Under the provisions of section 172(2)(d), read with sections 172(2)(a) and 167(5) of the Constitution, and read with section 8(1)(b) of the CCC Act and Rule 15(4).

The High Court's refusal of a postponement to the respondents

[5] The respondents did not file any answering affidavits in the High Court. Less than twenty-four hours before the matter was due to be heard by the High Court, the respondents sought a postponement of the hearing. They tendered costs on the attorney and client scale, coupled with an undertaking that the *status quo* with regard to the second to thirteenth applicants would persist until the final determination of the matter. The purpose was, according to the respondents, to:

> ". . . file comprehensive answering affidavits, as this Honourable Court would otherwise be left with little assistance regarding the purpose and practical implementation of the statutory provisions in question and the Government's reasons for opposing this application. These include issues of ripeness and the meaning, nature and purpose of the fundamental rights on which the Applicants rely, any issues of justification which arise, and the nature of the interim and final relief described in the Applicants' heads of argument . . ."

The High Court refused the application for postponement.

[6] The relevant surrounding facts are detailed in the judgment of the High Court and need not be repeated here; their gist is summarised in the following passage of Davis J's judgment:

> "In this case the respondents were served with the applicants' papers some seven months before the matter came before this Court. Persistent efforts were made by the applicants to remind the respondents of their obligations not only to this Court but ultimately to the Constitutional Court. No explanation was provided as to why the respondents had chosen to ignore the proceedings for more than seven months. Mr Mokoena's [the DG's] affidavit simply states that the cabinet decided the day before the hearing that the

application should be opposed and that important matters were raised."[4]

[7] Davis J also correctly pointed out that this Court has made it clear[5] that any evidence that the State considers relevant to an issue of the constitutional invalidity of a statutory provision ought to be adduced before the High Court first hearing the matter.[6] The learned Judge held that such consideration, however important, did not in itself justify the granting of a postponement which had to be based on clear principle. Davis J pointed out that no reasons at all had been furnished for the respondents' failure to observe the rules of court, that they had treated their obligations to the court with disdain and had ignored the rights of the applicants to a resolution of their claims and that accordingly the application had been dismissed.[7]

[8] The respondents sought in this Court to revisit the refusal of this application in two ways. First, they applied on notice of motion for an order with, amongst others, the following terms:

"1. Condoning the [respondents'] failure to file their Answering Affidavit in the

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4 Above n 1 at 287 C-E.

5 In *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) at para 5, which was decided seven months before the application in the present matter was launched.

6 See above n 1 at 286 J - 287 B.

7 See above n 1 at 287 E - 288 A.

Court *a quo*;

2. Granting the [respondents] leave to file their Answering Affidavit together with the annexures thereto;
3. *Alternatively* to prayer 2 above, remitting the matter to the Court *a quo* for rehearing of the application;

. . . . "

If the relief sought in paragraph 2 of the above notice of motion were to be granted, their founding affidavit in the application in this Court would stand as answering affidavit in the High Court application. The respondents did not attempt to make out a case, nor argue, for the reception of the founding affidavit as new evidence on appeal,[8] or as

[8] Constitutional Court Rule 29 read with section 22(1) of the Supreme Court Act 59 of 1959.

material falling under Constitutional Court Rule 30(1).[9]

[9] Secondly, and in the alternative to the above, they applied for an amendment of their notice of appeal in order to introduce a further ground of appeal, namely, that the High Court "in exercising its discretion erred in rejecting the [respondents'] application for postponement." The effect of this would be to set aside the orders made by the High Court and to have the matter remitted to the High Court, either to reconsider the application for the filing of an answering affidavit or to reconsider the application in the light of the respondents' answering affidavit. Although there is a brief passing reference to the former application in the respondents' written

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[9] Rule 30(1) provides:

> "Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record: Provided that such facts -
> (a) are common cause or otherwise incontrovertible; or,
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

argument, neither application was even alluded to in the respondents' oral argument in this Court, despite the fact that both applications were comprehensively and vigorously opposed in the applicants' written argument, in which both are characterised as being without merit, constituting an abuse and their dismissal sought with costs on an attorney and own client scale.

[10] Both these applications have, as their ultimate objective, the nullification of the High Court order and a re-hearing of the issue on the basis of the respondents' answering affidavit. The first application is wholly misconceived. Short of setting aside on appeal an order made by another court and substituting a different order, this Court has no jurisdiction to make an order on behalf of another court properly seized of a matter or to condone, on behalf of such court, non-compliance with the rules of procedure to which such court is subject. The second application and the ground of appeal which it seeks to introduce, are without merit, for the reasons which follow.

[11] A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[10] On its face, the

[10] See *R v Zackey* 1945 AD 505 at 511-2; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9; and *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC) at 314 H- 315 A and the authorities there cited.

complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground, on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such dismissal ought to be refused. The question of the appropriate costs order will be dealt with at the conclusion of this judgment.

The statutory framework and relevant facts

[12] Before reaching the constitutional issue in this matter it is necessary to consider the contentions raised by the respondents that the High Court should not have decided the issue of the constitutional validity of section 25(5) because it was not ripe for decision. But even this preliminary issue requires a consideration of the statutory framework and the facts relevant to the issue to be determined.

[13] As its long title indicates, the Act is wide-ranging and provides for "the control of the admission of persons to, their residence in, and their departure from, the Republic; and for matters connected therewith." For purposes of the present case it is sufficient to refer to chapter III, which deals with residence in the Republic and domicile, and to certain of its relevant provisions. Section 24(1) of the Act establishes an Immigrants Selection Board which consists of the central committee and at least one regional committee (a "regional committee") for each of

the provinces of the Republic. An important provision, for purposes of this case, is section 23 which deals with "aliens", an "alien" being defined in section 1(1) as "a person who is not a South African citizen", and which provides as follows:

> "Subject to the provisions of sections 28 and 29, no alien shall-
> *(a)* enter or sojourn in the Republic with a view to permanent residence therein, unless he or she is in possession of an immigration permit issued to him or her in terms of section 25; or
> *(b)* enter or sojourn in the Republic with a view to temporary residence therein, unless he or she is in possession of a permit for temporary residence issued to him or her in terms of section 26."

[14] For present purposes the exceptions enacted in section 29 are not germane, but the exemptions provided for in section 28 are, and to the extent relevant stipulate:

> "28(2) Notwithstanding the provisions of this Act, the Minister may, if he or she is satisfied that there are special circumstances which justify his or her decision, exempt any person or category of persons from the provisions of section 23, and for a specified or unspecified period and subject to such conditions as the Minister may impose, and may do so also with retrospective effect.
> (3) . . .
> (4) The Minister may withdraw any exemption granted under subsection (2) . . . .
> (5) The Minister may, notwithstanding any provision to the contrary in this Act, issue to any person whose exemption is withdrawn under subsection (4), an appropriate temporary residence permit referred to in section 26 to sojourn in the Republic or any particular part of the Republic."

[15] It is in the above legislative context that the provisions of section 25 must be understood and evaluated:

> **"25 Immigration Permit**

(1) [An application by an alien for an immigration permit is to be submitted to the DG.]

(2) [Such application is in turn submitted by the DG to a regional committee, who may not consider the application unless the applicant intends taking up permanent residence within the province in respect of which that regional committee has been appointed.]

(3) [Unless contrary to the provisions of the Act] the regional committee concerned may authorize the issue to the applicant of [an immigration] permit and make the authorization subject to the condition that the applicant shall pursue his or her occupation in the province in which he or she intends to take up permanent residence, for a minimum period of 12 months, and any other condition which the committee may deem necessary.

(4) The regional committee concerned may authorize the issue to the applicant of an immigration permit if the applicant-

(a) (i) is of a good character; and

(ii) will be a desirable inhabitant of the Republic; and

(iii) is not likely to harm the welfare of the Republic; and

(iv) does not and is not likely to pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic; or

(b) is a destitute, aged or infirm member of the family of a person permanently and lawfully resident in the Republic who is able and undertakes in writing to maintain him or her.

(5) Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit.

(6) A regional committee may, in the case of a person who applies for an immigration permit and who has entered into a marriage with a person who is

permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application, refuse to authorize such a permit unless the committee is satisfied that such marriage was not contracted for the purpose of evading any provision of this Act.

(7) [Requires, subject to the discretion of the DG to extend the period, that the person to whom the immigration permit is issued must] enter the Republic for the purpose of permanent residence therein within a period of six months from the date of issue of the permit . . .

(8) If any person to whom a permit has been issued in terms of subsection (7) does not enter the Republic for the purpose of permanent residence therein within a period of six months from the date of issue of such permit or within the further period which the [DG] may determine, the validity of such permit shall lapse.

(9)*(a)* [Provides for the issue to an alien, who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26(1)*(b)*,of an immigration permit] *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.

(b) Notwithstanding the provisions of paragraph *(a)*, a regional committee may authorize a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic, if such person is a person referred to in subsection (4)*(b)* or (5).

(10) [Provides for the rejection and renewal of applications for an immigration permit.]

(11) [Provides for the reconsideration of an application at the request of the DG.]

(12) [Establishes the circumstances under which a regional committee refers an application to the central committee for consideration or reconsideration.]

(13) [Sets out the powers of the central committee on considering or reconsidering an application.]

(14) [Criminalises certain conduct in relation to the application for and the issuing of an immigration permit.]

(15) [Provides for certain procedural powers of the DG.]"

The attack on the constitutional validity of section 25(5) concentrated on the fact that it

enables preferential treatment to be given to a foreign national[11] applying for an immigration permit who is "the spouse . . . of a person permanently and lawfully resident in the Republic", but not to a foreign national who, though similarly placed in all other respects, is in a same-sex life partnership with a person permanently and lawfully resident in the Republic.

[11] The term "alien" to describe a non-citizen is outmoded and modern writings and international legislation use the term "foreign national" (see, J Baloro "Immigration and Emigration" in Joubert et al *The Law of South Africa* (*Lawsa)* first reissue (Butterworths, 1998) vol 11 para 39 footnote 1), which expression will be employed in this judgment to connote "alien" as defined in the Act.

[16] The first applicant is a voluntary association of individual gay, lesbian, bisexual and transgendered people in South Africa and of 69 organisations and associations representing such people. Its principal objectives include the promotion of equality before the law for all persons, irrespective of their sexual orientation; the reform and repeal of laws that discriminate on the basis of such orientation; the promotion and sponsoring of legislation to ensure equality and equal treatment of people in respect of their sexual orientation; and to challenge by means of litigation, lobbying, advocacy and political mobilisation, all forms of discrimination on the basis of such orientation. The second to seventh applicants, none of whom is a South African citizen, are the "same-sex life partners"[12] of the eighth to the thirteenth applicants respectively. The eighth to the thirteenth applicants (the "South African partners") are all permanently and lawfully resident in South Africa. The fourteenth applicant is the Commission for Gender Equality.[13]

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12 The import of this expression will be dealt with later in this judgment.

13 The statutory body established as such under section 187 of the Constitution.

[17] Because none is a South African citizen, the second to seventh applicants must all, for purposes of the Act, be regarded as "aliens".[14] Their same-sex life partnerships with their respective South African partners are of differing duration[15] and not all identical in content. They all have certain features in common. Each relationship is an overt, same-sex life partnership which is intimate and mutually interdependent. This emerges more explicitly in the case of certain of the applicants. The third applicant and her South African partner have lived together in a joint household since March 1995, jointly purchased a home in February 1998, share living expenses, have joint insurances, and regulate their relationship by a domestic partnership agreement. Their emotional, physical and material interdependence is, like other applicants,[16] such that they would marry each other if the law permitted them to do so. The fourth applicant and his partner celebrated a public affirmation of their relationship attended by family members and friends. The seventh and the thirteenth applicants are reciprocal beneficiaries in each others' wills. If the second applicant is not granted permanent residence in South Africa, the eighth applicant would emigrate in order to pursue the relationship.[17]

[18] After the 1994 elections the first applicant initiated discussions with the DG on a number of issues, including the failure to recognise same-sex relationships for purposes of immigration

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14 See section 1(1) of the Act cited in paragraph 13 above.

15 The fifth applicant's relationship had been established for a little longer than one year when the High Court application was brought. The others have all been longer; the second respondent's relationship as well as that of the fourth respondent have been longer than four years.

16 For example the second, fourth and fifth applicants and their respective partners.

17 The eleventh applicant would likewise emigrate in order to pursue his relationship with the fifth applicant if the latter were not permitted to remain in South Africa.

permits under section 25(4), (5) and (6) of the Act. Pursuant to these discussions, which apparently developed into a cordial working relationship, a written confirmation was given to the first applicant on behalf of the DG that:

> ". . . all the requests for exemptions in terms of section 23(b) of the Aliens Control Act . . . will be considered on merit."

Although the reference to section 23(b) of the Act is somewhat obscure, it is clear from the context that what was being referred to was an exemption under section 28 of the Act from the requirements of section 23(b).

[19] Notwithstanding the above confirmation, the first applicant continued making representations for the express statutory recognition of same-sex relationships for purposes of sections 25(4), (5) and (6) of the Act. In consequence thereof at least thirteen temporary exemptions were granted between April and November 1997 under section 28(2) of the Act to foreign same-sex partners of lesbian or gay South Africans who were seeking permanent residence in the Republic. The exemptions were granted by an official duly delegated by the Minister and in each case it was stated that the temporary exemption had been granted for a period of twelve months "to await the outcome of the memorandum submitted to the Minister of Home Affairs" and that the grantor was "satisfied that special circumstances exist which justify such an exemption" under the provisions of section 28(2) from the requirements of section 23(b) of the Act.

[20] During the course of 1997 the department changed its attitude which culminated on 9

January 1998 in a blanket refusal of such exemptions to foreign same-sex partners of South African permanent residents. This refusal was embodied in a letter of the same date from the DG to the first applicant in which the following was, amongst other things, stated:

> "In terms of section 28[2] of the Act the Minister may only grant exemptions where there are **special circumstances** which justify such a decision. In view of the steady flow of applications for exemptions, one can hardly argue that special circumstances exist in any of these cases as contemplated by the said section of the Act.
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> The mere fact that the Aliens Control Act, 1991, does not cater for same-sex relationships cannot be considered as 'special circumstances' for the purposes [of] exercising the powers of exemption under that Act. In view of the above consideration, it has been decided not to grant exemptions under section 28[2] of the Act merely to accommodate alien partners in same-sex relationships." [Emphasis in the original]

The first applicant took various steps on behalf of certain of the applicants and other foreign partners in same-sex relationships to ameliorate their position in regard to the granting of exemptions under section 28(2) of the Act and otherwise, but to no avail, and ultimately the application was launched in the High Court.

The ripeness of the matter for hearing

[21] Although, in the High Court, the question of mootness[18] was also raised by the

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18 A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC), where Didcott J said the following at para 17:

> "[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."

See also *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (11) BCLR 1219 (CC); 1999 (4) SA 682 (CC) at paras 12-16, 18, 23 and Chaskalson et al

respondents, there has been no appeal against the High Court's dismissal of this argument. While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.[19]

Constitutional Law of South Africa third revision service, (Juta & Co Ltd, Kenwyn, 1998) page 8-15. Compare Laurence H Tribe *American Constitutional Law* 2 ed (The Foundation Press Inc., New York 1988) at 82.

19 *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC) at para 59; *Zantsi v Council of State, Ciskei, and Others* 1995 (10) BCLR 1424 (CC); 1995 (4) SA 615 (CC) at paras 2-5; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 199 and *S v Bequinot* 1996 (12) BCLR 1588 (CC); 1997 (2) SA 887 (CC) at paras 12-13. As Chaskalson et al, above n 18 at page 8-15 aptly put it -

> "[w]hile the 'ripeness' doctrine is concerned with cases which are brought too early, the 'mootness' doctrine is relevant to cases which are brought, or reach the hearing stage, too late, at a time when the issues are no longer 'live'."

Compare Tribe above n 18 at 78.

[22] On the issue of ripeness the argument followed much the same line as in the High Court. The contention was that the only remedy pursued by the second to seventh applicants was the obtaining of exemptions under section 28(2) of the Act. The decision regarding an exemption was one to be taken by the Minister. The applicants in question have never applied for an immigration permit under the provisions of section 25 of the Act, which application has to be dealt with by a regional committee and not the Minister. Without having followed such a course, so the argument ran, the applicants had not forced a determination of the issue as to whether a foreign national same-sex partner of a permanent and lawful resident in South Africa was entitled to be treated as a spouse and to the preferential treatment envisaged by section 25(5). The applicants had accordingly failed to pursue a non-constitutional remedy which, if successful, might have rendered it unnecessary to consider the constitutional validity of section 25(5). Such failure was in conflict, so it was contended, with the general principle, referred to in the previous paragraph, that where it is possible to decide any case without reaching a constitutional issue, that course should be followed.

[23] According to the respondents' argument, it was reasonably possible that a regional committee might, under section 39(2) of the Constitution,[20] interpret "spouse" in section 25(5) of the Act as including a same-sex life partner, thus making it unnecessary to consider the constitutional validity of the subsection. In my view the word "spouse" cannot, in its context, be so construed. There is, it is true, a principle of constitutional interpretation that where it is

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20 Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency.[21] Such a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered.

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21 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at para 85 and *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at para 59 and the authorities cited in footnotes 85 and 87.

[24] There is a clear distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" as required by section 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under section 172(1)(b), following upon a declaration of constitutional invalidity under section 172(1)(a). I deal later with the constitutional permissibility of reading words into a statutory provision.[22] What is now being emphasised is the fundamentally different nature of the two processes. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

[22] See para 65 and following below.

[25] The High Court correctly concluded that "spouse" as used in subsection 25(5) was not reasonably capable of the construction contended for by the respondents. The word "spouse" is not defined in the Act, but its ordinary meaning connotes "[a] married person; a wife, a husband."[23] The context in which "spouse" is used in section 25(5) does not suggest a wider meaning. The use of the expression "marriage" in section 25(6) and the special provisions relating to a person applying for an immigration permit and "who has entered into a marriage with a person who is permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application" is a further indication that "spouse", as used in section 25(5), is used for a partner in a marriage. There is also no indication that the word "marriage" as used in the Act extends any further than those marriages that are ordinarily recognised by our law. In this regard reference may be made to the recent House of Lords decision in *Fitzpatrick (A.P.) v Sterling Housing Association Ltd*[24] where "spouse" likewise could not be given such an extensive meaning and *Quilter v Attorney-General*[25] where the statute at issue did not define "marriage" but the New Zealand Court of Appeal unanimously held that textual indications prevented the term from being construed to include same-sex unions.

[26] Had the word "spouse" been used in a more extensive sense in section 25(5) of the Act, it would have been unnecessary to provide specifically in section 1(1) that marriage "includes a customary union". It is significant that the definition of "customary union" namely:

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23 *New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

24 Delivered on 28 October 1999 and as yet unreported. References are to the pages of the typescript judgment.

25 [1998] 1 NZLR 523 (CA).

> ". . . the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is party to a subsisting marriage, which is recognised by the Minister in terms of subsection (2);"

is based on an opposite-sex relationship. Under all these circumstances it is not possible to construe the word "spouse" in section 25(5) as including the foreign same-sex partner of a permanent and lawful resident of the Republic. The applicants were accordingly not able in law to pursue successfully a non-constitutional remedy, based on such a construction of "spouse". Accordingly the respondents' contention that the constitutional issue was not ripe for hearing was rightly dismissed by the High Court.

The constitutional validity of section 25(5)

Introduction

[27] It is convenient to deal at the outset with a submission advanced on the respondents' behalf which is central to their approach to the case and their categorisation of the issues concerning the constitutionality of section 25(5). Mr Patel, who together with Ms Moroka and Mr Dhlamini appeared for the respondents, submitted that the Republic, as a sovereign independent state, was lawfully entitled to exclude any foreign nationals from the Republic; that it had an absolute discretion to do so which was beyond the reach of the Constitution and the courts; and that, to the extent that Parliament legislated to permit foreign nationals to reside in South Africa, it did so in the exercise of such discretion and that the provisions of such legislation were equally beyond the reach of the Constitution and the courts.[26] He submitted that

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[26] For this submission reliance was placed on, amongst others, DA Martin "Refugees and Migration" in Christopher C Joyner (ed) *The United Nations and International Law*, (American Society of International Law, Cambridge University Press, 1997) at 155; Sir Robert Jennings and Sir Arthur Watts *Oppenheim's*

this was recognised by the Constitution in that certain provisions of the Bill of Rights conferred significant rights only on citizens of the Republic. Thus only a citizen has the right to "enter, to remain in and to reside anywhere in the Republic";[27] to "a passport";[28] to certain political rights;[29] and to choose a "trade, occupation or profession freely".[30]

International Law 9 ed vol 1 (Addison Westley Longman Inc., 1997) at 897-9; *Fong Yue Ting v United States* 149 US 698 (1893) at 705-711; Nishimura Ekiu v United States 142 US 651 (1892); *Galvan v Press* 347 US 522 (1954) at 530-2; *Adams v Howerton* 673 F2nd (Ninth Circuit) 1036 at 1042; *Naidenov v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T) at 901 C-E; *Parekh v Minister of Home Affairs and Another* 1996 (2) SA 710 (D) at 714 G - 715 C. But see also *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC). Other authorities dealing with the consequences of a state's territorial authority and its right to control the entry of foreign nationals into its territory are usefully collated in Van Heerden AJ's judgment in *Dawood and Another v The Minister of Home Affairs and Others; Shalabi and Another v The Minister of Home Affairs and Others; Thomas and Another v The Minister of Home Affairs and Others*, (the "*Dawood* case") case nos 12745/98; 13503/98; and 13435/98, a judgment in the Cape of Good Hope High Court of 21 September 1999 and as yet unreported. The authorities appear at 76-7 of the typescript judgment. This case is pending before this Court under section 172(2)(a) of the Constitution and on appeal.

27 Section 21(3).

28 Section 21(4).

29 Section 19.

[30] Section 22.

[28] Such an argument, even if correct, would not assist the respondents, because in the present case we are not dealing with such a category of foreign nationals, but with persons who are in intimate life partnerships with persons who are permanently and lawfully resident in the Republic (to whom I shall refer as "South Africans"). This is a significant and determinative difference. The failure of the Act to grant any recognition at all to same-sex life partnerships impacts in the same way on the South African partners as it does on the foreign national partners. In my view this case can, and ought properly to be decided, on the basis of whether section 25(5) unconstitutionally limits the rights of the South African partners, namely the eighth to the thirteenth respondents. In an important line of decisions, the Zimbabwean Supreme Court has held that the constitutional right of citizens to freedom of movement is contravened when the foreign national spouses of such citizens are denied permission to reside in Zimbabwe.[31] We do not reach the question of freedom of movement in the present case but it is important to note that the issue of the contravention in the Zimbabwean cases was considered in relation to the rights of the citizen spouse residing in Zimbabwe.

[29] Such an approach presents no procedural or substantive difficulty. It is true that the parties seeking immigration permits are the foreign national partners. On the objective theory of unconstitutionality adopted by this Court[32] a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right

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31 *Rattigan and Others v Chief Immigration Officer, Zimbabwe, and Others* 1995 (2) SA 182 (ZSC); *Salem v Chief Immigration Officer, Zimbabwe, and Another* 1995 (4) SA 280 (ZSC); *Kohlhaas v Chief Immigration Officer, Zimbabwe, and Another* 1998 (3) SA 1142 (ZSC), particularly at 1146 E-1147 B.

32 See *Ferreira v Levin* above n 19 at paras 26-28; *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at para 22; *Member of the Executive Council for Development Planning and Local Government, Gauteng v the Democratic Party*

unconstitutionally infringed is not that of the litigant in question but of some other person. Thus the second to the seventh applicants are entitled to rely on any unconstitutional infringement of any of the rights of the South African partners (the eighth to the thirteenth applicants) which has been brought about by the failure of the Act to grant any recognition to same-sex life partnerships. Obviously the South African partners may also invoke such infringement themselves.

The limitation by section 25(5) of the section 9 right to equality and the section 10 right to dignity

[30] Section 9 of the Constitution provides:

> "**Equality**
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (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, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted

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1998 (7) BCLR 855 (CC); 1998 (4) SA 1157 (CC) at para 64.

to prevent or prohibit unfair discrimination.

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

Section 10 provides:

"**Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected."

[31] Davis J found that section 25(5) constituted a clear limitation of the section 9 guarantee against unfair discrimination because it differentiated on the grounds of sexual orientation; under section 9(5) such differentiation, being a ground specified in section 9(3), is presumed to be unfair unless the contrary is established; and that the contrary had not been established.[33] The High Court considered it unnecessary to deal with the other grounds on which section 25(5) had been attacked. In National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others[34] (the "*Sodomy* case") this Court pointed out that in particular circumstances the rights of equality and dignity are closely related and found the criminal offence of sodomy to be unconstitutional because it breached both rights.[35] In the present case the rights of equality and dignity are also closely related and it would be convenient to deal with them in a related manner.

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33 Above n 1 at 291 G - 292 F.

34 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC).

35 Id at para 30. The Court also held that the right to privacy had been breached, which is not relevant to the present case.

[32] In dealing with the equality challenge I shall follow the approach laid down by this Court in various of its judgments as collated and summarised in *Harksen v Lane NO and Others*[36] and as applied to section 9 of the Constitution in the *Sodomy* case.[37] The differentiation brought about by section 25(5) is of a negative kind. It does not proscribe conduct of same-sex life partners or enact provisions that in themselves prescribe negative consequences for them. The differentiation lies in its failure to extend to them the same advantages or benefits that it extends to spouses. The applicants' complaint, as upheld by the High Court, is in effect that section 25(5) is "under-inclusive [because] it confers a benefit on a class that is defined too narrowly in that the class fails to include all members that have an equality-based right to be included."[38] This is, for purposes of establishing a breach of the right to equality, constitutionally irrelevant. Section 9(1)

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36 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 53 per Goldstone J.

37 Above n 34 at paras 58-63.

38 P Hogg *Constitutional Law of Canada* 3ed (Carswell, Toronto, 1992) at para 37.1(h) at 910.

> "makes clear what was already manifestly implicit in section 8(1) of the interim Constitution, namely that both in conferring benefits on persons and by imposing restraints on State and other action, the State had to do so in a way which results in the equal treatment of all persons."[39]

[33] Before this Court the respondents challenged the conclusion reached by the High Court that the omission in section 25(5) of spousal benefits to same-sex life partners was a differentiation based on the ground of sexual orientation. It was submitted on their behalf that the differentiation was based on the ground that they were non-spouses, which had nothing to do with their sexual orientation, and that accordingly, because the differentiation was on "non-spousal" grounds, rather than on marital status, it did not constitute unfair discrimination. There is no merit in this submission, because as indicated above in paragraph 25, spouse is defined with regard to marriage and is but the name given to the partners to a marriage.

[34] In the alternative it was argued that, even if the differentiation was on grounds of marital status, there was nothing that prevented gays and lesbians from contracting marriages with persons of the opposite sex, thus becoming and acquiring spouses and accordingly being entitled to the spousal benefits under section 25(5). Therefore, so the submission proceeded, the fact that they did not enjoy the advantages of a spousal relationship was of their own choosing. What the submission implies is that same-sex life partners should ignore their sexual orientation and, contrary thereto, enter into marriage with someone of the opposite sex.

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39 The *Sodomy* case above n 34 at para 59.

[35] I am unable to accede to this line of argument. It confuses form with substance and does not have proper regard for the operation, experience or impact of discrimination in society. Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts. As recognised in the *Sodomy* case -

> "[t]he experience of subordination - of personal subordination, above all - lies behind the vision of equality."[40]

[36] Moreover, the submission fails to recognise 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 section 25(5) affords protection only to conjugal relationships between heterosexuals and excludes any protection to a

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40 Above n 34 at para 22, quoting with approval Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Basil Blackwell, Oxford, 1983) at xiii.

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.

[37] A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships. A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament's commitment to equality on the ground of sexual orientation,[41] there is still no appropriate recognition in our law of the same-sex life partnership, *as a relationship*, to meet the legal and other needs of its partners.

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41 See, for example, the use of the expressions "spouse, partner or associate" in section 6(1)(f) of the Independent Media Commission Act 148 of 1993 and sections 5(1)(e) and (f) of the Independent Broadcasting Authority Act 153 of 1993 and the fact that, for purposes of these provisions, "spouse" includes "a *de facto* spouse"; "life-partner" in sections 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act 57 of 1997 and section 27(2)(c)(i) the Basic Conditions of Employment Act 75 of 1997; the definition of spouse in section 31 of the Special Pensions Act 69 of 1996 to mean "the partner . . . in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years"; the definition of "family responsibility" in section 1 of the Employment Equity Act 55 of 1998 which includes "responsibility of employees in relation to their spouse or partner"; the definition of "dependant" in the Medical Schemes Act 131 of 1998 which includes the "the spouse or partner, dependant children or other members of the member's immediate family in respect of whom the member is liable for family care and support"; and the definition of "spouse" in section 8(6)(e)(iii)(aa) of the Housing Act 107 of 1997 which includes "a person with whom the member lives as if they were married or with whom the member habitually cohabits" and sections 9(4) and 11(5)(b) of the South African Civil Aviation Authority Act 40 of 1998 and "life partners" in sections 10(2) and 15(9) of the Road Traffic Management Corporation Act 20 of 1999.

[38] It follows that same-sex partners are in a different position from heterosexual partners who have not contracted a marriage and have not become spouses. As will be emphasised later in this judgment, it is unnecessary in this case to deal at all with the position of such unmarried heterosexual partners. The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.[42]

[39] There is much to be said for the view that the discrimination in section 25(5) is on the ground of sexual orientation. As previously pointed out, the section 25(5) protection is not extended to the only form of conjugal relationship in which gays and lesbians are able to participate in harmony with their sexual orientation, namely, same-sex life partnerships. A similar conclusion was reached by the Canadian Supreme Court in *Canada (Attorney-General) v Mossop*,[43] *Egan v Canada*[44] and *M v H*.[45]

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42 *Quilter v Attorney-General* above n 25 at 537 per Thomas J.

43 (1993) 100 DLR (4th) 658 at 672 g - 673 a.

44 (1995) 29 CRR (2d) 79 at 141.

[45] (1999) 171 DLR (4th) 577 at paras 2 and 62.

[40] The better view, however, in my judgment, is that the discrimination in section 25(5) constitutes overlapping or intersecting discrimination on the grounds of sexual orientation and marital status, both being specified in section 9(3) and presumed to constitute unfair discrimination by reason of section 9(5) of the Constitution. As Sachs J correctly pointed out in the *Sodomy* case:[46]

> "One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly." [footnotes omitted]

I also agree with the following observations by L'Heureux-Dubé J in *Mossop*:[47]

> "This argument [of Lamer CJC] is based on an underlying assumption that the grounds of 'family status' and 'sexual orientation' are mutually exclusive. However . . . [i]t is increasingly recognized that categories of discrimination may overlap and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex . . . Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of

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46 Above n 34 at para 113.

47 Above n 43 at 720 e-721 a. Although Lamer CJC, for the majority, did not find overlapping grounds in the case at hand, he expressly recognized the principle of overlapping grounds at 673 g-h of the judgment.

discrimination may be present and intersect."

The prerequisite of marriage before the benefit is available points to that element of the discrimination concerned with marital status, while the fact that no such benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the grounds of sexual orientation. I propose dealing with the present case on this basis.

The impact of the discrimination on the affected applicants

[41] As affirmed in the *Sodomy* case the determining factor regarding the unfairness of discrimination is, in the final analysis, the impact of the discrimination on the complainant or the members of the affected group. The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness.[48] Important factors to be assessed in this regard (which do not however constitute a closed list) are:

(a) the position of complainants in society and whether they have suffered in the past from patterns of disadvantage;

(b) the nature of the provision or power and the purpose sought to be achieved by it.

48 Above n 34 at para 19.

If its purpose is manifestly not directed, in the first instance, at impairing the complainants in their fundamental human dignity or in a comparably serious respect, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question.

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[49]

It is noteworthy how the Canadian Supreme Court has, in the development of its equality jurisprudence under section 15(1) of the Canadian Charter, come to see the central purpose of its

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[49] Id.

equality guarantee as the protection and promotion of human dignity.[50]

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50 In *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR (4th) 1, Iacobucci J, writing for a unanimous Supreme Court stated the following at paras 52-4:

> ". . . [I]n the articulation of the purpose of s. 15(1) . . . a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment.
>
> . . . .
>
> [T]he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.
>
> . . . .
>
> The equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light

of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis."

[42] In the *Sodomy* case this Court dealt with the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and their same-sex partnerships,[51] concluding that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.[52] Although the main focus of that judgment was on the criminalisation of sodomy and on other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the patterns of discrimination to which they have been and continue to be subject are also applicable to lesbians. Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

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51 Above n 34 at paras 20-27.

52 Id at para 26(a).

[43] Similar views, with which I agree, were expressed in *Vriend v Alberta*,[53] where Cory J[54] expressed himself thus:[55]

> "It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy."

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53 (1998) 156 DLR (4th) 385 per Cory and Iacobucci JJ (Lamer CJC, Gonthier, McLachlin and Bastarache JJ concurring; L'Heureux-Dubé and Major JJ concurring in part and dissenting in part).

54 In this part of the judgment writing for the Court.

55 At paragraphs 69 and also 102 respectively, in passages cited in the *Sodomy* case, above n 34, at paras 22 and 23 respectively. See also *Egan* above n 44 at 144 - 5. Although the Court was divided in *Egan* on the disposition of the case, no disagreement was expressed with the views expressed in this passage from the joint dissenting judgment of Cory and Iacobucci JJ.

[44] This Court has recognised that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair."[56] Vulnerability in turn depends to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past disadvantage is so important. In a passage endorsed in *M v H*,[57] Iacobucci J in the *Law* case[58] expressed this tellingly as follows:

> "[P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group [citations omitted]. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact on them, since they are already vulnerable."

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56 Per O'Regan J in *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC) at para 112 as confirmed by the Court in the *Sodomy* case above n 34, at para 27 and n 33 in that judgment.

57 Above n 45 at para 68.

58 Above n 50 at para 63.

In the present case, like in *M v H*,[59] there is significant pre-existing disadvantage and vulnerability.

[45] I turn now to deal with the discriminatory impact of section 25(5) on same-sex life partners. I agree with the submission advanced on respondents' behalf that section 25(5) is manifestly aimed at achieving the societal goal of protecting the family life of "lawful marriages" (which I understand to mean marriages which are formally valid and contracted in good faith and not sham marriages for the purposes of circumventing the Act) and certain recognised customary unions, by making provision for family re-unification and in particular by entitling spouses of persons permanently and lawfully resident in the Republic to receive permanent residence permits. The pertinent question that immediately arises is what the impact of being excluded from these protective provisions is on same-sex life partners.

59 Above n 45 at para 69.

[46] The starting point is to enquire what the nature of such family life is in the case of spouses that section 25(5) specially protects and benefits. For purposes of this case it is unnecessary to consider comprehensively the nature of traditional marriage and the spousal relationship. It is sufficient to indicate that under South African common law a marriage "creates a physical, moral and spiritual community of life, a consortium omnis vitae"[60] which has been described 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 services in the running of the common household or in a support-generating business . . . ."[61]

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60 June D Sinclair assisted by Jaqueline Heaton *The Law of Marriage* Vol 1 (1996)("Sinclair and Heaton") 422 and authorities there cited.

61 Per Erasmus J in *Peter v The Minister of Law and Order* 1990 (4) SA 6 (E) at 9 G.

As Sinclair and Heaton point out,[62] the duties of cohabitation and fidelity flow from this relationship. In *Grobbelaar v Havenga*[63] it was held that "[c]ompanionship, love, affection, comfort, mutual services, sexual intercourse — all belong to the married state. Taken together, they make up the *consortium*."

[47] It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises. Sinclair and Heaton,[64] after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

> "But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the state and the family. Its heterogeneous society is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition' and, consequently,

62 Above n 60 at 423.

63 1964 (3) SA 522 (N) at 525 E.

64 Above n 60 at 6-7.

> reflects widely varying expectations about marriage, family life and the position of women in society." [Internal citations omitted]

[48] In other countries a significant change in societal and legal attitudes to same-sex partnerships in the context of what is considered to constitute a family has occurred. Evidence of these changes are to be found in the jurisprudence dealing with equality issues in countries such as Canada,[65] Israel,[66] the United Kingdom[67] and the United States.[68] In referring to these judgments from the highest courts of other jurisdictions I do not overlook the different nature of their histories, legal systems and constitutional contexts nor that, in the last two cases, the issue was one essentially of statutory construction and not constitutional invalidity. Nevertheless, these judgments give expression to norms and values in other open and democratic societies

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65 In *M v H* above n 45 at paras 49 - 53, 57, 59, 60; *Miron v Trudel* (1995) 124 DLR (4th) 693 at paras 151-8; 96 - 100.

66 *El Al Israel Airlines Ltd v Danilowitz and Another* High Court of Justice case no. 721/94, a judgment of the Supreme Court of Israel sitting as the High Court of Justice.

67 *Fitzpatrick (A.P.) v Sterling Housing Association Ltd* above n 24 at paras 3, 7, 13-4.

68 *Braschi v Stahl Associates Company* (1989) 74 N.Y.2d 201 at 211-3.

based on human dignity, equality and freedom which, in my view, give clear expression to the growing concern for, understanding of, and sensitivity towards human diversity in general and to gays and lesbians and their relationships in particular. This is an important source from which to illuminate our understanding of the Constitution and the promotion of its informing norms.[69]

[49] The impact of section 25(5) is to reinforce harmful and hurtful stereotypes of gays and lesbians. At the heart of these stereotypes whether expressly articulated or not, lie misconceptions based on the fact that the sexual orientation of lesbians and gays is such that they have an erotic and emotional affinity for persons of the same sex and may give physical sexual expression thereto with same-sex partners:

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69 Section 39(1) provides in its relevant parts:

> "When interpreting the Bill of Rights, a court, tribunal or forum -
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) . . .
> (c) may consider foreign law."

> "There are two predominant narratives that circulate within American society that help to explain the difficulty that lesbians and gays face in adopting children and establishing families. First, there is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality."[70] [Footnote omitted]

Such false classifications must be rejected. Our law has never proscribed consensual sexual acts between women in private[71] and the laws criminalising certain consensual sexual acts between males in private and certain acts in public have been declared constitutionally invalid.[72]

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70 Timothy E Lin "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases" in 99 *Columbia Law Review* 739 (1999) at 741-2.

71 The *Sodomy* case above n 34 at para 14 and the authorities there referred to.

72 Id.

[50] A second stereotype, often used to bolster the prejudice against gay and lesbian sexuality, is constructed on the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple. Gays and lesbians are certainly individually permitted to adopt children under the provisions of section 17(b) of the Child Care Act 74 of 1983[73] and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

[51] From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or

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[73] Section 17(b) provides that:

> "A child may be adopted —
>
> . . .
>
> (b) by a widower or widow or unmarried or divorced person; . . ."

sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

[52] I find support for this view in the following conclusions of L'Heureux-Dubé J (with whom Cory and McLachlin JJ concurred) in *Mossop*:[74]

> "The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version."

[53] The message that the total exclusion of gays and lesbians from the provisions of the sub-section conveys to gays and lesbians and the consequent impact on them can in my view be conveniently expressed by comparing (a) the facts concerning gays and lesbians and their same-sex partnerships which must be accepted, with (b) what the subsection in effect states:

(a) (i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;

(ii) Sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5) discrimination on it is unfair unless

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74 Above n 43 at 710 c-e and the judgment of Thomas J in *Quilter* above n 25 at 534.

the contrary is established;

(iii) Prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;

(iv) Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity;

(v) They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;

(vi) They are individually able to adopt children and in the case of lesbians to bear them;

(vii) In short, they have the same ability to establish a consortium omnis vitae;

(viii) Finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

(b) The subsection, in this context, in effect states that all gay and lesbian permanent residents of the Republic, who are in same-sex relationships with foreign nationals, are not entitled to the benefit extended by the subsection to spouses married to foreign nationals in order to protect their

> family and family life. This is so stated, notwithstanding that the family and family life which gays and lesbians are capable of establishing with their foreign national same-sex partners are in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they are to spouses.

[54] The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.

[55] We were pressed with an argument, on behalf of the Minister, that it was of considerable public importance to protect the traditional and conventional institution of marriage and that the government accordingly has a strong and legitimate interest to protect the family life of such marriages and was entitled to do so by means of section 25(5). Even if this proposition were to be accepted it would be subject to two major reservations. In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

[56] In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under section 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the section 25(5) benefits to same-sex life partners could negatively effect such protection. A similar argument has been roundly rejected by the Canadian Supreme Court,[75] which Court has also stressed, correctly in my view, that concern for the protection of same-sex partnerships in no ways implies a disparagement of the traditional institution of marriage.[76]

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75 In *M v H* above n 45 at para 109 Iacobucci J, writing for the Court, said the following:

> "Even if I were to accept that Part III of the Act is meant to address the systemic sexual inequality associated with opposite-sex relationships, the required nexus between this objective and the chosen measures is absent in this case. In my view, it defies logic to suggest that a gender-neutral support system is rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. In addition, I can find no evidence to demonstrate that the exclusion of same-sex couples from the spousal support regime of the *FLA* in any way furthers the objective of assisting heterosexual women."

76 In *Mossop* above n 43 at 712 d L'Heureux-Dubé J said the following:

> "[I]n some ways, the debate about family presents society with a false choice. It is

possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values."

The same learned judge confirmed this view in *Miron v Trudel* above n 65 at para 100:

"[L]egislatures have intervened in a wide variety of contexts to protect individuals' vested interests in relationships of some permanence and interdependence. These interventions are not anti-marriage. They simply acknowledge that the family unit is evolving in response to changing times."

[57] There is nothing in the scales to counteract such conclusion. I accordingly hold that section 25(5) constitutes unfair discrimination and a serious limitation of the section 9(3) equality right of gays and lesbians who are permanent residents in the Republic and who are in permanent same-sex life partnerships with foreign nationals. I also hold, for the reasons appearing throughout this judgment and culminating in the conclusion reached at the beginning of this paragraph, that section 25(5) simultaneously constitutes a severe limitation of the section 10 right to dignity enjoyed by such gays and lesbians. Having come to this conclusion it is unnecessary to consider whether any of the freedom of movement rights of the eighth to the thirteenth applicants, guaranteed under section 24 of the Constitution, have been limited in any way by section 25(5).

Justification

[58] I now apply the section 36(1) justification analysis, incorporating that of proportionality applied to the balancing of different interests, as enunciated in *S v Makwanyane and Another*[77] and as adapted for the 1996 Constitution in the *Sodomy* case.[78] The rights limited, namely equality and dignity, are important rights going to the core of our constitutional democratic values of human dignity, equality and freedom.[79] The forming and sustaining of intimate personal relationships of the nature here in issue are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities. Although expressed in a different context and when marital status was not a ground specified in

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77 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) para 104.

78 Above n 34 at paras 33-5.

79 See sections 1(a) and 7(1) of the Constitution.

section 8(2) of the interim Constitution, the following remarks of O'Regan J in *Harksen*,[80] are apposite:

> "I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one."

The effect of omitting same-sex life partnerships from section 25(5) limits the above rights at a deep and serious level.

[59] There is no interest on the other side that enters the balancing process. It is true, as previously stated, that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life partners were appropriately included under the protection of section 25(5). There is in my view no justification for the limitation in the present case and it therefore follows that the provisions of section 25(5) are inconsistent with the Constitution and invalid.

[60] It is important to indicate and emphasise the precise ambit of the above holding. The Court is in the present case concerned only with partners in permanent same-sex life partnerships. The position of unmarried partners in permanent heterosexual partnerships and

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80 Above n 36 at para 93.

their omission from the provisions of section 25(5) was never an issue in the case nor was any argument addressed thereon. The Court does not reach the latter issue in this case and I express no view thereon, leaving it completely open. Nor does the Court in this case reach the issue of whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships and this issue is similarly left open.

The appropriate remedy

[61] The High Court was faced with the difficult task of devising an appropriate remedy consequent upon its finding section 25(5) to be constitutionally invalid because of what it omitted.

[62] As far as the declaration of invalidity is concerned the High Court considered that three options were open to it. The first was to remedy the constitutional invalidity of section 25(5) by introducing ("reading in") words into the section in such a way that its provisions also applied to persons in same-sex life partnerships. The High Court decided against such remedy as an appropriate one, principally because it was of the view that it was not possible to define with a sufficient degree of precision the words that had to be inserted in section 25(5) in order for it to comply with the Constitution.[81] The second was postulated as follows:

> "Were a declaration of invalidity to provide that the section is inconsistent with the Constitution to the extent that it confers an exclusive benefit on spouses and hence discriminates on the grounds of sexual orientation, the rest of the section could remain valid. Thus spouses as defined in terms of the Act at present would continue to enjoy a

81 Above n 1 at 294 B - 295 G.

benefit."[82]

The third was to "declare the section in its entirety to be invalid."[83] The High Court purported to adopt the second option because it appeared -

> ". . . preferable to frame the declaration of invalidity so as to save a legitimate purpose (that is, acknowledging the importance of some forms of permanent relationships) rather than to deny a benefit to all who deserve it. But this perpetrates discrimination in respect of certain forms of permanent relationships. Thus legislative action is required to remedy the position and ensure that no unjustified discrimination is permitted by the Act,"[84]

and accordingly drafted paragraph 1 of its order to read:

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82 Id at 296 B.

83 Id at 296 C.

84 Id at 296 C - D.

> "Section 25(5) of the Aliens Control Act 96 of 1991 is declared invalid to the extent that the benefit conferred exclusively on spouses is inconsistent with section 9(3) in that on grounds of sexual orientation it discriminates against same sex-life partners".[85]

The High Court suspended this order for a period of twelve months "from the date of confirmation of this order to enable Parliament to correct the inconsistency" and made the further orders quoted in paragraph 2 of this judgment.

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85 Id at 296 H.

[63] While appreciating the novelty and difficulty of framing an appropriate order in the circumstances of the present case, one is driven to conclude that the High Court did not, in effect, through paragraph 1 of its order, bring about the invalidity of any portion of section 25(5). This is so for two reasons. It appears clearly from its motivation for the second option (which it adopted) that it aimed, through its order, to preserve the benefits of the section for spouses and was intent on giving an order to achieve this object. This was in fact also the effect of the order, the interpretation of which is complicated by the fact that it conflates reasons for the order with its operative terms. The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the *presence* of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision. An order giving effect to and embodying such notional severance in the case of constitutional invalidity was made for the first time in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others.*[86]

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86 Above n 19 where, in paragraph 1 of the order at para 157 of the judgment, the following declaration is made:

> "The provisions of section 417(2)(b) of the Companies Act 1973 are, with immediate effect declared invalid, *to the extent only* that the words
>
> > "and any answer given to any such question may thereafter be used in evidence against him"
>
> in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully

[64] Where, however, the invalidity of a statutory provision results from an *omission,* it is not possible, in my view, to achieve notional severance by using words such as "invalid to the extent that", or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance. This is implicit in the constitutional jurisprudence of Canada and the United States dealt with later in this judgment and has been expressly so held in Germany.[87] The only logical equivalent to severance, in the case of invalidity caused by omission, is the device of reading in. In the present case there are only two options; declaring the whole of section 25(5) to be invalid or reading in provisions to cure such invalidity.

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and satisfactorily."

87 See BVerfGE 18, 288 at 301 and 22 BVerfGE 349 at 360.

[65] In fashioning a declaration of invalidity, a court has to keep in balance two important considerations. One is the obligation to provide the "appropriate relief " under section 38 of the Constitution, to which claimants are entitled when "a right in the Bill of Rights has been infringed or threatened".[88] Although the remedial provision considered by this Court in *Fose*[89] was that of the interim Constitution,[90] the two provisions are in all material respects identical and the following observations in that case are equally applicable to section 38 of the Constitution:

> "Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[91] [Footnote omitted]

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88 The relevant part of section 38 reads as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights..."

89 *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC).

90 Section 7(4)(a) provided the following:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

91 Above n 89 at para 69. The footnote omitted from the end of the quotation in the text, reads as follows:

> "See the observations of Verma J in the *Nilabati Behera* case (*supra)* n 123 as quoted in para 51 *(supra)* and the remarks of Harlan J in the *Bivens* case *supra* n 25 at 407 quoted in paras 33, 34 and n 67 *(supra)*. In *Nelles v Ontario* (1989) 60 DLR (4th) 609 at 641-2

Lamer J observed as follows:
'When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.'"

The Court's obligation to provide appropriate relief, must be read together with section 172(1)(b) which requires the Court to make an order which is just and equitable.

[66] The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.[92]

[67] I am persuaded by Mr Trengove's submission that, as far as deference to the legislature is concerned, there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In the one case by excision and in

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92 *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) at paras 99-100.

the other by addition.

[68] This chance difference cannot by itself establish a difference in principle. The only relevant enquiry is what the consequences of such an order are and whether they constitute an unconstitutional intrusion into the domain of the legislature. Any other conclusion would lead to the absurdity that the granting of a remedy would depend on the fortuitous circumstance of the form in which the legislature chose to enact the provision in question. A legislature could, for example, extend certain benefits to life-partners generally and exclude same-sex life partners by way of express exception. In such case there would be no objection to declaring the exception invalid, where a court was satisfied that such severance was, on application of whatever the appropriate test might be, constitutionally justified in relation to the legislature. It would be absurd to deny the reading in remedy, where it was equally constitutionally justified in relation to the legislature, simply because of its form.

[69] There is nothing in the Constitution to suggest that form must be placed above substance in a way that would result in so glaring an anomaly. The supremacy clause, section 2, does not enact that "words" inconsistent with the Constitution are invalid but rather that inconsistent "law" is. Similarly section 172(1)(a) obliges a competent court to declare that "any law . . . that is inconsistent with the Constitution is invalid to the extent of its inconsistency" and not "any words" or "any words in any law". The same conclusion regarding the nature and permissibility of reading in as a constitutional remedy was reached by the Canadian Supreme Court in the leading case of *Schachter v Canada*.[93]

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93 (1992) 93 DLR (4th) 1 per Lamer CJC for the Court at 12 h to 13 h.

[70] I accordingly conclude that reading in is, depending on all the circumstances, an appropriate form of relief under section 38 of the Constitution and that

> ". . . whether a court 'reads in' or 'strikes out' words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result."[94]

The real question is whether, in the circumstances of the present matter, reading in would be just and equitable and an appropriate remedy.

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94 *Knodel v British Columbia (Medical Services Commission)* (1991) 91 CLLC ¶ 17, 023 at 16, 343, [1991] 6 WWR 728; 58 BCLR (2d) 356 (SC) per Rowles J, as quoted with approval by Lamer CJC in *Schachter*'s case above n 93 at 13 f.

[71] I am strengthened in this conclusion by the fact that in several jurisdictions, courts have held that they do possess the power to read words into statutes where appropriate. In *Schachter*,[95] the leading Canadian case, the Supreme Court of Canada held that a court may read words into a statute in appropriate circumstances and set out principles to guide such decisions. Since then, Canadian courts have read words into statutes on several occasions.[96] Courts in the United States also accept that they have the power to read words into statutes to provide remedies for unconstitutionality.[97] The Israeli Supreme Court[98] and the German Constitutional

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95 Above n 93 at 11-25.

96 See *Miron v Trudel* above n 65 paras 178-181. See also *Egan v Canada* above n 44 at 159-161 (in which the dissenters proposed the reading of words into a statute); *Rodriguez v British Columbia (Attorney-General)* (1994) 107 DLR (4th) 342 at 383-4.

97 See *Iowa-Des Moines National Bank v Bennett* 284 US 239 (1931); *Welsh v United States* 398 US 333 (1970); *Califano, Secretary of Health, Education and Welfare v Westcott et al* 443 US 76 (1979); *Skinner v Oklahoma* 316 US 535 (1942); and a discussion of the issue by Bruce K Miller "Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v Mathews*" in 20 *Harvard Civil Rights - Civil Liberties Law Review* (1985) 79 and by Evan H Caminker "A Norm-Based Remedial Model for Under-inclusive Statutes" in 95 *Yale Law Journal* (1985-6) 1185.

98 *El Al Israel Airlines*, cited above n 66.

Court[99] have also made similar orders.

[72] Criticism has also been expressed of a model for remedy selection, with respect to under-inclusive provisions, which assumes that there is no constitutional norm, albeit inchoate, which can guide such selection. While it is impossible to reflect adequately, in any summary, the richness and depth of the contentions advanced in this regard by Caminker, the following passages capture important aspects of their thrust and are relevant to the present enquiry:

> " . . . [G]iven the presence of an inchoate substantive norm and the absence of structural values obliging judicial passivity, the current model's assumption that courts conclude their 'essentially judicial' role simply by mandating equal treatment through either extension or nullification is false. Though both remedies are formally adequate, one is substantively preferred; courts (at least temporarily) can further actualize constitutional norms by choosing the preferred remedy.

99 The Court had previously declined to make such an order but in a landmark decision in November 1998 it adopted an approach which essentially constituted the reading in of words to a statute. Reported in 1999 NJW 557.

> Setting the remedial starting point in this manner maintains respect for the legislature's authority to participate in the remedial decision; the potential for subsequent legislative review 'vitiates any objection that the Supreme Court, in fashioning interstitial rules, violates separation of powers principles vis-a-vis Congress.' Indeed, employing the norm-based model not only will better execute the judiciary's proper remedial function, but it also will enrich the legislature's contribution by enhancing its subsequent deliberative process. When selecting a particular remedy according to this model, a court necessarily will discuss candidly the source and strength of the constitutional preference expressed by relevant inchoate norms. This discussion will inform the ensuing legislative deliberations and generate normative claims for leaving the court's starting point undisturbed; the legislature therefore is more likely to take account of both constitutional values and policy preferences when formulating its ultimate remedial response."[100][Footnotes omitted]

[73] Having concluded that it is permissible in terms of our Constitution for this Court to read words into a statute to remedy unconstitutionality, it is necessary to summarise the principles which should guide the court in deciding when such an order is appropriate. In developing such principles, it is important that the particular needs of our Constitution and its remedial requirements be constantly borne in mind.

[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute

100 Above n 97 at 1204-5.

is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.

[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion.[101] In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected,

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101 See the discussion concerning the appropriateness of a retrospective order which has serious budgetary implications in *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1996 (11) BCLR 1439 (CC); 1997 (1) SA 585 (CC) at para 9.

sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.[102]

102 *Schachter* above n 93 at 23-5.

[76] It should also be borne in mind that whether the remedy a court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, "fine-tuning" them[103] or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.[104]

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103 As it was put in *Westcott*, above n 97.

104 See, for example, Caminker, above n 97 at 1187 where the following is aptly stated:

> "Whether a court creates graveyards or vineyards, its choice is not final. Where courts nullify provisions, legislatures can respond by enacting extended and hence constitutional versions; where courts extend provisions, legislatures can subsequently repeal them. Thus, the legislature retains final control over the extension/nullification

decision.

Still, a court must implement a remedy which acts as a 'starting point' for legislative review." [Footnotes omitted]

See also Bruce Miller "Constitutional Remedies For Underinclusive Statutes: A Critical Appraisal of *Heckler v Mathews*" above n 97, and Nitya Duclos and Kent Roach "Constitutional Remedies as Constitutional Hints - A Comment on R v Schachter" in 36 *McGill Law Journal/Revue De Droit de McGill* (1991) 1, for illuminating discussions on this general topic.

[77] I turn finally to the application of the principles or guidelines, referred to above, to the facts and legislative unconstitutionality in the present case. The striking down of section 25(5) will have the unfortunate result of depriving spouses, as presently defined, from the benefits conferred by the section; it will indeed be "equality with a vengeance" and create "equal graveyards".[105] This consequence cannot properly be addressed by the device of suspending such order for a fixed period of time. The above unfortunate consequences would ensue if Parliament did nothing and the suspension lapsed with the effluxion of time.

[78] More important perhaps, is the fact that, normatively, such an order would convey an impression that achieving equality by striking down the benefits which spouses presently enjoy would be a constitutionally permissible result. It is unnecessary and undesirable to decide, in the present case, whether the failure to afford spouses the benefits that they currently enjoy by virtue of the provisions of section 25(5) would be constitutionally defensible. It would be equally undesirable to suggest the contrary by making a striking down order.

105 See *Schachter* above n 93 at 15 g.

[79] In any event the benefits conferred on spouses express a clear policy of the government to protect and enhance the family life of spouses. This policy extends back at least 69 years, for the provisions of section 3(1)(b)(v) of the Immigration Quota Act 8 of 1930 provided a comparable benefit, although less fully and in a more discriminatory manner.[106] The indications are therefore strong that, had Parliament considered the most appropriate way for it to remedy the unconstitutionality of section 25(5), it would have chosen a remedy which did not deprive spouses of their current benefits under the section. This view is fortified by the fact that the government is, in other areas, giving effect to its legislative obligations under the equality clause in respect of same-sex partners.[107] All these considerations indicate that, if reasonably possible, a striking down order should not be the remedy resorted to.

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106 The relevant part of section 3(1) reads:

> "Subject to the provisions of sub-section (2) of this section it shall be competent for the board in any calender year to permit in its discretion any person born in any particular country not specified in the Schedule to this Act to enter the Union for permanent residence therein, notwithstanding that the maximum number of persons born in that country which may, under section *one*, be permitted to enter the Union, have already been granted permission to enter the Union during that year:
> Provided -
> (a) . . .
> (b) that every person so admitted -
> (i) is of good character; and
> (ii) is in the opinion of the board likely to become readily assimilated with the inhabitants of the Union and to become a desirable citizen of the Union within a reasonable period after his entry into the Union; and
> (iii) is not likely to be harmful to the economic, or industrial welfare of the Union; and
> (iv) does not and is, in the opinion of the board, not likely to pursue a profession, occupation, trade or calling in which, in the opinion of the board, a sufficient number of persons is already engaged in the Union to meet the requirements of the inhabitants of the Union; or
> (v) *is the wife or a child under twenty-one years of age, or a destitute or aged parent or grandparent of a person permanently and lawfully resident in the Union who is able and undertakes to maintain him or her*." [Emphasis supplied]

107 See the statutes referred to in n 41 above.

[80] The group that reading in would add to "spouses" in section 25(5), namely same-sex life partners, must be very small in comparison to the group benefited by the section. No statistics were provided by any of the litigants to quantify this, but it is safe in my view to make this assumption. The government's policy behind the section 25(5) benefit would thus be left intact by a reading in remedy and the budgetary implications would be minuscule.

[81] In my view the observations made in *Fose*[108] which were quoted above[109] are of particular application in the present case. In order for the norms and values lying at the heart of our Constitution to be made concrete, it is particularly important for the Court in this case to afford an effective remedy, which will also be seen to be effective, to the eighth to thirteenth applicants, and people similarly placed within the context of section 25(5). If, in order to do this properly, new tools have to be forged and innovative remedies shaped, this must be done.

[82] An appropriate remedy in the present case must vindicate the rights of permanent same-sex life partners to establish a family unit that, while retaining the characteristic features derived from its same-sex nature, receives the same protection and enjoys the same concern from the law and from society generally as do marriages recognised by law. But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because

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108 Above n 89.

109 Id at para 65.

> "[t]he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society."[110]

The most effective way of achieving this in the present case is by a suitable reading in order, if this is reasonably possible.

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110 Per L'Heureux Dubé J in *Mossop* above n 43 at 698 b. See also the plea by Thomas J in *Quilter* above n 25 at 550:

> "If [the basic human rights of minority groups are being denied], it is important to spell that denial out if the basic dignity of everyone in a more enlightened age is to be secured."

[83] The only bar to such an order in this case would be if it were not possible to define with sufficient precision how section 25(5) ought to be extended in order to comply with the Constitution. What constitutes sufficient precision must depend on the facts and the demands of each case. In deciding what sufficient precision is, one must not lose sight of the fact that the reading in is not a final act. It is important to point out in this context that if the remedy decided upon by a court were the striking down of section 25(5), coupled with a suspension order, the question of interim relief to protect the successful applicants would present the same problems concerning the precise formulation of such an interim order as does the remedy of reading in. It was for this reason that the Court in *Miron*[111] declined to make a suspended striking down order coupled with a constitutional exemption as a form of relief.[112]

111 Above n 65.

112 Id at para 179.

[84] The legislature is empowered to amend or fine-tune any extension that the Court, through its order, might make to section 25(5), or to do so with regard to any related or relevant provision, in order to give more accurate effect to its policy, provided it does so in a manner which is not inconsistent with the Constitution. Equal protection and non-discrimination as guaranteed under section 9 do not require identical treatment.[113] The family unit of a same-sex life partnership is different from the family unit of spouses and to treat them identically might in fact, in certain circumstances, result in discrimination. Spouses in a conventional marriage are in a legal relationship acknowledged by the law in a particular way and the existence of the conventional marriage is capable of easy and virtually incontestable proof; the legal relationship can also not be terminated without the intervention of the courts. Same-sex life partnerships are as yet not recognised or protected in a comparable manner by the law. In order to ensure equal protection and non-discrimination for persons in such different family units it might be necessary to treat them differently.[114]

[85] Reasonable legislative and administrative steps may be taken to prevent abuse of section 25(5) and evasion of the provisions of the Act generally. Section 25(6) is such a step for it provides that

> "[a] regional committee may, in the case of a person who applies for an immigration

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113 See *President of the Republic of South Africa and Another v Hugo* above n 56 at para 41, n 63 and at para 112 of that judgment; and compare Hogg above n 38 at paras 52.6 (a) and (b).

114 *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC) at para 46.

> permit and who has entered into a marriage with a person who is permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application, refuse to authorize such a permit unless the committee is satisfied that such marriage was not contracted for the purpose of evading any provision of this Act."

Should the provisions of section 25(5) be extended to include permanent same-sex life partners, it would likewise be permissible for Parliament and the executive to take reasonable steps to prevent persons falsely purporting to be in same-sex life partnerships from evading the provisions of the Act.

[86] Against the background of what has been said above I am satisfied that the constitutional defect in section 25(5) can be cured with sufficient precision by reading in, after the word "spouse", the following words: "or partner, in a permanent same-sex life partnership," and that it should indeed be cured in this manner. Permanent in this context means an established intention of the parties to cohabit with one another permanently. In my view, such a reading in, seen in the light of what has been said above concerning the legislature's right to fine-tune the section as so extended and other provisions that may be relevant thereto, does not intrude impermissibly upon the domain of the legislature.

[87] It is necessary to emphasise again that the Court need only provide the reading in remedy for excluded same-sex life partners, because it is only in relation to them that the Court was called upon to decide, and only in relation to them that it has been decided above, that their exclusion from the provisions of section 25(5) is constitutionally invalid. Apart from those cases where the Constitution makes express provision to the contrary, a court decides constitutional disputes and makes, where appropriate, orders of constitutional invalidity, only on the issues

presented to it and not as a matter of abstract constitutional adjudication. When a statutory provision has been partially invalidated by way of notional severance, the hypothetical possibility always exists that subsequently, because of the issues and contentions then placed before the court, the ambit of the constitutional invalidity might have to be extended. Likewise, after reading in matter to cure a constitutionally invalid under-inclusive provision, the possibility exists that, for identical reasons, a court may have to extend the reading in, in order to cure the constitutional invalidity. There is in principle no difference between these two possibilities. The conclusion I have reached in this case is that section 25(5) is unconstitutional in that it fails to include within its benefits a group entitled to such benefits. The order to be made affords relief to such group. This does not mean that other groups are not entitled to the benefits provided by section 25(5).

[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related

benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgment, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership, is disclosed.

The Order

[89] No case has been made out for the suspension of an order giving effect to such reading in. Permanent same-sex life partners are entitled to an effective remedy for the breach of their rights to equality and dignity. In the circumstances of this case an effective remedy is one that takes effect immediately. At the same time, if the order were to have retrospective effect, it might cause uncertainty concerning the validity of decisions taken and acts performed in the past, in good faith and in reliance on the provisions of the Act as they then read, with regard to applications under the Act by partners in permanent same-sex life partnerships. In my view such uncertainty ought, if possible, to be avoided by limiting the order so that it has no retrospective effect. Such an order can cause no prejudice to partners in permanent same-sex life partnerships who wish to seek afresh, or persist with seeking, relief under the Act, for nothing prevents them from doing so immediately after the order is granted. It is therefore just and equitable to make such a limiting order.

Costs

[90] Mr Trengove submitted that the costs which should be awarded to the applicants in respect of the two abortive interlocutory applications in this Court should include the costs of two counsel and should be taxed on the scale as between attorney and own client for two reasons; first, because they constitute an abuse of court process and, second, because they are manifestly without merit.

[91] The fact that both applications are manifestly without merit appears from what has already been said. The High Court is rightly critical in its judgment of the conduct of the respondents in the High Court proceedings, their dilatory approach to the litigation, and their attempt at the last moment to delay the hearing of the case. The same criticism can be directed to their belated attempt to raise new issues through the two abortive interlocutory applications to which I have referred at the commencement of this judgment, and their failure to explain why, even at the stage of the hearing of the matter before this Court, they had for a period of over 14 months failed to lodge an answer to the factual averments made in the main application.

[92] The wasted costs occasioned by these applications form part of the costs which the respondents will be required to pay. What is in issue is whether the applications constitute an abuse of the process of the court which merits the making of an order that the costs of the applications be paid as between attorney and client.

[93] If the argument addressed to this Court by the respondents concerning the merits of the appeal had revealed the same lack of substance and apparent disregard for the rights of the applicants I would have had no hesitation in ordering them to pay costs as between attorney and

client, notwithstanding the fact that such costs are rarely awarded on appeal.[115]

[94] As far as the merits of the appeal are concerned, however, there is no criticism of the respondents' conduct. They raised issues of substance, and it cannot be said that their decision to oppose the confirmation of the order made by the High Court, and to appeal against the order made, was frivolous.

[95] The two applications were concerned with collateral issues which could be disposed of summarily and took up very little time. There are some wasted costs occasioned by the respondents having had to consider the issues raised in the interlocutory applications and to respond to them on affidavit. In relation to the costs of the appeal as a whole, however, such costs will be comparatively slight.

[96] It is regrettable that the state should have considered it appropriate to raise before this court issues of such little merit as those contained in the two abortive applications. Its conduct in doing so, however, taken in the context of the appeal as a whole, does not constitute such a serious abuse of the process of the Court as would warrant an order that the costs of such

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115 See *Herold v Sinclair and Others* 1954 (2) SA 531 (A) at 537 A-E; *Ward v Sulzer* 1973 (3) SA 701 (A) at 707 B-D and *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC); 1999 (2) SA 91 (CC) at para 55.

applications be paid on an attorney and client basis.

Summary

[97] Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by section 9 of the Constitution and their right to dignity under section 10. This limitation is not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom and accordingly does not satisfy the requirements of section 36(1) of the Constitution. This omission in section 25(5) of the Act is therefore inconsistent with the Constitution. It would not be an appropriate remedy to declare the whole of section 25(5) invalid. Instead, it would be appropriate to read in, after the word "spouse" in the section, the words "or partner, in a permanent same-sex life partnership". The reading in of these words comes into effect from the making of the order in this judgment.

[98] The following order is made:

1. The applications of the respondents for

    (a) condonation of their failure to file answering affidavits in the High Court;

    (b) leave to file their answering affidavits;

    (c) the matter concerning the filing of answering affidavits to be remitted to the High Court; and

(d) an amendment of their notice of appeal

are dismissed with costs, including the costs of two counsel, such costs to be paid by the respondents jointly and severally.

2. The appeal of the applicants succeeds and paragraphs 1, 2 and 3 of the order made by the High Court are set aside and replaced with the following:

2.1 the omission from section 25(5) of the Aliens Control Act 96 of 1991, after the word "spouse", of the words "or partner, in a permanent same-sex life partnership," is declared to be inconsistent with the Constitution;

2.2 section 25(5) of the Aliens Control Act 96 of 1991, is to be read as though the following words appear therein after the word "spouse":

"or partner, in a permanent same-sex life partnership".

3. The orders in paragraph 2 only come into effect from the moment of the making of this order.

4. Paragraphs 4, 5 and the costs part of the High Court order are confirmed.

5. The costs of the proceedings in this Court, including the costs of two counsel, are to be paid by the respondents, jointly and severally.

Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concurred with the above judgment.

ACKERMANN J

For the applicants/appellants: W Trengove SC and A Katz instructed by the Legal Resources Centre.

For the respondents: EM Patel SC, KD Moroka and TP Dhlamini instructed by the State Attorney.