CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/01

SUZANNE DU TOIT	First Applicant
ANNA-MARIÉ DE VOS	Second Applicant
versus	
THE MINISTER FOR WELFARE AND POPULATION DEVELOPMENT	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE COMMISSIONER OF CHILD WELFARE, PRETORIA	Third Respondent
THE LESBIAN AND GAY EQUALITY PROJECT	Amicus Curiae
ADVOCATE P STAIS	Curator ad Litem

Heard on : 9 May 2002

Decided on : 10 September 2002

JUDGMENT

SKWEYIYA AJ:

Introduction

[1] The applicants, partners in a longstanding lesbian relationship, wanted to adopt two

children. They could not do so jointly because current legislation confines the right to adopt children jointly to married couples. Consequently, the second applicant alone became the adoptive parent.

[2] Some years later, the applicants brought an application in the Pretoria High Court challenging the constitutional validity of sections 17(a), 17(c) and 20(1) of the Child Care Act[1] and section 1(2) of the Guardianship Act[2] which provide for the joint adoption and guardianship of children by married persons only. In the High Court, the relevant provisions of the Child Care Act were challenged on the grounds that they violate the applicants' rights to equality[3] and dignity[4] and do not give paramountcy to the best interests of the child as required by section 28(2) of the Constitution. Kgomo J found that these provisions of the Child Care Act and the Guardianship Act violated the Constitution and ordered the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by same-sex life partners.[5] The applicants now seek confirmation by this Court of the High Court order in terms of section 172(2)(a)

---

1 Act 74 of 1983.

2 Act 192 of 1993.

3 Section 9 of the Constitution, n 22 below.

4 Section 10 of the Constitution, n 28 below.

5 The High Court judgment is reported as *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).

of the Constitution.[6]

[3] The respondents did not oppose the application but the applicants were supported by the Lesbian and Gay Equality Project, which was admitted as an amicus curiae. They also enjoyed the support of Advocate Stais of the Johannesburg Bar, who was appointed by this Court to act as curator ad litem to represent the interests of the children who are the subject of this application and also other children born and unborn who may be affected by this Court's order. In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of section 28(1)(h) of the Constitution which provides that:

> "Every child has the right –
>
> . . . .
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result"[7]

Advocate Stais filed a thorough report concerning the welfare of the adoptive children of

---

6 Section 172(2)(a) provides that: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

7 See also the comments of this Court in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 53.

the second applicant and children generally. He also made submissions at the hearing of the matter. We are indebted to him for his assistance.

Factual background

[4] The applicants have lived together as life partners since 1989. They formalised their relationship with a commitment ceremony, performed by a lay preacher in September 1990. To all intents and purposes they live as a couple married in community of property; immovable property is registered jointly in both their names; they pool their financial resources; they have a joint will in terms of which the surviving partner of the relationship will inherit the other's share in the joint community; they are beneficiaries of each other's insurance policies; and they take all major life decisions jointly and on a consensual basis.

[5] In 1994, the applicants approached the authorities of Cotlands Baby Centre, Johannesburg (Cotlands) to be screened as prospective adoptive parents. They went through a standard three-month process which involved their being screened and counselled together by social workers as required by the Child Care Act which sets out the legal framework for adoptions in South Africa.[8] The screening of the applicants included psychological testing, home circumstance visits, extended family

[8] See section 18(1)(b) of the Child Care Act which states that before granting an adoption order, the children's court must consider a prescribed report by a social worker. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 30.

recommendations and a panel discussion. It was at all times made clear during the screening process that the adopted children would be moving into a family structured around a permanent lesbian life partnership. The suitability of both applicants to be parents of the adoptive children was considered in the light of these circumstances.

[6] Within two months of the commencement of the screening and counselling process, the applicants were accepted as adoptive parents by the Cotlands authorities. A sister and brother, born on 10 November 1988 and 20 April 1992 respectively, were chosen for possible adoption by the applicants. On 3 December 1994, the siblings were placed temporarily in the care of the applicants by the Cotlands authorities. Since then, the siblings have remained with the applicants and they consider the applicants to be their parents.

[7] In 1995, the applicants applied to the children's court in Pretoria[9] to adopt the siblings jointly. The children's court, constrained by current adoption legislation, awarded custody and guardianship to the second applicant alone despite both applicants having been recommended as suitable parents. The applicants now challenge the constitutionality of the impugned provisions in the Pretoria High Court.

---

9 In terms of section 18(1)(a) of the Child Care Act, the children's court of the district in which the adopted child resides shall effect an adoption order.

Current adoption and guardianship legislation

[8] Under current law there is no provision for couples, other than married couples, jointly to adopt a child. Section 17 of the Child Care Act provides that a child can be adopted:

> "(a) by a husband and his wife jointly;
> (b) by a widower or widow or unmarried or divorced person;
> (c) by a married person whose spouse is the parent of the child;
> (d) by the natural father of a child born out of wedlock."

Furthermore, section 20(1) of the Child Care Act provides that:

> "An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and that parent's relatives."

[9] Section 17 of the Child Care Act lists the categories of persons entitled to adopt children. Section 17(a) specifically allows for the joint adoption of children by married couples. It does not provide for the joint adoption of children by partners in a permanent same-sex life partnership. The reference to "husband" and "wife" in section 17(a) refers only to marriages ordinarily recognised by the common law and legislation between heterosexual spouses.[10]

---

[10] Section 1 of the Child Care Act defines "marriage" as ". . . any marriage which is recognised in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly". See in this regard section 2 of the Recognition of Customary Marriages Act 120 of 1998 which provides that for all purposes a duly contracted customary marriage will be recognised as a marriage. See also *National Coalition for Gay and Lesbian Equality and*

[10] Section 17(c) of the Child Care Act caters for so-called second-parent adoptions which envisage adoption by the spouse of the biological or adoptive parent of a child. The effect of such an adoption order is to confer equal parenting rights in respect of the child on the "second parent", giving both spouses the same legal relationship to the child as would have existed if the child had been born to the couple in marriage. Similarly, it vests in the child the same legal rights within the family as a child born to a married couple.

[11] While the above provisions require prospective adoptive parents to be married in order to adopt children jointly, the fact that same-sex life partners are excluded from this regime does not mean that they cannot adopt children at all. Section 17(b) of the Child Care Act permits adoption by a single applicant. Thus, a person living with a same-sex life partner may apply to adopt children in his or her own right, intending to raise the child with his or her partner, but the partner will have no legally recognised right in relation to the children.

[12] Under section 1(2) of the Guardianship Act, the parents of a child born in wedlock

---

Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 25-6 where this Court held that the term "spouse" and the use of the word "marriage" in the context of the Aliens Control Act 96 of 1991 referred only to marriages ordinarily recognised by South African law. See also *Satchwell v The President of the Republic of South Africa and Another,* CCT 45/01, an as yet unreported decision of this Court, dated 25 July 2002 at para 9.

have joint guardianship of the child, allowing them to exercise their rights and powers and carry out their duties arising from guardianship independently of each other.[11] This joint guardianship is subject to the requirement that the consent of both parents is obtained for certain important and specified acts relating to the child. This provision applies to the joint guardianship of adopted children by married spouses as well.[12]

[13] The effect of these provisions for the purposes of this matter is that married persons who jointly adopt a child are joint guardians of that child. The difficulty in respect of same-sex life partners is that (not surprisingly in the light of section 17 of the Child Care Act) section 1(2) of the Guardianship Act does not contemplate that same-sex life partners will be joint guardians of children. If sections 17(a) and (c) are in conflict with the Constitution because they do not permit adoption by same-sex life partners, as the applicants argue, then to the same extent and for the same reason, section 1(2) of the Guardianship Act must conflict with the Constitution.

---

11 Section 1(2) of the Guardianship Act reads –

> "Whenever both a father and mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of –
>
> (a) the contracting of a marriage by the minor child;
> (b) the adoption of the child;
> (c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;
> (d) the application for a passport by or on behalf of a person under the age of 18 years;
> (e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor child."

12 See section 20(2) of the Child Care Act.

[14] As a result of the current law the applicants cannot jointly adopt the siblings. Although first applicant is not the legally recognised adoptive parent, she is the primary care-giver. She provides the children with their principal source of emotional support within the family and, because of the constraints of the second applicant's professional life, she spends more time with them during week days than does the second applicant. Yet, she has no legal say in matters such as granting doctors permission to give either of the children an injection or the signing of school indemnity forms for school tours or sporting activities. More importantly, in the event of the partnership between herself and the second applicant ending, her claim to custody and guardianship of the children would be at risk.

The proceedings in the High Court

[15] To remove the legal bar to the first applicant becoming a joint adoptive parent of the children, the applicants launched application proceedings in the Transvaal High Court challenging the constitutionality of the impugned provisions which prevent them from jointly adopting the siblings. The Minister for Welfare and Population Development, the Minister of Justice and Constitutional Development and the Commissioner of Child Welfare, Pretoria were joined as respondents. They initially opposed the application but subsequently withdrew their opposition and gave notice that they would abide the decision of the High Court. They also abide the decision of this Court.

[16] In the High Court, as in this Court, the applicants argued that the impugned provisions of the Child Care Act violate, first, their rights protected in section 9(3) of the Constitution[13] by unfairly discriminating against gay and lesbian parents on the grounds of sexual orientation and marital status; second, the first applicant's rights in terms of section 10 of the Constitution[14] in that they deny the first applicant due recognition and status as a parent of her children; and third, section 28(2) of the Constitution[15] because an absolute prohibition of joint adoptions by same-sex parents cannot be in the best interests of adoptive children who are placed in the families of adoptive parents involved in permanent same-sex life partnerships. Similarly, they argued that section 1(2) of the Guardianship Act was in conflict with the Constitution on the grounds that it infringes sections 9(3) and 28(2) of the Constitution.

[17] The High Court upheld the application and declared the impugned provisions unconstitutional and invalid. It read into the relevant sections of the two statutes wording which would permit same-sex life partners jointly to adopt and be joint guardians of children. The full terms of the High Court order are as follows:

---

13 Section 9 of the Constitution, n 22 below.

14 Section 10 of the Constitution, n 28 below.

15 Section 28(2) of the Constitution provides that "A child's best interests are of paramount importance in every matter concerning the child."

"1. It is declared that:

1.1. the omission from section 17(a) of the Child Care Act 74 of 1983 after the word 'jointly' of the words 'or by the two members of a permanent same-sex life partnership jointly' is inconsistent with the Constitution and invalid; and

1.2. section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'jointly':

'or by the two members of a permanent same-sex life partnership jointly.'

2. It is declared that:

2.1. the omission from section 17(c) of the Child Care Act 74 of 1983 after the word 'child' of the words 'or by a person whose permanent same-sex life partner is the parent of the child' is inconsistent with the Constitution and invalid; and

2.2. section 17(c) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'child':

'or by a person whose permanent same-sex life partner is the parent of the child.'

3. It is declared that:

3.1. the omission from section 20(1) of the Child Care Act 74 of 1983 after the word 'spouse' of the words 'or permanent same-sex life partner' is inconsistent with the Constitution and invalid; and

3.2. section 20(1) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'spouse':

'or permanent same-sex life partner.'

4. It is declared that:

4.1. the omission from section 1(2) of the Guardianship Act 192 of 1993 after the word 'marriage' of the words 'or both members of a

permanent same-sex life partnership are joint adoptive parents of a minor child' is unconstitutional and invalid; and

4.2. section 1(2) of the Guardianship Act 192 of 1993 is to be read as though the following words appear therein immediately after the word 'marriage':

'or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child'."

The constitutional context

[18] Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28(1)(b) of our Constitution which guarantees a child's right to "family or parental care". Family care includes care by the extended family of a child, which is an important feature of South African family life. It is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.

[19] The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life

should change as social practices and traditions change.[16] I turn now to consider the constitutionality of the impugned provisions.

Paramountcy of the child's best interests

[20] The applicants submitted that the impugned provisions violate the "best interests" principle protected by section 28(2) of the Constitution. Section 28(2) of the Constitution states that:

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

In *Minister of Welfare and Population Development v Fitzpatrick and Others*,[17] Goldstone J observed that:

> "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*.[18]"

---

16 See *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 31; *National Coalition v Minister of Home Affairs*, above note 10 at para 47-8; and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 99.

17 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

18 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.

Both international law and the domestic law of many countries have affirmed the paramountcy of "the best interests of the child".[19] Similarly, section 18(4)(c) of the Child Care Act, which sets the best interests standard for the adoption of a child, provides that:

> "A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied –
>
> . . . .
>
> (c) that the proposed adoption will serve the interests and conduce to the welfare of the child . . ."

[21] In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act.[20] Their exclusion surely defeats the very essence and social purpose of

---

19 Examples of African countries which incorporate children's clauses in their constitutions include Namibia (art 15 of the Constitution of the Republic of Namibia); and Uganda (section 34 of the Constitution of the Republic of Uganda). The paramountcy of the best interests of children is confirmed in many international conventions. See, for example, art 3 of the United Nations Convention on the Rights of the Child, 1989. The convention was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. See also, art 4 of the African Charter on the Rights and Welfare of the Child, 1990.

20 Section 18(4) of the Child Care Act provides that:

> "A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied –
>
> (a) that the applicant is or that both applicants are qualified to adopt the child in terms of section 17 and possessed of adequate means to maintain and educate the child; and
>
> (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child; and
>
> (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; and
>
> (d) that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that

adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.[21]

[22] Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) of the Constitution. It is clear from the evidence in this case that even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions of the Child Care Act thus deprive children of the possibility of a loving and stable family life as required by section 28(1)(b) of the Constitution. This is a matter of particular concern given the social reality of the vast number of parentless children in our country. The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children and I conclude that, in this regard, sections 17(a) and (c) of the Act are in conflict with section 28(2) of the Constitution.

Equality

---

such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A; and

(e) that the child, if over the age of ten years, consents to the adoption and understands the nature and import of such consent".

See also section 40 of the Act (as read with section 18(3)) which provides that: ". . . regard shall be had to the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody he is to be placed or transferred."

21 These values are also reflected in the Preamble to the United Nations Convention on the Rights of the Child which states that, ". . . the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

[23] The argument advanced by the applicants in the High Court and in this Court was that the impugned provisions, in effect, differentiate on the grounds of sexual orientation and marital status, both of which are listed grounds in section 9(3) of the Constitution.[22]

[24] The High Court referred to the judgment of this Court in *Harksen v Lane*[23] which comprehensively describes the three stage test which is undertaken to determine whether a right has been infringed under the equality clause of the Constitution.[24]

[25] In applying this test, the judge found that the impugned provisions unfairly differentiate between married persons and the applicants as same-sex life partners.[25] He

---

22 Section 9 of the Constitution provides –

> "(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 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."

23 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 53; 1997 (11) BCLR 1489 (CC) at para 52.

24 This approach to the stages of equality analysis has been confirmed in a number of subsequent cases such as *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (the Sodomy case) at para 17; *National Coalition v Minister of Home Affairs,* above n 10 at para 32; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 22; and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27.

25 Above note 5 at para 11.

was satisfied that the omission of the words complained of in the Child Care Act was inconsistent with the Constitution and invalid to the extent of such inconsistency.

[26] I agree. The unfair effect of the discrimination is squarely founded on an intersection of the grounds upon which the applicants' complaint is based:[26] the applicants' status as unmarried persons which currently precludes them from joint adoption of the siblings is inextricably linked to their sexual orientation. But for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children in terms of the impugned legislation.[27] In this respect, then, the provisions of section 17(a) and (c) are in conflict with section 9(3) of the Constitution.

Dignity

[27] The applicants further argued that their inability to adopt the siblings jointly amounts to a limitation of the first applicant's right to human dignity[28] in that the challenged provisions of the Child Care Act deny her due recognition and status as a parent of the siblings even though she has played a significant role in their upbringing.

---

26 See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR (CC) at para 44; *National Coalition v Minister of Home Affairs*, above n 10 at para 40; and *National Coalition v Minister of Justice*, above n 24 at para 113.

27 Those criteria are set out in section 18(4) of the Child Care Act, above n 20.

28 Section 10 of the Constitution provides that "Everyone has inherent dignity and the right to have their dignity respected and protected."

More significantly, the first applicant is said to be denied recognition as a parent even though she and the second applicant have lived together as a family and made a consensual and deliberate decision jointly to adopt the siblings and to support and rear them equally as co-parents.

[28] They submitted further that the non-recognition of the first applicant as a parent, in the context of her relationship with the second applicant and their relationship with the siblings, perpetuates the fiction or myth of family homogeneity based on the one mother/one father model. It ignores developments that have taken place in the country, including the adoption of the Constitution.

[29] On the evidence presented in this case, the applicants constitute a stable, loving and happy family. Yet the first applicant's status as a parent of the siblings cannot be recognised. This failure by the law to recognise the value and worth of the first applicant as a parent to the siblings is demeaning.[29] I accordingly hold that the impugned provisions limit the right of the first applicant to dignity.

The Guardianship Act

[30] As the applicants have succeeded in establishing that the provisions of the Child

---

[29] See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 84; *Dawood*, above n 16 at para 35; *S v Mamabolo* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41; *Hoffmann*, above n 24 at para 27; and *National Coalition v Minister of Justice*, above n 24 at para 28.

Care Act constitute an infringement of the rights protected by sections 28(2), 9(3) and 10 of the Constitution, so for the same reasons have they established that section 1(2) of the Guardianship Act constitutes an infringement of the Constitution. The provisions of the Guardianship Act are premised on the assumption that same-sex life partners cannot be joint guardians of children. That assumption arises, in particular, from the provisions of section 17 of the Child Care Act. For the same reasons that section 17 is in conflict with the Constitution, then, section 1(2) of the Guardianship Act is.

Limitations Inquiry

[31] The respondents have not suggested that the impugned provisions are justifiable in terms of section 36 of the Constitution.[30] This is not, however, decisive of the matter.[31] The validity of these provisions is a matter of public importance which is properly before the Court and which must be decided. The Court must therefore consider whether the limitations occasioned by the impugned provisions are indeed justifiable in terms of section 36 of the Constitution.

---

30 Section 36(1) of the Constitution provides –

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

31 See *National Coalition v Minister of Justice*, above n 24 at para 5 and 35; and *Dawood*, above n 16 at para 15.

[32] The impugned provisions do not prevent lesbian or gay people from adopting children at all. They make no provision however for gay and lesbian couples to adopt children jointly. In this regard, they are not the only legislative provisions which do not acknowledge the legitimacy and value of same-sex permanent life partnerships. It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease. It is significant that there have been a number of recent cases,[32] statutes[33] and government consultation documents[34] in South Africa which broaden the scope of concepts such as "family", "spouse" and "domestic relationship", to include same-sex life partners. These legislative and jurisprudential developments indicate the growing recognition afforded to same-sex relationships.

[33] One of the considerations that could have been raised by the respondents to justify

---

32 See *National Coalition v Minister of Home Affairs*, above n 10; *Satchwell*, above n 10; and *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T).

33 See section 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997 providing for family responsibility leave in the event of death of a "spouse or life partner"; section 1(vii)(b) of the Domestic Violence Act 116 of 1998 referring to the definition of "domestic relationship"; and the definition of "spouse" in section 1 of the Estate Duty Act 45 of 1955 has been amended by section 3(a) of the Taxation Laws Amendment Act 5 of 2001 which now provides that ". . . 'spouse', in relation to any deceased person includes a person who at the time of death of such deceased person was the partner of such person . . . in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent . . .".

34 See, for example, Section 1 Chapter 8 Draft White Paper for Social Welfare, Ministry for Welfare and Population Development (November 1995), GN 16943 (2 February 1996).

the constitutional limitations in issue, relates to the procedures available for regulating and safeguarding the interests of children in the event of the termination or breakdown of the relationship between same-sex couples who may be joint adoptive parents. Same-sex couples are not immune to the breakdown of their relationships and at present the law does not make comprehensive or express provision either for the recognition or the dissolution of same-sex life partnerships, or the safeguarding of the interests of children in the event of such a breakdown.

[34] Important as a consideration like this is, I am satisfied that there are adequate mechanisms available for determining and protecting the best interests of minor children upon termination of a same-sex partnership in which the participants are joint adoptive parents.

[35] The curator ad litem, who supported the joint adoption by the applicants, argued in this Court that the lacuna in the law regarding the protection of children upon termination of the same-sex partnerships could be cured by invoking some of the provisions meant for the protection of children upon divorce or separation of the child's parents. In his report, the curator observed that an aggrieved parent could approach a High Court in terms of the provisions of section 5(1) of the Matrimonial Affairs Act 37

of 1953,[35] which allows applications for sole custody and/or guardianship in the event of a termination of the same-sex partnership. I am not persuaded that the Matrimonial Affairs Act can be read so as to achieve this result. It refers to an application by a "parent of a minor whose parents are divorced or are living apart", and speaks of an order lapsing in circumstances where "the parents become reconciled and live together again as husband and wife".[36]

[36] There can be no doubt, however, that the aid of the High Courts could always be sought in their capacity as upper guardian of all minor children.[37] Although it clearly would be preferable to have statutory guidelines and procedures governing the situation, there is no reason why existing procedures could not be used in appropriately adapted form.

---

35 Section 5(1) of the Matrimonial Affairs Act (as substituted by section 16(a) of the Divorce Act 70 of 1979) states that "Any provincial or local division of the Supreme Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent."

36 Sections 5(1) and (2).

37 "As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority." *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708J - 709A. The status of the High Courts as upper guardians of all minors has a long and established historical pedigree. See the discussion in Van Heerden et al *Boberg's Law of Persons and the Family* 2nd ed (Juta, Kenwyn 1999) at 500-1, n 7.

[37] The absence of statutory regulation concerning the protection of children in cases where same-sex adoptive parents break up, is not sufficient to render the limitations of the constitutional rights identified in this case justifiable. In the circumstances, then, I conclude that the limitations of the rights to equality, dignity and the paramountcy of the best interests of children in cases concerning them are not justifiable.

Remedy

[38] In concluding that the impugned provisions are inconsistent with the Constitution and to that extent invalid, I am now required to consider a remedy that is not only appropriate[38] but also just and equitable.[39] Applicants submit that in the present case, appropriate relief demands not merely a declaration that the impugned provisions are inconsistent with the Constitution and therefore invalid, but also the reading into the impugned provisions of words that will cure the constitutional defect.[40] Such an order would provide the first applicant with the legal basis upon which to adopt the siblings, effectively conferring on both the applicants equal parenting rights.

---

38 See section 38 of the Constitution which provides that a court "may grant appropriate relief" to anyone alleging that a right in the Bill of Rights has been infringed or threatened. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 95; and *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paras 18, 19, and 69. (These cases dealt with the comparable provision in the interim Constitution, namely, section 7(4).)

39 Section 172(1)(b) states that –

> "(1) When deciding a constitutional matter within its power, a court-
>
> . . . .
>
> (b) may make any order that is just and equitable. . ."

40 The wording to be read into the impugned provisions as prayed for by the applicants appears in the order handed down by the High Court, see para 17.

[39] This Court has recognised the remedy of reading into legislation wording that cures the constitutional defect as an appropriate form of relief. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, Ackermann J held that reading in is "an appropriate form of relief under s 38 of the Constitution".[41]

[40] During the hearing of this matter, the amicus curiae handed into Court a draft order, the terms of which proposed a variation of the relief granted by the High Court. The amicus proposed that the Court suspend a declaration of invalidity for a period of twenty-four months from the date of the order to enable Parliament to address the matter. In particular, the amicus argued that it was desirable that Parliament should provide a system of regulation of same-sex life partnerships which would ensure that the best interests of the children would be preserved in the event of the termination of such partnerships, in circumstances where the partners were joint adoptive parents of children.

[41] I have no doubt that the provision of effective protection for children upon termination of a same-sex partnership can best be cured by the passing of legislation by Parliament. However, in the interim, I am of the view that the interests of the siblings and prospective adoptive children in general can adequately be addressed by the high courts

---

41 Above n 10 at para 70. This form of relief has been used by the Constitutional Court subsequently on several occasions. See, for example, *Satchwell*, above n 10.

as the upper guardian of all minor children. In exercising that role, the high courts will seek to develop the constitutional standard of the best interests of the child. The flexibility of that standard will ensure that the welfare and best interests of children are protected.

[42] Accordingly, I shall grant the relief sought by the applicants in this case and confirm the order made by the High Court. I am of the view that such a remedy serves to protect not only the applicants' equal parenting rights in respect of the siblings, but all permanent same-sex life partners wanting to adopt children jointly or to undertake joint guardianship.

[43] I should, however, emphasise that in each decision concerning adoption, prospective adoptive parents should be evaluated on a case-by-case basis as provided for in the Child Care Act. In so doing, care will be taken to ensure that only suitable couples will be entitled to adopt children jointly.

[44] In conclusion, the following order is made:

1. The order made by Kgomo J in the High Court is confirmed.

2. It is accordingly declared that:

2.1. the omission from section 17(a) of the Child Care Act 74 of 1983 after the word “jointly” of the words “or by the two members of a permanent same-sex life partnership jointly” is inconsistent with the Constitution and invalid; and

2.2. section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “jointly”: “or by the two members of a permanent same-sex life partnership jointly”; and

2.3. the omission from section 17(c) of the Child Care Act 74 of 1983 after the word “child” of the words “or by a person whose permanent same-sex life partner is the parent of the child” is inconsistent with the Constitution and invalid; and

2.4 section 17(c) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “child”: “or by a person whose permanent same-sex life partner is the parent of the child”; and

2.5. the omission from section 20(1) of the Child Care Act 74 of 1983 after the word “spouse” of the words “or permanent same-sex life partner” is inconsistent with the Constitution and invalid; and

2.6 section 20(1) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “spouse”: “or permanent same-sex life partner”; and

2.7 the omission from section 1(2) of the Guardianship Act 192 of 1993 after the word "marriage" of the words "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child" is inconsistent with the Constitution and invalid; and

2.8 section 1(2) of the Guardianship Act 192 of 1993 is to be read as though the following words appear therein immediately after the word "marriage": "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child".

Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J and Sachs J concur in the judgment of Skweyiya AJ.

For the applicants:	P Ginsburg SC and M Chaskalson instructed by the Wits Law Clinic, Johannesburg.
For the amicus curiae:	PR Jammy and K Pillay instructed by Nicholls, Cambanis and Associates, Johannesburg.
Curator ad Litem:	P Stais.