CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/08
[2008] ZACC 21

IZAK ANDREAS GELDENHUYS — Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL — Second Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Third Respondent

Heard on : 28 August 2008

Decided on : 26 November 2008

JUDGMENT

MOKGORO J:

Introduction

[1] This is an application by a 53-year old man, a dentist by profession (the applicant), for confirmation of an order made by the Supreme Court of Appeal, declaring unconstitutional sections 14(1)(b) and 14(3)(b) of the erstwhile Sexual

Offences Act[1] (the Act), in terms of which the applicant had been convicted of acts of indecency. The effect of those provisions was to set the age of consent to "immoral or indecent acts" between people of the same sex at 19 years, as opposed to 16 years for the same acts between people of the opposite sex.

[2] The applicant had also sought leave to appeal his conviction on the merits, but this Court dismissed that part of the application on the basis that it bore no prospects of success. The issue of the application for leave to appeal against the applicant's conviction on the merits is therefore not before us.

Parties

[3] The applicant is Izak Andreas Geldenhuys. The first and second respondents are the National Director of Public Prosecutions and the Director of Public Prosecutions, Transvaal respectively. These respondents filed joint papers before this Court. The third respondent is the Minister of Justice and Constitutional Development, who is responsible for the administration of the impugned legislation and is joined in terms of the Rules of this Court.

Background

[4] Many of the facts included in the application concern the appeal against the applicant's convictions on the merits and are not relevant for the purposes of the

[1] 23 of 1957. These sections have since been repealed. See [26] below.

narrow question of the confirmation of unconstitutionality. I accordingly summarise only the relevant facts.

[5] In 1991 the applicant was convicted on four counts of indecency involving children. As a result, he was suspended from practising as a dentist for three years, commencing in 1996. During 1997, while working as a bus driver for a tour bus company, he met Mrs B.[2] He and Mrs B became close and she introduced him to her family, which included her husband and her two sons L and A. The applicant and the family were friendly and he often slept over at their home, usually in the room of the youngest son (A), which had bunkbeds. The applicant had informed the family of his previous conviction explaining that he was innocent and that the parents of the children had simply sought money from him.

[6] The applicant was generous with Mr and Mrs B's children, giving them gifts and sweets, and often lent money to their parents. The first of a series of indecent acts took place towards the end of 1997 between the applicant and L, when L was 14 years and A approximately 7 years old.

Procedural history

[7] Having been convicted in the Pretoria Regional Court on 9 February 2005 on charges of violating section 14(1)(b) of the Act and sentenced to a total of 11 years' imprisonment, the applicant appealed to the Transvaal High Court. On 21 November

[2] The anonymity of the parties is required as the victims of the offences were minors at all material times. See section 154(3) of the Criminal Procedure Act 51 of 1977.

2006 that Court confirmed his conviction but reduced his sentence. The applicant appealed further to the Supreme Court of Appeal against his conviction but not his sentence.

[8] On 31 March 2008 the Supreme Court of Appeal, per Van Heerden JA, made an order, including:

- declaring that subsections 14(1)(b) and 14(3)(b) of the Act are inconsistent with the Constitution and hence invalid to the extent that these sections differentiate between immoral and indecent activities between people of the opposite sex and people of the same sex by setting the legal age of consent at 16 years and 19 years respectively;
- replacing "19 years" with "16 years" in subsections 14(1)(b) and 14(3)(b) of the Act in order to cure the constitutional defect;
- ordering that the abovementioned changes to the Act shall not invalidate any conviction on the basis of the relevant subsections unless an appeal from or a review of the relevant judgment is pending, or the time for noting an appeal from that judgment has not expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a court of competent jurisdiction;[3]
- dismissing the applicant's appeal on the first four counts;

[3] This part of the order is based on a similar order made by this Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*), in which the crime of sodomy was overturned. Its purpose is to allow convicted persons to challenge their convictions under the relevant subsections while creating minimal disruption to the justice system.

- subject to confirmation by this Court, upholding the appeal on the remaining six counts;[4]
- suspending the sentences on the remaining six counts, pending this Court's confirmation; and
- referring the order of invalidity to this Court for confirmation.

[9] On 21 April 2008, the applicant approached this Court seeking not only confirmation of the order of invalidity of the Supreme Court of Appeal, but seeking also to appeal against the remainder of his convictions. On 14 May 2008, his appeal was dismissed.

Applicant's submissions

[10] The applicant sought confirmation of the order of the Supreme Court of Appeal. He made a straightforward equality argument, based on section 9 of the Constitution, to which I will return shortly. He echoed the finding of the Supreme Court of Appeal that counsel for the State were unable to suggest any constitutional justification for the discrimination in sections 14(1)(b) and 14(3)(b) of the Act, making the provisions unconstitutional and therefore invalid.

First and second respondents' submissions

[11] While the first and second respondents concluded that "the question whether or not to confirm the ruling of the Supreme Court of Appeal is . . . left to the discretion of

[4] This is because if the age of consent is lowered from 19 to 16 years, then the applicant can no longer be convicted of what are termed immoral or indecent acts for any offence after L's sixteenth birthday.

this Honourable Court", they did seek to dispel the notion that this matter is as simple and straightforward as suggested by the applicant. They conceded that the relevant provisions of the Act are discriminatory and unconstitutional. But, they submitted, there is a remaining question, which is to determine what the uniform age of consent should be.

[12] In their submissions, the first and second respondents acknowledged that the Criminal Law (Sexual Offences and Related Matters) Amendment Act[5] set a uniform age of consent of 16 years and that this fact carried great weight with the Supreme Court of Appeal. However, they made much of the variance between this age of consent and the constitutional definition of a child as a person below the age of 18 years, contending that the uniform age of consent must be consistent with that definition.[6]

[13] In addition, first and second respondents contended that this Court, in the context of child abuse, has also held that children are persons below the age of 18 years.[7] Hence, they argued, cogent reasons are required for departing from the notion of a child being a person below the age of 18 years as defined in the Constitution and other relevant instruments.[8] Although the South African Law Reform Commission was of the view that the age of 16 years was retained for the purpose of legal

[5] Act 32 of 2007 (2007 Act).

[6] Section 28(3) of the Constitution, 1996. See also Article 1 of the United Nations Convention on the Rights of the Child and Article 2 of the African Charter on the Rights and Welfare of the Child.

[7] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

[8] Above n 6.

certainty,[9] the respondents submitted that is not the case because 16 years as an age of consent is at odds with other legislation relating to children.[10] For example, no one may watch pornography involving a child under 18, but one may have consensual sexual intercourse with that child as long as the child is 16 years or older.[11]

[14] Furthermore, although the Supreme Court of Appeal concluded that Parliament had done "years of research" before arriving at 16 years as the age of consent, the first and second respondents argued that there was no evidence of such depth of research.[12] The only supportive evidence that the State, as respondent, placed before the Supreme Court of Appeal was a report by Doctors For Life International,[13] based on research relating to the cognitive abilities of children and the health risks of homosexual activities, recommending an age of consent of 19 years or even older.

[15] The Minister, as an intervening party before the Supreme Court of Appeal, based her submissions on a psychiatric report by retired psychiatrist Professor Tuviah Zabow. While the report was supportive of an age of consent of 16 years, there was no disagreement with the option of a higher age of consent.

Submissions of the third respondent

[9] South African Law Reform Commission *Sexual Offences Report* Project 107 December 2002 at 58-9.

[10] Above n 6.

[11] See sections 19 and 20 of the 2007 Act.

[12] The Minister, on the other hand, did state that the decision of Parliament was made after "a lengthy process of research, public hearings and debates", but did not offer further facts to support her view.

[13] This report had been submitted to the Portfolio Committee for Justice and Constitutional Development while they were debating the draft of the 2007 Act.

[16] The Minister submitted that the order of the Supreme Court of Appeal should be confirmed. She supported the order of invalidity of the Supreme Court of Appeal together with the remedy.

[17] Like the applicant, the Minister submitted that the explicit prohibition of discrimination based on sexual orientation in sections 9(1) and 9(3) of the Constitution precludes sections 14(1)(b) and 14(3)(b) from setting, as they do, an older age of consent to sexual acts between people of the same sex than that provided for between people of the opposite sex. On this basis, she conceded the discriminatory impact of the provisions and provided no justification.

Condonation

[18] First to dispose of is the preliminary issue of condonation. Written argument and an application for condonation for the late filing of it were lodged on behalf of the Minister, the third respondent in this matter, on 26 August 2008, more than three weeks after the due date provided for in the directions of the Chief Justice and only two days before the hearing itself.[14]

[19] In justifying the delay, a representative from the Department of Justice and Constitutional Development explained that it had arisen because, although the Minister's lawyers were waiting for the directions from this Court, those directions, issued on 15 May 2008, had not reached them. This is strange because the Registrar

[14] In directions issued on 15 May 2008, the Chief Justice required the respondents to file their submissions not later than Friday 1 August 2008.

of this Court did send the directions to the State Attorney, Johannesburg by facsimile transmission. Nor does it appear that the lawyers made any enquiries of the Registrar when they did not receive the directions. Moreover, written argument by the other parties was duly served on the Johannesburg State Attorney. At that stage, it should have been realised that directions had been issued by the Court and the matter was proceeding. The representative explained that the State Attorney thought that the written argument dealt only with the merits of the application for leave to appeal against the convictions, a matter in which the Minister had no interest. Of course, this is not the case as the application for leave to appeal against the convictions had been dismissed summarily by this Court on 14 May 2008, as has been described above, and the written argument lodged by the applicant dealt with the declaration of invalidity. According to the representative, the Minister's lawyers thus only became aware of the proceedings on 12 August 2008 when they were contacted by the representatives of the second respondent.

[20] The representative of the Department emphasised that the delay was due to a simple error and not in any way due to wilful default. Although the error, in my view, is less than simple and borders on negligence, if not incompetence, I accept that the delay was not due to wilfulness.

[21] The general rule is that non-compliance with the Rules of this Court will be condoned when it is in the interests of justice to do so.[15] In the circumstances of this

[15] This Court has often pronounced on the importance of parties complying with time limits set out in the Rules. In *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC)

case, although the explanation for the conduct is inadequate, I am inclined to grant condonation. These are confirmation proceedings that require the presence of the Minister, who is responsible for the administration of the impugned Act. None of the parties suggested that they had suffered any prejudice as a result of the delay. In these circumstances it is in the interests of justice to grant condonation. This, however, should not detract from the importance of litigants ensuring compliance with the directions of the Chief Justice and/or the Rules of this Court. Non-compliance must not only be discouraged as it creates great inconvenience for the courts and other litigants; it may also result in prejudice to the latter, placing the administration of justice in jeopardy.

The issue

[22] The matter before us has a narrow ambit. It concerns the confirmation of the order of invalidity of sections 14(1)(b) and 14(3)(b) of the Act, which set different ages of consent to what are termed acts of indecency for people of the opposite sex and people of the same sex. These provisions have already been repealed by Parliament and new legislation has already been promulgated. Thus, while the applicant is fully entitled to seek protection against unconstitutional legislation that

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at paras 20, 22, and 30-4; *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at paras 11-3; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3, this Court held that the broad test for granting condonation of late applications is whether it is in the interests of justice. In *National Police Service Union and Others v Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110 (CC) at paras 4-5 and 7-8, and in *Lekolwane and Another v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) at paras 17-20, this test was applied to postponement applications. In *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC) at paras 8-9, the same test was applied to late filing of papers other than applications. It is clear that there is a general rule to the effect that non-compliance with time limits will only be condoned if it is proven to be in the interests of justice.

infringes upon his rights, it is not for this Court to rule lightly on other matters not squarely relevant to the confirmation proceedings even if canvassed fully on the papers.

[23] Consequently, I emphasise that this matter is not concerned with the appropriate age of consent to sexual intercourse, though much reference was made in argument in that regard by the parties. The impugned provisions relate to the age of consent to acts of a sexual nature which by their nature or circumstances are termed "immoral or indecent acts" and explicitly set different ages of consent to these acts for people of the opposite sex and people of the same sex.

[24] What therefore needs to be answered is whether there is any justification for a law permitting same-sex sexual acts only at the age of 19 years, whereas opposite-sex sexual acts may occur at an earlier age of 16 years.

Impugned legislation

[25] The specific provisions of the Act that are challenged are section 14(1)(b) and 14(3)(b) which provide:

> "Sexual offences with youths—
>
> (1) Any male person who—
>
> (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
>
> (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of an offence.

. . . .

(3) Any female who—

(a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

(b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a boy or girl to the commission of an immoral or indecent act,

shall be guilty of an offence."

[26] Section 14 of the Act has in the meantime been repealed and replaced by the 2007 Act, which came into effect on 16 December 2007.[16]

[27] It is trite that a person must be judged according to the law in operation at the time of the commission of the offence.[17] The relatively common exception is when the legislation that is repealed is unconstitutional.[18] But in this case the fact that the legislation under which the applicant had been convicted has now been repealed does not, of itself, relieve him of his convictions. In this case, all material facts of the offences of which he had been convicted occurred after 1994, after the advent of the interim Constitution and its protective Bill of Rights. The applicant was therefore within his rights to approach the courts to impugn the legislation on the basis that it

[16] With the exception of chapters 5 and 6, which are irrelevant for present purposes.

[17] Section 12(2) of the Interpretation Act 33 of 1957. See also the discussion on the retrospectivity of sentences in Milton and Cowling *South African Criminal Law and Procedure* 2 ed vol 3 (Juta, Cape Town 2008) at 1-28.

[18] See for example the striking down of crimes in *National Coalition* above n 3 and *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC).

discriminated against him at the time, have it declared unconstitutional and obtain a retrospective order which would invalidate the provisions which criminalised his conduct at the time of the commission of the offence. That would not be an unusual order as the Constitution is decisively intolerant of permitting punishments for conduct that was not unlawful when it took place.

Constitutional validity of sections 14(1)(b) and 14(3)(b)

[28] I now turn to consider the crux of this matter: confirming whether the differentiation inherent in sections 14(1)(b) and 14(3)(b) unjustifiably infringes upon the applicant's right to equality, protected by section 9 of the Constitution. Although the issues in this Court are somewhat different from those that arose in the Supreme Court of Appeal, I am aided in the analysis by the comprehensive judgment of Van Heerden JA. Whereas in the Supreme Court of Appeal the applicant sought to argue for a uniform age of consent to be set at 12 years of age, in this Court he has not persisted with that argument. Here, the applicant seeks to confirm the Supreme Court of Appeal's order of the constitutional invalidity of sections 14(1)(b) and 14(3)(b) of the Act.

[29] It is now well-settled jurisprudence under the Constitution,[19] that where an impugned provision differentiates between categories of people, it must bear a rational

[19] See *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC) at para 53; 1997 (11) BCLR 1489 (CC) at para 52.

connection to a legitimate government purpose; otherwise the differentiation is in violation of section 9(1) of the Constitution.[20]

[30] Further, if the differentiation is on a ground specified in section 9(3) of the Constitution, unfairness is presumed.[21] Absent a rebuttal of the presumption, unfair discrimination is established, resulting in a violation of section 9(3) of the Constitution. The final step is to determine whether the violation is justified under the general limitations provision in section 36 of the Constitution.

[31] Section 14(1)(a) sets the age of consent for sexual intercourse between an adult man and a girl at 16 years for the girl. Read with section 14(1)(a), section 14(1)(b) provides, in the case of what are termed indecent acts between an adult man and a girl, an age of consent of 16 years for the girl but 19 years for a boy, if the acts are between an adult man and the boy.

[32] Similarly, in the case of sexual intercourse between an adult woman and a boy, the age of consent for the boy is set at 16 years in section 14(3)(a). However, read with section 14(3)(a), section 14(3)(b) determines that the age of consent for what are termed indecent acts between an adult woman and a boy is 16 years for the boy. But when the acts are between an adult woman and a girl, the age of consent for the girl is set at 19 years.

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[20] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25; *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC) at para 17; 1999 (2) BCLR 139 (CC) at para 16.

[21] *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 81.

[33] The age of consent for what are termed indecent acts between persons of the same sex, whether between an adult man and a boy or between an adult woman and a girl, is therefore set at 19 years, whereas when the acts are committed between an adult man and a girl or an adult woman and a boy, the age of consent for the girl or the boy is 16 years. The differentiation is clear. The age of consent to sexual acts for people of the same sex is older than the age of consent required for people of the opposite sex.

[34] There is no claim that the differentiation serves a rational purpose. Rather, it is common cause that the impugned provisions discriminate between sexual acts between people of the same sex and the same acts between people of the opposite sex. It is discrimination based on sexual orientation, a ground enumerated in section 9(3) of the Constitution.

Is the discrimination unfair?

[35] In terms of sections 9(3) and 9(5) of the Constitution, discrimination based on grounds of sexual orientation creates a presumption of unfairness unless the contrary is demonstrated. It is incumbent upon those who intend to uphold or protect the impugned legislation to demonstrate the absence of unfairness.[22] None of the respondents in the Supreme Court of Appeal or before this Court proffered evidence

[22] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 33.

sufficient to conclude that the discrimination was fair. I can find none. I therefore agree that the impugned provisions of the Act limit section 9 of the Constitution.

[36] Finally, the question is whether the violation can be justified under section 36 of the Constitution. Here, the applicant and respondents were in one mind in their submissions that there was no justification. I am inclined to agree. The impugned sections are specific in their effect: they do not purport to protect children between the ages of 16 and 18 against all sexual acts, but only against homosexual sexual acts. The inevitable inference is that there is something odd, deviant and even perverse about homosexual acts and/or homosexual people. For young people who are only just beginning to explore their sexuality and are perhaps considering "coming out" to their parents and their community, the negative effect of the discrimination in this case might be particularly harmful.

[37] The differential age of consent perpetuates a damaging stereotype of sexual conduct between same-sex partners as somehow disgraceful or as of less value than sexual conduct between opposite-sex partners. The effect is demeaning and in conflict with our Constitution and its values. It is contrary to the right to equality protected in section 9 of the Constitution and inimical to the values of equality, human dignity and freedom which are basic to our constitutional democracy. In *National Coalition*, Sachs J held:

> "The effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality

> interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself."[23]

[38] I find that the differential age of consent provided for by sections 14(1)(b) and 14(3)(b) discriminates unfairly on the grounds of sexual orientation. Justification for the discrimination not having been shown, the provisions are unconstitutional and therefore invalid.

Remedy

[39] Having found that sections 14(1)(b) and 14(3)(b) are inconsistent with the Constitution because of the unjustifiable age differentiation between victims of the offences contemplated in those sections, it is now necessary to determine the appropriate remedy. The Constitution empowers and obliges this Court to make a just and equitable order in the circumstances.[24] It would not be just and equitable to strike down the offending sections and remove them from the statute book altogether. It is true that the provisions in question have been superseded by legislation that cures the defect. There may nonetheless be outstanding cases relating to offences alleged to have been committed before the legislation that repealed and replaced the provisions in question came into force. A lacuna would result in relation to this class of cases if this Court were to strike down the provisions without more.

[23] See *National Coalition* above n 3 at para 109.

[24] Section 172(1)(b) of the Constitution.

[40] The Supreme Court of Appeal ordered, in effect, that it would be just and equitable for the age limit to be set at 16 years for all victims of section 14(1)(b) and 14(3)(b) offences. It was contended on behalf of the first and second respondents that the victim age limit in respect of these offences should be increased to 18 years. This was the only contested issue in this Court.

[41] The contention had two legs. The first was that the Constitution and all international instruments had set 18 years as the upper limit for the ages of children. Secondly, it was submitted that there was an incongruity between this legislation and other national legislation prohibiting related activity. For example, as indicated earlier, section 27(1) of the Films and Publications Act[25] prohibits the production of pornographic images of a child under the age of 18 years. It was urged that the remedy would be just and equitable because setting a uniform age limit at 18 years would render the legislation consistent with all these other instruments.

[42] I do not think however that the suggested route should be followed because it would bring with it serious inconsistencies. Indeed, two unacceptable consequences would inevitably follow. The one is that the victim age limit for offences relating to heterosexual intercourse[26] will remain at 16 years while that for victims of the offences with which we are here concerned will be 18 years. The other is that the legislation that has repealed and replaced the provisions at issue in this case has set the victim age limit at 16 years for offences comparable to those created by section

[25] 65 of 1996.

[26] Prohibited in terms of section 14(1)(a) and section 14(3)(a) of the Act.

14(1)(b) and section 14(3)(b) of the Act. The incongruity that would be created by accepting the suggestion to raise the age limit to 18 years can be neither just nor equitable. It must be borne in mind that there has as yet been no attack on the constitutionality of any of this legislation on the basis that the 16-year age limit is too low.

[43] I accordingly find that the remedial order made by the Supreme Court of Appeal is just and equitable.

Costs

[44] These are confirmatory proceedings which arise from criminal proceedings and which under our Constitution are mandatory for this Court to hear. It is therefore appropriate that no costs order be made.

Order

[45] The following order is made:

1. The order of the Supreme Court of Appeal to the following effect is confirmed:

> "1.1 It is declared that, with effect from 27 April 1994, ss 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957 are inconsistent with the Constitution and hence invalid to the extent that these sections differentiate between heterosexual and same-sex sexual activities by setting the legal age of consent at 16 and 19 years, respectively.
>
> 1.2 It is declared that, with effect from 27 April 1994, s 14(1)(b) of Act 23 of 1957 is to be read as though the words 'under the age of 19 years' after

the words 'a boy' have been replaced with the words 'under the age of 16 years'.

1.3 It is declared that, with effect from 27 April 1994, s 14(3)(b) of Act 23 of 1957 is to be read as though the words 'under the age of 19 years' after the words 'a girl' have been replaced with the words 'under the age of 16 years'.

1.4 In terms of s 172(1)(b) of the Constitution, it is ordered that the orders in paragraphs 1.1, 1.2 and 1.3 shall not invalidate any conviction for a contravention of s 14(1)(b) or 14(3)(b) of Act 23 of 1957 unless an appeal from or a review of the relevant judgment is pending, or the time of noting an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a court of competent jurisdiction."

2. There is no order as to costs.

Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Mokgoro J.

For the Applicant:	Advocate JJS Prinsloo SC and Advocate VDT Nolutshungu instructed by De Klerk & Marais Inc. with the Legal Aid Board.
For the First and Second Respondents:	Advocate FC Roberts instructed by the Office of the Director of Public Prosecutions.
For the Third Respondent:	Advocate I Hussein SC and Advocate SL Shangisa instructed by the State Attorney.