

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 94/22

In the matter between:

VJV

FIRST APPLICANT

RT

SECOND APPLICANT

and

MINISTER OF SOCIAL DEVELOPMENT

FIRST RESPONDENT

MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT

SECOND RESPONDENT

HEADS OF ARGUMENT ON BEHALF OF THE APPLICANTS

INTRODUCTION

1.

The applicants, two women, are permanent life partners. They wish to start a family of their own. They decided to have a baby by the invitro fertilization process and have set aside three embryos which are available for transfer. These embryos were brought into being by using the first applicant's gamete and the gamete of a donor. The plan is to transfer the embryos to the uterus of the second applicant, in this way assuring that both parents are biologically connected to the resultant child.

2.

The problem is that the first applicant will not be regarded as the legal parent of the child in spite of the fact that the child will be her biological offspring.

3.

This is so because Section 40 of the Children's Act, dealing with the rights of a child conceived by artificial fertilization, only allows for a situation where a man and a woman, married or not, conceive a child by means of artificial fertilization. The act does not provide for a situation where two women who are in a committed relationship conceive a child by using the fertilised gamete of one woman implanted in the uterus of her partner.

Given this exclusion, the question is whether Section 40 of the Children's' Act and the definition of parent in the Children's' Act is unconstitutional.

4.

It is the applicants' case that Section 40 of the Act:

1. Constitutes unfair discrimination;
2. Does not protect and respect the applicants' dignity;
3. Is not in the best interest of the child.

5.

The applicants applied to the High Court for an order in, inter alia, the following terms:

"1. That Section 40 of the Children's Act, Act 38 of 2005 ("the Children's Act") be declared to be inconsistent with the Constitution of South Africa to the extent that the section does not include the words:

- 1. "Or permanent life partners" after the word "spouse" and "husband" where ever such words appears in Section 40";*
- 2. "Or permanent life partners" after the word "spouse" where ever such word appears in Section 40";*

2. That, in Section 40 of the Children's Act, the words:

- 2.1 *“Or permanent life partners” after the word “spouse” and “husband” where ever such words appears in Section 40”;*
 - 2.2 *“Or permanent life partners” after the word “spouse” and “husband” where ever such words appears in Section 40”.*
3. *That it be declared that Section 40 of the Children’s Act is to reads as follows:*
- 1(a) *Whenever the gamete or gametes of any person other than a married person or his or her spouse or permanent life partners have been used with the consent of both such spouses or both such permanent life partners for the artificial fertilization of one spouse or one permanent life partner, any child born of that spouse or permanent life partner as a result of such artificial fertilization, must for all purposes be regarded to be the child of those spouses or permanent life partners.*
 - (b) *For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or permanent life partners have granted the relevant consent.*
- (2) *Subject to Section 296 whenever the gamete or gametes of any person have been used for the artificial fertilization of a woman, any*

child born of that woman as a result of such artificial fertilization must for all purposes be regarded to be the child of that woman.

(3) *Subject to Section 296, no right, responsibility, duty, or obligation arises between a child born of a woman as a result of artificial fertilization and any person whose gamete or gametes have been used for such artificial fertilization or the blood relations of that person, except when-*

(a) That person is the woman who gave birth to that child; or

(b) That person was the husband or permanent life partner of such woman at the time of such artificial fertilization.”

6.

None of the respondents opposed the application but The Centre for Child Law joined the proceedings as amicus.

7.

The High Court found that the provisions of Section 40(1)(a) and (3) are not constitutionally justifiable as they exclude unmarried people in a committed relationship and therefore unfairly discriminate against those persons¹. The Court

¹ Bundle 2 page 120 paragraph 16; page 124 paragraph 32 and page 125 paragraph 33 and further

thereupon granted the order as prayed for and also, as a temporary solution to the plight of the applicants, ordered that the words as recommended are to be read into Section 40 of the Act until such time as the Act is amended.

EQUALITY

8.

It is the applicants' case that the provisions of Section 40 in the Children's' Act offends against the equality clause in the Constitution². An inquiry into a violation of the equality clause proceeds by way of the following stages:³

8.1 Does the challenged law differentiate between people or categories of people? In this instance, it clearly does differentiate between married and unmarried persons.

² "Equality

9(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.*

9(2) ...

9(3) *The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, cultural, language or birth.*

9(4) ...

9(5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

³ See **Harksen v Lane NO 1998 (1) SA 300 (CC)** par 53

8.2 Does the differentiation have a rational connection to a legitimate government purpose?

8.3 Does the differentiation amount to unfair discrimination? This requires a two-stage analysis namely:

8.1.1. Firstly, does the differentiation amount to discrimination?

8.1.2. Does it amount to unfair discrimination?

8.1.3. And lastly, if the discrimination is unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.

RATIONALITY

9.

A law violates Section 9 if the differentiation does not have a legitimate purpose and if there is no rational connection between the differentiation and the purpose. In **Prinsloo v Van der Linde**⁴ the Constitutional Court explains the principle as follows:

“In regard to mere differentiation, the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked

⁴ 1997 (3) SA 1012 par 40

preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a Constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. Accordingly, before it can be said that mere differentiation infringes Section 8 (of the interim Constitution) it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship, the differentiation would infringe Section 8".

10.

All the State has to show is that the purpose was neither arbitrary nor irrational. It does not have to show that the purpose pursued was a wise one or one with which the Court agrees. In **Jooste v Corr Supermarket Trading (Pty) Ltd (Minister of Labor⁵ intervening)** the Court explained this as follows:

"It is clear that the only purpose of rationality review is an inquiry into whether differentiation is arbitrary or irrational or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislator could be improved in one respect or another. Whether an employee ought to have retained the Common Law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy

⁵ 1999 (2) SA 1 at paragraph 15

choice which the legislator and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review, an invitation which is firmly declined”.

In this particular instance the State has not proffered any rational reason for the exclusion of two women who are committed life partners from the right to be regarded as the legal parents of a child born in this manner. There can be no rational connection to a legitimate government purpose in this instance. Excluding the applicants serves no purpose whatsoever. Where there is no discernable purpose for the differentiation as in the present case, we submit that the court must find that the legislative provision is in breach of Section 9⁶.

UNFAIR DISCRIMINATION

11.

The differentiation between married and unmarried persons in this section clearly amounts to discrimination as the differentiation is made on illegitimate grounds. These grounds have been listed in Section 9(3) of the Constitution.

12.

As to whether this exclusion amounts to unfair discrimination, the answer is that first of all, Section 9(5) specifically places an onus on the State to show that the discrimination is fair. In this matter there is no opposition from the State and one

⁶ SEE For instance **Ngewu and Another v Post Office Retirement Fund and Others** BCLR 421 (CC)

can accept that the discrimination is unfair on the basis that it discriminates on one or more of the grounds listed in subsection (3).

13.

Discrimination is deemed unfair when it has an unfair impact. This impact occurs where burdens are imposed on people who have been the victims of past patterns of discrimination such as women, people of colour, gay people, or unmarried people, or indeed wherever the fundamental dignity of the complainant is prejudiced, as it is in this matter. Where the discriminating law or action is designed to achieve a worthy or important societal goal, it may make fair what would otherwise be unfair discrimination⁷. In this instance, there is simply no worthy or important societal goal that the State is trying to achieve by excluding the first applicant from being regarded as the legal parent of her own child.

14.

In this instance the discrimination against the first applicant is based on, first of all, her sexual orientation and secondly, her marital status.⁸

15.

By excluding lesbians from being automatically regarded as parents of their own children it perpetuates a number of harmful and hurtful stereotypes of gays and

⁷ See **Harksen** par 52

⁸ See for instance **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC)

lesbians. The first of these stereotypes is that gay and lesbian relationships are exclusively sexual with few or none of the family orientated characteristics of marriage namely consortium, companionship, love, affection, and support. The second stereotype is that gay and lesbian couples do not qualify as a family because they are incapable of procreating. This is demeaning not only to homosexual couples but also to heterosexual couples who, for whatever reason, do not have children.⁹

16.

The court made the following statement:

“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 lesbians¹⁰.”

17.

⁹ See **National Coalition** paras 40, 49, 50 and 54

¹⁰ **Harksen** par 54

In the matter of **J v Director-General, Department of Home Affairs**¹¹, Section 5 of the Children's Status Act, Act 82 of 1987 was declared unconstitutional because he did not provide for registration of persons in permanent same-sex life partnerships as parents of children conceived by artificial insemination.

18.

It is submitted that the court *a quo* correctly identified the fact that the family is one of the core foundational institutions in all societies on international, regional, and domestic level and that through family life peoples values, cultures, and traditions are held in safekeeping and passed on to following generations.¹² As a family is not necessarily defined by marriage, the Court found that Section 40 of the Children's Act does not correctly reflect the concept of a family and is therefore discriminating.¹³

DIGNITY

19.

Everyone has inherent dignity and the right to have their dignity respected and protected¹⁴. Human dignity is the central value of our Constitution.¹⁵ It is submitted

¹¹ 2003 (5) SA 621 (CC)

¹² SEE Bundle 2 page 121 paragraph 20 and further

¹³ SEE Bundle 2 page 122 paragraph 23 and further

¹⁴ Section 10 of the Constitution

¹⁵ See **S v Makwanyane** 1995 (3) SA 391 (CC) par 144; **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) par 28

that human dignity is not only a justiciable and enforceable right that must be respected and protected, but also a value that informs the interpretation of possibly all other fundamental rights and that it is of central significance in the limitation's inquiry.¹⁶

20.

In **Daewood v Minister of Home Affairs**¹⁷ the court specifically held that the right to dignity must be interpreted to afford protection to family life.

BEST INTEREST OF THE CHILD

21.

Section 28(2) of the Constitution requires that a child's best interest be of paramount importance in every matter concerning the child. Although the Constitution contains no express right to family life as already mentioned, the Constitutional Court held that this right is indirectly protected via the right to dignity.¹⁸ It is submitted that the right to family life includes the right to be the legitimate child of one's mother.

22.

¹⁶ See **Daewood v Minister of Home Affairs** 2000 (3) SA 936 (CC) par 35

¹⁷ 2000 (1) SA 997 (C)

¹⁸ See **Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa** 1996 (4) SA 744 (CC) paras 96-102 and **Daewood** supra para 36

The right to parental care includes the child's right to be cared for by both natural parents and in this case also to be seen as the legitimate child of both natural parents.

23.

In **Fletcher v Fletcher**¹⁹ the appellate division held that the most important factor to be considered in issues like custody and access is not the rights of the parents but the best interest of the child. The best interest test directs the court to exercise the discretion it possesses in its capacity as upper guardian of minors to promote the interests of the child rather than focusing on the rights or the entitlement of the parents. This test has now been constitutionally entrenched by Section 28(2) of the Constitution.

24.

It is submitted that it will be in the best interests of the expected child to be regarded as the legal child of the first applicant.

25.

It is important that the first applicant be regarded as the legal parent of the expected child for many reasons, including this that the rights but also the responsibilities, duties, and obligations which are granted to and expected of a

¹⁹ 1948 (1) SA 13 (A)

legal parent would otherwise not apply in this particular case, thereby disadvantaging the child.

LIMITATION OF RIGHTS

26.

The Bill of Rights provides for a limitation of rights or perhaps a justifiable infringement of rights, provided that the limitation contributes to an open and democratic society based on human dignity, equality, and freedom.²⁰

"36.1 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."*

22.

²⁰ Section 36

In deciding whether a law is an unjustifiable infringement of a right contained in the Bill of Rights, the court follows a two-stage approach. The first issue is whether a right in the Bill of Rights has been infringed by law and the second is whether the infringement can be justified as a permissible limitation of the right in question. It is submitted that once it has been established that there is an infringement, the next question should be whether there is justification. In more recent cases the Constitutional Court has indicated that only a cursory form of limitation analysis needs to be undertaken in cases where the respondent puts up a half-hearted or inadequate case for justification. In this matter the respondent puts up no case whatever for justification and it is submitted that the court should accept that there is no justification.

27.

In this regard appropriate evidence must often be led to justify the limitation of a right in accordance with the criteria laid down in Section 36. The determination often requires evidence about the impact that the legislative restriction has on society. Where justification rests on factual and/or policy considerations the respondent must put such material before the court. Failure to do so, may lead to

a finding that the limitation is not justifiable.²¹ In considering the legitimacy of a limitation the following dicta is apposite:²²

“In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”

28.

The proportionality inquiry required by Section 36 involves weighing up the harm done by a law against the benefits that the law seeks to achieve.

29.

At a minimum, reasonableness requires the limitation of a right to serve some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. It is very difficult to see what purpose the limitation contained in Section 40 has and how it contributes to an open and democratic society based on human dignity, equality and freedom.

²¹ See **Moise v Greater Germiston Transitional Local Council** 2001 (4) SA 491 (CC) para 19 *“If the government wishes to defend a particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before the court the requisite factual material and policy considerations. Therefore, although the burden of justification under Section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.”*

²² **S v Bhulwana** 1996 (1) SA 388 (CC) par 18

30.

In short, it is submitted that the limitation of the applicants' rights in no way qualifies in terms of Section 36 of the Constitution.

APPROPRIATE REMEDY

31.

In a constitutional state the supremacy of the Constitution means that laws found to be inconsistent with the Constitution are invalid and that a court must declare them to be so. To remedy the unconstitutionality of the provisions it is submitted that reading-in, as suggested, would be the correct remedy. The purpose of reading-in is to ensure that any inconsistency between the Constitution and the statute is removed. The reading-in remedy has been consistently employed to remedy statutes that confer benefits on the "spouse" of a married person but exclude permanent same-sex life partnerships from the benefits.²³

CONCLUSION

32.

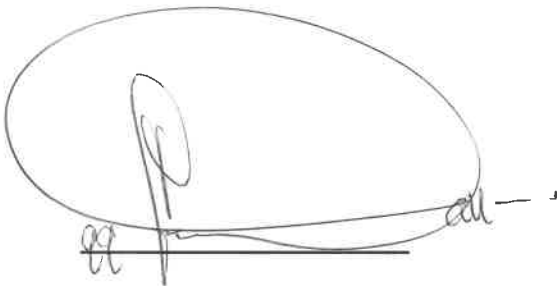
²³ See **Du Toit v Minister for Welfare and Population Development** 2003 (2) SA 198 (CC); **Satwell v President of the Republic of South Africa** 2002 (6) SA 1 (CC); and **J v Director-General, Department of Home Affairs** 2003 (5) SA 6221 (CC)

¹⁹ CCT 46/02; 2003 (5) SA 621 (CC); 2003 (5) BCLR 476 (CC)

It is submitted that the Court should follow the same approach that was followed in **J B v Director General, Department of Home Affairs and Other**²⁴. In that matter the Court dealt with exactly the same question but in relation to the Children's Status Act of 1987. The relief granted there corresponds with the relief claimed by the Applicants.

33.

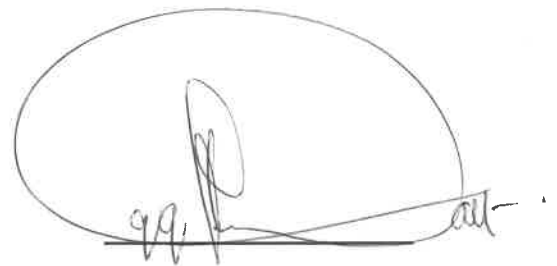
We therefor submit that an order in terms of the Notice of Motion be granted.

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A DE VOS SC

Counsel for Applicants

Harkerville

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HILGARD BOTMA

Counsel for Applicants

Pretoria

DATED: 18 August 2022

²⁴ See **Du Toit v Minister for Welfare and Population Development** 2003 (2) SA 198 (CC); **Shatswell v President of the Republic of South Africa** 2002 (6) SA 1 (CC); and **J v Director-General, Department of Home Affairs** 2003 (5) SA 6221 (CC)

¹⁹ CCT 46/02; 2003 (5) SA 621 (CC); 2003 (5) BCLR 476 (CC)