CONSTITUTIONAL COURT OF SOUTH AFRICA

Centre for Child Law v Schutte and Others

CCT 157/22

Date of hearing: 22 November 2022

MEDIA SUMMARY

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

On Tuesday, 22 November 2022 at 10h00, the Constitutional Court will hear an application for confirmation of a declaration of constitutional invalidity of the High Court, Gauteng Division, Johannesburg (High Court). The High Court held that section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 (the Act) is unconstitutional in that it is alleged to unfairly discriminate between children of married parents and those of unmarried parents in the manner in which their best interests are investigated by the Office of the Family Advocate (Family Advocate).

The applicant in this matter is the Centre for Child Law (CCL), a registered law clinic based in the Faculty of Law at the University of Pretoria. The CCL appeared as amicus curiae in the High Court where the first respondent, Ms Tamerin Schutte, was the applicant. On or about 18 September 2020, Ms Tamerin Schutte, the first respondent before this Court, launched a substantive application before the High Court in two parts. In Part A she sought, inter alia, an order directing the Family Advocate to investigate the best interests of her minor children vis-à-vis their possible relocation to Australia. In Part B, she sought, inter alia, an order permitting her to relocate to Australia with the minor children. Mr Naude Beukes, the second respondent before this Court, opposed both parts of the application and proceeded to institute a counter-application, wherein he sought, inter alia, for his home to be ordered to be the primary residence of the minor children. Ms Tamerin Schutte and Mr Naude Beukes are unmarried and are the parents of the minor children in question. The Minister of Justice and Correctional Services (the Minister), who appeared on behalf of the Family Advocate, was joined to the proceedings at the instance of the High Court.

Part A was set down on the opposed motion roll and was allocated to Bezuidenhout AJ who, on 21 September 2021, issued directions to the parties raising the constitutional validity of section 4 of the Act, stating that the section appeared to make an arbitrary distinction between the children of married, or formerly married and divorced parents, and children whose parents have never been civilly married and was thus inconsistent with the various provisions of the Constitution and with the Children's Act 38 of 2005.

Addressing the issue of constitutional invalidity, as raised by it, the High Court held that in determining whether the Act unfairly discriminates and offends against the rights of unmarried parents and children born from unmarried parents, it had to apply the Harksen test. In venturing to do so, the High Court indicated that it is common cause that the Act only applies to divorcing or divorced parents and in doing

so unmarried parents are not entitled to rely on the provisions of the Act to simply enlist the services of the Family Advocate after the institution of a legal process by completing a standard form. The Court indicated that the category of unmarried parents and their children are differentiated by the Act. In ascertaining whether the differentiation bore a rational connection to a legitimate governmental purpose, the High Court indicated that it used to and stated that the Family Advocate was established at a time when divorce rates were increasing in South Africa, and there was an urgent need to protect the interests of children. However, the High Court held that as a society, the institution of marriage in our country is no longer a prerequisite for children to be regarded as legitimate.

In declaring the impugned provision unconstitutional, the High Court stated that there can be no legitimate government purpose for the differentiation based on marital status when it comes to the treatment of children. Moreover, that such discrimination cannot be justified, cannot be in the best interests of children and is inconsistent with the Constitution. With regard to the question of costs, the High Court stated that in light of the Minister not opposing the constitutional challenge and acknowledging its deficiencies, it would not grant a costs order against the Minister at that stage, but left the issue to be determined by this Court.

In this Court, the CCL argues that the Family Advocate's services are, in the case of divorcing or divorced parents, provided on-demand. The parent, when initiating proceedings or anytime thereafter, simply completes a form that corresponds substantially to Annexure B of the Regulations made under the Mediation in Certain Divorce Matters Act (the Regulations) and the Family Advocate, in turn, and on receipt of such application initiates an enquiry in terms of section 4 of the Act. The CCL argues that this simple, streamlined, and cost effective procedure, however, is not available to unmarried or never-married parents therefore unfairly discriminating against unmarried parents and the children of those parents on the listed ground of marital status. The CCL submits that this in turn violates the right to equality, human dignity and the right of a child to have his/her best interests considered of paramount importance.

Mr Naude Beukes states that he will unreservedly abide this Court's decision but submits an alternative argument so as to assist the Court in coming to a well-considered, just decision. Mr Naude Beukes argues that the differentiation created by the impugned provision is not as a result of unfair discrimination but rather flows from the legal consequences of the choice married or formerly married parents made to get married. Furthermore, that unmarried parents must rather look at the Children's Act to engage the Family Advocate as it presents suitable alternative options. Like the second respondent, the Minister has indicated that he will abide the decision of this Court and makes submission only in relation to costs. The Minister submits that he was joined in the proceedings pursuant to the High Court raising, *mero motu*, concerns about the constitutionality of section 4 of the Act. The Minister argues that the High Court exercised its discretion judicially having regard to the relevant facts and circumstances of the case and this should not be interfered with. Additionally, the Minister submits that in light of *Biowatch* each party should, as a matter of fairness, bear their own costs in the High Court and in the confirmation proceedings before this Court. Moreover, the Minister submits that in any event he is not liable for the costs of the CCL, who appeared as amicus curiae in the High Court.