CONSTITUTIONAL COURT OF SOUTH AFRICA

Centre for Child Law v S T and Others

CCT 157/22

Date of Judgment: 29 June 2023

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 Thursday, 29 June 2023 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of a declaration of constitutional invalidity made by 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 unfairly discriminates between children of married parents and those of never-married 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 Mrs T S, was the applicant. On or about 18 September 2020, Mrs T S, 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 B N 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. Mrs T S and Mr B N are unmarried but are the parents of the minor children. 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 the High Court held that in determining whether the Act unfairly discriminates and offends against the rights of never-married parents and children born from never-married 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 never-married 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 never-married parents and their children are treated differently 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 in the past because at the time the Family Advocate was established, the divorce rate was increasing in South Africa, and there was an urgent need to protect the interests of children. However, the High Court held that presently 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.

In this Court, the CCL argued 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 initiates an enquiry in terms of section 4 of the Act. The CCL argued that this simple, streamlined, and cost effective procedure is not available to unmarried or never-married parents in that it unfairly discriminates against them and the children of those parents on the listed ground of marital status. The CCL submitted that this in turn violates the right to equality, human dignity and the right of a child to have their best interests considered of paramount importance.

Mr B N appeared before this Court but stated that he will unreservedly abide this Court's decision. He stated that he merely sought to submit an alternative argument so as to assist the Court in coming to a well-considered, just decision. Mr B N argued 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 never-married parents must rather look at the Children's Act to engage the services of the Family Advocate as it presents suitable alternative options. The Minister also indicated that he would abide by the decision of this Court and made submissions only in relation to costs.

In a unanimous judgment penned by Tshiqi J, the Court held that the impugned provision does indeed treat divorced or divorcing parents differently in the way it treats never-married parents and married parents who are separating but not divorcing, and that this establishes differentiation. In determining whether the impugned provision has a legitimate governmental purpose, the Court held that there is no legitimate governmental purpose for devising a simple streamlined process for divorced and divorcing parents while withholding that simple streamlined process from unmarried parents going through a separation or who simply cannot agree on how to deal with the interests of their children.

In rejecting the choice argument advanced by Mr B N, the Court, after analysing various provisions of the Children's Act,[1] found that it gives both married and never-married parents the right to approach a court to seek its intervention so that a family advocate is appointed to furnish a report to the court regarding issues around children's interests. It held that the Children's Act thus prescribes a process which is available to both married and never-married parents whilst the Act does not afford never-married parents a right to utilise a process similar to that available to married persons who are going through a divorce. The Court indicated that practically, married parents who wish to get divorced may use the process prescribed in section 4 of the Act by simply completing Annexure B when summons are issued and file the annexure simultaneously with their divorce summons. Following the filing of Annexure B, the Family Advocate becomes involved in the divorce proceedings in order to provide the court with a report on the interests of the children affected by the divorce. However, the Court held that, conversely, unmarried parents cannot simply complete Annexure B when they separate; in that they have to utilise a two-tier process that effectively seeks leave of the High Court to appoint the Office of the Family Advocate to mediate in the issues pertaining to the child or children. The Court thus found no merit in Mr B N's arguments.

The Court thus held that there is no doubt that the impugned provision limits section 9(1) and 9(3) as well as the rights of affected parents and children in terms of sections 10 and 28 of the Bill of Rights and that the limitation is not justifiable in terms of section 36 of the Constitution. As a result, the Court confirmed the order of constitutional invalidity and included an additional provision to the Act which provides access to the Family Advocate in the same manner as married parents who are divorced or going through a divorce.

[1] These provisions included sections 23, 28 and 29 of the Children's Act.