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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO. 97/023677

In the matter between:

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY	1st Applicant
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	2nd Applicant

and

THE MINISTER OF JUSTICE	1st Respondent
THE MINISTER OF SAFETY AND SECURITY	2nd Respondent
THE ATTORNEY GENERAL OF THE WITWATERSRAND	3rd Respondent

FILING SHEET: FIRST RESPONDENT'S ANSWER

Presented for filing by:

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TO: The Registrar of the above
Honourable Court
JOHANNESBURG

AND TO:
APPLICANTS' ATTORNEYS
NICHOLLS, CAMBANIS & ASSOCIATES
3rd Floor,
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Docex:
Ref.: Ms Cambanis/Ms Heaton-Nicholls
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Received copy hereof this the
03 day of OCTOBER
1997

WITHOUT PREJUDICE

FOR/APPLICANTS'
ATTORNEYS

"(a) an order declaring that the common law offence of sodomy is inconsistent with the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution") and invalid;

(b) an order invalidating any conviction for the offence of sodomy if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired;

(c) an order declaring that the common law offence of commission of an unnatural sexual act between men is inconsistent with the Constitution and invalid;

(d) an order invalidating any conviction for the offence of commission of an unnatural sexual act between men if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired;

(e) an order declaring that section 20A of the Sexual Offences Act, 1957 (Act 23 of 1957) is inconsistent with the Constitution and invalid;

(f) an order setting aside any conviction for the offence of contravening section 20A of the Sexual Offences Act 1957 (Act 23 of 1957), if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment is pending or the time for noting an appeal from that judgment has not yet expired;

(g) an order declaring the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is inconsistent with the Constitution and invalid;

(h) an order invalidating any act performed after 27 April 1994 under authority of the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act (Act 51 of 1977);

(i) an order declaring that the inclusion of sodomy as an item in the Schedule to the Security Officers Act, 1987 (Act 92 of 1987) is inconsistent with the Constitution and invalid;

(j) an order invalidating any act performed after 27 April 1994 under authority of the inclusion of sodomy as an item in the Schedule to the Security Officers Act (Act 92 of 1987);

(k) an order granting the Applicants further and/or alternative relief;

(l) ..."

The applicants formally withdrew the claims in paragraphs (h) and (j) to the notice of motion before the hearing commenced. Paragraph (l) was a claim for costs against any of the respondents who opposed the application. In consequence of the applicants' withdrawal of paragraphs (h) and (j), the first respondent no longer opposed the application. The second and third respondents have at no stage done so. They abide the decision of the Court. Accordingly the applicants seek no order for costs against the respondents.

Upon further reconsideration of their case the applicants no longer persisted in the claim for the retrospective relief set out in paragraphs (b) and (d) but submitted that the effect of the invalidity of the common law crimes should be considered in individual cases which have not yet been finalised. The concern of the applicants in this regard was that the common law crimes prohibited some conduct which may remain prohibited despite the Constitution. If, for example, a person has been convicted of sodomy (rather than indecent assault) for an act of "male rape" his sodomy conviction should not be set aside without being replaced by an appropriate new conviction for indecent assault. In the opinion of the applicants' counsel the broad relief sought by their clients in paragraphs (b) and (d) did not facilitate that process and they accordingly abandoned the claim to that relief.

The applicants were inclined to persist in their claim for the relief set out in paragraph (f) because, in their counsels' submission, problems of the sort posed

by the common law crimes are not presented by the invalidation of convictions in terms of section 20A of the Sexual Offences Act. The applicants submitted however that only the Constitutional Court had jurisdiction to grant relief which would have the generalised effect of the relief sought in paragraph (f) and, if they were correct in this submission, they would in due course approach the Constitutional Court for an appropriate order.

The first applicant is the National Coalition for Gay and Lesbian Equality, a duly constituted voluntary association of gay, lesbian, bi-sexual and transgendered persons comprising seventy organisations and associations. The first applicant has the right to sue and be sued in its own name.

The principal objectives of the first applicant include the following:

> "3.1 [To] promote equality before the law for all persons, irrespective of their sexual orientation, (as envisaged?) in the Constitution of the Republic of South Africa.
>
> ...
>
> 3.4 [To] challenge by means of litigation, ... all forms of discrimination on the basis of sexual orientation;"

The second applicant is the South African Human Rights Commission, a statutory body established by section 184 of the Constitution Act, 1996. The second applicant is obliged to "promote the protection, development and attainment of human rights" and has statutory power to litigate for this purpose. (See section

184(1)(b) of the Constitution and section 7(1)(e) of the Human Rights Commission Act 54 of 1994.)

The first respondent is the Minister of Justice in the National Government.

The second respondent is the Minister of Safety and Security in that Government.

The first and second respondents are members of the National Executive, responsible for the administration and enforcement of the Criminal Procedure Act, the *Sexual Offences Act and the Security Officers Act.*

The third respondent is the Attorney-General of the Witwatersrand Local Division of the High Court of South Africa. In the area of jurisdiction of this Court, the third respondent controls prosecutions for the offences of sodomy and commission of unnatural sexual acts and for contraventions of section 20A of the Sexual Offences Act.

The applicants ask the Court to declare unconstitutional the statutory and common law offences which criminalise sexual acts engaged in between male persons, and statutes which discriminate on the basis of convictions for those acts. They submit that the laws apply different standards to individuals and groups of persons dependent on their biological sex or sexual orientation.

The first applicant has a direct interest in the relief sought in this application arising out of the objectives set out in its constitution. The second applicant has a similar direct interest. In addition both applicants have standing in terms of section 38 of the Constitution consistent with the broad approach recognised in **Ferreira v Levin NO and Others** 1996 1 SA 984 (CC) at 1082G-H, and since applied in **Beukes v Krugersdorp Transitional Local Council and Another** 1996 3 SA 467 (W) at 474C-E and **Port Elizabeth Municipality v Prut NO and Another** 1996 4 SA 318 (E) at 324I-326B.

The challenged laws

Sodomy

The common law crime of sodomy is defined as "unlawful and intentional sexual relations **per anum** between two human males": Hunt, **South African Criminal Law and Procedure** 3rd ed (1996) by J R L Milton; Snyman, **Criminal Law** 3rd ed (1995) at 340; **S v Kampher** 1997 4 SA 460 (C).

Sodomy criminalises sexual conduct between men whether committed in public or private and with or without consent. The applicants, despite the unlimited scope of the claims in the notice of motion, sought before me, decriminalisation only to the extent that sodomy takes place in private between consenting parties. Heterosexual intercourse **per anum** falls outside the definition of sodomy and, if

consensual, non-commercial and private, is not an offence: **R v N** 1961 3 SA 147 (T); **R v M** 1969 1 SA 328 (R); **S v H** 1993 (2) SACR 545 (C).

Unnatural sexual acts

Hunt, **South African Criminal Law and Procedure** vol 2 (3rd ed) at 223 defines the common law crime of committing an "unnatural sexual act" in the following terms:

> "An unnatural sexual offence consists in the unlawful and intentional commission of an unnatural sexual act by one person with another person."

The limits of the crime are by no means clear. **A fortiori**, the meaning of an unnatural act is even more ill-defined: **S v C** 1988 2 SA 398 (Z) at 400D-H; **S v Kampher supra** at paragraph 20.

Hunt (**op cit**) at 227 observes:

> "Where the act amounts to sodomy or bestiality it should be charged as such. However sodomy and bestiality are just particular defined forms of unnatural offence and it is submitted that an indictment is not bad if it charges the conduct as an 'unnatural offence' without calling it sodomy or bestiality."

Under the rubric of "unnatural sexual offence" a broad category of consensual sexual acts between men have been criminalised. These include the following:

Mutual masturbation: **R v Curtis** 1926 CPD 385; **S v V** 1967 2 SA 17 (E);

Inter-femoral (thigh) sex: **R v Gough and Narroway** 1926 CPD 159; and

Oral sex: **R v K and F** 1932 EDL 71 (obiter).

However, the same consensual sexual acts performed between a man and a woman fall outside the scope of this crime and do not constitute an offence at common law: **R v N** 1961 3 SA 147 (T); **R v K and F supra; R v M supra.** Counsel submitted that the vagueness of this offence in itself renders the crime unconstitutional. I shall return to this question.

Section 20A of the Sexual Offences Act 1957

This section provides:

> "20A **Acts committed between men at a party and which are calculated to stimulate sexual passion or to give sexual gratification, prohibited**
>
> (1) a male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
>
> (2) For the purposes of subsection (1) 'a party' means any occasion where more than two persons are present.
>
> (3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law."

Section 20A creates an offence additional to the common law crime of sodomy. Counsel submitted that the section was not designed to prohibit the proscribed acts when performed in private. It is true that that was said in **S v C** 1987 2 SA

76 at 79G citing **S v C** 1983 4 SA 361 (T) at 364F, but the reliance was misplaced since what the earlier judgment said was:

> "The object of the section is clearly not to punish acts performed in private, as long as no more than two persons are present on any such occasion."

The section was introduced by Act 57 of 1969 and the definition of 'a party' echoes section 1(2)(a) of the Sexual Offences Act 1967 (United Kingdom). The text of section 1, (which was regarded as a major liberalisation of the law concerning sexual relationships between men) reads —

> "(1) Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years.
>
> (2) An act which would otherwise be treated for the purposes of this Act has been done in private shall not be so treated if done —
>
> (a) when more than two persons take part or are present; or
>
> (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise."

This section still embodies the English law.

Although the words of section 20A seem to be wide enough to strike at conduct by heterosexual men in the presence of women only or in the presence of other heterosexual men (the sort of stupid romp that sometimes results from excessive indulgence in liquor by sportsmen), the likelihood is that it was aimed at conduct directed by and at homosexuals. Prof B D van Niekerk's comment (87 (1970) SALJ 87 at 89-90) that the apparent object was "to stamp out homosexual

gatherings" seems to be inadequate, unless one assumes (which I do not) that homosexual men only associate for sexual purposes. It seems more likely that the legislature had in mind to discourage orgiastic practices to which homosexuality seems often to fall prey (if one may fairly judge from the books on "male bonding" which lie exposed to the inspection of all and sundry, including children, in the reputable bookshops of Johannesburg). These multiple couplings are not part of the picture of a "warm and stable relationship" to which counsel often referred in argument and such behaviour may fairly form the subject of public censure and legislative control whether in a hetero- or homosexual context.

The schedule to the Criminal Procedure Act 1977

The Criminal Procedure Act lists sodomy as a Schedule 1 offence. The effect of this inclusion is as follows:

(i) Section 37(1)(a)(iv) of the Act empowers any police official to take fingerprints, palm-prints or footprints of any person on whom a summons has been served in respect of the offence of sodomy;

(ii) Section 40(1)(b) of the Act allows a peace officer to arrest any person, with or without a valid warrant, if the officer reasonably suspects that that person has committed sodomy;

(iii) Section 42(1) of the Act allows a private person to arrest any person with or without a valid warrant if the private person reasonably suspects the individual has committed sodomy;

(iv) Section 49(2) of the Act allows a person authorised to arrest an individual suspected of having committed sodomy to kill the suspect if that suspect flees the scene of the crime and there is no other way to stop the suspect from avoiding arrest;

(v) Sections 60(4)(a), 60(5)(e) and 60(5)(g) of the Act provide that bail may be refused to an accused who is likely to commit sodomy and, in determining whether that will happen, the Court may take into account that the accused has in the past committed sodomy or has a propensity to do so;

(vi) Section 185A(a) of the Act provides for the protection of witnesses who have given or who are likely to give material evidence with reference to the offence of sodomy;

(vii) Section 3(1)(b) of the Interception and Monitoring Prohibition Act, 127 of 1992 (read with the definition of "serious offence" under section 1 of that Act), allows the State to intercept postal articles and private communications necessary for investigating sodomy;

(viii) Section 13(8) of the South African Police Service Act, 68 of 1995 gives wide powers to members of the South African Police Service to erect roadblocks in the prevention, detection and investigation of the offence of sodomy;

(ix) Section 1(8) and (9) of the Special Pensions Act, 69 of 1996 disqualifies persons guilty of sodomy from receiving a pension in terms of section 1 of that Act;

(x) Section 2(1)(c) of the Special Pensions Act precludes a surviving spouse or surviving dependant from receiving a surviving dependant's pension if the pensioner is guilty of the crime of sodomy.

The Schedule to the Security Officers Act 92 of 1987

The Security Officers Act deals **inter alia** with the requirements for registration as a security officer. Sodomy is listed in the Schedule to the Act. The provisions of this Act have the following consequences:

(i) Any person convicted of sodomy is prohibited from registering as a security officer (section 12(1)(b));

(ii) The registration of a security officer who is found guilty of sodomy may be withdrawn (section 15(1)(a)(i);

(iii) A security officer who commits sodomy is guilty of improper conduct (section 21(b)).

The law and homosexuality

Counsel, following Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights" 110 (1993) SALJ 450-472, submitted that, historically, the principal aim of criminalising specific types of sexual conduct was to stigmatise, punish and exclude people who did not conform to the dominant heterosexual norm. I suggest that that is a reactive conclusion which is too narrow and the truth is much broader: the censure arose mainly from moral objections rooted in religious interpretation; it was believed society needed to be protected against invasions of morality which the State regarded as subversive of the State religion and the fabric which bonds society together; thus if licence were granted to commit acts against the course of nature, the building blocks of human association, the propagation of the species, the family relationship and the integrity and dignity of right-thinking subjects of the State would be threatened or undermined. Criminalisation of homosexual conduct reflected the seriousness with which the State viewed deviations from sexual rectitude. The consequence was (and is) persecution, stigmatisation, exclusion of sexual non-conformists and punishment. The long and unhappy history is outlined in **S v Kampher supra**.

The new constitutional dispensation in South Africa was preceded by a softening in attitudes towards deviations from the heterosexual norm which was reflected

both in academic writing and in the judgments of the Courts. All South Africa's major political parties supported inclusion of the equality provisions in the Bill of Rights as a protection against discrimination on the grounds of sexual orientation.

In his pre-constitutional article referred to above Prof Cameron wrote:

> "The only plausible argument which adequately recognises sexual orientation as an impermissible ground of discrimination is based on a claim to equal protection of the law. This argument asserts unequivocally that discrimination on the ground of homosexuality is untenable, because sexual orientation is — or should be — a matter of indifference morally and constitutionally. There is thus no basis which can be countenanced before the law for treating homosexual men and women differently."

In my view section 9 of the Constitution achieves that result, subject only to the limited exceptions which may arise from the application of section 36 to a given case. Prof Cameron's article continues:

> "This implies acceptance of three critical premisses. They are (a) that sexual orientation, and consensual conduct expressing it, do not in themselves justifiably evoke social censure (whatever divergent moral views one may hold about it); (b) that homosexual orientation is not in itself evidence of illness or depravity; and (c) that orientation (homosexual or heterosexual) is or should be an indifferent factor in the distribution of social goods and services and the award of social opportunities."

I respectfully agree. Constitutionally we have reached a stage of maturity in which recognition of the dignity and innate worth of every member of society is not a matter of reluctant concession but is one of easy acceptance. Nor is that perception inimical to views held by a large percentage of the population, as witness the liberalisation of attitudes in the media, the open acceptance of persons

of divergent sexual orientation into positions of responsibility in society and the public recognition of what has always been the **de facto** reality that, by reason of their particular emotional and intellectual make-up, many homosexuals contribute vastly to the greater well-being of mankind. This is not to suggest that there has ever been reason to behave otherwise save for the usual impediments to all kinds of human progress such as religious intolerance, ignorance, superstition, bigotry, fear of what is different from or alien to everyday experience and the millstone of history. The Constitution enjoins equal treatment before the law of persons entitled to its protection. That excludes individual or class discrimination. To penalise a homosexual person for the expression of his or her sexuality can only be defended from a standpoint which depends on the baneful influences to which I have alluded.

The Constitution

On 4 February 1997 the Constitution of the Republic of South Africa (Act 108 of 1996) came into force. It is this nation's highest law. The centrality of the Bill of Rights and its foundational values to the newly created democracy are expressed in section 7 which provides:

> "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.
>
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

Section 7(2) is couched in imperative terms. It imposes a positive obligation upon the State. Section 237 of the Constitution requires that all constitutional obligations be performed diligently and without delay. By reason of the provisions of section 39(2) of the Constitution Courts are under a duty to promote i.e. to further or advance, the spirit, purport and objects and of the Bill of Rights.

Section 1 of the Constitution identifies the foundational values upon which the State is founded namely

> "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Consitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness."

The wide reach of the Constitution is manifested in section 8 which provides:

> "(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.
>
> (2) A provision of the Bill of Rights binds natural and juristic persons if, and to the extent, that it is applicable, taking into account the nature of the right and of any duty imposed by the right.
>
> (3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a Court —
>
> (a) in order to give effect to a right in the Bill, must apply, or where necessary, develop the common law to the extent that legislation does not give effect to that right; and