IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Applicant

and

MARIÉ ADRIAANA FOURIE	First Respondent
CECELIA JOHANNA BONTHUYS	Second Respondent

and

LESBIAN AND GAY EQUALITY PROJECT	*Amicus Curiae*

AFFIDAVIT

I, the undersigned,

BARRY PHILLIP GILDER

do hereby make oath and state as follows:

1.

1.1 I am in the employ of the Department of Home Affairs ("the department"). I am the Director-General ("the DG") of the Department and the second applicant.

1.2 I am authorised to depose to this affidavit in support of the application for leave to appeal to this Court.

2. Save where otherwise indicated, the facts to which I depose are based on my personal knowledge and are true and correct. To the extent that I rely on facts which are not within my personal knowledge, I verily believe them to be true and correct. To the extent that I make submissions in respect of law, I am guided by the advice of attorneys and counsel in this matter and make submissions in reliance on such advice.

3. The respondents are two adult females who have been living together in a permanent same-sex relationship.

4. The applicants respectfully apply for leave to appeal to this Court against the whole judgment and order of his Lordship Cameron JA, (supported by three other judges of the Supreme Court of Appeal

("SCA")), delivered on 30 November 2004 in the SCA under case number 232/2003.

5. The applicants now apply to this Court for leave to appeal in terms of rule 19 of the Constitutional Court rules. In terms of rule 19(3)(a) of this Court, this application must be accompanied by the judgment of the SCA. A copy of the judgment delivered by the SCA is annexed hereto marked "**A**".

6. In this affidavit, I deal with constitutional matters flowing from the SCA judgment and the grounds on which such decision is appealed against.

BACKGROUND:

7. The respondents initially approached to the Pretoria High Court and the matter came before Roux J, who dismissed the application. A copy of the judgment delivered in the High Court is annexed hereto marked "**B**".

8. The Lesbian and Gay Equality Project applied to intervene in terms of rule 16(A) of the uniform rules and was admitted as an *amicus curiae* ("the *amicus*") and was allowed to make submissions.

9. The respondents applied to the Pretoria High Court for leave to appeal against Roux J's judgment. The application came before Mynhardt J, who refused to grant the respondents a positive certificate in terms of the old rule 18 of the Constitutional Court rules but granted them leave to appeal to the SCA.

10. The respondents approached the Constitutional Court for leave to appeal directly to that Court against the judgment and the order of Roux J. This application was refused on the ground that the interest of justice required that it be heard first by the SCA.

11. After the attempt to approach this Court directly failed, the respondents approached the SCA and the matter was heard on 23 August 2004.

THE SCA

12. The issues on appeal to the SCA were:

    (a) the power of the SCA to develop the common law, taking into account:

        (i) sections 8(3), 39(2) and 173;

(ii) the limitation clause in terms of the provision in section 36(1) of the Constitution.

(b) whether the SCA in the particular circumstances of this case could develop the common law definition of marriage in order to promote the spirit, purport and objects of the Bill of Rights (s 39(2)).

THE DECISION OF THE SCA

13. In its judgment, the SCA held:

(a) that it has the task to develop the common law in accordance with the spirit, purport and the objects of the Bill of Rights, and the court must not hesitate to do so;

(b) that developing the common law involves a simultaneous creative and declaratory function in which the court puts the final touch on the process of incremental development that the Constitution has already authorized;

(c) that the extension of the common law definition of marriage to same sex couples cannot be regarded as involving a fundamental change in the traditional concept of marriage;

(d) that where the court order does not touch on legislation at all but develops the common law, it could not be regarded as straying into the legislative domain;

(e) that this was not a case in which suspension of the order was necessary as to do so would not be "in keeping with principle, the justice of this case or the role the Constitution assigns to courts in developing the common law".

14. On the issue of the suspension of the order, Farlam JA was of the view that the order of the court should be suspended in order to give Parliament time to take a decision on the matter and that this was dictated by the application of the doctrine of the separation of powers, which is one of the fundamental principles underlying our Constitution.

15. The majority made the following order:

"(1) It is declared that:

(a) In terms of sections 8(3), 39(2) and 173 of the Constitution, the common law concept of marriage is developed to embrace same-sex partners as follows:

'Marriage is the union of two persons to the exclusion of all others for life.'

(b) The intended marriage between the appellants is capable of lawful recognition as a legally valid marriage, provided the formalities in the Marriage Act 25 of 1961 are complied with.

(2) The respondents are ordered to pay the applicants' costs".

16. Farlam JA made the following order:

"I would make an order allowing the appeal with costs and replacing it with an order declaring that the intended marriage between the appellants, provided the formalities set out in the Marriage Act 25 of 1961 are complied with, would be capable of being recognised as a legally valid marriage, but suspending this declarator to enable Parliament to enact legislation to ensure that the appellants' rights to equality and human dignity are not unjustifiably infringed and providing that if such legislation is enacted, the declarator would fall away.

I would also order the respondents to pay the applicants' costs in the court below."

17. It is submitted that this case raises a number of constitutional matters which warrant the attention of this Court. The grounds of appeal are addressed below.

GROUNDS OF APPEAL

18. The SCA erred in the following respects:

(a) in dismissing Roux J's finding that failure to attack the provisions of the Marriage Act 25 of 1961 constituted an obstacle to granting the respondents any relief and was therefore fatal to the application;

(b) in developing the common law in a manner inconsistent with its obligation under section 39(2) of the Constitution and in violation of the principle of separation of powers;

(c) in finding that the extension of the common law definition of marriage to same-sex couples cannot be regarded as involving a fundamental change in the traditional concept of marriage;

(d) in the interpretation of section 39(2) in that it failed to consider the values of a significant majority of society; and

(e) in failing to take into account international comparative jurisprudence relating to same-sex marriages.

19. Alternatively, in the event, it is found that the SCA was correct in its findings, the majority erred in not suspending the order.

20. It is submitted that all the above grounds are constitutional matters.

INTERESTS OF JUSTICE

21. It is submitted that the prospects of success are good and that there is a reasonable prospect that this Court may materially alter the SCA judgment. It is in the interests of justice that the constitutional matters, as well as the issues connected to the decisions on constitutional matters finally be settled by this Court. In particular, it is submitted that the ruling of this Court on the nature, limit and extent of the powers of the court in terms of section 39(2), will not only be important to the present parties, but to many other parties and the public at large.

22. It is in the interests of the parties involved in this matter that the constitutional matters are finally determined by this Court.

23. The proposed appeal involves a live controversy, which is not yet moot and indeed it is a matter of great public importance.

24. The evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter.

CONCLUSION

25. The applicants pray for an order as set out in the Notice of Application.

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DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS THE CONTENTS OF THE DECLARATION WHICH WAS SWORN TO/AFFIRMED BEFORE ME ON THIS THE DAY OF 2004. THERE HAS BEEN COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATIONS CONTAINED IN GOVERNMENT GAZETTE R1258, DATED 21 JULY 1972 AS AMENDED.

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COMMISSIONER OF OATHS