

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/03

MARIE ADRIAANA FOURIE

First Applicant

CECELIA JOHANNA BONTHUYS

Second Applicant

versus

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL: HOME AFFAIRS

Second Respondent

Decided on: 31 July 2003

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JUDGMENT

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MOSENEKE J:

*Introduction*

[1] The applicants seek leave to appeal directly in terms of Rule 18 of the Rules of this Court, against the judgment and order of Roux J made on 18 October 2002 in the Pretoria High Court. Roux J dismissed their application and ordered that the applicants and The Lesbian and Gay Equality Project, which intervened as *amicus curiae*, pay the respondents' costs jointly and severally,<sup>1</sup> such costs to include those

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<sup>1</sup> The respondents have since abandoned the costs order made in their favour against the *amicus curiae*.

consequent upon the use of two counsel. The applicants are both females who have been living together as partners in a permanent same-sex relationship since June 1994. In the application before the High Court, the applicants sought, first, a declaratory order that the “marriage” between them was legally binding in terms of the Marriage Act<sup>2</sup> (the Marriage Act), provided that such marriage complied with the formalities prescribed in the Act; secondly, an order directing that the first and second respondents register their relationship as a marriage in terms of the Marriage Act and the Identification Act.<sup>3</sup> The respondents opposed the application.

[2] The application appears to be premised on the assumption that the rule of law that barred same-sex marriages has, since the introduction of the Constitution, been developed to warrant the relief sought or that it should be developed to accord with the spirit, purport and objects of the Bill of Rights. Moreover, the applicants’ premise is that the rule amounts to an invasion of their constitutional rights to dignity<sup>4</sup> and equality,<sup>5</sup> including the right to be free from unfair discrimination.<sup>6</sup>

[3] The High Court dismissed the application on the ground that, to the extent that the applicants sought a declaratory order under section 19(1)(a)(iii) of the Supreme

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<sup>2</sup> Act 25 of 1961.

<sup>3</sup> Act 68 of 1997.

<sup>4</sup> Section 10 of the Constitution.

<sup>5</sup> Section 9 of the Constitution.

<sup>6</sup> Section 9(3) of the Constitution.

Court Act,<sup>7</sup> the right that they sought to have determined was no more than an assumption that they were married and thus had no validity in law. The court held that, under the common law, marriage is the legal union of a man and a woman for the purpose of a lifelong mutual relationship and that the Marriage Act contemplates a marriage between a male and a female, to the exclusion of all others. The court concluded that to require the respondents to register their relationship as a marriage would be to compel them to do what is unlawful.

[4] Aggrieved by that decision, the applicants approached the High Court for a positive certificate under Rule 18(2) for leave to appeal directly to this Court and if refused, to the Supreme Court of Appeal (SCA). The High Court refused to issue a positive certificate but granted the applicants leave to appeal to the SCA. The applicants, have nevertheless, approached this Court in terms of Rule 18(7).

[5] The applicants contend that it is in the interests of justice that their appeal be heard directly by this Court. They submit that such leave should be granted on the grounds that, first, the High Court erred in approaching the claim for a declarator as discretionary relief under section 19(1)(a)(iii) of the Supreme Court Act rather than as a prayer for effective relief in terms of section 38<sup>8</sup> read together with section 173<sup>9</sup> of

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<sup>7</sup> Act 59 of 1959.

<sup>8</sup> Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own

the Constitution;<sup>10</sup> secondly, a direct appeal to this Court would save substantial legal costs and provide a speedy and effective restoration of their constitutional rights to equality and dignity as well as the rights of other members of the homosexual community; thirdly, the equality and dignity jurisprudence of this Court has ripened to a stage where the prospects of success of their claim are high and the skill and experience of the SCA in developing the common law would be neither relevant nor necessary; and fourthly, this case raises important constitutional issues which deserve the attention of this Court to pronounce, in a holistic manner, on the constitutional rights of persons who are involved in permanent same-sex partnerships.

[6] The respondents have filed a notice of intention to oppose the present application.

*The applicable test*

[7] Section 167(6)<sup>11</sup> of the Constitution, read with Rule 18(6),<sup>12</sup> governs when an appeal from a decision of any court other than the SCA may be brought directly to this

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- name;
  - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
  - (d) anyone acting in the public interest; and
  - (e) an association acting in the interest of its members.”

<sup>9</sup> Section 173 of the Constitution provides:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

<sup>10</sup> For this proposition the applicants place reliance on the case of *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 9-10 and 12.

<sup>11</sup> Section 167(6) provides:

Court. Such an appeal is subject to the leave of this Court, which must be granted when it is in the interests of justice to do so. In *Khumalo and Others v Holomisa*<sup>13</sup> it was accordingly held that the “Constitution intends that the interests of justice (coupled with leave of this Court) be the determinative criterion for deciding when appeals should be entertained by this Court.” However, the decision in respect of which leave is sought must be on a constitutional matter.<sup>14</sup> Once it is clear that the case does raise a constitutional matter, the next question is whether it is in the interests of justice for an appeal to lie directly to this Court. This Court has developed criteria for deciding whether it is in the interests of justice or not and has made it clear that each case has to be decided on its own merits.<sup>15</sup>

*Was the dismissal of the application a decision on a constitutional matter?*

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“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.”

<sup>12</sup> Rule 18(6) provides:

- “(a) If it appears to the court hearing the application . . . that-
- (i) the constitutional matter is one of substance on which a ruling by the Court is desirable; and
  - (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence; and
  - (iii) there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given, such court shall certify on the application that in its opinion

(b) The certificate shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court.”

<sup>13</sup> 2002 (5) SA 401 (CC); 2002 (8) BCLR 771(CC) at para 8.

<sup>14</sup> Rule 18 specifically limits a direct appeal of this class to “a decision on a constitutional matter”. *Id* at para 7.

<sup>15</sup> Above n13 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 at para 32.

[8] It is crucial to ascertain first whether the dismissal of the application constitutes a decision on a constitutional matter. The High Court took the view that the issues before it did not raise any constitutional matter since there was no constitutional challenge to the applicable provisions of the Marriage Act; the relief sought was discretionary under section 19 of the Supreme Court Act and the applicants had not established, under the common law or statute, the right to marry.

[9] Before the High Court, the applicants did not seek a declaration that the Marriage Act and the Identification Act were inconsistent with the Constitution or an order that the common law should be developed to make provision for same-sex partnerships with consequences appropriate to such partnerships. Such relief, if sought, would clearly have raised constitutional matters.<sup>16</sup> It seems to me that the relief they required can be achieved only if both the common law and the relevant statutory infrastructure is developed or amended to permit marriage between gay and lesbian couples. However, neither in their notice of motion, nor in their founding affidavits, nor in their written argument before the High Court, did the applicants advance a challenge to the statutory infrastructure.

*Interests of justice*

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<sup>16</sup> See *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 33-7.

[10] The applicants' claim that their prospects of success on appeal are high in the light of prior decisions of this Court on permanent same-sex partnerships.<sup>17</sup> Although their application was unsuccessful before the High Court, leave was granted for their appeal to lie to the SCA. Even if I assume in the applicants' favour that there are prospects of success on appeal, the matter does not end there for prospects of success are not necessarily decisive in determining whether it is in the interests of justice for an appeal to be entertained directly by this Court.<sup>18</sup> To that end, all other relevant factors must be brought into consideration.

[11] The applicants do not seek a declaration that any of the provisions of the legislation dealing with the solemnising or recording of marriages is inconsistent with the Constitution, or if any is, what the appropriate relief would be in that regard. Nor do they address all the consequences that would flow from the recognition of such a union or how it should be dissolved. Nor do they challenge the legislation dealing with the solemnising and recording of marriages or the legislation dealing with the consequences and dissolution of marriages. Nor do they claim substantive relief directed at the need to regulate all the consequences of same-sex relationships and their dissolution. However, whether the claim as formulated by the applicants is appropriate and sufficient to secure effective relief for them if they were to succeed, is

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<sup>17</sup> See *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Satchwell v President of the RSA and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Du Toit and Another v Minister for Welfare and Population Development and Others* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC); *J and Another v Director General: Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

<sup>18</sup> *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

not a matter that need be decided in this application. I am satisfied for reasons that follow that, even if it is, the application for leave to appeal directly to this Court should be refused.

[12] This appeal is likely to raise complex and important questions of the legal conformity of our common law and statutory rules of marriage in the light of our Constitution and its resultant jurisprudence. Marriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover marriage touches on many other aspects of law, including labour law, insurance and tax.<sup>19</sup> These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large. While considerations of saving costs, and of “an early and definitive decision of the disputed issues”<sup>20</sup> are in themselves weighty, they should not oust the important need

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<sup>19</sup> There are at least 44 Acts of Parliament in which reference is made to ‘husband’ and/or ‘wife’ either in the body of the Act or in the regulations to the Act. These include the South African Citizenship Act 88 of 1995; Prevention of Family Violence Act 133 of 1993; Sexual Offences Act 23 of 1957; Insolvency Act 24 of 1936; Child Care Act 74 of 1983; Children’s Act 33 of 1960; Children’s Status Act 82 of 1987; Divorce Act 70 of 1979; Marriage Act 25 of 1961; Matrimonial Affairs Act 37 of 1953; Matrimonial Property Act 88 of 1984; Recognition of Customary Marriages Act 120 of 1998; Banks Act 94 of 1990; Mutual Banks Act 124 of 1993; Mental Health Act 18 of 1973; Income Tax Act 58 of 1962; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Deeds Registries Act 47 of 1937; Mining Titles Registration Act 16 of 1967; Civil Proceedings Evidence Act 25 of 1965; Criminal Procedure Act 51 of 1977; Criminal Law and the Criminal Procedure Act Amendment Act 39 of 1989; Law of Evidence Amendment Act 45 of 1988; Merchant Shipping Act 57 of 1951; Friendly Societies Act 25 of 1956; Government Employees Pension Law 1996; Railways and Harbours Service Act 28 of 1912; Railways and Harbours Acts Amendment Act 15 of 1956; Black Administration Act 38 of 1927; \*South African Passports and Travel Documents Act 4 of 1994; \*Companies Act 61 of 1973; \*Supreme Court Act 59 of 1959; \*Administration of Estates Act 66 of 1965; \*National Parks Act 57 of 1976; \*Mediation in Certain Divorce Matters Act 24 of 1987; \*Health Act 63 of 1977; \*Value-Added Tax Act 89 of 1991; \*Human Tissue Act 65 of 1983; \*South African Police Service Act 68 of 1995; \*National Road Traffic Act 93 of 1996; \*Housing Development Scheme for Retired Persons Act 65 of 1988; \*South African Reserve Bank Act 90 of 1989; \*Black Communities Development Act 4 of 1984; \*Mining Titles Registration Act 16 of 1967. The Acts marked with an asterisk contain references to ‘husband’ and/or ‘wife’ in their regulations only.

<sup>20</sup> See *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 33.

for the common law, read in the light of the applicable statutes, to develop coherently and harmoniously within our constitutional context. The views of the SCA on matters that arise in the appeal are of considerable importance. The nature of the dispute raised by the appeal is, as the High Court correctly held in issuing a negative rule 18(2) certificate, pre-eminently suited to be considered first by the SCA.<sup>21</sup> In this regard, in *Amod v Multilateral Motor Vehicle Accidents Fund*<sup>22</sup> this Court held that:

“When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a ‘constitutional matter’ are of particular importance. Assuming, as Mr Omar contends, that this Court’s jurisdiction to develop the common law in constitutional matters is no different to that of the Supreme Court of Appeal, it is a jurisdiction which ought not ordinarily to be exercised without the matter having first been dealt with by the Supreme Court of Appeal.”

In my view, the interests of justice require that this appeal be heard first by the SCA.

*The order*

[13] The applicants have urged that should this Court refuse leave for a direct appeal, it should grant the applicants leave to appeal to the SCA. Such an order would

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<sup>21</sup> Id at para 31.

<sup>22</sup> 1998 (4) SA 753 (CC); 1998(10) BCLR 1207 (CC) at para 33.

be neither competent nor necessary. The High Court has the power to grant leave to appeal against its judgments and orders to the SCA. As observed earlier, such leave has already been granted. Once the matter has been disposed of by the SCA, it is, of course, open to either party to approach this Court, if so advised, for leave to appeal.

[14] In my view this is not a matter in which it would be appropriate to make any order as to costs.

[15] The application for leave to appeal directly to this Court from the decision of Roux J in the Pretoria High Court is refused.

Chaskalson CJ, Langa DCJ, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J and Yacoob J all concur in the judgment of Moseneke J.

For the Applicant: M. Van Den Berg, Pretoria

For the Respondent: Adams and Adams, Hatfield