

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Home Affairs and Another v Fourie and Another, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)

CCT 60/04

Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others

CCT 10/05

Decided on 1 December 2005

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.

Ms Marié Adriana Fourie and Ms Coelia Johanna Bonthuys, of Pretoria, are the applicants in the first of two cases (the *Fourie* case) that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. They contend that the exclusion comes from the common law definition which states that marriage in South Africa is a union of one man with one woman, to the exclusion, while it lasts, of all others. In the second case, (the *Equality Project* case) the Gay and Lesbian Equality Project challenge section 30(1) of the Marriage Act, which provides that marriage officers must put to each of the parties the following question: "Do you AB... call all here present to witness that you take CD as your lawful wife (or husband)?" The reference to wife (or husband), they contend, unconstitutionally excludes same-sex couples.

The two cases raised the question whether the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amounts to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation, contrary to the provision of the Constitution guaranteeing the right to equality and dignity. And if it does, what is the appropriate remedy that this Court should order?

In the *Fourie* case the High Court held that the applicants were barred from getting an order allowing them to marry because they had not challenged the constitutionality of the Marriage Act. The majority in the Supreme Court of Appeal held that the right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act; in the meanwhile the common law definition of marriage should be developed so as to embrace same-sex couples. The minority judgment held both that the common law should be developed and that the Marriage Act could and should be read there and then in updated form so as to permit same-sex couples to pronounce the vows. It held further, however, that the development of the common law to bring it into line with the Constitution should be suspended to enable Parliament to enact appropriate legislation.

The *Equality Project* case in the meantime was brought as a challenge to the Marriage Act vow as well as to the common law definition. Originally due to be heard in the High Court in October this year, it was eventually set down for January next year. The Equality Project then applied for direct access to this Court to enable their case to be heard together with the appeal and the cross-appeal noted in the *Fourie* case.

The state contended that the Equality Project was incorrect in seeking an order from this Court declaring the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act to be unconstitutional. It argued further that if the Court ruled otherwise, any declaration of invalidity should be suspended to enable Parliament to correct the defect.

The Minister Of Others Affairs

Thomas Griffiths



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