Fourie and another v Minister of Home Affairs and others
[2005] 1 All SA 273 (SCA)

Division:	Supreme Court of Appeal
Date:	30 November 2004
Case No:	232/2003
Before:	IG Farlam, E Cameron, KK Mthiyane, BJ van Heerden JJA and VM Ponnan AJA
Sourced by:	PR Cronjè
Summarised by:	D Harris

• Editor's Summary • Cases Referred to • Judgment •

[1] Constitutional law – Powers of courts – Obligation to develop common law where legislation is inadequate in giving effect to a constitutional right of an individual before the court.

[2] Constitutional law – Right to equality – Right of same-sex partners to marry – Marriage Act 25 of 1961 not making provision for such possibility – Court exercising power to develop common law by expanding definition of marriage to include same-sex partners.

[3] Marriage – Definition – Procreation not a defining characteristic of conjugal relationships.

Editor's Summary

The appellants had been in a same-sex relationship for more than ten years when they approached the court for permission to marry. The problem lay in the fact that they were of the same sex, and to date, marriage as a social and legal institution was understood to be reserved for couples of opposite sexes.

Raising no statutory challenge, the appellants instead requested the Court to develop the common law in accordance with the Constitution. The court *a quo* had dismissed their application for such relief on the ground that the relief they sought was incompatible with the Marriage Act 25 of 1961 ("the Marriage Act").

Held – Section 173 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account the interests of justice. In terms of section 8(3) of the Constitution , when a court is called upon to give effect to a constitutional right of a person before it, it must develop the common law to the extent that legislation does not give effect to that right.

The Constitution enshrines the right not to be discriminated against by the State on the ground of sexual orientation. The Court undertook a detailed examination of the history of our equality jurisprudence, culminating in a number of recent decisions in which same-sex partners have been granted equal rights in certain areas of law. It was evident that marriage forms a cornerstone of society and that its significance extends to many aspects of an individual's existence. To exclude homosexual couples from the advantages and recognition of marriage was found to be anathema to the spirit and specific provisions of the Constitution. In the absence of justification, it constituted unfair discrimination that violated the equality of the appellants.

Page 274 of [2005] 1 All SA 273 (SCA)

In explaining the justification for the constitutional violation, the respondents argued that the procreative purpose of marriage required that the institution be restricted to heterosexual couples only. This argument did not pass muster with the Court in the light of decisions which had rejected procreation as a defining characteristic of conjugal relationships.

Addressing the approach of the High Court, the present Court differed with the opinion that the provisions of the Marriage Act were peremptory and that they constituted an obstacle to granting the appellants any relief. The Marriage Act contains no definition of marriage, and the accepted definition was based on the assumption

that it applied to heterosexual couples only. The Court, for the reasons articulated throughout its judgment thus far, rejected that assumption. It concluded that the appellants were entitled to the relief sought by them. The majority judgment differed from that of the minority in refusing to suspend the order.

Notes

For Constitutional Law see:

- *LAWSA* Second Edition (Vol 5(3), paras 1–379)
- Cheadle H, Davis D, Haysom N *South African Constitutional Law: The Bill of Rights* Durban LexisNexis Butterworths 2003

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed. **HN** refers to corresponding headnote number.)

South Africa

Brink v Kitshoff NO 1996 (6) BCLR 752 (1996 (4) SA 197) (CC)	278
Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (2001 (4) SA 938) (CC)	276
Daniels v Campbell 2004 (7) BCLR 735 (2004 (5) SA 331) (CC)	279
Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (8) BCLR 837) (2000 (3) SA 936) (CC)	280
Du Plessis v Road Accident Fund 2003 (11) BCLR 1220 (2004 (1) SA 359) (SCA)	279
Du Toit v Minister of Welfare and Population Development 2002 (10) BCLR 1006 (2003 (2) SA 198) (CC)	279
Durban City Council v Gray 1951 (3) SA 568 (A)	319
Fourie and another v Minister of Home Affairs and another 2003 (10) BCLR 1092 (2003 (5) SA 301) (CC)	287
Frankel's Estate v The Master 1950 (1) SA 220 (A)	315
Fraser v Children's Court, Pretoria North and others 1997 (2) BCLR 153 (1997 (2) SA 261) (CC)	323
Harksen v Lane NO 1997 (11) BCLR 1489 (1998 (1) SA 300) (CC)	281
Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2000 (10) BCLR 1079 (2001 (1) SA 545) (CC)	278
J v Director General, Department of Home Affairs 2003 (5) BCLR 463 (2003 (5) SA 621) (CC)	279
Langemaat v Minister of Safety and Security [1998] 2 All SA 259 (1998 (3) SA 312) (T)	279

Page 275 of [2005] 1 All SA 273 (SCA)

Mashia Ebrahim v Mahomed Essop 1905 TS 59	303
Minister of Welfare and Population Development v Fitzpatrick 2000 (7) BCLR 713 (2000 (3) SA 422) (CC)	323
Min of Health and others v The Treatment Action Campaign and others 2002 (10) BCLR 1028 (2002 (5) SA 713) (CC)	292

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (2000 (2) SA 1) (CC) 279

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (1999 (1) SA 6) (CC) – [HN 3] 279

S v Bhulwana, S v Gwadiso 1995 (12) BCLR 1579 (1996 (1) SA 388) (CC) 56

S v Makwanyane 1995 (6) BCLR 665 (1995 (3) SA 391) (CC) 290

Satchwell v President of the Republic of South Africa 2002 (9) BCLR 986 (2002 (6) SA 1) (CC) 279

Seedat's Executors v The Master (Natal) 1917 AD 302 303

Van Niekerk v Van Niekerk 1959 (4) SA 658 (GW) 316

Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening) 2002 (8) BCLR 810)(2002 (5) SA 246) (CC) 283

Venter v Venter 1949 (4) SA 123 (W) 316

Zondi v Member of the Executive Council for Traditional and Local Government Affairs and others 2004 JOL 13507 (CC) 289

Canada

Barbeau v British Columbia (Attorney-General) (2003) 225 DLR (4th) 472 (BCCA) 310

Catholic Civil Rights League v Hendricks [2004] QJ No 2593 324

Corbiere v Canada [1999] 2 SCR 203 324

Dunbar & Edge v Yukon (Government of) & Canada (AG) 2004 YKSC 54 310

EGALE Canada Inc v Canada (Attorney General) (2003) 225 DLR (4th) (BCCA) 324

EGALE Canada Inc v Canada (Attorney-General) 228 DLR (4th) 416 (BCCA) 324

Halpern v Attorney-General of Canada 225 DLR 529 (Ontario Court of Appeal) 281

Hendricks v Quebec Procureur Genera [2002] RJQ 2506 (SC of Quebec) 310

R v Salituro (1991) 3 SCR 654 ((1992) 8 CRR (2d) 173) (SCC) 308

Re Layland and Minister of Consumer and Commercial Relations; Attorney-General of Canada et al, Interveners (1993) 104 DLR (4th) 214 (Ont Div Ct) 304

Schachter v Canada (1992) 10 CRR (2d) 1 (SCC) 323

United Kingdom

Bellinger v Bellinger [2003] 2 AC 467 (HL (E)) 311

United States of America

Goodridge v Department of Public Health 440 Mass 309, 798 NE 2d 941 282

Judgment

CAMERON JA

[1] I am indebted to my colleague Farlam JA for the benefit of reading his judgment. On the main question, the development of the common law,

Page 276 of [2005] 1 All SA 273 (SCA)

we agree. We differ in our approach to one aspect of the Marriage Act 25 of 1961, and on whether the order should be suspended. In view of this and other differences I propose briefly to set out my reasons for allowing the appeal, without the order of suspension Farlam JA proposes.

[2] The appellants are two adult persons who on the undisputed evidence love each other. They feel and have deliberately expressed an exclusive commitment to each other for life. The question is whether the common law of this country allows them to marry. That question is controversial because they are of the same sex. Until now, marriage as a social and legal institution has been understood to be reserved for couples of opposite sexes. Joined by the Lesbian and Gay Equality Project as *amicus*, the appellants – two women who more than ten years ago dedicated themselves to a life together – ask the court to issue a declaration that this is not so. They wish to be married, they testify, "for the very reason that the bond between us is so genuine and serious",[1] and because not being able to marry presents a host of practical and legal impediments to their shared life.

[3] They raise no statutory challenge. Instead, their founding affidavit asks the court to grant them relief by invoking its jurisdiction to develop the common law in accordance with the Constitution. In the Pretoria High Court Roux J dismissed their application on the ground that the relief they sought was incompatible with the Marriage Act 25 of 1961. He ordered them and the *amicus* to pay the costs of the respondents (the Minister and Director-General of Home Affairs). (The respondents later abandoned the costs order against the *amicus*.)

[4] The Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts "to develop the common law, taking into account the interests of justice" (section 173). The Bill of Rights (section 8(3)) provides that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" (though it may develop the rules of the common law to limit the right in accordance with the limitations provision in section 36(1)). It also provides that when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights" (sec-tion 39(2)).

[5] Taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately.[2]

Page 277 of [2005] 1 All SA 273 (SCA)

[6] This provides the background to our task in the appeal. At its centre is the fact that our Constitution expressly enshrines equality on the ground of sexual orientation.[3] When this took effect at the birth of our democracy on 27 April 1994,[4] it was unique: at the time no other country's founding document outlawed unfair discrimination on the express ground of sexual orientation. Its inclusion in the list of conditions specially protected against unfair discrimination was both novel and bold.[5] This is important to emphasise, not because our decision requires boldness, but because the reasons for including sexual orientation in the Constitution illuminates our path.

[7] Through more than 300 years, the primary criterion for civic and social subordination in South Africa was race. On the basis of their skin colour, black women and men were subjected to a host of systematic indignities and exclusions. These included denial of voting rights and citizenship. What was unique about apartheid was not that it involved racial humiliation and disadvantage – for recent European history has afforded more obliterating realisations of racism – but the fact that its iniquities were enshrined in law. More than anywhere else, apartheid enacted racism through minute elaboration in systematised legal regulation. As a consequence, the dogma of race infected not only our national life but the practice of law and our courts' jurisprudence at every level.

[8] Yet despite this rank history, the negotiating founders determined that our aspirations as a nation and the structures for their realisation should be embodied in a constitution that would regulate contesting

claims through law. This decision embodied a paradox. Though apartheid used legal means to exclude the majority of this country's people from civic and material justice, the law – embodied in a detailed founding document – would now form the basis for our national aspirations. This paradox lies at

Page 278 of [2005] 1 All SA 273 (SCA)

the core of our national project – that we came from oppression by law, but resolved to seek our future, free from oppression, in regulation by law. Our constitutional history thus involves:

> "a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance".6

[9] In expressing this vision of our future, the founders committed themselves to a conception of our nationhood that was both very wide and very inclusive. In this lay a further paradox: for the very extent of past legal exclusion and denigration now determined the generosity of the protection that the Constitution offered. It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans.

[10] These paradoxes illuminate the significance of the Constitution's promise of freedom from unfair discrimination on the ground of sexual orientation. For though oppression on the ground of sexual orientation was not paramount in the scheme of historical injustice, it formed part of it, and the negotiating founders deliberately committed our nation to a course that disavowed all forms of legalised oppression and injustice.7 Instead of selective remediation of the badges of repression and dishonour, all criteria of unfair discrimination were renounced in favour of an ample commitment to equality under law. The national project of liberation would not be mean-spirited and narrow but would encompass all bases of unjust denigration. Non-discrimination on the ground of sexual orientation was to be a part – perhaps a relatively small part, but an integral part – of the greater project of racial reconciliation and gender and social justice through law to which the Constitution committed us.

[11] The fact that homosexuality was in 1994 and still is a controversial issue in Africa, as elsewhere in the world, did not deflect from this commitment. The equality clause went further than elsewhere in Africa: but this was because the legal subordination imposed by colonialism and apartheid went further than anywhere else in Africa. It lasted longer, was more calculated, more intrusive, more pervasive and more injurious. In response the nego-

Page 279 of [2005] 1 All SA 273 (SCA)

tiating founders offered the humane vision of nationhood on the basis of expansive legal protections.

[12] This setting explains the "strides"8 that our equality jurisprudence has taken in respect of gays and lesbians in the last ten years. Consensual sexual conduct between adults in private has been freed from criminal restriction, not only because sexual orientation is specifically listed in the Bill of Rights, but on wider grounds of dignity and privacy.9 Same-sex partners have been held to be entitled to access to statutory health insurance schemes.10 The right of permanent same-sex partners to equal spousal benefits provided in legislation has been asserted.11 The protection and nurturing of same-sex partners can jointly offer children in need of adoption has been put on equal footing with heterosexual couples.12 The right of a same-sex partner not giving birth to a child conceived by artificial insemination to become the legitimate parent of the child has been confirmed.13 The equal right of same-sex partners to beneficial immigrant status has been established.14 And this Court has developed the common law by extending the spouse's action for loss of support to partners in permanent same-sex life relationships.15

[13] The importance of these cases lies not merely in what they decided, but in the far-reaching doctrines of dignity, equality and inclusive moral citizenship16 they articulate. They establish the following:

(a) Gays and lesbians are a permanent minority in society who in the past have suffered from patterns of disadvantage. Because they are a minority unable on their own to use political power to secure legislative advantages, they are exclusively reliant on the Bill of Rights for their protection.17

(b) The impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels.18

Page 280 of [2005] 1 All SA 273 (SCA)

(c) "The sting of past and continuing discrimination against both gays and lesbians" lies in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they "do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships". This "denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity", namely that "all persons have the same inherent worth and dignity", whatever their other differences may be.19

(d) Continuing discrimination against gays and lesbians must be assessed on the basis that marriage and the family are vital social institutions. The legal obligations arising from them perform important social functions.20 They provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children.21

(e) Family life as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change.22

(f) Permanent same-sex life partners are entitled to found their relationships in a manner that accords with their sexual orientation: such relationships should not be subject to unfair discrimination.23

(g) Gays and lesbians in same-sex life partnerships are "as capable as heterosexual spouses of expressing and sharing love in its manifold forms". They are likewise "as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household". They "are individually able to adopt children and in the case of lesbians to bear them". They have in short "the same ability to establish a *consortium omnis vitae*". Finally, they are "capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life" in a way that is "not distinguishable in any significant respect from that of heterosexual spouses".24

(h) The decisions of the courts regarding gays and lesbians should be seen as part of the growing acceptance of difference in an increasingly open

Page 281 of [2005] 1 All SA 273 (SCA)

and pluralistic South Africa that is vital to the society the Constitution contemplates.25

(i) Same-sex marriage is not unknown to certain African traditional societies.26

[14] These propositions point our way. At issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans. As Madala J has pointed out, not everyone may choose to get married: but heterosexual couples have the choice.27 The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. 28 It offers a social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.

[15] The current common-law definition of marriage deprives committed same-sex couples of this choice. In

this our common law denies gays and lesbians who wish to solemnise their union a host of benefits, protections and duties. Legislation has ameliorated,29 but not eliminated,30 the disadvantage same-sex couples suffer.31 More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.

[16] The vivid message of the decisions of the last ten years is that this exclusion cannot accord with the meaning of the Constitution, and that it "un-

Page 282 of [2005] 1 All SA 273 (SCA)

dermines the values which underlie an open and democratic society based on freedom and equality".32 In the absence of justification, it cannot but constitute unfair discrimination that violates the equality and other guarantees in the Bill of Rights.

[17] The justification respondents' counsel suggested in this case was in essence that the procreative purpose that is usually and rightly associated with marriage requires that the institution be restricted to heterosexual couples only. But this does not pass. The suggestion that gays and lesbians cannot procreate has already been authoritatively rejected as a mistaken stereotype.33 In any event the Constitutional Court has held that "from a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships".34

[18] The appellants moreover do not seek to limit procreative heterosexual marriage in any way. They wish to be admitted to its advantages, notwithstanding the same-sex nature of their relationship. Their wish is not to deprive others of any rights. It is to gain access for themselves without limiting that enjoyed by others. Denying them this, to quote Marshall CJ in the Massachusetts Supreme Court of Judicature, "works a deep and scarring hardship on a very real segment of the community for no rational reason."35 Marshall CJ elaborated thus:

> "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognising the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognising the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit." (Para 57.)

[19] It is for this reason that the question of extending marriage to same-sex couples involves such intense and pure questions of principle. As Sachs J has observed in a different setting, "because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitutional order".36 The focus in this case falls on the intrinsic

Page 283 of [2005] 1 All SA 273 (SCA)

nature of marriage, and the question is whether any aspect of same-sex relationships justifies excluding gays and lesbians from it. What the Constitution asks in such a case is that we look beyond the unavoidable specificities of our condition – such as race, gender and sexual orientation – and consider our intrinsic human capacities and what they render possible for all of us. In this case, the question is whether the capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation. The answer suggested by the Constitution itself and by ten years of development under it is, "Yes".

[20] The remaining justification sought to be advanced – impliedly if not expressly – invokes the acknowledged fact that most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour. Six years ago, the Constitutional Court acknowledged that revoking the criminal prohibitions on private consensual homosexual acts touched "deep convictions" and evoked "strong emotions", and that

contrary views were not confined to "crude bigots only".37 We must do the same. Our task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this our sole duty lies to the Constitution: but those we engage with most deeply in explaining what that duty entails is the nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.

[21] In interpreting and applying the Constitution we therefore move with care and respect, and with appreciation that a diverse and plural society is diverse and plural precisely because not everyone agrees on what the Constitution entails. Respect for difference requires respect also for divergent views about constitutional values and outcomes.

[22] It is also necessary to be mindful, as the Constitutional Court reminds us, "of the fact that the major engine for law reform should be the Legislature and not the Judiciary".38 In the same breath in which it issued this cautionary, however, the court drew attention to the imperative need for the common law to be consonant with "a completely new and different set of legal norms". It therefore urged that courts "remain vigilant" and not "hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights".39

[23] In moving forward we also bear in mind that the meaning of our constitutional promises and guarantees did not transpire instantaneously. Establishing their import involves a process of evolving insight and application.40

Page 284 of [2005] 1 All SA 273 (SCA)

Developing the common law involves a simultaneously creative and declaratory function in which the court puts the final touch on a process of incremental legal development that the Constitution has already ordained. This requires a deepening understanding of ourselves and our commitment to each other as South Africans across the lines of race, gender, religion and sexual orientation. As Ngcobo J has stated:

> "Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society." 41

[24] This process also requires faith in the capacity of all to adapt and to accept new entrants to the moral parity and equal dignity of constitutionalism. Judges are thus entitled to put faith in the sound choices the founding negotiators made on behalf of all South Africans in writing the Constitution. And they are entitled also to trust that South Africans are prepared to accept the evolving implications that those choices entail.

[25] The task of applying the values in the Bill of Rights to the common law thus requires us to put faith in both the values themselves and in the people whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all. The South African public and their elected representatives have for the greater part accepted the sometimes far-reaching decisions taken in regard to sexual orientation and other constitutional rights over the past ten years. It is not presumptuous to believe that they will accept also the further incremental development of the common law that the Constitution requires in this case.

Relief the appellants seek: the Marriage Act 25 of 1961

[26] In their founding affidavit the appellants ask the Court to develop the common law to recognise same-sex marriages. Their notice of motion seeks to cast this relief by way of a declarator that their (proposed) marriage be recognised as a valid marriage in terms of the Marriage Act 25 of 1961, and that the Minister and Director-General of Home Affairs be directed to register their marriage in terms of the Marriage Act and the Identification Act 68 of 1997. In the High Court, Roux J concluded that the provisions of the Marriage Act were "peremptory" and that they constituted an obstacle to granting the appellants any relief. This is not correct.

[27] The Marriage Act contains no definition of marriage. It was enacted on the assumption – unquestioned at the time – that the common-law definition of marriage applied only to opposite-sex marriages. That

definition underlies the statute. This Court has now developed it to encompass same-sex marriages. The impediment the statute presents to the broader relief the appellants seek is only partial. This lies in the fact that section 30(1) prescribes a default – but not exclusive – marriage formula. That

Page 285 of [2005] 1 All SA 273 (SCA)

formula must be used by (a) marriage officers who are not ministers of religion or persons holding a "responsible position" in a religious denomination or organisation; and (b) marriage officers who are ministers of religion or who do hold such a position, but whose marriage formulae have not received ministerial approval.42 The statute requires that such marriage officers "shall put" the default formula to the couple, and it requires each to answer the question whether they accept the other "as your lawful wife (or husband)". The statute empowers the Minister however to approve religious formulae that differ from the default formula.

[28] Farlam JA suggests that we can change even the default formula by a process of innovative and "updating" statutory interpretation by reading "wife (or husband)" in this provision as "spouse". I cannot agree. There are two principal reasons. The first is that I think this would go radically further than the process of statutory interpretation can appropriately countenance. The second is that in my view the particular words, because of their nature and the role the statute assigns to them, are not susceptible to the suggested interpretative process.

[29] First, as Ackermann J explained in the *Home Affairs* case, there is "a clear distinction" between *interpreting* legislation in conformity with the Constitution and its values, and granting the *constitutional remedies* of reading in or severance. The two processes are "fundamentally different":

> "The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."43

[30] That it is not always easy to determine "what the text is reasonably capable of meaning" emerges from *Daniels v Campbell*.44 In a split decision, the Constitutional Court held that the word "spouse" in the Intestate Succession Act 81 of 1987 can be read to include the surviving partner to a monogamous Muslim marriage. The majority came to this conclusion after distinguishing the position of same-sex partners, who, that court had previously held,45 could not be read as being included in statutory refer-

Page 286 of [2005] 1 All SA 273 (SCA)

ences to "spouse". The majority held, per Sachs J, that central to the court's previous decisions to this effect "was a legal finding that it would place an unacceptable degree of strain on the word "spouse" to include within its ambit parties to a same-sex life partnership".46 The majority also concluded, per Ngcobo J, that the previous decisions "must be understood to hold that the word "spouse" cannot be construed to include persons who are not married."47 Moseneke J agreed with the result but considered that the provision should be declared unconstitutionally narrow and the remedial process of "reading in" adopted.48

[31] The majority in *Daniels* (*supra*) assigned a broad meaning to a word whose purport was not certain. It applied the constitutionally interpretative approach. This involved attributing a wide meaning to a word, without changing the word. The approach suggested by Farlam JA goes radically further. It does not assign a broad meaning to a contested word or phrase, but substitutes a phrase with an entirely different word. In the circumstances of this case I do not consider that this is permissible. Radically innovative statutory interpretations of this kind were devised, as the authority Farlam JA quotes shows, for jurisdictions which do not, or at the time did not, have the ample remedies of constitutionalism. Under our Constitution, the proper interpretative approach is plain.49 If statutory wording cannot reasonably bear the meaning that constitutional validity requires, then it must be declared invalid and the "reading in" remedy adopted.

[32] Second. Most statutory provisions create norms that guide State officials and others who exercise power. When their interpretation is at issue, the question is how broadly or narrowly they apply.

Section 30(1) does not create a norm for the application of State power. It describes an action. It prescribes a verbal formula that must be uttered if the legal consequences of lawful marriage are to follow. What it requires is action that must be performed if the parties' personal status is to be changed in relation to each other and the world. The action consists in the utterance of specified words. But it is action no less. The statutory formula in other words encodes a "performative utterance"[50] which the statute requires as a precondition to the happening of the marriage and its legal consequences.

Page 287 of [2005] 1 All SA 273 (SCA)

[33] In my view where the Legislature prescribes a formula of this kind its words can not be substituted by "updating" interpretation. If the court, and not the Legislature, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of "reading in". That remedy is appropriate because it changes in a permissible manner the nature of the action the statute requires, without purporting merely to interpret its words.

[34] The appellants' legal advisors apparently overlooked the question of the marriage formula entirely. As Moseneke J pointed out in refusing leave to appeal directly to the Constitutional Court, their papers 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".[51]

[35] This does not however in my view constitute an obstacle to granting the appellants some portion of the relief they seek, as Roux J considered. As Farlam JA points out (paragraph 91), the Act permits the Minister to approve variant marriage formulae for ministers of religion and others holding a "responsible position" within religious denominations. There are many religious societies that currently approve gay and lesbian marriage, including places of worship specifically dedicated to gay and lesbian congregations. Even without amendment to the statute, the Minister is now at liberty to approve religious formulae that encompass same-sex marriages.

[36] It is important to emphasise that neither our decision, nor the ministerial grant of such a formula, in any way impinges on religious freedom. The extension of the common-law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages. The Marriage Act specifically provides that:

> "Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation" (section 31).

[37] When the Minister approves appropriate religious formulae (though subject to the possibility of further appeal proceedings), the development of the common law in this appeal will take practical effect. Religious orders for whose use such formulae are approved will at their option be able to perform gay and lesbian marriages. But gay and lesbian couples seeking to have a purely secular marriage will have to await the outcome of proceedings which, we were informed from the Bar, were launched in the

Page 288 of [2005] 1 All SA 273 (SCA)

Johannesburg High Court in July 2004, designed to secure comprehensive relief by challenging the provisions of the Marriage Act and other statutes.

Should our order be suspended?

[38] Having concluded that the common law should be developed, Farlam JA proposes to suspend the order for two years. I cannot agree. The suggested suspension is in my respectful view neither appropriate nor in keeping with principle, the justice of this case, or the role the Constitution assigns to courts in developing the common law. It is in my view also not logical to hold that developing the common law does not stray into the legislative domain, as Farlam JA rightly holds, but then to suspend the order as though it did.

[39] First the Constitution. As suggested earlier, development of the common law entails a simultaneously

creative and declaratory function in which the court perfects a process of incremental legal development that the Constitution has already ordained. Once the court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process. Nor in fulfilling that function does the court intrude on the legislative domain.

[40] It is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the judiciary. As set out earlier (paragraph 3 above), section 8(3) of provides that in order to give effect to a right in the Bill of Rights a court must – subject to limitation – "apply, or if necessary develop, the common law *to the extent that legislation does not give effect to that right*". Section 8(3) envisages just the situation this appeal presents – that legislation to give effect to a fundamental right is absent. In this circumstance, the Constitution deliberately assigns an imperative role to the court. Subject to limitation, it is obliged to develop the common law appropriately. And this role is particularly suited to the judiciary, since the common law and the need for its incremental development are matters with which lawyers and judges are concerned daily.

[41] In this case the equality and dignity provisions of the Bill of Rights require us to develop the common law. This is because legislation "does not give effect" to the rights of same-sex couples discussed above. In such a situation the incremental development that the Bill of Rights envisages is entrusted to the courts. It will be rarely, if ever, that an order pursuant to such incremental development can or should be subjected to suspension.

[42] This approach is borne out by the Constitutional Court's approach in *J v Director General, Department of Home Affairs and others*.52 There the court declared a statutory provision to be inconsistent with the Constitution and afforded a remedy that "read in" appropriate expansionary words. The Home Affairs Department – also a respondent in this appeal – asked the court to suspend the declaration of invalidity, as it asks us to suspend the order developing the common law here. The basis on which it sought suspension there was identical to that it advances here, namely the pros-

Page 289 of [2005] 1 All SA 273 (SCA)

pect of legislation following a pending South African Law Reform Commission investigation.53

[43] In that case the Constitutional Court refused to suspend. It held that "Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order":

> "This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it."54

The reasoning in *J v Director General, Department of Home Affairs and others* (*supra*) seems to me to apply with even greater force where the court's order does not touch on legislation at all, but develops the common law. Legislation is the province of Parliament. If granting the remedy of "reading in" does not intrude on the legislative domain, then development of the common law in accordance with the Constitution – the particular responsibility of the judiciary – does so even less.

[44] The reference in the judgment of Farlam JA to the recent decision of the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (15 October 2004) does not, with respect, take the matter any further. *Zondi* (*supra*) re-emphasises three clear strands of the remedial jurisprudence of the Constitutional Court. The first is that the court "should be slow to make those choices which are primarily choices suitable for the Legislature".55 The second is that, for this reason, the court frequently suspends an order of statutory invalidity – as it did in *Zondi* (*supra*) – in order to give the legislature the opportunity to fulfil its particular function of matching Legislation with constitutional obligation.

[45] What my colleague's allusion to *Zondi* leaves out of account is that the case itself illustrates a third, equally vital, strand of Constitutional Court remedial jurisprudence. This is the "important principle of constitutional adjudication that successful litigants should be awarded relief".56 In *Dawood*, that had the consequence that (a) the provisions of the statute at issue were declared invalid; (b) the order of invalidity was suspended to enable Parliament to do what was constitutionally necessary; but (c) an

extensive order was also granted, requiring Home Affairs officials in the interim to act in accordance with the principles of the judgment, pending the legislative modifications.57 In *Zondi*, too, an order of invalidity was issued and suspended, but extensive remedial assistance was granted.58

Page 290 of [2005] 1 All SA 273 (SCA)

[46] In my respectful view the appellants in this case are entitled to no less. Our order developing the common law trenches on no statutory provision. Deference to the particular functions and responsibilities of the Legislature does not therefore require that we suspend it. Instead, the appellants are entitled to appropriate relief. They should be awarded the benefit of a declaration regarding the common law of marriage that takes effect immediately.

[47] In conclusion I would add that the Constitutional Court called in *J* (*supra*) for "comprehensive legislation" regularising same-sex partnerships.59 That has not been forthcoming. This may be for many reasons, doubtless including the imperative requirements of other legislative priorities. It is not inconceivable, however, that the legislature may be content, or even prefer, that this process of fulfilling the sexual orientation guarantee in the Constitution should proceed incrementally by leaving development of the common law to the courts.60 If this is not so, our unsuspended decision will not preclude later constitutionally sound legislation.61

[48] In all these circumstances I conclude that the appellants are entitled to immediate declaratory relief regarding the development of the common law, and to a declaration that their intended marriage is capable of recognition as lawfully valid subject to compliance with statutory formalities.

Order

[49] The following order is made:

1. The appeal succeeds with costs.

2. The order of the court below is set aside. In its place is substituted:

"(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."

(Mthiyane, Van Heerden JJA and Ponnan AJA concurred in the judgment of Cameron JA.)

Page 291 of [2005] 1 All SA 273 (SCA)

FARLAM JA

Introduction

[50] This is an appeal against a judgment of Roux J, sitting in the Pretoria High Court, who dismissed with costs an application brought by the appellants against the respondents, the Minister of Home Affairs and the Director General: Home Affairs, for orders (a) declaring that the marriage between them be recognised as a legally valid marriage in terms of the Marriage Act 25 of 1961, provided that it complied with the formalities set out in the Act; and (b) directing the respondents to register their marriage in terms of the provisions of the Marriage Act and the Identification Act 68 of 1997.

Evidence for appellants

[51] The appellants are two adult females who have been living together in a permanent same-sex

relationship since June 1994. The first appellant stated in her founding affidavit, which was confirmed in a supporting affidavit by the second appellant, that the purpose of the application was to obtain a declaratory order that the *intended* marriage between the appellants be recognised as legally valid. She stated further that she and the second appellant had approached a magistrate at one stage and asked her if she would be prepared to solemnise a marriage between them. The magistrate's reply was that she was prepared to perform such a marriage ceremony for them but that it would not be legally valid and that she would not be able to record it in the marriage register. The first appellant also stated that she and the second appellant had learnt that the Department of Home Affairs would not be prepared to register their intended marriage in terms of the provisions of the Marriage Act.

[52] According to the first appellant, no bank was prepared to allow her and the second appellant to open a joint bank account and that they also could not obtain a joint mortgage bond. Moreover, it would be much easier for them to become members of a medical aid fund, to adopt a child or to have a child placed in their care as foster parents if they were married to each other.

[53] The first appellant stated that she had been advised that it was what she called a "common law impediment" that persons of the same sex could not marry each other. She submitted, however, that the common law had in the meanwhile so developed that a marriage between herself and the second appellant could now be recognised as legally valid.

[54] She had been advised further that, in terms of the Constitution, she and the second appellant could not be discriminated against on the ground of their sexual preferences and that their human dignity could not be infringed. She contended that the failure by the law to recognise a marriage between her and the second appellant discriminated against them and infringed their dignity. In the concluding paragraph of this part of her affidavit the first appellant stated that she had been advised that in terms of the Constitution the common law had to be developed to promote the spirit, purport and objects of the Bill of Rights. She submitted that the common law (by which she clearly meant the common law of marriage

Page 292 of [2005] 1 All SA 273 (SCA)

in terms of which it was not possible for two persons of the same sex to marry one another) had now to be so developed.

Rule 16a Notice

[55] Before the respondents' opposing affidavits were filed the appellants caused a notice to be given to the Registrar of the Pretoria High Court in terms of rule 16A in which they indicated that they would raise in their application a constitutional point, which they formulated as follows:

> "Whether the common law has so developed that it can be amended so as to recognise marriages of persons of the same sex as legally valid marriages in terms of the Marriage Act, provided that such marriages comply with the formality requisites set out in the Act."

The purpose of the rule is to enable parties interested in a constitutional issue to seek to be admitted as *amici curiae* in the case in which the issue is raised so that they can advance submissions in regard thereto. As a result of the appellants' notice to the Registrar in terms of rule 16A a voluntary association known as The Lesbian and Gay Equality Project was allowed to intervene as *amicus curiae* in the case and submissions were made on its behalf at the hearing in the court *a quo.* Being of the opinion that the conduct of the *amicus* went well beyond what was regarded as proper in the Constitutional Court decision *In re certain amicus curiae applications: Minister of Health and others v The Treatment Action Campaign and others*,62 Roux J ordered the *amicus* to pay the respondents' costs jointly and severally with the appellants. The respondents subsequently abandoned this part of the order of the court *a quo.*

[56] After the matter had been set down for hearing in this Court the Lesbian and Gay Equality Project once again sought to be admitted as amicus curiae in the matter. Neither the appellants nor the respondents opposed the application and it was granted. The amicus submitted written arguments before the case was argued and Mr Berger and Ms Kathree appeared at the hearing and made oral submissions.

Evidence for respondents

[57] The respondents caused an affidavit to be filed on their behalf in which they asked that the application be dismissed with costs. In this affidavit it was averred that the magistrate who told the appellants that a "marriage" between them would not be legally valid was correctly stating the law as it stands. It was also conceded that the Department of Home Affairs is not prepared to register the proposed marriage between the appellants. (It is clear that the Department's attitude in this regard is based on its contention regarding the validity of the intended marriage between the appellants. There is no reason to think that this attitude will be persisted in if the Department's contention on this point is not upheld.) The respondents did not deny the first appellant's statements regarding the practical difficulties the appellants experience in consequence of the fact that they are not married but contented themselves with putting the appellants to the proof thereof.

Page 293 of [2005] 1 All SA 273 (SCA)

[58] The respondents "admitted" that the common law prohibits members of the same sex from entering into a valid marriage relationship. They denied that the common law has developed to the extent that permanent same-sex life partnerships can be recognised as marriages and submitted that the appellants had not laid any factual basis for this contention. After admitting that under the Constitution the appellants may not be discriminated against on the basis of their sexual orientation and that their human dignity may not be infringed and that they are, as it was put, "living in some sort of consortium with each other", the respondents denied that the appellants are being discriminated against or that they are, as it was put, "suffering indignity because their intended marriage will not be recognised". The respondents also contended that the appellants had not provided any factual basis for the allegation that they were being discriminated against. In this regard it was said that it was "revealing" that the appellants had "not as yet approached the Department of Home Affairs for the registration of their relationship".

Judgment of court *a quo*

[59] In his judgment dismissing the application Roux J, after pointing out that the appellants commenced living together in June 1994 and that their relationship appeared to be a "sincere and abiding" one, said that they claimed to be married. He emphasised that no attempt had been made to amend the prayers and added:

> "This despite airing my view on how appropriate this relief could be in the light of the facts and the Statute to which I will refer later."

He held that the appellants were seeking a declaratory order. Such an order, he said, is catered for by section 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, which vests the court with a discretion, at the instance of any interested person, "to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".

[60] He continued:

> "The 'right' in question must be the [appellants'] assumption that they are married . . . In Roman law marriage is the full legal union of man and woman for the purpose of lifelong mutual companionship. I refer for example to Sohm *Institutes of Roman Law,* 3rd edition at p 452. Nothing I am aware of has changed since. Indeed the Marriage Act 25 of 1961 mirrors the age old concept of what a marriage is. I refer to the peremptory provisions of section 30(1) of the Act:
>
> "1. In solemnising any marriage any marriage officer designated under sec-tion 3 may follow the marriage formula usually observed by his religious denomination or organisation if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:
>
> 'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?'

This section . . ., as I have already pointed out, is peremptory. It contemplates a marriage between a male and a female and no other.

Page 294 of [2005] 1 All SA 273 (SCA)

Section 11(1) of the same Act provides as follows:

"11 (1) A marriage may be solemnised by a marriage officer only."

It must follow that the Applicants are not married as required by the law. I am not prepared to exercise the discretion vested in me by section 19 of Act 59 of 1959 to enquire into a non-existing right.

Prayer 3 of the notice of motion [the prayer asking for an order directing the respondents to register the marriage in terms of the Marriage Act and the Identification Act] requires me to compel the Respondents to do what is unlawful. Obviously I will not make such an order.

There is no attack on the provisions of Act 25 of 1961 on the basis that they offend the Constitution. No more need therefore be said. This application is obviously still-born.

Leave to appeal

[61] The applicants applied to the Pretoria High Court for leave to appeal against this judgment. As Roux J had in the interim retired, the application came before Mynhardt J, who refused to grant the appellants a positive certificate in terms of rule 18 of the Constitutional Court Rules but did grant them leave to appeal to this Court.

Application to constitutional court

[62] The appellants then approached the Constitutional Court for leave to appeal directly to it against the judgment and order of Roux J. This application was refused on the ground that the interests of justice required that the appeal be heard first by this Court. The judgment of the Constitutional Court, which was delivered by Moseneke J, has been reported: see *Fourie and another v Minister of Home Affairs and another*[63].

Relevant statutory provisions

[63] Before the issues arising for decision in this case and the contentions of the parties in regard thereto are considered it will be appropriate to set out the relevant provisions of the Constitution as well as sections 3, 29A, 30 and 31 of the Marriage Act (as far as they are relevant) and sections 3, 5(1) and 8 (e) of the Identification Act 68 of 1997.

(a) *The Constitution*

[64] The following provisions of the Constitution are relevant in this matter: sections 7, 8 (1), (2) and (3), sections 9 (1), (2), (3) and (5), section 10, sections 31(1)*(a)* and (2), section 36, section 38 (the general part of the section and paragraph *(a)*), s 39(1) and (2) and section 172(1).

They provide as follows:

'"7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of allt people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The State must respect, protect, promote and fulfill the rights in the Bill of Rights.

Page 295 of [2005] 1 All SA 273 (SCA)

(3) The rights in the Bill of Rights are subject to the limitations con-tained or referred to in section 36, or elsewhere in the Bill.'

'8. (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 a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(*a*) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(*b*) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

'9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

'10. Everyone has inherent dignity and the right to have their dignity respected and protected.'

'31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(*a*) to enjoy their culture, practise their religion and use their language; and

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

32. . . .

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State.'

'36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Page 296 of [2005] 1 All SA 273 (SCA)

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

'38. 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;

. . .'

'39. (1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

'172. (1) When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

(b) *The Marriage Act*

[65] As far as they are relevant sections 2, 3, 11(2) and 3, 29A, 30(2) and (3) and 31 of the Marriage Act read as follows:

'"2. (1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.

(2) The Minister and any officer in the public service authorised thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.'

'3. (1) The Minister and any officer in the public service authorised there-to by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnising marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.'

'11. (2) Any marriage officer who purports to solemnise a marriage which he is not authorised under this Act to solemnise or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be guilty of an offence

Page 297 of [2005] 1 All SA 273 (SCA)

and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

(3) Nothing in subsection (2) contained shall apply to any marriage ceremony solemnised in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.'

'29A. (1) The marriage officer solemnising any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnised.

(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act 72 of 1986).'

'30. (2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organisation, may in solemnising a marriage follow the rites usually observed by his religious denomination or organisation.

(3) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnised or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to –

(a) an error, omission or oversight committed in good faith by the marriage officer; or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been solemnised in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnised before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.'

'31. Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnise a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation."'

(The text of sections 11(1) and 30(1), which are also relevant, were quoted by Roux J in the extracts from his judgment set out in paragraph [60].)

(c) *The Identification Act*

[66] Sections 3, 8(*e*) and 13 of the Identification Act 68 of 1997 read as follows:

'"3. This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic.'

Page 298 of [2005] 1 All SA 273 (SCA)

'8. There shall in respect of any person referred to in section 3, be included in the population register the following relevant particulars available to the Director-General, namely –

. . .

(e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General . . .'

'13 (1) The Director-General shall as soon as practicable after the receipt by him or her of an application, issue a birth, marriage or death certificate in the prescribed form after the particulars of such birth, marriage or death were included in the register in terms of section 8 of this Act.

(2) Any certificate issued in terms of subsection (1), shall in all courts of law be *prima facie* evidence of the particulars set forth therein."'

Issues arising for decision

[67] In the course of the argument it became clear that the following issues arise for decision in this case:

(1) Does the common-law definition of marriage which precludes two persons of the same sex from marrying one another discriminate against the appellants?

(2) If so, is such discrimination unfair?

(3) Does it infringe their human dignity?

(4) If there is unfair discrimination, and/or an infringement of human dignity, should this court give the appellants the remedy they seek, namely a development of the common law definition of marriage so as to allow same sex marriages?

To answer that question it will be necessary to consider:

(5) whether such development would constitute an incremental change required to promote the spirit, purport and objects of the Bill of Rights or would it, on the other hand, require a fundamental change to the common law, of such a nature that it should rather be undertaken by Parliament?

(6) That in turn will necessitate consideration of the question:

what is the essence of the concept of marriage as it has developed down the centuries and especially since 1994 in this country?

If all these questions are answered in favour of the appellants it will be necessary to ask:

(7) Can the appellants be granted the relief they seek in the absence of a prayer for declarations that the Marriage Act and the Identification Act are inconsistent with the Constitution? And;

(8) Can and should any order the court may make be suspended to enable Parliament to consider the matter?

History of institution of marriage in our law

[68] Before I proceed to consider these issues it is in my view desirable to say something about the history of the institution of marriage in our law.

Page 299 of [2005] 1 All SA 273 (SCA)

[69] It is convenient for our purposes to begin with the marriage law of the Romans during the period of the classical Roman law (the first two and a half centuries of the Christian era).

As Professor Max Kaser says:64

> "[T]he Roman marriage *(matrimonium)* was not a legal relationship at all, but a social fact, the legal effects of which were merely a reflection of that fact . . . Marriage was a "realised union for life" . . . between man and woman, supported by *affectio maritalis,* the spouses' consciousness of their union being marriage."

The act which brought the marriage into existence was a purely private one. No State official was involved. The marriage did not have to be registered: indeed no public record of any kind was required. No religious or ecclesiastical rite was essential, even after Christianity became the official religion of the Roman Empire in 313 AD. In fact no prescribed form was required. All that was necessary was the reciprocally expressed consent of the parties, even cohabitation was not required. Ulpian expressed the rule as follows (D 35.1.15; D 50.17.30):

> *"Nuptias non concubitus, sed consensus facit."* (Consent not cohabitation makes a marriage.)

[70] Even when marriage began to be controlled by the Church after the disintegration of the Roman Empire in the West, what Bryce calls "the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church"65 remained the legal position until the middle of the sixteenth century. The Church's control over marriage was manifested in the fact that, from the tenth century, the Church's tribunals had exclusive jurisdiction in regard to questions relating to marriage. As a result there was a uniform law of marriage applied in Western Europe. Marriage, which the Church regarded as a sacrament, was indissoluble, except by decree of the Pope. The Church encouraged the parties to declare their consent before a priest and to receive a blessing; what was referred to as the *benedictio ecclesiae* (the blessing of the church). In some areas the publication of banns before the church ceremony was insisted on and this was made the general law of the Church by the Fourth Lateran Council of 1215. Only marriages which took place "in the face of the Church" were regarded as "regular" marriages.

[71] But marriages resting on the consent of the parties alone, so-called "irregular" marriages, were nevertheless valid although the parties thereto were subject to ecclesiastical and secular penalties. Secret or clandestine marriages, which often gave rise to great scandal, were thus valid. Eventually the need for reform became irresistible and at its Twenty Fourth Session in 1563 the Council of Trent passed a decree, the famous *Decretum Tametsi,* which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless banns were published and the parties declared their

Page 300 of [2005] 1 All SA 273 (SCA)

consent before a priest and at least two witnesses. The decrees of the Council of Trent did not become law in the Northern Netherlands but the principles of the *Decretum Tametsi* were adopted in the various provinces thereof. The Political Ordinance of 1 April 1580, which was enacted by the States of Holland, provided in section 3 for banns to be published, on three successive Sundays or market-days, in church or in the council chamber of the city or town where the intending spouses resided, and for their marriage to be solemnised by the magistrate or minister of religion "according to the forms in use in the churches or which shall have been prescribed to the magistrates for that purpose by the States".66 "Marriages" not solemnised in accordance with section 3 were invalid. Similar legislation was enacted in the other provinces of the Northern Netherlands.67

[72] The provisions of the Political Ordinance on the point were received as law at the Cape when it was colonised by the Dutch East India Company.68 Despite the reception of the Political Ordinance at the Cape it appears that from 1665, when the first resident clergyman was appointed, marriages were solemnised by a minister of the Church. Before that date they were solemnised by the Secretary of the Council of Policy.69

[73] As far as I have been able to discover, Holland was the first European jurisdiction to permit civil marriages. In practice persons who chose to be married by magistrates were those who were not of the Reformed religion70 or, "who, being estranged from the orthodox church, hated ecclesiastical benediction".71

[74] Marriage law was secularised at the advent of the Reformation as the Protestant reformers did not regard marriage as a sacrament. Brissaud refers to what he calls "this remarkable evolution" by which marriage was completely secularized.72 The point of departure for this, he says, "was in a theological, legal theory of which Saint Thomas Aquinas was perhaps the first to give the formula. According to that writer, marriage could be regarded at one and the same time: 1st. As a contract of natural law (a borrowing from the Roman writings, which understood by this the law which is given to man and to animals). 2d. The civil contract, that is to say, one governed by the Roman law as it was organized, so long as the Church did not have the monopoly concerning questions relating to marriage. 3d. A sacrament, of which the contract was the element and which could not exist without the latter. The civil marriage and the religious marriage are separated in this analysis, whereas in former times they were not distinguished. These speculations, which had no very great bearing so long as they remained shut up within the Schools, were

Page 301 of [2005] 1 All SA 273 (SCA)

propagated during the sixteenth century by virtue of the favour shown them by the Renaissance and the Reformation; they were presented before the Council of Trent by more than twenty prelates and theolo-gians, and, a more serious thing, the jurists took possession of them in order to make of them a weapon against the Church. From this they came to the conclusion that marriage ought to be subjected to the Church in so far as it was a sacrament, to the State in so far as it was a civil contract."

This development culminated, as far as France was concerned, in the adoption in the constitution of 1791 of the principle that "the law only considered marriage as a civil contract; the Church was free to set up the sacrament in establishing the forms and conditions which might please it, the faithful were at liberty to respect its doctrines, but the State had no power to bind itself to impose them upon all citizens without affecting their liberty of conscience. The decree of September 20, 1792, organized the certificates of civil status and marriage; the latter must thenceforth be executed before a municipal official in order to be recognized by the State."73

[75] The principle that marriages had to be solemnised by a civil official was adopted in some of the provinces of the Northern Netherlands after 1795 and became the legal position in the whole of what was now called the Kingdom of Holland in 1809 when the Code Napoleon, with adaptations, was given the force of law by King Louis Napoleon.

[76] During the period between the two British occupations of the Cape, when the Cape was under the control of the Batavian Republic, Commissioner General De Mist introduced the secular marriage before landdrost and heemraden in the country districts and before the Court for Matrimonial and Civil Affairs

in Cape Town. This change was, however, repealed at the beginning of the Second British Occupation by a proclamation issued on 26 April 1806 by Sir David Baird prohibiting civil marriages and providing that all marriages were "to be performed . . . by an ordained clergyman or minister of the Gospel, belonging to the settle-ment".74

[77] The law relating to the solemnisation of marriages in the Cape was altered by Order in Council dated 7 September 1838. This order made detailed provision for the publication of banns, the issuing of special licences, the establishment of a marriage register and the appointment of civil marriage officers where there was "not a sufficient number of . . . ministers [of the Christian religion] to afford convenient facilities for marriage". By the Marriage Act 16 of 1860 the resident magistrates were made marriage officers and the Governor was empowered to appoint marriage officers for Jews and Muslims. Similar legislation was passed in the other colonies which eventually made up the Union of South Africa.

Page 302 of [2005] 1 All SA 273 (SCA)

[78] The Marriage Act 25 of 1961 consolidated the laws governing the formalities of marriage and the appointment of marriage officers and repealed some 47 Union and pre-Union statutes from the Marriage Order in Council of 7 September 1838 onwards. It is clear from a study of the provisions of the Marriage Act that it builds on the foundations laid by the Council of Trent in 1563 and by the States of Holland in 1580. It is solely concerned with marriage as a secular institution. Although it does not go as far as the French did in 1791 and 1792 and the Dutch legislature thereafter in requiring all marriages to be solemnised by a civil official and not allowing clerics to solemnise them, it clearly constitutes clerics who are marriage officers State officials for the purpose of bringing into being a marriage relationship between the intending spouses which is recognised by the State.

[79] Indeed it is instructive to note that this way of seeing the matter is set forth by Henricus Brouwer (1625–1683), a leading Roman-Dutch writer, in his work *De Jure Connubiorium,* which was first published in 1665. In book 2, chapter 27, paragraph 20 we find the following:

> "It is possible for someone indeed to call one marriage a political marriage and the other a church marriage inasmuch as one is contracted in the face of the church and the other before a court. But if this distinction were to be approved it proceeds from the incidentals of the marriage and is of no force if one has regard to the bond of the marriage itself, honourableness, the legitimate status of the children who are born therefrom and all the rights which the spouses obtain. Because the same legal position applies in both cases, the same dignity, the same honourableness, the same bond. Indeed a marriage contracted in church can be called a political marriage in so far as it is solemnised in the church by the authority of a magistrate through a delegated person, namely a minister of God."

This analysis is clearly correct and as applicable today as it was in 1665 when it was first published.

[80] I have dealt in some detail with the history of the law of marriage because it throws light on a point of cardinal importance in the present case, namely that the law is only concerned with marriage as a secular institution. It is true that it is seen by many to have a religious dimension also but that is something with which the law is not concerned. Even though clerics are appointed marriage officers, when they solemnise marriages they do so in a twofold capacity: first as clerics, giving the *benedictio ecclesiae* to the couple and affording them the opportunity to take their vows at a religious service; and secondly as State marriage officers, bringing into existence a secular legal bond recognised by the State.

[81] But as section 31 of the Marriage Act makes clear, clerics who are marriage officers are not obliged to marry couples if to do so would be against the tenets of their religion. Thus, to take an obvious example, a Roman Catholic priest who is a marriage officer is not obliged to marry a couple one of whom is divorced and whose former spouse is still alive. The Marriage Act contains a provision (section 28) which renders it lawful for a person to marry certain relatives of his of her deceased or divorced spouse. This provision repeals the common-law rules which dealt with prohibited degrees of relationship in so far as collaterals by affinity are concerned. These rules were based on the canon law and, to the extent that they are still upheld by certain denominations, clerics belonging to such denomi-

Page 303 of [2005] 1 All SA 273 (SCA)

nations would be unwilling to solemnise marriages between such persons. Section 31 makes it clear that they are free to refuse to do so. These examples also help to make clear the distinction between the secular institution of marriage which the law regulates and the religious institution of marriage which is recognised in the Act.

[82] As I have said, we are concerned in this case only with the secular institution. Nothing that we say is intended to deal with the religious institution. Indeed it would be inappropriate and improper for judges in a secular State to do otherwise.

Does the common law definition discriminate against homosexual persons?

[83] Against that background I turn to the question whether the common-law definition of marriage discriminates unfairly against homosexual persons.

What may be called the common-law definition of marriage was stated as follows by Innes CJ in *Mashia Ebrahim v Mahomed Essop:*75

> "With us marriage is a union of one man with one woman, to the exclusion, while it lasts, of all others".

He approved this statement in *Seedat's Executors v The Master (Natal).*76

[84] As to what is meant by "a union" in that definition it is necessary to have regard to the definition of marriage attributed to the Roman jurist Modestinus, who flourished in the first half of the third century, and the definition given in Justinian's *Institutes.* Modestinus's definition reads as follows (D 23.2.1):

> '"*nuptiae sunt coniunctio maris et feminae et consortium omnis vitae divini et humani iuris communicatio*' (marriage is a joining of man and woman, a partnership in the whole of life, a sharing of rights both sacred and secular".77

Justinian's definition reads as follows (Inst. 1.9.1):

> '"*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam vitae consuetudinem continens*' (wedlock or marriage is a union of male and female involving an undivided habit of life)".78

These definitions have been quoted over and over again down the centuries. Indeed O'Regan J, in *Dawood, Shalabi and Thomas v Minister of Home Affairs*79 used the expression *consortium omnis vitae* in referring to the "physical, moral and spiritual community of life" created by marriage.

A useful expanded paraphrase of the concept was given by the great Scots jurist Viscount Stair in his *Institutions,* published in 1681. He said that the consent to marriage is:80

> "the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of

Page 304 of [2005] 1 All SA 273 (SCA)

> marriage is the solace and satisfaction of man [by which I take it he meant humankind]."

[85] Mr *Oosthuizen,* who appeared for the appellants, submitted that our law and societal practice grants many rights and privileges to married persons because they are married. Mr *Sithole,* for the respondents, did not dispute this. It is clear therefore that our law, in terms of the common law definition to which I have referred, permits heterosexual persons to enter a conjugal society as described by Viscount Stair, by Modestinus and Justinian, it recognises and protects that relationship in many ways, and grants the parties thereto many legally enforceable rights and privileges.

[86] It will be recalled that section 9(1) of the Constitution provides that everyone has the right to equal protection and benefit of the law, while section 9(3) lists among the proscribed grounds of discrimination sexual orientation. Homosexual persons are not permitted in terms of the common-law definition to marry each other, however strong their yearning to establish a conjugal society of the kind described. As a result they are debarred from enjoying the protection and benefit of the law on

the ground of their sexual orientation. This clearly constitutes discrimination within the meaning of section 9 of the Constitution.

[87] Mr *Sithole* contended that this conclusion is not correct. He argued that the common-law definition does not discriminate against homosexuals because it does not prevent them from marrying. Reliance was placed on a dictum by Southey J, with whom Sirois J concurred, in *Re Layland and Minister of Consumer and Commercial Relations; Attorney-General of Canada et al, Interveners.*[81]

The dictum relied on reads as follows:

> "The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law."

[88] This approach to the matter was expressly rejected by Ackermann J in the *Home Affairs* case[82] at paragraph 38 where he said:

> "The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to *express their orientation in a relationship of their own choosing.*" (The italics are mine.)

Is such discrimination fair?

[89] Section 9(5) provides that discrimination on a ground listed in s 9(3) is unfair unless it is established that the discrimination is fair. No attempt was made by the respondents to establish the fairness of the discrimination. Instead they contended that there was *differentiation* in this case but not *dis-*

crimination, a submission which for the reasons given above I cannot accept.

[90] In my opinion there can be no doubt that the discrimination flowing from the application of the common-law definition of marriage is unfair. In the *Home Affairs* case (*supra*) the Constitutional Court considered the provisions of section 25(5) of the Aliens Control Act 96 of 1991, which empowered a regional committee of the immigrants selection board to dispense with certain pre-conditions in authorising the issue of an immigration permit to the foreign spouse of a person permanently and legally resident in South Africa upon the application of such spouse, and held that the omission from the subsection after the word "spouse" of the words "or partner in a permanent same-sex relationship" was inconsistent with the Constitution. It held further that the subsection should be read as though the words omitted appeared therein after the word "spouse".

[91] In reaching that conclusion the Constitutional Court held that the total exclusion of homosexual persons from the provisions of the subsection constituted unfair discrimination. It also held that, for substantially the same reasons as those set out in its judgment in relation to unfair discrimination, section 25 (5) "simultaneously constitutes a severe limitation on the section 10 right to dignity enjoyed by . . . gays and lesbians" who are permanently resident in the Republic and who are in permanent same-sex life partnerships with foreign nationals.

[92] The reasoning leading up to that conclusion is conveniently set out in paragraphs 53-57 of the judgment in the *Home Affairs* case (*supra*) which read as follows:

> "[53] The message that the total exclusion of gays and lesbians from the provisions of the subsection conveys to gays and lesbians and the consequent impact on them can, in my view, be conveniently expressed by comparing (a) the facts concerning gays and lesbians and their same-sex partnerships which must be accepted, with (b) what the subsection in effect states:
>
> (a) (i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;
>
> (ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9 (5) discrimination on it is unfair unless the contrary is established;
>
> (iii) prior criminal proscription of private and consensual sexual expression between gays,

arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;

(iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;

(v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;

(vi) they are individually able to adopt children and in the case of lesbians to bear them;

Page 306 of [2005] 1 All SA 273 (SCA)

(vii) in short, they have the same ability to establish a *consortium omnis vitae;*

(viii) finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

(b) The subsection, in this context, in effect states that all gay and lesbian permanent residents of the Republic who are in same-sex relationships with foreign nationals are not entitled to the benefit extended by the subsection to spouses married to foreign nationals in order to protect their family and family life. This is so stated, notwithstanding that the family and family life which gays and lesbians are capable of establishing with their foreign national same-sex partners are in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they are to spouses.

[54] The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.

[55] We were pressed with an argument, on behalf of the Minister, that it was of considerable public importance to protect the traditional and conventional institution of marriage and that the government accordingly has a strong and legitimate interest to protect the family life of such marriages and was entitled to do so by means of s 25(5). Even if this proposition were to be accepted it would be subject to two major reservations. In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

[56] In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under s 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the s 25(5) benefits to same-sex life partners could negatively effect such protection. A similar argument has been roundly rejected by the Canadian Supreme Court, which Court has also stressed, correctly in my view, that concern for the protection of same-sex partnerships in no way implies a disparagement of the traditional institution of marriage.

[57] There is nothing in the scales to counteract such conclusion. I accordingly hold that s 25(5) constitutes unfair discrimination and a serious limitation of the s 9(3) equality right of gays and lesbians who are permanent residents in the Republic and who are in permanent same-sex life partnerships with foreign nationals. I also hold, for the reasons appearing throughout this judgment and culminating in the conclusion reached at the beginning of this paragraph, that s 25(5) simultaneously constitutes a severe limitation of the s 10 right to dignity enjoyed by such gays and lesbians." (Footnotes omitted.)

Page 307 of [2005] 1 All SA 273 (SCA)

[93] That reasoning clearly applies here. The effect of the common-law pro-hibition of same-sex marriages

is clearly unfair because it prevents parties to same-sex permanent relationships, who are as capable as heterosexual spouses of establishing a *consortium omnis vitae,* of constituting a family and of establishing, enjoying and benefiting from family life, from entering into a legally protected relationship from which substantial benefits conferred and recognised by the law flow.

Is the right to human dignity infringed?

[94] It is clear from the reasons given in the passage cited from the *Home Affairs* case (*supra*) that the common-law definition of marriage not only gives rise to an infringement of the appellants' constitutional right not to be the victims of unfair discrimination in terms of section 9 of the Constitution but also to their right to human dignity in terms of section 10.

Justifiable limitation under section 36

[95] It is not suggested by the respondents that the common law definition of marriage in so far as it prevents homosexual persons from entering into same-sex marriages constitutes a justifiable limitation on the appellants' rights under sections 9 and 10 of the Constitution. In my view, there would be no merit in any such suggestion.

Remedy

[96] It is now necessary to consider what remedy, if any, should be given to the appellants. The respondents contended that the court *a quo* correctly dismissed the application for the reasons given in the judgment which I have summarised in paragraphs [59] and [60] above. They laid great stress on the point, which had found favour with the court *a quo,* that, as the appellants had not attacked the validity of those provisions of the Marriage Act which appeared to place a legislative imprimatur on the common law definition, the application could not succeed.

[97] The respondents did not suggest that the appellants should in addition have sought a declaration that the Identification Act 68 of 1997 is inconsistent with the Constitution (as Moseneke J suggested may be the position[83]). The attitude adopted by the respondents in this regard was, in my view, entirely correct because the provision in the Identification Act which deals with the registration of marriages (section 8(*e*)) does not depend in any way on an acceptance of the common-law definition.

[98] Later in this judgment I shall state my reasons for being of the opinion that the statutory marriage formula set forth in section 30(1) of the Marriage Act does not constitute a basis for denying the appellants relief in this matter. This renders it unnecessary for me to decide whether the absence of a challenge to the constitutional validity of section 30(1) precludes the appellants from receiving any relief at all in their application.

Page 308 of [2005] 1 All SA 273 (SCA)

[99] It will be recalled that the court *a quo* approached the application on the basis that the appellants claimed to be married. After referring to their "assumption" that they were married, Roux J held that they were not married as required by the law. It is clear that the learned Judge was misled by the notice of motion, which spoke of the marriage of the parties. It is clear however, from the founding affidavit, which I have summarised above, that the appellants' true case is that they intend to enter into a marriage with each other and they seek a declaration that such marriage, when entered into in accordance with the formalities in the Marriage Act, will be valid and registrable under the Marriage Act and the Identification Act. The respondents' contention that the prayers in the notice of motion indicate that the appellants regarded themselves as married and considered that all they needed from the court was a declaration to legalise their marriage is accordingly not correct.

[100] In constitutional litigation, where infringements of rights entrenched in the Bill of Rights are at issue, it is in any event inappropriate to adopt an overly technical attitude to the relief sought by an applicant. Holding, as I do, that the application of the common law definition of marriage subjects the appellants to infringements of their rights under sections 9 and 10 of the Constitution, I must conclude that this is an instance where the common law deviates from the spirit, purport and objects of the Bill of Rights

and it should accordingly be developed, if this is possible and appropriate, so as to remove the

deviation.

[101] As the Constitutional Court held in *Carmichele v Minister of Safety and Security and another*[84] where the common law is deficient as regards the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution, the courts are under a general obligation to develop the common law appropriately. The Constitutional Court pointed out[85] that "in exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary". It proceeded to cite with approval a dictum by Iacobucci J in a decision of the Canadian Supreme Court, *R v Salituro,*[86] which contained the following:

> "In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

[102] In *Du Plessis v Road Accident Fund*[87] that this Court extended the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another. Cloete JA said[88] that this extension would be "an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements."

Page 309 of [2005] 1 All SA 273 (SCA)

Would the extension of the common-law definition of marriage to allow persons of the same sex to marry constitute an incremental step or is the problem one more appropriately to be solved by the Legislature?

[103] Counsel for the respondents contended that the step which the appellants ask the Court to take is not merely an incremental one but one which would require a fundamental rewriting of important aspects of what can be described as the essence of marriage. He incorporated in his argument portion of the submissions advanced by Counsel for the Attorney General of Canada in a matter heard in November 2001 in the Ontario Superior Court of Justice, Divisional Court,[89] in which the divisional court declared the common-law definition of marriage recognised in Canada (which is the same as ours) to be constitutionally invalid and inoperative but suspended the effect of the declaration for 24 months to permit the Canadian Parliament to act. (On appeal to the Ontario Court of Appeal, the Court, in a judgment delivered on 10 June 2003, upheld the declaration of invalidity but set aside the suspension and ordered the declaration to have immediate effect.[90])

[104] The submission incorporated into counsel for the respondents' argument before this Court reads as follows:

> "This case is about our humanity . . . There are different aspects, but at its core is our femaleness and maleness. The issue before this court is a legal one. It is whether government action, embodied in common law, and statutes, meets the charter rights that the applicants possess. . . . It is a unique institution, and the court has to decide whether to change marriage forever. . . . The purpose of marriage has nothing to do with excluding the applicants. That is an effect, but the purpose of marriage, outside the law, at its roots, was to define an institution that would bring together the two core aspects of our humanity; our maleness and our femaleness, because at its essence this is the basis for humanity. If you take that purpose away, we have something else; the institution has changed."

[105] Counsel for the respondents contended further that the essence of marriage in our law is a combination of factors: the characteristics going together to make up marriage, so he contended, were procreation, the *consortium omnis vitae* and what counsel for the Attorney General of Canada in the *Halpern* case in the divisional court called "the complementarity of the two human sexes", "our femaleness and our maleness".

[106] Counsel pointed out further that, with the exception of two states of the United States of America (Massachusetts[91] and Washington[92]), three

Page 310 of [2005] 1 All SA 273 (SCA)

provinces and a territory in Canada (Ontario,[93] Quebec,[94] British Columbia[95] and the Yukon[96]) and

the Netherlands and Belgium, no jurisdiction of which he was aware has extended the definition of marriage to cover same-sex unions, although some countries recognise what may be called a parallel legal institution, which gives a separate status, although the parties thereto enjoy virtually all the rights available to married couples. He contended that we would be out of kilter with the rest of the world if we were to recognise same-sex marriages.

[107] He submitted that an extension of the common-law definition to apply to same-sex unions would not be an incremental step but what he called "a quantum leap across a chasm", the consequences of which would be "a crisis of the reality of the law". By this he meant, he said, a situation where what the population is practising is the opposite of what is in the law books. He referred in this regard to a lecture given in 1998 by the Hon David K Malcolm, the Chief Justice of Western Australia, addressing the issue of the independence of the judiciary97.

[108] At one point in his lecture Chief Justice Malcolm said:

> "In reality, a strong, independent judiciary forms the foundation of representative democracy and observance of the Rule of Law and human rights. [However] it is primarily the confidence of the community in the legal system which encourages observance of the law . . . [The practice of judicial independence] also relies on a community perception that in resolving disputes between parties, the judiciary reflects and acts upon the basic and enduring values to which the community subscribes . . ."
>
> "If one accepts that the courts work through the voluntary acceptance of their authority by the community, the relationship between the courts and public must be reciprocal. This does not mean that the courts will decide cases by reference to every shift in public opinion. The courts and the judiciary must have the confidence of the community in order to maintain their authority. Apart from acting in accordance with their ethical obligations, the judiciary must also keep a "weather eye" on community values in order to retain the relevance of their decisions to that community."

[109] Counsel for the respondent submitted that, if this Court were to be of the opinion that the definition of marriage should be extended to cover same-sex unions, it should suspend whatever relief it was minded to grant to the appellants for 24 months so as to give the Legislature time to consider the matter and pass such legislation as it considered necessary to deal with the problem.

[110] Counsel for the appellants attached to his heads of argument Discussion Paper 104 published by the South African Law Reform Commission in connection with its Project 118, which is devoted to the topic of Domestic

Page 311 of [2005] 1 All SA 273 (SCA)

Partnerships. Discussion Paper 104 contains proposals prepared by the Commission aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. The Commission considers "as unconstitutional the fact that there is currently no legal recognition of same-sex relationships". It proposes that same-sex relationships should be acknowledged by the law and identifies three alternative ways of effecting legal recognition to such relationships, viz:

(a) "opening up the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act";

(b) separating the civil and religious elements of marriage, by amending the Marriage Act to the extent that it will only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law, and by providing in it for the civil marriage of both same- and opposite-sex couples; and

(c) providing what is called a "marriage-like alternative", according same-sex couples (and possibly also opposite-sex couples) the opportunity of concluding civil unions with the same legal consequences as marriage.

[111] As appears from what I have said above, I share the Commission's view that the fact that there is no legal recognition of same-sex relationships is contrary to the Constitution. It is clear, however, that this Court is not able, in the exercise of its jurisdiction to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights, to grant relief based on the incorporation into our

law of either the second or the third options mentioned by the Law Reform Commission. Only the first option is available to us and then only if it can be regarded as an incremental step.

[112] In *Bellinger v Bellinger* [2003] 2 AC 467 (HL(E)) the House of Lords upheld a decision dismissing a petition under section 55 of the Family Law Act 1986 for a declaration that a marriage celebrated between a person registered at birth as a male who later underwent gender reassignment surgery and a male partner was valid but it granted a declaration under section 4 of the Human Rights Act 1998 that section 11(*c*) of the Matrimonial Causes Act 1973 (which provides that a marriage is void unless the parties are "respectively male and female") is incompatible with the appellant's right to respect for her private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and her right to marry under article 12 of the Convention. One of the points considered was whether the problem confronting Mrs Bellinger could not be resolved by recognising same-sex marriages. Lord Nicholls of Birkenhead said (at paragraph 48):

> "[i]t hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage".

Lord Hope of Craighead was of the same opinion. At paragraph 69 of his opinion he said:

> ". . . problems of great complexity would be involved if recognition were to be given to same-sex marriages. They must be left to Parliament."

[113] These statements do not apply with the same force in this country. With us the concepts of marriage and the family have to be seen against the

Page 312 of [2005] 1 All SA 273 (SCA)

background of the numerous strands making up the variegated tapestry of life in South Africa. In addition the influence of the Constitution and its express recognition of the importance of the democratic values of human dignity and equality have played a major role in transforming attitudes in this as in many other areas of the law. The point is well put by Professor Joan Church in her valuable and scholarly article "Same-sex unions – Different Voices".98 Professor Church says:99

> "In South Africa until recently, however, the traditional notion of marriage was that it was a legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts. In terms of this definition the constitutive elements of the marriage is that it is a legal institution, the coming into being and termination of which is legally determined, it is based on the consent of the parties to it, and it is only possible between two persons of the opposite sex. In the present multicultural South African society and in the light of the new constitutional dispensation, this definition no longer holds good. In the first place, in the light of the Constitution and the Recognition of Customary Marriages Act that came into operation on 15 November 2000, polygamous or potentially polygamous marriage is legally recognized. In the second place, and perhaps more importantly, discrimination on the grounds of sexual orientation is contrary to the Bill of Rights. As Edwin Cameron points out, the fact that sexual orientation is specifically mentioned with regard to equality and protected conditions, is a milestone not only in the South African context but in world constitutional history. A greater sensitivity towards and acceptance of cultural differences as well as the libertarian jurisprudence that has emerged in the new constitutional dispensation has shaped, and doubtless will still shape, changing policy. This will be discussed later. Although same-sex marriage has as yet not been legally recognised, it is clear that in less than a decade there have been major policy changes in South Africa regarding homosexuals and homosexual conduct. It is suggested that despite some previously dissenting voices, the cases of *S v H* [1995 (1) SA 120 (C)] and [*S v Kampher* 1997 (4) SA 460 (C)] that decriminalized sodomy, were at the vanguard of changing attitudes." (Footnotes omitted.)

Later in the article, under the heading "Same-sex marriage and cultural patterns",100 she refers to various same-sex relationships in non-western societies which serve cultural or economic functions, and gives two examples from indigenous African culture. The first concerns the traditional woman-to-woman marriages which are reported from all over Africa. What she calls a "notable example" of these involves the Rain Queen of the Lovedu, the last of whom had four wives. Further details of such marriages are given by Oomen in her note "Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act."101

[114] Since the coming into operation of the Interim Constitution 200 of 1993 on 27 April 1994 the courts have given a series of decisions based on the equality and human dignity provisions of the Interim Constitution and the

Page 313 of [2005] 1 All SA 273 (SCA)

present Constitution affording to same-sex couples benefits that were previously enjoyed only by married couples.[102]

[115] In the *Home Affairs* case,[103] Ackermann J emphasised that "over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises." The judgments which I list in footnote 102 above do not recognise same-sex marriages as such but rather a parallel, equivalent institution. It may accordingly be argued that they do not afford a basis for adopting by judicial decision the first option suggested by the Law Commission, viz the opening up of the institution of marriage to same-sex couples, but rather as paving the way for the adoption by the Legislature of the second or third options. Such a point is clearly not without substance but it does not detract from the fact that these decisions indicate a recognition of the process of transformation to which Ackermann J referred in the *Home Affairs* decision (*supra*).

[116] Parliament has also over the years since 1994 enacted numerous provisions giving recognition, in some cases expressly in others impliedly, to same-sex partnerships.[104] These enactments evidence an awareness on the part of Parliament of the changing nature of the concept of the family in our society.

[117] I am satisfied in the circumstances that the extension of the common law definition of marriage to same-sex couples cannot be regarded in South Africa in 2004 as involving a fundamental change in the traditional concept of marriage.

[118] It seems to me that the best way of ascertaining whether the proposed extension would for us be merely an incremental step or would involve problems of great complexity, as Lord Hope of Craighead suggested would be the case in the United Kingdom, is to consider the main rules comprising that part of the law traditionally regarded as part of the law of marriage or matrimonial relations.

[119] But before doing so it is appropriate to refer to the reason given by the Roman-Dutch writers who dealt with the topic for the rule restricting the marriage relationship to heterosexual couples. In his commentary on the Institutes[105] Arnoldus Vinnius says in discussing Justinian's definition of

Page 314 of [2005] 1 All SA 273 (SCA)

marriage, which is set out in Inst 1.9.1 and which is quoted in paragraph [37] above:

> "*of a male* and a *female.*
>
> For the union of two persons of the same sex is to be detested and is condemned by the law of God, the law of nature and the laws of all nations."

Brouwer, after quoting the definitions of Justinian and Modestinus, says:[106]

> "We say *"of a male and a female"* in the singular to exclude polygamy: we express both sexes to condemn lechery contrary to nature towards the same sex."

Similar views were expressed by Hendrik Jan Arntzenius:[107]

> "We say "a man and a woman" which indicates that polygamy and the unspeakable practice of homosexualism are repugnant to the nature of marriage."

[120] We no longer condemn sodomy.[108] It follows that a major reason given by jurists from the Roman-Dutch era for the heterosexual requirement in the definition has now fallen away.

[121] Until comparatively recently there were other reasons precluding the recognition in our law of same-sex marriages. Because the principle of legal equality between the spouses was not enshrined in our law there were many rules forming part of our law of matrimonial relations which put the husband in a superior position and the wife in an inferior one. The law could thus not easily accommodate same-sex unions because, unless the partners thereto agreed as to who was to be the "husband" and who the "wife", these rules could not readily be applied to their union.

[122] Thus it was a consequence of a marriage in our law that the husband had

(a) power as head of the family, which meant that he had the decisive say in all matters concerning the common life of the parties, with the result, amongst other things that the wife automatically acquired her husband's domicile;

(b) marital power over the person of his wife, by which was meant in modern times representing her in civil legal proceedings;109 and

(c) marital power over his wife's property.

Powers (b) and (c) could be excluded by antenuptial contract either com-pletely or in part. Power (a) was an invariable consequence of the marriage and could not be excluded.110

[123] The Matrimonial Property Act 88 of 1984 abolished the husband's marital power over his wife's person and property in respect of marriages entered into after the commencement of the Act and not governed by the Black Administration Act 38 of 1927. The Marriage and Matrimonial Property Amendment Act 3 of 1988 extended the provisions of the Matrimonial

Page 315 of [2005] 1 All SA 273 (SCA)

Property Act to the civil marriages of Blacks (which were previously governed by the Black Administration Act). Sections 29 and 30 of the General Law Fourth Amendment Act 132 of 1993 abolished the marital power that a husband had over the person and property of his wife in respect of all marriages to which it still applied and also his power flowing from his position as head of the family. This Act contained a number of other provisions repealing or amending statutory provisions which differentiated between men and women and, in particular between husbands and wives. A year before this Act was passed Parliament passed the Domicile Act 3 of 1992, which conferred on all persons over the age of eighteen years the capacity to acquire a domicile of choice and thereby abolished the common law rule that a wife automatically acquired and followed her husband's domicile. The Guardianship Act 192 of 1993 repealed the common law rule that a father is the natural guardian of his legitimate children and replaced it by the rule that parents share guardian-ship in respect of their legitimate children.

[124] As far as I am aware the only common-law rule for the application of which it is necessary to be able to identify the husband which still forms part of our matrimonial law is the rule which provides that the proprietary consequences of a marriage are determined, where the prospective spouses have different domiciles, by the law of the domicile of the husband at the time of the marriage. (This rule was established by the decision of this Court in *Frankel's Estate v The Master*111). All other rules apply equally to both spouses. Thus spouses owe each other a reciprocal duty of support and either spouse can be ordered to support the other or, where a redistribution order is competent, to transfer assets to the other on divorce.

[125] With the exception of the rule in *Frankel's* case (*supra*) no problems will be encountered in applying the rules governing the relations between husbands and wives to partners in a same-sex union. I do not believe that the impossibility of applying the rule in *Frankel's* case to same-sex unions would give rise to insoluble problems.112 The existence of this problem would not constitute a reason for refusing to extend the definition in the way we have been asked to do.

[126] Although counsel for the respondent did not contend that an inability on the part of parties to a same-sex union to procreate with each other was a basis for refusing to grant the extension of the definition sought, he did say, as I indicated earlier, that procreation is one of the characteristics going together to make up marriage. In one of the minority judgments in the *Massachusetts* decision (*supra*) to which I referred above,113 Cordy J, with whom Spina and Sosman JJ concurred, said:

> "The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family

Page 316 of [2005] 1 All SA 273 (SCA)

responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed."

The learned Judge went on to say that "a family defined by heterosexual marriage continues to be the most prevalent social structure into which the vast majority of children are born, nurtured and prepared for productive participation in civil society" and continued:

"It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose."

He then considered whether the Massachusetts statute, construed (as he held it had to be) as limiting marriages to couples of the opposite sex, remains a rational way to further that purpose. He concluded that it did. In reaching that conclusion he said, amongst other things:

"As long as marriage is limited to opposite sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavour; that if they are to procreate, their society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes.

If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur."

[127] In my view it is appropriate to consider what importance or relevance is to be attached in the present context to the fact that the parties to a same-sex union are incapable of procreating "naturally" with each other.

[128] As was pointed out in the *Halpern* case when it was before the Ontario Court of Appeal:[114]

"While it is true that, due to biological realities only opposite-sex couples can 'naturally' procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination."

This fact in itself may well constitute sufficient refutation of the arguments set out in Cordy J's judgment in the *Goodridge* case which I have quoted above.

[129] It is a controversial question in our law whether sterility (an inability to procreate) not accompanied by impotence (an inability to have intercourse) is a sufficient ground for the annulment of a marriage. *Venter v Venter*[115] is authority for the proposition that it is not, except where the inability was deliberately concealed by the affected spouse. *Van Niekerk v Van Niekerk*[116] on the other hand, is authority for the contrary proposition,

Page 317 of [2005] 1 All SA 273 (SCA)

namely that inability to procreate, even where it was not fraudulently concealed, is a ground of annulment. This is subject, however, to the important proviso that this is not the case where the parties knew that procreation was not possible.[117] In a same-sex union the parties would be aware at the time of the marriage that what the Ontario Court of Appeal called "natural" procreation is not possible. It follows that their union, if it is to be regarded as a marriage, would not be subject to annulment and the factor under consideration is not relevant.

[130] Further authority for this view is to be found in the judgment of Ackermann J in the *Home Affairs* case.[118] Having referred[119] to the reinforcement of "harmful and hurtful stereotypes of gays and lesbians", Ackermann J said:

"[50] A second stereotype, often used to bolster the prejudice against gay and lesbian sexuality, is constructed on the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple. Gays and lesbians are certainly individually permitted to adopt children under the provisions of s 17(b) of the Child Care Act 74 of 1983 and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other that strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

[51] From a legal and constitutional point of view procreative potential is not a defining characteristic of

conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

[52] I find support for this view in the following conclusions of L'Heureux-Dubé J (with whom Cory J and McLachlin J concurred) in *Mossop* [*Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658]:

> "The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version.'" (Footnotes omitted.)

Page 318 of [2005] 1 All SA 273 (SCA)

[131] I have already referred to the fact that Parliament has in the years since 1994 passed a number of statutes recognising same-sex partnerships. As appears from the judgment given by Moseneke J when this case was before the Constitutional Court 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 regulations to the Act.120 The extension of the definition of marriage would not appear materially to affect the operation of these statutory provisions and I am satisfied that the existence of these provisions on the statute book would not prevent the development of the common law under discussion from being considered to be no more than an incremental step. In fact it may well be that Parliament would consider it appropriate to pass an Act, possibly by way of an amendment to the Interpretation Act 33 of 1957, to provide that a reference in a statue to a "husband" or a "wife" in terms of a marriage under the Marriage Act would include a reference to a "spouse" married in terms of that Act. This is, however, for Parliament to decide and as I am of the view, for the reasons that I shall give later in this judgment, that the order to be given in this case should be suspended for two years to allow Parliament to consider the matter, Parliament will have the full opportunity to consider the advisability of enacting such a provision when it considers other aspects of the matter.

Are the appellants debarred from seeking relief because they did not challenge the constitutional validity of section 30(1) of the Marriage Act?

[132] I proceed to consider whether, as the court *a quo* held, this Court is precluded from granting relief to the appellants because they did not challenge the constitutional validity of section 30(1) of the Marriage Act, which sets out the marriage formula. This formula, which has been quoted above, is clearly based on the declaration prescribed by the Order in Council of 7 September 1838.121 Section 7, as amended by an Order in Council of 3 April 1840, provided that in the case of marriages other than those using the form and ceremony or ritual of the Anglican or Dutch Reformed Churches, each of the parties had to make the following declaration: "I do solemnly declare that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D., here present." Thereafter each of the parties had to say to the other: "I call upon these persons here present to witness that I, A.B., do take C.D to be my lawful wedded wife (or husband)."122

[133] There is no section of the Act that expressly approves the common law definition of marriage and I do not think that section 30(1) can be regarded as placing what may be called a legislative imprimatur on that definition. Clearly what has happened is that the marriage formula contained in the Act was framed on the assumption that the common-law definition was the correct one, which it was in 1838 and in 1961.

Page 319 of [2005] 1 All SA 273 (SCA)

[134] The question to be considered is whether if the common-law definition were to change (as I believe it will have to if Parliament does not take other action to ensure that the appellant's rights to equality and human dignity are not infringed) the Court would be able to modify the language of the formula so as to bring it in line with an extended definition.

[135] It is well settled that "it is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the Legislature's intention".123 Here Parliament's intention was to provide a formula for the use of those capable of marrying each other and wishing to do so, unless in the case of a marriage solemnised by a marriage officer who was a minister of religion the formula observed by the denomination to which the minister in question belonged had been approved by the Minister of Home Affairs. It is important to note that no limitations are placed on the Minister's power to approve a religious marriage formula. In other words, there is nothing to prevent the Minister from, for example, approving such a formula which uses the word "spouse" instead of "wife" or "husband" in the statutory formula. This indicates clearly that Parliament is not to be taken as having intended to approve the common law definition and, as it were, to prohibit same-sex marriages by failing (or refusing) to provide a formula for use thereat. That is why I say that Parliament's intention was to provide a formula for the use of those capable of marrying each other and wishing to do so.

[136] Francis Bennion,124 refers to a presumption that an updating construction is to be given to statutes except those comparatively rare statutes intended to be of unchanging effect, which he calls "fixed-time Acts." All other Acts he calls "ongoing Acts".

He explains the law as follows:

> "It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as *always speaking.* This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law."

This, he says,

> "states the principle, enunciated by the Victorian draftsman Lord Thring, that an ongoing Act is taken to be always speaking. While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. As Lord Woolf MR said of the National Assistance Act 1948 –
>
> > 'That Act had replaced 350 years of the Poor Law and was a prime example of an Act which was "always speaking". Accordingly it should be construed by continuously updating its wording to allow for changes since the Act was written.'"

Later on Bennion says:125

Page 320 of [2005] 1 All SA 273 (SCA)

> "Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act's legislative history, necessarily becomes less relevant as time rolls by. Yet their words remain law. Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.
>
> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as 'a living Constitution', so an ongoing British Act is regarded as 'a living Act'. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no

argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording."

[137] Among the examples he gives of the application of the working of the presumption are the following:126

> "Changes in the practices of mankind may necessitate a strained construction if the legislator's object is to be achieved.
>
> *Example 288.16* The Carriage by Air Act 1961 gives legislative force to the Warsaw Convention as amended at The Hague in 1955, which is set out in Sch 1. The Convention limits liability for loss of or damage to "registered baggage", but does not explain what "registered" means or what "registration" entails. Lord Denning MR explained that originally airlines kept register books in which all baggage was entered, but that this had been discontinued. He added: "What then are we to do? The only solution that I can see is to strike out the words 'registered' and 'registration' wherever they occur in the articles. By doing this, you will find that all the articles work perfectly, except that you have to find out what a 'baggage check' is."
>
> *Example 288.16A* A reference in an enactment originating in 1927 to a business which a company "was formed to acquire" was held to cover an off the shelf company, even though such companies were unknown in 1927.
>
> . . .
>
> *Developments in technology*. The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modi-fied accordingly when this is needed to implement the legislative intention.
>
> *Example 288.19* Section 4 of the Foreign Enlistment Act 1870 makes it an offence for a British subject to accept any engagement in "the military or naval service" of a foreign state which is at war with a friendly state. The mischief at which s 4 is aimed requires this phrase to be taken as now including air force service. Textual updating of the 1870 Act was recommended in the Report of the Committee of Privy Councillors appointed to inquire into the recruitment of mercenaries, but has not been done. Even so it seems that a modern court

Page 321 of [2005] 1 All SA 273 (SCA)

> should treat "military or naval service" in s 4 as including any service in the armed forces of the state in question." (Footnotes omitted.)

[138] If one applies this presumption to the marriage formula in section 30(1) of the Marriage Act, it is clear that, in order to give effect to Parliament's intention, it would not only be permissible but appropriate to regard the words "lawful wife (or husband)" as capable of including the words "lawful spouse" if the common law definition were to be extended so as to cover same-sex marriages. It follows that section 30(1) of the Marriage Act does not afford a basis for denying the appellants relief in this matter.

Should the court's order be suspended to enable Parliament to deal with the matter?

[139] I am satisfied for the reasons I have given that the appellants have established that the continued application of the common-law definition of marriage infringes their constitutional rights to equality and human dignity and that it is possible for this Court to give them an effective remedy because the extension of that definition to cover same-sex unions would be an incremental step in the development of the law and would not involve the court in trespassing on the domain of the Legislature by effecting extensive amendments to the law involving problems of great complexity.

On the other hand it is also relevant to bear in mind that the Law Reform Commission in its Discussion Paper to which I have referred127 has drawn attention to two other possible remedies to the problem raised by the appellants which this Court could not consider for the reasons I mentioned.

[140] It is desirable that all three options be carefully considered by Parliament before a final decision is taken as to which remedy should be adopted in this country. I am deeply conscious of the fact that this Court, consisting as it does of unelected judges, should not do anything which prejudices or even possibly pre-empts the decision Parliament takes on the matter. Important and wide-ranging policy issues have to be considered. Our conclusion, limited as it is to a consideration of but one of the available options, is based solely on juridical considerations. The policy issues are for Parliament, not for us. This is a result of the application of the doctrine of the separation of powers, which, as the

Constitutional Court has recently reminded us, must be respected by the courts. See *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and others,* an as yet unreported decision of the Constitutional Court, delivered on 15 October 2004, in which Ngcobo J, discussing what the appropriate remedy would be in a case where certain provisions in the Pound Ordinance (KwaZulu-Natal), 1947, were found to be inconsistent with the Constitution, pointed out (at paragraph 122) that, in deciding whether words should be severed from a provision or read into one, "there are two primary considerations to be kept in mind: The need to afford appropriate relief to successful litigants, on the one hand, and the need to respect separation of powers and, in particular, the role of the Legislature as the institution that is entrusted with the task of enacting legislation, on the

Page 322 of [2005] 1 All SA 273 (SCA)

other." Later (in paragraph 123) he said that "when curing a defect in [a] provision would require policy decisions to be made, reading-in or severance may not be appropriate. So too where there are a range of options open to the Legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the Legislature." In the present case Parliament may decide, after a full consideration of all the relevant factors, that one of the other options suggested by the Law Reform Commission should be adopted and if that decision survives such constitutional scrutiny as that to which it may be subjected, that will be the answer our country gives to the problem.

[141] I am accordingly satisfied that the appropriate way forward is for this Court to make an order within its powers to grant the appellants relief but to suspend such order for two years to enable Parliament to deal with the matter.

[142] Counsel for the appellants argued that such suspension would not be either competent or appropriate. I do not agree.

[143] As far as this Court's powers are concerned, the matter, being a constitutional one, is governed by section 172(1)*(b)* of the Constitution, which, it will be recalled, empowers the Court to

> "make any order that is just and equitable, including –
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (i) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Even if one assumes that a decision to develop the common law – because without the development it is not in accord with the spirit, purport and objects of the Bill of Rights – does not amount to a declaration of invalidity (a matter on which it is not necessary for me to express an opinion), it is clear that the Court's powers to grant "any order that is just and equitable" must include the power to suspend an order developing the common law, when the problem under consideration can also be solved by other methods which only Parliament can employ and where the ultimate decision as to which method should be employed depends to a substantial degree on policy considerations.

[144] If this Court were to plump for the only remedy open to it, it is likely, if this Court's order is not suspended, that many same-sex couples will get married. This factor will clearly make it difficult, if not impossible, for Parliament to decide to adopt one of the other options set out in the Law Reform Commission's report.

[145] There is no case of which I am aware where an order developing the common law has been suspended, but in a number of cases where statutory provisions were declared invalid the Constitutional Court has ordered that a statutory provision declared invalid was to remain in force for a specified period to enable Parliament to correct the defect in the provision. Under the Interim Constitution such orders were made under section 98(5) thereof which provided that the Constitutional Court might "in the interests of justice and good government" require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in a provision declared to be invalid, which provision was to remain in force pending correction or the expiry of the specified

Page 323 of [2005] 1 All SA 273 (SCA)

period. One of the cases where this power was exercised was *Fraser v Children's Court, Pretoria North, and others*,128 in which it was said129 that regard being had, *inter alia,* to the nuanced legislative responses which might be available in meeting the issues raised by the case, it was a proper case to require Parliament to correct the defects identified in the relevant statutory provision by an appropriate statutory provision. Section 98(5) of the Interim Constitution has been replaced by section 172(1)*(b)* (ii) of the Constitution, which is set out above and which does not repeat the phrase "in the interests of justice and good government" although this is the test still applied by the Constitutional Court.130

[146] In the present case the matter has since April 1998 enjoyed the attention of the Law Reform Commission. In its report to which I referred earlier the Commission requested respondents to submit written comments and representations by 1 December 2003. It is clearly envisaged that after the comments and representations it has received have been evaluated and it has finally deliberated on the matter, a report will be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament. For the reasons I have given earlier I think it important that Parliament be given a free hand to consider the matter and all the policy factors that arise without being subject to pressure of any kind flowing from the fact that one of the options to be considered by it has already been implemented by judicial decision, (without the policy implications of that option, or the other options, being evaluated).

[147] I am of course aware of the fact that the Ontario Court of Appeal, overruling the majority in the Divisional Court of Justice, ordered that its declaration that the common-law definition was invalid and its refor-mulation thereof was to have immediate effect. I do not think that the approach set out in that judgment should be applied here. In Canada there is, as far as I am aware, no statutory equivalent to section 172(1)*(b)* of our Constitution. The Canadian courts have assumed a power to give "temporary force and effect" to unconstitutional laws to allow the Legislature time to pass correcting legislation.131 The leading case on the point is *Schachter v Canada,*132 in which Lamer CJC said:133

> "Temporarily suspending the declaration of invalidity to give Parliament or the provincial Legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:
>
> A. striking down the legislation without enacting something in its place would pose a danger to the public;
>
> B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

Page 324 of [2005] 1 All SA 273 (SCA)

> C. the legislation was deemed unconstitutional because of under-inclusive-ness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefiting the individual whose rights have been violated.
>
> I should emphasise before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context."

Professor Hogg134 points out that these "guidelines" were not referred to in and do not accommodate five subsequent decisions of the Supreme Court of Canada in which temporary validity was given to certain laws to enable the Legislature to redraft them and in one case135 to allow for consultation with Aboriginal people before a new law was drafted.

The Ontario Court of Appeal in *Halpern* applied the "guidelines" very strictly, without referring to Lamer CJC's statement that they were not hard and fast rules or to the subsequent Supreme Court of Canada decisions to which Professor Hogg refers. Other Canadian courts confronted with the problem have suspended the coming into effect of their orders. Thus in Quebec Lamelin J suspended for two years the order she made in *Hendricks v Quebec Procureur General,*136 as did the majority of the Divisional Court in the *Halpern* case.137 The British Columbia Court of Appeal suspended its order in *EGALE*

*Canada Inc v Canada (Attorney General)*138 until the expiry of the two-year period imposed in the *Halpern* case in the Divisional Court. After the Attorney General of Canada indicated that he did not intend proceeding with his appeal against the Court of Appeal decision in the *Halpern* case, the Quebec and British Columbia suspensions were uplifted.139 The Supreme Court of Massachusetts stayed entry of its judgment in the *Goodridge* case (*supra*) for 180 days to permit the Legislature to take such action as it might deem appropriate in the light of the court's opinion.

[148] The power of a South African court to suspend the coming into effect of an order in a constitutional case to enable the Legislature to deal with the matter is not subject to the strict application of "guidelines" such as those set forth in the *Schachter* case (*supra*) with the result that this part of the Court of Appeal decision in the *Halpern* case (*supra*) is not applicable in this country.

Page 325 of [2005] 1 All SA 273 (SCA)

[149] In the circumstances I am satisfied that this Court should suspend the order it makes for a period to allow Parliament to deal with the matter in such a way as to bring an end to the unjustifiable breach of the appellants' rights to equality and human dignity. This would have the result that the appellants would be successful in putting a stop to the breach of those rights, either because Parliament will enact appropriate legislation to deal with the matter or, if it fails to do so (either because it enacts no legislation or because it enacts legislation which does not survive constitutional scrutiny140), because this Court's order would then come into operation.

[150] 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.

For the appellant:

P Oosthuizen SC instructed by *M Van den Berg Attorneys*, Bloemfontein

For the respondent:

MNS Sithole SC and *MD Mohlomonyane* instructed by State Attorney, Pretoria

Footnotes