



PRESENTATION TO THE PORTFOLIO
COMMITTEE ON HOME AFFAIRS ON
THE CONSTITUTIONAL COURT
JUDGMENT RELATING TO THE
MARRIAGE ACT, 1961
(ACT NO. 25 OF 1961)

Department of Home Affairs

① 060801p/home



THE CONSTITUTIONAL COURT JUDGMENT

The Constitutional Court of the Republic of South Africa heard the matter of Minister of Home Affairs and Another v Fourie and Another, as well as the matter of Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs, jointly.

- ◆ In the Fourie-matter the common law definition of “marriage” was challenged in that it does not make provision for the union of same-sex partners.
- ◆ In the Lesbian and Gay Equality-matter, section 30(1) of the Marriage Act, 1961 (Act No. 25 of 1961), hereinafter referred to as “the Marriage Act”, was challenged in that the reference to wife (or husband) in the marriage formula unconstitutionally excludes same-sex partners.

THE CONSTITUTIONAL COURT JUDGMENT (CONTINUED)



THE ISSUES IN BOTH MATTERS WERE:

1. Whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination and, if so,
2. What the remedy for the unconstitutionality should be.



THE CONSTITUTIONAL COURT JUDGMENT (CONTINUED)

In terms of the common law definition marriage in South Africa is:

“a union of one man with one woman, to the exclusion, while it lasts, of all others.”

Section 30(1) of the Marriage Act provides as follows:

“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)?”, and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that A.B. and C.D. here present have been lawfully married.’”

THE CONSTITUTIONAL COURT JUDGMENT (CONTINUED)



THE CONSTITUTION

The Court examined the Constitution and noted that:

- Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
- Section 9(3) of the Constitution prohibits unfair discrimination on the grounds of sexual orientation;
- The common law and section 30(1) of the Marriage Act deny same-sex couples equal protection and benefit of the law in conflict with the said sections of the Constitution.

THE CONSTITUTIONAL COURT JUDGMENT (CONTINUED)



DECISION OF THE CONSTITUTIONAL COURT

- The common law definition of marriage was found to be inconsistent with the Constitution and declared invalid in that it does not permit same-sex partners to enjoy the same status as heterosexual couples.
- The omission from section 30(1) of the Marriage Act of the words "or spouse" after the words "or husband" is inconsistent with the Constitution for the same reason as mentioned above.
- The Court suspended these declarations of invalidity for 12 months (until 1 December 2006) to allow Parliament to correct the defects.
- Should Parliament not correct the defects within this period, section 30(1) of the Marriage Act will automatically be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.