

THE CONSTITUTIONAL COURT JUDGMENT (CONTINUED)



REMEDIES PROPOSED BY THE CONSTITUTIONAL COURT

The Court noted that Parliament should decide the best way in which to achieve the rights of equality in this matter.

In the discussion papers before the Court, two legislative proposals were made:

- (i) The proposal of the Equality Project is to read in the words "or spouse" after the words "or husband" in section 30(1) of the Marriage Act.
- (ii) The South African Law Reform Commission (hereinafter referred to as "the SALRC") proposed the "Dual Act" which calls for a new generic marriage act (the Reformed Marriage Act) that would be enacted to give legal recognition to all marriages, and the current Marriage Act, which would not be repealed, but only be renamed as the Conventional Marriage Act, to give legal recognition to conventional heterosexual Christian marriages.



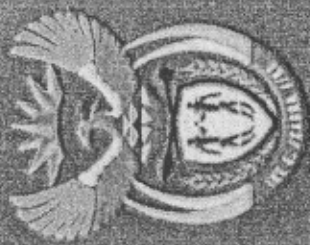
THE PROPOSALS OF THE SALRC

The SALRC proposed two draft Bills which would give effect to both the right to equality enshrined in section 9 of the Constitution and the right to freedom of religion, belief and opinion enshrined in section 15 of the Constitution.

(i) The Reformed Marriage Act

- A new generic marriage act, based on the current Marriage Act, which will afford legal recognition to all marriages, including those of same-sex couples and heterosexual couples of all religions (other than Christians), irrespective of the race or culture of a couple.
- The State will designate its marriage officers in terms of the Reformed Marriage Act.

Department of Home Affairs



THE PROPOSALS OF THE SALRC (CONTINUED)

The definition of "marriage" to be inserted after the definition of "magistrate" to read that *"marriage means the voluntary union of two persons concluded in terms of this Act to the exclusion of all others"*.

The definition of "spouse" to be inserted after the definition of "prior law", to read that *"spouse means a lawful partner of a person in a valid marriage concluded in terms of the Act,"*.

Section 30(1) of the Marriage Act to be amended by the inclusion of the words "or spouse" after the words "or husband" in the marriage formula.

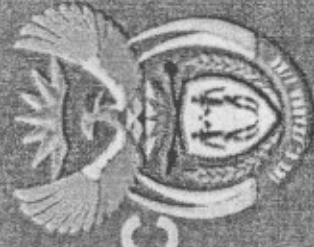
A new section 39B to be inserted after the repealed section 39A which provides that *"Any reference to spouse in any other law includes a spouse as defined in this Act."* This will make the definition of spouse applicable to other legislation.

THE PROPOSALS OF THE SALRC (CONTINUED)



(ii) The Conventional Marriage Act

- To be based on the text and format of the Marriage Act, renamed as "the Conventional Marriage Act".
- A definition for "conventional marriage" to be inserted in section 1 of the Marriage Act to read that "a *conventional marriage* means the *voluntary union of a man and a woman concluded in terms of this Act to the exclusion of all others.*"
- Section 2, which formerly dealt with *ex officio* marriage officers, to be omitted and replaced with a new section governing the designation of marriage officers.
- The term "conventional marriage" to be used throughout the Act.



THE PROPOSALS OF THE SALRC (CONTINUED)

It entails no separation of the religious and civil aspects of the marriage, and ministers of religion will have the choice to decide in terms of which Act they wish to be designated as marriage officers.

Under this proposal, the family law dispensation in South Africa will make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages, etc.

Choosing a marriage act in terms of which to get married will be regarded as a couple's personal choice, taking into account their religion, culture and sexual preference.



GUIDING PRINCIPLES NOTED BY THE COURT

- (i) The Court indicated that it did not want to pronounce on the constitutionality of any of the proposed routes, and noted that the two proposals did not necessarily exhaust the available paths to be taken.
- (ii) The Court noted that at the heart of the principles should lie the objective of promoting human dignity, equality and the advancement of human rights and freedom.
- (iii) The Court noted that Parliament ought to be sensitive to the need to avoid a remedy that on the face of it provides protection but would do so in a manner that would result in new forms of marginalisation.