IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

Case no 1906/2002

In the matter between

J First Applicant

B Second Applicant

And

DIRECTOR GENERAL, DEPARTMENT OF
HOME AFFAIRS First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA Third Respondent

JUDGMENT October 2002

MAGID, J:

Background

[1] The applicants are two adult women who are, and have been since November 1995, in a permanent same-sex life partnership with each other. The first and second respondents are respectively the Director-General and the Minister of Home Affairs and the third respondent is the President of the Republic of South Africa.

[2] On 18 August 2001 the second applicant gave birth to twins, a boy and a girl, as a result of in vitro fertilisation, using the oocytes of the first applicant and the sperm of an anonymous male donor. It was, and remains, the applicants' desire and intention that they both be regarded as the parents of the children. Shortly after the birth of the children the applicants attempted to register their births, but the first respondent has refused such registration on the grounds, as it was put in a letter dated 16 November 2001 addressed by the Acting Regional Representative of the Department of Home Affairs, that 'the two ladies cannot be regarded as father and mother or parent of children since there is no legal marriage and none [sic] of them can claim fatherhood

of them.'

[3] In order to ensure that the interests of the minor children were represented in this application in the unlikely event of there being any conflict of interest between the children and the applicants, the applicants, quite correctly, first sought the appointment of a curator ad litem to the children. That order was granted on 27 March 2002 and I have had the benefit of a very full and careful report from the curator, Ms Gabriel, who has strongly urged that the best interests of the children direct that the relief sought by the applicants should be granted. Her report provides considerable circumstantial information confirming the permanence of the relationship between the applicants and the very thorough arrangements, both financial and otherwise, they have made for the children. Annexed to the report are photographs depicting two apparently healthy, happy and well-fed children.

[4] The relief sought by the applicants was (as amended without objection during argument) set forth in the Second Order Prayed as follows:

1. That the first respondent is ordered to
(a) issue to the applicants a birth certificate for both the minor children; and
(b) register the birth of both of the said minor children in the population register, reflecting:
(i) the second applicant as their mother
(ii) the first applicant as their parent
(iii) their surname as being the surname of the second applicant.

2. That the second respondent is ordered to cause annexure 1A of the Regulations in terms of section 32 of the Birth and Deaths Registration Act 51 of 1992 to be amended so as to allow for the recordal of a non-anonymous donor of a gamete used in artificial insemination as contemplated in section 5 of the Children's Status Act 82 of 1987 from which a child is born, as a parent of that child.

3. It is declared that for all relevant purposes the first applicant is a natural parent and guardian of the aforesaid minor children.

4. That in section 5 of the Children's Status Act 82 of 1987, the word 'married' be struck out wherever it appears as being constitutionally invalid, and that the section be read as including the words 'or permanent same-sex life partner' after the word 'husband' wherever it appears, save that the relief in this paragraph is suspended pending confirmation thereof by the Constitutional Court.

5. That in section 11 (4) of the Births and Deaths Registration Act 51 of 1992 the words 'or herself' are to be read-in immediately after the word 'himself' and the word 'father' is to be deleted and replaced with the word 'parent' in order to save the section from constitutional invalidity, save that the relief in this paragraph is suspended pending confirmation thereof by the Constitutional Court.

6. That if the relief in paragraph 5 is confirmed by the Constitutional Court, the second respondent is ordered to make the necessary consequential amendments to the regulations promulgated in terms of section 32 of the Births and Deaths Registration Act 51 of 1992.

7. That the respondents, jointly and severally, pay the costs of the application.

8. That the rule nisi in the first order prayed be confirmed.'

The rule nisi referred to in paragraph 8 of the Second Order Prayed, which was granted when the curator ad litem was appointed, protects the anonymity of the applicants and the children. In this judgment I shall refer to the Births and Deaths Registration Act No 51 of 1992 as 'the Registration Act' and the Children's Status Act No 82 of 1987 as 'the Status Act'.

[5] The applicants joined the President as third respondent in the application because, so it was alleged, their legal advisers were unable to ascertain who was responsible for the administration of the Status Act. The State Attorney lodged a Notice of Opposition on behalf of the President as well as the first and second respondents but it appears that the opposing affidavits were lodged only on behalf of the first and second respondents and not on behalf of the President. In what follows I shall refer to the first and second respondents collectively as 'the respondents'. In the opposing affidavits lodged on behalf of the respondents it was disclosed that the Minister responsible for the administration and implementation of the Status Act is the Minister of Justice and Constitutional Development, although such affidavits contained no documentary proof thereof. At the hearing of the matter Mr Madonsela, who appeared for the respondents, expressly disavowed any reliance on the non-joinder of the Minister of Justice. In any event, it seems that the joinder of the President must inevitably take care of any problem raised by the citation of the incorrect, or the non-joinder of the correct, cabinet minister in this litigation. After all, the executive authority of the Republic is, in terms of section 85 (1) of the Republic of South Africa Constitution Act No 108 of 1996 ('the Constitution') vested in the President.

[6] The issues raised by the relief sought may be summarised as follows:

(a) the manner of registration of the twins' birth;
(b) the issue of parenthood including the constitutionality of section 5 of the Status Act;
(c) the constitutionality of section 11 (4) of the Registration Act.

Registration of the twins' birth

[7] In argument Mr Madonsela confirmed that the respondents

(a) consent to the confirmation of the rule nisi contained in the First Order Prayed; and
(b) are willing to issue birth certificates to the minor children and consequently

do not oppose the orders prayer for in paragraphs 1 (a), (b)(i) and (iii) of the Second Order Prayed.

What is in issue on this part of the case is, therefore, whether the applicants have a right to insist that the first applicant be reflected in such birth certificate as the 'parent' of the children.

[8] Section 28(2) of the Constitution provides that: 'A child's best interests are of paramount importance in every matter concerning the child'.
And section 28 (1) of the Constitutional provides that: 'Every child has the right –
(a) to a name and nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment ….'

The Court is enjoined by section 28(2) of the Constitution to regard the interests of the children as 'of paramount importance'. The use of the word 'paramount' (defined as it is in theShorter Oxford English Dictionary as 'superior to all others in influence, power etc; pre-eminent') makes it clear that the interests of the children are not merely important – they override all other considerations in cases concerning children. In this connection it is important to bear in mind what was said by Goldstone J in Minister of Welfare & Population Development v Fitzpatrick & Others 2000 (3) SA 422 (CC) at 428 C (para [17]), namely:
' Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions.'

This case very fundamentally concerns the children in every aspect of it and it is vital to take account of their best interests.

[9] Section 9 (1) of the Registration Act requires notice of a birth to be given 'in the prescribed manner'. Regulation 5 (1) of the Regulations issued in terms of the Registration Act ('the Regulations') reads as follows:

'A notice of birth in terms of Chapter II of the Act shall be in the form and contain substantially the information set out in –
(a) Annexure 1 A in the case of a person under one year;
(b) …'

It is common cause that the applicants utilised the forms set forth in Annexure 1A to the Regulations when they sought to register the births of the children. In terms of the Regulations, a separate form was required for each child. The details of the second applicant were correctly set forth in the portion of the forms bearing the heading 'NATURAL MOTHER OF CHILD'. In the circumstances there was no person whose name could be validly inserted in the portion which bears the heading, 'NATURAL FATHER OF CHILD'. What the parties then did was to insert the details relevant to the first applicant in

that portion of the form and to delete the word ‘FATHER’ in the heading and replace it in manuscript with the word ‘PARENT’.

[10] In paragraph 22(a) of the main opposing affidavit filed on behalf of the respondents, the deponent denies the applicants’ contention that the manner in which the forms were completed does not create a legal obstacle to the registration of the births of the children and goes on to say:

’22. Ad paragraphs 33 and 34:

(b) The first and second respondent officials can issue birth certificates to Z and A only if the particulars and information relating to the second applicant are to be reflected thereon. Not, as is insisted upon by the first applicant, to reflect both the information pertaining to the first and second applicants. This, as I have stated, is possible under the provisions of Section 10 of the Births and Deaths Registration Act. As the first applicant is neither the mother of the children nor their father, her particulars cannot be reflected in the birth certificates of the minor children.
(c) The deletion of the term ‘mother’ and substitution therefor of ‘parent’ is, in my submission, not a minor alteration of the birth form; it blurs a fundamental distinction between a mother and a father of a child whose birth registration is sought to be made. The distinction between mother and father is, for statistical reasons, significant in the administration of birth registrations.
(d) The fact that the first applicant is neither the mother nor the father of the children, is, in my submission, a legal obstacle for the first applicant's particulars to be contained in the births register of the children. The first applicant therefore is unable to fit herself within the legislation and regulations promulgated thereunder to have her name reflected in the births register.’

[11] The reference to the deletion of the word ‘mother’ in paragraph 22(c) of the opposing affidavit is inaccurate. As mentioned earlier, it was the word ‘father’ which was deleted and replaced with the word ‘parent’. Nowhere in the opposing affidavits was I informed why ‘the distinction between mother and father’ is statistically significant ‘in the administration of birth registrations’. Me Madonsela was unable to give me any assistance in this regard; nor have I been able to discern the statistical significance of the distinction between mother and father. I should have thought that the only significant distinction between them was biological in nature. However that may be, I must consider whether there is any positive bar in terms of the Registration Act or the Regulations which prevents the registration of the births of the children pursuant to the forms lodged by the applicants. In the instant case, the children actually have two mothers – the first applicant, the fertilisation of whose oocytes led to the birth of the children; and the second applicant in whose womb the foetuses were carried until their birth.

[12] The relevant definition of the word ‘substantially’ in the second edition of the Oxford English Dictionary is: ‘In all essential characters or features; in regard to everything material; in essentials; to all intents and purposes; in the main.’

In In re Burford; Burford v Clifford [1932] 2 Ch 122 the English Court of Appeal had occasion to consider the meaning of the phrase ‘substantially the same’ in a Rule of Court relating to a cause of action. Lord Hanworth M.R. said at 138, ‘ “Substantially” must have been put in in order to embrace within the rule something which was not exactly a repetition of the relief or remedy asked for.’

In my view the word ‘substantially’ where it appears in Regulation 5 (1)(a) bears a similar meaning, in that what is required is information in a notice of birth substantially as distinct from exactly or precisely, as set forth in the form. And although, as Mr Madonsela argued, the word ‘shall’ normally connotes a peremptory requirement, I do not think that the alteration of one word (from ‘FATHER’ to ‘PARENT’) can be regarded as anything other than due or substantial compliance with the requirement relating to the information required to be contained in the prescribed form.

[13] In my judgment, there is no justification in terms of Regulation 5(1)(a) for the first respondent’s refusal to register the births of the children because in my view there can be no doubt but that the forms used by the applicants were certainly those prescribed by the Regulation and they contained substantially the information required to be inserted therein. The Regulation did not require exact or precise provision of the information set forth in the prescribed form and I can see no practical or other real objection (other than bureaucratic intransigence) to object, in a case where there is no justification for inserting the name of the genetic father of the children in the form, to the insertion therein of the name of the woman who is not only the genetic mother of the children but who is intended, in collaboration with the second applicant, to be responsible for the rearing, education and general upbringing of the children. I am therefore satisfied that there is nothing in the Regulations which bars the grant of the order sought in prayer 1.

[14] So much for the Regulations. Is there any provision of the Registration Act which would prevent the grant of the relief sought in prayer1? Section 10 is the only provision of the Registration Act which was suggested as constituting a bar to the registration of the births of the children. Such a reference was contained in paragraph 22(b) of the respondent’s opposing affidavit which is quoted in [10] supra.

[15] Section 10 of the Registration Act reads as follows:
‘Notice of birth of child born out of wedlock –
(1) Notice of birth of a child born out of wedlock shall be given –
(a) under the surname of the mother; or
(b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1) the notice of birth may be given under the surname of the mother if the person mentioned in subsection

(1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.'

An analysis of the provisions of the section reveals that it deals with the surname under which the birth of a child born out of wedlock is to be registered. Thus it provides that the primary registration is to be in the name of the mother; but if the father acknowledges himself in writing to the relevant official to be the father, then on the joint request of the father and the mother, the child can be registered with the father's surname. Finally, subsection (2) provides that even where the father acknowledges himself to be such the birth of the child can be registered with the mother's surname.

[16] In this case it is common cause that the children were born out of wedlock. But section 10 of the Registration Act has no bearing on the formalities to be followed in order to register their births. The question of the surname they shall bear is not in issue. No other section of the Registration Act appears to bar the relief sought in paragraph 1 of the Second Order Prayed. Certainly none was relied on by the respondents. I therefore conclude that there is nothing in the Registration Act or the Regulations thereunder which entitled the respondents to refuse to register the twins' birth on the basis of the forms completed by the applicants.

[17] I have arrived at this conclusion on a purely linguistic treatment of Regulation 5(1)(a) of the Regulations. But there is another, and possibly more important reason to arrive at the same conclusion. If a child has, as is provided in section 28(1)(a) of the Constitution 'the right to a name from birth', the official of the State who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the State; Certainly it is no part of the function of that official to place technical difficulties in the way of such registration.

[18] Having concluded that there is no bar to the granting of the relief sought in paragraph 1 in the Second Order Prayed, I consider that the applicants do not for themselves require the relief set forth in prayer 2. But that does not render the relief sought by them either academic or moot. Unusual though the fact of this case may be, I am sure that they cannot be totally unprecedented. And I think it is only appropriate that the second respondent be ordered to construct a form which will be appropriate for use in such circumstances.

The issue of parenthood

[19] The applicants desire to have the first applicant recognised by law, as she is genetically, as the mother and hence a parent and natural guardian of the twins. The legislature enacted Section 5 of the Status Act in order, presumably, to ensure that where a child is born by artificial insemination to a married woman by the use of gametes donated by someone ('the donor') other than the wife or husband, the child is 'for all purposes' to be regarded as the legitimate child of that husband and wife, and that, with certain exceptions

which are not relevant to this matter, no right, duty or obligation should arise between the child and the donor of the gametes.

[20] In the present state of the law only the second applicant by virtue of her recognition as the mother of the twins, has a legal obligation to support them and they have the legal right to claim support only from her. It is true that the first applicant has expressed a willingness, indeed a desire, to assume an obligation to support them in both a material and a spiritual sense. But such a desire is vastly different from a legal obligation. For example, if the relationship between the applicants were to terminate (however unlikely that appears at the moment to be) not only would the first applicant have no right of access to the twins but they would have no right to call upon her for their maintenance. Nor would they be entitled to any access to her which might well (depending of course on their ages when and if such were to occur) have a devastating emotional and psychological impact upon them.

I am informed by the curator that the second applicant has made a will containing a provision that on her death the first applicant is to be appointed as the guardian of the children. But wills can easily be revoked and the children might in that event be left without a guardian. But even if the applicants were not to part, it is demonstrably in the interests of the children that they have two parents and guardians, rather than one. In cases of emergency (for example, consent to surgery) it might well be vital, in the interests of the children, that the first applicant be entitled to given the requisite consent if, for whatever reason, the second applicant was not available to give such consent.

[21] Mr Madonsela submitted that if the first applicant desired to be the guardian of the twins that result could be satisfactorily achieved by adopting them. (du Toit & Another v Minister of Welfare & Population Development & Others 2002 (10) BCLR 1006 (CC)). Indeed, section 74 (2) of the Children's Act No 33 of 1960 provides that with certain exceptions which are of no relevance to this enquiry 'an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent.' Mr Madonsela went so far as to submit that because the first applicant had this alternative remedy I was precluded from considering the constitutionality of section 5 of the Status Act. I shall revert to this argument presently.

[22] The first applicant desires to be treated and regarded in law as a parent of the twins. It is common cause that she is genetically their mother and hence their parent. I am asked, in paragraph 3 of the Second Order Prayed to make an order declaring that 'for all relevant purposes' she is such. What that phrase is intended to mean is not clear to me. But my constitutional duty is clear. It is, in terms of section 39(1)(a) of the Constitution, when interpreting the Bill of Rights, to 'promote the values that underlie an open and democratic society, based on human dignity, equality and freedom'. It is also, when interpreting legislation or when developing the common law to 'promote the spirit, purport and object of the Bill of Rights'. I believe that, in the circumstances of this case, the first applicant's right to human dignity in terms of section 10 of the Constitution and the twins' right to family and parental

care in terms of section 28(1)(b) of the Constitution demand that her rights as the genetic mother of the twins and the twins' right to have a claim against her, be recognised by the law.

[23] I have previously (paragraph [18] supra) referred to the general purport of section 5 of the Status Act. Plainly the legislature sought thereby to deal with advances in fertility and reproductive technology but it seems to have confined itself to the traditional view of the family. Hence the repeated reference to 'married women' and 'husband'. In Miron v Trudel (1995) 124 DLR (4th) 693 at para 102 (quoted with approval by Madala J in Satchwell v President of the Republic of South Africa and another 2002 (9) BCLR (CC) at 991 (para [11]_L'Heureux-Dube J said:

'Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration and protection under the law.'

The fact of the existence of other forms of family and life partnerships has been recognised by the Constitutional Court in several cases, including Satchwell, supra. As it was put in National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others 2000 (2) SA 1 (CC) at 24 I (para [36]):

'… marriage represents but one form of life partnership. The law currently only recognises marriages that are conjugal relationships between people of the opposite sex. It is not necessary, for purposes of this judgment to investigate other forms of life partnership. Suffice it to say that there is another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex.'

And in Dawood and Others v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at 960 C )para [31]) O'Regan J said –

'However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.'

[24] The applicants contend that section 5 of the Status Act is unconstitutional because (and I quote from the Heads of Argument prepared by Mr Stewart who appeared for the applicants):

'… the failure of the legislature to extend the protection afforded children conceived by artificial insemination using donor gametes and born to married couples, and the benefit afforded the spouses to the marriage, to children conceived by artificial insemination and born to same-sex couples, and the benefit afforded to the partners, constitutes unfair discrimination.'

[25] The right to equality of treatment is enshrined in the Bill of Rights. Its essentials are contained in subsections (1) (3) and (5) of section 9 of the Constitution which reads as follows:

‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2)…
(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.
(4) ….
(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[26] The nature of the enquiry to ascertain whether an attack on a piece of legislation on the ground of unfair discrimination in terms of section 9(3) of the Constitution is well-founded was thus described by Goldstone J in Harksen v Lane NO & others 1998 (1) SA 300 (CC) at 324 I (para [54]):

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
(b) Does the discrimination amount to unfair discrimination? This requires a two-stage analysis:
(i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a special ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
(ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the Interim Constitution).’

The learned Justice was, of course, dealing with the similar provision in section 8 of the Interim Constitution, but this test has been quoted with approval and applied in numerous decisions of the Constitutional Court since

then.

[27] I proceed then to apply the Harksen test. In the first place, it seems to me beyond question that the section differentiates between married couples and unmarried couples, whether engaged in a same sex relationship or not; for it creates a relationship of parent and legitimate child in the one case and not in the other. For a similar reason it certainly differentiates between the children produced depending on their parentage. I do not think the differentiation can bear any rational connection to any legitimate government purpose – certainly not in relation to the children.

In my judgment, the differentiation between married and unmarried couples clearly amount to discrimination on the grounds of marital status and probably sexual orientation. As between children born by artificial insemination to married and unmarried couples the differentiation amounts to discrimination on the grounds of social origin and birth.

As I have held that discrimination exists on prohibited grounds it is presumed to be unfair. It follows that the section must be held to be unconstitutional unless it can be justified in terms of section 36 (1) of the Constitution as being 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors ….'

[28] Mr Madonsela did not attempt to argue that the section was saved by the provisions of section 36 (1) of the Constitution. He merely submitted that I should not make an order declaring the section unconstitutional as he put it in his Heads of Argument, 'where there are other non-constitutional remedies available to the applicants … which have not been pursued.' It was in this context that he suggested that the first applicant should adopt the twins. He relied on the judgment of the Constitutional Court in Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC) in which the principle was re-affirmed that 'where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed.' Counsel's submission has no merit for it is based upon a misapplication of the Motsepe principle, which relates solely to the manner in which cases involving constitutional issues are to be managed and not to the manner in which citizens of the Republic must manage their lives. The dictum did not lay down that the constitutionality of legislation depended on whether the litigant had a satisfactory alternative remedy. Apart from any other consideration I assume that the process of adoption is not something that can be done overnight and I do not think the first applicant can be compelled to follow that course if indeed the section is unconstitutional.

[29] Mr Madonsela also argued (and against I quote his Heads of Argument):

'… that the effect of such declaration of invalidity would be to
(i) equate same sex partnership with civil marriages;
(ii) recognise surrogate motherhood;
which would have a myriad of legal effects. These being matters impacting on

social policy considerations, it is submitted, are best left for the legislature to deal with rather than being the subject of ad hoc judicial amendment.'

I fail to understand why a declaration of invalidity would 'equate same sex partnership with civil marriages'. It would merely decide that the Constitution does not permit unfair discrimination between those who are married and those who are not, in the context of assistance in the reproductive process by artificial insemination. As to the recognition of surrogate mother, I would merely point out that paragraph (b) of the definition of 'artificial insemination' appears to do just that. In any event Mr Madonsela did not explain the myriad of legal effects such an order would have or why it was a bad thing to have them. Moreover, if legislation is validly challenged as unconstitutional, a Court would be failing in its constitutional duty if it were to offer, as a reason for not making the appropriate order, the excuse that the legislature ought to deal with the matter.

[30] I accordingly find that section 5 of the Status Act is unconstitutional. If it were struck down in toto, the effect would be to deny its benefit to all children conceived by artificial insemination using the gametes of an outside donor. Such children would be left in a very vulnerable position, and those intending to be their parents would be left with deficient status quoad the children. It seems to me therefore that this is an appropriate case to cure the defects in the legislation by reading into it the phrases suggested in paragraph 4 of the Second Order Prayed. The effect of that will be that subsection (1) and (2) of section 5 of the Status Act will read as follows:

'(1) (a) Whenever the gamete or gametes of any person other than a (married) woman or her husband OR PERMANENT SAME SEX LIFE PARTNER have been used with the consent of both that woman and her husband OR PERMANENT SAME SEX LIFE PARTNER for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband OR PERMANENT SAME SEX LIFE PARTNER as if the gamete or gametes of that woman or her husband OR PERMANENT SAME SEX LIFE PARTNER were used for such artificial insemination.
(b) For the purposes of paragraph (a) is shall be presumed, until the contrary is proved, that both the (married) woman and her husband OR PERMANENT SAME SEX LIFE PARTNER have granted the relevant consent.
(2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where –
(a) that person is the woman who gave birth to that child; or
(b) that person is the husband OR PERMANENT SAME SEX LIFE PARTNER of such a woman at the time of the such artificial insemination.'

There will be no amendment to section 5(3) of the Status Act.

[31] Section 11 (4) of the Registration Act reads as follows:

‘A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.’

This subsection was introduced by Act No 56 of 1998. Its apparent purpose was to enable the unnamed father of a child born out of wedlock who wished to take joint responsibility for the child to disclose his name and be recorded as father of the child in the birth register. The applicants contend that this provision is unconstitutional because it is discriminatory. I consider that the applicants’ contention is probably sound, but counsel, including the curator ad litem, were agreed that if I were to grant the order sought in paragraphs 1 to 4 of the Second Order Prayed, the relief sought in relation to section 11 (4) of the Registration Act would for obvious reasons, fall away.

Costs

[32] Mr Madonsela submitted that the application should be dismissed with costs. In the circumstances I can think of no reason why the costs should not follow the result.

The Order

[33] In the result therefore I grant an order in terms of paragraphs 1,2,3,4,7 and 8 of the Second Order Prayed.