CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 31/96

LAWRIE JOHN FRASER — Applicant

versus

THE CHILDREN'S COURT, PRETORIA NORTH — First Respondent
ADRIANA PETRONELLA NAUDE — Second Respondent
THE ADOPTIVE PARENTS — Third Respondents

Heard on: 12 September 1996

Decided on: 5 February 1997

JUDGMENT

MAHOMED DP:

[1] The applicant is a system developer employed in the computer industry. The second respondent is a violinist employed by the South African Broadcasting Corporation. For some months during the period 1994 to 1995 the applicant and the second respondent became involved in an intimate relationship and lived together as man and wife in a commune in Johannesburg, initially in Melville and subsequently in Malvern. It is common cause that the second respondent gave birth to a boy named Timothy on 12 December 1995 and that the applicant is the father of that child. No marriage was solemnized between the parties.

[2] During April 1995, shortly after the second respondent discovered that she was pregnant with this child she decided that it would be in the best interests of the unborn child that he be put up for adoption. When this became known to the applicant he resisted the proposed adoption and

that resistance has given rise to extensive litigation between the parties commencing early in December 1995.

[3] This litigation included an initial urgent application by the applicant in the Supreme Court for an interdict restraining the second respondent from handing over the child (then yet to be born) for adoption. This application was dismissed by Coetzee J on 8 December 1995 on the grounds that the applicant had established no prima facie right.[1] The applicant's attorney thereupon wrote to the Minister of Justice on 14 December 1995 seeking the assurance of the Minister that the Commissioner of Child Welfare would be instructed to afford to him an immediate right to oppose the adoption of Timothy until such time as the Constitutional Court had made a ruling on his rights. The reply of the Minister was swift and empathetic to the plight of fathers of "illegitimate"[2] children. He referred the applicant to a Bill designed to alleviate the plight of such children and then expressed himself as follows:

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1 *Fraser v Naude* (WLD) Case No 28831/95, 8 December 1995, not yet reported.

2 The children born of unions not formalised by marriage have traditionally been described as "illegitimate" children. Such a description has the potential to stigmatise such children. When the law refers to "illegitimate" children, however, what it is describing is simply the issue of a union or relationship not

solemnised by a legally recognised marriage ceremony and this is the sense in which I will use the expression in this judgment.

> "Despite the current legal position, the Minister respects the rights of parents and children enshrined in our Constitution and in pursuance thereof believes that your clients [sic] should at least be afforded the opportunity to be heard by the relevant Commissioner(s)."

[4] The litigation also included a number of separate hearings before the Commissioner of the Children's Court, Pretoria North, which is the first respondent in the present proceedings. On these occasions the applicant sought to intervene in the adoption proceedings on the grounds that he was an interested party and also on the grounds that he wished to be considered as a prospective adoptive parent. He also sought a stay of the adoption proceedings pending an application to the Constitutional Court to challenge the constitutionality of section 18(4)(d) of the Child Care Act 74 of 1983 ("the Act"), insofar as it dispenses with the father's consent for the adoption of an illegitimate child. This subsection reads as follows:

> "A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied-
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> . . . .
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> (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be;
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> . . . ."

[5] The first respondent gave its judgment on 23 February 1996. It made an order in terms of the Act sanctioning the adoption of Timothy. (The identity of the third respondents, who are cited in these proceedings as "the adoptive parents", was at that stage not yet known by the applicant.)

[6] On the following day the applicant launched another application in the Supreme Court in which he claimed, inter alia, the disclosure of the identities of the adoptive parents so as to enable him to interdict them from causing Timothy to leave the Republic of South Africa. This interdict was sought pending the outcome of an appeal or review against the decision of the first respondent in the adoption proceedings which had been concluded on 23 February 1996. This application was also dismissed.[3]

[7] On 11 March 1996 the applicant thereafter brought proceedings in the Transvaal Provincial Division for review of the decision made by the first respondent, on an urgent basis. The notice of motion included the following prayers:

> ". . . .
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> 3. An order reviewing and setting aside the order for the adoption of Timothy Naude made by the First Respondent on the 23rd day of February 1996.
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> 4. An order declaring that the father of an illegitimate child is entitled to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms of the Child Care Act, 74 of 1983.
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> 5. An order declaring that Regulation 21(3) of the Regulations in terms of the Child Care Act is inconsistent with the Constitution and invalid at least insofar as it denies the father of an illegitimate child the right to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms

[3] *Fraser v Naude* (WLD) Case No 28831/95, 26 February 1996, not yet reported, (judgment of Wunsh J).

of the Child Care Act, 74 of 1983.

6. An order declaring that Section 18(4)(d) of the Child Care Act, 74 of 1983 is inconsistent with the Constitution and invalid insofar as it dispenses with the father's consent for the adoption of an illegitimate child.

. . . ."

[8] After various preliminary skirmishes, judgment was eventually given by Preiss J on 24 May 1996[4] in which the order made by the first respondent for the adoption of Timothy was set aside. Prayer 6 was referred to this Court for determination. The court found it unnecessary to make any other orders.

The referral

[9] The first question which requires to be dealt with is whether or not the referral to this Court by Preiss J was competent in terms of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution"). The court a quo relied on the provisions of section 102(1) of the Constitution in making the order of referral.

[10] The relevant provisions of section 102 of the Constitution provide as follows:

[4] *Fraser v Children's Court, Pretoria North and Others* 1996 (8) BCLR 1085 (T).

"(1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

(2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

(3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction."

[11] It is clear that before there can be a competent and proper referral in terms of section

102(1) four requirements must be satisfied:[5]

1. There must be an issue before the provincial or local division of the Supreme Court concerned which may be decisive for the case.
2. The issue sought to be referred must fall within the exclusive jurisdiction of the Constitutional Court.
3. The referral must be in the interests of justice.
4. The interests of justice also require an assessment as to whether there are reasonable prospects of success for the party seeking to attack the constitutionality of the relevant statute or any particular part thereof.

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[5] These four requirements appear clearly from the judgments of this Court in *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 6 and 8; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at paras 4 and 6; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996(4) BCLR 449 (CC) at para 2; *Brink v Kitshoff* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at paras 8 and 9; *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1996 (11) BCLR 1439 (CC) at para 4; *S v Bequinot* 1996 (12) BCLR 1588 (CC) at para 7.

[12] Preiss J was undoubtedly correct in concluding that the second requirement for a valid referral, which I have set out above, was satisfied. Moreover, no attack was made on the conclusion that the third and fourth requirements were also satisfied in the circumstances of the present case.

[13] In response to an invitation from this Court, the second and the third respondents contended, however, that the first of the four requirements for a valid referral was not satisfied and that it could not properly be said that there was an issue before the provincial or local division concerned which could be decisive for the case.[6]

[14] It is clear that if the impugned portion of section 18(4)(d) of the Act is indeed inconsistent with the Constitution the adoption order made by the first respondent was invalid. The court a quo might therefore have been justified in acting in terms of sections 102(1) and 102(2) in referring the constitutionality of section 18(4)(d) of the Act to this Court and in suspending the proceedings before the Supreme Court pending the decision of this Court. This is not, however, the course which the court did in fact follow. It proceeded to uphold the prayer to set aside the adoption order on the grounds that the applicant had not received a proper hearing because the first respondent had

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6 See *Luitingh's* case supra n 5 at para 9; *Brink v Kitshoff* supra n 5 at para 10 and *Tsotetsi's* case supra n 5 at para 5.

> ". . . pre-empted the applicant's request for *viva voce* evidence to which he was entitled as a party with a substantial interest in the proceedings under the common law, or as a person likely to be affected by the adoption order in terms of section 8(5) of the Child Care Act, or as a parent at an adoption inquiry in terms of regulation 4(1), or on the application of the *audi alteram partem* principle."[7]

[15] It could therefore be contended with some force that once the court a quo was able to and did in fact set aside the adoption order of the first respondent on grounds unrelated to the constitutionality of section 18(4)(d) of the Act, it could not be said that a decision on the constitutionality of that section was "decisive for the case" before it.

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7 *Fraser v Children's Court, Pretoria North and Others* supra n 4 at 1099H-I.

[16] The cogency of that argument depends on a proper analysis of the "case" before the court a quo. If prayer 6 is simply an order sought to support the order to set aside the adoption proceedings in prayer 3 then the argument has considerable force because the adoption order was in fact set aside by the court a quo without any reference to the constitutionality or otherwise of section 18(4)(d) of the Act. But this would not be the case if prayer 6 was a self-contained prayer sought not for the purposes of justifying an order in terms of prayer 3 but for the purposes of securing for the applicant an independent right to veto the adoption of his child on the same basis as the mother (and subject only to the provisions of section 19 of the Act).[8]

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[8] Section 19 reads as follows:

"**Circumstances in which consent to adoption may be dispensed with**.-No consent in terms of section 18(4)(*d*) shall be required-

(a) in the case of any child whose parents are dead and for whom no guardian has been appointed;

(b) from any parent-

(i) who is as a result of mental illness incompetent to give any consent; or

(ii) who deserted the child and whose whereabouts are unknown; or

(iii) who has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; or

(iv) who has caused or conduced to the seduction, abduction

[17] Prayer 6 was sought in the form of a declarator and cannot simply be treated as a ground in support of an order to set aside the adoption order in terms of prayer 3. The applicant had a separate and substantive interest in obtaining an order in terms of prayer 6 in addition to the order setting aside the adoption order made by the first respondent. Setting aside the adoption order, without a declarator in terms of paragraph 6, would have given to the applicant a new opportunity of being properly heard before the first respondent. It would not have given to him

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or prostitution of the child or the commission by the child of immoral acts; or

(v) whose child is by virtue of the provisions of section 16(2) in the custody of a foster parent or is a pupil in a children's home or a school of industries; or

(vi) who is withholding his consent unreasonably."

the advantage of a veto on the adoption which an order in terms of prayer 6 might secure (subject to the provisions of section 19 of the Act). Viewing the case as two distinct ones in substance, as I therefore do, I accordingly consider that the referral was covered by section 102(1) and that section 102(2) did not enter the reckoning because the issue referred was the only one raised by the case in question and there were no proceedings in it which had to be suspended in the meantime.

The constitutionality of section 18(4)(d)

[18] The relevant parts of section 18(4)(d) of the Act[9] which are attacked on behalf of the applicant are all the words after the word "child" where it occurs for the first time in the section. If this attack is successful its effect would (subject to the provisions of section 19 of the Act) be to preclude a Children's Court from making an adoption order in any case unless it is satisfied that consent to the adoption has been given by both parents of the child and it would not matter whether or not the parents of the child to be adopted are married to each other or whether the child is "legitimate" or "illegitimate".

[19] The main attack on section 18(4)(d) of the Act made on behalf of the applicant was that, in its existing form, it is inconsistent with section 8 of the Constitution because it violates the right to equality in terms of section 8(1) and the right of every person not to be unfairly discriminated against in terms of section 8(2) of the Constitution.[10]

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9 Quoted in para 4 of this judgment.

10 Section 8 of the Constitution provides:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (*a*) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(*b*) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[20] There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.[11] In the very first paragraph of the preamble it is declared that there is a ". . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms". Section 8(1) guarantees to every person the right to equality before the law and to equal protection of the law. Section 8(2) protects every person from unfair discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. These specified grounds are stated to be without derogation from the generality of the provision. Section 8(3)(a) makes it clear that nothing in sections 8(1) or (2) precludes measures designed to achieve the adequate protection or advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. Consistent with this repeated commitment to equality are the conditions upon which there can be any justifiable limitation of fundamental rights in terms of section 33 of the Constitution. In order for such a limitation to be constitutionally legitimate it must be "justifiable in an open and democratic society based on freedom and equality".

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11 *Brink v Kitshoff* supra n 5 at para 33; *S v Makwanyane and Another* 1995(3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 155 - 6 and 262; *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26.

[21] In my view the impugned section does in fact offend section 8 of the Constitution. It impermissibly discriminates between the rights of a father in certain unions and those in other unions. Unions which have been solemnised in terms of the tenets of the Islamic faith for example are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is "potentially polygamous" and for that reason, said to be against public policy.[12] The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant to section 18 of the Act. The child would not have the status of "legitimacy" and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable.[13]

[22] Whatever justification there might have been for discrimination against the fathers of such unions is destroyed by section 27 of the Act which provides that a "customary union" as defined in section 35 of the Black Administration Act 38 of 1927 ("the Black Administration Act") is deemed to be a marriage between the parties thereto for the purposes of Chapter 4 of the Act (which includes section 18(4)). That definition in the Black Administration Act defines "customary union" to mean

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12 *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 (1) SA 1006 (A). Cf *Ryland v Edros* (CPD) Case No 16993/92, 13 August 1996, not yet reported.

13 See Fyzee *Outlines of Muhammadan Law* 2ed (Oxford University Press, London 1949) Chapters II, V, VI and VII.

> "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage".

The effect of section 27 of the Act is therefore to deem a customary union in terms of Black law and custom to be a marriage for the purposes of the Act. The consequence which follows is that, in terms of section 18(4)(d) of the Act, the consent of both the father and the mother would, subject to the provisions of section 19, be necessary for an adoption order to be made in respect of a child born from such a union.

[23] In respect of adoption proceedings under the Act, fathers of children born from Black customary unions have greater rights than similarly placed fathers of children born from marriages contracted according to the rites of religions such as Islam. This appears to be a clear breach of the equality right in section 8 of the Constitution. The question which arises is whether there can be any justification for this discrimination in terms of section 33 of the Constitution. In my view there is none. Such a distinction might or might not have been justified if the "Black law and custom" referred to in the definition of "customary union" precluded polygamy. But, in any event, it does not.[14] There appears to me to be no reason why exactly the same recognition should not be afforded to marriages in accordance with the rights of systems which potentially allow polygamy. This invasion of section 8 of the Constitution is, in my view, clearly not reasonable and not "justifiable in an open and democratic society based on freedom and equality". The objection to section 18(4)(d) of the Act must, on this ground, therefore be upheld. It is true that what was directly attacked by the applicant is section 18(4)(d) of the Act and not

[14] See, for example, Bekker *Seymour's Customary Law in Southern Africa* 4ed (Juta, Cape Town 1989) 126.

section 27, but the two have to be read together. Section 27 is effectively a definitional section which includes a "customary union" (as defined in the Black Administration Act) in the definition of marriage.[15]

[24] Apart from the fact that the impugned section unfairly discriminates between some matrimonial unions and others, it might also be vulnerable to attack on other grounds. A strong argument may be advanced in support of other attacks on the section made in terms of section 8 of the Constitution on the grounds that its effect is to discriminate unfairly against the fathers of certain children on the basis of their gender or their marital status.

[25] Sometimes the basic assumption of the attack on the impugned section based on gender discrimination is that the only difference between the mother and the father of a child born in consequence of a relationship not formalised through marriage is the difference in their genders and on that basis it is suggested that this is expressly made an impermissible basis for discrimination in terms of section 8(2) of the Constitution. In my view, this proposition is too widely stated. The mother of a child has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father. For this reason the

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15 On this ground the present situation is distinguishable from the problem adverted to in passing in *Nel v Le Roux NO and Others* 1996(4) BCLR 592 (CC) at para 25.

kind of discrimination which section 18(4)(d) of the Act authorises against a natural father may be justifiable in the initial period after the child is born. My difficulty, however, is that the section goes beyond this. Every mother is given an automatic right, subject to section 19, to withhold her consent to the adoption of the child and that is denied to every unmarried father, regardless of the age of the child or the circumstances. This could lead to strangely anomalous and unfair results. The consent of the father to the adoption of such a child would be unnecessary even if the child is eighteen years old, has the strongest bonds with the father and the mother has not shown the slightest interest in the nurturing and development of the child after the first few months. On those facts the mother's consent would, subject to section 19 of the Act, always be necessary, but not that of the father. It may be difficult to find justification in terms of section 33 of the Constitution for this kind of discrimination. There is a strong argument that the discrimination authorised by the impugned section is unreasonable in these circumstances and without justification in an open and democratic society based on freedom and equality.

[26] It was also contended before us on behalf of the applicant that section 18(4)(d) of the Act impermissibly discriminates between married fathers and unmarried fathers. There is also some substance in that objection. The effect of section 18(4)(d) of the Act is that the consent of the father would, subject to section 19, be necessary in every case where he is or has been married to the mother of the child and never necessary in the case of fathers who have not been so married. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with. But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is

justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies. The consent of a father, who after his formal marriage to the mother of the child concerned, has shown not the slightest interest in the development and support of the child would, subject to section 19, always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and has shown a real interest in the nurturing and development of the child, would not be entitled to insist that his consent to the adoption of the child is necessary. The consent of the mother only would, subject to section 19, be necessary even if the only reason why the relationship between the couple has not been solemnised through a marriage is that the mother refuses to go through such a ceremony, either on the ground that she has some principled objection to formal marriages or on some other ground.

[27] None of these anomalies would, however, necessarily justify a simple striking down of all the words in section 18(4)(d) of the Act after the word "child" where it occurs for the first time. The result would be simply to make it necessary (subject to the provisions of section 19) for the consent of every parent to be given for the proposed adoption of their child, regardless of the circumstances. Such a simplistic excision of the subsection would mean that every father could insist on his consent to the proposed adoption of the child even if the child was born in consequence of the rape of the mother or of an incestuous relationship.

[28] The anomalous examples which I have discussed in the preceding paragraphs expose the undesirability of a blanket rule which (subject to section 19) either automatically gives to both parents of a child a right to veto an adoption or a blanket rule which arbitrarily denies such a

right to all fathers who are or were not married to the mother of the child concerned.

[29] The anomalies which I have described in the preceding paragraphs are not accommodated by such blanket rules. Even outside these anomalous cases such blanket rules fail to take into account other cases of a more complex nature. A child born out of a union which has never been formalised by marriage often falls into the broad area between the two extremes expressed by the case where he or she is so young as to make the interests of the mother and the child in the bonding relationship obvious and a child who is so old and mature and whose relationship with the father is so close and bonded as to make protection of the father-child relationship equally obvious. There is a vast area between such anomalies which needs to be addressed by a nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which "first world" western societies are premised;[16] by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both.

[30] In addressing itself to these matters the legislature might, however, have to consider the judicial and legislative responses in certain foreign jurisdictions to some of the problems to which I have referred, but only insofar as they may be relevant to our own conditions.

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16 See "Introduction: Assessing Legitimacy in SA" in Burman and Preston-Whyte (eds), *Questionable issue: Illegitimacy in SA* (Oxford University Press, Cape Town 1992).

USA

[31] Before 1972 the common law of the United States did not require the consent of the father to the adoption of his child if he was not married to the mother. He was, in those circumstances, not even entitled to notice of the proposed adoption.[17] In 1972, in the case of *Stanley v Illinois*[18] the court had to consider the position of an unwed father who had cohabited with the mother of his children intermittently for 18 years and had established a substantial relationship with the children. The court held that before the children could be separated from their natural father he was entitled to a hearing. The court emphasised that although most unmarried fathers might be unsuitable and neglectful parents not every unmarried father fell into this category. The fitness of the father was made the test for the determination of his rights. Six years later in *Quilloin v Walcott*[19] the court was concerned with the adoption of a child who had lived with its mother and her husband for eight years. The natural father of the child who had never been married to the mother contested an order sought for the adoption of the child by the mother's lawful husband. The natural father had never supported the child and the proposed adoptive father was living with the mother in a stable family unit. The court held that the test which had to be adopted was what was in the best interests of the child. It sanctioned the

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17 Wehner, *Comment: Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 Houston Law Review 691, 693 (1994).

18 405 US 645 (1972).

19 434 US 246 (1978).

adoption.

[32] In *Caban v Mohammed*[20] the unwed father of two children had lived with their mother for several years and contributed to the support of the family during that period. The couple later separated and the mother married another person who sought an order of adoption in respect of the two children of the relationship between their mother and their natural father. Under New York law, only the consent of the mother was necessary for a competent adoption. The natural father had no right to veto the adoption and could only succeed in stopping the adoption if it was not in the best interests of the children. The statute concerned was attacked on the grounds that it discriminated against the father on the grounds of gender. The court upheld this objection on the basis that the difference in the treatment of unmarried fathers and unmarried mothers did not bear a substantial relationship to the interests of the state in promoting the adoption of illegitimate children.[21]

[33] In *Lehr v Robertson*[22] the court was again faced with a challenge to an adoption order by a natural father who had not been married to the mother and who had shown no interest in the child. The Supreme Court held that the "mere existence of a biological link does not merit equivalent constitutional protection" for the unwed father.[23] What needed to be demonstrated

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20 441 US 380 (1979).

21 Id at 393.

22 463 US 248 (1983).

23 Id at 261.

was some interest in the child and a parental relationship with the child.[24]

[34] What appears from these and other cases in the United States is that an unwed father does not have any automatic right to be heard in proceedings for the adoption of his children or to veto any such adoption. Such rights may only be accorded to him if he has taken the opportunity to take an interest in the child and participated in its nurturing and development.

Statutory responses in the United States

[24] This approach also appears from the more recent cases in the United States. See *Michael H. v Gerald D.* 491 US 110 (1989); *Ruben Pena v Edward Mattox* 84 F 3d 894 (1996) and *In re Petition of John Doe and Jane Doe, Husband and Wife, to Adopt Baby Boy Janikova* 159 Ill 2d 347, 638 NE 2d 181 (1994).

[35] With the increasing instances of cohabitation between couples outside of formal marriages, the legislatures in the different states in the United States have articulated different statutory responses to the problems which arise when the issue of such relationships are put up for adoption. In some cases the consent of the putative father is made an absolute requirement, but this requirement can be dispensed with if it is in the best interests of the child.[25] In other cases the putative father's consent is required only if he meets certain established criteria such as proof of an open acknowledgement of paternity or regular support for the child or responsibility towards the welfare of the child.[26] In more recent times a Uniform Adoption Act has been formulated as a model to guide state legislation, although it has not been adopted by many states in the USA.[27] In terms of this Act the consent of a putative father is provided for only where such a father has a relationship with the child amounting to something more than the mere acknowledgement of paternity. The consent of a putative father is required in cases where he-

a. is or has been married to the mother of the child if the child was born during the marriage or within 300 days after the marriage was terminated or a court has issued a decree of separation;

b. attempted to marry the mother before the child's birth by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid, if the child was born during the attempted marriage or within 300 days after the attempted marriage was terminated;

c. has, under applicable law, been judicially determined to be the father of the child,

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25 Wehner supra n 17 at 705.

26 Id at 706-7.

27 Uniform Adoption Act 9 U.L.A. 11 (1988 & Supp. 1994).

or has signed a document which has the effect of establishing his parentage of the child; and

i. has provided support within his financial means and has regularly visited or communicated with the child; or

ii. married or attempted to marry the mother after the child's birth in a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid; or

d. has received the child into his home and openly held out the child as his own.[28]

[28] Id section 2-401. These grounds would not have assisted the applicant on the facts of the present case.

In terms of this Uniform Adoption Act the consent of the putative father is not required in certain defined circumstances such as the case where he has himself relinquished the child to an agency for the purposes of adoption or where his parental relationship has been terminated or where he has been judicially declared to be incompetent or where he has made a statement denying paternity or where the court determines that consent is being withheld contrary to the best interests of the child.[29]

Canada

[29] Id section 2-402.

[36] In the leading case of *Re MacVicar and Superintendent of Family and Child Services et al*[30] the mother of the child to be adopted had consented to the adoption. The unwed father brought an application to the British Columbia Supreme Court in which he contended that the relevant statutory provision of British Columbia which dispensed with the need for the father's consent where the mother and the father of the child had never gone through a form of marriage with each other was inconsistent with the equality guarantee of the Canadian Charter of Rights and Freedoms.[31] The court held that the impugned section was indeed inconsistent with the Charter because it discriminated against the father on the grounds of sex and on the grounds of marital status and had the effect of permitting a severance of the father's relationship with his child without his consent but precluded such a severance of the mother's relationship with the child without her consent. The court could see no justification for such discrimination in terms of the limitations clause of the Charter.

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30 (1986) 34 DLR (4th) 488 (British Columbia Supreme Court).

31 Section 8(1)(b) of the Adoption Act, RSBC 1979, c.4 at that time, provided:

> "8(1) Subject to the provisions of subsection (8), no adoption order may be made without the written consent to adoption of
>
> . . .
>
> (b) the parents or surviving parent of the child, but where the mother and father have never gone through a form of marriage with each other and the child has not previously been adopted, only her consent is required;
>
> . . ."

Subsection (8) provided for the court to dispense with the requisite consents on certain grounds not dissimilar to the grounds listed in section 19 of the South African Child Care Act.

[37] Following on this litigation there was a statutory amendment to section 8(1) of the British Columbian statute which generally requires the consent of both parents before an adoption can be made, but which only includes certain categories of natural fathers within the definition of a "parent", such as a man who has acknowledged paternity of the child by having signed the child's Registration of Live Birth.[32]

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[32] Section 8(1) now reads as follows:

> "8.(1) Subject to the provisions of subsection (8), no adoption order may be made without the written consent to adoption of
> (a) the child, if over the age of 12 years;
> (b) the parents or surviving parent of the child;
> (c) the applicant's spouse, where the application for adoption is made by a husband only or a wife only;
> (d) the lawful guardian of the child where the child has no parent whose consent is necessary under this subsection, or of the Public Trustee if the child has no other lawful guardian or if the other lawful guardian cannot be found.
>
> (1.1) For the purpose of subsection (1) and of section 4, "parent" means
> (a) the mother of the child,

(b) a man who has acknowledged paternity of the child by having signed the child's Registration of Live Birth,

(c) a man who is or was the guardian of the child's person or joint guardian of the child's person with the mother,

(d) a man who has acknowledged paternity and who has custody or access rights by court order or agreement, and

(e) a man who has acknowledged paternity and has, pursuant to an order of the Supreme Court or any other court or otherwise, supported, maintained or cared for the child."

[38] In the case of *Re T. and Children's Aid Society and Family Services of Colchester County*[33] the Court upheld a Nova Scotia statute which provided that a child could not be placed in a home for the purposes of adoption pursuant to an adoption agreement, unless and until every parent of the child had entered into such an agreement but which defined a parent so as to include the mother of the child in all cases but so as to exclude the father from the definition, save where there has been some involvement with his child by way of support or access.[34] The

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[33] (1992) 91 DLR (4th) 230.

[34] The Children and Family Services Act, SNS 1990, c.5, s67(1):

> "In this Section and Sections 68 to 87,
> . . . .
> (f) "parent of a child means
> (i) the mother of the child,
> (ii) the father of the child where the child is a legitimate or legitimated child,
> (iii) an individual having custody of the child,
> (iv) an individual who, during the twelve months before proceedings for adoption are commenced, has stood in *loco parentis* to the child,

reasoning of the Court was that, properly interpreted, the relevant statute only affected a relatively small group of fathers who had established no paternal interest and had not been married to the mother of the child.

European Court of Human Rights

(v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before proceedings for adoption are commenced, provided support for the child or exercised a right of access,

(vi) an individual who has acknowledged paternity of the child and who

(A) has an application before a court respecting custody, support or access for the child at the time proceedings for adoption are commenced, or

(B) has provided support for or has exercised access to the child at any time during the two years before proceedings for adoption are commenced,

but does not include a foster parent.

. . . ."

[39] In the case of *Keegan v Ireland*[35] the relevant part of the Irish Adoption Act, 1952 provided that an adoption order could not be made without the consent of the child's mother and the child's guardian. A married man was recognised as a guardian of his children but an unmarried man could only become a guardian if so appointed by the Court. This provision was attacked before the European Commission of Human Rights and the European Court of Human Rights on three grounds. The first ground was that it constituted a breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms because it invaded the right of persons to family and private life.[36] The second ground was that the statute contravened

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35 (1994) 18 EHRR 342.

36 Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 6(1) of the Convention which guarantees a fair and public hearing of every person's civil rights and obligations, and the third ground was that the statute was a violation of Article 14 which guarantees the right to equality. Both the European Commission and the European Court of Human Rights upheld the first and the second grounds and therefore found it unnecessary to deal with the third.

The United Kingdom

[40] The relevant statutory provision dealing with adoptions is the Adoption Act of 1976, as amended. Ordinarily it requires the parents of a child to consent to the child's adoption, but section 72(1) of the Act, as amended by Schedule 10 to the Children's Act of 1989, defines a parent to mean any parent who has parental responsibility for the child under the Children's Act. In terms of the latter Act, a mother always has parental responsibility for the child, but if the father is not married to the mother at the time of the birth of the child, he only has parental responsibility if he acquires such responsibility by order of the Court or this is provided for by a parental responsibility agreement between the natural parents of the child.[37]

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[37] Sections 2 and 4 of the Children's Act of 1989.

[41] The natural father is therefore not excluded from any decision-making process as to whether the child should be freed for adoption. He can preclude that, in terms of section 16 of the Adoption Act, by acquiring parental authority and thus falling within the definition of a "parent". The court could in such circumstances only free the child for adoption if one of the exceptions in section 16(2) of the Adoption Act applies.[38]

[42] Effectively therefore, the father of an illegitimate child is not automatically barred from opposing a proposed adoption of his "illegitimate" child. Unless he falls within one of the exceptions which we have dealt with in section 16(2) of the Adoption Act, it is necessary for him to agree to the making of an adoption order if he has succeeded in acquiring parental

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[38] In terms of that subsection the agreement of such a parent to the making of an adoption order can only be dispensed with on the grounds that he-

> "(a) cannot be found or is incapable of giving agreement;
> (b) is withholding his agreement unreasonably;
> (c) has persistently failed, without reasonable cause to discharge the parental duties in relation to the child;
> (d) has abandoned or neglected the child;
> (e) has persistently ill-treated the child;
> (f) has seriously ill-treated the child . . . ."

responsibility in terms of section 4 of the Children's Act by showing that he is willing to acquire the obligations and duties of a father in relation to the support and upbringing of the child.

The effect of the foreign responses

[43] What is evident from the modern legislative and judicial responses to the problems associated with adoption is the recognition of the fact that in determining the rights of fathers to withhold their consent to the adoption of their children it may be too simplistic merely to draw a distinction between married and unmarried fathers, and it may equally be too simplistic to discriminate between the mothers and fathers of children born in consequence of a union not formalized by marriage. Unmarried fathers, by the acceptance of their paternity and parental responsibility, may often be qualified to make the most active inputs into the desirability of such an adoption order and in certain circumstances they may legitimately wish to withhold their consent to such an adoption order. It is equally evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional. The statutory and judicial responses to these problems are therefore nuanced having regard to the duration of the relationship between the parents of the children born out-of-wedlock, the age of the child sought to be given up for adoption, the stability of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reasons why the relationship between the parents has not been formalised by a marriage ceremony and generally what the best interests of the child are.[39] The Act in the

[39] See *Bethell v Bland and Others* 1996 (2) SA 194 (W); *B v S* 1995 (3) SA 571 (A).

present case may be open to attack on the grounds that it shows no adequate sensitivity to these nuances. The consent of the mother of a child born out-of-wedlock is (subject to the provisions of section 19) always a precondition. That of the father, never. There is accordingly a strong argument against the constitutionality of section 18(4)(d) of the Act in that form, but it is for Parliament and not for this Court to formulate what it considers to be an appropriate statutory formulation which would meet this argument, regard being had to the responses which have found favour in other jurisdictions and regard being further had to any special circumstances appropriate to our own history and conditions impacting on the problem.

[44] The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage. In seeking to avoid doing so, it may well be that the legislative approaches adopted in "first-world" countries described in the preceding paragraphs should be viewed with caution. The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the "first-world" countries described.[40] The task facing parliament is thus a challenging one.

The proper order

[45] In terms of section 98(5) of the Constitution, if this Court finds that any law or any

[40] See paragraph 29 above.

provision thereof is inconsistent with the Constitution, "it shall declare such law or provision invalid to the extent of its inconsistency". But the proviso to this subsection gives jurisdiction to this Court, "in the interests of justice and good government" to require Parliament, within the period specified by the Court, to correct the defect in the law or the provision "which shall then remain in force pending correction or the expiry of the period so specified".

[46] The first question which arises is whether the Court should declare section 18(4)(d) of the Act invalid in its entirety or whether it is possible to sever from its provisions all the words after the word "child" where it occurs for the first time in the subsection and merely declare these words to be invalid.

[47] In my view such a severance of the offending portions of the subsection is not justified. A simple deletion of all the words in the section which discriminate against the father of an illegitimate child would mean that section 18(4)(d) of the Act would be substituted by a simple requirement that in all cases of adoption the consent of both parents of a child would be necessary, save in the circumstance described in section 19 of the Act.

[48] I am not satisfied that such a truncated residue of section 18(4)(d) would adequately reflect what Parliament would wish to retain if it became alive to the fact that the section was vulnerable on constitutional grounds for the reasons which I have described. The consequences of such a truncated subsection would be that the consent of every father would always be necessary before an adoption order could be made, unless the circumstances described in section 19 were of application. The father of a child born in consequence of the rape of the mother or an

incestuous relationship would be entitled to assert that his consent should first be procured before the adoption order can effectively be made. Such a requirement is not justified. The lawmaker may consider it gravely objectionable for the consent of such a father to become compulsory for a valid adoption, even if this was subject to the exceptions contained in section 19 of the Act.

[49] There is another fundamental problem: even if the fathers of children born in consequence of the rape of the mother or an incestuous relationship were to be excluded specifically from the requirement that both parents of the child to be adopted must consent to the adoption, the effect would still be to put all other fathers and mothers in the position where their consent was necessary to the adoption, save in the circumstances set out in section 19. This is again not always rational or justifiable and the legislature may want a different formulation to accord with what is rational and desirable. Why should the consent of a father who has had a very casual encounter on a single occasion with the mother have the automatic right to refuse his consent to the adoption of a child born in consequence of such a relationship, in circumstances where he has shown no further interest in the child and the mother has been the sole source of support and love for that child? Conversely, why should the consent of the father not ordinarily be necessary in the case where both parents of the child have had a long and stable relationship over many years and have equally given love and support to the child to be adopted? Indeed, there may be cases where the father has been the more stable and more involved parent of such a child and the mother has been relatively uninterested in or uninvolved in the development of the child. Why should the consent of the mother in such a case be required and not that of the father? The fact that there is no formal marriage between the parents who have lived together may even be due to the steadfast refusal of the mother to marry the father and not owing to any

unwillingness on his part to formalise their relationship or to accept his responsibility towards the child.

[50] The next question which arises is whether the Court should simply declare section 18(4)(d) of the Act to be invalid without invoking the proviso to section 98(5) of the Constitution or whether "the interests of justice and good government" justify an order which would give Parliament an opportunity of correcting section 18(4)(d). Having regard to the difficulties mentioned above and the multifarious and nuanced legislative responses which might be available to the legislature in meeting these issues, it seems to me that this is a proper case to exercise our jurisdiction in terms of section 98(5) of the Constitution by requiring Parliament to correct the defects which I have identified in section 18(4)(d) of the Act by an appropriate statutory provision. The applicant is not the only person affected by the impugned provision. There are many others and it is in the interests of justice and good government that there should be proper legislation to regulate the rights of parents in relation to the adoption of any children born out of a relationship between them which has not been formalized by marriage.

[51] In the meanwhile, it would be quite chaotic and clearly prejudicial to the interests of justice and good government if we made any order in terms of section 98(6) of the Constitution which might have the effect of invalidating any adoption order previously made pursuant to section 18 of the Act. What is clearly called for in the circumstances of the present case is an order in terms of the proviso to section 98(5) of the Constitution which would allow section 18(4)(d) to survive pending its correction by Parliament within what would be a reasonable period. Regard being had to the complexity and variety of the statutory and policy alternatives

which might have to be considered by Parliament it appears to me that such a reasonable period should be two years.

Order

[52] I would accordingly make the following order:

1. It is declared that section 18(4)(d) of the Child Care Act 74 of 1983 is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 and is therefore invalid to the extent that it dispenses with the father's consent for the adoption of an "illegitimate" child in all circumstances.

2. In terms of the proviso to section 98(5) of the Constitution, Parliament is required within a period of two years to correct the defect in the said provision.
3. The said provision shall remain in force pending its correction by Parliament or the expiry of the period specified in paragraph 2.

Chaskalson P, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Mahomed DP.

For the applicant:	W Trengove SC, R Hutton and M Chaskalson instructed by Soller and Manning
For the second respondent:	N Davis instructed by Van Der Walt & Hugo
For the third respondent:	CJ Hartzenberg SC and CJ Van Schalkwyk instructed by Dion Röder and Heunis
For the amici curia:	DM Davis instructed by Centre for Applied Legal Studies and others
For the amicus curiae:	B Spilg, J Clark, P Jammy; EJP Olivier and N Barnes (attorneys at Brink Cohen Le Roux & Roodt Inc); SB Fine (attorney at Shelley B Fine); C Formanek (attorney at Harvey Nossel); and M Budow (attorney at E F K Tucker); instructed by Lawyers for Human Rights
For the Department of Welfare and Population Development:	DA Smith SC and S Hassim instructed by the State Attorney