

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/02

KATHLEEN MARGARET SATCHWELL

Applicant

versus

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Second Respondent

Heard on : 11 March 2003

Decided on : 17 March 2003

JUDGMENT

O'REGAN J:

[1] This is an application for direct access to this Court. In earlier proceedings, the applicant sought and obtained an order of constitutional invalidity from the Pretoria High Court in respect of sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (the 1989 Act) and regulations 9(2)(b) and 9(3)(a) promulgated in Government Notice R839 of 6 June 1995 under that Act (the 1995 regulations).¹ The basis of constitutional invalidity was unfair discrimination on the

¹ That judgment is reported as *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T).

grounds of sexual orientation and marital status in that the legislation conferred certain benefits upon the spouses of judges but not on the permanent same-sex life partners of judges. The order made by the High Court in respect of sections 8 and 9 of the 1989 Act had no force until confirmed by this Court. The matter therefore came before this Court for confirmation² and on 25 July 2002 this Court confirmed the order of the High Court with slight variations.³

[2] Subsequent to this Court's judgment, the Chief Justice wrote a letter drawing the parties' attention to the fact that the 1989 Act had been replaced on 22 November 2001 by the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, (the 2001 Act) and that the 1995 regulations had been replaced by new regulations promulgated on 5 July 2002 and published in GN R894 (the 2002 regulations). The main difference between the relevant provisions of the 1989 legislation and the 2001 legislation is that the latter includes Constitutional Court judges within its scope. The 2001 legislation however still affords benefits only to spouses of judges, and does not extend benefits to their permanent same-sex life partners. The effect of the repeal of the 1989 Act and its attendant regulations is that the applicant does not gain any effective relief from the order of this Court made on 25 July 2002.

[3] The applicant accordingly once again approached this Court. Before doing so, her attorney wrote to the state attorney seeking the attitude of the second respondent,

² See section 172(2)(a) of the Constitution and rule 15.

³ This Court's earlier judgment is now reported: *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

the Minister of Justice and Constitutional Development, who had on behalf of the government opposed the earlier application by the applicant. The Minister's attitude to this new application is set out in an affidavit made by a Director in the Department of Justice and Constitutional Development which was annexed to the founding papers. The second respondent does not oppose this application. This attitude was repeated later in the proceedings when the second respondent filed a notice indicating that he did not intend to object to an application to amend the notice of motion lodged by the applicant.

[4] The relief initially sought by the applicant was a variation of the order made by the Court on 25 July 2002. However, a notice to amend was subsequently lodged in which the applicant asked for an order in the following terms:

- “2. With effect from the date of this order it is declared that the omission from sections 9 and 10 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 after the word “spouse” of the words “or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” is inconsistent with the Constitution.
3. With effect from the date of this order, sections 9 and 10 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 is to be read as though the following words appear therein after the word “spouse” – “or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.”
4. With effect from the date of this order, it is declared that the omission from regulations 12(2) and 13(2) of the Judges' Remuneration and Conditions of Employment Act, 47 of 2001 after the word “spouse” of the words “or partner, in

a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” is inconsistent with the Constitution.

5. With effect from the date of this order, regulations 12(2) and 13(2) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 is to be read as though the following words appear therein after the word “spouse” – “or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.”

[5] The amendment to the notice of motion was appropriate. From the judgment given in *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at paras 22 – 30, it is clear that the power to vary the Court’s own orders will be exercised sparingly and only in appropriate cases.⁴ In the present case, the applicant originally sought a variation of an order which would have resulted in provisions of a statute being declared invalid that had not been declared invalid by the High Court. Confirmation proceedings in this Court are by their very nature concerned with legislation (or conduct of the President) that has been declared to be inconsistent with the Constitution by a High Court or the Supreme Court of Appeal.⁵ The consideration of statutory provisions other than those declared invalid by the High Court is a different exercise altogether. There can accordingly be no question of correcting or altering the order made by the Court in the confirmation proceedings, as both the subject matter of this application and the basis of this Court’s jurisdiction differ materially from those in the earlier proceedings. The only basis upon which this

⁴ See also *African National Congress v United Democratic Movement and Others (Krog and others intervening)* 2003 (1) SA 533 (CC); 2003 (1) BCLR 1 (CC) at paras 14 – 17; *Ex parte Women’s Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) at paras 4 – 6.

⁵ See section 172(2)(a) of the Constitution and Rule 15.

Court can determine the constitutionality of the challenged provisions in this case is if it grants direct access to the applicant for substantive relief in respect of those provisions. This was properly conceded by the applicant's counsel in his argument.

Direct access

[6] Rule 17 governs applications for direct access. They are granted only when it is in the interests of justice to do so. Ordinarily an applicant will have to show that exceptional circumstances exist in order to establish that the interests of justice require the grant of an application for direct access.⁶ In determining whether exceptional circumstances have been demonstrated, the Court will consider a range of factors. Relevant considerations include whether any dispute of fact may arise in the case,⁷ whether the issues have been properly traversed by other courts,⁸ the attitude of the other parties to the litigation,⁹ the possibility of the applicant obtaining relief in another court,¹⁰ the importance of the legal issues raised¹¹ and the desirability of an immediate decision¹² thereupon. Perhaps the most important factor is the recognised

⁶ See, for example, *Van der Spuy v General Council of the Bar of South Africa and Others* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 (CC) at para 6; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 7.

⁷ *Bruce and Another v Fleecytex Johannesburg CC and Others*, id para 7.

⁸ Id para 7.

⁹ See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) para 18.

¹⁰ See *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)* 1996 (6) BCLR 745 (CC); 1996 (4) SA 331 (CC) para 7.

¹¹ See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 11.

¹² Id.

undesirability of this Court being the court of both first and final instance in a matter.¹³

[7] The issues in this case are materially no different from those raised in the earlier case involving the same litigants, and the respondents do not oppose the relief sought in this case. There is accordingly no dispute of fact, and the issues in the case have already been considered by both this Court and the Pretoria High Court. Refusing direct access would cause great inconvenience to the applicant and further delay her obtaining the substantive relief to which she is entitled. In all these circumstances I am convinced that it is in the interests of justice to grant direct access.

The challenged provisions

[8] The applicant challenges sections 9 and 10 of the 2001 Act. Section 9 provides:

“(1) The surviving spouse of a Constitutional Court judge or judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he or she dies an amount –

(a) in the case of a surviving spouse of a Constitutional Court judge or a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that Constitutional Court judge or judge; or

(b) in the case of a surviving spouse of a Constitutional Court judge or judge who died while performing active service as a Constitutional Court judge or judge, equal to two thirds of the amount to which that Constitutional Court judge or judge would have been entitled in terms of section 5 if he or she was

¹³ See *Bruce and another v Fleecytex Johannesburg CC and others*, cited above n 6, para 8.

discharged from active service in terms of section 3 (1) (a) or (2) (a) on the date of his or her death.

(2) The amount payable to the surviving spouse of a Constitutional Court judge or judge in terms of subsection (1) shall be payable with effect from the first day of the month immediately succeeding the day on which he or she died, and shall be payable until the death of such spouse.”

And section 10 provides:

“If a gratuity referred to in section 6 would have been payable to a Constitutional Court judge or judge who died or dies on or after the fixed date had he or she not died but, on the date of his or her death, was discharged from active service in terms of section 3 or 4, there shall-

(a) if such Constitutional Court judge or judge is survived by a surviving spouse, be payable to such surviving spouse, in addition to any amount payable to that spouse in terms of section 9; or

(b) if such Constitutional Court judge or judge is not survived by a spouse, be payable to the estate of such Constitutional Court judge or judge, a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such Constitutional Court judge or judge had he or she not died but was, on the date of his or her death, discharged from active service as aforesaid.”

[9] The applicant argues that these provisions are unfairly discriminatory in that they do not provide benefits to permanent same-sex life partners of judges who have undertaken reciprocal duties of support. The only material difference to the equivalent provisions of the 1989 Act successfully challenged in the earlier litigation is that the new provisions cover Constitutional Court judges as well as other judges.¹⁴

¹⁴ Sections 8 and 9 of the 1989 legislation read as follows:

“8. (1) Subject to the provisions of subsection (2) the surviving spouse of a judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he dies an amount –

For the reasons given in our earlier judgment, the failure to afford these benefits to permanent same-sex life partners who have undertaken reciprocal duties of support is unfairly discriminatory, and there is no justification for that discrimination. The applicant should therefore be afforded the relief she seeks.

[10] The applicant also challenges two provisions of the 2002 regulations.

Regulation 12(2) provides:

“(2) A Constitutional Court judge, judge or acting judge is entitled to be accompanied by his or her spouse on official journeys at State expense if she or he uses the same motor vehicle as the Constitutional Court judge, judge or acting judge, and to claim in respect of his or her spouse the subsistence allowance prescribed in regulation 14(1) if the Constitutional Court judge, judge or acting judge -

(a) is on circuit court duty;

(a) in the case of a surviving spouse of a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that judge;

(b) in the case of a surviving spouse of a judge who died while performing active service as a judge, equal to two thirds of the amount to which that judge would have been entitled if he was discharged from active service on the date of his death.

(2) For the purpose of subsection (1) the amount payable to a surviving spouse shall be adjusted whenever the salary applicable to the office held by the judge concerned on his discharge or at his death, is increased.

(3) The amount payable to the surviving spouse of a judge in terms of subsection (1) shall be payable with effect from the first day of the month immediately succeeding the day on which he died, and shall be payable until the death of such spouse.

9. If a gratuity referred to in section 6 would have been payable to a judge who died or dies on or after the fixed date had he not died but, on the date of his death, was discharged from active service in terms of section 3 or 4, there shall –

(a) if such judge is survived by a spouse, be payable to such a spouse, in addition to any amount payable to that spouse in terms of section 8; or

(b) if such judge is not survived by a spouse, be payable to the estate of such judge, a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such judge had he not died but was, on the date of his death, discharged from active service as aforesaid.”

- (b) is on official duties contemplated by section 3(4) of the Supreme Court Act, 1959 (Act No. 59 of 1959), with the exception of official duties in the Witwatersrand Local Division of the High Court of South Africa;
- (c) is on official duties as contemplated by section 3(5) of the Supreme Court Act, 1959 (Act No. 59 of 1959);
- (d) performs service away from his or her headquarters after being discharged from active service; or
- (e) attends occasions in his or her official capacity.”

The equivalent provision was regulation 9(2)(b) of the 1995 regulations.¹⁵ Once again the major difference between the 1995 regulation and its replacement is that Constitutional Court judges now fall within the ambit of the regulation. Once again however the regulation provides only for the spouses of judges and not for their permanent same-sex life partners. In the circumstances, this regulation too suffers from the same constitutional complaint as its predecessor and warrants the same intervention by this Court.

[11] Finally, the applicant launched an attack on regulation 13(2) of the 2002 regulations which provides:

¹⁵ Regulation 9(2)(b) provided: “A judge or acting judge shall be entitled to be accompanied by his or her spouse on official journeys at State expense if she or he uses the same vehicles as the judge or acting judge, and to claim in respect of such spouse the subsistence allowance prescribed in regulation 10 (1) if such judge or acting judge-

- (i) is on circuit court duty;
- (ii) is on official duties as contemplated by section 3 (4) of the Supreme Court Act, 1959 (Act No. 59 of 1959), with the exception of official duties in the Witwatersrand Local Division of the Supreme Court of South Africa;
- (iii) is on official duties as contemplated by section 3 (5) of the Supreme Court Act, 1959;
- (iv) performs service away from his or her headquarters after being discharged from active service;
- (v) has been seconded for service as a judge of the High Court or Supreme Court of any of the former independent states of Transkei, Bophuthatswana, Venda or Ciskei and he or she is not provided with free accommodation; or
- (vi) attends occasions in his or her official capacity.”

“A subsistence allowance in accordance with regulation 14(1) shall be paid to the judge or acting judge and his or her spouse when they are travelling as referred to in subregulation (1)(a) as if he or she were absent from his or her headquarters on official duties for the duration of each such journey.”

This regulation applies only to Constitutional Court judges and judges of the Supreme Court of Appeal and acting judges in those courts.¹⁶ It was not challenged by the applicant in the earlier litigation due to an oversight.¹⁷ However, the regulation was challenged both in the original notice of motion lodged in the direct access application and in the subsequently amended notice of motion. Both the original notice of motion and the amendment were served on the Minister who filed a notice indicating that he did not intend to oppose the application.

[12] It is not surprising that the Minister does not oppose the relief as the same constitutional complaint arises in respect of regulation 13(2) as has arisen in relation to the other provisions already considered. The regulation affords benefits to spouses of certain judges, but not to permanent same-sex life partners who have undertaken reciprocal duties of support. It is true that the provision applies only to Constitutional Court judges and to judges of the Supreme Court of Appeal. However, all High Court judges are eligible for both permanent and acting appointments to such courts and the applicant therefore has sufficient standing to challenge the provision. The challenge

¹⁶ This is so because regulation 13(1)(a) regulates travelling by Supreme Court of Appeal judges and Constitutional Court judges from their homes to the seat of those courts during court terms.

¹⁷ There are other regulations, too, which provide benefits to the spouses of judges but not to permanent same-sex life partners. These regulations were not challenged in this case, but may call for the attention of the Legislature. See, for example, regulations 12(1) and 19(1) of the 2002 regulations.

to this regulation, therefore, must succeed for the same reasons that the challenges to the other provisions succeed.

Order

[13] This Court should make an order that is in substantially similar terms to that made in our previous judgment. The applicant did not ask for costs.

[14] It is ordered, with effect from the date of this order, that:

1. the omission from sections 9 and 10 of the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, after the word "spouse" of the words "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the Constitution;
2. sections 9 and 10 of the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, are to be read as though the following words appear therein after the word "spouse" — "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support";

3. the omission from regulations 12(2) and 13(2) of the regulations promulgated under the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, and published in GN R894 dated 5 July 2002 after the word "spouse" of the words "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the Constitution; and

4. regulations 12(2) and 13(2) of the regulations promulgated under the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, and published in GN R894 dated 5 July 2002 are to be read as though the following words appear therein after the word "spouse" – "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support."

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Moseneke J and Yacoob J concur in the judgment and order of O'Regan J.

Counsel for the applicant: Advocate P.R. Jammy instructed by Raymond
Tucker, attorney.