
Explanatory Note

The following explanation is given purely to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case concerns the question whether section 18(4)(d) of the Child Care Act (the “Act”) is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 (the “interim Constitution”). The applicant challenged section 18(4)(d) insofar as it requires a Children’s Court to obtain the consent of both parents before it may issue an order for the adoption of a “legitimate” child, but dispenses with the need to obtain a father’s consent for the adoption of his “illegitimate” child. Under the Act, “legitimate” children includes those children born of a relationship solemnised by a civil marriage recognised by the State, and under section 27 of the Act, children born of a customary union solemnised according to Black law or custom, as defined by the Black Administration Act.

The Court held that section 18(4)(d), as read with section 27, of the Act was inconsistent with section 8 of the interim Constitution, the equality provision. The Court held that the section discriminates between fathers in Black customary unions and fathers in marriages contracted according to the rites of religions such as Islam. The invasion of the equality provision was said to be unreasonable and unjustifiable in an open and democratic society based on freedom and equality.

The Court noted that there were other strong attacks that might be advanced against section 18(4)(d) of the Act on the ground that its effect was to discriminate unfairly against fathers on the basis of their gender or their marital status. The Court stated that the effect of the section could lead to anomalous and unfair results. For example, the consent of the father to the adoption of his “illegitimate” child would be unnecessary even if the child is eighteen years old and has the strongest bonds with the father; yet the mother’s consent is necessary even if she has not shown the slightest interest in the child. The Court was of the view that the anomalous results it had identified would not be remedied by a simple deletion of those parts of section 18(4)(d) which offended the Constitution. The result of such a deletion would be to make every parent’s consent necessary for every proposed adoption of a child, regardless of the circumstances, even, for example, if the child was born in consequence of the rape of the mother. The Court concluded that a nuanced and balanced consideration of the factual demographic picture in South Africa, the nature of parental relationships and the interests of the child were all necessary before the challenged section could be remedied.

The Court thus held that it was in the interests of justice and good government that Parliament be given two years to correct the defect in the said provision. Section 18(4)(d) of the Act thus remains in force pending its correction by Parliament.

5 February 1997.