



CONSTITUTIONAL COURT OF SOUTH AFRICA

Izak Andreas Geldenhuys v The National Director of Public Prosecutions and Others

**CCT 26/08
[2008] ZACC 21**

Judgment Date: 26 November 2008

MEDIA SUMMARY

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

On 26 November 2008 the Constitutional Court handed down judgment in a case concerning the confirmation of an order made by the Supreme Court of Appeal (SCA) declaring sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957 unconstitutional and invalid. The effect of those provisions was to make the age of consent for same-sex sexual relations 19 years, as opposed to 16 years for heterosexual sexual relations.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Criminal Law Amendment Act) which came into effect on 16 December 2007 has repealed these provisions. This matter is therefore about the protection of persons, like the applicant, who claim to have been unjustly convicted in terms of unconstitutional legislation then in force.

The applicant, Izak Andreas Geldenhuys, had sexual relations with a boy below the age of 19 years and was convicted on 10 counts of contravening the now repealed provisions of the Sexual Offences Act.

The SCA found the differentiation between the ages of consent for same-sex and heterosexual persons to be unfair discrimination under the Constitution and accordingly replaced the age of 19 years with 16 years, creating a uniform age of consent. Consequently the SCA overturned, pending confirmation of the order of constitutional invalidity by this Court, the applicant's convictions on six of the ten counts where the sexual acts in question had taken place after the boy's 16th birthday.

In this Court, the applicant, seeking to uphold the order of invalidity, relied on section 9 of the Constitution which forbids discrimination on the ground of sexual orientation. The respondents, including the Minister of Justice and Constitutional Development, conceded the unconstitutionality of the section. The only issue before this Court was therefore what the appropriate remedy should be.

In this regard, the National Director of Public Prosecutions (the first respondent) and the Director of Public Prosecutions (Transvaal Provincial Division of the High Court) (the second respondent) argued that, rather than lower the age of consent to 16 years, it should be set at 18 years for both heterosexual and same-sex sexual activity, in line with the constitutional, international and domestic law definitions and treatment of children as persons under 18 years.

Writing for a unanimous Court, Mokgoro J held that the differentiation did amount to unfair discrimination but declined to set the level of consent at 18 years. In respect of the latter, such a ruling would leave the age of consent to heterosexual sexual relations at 16 years, and thus maintain an incongruity between the ages of consent to heterosexual and same-sex sexual relations. Further, Parliament has already spoken through the Criminal Law Amendment Act, which set a uniform age of consent of 16 years, and there was no attack on the constitutional validity of the Criminal Law Amendment Act.

The decision of the Supreme Court of Appeal was accordingly confirmed.