
Explanatory Note

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

This judgment deals with the confirmation of a high court order declaring sections 8 and 9 of the Judges Remuneration and Conditions of Services Act and corresponding regulations unconstitutional to the extent that they afford benefits to the spouses of judges but not to their same-sex life partners.

The applicant, a judge, and her same-sex partner, have been involved in an intimate, committed, exclusive and permanent relationship since about 1986. Although they live in every respect as a married couple and are acknowledged as such by their families and friends, they are not legally “spouses” and don’t enjoy the benefits accorded to heterosexual married judges.

The high court order of unconstitutionality was based on section 9(3) of the Constitution which prohibits unfair discrimination on the grounds of sexual orientation and marital status. In the Constitutional Court, government accepted that same-sex partners are entitled to found their relationships compatibly with their sexual orientation and added that the restrictive legal meaning of the word “spouse” not only offends against same-sex partners but also against heterosexual partners in permanent life-lasting relationships.

Madala J, on behalf of a unanimous Court, finds it inappropriate to consider the latter argument, which raises questions of fact and law not raised by the applicant and not considered by the high court. The discrimination in issue here is between spouses and same-sex partners in a permanent life-relationship similar in other respects to marriage. Because marriage entails reciprocal duties of support between spouses, the Court adds a corresponding qualification to the order made by the high court: benefits should be afforded to same-sex partners of judges only where it can be shown that they have undertaken such reciprocal duties towards one another. Subject to this qualification, the Constitutional Court finds that the provisions in question unfairly and unjustifiably discriminate on the basis of sexual orientation.

Because its conclusion differs slightly from that of the high court, the Court substituted its own order: with effect from today, sections 8 and 9 of the Judges’ Remuneration Act and the relevant regulations are to be read as according benefits not only to spouses of judges but also to permanent same-sex life partners of judges where reciprocal duties of support have been undertaken.