

Explanatory Note

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

Section 44 of the Insurance Act 27 of 1943 deprives married women, in certain circumstances, of some or all of the benefits of life insurance policies ceded to them or made in their favour by their husbands. The issue of the constitutionality of the section was referred to the Constitutional Court by the Transvaal Provincial Division in terms of s 102(1) of the Constitution.

The Court found that the referral was incompetent, but granted the parties direct access to the Court.

On the merits, the Court held that s 44 discriminated against married women on the basis of sex and marital status and was thus clearly a violation of s 8 of the Constitution. The Court pointed out that married men did not lose the benefits of insurance policies ceded to them or made in their favour by their wives. After comparing the equality provisions of foreign and international human rights documents, the Court noted that those provisions reflected approaches to equality arising from different historical circumstances and varying jurisprudential and philosophical understandings of equality. The equality clause in the South African Constitution was a product of South Africa's particular history and ought to be interpreted against a background of systematic disadvantage caused by racial and other discrimination. Section 8 of the Constitution recognised that discrimination built and entrenched inequality amongst different groups and led to patterns of group disadvantage and harm.

Turning to the question of whether the discrimination could be justified, the Court held that since the common law rule prohibiting donations between spouses had been abolished, the argument that the section provided married women with a benefit was no longer applicable. The Court also rejected the argument that the section was necessary to prevent collusion between spouses: such collusion could as easily occur where husbands rather than wives were insurance policy beneficiaries.

In formulating its order, the Court took into account that many estates had been wound up since the date of commencement of the Constitution and that there were cogent reasons of good government against making an order that would expose these concluded proceedings to challenge. In the circumstances, the Court ordered that the deeming provisions of ss 44(1) and 44(2) of the Insurance Act were invalid as from 27 April 1994 but exempted payments already made on the strength of those provisions.

The judgment of the Court on the issue of the validity of the referral was delivered by Chaskalson P and was concurred in by the other members of the Court. The judgment of the

Court on the merits was delivered by O'Regan J and was concurred in by the other members of the Court.