

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others

The National Coalition for Gay and Lesbian Equality (NCGLE), joined by six same sex couples and the Commission for Gender Equality (CGE), brought an application in the Cape Provincial Division of the High Court against the Minister, Deputy Minister and Director General of Home Affairs. The case was then referred to the Constitutional Court.

The CGE was the fourteenth applicant in this matter.

This case raised two important questions:

1. Whether it is constitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same sex life partnerships with permanent South African residents;
2. Whether when it concludes that provisions in a statute are unconstitutional, the court may read words into the statute to remedy the unconstitutionality. These questions arise from the provisions of Section 25(5) of the Aliens Control Act 96 of 1991 and the applications of the provisions of section 172(1)(b) of the 1996 Constitution should section 25(5) be found to be inconsistent with the Constitution.

Section 25(5) essentially discriminated on the basis of sexual orientation and therefore violated the constitutional right to equality in that it omitted to give persons who are partners in permanent same sex life partnerships the benefits it extends to spouses.

The court found that Section 25(5) reinforced harmful stereotypes of gays and lesbians and it essentially conveys the message that gays and lesbians lack the inherent humanity to have their families and family lives respected or protected. It was held that the section discriminated unfairly against gays and lesbians on the grounds of sexual orientation and marital status and limited their equality rights and right to dignity. The limitation was found to be unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

The decision in the National coalition case paved the way for the realisation of rights for same sex couples in that subsequent judgments extended other benefits of marriage to same sex couples, including adoption, medical and

pension benefits, etc. In December 2005, the Constitutional Court ruled, in *Minister of Home Affairs v Fourie* that marriage should be extended to same sex couples. This was duly done with the passage of the Civil Union Act No. 17 of 2006.