

**THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY AND
ANOTHER v THE MINISTER OF JUSTICE AND OTHERS**

CCT 11/98

Explanatory Note

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.

In this case, the Constitutional Court was asked to confirm an order made by the Witwatersrand High Court that the following laws are unconstitutional and invalid: the common law offence of sodomy, the inclusion of sodomy in schedules to certain Acts of Parliament, and a section of the Sexual Offences Act which prohibits sexual conduct between men in certain circumstances. Although technically the Constitutional Court only had to decide on the constitutionality of the inclusion of sodomy in the schedules and of the section of the Sexual Offences Act, this could not be done without also considering the constitutionality of sodomy as a common law offence.

Justice Ackermann wrote the main judgment in this case. All the other judges who sat in the matter concurred with his judgment. Justice Sachs wrote a separate concurring judgment, the sentiments of which were supported by the rest of the Court.

Justice Ackermann found that the above offences, all of which are aimed at prohibiting sexual intimacy between gay men, violate the right to equality in that they unfairly discriminate against gay men on the basis of sexual orientation. Such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination.

Gay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences criminalise private conduct between consenting adults which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy.

For Justice Ackermann, the fact that the offences, which lie at the heart of the discrimination, also violate the rights to privacy and dignity strengthens the conclusion that the discrimination against gay men is unfair.

No legitimate reason could be found why the rights of gay men should be limited in the ways set out above. Open and democratic societies around the world are increasingly turning their backs on discrimination on the basis of sexual orientation, even though South Africa is the first to do so in its national Constitution. The Court therefore concluded that the common law offence of sodomy, its inclusion in certain statutory schedules, and the relevant section of the Sexual Offences Act were not reasonable or justifiable limitations on the rights of gay men to equality, dignity and privacy. The offences were accordingly found to be unconstitutional and invalid.

In his separate concurring judgment, Justice Sachs began by observing that human rights are better approached and defended in an integrated rather than a dislocated fashion. In the present case, the violation of equality by the anti-sodomy laws is all the more egregious because the

offences also violate the right to privacy by touching the deep, invisible and intimate side of people's lives.

He also reiterated the Court's jurisprudence on the centrality of dignity and self-worth to the idea of equality, and said that inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage. This leads to the scarring of the sense of dignity and self-worth associated with membership of the group, in this case the gay and lesbian community.

Finally, in Justice Sachs' view, the Constitution requires that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal is no longer the basis for establishing what is legally normative. The scope of what is constitutionally normal has expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. The decision of the Court should thus be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa.

9 October 1998.