CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 157/22

In the matter between:

CENTRE FOR CHILD LAW	Applicant
and	
T S	First Respondent
B N	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent

Neutral citation:	*Centre for Child Law v T S and Others* [2023] ZACC 22
Coram:	Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J; Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J
Judgment:	Tshiqi J (unanimous)
Heard on:	22 November 2022
Decided on:	29 June 2023
Summary:	Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 — unfair discrimination — parental rights — unmarried parents

ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Local Division, Johannesburg, the following order is made:

1. The order of the High Court, Gauteng Local Division, Johannesburg, declaring section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 to be inconsistent with the Constitution and invalid is confirmed to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do.
2. The declaration of invalidity referred to in paragraph 1 shall not be retrospective and is suspended for a period of 24 months to enable Parliament to cure the defect in the Mediation in Certain Divorce Matters Act giving rise to its invalidity.
3. During the period of suspension referred to in paragraph 2, the Mediation in Certain Divorce Matters Act shall be deemed to include the following additional provision:

   "Section 4A

   (1) The Family Advocate shall—

   (a) after an application has been instituted that affects, or is likely to affect, the exercise of any right, by a parent or non-parent with regard to the custody or guardianship of, or access to, a child; or after an application has been lodged for the variation, rescission or suspension of an order with regard to any such rights, complete Annexure B to the regulations, if so requested by any party to such proceedings or the court concerned, institute an enquiry to

enable them to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to them by the court.

(2) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned apply to the court concerned for an order authorising him or her to institute an enquiry contemplated in sub-section (1)(a).

(3) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned, and shall, if so requested by a court, appear at the hearing of any application referred to in sub-section (1)(a) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat."

4. Should Parliament fail to cure the defects within the 24-month period mentioned in paragraph 2 above, the reading-in will continue to be operative.

5. The third respondent must pay the applicant's costs in this Court and the first respondent's costs in the High Court occasioned by the filing of written submissions and the hearing of 10 January 2022.

JUDGMENT

TSHIQI J (Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J; Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J and Rogers J concurring):

Introduction

[1] This is an application for confirmation of a declaration of constitutional invalidity of section 4 of the Mediation in Certain Divorce Matters Act[1] (Act), made by the High Court of South Africa, Gauteng Division, Johannesburg. Section 4 of the Act reads as follows:

> "(1) The Family Advocate shall—
>
> (a) after the institution of a divorce action; or
>
> (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),
>
> if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.
>
> (2) A Family Advocate may—
>
> (a) after the institution of a divorce action; or
>
> (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,
>
> if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in sub-section (1).
>
> (3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in sub-sections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat."

[1] 24 of 1987.

[2] The applicant's primary argument is that section 4 of the Act is unconstitutional in that it places an obstacle in the way of never-married parents and their children, to access the services of the Office of the Family Advocate in the same way that married parents going through a divorce and parents who were married to each other are able to access those services when there is a dispute regarding the care and contact of their children. This is so because divorced or divorcing parents need only fill in a form (Annexure B to the Regulations of the Act)[2] which in turn prompts the Office of the Family Advocate to initiate an enquiry in terms of section 4. Never-married parents on the other hand have to approach a court and bring a two-pronged application where, in Part A, they seek an order for the Office of the Family Advocate to investigate and file a report on the best interests of the child; and Part B being an application for whatever substantive relief they seek.

[3] The applicant submits that this unjustifiably infringes on several of the constitutional rights of the excluded category of parents, namely sections 9 and 10, and also infringes the section 28(2) rights of the children concerned. Therefore, the constitutional attack on section 4 of the Act is premised on the ground that it is discriminatory to the extent that it provides a simple, streamlined process for married parents getting divorced, and for those who were married to each other, whilst it does not grant unmarried parents the same streamlined process, even if such parents are separating and do not have a parenting plan.

Parties

[4] The applicant is the Centre for Child Law (CCL), a registered law clinic based in the Faculty of Law of the University of Pretoria. The law clinic works towards establishing systemic change and sustainable impact by developing the law to the benefit of children through advocacy, research and, where necessary, litigation. The

[2] Regulations made under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) GN R2385 *GG* 12871, 3 October 1990 (Regulations).

first respondent is Ms T S, who is the mother of the minor children that are the subject of the application. She was never married to the father of the minor children and is no longer involved in the proceedings. The second respondent is Mr B N, and is the father of the minor children. The third respondent is the Minister of Justice and Correctional Services (Minister) who is cited in his official capacity and who initially filed a notice opposing costs only but later filed written submissions.

Factual background

[5] Mrs T S, at the time still Ms J, and Mr B N met in 2007 when Mr B N was in Knysna during his holiday from France, where he was living and working as a professional rugby player. Their romantic relationship progressed, and in August of 2008, Mrs T S moved to the town of Oyonnax in France to live with Mr B N. In 2009 and 2011 she gave birth to their two children. From 2012, the couple started drifting apart, and in June 2014, the couple terminated their relationship and they agreed that Mrs T S and the children could return to South Africa. At this stage Mr B N was paying Mrs T S R20 000 maintenance per month which was reduced to R15 000 after she secured employment in Johannesburg.

[6] In December 2015 Mr B N moved to George in the Western Cape at which point Mrs T S suggested to him that they have a parenting plan drawn up. Mr B N rejected the idea. During the Easter school holidays of 2016, the parties agreed that the children would visit Mr B N in George but upon realising that Mr B N had booked a one-way ticket for the children and refused to book a return ticket, Mrs T S refused to send the children to their father and proposed that Mr B N visit them in Johannesburg instead. On 13 March 2016 Mr B N launched an urgent application in the High Court for an order granting him contact with his children. The parties resolved the matter by concluding a parenting plan which was made an order of court on 15 March 2016. It dealt with guardianship, parental responsibilities, residential arrangements, access and visitation rights. The rights were to be exercised and enjoyed by both parties in South Africa and Mrs T S's residence was to be the primary residence.

[7] In February 2020 Mrs T S got married and she and her husband debated the possibility of emigrating from South Africa with the children born of her relationship with Mr B N. Mr B N did not support the idea when it was conveyed to him and instead insisted that the children live with him in George in the event Mrs T S and her husband decided to leave South Africa. Unable to secure Mr B N's consent to relocate with the children to Australia, Mrs T S approached the High Court for relief.

Litigation history

High court

[8] Mrs T S's application in the High Court was in two parts. In Part A she sought, inter alia, an order directing the Office of the Family Advocate to investigate the best interests of her minor children around their possible relocation with her to Canberra, Australia. Part B sought, inter alia, an order permitting Mrs T S to relocate to Australia permanently with the minor children, thereby varying the parenting plan which had been made an order of court in March 2016. The consequence of such an order would be that the minor children's primary residence would still be with Mrs T S and she would still be the primary caregiver but their place of residency would be varied to be Australia instead of South Africa. Mr B N opposed both parts of the application and instituted a counter-application in which he sought an order, inter alia, that his home be the primary residence of the minor children.

[9] Part A was set down on the opposed motion roll for 24 August 2021 and was allocated to Bezuidenhout AJ. The hearing was adjourned, inter alia because the Judge had concerns about the constitutionality of section 4. On 21 September 2021, the Court issued the following directions to the parties:

> "2. The Court has identified the following issues which require further argument and consideration:
>
> 2.1 It is trite that in almost all litigated matters involving children, the court will require a report from the Family Advocate in order to rule finally in the matter.

2.2 Parties, as is the case in this instance, who have never been civilly married have a different path to follow entirely as they are informed that the Family Advocate [O]ffice will not become involved without a court order directing it to do so. This means that one or both parties must first approach the Court for such an order.

2.3 In stark contrast, if a party to any litigation who is married and in the process of divorcing or who was previously divorced and who wishes to litigate further, she can easily complete and sign an [A]nnexure "B" form to the [Act], and serve it on the opposition as well as on the office of the Family Advocate and an investigation will be conducted on the strength thereof.

2.4 It would therefore appear that an arbitrary distinction is made between the children of married, or formerly married and divorced parents, and parents of children whose parents have never been civilly married.

2.5 The category of unmarried parents naturally would include a large number of persons who elected not to be married for many and varied reasons, often economic, cultural, religious or social or simply subscribing to a different belief system.

2.6 The arbitrary distinction occasioned by policy and/or the Act appears to be inconsistent with the various provisions of the Constitution of the Republic of South Africa, 1996 and with the Children's Act, 38 of 2005, including but not limited to the following:

2.6.1 **The Children's Act**

Section 6(2)(c) and 6(2)(d) - all proceedings, actions or decisions in a matter concerning a child must -

. . .

(c) treat the child fairly and equitably;

(d) protect the child from unfair discrimination on any ground, including. . .

(ii) Section 6(4)(b) - in any matter concerning a child - a delay in any action or decision to be taken must be avoided as far as possible.

(iii) Section 7(1)(n) which states, paraphrased, that in considering the best interests of the

child standard in the application of any provision of the Act that factors to be taken into account include . . . 'which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.'

2.6.2 **The Constitution**

Section 9(3) Bill of Rights – 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, . . . marital status'.

2.7 In terms of section 172(1) of the Constitution of the Republic of South Africa, 1996, when deciding a constitutional matter within its power, a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable, including:

(i) An order limiting the retrospective effect of the declaration of invalidity; and

(ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

3. The parties are therefore directed to submit further written submissions on the specific issues referred to above, which should include but not necessarily be limited to whether the Act and/or policy adopted is unconstitutional and should be declared as such.

4. The Court requests the following amicus curiae to assist and make submissions:

4.1 The Centre for Child Law;

4.2 The Office of the Family Advocate (Johannesburg and Pretoria);

4.3 The Gauteng Family Law Forum;

4.4 The Legal Resources Centre."

[10] Subsequent to the issuing of the directive, the CCL was joined to the proceedings together with the Minister, who was also mandated to appear and make submissions on

behalf of the Office of the Family Advocate. The matter was argued before the High Court on 10 January 2022.

[11] The CCL and Mrs T S aligned themselves with the view expressed in the directions issued by the High Court. They agreed that the Office of the Family Advocate does not conduct investigations nor compile reports in matters involving minor children, if the parents have never been married, unless specifically ordered to do so in terms of an order of court, which order is only obtained on application by one of the parents. The effect of this, so argued the CCL and Mrs T S, is that never-married parents are forced to go through the process of first approaching a court for an order authorising the Office of the Family Advocate to assist the parties, instead of accessing the services of the Office of the Family Advocate through the filling in and submission of Annexure B issued in terms of the Regulations, as married parents are entitled to do. The CCL and Mrs T S argued that this creates an additional legal step for these parents, with additional costs and further delays in the proceedings, even in unopposed referrals.

[12] The CCL and Mrs T S further argued that by singling out couples who were married and those who had gone through the process of divorce, the Act excludes a large group of parents and other interested parties who approach the courts regularly in the best interests of minor children. This group includes concerned grandparents or other relatives of children who apply to the court in terms of sections 23 and 24 of the Children's Act. The CCL and Mrs T S submitted that this distinction infringed: (a) the rights of parents not to be unfairly discriminated against on the grounds of marital status as envisaged in section 9(3) of the Constitution; (b) minor children's rights to have their best interests held to be paramount in all matters as per section 28(2) of the Constitution; and (c) unmarried litigants and their children's rights to dignity in terms of section 10 of the Constitution.

[13] Mr B N agreed that there is differentiation but submitted that the differentiation in the Act has nothing to do with superior treatment of the one group of parents above

the other. He argued that the differentiation flows from the legal consequences of the choice made by parties not to marry. He denied that the provisions of the Act are unconstitutional.

[14] The Minister conceded that the Act does not provide for the interests of unmarried litigants and their minor children. He submitted that this prima facie constituted a differentiation between married and unmarried parents or litigants. He further submitted that the Act is outdated, pre-constitutional legislation.

[15] The High Court concluded that the challenge raised in respect of the impugned provision was justified and not in the best interests of children and the public. It declared the impugned provision unconstitutional[3] and made the following order, which in relevant parts read:

> "6. Section 4 of the [Act] is declared to be inconsistent with the Constitution of the Republic of South Africa, 108 of 1996, and invalid.
>
> 7. The declaration of invalidity is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution of the Republic of South Africa, 108 of 1996.
>
> 8. The declaration of invalidity is suspended for a period of 24 (twenty-four) months from the date of confirmation by the Constitutional Court to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
>
> 9. As a temporary measure and pending the decision of the Constitutional Court on the validity of the Act:
>
> 9.1. the word 'or' between paragraphs 4(1)(a) and 4(1)(b) as well as between paragraphs 4(2)(a) and 4(2)(b) is struck out and a new paragraph (c) in both sections 4(1) and 4(2) is to be read in and shall read as follows:
>
> '(c) After an application has been instituted that affects (or is likely to affect) the exercise by a parent of any parental responsibilities and rights provided for in

[3] *ST v BN* [2022] ZAGPJHC 374; [2022] 2 All SA 580 (GJ).

section 18(2)(a) to (c) and 18(3) of the Children's Act, 38 of 2005 or after an application has been instituted by a non-parent as contemplated in sections 23 and 24 of the Children's Act, 38 of 2005.'

9.2. The words 'of a marriage concerned' as they appear in sections 4(1)(b) and 4(2)(b) are struck out.

9.3. All requests for inquiries envisaged in paragraph 9.1 above shall be made to the Family Advocate by the completion of an Annexure B form found in the Regulations to the Act.

10. The costs occasioned by the filing of written submissions and the hearing of 10 January 2022 are reserved for determination by the Constitutional Court when it decides on the validity of the Act."

This Court

Condonation

[16] The application for confirmation of invalidity has been brought by the CCL. As its role in the High Court proceedings was limited to an amicus curiae (friend of the court), it only monitored progress with a view to possibly applying to intervene in that capacity in this Court as well. It was only after a while that it was able to establish that no steps had been taken to approach this Court for confirmation of the order of invalidity. It then decided to proceed with the matter, even though it was not the primary litigant, has limited resources, and is inundated with requests for assistance in other matters. There was no obligation on the CCL to take the initiative. I see no reason why condonation should not be granted. Its explanation for the delay is reasonable and acceptable.

Jurisdiction

[17] This matter falls within the jurisdiction of this Court as a declaration of constitutional invalidity has no effect until it has been confirmed by this Court.[4]

[4] *Centre for Child Law v Director for Public Prosecutions, Johannesburg* [2022] ZACC 35; 2022 (2) SACR 629 (CC); 2022 (12) BCLR 1440 (CC) at para 20.

Merits

Applicant's submissions

[18] The CCL argues that there are at least three rights that are violated by the impugned provision, namely: the section 9 right to equality, the section 10 right to human dignity and the right of minor children to have their best interests considered of paramount importance as envisaged in section 28.

[19] The CCL submits that the High Court approached the issue of whether the impugned provision is constitutionally justifiable through the lens of the right to equality and that all the parties were in agreement that the provisions violated the right to equality. The CCL highlights that the High Court recorded the concessions made by counsel for the Minister as follows:

> "Ms Dayanand-Jugroop submitted that neither the Minister, nor the Family Advocate can refute the fact that the Act does not provide for the interests of unmarried litigants and their minor children. This, so it was argued, prima facie constitutes a differentiation between married and unmarried parents or litigants.
>
> On behalf of the Family Advocate, Ms Dayanand-Jugroop submitted that the Act discriminates against unmarried parents, including unmarried fathers and that its office therefore recognises the fact that unmarried parents have no choice but to obtain a court order in order to direct the Family Advocate to conduct an investigation into what is in the best interests of the minor children before a court can make a final decision in litigation involving these unmarried parents. It was submitted further the Act is outdated, pre-constitutional legislation and that its relevance is questionable for a number of reasons."[5]

[20] It is also clear from the above concession that the Minister accepted that the section 28 rights of what is in the best interests of minor children are impacted by section 4 of the Act. In this Court the Minister is still conceding that the challenged

[5] High Court judgment above n 4 at paras 26-7.

provisions are unconstitutional and does not oppose the application for confirmation of the order of invalidity. But, as stated above, the focus in the High Court was on the right to equality, and it dealt with the section 10, the right to human dignity, and section 28 right which concerns what is in the best interests of the child in the context of the right to equality. Here, it is not in dispute that once this Court finds that the order of constitutional invalidity based on the violation of the right to equality should be confirmed, a finding that the section 10 right to human dignity and section 28 rights of minor children would be impacted is inescapable. I will thus focus this judgment on the right to equality and not deal with sections 10 and 28 rights separately, specifically because the major part of the judgment will deal with Mr B N's contentions that dispute that section 4 is discriminatory.

[21] Mr B N has submitted that he does not oppose the application, but seeks to assist the Court in giving it a different perspective to that of the CCL and the Minister on section 4. Mr B N has prayed that he should thus not be mulcted with costs in the event his submissions are not upheld and has further stated his willingness to abide the decision of this Court unreservedly. During argument Mr B N's counsel agreed that he is also not participating as an amicus and that an application to participate in that capacity was not made. In this judgment I will however traverse some of the submissions made by Mr B N in order to determine whether there is any merit to the different perspective he has presented to the Court. In any event, he is the father of the minor children and participated fully in the High Court. I should also mention that, subsequent to the High Court's decision on constitutional invalidity, the substantive application relating to Mrs T S's relocation with the children was finalised.

[22] Mr B N accepts that the challenged provision of the Act differentiates between married and unmarried parents, but contends that this has nothing to do with superior treatment of the one category of parents above the other. He contends that the differentiation is as a result of the legal consequences of the choice made by married or formerly married parents to get married. If the choice not to get married later turns out

to have unsatisfactory consequences for the parents and their minor children, this does not render the legislation unconstitutional.

[23] According to Mr B N, never-married parents are not restricted in their access to courts any more than divorced or prospective divorced parents (that is, parents in the process of getting divorced). Divorced or prospective divorced parents can enlist the services of the Office of the Family Advocate after an action or an application has been lodged in a court in terms of section 4(1) of the Act. Never-married parents who choose to have their parenting plan agreement made an order of the court may bring an application to court in terms of section 34(5)(a) of the Children's Act. Thereafter the court will, in terms of section 29(4) and 29(5)(a) read with section 34(6) of the Children's Act, order the Office of the Family Advocate to submit a report to court with recommendations on the best interests of the child(ren). In both instances the Office of the Family Advocate is activated after an application has been lodged.

[24] Mr B N submits that where, under the auspices of the Act, a party would have to first lodge an action or application before they can approach the Office of the Family Advocate, in terms of the Children's Act the lodging of the action or application happens almost simultaneously with the court order to involve the Office of the Family Advocate. At the hearing of the action or application, the Office of the Family Advocate's report and recommendation would already be available. He argued that all parents have equal access to justice, though through different pieces of legislation.

Is section 4 discriminatory?

[25] Section 9(1) of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) prohibits direct and indirect discrimination by the State against anyone on any of the grounds listed therein. It provides:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[26] In *Harksen*[6] this Court laid down the following helpful test for assessing whether differentiation amounts to discrimination and whether the discrimination is unfair:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of [section 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two- stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) or section 9(4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."

[6] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

Section 9(5) provides that "discrimination on one or more of the grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair".

[27] The first question is whether there is differentiation between people or categories of people?

Differentiation

[28] This portion of the enquiry is concerned with whether the impugned provision treats different groups of people differently. Central to this enquiry is the determination of the relevant groups. Section 4 of the Act only caters for married parents who are in the process of divorce or have already divorced. This means, first, that never-married parents can never invoke section 4 to enlist the services of the Office of the Family Advocate in circumstances that are analogous to those of married parents who are in the process of divorce or have already divorced. Second, it means that married parents who choose to separate – for an indefinite or short period – without divorcing each other also can never enjoy the protections provided for by section 4. Thus, the provision treats divorced or divorcing parents differently to how it treats never-married parents and married parents who are separating but not divorcing. Differentiation is thus established.

[29] The next question is whether the differentiation bears a rational connection to a legitimate government purpose. If the differentiation does not bear a rational connection to a legitimate government purpose, there is a violation of section 9(1). However, even if it does, it might nevertheless amount to discrimination. In *National Coalition*[7] this Court stated that it may be unnecessary to ask this question in all cases, specifically if the discrimination is on a listed ground. But in this case it is important to highlight that only the Minister, who participated as the individual

[7] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 18. See also Albertyn and Goldblatt "Equality" in Woolman and Bishop *Constitutional Law of South Africa* 2 ed (Juta & Co, Cape Town 2013) at 19.

responsible for the administration of the Act, admitted upfront that there is no sound reason which could be construed as a legitimate governmental purpose that is served by the differentiation brought about by the Act. Instead, the Minister submitted that the Act is outdated and ought to be aligned with our constitutional norms and standards.

[30] The stance adopted by the Minister is supported by the fact that it is common cause that the Act was enacted before our Constitution came to be. This was before equal protection was given to the rights of all children, including those of unmarried parents. The Act was enacted when discrimination against unmarried parents and their children was ubiquitous. There was also no protection afforded to unmarried partners in any form of relationship, whether these were long term relationships or not. Because, just like married parents, unmarried parents may also disagree on issues concerning custody, guardianship and parental responsibilities for the children, there is no rationale for the differentiation.

[31] The Act, and by extension the impugned provision, simply had in mind the need to protect the interests of minor children during divorce, a process that was, and still is, adversarial and often acrimonious in nature. It ignored the fact that unmarried parents, just like those who are married, often have disagreements about parental responsibilities when they are going through a separation. It also did not take into account the reality that some married parents who are separated and remain in that position for a long period may have such disagreements.

[32] I therefore accept the concession by the Minister that there is no purpose advanced for the differentiation. Although the Act centres on divorce, there is no legitimate governmental purpose for devising a simple streamlined process for divorced and divorcing parents while withholding that simple streamlined process from unmarried parents going through a separation or who simply cannot agree on how to deal with the interests of their children.

[33] The CCL and the Minister also agree that discrimination has been established and that it is on the specified ground of marital status. Furthermore, they agree that the discrimination is unfair and cannot be justified under the limitations clause. This would have ordinarily been the end of the matter but Mr B N has adopted a different stance on all the issues conceded.

[34] Mr B N argued that no discrimination has been established. His contention is that section 4 is unavailable to never-married parents and parents who are not married to each other by virtue of them exercising their choice not to get married. It falls to this Court once again to remind those who invoke the choice argument that this submission is legally unfounded. The notion that the rights of parties who get married should be elevated above those of persons who do not conclude marriages, was dealt with extensively by this Court in *Bwanya*[8] where the majority in this Court said:

> "The reality is that as at 2016, 3.2 million South Africans were cohabiting outside of marriage and that number was reported to be increasing. Thus we find a substantial number of families within this category. Indeed, in *Paixão* the Court said '[t]he fact is . . . that the nuclear family [in context, using this term to refer to a family centred on marriage] has, for a long time, not been the norm in South Africa'. Unsurprisingly, *Dawood* says 'families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.' Surely, this caution applies equally to the institution of marriage, which is foundational to the creation of one category of family. To paraphrase what was said about the family, we should be wary not to so emphasise the importance of the institution of marriage as to devalue, if not denigrate, other institutions that are also foundational to the creation of other categories of families. And this must be so especially because the other categories of families are not only a reality that cannot be wished away, but are on the increase.
>
> There is no question that all categories of families are definitely deserving of legal protection. The question is to what extent each category of family must be legally

[8] *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51; 2022 (3) SA 250 (CC); 2022 (4) BCLR 410 (CC).

protected as a family. Therein lies the centrality of the question posed by Sachs J in the opener to this judgment, and it bears repetition:

> '[S]hould a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never-married.'

This question in no way suggests that marriage and permanent life partnerships must be collapsed into one institution. They are not the same. And for a variety of reasons some of those who are spouses or partners in one type of institution may even have an aversion to the other. But where the rationale for the existence of certain legal protections in the case of marriage equally exists in the case of permanent life partnerships, the question arises: why are those legal protections not afforded to life partners? That, to me, is the real question."[9] (Footnotes omitted.)

[35] Section 4 of the Act is triggered on the happening of one of two things: first, the institution of a divorce action, or second, the lodging of an application for the variation, rescission or suspension of an order relating to custody or guardianship of, or access to, a child made in terms of the Divorce Act. A dispute regarding the custody or guardianship of, or access to, a child generally arises when parents are either getting divorced or separated or are no longer able to agree on a parental responsibility arrangement concerning the children. Some unmarried parents are not able to reach consensus even after the birth of the child. A fair process would be for both married and unmarried parents to be afforded the same process to resolve these disputes.

[36] We know that section 29(5)(a) of the Children's Act gives both married and never-married parents the right to approach a court to seek its intervention so that a family advocate is appointed to furnish a report to the court regarding issues around children's interests. The Children's Act thus prescribes a process which is available to both married and never-married parents whilst the Act does not afford never-married parents a right to utilise a process similar to that available to married persons who are

[9] Id at paras 52-4.

going through a divorce. Practically, married parents who wish to get divorced may use the process prescribed in section 4 of the Act by simply completing Annexure B when summons is issued and filing this form simultaneously with their divorce summons. After the filing of Annexure B, the Office of the Family Advocate becomes involved in the divorce proceedings in order to provide the court with a report on the interests of the children affected by the divorce. Conversely, unmarried parents, whether they were in a long term relationship or not, cannot simply complete Annexure B when they separate. They have to utilise a two-tier process that effectively seeks leave of the High Court to appoint the Office of the Family Advocate to mediate in the issues pertaining to the child or children. The Office of the Family Advocate will get involved only after a court has granted an order for it to intervene.

[37] Having highlighted the flaws in Mr B N's submissions that the differentiation is based on choice and does not amount to discrimination, the next step is to illustrate briefly why the CCL and the Minister are correct in contending that the discrimination is unfair.

[38] Mr B N's argument is that it is not accurate to contend that the impugned provision discriminates on the basis of marital status because married parents who choose to separate without divorcing would also not benefit from section 4. This argument fails to take into account the fact that the section is challenged because the process it provides is only available to married parents and not to never-married ones. The fact that some married parents may not go through a divorce, and thus not approach the Office of the Family Advocate, does not mean that they are not entitled to the simpler streamlined process. There is therefore no doubt that section 4 discriminates on the basis of marital status, albeit indirectly. The fact that the discrimination is indirect cannot save it from constitutional invalidity.

[39] Albertyn and Goldblatt remark as follows on the distinction between direct and indirect discrimination:

> "Direct discrimination occurs where a provision specifically differentiates on the basis of a listed or unlisted ground. For example, the common law definition of marriage specifically referred to 'a man and a woman' and thus discriminated directly against same-sex couples on the ground of sexual orientation. Indirect discrimination occurs where differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground, whether listed or unlisted. For example, where a measure that treats people in one geographical area differently from people in another area is really based on the fact that white people live in the one area while black people live in the other, indirect discrimination on the basis of race may have occurred. In *Walker*, the Court noted that the reference in the right to direct and indirect discrimination reflected a concern for the 'consequences' rather than the 'form' of the conduct. This approach was consistent with the Court's desire [in *Walker*] to uncover the impact of discrimination."[10]

[40] In *Walker*[11] the Council had allowed residents of previously black townships to pay a lower flat rate for municipal services and had refrained from collecting arrear payments in these areas. In contrast, the mostly white residents of "old Pretoria" were required to pay a metered rate for services, and arrear payments were enforced. This Court found that the use of geographic distinctions that coincided with racially based apartheid urban divisions meant that the differentiation had a disparate racial impact and amounted to indirect discrimination on the basis of race.[12]

[41] The question we must ask, and answer, is whether section 4 discriminates on the basis of a characteristic that is common to a specific group and less common, or non-existent, in other groups. Divorce proceedings are at the centre of section 4. There can, however, *never* be divorce proceedings without a preceding subsisting marriage. Marriage is thus at the centre of divorce proceedings and, thus, at the centre of the

[10] Albertyn and Goldblatt above n 7 at 47.

[11] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC), endorsed in *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) in respect of a constitutional challenge to legislative provisions that placed a cap on the recovery of damages by the victims of motor collisions under the Road Accident Fund Act 56 of 1996 which apparently provided for a neutral compensation cap for passengers on public transport who are injured in a motor collision, the effect of which had a disparate impact on poor black people who constituted the vast majority of passengers on public transport.

[12] *Walker* id at paras 32-3.

discrimination. As such, we cannot escape the reality that section 4 indirectly discriminates on the basis of marital status.

[42] In *Mahlangu*,[13] this Court held:

> "First, this Court has already established that a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups amounts to indirect discrimination. Secondly, this Court has established that for the purposes of a section 9(3) enquiry, there is no qualitative difference between discrimination that occurs directly or indirectly. Once indirect discrimination on a listed ground has been established, then the law or conduct in question is presumed to be unfair."[14]

[43] Mr B N's argument also fails on the limitations analysis for the following reasons. Section 36(1) of the Constitution contains the limitations clause and states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[44] This Court in *Law Society of South Africa*[15] stated that:

> "A rights-limitation analysis is wide-ranging. Courts take into account all relevant factors that go to justification of the limitation. The enquiry is not restricted to the factors listed under section 36(1) of the Constitution. All factors relevant to that

[13] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC).

[14] Id at para 92.

[15] *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC).

> particular limitation analysis may be taken into account in reaching a decision whether the limitation on a fundamental right is constitutionally tolerable or not. It is significant that one of the relevant factors listed in section 36 is the 'relation between the limitation and its purpose'. This is so because the requirement of rationality is indeed a logical part of the proportionality test. It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right. Equally so, a law may be rationally related to the end it is meant to pursue and yet fail to pass muster under the rights-limitation analysis."[16]

[45] Section 4 of the Act is a law of general application. The question therefore is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, in view of all relevant factors, including those mentioned in section 36(1). *Economic Freedom Fighters*[17] reminds us that:

> "All relevant factors must be taken into account to measure what is reasonable and justifiable, and the factors listed in section 36(1)(a)-(e) are not exhaustive. What is required is for a court to 'engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'."[18]

[46] The limitations clause thus postulates a nuanced and context-specific form of balancing exercise. As a result, each limitations analysis will take its own shape and form based on the factual matrix of each case.[19]

[47] In the context of this matter, the importance of the rights asserted cannot be gainsaid. Their inter-relatedness is also not disputed. This Court in *Qwelane* said that "[w]hile equality and dignity are self-standing rights and values, axiomatically, equality is inextricably linked to dignity".[20] This, in line with Yacoob J's observations in

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[16] Id at para 37.

[17] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC).

[18] Id at para 91.

[19] See *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 at para 31.

[20] *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) at para 62.

Grootboom that rights are interrelated and are all equally important, has immense human and practical significance in a society founded on these values.[21]

[48] Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. This Court, in *Fitzpatrick*[22] held that:

> "The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1). This interpretation is consistent with the manner in which section 28(2) was applied by this Court in [*Fraser v Naude*].
>
> In 1948 the Appellate Division first gave paramountcy to the standard of the 'best interests of the child'. It held that in deciding which party should have the custody of children on divorce the 'children's best interests must undoubtedly be the main consideration'. The decision ran counter to the traditional approach in terms of which the 'innocent spouse' in divorce proceedings was granted custody of the children. Since then the 'best interests' standard has been applied in a number of different circumstances. However, the 'best interests' standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. *It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.*"[23]

[49] The nature of the right implicated is the right not to be discriminated against on the basis of marital status. This in turn implicates the rights of children born of married parents and those born of unmarried parents. What lies at the core of the implicated rights are the best interests of the child. There is no argument that the limitation is significant and there is no discernible purpose for it. It is outdated and is no longer in line with the constitutional imperatives, a point the Minister readily conceded.

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[21] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 83.

[22] *Minister for Welfare Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).

[23] Id at paras 17-8.

[50] Having found that there is no discernible purpose for the section, it is unnecessary to address whether there is a relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. This ordinarily should then be the end of the enquiry, but there is a contention by Mr B N that the Act specifically deals with divorce and is, as a result, not the right target of the constitutional attack. On the face of it, this proposition is tempting. However, it has its weaknesses.

[51] We know that the Children's Act provides a system that may be utilised by never-married parents to seek the intervention of the Office of the Family Advocate. We also know that the difference between the process envisaged in the Children's Act and the one in the Act is that in terms of the Children's Act, the parents would need to obtain a court order before a family advocate gets involved. The impugned provision of the Act, in my view, notwithstanding its close association with the Divorce Act, mainly deals with the best interests of children who are affected by the divorce proceedings.[24] Section 1 provides for definitions; section 2 provides for the

[24] Powers and duties of Family Advocates—

"(1) The Family Advocate shall—

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979), if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

(2) A Family Advocate may—

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979, if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorising him to institute an enquiry contemplated in sub-section (1).

(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in sub-sections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat."

appointment of family advocates; section 3 with the appointment of family counsellors; section 4 with the powers and duties of family advocates; section 5 with the Minister's powers to make regulations concerning family advocates and family counsellors; section 5A with condonation for non-compliance with a provision of the regulations made in terms of section 5; and sections 6 to 8 with the amendment of certain provisions of the Divorce Act. Section 9 is the short title. It would thus be inaccurate, in my view, to say the Act *specifically* deals with divorce.

[52] It could be argued that the Children's Act should have provided for a simpler streamlined regime or system that is similar to that provided for in section 4. Perhaps it could have. But this argument does not take us further in determining the core issue before us. This is so because the Children's Act cannot be attacked on the basis that it is discriminatory. It treats married and unmarried parents the same way.

[53] Section 29 of the Children's Act, headed court proceedings, provides:

> "(1) An application in terms of section 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.
>
> (2) An application in terms of section 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child.
>
> (3) The court hearing an application contemplated in sub-section (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child.
>
> (4) When considering an application contemplated in sub-section (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.
>
> (5) The court may for the purposes of the hearing order that—
>
> (a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;

(b) a matter specified by the court must be investigated by a person designated by the court;

(c) a person specified by the court must appear before it to give or produce evidence; or

(d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance.

(6) The court may, subject to section 55—

(a) appoint a legal practitioner to represent the child at the court proceedings; and

(b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.

(7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation in terms of section 155(2)."

[54] Section 23 of the Children's Act is titled "Assignment of contact and care to interested person by order of court", and provides that:

"(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—

(a) contact with the child; or

(b) care of the child.

(2) When considering an application contemplated in sub-section (1), the court must take into account—

(a) the best interests of the child;

(b) the relationship between the applicant and the child, and any other relevant person and the child;

(c) the degree of commitment that the applicant has shown towards the child;

(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(e) any other fact that should, in the opinion of the court, be taken into account.

(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court—

(a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and

(b) may suspend the first-mentioned application on any conditions it may determine.

(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child."

[55] In Davel and Skelton (eds) *Commentary on the Children's Act* the author remarks that:

> "Examples of persons who may have an interest in the child's care, well-being or development [i.e. people who may approach a court in terms of section 23] are the child's unmarried father who does not have parental responsibilities and rights in terms of section 21 or section 22, the child's grandparents, and a parent's life-partner. A known sperm donor might also qualify as a person who has an interest in the child's care, well-being or development. In *CM v NG* it was held that either contact or care, or both contact and care, can be awarded to the applicant in terms of section 23(1). If the court assigns contact or care to a person, it may impose any conditions it deems necessary. Section 23(2) lays down the factors the court must take into account when considering the application for assignment of contact or care. These factors bear some resemblance to those listed in the Natural Fathers of Children Born out of Wedlock

> Act[25] in respect of an unmarried father's application for guardianship and/or custody and/or access. Section 23(3) deals with the situation where different applicants apply for assignment of contact or care and for an adoption order. In such event, the court that hears the application for assignment of contact or care is compelled to request a report and recommendations on what is in the child's best interests. The report and recommendations must be furnished by a family advocate, social worker or psychologist. Apart from requesting the report and recommendations, the court may choose to conditionally suspend the application for assignment of contact or care. Section 23(4) makes it clear that if the court assigns contact or care to the applicant in terms of section 23, such assignment does not affect the parental responsibilities and rights another person has in respect of the child. Thus, for example, an unmarried mother does not lose her parental responsibilities and rights or any element of those responsibilities and rights simply because the court assigns contact or care to the child's unmarried father. However, section 28(2) authorises combining an application in terms of section 23 with an application for termination, extension, suspension or circumscription of parental responsibilities and rights. Therefore, the father in the example above could, for instance, ask the court to suspend the mother's responsibility and right of care in terms of section 28 and to assign it to him in terms of section 23."[26]

[56] In terms of sections 23, 28 and 29, a party in Mrs T S's position can approach a court for the extension of her parental responsibilities and rights and the simultaneous termination, suspension or circumscription of the father's responsibilities and rights regarding the children. In these proceedings, in terms of section 29(5), the court hearing the matter can order the Office of the Family Advocate to enquire into the best interests of the child and produce a report with recommendations for the purposes of the hearing. Furthermore, the court can order the Office of the Family Advocate to attend court and give evidence. The Office of Family Advocate cannot get involved without a court ordering it to be involved, whilst in divorce proceedings, it gets involved through the mere submission of Annexure B.

[25] 86 of 1997. This Act was repealed by the Children's Act.

[26] Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* Revision Service 13 (2022).

[57] So, therefore, the two Acts differ in the following respects. First, section 4 allows married parents, who are divorced or divorcing, to request the Office of the Family Advocate, through the completion of Annexure B of the Regulations, to enquire into the best interests of the child and sections 23, 28 and 29 do not provide for a similar streamlined process. Second, section 4 allows the Office of the Family Advocate to apply to a court hearing divorce proceedings in order for it to enquire into the best interests of the child and sections 23, 28 and 29 do not provide for a similar *mero motu* mechanism. It is the Act, read in the broader legislative context (including the Children's Act), which gives rise to the unfair discrimination. It does not follow that Parliament's remedy has to involve an amendment to the Mediation Act. Parliament could elect to remedy the defect by amending the Children's Act (by introducing a streamlined process similar to the Act) or by passing a new Act dealing with the involvement of the Office of the Family Advocate in cases of never-married parents. The Minister informed us from the Bar that there is currently a process aimed at overhauling the whole system in order to ensure that it is constitutionally compliant.

[58] In summary, the analysis above leads to the conclusion that section 4 limits section 9(1) and 9(3) of the Bill of Rights and that the limitation is not justifiable in terms of section 36 of the Constitution. And, as stated earlier, this inescapably leads to the conclusion that section 4 also is an unjustifiable limitation of the rights of affected parents and children in terms of sections 10 and 28 of the Bill of Rights.

Remedy

[59] The High Court in its order declared section 4 of the Act inconsistent with the Constitution and suspended the declaration of invalidity for a period of 24 months from the date of this Court's confirmation to enable Parliament to take the necessary steps to cure the constitutional defects identified by it. The Court then decided to read-in certain provisions, pending the decision of this Court.

[60] The effect of the reading-in by the High Court is that section 4 would in the interim read as follows (the High Court's deletions are shown in strike-through text and its additions in underlined text):

> "(1) The Family Advocate shall—
>
> (a) after the institution of a divorce action; ~~or~~
>
> (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979);
>
> (c) after an application has been instituted that affects (or is likely to affect) the exercise by a parent of any parental responsibilities and rights provided for in section 18(2)(a) to (c) and 18(3) of the Children's Act, 38 of 2005 or after an application has been instituted by a non-parent as contemplated in sections 23 and 24 of the Children's Act 38 of 2005,
>
> if so requested by any party to such proceedings or the court concerned, institute an inquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child ~~of the marriage concerned~~ or regarding such matter as is referred to him by the court.
>
> (2) A Family Advocate may—
>
> (a) after the institution of a divorce action; ~~or~~
>
> (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979;
>
> (c) after an application has been instituted that affects (or is likely to affect) the exercise by a parent of any parental responsibilities and rights provided for in section 18(2)(a) to (c) and 18(3) of the Children's Act, 38 of 2005 or after an application has been instituted by a non-parent as contemplated in sections 23 and 24 of the Children's Act 38 of 2005,

> if he deems it in the interest of any minor or dependent child ~~of the marriage concerned~~, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in sub-section (1)."

[61] It is not clear from the order of the High Court what its thoughts were on the provisions of section 4(3). The High Court could have struck out the same words it chose to strike out in the sub-sections referred to above and could have added a cross-reference to its new paragraph (c), and section 4(3) would then have read as follows:

> "(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child ~~of a marriage concerned~~, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in sub-sections (1)(b) or (1)(c) and (2)(b) or 2(c) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat."

[62] The Court then went on to insert a self-standing provision in paragraph 9.3 of its order to allow never-married parents to approach the Office of the Family Advocate in order to enlist its services. That portion of the order reads:

> "All requests for enquiries envisaged in paragraph 9.1 above shall be made to the Family Advocate by the completion of an Annexure B form found in the Regulation to the Act."

[63] As stated, the High Court suspended the declaration of invalidity for a period of 24 months from the date of this Court's confirmation to enable Parliament to take the necessary steps to cure the constitutional defects identified by it. This Court in *J v Director General, Department of Home Affairs*,[27] in respect of suspension orders, held that:

[27] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

> "The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a *lacuna*. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the *lacuna*. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the Legislature an opportunity 'to correct the defect'. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants.
>
> Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation."[28]

[64] The Minister has told us that amendments that are expected to completely overhaul the whole process are in the pipeline. Even though the Minister has alerted this Court to these amendments, this Court in *NL v Estate Late Frankel* held that a declaration of invalidity coupled with an interim reading-in does not intrude unduly into the domain of Parliament, and can be just and equitable.[29]

Costs

[65] The High Court did not grant a costs order when it delivered its judgment, instead ordering that "[t]he costs occasioned by the filing of written submissions and the hearing of 10 January 2022 are reserved for determination by the Constitutional Court when it decides on the validity of the Act". It reserved the costs occasioned by the hearing of 24 August 2021 for final determination at the hearing of Part B of the main application and the counter-application. Those latter costs are not for determination by us.

[66] The applicant in this matter was the amicus curiae before the High Court and brought the matter for confirmation before this Court as the primary litigant, as none of

[28] Id at paras 21-2.

[29] *NL v Estate Late Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at para 73.

the other parties decided to do so. It would be unfortunate for the applicant to be saddled with the costs of bringing this matter to the attention of this Court when it was not one of the primary litigants before the High Court. I am thus of the view that the applicant is entitled to its costs in this Court. Since it was an amicus curiae in the High Court, it should not be awarded costs in that Court, and there is no indication that the CCL has ever sought to hold the Minister liable for its costs in the High Court.

[67] Regarding Mrs T S's costs occasioned by the filling of written submissions and the hearing of 10 January 2022 reserved by the High Court for determination by this Court, in *Malachi*,[30] this Court said:

> "The Minister for Justice and Constitutional Development (fourth respondent) is enjoined by the constitutional development leg of his portfolio to ensure that pre-Constitution laws which are inconsistent with the Constitution are identified for repeal or suitable amendment. The impugned provisions are in point. The fourth respondent omitted to amend or repeal section 30(1) and (3). The ill effects are evident in this case. Not only was the applicant struck by the provisions, but she had to approach both the High Court and this Court to ensure that these unconstitutional provisions are removed from the statute books. For that reason her costs must, at least to some extent, be borne by the fourth respondent who correctly conceded such an order."[31]

[68] Similarly, the Minister in this matter conceded that the Act is outdated and requires a complete overhaul. Although the Minister has made these concessions, I see no reasons to stray from the reasoning employed in *Malachi*. In essence, the Minister must pay Mrs T S's costs in the High Court in respect of the written submissions and hearing on 10 January 2022.

[69] I thus make the following order:

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[30] *Malachi v Cape Dance Academy International (Pty) Ltd* [2010] ZACC 13; 2010 (6) SA 1 (CC); 2011 (3) BCLR 276 (CC).

[31] Id at para 50.

1. The order of the High Court, Gauteng Local Division, Johannesburg, declaring section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 to be inconsistent with the Constitution and invalid is confirmed to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do.
2. The declaration of invalidity referred to in paragraph 1 shall not be retrospective and is suspended for a period of 24 months to enable Parliament to cure the defect in the Mediation in Certain Divorce Matters Act giving rise to its invalidity.
3. During the period of suspension referred to in paragraph 2, the Mediation in Certain Divorce Matters Act shall be deemed to include the following additional provision:

"Section 4A

(1) The Family Advocate shall—

(a) after an application has been instituted that affects, or is likely to affect, the exercise of any right, by a parent or non-parent with regard to the custody or guardianship of, or access to, a child; or after an application has been lodged for the variation, rescission or suspension of an order with regard to any such rights, complete Annexure B to the regulations, if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable them to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to them by the court.

(2) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned apply to the court concerned

for an order authorising him or her to institute an enquiry contemplated in sub-section (1)(a).

(3) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned if so requested by a court, appear at the hearing of any application referred to in sub-section (1)(a) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat."

4. Should Parliament fail to cure the defects within the 24-month period mentioned in paragraph 2 above, the reading-in will continue to be operative.

5. The third respondent must pay the applicant's costs in this Court and the first respondent's costs in the High Court occasioned by the filing of written submissions and the hearing of 10 January 2022.

For the Applicant:	R M Courtenay instructed by Centre for Child Law
For the Second Respondent:	J Bezuidenhout instructed by DP Bezuidenhout Attorneys Incorporated
For the Third Respondent:	U Dayanand-Jugroop instructed by the State Attorney, Johannesburg