CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/08
[2009] ZACC 5

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| JOHNCOM MEDIA INVESTMENTS LIMITED | Applicant |
| versus | |
| M | First Respondent |
| PD | Second Respondent |
| MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT | Third Respondent |
| with | |
| MEDIA MONITORING PROJECT | Amicus Curiae |

Heard on : 8 May 2008

Decided on : 17 March 2009

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JUDGMENT

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JAFTA AJ:

*Introduction*

[1] This matter raises the difficult question of maintaining the correct balance between competing rights entrenched in the Bill of Rights. The present tension arises between, on the one hand, the right to freedom of expression, and the rights to privacy

and dignity, on the other. The issue has previously confronted this Court on more than one occasion, albeit in different contexts.[1]

[2] In this case, the need to balance these competing interests arises in the context of a declaration of constitutional invalidity. Section 12 of the Divorce Act 70 of 1979[2] (the Divorce Act) seeks to protect divorcing parties' rights (and those of their children) to privacy and dignity by prohibiting publication of information that comes to light during a divorce action, including information which emerges during proceedings related to the enforcement or variation of such order. On 11 February 2008, the High Court in Johannesburg declared the section invalid on the basis that it was inconsistent with the right to freedom of expression enshrined in section 16 of the Constitution.[3] The matter comes before us as an application for confirmation of the High Court's order.

*Factual background*

[3] Ms M and Mr D were married on 22 March 1975. On 22 December 1976 Ms M gave birth to a boy – PD. Later a girl was born out of the marriage. The marriage subsisted until 8 March 1995. It was dissolved by means of a decree of divorce which incorporated the parties' settlement agreement. This agreement dealt with issues such

[1] *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at paras 144-8; and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 21-8.

[2] For the full text of section 12 see [17] below.

[3] For the full text of section 16 see [20] below.

as the custody of the children and the division of their assets. PD's custody was awarded to Mr D.

[4] In 2001 Mr D instituted action in the High Court against Ms M and PD. He sought payment of the sum of R1 009 847,51 as damages; a restoration of certain benefits paid to Ms M in accordance with the settlement agreement; a partial rescission of the divorce order insofar as it referred to PD as his son; and an order declaring that PD was not his biological son. The action was based on the assertion that Ms M had wrongfully misrepresented to Mr D that PD was his biological son when she knew this to be false. He contended that, as a result of the alleged misrepresentation, he had suffered damage in the amount claimed. The action was defended and the necessary pleadings were filed.

[5] While the action was pending the editor of *The Sunday Times* – a newspaper owned by Johncom Media Investments Ltd (the applicant) – became aware of the case. Of the opinion that a story based on the facts of the case would be of interest to the newspaper's three million readers, he wished to have it published in *The Sunday Times* of 29 April 2007. A journalist was assigned to write a story, based on the untested facts alleged in the pleadings as the case had not yet gone to trial.

*High Court proceedings*

[6] Before publication, the newspaper, as a matter of ethical practice, sought comments from the affected parties. This request precipitated an urgent application

for an interdict against the applicant. The application was instituted by Ms M and PD, and was placed before Burman AJ late on 28 April 2007 – the night before the date of publication. He issued an interim interdict restraining the publication of the story. The application was premised on the ground that the publication would violate the provisions of section 12 and also infringe Ms M and PD's constitutional rights to privacy and dignity. A similar order was later obtained against members of the Independent Group of Newspapers. As a consequence the story could not be published in any newspaper in this country.

[7] The applicant opposed the confirmation of the interim order in the High Court and launched a counter-application in terms of which it challenged the constitutional validity of section 12. The sole ground on which the validity of the section was challenged was that it is overbroad in that its prohibition against publication covers information falling outside the scope of the rights it seeks to protect.

[8] In the affidavit deposed to by the editor of *The Sunday Times*, the applicant outlined its attack in the following terms:

> "For the reasons that follow, I respectfully submit that section 12 of the Divorce Act is overbroad and disproportionate:
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> Section 12 of the Divorce Act imposes a blanket prohibition which applies without regard to the identity of the parties to the action, or the content of the material whose publication is prohibited. In the result, section 12 does not merely prohibit publication of matter that violates the privacy of divorcing parties or that may harm the interests of children. On the contrary, it goes much further and prohibits publication of *all* matter which 'comes to light' in the relevant proceedings, even if

> such matter is not private and even if its publication would not harm the interests of minors. I accordingly submit that the means employed in section 12 of the Divorce Act are out of all proportion to the end sought to be achieved. Simply put, section 12 goes much further than is necessary to protect the privacy of divorcing parties and their children.
>
> It is also a feature of section 12 that it fails to afford any discretion to the court to determine whether it is appropriate that media disclosure should be prohibited in order to serve a legitimate purpose. It prohibits publication of all information which comes to light in the course of the relevant proceedings, even if such information does not require protection. It prohibits publication irrespective of whether matters of public interest are raised or whether legitimate concerns (such as the interests of children) are in jeopardy."

[9] The editor concluded by stating:

> "I respectfully submit that section 12 of the Divorce Act is overly broad since it serves to prohibit [The Sunday Times] (and other members of the media) from reporting properly on matters before Court in circumstances where there is no justifiable basis to limit such reporting. I accordingly submit that section 12 of the Divorce Act violates the constitutional right to freedom of expression in a manner that is not reasonably justifiable in an open and democratic society based on human dignity, equality and freedom."

[10] The constitutional challenge mounted by the applicant necessitated the joinder of the Minister for Justice and Constitutional Development (the Minister) as a party to the proceedings. The Minister was joined because she is responsible for the administration of the Divorce Act. She filed an affidavit deposed to by Ms Theresia Bezuidenhout – the Director of Law Enforcement in her department. Ms Bezuidenhout stated that the Minister did not oppose the declaration of invalidity and that the purpose of filing the affidavit was to inform the Court of steps already taken

by the department in an attempt to align the Divorce Act with the Constitution. Reference was made to the investigation and the recommendation made by the South African Law Reform Commission (the Commission) set out in its report which was submitted to the Minister's predecessor in August 2002. In its report the Commission recommended that section 12 be retained, albeit in an amended form. The Commission noted that in its current form the section is overbroad and therefore inconsistent with section 16 of the Constitution.

[11] The Commission noted further the tension between the right to freedom of expression and the rights to privacy and dignity created by the implementation of the section in its present form. Having accepted that the section serves a legitimate purpose, the Commission did not recommend the repeal of the entire section but that it be amended so as to create a balance between the conflicting rights. In her papers the Minister asked, without presenting any supporting facts, that the order of constitutional invalidity be suspended to give Parliament the opportunity to amend the section.

[12] On 11 February 2008 judgment in the main and counter-application was handed down by Cassim AJ. It is not necessary to discuss his reasoning in relation to the interdict.

[13] Cassim AJ accepted the proposition that section 12 was overbroad and as a result inconsistent with the right to freedom of expression enshrined in section 16 of

the Constitution. He proceeded to declare the entire section invalid on the basis of its over breadth. He issued the following order:

> "19.1 Section 12 of the Divorce Act is hereby declared inconsistent with the Constitution and invalid.
>
> 19.2 This order of constitutional invalidity is referred to the Constitutional Court for confirmation in terms of section 167(5) of the Constitution."

[14] The civil case on which the story was based went to trial. Absolution from the instance was granted, and this meant that the plaintiff was unsuccessful as he had failed to prove the alleged misrepresentation that PD was his biological son.

*The issues in this Court*

[15] For this Court to confirm the High Court's order, it must be satisfied on two issues. The first issue is whether section 12 is indeed unconstitutional. If it is, the second issue will be whether the order issued by the High Court is a just and equitable order contemplated in section 172(1)(b) of the Constitution.[4]

*Amicus curiae*

[16] The Media Monitoring Project (the Project) is a non-governmental organisation which, as its name indicates, is concerned with ensuring that media in South Africa are effectively monitored. The Project applied to be admitted as amicus curiae in this Court. The application was granted and the amicus subsequently

[4] For the full text of section 172 of the Constitution see [32] below.

submitted very helpful written and oral argument. We are indebted to the amicus for its important contribution.

*Constitutional invalidity of section 12*

[17] The answer to the question of invalidity lies in the interpretation of section 12 measured against the provisions of section 16 of the Constitution, which entrenches the right to freedom of expression. Section 12 reads:

> "Limitation of publication of particulars of divorce action—
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> (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.
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> (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information—
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> (a) for the purpose of the administration of justice;
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> (b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
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> (c) for the advancement of or use in a particular profession or science.
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> (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

> (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

[18] Textually, the section means that apart from the specified limited information, publication of information that comes to light during a hearing of the divorce case is prohibited irrespective of the nature of the information, and regardless of whether the publication will infringe the rights of the divorcing parties and the interests of their children.

[19] Section 16 of the Constitution confers upon everyone the right to freedom of expression. The section itself limits the right. This does not, however, mean that the right is insulated against the general limitation contemplated in section 36 of the Constitution.[5] Nor does the Constitution accord hierarchical precedence to any particular right entrenched in the Bill of Rights over other rights referred to therein.

[20] Section 16 of the Constitution provides:

> "(1) Everyone has the right to freedom of expression, which includes—
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> (a) freedom of the press and other media;
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> (b) freedom to receive or impart information or ideas;
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> (c) freedom of artistic creativity; and
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> (d) academic freedom and freedom of scientific research.
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> (2) The right in subsection (1) does not extend to—

[5] See n 8 below.

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[21] Section 16 thus defines the ordinary bounds of the right to freedom of expression. But over and above that defined scope, there may be limitations placed on the right, provided that they meet the requirements of section 36 of the Constitution. In a unanimous judgment of this Court in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International*,[6] Moseneke J said:

> "We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. Section 16 is in two parts: the first subsection sets out expression protected under the Constitution. It indeed has an expansive reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. The second part contains three categories of expression which are expressly excluded from constitutional protection. It follows clearly that unless an expressive act is excluded by s 16(2) it is protected expression. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless. As Kriegler J in *S v Mamabolo* puts it: 'With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right.' In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression." (Footnotes omitted.)

[22] In determining whether section 12 infringes the right to freedom of expression, a court has to apply a two-stage test. In *Coetzee v Government of the Republic of South Africa*,[7] the test was formulated as follows:

[6] [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 47.

[7] [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 9; see also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening*

> "This Court has laid down that, ordinarily, one adopts a two-stage approach for determining the constitutionality of alleged violations of rights in chapter 3 of the Constitution. The first stage is an enquiry whether the disputed legislation or other governmental action limits rights in chapter 3 of the Constitution. If so, the second stage calls for a decision whether the limitation can be justified in terms of s 33(1) of the Constitution." (Footnote omitted.)

Although *Coetzee* was concerned with the interim Constitution, the final Constitution is structured in the same way and requires the same approach.

[23] The prohibition contained in section 12 does not fall within any of the exceptions listed in section 16(2) of the Constitution. Yet, it prohibits publication of any information which comes to light during a divorce action or any proceedings related thereto. This constitutes a limitation of the media's right to impart information. It brings us to the second leg of the enquiry, namely, whether the limitation is reasonable and justifiable as envisaged in section 36 of the Constitution.[8]

*Justification*

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*(Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 7; *S v Williams and Others* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 54.

[8] Section 36 provides:

> "(1) 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—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose.
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> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[24] The process of determining whether a limitation is reasonable and justifiable within the contemplation of section 36 involves the balancing of competing interests. It entails taking account of the considerations enumerated in section 36. This process has been described as a proportionality analysis.[9] In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,[10] the limitation exercise was defined in these terms:

> "The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose." (Footnote omitted.)

[25] To effect a proper balance, the right infringed must be identified, and its nature as well as its importance in a particular context must be considered. The purpose of the limitation must be pin-pointed, together with its extent, so as to determine the relation between the limitation and the purpose it is designed to achieve. We must also consider whether the purpose could be achieved by less restrictive means.

[26] No party contended that the section 36 justification requirements were met. It is nevertheless necessary to deal with the question of justification briefly.

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[9] *Phillips and Another v Director of Public Prosecutions and Others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 22.

[10] [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 35.

[27] The importance of the right to freedom of expression has been acknowledged by this Court. In *Islamic Unity Convention v Independent Broadcasting Authority and Others*,[11] this right was described thus:

> "Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'. As pointed out by Kriegler J in *Mamabolo*,
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> > '. . .freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15-19 of the Bill of Rights'." (Footnotes omitted.)

[28] The prohibition in section 12 limits the right to freedom of expression in a manner that does not only affect the media but also the right of members of the public to receive information. In *Midi Television (Pty) Limited t/a E-TV v Director of Public Prosecutions (Western Cape)*,[12] the Supreme Court of Appeal said:

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[11] [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 27.

[12] [2007] ZASCA 56; 2007 (5) SA 540 (SCA); 2007 (9) BCLR 958 (SCA) at para 6. See generally *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC). In particular paragraph 42 reads:

> "While the SABC, as the national public broadcaster, is obviously a bearer of section 16(1) rights, the general public also has a fundamental constitutional right to freedom of expression; indeed, it may be said that the primary bearer of the right to 'receive information and ideas' *is* the general public. It is also true, as contended by counsel for the SABC, that openness and

> "It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. As pointed out by Anthony Lewis, in a passage that was cited by Cameron J in *Holomisa v Argus Newspapers Ltd*: 'Press exceptionalism — the idea that journalism has a different and superior status in the Constitution — is not only an unconvincing but a dangerous doctrine.' The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself." (Footnotes omitted.)

[29] The purpose of the limitation is apparent. The objective is to protect the privacy and dignity of people involved in divorce proceedings, in particular children. However, as pointed out by the High Court and contended by the applicant and the amicus the prohibition also affects "the general rule that courts are open to the public".[13] As the High Court further pointed out:[14]

> "Section 12 of the Divorce Act . . . has an absolute prohibition. The prohibition, moreover, is unlimited as to time. Section 12 prohibits publication of all information which comes to light in the course of the divorce proceedings, even if such information does not require protection. Matters of public interest which are raised in a divorce action and where there are legitimate reasons for such issues to be raised in public are prohibited."

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> accountability are underlying values of the Constitution and that, in accordance with the principle of open justice, the public should, as far as possible, be informed and aware of what takes place in our courts. Where a court exercises a discretion under section 173, it must ensure that if, in so doing, it impinges upon rights entrenched in chapter 2 of the Constitution, the extent of the impairment of rights is proportional to the purpose the court seeks to achieve. We do not need to consider here whether this is a section 36 limitation analysis or not. It is clear that it is a proportionality enquiry that a court exercising its section 173 powers must undertake." (Footnote omitted.)

[13] *M & Another v Johncom Media Limited; Johncom Media Limited v M and Others* Case No 2007/06719, Witwatersrand Local Division, 11 February 2008, unreported, at para 9.

[14] Id.

[30] But the chosen method of protecting the rights of children, quite apart from going too far, is also not particularly efficient in achieving the purpose. The legislature, almost thirty years ago, chose to allow the publication of the identities of children as well as of parties to a divorce action and, at the same time, prohibited the publication of any evidence at a divorce trial, whether or not the prohibition of publication was necessary to protect the relevant privacy and dignity interests. Yet as will be shown below,[15] another way to protect children and parties would, in my view, be to prohibit publication of the identity of the parties and of the children. If that were to be done, the publication of the evidence would not harm the privacy and dignity interests of the parties or the children, provided that the publication of any evidence that would tend to reveal the identity of any of the parties or any of the children is also prohibited. The purpose could be better achieved by less restrictive means.

[31] In the circumstances it must be held that the limitation cannot be justified. Section 172(1)(a) of the Constitution empowers courts of competent jurisdiction to declare legislation inconsistent with the Constitution to be invalid, but only to the extent of the inconsistency. A limited declaration of invalidity is possible only if the good can be severed from the bad either notionally or textually. It is not possible to achieve that result here. In the circumstances there is no alternative but to declare the whole of the impugned provision inconsistent with the Constitution.

*Remedy*

[15] See [35] and [41] below.

[32] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
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> (i) any order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[33] The only issue that was debated in argument before us concerned the question whether any order in terms of section 172(1)(b)(ii) should be made if the section were to be struck down, and if so, the ambit of the order concerned.

[34] Three options emerged during the argument before us. The applicant contended that there was no need for any order of suspension at all. The Minister urged that the declaration of invalidity should be suspended in order to enable Parliament to cure the defect. The amicus agreed with the Minister but suggested that, in the interim, a proviso be read into section 12 to create a discretion for the court to allow the publication of certain matters. The effect of this would be to permit publication of the material covered by section 12 only if so ordered by a court.

[35] There is, however, a fourth possibility which, though not commended by any of the parties, emerges from the material put up by the amicus in support of the invalidity argument and canvassed in the report of the Commission. That route entails

an order preventing publication of the identities of the parties and children in divorce proceedings as well as any material that tends to reveal the identities of one or other of the people to be protected.

[36] I discuss each of these approaches in turn.

[37] Implementing the suggestion of the Minister (suspension without more) would result in neither justice nor equity. An unduly broad law that prevents publication of evidence before a court will remain in force. And what is more, the period during which it would remain in force is not a short one. The Minister suggests 18 months. She contends that the dignity and privacy of children and parties to a divorce would otherwise suffer. This is not a good enough reason to allow the continued operation of an egregious law. I can think of no reason why an unmitigated suspension would be justified.

[38] The way pointed to by the applicant is also, in my view, not wholly just and equitable. The applicant, in effect, supports the following reasoning of the High Court:

> "I am persuaded that the finding that section 12 is unconstitutional would not result in any injustice. First, a court retains a discretion to order the non-publication of material which unduly and unfairly infringes in the private life of a litigant. The court will weigh up the competing interest of the rights of freedom of expression and that of privacy in arriving at a just and fair decision. Similarly, the rights of children are protected; bearing in mind that the court is the upper guardian of all children, and section 8(3) of the Child Care Act, 74 of 1983 prohibits the publication in any manner

> whatever of any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings unless the Minister or the presiding commissioner is of the opinion that this would be just and equitable in the circumstances. The court as upper guardian of children will always bear in mind the need to protect children."[16]

[39] If this Court makes no order mitigating the effect of its striking down the provision, the difference between the position of a children's court and the High Court is manifest. There is a limited prohibition on publication as far as a children's court is concerned.[17] When it comes to the High Court, however, the absence of any order mitigating the resultant position would require a Court to consider in every case before it what information should be published and what should not. In my view, this places an undue burden on the High Court and would require, in many cases, the party to be prejudiced to place the relevant arguments before the High Court so that a decision can be made. The applicant's position would thus unduly favour the publisher and place no responsibility on those intending to publish. It would not

[16] Id at para 12.

[17] The Child Care Act 74 of 1983 has in large part been superseded by the Children's Act 38 of 2005, the relevant section of which will come into effect on a date to be proclaimed. Section 8(3) of the Child Care Act will then be replaced by section 74 of the latter Act. On publication of information relating to proceedings in a children's court, the provisions of the two Acts are similar.

Section 8(3) of the Child Care Act provides:

> "No person shall publish in any manner whatever any information relating to proceedings in a children's court which reveals or may reveal the identity of any child who is or was concerned in those proceedings: Provided that the Minister or the commissioner who presides or presided at those proceedings may authorize the publication of so much of the said information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."

Section 74 of the Children's Act provides:

> "No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings."

accord appropriate protection to the indigent litigant. I will therefore not go in this direction.

[40] The third possibility entails a suspension of the order of constitutional invalidity coupled with an order of reading-in. The effect of this relief would be to authorise any court, during the period of suspension, to prohibit publication if it were appropriate to do so. The applicant objected to this approach on two grounds. It submitted, first, that this Court is not competent to read-in to provide interim relief as reading-in can be resorted to only in the process of curing the defect. If this is not done, at the stage when constitutional validity is considered, it cannot be done, so the argument went, at the stage of remedy. I do not agree. The argument entails an unduly limited conception of this Court's power to make any order that is just and equitable. If the order suggested by the applicant were, in the opinion of this Court, to be just and equitable, nothing precludes that order from being made.

[41] I am, however, of the view that this option too does not accord fully with the just and equitable result that this Court is obliged to achieve. As is the case with the order suggested by the applicant, the suggestion of the amicus would also result in placing an additional burden on a court in every divorce case. A court must in every case decide whether, and the extent to which, publication should be allowed. The applicant's position is perfectly understandable, for while the route it suggests favours the media at the expense of indigent people, the position adopted by the amicus makes

it more difficult for the media to publish the information. I intend to make an order that does not unduly favour either the media or the litigant.

[42] I come now to the fourth and final possibility. As noted above, this Court could in terms of section 172(1) prohibit all publication of the identity of and any information that may reveal the identity of any party or child in any divorce case before any court. This is the position adopted in the Child Care Act.[18] It is also important to emphasise that this Court has adopted the approach of not disclosing the identities of children and vulnerable parties in all appropriate cases.[19] In my view, this is an appropriate order. Such an order will not place an undue burden on the courts nor will it impose a particular burden on parties seeking publication or those parties seeking remedies on the basis that they may be prejudiced by publication.

[43] The order concerns the publication of court proceedings, and it is entirely appropriate for this Court to determine the minimum standards that must apply in relation to publication of the evidence and material before a court. Furthermore, the Court, as upper guardian of the child, has a particular responsibility to act in the best interests of the child. The order is binding and will apply to all court proceedings.

[18] Section 8(3) of Child Care Act 74 of 1983.

[19] See *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC); *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC); *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); *J and Another v Director General, Department of Home Affairs, and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC); and *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC).

Failure to comply with this order will amount to contempt of court. Of course the legislature may choose to intervene at any time.

*Costs*

[44] It would not have been necessary for the applicant to seek judicial intervention absent the unconstitutional provision of the Divorce Act. The applicant is therefore entitled to costs in both the High Court and in this Court.

*Order*

[45] The following order is made:

1. The order of the High Court in Johannesburg declaring section 12 of the Divorce Act 70 of 1979 to be inconsistent with the Constitution and invalid is confirmed.
2. Subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited.
3. The Minister is ordered to pay the applicant's costs in the High Court and in this Court, including the costs of two counsel.

Langa CJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Jafta AJ.

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| Counsel for the Applicant: | Advocate AJ Freund SC and Advocate A Cockrell instructed by Bell Dewar & Hall. |
| Counsel for the Third Respondent: | Advocate I Hussain SC and Advocate PT Bezuidenhout instructed by the State Attorney. |
| Counsel for the Amicus Curiae: | Advocate AM Skelton instructed by the Centre for Child Law. |