**DU TOIT AND ANOTHER v MINISTER OF WELFARE AND POPULATION DEVELOPMENT AND OTHERS (LESBIAN AND GAY EQUALITY PROJECT AS AMICUS CURIAE) 2003 (2) SA 198 (CC)**

**Headnote : Kopnota**

The applicants, partners in a long-standing lesbian relationship, wanted to adopt two children jointly. Legislation confined the right to adopt children jointly to married couples. The applicants challenged the validity of ss 17(a), 17(c) and 20(1) of the Child Care Act 74 of 1983 and s 1(2) of the Guardianship Act 192 of 1993 in a Provincial Division of the High Court. It was found that the said legislation violated the Constitution of the Republic of South Africa Act 108 of 1996 and ordered the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by permanent same-sex life partners. The applicants in the present matter sought confirmation of such High Court order in terms of s 172(2)(a) of the Constitution.

*Held*, that where the interests of children were at stake it was important that their interests were fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there was a risk of injustice, a court was obliged to appoint a curator to represent the interests of children. (Paragraph [3] at 201G.)

*Held*, further, that s 17 of the Child Care Act did not provide for the joint adoption of children by partners in a permanent same-sex relationship. (Paragraph [9] at 203E.)

*Held*, further, that excluding partners in same-sex life partnerships from adopting children jointly where they would otherwise be suitable to do so was in conflict with the principle enshrined in s 28(2) of the Constitution, ie that 'a child's best interests are of paramount importance in every matter concerning the child'. (Paragraph [22] at 208B.)

*Held*, further, that the impugned provisions of the Child Care Act thus deprived children of the possibility of a loving and stable family life as required by s 28(1)(b) of the Constitution. (Paragraph [22] at 208C.)

*Held*, further, that the said provisions of the Child Care Act failed to accord paramountcy to the best interests of the children and was inconsistent with the Constitution and invalid to the extent of such inconsistency. (Paragraphs [22], [25] and [26] at 208C/D - D and 209B - C.)

*Held*, further, that s 1(2) of the Guardianship Act did not contemplate that same-sex life partners would be joint guardians of children. (Paragraph [13] at 204D/E - E.)

*Held*, further, that the failure by the law to recognise the value and worth of the first applicant as a parent to the siblings was demeaning and that the

impugned provisions limited the first applicant's right to dignity. (Paragraph [29] at 210D - D/E.)

*Held*, further, that the provisions of the Guardianship Act were premised on the assumption that same-sex life partners could not be joint guardians of children. Such assumption arose from s 17 of the Child Care Act and for the same reasons that s 17 was in conflict with the Constitution, s 1(2) of the Guardianship Act was in conflict with the Constitution. (Paragraph [30] at 210F - G.)

*Held*, further, that the limitations of the rights to equality, dignity and the paramountcy of the best interests of children in cases concerning them were not justifiable. (Paragraph [37] at 212F - F/G.)
*Held*, accordingly, that the application for confirmation of the order of the High Court had to be granted. (Paragraph [42] at 214A/B - B.)