

Religious freedom v prohibited discrimination based on sexual orientation; which right outweighs the other?

Introduction

In light of the fact that South Africa is celebrating 25 years of democracy, it is appalling to realise that we still live in a society of intolerance and grave disrespect towards each other's diversities. This is evident from an article recently published and is titled: "*Cape jeweller refuses to make engagement ring for same sex couple*" published on 8 August 2019.

Synopsis of the article

The article is about Mary, a 30-year old woman, living in Cape Town, who discovered that Craig Marks Diamonds, a business producing custom jewellery, refused to make her and her fiancé an engagement ring because they were in a same-sex relationship. They considered themselves followers of Christ, who do not partake in what God calls sin which is a man with a man or a woman with a woman.

Legal discussion

There are two competing rights which stand out immediately to the reader of this article, namely, freedom of religion and the right not to be discriminated against based on sexual orientation. Both these rights are enshrined and protected by our Bill of Rights. The article referred to above begs the question whether one right outweighs the other. In numerous decisions, South African courts held that: "*Where rights come in conflict with each other, a balancing exercise must be conducted in order to try and harmonise the two competing rights*".

Equality

The Constitution of the Republic of South Africa is founded on the core values of equality and dignity. The equality clause in our Bill of Rights includes a clear

prohibition against discrimination based on sexual orientation in section 9(3). South Africa's constitution is, therefore, the first in the world to prohibit unfair discrimination on the grounds of sexual orientation.

The Constitution further prohibits the state from discriminating against individuals based on sexual orientation. However, as is evident from the article above, private individuals and even organizations can be a source of discrimination, which is where section 9(4) finds an application and states that: "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds listed in subsection 3". To take matters further, section 8(2) also provides that the Bill of Rights is binding upon natural and or juristic persons.

There are several Constitutional Court decisions which played a role in enforcing the prohibition against unfair discrimination based on sexual orientation. ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Other***, a 1998 judgment, dealt with the law which prohibited sodomy between two consenting adult men. The court found that sodomy laws criminalised the intimate relationships of a vulnerable minority group (gay men) and that this degrading treatment constituted a violation of the rights to dignity and privacy and that the existence of these offences violated the right to equality.

Religion

The equality clause lists several grounds upon which a person may not be discriminated against and amongst them is religion. It is, therefore, true that religious freedom is also enshrined in and advocated by our Constitution, and there are specifically three clauses in the Bill of Rights that address religious freedom:

S15(1) - "everyone has the right to freedom of conscience, religion, thought, belief and opinion"

S15(2) - "religious observances may be conducted at state or state-aided institution" (under certain circumstances)

S31 - "persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community-

- 1. To enjoy their culture, practice their religion and use their language; and*

2. *To form, join and maintain cultural, religious and linguistic associations and other organs of civil society*”

The point on religious belief is better illustrated by the following case:

Strydom v Nederduitse Gereformeerde Gemeente Moreleta park is a 2008 decision of the Transvaal Provincial Division of the High Court, where the applicant was employed as an independent contractor at a church and succeeded with an unfair discrimination claim against the church for terminating his contract when it learned of his sexuality.

The church organisation relied on the freedom of religion clause in the Constitution to justify the unfair discrimination of the applicant. The right to equality of the applicant had to be balanced against the freedom of religion of the church. The Court acknowledged the importance of religious freedom as an entrenched right in the Constitution and acknowledged that religious freedom could, “potentially be outweighed by other constitutionally protected rights. Religious freedom is apt to run up most often against demands for equality. These demands will be most compelling regarding discrimination based on race, sex and sexual orientation.

The church argued that keeping the applicant in his position, considering the church’s view on homosexuality as a sin, would mean that they would have “condoned” a homosexual relationship. The Court weighed the impact that denying the church an exemption from anti-discrimination legislation would have against the discrimination faced by the applicant on the basis of his sexual orientation. The Court held that the impact on the church’s religious freedom was minimal compared to the enormous impact on the applicant’s right to equality. The right of equality, the Court held, is a foundational value of our Constitution and concluded that the right to dignity was seriously impaired by the decision of the church and that this was unjustifiable.

Conclusion

Discrimination based on sexual orientation has a severe impact and is targeted towards same-sex couples because of their dignity, personhood and sexual orientation. As stated above, the constitution of the Republic of South Africa is founded on the core values of dignity, equality and freedom. Private persons are not denied their equal protection to religious freedom; however, as emphasised in

case law, there must be a balancing of rights and interests whenever there are competing rights and interests.

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