

SAIFAC/SAHRC Seminar on the Fourie/L&GEP Judgment, 23 August 2006, SAHRC Offices, Parktown

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Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (3) BCLR 355 (CC)

In 2002 a lesbian couple (Fourie and Bonthuys) began their struggle for the right to marry under South African law. After approaching the High Court, then the Supreme Court of Appeal and finally the Constitutional Court they were told in December last year that they would have to wait another year for the law to be changed by Parliament, or failing this, by the automatic operation of the court's own order on 2 December 2006. The couple asked the court to address their exclusion from the common law definition of marriage, which says that marriage is "a union of one man with one woman, to the exclusion, while it lasts, of all others". The court was asked, in a separate (but joined) case brought by the Lesbian and Gay Equality Project, to remedy the problematic marriage formula in the Marriage Act 25 of 1961 that refers to a person taking another person as his or her "lawful wife (or husband)". The state opposed both cases. Sachs J. gave a judgment on behalf of the majority of the court finding that the common law and the formula in the Marriage Act were inconsistent with the Constitution and invalid to the extent that they excluded same-sex couples from marriage. The decision was based primarily on the right to equality in the Bill of Rights that affords "equal protection and benefit of the law" and includes a prohibition against unfair discrimination on the basis of a set of listed grounds including sexual orientation. It followed a long line of cases brought successfully by gay and lesbian people to assert their rights to be treated equally and with dignity. The court said that same-sex couples have been denied the 'dignity, status, benefits and responsibilities' that the law provides to heterosexual couples.

Sachs J. stressed the need for tolerance and "respect across difference". He said (at 60):

...[W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

The judgment dealt with four arguments advanced in favour of leaving traditional (heterosexual) marriage intact. First, the court countered the argument that marriage is defined by its procreative potential (and thus excludes same-sex unions) by stating that many heterosexual couples cannot or do not wish to have children. Second, in response to the argument that opening up marriage would violate the religious freedom of many, Sachs J. said that "(i)t is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution" (para 92). Allowing gays and lesbians into the institution of

marriage would not prejudice the religious rights of anyone else. The judge pointed to a provision of the Marriage Act that allows (religious) marriage officers to refuse to solemnize marriages that do not accord with their beliefs. He said that “the two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity” (para 98). Third, the argument that international law protected heterosexual marriage was answered by the Court in saying that these laws do not necessarily preclude same-sex marriage. And fourth, it was argued that section 15(3) of the Constitution (part of the freedom of religion, belief and opinion right) that refers to the sanctioning of legislation recognising alternative systems of family law was an indication that same-sex partnerships should be given legislative protection separate from marriage. Sachs J. said that the existence of the section did not prevent the Court from affirming the claims of the applicants to marry.

The remedy

The only real debate within the Court concerned the appropriate remedy to be ordered. The majority decided to suspend the declaration of invalidity for one year from the date of judgment to allow the legislature to correct the defects in the common law and Marriage Act. In the event that this was not done in time the offending words in the marriage formula would be read as including the words “or spouse” after the words “or husband”. The common law would become invalid to the extent that it did “not permit same-sex couples to enjoy the status and benefits coupled with responsibilities it accords to heterosexual couples”. O’Regan J., dissenting only on the issue of remedy, found that the Court should have developed the common law to include same-sex partners in the definition of marriage and should have read in wording to address the invalidity of the marriage formula in the legislation. O’Regan J. said that immediate relief should have been given to the applicants. Allowing gays and lesbians to marry would in no way undermine the institution of marriage. Changes to the Marriage Act and development of the common law would not prevent Parliament from making appropriate legislative changes in the future. In any event, the possible legislative choices were narrow. While separation of powers was important, this could not “be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint” (para 170). An order of the court has legitimacy since it flows from the Constitution itself.

The State’s Obligations in terms of the Judgment

The South African Law Reform Commission has recently submitted its report on same sex marriage and domestic partnerships to the Minister of Justice although this has not yet been released publicly. The report proposes amendments to the Marriage Act that would extend its reach to same sex couples. The report also proposes a new ‘orthodox’ marriage act that would be available to those who did not wish to marry under the amended Marriage Act. The Court referred to this proposal as a possible way of addressing the unconstitutionality of the existing law. Sachs J said that whatever legislation was introduced it must ensure that same sex couples are ‘not subjected to marginalization or exclusion by the law, either directly or indirectly’ (147). The judgment

sets out the principles that must be applied to ensure that any new law is constitutionally adequate (paras 148-153).

Recent statements in the press refer to the Department of Home Affairs Draft Bill that simply amends and extends the Marriage Act. But statements from the Deputy Minister of Justice that there is a ‘social cohesion deficit’ around the issue of same sex marriage seem to indicate that Justice will try to introduce a Bill that aims to appease those who are against full recognition of same sex marriage. The two Ministers have promised that a Bill will be tabled in Parliament by 1 September.

Should Parliament fail to enact legislation concerning same sex marriage before 2 December the door will not be closed to future legislation. However, any such new legislation will have to comply with the sentiments expressed by the Constitutional Court in the judgment. That is, any alternative to full civil marriage for same sex couples will still be open to scrutiny by a court as to whether it adequately accommodates the rights of same sex couples and affirms their dignity.

Implications of the Judgment for Civil Society

Civil society needs to participate in the Parliamentary process over the next few months. It is also important to provide accurate information for the benefit of public understanding of the issues involved. Should Parliament pass a law that appears to fall short of the requirements set out in the court’s decision, groupings in civil society will need to consider bringing a legal challenge against the new law and engaging in other activities to highlight the violation of human rights. Should Parliament fail to pass a new law before the 2 December deadline, the law will automatically change to allow same-sex marriage. This would not however prevent Parliament from enacting future legislation. Obviously, any future legislation would also have to be considered in terms of its constitutionality.