African Journal of Hospitality, Tourism and Leisure. ISSN: 2223-814X

August 2020, Vol 9, No 4, pp. 685-697

Discrimination Based on Sexual Orientation Towards Patrons in the Hospitality Industry In South Africa

Stella Vettori*

Graduate School of Business Leadership, UNISA, Email, vettom@unisa.ac.za

***Corresponding Author**

How to cite this article: Vettori, S. (2020). Discrimination Based on Sexual Orientation Towards Patrons in the Hospitality Industry In South Africa**.** African Journal of Hospitality, Tourism and Leisure, 9(4):685-697. DOI: **https://doi.org/10.46222/ajhtl.19770720-45**

Abstract

This is a conceptual analytical research paper that discusses the issue of what amounts to unfair discrimination on the basis of sexual orientation in the hotel industry. This can be a very emotional issue if it is perceived as essentially a contest between two fundamental human rights, namely the right to freedom of religion on the one hand, and on the other hand, the right of the LGBTI+ community to equality and dignity. By unpacking and analysing the content of the competing fundamental rights in terms of case law and legislation, a better understanding of how these fundamental rights can both be upheld and co-exist in a free and democratic society can be gained. The article thus strives to impart legal knowledge regarding how the law views discrimination based on sexual orientation so that those in the hospitality industry can make policy decisions and draft policies that are not contrary to the law with regard to discrimination based on sexual orientation.

Keywords: Sexual orientation, fundamental human rights, equality, discrimination

Introduction

Beloftebos is a wedding venue situated in the Western Cape. In 2017, Beloftebos refused to host the wedding of a couple that identifies as lesbian (Ms Alexandra Thorne and Ms Alex Lu). When enquiries were made by the couple for the reasons for the refusal to host the proposed wedding, representatives of the wedding venue informed the couple that, in terms of the Beloftebos policy, the venue hosts heterosexual marriages only. This resulted in attacks on Beloftebos venue's Facebook page from the public (Cape Venue refuses gay wedding, 2017). In 2020, Beloftebos wedding venue again sparked controversy when it refused to host the wedding of same-sex couple Megan Watling and Sasha-Lee Heekes scheduled for 21 April 2020. (Beloftebos, 2020). This refusal attracted both national and international media coverage and outrage from some members of the public. The explanation put forward by the representatives of Beloftebos wedding venue was again that, as Christians, they believe that marriage is between a man and a woman, and it does not include marriage between same-sex couples. For this reason, to host a same-sex marriage would be contrary to their deeply held religious beliefs. (Beloftebos Media statement, 2020). On the face of it, this dispute, therefore, seems to be a contest between two fundamental human rights, namely, the right not to be discriminated against on the basis of sexual orientation on the one hand, and the freedom of religion on the other hand. The question many have asked is, which right should take precedence? It is submitted that it should not be a question as to which right should trump the other, but rather how both these rights can co-exist in a free and democratic society so as to ensure that they are both upheld. The purpose of this article is to find the answer to this question by examining relevant legislation and case law.

The South African Constitution is hailed as one of the most progressive constitutions in the world. It contains a Bill of Rights where fundamental human rights are given protection. For the purpose of this article, the relevant human rights are the right to equality, the right to dignity and the right to freedom of religion. These fundamental rights are contained in Chapter 2 of the Constitution Act 108 of 1996. Legislation is meant to uphold and promote the fundamental rights contained in the Bill of Rights and any legislation contrary to these rights is invalid. Section 2 of the Constitution provides: *The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.* Therefore, the fundamental basis of an analysis of how to accommodate the seemingly competing rights of freedom of religion and rights to equality of LGBTI+ persons in a free and democratic society is the Bill of Rights contained in the Constitution. However, before discussing the content of the rights contained in the Bill of Rights, the extent to which our courts and legislation other than the Constitution have recognised the marital rights of same-sex couples will be summarised.

Thereafter, the constitutional rights contained in the Bill of rights designed to combat unfair discrimination in a free and democratic society will be set out. The manner in which legislation and case law have given content to specifically the right not to be discriminated against on the basis of sexual orientation and the freedom of religion will then be discussed. This analysis will provide clarity as to what hospitality establishments may and may not do so as to accommodate seemingly competitive fundamental rights. With this knowledge, employers are better equipped to draft policies concerning these rights which are essential to maintaining these rights, running an ethical establishment and abiding by the laws of our land.

Same-sex marriages are legally recognised in South Africa
Case law:

The case law evidences a long line of cases that recognise that the rights of same-sex partners or couples should be no different than those of heterosexual couples. The rights upheld by these cases mirror the rights of spouses in conventional heterosexual marriages. They include:

i) the reciprocal duty of support between same-sex partners (Langemaat v Minister of Safety and Security,1998).
ii) claim for loss of support sustained when a same-sex partner was killed in an accident negligently caused (Du Plessis v Road Accident Fund,2004).
iii) the right to immigration benefits of a same-sex partner of a South African citizen (National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, 2000).
iv) Pension benefits and remuneration (Satchwell v President of the Republic of South Africa, 2002).
v) Adoption of children by same-sex couple allowed (Du Toit v Minister of Welfare and Population Development, 2002).
vi) Both partners recorded as parents of child conceived by means of artificial insemination (J v Director General, Department of Home Affairs,2003).
vii) Inheritance given to same partner who's partner died intestate (Gory v Kolver NO, 2007).

It is clear, therefore, that South African law perceives the legal rights and entitlements of same-sex partners no differently from those of spouses in a heterosexual union. One of the most noteworthy cases regarding rights and entitlements of same-sex partners is the "Fourie-case" (Fourie and Another v Minister of Home Affairs and Another,2003). In this case, the Constitutional Court declared to be unfairly discriminatory, unjustifiable and consequently unconstitutional both the common law definition of marriage and the omission or exclusion of

same-sex marriages in the Marriage Act (1961). The fact that both the common law and the Marriage Act excluded same-sex marriages and were intended to cover exclusively marriages entered between two people of different genders was found to be unconstitutional by the Constitutional Court. The court found further the exclusion of same-sex couples from marriage to be unfairly discriminatory and in contravention of the equality clause in the Bill of Rights. In short, the Constitutional Court confirmed the right of same-sex couples to be legally married. In terms of the decision, the government was given twelve months from the date of the judgment to correct the defects in the common law and the Marriage Act. Failure to do this would result in both the common law definition of marriage and the provisions of the Marriage Act being read and interpreted to include same-sex marriages in their application.

Civil Union Act

The simplest way of remedying the defects in the prevailing legal situation would have been to simply extend the common law definition of marriage to include same- sexmarriages and to insert the words "or spouse" after the reference to husband and wife in section 30(1) of the Marriage Act. Instead of doing this, in order to allay protests and objections mainly from religious groups, Parliament enacted the Civil Union Act (2006). This Act provides for same-sex as well as heterosexual marriages. Since the Marriage Act still stands unchanged, this gives heterosexual couples the choice of marrying in terms of the Marriage Act or in terms of the Civil Union Act. Same-sex couples do not have the choice. They must be married in terms of the Civil Union Act. The legal consequences of a marriage are the same irrespective of whether the marriage is in terms of the Civil Union Act or the Marriage Act. However, there is a difference when it comes to the solemnisation of the marriages. Both pieces of legislation provide that marriages can be solemnised by either religious officials or public marriage officers appointed by the state. The Marriage Act also provides for the appointment of marriage officers from different religious groups including Christian, Jewish, Muslim, and Hindu so as to accommodate diverse religious practices and beliefs in South Africa. In terms of section 31 of the Marriage Act, these religious marriage officers may refuse to conduct marriages that are not in conformity with "the rites, formalities, tenets, doctrines or disciplines" of their specific religions. Public servants who are marriage officers, on the other hand, may not refuse to solemnise a marriage on this basis.

The Civil Union Act also distinguishes between civil and religious marriage officers in the same way the Marriage Act does. However, the Civil Union Act makes it more cumbersome to appoint a religious marriage officer. Firstly, the religious organisation must make application for approval for the solemnisation of marriages. If approval is granted, individual officials from the religious organisation in question may apply to be a marriage officer. In terms of the Marriage Act, there is no need for the religious institution to be approved and an individual religious officer can simply apply to be a marriage officer in terms of the Act. Religious marriage officers appointed in terms of the Civil Union Act are not granted the privilege to refuse to solemnise a marriage that is not in accordance with the beliefs and traditions of their particular faith or religion. That said, it has been reported that some marriage officers display hostility towards same-sex couples compelling those couples to seek another marriage officer to solemnise their marriage. It must be noted that the Civil Union Act deems religious marriage officers appointed to be marriage officers in terms of the Marriage Act to automatically be marriage officers in terms of the Civil Union Act. Their right to object to and consequently refuse to solemnise a marriage on religious grounds remains intact. In practice, this means that these marriage officers can legally refuse to solemnise same-sex marriages. This is an unintended consequence which may make it more difficult for same sex-couples to get married.

From the above, it appears that Parliament has unnecessarily complicated the situation by introducing a new piece of legislation instead of making simple amendments to the common law and the Marriage Act. The above discussion of this anomaly demonstrates the legislature's insistence on allaying the fears -some might say prejudices-of some religious organisations. It is submitted that this choice of the legislature is surprising given the Constitutional Court's instruction to Parliament requesting it to: (par 150 of the Fourie judgment)

> *…avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Historically the concept of "separate but equal" served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation…*

Despite, the clumsy accommodation of the rights of religious groups to equality and freedom of religion in giving legal effect to same-sex marriages, the Civil Union Act is perceived as progressive and South Africa is the first country in Africa to grant all marriage rights to same-sex partners (De Vos, 1996).

Legislation for the protection of the rights of the gay/lesbian community and the freedom of religion

The Bill of Rights

The cornerstone of this protection is contained in section 9 of the Constitution which reads:

> *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
> *(3) The state may not 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.*
> *(4) No person may discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

It is clear from these provisions that the state, as well as individuals and corporations are prohibited from discriminating unfairly, directly or indirectly on the basis of *inter alia* sexual orientation as well as on the basis of religion, conscious belief or culture. Therefore, neither a company carrying on business in the hospitality sector nor an individual carrying on business in the hospitality business in the form of a sole trader or a number of individuals carrying on business in the hospitality sector in the form of a partnership may not discriminate against anyone unfairly on the basis of sexual orientation. This means that neither employees nor patrons may be discriminated against on the basis of sexual orientation. Similarly, no employee of any such hospitality provider may discriminate against another employee or patron of that hospitality provider on the basis of sexual orientation. Yet, at the same time,, the freedom of religion is also protected. For an in depth analysis and discussion of the rights contained in the Bill of Rights which are beyond the scope of this article (see Albertyn, 2019).

The Bill of rights provides protection for the freedom of religion in section 15(1) of the Constitution as follows:
"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."
In addition, section 31(1) provides: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights." Section 31 deals primarily with the right to of freedom of religion amongst others in the context of a community. This is only peripherally relevant to the question at hand, and, therefore, will not be discussed.

The meaning of section 15 is discussed with reference to case law below.

The Employment Equity Act 55 of 1998
Section 6 of the EEA provides that it is unfair to discriminate against an employee on the grounds of:
Race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground. Again the right to freedom of religion and sexual orientation are both protected.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (also referred to as "PEPUDA" or "the Act")
The objects of the Act are, *inter alia*, to enact legislation required by section 9 of the Constitution to give effect to the letter and spirit of the Constitution, including the promotion of equality; the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution.

In terms of section 1 of the Act, discrimination "*means any act or omission, including a policy, law, rule practice, condition or situation which directly or indirectly-*
(a) imposes burdens, obligations or disadvantage on; or
(b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds;".
Prohibited grounds "*are- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation,(my emphasis)age disability, religion, conscience, belief, culture, language and birth*".
Again, the right to freedom of religion and sexual orientation are both protected.

Who bears the onus of proof in terms of legislation?
In terms of the EEA if an employee makes out a *prima facie* case of unfair discrimination the respondent must prove:
(a)That the discrimination did not take place, or
(b)The conduct is not based on a prohibited ground.
If the discrimination alleged is based on a prohibited ground the employer must prove that it was fair.
If the discrimination alleged is based on an unlisted, arbitrary ground it is unfair if:
(a) It causes all perpetuates systematic disadvantage in the workplace;
(b) Undermines human dignity; or

(c) Adversely affects the equal enjoyment of a person's right and freedom in a manner that is comparable to discrimination on the ground listed in section 6(1).

PEPUDA in section 13(2)(a) provides that :

"If the discrimination did take place-
On a ground in paragraph (a) of the definition of "prohibited grounds", then it is unfair, unless the
respondent proves that the discrimination is fair;".

Section 14(2) of the PEPUDA provides as follows:
"(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
(a) the context;
(b) the factors referred to in subsection (3);
(c) whether the discrimination reasonably and justifiably differentiates between persons according to
objectively determinable criteria, intrinsic to the activity concerned.
(3) The factors referred to in subsection (2) (b) include the following:
(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether the discrimination is systemic in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances.

The most important court decision with regard to the onus of proof and what constitutes unfair discrimination is the Constitutional Court decision in *Harksen v Lane* NO (1997). In this case, it was held that the first enquiry is whether there is differentiation between persons or categories of persons. If there is differentiation, does this differentiation bear a rational connection to a legitimate government purpose? If it does not then it amounts to discrimination. If the differentiation is based on one or more of the factors listed in subsection 3 of section 9 of the Constitution (the equality clause) then it amounts to discrimination. If the differential treatment is not based on one of the grounds listed in subsection 3 of the equality clause, it will amount to discrimination if the ground for differentiation is based on attributes and characteristics which have the potential to impair the fundamental human dignity of human beings or to affect them adversely in a comparable manner.

If the differentiation amounts to discrimination, the next step is the determination as to whether the discrimination is fair or unfair. Unfair discrimination is the kind that impairs human dignity. There are two stages to the enquiry: Firstly, was there an infringement of a right? If the answer to this question is no, that is the end of the matter. If the answer is yes the second enquiry is whether such infringement is justified. If the infringement impairs human dignity it cannot be justified. (Rautenbach, 2012).

If the discrimination is based on one or more of the factors listed in subsection 3 of the equality clause then the discrimination is presumed to be unfair and the person or entity that perpetrated the discrimination bears the onus of proving that the discrimination is not unfair. If the discrimination is not based on one of the listed grounds then unfairness will have to be established by the complainant. The enquiry as to the fairness or otherwise of the discrimination focuses on the impact of the discrimination on the complainant(s).
As seen above, the same applies to the burden of proof if the complainant uses PEPUDA as the basis of his/her claim

Case law dealing with discrimination based on sexual orientation
South Africa was the first country in the world to acknowledge sexual orientation as a basic human right in its Constitution (Van Zyl, 2011). In the case *of Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2008), the complainant, Mr Johan Daniel Strydom, instituted proceedings in terms of the PEPUDA. He alleged that the respondent, the Nederduitse Gereformeerde Gemeente Moreleta Park ('the church') unfairly discriminated against him on the ground of his sexual orientation. The complainant had worked as an independent contractor as a music teacher for the church. Strydom's contract was terminated by the church on the ground of his sexual orientation. The unfair discrimination *in casu* took place within the context of section 14(2)(a) the PEPUDA. The church alleged that it was entitled to terminate Strydom's contract and justify the discrimination on the basis of the freedom of religion as entrenched in the Constitution. The right to equality of Strydom, therefore, must be balanced against the freedom of religion of the church. The court recognised the importance of the right to freedom of religion and quoted the following from the case of *Prins v President, Cape Law Society and Others* (2002) (CC) at paragraph 49 with approval:

"The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages; the prohibition of discrimination on the grounds of , among other things, religion, ethnic and social origin; and the recognition of freedom of religion and worship. The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity".

Yet, the court also recognised the importance of the right to equality as entrenched in section 9 of the Constitution as the cornerstone of fundamental rights. The court referred to the case of *Minister of Education & Another v Syfrets Trust Ltd NO & Another* (2006) at para [30] in this regard and quoted the following passages from that case:

"As a cursory perusal of constitutional jurisprudence shows, equality is not merely a fundamental right; it is a core value of the Constitution. This is borne out by various provisions in the Constitution itself, which articulate the ideal of equality".
And at para [31]:
"The centrality of equality in the Constitutional value system has also repeatedly been emphasised by the Constitutional Court. As Moseneke J put it in Minister of Finance and Another v Van Heerden 'the achievement of equality goes to the bedrock of our Constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and

freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance'".

The court then, with reference to the factors listed in section 14(3)(d) of the PEPUDA and taking cognisance of the effect of the sexual orientation of Strydom on the freedom of religion of the church on the one hand, and the effects of the discrimination on Strydom on the other hand, concluded that the discrimination against Strydom was indeed unfair. In reaching this conclusion, the court found that since Strydom was merely teaching music and not religious doctrine, and that he was not even a member of the church, it was difficult to see how his lifestyle as an independent contractor affected or influenced his music students or the right to freedom of religion of the church. Strydom's lifestyle as a contract worker, not even an employee of the church, was at stake. The court found on the evidence that Strydom's dignity was impaired when his contract was terminated on the basis of his sexual orientation. The evidence showed that he suffered from depression and was unemployed due to the publicity of this case. He also had to sell his piano and house. The nature and extent of the discrimination was thus all encompassing (section 14(3)(d) of the Act). Having due regard to the factors listed in section 14(3) of the PEPUDA, the court in the Strydom case concluded that the impact on Strydom rendered the discrimination against him unfair.

Applying the law as applied in these cases to the Beloftebos scenario, the following conclusions can be made: First, it is clear that the refusal by Beloftebos to host the wedding of the same-sex couple constitutes discrimination on one of the grounds in section 9, namely, the sexual orientation of the patrons. Secondly, the discrimination will be presumed to be unfair because it is based on the listed prohibited ground of sexual orientation. (See the case of *Harksen v Lane* and the 2015 amendments to the EEA as well as section 13 of the PEPUDA as set out above). It follows that if the matter were to be heard in court, Beloftebos would bear the onus of proving that the discrimination was justified and, therefore, not unfair. Beloftebos would have to prove that their right to freedom of religion and belief justifies the discrimination. This would have to be balanced against the effect of the discrimination on the same-sex couple as was done in the Strydom case in line with the *Harksen v Lane* case where it was established that the enquiry as to the fairness or otherwise of the discrimination focuses on the impact of the discrimination on the complainant(s). As pointed out above, this is also legislatively provided for in terms of section 14 of the PEPUDA. The court would have to scrutinise evidence regarding the circumstances and facts surrounding the matter in order to answer the questions and/or factors listed in section 14 of the PEPUDA (listed above) in order to discover whether the discrimination against the same-sex couple is in fact unfair.

Case law dealing with discrimination based on religion

The importance of the right of freedom of religion has been emphasised in case law. For example in *Minister of Home Affairs and Another v Fourie and Another Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 at para 91 the court stated:

"Furthermore, in relation to the extensive national debates concerning rights for homosexuals, it needs to be acknowledged that, though religious strife may have produced its own forms of intolerance, and religion may have been used in this country to justify the most egregious forms of racial discrimination, it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism".

Regarding the meaning attributed to freedom of religion the following dictum from the case of *R v Big M Drug Mart Ltd* (1985) by Dickson CJC is instructive at par 18-19:

"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

Dickson elaborated on the meaning of religion further by stressing that freedom of religion also:

"*…implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs... This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. ..."*

If this definition of freedom of religion is applied to the Beloftebos scenario, it could be argued that coercing the owners of Beloftebos to host same-sex marriages at their venue constitutes forcing people to act or refrain from acting in a manner contrary to their religious beliefs.

As set out above, section 9 of the Constitution also prohibits unfair discrimination on the basis of religion, conscience, belief and culture as well as sexual orientation. It is clear that sometimes different human rights are in competition with each other. It is not useful to try and establish which fundamental right is more important or more relevant, but rather to devise ways in which all the rights can co-exist in a free and democratic society as envisioned by our Bill of Rights in the Constitution. What follows is a brief analysis of the ground breaking Constitutional Court case of *Christian Education v Minister of Education* where it was alleged that the right to religion, belief, conscience or culture were compromised. The purpose of reference to this case is to establish criteria to adopt in devising ways to allow equal but potentially competing human rights to co-exist so that none of them are compromised. By extracting the principles and guidelines set out by the Constitutional Court to determine how to allow two or more seemingly opposing rights to co-exist, it is hoped to shed some light and clarity on how employers in the hospitality industry can ensure that both the right to equality of the LGBTI+ persons and the right to freedom of religion can be simultaneously upheld.

***Christian Education South Africa v Minister of Education* 2000(4) SA (CC)**

Parliament's prohibition of corporeal punishment in schools was alleged to have unconstitutionally limited the religious rights of parents of children in independent schools. This allegation was based on the fact that the parents of these children had consented to 'corporeal correction' by the school teachers in line with their religious convictions. The Constitutional Court had to separate the secular from the religious. It concluded that believers cannot expect to be exempt from the laws of the land because of their beliefs. However, the Constitutional Court emphasized the duty of the state as far as is reasonably possible, to avoid putting believers in a situation where they have to make a choice between either abiding by the laws of the land or abiding by their religious beliefs.

The Constitutional Court found that the law prohibiting corporeal punishment in schools did not prohibit corporeal punishment of children by their parents in their homes. The court concluded that since schools of necessity operate in the public domain and not in private

homes the parents were not placed in a position to make an absolute and strenuous choice between obeying the law or following their conscience or beliefs. The parents were merely prohibited from authorising teachers from handing out corporeal punishment to their children. Nothing stopped them from correcting their children's behaviour in accordance with their biblically ordained responsibilities. The Constitutional Court, therefore, upheld the law prohibiting corporeal punishment in schools.

Application of the case law to the Beloftebos facts

This case is very instructive with regard to the circumstances in the Beloftebos situation. If the matter is approached in a similar way to the Constitutional Court in the Christian Education case, the first question to be answered is whether the Beloftebos venue of necessity operates in the public domain. It could be argued that even though the Beloftebos venue is open to the public, it does not of necessity operate in the public domain as a school does. Based upon this premise, it could be argued further that since the Beloftebos venue is not in the public domain, it is free to practice the religious beliefs and convictions of the owners. Therefore, the right to freedom of religion, belief and opinion which includes a refusal to do something that is contrary to their religious beliefs should be protected in the Beloftebos case. This of course cannot be at the expense of other rights such as the right to equality of LGBTI+ persons. Since LGBTI+ persons (in this case, same-sex couples) are free to choose another venue for their marriage, it may be argued that their rights have not been compromised. If the reasoning in the Christian Education case is interpreted in this manner in the Beloftebos case, it is submitted that the venue is entitled to refuse the solemnisation of same-sex marriages based on religious conviction.

What is in the public domain regarding the solemnisation of marriages, is the solemnisation of marriages by marriage officers appointed by the state to solemnise marriages. It is interesting that even in this situation, the Civil Union Act allows state appointed religious marriage officers the option to refuse to solemnise marriages that are contrary to their religious beliefs. Given that this privilege is given to religious marriage officers in the state or public domain, some may postulate that it follows that this privilege should be accorded to believers outside of the public domain. However, the Civil Union Act accords this privilege to religious state marriage officers only. This option does not extend to other state marriage officers. Other marriage officers (i.e. not religious marriage officers) do not have this privilege. Therefore, it does not necessarily follow that the privilege is extended to the owners or directors of a wedding venue to refuse to allow the solemnisation of a wedding based on their religious beliefs.

The Christian Education case could be applied to the facts of Beloftebos with reference to the Constitutional Court's ruling that the state has a duty as far as is reasonably possible, to avoid putting believers in a situation where they have to make a choice between either abiding by the laws of the land or abiding by their religious beliefs. The question to be asked is: If the Constitutional Court were to find that refusal by Beloftebos to host the wedding of the same-sex couple to be contrary to the Constitution and a breach of sections 9 and 10, would this amount to forcing the owners of Beloftebos to turn their backs on their religious beliefs in the interests of abiding by the law? The answer to this question could depend on whether the marriage of the same-sex couple was to be solemnised by the owners or employees of the venue themselves or whether it was to be solemnised by someone contracted by the same-sex couple from outside. It could be argued that if the owners or employees of the venue are not forced to solemnise the marriage, then they cannot argue that their freedom of religion, conscience or belief is challenged because they are not forced to do anything contrary to their beliefs. All

they are doing is making the venue available, they are not as such taking part in the ceremony which is contrary to their beliefs.

That said, others may argue that their religious beliefs would not allow them to allow a ceremony which is contrary to their religious beliefs to take place at their premises.
A distinction should be made between refusing to host the solemnisation of a marriage between a same-sex couple at a venue on the one hand and, a refusal to host same-sex couples and their friends in general on the other hand. It is clear that the latter would be unconstitutional and contrary to the provisions of the equality clause and the right to dignity contained in section 10 of the Constitution. However, refusing to allow the solemnisation of a marriage which is contrary to religious beliefs at your venue is a different issue and whether or not this is contrary to the equality clause in the Constitution is not that easily answered. Would the venue be entitled to refuse to host the celebration of the same-sex wedding which was solemnised elsewhere? This is unlikely since the venue in this scenario would not be forced to do something that is contrary to their religious beliefs.

There is the danger that if the Constitutional Court were to oblige all venues to allow the solemnisation of all same-sex marriages, it may open the proverbial can of worms. Would such a decision render it obligatory for example for all wedding venues to allow the solemnisation of traditional African weddings where the slaughter of animals without anaesthetic is an essential part of the wedding ceremony? Would it oblige the venues to allow the solemnisation of polygamous marriages or the solemnisation of marriages that contain Satanic rituals? The repercussions extend to other religious ceremonies. For example, the Muslim celebration of Eid entails the slaughter of animals in a particular way. These are questions that have a myriad of social implications and the answers to these questions are beyond the scope of this article.

Conclusion

In summary, all that is clear at the moment is that the refusal to host a same-sex couple and their friends in general for no other reason than that a couple is a same-sex couple- or identifies as LGBTI+ persons would clearly be contrary to the equality clause. However, the question whether refusal to host the solemnisation of the same-sex wedding is justified on the basis of freedom of religion, belief and opinion is not that easy to answer. We shall have to wait for the findings of the Constitutional Court in the Beloftebos case. It could be argued that since wedding venues are not in the public domain in the same way that private schools are, owners of venues would be entitled to refuse to host the solemnisation of a wedding or other religious ceremonies that are contrary to their personally held religious beliefs. To force private individuals to do this is tantamount to force them to do something that is contrary to their religious beliefs. As seen above, the courts have stated that *"freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs..." (R v Big M Drug Mart*, 1985)).

Furthermore, in considering whether or not the dignity of the patrons would be compromised, an important factor to note is that no patron is obliged to go to a particular venue to have their weddings solemnised. The fact is, there are many other venues that the couple *in casu* could make use of for the solemnisation of their wedding. In addition to this, the celebration of the solemnisation of the marriage could still be held at Beloftebos. It is submitted that the facts of the Strydom-case are not comparable to this case. The Strydom case is a clear example that evidences circumstances where the person's dignity was impaired and the defendant had no justification for doing so. In no way were the church's beliefs and structures compromised by Strydom working there. Strydom's dignity was impaired for the reasons mentioned above including the loss of his livelihood and possessions. In the case of Beloftebos,

the owners of the venue would be obliged to do something which is contrary to their religious beliefs. The refusal to host the solemnisation of the wedding in no way prevents the couple from getting married. Ultimately, the test centres on whether the court's deliberation on the facts under scrutiny promotes or retards the achievement of human dignity, equality and freedom. Having said this, an important factor to consider is, that in this case, Beloftebos bears the onus of proving that the discrimination is justified or fair. From a litigation perspective this places the venue on the proverbial backfoot leading to lengthy and expensive litigation. It is advisable therefore that venue owners tread carefully in these yet untested areas of the law and avoid not only costly litigation but the sometime insurmountable losses resulting from bad publicity.

References

Albertyn, C. (2018) Equality in Cheadle MH, Davis DM and Haysom NRL (eds) *South African Constitutional Law: The Bill of Rights*,Service Issue 25:4-1-4-65.

Beloftebos wedding venue taken to court for refusing same sex couple. (2020). Available at https://www.iol.co.za/weekend-argus/news/beloftebos-wedding-venue-taken-to-court-for-refusing-same-sex-couple-41331062 [Retrieved 31 July 2020].

Beloftebos Media statement.2020). Available at https://www.beloftebos.co.za/media-statement [Retrieved 31 July 2020].

Cape Venue refuses gay wedding (2017).Available at https://www.timeslive.co.za/news/south-africa/2017-08-02-cape-venue-refuses-gay-wedding/[Retrieved 31 July 2020].

De Vos, P. (1996). A judicial revolution? The court led achievement of same –sex marriage in South Africa. *South African Journal on Human Rights,* 12 (2), 265-290.

Rautenbach, I.(2012). Riglyne om die reg op gelykheid toe te pas. *Litnet Akademies,* 9(2), 229.

Van Zyl, M. (2011) *Journal of Social Issues*, 67 (2), 335.

Legislation

The Constitution Act108 of 1996.

Marriage Act 25 of 1961.

Civil Union Act 17 of 2006.

The Employment Equity Act 55 of 1998.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

Case law

Christian Education South Africa v Minister of Education 2000(4) SA (CC).

Du Plessis v Road Accident Fund (2004) 1 SA 359 (SCA).

Du Toit v Minister of Welfare and Population Development 2003 (2) SA198 (CC).

Fourie and Another v Minister of Home Affairs and Another ([2003] ZACC 11).

Gory v Kolver NO (2007) 4 SA 97 (CC).

Harksen v Lane NO (1997 11 BCLR 1489 (CC).

J v Director General, Department of Home Affairs (2003) 5 SA 621 (CC).

Langemaat v Minister of Safety and Security (1998) 19 ILJ 240 (T).

Minister of Education & Another v Syfrets Trust Ltd NO & Another 2006 (4) SA 25 (CC).

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000(1) BCLR 39 (CC).

Prins v President, Cape Law Society and Others 2002 (2) SA 794 (CC).

R v Big M Drug Mart Ltd (1985) 1 SCR 295.

Satchwell v President of the Republic of South Africa (2002) (9) BCLR986 (CC).
Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park (26926/05) [2008] ZAEQC 1; (2009) 30 ILJ 868 (EqC) (27 August 2008).