IN THE EQUALITY COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case number: 26926/05

In the matter between:

JOHAN DANIEL STRYDOM **Complainant**

and

NEDERDUITSE GEREFORMEERDE

GEMEENTE MORELETA PARK **Respondent**

JUDGMENT

BASSON, J

[1] The complainant, Mr Johan Daniel Strydom, has instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (also referred to as "*PEPUDA*" or "*the Act*") alleging that the respondent, the Nederduitse Gereformeerde Gemeente Moreleta Park (also

referred to as "*the church"*), has unfairly discriminated against him on the ground of his homosexual orientation. The complainant worked as an independent contractor (also called a "*contract worker*") in the so-called "*kunste-akademie*" of the church, teaching music to students. The complainant alleges that his contract was terminated by the church on the ground of his sexual orientation.

[2] The objects of the Act are, *inter alia*, to enact legislation required by section 9 of the Constitution (that is, the Constitution of South Africa Act, Act 108 of 1996); to give effect to the letter and spirit of the Constitution, in particular – the equal enjoyment of all rights and freedoms by every person; **the promotion of equality**; **the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution**; to provide for procedures for the determination of circumstances under which discrimination is unfair; and to provide remedies for victims of unfair discrimination. See section 2 of the Act – my underlining.

[3] 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;".

[4] **Prohibited grounds** "*are- **(a)** race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age disability, religion, conscience, belief, culture, language and birth*" (my underlining).

[5] As far as the **burden of proof** is concerned section 13(2)(a) of the Act finds application *in casu*: "*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;".*
>
> (my underlining).

[6] In the present matter it was common cause that the complainant's contract with the church to render services as a so-called "*contract worker*" was terminated on the basis that he was involved in a homosexual relationship. In the event, the church unfairly discriminated against the complainant on the basis of his sexual orientation (one of the said prohibited grounds).

[7] It is clear that the complainant thus suffered disadvantage and the withholding of advantages based upon a **prohibited**

ground, that is, his **sexual orientation**. In the event, the *onus* rested on the respondent to prove that the unfair discrimination was fair. Section 14(2) of the Act 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 to -

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

[8] The unfair discrimination *in casu* took place within the context (section 14(2)(a) above) of a church organisation relying on the freedom of religion as entrenched in the Constitution to justify the unfair discrimination on the basis of the complainant's sexual orientation. The right to equality of the complainant must therefore be balanced against the freedom of religion of the church. It was stated as follows in Woolmer *et al* **Constitutional Law of South Africa** at p 41-46:

> ***"****Rights to religious freedom can 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 with regard to discrimination on the basis of race, sex and sexual orientation".

[9] There can be little doubt about the importance of the right to religious freedom. It is entrenched in terms of the Bill of Rights in section 15 of the Constitution. It was stated in the case of **Prins v President, Cape Law Society and Others** 2002 (2) SA 794 (CC) at paragraph [49]:

"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".

[10] On the other hand, the right to equality (protected in terms of section 9 of the Constitution) is viewed as foundational to our constitutional order. See *inter alia*, in this instance the case of **Minister of Education & Another v Syfrets Trust Ltd NO & Another** 2006 (4) SA 25 (CC) at para [30]:

> *"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'".

[11] See in general cases in the Constitutional Court on discrimination based on sexual orientation. For instance, the case of **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) at para [38]:

"As far as religious views and influences are concerned I would repeat what was stated in S v H:

> *'There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds this view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homosexuality.'*

It would not be judicially proper to go further than that in the absence of properly admitted expert evidence. I think it necessary to point out, in the context of the present case, that apart from freedom of expression, freedom of conscience, religion, thought, belief and opinion are also

> *constitutionally protected values under the 1996 Constitution. The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view that holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would wish not to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to the grounds of sexual orientation.".*

See also the case of **Minister of Home Affairs and Another v Fourie and Another Lesbian and Gay Equality Project v Minister of Home Affairs** 2006 (1) SA 524 (CC) at para [91]:

> *"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".

The above *dictum* in the case of **National Coalition for Gay and Lesbian Equality** is then quoted with approval.

At para [92] the judgment continues:

"It is also necessary to highlight this qualification:

'It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates on the grounds of sexual orientation'.

It 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. It would be out of order to employ the sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies".

And at para [94]:

> *"In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the law and the Constitution to step in and counteract rather than reinforce unfair discrimination against a minority. The test, where majoritarian and minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom".*

[12] *In casu* it is clear on the evidence presented that it is the stated belief of the church (also the church Synod that takes binding decisions on church dogma) that marriage can only validly exist between one man and one woman and that persons of homosexual orientation must therefore be celibate and cannot be involved in a homosexual relationship. This would, in fact,

amount to a cardinal sin in view of the church's teachings based upon the Bible.

[13] As pointed out above, in terms of the Act, discriminatory action against a homosexual based on this view unfairly discriminates against him on the basis of his sexual orientation. The question, however, remains whether the church can prove that such discrimination is fair, that is, in this regard the onus rests upon the church.

[14] The question remains whether the right to religious freedom outweighs the Constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation? The Constitutional right to equality is foundational to the open and democratic society envisaged by the Constitution. As a general principle therefore, the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation.

[15] It was argued on behalf of the church that persons in leadership positions such as ministers cannot live in a homosexual relationship (but must remain celibate) as it was an inherent requirement that a spiritual leader must support church doctrine, also in regard to this controversial issue.

See in this regard the book on constitutional law in South Africa: Woolman *et al (supra)* at p 41-47:

> *"The first scenario involves discrimination against a person with spiritual responsibilities (such as a priest or candidate for ordination). Few exercises are more central to religious freedom than the right to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any other enumerated ground in the equality clause, a disqualifying factor for priesthood, the effect for many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders. Where appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination".*

[16] The church then argues that the complainant is also a spiritual leader and as such cannot by way of his example of living in a homosexual relationship deliver his services as lecturer in music

at the church's "*kunste-akademie*". In other words, as a role model the complainant was to follow an exemplary Christian lifestyle.

See in this regard Woolman *et al supra* at p 41-47 to 41-48, still referring to case law in the USA and Canada:

> *"The second scenario relates to discrimination against employees of a seminary or Christian school. Factors militating against legal intervention might include the job description of the person suffering discrimination and the impact on religious freedom of not granting the religious institution an exemption. If, for example, the seminary or theology faculty could show that a teaching post involved* ***substantial religious responsibilities****, the seminary might be able to succeed in obtaining an exemption from anti-discrimination legislation using the* ***analogy of the "church-minister" exemption*** *… Furthermore, if a Christian school could show that* ***leading an 'exemplary Christian life'*** *was an* ***important part of every teacher's job description*** *– 'exemplary', of course, being interpreted by the church in accordance with its own tenets – then it is conceivable that the church would be given some latitude to flout the legal prohibition on employment discrimination.*

> ***Apart from these sorts of special circumstances****, however, religious institutions like schools, seminaries or universities – would probably* ***not be deemed exempt from anti-discrimination law”****.*(My underlining).

[17] I am not convinced on the evidence presented by the church that on the facts of the matter at hand the complainant was in such a position of spiritual leadership. In other words, the church has not rid itself of its onus in this instance. *In casu,* the description of the services to be rendered on the evidence was (in the absence of a written contract of work) to teach music at the “*kunste-akademie*” of the church. There was not a shred of evidence that the complainant had to teach Christian doctrine. On the contrary, the Christian foundations were taught at the “kunste-akademie” by ministers of the church. The complainant mostly taught issues around music (also technical issues). In the event, the complainant’s work involved no religious responsibilities at all.

[18] The high water mark in this regard was that, during the interview, the complainant was questioned on his Christian values in relation as to whether he had a personal relationship with God. On the basis of this interview his commitment to these values was never questioned. In fact, it was common cause that the complainant had rendered excellent services. It was only

when the fact that he was in a homosexual relationship had come to light that his belief was questioned. This was, of course, also the reason for the termination of his services.

[19] It was clear from the evidence of minister Dirkie Van der Spuy ("*Van der Spuy*") that the leadership of the church (congregation or "*gemeente*") was seated in the "*Kerkraad*" which consisted of ten ministers (with him at the helm) as well as the "*ampte*", meaning the deacons, elders and the scriba or "*gemeentebestuurder*". Even on this evidence, the complainant was placed at the very bottom of church "*leadership*".

[20] Further and importantly, the complainant was not even a member of the church (he was a member of the Christian "*Hervormde kerk*" where he stated that he experienced a "*meer ontvanklike*" position regarding his sexual orientation). There was accordingly no question of a member of the church living in a homosexual relationship. It was the lifestyle of a contract worker that was at stake. He was not even an employee of the church. It is thus clear that the complainant was in a sense removed or distanced from the church, and did not even participate in its activities.

[21] It was stated by the church that there was doubt whether the complainant could lead an exemplary Christian life due to his

homosexual lifestyle. He would therefore set a bad example to his students.

[22] However, these students were post-school persons and only numbered seven. I am not persuaded that the church has shown that it was part of his job description that he was to become a role model for Christianity. At best he was a mentor of the students on a personal and not necessarily spiritual level. There is also not a shred of evidence that the complainant wanted to influence the students or any other church member. In fact, he wanted to keep his homosexual relationship to himself as he regarded it as a private matter. He did not even want to discuss the matter with the church leadership.

[23] In short, it would not have been devastating to the church to keep the complainant on in his teaching position. Van der Spuy mentioned that this would mean that the church "*condoned*" a homosexual relationship.

[24] However, if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the Constitution that they not discriminate on the basis of a person's sexual orientation when concluding a contract of work. For instance, if a person in a homosexual relationship was employed or contracted to do typing work as a

secretary of the "*kunste-akademie*", terminating his contract on that basis (his sexual orientation) would clearly amount to unfair discrimination in terms of the listed grounds in the Constitution. Again, the explanation for employing such person is clear: it would amount to unfair discrimination based on sexual orientation to terminate his contract.

[25] I repeat that the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining on in his position as a lecturer of music. On the other hand, the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination.

[26] In the event, the church has failed to convince me that the complainant was not unfairly discriminated against. In other words, I am not persuaded that the discrimination was fair.

[27] The church relied on the Canadian Supreme Court case of **Caldwell v The Catholic Schools of Vancouver Archdiocese and Attorney General of British Columbia** 66 BCLR 398 [1984] 2 SCR 603. The appellant, a Roman Catholic teacher in a

Roman Catholic school, was not rehired after she married a divorced man in a civil ceremony. By the marriage the appellant contravened two rules of the church requiring that marriage be in the Catholic Church and prohibiting marriage to a divorced person. The failure to rehire was attacked on the basis of discrimination on the grounds of religion and marital status. However, the court decided against the teacher. The appeal also failed. This case can be distinguished on the basis that section 22 of the Code permitted the respondent to make preference in hiring among members of the Catholic community. It is further distinguishable on the facts because the teaching of doctrine and the observance of standards by teachers formed part of the contract of employment of teachers. They are required to exhibit the "*highest model for Christian behaviour*". **Religious and moral training occupies the principal place in the curriculum**.

[28] As it was pointed out above, in the present matter there is no such requirement which forms part of the work contract between the "*kunste-akademie*" of the church and the complainant. Moreover, that part of the course dealing with Christian foundations were not taught by him but by the religious leaders in the church (the ministers).

[29] The facts of the **Caldwell** case also differed in that the Catholic school held retreats for its teaching staff at which the special role of the Catholic school was a subject of instruction. The appraisal form for the evaluation of teacher performance, though based on the public school form, contained an additional part entitled “Teaching in the spirit of the Catholic school – its character and mission”. This part concerns itself with the teacher’s performance as a Christian witness to the students. The glaring dissimilarities with the case at hand are obvious.

[30] The reference to the case of **Taylor v Kurstag NO and Others** [2004] 4 All SA 317 (W) is not helpful in deciding the issue of balancing the right to freedom of religion against the right to equality protected by the Constitution and in terms of the Act. It does refer to the associational right to freedom of religion enshrined in sections 31 and 18 of the Constitution and the *dictum* that freedom includes the right of others to exclude non-conformists and to require those who join an association to conform with its principles and rules. The complainant, however, was not a member of the church and therefore was not foisted upon the church but he merely had a work contract to teach at the “kunste-akademie” of the church. Moreover, there was, as stated above, no question of unfair discrimination to be decided in this case.

[31] Further, unfair discrimination should be seen in the context of the matter. See section 14(2)(a) of the Act quoted above. It was already spelt out above that the fact that the freedom of religion must be balanced against the complainant's right to equality, in essence, forms the context of the question whether the unfair discrimination was fair.

[32] In deciding whether the unfair discrimination had a legitimate purpose (section 14(3)(f) of the Act) the church argued that it was to ensure that persons in positions of leadership do not set bad examples and that the church must not be seen to condone the sin of living in a homosexual relationship. This purpose was achieved by terminating the complainant's contract (section 14(3)(g) of the Act). These issues were already discussed above: the complainant was not in a position of leadership and the church did not have to "*condone*" homosexual relationships by not terminating his contract. In the event, the unfair discrimination did not have a legitimate purpose. This means that the question whether there are less restrictive or less disadvantageous means to achieve the purpose (section 14(3)(h) of the Act) becomes moot. In my view, the respondent has also taken no steps as being reasonable in the circumstances to address the disadvantage which arises from the unfair discrimination of the complainant or to accommodate diversity (section 14(3)(i) of the Act).

[33] It was clear from the evidence of the complainant that his dignity was impaired when his contract was terminated on the basis of his sexual orientation (section 14(3)(a) of the Act). Its impact on his life (section 14(3)(b) of the Act) was made abundantly clear: he suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house. The nature and extent of the discrimination was thus also encompassing (section 14(3)(d) of the Act).

[34] Procedurally, the church exacerbated the situation. The complainant refused to discuss his "problem" with the church leadership. In my view, he was fully justified in doing so. Van der Spuy testified that the complainant was offered "*n liefdevolle pad van berading*". However, in practice this meant that sooner or later the complainant would be offered an opportunity to take part in a program called H2O (Homosexuality to Overcome) which, in effect, tries to *"cure*" homosexuals and turn them into heterosexuals. This request would have added insult to injury.

[35] As far as relief for the impairment of the complainant's dignity and emotional and psychological suffering due to the unfair discrimination is concerned, there is no precedent in South African case law. The following statement from the judgment of

Minister of Home Affairs v Fourie *supra* at para [60] *per Sachs J* is particularly apposite:

> *"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the Affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society".*

[36] In my view, the fact that the complainant allowed his case to receive publicity and thereby highlighted the plight of homosexuals in South Africa, should not now be held against him when deciding the quantum of the damages for the impairment of dignity and emotional and psychological suffering.

[37] I award an amount of R 75 000,00 for the impairment of the complainant's dignity and emotional and psychological suffering.

[38] The complainant also claimed for loss of earnings for the remaining period of his work contract in 2005 (it was terminated in July). If the complainant was allowed to teach for the remainder of the year, he would have earned R 133,00 per hour and rendered services for 5 hours per week. It would appear as if the complainant would have worked for a further 18 weeks, amounting to a total amount of R 11 970,00. He can not claim for services rendered under the contract in 2006 as the "*kunste-akademie*" had to close its doors due to lack of interest from students. He was well aware of the fact that the in order for the course to continue a minimum number of students were required. Therefore he has no claim for 2006.

[39] The complainant also prayed for an order that the respondent make an unconditional apology. In my view such order is a suitable remedy in cases such as these. See section 21(2)(j) of the Act.

[40] As far as an order as to costs are concerned, I am of the view that the matter is complex and justifies the appointment of two counsel.

[41] I make the following order:

1. The respondent unfairly discriminated against the complainant on the ground of his sexual orientation.

2. The respondent is to pay the complainant an amount of R 75 000,00 for the impairment of his dignity and emotional and psychological suffering.

3. The respondent is to pay the complainant R 11 970,00 for loss of earnings.

4. The respondent is to unconditionally apologise to the complainant.

5. The respondent is to pay the complainant's costs, including the costs of two counsel.

_____

D A BASSON

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

On behalf of the complainant: R G Tolmay SC and T Khatri

Instructed by Sanquela-Spies Attorneys

On behalf of respondent: J W Louw SC

Instructed by Van der Merwe Du Toit Inc