

**ANALYSIS OF DISCRIMINATION ON THE BASIS OF SEXUAL  
ORIENTATION IN THE WORKPLACE**

by

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## **DECLARATION**

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of Laws in Labour Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged .

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**2013**

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## **ABSTRACT**

Like other forms of prohibited discriminations, discrimination on the basis of sexual orientation has become an area of concern in the workplace. The law prohibits discrimination in whatever form and declares it unlawful to discriminate people on the basis of sexual orientation. In this work, South African anti-discrimination provisions on the basis of sexual orientation will be emphasized, whereas foreign countries will only be referred to for the sake of comparative analysis. Discrimination of lesbian, gay, bisexual, transsexual and homosexual people (LGBTH) in the workplace is manifested by harassment and constructive dismissal through homophobia. Homophobia is a psychological concept which refers to the hatred of people after declaring their gay, lesbian or homosexual identities. This study reveals homophobic practices towards homosexuals as if they are not beneficiaries of contemporary democratic laws and dividends of democracy enshrined in Chapter 2 of the RSA Constitution of 1996 and Chapter 2 of the Employment Equity Act (EEA) 55 of 1998. To this, the research revealed an interesting corroboration in section 9(4) of the RSA Constitution of 1996, and section 6(1) of the EEA 55 of 1998, which provide that no person may unfairly discriminate another on the grounds of sexual orientation. The study has also revealed that among others, employment rights of people in South Africa and in foreign countries are being violated on the basis of sexual orientation. In most case laws, people who disclosed to their employers, that their gender identities are different to what was expected as straight genders and those who informed their employers about their intentions to undergo sex change surgeries are being hired and fired. The study also proved a point that when it comes to sexual orientation exclusion and discrimination, the same vulnerable groups of gays and lesbians are as well caught up in practices of sodomy and sexual harassments. Therefore, the remedies suggested by this research will also apply to everyone including gays and lesbians. To avoid controversy and issues, statutes and decided court cases have been stated as they are, in chapter 4 of this research, for the sake of comparative analysis in order to unravel the existing state of affairs through approaches from different jurisdictions.

## ACRONYMS/ABBREVIATIONS

BCCHR:	British Colombia Code of Human Rights
BCEA:	Basic Conditions of Employment Act 75 of 1997
CC:	Constitutional Court
CEEA:	Canadian Employment Equity Act of 1970
CHRA:	Canadian Human Rights Act of 1985
CPA:	Civil Partnership Act of 2004
CRA:	Civil Rights Act of 1981
CUA:	Civil Union Act 17 of 2006
DOMA:	Defence of Marriages Act of 1996
EEA:	Employment Equity Act 55 of 1998
EPA:	Equal Pay Act of 1963
EU:	European Union
EUCFDAD:	European Union Campaign For Diversity Against Discrimination
LGBTH:	Lesbian, gay, bisexual, transsexual and homosexual people
LRA:	Labour Relations Act 66 of 1995
MA:	Marriages Act 25 of 1961
MPA:	Matrimonial Property Act 88 of 1984
NCGLE:	National Coalition for Gay and Lesbian Equality
OOPM:	Office Of Personal Management
PEPUDA:	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
RA:	Rehabilitation Act of 1973
SOR:	Sexual orientation Regulation 1661 OF 2003

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## CHAPTER 1

### 1.1 INTRODUCTION AND BACKGROUND OF THE STUDY

Nowadays, a growing number of employers are finding themselves responsible for providing a workplace that is discrimination and harassment free on the basis of sexual orientation. This statement is also supported by Steingold Fred.<sup>1</sup> According to him, employers are required by law to take steps to promote equal opportunities in the workplace by eliminating unfair discrimination in any employment policy or practice. Although this debate is wide, the present researcher will focus on South African situation and will always refer to foreign countries for emphasis and comparison.

According to Grogan J,<sup>2</sup> discrimination may be fair or unfair. In terms section 6(2) (a) and (b) of Employment Equity Act (EEA),<sup>3</sup> discrimination may be fair when a job applicant or employee may not be suitable for a job applied for in terms of the principles of affirmative action and inherent requirements of a job. Section 186(2) of the Labour Relations Act (LRA),<sup>4</sup> provides that unfair discrimination is an example of unfair labour practice. The LRA defines unfair labour practice and dismissal in section 187(1)(f) when the employer unfairly discriminated against an employee directly or indirectly, on any arbitrary grounds including, but not limited to race, gender, sex, ethnicity, colour, sexual orientation etc. The focus of this research will be on unfair discrimination in the workplace based on sexual orientation.

According to Du Toit D,<sup>5</sup> the concept “discrimination” emanates from racial and economic disparities of the past. He further emphasized that in a society that is characterized by statutory inequalities, discrimination became an ingrained feature of employment relations. Among others, Du Toit also discovered that it was only in 1981, that discrimination on the basis of sex, gender, sexual orientation, race, ethnicity, religion, colour, culture and disability, in the workplace was outlawed for the first time in many

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<sup>1</sup> Manage Your Employees & Workplace Effectively Employer's legal Handbook (2007) Page 30.

<sup>2</sup> Workplace Law, 10<sup>th</sup> edition, Pretoria, 2009, Page 74.

<sup>3</sup> Act 55 of 1998.

<sup>4</sup> Act 66 of 1995.

<sup>5</sup> The Labour Relations Act of 1995, 2<sup>nd</sup> edition, Butterworth, Durban 1995 Page 65.



countries including South Africa. Item 2(1)(a) of Schedule 7, of LRA also provides for the definition unfair discrimination on the basis of sexual orientation in the workplace.

Unfair discrimination on the basis of sexual orientation has since been prohibited as indicated in Article 1 of the International Labour Organisation (ILO) Convention.<sup>6</sup> Since South Africa is a signatory of international treaties, the Republic of South African (RSA) Constitution,<sup>7</sup> expressly provides the regulation of discrimination on the basis of sexual orientation. For instance, section 9(3) provides that the *state* may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sexual orientation, and section 9(4) provides that no *person* may directly or indirectly discriminate against anyone on one or more grounds, including sexual orientation. The other legislation that regulates unfair labour practice and discrimination is section 6(1) Employment Equity Act (EEA),<sup>8</sup> which corroborates the RSA Constitution in the sense that , discrimination is prohibited on listed grounds, such as; gender, sex, pregnancy, marital status, belief, colour, ethnicity, age, disability, religion, conscience, belief, culture, language, race and on the basis of sexual orientation.

## 1.2 PROBLEM STATEMENT

Discrimination on the basis of sexual orientation in the workplace is a serious violation of fundamental rights enshrined in the RSA Constitution, ILO Conventions, and other legislations. Important constitutional provisions relevant to this are: the right to fair labour practice in section 23, the right to freedom of association section 18, the right to equality before the law section 9, the right to freedom of occupation section 22, and the right to inherent human dignity in section 10.<sup>9</sup>

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<sup>6</sup> *Convention III of 1958.*

<sup>7</sup> *Of 1996.*

<sup>8</sup> See 3 Supra.

<sup>9</sup> See 7 Supra.

### **1.3 OBJECTIVE OF THE STUDY**

The objective of this study is to create awareness to people both at the workplace as well as in the communities, that the law is against unreasonable practices of sexual orientation discrimination and harassment of people based on sexuality, and that perpetrators will definitely be accountable. The state should stand up to its constitutional obligations to uphold the law. The most critical objective of this research is the defence of the constitutional provisions irrespective of the identity of those whose rights are bound to be protected. The rights of the minorities which are always violated by majorities have provisions for their protection enshrined. As the intention of the current writer, homosexuals such as lesbians and gays will be used as examples of the minorities who are supposed to be against violation of their constitutional rights as well as other vulnerable people whose rights may be abused in South Africa.

### **1.4 AIMS OF THE STUDY**

- 1.4.1 To examine and analyse discrimination based on sexual orientation in the workplace.
- 1.4.2 To define concepts and contextualize the discrimination of sexual orientation in the workplace.
- 1.4.3 To make recommendations based on findings from the study.

### **1.5 SIGNIFICANCE OF THE STUDY**

It has been observed that homosexuals and bisexuals are afraid of reporting discrimination practices against them as some of them were not aware of the fact that there are legal provisions in place to protect them. The significance of this research is to create an awareness of the availability of legal provisions for victims to report sexual orientation discrimination tendencies so that perpetrators may be prosecuted.

## 1.6 METHODOLOGY

In this research, sources of information were obtained from the library and inter-library loans. Secondary sources such as textbooks, newspaper reports, websites, legislations, decided court cases or precedents, government gazettes, states regulations, prescripts, proposed bills, articles and journals were consulted. Cases from foreign jurisdictions have been cited for the purposes of comparison with South African cases of homophobia, and it has been established from the research that challenges faced by employees in the workplace are increased by sexual orientation discrimination.

## 1.7 LITERATURE REVIEW

Pincus F,<sup>10</sup> defines sexual orientation as the terminology determined by those to whom people are attracted sexually, physically and emotionally. On the other hand Hurst Charles,<sup>11</sup> defines sexual orientation in terms of inequality, wherein there is a manifestation of inequality in terms of status / when gays and lesbians are differently treated.

According to Griffith KH and Hebl MR,<sup>12</sup> discrimination on the basis of sexual orientation should not be considered in a vacuum but in relation to the broader work environment. Wintemute R,<sup>13</sup> views sexual orientation as a complex phenomenon that has several senses and further maintains that sexual orientation may take the form of being sexually attracted to the person of same sex or persons of opposite sex, and to persons of both sexes. Unlike Wintemute R, Breytenbach J,<sup>14</sup> avers that sexual orientation is a person's preference to gratify sexual and erotic feelings, thoughts, fantasies and behaviour towards people of the same sex. He argues that sexual orientation is all about the way a person sees himself physically like a male, female or both. Breytenach, in his research also avers that it is possible for a person who was born a male to see himself as a

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<sup>10</sup> Understanding Diversity, An introduction to class, Race, Gender and Sexual Orientation, 2006.

<sup>11</sup> Social Inequality, Forms, Causes and Consequences, 2010.

<sup>12</sup> Discrimination dilemma for gay men and lesbians, 2002.

<sup>13</sup> Sexual Orientation and human Rights, 1995.

<sup>14</sup> Optimal experiences in the workplace of homosexual men compared to heterosexual men, MA Unpublished Thesis, University of Potchefstroom, 2000.

female. In this context a person views his/her body and soul being trapped in a wrong body.

Deitch EA & Brief AP;<sup>15</sup> state that sexual orientation discrimination can be viewed as a negative action directed at LGBs based on their sexual orientation that does not directly involve organizational policies. It is coupled with a tendency to manifest itself in the form of interpersonal animosity and derogatory jokes and comments from co-workers or superiors. Correia-Hirata N & Kleiner BH,<sup>16</sup> emphasise that failure to disclose one's sexual orientation as a consequence of fear for victimization in the workplace often causes homosexuals to develop a psychological syndrome which impacts negatively to the productivity of the business.

Day NE & Schoenrade P,<sup>17</sup> state that homosexual employees are facing challenges that are unique to those faced by the majority in South African institutions and in the public domain. This will be illustrated under the victimization of lesbian by community member in Chapter Two below. Employers are therefore requested to manifest their commitment to create discrimination-free workplaces for homosexuals. A key concept of discrimination is well defined by Grogan J,<sup>18</sup> as the prohibition of acts or omissions involving unfair discrimination, either directly or indirectly against an employee and could embrace any employment practice which has the effect of unfair discriminating in any way, for whatever motive. The discriminatory practice according to him must impact on the dignity of the affected individual, who must be a member of a group deemed worthy of protection.

Many cases defined sexual orientation discrimination to the satisfaction of the researcher and assisted in the conceptualization of the concept. In the *National Coalition for Gays and Lesbians Equality v Minister of Justice*,<sup>19</sup> sexual orientation is defined as an enduring emotional, romantic, sexual or affection attraction to another person. It can be

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<sup>15</sup> Out of the closet and out of a job: The nature, import and causes of sexual orientation discrimination in the workplace, 2004.

<sup>16</sup> New developments concerning sexual orientation discrimination and harassment, International Journal of Sociology and Social Policy, 21(8) 2001.

<sup>17</sup> Staying in the closet versus coming out: Relationships between communication about sexual orientation and work attitudes, Personnel psychology. Page 163.

<sup>18</sup> Workplace Law, 10<sup>th</sup> edition, 2009, Page 95.

<sup>19</sup> 1999 (1) SA 6 (CC).

distinguished from other aspects of sexuality including biological sex, gender-identity, social gender or the role for adherence to cultural norms for feminine and masculine behaviour. In *Geldenhuys v National Director of Public Prosecution*,<sup>20</sup> sexual orientation discrimination is viewed as an undesirable inequality. In *Pearce v Governing Body of Mayfield School*,<sup>21</sup> discrimination of sexual orientation may also manifests itself in the form of verbal abuse, and in some instances like in the case of *Fourie v Minister of Home Affairs*,<sup>22</sup> it is the discrimination by refusing same-sex unions to marry and to have their union registered by the Department of Home Affairs.

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<sup>20</sup> (2009) (1) SACR 1 (SCA).

<sup>21</sup> (2003) IRLR 512.

<sup>22</sup> (2000) (1) SA 524 (CC).

## CHAPTER 2

### DIFINITION OF CONCEPTS

#### 2.1 INTRODUCTION

Key concepts of the research such as discrimination and sexual orientation as well as the victimization by members of the community will be defined and discussed here. The discussion will as well bring readers to the understanding that cultural and religious beliefs have affected these vulnerable members of the societies.

##### 2.1.1 DISCRIMINATION

The concept discrimination has been defined by many authors and in many case laws. However, the preferred definition for this research is as stated by Grogan J,<sup>23</sup> that people are discriminated against when they are denied privileges or rights accorded to others.

##### 2.1.2 SEXUAL ORIENTATION

Sexual orientation, according to Giddens Anthony,<sup>24</sup> refers to the direction of one's sexual or romantic attraction. The aforementioned writer further avers that sexual orientation in all cultures results from a complex interplay of biological and social factors which are not yet fully understood.<sup>25</sup> The most commonly found sexual orientation in all cultures is heterosexuality which is a romantic attraction for persons of the opposite sex, commonly referred to as straight gender. "Hetero" originates from a Greek word meaning different. According to Rosenblum Karen & Travis Toni-Michelle,<sup>26</sup> homosexuality involves sexual or romantic attraction for persons of one's own sex. Nowadays homosexuals include gays if they are male homosexuals, lesbians if they are female homosexuals and bisexuals if sexual and romantic attraction is dualistic. Homosexuality is commonly viewed in two ways, namely psychiatric disorder and religious sin.<sup>27</sup>

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<sup>23</sup> See 18 Supra.

<sup>24</sup> Sociology 6<sup>th</sup> edition, Polity Press Publishers, 2009 Page 581.

<sup>25</sup> See 24 Supra.

<sup>26</sup> The meaning of Difference, American Constructions of Race, Sex Gender, and Sexual Orientation, 1996. Pages 359

<sup>27</sup> Ibid.

In instances where homosexuality is prohibited even though it is practiced by full fleshed adults with clear consensus, it is viewed as a religious sin. In this case the practices are classified as sodomy, and it is always outlawed. In the ancient Western European countries psychiatric, religion and homosexuality were outlawed and regarded to be punishable offences, sometime by death penalty.<sup>28</sup> However after the advent of democracy punishment of homosexuality has been abolished, enabling statutes were passed; henceforth homosexuality became protected by antidiscrimination laws.<sup>29</sup>

Discrimination on the basis of sexual orientation as defined in the case,<sup>30</sup> refers to the discrimination of people who after declaring their sexual identity, that they are homosexuals are sidelined, or the discrimination of people who are attracted to the members of the same sex. It becomes evident that in Sexual orientation discrimination an individual is treated less favourably than other people for a reason related to his or her sexual orientation, and this treatment often occurs everywhere in the society.

### **2.1.3 VICTIMISATION BY MEMBERS OF COMMUNITY**

A story was reported on Iraq homosexual issues in “The Male homosexuality still a taboo.”<sup>31</sup>The article states that, the horror killings by Iraqis against gay family members are common and given some legal protection.<sup>32</sup> In August 2009 Human Rights Watch published an extensive report detailing torture of men accused of being gays in Iraq including the blocking of their anuses with glue and then giving them laxatives.<sup>33</sup>

In the Church, priests are being victimised for being gays. In Los Angeles a gay rights movement evicted priests who opposed same-sex marriages and the congregation ended up praying in the street.<sup>34</sup> The story was about a priest called Thomas Morris who was evicted by the judge who realized the congregation’s homophobic character by hating same-sex couples and started fighting the gays and lesbians in Massachusetts

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<sup>28</sup> See 26 Supra.

<sup>29</sup> Ibid.

<sup>30</sup> See 19 Supra.

<sup>31</sup> [Http://wikiislam.net/wiki/persecution of Homosexuals-\(Iraq\)](http://wikiislam.net/wiki/persecution_of_Homosexuals-(Iraq)).

<sup>32</sup> Ibid.

<sup>33</sup> See 31 Supra.

<sup>34</sup> Deseret News, Sexual Orientation article, 15 March, 1999.

Daises.<sup>35</sup> In Virginia lawmakers (legislatures) blocked a prosecutor from becoming the State's first gay judge.<sup>36</sup>

More of victimization stories on Sexual orientation discrimination are based on homophobia. According to Nel J and Judge M,<sup>37</sup> homophobia is the hatred of people due to their sexual orientation. Any practice that involves the discrimination of people because of their sexuality is homophobic practice. Homophobia is rife in South Africa. The aforementioned authors also outlined evidences of sexual orientation, as crime-related incidences like, assault, malicious damage to property, corrective rape and murder.<sup>38</sup>

In *Whitehead v Brighton Marine Palace & Pier Company Ltd.*<sup>39</sup> A Brighton found that an employee who resigned after he found out that he had been the subject of exceptionally offensive homophobic remarks from a colleague had been discriminated against contrary to the sexual orientation regulation (SOR), and the employment tribunal awarded £9,215 in compensation.<sup>40</sup>

An unreported case decided in the Regional court of Delmas involved a 31 year old Banyana-Banyana lesbian soccer star, Eudy Simelane who was found murdered at Kwa-Thema, in Springs, in April 2008. The case is filed under Uncategorized, Tags: African Women, Black lesbians SA, National Football Team, SA Politics.<sup>41</sup> The news was met with mixed emotions. Many of the activists who gathered to picket outside the court expressed outrage that Tshepo Pitja, who was one of the men who picked Eudy up from her home the Sunday before her body was found, had been set free. According to Lesbian and Gay Equality Project members, the Director of Public prosecution (DPP)

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<sup>35</sup> Ibid.

<sup>36</sup> <http://www.dailykos.com/story/2012/05/16/1092159-virginia-State-House>.

<sup>37</sup> Exploring homophobia victimization in Gauteng, South Africa; Issues, Impacts and response, University of south Africa, with reference to South Africa issues, impacts and responses, 2008.

<sup>38</sup> Ibid.

<sup>39</sup> 312595 /04 (ET) (2005).

<sup>40</sup> Ibid.

<sup>41</sup> <http://constitutionallyspeaking.co.za/lesbian-and-gay-equality-project-welcomes-sas-un-moves-on-sexual-orientation>.



saw no sufficient information to charge Pitja and that he will collaborate with the State during trial.<sup>42</sup>

At the stand and under oath, one of the accused testified that in all the four statements he had lied, that the three cautioned him against any violence on Simelane and that they left him alone and thus formed no part in the killing. He also said that robbing Simelane and her party was not premeditated; that they just walked into them and only then decided they were the targets for the intended robbery.

In the most unexpected way, following the accused testimony, the advocate on record requested an adjournment. Upon continuation, the advocate established that he had contradicted all statements and went against the consultation they had both had prior to that day. One of the accused testified that no one of them had any physical contact with Simelane but still, could not explain in any acceptable way how her (Simelane) blood was found on the clothes of one of them. Their defence council failed to mitigate maximum sentence. In the final judgment the accused was sentenced for 32 years period of imprisonment, while the other two were acquitted due to lack of evidence.<sup>43</sup>

Another story of sexual orientation and homophobia is about a brutal murder of Zoliswa Nkonyama from Khayelisha, Cape Town, in February 2006, as reported by De Waal Mandy.<sup>44</sup> A gang of nine men clubbed, stabbed, kicked and assaulted a 19 years old Zoliswa to death for disclosing that she was a lesbian.<sup>45</sup> Activists such as Social Justice Coalition (SJC), Treatment Action Campagin of the Constitution (TAC), Free Gender Triangle Project and Sonke Gender Justice tried for several occasions, marching against the Khayelisha Magistrate court without a success.<sup>46</sup> They cried foul and maintained that in their case, there is miscarriage of justice, because the matter was delayed for more than five years without prospects of fair trial.

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<sup>42</sup> Ibid.

<sup>43</sup> See 41 Supra.

<sup>44</sup>“We will make you a real woman even if it kills you,” Sci-Tech Article, 2012.

<sup>45</sup> Triangle Project, 1 February 2012.

<sup>46</sup> Ibid.

In 2008 the State was found to have committed gross negligence for failing to ensure that witnesses were present in court; there had been poor case management as defence attorneys routinely missed court dates without any repercussions.<sup>47</sup> In 2010, four of the accused managed to escape from their holding cells, causing great panic and fear (among witnesses). They were later rearrested by police officers, and one police was arrested for aiding them to escape and was charged with defeating the ends of justice.<sup>48</sup>

According to Iain Curry & Jonan De Waal,<sup>49</sup> there goes a saying that justice delayed is justice denied. Zoliswa Nkonyana's family finally saw her killers go to jail in February 2012. After a period of almost half a decade, four men were sentenced to 18 years each in prison by the magistrate. Four years of their sentences were suspended for five years due to the youthfulness of the killers and the fact that they had already spent some time in prison. The four men are now known as Lubabalo Ntlabathi, Sicelo Mase, Luyanda Londzi and Mbulelo Damba. Sabelo Yekiso, Themba Dlephu and Mfundo Kulani were acquitted because the state could not prove their involvement in the murder beyond reasonable doubt. The court finally established that Zoliswa was murdered by the four for her sexual orientation. She practised her right to live as a lesbian and the accused as charged did not agree to her choice of living as a lesbian.

The two stories of Simelane and Nkonyama demonstrate the reluctance of communities to change from stereotypes of victimization of homosexuals which were practised in defence of sodomy. The decriminalization of sodomy by the law may be one of the contributing factors of corrective rapes and murder. This may be illustrated in *S v Kampher*<sup>50</sup> where the High Court ruled against sodomy, that the common law crime of sodomy was incompatible with the constitutional rights to equality and had ceased to exist as an offence when the Interim Constitution came into force on the 27 April 1994. Speaking at the Institute for Security Studies (ISS) international conference on crime, Kerry Williams as quoted by Moeng K,<sup>51</sup> people who commit crimes against gays and lesbians are getting away with murder. Her views were supported by Dr Bill Dixon who

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<sup>47</sup> See 44 Supra.

<sup>48</sup> Ibid.

<sup>49</sup> The Bill of Rights Handbook, 5<sup>th</sup> edition, 2005 Page 234.

<sup>50</sup> (1997) 2 SACR 418 (C).

<sup>51</sup> Justice system fails gay, lesbian victims, Crime reporter, October, 2012.

said law makers needed to rethink whether more laws lead to less hate, since there was no evidence of a reduction in the frequency and severity of hate crimes. Dr Dixon said current legislation could only marginally deter hate crime because legislation only looked at enhancing sentencing but did little to look at the contributing factors of such hate crimes.<sup>52</sup>

South Africa's post-apartheid Constitution was the first in the world to outlaw discrimination based on sexual orientation. On 1 December 2006 South Africa made history by becoming the fifth country in the world, and the first in Africa to legalize same sex marriages.<sup>53</sup> The first same-sex couples in South Africa, Vernon Gibbs and Tony Halls,<sup>54</sup> whose marriage was solemnized under Civil Union Act,<sup>55</sup> were reported to have experienced incidences of hate crimes on regular basis, as their house was always vandalized for homophobic reasons.

According to the sociologist Giddens Anthony, sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality.<sup>56</sup> Bisexual persons can as well experience sexual emotional and affection to both their own sex and the opposite sex. Giddens A, also avers that people with homosexual orientation are sometimes referred to as gays or lesbians. From his findings one may draw the conclusion, that gays may be both male and female whereas lesbians may be females only. According to Martin Susan & Jurik Nancy, gays and lesbians may have children through artificial insemination, adoption, and some who are homosexual due to choice had children before they took the decision to be homosexuals, normally lesbian women who became disillusioned in their straight sexual identities.<sup>57</sup>

Sexual orientation as already indicated, has been well defined in *National Coalition for Gay and Lesbian Equality v Minister of Justice* Case as the differentiation of people erotically attracted to members of the same sex. This case was referred to the

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<sup>52</sup> Ibid.

<sup>53</sup> See 37 Supra.

<sup>54</sup> Ibid.

<sup>55</sup> 17 of 2006.

<sup>56</sup> See 24 Supra.

<sup>57</sup> Doing Justice Doing Gender, Women in Legal and Criminal Justice Occupations, 2007, Page 20.

Constitutional Court by the Cape of Good Hope High Court, which declared section 25(5) of the Alien Control Act.<sup>58</sup> Section 25(5) of the Aliens Control Act, omits to give persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses under this section (25).

In *TWC and Other v Rentokil Pension Fund and Another*,<sup>59</sup> the deceased has been in a monogamous homosexual relationship for a period of five years until his death in 1997, nominated his gay life partner as a beneficiary in his pensions, however the former divorced spouse challenged it without success as the pension fund adjudicator found the same-sex partner as well, being fit and proper person to benefit. He ordered for the trust to be opened and that an application be made to the effect that she receives her share in the estate so that she can pay for her medical expenses.<sup>60</sup>

Two important questions were raised: The first is whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the foreign national spouses of permanent South African residents but not to afford the same benefits to South African gays and lesbians in permanent same-sex life partnerships with foreign nationals. The second is whether, when it concludes, that if provisions in a statute are unconstitutional, the Court may insert words into the statute to remedy the unconstitutionality of the section. In *National Coalition for Gays and Lesbian Equality* case,<sup>61</sup> indicated *inter alia*, the Court only dealt with the position of gays and lesbians who are permanent South African residents who have foreign national same-sex life partners. The Court did not deal with unmarried partners in permanent heterosexual partnerships and the fact that the section also omitted to provide for these couples.

The Court rejected the argument that the word spouse could be interpreted so as to include a permanent South African resident who was in a permanent same-sex life partnership with a foreign national. It therefore became necessary for the Court to consider the constitutional validity of section 25(5)<sup>62</sup>. Section 25(5) was held to

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<sup>58</sup> Act 96 of 1991.

<sup>59</sup> No. PFA/KZN/129/98.

<sup>60</sup> Ibid.

<sup>61</sup> See 19 Supra.

<sup>62</sup> Ibid.

discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. The message out of this section is that gays and lesbians lack the inherent human dignity to have their families and family lives in such same-sex relationships respected / protected which constitutes an infringement of their dignity. This is a breach in terms of the abovementioned statutes namely, the EEA and the International Labour Organization (ILO), that prohibit discrimination on the basis of sexual orientation.

The rights of equality and dignity were found to be outlined and broadly covered in the case,<sup>63</sup> it was held that section 25(5) reinforced harmful stereotypes of gays and lesbians. This conveyed the message that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity. Section 25(5) was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. It did so in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Court accordingly held that the omission from section 25(5) of partners in permanent same-sex life partnerships was inconsistent with the Constitution. Having come to this conclusion it was unnecessary to consider whether any of the freedom of movement rights were in any way limited by section 25(5).

Having found such inconsistency, the Court was of the view that there were only two ways to remedy it in the present case: by declaring the whole of section 25(5) to be invalid or by reading words into the section to cure such inconsistency. Striking down section 25(5) would have deprived spouses, as presently defined, from the benefits conferred by the section. This could also create the impression that achieving equality by removing the benefits which spouses presently enjoy would be a constitutionally permissible result.

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<sup>63</sup> See 61 Supra.

In order to remedy the constitutional defect the Court decided the word “partner” in a permanent same-sex life partnership should be added to the section. Permanent life partners are those who have an established intention to cohabit with one another permanently. The Court emphasised that the Legislature can refine and alter the remedy of the court within constitutional limits. The remedy takes effect immediately but does not have retrospective effect. The court ordered that the costs of the proceedings, including the costs of two counsels, ought to be paid by the respondents, jointly and severally. In terms of British Columbia Code of Human Rights,<sup>64</sup> discrimination of sexual orientation and sex discrimination are not the same. The Code provides a definition of discrimination of sexual orientation as treating others differently and poorly because they are homosexuals or heterosexuals.<sup>65</sup> Whereas sex discrimination may be referred to as the discrimination of an individual on the basis of his/her gender.

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<sup>64</sup> Human Rights Act 4 of 1996 British Columbia.

<sup>65</sup> Ibid.

## CHAPTER 3

### DISCRIMINATION OF SEXUAL ORIENTATION IN THE WORKPLACE

#### 3.1 INTRODUCTION

In this instance, emphasis is on discrimination of sexual orientation in the workplace. This will be discussed under concepts like: dismissals, sexual harassments and remedies for sexual orientation discrimination in the workplace. As alluded to, *inter alia* that discrimination of sexual orientation takes place when an individual is treated less favourably than other people for a reason related to his or her sexual orientation, and that the treatment often occurs everywhere in the society, for both relevance and purpose of this research, the treatment concerned will be confined to the workplace.

Most cases relevant to discrimination in the workplace are sexual harassment cases. Reuters Thomas;<sup>66</sup> refers to discrimination of sexual orientation as harassment or differential treatment based on someone's perceived / actual gay, lesbian, bi-sexual or heterosexual orientation. Lesbians are homosexuals who are female-orientated, gays are homosexuals who are male-orientated and bisexuals are attracted to both males and females.<sup>67</sup> Discrimination resulting from, sexual harassments, killings and corrective rapes in the workplace should be regarded as a serious violation of victims' rights to life, inherent human dignity and unfair labour practice as enshrined in the RSA Constitution of 1996.<sup>68</sup>

The ILO Convention 111<sup>69</sup> defines unfair discrimination as, any distinction, exclusion or preference made on the basis of race, colour, sex, sexual orientation, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employer' or workers' organization, where such exist, and which other appropriate bodies. According to Lee

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<sup>66</sup> Fin Law Busines, 2011.

<sup>67</sup> See 24 Supra.

<sup>68</sup> See 9 Supra.

<sup>69</sup> Of 1958.

Badgett & Frank Jeff,<sup>70</sup> distinction should therefore be drawn between differential treatment which carries no negative connotation, e.g. providing separate toilet facilities for men and women *versa-vis* providing toilet facilities for women who are substantially inferior to those provided for men. Differential treatment becomes unfair discrimination if it amounts to treating persons differently in such a way that impairs their fundamental dignity as human beings.<sup>71</sup>

### **3.1.1 DISMISSAL FROM WORK ON THE BASIS OF SEXUAL ORIENTATION**

Dismissal is defined in the LRA<sup>72</sup> as the termination of a contract of employment with or without notice. Dismissal in terms of section 187(1) (f) is based on sexual orientation and classified as automatically unfair dismissal. The employer must notify the employee that the employment has been terminated. It will be very much unfortunate if an employer may be proven or linked to have terminated an employment contract of an employee on the basis of sexual orientation.

Termination of the contract of employment as described above, in terms of section 187(1)(f) of the LRA,<sup>73</sup> applicable to bisexuals, homosexuals and transsexuals particularly after they shall have disclosed preferred sexual orientation to their employers serve as good examples of sexual orientation discrimination. Such dismissals are automatically unfair, and may be referred to the CCMA, to avoid high costs of the Labour Court; however in some instances direct access to the Labour Court may be preferred. In the case of *Atkins v Datacentrix Pty Ltd*<sup>74</sup> the court confirmed the applicant's dismissal to be based on sexual orientation. *In casu* the applicant was interviewed for a post as an IT technician. He became successful in the interview and after the contract was concluded he informed the respondent (employer) that he intends to undergo sex-change operation. The respondent employer immediately dismissed the applicant, and he approached the labour Court in order to claim that his dismissal constitutes automatically unfair dismissal in terms of Section 187(1) (f) of the LRA and

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<sup>70</sup> Sexual Orientation Discrimination: An International Perspective, Vol 5, 2007.

<sup>71</sup> Ibid.

<sup>72</sup> Labour Relations Act 66 of 1995 Section 186(1) (a)(b)(c)(d)(e) and (f).

<sup>73</sup> Ibid.

<sup>74</sup> (2010) 4 BLLR 351 (LC).



the court awarded him a compensation for four months.<sup>75</sup> Sexual orientation as a consequence of transgender has to do with changing of organs by way of undergoing an operation to suit a preferred sex. This confirms the rights of proper employees as equal to the rights of job applicants.

Practices such as being overlooked for promotion, being given baseless write-ups or improvement plans, and wrongful termination because the employer disagrees with one's sexual orientation are more along the lines of differential treatment amount to sexual orientation discrimination in the workplace. In Finland, two lesbians, Amy and Linda, living together as a couple were expecting a baby. Excited for them, a colleague called Tina circulated a card around the office for everyone to sign. When the manager saw it she commended that she wouldn't have promoted Linda if she could have known that she was a lesbian. As her words were against the Human Resource anti-discrimination policy on the basis of sexual orientation, Linda was entitled to a legal claim against her employer.<sup>76</sup>

In *Pearce v Governing Body of Mayfield School*,<sup>77</sup> the Employment Appeal Tribunal (EAT) ruled that a female teacher who was subjected to gender-specific homophobic verbal abuse was not unlawfully discriminated on the grounds of sex but on the basis of sexual orientation.<sup>78</sup>

The facts in Pearce's case are: Ms Shirley Pearce was employed as a science teacher at Mayfield Secondary School in Portsmouth from 1975. In 1992 she started to experience oral abuses calling her a lesbian. These were reported to the deputy headmaster but the abuse continued. Ms Pearce took a long leave as a result of stress emanating from the abuse. In 1995 she came back to work but the abuse still continued. When she reported again the head of Department advised her to look for another job. Ms Pearce consequently took an early retirement. She brought a complaint of unlawful discrimination on the basis of sex; however the employment tribunal referred to it as

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<sup>75</sup> Ibid.

<sup>76</sup> <http://employment.findlaw.com/employment-discrimination/sexual-orientation-discrimination-in-the-workplace.html>.

<sup>77</sup> (2003) IRLR 512.

<sup>78</sup> Ibid.

discrimination of sexual orientation but not sex discrimination and she was given an award for sexual orientation on out of court settlement basis.<sup>79</sup>

In *Price Waterhouse v Hopkins* 490 US,<sup>80</sup> the Supreme Court ruled that discrimination of sexual orientation against Ms Hopkins violates Title VII of the Civil Rights Act<sup>81</sup>. In 1989 Hopkins was employed as a senior manager at an accounting firm, and was denied consideration for partnership because she was not deemed feminine enough by partners who were evaluating her. Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, concluded that, when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

In the case of *Oncale, Petitioner v Sundowner Offshore Services Incorporated*<sup>82</sup>, Joseph Oncale was employed at Sundowner Offshore Services on a Chevron U.S.A, inc. oil platform in the Gulf of Mexico. He was working as a roust-about on an eight-man crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. Lyons the crane operator and Pippen the driller had supervisory authority. On several occasions, Oncale was forcibly subjected to sexuality related humiliations by Lyons, Pippen and Johnson in the presence of the rest of the crew. They also threatened him with rape. Oncale complained to the supervisory personnel and they failed to intervene. They called him names suggesting that he is a homosexual and sometimes assaulted him in a sexual manner.

Oncale abandoned the job and filed a complaint against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that he was discriminated against in his employment on the basis of sexuality. The Court held that Oncale has no cause of action under Title VII of the Civil Rights Act of 1964. On appeal the court concluded that under no circumstances should an employer discriminate against any one

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<sup>79</sup> See 78 Supra.

<sup>80</sup> 228 (1989).

<sup>81</sup> 17 of 1981.

<sup>82</sup> 523 US, 75, 118 S. 1998.

on the basis of his or her sexuality and other related forms, and Oncale was awarded compensation.<sup>83</sup>

### 3.1.2 SEXUAL HARASSMENT IN THE WORKPLACE

According to Prekel T,<sup>84</sup> sexual harassment in the workplace may be defined as unwelcome or unwanted attention of a sexual nature from someone at work that causes discomfort, humiliation, offence or distress, and / or interferes with the job. This includes all such actions and practices of a sexual nature by a person or a group of people directed at one or more workers. Sexual harassment may be committed by employers, colleagues or co-workers, against each other. In terms of the EEA if sexual harassment is done by employees of the employer, the employer will be vicariously liable. The employer may only escape liability by proving that he has taken the necessary steps to eliminate the alleged conduct.<sup>85</sup> In terms of the Criminal Law (Sexual Offences and Related matters) Amendment Act of 2007's definition of sexual harassment, a man also may file claim against a perpetrator who might have committed sexual orientation discrimination against him, and if found guilty by a competent forum or court will have to spend five years in jail.

According to Van Niekerk *et al*, sexual harassment in the workplace amounts to discrimination because it establishes arbitrary barriers to the full and equal enjoyment of a person's right in the workplace, and it violates the dignity of a person.<sup>86</sup>

According to Heartfield Susan M,<sup>87</sup> sexual harassment is a form of discrimination that violates Title VII of the Civil Rights Act of 1964. The author corroborates the abovementioned one in the sense that sexual harassment occurs when one employee makes continued, unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature, to another employee, against his or her wishes.<sup>88</sup>

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<sup>83</sup> Ibid.

<sup>84</sup> Sexual Harassment: Causes, Consequences and Cures, Cape Town, 2001.

<sup>85</sup> Section 60(2).

<sup>86</sup> Law@work, 2<sup>nd</sup> edition, Durban, 2012, Page 127.

<sup>87</sup> Human Resource Guide, 2004.

<sup>88</sup> Ibid.

Examples of sexual harassment have been outlined by the above mentioned authors,<sup>89</sup> which are not intended to be exhaustive: unwanted jokes, gestures, offensive words on clothing, and unwelcome comments and repartee; touching and any other bodily contact such as scratching or patting a co-worker's back; grabbing an employee around the waist, or interfering with an employee's ability to move; repeated requests for dates that are turned down or unwanted flirting; transmitting or posting e-mails or pictures of a sexual or other harassment-related nature; displaying sexually suggestive objects; pictures; or posters; playing sexually suggestive music and Quid Pro quo i.e. when an employer attempts to influence the process of employment, promotion, training, salary or other benefits of an employee or job applicant in exchange of sexual favour. A case relevant to Quid Pro quo, is in *Sookunan v SA Post Office (2000)*<sup>90</sup>, where the acting post master in the position of the applicant was awarded a call for higher pay equal to another employee who was highly paid on the basis of preferential treatment which was against the policy of the employer.

When an employee complains to a supervisor, another employee, or the Human Resources office, about sexual harassment, an immediate investigation of the charge should occur. Supervisors should immediately involve Human Resources staff. Employees need to understand that they have an obligation to report sexual harassment concerns to their supervisor or the Human Resources office.

If unwelcome attentions are repeated even though they have been declined, or if the person is victimised because of having turned down such advances, the situation becomes worse. However the relationship between two consenting adults would usually not be harassment. Cases have been reported of men being harassed by women or by other men (guys), or women by other women (lesbians), in the workplace. Cases reported in a survey conducted in South Africa in the early 1990's are related to men harassing women at work or in work-related situations. Unfortunately when men are being harassed by men, or women harassed by fellow women the victims are not taken

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<sup>89</sup> See 87 Supra.

<sup>90</sup> 21 ILJ 1923 (CCMA).

seriously when reporting to management. This implies that gays and lesbians are not yet aware of the fact that they are also covered by the harassment policies developed in line with the legislative framework.<sup>91</sup> For the purpose of this research, only cases of harassment of guys and lesbians in the workplace will be emphasized. Although they seem to be fewer cases is due to the fact that they are not reported or not taken seriously.

To combat these practices, the Department of Labour in South Africa has produced a Code of Good Practice on the handling of Sexual Harassment cases.<sup>92</sup> Item 3 of that Code,<sup>93</sup> provides that sexual harassment is a prohibited form of unfair discrimination on the grounds *inter alia* of sexual orientation.

### **3.1.3 REMEDIES FOR DISCRIMINATION OF SEXUAL ORIENTATION IN THE WORKPLACE**

The internationally accepted norm in claims of sexual orientation is in terms of the UK Employment Equality Sexual Orientation Regulation (S O R).<sup>94</sup> The Regulation provides employees with protection against direct and indirect discrimination, and harassment and victimisation on the grounds of their sexual orientation, and this is clear in the amended of the SOR.<sup>95</sup> In terms of the regulation there is no requirement for a person to have been employed by an employer for any length of time before he/she can bring a claim for unlawful discrimination. In fact, there is no need for an individual person to actually be an employee, to sue or claim for sexual orientation discrimination, even job applicants may sue as is the case with any form of discrimination based on listed grounds.<sup>96</sup>

In South Africa the EEA,<sup>97</sup> provides remedies for disputes concerning unfair discrimination including discrimination on the basis of sexual orientation. The dispute

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<sup>91</sup> See 88 Supra.

<sup>92</sup> GG 27865 of 2005.

<sup>93</sup> Ibid.

<sup>94</sup> Reg. 1661 of 2003.

<sup>95</sup> Section 3 Reg.1661 of 2007.

<sup>96</sup> Opperman Theo, Analysis of sexual orientation discrimination framework in the workplace in the public sector Unpublished Thesis , Stellenbosch University, 2009 Page 25.

<sup>97</sup> See 3 Supra.

must be referred to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.<sup>98</sup> If a dispute remains unresolved after conciliation, any of the parties in the dispute may refer it to the Labour Court for adjudication. All the parties may, however, consent to arbitration of the dispute, in which event it may be arbitrated.

The following categories may sue: A job applicant (e.g. if a person is turned down for a job because of his/her sexual orientation, an employee, even if in the first day of employment, a contractant and an ex-employee, for example whose ex-employer refused to assist him/her on the grounds of unlawful discrimination whilst he/she was still an employee as in the case of *Atkins v Datacentrix*, (referred in 3.1.1 *supra*, and 4.1.2). However for the purpose of statutory compliance all cases of unfair labour practice such as sexual orientation discrimination should be reported within 90 days in terms of section 191(b)(ii) of Labour Relations Act<sup>99</sup>.

A claim for being discriminated against on any of these grounds should be directed to the Employment Tribunal which may award compensation. There is normally compensation for any losses suffered (e.g. lost wages if a person has been dismissed) and an award for injury. There is no limit to the amount of compensation that can be awarded for unlawful discrimination including sexual orientation discrimination.<sup>100</sup> In the case decided in Durham on 20 April 2005 as quoted by Straus SA,<sup>101</sup> a case of *Gimondi v Council of City of Durham 2 Mr Edmund Tutty*, a Durham employment tribunal found that the Council of the City of Durham had discriminated against a gay- theatre worker who had suffered months of bullying and harassment at the hands of his manager. The tribunal found that he had been constructively and unfairly dismissed and that the council and the harasser had breached the SOR.<sup>102</sup>

Mr Gismondi was employed by Durham City Council as a group bookings coordinator at Durham's Gala Theatre from 14 June 2002.<sup>103</sup> Mr Tutty (the second respondent) was

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<sup>98</sup> Section 10(2).

<sup>99</sup> See 4 *Supra*.

<sup>100</sup> *Sexual Orientation Regulation*, 2005.

<sup>101</sup> *Doctor, Patient and the Law*, 3<sup>rd</sup> edition, Van Schaik, Pretoria, 1991.

<sup>102</sup> *Ibid*.

<sup>103</sup> See 100 *Supra*.

appointed in November 2002 as a part-time press officer and subsequently took over line management of Mr Gismondi. Mr Gismondi encountered problems from the very start of his relationship with Mr Tutty. Mr Tutty was clearly aware of Mr Gismondi's sexual orientation, which was widely known throughout the theatre. Mr Tutty used his managerial position in an aggressive manner towards Mr Gismondi and Mr Gismondi was made aware that this could be due to his sexual orientation. In August 2003, Mr Gismondi made a formal complaint but nothing was done to deal with the matter. However, following a staff restructuring in December 2003, Mr Tutty was removed as Mr Gismondi's line manager.

Mr Tutty consistently referred to Mr Gismondi as gay-boy and would use this term in an offensive manner. In December 2003, Mr Gismondi and Mr Tutty were separated in the workplace. Between December 2003 and January 2004, Mr Tutty continued to exhibit a hostile attitude towards Mr Gismondi and persisted in making negative comments about his performance, in spite of the fact that he no longer had any line management duties towards him.

In February 2004, Mr Gismondi felt that his position had not improved and that his complaints had not been dealt with, therefore, he submitted a formal grievance referring to the SOR.<sup>104</sup> Durham City Council failed to follow its procedures correctly and found no evidence of bullying and harassment, but that Mr Tutty had used the words gay-boy. Mr Tutty received a formal written warning for this. Mr Gismondi was not properly informed of the outcome of his grievance but merely told he could appeal. He therefore submitted an appeal on 5 April 2004 but this was dismissed on 11 May 2004. As a result, Mr Gismondi resigned on 19 May 2004.<sup>105</sup>

The tribunal found that Mr Gismondi had been constructively and unfairly dismissed. They also found that Mr Gismondi had suffered direct discrimination and harassment on the grounds of his sexual orientation and that the Durham council had failed to take reasonable and practicable steps to prevent this discrimination occurring. The tribunal referred to the process the council did take as a shambles, and that they have signally failed in their duty to protect an employee who has been bullied and harassed contrary to

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<sup>104</sup> 1661 of 2003.

<sup>105</sup> Ibid.

their own express policies. The tribunal also commented that it is hard to envisage conduct more likely to shatter the trust and confidence of an employee in his employer.

The tribunal found that both Durham City Council and the harasser had breached the SOR. It is an important decision because it clearly highlights the obligations of an employer under the SOR. The issue of compensation was postponed to be remedied by a hearing. In the meantime, the parties had settled the case out of court and the amount stated as fine agreed upon is not known.

In South Africa a High Court decision on *Langemaat v Minister of Safety and Security and Others*,<sup>106</sup> to be discussed in details in Chapter Four below, is more relevant to Kolinsky's case. In this case, the Minister of Police was sued for denying a police officer health benefits in respect of her lesbian life time partner in terms of Polmed rules. This case will be referred to regulate relationships between the employees and the employers in terms of rights, duties and obligations of each one of the parties in the employment relations.

In America, in the case of *Golinski v US Office of Personal Management*,<sup>107</sup> Golinski was denied health benefits for her spouse by her employer due to the fact that they were both females. Ms Golinski approached the court for a leave to appeal in San Francisco and Alex CJ decided in favour of Ms Golinski and said the denial of benefits to her amounts to discrimination based on sexual orientation.

Another American case involves a transsexual court case ruling in *Anonymous v Weiner*.<sup>108</sup> In *casu* the American court refused to order the amendment of a birth certificate of a transsexual who had undergone convulsive surgery. The point of issue was whether there was a proper exercise of an administrative function entrusted to the New York Board of Health, which had refused to amend the birth certificate.<sup>109</sup>

Strauss in 1991 also quoted a classical story of Dr Ricardo San Martin of Argentine, in which transsexual law or law on sexual operation was a legal issue.<sup>110</sup> He further cited a

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<sup>106</sup> (1998) 19 ILJ 240 (T).

<sup>107</sup> (1995) 23 C.H.R.R D/319 (B.C.C.H.R).

<sup>108</sup> (1966) 270 NYS 2d 319.

<sup>109</sup> See 100 Page 237.

<sup>110</sup> Ibid.



story about a medical practitioner who was the accused in the criminal case for performing an unsuccessful operation upon a homosexual victim whose physiology only allowed him to continue being a man until he dies. No female hormones were found in his cellular nuclei. The accused doctor's defence was that he was obliged to remove the penis as there was a sign of cancer. However this was since rejected by the court and the accused was criminally charged and convicted.<sup>111</sup>

It was established by the court that the doctor was in a way trying to convert a man into a woman as out of natural denial he always rejected his body which according to him was trapped in the one belonging to males, so he wanted to remove all male parts in his body to remain with female parts. However, the failure of the operation created problems to the sympathising doctor who was ultimately charged with culpable homicide and ordered to pay damages<sup>112</sup>.

In the United Kingdom (UK) in Bristol, Mr Tony Gaman had been awarded thousands of undisclosed amounts of money by the employment tribunal for having been unfairly dismissed on the basis of sexual orientation. Mr Gaman disclosed his eight years gay relationship with his partner to the manager of Bristol Country Sports Club. Since after disclosing his relationship to his employer, life became tough on their part as they were always suffering verbal abuses and sometimes threatened with violence. Mr Gaman was finally dismissed in 2006 after reporting to the manager that he was threatened with violence while he was busy working for overtime with his male partner. The tribunal also disclosed that Mr Gaman has been underpaid while working for 75 hours overtime, and this undisclosed amount of money also included his outstanding overtime wages.

In the United States of America (USA) in Ohio City, Mrs Shari Hutchinson has won a case of sexual orientation against her employer in terms of Equal Protection clause of the USA Constitution. Mrs Hutchinson was employed as support officer for the Cuyahuga County Child Support Enforcement Agency (CCCSEA). After disclosing to the employer and others her sexual orientation as a lesbian, they continued to spread false rumours about her, and promoted less qualified applicants above her, as well as appointing people who failed the test that serves as the requirement of appointment in the Agency.

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<sup>111</sup> See 108 Supra..

<sup>112</sup> Ibid.

That forced Mrs Hutchinson to claim for constructive dismissal, and she was awarded against her employer.<sup>113</sup>

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<sup>113</sup> [http://www.bilerico.cm/2011/12/lesbian\\_wins\\_federal\\_employment\\_discrimination\\_cas.php](http://www.bilerico.cm/2011/12/lesbian_wins_federal_employment_discrimination_cas.php).

## CHAPTER 4

### COMPARATIVE ANALYSIS

#### 4.1 INTRODUCTION

In the comparative analysis, anti-discrimination provisions and court judgments from different jurisdictions will unravel the way sexual orientation discrimination is dealt with. Countries selected by the current writer for the above-stated purposes are: South Africa, USA and Canada. According to Lee B and Frank J,<sup>114</sup> sexual orientation is a relatively recent notion in Human Rights law and practice and one of the controversial issues in politics. Prejudices, negative stereotypes and discrimination are deeply imbedded in our value system and patterns of behavior. For many public officials and opinion makers the expression of homophobic prejudice remains both legitimate and respectable in a manner that would be unacceptable for any other minorities and the vulnerable people<sup>115</sup>. The main principles guiding the right approach on sexual orientation relate to equality and non-discrimination or antidiscrimination.

According to Sganga C and Tibbitts F,<sup>116</sup> Human rights activists seek to ensure social justice and guarantee the dignity of lesbians, gays and bisexuals by emphasizing the two concepts of equality and non-discrimination. European Union Human Rights (EUHR) on sexual orientation discrimination prohibition is still not clear in the protection of people discriminated on the grounds of sexual orientation.<sup>117</sup> Several European Union (EU) laws offer protection from discrimination based on sexual orientation and additional requirements refer to the human rights situation in accession countries. The founding treaties on the European Union (EU) were amended in the treaty of Amsterdam to enable EU member countries to fight sexual orientation discrimination. In 1999, the provision of Article 13 EU Treaty entered into on the 1 May came to force, being the first ever international treaty to explicitly mention the protection of sexual orientation discrimination.

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<sup>114</sup> Sexual Orientation Discrimination –An International perspective. (1) 1996.

<sup>115</sup> Ibid.

<sup>116</sup> Human Rights Education Associates, 1996.

<sup>117</sup> Ibid.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. In December 2000, the Council adopted a generic binding Framework Directive on equal treatment in Employment prohibiting direct and indirect discrimination on the grounds of religion or belief, age, disability or sexual orientation. The Framework Directive is binding upon the current member states, while the accession states are required to have completed national implementation of the Directive before joining the EU.<sup>118</sup>

The Charter of Fundamental Rights of European Union (COFROEU) which meant to be the EU code of fundamental rights was proclaimed in Nice in December 2000. The Charter currently is a non-binding document but is important since it expresses the EU vision on human rights. For lesbians, gay and bisexuals the Charter is important because of the explicit non-discrimination provisions in Article 21 (1): it provides that any discrimination based on any ground such as sex, race, colour, sexual orientation, etc shall be prohibited.

The European Parliament (EP) passed several (non binding) decisions on Human Rights and sexual orientation. The first was adopted in 1984, calling for an end to work-related discrimination on the basis of sexual orientation.<sup>119</sup> In 1994, the Roth Report detailed the variety of discrimination against lesbians and gays in the EU and the Parliament adopted a recommendation on the abolition of all forms of sexual orientation discrimination. Although its power is limited, EP can exert a significant political influence on the Council and the Commission as in 1999 it requested them to raise the question of discrimination against homosexuals during membership negotiations, where necessary.<sup>120</sup> Regarding the enlargement of the European Union, the EP adopted a resolution in 1998 stating that it will not give its consent to the accession of any country that, through its legislation or policies, violates the Human Rights of lesbians and gay men.<sup>121</sup>

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<sup>118</sup> See 114 Supra.

<sup>119</sup> Ibid.

<sup>120</sup> See 116 Supra.

<sup>121</sup> Ibid.

#### 4.1.1 SOUTH AFRICA, USA AND CANADIAN ANTI-DISCRIMINATION LAWS ON THE BASIS OF SEXUAL ORIENTATION

In terms of section 9(4) of the RSA Constitution,<sup>122</sup> discrimination of sexual orientation includes discrimination of a protected category. The afore-mentioned section provides that no one (person) may unfairly discriminate directly or indirectly against anyone on more grounds including race, gender, sex, pregnancy, marital status, belief, colour, ethnicity, age, disability, religion, conscience, belief, culture, language and sexual orientation.

The EEA,<sup>123</sup> corroborates the constitution by providing that no person may unfairly discriminate directly or indirectly against an employee in any employment policy or practice on one or more grounds, including, gender, sex, pregnancy, marital status, ethnicity, social origin, colour, belief, culture, language, political opinion and sexual orientation. Section 185(b) of the Labour Relations Act (LRA),<sup>124</sup> provides the rights of employees not to be subjected to unfair labour practices.

In terms of section 6 of Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>125</sup> there is provision for prevention and prohibition of unfair discrimination in general. Section 8, provides that a person may not be unfairly discriminated against, on the grounds of gender, including gender-based violence, female genital mutilation, preventing females from inheriting family property. Section 10 provides for hate speech as a form of discrimination. Section 11 provides for prohibition of sexual harassment, which in terms of LRA is a form of discrimination.<sup>126</sup> Undermining equality of women to men, denial of women to inherit in terms of land rights provisions,<sup>127</sup> denial of women to access of social assistance, and others. Fran J,<sup>128</sup> avers that sexual orientation as a consequence of transgender has to do with changing of organs by undergoing an operation to suit a preferred sex. However from a psychological perspective, Wade C and

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<sup>122</sup> See 7 Supra.

<sup>123</sup> See 3 Supra.

<sup>124</sup> 66 of 1996.

<sup>125</sup> 4 of 2000.

<sup>126</sup> GN 1357 in GG 27865 of 4 August 2005 (Code of Good Practice on handling sexual Harassment).

<sup>127</sup> Shilubana & Others v Mwamitwa (2009) 2 SA 66 (CC).

<sup>128</sup> Transgender issues and sexual orientation volume 3 Issue 1, 1996.

Tavris C,<sup>129</sup> indicated that it is the mindset of a being that changes to prefer a particular sex and continues to identify and prefers to be addressed as such. This affects lesbians, gays, bisexuals and homosexuals the same way. The alteration of Sex Description and Sex Status Act<sup>130</sup> as one of the antidiscrimination laws allows gender changes operation provided due procedures have been followed.

Section 18(1)(k) of the Employment of Educators Act,<sup>131</sup> provides that an educator will be charged with misconduct and appear for disciplinary hearing if it is alleged that he/she unfairly discriminated another on the basis of sexual orientation. There is enough evidence of charges of educators for homosexual and sexual assault among most of our boarding school learners in South Africa, particularly in Limpopo and Gauteng girls' schools, however this will be left for future research as a case study in *sue generis*. The current researcher can only make interested readers aware of website judgments of educators on cases of sodomy.

In the USA, employment discrimination is prohibited by a collection of state and federal laws as well as by ordinances of counties and municipalities. The US Constitution, in Article 1 section 7,<sup>132</sup> prohibits discrimination by federal and state governments. Discrimination in the private sector is not directly constrained by the Constitution, but has become subject to a growing body of federal and state law. Federal law prohibits discrimination in a number of categories, including recruiting, hiring, job evaluations, promotion policies, training, compensation and disciplinary action. State laws often extend protection to additional categories or employers.

Important anti-discrimination statutes which are more relevant to sexual orientation in the USA are, Defence of marriage Act of 1996 commonly known as (DOMA), Civil Rights Act of 1981, 1964, 1968 and 1991, Equal Pay Act of 1963 , Rehabilitation Act of 1973, and Title IX Regulation used by the Department of Education to prohibit sex discrimination in schools. In terms of section 3 of DOMA,<sup>133</sup> marriage is defined as a

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<sup>129</sup> Psychology, 3<sup>rd</sup> edition, Harper Collins College, US, 1993.

<sup>130</sup> 49 of 2003.

<sup>131</sup> Act 76 of 1998

<sup>132</sup> Of 1787.

<sup>133</sup> Of 1996.

legal union between one man and one woman. All other unions including same sex relationships were initially outlawed in terms of this section.

In October 2010 federal states challenged the constitutionality of the law in terms of DOMA. In *Baker v Nelson*<sup>134</sup>, Richard John Baker and James Michael McConnell made an application for a marriage license with the respondent, who was the clerk of Hennepin County District Court. They were denied a license on the grounds that they were not man and woman. This was ultimately cleared by President Barack Obama by declaring Section 3 of DOMA unconstitutional on February 2011.<sup>135</sup> This will mean good news and reforms to US same sex partners under Barack Obama's administration. United States cities such as, California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont and Wisconsin have passed civil rights laws that include sexual orientation. The US Supreme Court had ruled that an amendment to the Colorado State Constitution that would have banned anti-discrimination laws based on sexual orientation violated the equal protection clause of the US Constitution and was, therefore, unlawful. This ruling is a landmark victory for equal rights and may provide an important precedent for future US anti-discrimination cases.

In Canada anti-discrimination laws of sexual orientation such as the Canadian Charter of Rights and Freedom, Canadian Employment Equity Act of 1970 and Canadian Human Rights Act,<sup>136</sup> are important statutes on discrimination in the workplace. This Canadian Human rights Act forbids discrimination of sexual orientation by federally-regulated employers, landlords and services providers (in the workplace). Federal constitutional protections are provided by the Canadian Charter of Rights and Freedoms. Provincial human rights laws provide protection based on sexual orientation in all Canadian provinces except Alberta, Newfoundland, and Prince Edward Island.

In Canada lesbians, gays and bisexuals were allowed to serve openly in military services.<sup>137</sup> A study of gays and lesbians in the Canadian military has found that after

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<sup>134</sup> 291 Minn. 310 (1971).

<sup>135</sup> Sexuality Information and education in US, December 2011.

<sup>136</sup> Of 1985.

<sup>137</sup> Lesbian, gay, bisexual and transsexual (LGBT) Policy In The Canadian Military, 1992 .

Canada's 1992 decision to allow homosexuals to serve openly in its armed forces, military performance did not decline which implies, that the lifting of restrictions on gay and lesbian service in the Canadian Forces has not led to any change in military performance.<sup>138</sup>

According to Tattrie John,<sup>139</sup> there is a changed attitude towards the presence of homosexual members in the Canadian Forces. He quoted a Canadian Forces spokesperson, Rana Sioufi as saying, members who are same-sex partners are entitled to the same respect and dignity as heterosexual married couples or common-law partners.<sup>140</sup>

Lesbian, gay, bisexual, and transgender (LGBT) rights in Canada are the most advanced than in the USA.<sup>141</sup> LGBT Canadians have most of the same legal rights as non-LGBT citizens, and are extended more legal rights than many other nations where homosexuality is legal. Since 2005, Canada has offered civil marriage rights nationwide to same-sex couples. Canada was the third nation in the world where same-sex marriages were legally performed (commencing in 2003 in the province of Ontario, the fourth nation in the world to perform same-sex marriages nationwide, and it was the first nation in the Americas to perform such marriages nationwide. While same-sex sexual activity is not criminalized, the age of consent is 18 for anal sex under section 159 of the Canadian Charter of Rights and Freedoms. It sometimes becomes clear to the current researcher that in some countries rights of homosexuals are abused by victims themselves.

The inference of this researcher therefore is the fact that there is a high rate of dismissals in the workplace on the basis of sexual orientation in South African. Most unemployment rates, lower remunerations, poverty levels, suspensions retrenchments are as a consequence of discrimination and unfair labour practice. Majority have resigned while some are busy resigning on daily basis which contribute to an increase in unemployment

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<sup>138</sup> Restrictions on Gay and Lesbian Service in the Canadian Forces, 1992.

<sup>139</sup> Being Gay in the Military, Metro Ottawa, 2010.

<sup>140</sup> Ibid.

<sup>141</sup> See 138 Supra.



rates. The legacy of apartheid had punished homosexuals and women in the workplace for reasons not acceptable to the morals of a civilized society.

#### **4.1.2 SOUTH AFRICA, USA AND CANADIAN DECIDED COURT CASES OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION**

The High Court decision on the judgment in *Langemaat v Minister of Safety and Security and Others*.<sup>142</sup> In *casu* Ms Langemaat, a lesbian police officer applied to have her live-in partner who was a female to be registered as a dependent member of her medical aid scheme, referred to as Polmed. Her application was rejected in terms of the rules of the Medical scheme which provide that a dependent partner should be a legal spouse or widow/widower or child of a member.

Ms Langemaat applied to the Court for an order declaring the regulations of the scheme to be in conflict with the Constitution and setting aside the decision of the scheme not to register her lesbian partner as her dependent member. The court noted that a dependent is the one who relies on another for maintenance and that to establish whether a person is dependent involves two legal issues: whether the person requires financial aid and whether the relationship between the two persons creates a duty to maintain. Consequently, the Court held that the discrimination was unfair on the basis of sexual orientation.<sup>143</sup>

In *Atkins v Datacentrix Pty Ltd*<sup>144</sup> the court confirmed the applicant's dismissal based on sexual orientation. In *casu* the applicant was interviewed for a post as an IT technician. He became successful and after the contract was concluded he informed the respondent (employer) that he intends undergoing sex-change operation. The respondent immediately dismissed the applicant, Mr. Atkins and he claimed that to constitute automatically unfair dismissal and the court awarded him a compensation for four months.

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<sup>142</sup> (1998) 19 ILJ 240 (T).

<sup>143</sup> Ibid.

<sup>144</sup> (2010) 4 BLLR 351 (LC).

Another case on sexual orientation discrimination in South Africa is the Constitutional Court decision in *Gory v Kolver NO and Others*.<sup>145</sup> The applicant approached the court to test the constitutional validity of section 1(1) of the intestate succession Act,<sup>146</sup> to the extent that it confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partnerships as well as the appropriate remedy should the constitutional court confirm the order of constitutional invalidity made by the court *aquo*.

The facts of the case are: The applicant Mark Gory had stayed with Henry Harrison Brooks, the deceased, as permanent same-sex life partners in which they undertook reciprocal duties of support. In the judgement of Hatjenberg J, the following order was made: That it is declared that the omission in section 1(1) of the intestate succession Act<sup>147</sup> after the word spouse, wherever it appears in the section of the words or partner in permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support is inconsistent with the constitution of the Republic of South Africa. The same section has to be read as though the following words appear therein, after the word spouse, wherever it appears in the section or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.

It was also held that the applicant and the late Henry Brooks were at the time of the death of the deceased, partners in permanent same –sex life partnership in which they had undertaken reciprocal duties of support. It was also held that the applicant was a sole heir of the deceased(Mr Henry Harrison Brooks) and the agreement dated 9 September, 2005 in which the property situated at 152 First Avenue Bezuidenhout Valley, Johannesburg was purportedly sold to the fourth and fifth respondents is declared to be of no force and effect.

The applicant was declared to be entitled to occupation of the above-mentioned property on condition that he pays monthly bond instalments and the municipal account for rates, taxes, water and electricity. The court agreed to remove the first respondent according to the applicant as executor of the estate of the deceased, and he was not entitled to the remuneration for his services. The first respondent also ordered *de bonis propriis* (out of

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<sup>145</sup> CCT28/06 (2006) ZACC 20 (4) SA 97 (CC).

<sup>146</sup> 81 of 1987.

<sup>147</sup> Ibid.

own costs) to pay half of the costs and the applicant the second and the third respondents jointly and severally ordered to pay the remaining half.

The orders in this case were later amended and confirmed as follows:

With effect from 27 April 1994, the omission in section 1(1) of the Intestate Succession Act, after the word “spouse”, wherever it appears in the section, of the words “or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” is unconstitutional and invalid. It is declared that, with effect from 27 April 1994 elections, section 1(1) of the Intestate Succession Act is to be read as though the following words appear therein after the word spouse, wherever it appears in the section: “or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support. In terms of section 172(1)(b)<sup>148</sup>, the orders in the preceding two paragraphs shall not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application. If serious administrative or practical problems are experienced, any interested person may approach the Court for a variation of this order.

It is declared that the applicant and the late Henry Harrison Brooks were, at the time of the death of Mr Brooks, partners in a permanent same-sex life partnership in which they had undertaken reciprocal duties of support. It is declared that the applicant is the sole intestate heir of the late Henry, Harrison Brooks. The agreement was dated 9 September 2005, in which the property situated at 152 First Avenue, Bezuidenhout Valley, in Johannesburg was purportedly sold to the fourth and/or fifth respondents in the Pretoria High Court, is declared to be of no force and effect. The first, second and third respondents jointly and severally, the one complying the other to be absolved, are directed to return the items on X2, as amended by the Pretoria High Court, to the applicant within seven days of the date of this order.

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<sup>148</sup>See 145 Supra.

The first respondent is removed from his office as executor of the estate of the late Henry Harrison Brooks and the administration of this estate is suspended pending the appointment of a new executor by the Master of the High Court, Pretoria. The fifth respondent is ordered to pay the applicant's and the first respondent's costs in this Court and in the Pretoria High Court, including the costs of two counsels.

A victorious judgment similar to the above-stated was in a case which was finally decided by the Constitutional court in favour of same-sex couples was a judgment *in Fourie v Minister of Home Affairs*.<sup>149</sup> Victorious in the sense that it embodies a ruling that it was unconstitutional for the state to deny same-sex couples the ability to marry, and gave Parliament one year in which to rectify the situation. In terms of this case Ms Marie Andriaana Fourie and Ms Cecilia Johanna Bonthuys approached the court *aquo* to complain about their exclusion by the law by denying them their constitutional rights to regularize their union to show commitment to each other in a marriage and have their marriage being registered by the Minister of Home Affairs as is the case with others (straight genders). They referred to their exclusion as coming from the common law definition of marriage in South Africa, defining marriage as a union of one man with one woman to the exclusion of others.

According to them the common law definition of marriage is not appealing and enforcing, hence for it to have a legal effect the provisions of the Marriage Act<sup>150</sup> have to be invoked. It provides that a minister of religion who is designated as a marriage officer may follow a marriage formula observed by the religion concerned. In terms of section 30(1) of the Marriage Act<sup>151</sup>, the marriage officer must put to each of the marrying parties questions such as; Do you AB declare that as far as you know there is no legal impediment to your proposed marriage to CD, and you call all present here to witness that you take CD as your wife (husband)? Thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: I declare that AB and CD have been lawfully married. According to

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<sup>149</sup> (2006) (1) SA 524 (CC).

<sup>150</sup> 25 of 1961.

<sup>151</sup> Ibid.

them, the issue was the reference to wife or husband purposefully excludes same-sex couples.

The pre-democratic era was against same-sex relationships and those who practised them were imprisoned. However, with the new constitutional democracy, the Bill of Rights in the interim constitution, section 9(1) provides that everyone is equal before the law, and has the right to equal protection and benefit of the law. Section 9(3) of the RSA Constitution of 1996, expressly prohibits unfair discrimination on the grounds of sexual orientation. It provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds, including race, gender, sex, pregnancy, marital status, ethnicity or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, and section 9(4) provides that a person may not discriminate against any one on the basis of the above- mentioned grounds, including sexual orientation.

The raised question was the matter before the court; whether the fact that provision is made for application and all those, like in this situation, to marry each other amounts to denial of equal protection by the law and unfair discrimination by the state against them because of their sexual orientation. If it does, what is the appropriate remedy that the court could provide? The initial judgment was in terms of section 30(1) of the Marriages Act,<sup>152</sup> as mentioned in the opening statement, and their application to marry as same-sex couples as well as to have their marriage registered by the second respondent was dismissed but a leave to appeal was granted, were the application was successful in the Constitutional Court.

In USA, in *Inosencio v Johnson*,<sup>153</sup> a legal issue was presented before the Circuit judge Boyce Martin j, whether state prison officials may prohibit inmates affiliated with the Universal Fellowship of Metropolitan Community Churches, a Christian church which has a special ministry to the spiritual and religious needs of homosexuals, from participating in group worship services within the prison, while permitting other churches to hold such worship services.

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<sup>152</sup>.See 150 Supra.

<sup>153</sup> 547 F Supp 130 (ED.Mich.1982).

*In casu* plaintiffs are state prisoners. The Detroit Metropolitan Community Church officials appeal a decision of the District court finding that the defendants, prison officials at the Jackson State Prison for Southern Michigan, did not act unreasonably or over-react when it prohibited congregate worship services by the Church at the prison.

Prison officials recognized the Church as a bona fide religion in 1976. Following this recognition prison officials have allowed the Church's ministers to meet with inmates on an individual basis and to mail religious literature to them. Church officials have not, however, been permitted to conduct congregate worship services within the prison. The Plaintiffs began this action in February 1977. They challenged the blanket prohibition against congregate worship services within the prison by the Church.<sup>154</sup>

The Church is a member of the Universal Fellowship of Metropolitan Community Church and differs from other Protestant churches principally in not condemning homosexuality. One of its purposes is to minister to the spiritual needs of homosexual persons in and out of prison; the Church, however, does not encourage homosexual behaviour.

The plaintiffs initially argued that the prison's blanket prohibition against congregate worship services by the Church violated the first amendment because inmates of other faiths and their respective churches, which were not supportive of the spiritual needs of homosexual inmates, were permitted to conduct congregate worship services, while the plaintiffs were not. This claim was rejected by the District Court. However in *Simonton v Runyon*<sup>155</sup> the plaintiff-appellant Dwayne Simonton sued the Postmaster General and the United States Postal Service (together defendant) under Title VII of the Civil Rights Act<sup>156</sup> 42 U.S.C. Suffered for abuse and harassment on the basis of his sexual orientation discrimination. The United States District Court for the Eastern District of New York dismissed Simonton's complaint for failure to state a claim, reasoning that Title VII does not prohibit discrimination based on sexual orientation.

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<sup>154</sup> See 152 Supra.

<sup>155</sup> 232 F 3d 33.

<sup>156</sup> 4 of 1964.

Review *de novo*, the dismissal of a complaint was reviewed in terms of case *de novo* (*afresh*). All facts were accepted as alleged by the complainant as true, and the dismissal would be affirmed only where it will appear beyond doubt that the plaintiff managed to prove a set of facts in support of his claim which would entitle him for relief. The facts of this case are all too familiar in their general form. Simonton was employed as a postal worker in Farmingdale, New York for approximately twelve years. He repeatedly received satisfactory reward for excellent performance evaluations, however, subjected to an abusive and hostile work environment by reason of his sexual orientation. The abuse he allegedly endured was so severe that he ultimately suffered a heart attack.

For the sake of decency and judicial propriety, the case of Simonton, abuse was delayed. Nevertheless, it was established to be important to acknowledge the appalling persecution Simonton allegedly endured and to identify the precise nature of the abuse so as to distinguish this case from future cases as they arise. It is therefore related to some, but not all of the alleged harassment that forms the basis for this suit.

Simonton's sexual orientation was known to his co-workers who repeatedly assaulted him with such comments as go fuck yourself, and so you like it up the ass. Notes were placed on the wall in the employees' bathroom with Simonton's name and the name of celebrities who had died of AIDS. Pornographic photographs were taped in his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home. Pictures of an erect penis were posted in his work place, as were posters stating that Simonton suffered from mental illness as a result of bung-hole disorder. There were repeated statements that Simonton was a fucking faggot.<sup>157</sup>

There can be no doubt that the conduct allegedly engaged in by Simonton's co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace. When interpreting a statute, the role of a court is limited to discerning and adhering to legislative meaning. Scialdone Frank,<sup>158</sup> avers that the law is well-settled in the circuit and in all others to have reached the question that Simonton has no cause

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<sup>157</sup> US Court of Appeal ,232 F 3d 33 .

<sup>158</sup> Sexual orientation-Based Workplace, 2002.

of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.

In *Baker v Nelson*,<sup>159</sup> Richard John Baker and James Michael McConnell made an application for a marriage license with the respondent, who is the clerk of Hennepin County District Court. They were denied a license on the grounds that they were not man and woman, but man and man who contravened DOMA, which defines marriage as a legal union between a man and a woman.<sup>160</sup> The trial court ruled that the respondent was not required to issue a marriage license and specifically directed that a marriage license not be issued to them. The couple appealed. In *Skinner v. Oklahoma*,<sup>161</sup> the court held that marriage is a fundamental Human Right and to deny an individual this freedom, to choose who to marry is homophobic. Such behaviour is inconsistent with President Barack US new reforms on legalisation of same sex relationships.

In *Golinski v US office of Personnel Management*,<sup>162</sup> Karen Golinski was denied health benefits on behalf of her spouse by her employer. Her employer was the Ninth Circuit Court of Appeals in San Francisco. In January 2009, Chief Judge Alex Kozinski ruled that the employer violated the Ninth Circuit's employment policies by promoting discrimination based on sexual orientation to deny the legally married Golinski the same benefits for her wife. The federal Office of Personal Management (OPM), an agency of the executive branch responded that the law governing federal employees' health insurance and the so-called Defence of Marriage Act (DOMA) prevent coverage for the spouses of lesbian and gay federal employees, and instructed Golinski's insurer not to enrol her spouse called Cunninghis. According to Elias Steve, Lambda Legal, on behalf of the plaintiff (Golinski) is suing the federal government to compel it to stop interfering with the orders of the federal appellate court's chief judge so that Golinski can be provided equal benefits for her wife.<sup>163</sup>

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<sup>159</sup> 291 Minn. 310 (1971).

<sup>160</sup> Ibid.

<sup>161</sup> 316 U.S. 535, 541 (1942).

<sup>162</sup> (1995) 23 CHRR D/319 (B.C. C.H.R).

<sup>163</sup> Preventing sexual Orientation Discrimination in the Workplace, 2011.



In USA an unidentified killer prisoner said through his lawyers he was a woman trapped in a man's body. This implies that he prefers to be a woman. He denies to identify with males. The prisoner was jailed for manslaughter in 2001 after he admitted strangling his boyfriend with a pair of tights after the older man refused to pay for a private sex-change operation. He was given a five-year jail term but was released on licence in late 2002. Five days later he attempted to rape a female shop assistant in Manchester when he was living in a women's bail hostel. He was placed in the male cell. He made an application to the court to be moved from the male cells to female cells. Initially he was denied by Justice Jack Straw and later transferred by Deputy Judge David Elvin QC.

According to the Deputy Judge it was unfair for him to be kept in a male jail, where he was only allowed to dress in women's clothing when alone in his cell. He begun to take hormone treatment to make him appear more feminine, and has developed breasts and adopted a female name. The Doctors refused to go ahead with sex-change surgery until he has lived as a woman for at least two years, which his lawyers said he could not do in a men's jail. His lawyer also said a justification for his killing that he killed because of his desperation to become a woman.<sup>164</sup>

In Canada, in 1982, the Federal Government modified Canada's constitution in order to better reflect the human rights goals and standards set by the universal declaration of Human Rights.<sup>165</sup> The Government enacted a statute known as the Canadian Charter of Rights and Freedoms (CCORAF). The purpose of the charter is to protect the basic human rights of all Canadians. The CCORAF prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, gender, age, and mental or physical disability. In 1996 the charter included sexual orientation in its protection of Canadians from discrimination. Actions were taken by the central Government of Canada, the government of any province or territory, as well as the government agencies, such as hospitals, schools or Human Resource Centres.<sup>166</sup>

Section 15(1) of the Canadian Charter of Rights and Freedoms states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on

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<sup>164</sup> [Http://www.pch.gc.ca/pgm/pdp/hrp/Canada/sxrnt.cfm](http://www.pch.gc.ca/pgm/pdp/hrp/Canada/sxrnt.cfm).

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. This subsection (1) does not preclude any law, program or activity that has as its object being the amelioration of conditions of disadvantaged individual or groups including those that are disadvantaged because of race, national or ethnic origin or sexual orientation.

In 1978 the Canadian Human Rights Act (CHRA) came into force. Its main purpose is to outlaw discrimination in employment and in the delivery of goods and services on eleven grounds: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, pardoned conviction, disability, and sexual orientation. The Canadian Human Rights Act applies to people working for either the federal government or private company regulated by the federal government.

It also applies to anyone who receives goods and services from any of those Sectors. All the Federal Government departments and crown corporates (such as the CBC or Canada Post) are required to adhere to the Canadian Human Rights Act. Private companies such as rail-roads, airlines, banks, telephone companies, and radio or TV stations also had to adhere and be subjected to the Canadian Human Rights Act.

Canada created human rights commission at both the federal and provincial levels. Human Rights Commissions investigate complaints regarding human rights violations. If you have experienced discrimination you have the right to contact your provincial human rights commission and file a complaint. In many countries people had no way to have their human rights complaints heard or resolved. Human rights commissions are tremendously valuable resource for Canadians.

Sexual orientation discrimination cases in Canada are; in *Egan v Canada*,<sup>167</sup> - *In casu* James Egan and John Norris Nesbit, as applicants, were gays living as a couple in conjugal relationship since 1948. Upon reaching the age of 65 in 1986, Egan became eligible to receive old age security and a guaranteed income supplement from the government under the Old Age Security Act. The *Old Age Security Act* provides that a spouse of the pensioner may receive a spousal allowance should their combined income fall below a certain amount. When Nesbit reached 65, he applied to the Department of National Health and Welfare for a spousal allowance. However, he was refused on the

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<sup>167</sup> (1995) 2 SCR 513.

basis that spouse, defined in section 2 of *Old Age Security Act*, did not include a member of the same sex. Joseph J Arvay, representative Counsel of the plaintiffs, delivered a motion for declaring Section 2 of the Old Age Security Act to be unconstitutional in the Federal Court of Canada.

It is in this case where the Supreme Court of Canada held that although sexual orientation is not listed as a ground for discrimination in section 15(1) of the Canadian Charter of Rights and Freedom,<sup>168</sup> it constitutes an analogous ground on which claims of discrimination may be based. Section 15 of the Canadian Charter of Rights and Freedoms states that every individual is to be considered equal regardless of religion, race, national or ethnic origin, colour, sex, age or physical or mental disability. However in *Canada (A.G) v Mossop* the Supreme Court held that discrimination on the basis of family status was the discrimination of sexual orientation in terms of subsection 15(1) of Canadian Charter of Rights and Freedom.

In *R v M. (C)*<sup>169</sup> the court decision on denial of defence of consent in respect of the criminal charge of engaging in anal intercourse, with consenting person aged 14 to 18 years in violating section 15 of Charter of Human Rights on the basis of age. Concurring that minority section 15 violation based primarily on sexual orientation. But in *R. v. Mc Gowan*,<sup>170</sup> the court held that homosexual activities, including anal intercourse, between people, who are fourteen year old males, court applying C v M decision, as well, that, anyone who is 14 or more can consent to non-exploitive sexual conduct without criminal consequences.

In *Crozier v. Asselstine*,<sup>171</sup> an employee complained about harassment and the court held that harassment constitutes discrimination on ground of sexual orientation.

In *CDPQ v Anglsberger*<sup>172</sup> damages were awarded by the court to a transsexual man who was refused service in a restaurant.

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<sup>168</sup> Of 1984.

<sup>169</sup> (1995) 23 OR (3d) 629, 30 CRR (2d) 112 (Ont. CA).

<sup>170</sup> (1995) 102 CCC (3d) 461 (Ont. Ct. (Prov. Di.).

<sup>171</sup> (1994) 22 CHRR D/244 (Ont. Bd. of Inquiry).

<sup>172</sup> (1982) 3 CHRR D/892.

In *Minister of National Defence v Canada (Security Intelligence Review Committee (SIRC), T76390, March 29, 1990*,<sup>173</sup> the court dismissed an application to prohibit SIRC from investigating a complaint of member of armed forces related to revocation of security clearance based on her sexual orientation . In *Potter v Korn*,<sup>174</sup> an application for judicial review was dismissed. In this case it was found that discrimination of the lesbian couple by the doctor who refused to provide artificial insemination services amounted to sexual orientation discrimination.

In *Vriend v Alberta*,<sup>175</sup> a leave to appeal to the Supreme Court of Canada was granted in a matter concerning the omission of sexual orientation from Individual Rights Protection Act. It was found not to be the violation of section 15 of the Act. The violation of section 15 by omission of sexual orientation from the Act will be equated to discrimination against homosexuals.

In *Grace v Mercedes Homes Inc.*,<sup>176</sup> the court held that the dismissal of complaints of a gay couple who were alleging that they were discriminated against in housing accommodation, amounted to sexual orientation discrimination. In *Commission des droits de la personne du Québec v Camping & Plage Gilles Fortier Inc.*,<sup>177</sup> a tribunal finding the campground policy denying accommodation to two or more adults of same sex indirectly discriminating on basis of sexual orientation .

In January 1996, it was reported that a gay Rights group or activists referred to as Humans against Homophobia, had filed a complaint with the Nova Scotia Human Rights Commission, alleging that a Halifax coffee shop had discriminated against gay couples in at least two homophobic incidents.

In *R v Jewell and Gramlick, Doc. CA C18639, C18641, July 21*,<sup>178</sup> the court quashed convictions under section 159 of homosexual *hebophile* (attraction to mid-adolescent males) on the basis of a decision in C v M. Conviction of a man who sleeps with another

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<sup>173</sup> [1990] FCJ No 278 (QL) (FCTD).

<sup>174</sup> (1995) 23 CHRR D/319 (BC CHR).

<sup>175</sup> (1996) 132 D.L.R. (4th) 595, 25 C.H.R.R. D/1 (Alta. C.A).

<sup>176</sup> (1995) 23 CHRR D/350 (Ont. Bd. of Inquiry).

<sup>177</sup> JE 95-287 (TDPQ).

<sup>178</sup> (1995) Ont. CA).

man in terms of this decision is unwelcomed sexual orientation discrimination, particularly when there is consensus and majority age.

In *R v Mc Gowan* (1995), 102 C.C.C. (3d) 461 (Ont. Ct. (Prov. Div)),<sup>179</sup> homosexual activities, including anal intercourse, between people, who are fourteen year old males, court applying in *C v M* decision, the court held that anyone who is 14 or more can consent to non-exploitive sexual conduct without criminal consequences. These are examples of decided court cases which protect sodomy, unlike in the ancient times when people were stoned for practicing sodomy in their communities. In the eyes of straight genders and heterosexuals, sodomy is contrary to the morals of the society, whereas to the homosexuals, is acceptable to hear or preside over cases of sodomy.

In *Board of Governors of the University of Saskatchewan v Saskatchewan Human Rights Commission* (1976), 66 DLR (3d) 561 (Sask. QB) the Human Rights Commission was prevented from investigating employment-related complaint based on sexual orientation on grounds that sex is limited to gender, but in *Commission des droits de la personne du Québec c. Le Progrès du Saguenay Lée. et Paul Bergeron*, File No. 150-02-000354-79, April 24, 1979, (CDPQ) the court action was instituted seeking damages on behalf of Centre homophile d'aide et de libération Inc, having found newspaper's refusal to publish advertisement of second Congress of Gays in violation of Québec Charte des droits et libertés de la personne. The matter was settled out of court.

In *Crozier v Asselstine* (1994), 22 CHRR D/244 (Ont. Bd. of Inquiry)<sup>180</sup> an employee complained about harassment and it was held that harassment constitutes discrimination on ground of sexual orientation but in *CDPQ v Anglsberger*,<sup>181</sup> damages were awarded to a transsexual man who was refused service in a restaurant.

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<sup>179</sup> (1995) 102 CCC.

<sup>180</sup> (1994) 22 CHRR D/244.

<sup>181</sup> (1982) 3 CHRR D/892.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 CONCLUSION**

It is evident from the literature and cases referred to in this research that, the RSA Constitution is one of the best in the world in terms of regulating discrimination tendencies. People who discriminate others on arbitrary grounds don't have a place in South Africa. Employers and co-workers know their duties and their obligations in terms of employment relations as they learned from the previous court cases as well as the constitutional review cases.

Traditionally homosexuals were afraid to speak out their harassments as they were always in minorities and their voices couldn't be heard. However, as a consequence of the constitutional provisions and landmark cases such as, Du Toit, Fourie, Langemaat, NCGLE, Gory/Clover, Atkins, and others, many human Rights movements have been constituted and they are always available to approach courts on behalf of people whose rights shall have been violated.

The research has proved that there is still a challenge in terms of the protection of lesbians against homophobic practices, such as constructive dismissals, harassments, corrective rape and unlawful killings both in the workplace and in the society. It is still a concern to learn that the research has proved beyond any reasonable doubt that every day there are always breaking news about the homophobic attacks of the LGBTH. Despite the criminalization of homophobia by the legislations and arbitration awards in favour of homosexual victims, discrimination of lesbians, gays, bisexuals and transsexuals (LGBT) in South African workplaces is still rife.

The protection of LGBTH rights in South Africa is based on section 9 of the RSA Constitution of 1996. This section prohibits discrimination on the basis of sex, gender or sexual orientation, and applies to the government and private individuals or groups. The Constitutional Court has stated that the section must also be interpreted as prohibiting

discrimination on the basis of sexuality of the transsexuals, which is allowed by *Alteration of Sex Description and Sex Status Act 49 of 2003*. These Constitutional protections have been reinforced by the jurisprudence of the Constitutional Court and various statutes enacted by Parliament.

Researchers such as Opperman T and Milton John, have successfully proved that in many communities as well as in the workplace, a substantial number of LGBTH persons continue to face sexual orientation and gender related discrimination, oppressions, marginalization, and victimization<sup>182</sup>.

The research shows that throughout the world, sexual relationships between persons of the same gender have often been the cause for discrimination by society. In Canada, before 1969, same-sex practices between consenting adults were considered crimes punishable by imprisonment. In that year, the Canadian government passed an omnibus bill decriminalizing private sexual acts between two people over the age of 21 a breakthrough in treating gay men, lesbians and bisexuals equally under the law. Almost ten years later, in 1977, Québec became the first jurisdiction in Canada to amend the province's Charter of Human Rights to include sexual orientation as a prohibited ground for discrimination.

The Canadian Human Rights Act bans discrimination, including the unequal treatment of gay men, lesbians and bisexuals. In 1996, it was amended to explicitly include sexual orientation as one of the prohibited grounds of discrimination. This inclusion of sexual orientation in the Act was an express declaration by Parliament that gay and lesbian Canadians are entitled to "an opportunity equal with other individuals to make for themselves types of lives they are able and wish to live. Canadian Human Rights Commission, which is responsible for monitoring the implementation of the Act, provides further information about human rights and sexual orientation. Complaints, progress and other activities are all included in the commission's annual reports.

Section 15 of the Canadian Charter of Rights and Freedom states that every individual is to be considered equal regardless of religion, race, national or ethnic origin, colour, sex,

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<sup>182</sup> Analysis of sexual orientation discrimination framework in the workplace in the public sector Unpublished Thesis , *Stellenbosch University* , 2009 Page 10.

age or physical or mental disability. In *Egan v Canada* (1995) 2 S.C.R.513 , the Supreme Court of Canada held that although sexual orientation is not listed as a ground for discrimination in section 15(1), it constitutes an analogous ground on which claims of discrimination may be based. In *Vriend v Alberta* (1998) 1 S.C.R.493, the Court held that provincial human rights legislation that omitted the ground of sexual orientation violated section 15(1) of Canadian Charter of Human Rights.

Although there are exceptions, peace loving South Africans know the right things being respect of the rights of everyone in South Africa including gays and lesbians. The South Africa's post-apartheid constitution was the first in the world to outlaw discrimination based on sexual orientation. As indicated above, South Africa became the fifth country in the world on the 1 December 2006, and the first in Africa to legalise same-sex marriages. In the introduction of the Civil Union Act, South Africans had a choice of either marriage partners or civil union partners, and priests as well had a choice to solemnise marriages of their own choice.

It is the intention of the current writer to emphasise the fact that, the South African position on the rights of homosexuals is clear, and that those who are in breach are fully aware of their unlawful conducts. Conservative social attitudes among Blacks and Whites in South Africa are traditionally unfavourable to homosexuality; such attitudes have persisted to some degree in post-Apartheid society. To some extent, the outbreak of HIV-AIDS epidemic in South Africa, forced homosexuals in South Africa to reveal their sexual orientation, in order to be able to fight the spread of the disease and to ensure that those who are infected have access to life-saving medicines.

To the author it is like failure to disclose one's sexual orientation is tantamount to failure to disclose one's HIV/AIDS status which amounts to criminal liability, if it may be discovered that the accused person who infected a complainant has done so while he/she was consciously aware of his HIV/AIDS positive status. Homosexuals are therefore in trouble because when they disclose their sexual orientation, especially in the workplaces, they become victimised by both employers and co-employees. When they don't disclose their sexual orientation it becomes a breach of a legal duty to disclose one's sexual orientation.



## 5.2 RECOMMENDATIONS

It is recommended that everyone must know what discrimination of sexual orientation is, and how it relates to other forms of discrimination. It has been established in the investigation that most of sexual orientation discrimination cases are unfair discriminations, and dismissals based on such are automatically unfair dismissals that fall under section 187 of LRA 66 of 1995. Differentiation on the basis of one of the listed grounds in Section 9(3) and (4) is unfair discrimination unless the contrary is established. In the decided case of *Harksen v Lane NO 1998 (1) SA 300 (CC)*, the onus rests with the complainant that he/she has been discriminated on the basis of sexual orientation.

The RSA Constitution of 1996's promises of transformation and social justice require collaborative efforts to develop informed and unified strategies towards ensuring that in the spirit of our social contract, all South Africans are able to enjoy human rights which are also an international requirement. With reference to precedence and court decisions, we need to build a collective morality that affirms human dignity and non-discrimination in a manner that is felt by all those who live in our country, especially in the workplace. In terms of the EEA 55 of 1998 policies or any other policies relevant to redress discrimination practices of the past should be impressed upon all people practising homophobic behaviours in the workplaces as well as in the community at large.

Employment legislations, policies and prescripts developed by employers in the workplace should be applied effectively and efficiently to protect the rights of people which are at all times being violated. Homophobic dismissals from work and murdering of people due to their sexual orientation should be regarded as naïve practices. Perpetrators should always be brought to book and be punished with maximum sentences deserving their conduct.

It is about time that our Judiciary opens a specialized field that will assist Chapter Nine institutions, in investigating cases of homophobic killings as well as constructive dismissals based on sexual orientation. The researcher also recommends that from literature and case law reviewed there is a high rate of victimization of homosexuals which dictates for declaration of homosexuals as vulnerable people in the society and

should be protected by imposing maximum sentences to any potential perpetrator of the bisexuals. The research recognises the Human Rights movements and NGO campaigning for the protection of Human rights guaranteed by the RSA Constitution of 1996. Pro-human rights organizations such as: ActiveAid, have condemned the continued impunity of homophobic perpetrators and accused the South African government of turning a blind eye to report murder of lesbians in the forms of the so called corrective rapes, in which a male rapist purports to rape the lesbian victim with the intention of curing her of her sexual orientation.<sup>183</sup> Throughout the research, it has been discovered that the majority of homophobic perpetrators are men with frustrations of unemployment. Therefore there is a significant relationship between unemployment and hate crimes. Consequently, the spade of unlawful strikes, which contribute to thousands of job losses, will contribute to more frustrations among unemployed men and more homophobic and xenophobic attacks.

In South Africa, homophobic hot spots are in major cities such as, Johannesburg, Pretoria, Durban, Cape Town, Bloemfontein, Port Elizabeth and East London. People who practice homophobia are straight men, lesbians attacking other lesbians and gays attacking other gays. Therefore hate crime in the workplace and in the society are very complex and need more researches in both workplaces and societies.

Even among police and soldiers, homosexuals are available and need the constitutional protection. In 1996, a White Paper on National Defence was drafted by Parliament stating that in accordance with the Constitution SANDF shall not discriminate against any of its members on the basis of sexual orientation.<sup>184</sup> Fore-warned is fore-armed. In South Africa denialists and perpetrators are strongly warned to stop persecuting homosexuals and transsexuals because their rights, like everyone's rights enshrined in the Constitution are protected against violation.

In the interest of justice to this research, co-employees who practise discrimination of homophobic practices such as calling gays and lesbian's names should be charged with the use of abusive language as justification subjecting hearing and subsequent dismissal

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<sup>183</sup> Gay Rights win in South Africa, BBC News, 9 October 1998.

<sup>184</sup> White Paper on National Defence for the Republic of South Africa: Defence in Democracy, SA 8 May 1996.

in the workplace. In the decided court case of *Lebowa Platinum Mines Ltd v Hill*,<sup>185</sup> the Labour Appeal Court upheld a dismissal of an employee who called another a “bobejaan” on the basis of using abusive language as a justification for fair dismissal. Another similar incident was in the case of *Oerlikon Electrodes SA v CCMA & Others*,<sup>186</sup> in which the Court confirmed the dismissal of a man who called another a “Dutchman”, on the basis of using abusive language as a justification for fair dismissal.

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<sup>185</sup> (1998) 19 ILJ 1112 (LAC).

<sup>186</sup> (2003) 9 BLLR 900 (LC).

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