

Fourie and Bonthuys “same-sex marriage” issue in Con Court May 16 2005

ORAL ARGUMENT by John Smyth

May it please the Court, Chief Justice,

Conscious of my duty not to repeat submissions made by the State and other amici, may I outline very shortly how my arguments will differ from theirs.

The Court has given me leave to speak not only on my own behalf – as a religious person who regards his marriage vows as sacred – but also on behalf of what might be described as a core group of Jews, Moslems and Christians who share my beliefs, and who would be deeply offended on the grounds of our religions, consciences and beliefs, if the SCA decision were allowed to stand.

Not merely do we say as many religious people do, for example the Christians represented by the MA – “ This is wrong; we cannot accept that this is right for South Africa; this is an unjustified experiment in social engineering” – we adopt those submissions of course – but we go further and say to the Court:

“If this change in the definition of marriage is allowed to stand, it will be so offensive to our religious beliefs, it would do such violence to our consciences and our spirits, and it would be invasive our dignity as religious married persons, that such a change in the law would UNFAIRLY DISCRIMINATE AGAINST US AND INFRINGE OUR CONSTITUTIONAL RIGHTS UNDER SECTIONS 9 AND 10.

Now, the State has homed in on sections 39 and 173 – the spirit, the purport and objects of the B of Rts, and the question posed by s.173 – ‘What is in the interests of Justice?’ We adopt those submissions, and indeed their submissions about the separation of powers, without further comment.

But we respectfully submit – the answer to the questions before the Court today – can be found in sections 9 and 10, supplemented if necessary by section 36; we submit that the section 36 test of what is reasonable and justifiable in an open and democratic society is perhaps a more helpful test in this case than the interests of justice.

If challenged about my group: It is marked by a conviction, a passionate belief, that 2 things are absolutely clear in both old and new Testaments

1. A belief that marriage vows are sacred because marriage is ordained, instituted, defined by the God of both the Old and New Testaments.....page 1 of

the OT: Genesis 1.27 “God created man in his own image – male and female he created them.” Next verse: “God said be fruitful and increase in number.” Page 2 of the OT: Gen 2.24:” For this reason (that is because he created male and female, and because they must procreate) a man shall leave his father and mother and cleave to his wife, and the two will become one flesh.”

In the NT – for Christians – not one word changes. Jesus is asked about marriage and divorce; his response is simply to quote those scriptures from the opening pages of the OT – “Haven’t you read, he says, that at the beginning the Creator made then male and female and he goes on to quote Gen 2.24 verbatim. That’s Mt 19, and in the epistles St Paul does exactly the same The definition of marriage has stood unchanged from the beginning with those 2 essential qualities: male and female, with the object of procreation.

2. The second conviction of the group I seek to represent again comes straight from the old and new testaments and it is this:

Sexual *inclinations* whatever they be, or sexual *temptations* are never condemned in scripture; the classic NT example is the woman taken in adultery to whom Jesus said with such compassion: “Has no one cast the first stone; neither do I condemn you; but go and sin no more.”

Having said that there is no escaping the fact that in both Testaments, homosexual **practices** are condemned in devastatingly strong language: For example, Leviticus 20.13 in the OT. Matthew 11.23&24 in the NT where Jesus uses God’s judgement on the city of Sodom as an example of God’s holy wrath, and then St Paul in Romans 1 could hardly use stronger language. (abomination/detestable/shameless lusts)

What is the size of the group I seek to represent?

Impossible to say. We don’t form coalitions, societies, projects. We don’t have any official voice. We are united only by those 2 scriptural convictions. But the C is there to protect us as much as any other group.

My Framework on page 3 I hope is self-explanatory.

B.1.1 on page I move to the question of whether the present defn of marriage discriminates agst gay persons:

B.1.1 – the Harksen and Lane tests, and the powerful quotation at the bottom of page 4 from the Home Affairs case has been dealt with by Mr Moerane. I would add only this:

We would make so bold as to put the case as high as this:

If that second test laid down by the Court in Harkesn v Lane, and reiterated and applied in the Home affairs case, is correct, then that really is an end of the R's case.

It's a test for stage 1 : Is there discrimination, or merely differentiation?

We say:

You cannot have a more important and more worthy societal goal, you cannot have a more legitimate government purpose, than upholding traditional marriage and the best quality of family life.

I turn then to page 5

B.1.1.2: The vital distinction between status and rights.

We adopt what the State says: over the years there has been an incremental awarding of the rights and privileges of marriage by this court and by the legislature, and I am not concerned to challenge those who say that Parliament must provide a Civil Unions package to tidy up this area of the law, BUT the status of marriage cannot be altered and it is quite simply not open to homosexual couples, NOT because we discriminate against them, but simply because they do not QUALIFY for that status.

May I replace my illustration on page 5 of the aspiring advocate who has no legal training but complains that the Advocates' Act discrim's agst him? It is not the best analogy because it is difficult to see on what ground of discrim he cd rely.

But what about the actress who wants a male role in a movie?
Or the man who applies for a job supervising the girls in their dormitories in a boarding school? Are they to complain of discrim on the ground of gender?

If they did, the simple answer wd be : 'You do not qualify.'

In our submission, those analogy come much nearer home: Because the bottom line in this case is that it is not about sexual orientation at all, but rather about gender.

Marriage law isn't concerned about sex. orient. When a couple present themselves for marriage the marriage officer is not concerned about that. He simply says to each:

"You don't *qualify* to marry as you are of the same gender as the person you wish to marry."

Isn't that the short answer to the instant case?

B.1.1.3 page 6 (unless previously dealt with in answer to a Q)

May I add just a word about the fundamental and foundational nature of marriage theologically?

Marriage is ordained, instituted, defined by the God of both the Old and New Testaments.....

Page 1 of the OT: Genesis 1.27 “God created man in his own image – male and female he created them.” Next verse: “God said be fruitful and increase in number.” So right on the first page of the Book which is sacred to Jews, Moslems and Christians we are given the two unchangeable hallmarks of marriage.

1. Male and female 2. Procreation

Page 2 of the OT: Gen 2.24: “For this reason (that is because he created male and female, and because they must procreate) a man shall leave his father and mother and cleave to his wife, and the two will become one flesh.”

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The theologians would say marriage is ‘creational’, and of course other religions mirror and adopt marriage but never without those 2 hallmarks.

B.1.1.4 A small point. I need not add anything.

Moving on to Para B.1.1.5,

Farlam JA's discourse at paras 68-79 of his judgement:

We make 5 short points (a) to (d):

(a) Contrary to history, theology, and jurisprudence, the learned Judge of Appeal was determined to try and drive a wedge between the Christian church and state, between civil and secular marriage. He did it without any argument from the Bar; we say he was attempting the impossible.

(b) Certainly from the time of Constantine when Christianity became the official religion of the Roman Empire, the Romans embraced Jewish and Christian marriage. In reality they had done so from the classical Roman era before Christ. The 2 hallmarks were always there.

(c) When he moves forward a 1000 years to the Reformation, he seeks to find support for his case from the somewhat technical and tenuous point that the Reformers, the Protestants, took the view that marriage should no longer be a sacrament on a par with baptism and Holy Communion. Yes, but the vital point we submit is that both Catholics and Protestants have always regarded marriage as sacred.

The current Anglican prayer book says: (bottom of page 7)

Fourth point (d):

The Marriage Act, so far from supporting the learned Judge's dichotomy, does, we submit, the exact opposite:

It provides for 2 types of marriage officer, Magistrates and Ministers of religion, and two types of ceremony. In fact it blends together church and state giving them parallel and equal roles in celebrating marriage. And both institutions recognise that a marriage celebrated by the other is of equal validity.

Final point: (e):

My analogy with apartheid, where for so long certain very influential sections of the church, in our recent history, sought to justify the scandal of apartheid by saying religion must be kept out of politics.

The equality of the races is as foundational in Holy Writ as is the definition of marriage. In such matters we submit it is impossible to separate church from state. May I offer the Court two quotations – I'm afraid they are not in my written argument:

Inscribed on the walls of the Harvard Law School, still today, are the words '*Non sub homine sed sub Deo et lege*' It is not by men but by God and the law that we are governed.

Blackstone's Commentaries are still on the bookshelves of law libraries worldwide: "*The law of nature dictated by God himself is binding in all countries and at all times.*"

Of course the Court has the duty of interpreting our C which is supreme; but the context of the C set out in the Preamble is 'May God protect our people'. 'May God bless south Africa.'

And so we submit that the Court should endeavour to interpret the C if it possibly can against the background of the law of nature dictated by God himself, as Blackstone put it.

B.1.1.6: ? Mr Moerane has dealt with that.

I MOVE NEXT TO THE QUESTION OF UNFAIRNESS, WHICH ONLY ARISES OF COURSE IF THE COURT FINDS THE PRESENT DEFINITION OF MARRIAGE TO BE DISCRIMINATORY - CONTRARY TO THE STATE'S SUBMISSIONS AND MINE:

We accept of course the presumption under 9(5) but its only a presumption and it can be rebutted.

In paras B.1.2.2 and 1.2.3. we give two additional reasons why discrimination, if found, would not be unfair:

1. Homosexual couples can be given all the rights and privileges appertaining to marriage under civil union legislation.

I take the point raised in the R's Heads of Argument, with citations from the Canadian cases, that 'separate but equal' may be discriminatory.

In my personal submission to the SALRC 18ms ago I dealt with that; I said that it was essential that new legislation must provide that Civil Unions are open to heterosexual couples as well as homosexual couples. And of course in today's society there is a demand for that from heterosexual couples.

2. Nowadays the weight of scientific evidence establishes that homosexuality is a matter primarily of nurture, not nature. Environment and choice, not genes. In other words homosexuals do have a choice; they can and do choose to marry. Many who in later life adopted a homosexual lifestyle began with marriage and fathering children.

Now I am aware of course that the Court dismissed this argument as unrealistic in the Home Affairs case – para 38 – quoted in the SCA judgement in this case at para 88.

Furthermore, I am very much aware that Farlam JA made his finding of unfairness (para 93 SCA) fair and square on the basis of those paras from the Home Affairs judgement of this Ct where Justice Ackermann says emphatically and repeatedly that ss couples are capable of forming relationships and providing a consortium omnis vitae of a quality equal to that of heterosexual couples. (Para 53 of the Home Affairs judgement quoted at para 92 of Farlam JA's judgement).

AND, of course, the Rs at page 15 and para 15 of their Heads, and again at page 17/para 17 effectively concede that the outcome of the case turns on whether those dicta in the Home Affairs case are correct.

So I must grasp this nettle.

I make 3 points about that:

(i) In the Home Affairs case the Court was not assisted by any evidence on these 2 issues, and had to make assumptions. It made assumptions in favour of the applicants. But today the Court has substantial (unchallenged) expert and scientific evidence refuting those assumptions. The Court cannot ignore that evidence. In previous cases involving sexual orientation the issues of whether Hs have a choice, and whether they are as capable of forming a consortium omnis vitae were not investigated; no evidence was adduced.

So how is the Court to proceed; how is the conflict to be resolved:

We submit there are happily a choice of answers:

(i) First, we say that to reach the conclusion that SS couples wd suffer unfair discrim if they do not have the same **rts** – immigration, pension rts etc – as marrd couples did NOT require the Court to make *a value judgement* about the H lifestyle. THEREFORE the dicta in earlier cases may be regarded as obiter.

On the other hand, to decide whether the definition of marriage is to be altered does require a value judgement as to the quality of the H lifestyle – because the Ct would not want to debase the coinage of marriage by making a less beneficial lifestyle an integral part of it.

(ii) If the Court is not happy with that approach, then I pray in aid Justice Moseneke’s dicta in the *Daniels and Campbell* case where he sets out the recognised exceptions to the *stare decisis* rule: (2004 (7) BCLR 735 at para 95)

At para 95, he says they are where the court is satisfied that its *previous decision was wrong*, or *where the point was not argued*, or where the issue is in some legitimate manner distinguishable.

“Where the point was not argued” comes nearest to home; it was a point which required expert evidence and none was provided.

So in respect of the question – ‘Does the present defn of marriage *unfairly* discr against Hs?’ we submit that for all those reasons, even if the Ct were to find discr – we have discharged the B/P to refute the statutory presumption.

My Para B.1.3 – the next q of course in its logical sequence is the impact of s.36 on the R’s case if they establish both discrim and unfairness.

May I leave that until I have dealt with the unfair discr which we as a group allege wd arise if the defn of marr were changed?

B.2.1

If the SCA decision is allowed, does it so emasculate the concept of marriage that married persons like my wife and myself, and those of similar convictions whom I seek to represent will suffer unfair discrim on the gr of our religions, consciences and beliefs. And impairment of our dignity?

Little help is to found from precedents. The Court did touch on discrim on the ground of 'religion and culture' in Daniels v Campbell, the Muslim marriage case, but otherwise I believe this is the first time the Court has been asked to consider the ground of religion, conscience and belief. The Court has of course considered s. 15 – freedom of religion – in the Liquor Laws case, but my reading of that case provided nothing that would assist the court in this case.

B2.1.2 I do stress the fact that our C enshrines religion in no less than 3 section of the B of Rts. It is also I have quoted implicit in the Preamble, and we submit that it is implicit in section 10. Nothing impugns one's dignity more than to have the things one holds most sacred denied, distorted or diluted.

In B.2.1.3 I provide the Court with some definitions from leading dictionaries. Discrim is synonymous with prejudice.

(Turning to page 12)read para at top of page 12.

Turning to the issue of UNFAIRNESS, paras B.2.2.1 to 4:

Remind the Court of how often it has said that it is the IMPACT of the discrim on the members of the affected group which is the determining factor:

Para 41 of the Home Affairs case, the Court says:

As affirmed in the sodomy case the determining factor regarding the unfairness of discrim is, in the final analysis, the impact of the discrim on the complainant or members of the affected group.

The impact on us is 2 fold:

1. As I have already explained, a change in the defn of marriage emasculates the scriptural origin and definition of marriage which has two unchangeable hallmarks from Genesis 1. 27&28: 1. Male and Female 2. Procreation – be fruitful and multiply.

2. (if not already in) *Sexual inclinations whatever they be, or sexual temptations are never condemned in scripture; the classic NT example is the woman taken in adultery to whom Jesus said with such compassion: “Has no one cast the first stone; neither do I condemn you; but go and sin no more.”*

Having said that there is no escaping the fact that in both Testaments, homosexual practices are condemned in devastatingly strong language: For example, Leviticus 20.13 in the OT. Matthew 11.23&24 in the NT where Jesus uses God’s judgement on the city of Sodom as an example of God’s holy wrath, and then St Paul in Romans 1 could hardly use stronger language. (abomination/detestable/shameless lusts)

It is our conviction that these passages cannot be ignored. They are part of the immutable word of God.

There then is the 2-fold impact on us which we say amounts to unfair discrimination.

Para B.2.2.2 I adopt Justice O’Regan’s word in the Hugo case.

“Invasive”.....read para. B.2.2.2

In this case we say unfair discrim and impairment of dignity clearly go together. Again it’s a question of the IMPACT on the group I seek to represent.

And para B.2.2.3: And of course we of course take the very strongest issue with the Massachusetts Supr Ct dictum quoted by Cameron JA. To open marriage to same sex couples would, we submit, not merely *diminish* the validity and dignity of

opposite sex marriage, but distort it beyond recognition. It wd make a mockery of marriage.

B.3 I MOVE NOW TO SECTION 36 - LIMITATION OF RIGHTS – what is reasonable and justifiable

As the Court has often said – most recently in the Volks NO and Robinson case – the focus of fairness is on the impact of those effected, while the emphasis in the case of justification is on the public interest eg Justice Sachs at para 209.

Now the state in their submissions have chosen to concentrate on the tests provided by section 39(2) and s.173, perhaps understandably because this case is about developing the common law.

But our submission is that s.36 provides the better tool when it comes to making value judgements in this case. When the Court is considering rights under the equality clause, the interests of justice is not an easy test to apply. The section 36 tests on the other hand are more user friendly and of vital importance in this case where we have conflicting claims of unf discr under section 9(3).

As I come to the first of the 5 specified relevant factors – **the nature of the right** - may I set it firmly in the context of the introductory words ‘what is reasonable and justifiable in an open and democratic society.’

And I home in on the word ‘democratic’. The group I seek to represent is undoubtedly a minority group of religious folk, perhaps a small minority. Not every religious person is impacted deeply in his spirit about this matter; that’s why we make the special claim of unf discr; BUT a majority of people in this country – according to the census it is 70%+ - claim to be religious and most of that majority believe ssm to be an oxymoron.

S.36 enjoins the Court to consider the issues in the context of a democratic society and we say that means the Court must pay high regard to the wishes of the majority.

Yes, I’m of course aware of the capital punishment case and the Hoffman vs SAA, cabin attendant case, where the Court stressed that the C is supreme and in some instances the Ct may have to assume the role of educator of public opinion. But the nature of marriage as the bedrock of society means those cases are worlds away from this case; the most common word in the C is ‘everybody’; the majority has rights under the C as well as minorities. And so we respectfully submit that in applying s.36 the Ct should be very slow to ignore the wished and beliefs of the

majority. In other words what is justifiable and reasonable in limiting rts must take into consideration the wishes of the majority.

Having said that, my particular submission about factor (a) is that the rts of the religious core group who would be so offended if marriage is redefined go so deep that they should prevail over the rts of ss couples which can met by Parliament in other ways.

Factor 2 - little (b): I need nothing to para B.3.3 on page 14. (read)

Factor 3 – little (c): Ditto para B.3.4 (read) .

Factor 4 – little (d): Ditto read B.3.5

Factor 5 – little (e): There are no less restrictive means which can prevent the injury to the spirits and dignity of myself and others like me if the defn of marriage is changed. On the other hand the rts of ss couples to obtain the benefits of marriage can be provided by Parliament in so far as they have not received them incrementally already.

Finally in dealing with proportionality. I draw attention to paras 59 and 60 of the Home affairs judgement which I set out at paras A.4 and A.5 of my addendum. These paras are NOT quoted in the SCA judgement. Farlam JA stops his lengthy quotation at para 57.Read from my addendum pages 17 and 18.

UNLESS I CAN BE OF ANY FURTHER ASSISTANCE TO THE COURT, I
SHALL SIT DOWN