

July 2018

Without Prejudice

When considering what equality in the workplace means for the lesbian, gay, bisexual, transgender and intersex (LGBT+) community in South Africa, one has to consider how far South Africa has come since its first democratic elections in 1994. There have been improvements to many facets of life, including ensuring the equality of all persons in South Africa. But have the changes for members of the LGBT+ community been sufficient?

Section 9 of the Constitution, which relates to equality, reads:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." (Our emphasis)

Section 9 prohibits the unfair discrimination of people based, *inter alia*, on their sexual orientation. Sub-section (5) creates a rebuttable presumption of unfairness in relation to the listed grounds stated in sub-section (3), which includes sexual orientation. One of the reasons sexual orientation was included as a listed ground in the equality section of the Constitution was because of the manner in which members of the LGBT+ community were discriminated against during the Apartheid era. It is important to remember that in the not-too-distant past, members of the LGBT+ community were treated with contempt by the previous regime and certain laws criminalised gay relationships.

South Africa can proudly boast that it is one of the first, and still one of the only, countries to specifically enshrine the rights of the LGBT+ community in its Constitution. Section 9 extends to both the treatment of individuals by government (section 9(3)) and the treatment of individuals by natural and juristic persons (section 9(4)).

In addition to the protection enshrined by the Constitution, the Constitutional Court of South Africa has on a number of occasions upheld the rights of the LGBT+ community in South Africa. By way of example, in the matter of *Satchwell v the President of the Republic of South Africa 2003 (4) SA 266 (CC)*, the court held that sections 8 and 9 of the Judges' Remuneration and Conditions of Services Act 88 of 1989 were unconstitutional in that benefits that were afforded to the spouse of a judge were not extended to a judge's same-sex life partner. Sections 8 and 9 of the Judges' Remuneration and Conditions of Services Act were found to unfairly discriminate on the basis of sexual orientation and the Constitutional Court ordered that these sections be read to include permanent same-sex life partners.

It must be noted, however, that there is still a vast gap between the legal protections afforded to the LGBT+ community and the actual practice in workplaces and society. The rights of LGBT+ persons are still often infringed, and one need only read the news to know that South Africa still has a long way to go, in practice, to attain true substantive equality for all.

South Africa has made commitments internationally to eliminate discrimination and is taking steps to address the issues faced by members of the LGBT+ community. The country presented a resolution to the UN Human Rights Council in 2011 calling for an international investigation into laws and practices discriminating against sexual and gender minorities. The Department of Justice and Constitutional Development has set up a task team to implement an Intervention Strategy for members of LGBT+, which aims to, inter alia, implement awareness raising programmes and integrate Prosecutors and Hate Crimes Training (PAHCT) programmes.

Although the initiatives by government are welcomed by the LGBT+ community, further practical implementation is wanting. In 2014, the Labour Research Services and the Gay and Lesbian Memory in Action prepared a discussion paper that reported that ensuring equality in the workplace for members of the LGBT+ community has not been made a priority by the government. It was found that LGBT+ employees were often subjected to discrimination such as "being passed over for promotion; animosity from co-workers and supervisors; name-calling; verbal and physical intimidation; blackmail; limited productivity and career progression; and physical and sexual violence". It was further found that there is reluctance on the part of LGBT+ employees to report discrimination as there is a fear regarding secondary victimisation.

It is vital that the private sector takes steps to actively ensure equality in the workplace for all staff members. The South African LGBT+ Management Forum has launched the South African Workplace Equality Index, which will create a benchmark for South African employers to measure their company's levels of LGBT+ inclusiveness. Law firms, as the inherent protectors of the Constitution, should be at the forefront of promoting equality and inclusiveness in the workplace.

On 17 May 2017 Hogan Lovells launched its global LGBT+ and allies' network: Pride+. The objectives of the Pride+ Network are to:

- promote a supportive and inclusive working culture for all LGBT+ colleagues and to visibly show support for the LGBT+ community;
- provide a safe environment for LGBT+ colleagues so that they may be themselves and speak openly;
- raise awareness of issues faced by LGBT+ colleagues and to help overcome barriers; and
- challenge inappropriate behaviours, language, stereotypes and assumptions.

In the last year, the Pride+ Network has held events and launched initiatives to educate and promote the rights of the LGBT+ community and to ensure that our LGBT+ colleagues feel supported. This included hosting an extremely well-attended internal presentation, in collaboration with the Hogan Lovells Pro-Bono department regarding "The right to LGBT equality in South African law". The Pride+ Network encourages heterosexual allies of the LGBT+ community to join the network and to engage with colleagues to create an open, safe and inclusive environment.

South Africa may still have a long way to go before we are all treated equally, but by tackling the issues head on, including supporting the LGBT+ community, we are slowly moving toward that goal. As the late President Nelson Mandela said: "For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."

> [Read the full article online](#)