The Marriages Act v The Civil Unions Act

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Without Prejudice

Heterosexual couples intending to get married in South Africa today can choose to marry either in terms of the Marriages Act or the Civil Unions Act. This begs the question: why do we have two pieces of legislation to regulate a single act of union and what are the implications of choosing one over the other?

Historically, the Marriage Act 25 of 1961, codified the common law definition of a marriage as the legally recognised voluntary union of one man and one woman to the exclusion of others while it lasts. This legislation was challenged by *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) on the grounds that the common law and section 30(1) of the Marriage Act denied same-sex couples equal protection and benefit of the law in contravention of section 9(1) of the Constitution. In addition, these provisions resulted in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution. In a constitutional democracy this position needed to be remedied.

The Constitutional Court acknowledged that the common law definition of marriage was inconsistent with the Constitution and declared the provisions of the Marriages Act invalid to the extent that it did not permit same-sex couples to enjoy the status, benefits and responsibilities it accords to heterosexual couples.

Moseneke J held that, "the exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples."

As a result of this decision, parliament was afforded 12 months from the date of judgment to correct these defects. The Civil Union Act 17 of 2006 commenced on 30 November 2006 and provides for the solemnisation of civil unions either in the form of a "marriage" or a "civil partnership".

Rather than amending the Marriages Act, which still permits marriage exclusively for heterosexual individuals, the new Civil Unions Act allows any two persons to conclude a marriage relationship. Heterosexual couples can, therefore, choose to marry in terms of the Marriages Act or in terms of the Civil Unions Act. Homosexual couples can only marry in terms of the Civil Unions Act.

In both pieces of legislation, the criteria and requirements for marriage are similar and the marital regimes remain unchanged, affording parties the same rights and responsibilities. However, the Civil Unions Act differs in that it recognises partnerships that are not solemnised by marriage. This affords couples who choose not to marry the right to enjoy the benefits that marriage brings, in terms of sharing in the joint estate.

There was an anomaly, however. Section 6 of the Civil Unions Act allowed marriage officers to refuse to constitute a civil union or marriage between persons of the same sex based on conscience, religion and belief. Ironically, ministers of religion were excluded from section 6 and so only those marriage officers employed at the Department of Home Affairs can exercise this right to refuse to marry a same sex couple. The irony of the exclusion was clearly lost on the lawmakers.

The principle of discrimination against same sex couples had come full circle. With the ability to marry or conclude partnerships, same-sex couples were close to equality, however, section 6 remained discriminatory, frustrating the rights accorded to same-sex couples and diminishing their options.

Moseneke J, in *Minister of Home Affairs v Fourie and Ano*, stated "It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way."

Same sex couples could not expect to be married at a Department of Home Affairs of their choice. They would instead be required to find a branch where the marriage officer had no objection. Home Affairs revealed that only *28.6%* of Home Affairs branches have marriage officers willing to marry same-sex couples. The outcry from the LGBTI community and lawmakers alike resulted in Cope's Deidre Carter sponsoring the Amendment Bill in 2018 with a view to repealing section 6.

Despite the plethora of political views in the debate, the Amendment Bill was passed in parliament on 8 December 2018. The Department of Home Affairs has been given 24 months to re-train all marriage officers, including those who were previously granted the exemption in terms of section 6.

Now that the defect has been resolved, we are still left with two pieces of legislation, one of which is clearly superfluous. It is likely the legislation will remain as two separate and distinct Acts as our society continues to grapple with same sex couples and marriages. Legally speaking, however, there is no difference between the two and the rights and obligations afforded to all couples in the Civil Unions Act are the same as those afforded to only heterosexual couples in terms of the Marriages Act.

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