

ORGANISASIE VIR GODSDIENSTE-ONDERRIG EN DEMOKRASIE V LAERSKOOL RANDHART AND OTHERS

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In June, the South Gauteng High Court (the High Court) ruled in favour of the Organisasie vir Godsdienste-Onderrig en Demokrasie (OGOD) in a matter concerning the promotion of religion in South African public Schools. The premise of the application was that there is a bias in favour of the Christian faith in public schools, and that this bias is in contravention of the Constitution. The High Court found that public schools, as state institutions, cannot promote a single religion to the exclusion of others.

The Constitution extends the freedom of religion, belief and opinion to all in section 15. The contentious provision in this case was the interpretation of section 15(2), which stipulates that religious observances are permitted at state or state-aided institutions, provided that the appropriate rules are followed, that they are conducted on an equitable basis and that participation is free and voluntary. Each school in this matter has an ethos founded on Christianity. Their defence was based on section 16 of the *Schools Act*, which permits schools to determine a school's character/ethos according to the religious make-up of its feeder community. This of course must be done in line with section 15(2) of the Constitution. OGOD argued that such conduct is unlawful and unconstitutional because once a school identifies with one religion, it cannot address any others equitably. It thus sought an interdict prohibiting all public schools from promoting a single religion, as well as permitting a myriad of religious observances.

In making its decision, the Court drew extensively from the *S v Lawrence* matter where the Constitutional Court had previously explored the freedom of religion and its limitations. In the *Lawrence* case, it was held that compulsory attendance at school prayers would infringe upon the freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in that environment, voluntary school prayers could amount to coercion of pupils to participate. That Court also emphasised equitable application and participation free of coercion. Furthermore, it said that the express protection of religious freedom by the Constitution means that South Africa is not a secular state and the diversity of its people, and thus religions, will feature in all tenets of life.

The primary issue in the OGOD matter was whether a public school may hold itself out as a Christian school and if so, to what extent. The High Court found that that a school cannot do this because feeder communities evolve, and considering the racially unbalanced nature of some residential areas due to past apartheid laws, this evolution must be encouraged. Such change will invariably alter the generic nature of feeder communities and introduce diversity of religions and beliefs. In addition, in the case of agnostics, minority religions or atheists, even where a school governing body (SGB) makes express provisions for free and voluntary participation, that exclusion cannot be excused. The High Court noted that this could convey a message of inferiority or "otherness" to those that opt out.

There were two other issues OGOD sought for the High Court to address. The first being the extent to which a public school may conduct religious observances. The second was whether a learner can be asked to declare if they adhere to a particular religion. The High Court could not rule on these issues due to a technicality - the principle of subsidiarity. According to the subsidiarity principle, legislation is enacted to give effect to the Constitution. Once such legislation is passed, the Constitution ceases to be the primary reference point. The *Schools Act* is the national law in all school matters, buttressed by provincial legislation and even further, by the rules on religion developed by SGBs. SGB rules address religion at each school in depth - including the issues for which OGOD sought interdicts. OGOD challenged the schools based on the Constitution without following the hierarchy of law. As such, the case should have been founded on SGB rules. The High Court could not consider the interdictory request in that regard. This unfortunately deprived the nation of a more substantial analysis of the issues at hand.

Nonetheless, this ruling echoes multiple cases which emphasise the importance of the promotion of diversity in South Africa's democracy. The High Court recognised the role that religion plays in the everyday life of all who live in South Africa and that one of the ways to entrench unity in diversity, is to foster religious rights on an equitable basis. A pivotal lesson is that requiring the government to act even-handedly does not necessitate secularism - meaning that religious rights can still be observed in state institutions, within certain prescribed parameters.