

Ubuntu

(The quality of being Human)

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Introduction

Ubuntu is a quality that includes the essential human virtues: compassion and humanity. It is a value enshrined in the Constitution and it recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. (*S v Makwanyane*, 1995).

In the case of 'Emmanuel Paulking v Mzalisi' in 2018 the Department of Home Affairs barred a man with asylum seeker status from registering a customary marriage and marrying in terms of civil law. The contention of the barring of the above case was that Mr Paulking and his wife, who is a South African by birth, were not entitled to enter into a civil marriage. This was based on an assumption that this was a marriage of convenience, without any thorough investigation into the merits of this particular union.

South African law regulates and protects marriages and families and also safeguards the interests of children. In terms of the African Charter of Human Rights it provides that: "*the family shall be the natural unit and basis of society. It shall be protected by the state*" (African Charter on Human and Peoples' Rights ("Banjul Charter"), 1981).

As one legal case submitted; "at issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans." (*Fourie and another v Minister of Home Affairs and others*, 2005).

Ubuntu as an underlying value in South Africa

South Africa is faced with an enormous backlog in the administration and service sector, particularly in the Department of Home Affairs. In terms of the 2011 Census there were 309 794 asylum seekers in South Africa with 171 700 undecided cases as from 2009.

But is that justification enough for a departmental head blatantly to deny a service to those who desperately need it?

People in high positions, possibly with their own agendas, seem to have enabled the Department of Home Affairs to pass notices which infringe on basic human rights. The right to get married ties in with the right to dignity which is a basic human right that the Constitution strives to promote and protect. However, time and again Government officials deny non-citizens fair and just administrative action. In terms of Circular Notice No.4 of 2016 refugees whose asylum seeker status is pending cannot contemplate marriage. However, should there be an inquiry to a refugee or asylum seeker's status, the marriage cannot be concluded (Department of Home Affairs, 2016).

Based on the statement above, it can be inferred that the provision implies that any person who is a refugee or asylum seeker should not even think about marriage, let alone intend to enter into one. I do not see justification for this because asylum seekers should share the right to dignity, the right not to be discriminated against, and the right to equal protection from the law, like any other human being living in a country subscribing to international basic human rights.

If people's perceptions of refugees and asylum seekers are negative, then the concept of Ubuntu is far from being achieved. As much as the law is essential in a democratic society, it is nothing without the society it seeks to regulate; and it is my view that the law should aim to protect human rights to a greater extent than it does to limit them. It is in this same country that refugees are granted access to seek asylum. In addition, they are afforded primary health care should they need any and, thirdly they are mostly provided with work permits should they have the need to pursue economic independence. It is, therefore, contradictory and unreasonable not to afford the same

people who are openly welcomed into the country the very rights that afford them the dignity they should inherently have as human beings.

A practical approach into exercising ubuntu

The Courts are transformative, and the Constitution of the Republic of South Africa is also regarded as a Transformative Constitution. Justice Pius Langa defines a Transformative Constitution as; “a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex” (Langa, 2006).

Government officials should be trained to exercise their authority in a manner which serves to provide everyone with equal opportunities where human rights are concerned. The legal culture should be transformed by;

“a culture of justification, a culture in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion” (Langa, 2006).

In a country where equality exists only on paper some people will be more privileged. That privilege may be because of the colour of their skin or, as in this case, their nationality. It is impossible to rationalise how people who flee their country of origin due to fear of persecution, are consequently welcomed into this country to seek asylum yet still get treated with very little human regard as opposed to others who choose to come into the country with study and work permits, for example, and are financially secure.

This perhaps implies that one person is more human or worthy than the other, based on standards set by the society by the current parameters of legality by the South African state.

Family and Marriage in South Africa

In terms of the Universal Declaration of Human Rights, the family is the natural and fundamental group or unit of society and is entitled to protection by society and state. (Universal Declaration of Human Rights, 1948). Mr Paulking in this case may not be a South African, but his wife is, and it is legally understood that when people marry, they acquire legal rights which regard them as a union. Therefore, refusing to allow an asylum seeker to marry in this instance is consequently infringing on the rights of the South African citizen; but the courts currently do not have the required comprehension in place to accommodate this kind of a provision. It is thus my view that not only is an asylum seeker discriminated against based on their nationality, but the wife's rights are also unjustifiably limited in this instance.

Conclusion

The human rights case forming the basis of this paper went to the upreme Court of Appeal (SCA) at the time of writing, and the judgment has since been published in favour of Mr Paulking with the effect of declaring the whole paragraph that had intended to bar asylum seekers and refugees from contemplating marriage unconstitutional. This case has highlighted the malpractices found in government sector and the court moved a step closer to remedy the injustices. It is my hope that the practices that hinder South Africa's progress in trying to pursue a democratic society based on human dignity, equality and freedom are done away and the spirit of Ubuntu prevails.

Reference List

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