

**RACISM AND LAW:
IMPLEMENTING THE RIGHT TO EQUALITY IN
SELECTED SOUTH AFRICAN
EQUALITY COURTS**

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Abstract

Racism has informed South African society since colonial times. Racist beliefs found expression in the laws of colonial and apartheid South Africa and shaped both state and society. The constitutional state that South Africa has become since 1994, is based on the values of 'human dignity', 'the achievement of equality' and 'non-racialism', among others. Law formed the basis of the racist state prior to 1994, and now law has a fundamental role to play in the transformation of the state and society in an egalitarian direction by addressing socio-economic inequalities on the one hand, and by changing patterns of behaviour based on racist beliefs forged in the past, on the other. This thesis examines one of the legal instruments that is intended to contribute to transformation in the latter sense, namely the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), with specific reference to the issue of racism. The provisions of this Act and the framework for its operation against the background of South Africa's racist past, and within the broader framework of international and constitutional law, are examined. These two legal frameworks are analysed for the purpose of determining the standards set by international and constitutional law regarding racial equality in order to determine whether the Equality Act measures up. This thesis also incorporates an analysis of the practical application of the provisions of the Equality Act to complaints of racism in selected equality courts. The theoretical analysis of the Act's provisions and their application in the equality courts point to various problematic formulations and obstacles which negatively affect the application of the provisions and thus hamper social change. The thesis concludes with recommendations for refining the Act's provisions and its application.

Measure for Measure

go measure the distance from cape town to pretoria
and tell me the prescribed area i can work in

count the number of days in a year
and say how many of them i can be contracted
around

calculate the size of house you think good for me
and ensure the shape suits tribal tastes

measure the amount of light into the window
known to guarantee my traditional ways

count me enough wages to make certain i
grovel in the mud for more food

teach me just so much of the world that i
can fit into certain types of labour

show me only those kinds of love
which will make me aware of my place at all times

and when all that is done
let me tell you this
you'll never know how far i stand from you

Sipho Sepamla
The Soweto I love
(1977)

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Abbreviations

A	Appellate Division
<i>AE</i>	American Ethnologist
<i>Afr HR LJ</i>	African Human Rights Law Journal
AJ	Acting Judge
<i>All SA</i>	All South African Law Reports
ANC	African National Congress
APRM	African Peer Review Mechanism
ARB	Arbitration
art	article
AU	African Union
<i>Aust YBIL</i>	Australian Yearbook of International Law
BALR	Butterworths Arbitration Law Reports
BCCSA	Broadcasting Complaints Commission of South Africa
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
<i>Cal LR</i>	California Law Review
<i>Case Western Reserve LR</i>	Case Western Reserve Law Review
<i>CBR</i>	Canadian Bar Review
C	Cape of Good Hope Provincial Division
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CERD	Committee on the Elimination of Racial Discrimination
CGE	Commission for Gender Equality
<i>CI</i>	Critical Inquiry

CJ	Chief Justice
<i>CILSA</i>	The Comparative and International Law Journal of South Africa
<i>CJWL</i>	Canadian Journal of Women and the Law
<i>Colum J Transnat'l L</i>	Columbia Journal of Transnational Law
D	Durban and Coast Local Division
<i>Denv J Int'l Pol'y</i>	Denver Journal of International Law and Policy
DoJ & C	Department of Justice and Constitutional Development
DP	Deputy President (of the Constitutional Court)
<i>Duke LJ</i>	Duke Law Journal
E	Eastern Cape Provincial Division
ESC	Economic and Social Council
<i>EJLE</i>	European Journal of Legal Education
<i>Georgetown LJ</i>	Georgetown Law Journal
<i>Gonzaga LRev</i>	Gonzaga Law Review
<i>Harvard LR</i>	Harvard Law Review
<i>HR&Const LJ of Southern Africa</i>	Human Rights and Constitutional Law Journal of Southern Africa
<i>HRLJ</i>	Human Rights Law Journal
<i>HRQ</i>	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IC	Industrial Court
ICJ	International Court of Justice

<i>ILSA Journal of International and Comparative Law</i>	International Law Students' Association Journal of International and Comparative Law
<i>Int J of Law, Policy and the Family</i>	International Journal of Law, Policy and the Family
<i>ILJ</i>	Industrial Law Journal
<i>ILO</i>	International Labour Organisation
<i>Int'L & Comp LQ</i>	International and Comparative Law Quarterly
<i>ISSJ</i>	International Social Science Journal
<i>J</i>	Judge
<i>JAL</i>	Journal of African Law
<i>JEMS</i>	Journal of Ethnic and Migration Studies
<i>JOL</i>	Judgments Online
<i>JSI</i>	Journal of Social Issues
<i>LC</i>	Labour Court
<i>LAC</i>	Labour Appeal Court
<i>L & Soc Inq</i>	Law and Social Inquiry
<i>L & Soc Rev</i>	Law and Society Review
<i>Man LJ</i>	Manitoba Law Journal
<i>McGill LJ</i>	McGill Law Journal
<i>Mich LR</i>	Michigan Law Review
<i>MLR</i>	Modern Law Review
<i>N</i>	Natal Provincial Division
<i>NEPAD</i>	New Partnership for Africa's Development
<i>NLR</i>	Natal Law Reports
<i>O</i>	Orange Free State Provincial Division

OAU	Organisation of African Unity
Off Rep	Official Reports High Court of the South African Republic
<i>Osgoode LJ</i>	Osgoode Law Journal
P	President (of the Constitutional Court)
para	paragraph
paras	paragraphs
<i>Queen's LJ</i>	Queen's Law Journal
s	section
ss	sections
SA	South African Law Reports
SAHRC	South African Human Rights Commission
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>SA Merc LJ</i>	South African Mercantile Law Journal
<i>SAPL</i>	South African Public Law
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SCR	Canada Supreme Court Law Reports
SE	South Eastern Cape Local Division
sms	short message service
<i>SMU LR</i>	Southern Methodist University Law Review
SSSBC	Safety and Security Sectoral Bargaining Council
<i>Stanford LR</i>	Stanford Law Review
<i>Stell LR</i>	Stellenbosch Law Review
T	Transvaal Provincial Division

<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Tk	Transkei High Court
<i>TRW</i>	Tydskrif vir Regswetenskap
TS	Transvaal Supreme Court Reports
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg
<i>UBC LR</i>	University of British Columbia Law Review
<i>U of P LR</i>	University of Pennsylvania Law Review
UN	United Nations
<i>Va J Int'l L</i>	Virginia Journal of International Law
W	Witwatersrand Local Division
<i>Willamette LR</i>	Willamette Law Review
<i>Wis LRev</i>	Wisconsin Law Review
<i>UKHL</i>	United Kingdom House of Lords
<i>Yale LJ</i>	Yale Law Review
<i>Yale L & Pol'y Rev</i>	Yale Law and Policy Review
UKHL	United Kingdom House of Lords
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
<i>ZaöRV</i>	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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I wish to dedicate this thesis to the grown-ups of tomorrow; in particular to my godson, Thomas Horan. May you be fluent in the language of equality.

Chapter 1

INTRODUCTION

1.1 PURPOSE OF THE STUDY

The political and legal revolution of the 1990s meant the end of an era in South African society and politics in general, and in South African constitutional law in particular. Constitutional supremacy, judicial review, a justiciable bill of rights, and most importantly, democratic elections in which all adult South Africans were allowed to vote, meant the end of legally-sanctioned racial segregation and racism. The official end to the sanctioning of racially discriminatory laws and policies did not, however, mean that racism and racial discrimination died a quiet and sudden death.¹ The beliefs and behaviour of many South Africans are still guided by convictions forged in the past and perpetuated in the present.

¹ A brief survey of South African newspaper articles published in the first few months of 2008 shows that racism abounds in all spheres of South African society. The following brief list is by no means complete, but it gives an indication of the pervasiveness of racism in different spheres of South African society: in respect of housing, see for example L Samodien and A Makinana 'ANC steps into ugly housing row' *Cape Argus* (31 January 2008) 4, L Dentlinger 'Tempers flare in council over Delft housing' *Cape Argus* (7 March 2008) 4; in respect of crimes that are racially motivated: G Makhafola 'Killer teen frenzy' *The Sowetan* (17 January 2008) 4, Y Groenewald and L Donnelly 'Sudden death in Skielik' *Mail and Guardian* (24 January 2008) 8, B Makwabe 'Man's leg broken in alleged racist attack' *Sunday Times* (9 March 2008) 4; in relation to matters concerning sport, selection of sports teams and coaches and the language used by sport administrators and policy makers: A Mohamed 'Still racism in rugby, Stofile warns' *Cape Times* (4 February 2008) 1, N Manthorp 'Row over racial make-up of cricket squad for Bangladesh' *The Star* (7 February 2008) 2, C Mboyisa 'K-word: Komphela boots an' all' *The Citizen* (27 March 2008) 3, S waka-Zamisa 'Khoza under fire for 'racist' slur' *The Witness* (22 February 2008) 6, T Thakali 'K-word: Khoza off hook for now' *The Saturday Star* (1 March 2008) 1; in relation to the creation of voluntary racially exclusive bodies: C Bathembu 'All-black forum is wrong, says HRC' *The Citizen* (9 April 2008) 3, I Lekota 'We will take you to court, FBJ told' *The Sowetan* (10 April 2008) 4, F Rabkin 'No knockout victory in blacks-only bout' *Business Day* (11 April 2008) 4; in relation to airing of controversial views regarding matters of race: A Tissen 'Editor tells Bullard to stay out to lunch' *The Citizen* (12 April 2008) 4, S Ngalwa 'Jordan climbs into 'racist' Bullard and his ex-editor' *The Star* (23 April 2008) 11; in relation to racism in the police force: K Kalame 'Racism 'still rife in police'' *The Citizen* (3 April 2008) 11, A Moselakgomo 'Racist' chief cop suspended after staff complaints' *The Sowetan* (16 April 2008) 8; in educational institutions at various levels: S Mngoma 'Racism alleged at KZN School' *The Witness* (23 January 2008) 4, W Jasson da Costa 'Outrage over race video spills over into parliament' *Cape Times* (29 February 2008) 1, M Dibetle 'Combating racism 101' *Mail and Guardian* (27 March 2008) 7, A Serrao 'Students beaten as 'racist' attacks rock varsity' *The Star* (22 April 2008) 3. This brief list of newspaper articles containing reports of racism in various spheres is by no means complete, but it provides a sense of the incidence of racism in South African society.

The transition to constitutional democracy, guided by the negotiated interim Constitution,² led to the passing and ultimate certification of the Constitution of the Republic of South Africa, 1996.³ This Constitution, like the interim Constitution, secures equal protection and benefit of the law and equality before the law for everyone, and it prohibits unfair discrimination on a variety of grounds, including race, ethnicity and colour.⁴

In the eyes of the law, all South Africans, irrespective of race, ethnicity or colour are equal.⁵ This means that government, through its actions and in law, may not infringe upon the rights of individuals on any of the prohibited grounds provided for in s 9 of the Constitution and that government is obliged to promote the attainment of equality in South African society. The attainment of equality as an ideal requires, among other things, the eradication of racism which manifests itself in various forms in our society and its institutions. This study explores one of the legal responses that is used in the struggle against racism. It focuses on the Promotion of Equality and Prevention of Unfair Discrimination Act⁶ (the Equality Act) that has been enacted to give effect to the constitutional injunction regarding equality.⁷ The study considers the provisions of this legislation as they pertain to complaints involving racism (in view of the historical significance of race, racialism and racism in South Africa) as well as the application of these provisions by selected equality courts. It does so within the broader legal framework established by international law and by the Constitution.

² The Constitution of the Republic of South Africa Act 200 of 1993. I refer to this constitution as 'the interim Constitution' throughout this thesis.

³ *Chairperson of the Constitutional Assembly, 1996, In re: Ex parte Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC); *Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC).

⁴ Section 9 of the Constitution.

⁵ I refer to this constitution as 'the Constitution' throughout this thesis.

⁶ Act 4 of 2000. I refer to this act as 'the Equality Act' throughout this thesis.

⁷ Section 9(4).

1.2 CONCEPTS

Before engaging with the provisions of the Equality Act or the context within which they should be construed, it is necessary to clarify the inter-related concepts of 'race', 'racism', 'racialism' and 'non-racialism' as they are used in this thesis.⁸

Over the centuries much significance has been attributed to a person's race.⁹ Physical differences in skin colour, eye colour, hair texture and so forth were viewed as the markers of racial, and thus biological, difference.¹⁰ Modern science has shown that these differences are superficial and in no way proof of the existence of different races. Scientifically there is no basis for the distinction between races.¹¹ There is only one human race.¹² Race, as it is used in everyday speech and in academic writing, is thus a social construct.¹³ The constructed-ness of race does not mean that race is an empty concept, but it requires one to consider the meaning given to race in a particular society.¹⁴ If race were an empty concept, this study and many contemporary debates on race and racism would be redundant. As a social category, race has meaning.¹⁵

Lee notes that the term 'race' does not have a fixed meaning, but holds that the content of the concept is determined by the context within which it is utilised.¹⁶ In this thesis I consider a South African legal response to racism, which then means that the meaning of race (as a social construct) has to be determined in this context. For the purpose of this thesis, then, a person's race is 'white', 'coloured', 'Indian' or 'black', based on the skin colour of that person, in accordance with the racial classification

⁸ See in general SAHRC *Faultlines* 48ff.

⁹ Gilroy 843-844.

¹⁰ Racial difference was believed to go further than the physical differences; it was also believed to explain the different aptitudes and attitudes of members of the different races. See SAHRC *Faultlines* 57-58.

¹¹ This statement does not stand uncontested. Arthur 72ff argues that race is also a natural category on the basis of the findings of studies of the human genome. These studies have revealed the existence of five major population groups based on geography. These groups are linked to the geographical areas of Africa, Eurasia, East Asia, Melanesia and the Americas. Broadly, these population groups correspond with racial groups as these are generally identified.

¹² Appiah 19; Zack 258-259.

¹³ Appiah 19; Gilroy in general, but see specifically 842 and 845; Lee 751.

¹⁴ Arthur 60.

¹⁵ Race also may have significance as a biological category, but this does not serve as a justification for racism, especially with reference to medical conditions; see Arthur 79-80.

¹⁶ Lee 758.

used under apartheid and during colonialism.¹⁷ In addition to these perceptible differences, it is also necessary to note that references to race often also include cultural and linguistic differences.¹⁸ This broad view of race as a social construct shaped by South African history informs this thesis. In response to the acceptance of this definition, the reader may ask why is it necessary to adhere to a categorisation that has clearly been discredited. There are a number of reasons for doing so which are outlined below.

For the purpose of fulfilling the constitutional goal of the attainment of equality, the use of the term 'race' as it was used under apartheid and during colonialism, is necessary. The constitutional commitment to equality does not only demand the eradication of unfair discrimination, but it also includes the idea of restitutionary equality.¹⁹ For the purpose of restitutionary equality, it is necessary to look at past racial categorisation.²⁰ This has to be done with transformation as the goal and cognisant of the constructedness of race.²¹ Race also remains relevant because of the constitutional commitment to substantive equality.²² Equality is not about identical treatment, but about tolerance and the celebration of difference. Diversity, and particularly cultural diversity, has been noted by the Constitutional Court to be a positive feature of our society that requires nurturing and support.²³ Multiculturalism or cultural diversity is accordingly viewed as a positive attribute.²⁴ This will be discussed below.

¹⁷ See chapter 2.

¹⁸ Arthur 71.

¹⁹ Section 9(2) and *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 30. See also Sharp 243ff who warns that care should be taken not to relegate the non-racialism to empty rhetoric. A true commitment to non-racialism would, according to Sharp, entail '... the ending of racial discrimination is complemented by a concerted programme to provide wide-ranging redress for the disadvantages that the majority of South Africans suffered in the past'.

²⁰ Sharp 251 condemns the labelling of the assertion of a racial or ethnic identity by the downtrodden as 'coloured racism'. In a paradoxical way, Sharp argues, such an assertion advances non-racialism and rejects exclusivity.

²¹ Maré 30. See also SAHRC *Faultlines* 53 where it is noted that 'race' used in this way is a 'neutral concept'.

²² See chapter 4.

²³ The Preamble to the Constitution also celebrates diversity: 'We, the people of South Africa ... Believe that South Africa belongs to all who live in it, united in our diversity'. See Sachs J in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60: 'The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.' Section 30 and s 31 of the Constitution are also important in this regard. The former protecting the right of everyone to use the language and to

'Racism' is a term more commonly used than the term 'racialism', and the two words are often used interchangeably in everyday speech and in the media. Social theorists disagree about the precise definitions of both terms,²⁵ but basic consensus exists that racism is rooted in beliefs about racial superiority and inferiority of people ostensibly belonging to different races.²⁶ Racialism is the belief that there are '... heritable characteristics, possessed by members of our species, which allow us to divide them into a small set of races, in such a way that all the members of these races share certain traits and tendencies with each other that they do not share with members of any other race'.²⁷ People subscribing to racist beliefs base their racial classifications on physical attributes such as skin colour, hair texture etc.

Racism is a belief in the superiority of one race in relation to other races.²⁸ Beliefs about racial inferiority or superiority are beliefs about (1) intellectual; (2) moral; (3) physical; (4) aesthetical or (5) emotional inferiority/superiority.²⁹ These beliefs are shaped by the 'historic exploitative relationship between people of different degrees of

participate in the cultural life of his/her choice subject to its consistency with the provisions of the Bill of Rights. Section 31 pertains to the right of people to enjoy their culture, practise their religion and use their language collectively, in a manner consistent with the provisions of the Bill of Rights.

²⁴ 'Modern' versions of racism often substitute the term 'race' for 'culture' and thus creates scope for racism to continue in society under the guise of cultural pluralism: Appiah 72. See also Pieterse 389 and S Fredman 'Equality: A New Generation' in S Jagwanth and E Kalula *Equality Law: Reflections from South Africa and Elsewhere* (2001) Juta: Cape Town 214 at 216. See the discussion below.

²⁵ Appiah 18. Pieterse 365 relies on the work of T Todorov and defines racism as a form of behaviour; "a manifestation of hatred or contempt for individuals who have well-defined physical characteristics different from our own" and racialism as the 'theoretical doctrines of racial superiority and inferiority which are often used to justify racist behaviour.' The author states that '[r]acism could thus be conceived as a practical manifestation of racialism'. MacDonald 107 explains thus: 'Where racists must insist that their group deserves more power because it is better than others, racialists must insist only that groups, because they are different, require representation as groups'. See also the contributions by different authors in S Zubaida *Race and Racialism* (1970) Tavistock Publications Ltd: London; Rex 118.

²⁶ See Arthur 9-12.

²⁷ Appiah 18-19. Appiah continues his argument to distinguish between extrinsic and intrinsic racism.

²⁸ Arthur 9-14 provides an overview of the different definitions that commentators have crafted for the term. Arthur is of the opinion that racism is a negative attitude towards persons by virtue of their race – 'racial contempt in the form of hostility or indifference towards people's legitimate interests in virtue of their race' (15). This definition makes sense, but I am of the view that attitudes are rooted in beliefs, hence my preference for the definition that sets racism as a belief. Racism is not the exclusive belief of 'white' people; 'black' racists are also to be found. Typically in South Africa the white 'race' is seen or portrayed as superior to the black 'race'. See in this regard also SAHRC *Faultlines* 57-58 and Zack 248-252.

²⁹ Arthur 35. Matsuda 2332 identifies 'the implements of racism' to include 'violence and genocide'; 'racial hate messages, disparagement and threats; overt disparate treatment'; and 'covert disparate treatment and sanitized racist comments'.

pigmentation. History is the essential soil in which racism always grows'.³⁰ Racism thrives on racial stereotypes and racial stigmatisation. It manifests itself in different forms; varying from hatred, dislike, hostility or indifference.³¹ It is often said that racism is institutional or systemic.³² Viewed as such, an understanding that racism is a belief means that the people in an institution harbour racist beliefs that manifest themselves in the way things are managed in the particular institution or in the system.

There is consensus among 'most educated and benevolent people ... that racism is wrong, racists are immoral and that racist actions ought to be punished'.³³ From this it follows that racism should be eliminated or that the elimination thereof should be the ideal.³⁴ This view is supported in this thesis.

One could thus say that racialism underpins racism.³⁵ But what does a commitment to non-racialism mean in South Africa, given our history of state-sanctioned racism and racialism? On a theoretical plane, a society committed to non-racialism is a society in which race is irrelevant as a political and social organising principle.³⁶ Theoretically, that seems to be the commitment in South Africa.³⁷ Non-racialism has been the official policy of the African National Congress (ANC) for many years.³⁸ Its acceptance by the ANC paved the way for eventual inclusion in the Constitution.³⁹ During the Struggle, the organisation's understanding of non-racialism was shaped by apartheid racial classifications and, as used in the Struggle, according to Maré, non-racialism in fact meant multi-racialism.⁴⁰ Multi-racialism does not deny the existence

³⁰ SAHRC *Faultlines* 58.

³¹ Arthur 16.

³² SAHRC *Faultlines* 57; Zack 249.

³³ Zack 246. Arthur 19 notes that racism is an epistemic defect, but adds that it also could be a moral defect depending on circumstances.

³⁴ Zack 246. See also Pieterse 366.

³⁵ But Rex 118 is of the opinion that it is the other way around: racism is theory and racialism refers to the practice of the theory of racism.

³⁶ Appiah 18; Maré 29 and MacDonald 92ff.

³⁷ Section 1(b) of the Constitution.

³⁸ J Frederikse *The Unbreakable Thread: Non-Racialism in South Africa* (1992) Indiana University Press: Bloomington 62ff. See also the reproduction of the ANC's Constitutional Guidelines for a Democratic South Africa (1988) at 254 of this Frederikse's book: 'South Africa shall be an independent, unitary, democratic and non-racial state' and JD van der Vyver 'Comments on the Constitutional Guidelines of the African National Congress' (1989) 5 *SAJHR* 133.

³⁹ K Asmal 'Victims, Survivors and Citizens – Human Rights, Reparation and Reconciliation' (1992) 8 *SAJHR* 491.

⁴⁰ Maré 23-27. The author (24-25) refers to the use of 'race' in the Freedom Charter where it is stated that 'South Africa belongs to all who live in it, black and white' and that 'national groups' shall be

of races. Multi-racialism accepts that race, at least as a social category, is significant. The Constitution's commitment to non-racialism seems to be cast in this mould. Race-thinking and race-talk – in the racist sense – continue in South Africa despite the constitutional commitment to non-racialism. We accept race as meaningful when we allow race – a person's 'white-ness', 'coloured-ness', 'Indian-ness' or 'black-ness' – as a category in a national census, or for purposes of affirmative action or black economic empowerment or when determining quotas for national sports teams, or when people assert their African or Afrikaner heritage.⁴¹ Multi-racialism is perhaps more palatable in the guise of multiculturalism. In a multicultural society there is respect for differences⁴² and diversity (e.g. cultural, language diversity) is valued positively.⁴³ Care should be taken to ensure that racism does not inform our understanding of multiculturalism.⁴⁴ Kriegler J expressed this point very strongly in *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*⁴⁵ where he stated:

protected against insults to their race and national pride. Maré accordingly maintains that non-racialism, during this time, was 'most often seen as *non-antagonistic relations between races*' (20). See also MacDonald 96-97 and 105.

⁴¹ Maré 27. The author also refers to essentialised notions of culture which perpetuate racial thinking, for example 'African' management or a call to return to 'traditional values' and to the continued existence of racially exclusive organisations in civil society as other examples of perpetuation of racialism. See also MacDonald 133 and 177ff.

⁴² A Gutmann 'Introduction' in A Gutmann (ed) *Multiculturalism* (1994) Princeton University Press: Princeton 22-24. The author states: 'Multicultural societies and communities that stand for the freedom and equality of all people rest upon mutual respect for reasonable intellectual, political, and cultural differences. Mutual respect requires a widespread willingness and ability to articulate our disagreements, to defend them before people with whom we disagree, to discern the difference between respectable and disrespectable disagreement, and to be open to changing our own minds when faced with well-reasoned criticism. The moral promise of multiculturalism depends on the exercise of these deliberative virtues' (24).

⁴³ *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) paras 49 and 52 per Sachs J. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 134-135 per Sachs J.

⁴⁴ DT Goldberg *The Racial State* (2002) Blackwell Publishers: Malden 200ff warns against the official acceptance of racelessness or non-racialism while retaining an institutional culture and institutions which perpetuate a racial hierarchy.

⁴⁵ 1996 (3) SA 165 (CC) para 40 'A common culture, language or religion with racism as core element has no constitutional claim to separate educational institutions. The Constitution protects diversity, not racial discrimination.' (My translation). Sachs J expressed the same sentiment (para 52): '[T]he dominant theme of the Constitution is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity.... The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity'.

“n Gemeenskaplike kultuur, taal of godsdiens met rassisme as ‘n wesenselement het geen konstitusionele aanspraak op die vestiging van afsonderlike onderwysinstellings nie. Die Grondwet beskerm verskeidenheid nie rassiediskriminasie nie.’

Multiculturalism provides scope for minorities in a society to assert their identities without denying the dignity of other groups in society.⁴⁶ The recognition of difference accentuates the inherent equal dignity of people and their agency in that regard.⁴⁷

1.3 APPROACH, METHODOLOGY AND STRUCTURE

1.3.1 Approach and Methodology

1.3.1.1 Law and Change

From the above discussion it is clear that racism and racialism are beliefs. Thoughts, ideas, convictions and beliefs, if they are not acted upon, do not give rise to legal liability. If they did, we would find ourselves living in the world of Winston Smith in which the ‘Thought Police’ clamped down on all thoughts that were regarded as unsuitable.⁴⁸ People’s thoughts, ideas, convictions and beliefs may, however, be influenced by law and in this way law could contribute to the eradication of racism as a belief system. The racist will bear the full brunt of the law when her/his beliefs manifest themselves in outlawed behaviour or utterances and this thesis aims to

⁴⁶ Taylor 25 holds that identity ‘designates something like a person’s understanding of who they are, or their fundamental defining characteristics as a human being.... Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false distorted, and reduced mode of being’. See also MacDonald 21-24.

⁴⁷ Taylor 39-41, 59. See also O’Regan 88 who is of the view that the Constitution ‘asserts that human beings are morally responsible agents and that it imposes obligations upon the State to foster the conditions of moral agency’.

⁴⁸ G Orwell *Nineteen eighty four* (1983) Penguin Books: Harmondsworth. See also the remarks of Satchwell J in *S v Bressler* 2002 (2) SACR 18 (C) at 27h-j: ‘... [Y]ou may hold that whatever belief you may like. You may hold that belief no matter how farcical it is, no matter how grotesque it is, no matter how offensive it maybe to this Court or to anyone else. This is a democracy and you are entitled to your views and your opinions. You are as entitled to be a racist as the next person is entitled to be a communist or another a liberal. But, when you express those views in public, when you act upon them and when your behaviour and your actions impact upon other persons, then this Court is entitled to and will examine your actions to determine whether any offence has been committed.’

explore the scope and application of the legal measures adopted for the purpose of combating racist behaviour.⁴⁹

This idea that law concerns itself with behaviour is contextualised further by a consideration of the interaction between law and social change.⁵⁰ Legal systems are often criticised for entrenching the *status quo* and resisting change and innovation.⁵¹ This criticism is also true in respect of legal responses to various forms of racist behaviour.⁵² While the limits of law for guiding social change have to be recognised, the support that law can provide to facilitate change is considerable.⁵³

Certain features of law and change in their interaction must to be noted. Change brought about through law happens slowly⁵⁴ and is difficult to plan and implement.⁵⁵ Where law envisions litigation to be driving change, complications could arise. Litigation will not 'automatically and unproblematically translate into anticipated social changes'.⁵⁶ The application of procedures envisioned by the legislation may be fraught with difficulties and issues regarding the enforcement of judgment may arise.⁵⁷ These problems do not mean that social change grounded in law is impossible. In some instances 'law can serve as a first step in transforming social realities.... It can validate injuries and, in some cases, deter or redress them'.⁵⁸ Where legislation provides for reactive responses to unfair discrimination and other manifestations of racism, it has the potential to contribute meaningfully to social change by imposing

⁴⁹ Racist behaviour (or racist utterances) is the behaviour (or utterance) that 'normally signifies racism': Arthur 27, 55.

⁵⁰ Kok (2007) chapter 2 provides an analysis of the role of law in facilitating social change. The author is of the view that litigation has a limited role in the process of change. See also Kok (2008).

⁵¹ M Kessler 'Lawyers and Social Change in a Postmodern World' (1995) 29 *L & Soc Rev* 769 at 772. See also JL Comaroff and J Comaroff 'Criminal Justice, Cultural Justice: the Limits of Liberalism and the Pragmatics of Difference in the new South Africa' (2004) 31 *AE* 188 at 192.

⁵² See, for instance, S Fish 'Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech' (1997) 23 *CI* 378 at 392-393.

⁵³ RJ Krotoszynski Jr 'Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent for Transformational Social Change' (1996-1997) 47 *Case Western Reserve LR* 423 at 427. Auerbach 1227: 'It is now a commonplace to say that the legal system is an instrument as well as a product of social change'.

⁵⁴ Morison 8.

⁵⁵ Morison 11; Hepple 604-606.

⁵⁶ SLR Anleu *Law and Social Change* (2000) Sage Publishers: London 121.

⁵⁷ Ibid.

⁵⁸ PM Grotty 'Legislating Equality' (1996) 10 *Int J of Law, Policy and the Family* 317 at 318. See also Hepple 603-604. See also *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 138.

penalties on those who transgress the norms set down in legislation.⁵⁹ Change brought about through litigation will not necessarily be dramatic or strike very wide, but it will address the complaint and vindicate the rights of the complainant which will feed into broader societal transformation.⁶⁰

Law also shapes people's behaviour in ways other than the reactive fashion discussed above. People modify their behaviour to accord with the law for a variety of reasons.⁶¹ Many people obey the law because 'that is the law';⁶² because they believe that law benefits the greater good of society;⁶³ because they believe that they have consented to the authority of law through their participation in democratic elections⁶⁴ or because they believe that law reflects higher moral values.⁶⁵ So, if the law aims to change society by the eradication of racist behaviour, people can be expected to terminate such behaviour for a variety of reasons. A change in behaviour will not necessarily mean that the racist beliefs of a person have abated.

The task of changing people's behaviour that is based on past discriminatory policies and practices is not only a task for the law. Education has a very important role in inculcating respect for human rights and tolerance of difference.⁶⁶ Socialisation in the family and institutions of civil society similarly play an important role in this regard.⁶⁷ These aspects fall beyond the scope of the current investigation and are not addressed in this thesis.

⁵⁹ The penalties can stem for criminal law or provide civil remedies to the victims of racist behaviour. See in this regard the authorities discussed by Kok (2008) 129. Kok (2008) is of the view that court-driven social change has limitations which seriously detracts from its utility to bring about social change (130-138).

⁶⁰ See JF Handler *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) Academic Press: New York 3 notes that litigation in matters of public interest can contribute to conscious-raising and legitimisation which aid social change. See also 103ff of this publication.

⁶¹ See in general TR Tyler *Why People Obey the Law* (1990) Yale University Press: New Haven.

⁶² Sarat 387. Auerbach 1333. See also TR Tyler 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities' (2000) 25 *L & Soc Inq* 983 at 984-985 who states that morality and legitimacy are the main reasons for obeying the law.

⁶³ Sarat 388-389.

⁶⁴ Sarat 389.

⁶⁵ Sarat 390.

⁶⁶ Zack 265. Education needs to dispel the myths of race and racism on the one hand, while education in a multicultural environment allows for people from different races to interact and learn about and from one another.

⁶⁷ See SAHRC *Faultlines* 58.

1.3.1.2 'Law in books' and 'law in action'⁶⁸

'We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about feet. It not only does not help. It hinders.'⁶⁹

The feud over methodology between the legal realists and the formalists in the United States of America that marked the early decades of the previous century is no longer pertinent, since 'all [are] realists now'.⁷⁰ The outcome of that disagreement still resonates through the passages of law schools around the globe; albeit in a different guise. New methodological turf wars are now raging between the various successors to the Realist School, especially in American law schools.⁷¹ In the global world, South African legal scholars have little choice but to take note of these developments, and through their teaching and research, align themselves with one of many schools of thought ranging from the conservative 'Law and Economics School' on the right, to the Critical Legal Studies Movement on the left – with some choices, mostly liberally inclined, tucked in the middle.⁷²

The Law and Society Movement covers part of that liberally-inclined middle ground and Rustad calls this movement 'the closest intellectual heir to Llewellyn's approach to legal studies'.⁷³ Like the Realists, the Law and Society Movement places emphasis on, amongst other things, a consideration of the application of rules to resolve

⁶⁸ This juxtaposition was espoused by Roscoe Pound, a proponent of the sociological study of law, who is generally regarded as one of the predecessors of Legal Realism: Rustad 146.

⁶⁹ KN Llewellyn *The Bramble Bush: On Our Law and Its Study* (1996) Oceana Publications Inc: New York 2.

⁷⁰ Hull 1303. See also Jacob 407ff.

⁷¹ Rustad 142-146.

⁷² Rustad 142.

⁷³ *Ibid.*

disputes.⁷⁴ Of importance to the adherents to this school is the matter of ‘law in action’ as opposed to ‘law in books’.⁷⁵ In this thesis I draw on this approach, as is also evident from 1.3.1.1 above, where one of the other fundamentals of the Law and Society Movement is discussed.

The Law and Society Movement is diverse and the approaches followed and methodologies implemented by its adherents are numerous.⁷⁶ The interpretations ascribed to ‘law in action’ are plentiful. Writing on a revival (and renewal) of the old Realist tradition by the so-called New Realists (an approach followed by some within or related to the Law and Society and/or Critical Legal Studies Movements), Macaulay notes that the term ‘law in action’ was interpreted in the 1950s and 1960s ‘to include both the gaps between the law on the books and what happened in legal institutions, and, the problems were avoided, suppressed, and dealt with apart from official public norm, sanctions and institutions’.⁷⁷ For adherents to this approach, the consideration of the impact of law on society is of the greatest importance in the study of law. In this thesis I set out to determine the impact and success (or the lack of success) of the Equality Act in relation to complaints of racism. This is done by considering the application of the Equality Act by the presiding officers at selected court sites against the background of the transformation objectives of the Act.⁷⁸ In considering the application of the Act, I rely on information that I collected at the selected court sites regarding complaints made to the equality courts.

For purposes of this thesis, I have chosen a ‘bottom-up’ approach, utilised in many different variations by adherents of the Law and Society Movement.⁷⁹ A ‘bottom-up’ approach refers to the application of the Act at the level of magistrates’ courts, as

⁷⁴ FE Lucey ‘Natural Law and American Realism: Their Respective Contributions to a Theory of Law in a Democratic Society’ (1942) 30 *Georgetown LJ* 493 at 505; Hull 1310; Rustad 142.

⁷⁵ Rustad 143; Galanter 544.

⁷⁶ See for instance Jacob in general and the possibilities for law and society researchers raised by the author 408ff.

⁷⁷ Macaulay 387. See Macaulay in general for a discussion of the link between New Realists and the Law and Society Movement. See also Handler *et al* 508-509; AF McEvoy ‘A New Realism for Legal Studies’ (2005) *Wisconsin LR* 433 at 443ff.

⁷⁸ See Handler *et al* 501 on ‘implementation studies: ... the scholar can try to assess the efficacy of the regime’s current practices in vindicating its articulated roles’.

⁷⁹ See Handler *et al* 484-485 on the rationale for a ‘bottom-up’ approach. Research in the Law and Society movement in the USA has, over the years, moved its focus from ‘the Supreme Court to the trial court’: Galanter 543.

opposed to its application at the level of high courts⁸⁰ for the purpose of considering the impact of the Act.⁸¹ The magistrates' courts are the courts closest (hierarchically) and most accessible (physically and financially) to the majority of South Africans.⁸² The realisation of the constitutional vision of an egalitarian society is, insofar as the judicial branch is concerned, not limited to higher courts.⁸³ For this reason, an investigation at the level of the lower courts is valuable.⁸⁴ The scope and scale of this thesis do not allow me to consider the views of the litigants or court officials involved in matters before the equality courts, which admittedly, would give a more expansive perspective on the impact of the law on society. Time and resource constraints allowed only a consideration of the written materials – court documents – collected at these courts. The selection of these sites and the collection of information is discussed in chapter 7.

This thesis is the fruit of a combination of approaches and methodologies in order to present what can be considered to be a 'gap study', according to Macaulay's definition mentioned above.⁸⁵ In order to do so, different methodologies are employed. In some chapters the methodology resembles a doctrinal (or formal) exposition and consideration of the law, while the methodology in another reflects a more practical orientation which relies on the analysis of information collected at the selected court

⁸⁰ Legal research in South Africa is generally focused on the application of law by higher courts. For an exposition of the different institutional contexts of the higher and lower courts in South Africa see *S v Steyn* 2001 (1) SA 1146 (CC) paras 13-22 per Madlanga AJ.

⁸¹ This does not mean that the application and interpretation by the Act by higher courts will be ignored. In the discussion of the provisions of the Act reference is made to the interpretation and application of the Act by the Constitutional Court, the Supreme Court of Appeal and various high courts.

⁸² Jagwanth 201-203. See specifically the quotation (203) from *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 83J-84A: '... [I]t is "inconceivable that those provisions of the [Bill of Rights] which are meant to safeguard the fundamental rights of citizens should not be applied in courts where the majority of people have their initial and perhaps only contact with the provisions of the Constitution, namely the lower courts. Such an interpretation would frustrate its very purpose of constituting a bridge to a better future. It would negate the principle of accountability or justification in those courts where most of the day to day administration of justice takes place.'" See also *S v Steyn* 2001 (1) SA 1146 (CC) para 18.

⁸³ Sections 165 and 166 of the Constitution. Jagwanth 202-203, 214.

⁸⁴ See Jagwanth 213: 'However, the Acts [including the Equality Act] must be seen as an important first step in bridging the gap between the superior and lower courts in South Africa, and the beginning of the process of allocating responsibility to magistrates to perform constitutional functions through the interpretation and enforcement of legislation.'

⁸⁵ But see Galanter 546 who discredits 'gap' studies as separating 'rule' and 'context' and who notes that 'gap' studies have been replaced by studies that consider 'the matrix of conditions in which rules and other features are intertwined.' I attempt to link the rule and the context in the course of the thesis, and do not view 'gap' studies as necessarily divorcing rule and context. The application of a rule must always be considered in context and the impact of context on the formulation of a rule cannot be denied.

sites. The analysis of the information is aimed at an appraisal of the extent to which the implementation of the Act – on both procedural and substantive levels – is successful in relation to complaints concerning racism. Doctrinal and realist methodologies are combined in this thesis to identify some of the shortcomings in the legislation and its application so as to yield a proposal of workable improvements/changes thereto in the light of the objectives of the legislation.⁸⁶

1.3.2 Structure

In this introductory chapter I define the key concepts and explain the methodology that I use in this thesis to explore the legal response to racism as set out in the Promotion of Equality and Prevention of Unfair Discrimination Act. I also provide an exposition of the approach, methodology and structure used in this thesis.

Chapter 2 sets out the historical significance of race in South African constitutional law. This chapter traces the history of race through the colonial and apartheid periods. It paints a picture of a state founded on racism in which law was one of the major forces that entrenched racism and racist practices in both state and society. As such it forms the background for the consideration of the transformation driven by law that is set as a goal of the new constitutional order.

Chapter 3 sets out and provides an analysis of the applicable international law standards in relation to racial equality as these apply to South Africa. The chapter contains an exposition of international law which incorporates an historical overview of the development of international law as relevant to complaints of racism and the ideals of racial equality. I also consider the interpretation of the international law standards by the authorities clothed by international law to make pronouncements regarding their scope and application.

Chapter 4 of the thesis contains an exposition and analysis of the constitutional equality standard. It specifically deals with the equality right insofar as this right

⁸⁶ See Macaulay 398ff.

prohibits unfair discrimination. The chapter contains an analysis of the Constitutional Court's equality jurisprudence on non-discrimination as well as a proposal for the refinement of the analysis proposed by the Constitutional Court. The proposal is specifically aimed at setting a standard for constitutionally mandated legislation regarding the equality right.

Chapters 5 and 6 deal with the Equality Act. Chapter 5 considers transformative constitutionalism as a background to the Act. It furthermore considers the history of the drafting of the Act, its reactive provisions and remedies as they are relevant to complaints of racism, as well as the role of the common law in relation to the Act. Chapter 6 sets out the operational framework of the Act and the support structures for the implementation of the Act.

Chapter 7 of the thesis considers the application of the Act at selected equality courts. In this chapter I analyse the successes and failures of the Act in addressing complaints of racism. For the purpose of appraising the Act, I rely only on information gathered from equality courts at the level of the lower courts.

The thesis is concluded by chapter 8 which ties the arguments of this thesis together. The conclusions drawn in earlier chapters are not repeated, but rather are analysed. In this chapter I consider the provisions and application of the Equality Act in complaints of racism against the standards of international law, as well as that set by the Constitution. I engage in an appraisal of the legislative framework and operations of the equality courts against the benchmarks identified in the earlier chapters. I set out specific recommendations in this concluding chapter.

Chapter 2

HISTORICAL BACKGROUND: CONTEXTUALISING RACE IN SOUTH AFRICAN CONSTITUTIONAL LAW

2.1 INTRODUCTION

The Constitution and the legislation passed in order to further the constitutional ideals of equality, dignity and freedom originate in society and exist for the benefit of society.¹ As such the Constitution and the legislation must be interpreted against the background of the history of our society. If it is said that racism, racialism and race-thinking are prevalent in South African society, the history of South Africa needs to be explored to determine the origins and extent of such beliefs and/or thinking.

This chapter traces the legal historical significance of race in South Africa and deals with race in constitutional law, as this has been a source of racism. Anecdotal accounts of life under colonialism and apartheid, while valuable, fail to paint the full picture of the role of law in the shaping and entrenchment of racism in South Africa. My emphasis on the role of law in entrenching racialism and racism in South Africa is conscious, since law now has the task of redressing past injustices that were entrenched and perpetuated by law under colonialism and apartheid.

This chapter consists of two main parts, one dealing with colonial South Africa and the other with South Africa under apartheid. This division is not strict and the influences of the first period resound strongly in the latter. My aim is not to provide a detailed account of South African constitutional history but rather to identify themes in relation to race that developed in South African constitutional law through the years.

¹ Much has been made of the need for the interpretation of the Constitution in its historical context. See for instance *S v Makwanyane* 1995 (3) SA 391 (CC) para10 per Chaskalson P; para 262 per Mahomed J; paras 322-323 per O'Regan J. See also P de Vos 'A bridge too far? History as context in the interpretation of the South African constitution' (2001) 17 *SAJHR* 1.

2.2 COLONIAL SOUTH AFRICA

2.2.1 A Dutch Foothold at the Cape

From 1590 onwards Dutch and English ships regularly visited Table Bay en route to and from Europe and the Indies.² Table Bay provided a mid-way stop between Europe and the East for the crew members of these ships who were often ill and in need of fresh supplies. These visits led to interaction in the form of barter between the indigenous Khoikhoi and the visiting Europeans, with the former providing fresh beef and mutton in exchange for copper, iron and tobacco.³ Sometimes the interaction extended over long periods of time during which the Europeans came to know the habits of some of the indigenous people.⁴

The Dutch East India Company was a private commercial company owned by shareholders and managed by an executive council called the Lords Seventeen.⁵ The decision of the Dutch East India Company to establish a 'fort and garden'⁶ at the Cape of Good Hope was motivated by the commercial advantage that it would have for the Company.⁷ Initially the Company had no intention of establishing a colony.⁸ Trade between the East and Europe would be more profitable for the Company if it had a means to ensure the health of its crew on its ships by the provision of fresh food half-way between Europe and the East, and the Cape provided such an opportunity.⁹

As a result of the regular contact between the crew of visiting European ships and the indigenous population, the Europeans formed opinions about the indigenous population which influenced their future decisions. Generally the impressions were

² Elphick and Malherbe 7-10.

³ Elphick and Malherbe 8.

⁴ The Dutch ship, the *Haarlem*, stranded at the Cape in 1648 and the crew members stayed at the Cape for five months during which they interacted with the indigenous Khoi people. See Janz and Proot 3-4.

⁵ G Schutte 'Company and Colonists at the Cape 1652-1794' in R Elphick, R and H Giliomee (eds) in *The Shaping of South African Society 1652-1840* (1989) Maskew Miller Longman: Cape Town 284.

⁶ Janz and Proot 1.

⁷ Janz and Proot 3-4.

⁸ Davenport and Saunders 21.

⁹ Elphick and Malherbe 10; Davenport and Saunders 21; Eybers xviii-xix, at xix: 'They were traders first and legislators afterwards.'

negative. The indigenous population was seen as backward and primitive.¹⁰ In their recommendation to the Directors of the Dutch East India Company that a 'fort and garden' should be established at the Cape, Janz and Proot, two of the crew members of the *Haarlem* which was stranded at the Cape in 1648, put forth a view of the indigenous population which positively influenced the Company in its decision:

'Others will say, that the natives are savages and cannibals, and that no good is to be expected from them, but that we must always be on our guard; this is, however, only a popular error (*Jan Hagel's praetjen*) as the contrary shall be fully shown, but that they are without laws and civil policy, such as many Indians have, is not denied; that some of our soldiers and sailors have also been beaten to death by them, is indeed true; but the reasons why, are, for the exculpation of our people who give them cause, always concealed; for we firmly believe, that the farmers in this country [the Netherlands], were we to shoot their cattle or take them away without payment, if they had no justice to fear, would not be one hair better than these Natives.'¹¹

Even though this view carried the undertones of the time during which it was formulated, it was uncommonly positive. Prior to his departure for the Cape of Good Hope, Jan van Riebeeck expressed a more cynical view about the indigenous population:

'[T]hey are by no means to be trusted, but are a savage set, living without conscience....'¹²

By the time that the Dutch arrived at the Cape in 1652, they had firm ideas about the 'savage' nature of the 'inferior' indigenous population at the Cape. Despite their misgivings about the indigenous people, the Dutch had a very definite plan for the indigenous population in mind, namely, the provision of cattle and sheep through trade.¹³ The possibility of employing indigenous people and converting them to the

¹⁰ Davenport and Saunders 23.

¹¹ Janz and Proot 3.

¹² J van Riebeeck 'Further considerations and reflections upon some points of the Remonstrance presented by Mr Leendert Janz, upon the project of establishing, at the *Cabo de Boa Esperance*, a Fortress and Plantation, and whatever more there may be in due time expected to contribute most to the service of the Company July 1651' in D Moodie (translator, editor) *The Record; or A Series of Official Papers Relative to the Condition of the Native Tribes of South Africa* (MDCCCCLX) AA Balkema: Amsterdam 5.

¹³ D Pruijs 'Instructions for the Commanders proceeding for the service of the said Company, with their ships *Drommedaris*, *Reijger*, and the yacht the *Hoop*, to the *Cabo de Boa Esperance* 25 March 1651' in D Moodie (translator, editor) *The Record; or A Series of Official Papers Relative to the Condition of the Native Tribes of South Africa* (MDCCCCLX) AA Balkema: Amsterdam 7-8.

Christian religion were fringe considerations to the commercial motivation for the establishment of a refreshment station at the Cape.¹⁴

2.2.2 Issues of Race during the Dutch Occupation

The arrival of Van Riebeeck at the Cape of Good Hope concretised the earlier prejudicial ideas of the Dutch regarding the indigenous population in terms of settlement practices. The Dutch employees of the Company established a separate settlement for themselves and viewed themselves as a separate superior group from the indigenous population with whom they wanted to barter to obtain meat to provide to passing ships and to feed themselves.¹⁵

Soon after his arrival, Van Riebeeck entertained the possibility of allowing free men to settle at the Cape thus establishing a colony, and not merely a halfway-house, between the East and Europe.¹⁶ From 1652 to 1657 the production of fresh produce was the exclusive task of the employees of the Company. The produce of the Company employees was not enough to fulfil the needs of the settlement and to provide to the passing ships.¹⁷ Van Riebeeck's vision of establishing a community of free burghers became a reality when the Lords Seventeen granted permission to allow free farming in 1656.¹⁸ In February 1657 land was allocated to the first free burghers who were no longer employees of the Company, but still subjects thereof. These free burghers had certain economic freedom and, most importantly, acquired the right to own land.¹⁹ In this way, a third group (separate from the company employees and the

¹⁴ See, for instance, Janz and Proot 4: 'By maintaining a good correspondence with them [the indigenous population] we shall be able in time to employ some children as boys and servants, and to educate them in the Christian Religion, by which means, if it pleases God Almighty to please this good cause, as at Tayouan and Formosa, many souls will be brought to God and to the Christian Reformed Religion, so that the formation of the said Fort and Garden, will not only tend to the gain and profit of the Honourable Company, but to the preservation and saving of many men's lives, and what is more, to the magnifying of God's holy name, and to the propagation of his gospel, whereby, beyond all doubt, your Honors' trade over all India will be more and more blessed.'

¹⁵ Leipoldt 118ff. The author indicates that the development of the trade relationship between the Dutch and the indigenous Khoikhoi was slow.

¹⁶ Leipoldt 31.

¹⁷ Guelke 69.

¹⁸ Leipoldt 171. The author points out that the report of Commissioner Van Goens, who was in favour of permanent colonization, was instrumental in obtaining the necessary permission.

¹⁹ Guelke 70.

indigenous population) came into existence at the Cape and the settlement became a colony.

The number of free burghers increased rapidly.²⁰ The small plots of land that had been allocated to the first free burghers proved to be inadequate since the intensive farming methods, based on their experience in the Netherlands, were not successful at the Cape.²¹ The free burghers turned to extensive farming (especially stock farming) for which more land was needed. Consequently, bigger plots of land were allocated and free burghers could, in addition, obtain loan farms from the Company for grazing purposes.²² The Company encouraged immigration from Europe and the white population at the Cape grew steadily. Dutchmen and Germans (mainly former employees of the Company), and later, French people, came to the Cape in search of a better future.²³ The practice of granting bigger plots of land as free and loan farms to free burghers and 'trekboere' invariably led to the expansion of the colony eastwards and northwards.²⁴

Initially the Khoikhoi were regarded only as trading partners, but with the increase in labour needs as a result of extensive farming practices, more and more Khoikhoi were employed by the free burghers and 'trekboere' who lived on the frontier.²⁵ The frontier farmers viewed themselves as superior to the Khoikhoi labourers they employed and to the slaves that they owned.²⁶ In their eyes, what set them apart from the 'heathens' who served them, was their Christian religion.²⁷ Guelke adds that race, in addition to religion, added to this group formation.²⁸ Frontier farmers shunned white males who entered into relationships with Khoikhoi women.

A further group was added to the three groups identified above (viz. Company employees, Khoikhoi and free burghers) with the introduction of slavery at the Cape in

²⁰ Leipoldt 171.

²¹ Guelke 70-71.

²² Guelke 73-75; Davenport and Saunders 29-30.

²³ Guelke 57-68. The author points out that the majority of immigrants were 'poverty stricken ... from the lower rungs of European society' (67).

²⁴ Davenport and Saunders 29.

²⁵ Elphick and Malherbe 28.

²⁶ See below for a discussion of slavery at the Cape.

²⁷ Guelke 96-97; Davenport and Saunders 33-35.

²⁸ Guelke 97-99.

1658.²⁹ Prior to 1658 there had been a few personal slaves at the Cape,³⁰ but Van Riebeeck required more slaves to fulfil the labour needs of the refreshment station.³¹ During the time of the Dutch occupation, the Company obtained slaves from Angola, Madagascar, Mozambique, Delagoa Bay, Dahomey and Asia (Bengal, Malabar, Cormandel, Ceylon, Batavia and Macassar).³² At the time slavery was an established and acceptable institution³³ and the Dutch East India Company regulated it by law, namely the Statutes of India of 1632 and the amendments thereto.³⁴ Private (illegal) slave trade also accounted for a number of slaves from a variety of origins.³⁵ Slaves were kept by the Company and by free burghers and they contributed significantly to the economy of the young colony through the provision of their labour.³⁶

In time a fifth distinct group, that of free blacks, came into existence at the Cape. This group was made up largely of manumitted slaves. Conversion to the Christian religion and miscegenation contributed to its growth.³⁷ Free blacks were free to own land, but had to render services to the Company. They were organised into separate fire fighting brigades and a separate militia company was established for free blacks.³⁸ Free blacks were not viewed as the complete equals of Europeans and the term 'burgher' was not frequently applied in relation to members of this group.³⁹

From the above it is clear that the Dutch occupation at the Cape led to the formation of distinct groups in law and society. Elphick and Giliomee⁴⁰ indicate that the basis of the structured society lay in the creation of distinctive legal status groups that remained in place for more than 150 years. The groups coincided largely with the difference in skin colour of the people.⁴¹ The Dutch, German and French European settlers viewed themselves, their culture and religion as superior to that of the

²⁹ Armstrong and Worden 111.

³⁰ Armstrong and Worden 111. The slaves who were at the Cape before 1657 were personal slaves belonging to Company employees.

³¹ Leipoldt 185.

³² Armstrong and Worden 112, 121.

³³ Leipoldt 184-185.

³⁴ Armstrong and Worden 110.

³⁵ Armstrong and Worden 117ff. Many of these slaves were bought privately from their owners who were on their way back to Europe. In many instances these slaves were highly skilled.

³⁶ Armstrong and Worden 122-136. See also Leipoldt 187.

³⁷ Elphick and Shell 214.

³⁸ Elphick and Shell 215.

³⁹ Elphick and Shell 215.

⁴⁰ Elphick and Giliomee 522, 528-529.

⁴¹ Elphick and Giliomee 524-526.

indigenous population and the mixed offspring of European men and indigenous women or slaves. Slaves were seen as chattels; inferior to their mainly European owners. By the end of the Dutch occupation, society at the Cape was stratified along racial lines. The racial groups within society had different rights 'to land, to free movement, to marriage, to inheritance and to justice'.⁴² Such was the society into which the British extended its influence at the end of the eighteenth century.

2.2.3 British Occupation

The reign of the Dutch East India Company ended in 1795 with the British occupation of the Cape after war had broken out between France and Britain. The Dutch supported France in the war and consequently expelled the Prince of Orange from the Netherlands, who then fled to Britain where he gave orders for the British to occupy the Cape.⁴³ In 1803 the Cape was returned to Dutch rule under the Batavian Republic, but the second Dutch occupation was short-lived: in 1806 the British occupied the Cape for a second time which was to extend over the next century and longer.

The previous section has indicated how a hierarchy of racial groups was formed in South Africa and sets out how racialism and racism became embedded in South African society. In what follows the focus shifts to constitutional developments insofar as these were significant for the identified racial groups.

2.2.3.1 The Build-up to the formation of the Union of South Africa in 1910

The Union of South Africa was formed in 1910 when the four British colonies, the Cape Colony, Natal, the Free State and Transvaal, were united under British rule. In the years after the second British occupation, these colonies existed as separate constitutional entities; each with its own practices, policies and legislation in relation to issues of race. Each of these constitutional entities will be discussed in turn.

⁴² Elphick and Giliomee 554.

⁴³ Eybers xviii-xxvi.

2.2.3.1.1 The Cape Colony until 1910

The constitutional history of the Cape Colony under British rule is marked by two major developments. These are the granting of representative government in 1853 and subsequent to that, the granting of responsible government in 1872.⁴⁴

The Cape Colony was governed as a Crown Colony until 1853 and the early years of British occupation saw a strong centralisation of governmental power.⁴⁵ During these years the British attempted to establish 'the English way of life' in respect of language, laws and institutions at the Cape.⁴⁶ The strong government was tolerated by the Cape colonists, but they soon agitated for representative government.⁴⁷ In response to these requests, a nominated Advisory Council was introduced in 1825.⁴⁸ This was seen as the first step in the direction of representative government. At the same time the colonial government had to grapple with the unrest on the eastern frontier⁴⁹ and the exodus of scores of Voortrekkers from the Colony.⁵⁰ In 1834 a decision-making Executive Council was established in the Colony. This was a nominated body consisting of five people who fulfilled executive functions and which was later enlarged to seven people as legislative capacity was added to its duties.⁵¹ The powers of this body were limited since the Governor retained the bulk of the power.⁵²

Race relations received attention during the early years of British occupation. One of the most important developments in this regard was the abolition of slavery. Another important measure insofar as race relations were concerned, was the consolidation and extension of 'Hottentot'⁵³ liberties. The policies for the abolition of slavery and the

⁴⁴ Eybers xxvi.

⁴⁵ Eybers xxvii-xxxv; Hahlo and Kahn 51.

⁴⁶ Davenport and Saunders 44-46. Part of this drive was the settlement of about 4000 British settlers in the Albany district in the 1820s.

⁴⁷ Eybers xxviii.

⁴⁸ Eybers xxix; Hahlo and Kahn 52. The advice of this council could be ignored by the Governor provided that he explained his reasons to the Secretary of State.

⁴⁹ Nine wars were fought between the Xhosas and the white population on the eastern frontier in the period between 1778-1878. See for instance the discussion of Davenport and Saunders 136-139 on the Sixth Frontier War that took place in the 1830s.

⁵⁰ Eybers xxxi.

⁵¹ Davenport and Saunders 103.

⁵² Davenport and Saunders 103.

⁵³ This term is used in the sources to refer to the indigenous Khoikhoi population.

consolidation and extension of 'Hottentot' liberties were conceived during the second Dutch occupation and the British gave effect to the policies thus formulated.⁵⁴ A further significant development was the introduction of pass laws in 1828. These will be discussed below.

In anticipation of the abolition of slavery in 1834, a variety of measures were introduced.⁵⁵ So, for instance, a slave registry was introduced in 1816 and minimum standards were set in respect of clothing, food and working hours for slaves in 1823. An official protector for slaves was appointed in 1826 and slaves could, from that year onward, buy their own freedom.

The second important development was the acceptance of legislation to restore the freedom and status of the indigenous population. According to Hahlo and Kahn, both Roman-Dutch Law and English common law would have treated the indigenous population as equals before the law.⁵⁶ It was, however, not the common law, but the need for labour at the Cape that determined the status of the indigenous population.⁵⁷ Ordinance No 50, the Extension of 'Hottentot' Liberties of 17 July 1828, aimed at restoring the common law position in relation to the status of the indigenous Khoikhoi people.⁵⁸ This ordinance was enacted to change 'usage and custom of the Colony' in terms whereof members of the indigenous population and other free black persons 'have been subjected to certain restraints as to their residence, mode of life, and employment, and to certain compulsory services to which others of His Majesty's Subjects are not liable'.⁵⁹ Seemingly, white inhabitants forced members of the indigenous population and other free blacks to work for them under the pretence that they were guilty of vagrancy. The legislation furthermore stipulated that members of the indigenous population and other free blacks could acquire land in the Colony.⁶⁰

⁵⁴ Eybers xxx-xxxi; Davenport and Saunders 46-47.

⁵⁵ Davenport and Saunders 47.

⁵⁶ Hahlo and Kahn 794.

⁵⁷ Hahlo and Kahn 794. The authors refer to a proclamation of 1809 issued by the Governor of the Cape Colony which stated that Coloureds were to have a fixed place of residence, that they could not own land and required a pass to move around. See in this regard also Joffe 59-60.

⁵⁸ The Extension of Hottentot Liberties [17 July 1828] Ordinance No 50 as published in Eybers 26.

⁵⁹ The Extension of Hottentot Liberties [17 July 1828] Ordinance No 50 s II.

⁶⁰ The Extension of Hottentot Liberties [17 July 1828] Ordinance No 50 s III.

While Ordinance No 50 extended the liberties of the Khoikhoi and free blacks, Ordinance No 49 of 1828 was aimed at restricting the entry of the amaXhosa who entered the Colony in search of work.⁶¹ This Ordinance required 'natives' to carry passes when entering the Colony. With the proclamation of this ordinance, pass laws were introduced in South Africa, which in later years caused major upheavals.

The agitation for representative government led to the passing of 'an unusually liberal constitution' for the Cape Colony in 1853.⁶² In terms of this constitution, the parliament of the Cape of Good Hope was to consist of the Governor, a Legislative Council and a House of Assembly. Representative government introduced parliamentary sovereignty as a pillar of the constitutional system in the Cape Colony. The unrestricted power granted to this unrepresentative body created scope for the abuse of human rights.⁶³

The representatives in the Legislative Council and the House of Assembly were elected.⁶⁴ The franchise requirements were low: male persons over the age of 21 and not subject to legal incapacities, who occupied property to the value of £25, or received a salary of £50 per year or £25 per year with board and lodging, could register to vote and exercise their vote for representatives in the Legislative Council and the House of Assembly.⁶⁵ Any male person over the age of 30 who was eligible to vote and who owned fixed property to the value of £2000 could be elected.⁶⁶ The franchise requirements were lower than those recommended by the Cape Council, which wanted to restrict the franchise of free blacks.⁶⁷ As set out in the constitution, the franchise requirements reflected the view of the imperial government which

⁶¹ Haasbroek 25; Hahlo and Kahn 794-795. The authors note that this ordinance was believed to be technically invalid, but that it was enforced despite technical problems.

⁶² Eybers xxiii. Not everyone is in agreement about the 'liberal' nature of this constitution. Haasbroek 35ff points out that the constitution was drafted after a lengthy struggle between conservatives and liberals at the Cape.

⁶³ Dugard 17. It has to be borne in mind that parliamentary sovereignty was accepted throughout the colonized world at the time.

⁶⁴ The Cape of Good Hope Constitution Ordinance [3 April 1852] s 1 as published in Eybers 45.

⁶⁵ The Cape of Good Hope Constitution Ordinance [3 April 1852] s 8 as published in Eybers 48. Eybers xxxiii points out that the occupation requirement was included at the insistence of the imperial government that wanted to include coloured voters. The Cape Council, on the other hand, wanted to raise franchise requirements by insisting on ownership of property.

⁶⁶ The Cape of Good Hope Constitution Ordinance [3 April 1852] s 33 as published in Eybers 49.

⁶⁷ Hahlo and Kahn 54.

favoured the granting of franchise on the basis of civilisation rather than colour.⁶⁸ In reality, these requirements still excluded the majority of free blacks who were not able to meet the franchise requirements.⁶⁹

Representative government was introduced in 1872. Representative government meant that the majority party gained control of the executive.⁷⁰ Representative government furthermore brought about the creation of the office of the Commissioner of Crown Lands and Public Works and the creation of an office for the Secretary of Native Affairs.⁷¹ The creation of these offices was inextricably linked to the issue of defence.⁷² The imperial government's standard rule was that 'when responsible government is given to a colony it must provide for its own internal order and for its defence against savage peoples on its borders'.⁷³

As the Colony expanded through annexation of land on the eastern frontier, the indigenous population of the Colony grew and more blacks met the franchise requirements that had been set in 1853. Fears of the impact of the 'native vote' led to the passing of the Narrowing of Parliamentary Franchise Act 9 of 1892 which laid down stricter franchise requirements.⁷⁴ The property occupancy requirements were raised to £75; the franchise of those who earned £25 plus board and lodging was taken away and an additional requirement of being able to 'sign his name and to write his name and occupation' was introduced.⁷⁵ These requirements meant that few black inhabitants of the colony met the franchise requirements.

The Glen Grey Act of 1894 followed shortly on the restrictions of the franchise rights of black inhabitants of the Colony. This Act was passed while Cecil John Rhodes was the prime minister of the Cape Colony. It provided for individual land tenure for black

⁶⁸ Hahlo and Kahn 54.

⁶⁹ Eybers xxxiii.

⁷⁰ Haasbroek 89.

⁷¹ Responsible Government [28 November 1872] No 1 of 1872 s 1 as published in Eybers 63.

⁷² Eybers xxxviii.

⁷³ Eybers xxxix.

⁷⁴ Hahlo and Kahn 58 state as follows: '[A]s the boundaries of the colony swelled, the unappealing prospect of hordes of uncivilized "blanket kaffirs" dominating the polling booths persuaded Rhodes to secure a tightening of the liberal franchise requirements.'

⁷⁵ Eybers xli.

people in the form of perpetual quitrent over four morgen erven.⁷⁶ The Glen Grey Act was preceded in 1879 by legislation providing for the expropriation of land to create 'native locations'.⁷⁷ This Act formed part of Rhodes' native policy which was aimed at securing the labour of indigenous people, excluding them from the broader political process, and keeping them under the control of the white minority.⁷⁸

2.2.3.1.2 Natal until 1910

During the first years of the British occupation of the Cape Colony, very few white settlers moved into the territory of Natal.⁷⁹ The territory was beyond the borders of the Cape Colony and the British did not concern themselves with matters of governance beyond the borders of the colony. The massive exodus of Dutch settlers (Voortrekkers or trekkers) from the Cape Colony to Natal in 1838 drew the attention of the British authorities to the area.⁸⁰ In response to the exodus, British authority was extended beyond the borders of the Cape Colony in order to ensure that the trekkers were subject to the laws of the Cape Colony.⁸¹ In addition to this measure, the British acknowledged, either formally or informally, the authority of some indigenous chiefs in whose territory the trekkers settled.⁸² Despite these measures to counter their wishes for self-government, the Voortrekkers proclaimed the Republic of Natalia in 1839.⁸³ The short-lived republic had a *Raad van Representanten van het Volk* for which all white males could vote.⁸⁴ The British annexed the territory of Natal in 1842 and the territory was governed as a Crown Colony from 1842 to 1856.⁸⁵

⁷⁶ Davenport and Saunders 190-191. The Act also prohibited squatting and provided for the raising of taxes.

⁷⁷ Joffe 117.

⁷⁸ See Davenport and Saunders 109; Joffe 117.

⁷⁹ Eybers xlv. The few white settlers who moved to Natal established themselves as traders in the area.

⁸⁰ Eybers xlv. The author lists diverse reasons for the Great Trek: unwillingness to be ruled by the British; dissatisfaction with absolute rule by the British; legislation requiring better treatment of slaves; absence of compensation when slaves were set free; lack of protection against attacks by the indigenous population; and the desire for independence. See also Haasbroek 31-32; Davenport and Saunders 77ff.

⁸¹ Eybers xlv. See also Eybers 146: British Authority Beyond Cape Borders [13 August 1836].

⁸² Eybers xlv-xlvi.

⁸³ Davenport and Saunders 80.

⁸⁴ Davenport and Saunders 80.

⁸⁵ Eybers xlviii. Natal resorted under the Cape Colony until the establishment of a legislative council for Natal in 1847.

In 1856 Natal was established as a separate colony under the control of a Governor, assisted by an appointed Executive Council.⁸⁶ The legislative authority of the new colony was vested in a sixteen-member Legislative Council, twelve of whom were elected.⁸⁷ Franchise requirements for the election of representatives in the Legislative Council were not restricted in terms of race, but the property requirements provided for in the Charter of Natal were stringent. Section 11 of the Charter provided:

‘Every man, except as hereinafter excepted, above the age of twenty-one years, who possesses any immovable property of the value of Fifty pounds or who rents any such property of the yearly value of Ten pounds within any electoral district and who is duly registered in manner hereinafter mentioned, shall be entitled to vote at the election of a member for such district.’

The section went on to enable communal land owners to qualify for the franchise.

In 1865 the Legislative Council of Natal severely restricted the franchise rights of the indigenous population in order to restrict their influence on the process of governance in Natal.⁸⁸ In terms of the 1865 legislation, only native men who had stayed in the Colony for 12 years, who had been exempted from native law for seven years, who satisfied the property qualification and who could produce a certificate signed by three white voters, recommending them to be qualified for the vote, were allowed the franchise. These restrictions made it virtually impossible for black voters to qualify.⁸⁹ At more or less the same time, in 1864, a ‘Native Trust, a body corporate consisting of the Governor and members of the Executive Council’ was established, ‘to hold and administer land occupied communally by Natives’.⁹⁰ These legal measures effectively excluded the indigenous population in Natal from participating in matters of governance.

The aim of the British in Natal was to govern the whole territory under a uniform system of law.⁹¹ In terms of this goal, the law and traditions of the indigenous population had to be ousted and replaced by ‘civilised law’. This proved to be difficult

⁸⁶ Charter of Natal [Letters Patent, dated 15 July 1856] ss 1, 2 and 5 as published in Eybers 188-189.

⁸⁷ Charter of Natal [Letters Patent, dated 15 July 1856] ss 6 and 7 as published in Eybers 189.

⁸⁸ The Native Franchise Act 11 of 1865 as published in Eybers 194.

⁸⁹ Hahlo and Kahn 67.

⁹⁰ Hahlo and Kahn 67.

⁹¹ Haasbroek 49.

and the colony attempted to deal with the 'native problem' differently.⁹² According to Eybers, the 'native problem' included the question whether the Zulus could 'be put to any use for the purposes of labour, defence or commerce, and if so, what return could be made them as a people for the services rendered?'⁹³ Under the guidance of Shepstone, who 'believed in control, not civilisation of the noble savage',⁹⁴ a policy of separation between the black and the white population of the colony was embraced. The Administration of Justice Among Natives Ordinance⁹⁵ was passed in 1849. This Ordinance introduced the idea of a repugnancy clause in relation to customary law in South Africa for the first time.⁹⁶ The repugnancy clause in this Ordinance, like those in successive pieces of legislation, provided that customary law is to be applied in disputes between 'natives', unless it is repugnant 'to the general principles of humanity, recognised throughout the whole civilised world'.⁹⁷ The Ordinance furthermore provided for the application of 'native laws and customs' in matters between 'natives' under the supervision and control of the Lieutenant-Governor through appointed officials. Chiefs and headmen were instrumental in the hierarchical governmental structure established by Shepstone in which the Lieutenant-Governor occupied the position of the 'Supreme Chief of the native tribes'.⁹⁸ The Lieutenant-Governor acquired wide, if not absolute powers, in respect of 'native' affairs.⁹⁹ Through the introduction of this Ordinance a system of indirect rule of the indigenous population came into being with the colonial powers administering the affairs of the indigenous population by means of control over traditional leaders.

The 1849 Ordinance was repealed by the Native Administration Law of 1875. This law deviated from Shepstone's vision of indirect rule in that it brought the administration of justice, as far as the indigenous population was concerned, back into

⁹² Eybers xlix.

⁹³ Eybers xlix-l.

⁹⁴ Hahlo and Kahn 321.

⁹⁵ The Administration of Justice Among Natives Ordinance No 3 of 1849 as published in Eybers 235. The preamble of this ordinance is noteworthy: 'Whereas the said District of Natal is inhabited by numerous Tribes, Natives of the said District, or of the Countries thereunto adjacent, whose ignorance and habits unfit them for the duties of civilized life, and it is necessary to place them under special control, until having been duly capacitated to understand such duties.'

⁹⁶ Shepstone played a key role in the passing of the Ordinance. Hahlo and Kahn 321 note that Shepstone 'virtually dictated native policy in Natal from 1845-75'.

⁹⁷ The Administration of Justice Among Natives Ordinance No 3 of 1849 s 7 as published in Eybers 238.

⁹⁸ The Administration of Justice Among Natives Ordinance No 3 of 1849 preamble, ss 2-4 as published in Eybers 237. Hahlo and Kahn 322; Verloren van Themaat 226.

⁹⁹ Eybers lvi-lvii.

the main stream through the provision of a court system in the central administration to deal with suits between 'natives'.¹⁰⁰ The recognition extended to 'native law' remained subject to a repugnancy clause.¹⁰¹ The 1875 legislation paved the way for the drafting of a Code of Native Law which codified customary law and which could be amended by the executive.¹⁰² A separate legal system, administered by white colonialists and a system of governance that virtually excluded black voters meant that the indigenous population of Natal were treated as subjects rather than citizens.¹⁰³

The white settler and indigenous Zulu population formed two distinct groups in pre-unification Natal with their respective statuses determined differently by law. From 1860 until 1870 group of Indian immigrants arrived in Natal to work as indentured labourers on the sugar plantations.¹⁰⁴ The immigrants were initially indentured for five years after which their contracts would be renewed for another five years. After ten years of labour, the labourers earned a free passage back to India. Some Indian labourers returned to India after ten years, but many chose to stay.¹⁰⁵ Many Indians who chose to stay bought land and became market gardeners.¹⁰⁶ In addition to the indentured labourers, another group of Indians immigrated to Natal in the 1870s who involved themselves mainly in trade. Some white Natalians felt threatened by the Indian presence and attempts were made to discourage permanent settlement. So for instance, was poll tax imposed, were trading licences refused and attempts made to disenfranchise Indian voters.¹⁰⁷

Shortly after representative government was granted in 1893,¹⁰⁸ the Natal legislature passed the Franchise Amendment Act in 1896.¹⁰⁹ In terms of this Act no further 'natives' or Indians were enfranchised unless they were exempted from the operation

¹⁰⁰ Hahlo and Kahn 322.

¹⁰¹ Hahlo and Kahn 323.

¹⁰² Hahlo and Kahn 323.

¹⁰³ See M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) Princeton University Press: Princeton chapter 1 and part II.

¹⁰⁴ Davenport and Saunders 120-121; Haasbroek 56ff.

¹⁰⁵ Davenport and Saunders 120-121; Haasbroek 56ff.

¹⁰⁶ Hahlo and Kahn 805.

¹⁰⁷ Hahlo and Kahn 805.

¹⁰⁸ The Constitution Act No 14 of 1893 as published in Eybers 204. In terms of this Act members of the Executive Council had to become (and be) members of the Legislative Council.

¹⁰⁹ The Franchise Amendment Act 8 of 1896 as published in Eybers 215.

of this legislation by the Governor.¹¹⁰ This enactment limited the number of black voters in the colony and thereby minimised the potential impact of indigenous or Indian voters on the governing process.¹¹¹

The legacy that Natal carried into unification was, like that of the Cape Colony, one of racial stratification and racism. The indigenous population was subjected to indirect rule and had, like the Indian population of Natal, very little say in matters of governance.

2.2.3.1.3 The Free State and the South African Republic

The purpose of this historical survey is not to provide a complete overview of the constitutional history of the constituent parts of South Africa prior to 1910, but to reflect on race as a relevant factor in South African constitutional law and to determine how racism came to infuse South Africa law and society. The Free State and the South African Republic shared – at least to some extent – a background. In what follows, these two states, later colonies, are considered together. Both these republics were established by Dutch- (or Afrikaans-) speaking trekkers who wanted to escape from British rule. These trekkers shared a constitutional perspective in respect of the position of the indigenous population.

The South African Republic came into existence in 1852 as a result of the Sand River Convention. In terms of the Convention, the ‘emigrant farmers beyond the Vaal River [were granted] the right to manage their own affairs and to govern themselves according to their own laws, without any interference on the part of the British government’.¹¹² Circumstances on the eastern frontier of the Cape Colony encouraged the British to relinquish their claims on the territory beyond the Vaal

¹¹⁰ Section 2 of the Franchise Amendment Act 8 of 1896.

¹¹¹ Dugard 18 notes that the franchise granted to black people was a ‘token’ franchise with no real impact.

¹¹² The Sand River Convention of 1852 as published in Eybers 358. It was agreed that the British would disclaim all alliances with ‘coloured nations north of the Vaal’.

River.¹¹³ Similarly, the Bloemfontein Convention of 1854 granted independence to the Republic of the Orange Free State.¹¹⁴ In this instance, security challenges posed by the Basotho prompted the decision on the part of the British.¹¹⁵

The Dutch-speaking trekkers north of the Vaal River initially experienced a time of internal conflict which they settled before accepting a lengthy constitution in 1858.¹¹⁶ According to Eybers¹¹⁷ the 1858 Constitution documented all the likes and dislikes the Dutch trekkers carried over from their experience of British Rule in the Cape Colony; it provided for separate political mandates for the legislature and the executive.¹¹⁸ The franchise was restricted to burghers over the age of 21 who were members of the Dutch Reformed Church.¹¹⁹ Section 9 of this constitution is of particular importance for purposes of this discussion: 'The people desire to permit no equality between coloured people and the white inhabitants, *either in Church or State*.'¹²⁰ This disapproval of coloured people was further emphasised in article 31 by the prohibition of 'coloured persons or half-castes' from attending meetings of the legislature. This constitution was 'racist in form', as Dugard points out.¹²¹

The Constitution of the Republic of the Orange Free State created a constitutional framework for this republic based on the model of the United States of America.¹²² The constitution was rigid,¹²³ provided for separate political mandates for the legislature and the head of the executive¹²⁴ and protected certain rights of its citizens

¹¹³ War broke out on the eastern frontier between the British and the amaXhosa under Sandile. The war of 1850 became known as the Eighth Frontier War: J Meintjes *Sandile* (1971) Bulpin: Cape Town 202-229; Eybers 357.

¹¹⁴ The Bloemfontein Convention [23 February 1854] as published in Eybers 281; Van der Walt, Wiid and Geyer 324-344; Davenport and Saunders 282.

¹¹⁵ Davenport and Saunders 282.

¹¹⁶ Eybers lxviii.

¹¹⁷ Eybers lxviii.

¹¹⁸ The Grondwet of the South African Republic [Feb. 1858] arts 12, 29 and 61. One of the major criticisms against this constitution was that it was unclear what the highest constitutional authority in the state was; i.e. whether the legislature or the constitution was supreme. See Eybers lxi and also Hahlo and Kahn 86 for different views. This uncertainty led to the controversy surrounding the decision of Kotze CJ in *Brown v Leyds NO* (1897) 4 Off Rep 17.

¹¹⁹ The Grondwet of the South African Republic [Feb. 1858] art 32 as published in Eybers 368-369.

¹²⁰ Emphasis in original.

¹²¹ Dugard 20.

¹²² Davenport and Saunders 84-86.

¹²³ The Constitution of the Orange Free State [10 April 1854, 1866 etc] art XXVI as published in Eybers 291.

¹²⁴ The Constitution of the Orange Free State [10 April 1854, 1866 etc] arts IV, XIII and XXXI as published in Eybers 287, 288 and 292.

(burghers).¹²⁵ The Orange Free State Constitution provided for equality before the law in article LVII: 'The law is for all alike, always understanding that the judge shall exercise all laws with impartiality and without respect to persons.' This equal protection in terms of the law presumably only pertained to the white inhabitants of the republic.¹²⁶ Franchise was not extended to the 'subject native tribes' in the territory of the Free State, 'but they generally retained their own laws and customs administered by their own chiefs under the guidance of a European official'.¹²⁷ Eybers¹²⁸ notes that two principles in relation to the indigenous population were established in the Free State during the time of its independence: executive control over the indigenous population and segregation through the establishment of 'native reserves'.

Neither the South African Republic nor the Republic of the Orange Free State regarded the indigenous inhabitants of their respective territories as citizens of their republics. The perceived superiority of the white population was statutorily protected and the distinction between white and black was jealously guarded by the ruling white minorities.

In 1868 diamonds were discovered in the Orange Free State.¹²⁹ Shortly thereafter, in 1873, the first alluvial gold deposits were discovered north of the Vaal River in the Lydenburg district.¹³⁰ The economic boom sparked a conflict of interest between the independent republics and British imperialists.¹³¹ Disputes arose as to the ownership of the natural resources. In respect of the diamond fields, Lieutenant-Governor Keate of Natal determined in 1871 that the diamond-rich Kimberley area belonged to the Griqua people, who subsequently requested the British to take over the territory.¹³² The federal aspirations of administrators of the British Empire like Carnavon,

¹²⁵ The Constitution of the Orange Free State [10 April 1854, 1866 etc] arts LVII (equality before the law); LIX (right to property); LX (personal freedom) and LXI (press freedom) as published in Eybers 295-296.

¹²⁶ Hahlo and Kahn 76; Dugard 19 where the author discusses the case of *Cassim and Solomon v the State* (1892) 9 *Cape Law Journal* 58.

¹²⁷ Eybers lxxv.

¹²⁸ Eybers lxxvi.

¹²⁹ Van der Walt, Wiid and Geyer 391; Davenport and Saunders 201. It was not clear whether Du Toitspan (where current day Kimberley is situated) fell within the territory of the Republic of the Orange Free State or within the territory of the Griqua people.

¹³⁰ Van der Walt, Wiid and Geyer 391; Davenport and Saunders 93.

¹³¹ BM Magubane *The Making of a Racist State : British Imperialism and the Union of South Africa, 1875-1910* (1996) Africa World Press: Trenton chapter 4; Davenport and Saunders 201.

¹³² Van der Walt, Wiid and Geyer 379-383; Davenport and Saunders 201-203.

Shepstone and Frere, saw to the annexation of the South African Republic in 1877.¹³³ The difficulties that the government of the South African government experienced in its relations with the indigenous population provided further impetus for the British to intervene.¹³⁴

During the time of British rule in the Transvaal (1877-1881), the position regarding equality between whites and black inhabitants provided for 'equal justice..., but not equal civil rights to Non-whites'.¹³⁵ The British occupation of the territory ended in 1881 after military skirmishes between the British and burghers of the South African Republic.¹³⁶ These were formally ended by the Convention of Pretoria of 1881 which re-established some semblance of independence for the South African Republic. It incorporated the principle of suzerainty in terms whereof the British Crown reserved the right to appoint a British Resident for the territory; the right to move troops through the territory in time of war and the right to control the external affairs of the state.¹³⁷ The Convention also provided for some form of protection for the interests of the indigenous population in the form of 'the royal power of veto on native legislation'.¹³⁸ This arrangement embodied in the Convention was not popular amongst the white inhabitants of the South African Republic. Consequently they agitated for a relaxation of its terms, which was granted and embodied in the London Convention.¹³⁹ In terms of this Convention, the Republic regained control of its 'native policy' and the influence of the Imperial Government on its foreign relations was restricted.¹⁴⁰

In 1886 rich gold reefs were discovered along the Witwatersrand in the South African Republic.¹⁴¹ This provided for major industrial development; investors, miners, businessmen and opportunists flocked to the gold fields. The promise of economic prosperity and the fate of the foreigners in the South African Republic, together with

¹³³ Van der Walt, Wiid and Geyer 395-406; Davenport and Saunders 203-208; Krüger (1969) 328. Carnavon had successfully brought about the Canadian Federation in 1867 and had similar plans for South Africa.

¹³⁴ Davenport and Saunders 165-168.

¹³⁵ Hahlo and Kahn 89.

¹³⁶ Davenport and Saunders 208-209.

¹³⁷ The Convention of Pretoria [3 August 1881] art II as published in Eybers 455.

¹³⁸ Hahlo and Kahn 90. The Convention of Pretoria [3 August 1881] arts XII, XIII, XVIII, XXI, XXII and XXIV protected the interests of the indigenous population.

¹³⁹ Krüger (1969) 332.

¹⁴⁰ Davenport and Saunders 97. See also The London Convention [27 February 1884] as published in Eybers 469.

¹⁴¹ Krüger (1969) 334.

the confederational aspirations of the British imperial government, led to increased tension between the government of the South African Republic and imperialists like Chamberlain, Rhodes and Milner.¹⁴² The differences between the parties could not be bridged and war broke out in 1899.¹⁴³ In terms of a defence agreement between the South African Republic and the Republic of the Orange Free State, the latter joined the war on the part of the South African Republic.¹⁴⁴

The war was ended by the Treaty of Vereeniging of 1902. The former republics became crown colonies and became part of the British Empire. It was agreed between the parties that 'the question of granting the franchise to natives will not be decided until after the introduction of self-government'.¹⁴⁵ Under crown colony government, as well as during the few years of self-government that preceded the formation of the Union, franchise in the two colonies remained restricted to white males with no additional property requirements.¹⁴⁶ The indigenous population in the two colonies remained under indirect and administrative rule of the white colonists.

The politics, practices and laws of the four colonies that were to become the Union of South Africa shared certain characteristics in relation to the attitude and treatment of indigenous people and people who were not white. The common denominator which was carried into the formation of the Union was that of a racial hierarchy which was founded in law and reflected and reinforced by societal practices. Racism, as defined in chapter 1, informed law and society in all four colonies.

¹⁴² Krüger (1969) 340-342; P Richardson and JJ Van-Helten 'The Gold Mining Industry in the Transvaal 1886-99' in P Warwick (ed) *The South African War: The Anglo-Boer War (1899-1902)* (1980) Longman: Harlow 12-17; T Pakenham *The Boer War* (1979) Jonathan Ball: Johannesburg 12.

¹⁴³ Krüger (1969) 340-342.

¹⁴⁴ H Giliomee and B Mbenga *Die Nuwe Geskiedenis van Suid-Afrika* (2007) Tafelberg Uitgewers: Paarl 208.

¹⁴⁵ The Vereeniging Peace Treaty [31 May 1902] art 8 as published in Eybers 346.

¹⁴⁶ Davenport and Saunders 254; Thompson 111, 119.

2.2.4 The Formation of the Union of South Africa

2.2.4.1 *The South African Native Affairs Commission*

In the time leading up to the formation of Union (1902-1910), the British High Commissioner, Lord Milner, instructed the South African Native Affairs Commission (the Lagden Commission) to 'gather accurate information on certain affairs relating to the Natives and Native Administration and to offer recommendation to the several Governments concerned, with the object of arriving at a common understanding of native policy' in view of the impending amalgamation of the British colonies in Southern Africa.¹⁴⁷ The views expressed by this Commission provide a key to the policy formulation and the legislation dealing with the indigenous population of the Union.

In its discussion of the provisions for governance of the indigenous population at the turn of the previous century, the Commission remarked that the systems of governance in the different colonies were divergent. The Commission held that such divergence was justified in view of the varied degrees of civilisation attained by 'natives' in the different colonies.¹⁴⁸ The conclusion of the Commission was that the imposition of a uniform system of governance would be impractical in view of the different degrees of civilisation attained in the different areas. The Commission's point of departure was that civilisation justified the extension of a 'native's' rights, but that such extension was impossible in instances where indigenous persons lived 'tribal' lives. This policy stance was similar to that followed in the Cape Colony; rights could be earned by blacks who 'lived white'. This policy viewed the indigenous black population as uncivilised and in need of guidance to civilisation which was to be provided by the 'superior' European colonisers.¹⁴⁹

The terms of reference for the Commission's investigation specifically included an investigation into land tenure issues since this was viewed to be the common origin of

¹⁴⁷ Lagden Commission Report Vol 1 para 2.

¹⁴⁸ Lagden Commission Report Vol 1 para 52.

¹⁴⁹ See Lagden Commission Report Vol 1 paras 264, 267, 270, 272, 273, 282 and 325.

‘serious native problems’.¹⁵⁰ Divergent strategies and policies were followed in the different colonies – some allowed individual tenure for indigenous people, while others restricted land ownership of the indigenous population to communal ownership. In the Cape Colony the land tenure policy shared the underlying aim of that colony’s policy in respect of the indigenous population, namely that of ‘the civilisation of the native’.¹⁵¹ Accordingly, individual tenure which was seen as civilised was encouraged in areas where land was held communally.¹⁵² Land ownership by members of the indigenous population was prohibited in the Orange River Colony and restricted in the Transvaal.¹⁵³ The Commission noted that the principle of urban segregation between Europeans and the indigenous population was recognised and entrenched throughout all the colonies.¹⁵⁴ The recommendation of the Commission, in order to safeguard the interests of ‘the Europeans of this country’, was to limit but not prohibit the indigenous population from owning land. The limitation included restriction of land ownership by blacks to certain designated areas.¹⁵⁵ In relation to land held in trust as reserves, the Commission recommended that the land to be set apart as ‘locations, reserves or otherwise, should be defined, delimited and reserved for natives by legislative enactment.... That this should be done with a view to finality in the provision of land for the native population and that thereafter no more land should be reserved for native occupation.’¹⁵⁶ It was further recommended that land held in trust should be converted into individual holdings.¹⁵⁷ These recommendations built on the *status quo* of territorial and legal separation.

The Commission’s remarks under the heading ‘Tribal system – native law and custom – administration’ were instrumental in the perpetuation of the system of indirect rule of indigenous people after 1910. The Commission defined a tribe as ‘a community or collection of Natives forming a political and social organisation under government, control and leadership of a Chief who is the centre of the national or tribal life.... It is

¹⁵⁰ Lagden Commission Report Vol 1 para 75.

¹⁵¹ Lagden Commission Report Vol 1 para 81.

¹⁵² Lagden Commission Report Vol 1 paras 81 and 149.

¹⁵³ Lagden Commission Report Vol 1 para 185. In the Transvaal a ‘native man’ could acquire land subject to its transfer on trust to an officer of the government.

¹⁵⁴ Lagden Commission Report Vol 1 para 190.

¹⁵⁵ Lagden Commission Report Vol 1 para 193. The Commission recommended that the restrictions should also include a prohibition of communal or tribal ownership of land and that this restriction should apply to the leasing of land as well (para 197).

¹⁵⁶ Lagden Commission Report Vol 1 para 207.

¹⁵⁷ Lagden Commission Report Vol 1 para 208.

through the existence of a Chief that the tribe is conscious of its unity.¹⁵⁸ The argument of the Commission was simply that the tribe could be controlled if the Chief was controlled and so it recommended that Chiefs and Headmen should be remunerated 'in recognition of the valuable services they render to the Government'.¹⁵⁹ In view of the ultimate goal of civilisation of the indigenous population, the Commission lamented the need for the continuance of the tribal system and 'special laws for natives', but it foresaw the eventual abolition thereof by the passing of time and establishment of civilisation.¹⁶⁰

The recommendation of the Commission on issues of representation of the indigenous population played an important role in the eventual formation of the franchise provisions in the South Africa Act of 1909. As far as the governance of the indigenous populations of the Transvaal and Orange River Colony was concerned, the Commission found that the system of indirect rule and representation,¹⁶¹ as well as the managing of 'native affairs' by a member of the Executive Council provided adequate safeguards for the interests of the indigenous population.¹⁶² In its discussion of the colonies where people had the vote irrespective of their skin colour, the Commission made it clear that the high property requirements in Natal virtually ruled out the 'coloured vote'.¹⁶³ In its consideration of the position in the Cape Colony the Commission took a cautious approach:

'[The] franchise of the native in the Cape Colony ... permits it being used in a spirit of rivalry with an antagonism to the European electorate, which makes organised Native vote the arbiter in any acute electoral struggle between political parties and as native voters increase numerically will enable them to outvote the Europeans in certain parts of the country, is sure to create an intolerable situation and is an unwise and dangerous thing.'¹⁶⁴

In the light of the Commission's view that a balance should be struck between the need for better protection of the interests of the indigenous population through

¹⁵⁸ Lagden Commission Report Vol 1 para 212.

¹⁵⁹ Lagden Commission Report Vol 1 para 229.

¹⁶⁰ Lagden Commission Report Vol 1 paras 218 and 230.

¹⁶¹ Lagden Commission Report Vol 1 para 425. The system of representation relied on commissioners, magistrates and other officials appointed to administer 'native affairs'.

¹⁶² Lagden Commission Report Vol 1 para 427. In addition, the Governors of Natal and Transvaal were designated 'supreme chief' of the tribes in their respective colonies (para 426).

¹⁶³ Lagden Commission Report Vol 1 para 430. In 1903 Natal had a total of 18946 voters of whom 18680 were white.

¹⁶⁴ Lagden Commission Report Vol 1 para 441.

extended franchise and the need for the protection of European interests in the Cape Colony, it recommended the creation of franchise rights for 'natives' in other colonies and a restriction of their franchise in the Cape Colony.¹⁶⁵ The Commission recommended a system which had been tested in other British colonies: separate voting by the indigenous population for a fixed number of representatives in the legislatures of that country.¹⁶⁶ The recommendation effectively meant political segregation.

With the broad policy framework in favour of territorial and political segregation set out by the Commission, the representatives of the colonies came together in 1908 to negotiate the formation of a single South African state within the British Empire.

2.2.4.2 *The National Convention and the South Africa Act, 1909*

Since the middle of the nineteenth century, various role players had had hopes of unification or at least the formation of a federation between the different Southern African territories. After the Anglo-Boer War this dream was revived. Economic reasons, especially in relation to customs and the need for a uniform response to 'the native issue'¹⁶⁷ were the main motivations for engaging in serious negotiations about the formation of a single South African state.¹⁶⁸

Prior to the National Convention, a Customs Convention took place in Pretoria in 1908 during which representatives from the different colonies accepted the principle of the formation of a single state in the near future.¹⁶⁹ This paved the way for the National Convention during which the details of the South Africa Act of 1909 were agreed upon.

¹⁶⁵ Lagden Commission Report Vol 1 para 440.

¹⁶⁶ Lagden Commission Report Vol 1 para 443.

¹⁶⁷ Eybers (lxxviii) reflecting in 1918 on this issue stated: 'The native problem loomed large on all occasions when the subject of union was mentioned. There was no danger that a serious native war would have to be faced, but the numbers of the coloured people were increasing very rapidly and they would want to expand. Their old habits of life needing large areas to grow their mealies and graze their cattle would have to be modified. Many of them were being educated and the systems of government would have to be readjusted. It was eminently undesirable that there should be marked differences in the manner of treating person of the same blood and colour, perhaps in adjoining areas. A consistent, large and enlightened policy was needed and it could only be worked out by employing the most capable men in the whole country and backing them with the authority of some central power.'

¹⁶⁸ Thompson 91-92.

¹⁶⁹ Thompson 91; Krüger (1979) 468.

Two individuals dominated the process of unification: Jan Smuts from the Transvaal Colony and John X Merriman from the Cape Colony corresponded and worked together to lay the basis of a constitution for a unified South Africa.¹⁷⁰ Both had been schooled in the British tradition of constitutional law and both held the interests of the two white groups in South Africa at heart.¹⁷¹

The South Africa Act embraced parliamentary sovereignty as the basis for government of the Union. Neither Smuts nor Merriman seriously contemplated the American model. They viewed a flexible constitution with a sovereign parliament as adequate for the protection of the interests of the white population of South Africa.¹⁷² Modern authors see the seed for later human rights abuse in the acceptance of this system.¹⁷³ An unrepresentative parliament with sovereign power had legal authority to legislate contrary to the interests of the majority of the population. At the time, the major role players considered the interests of the white minority only and opted for a system with which they were familiar. Their familiarity with a unitary system also influenced the decision to form a union rather than a federation. Strong arguments for the formation of a federation were raised,¹⁷⁴ but in the end the Westminster model was accepted as a basis, both in terms of parliamentary sovereignty and unification.

The National Convention also spent considerable time dealing with the issue of the 'native vote'. The different franchise requirements that were applied in the different colonies shared a common trait – that of white domination of the political process. The requirements in the Cape Colony were the most liberal and its representatives wanted these requirements to be applicable throughout the unified South Africa.¹⁷⁵ This view was supported by the British government that wanted to extend the franchise to all 'civilised natives'. The Transvaal, the Orange River Colony and Natal, on the other hand, were firm in their opposition to the granting of liberal franchise rights to the indigenous population.¹⁷⁶ In the end a compromise was reached:¹⁷⁷ the

¹⁷⁰ Thompson 95.

¹⁷¹ Thompson 95-96. After the Anglo-Boer War there was animosity between English speaking South Africans and the Afrikaners. These two groups were often depicted as different 'races'.

¹⁷² Thompson 98.

¹⁷³ Dugard 25ff; Klug 2-4.

¹⁷⁴ Thompson 101-109.

¹⁷⁵ Thompson 116ff; Hahlo and Kahn 122.

¹⁷⁶ Thompson 117.

status quo would be retained in the different provinces. Section 35 of the South Africa Act of 1909 entrenched the right of coloured and black voters in the Cape of Good Hope. These voting rights could be revoked by an Act of Parliament passed by a two-thirds majority of both houses at a joint sitting. Other provinces of the Union retained their right virtually to exclude (Natal) and fully exclude (Tranvaal and OFS) black voters. It is clear that the drafters of the South Africa Act deemed the formation of Union more important than the clarification of the voting rights of black people.¹⁷⁸ WP Schreiner's 1909 deputation of African and coloured people failed to sway the British Parliament to reject the franchise restrictions in the South Africa Act.¹⁷⁹

The South Africa Act was enacted by the Westminster Parliament as proposed by the South African Convention. King Edward VII assented to the Act on 20 September 1909. A Royal Proclamation determined 31 May 1910 as the date on which the Union would come into being

Modern authors attribute the creation of a racially bifurcated or racially divided South Africa to the South Africa Act.¹⁸⁰ This is a narrow view. The franchise rights of 'civilised native men' in pre-Union times were extremely limited. It only allowed a few black men who were 'civilised' into the brotherhood of voters while territorial segregation of people of different skin-colours was widely accepted. If one considers the South Africa Act in the context of the British Empire as it existed at the time, it is clear that the existence of separate indirect governance structures for the indigenous population was deemed acceptable throughout the Empire. With reference to India, Viscount James Bryce wrote in 1901:

[T]he existence of a system securing these benefits [of just government] is compatible with absolute separation between the rulers and the ruled. The chasm between them has in these hundred years of intercourse grown no narrower. ... As one of the greatest problems of this age, and of the age which will follow, is and must be the relation between the European races as a whole on the one hand, and the more backward races of a different colour on the other, this incompatibility of temperament, this indisposition to be fused, or, one

¹⁷⁷ See in this regard the exchanges between Smuts and Merriman as documented in Thompson 118-124.

¹⁷⁸ Eybers 517.

¹⁷⁹ Thompson 402-406; Dugard 27; Davenport and Saunders 262-264.

¹⁸⁰ See for instance Klug 2-4; SEM Pheko SA: *Betrayal of a Colonised People* (1992) Skotaville Publishers: Johannesburg.

may almost say, this impracticability of fusion is a momentous result, full of significance for the future.'¹⁸¹

To the extent that the South Africa Act provided for political segregation between the different racial groups, this was a reflection of the acceptable practice within the colonies at the time. It perpetuated the divided system (or then the bifurcated state) and as such it was 'a consummation of the earlier history of the various parts of the country'.¹⁸²

2.2.5 South Africa as a Union

The early years of Union saw a legislative consolidation and confirmation of the principles of territorial segregation of the different racial groups and indirect rule of the indigenous population. Segregation was confirmed and developed as a principle of organisation in relation to a number of fields. The first confirmation of this principle took place in 1910 with the formation of a Department of Native Affairs. This 'implied the existence of the Bantu population as a separate community, to be legislated for specially'.¹⁸³

In the field of labour, the Mines and Works Act 12 of 1911 provided for the reservation of certain jobs for white people.¹⁸⁴ Racial segregation in the field of labour was bolstered by the Apprenticeship Act of 1922 which effectively favoured white youths in gaining skills. The Industrial Conciliation Act of 1924 restricted collective bargaining to white and coloured workers.¹⁸⁵

In relation to land affairs, the Native Land Act of 1913 was passed in an attempt by the Union Parliament to give effect to the recommendation of the Lagden Commission.¹⁸⁶ Reserves for 'natives' were demarcated. Sale of land in any of these reserves to

¹⁸¹ J Bryce *Studies in History and Jurisprudence* (1901) Clarendon Press: Oxford 80.

¹⁸² Eybers lxxxi. See also Hahlo and Kahn 495.

¹⁸³ DW Krüger *The Making of A Nation: A History of the Union of South Africa* (1960) MacMillan: Johannesburg 60.

¹⁸⁴ Krüger (1979) 488; Davenport and Saunders 271. This Act was amended in 1926 so as to reserve trades for whites and coloureds.

¹⁸⁵ Davenport and Saunders 271.

¹⁸⁶ See 2.4.1 above.

whites was prohibited.¹⁸⁷ Further legislation to ensure territorial segregation between white and black people followed in the form of the Native Affairs Act of 1920 and the Native (Urban Areas) Act of 1923.

The Native Affairs Act of 1927 was enacted to bring about uniformity regarding the administration of affairs of the indigenous population. It consolidated the key principles followed by the different provinces in a comprehensive statute. The policies developed by Shepstone in Natal in the previous century resounded strongly in this statute. It provided for executive control over 'native affairs' by means of indirect rule through Chiefs and Headmen with the Governor-General set to be the Supreme Chief of all 'natives'.¹⁸⁸ The latter had extensive powers in relation to 'native affairs'. The Act retained the application of customary law to the indigenous population, unless they were exempted from its application. Problematic issues of a practical nature, like the absence of clear rules relating to choice of law and the continued existence of the Natal Native Code were not solved by the passing of this legislation.¹⁸⁹ The year 1927 also was the passing of the Immorality Act which criminalised illicit carnal intercourse between 'Europeans and Natives' in an attempt to 'minimise miscegenation'.¹⁹⁰

Systematically the legislature (representing white interests) moved to enhance the interests of the white population. In doing so, it provided for the separation and separate management of the interests of the different race groups. White women were given the vote in 1930 and all voting qualifications for white males were removed in 1931. Race was fast becoming the only relevant qualification for the franchise.¹⁹¹ The political separation was taken further by the removal of black and later coloured voters from the common voters' role in the Cape Province.

¹⁸⁷ Hahlo and Kahn 803. The Act provided for an investigation into the expansion of the reserves. The initial report was finalised by 1916, but only after further reports legislation was passed in 1936 which claimed to have finally settled the division of lands between whites and blacks.

¹⁸⁸ Hahlo and Kahn 330.

¹⁸⁹ Hahlo and Kahn 330-334.

¹⁹⁰ Hahlo and Kahn 313. The Act was amended in 1950 to prohibit illicit carnal intercourse between 'Europeans and non-Europeans'.

¹⁹¹ See DW Krüger 'Die Bondgenootskap tussen Nasionalisme en Arbeid, 1924-1933' in DW Krüger (ed) *Geskiedenis van Suid-Afrika* 2de uitgawe (1979) Nasou Bpk: Goodwood 522 who opines that the Cape Province was forced to accept race as the determining factor in relation to franchise by the removal of the property requirements for white males and the granting of the vote to white women.

The Representation of Native Voters Act 12 of 1936 provided for the removal of black (African) voters from the common voters' roll in the Cape Province. The need for a uniform system of representation of natives and the 'right' of the European population to protect its own interests were put forward as justification for the legislation.¹⁹² Indigenous voters from all the provinces were placed on a separate voters' roll through which they could elect white senators to represent their interests in the Senate and members of a Native Council which were to plead the case of the indigenous population with the Legislative Assembly.¹⁹³ The Act aimed to implement the recommendations of the Lagden Commission by providing for indirect rule and separate representation.¹⁹⁴

After the passing of the Act in 1936, its validity in terms of s 35 of the South Africa Act was contested by a voter, Mr Ndlwana, who had been removed from the common voters' roll in the Cape Province. In *Ndlwana v Hofmeyr NO*¹⁹⁵ it was argued on behalf of Mr Ndlwana that the Act was *ultra vires* the South Africa Act in view of the passing of the Statutes of Westminster. The Appellate Division held that the sovereign Union Parliament had the power to determine its own processes which were beyond the scrutiny of the court. The Representation of Native Voters Act was thus held to be valid. This Act represents the first step in the total elimination of the political influence of black South Africans.

Under the guidance of General Hertzog as Prime Minister, Parliament also passed the Native Trusts and Land Act 18 of 1936. This legislation provided for the addition of further land to the land set aside for the indigenous population in terms of the 1913 Natives Land Act. With this the division of land between black and white was seen as finalised.¹⁹⁶ The goal of territorial separation was also enhanced by the Native (Urban Areas) Consolidation Act 25 of 1945. Territorial segregation was to be enforced through means of influx control measures that were introduced by the Native Laws Amendment Act 46 of 1937.

¹⁹² Hertzog 385-393.

¹⁹³ Hertzog 390-391. See also the provisions of this Act.

¹⁹⁴ See 2.2.4.1 above.

¹⁹⁵ *Ndlwana v Hofmeyr NO* 1937 AD 484.

¹⁹⁶ Hahlo and Kahn 803.

Group differentiation (racial classification) was underlined by the differential treatment that was provided for in the Asiatic Land Tenure and Indian Franchise Act 28 of 1946. This legislation imposed restrictions on Indians regarding the acquisition and occupation of land. It furthermore provided for the representation of Indians by white representatives in the House of Assembly, Senate and the Natal Provincial Council.¹⁹⁷

From the above it is clear that a succession of Union Parliaments adopted legislation which built on the pre-Union legacy of racial stratification and division. South Africa was seen as a country of and for white people and its Parliament passed legislation in order to further the interests of that group. The Westminster constitutional system of parliamentary sovereignty provided successive parliaments, focused on preserving white interests, with the legal means to legislate for separation and separateness. Africans, Indians and coloured people were treated as distinct groups who needed to be governed and led to civilisation by the white population.

2.2.6 Complete Segregation and the Evolution to Apartheid

The National Party of Dr DF Malan won the general election on 26 May 1948.¹⁹⁸ Internal unrest about the race issue forced the issue of race relations to come to a head. In view of the unrest, the National Party's policy on race relations, called apartheid, appealed to white voters.¹⁹⁹ The policy of the United Party which lost the election to the National Party had been phrased along similar lines in its references to social and residential separation.²⁰⁰ The National Party's republican ideal appealed to many white voters²⁰¹ and this, coupled with the party's proposed solution to the race issue, secured a narrow victory.²⁰² The Nationalist government set out to make good on its election promises and embarked on a mission to implement its apartheid policy by means of legislation.

¹⁹⁷ Davenport and Saunders 379 refer to this franchise as 'token franchise'.

¹⁹⁸ Davenport and Saunders 369ff; Haasbroek 187.

¹⁹⁹ See 'Race Relations Policy of the National Party 1947' as published in DW Krüger (ed) *South African Parties and Policies 1910-1960* (1960) Human & Rousseau: Cape Town 402-407.

²⁰⁰ See 'The Native Policy of the United Party, 1949' in DW Krüger (ed) *South African Parties and Policies 1910-1960* (1960) Human & Rousseau: Cape Town 408-409.

²⁰¹ Haasbroek 187.

²⁰² Davenport and Saunders 369ff; Haasbroek 187.

The Prohibition of Mixed Marriages Act 55 of 1949 took the principle of the Immorality Act of 1927 further by prohibiting marriages between whites and people from other race groups.²⁰³ In the following year, two flagship apartheid statutes were passed, namely the Population Registration Act 30 of 1950 and the Group Areas Act 41 of 1950. The former statute was of particular importance since racial classification was essential to 'differential legislation based on race'.²⁰⁴ Prior to the enactment of the Population Registration Act, various statutes employed a variety of different definitions.²⁰⁵ The Population Registration Act was regarded as a 'cornerstone of the policy of apartheid'.²⁰⁶ This Act relied on the criteria of descent, appearance and 'general acceptance and repute' to determine a person's race as either 'white', 'native' or 'coloured', with further classification of the latter two groups into ethnic groups.²⁰⁷ Legislation determined a person's race and that determined the person's status: where s/he may live or work; whom s/he may marry and her/his rights as a citizen.²⁰⁸

The Nationalist government also moved fast to abolish the token systems of political representation that were in place for black, Indian and coloured people.²⁰⁹ The Indian representation that had been introduced in 1946 was abolished in 1948. In 1951 the Native Representative Council was abolished. The removal of coloured voters from the common voters' roll in the Cape Province proved to be more difficult. A series of attempts were launched from 1951 to 1956 to obtain the necessary two-thirds majority in both houses of Parliament to remove coloured voters from the common roll as was required in terms of s 35 of the South Africa Act.²¹⁰ These events led to a constitutional crisis in the 1950s in which the Appellate Division played a major role. In *Harris v Minister of the Interior*²¹¹ the validity of the Separate Representation of Voters Act 46 of 1951 was challenged. By taking into consideration the interests of justice, the court came to the conclusion that the legislation was invalid since its aim

²⁰³ Davenport and Saunders 378.

²⁰⁴ Suzman 339.

²⁰⁵ Suzman 341-342.

²⁰⁶ Suzman 353.

²⁰⁷ Hahlo and Kahn 796. See Suzman 353ff for a discussion of the provisions of the Act.

²⁰⁸ Hahlo and Kahn 797.

²⁰⁹ Davenport and Saunders 379.

²¹⁰ Haasbroek 187; Davenport and Saunders 379-383.

²¹¹ *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

was to disqualify voters solely on the basis of their race.²¹² A subsequent attempt to cloak Parliament with judicial authority to deal with challenges to legislation failed dismally.²¹³ Coloured voters were finally removed from the common voters' roll after the enlargement of the Senate by the Senate Act 53 of 1955 which enabled the National Party to obtain the necessary two-thirds majority.²¹⁴ When this Act was challenged, the Appellate Division held that a sovereign Parliament had the authority to determine its own composition.²¹⁵ The sanctity of the sovereignty of Parliament thus became a means to the end of embedding racism in South African constitutional law.

In subsequent elections the mandate of the National Party was extended by its white supporters, but its power base was not secure.²¹⁶ The Nationalist government needed a strategy to implement its vision of a completely racially segregated society. Accordingly, it tasked the Tomlinson Commission in 1955 to 'conduct an exhaustive inquiry into and to report on a comprehensive scheme for the rehabilitation of the Native Areas with a view to developing within them a social structure in keeping with the culture of the Native and based on socio-economic planning'.²¹⁷ The report of this Commission was instrumental in determining the policy direction taken by the government of the day.

2.2.6.1 *The Tomlinson Commission Report*

At the time of the finalisation of the Tomlinson Report (1955) the National Party had been in power for less than ten years. World War II marked a significant international turnabout in respect of race relations in the international community. All over the world states began to realise that the 'separate but equal' justification for racial differentiation lacked substance.²¹⁸ More and more former colonies were gaining

²¹² *Harris v Minister of the Interior* 1952 (2) SA 428 (A) 454-456. See also Verloren van Themaat 455-456 who criticises the judgment.

²¹³ Haasbroek 187. The High Court of Parliament Act was declared to be invalid by the Appellate Division in *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

²¹⁴ Davenport and Saunders 395-396.

²¹⁵ *Collins v Minister of the Interior* 1957 (1) SA 522 (A).

²¹⁶ Davenport and Saunders 382.

²¹⁷ Tomlinson Report xviii.

²¹⁸ Dugard 54-55.

independence from the colonial powers, signalling international unease with earlier policies based on beliefs of white supremacy. Segregation as a policy guiding governance was losing support very fast. In the United States the civil rights movement was gaining momentum.²¹⁹ In contrast to the international trend, the policy of apartheid that the Nationalist government actively had pursued by legislative means since 1948 was premised on outdated racist beliefs.

The Commission's recommended a comprehensive policy response to what was termed the 'native problem'. The policy had to be general, clear and purposeful.²²⁰ The Commission weighed the different policy possibilities which they identified as integration and segregation.²²¹ It concluded that the latter policy had been the accepted policy in South Africa since the earliest times, but that it had 'not been fully implemented or followed to its logical conclusion'.²²² The Commission identified increasing economic integration between black and white and the consequent urbanisation of the indigenous population as problematic. It stated:

'[T]he following consequences may be expected from such intermingling of interests:-

- (i) cultural assimilation as the result of contact, i.e. the gradual diminution of differences in culture and level of civilisation, until these differences eventually disappear for the great majority in each of the respective population groups;
- (ii) the removal or disappearance of all economic measures differentiating between the two groups. This leads to the development of a socio-economic stratification based not on colour, but on purely socio-economic considerations;
- (iii) cultural and economic equality leading to political equality, and the creating of a common society in the political sphere;
- (iv) these conditions give rise to increased social contact and association, with the consequent disappearances of any stigma attached to such contact and association. Personal relationships come to be based on socio-economic preferences or prejudices; and
- (v) the ultimate result – though it may take a long time to materialise – is complete racial assimilation, leading to the creation, out of two original communities, of a new biological entity.'²²³

²¹⁹ On 1 December 1955 Rosa Parks, an African American woman, refused to give up her seat in a bus to a white man in Montgomery, Alabama, USA. Her defiance sparked a vibrant civil rights campaign throughout the USA. See ER Shipp 'Rosa Parks, 92, Intrepid Pioneer of Civil Rights Movement, Is Dead' (25 October 2005) *New York Times* 1.

²²⁰ Tomlinson Report 101 paras 1-4.

²²¹ Tomlinson Report 101-102 paras 5-11.

²²² Tomlinson Report 101 para 5.

²²³ Tomlinson Report 103 para 20.

The Commission expressed its doubts about peaceful integration in South Africa. The situation in South Africa demanded, according to the Commission, that the 'European' population should 'retain the direction of affairs in the foreseen future'.²²⁴ The reason for this being that the 'responsibility and task ... to Christianise and civilise the indigenous peoples' rested on 'the European'.²²⁵ The second reason identified by the Commission for the likely failure of (or difficulty with) integration, lay in the unwillingness of 'European people' to 'sacrifice their right of existence as a separate national and racial entity'.²²⁶ Factors pointing favourably in the direction of integration,²²⁷ according to the Commission, weighed little in comparison to white fears of black domination.²²⁸ The Report stated plainly: '[W]here the continued existence of a people is at stake, purely rational considerations play a relatively unimportant role.'²²⁹ A further argument raised in justification of the suggested continuation of the policy of apartheid was that '[i]ntegration leads to racial friction'²³⁰ in the face of the identified difficulty (or impossibility) of evolutionary integration. The establishment of separate communities for black and white would, according to the Commission, create 'the fullest opportunity for self-expression and development' for each group.²³¹ The Commission ultimately identified separate development as the policy that would benefit both black and white. For the 'Europeans', the advantages were identified as 'ensur[ing] their future unfettered existence, by which increasing race tensions and clashes can be avoided, and by means of which the Europeans will be able fully to meet their responsibilities as guardians of the Bantu population'.²³² For the black population, the policy of separate development would secure their own territory, developmental opportunities for individuals and communities, self-government and economic advances.²³³ On this point the Commission Report referred to different ethnic groups for which 'national homes' were to be created based

²²⁴ Tomlinson Report 103 para 20.

²²⁵ Tomlinson Report 103 para 20.

²²⁶ Tomlinson Report 103 para 20.

²²⁷ Tomlinson Report 103 para 15 sets out (amongst others) the following as factors favouring integration: economic integration and interdependence, urbanisation, Christianisation and westernisation of the indigenous population, common patriotism and lack of other alternatives.

²²⁸ Tomlinson Report 103 para 17.

²²⁹ Tomlinson Report 103 para 21.

²³⁰ Tomlinson Report 103 para 29.

²³¹ Tomlinson Report 105 para 29.

²³² Tomlinson Report 106 para 40.

²³³ Tomlinson Report 106 para 38.

on the 'historic-logical homelands of the principal ethnic groups'.²³⁴ In relation to the identification of the different ethnic groups the Commission remarked that the 'Bantu' could, '[o]n linguistic grounds (and in the main these coincide with the general ethnic bonds)' be divided into four main groups, namely the Nguni, the Sotho, the Venda and the Tsonga.²³⁵

The Tomlinson Report was instrumental in the development and expansion of the policy of apartheid to its 'logical conclusion' which was that of complete separation and self-governance by all ethnic groups. It did not introduce any new concepts but proposed the perpetuation of a system of discrimination based on race.²³⁶ The Commission masked its recommendations as furthering racial equality and protecting the identities of the different ethnic groups. In colonial times the colonial authorities made use of 'tribalism' to divide and rule the indigenous population. The report – according to the fashion of the time – recommended ethnic pluralism as the basis for the segregation it proposed. Like the Lagden Commission, the Tomlinson Commission based its recommendations on a view of entitlement to dominance by the white population. Integration with the black population was seen to be the inevitable outcome of interaction between the two groups. This threatened the 'continued existence' of the white population and this threat, according to the Commission, warranted disregard of 'purely rational considerations'.²³⁷

2.3 THE LAW OF APARTHEID

The Tomlinson Commission Report provided impetus for expanding apartheid through the enactment of laws to further racial segregation. A comprehensive analysis of the all of statutes passed in order to implement the policy of apartheid falls outside the scope of this historical survey. Accordingly, only a broad overview is provided.

²³⁴ Tomlinson Report 106 para 42.

²³⁵ Tomlinson Report 180 para 1. See further chapter 46 of the Report.

²³⁶ Tomlinson Report 106 and further para 43 where the minority view of Commission Member Bisschop is set out. Bisschop acknowledged that the relations between black and white in South Africa was premised on discrimination.

²³⁷ Tomlinson Report 104 para 21.

Apartheid statutes can broadly be classified into two categories, namely those dealing with segregation and discrimination on a personal level (petty apartheid) and those aiming to secure complete territorial segregation of the different race groups through the creations of self-governing territories and homelands (grand apartheid). While these two categories of statutes were passed to implement the policy of apartheid, they were complemented by a third group of statutes that was aimed at the repression of opposition that arose in response to the policy.²³⁸

According to Dugard, the National Party 'transformed the largely conventional system of racial segregation that had existed before that date [1948] into the aggressive ideological policy of apartheid'.²³⁹ In the active pursuit of the realisation of this policy, legislation was passed to provide for discrimination on the basis of race in all areas of life.²⁴⁰ In the provision of basic services and facilities,²⁴¹ in relation to marriage and sexual relations,²⁴² movement,²⁴³ education,²⁴⁴ and labour,²⁴⁵ race was the determining factor. The services and facilities that were provided to black, coloured and Indian South Africans were of an inferior quality.²⁴⁶ On a local level, legislative provisions still provided for indirect administrative rule of black South Africans.²⁴⁷ Whereas racial prejudice and discrimination were real forces in society prior to the enactment of these apartheid laws, the legislation institutionalised and normalised racism, at a personal level, for all South Africans by reinforcing pre-existing racist beliefs.²⁴⁸

²³⁸ J Dugard and WHB Dean 'The Just Legal Order' in ST van der Horst and J Reid (eds) *Race Discrimination in South Africa: A Review* (1981) D Philip: Cape Town 23.

²³⁹ Dugard 6.

²⁴⁰ Dugard 105.

²⁴¹ For instance the Reservation of Separate Amenities Act 49 of 1953.

²⁴² For instance the Prohibition of Mixed Marriage Act 55 of 1949.

²⁴³ Prior to the National Party coming into power in 1948, various Acts were in place to secure territorial segregation. The implementation of these was supported by pass and influx control provisions. The most notorious of these was the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

²⁴⁴ Separate education on primary, secondary and tertiary levels was provided for in the heyday of apartheid: the Bantu Education Act 47 of 1953, Extension of University Education Act 45 of 1959. See Dugard 83-85. The level of education provided to black pupils and students was of inferior quality.

²⁴⁵ Job reservation was the most notable example of racial discrimination in the field of labour: Bantu Building Workers Act 27 of 1951.

²⁴⁶ Dugard 63-65. The author states that apartheid South Africa approved of the 'separate and unequal' philosophy.

²⁴⁷ See Rogers 14ff for discussion of the different legislative provisions.

²⁴⁸ See Arthur 145.

Grand apartheid revolved around the spatial reservation of land for members of different racial groups. This pillar of apartheid entailed vertical separate development²⁴⁹ and the creation of 'a commonwealth of nations in South Africa'.²⁵⁰ Ethnicity and membership of an ethnic group were set to be the basis of the different 'nations' to be found in South Africa. The Promotion of Bantu Self-Government Act 46 of 1959 was seminal in the process of establishing homelands for the different 'nations'. This Act was based on the understanding that the 'Bantu peoples of South Africa do not constitute a homogenous people, but [that they] form eight separate national units on the basis of language and culture'.²⁵¹ Thus South African society was constructed as a society of minorities.²⁵² The artificial nature of this construction is evident from a consideration of the issue of citizenship in Transkei.²⁵³ Transkei was the first national unit to become self-governing and later 'independent' from South Africa following the process envisioned by the Bantu Authorities Act 68 of 1951.²⁵⁴ The first step in the process of ridding 'white South Africa' of its amaXhosa nationals was the passing of the Bantu Homelands Citizenship Act 26 of 1970 which provided that a person of African descent would, in addition to her/his South African citizenship, become a citizen of a territorial authority area to which s/he is attached by birth, domicile or cultural affiliation. This provision was followed by South African legislation that provided for the independence of Transkei. The South African legislature would have it that all isiXhosa-speaking people living in the territory of South Africa would become nationals of Transkei (save for those who were citizens of Ciskei) and that they would lose their South African citizenship. The government of the 'independent' Transkei refused to accept this arrangement and wanted to confer citizenship rather than serve as a dumping ground for unwanted South African citizens. It is evident that the South African government of the time manipulated the ill-defined concepts of culture language and ethnic identity in the name of self-development for its own political purposes.

²⁴⁹ Rogers 4.

²⁵⁰ Dugard 90.

²⁵¹ Dugard 90. The separate national groups were listed as Northern Sotho, Southern Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

²⁵² See Carpenter 118.

²⁵³ Dugard 91-102.

²⁵⁴ See Dugard 93 for a discussion in relation to the process followed in respect of the different national territories.

Opposition to the system of apartheid mounted as the years progressed. Cosmetic changes to the system by the adoption of the 1983 Constitution retained the essence of white domination which lay at the core of the apartheid policy.²⁵⁵ The Population Registration Act of 1950 remained the cornerstone of the constitutional system provided for in the 1983 Constitution which provided for representation of whites, Coloureds and Indians in separate houses of Parliament.²⁵⁶ Each of the houses carried responsibility for the 'own' affairs of its population group while the responsibility for 'general affairs' vested with the dominant House of Assembly that represented white voters. Membership of a racial group remained a key constitutional feature and white domination remained firmly entrenched. The acceptance of the tri-cameral Constitution denoted a public acknowledgment on the part of the Nationalist government, that a need for political representation of all South Africans was patent.

After the turbulent 1980s, the unstable and highly contested system of governance that was apartheid was finally abandoned in the early 1990s. The repeal of apartheid legislation and democratic elections ended official legally sanctioned political segregation based on race. In the preamble to the negotiated interim Constitution the goal was set to create an order in which 'all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. In this society there would be no place for the beliefs and practices of the past.²⁵⁷

2.4 CONCLUDING REMARKS

The exposition provided in this chapter indicates that differentiation and discrimination on the basis of skin colour informed the constitutional framework(s) of South Africa since the earliest times. A racial and racist hierarchy which was reflected in law was established early on. This racist hierarchy existed throughout South Africa and was

²⁵⁵ Davenport and Saunders 436-437, 447-454. Klug 2-10 points out that white domination was secured through the determination that set the ratio of white to coloured to Indian representatives at 4:2:1. See also Motala and Ramaphosa 3.

²⁵⁶ These were respectively the House of Assembly, the House of Representatives and the House of Delegates.

²⁵⁷ See chapter 5.

perpetuated and extended over time. Law was instrumental in this process of institutionalising racism in South Africa.

Through the extension of the racist system by means of petty apartheid laws, barriers were created between people of different skin-colours leaving them virtual strangers to one another; living in different realities where wealth and power were associated with being white. The different realities were further concretised by the laws of grand apartheid that created separate homelands for different ethnic groups thereby furthering the divide between black and white and between different black ethnic groups.

The legacy that the new South Africa inherited was that of a racialist and racist division of its population, both in law and society. The challenge for the new constitutional dispensation is to overcome this rift that has been present in South Africa since the earliest days of white occupation. As law was one of the means by which racism was entrenched in our society, now, in a post-apartheid society, it has the task of addressing racism through the role that it plays in transformation.

The challenge posed by racism does not only face South Africa or South African law. International law provisions aimed at the eradication of racial discrimination and racism were established in the previous century with international human rights law gaining prominence at the time when the Nationalist government expanded its apartheid policy. International human rights law provides a standard in respect of racial equality and non-discrimination which serves as a benchmark for South African law. In the next chapter these standards set in international law are examined before considering South African constitutional standards in the chapter thereafter.

Chapter 3

BENCHMARK I: INTERNATIONAL LAW AND RACISM

3.1 INTRODUCTION

Colonialism and apartheid left South African society divided and in need of measures to address the legacy of the past and to guide state and society in future. Many hopes were pinned on human rights as measures to address past injustices and inequalities. In South Africa, the protection and advancement of human rights take place within the framework of constitutional law which is influenced by international law standards and practices. The Constitution acknowledges and encourages the influence of international law in that it provides for the compulsory consideration of international law when interpreting the Bill of Rights.¹ Moreover, international agreements signed and ratified by South Africa are binding and impose obligations on the country which have to be fulfilled.

In order to contextualise the international law standards pertaining to racial equality and non-discrimination, this chapter selectively traces the evolution of international human rights law in this area. The long and complex history of international human rights law falls beyond the scope of this study.² Brief references to historical developments are made where such references illuminate the development of international human rights law relevant to legal responses to racism.

The contribution of the United Nations (UN) to the international debate on human rights is of great importance,³ and so I consider its role and the international law

¹ Section 39(2). See ME Olivier 'International human rights agreements in South African law: procedure, policy and practice (part 2)' (2003) *TSAR* 490. See also ss 231, 232 and 233 of the Constitution.

² For a brief discussion see I Brownlie *Principles of Public International Law* 5th ed (1998) Oxford University Press: Oxford 568ff.

³ Alston 1 notes that the United Nations is 'one part of the broader international [human rights] regime which, by definition, must also embrace at least: the authentically human rights-conscious UN agencies such as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); mechanisms such as the Conference on Security and Co-operation in Europe; and various regional organisations such as the Council of Europe, the Organization of American States and the Organization of African Unity'.

documents relevant to the struggle against racism. This organisation has inspired an African initiative for the protection and advancement of human rights on the continent. In determining the benchmark set by international law in respect of racial equality and non-discrimination, I also discuss the regional framework.

3.2 THE UNITED NATIONS AND HUMAN RIGHTS

3.2.1 Background

The international system for the protection and advancement of human rights developed under the auspices of the United Nations is a complex system. It involves Charter-based organs like the General Assembly, the Economic and Social Council and Security Council, as well as a number of treaty-based bodies like the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.⁴ In addition to these bodies, the General Assembly has established the Office of the High Commissioner for Human Rights in 1993 with the broad mandate to promote and protect all human rights.⁵ Each of these bodies contributes in some way to the international human rights system with Charter-based bodies and treaty-based bodies complementing each other in the execution of their tasks.⁶ In an attempt to crystallise the main principles relevant to the struggle against racism, I trace the evolution of the relevant international instruments, namely the Charter of the United Nations, the Universal Declaration on Human Rights, the Covenants and the International Convention on the Prevention of All Forms of Racial Discrimination.

⁴ For a chart of the UN system see Alston 6-7. See also KT Samson 'Human Rights Co-ordination within the UN System' in P Alston (ed) *The United Nations and Human Rights A Critical Appraisal* (1992) Clarendon Press: Oxford 620ff.

⁵ A/RES/48/141 (7 January 1994) recording Resolution 141/48 of 20 December 1993.

⁶ Addo xxix.

3.2.2 The Charter of the United Nations

The paramountcy of human rights in international law is largely a post-World War II development.⁷ In the wake of the racially motivated atrocities committed during World War II, members of the international community came to see a clear link between world peace and the protection of human rights.⁸ Human rights abuses within states, and specifically those that were motivated by racism, could no longer be ignored. This was recognised during international negotiations in the years preceding the end of the war.⁹ At the San Francisco Conference, human rights and the issue of racial equality were placed firmly on the agenda – the to-be-established international organisation was to give priority to the protection of human rights within states and address the issue of racial discrimination if it was to further the goal that was set in respect of the maintenance of world peace.¹⁰

The fundamental importance of human rights to the maintenance of world peace is documented in the Charter. The preamble to the Charter captures this commitment as follows:

‘We The Peoples of the United Nations Determined
to save succeeding generations from the scourge of war, which twice in our
lifetime has brought untold sorrow to mankind, and
*to reaffirm faith in fundamental human rights, in the dignity and worth of the
human person, in the equal rights of men and women and of nations large and
small*
to establish conditions under which justice and respect for the obligations
arising from treaties and other sources of international law can be maintained,
and
to promote social progress and better standards of life in larger freedom,

And for These Ends
to practice (sic) tolerance and live together in peace with one another as good
neighbours, and

⁷ Dugard (2000) 234. After World War I attempts were made to afford protection to human rights (and rights specifically pertaining to racial equality) in the Covenant of the League of Nations, but such attempt were met with resistance and abandoned: Lauren 2. See also R Müllerson *Human Rights Diplomacy* (1997) Routledge: London 1 and EF Defeis ‘Universal Declaration of Human Rights: A Standard for States’ (2004) 28 *Seton Hall Legislative Journal* 259 at 261.

⁸ Lauren 3-4.

⁹ Lauren 4-6.

¹⁰ Lauren 15-17. The San Francisco Conference (April to June 1945) brought together many international role players (states and nongovernmental organisations) who called for the inclusion of human rights in the charter of the to-be-established United Nations.

to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all people.¹¹

Other specific references to human rights and the importance of non-discrimination are contained in art 1(3), which sets out the purposes of the UN;¹² art 13(1)(b), which sets out the tasks of the General Assembly in relation to research and recommendations flowing from the research;¹³ arts 55 and 56, which provide for international economic and social co-operation;¹⁴ art 62(2), which provides for the tasks of the Economic and Social Council;¹⁵ and art 68, which provides for commissions to be set up by the Economic and Social Council among them a commission for the promotion of human rights.

These references in the Charter are 'scattered, terse, even cryptic'.¹⁶ Where the Charter contains provisions regarding human rights, the commitment is couched in promotional and programmatic language.¹⁷ The Charter sets out goals in respect of the protection and advancement of human rights and the only right which receives specific mention is that of equal protection before the law.

¹¹ Charter of the United Nations Preamble (emphasis added). See the comments of J Greenberg 'Race, Sex, and Religious Discrimination in International Law' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues Vol II* (1984) Clarendon Press: Oxford 310-311.

¹² Article 1(3): 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.'

¹³ Article 13(1)(b): 'Promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms without distinction as to race, sex, language, or religion.'

¹⁴ Article 55: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development.
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56: All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

¹⁵ Article 62: 'It [ESC] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.'

¹⁶ Steiner and Alston 138.

¹⁷ Steiner and Alston 138.

The potential of the Charter to protect of human rights is further hampered by the retention of the principle of national sovereignty in art 2(7).¹⁸ This was necessary at the time of the establishment of the UN. The retention of this principle legitimated the creation of the UN and its goals and purposes because it was in accordance with international law standards acceptable at the time.¹⁹ The wording of the Charter leaves scope to member states of the UN to raise their sovereignty in an attempt to justify human rights infringements.²⁰ Nonetheless, the Charter put human rights on the international agenda.²¹

The importance of the Charter for modern international human rights law is that it provided the impetus for the drafting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and several other human rights treaties²² of which the Convention on the Elimination of All Forms of Racial Discrimination is the most important for the purpose of this thesis. These subsequent developments in international law, specifically in relation to racial equality and non-discrimination, show the Charter to be the foundation of modern international human rights law.

3.2.3 The Universal Declaration of Human Rights

Pursuant to provisions of the Charter, the Economic and Social Council of the UN created a Human Rights Commission which was tasked with the drafting of an international Bill of Rights. The Commission met for the first time in 1947²³ and resolved to draft a declaration and a convention on human rights simultaneously.²⁴

¹⁸ Dugard (2000) 237. See also Lauren 18-19.

¹⁹ Addo xiv-xv. The Charter honoured the principle of subsidiarity and co-operation between national and international law for purposes of the protection of human rights.

²⁰ As has happened in the case of apartheid South Africa. See Dugard (2000) 237-240.

²¹ Henkin 6.

²² Lauren 22-24.

²³ Pechota 33-34.

²⁴ Pechota 34. The Commission was divided in that some members favoured the drafting of only a declaration, leaving the implementation of human rights to the member states of the UN, while other members of the Commission favoured the drafting of international conventions on human rights to ensure compliance by member states. See also JT Möller 'The Universal Declaration of Human Rights: How the Process Started' in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (1992) Scandinavian University Press: Oslo 1.

The declaration was to set standards or goals which were unenforceable,²⁵ while the convention had to transform these standards into enforceable legal rights.²⁶ The declaration saw the light of day in 1948 after much deliberation.²⁷ The Universal Declaration of Human Rights was approved as a resolution by the General Assembly of the UN on 10 December 1948.²⁸

The Universal Declaration took the commitment to the protection and promotion of human rights set out in the UN Charter further by enumerating specific rights. The commitment to the protection and advancement of human rights by means of the Universal Declaration is premised on the recognition of the inherent equal dignity of all human beings.²⁹ The Declaration is set as 'a common standard of achievement for all peoples and all nations'.³⁰ At the time of its acceptance, no binding legal obligations flowed from the Declaration. The text emphasises standard-setting in relation to human rights protection and enforcement, and stresses the importance of education and dissemination of information regarding human rights, but the Declaration does more than merely set standards in that it asserts the importance of the rule of law in relation to matters concerning the human rights.³¹ Accordingly, the Declaration has played an important guiding role in the drafting of international and national human rights documents.³²

²⁵ Henkin 9.

²⁶ Pechota 34.

²⁷ Defeis 262 comments on the important role of Eleanor Roosevelt as the first chairperson of the Commission and notes that her involvement introduced 'United States legal standards' into the Declaration.

²⁸ Adopted by General Assembly in terms of resolution 217 A (III). In 1948 the Declaration could hardly have been a universal resolution of the international community. Forty eight states supported the acceptance of the resolution while 8 abstained from voting at the meeting of the General Assembly. The notion of universal human rights did however get more widespread support over the years with more states (former colonies gaining independence) becoming members of the UN and acceding to human rights treaties prepared under the auspices of the UN.

²⁹ Preamble to the Universal Declaration. This idea is echoed in Article 1. See also T Lindholm 'Article 1 A New Beginning' in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (1992) Scandinavian University Press: Oslo 31-54.

³⁰ Preamble.

³¹ Preamble.

³² Dugard (2000) 240. See also A Eide and G Alfredsson 'Introduction' in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (1992) Scandinavian University Press: Oslo 6-7.

Individuals are recognised as bearers of the rights that are set out in the Declaration.³³ People, and not states, are the beneficiaries in terms of the Declaration and their inherent dignity founds their human rights.³⁴ The Declaration affirms the principle of equality in a number of ways. The text of the Declaration uses the term ‘everyone’ where rights are framed positively, and ‘no-one’ where rights are framed negatively to convey the idea of equal entitlement to rights.³⁵ Both civil and political and socio-economic rights are enumerated in the Declaration.³⁶ The commitment to equality permeates all the articles of the Declaration, but arts 2 and 7 deal specifically with non-discrimination³⁷ and equal protection by the law.³⁸

The moral compulsion and the important normative guidance of the Declaration made an impact on its standing in international law. Over the years it has played an important role in guiding the drafting of national and regional human rights documents, thus fulfilling its standard-setting role. Moreover, many of the articles of the Universal Declaration have acquired the status of customary international law.³⁹ Some argue that the entire Declaration can be regarded as customary international law, but a more convincing argument is that only some of the articles have acquired the status of customary international law through *usus* and *opinio iuris*.⁴⁰ Among these articles are the articles expounding commitment to equality and non-discrimination.⁴¹

³³ Defeis 264; J Mårtenson ‘The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme’ in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (1992) Scandinavian University Press: Oslo 20-21.

³⁴ Preamble.

³⁵ S Skogly ‘Article 2’ in A Eide (ed) *The Universal Declaration of Human Rights: A Commentary* (1992) Scandinavian University Press: Oslo 57.

³⁶ See Henkin 8 and Defeis 263.

³⁷ Article 2 provides: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.’

³⁸ Article 7 provides: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’

³⁹ Dugard (2000) 240; Defeis 264.

⁴⁰ Dugard (2000) 241; T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) Clarendon Press: Oxford 92-95. Pechota 38 opines that legal significance was soon attributed to the Declaration because of the delay in drafting the treaty that was to provide legal status to the human rights aspirations set out in the Declaration.

⁴¹ Dugard (2000) 241. Some of the other Declaration principles accepted as part of customary international law deal with the prohibition on torture and cruel, inhuman and degrading treatment and the right to a fair trial.

In subsequent years the commitment to the rights set out in the Declaration has been confirmed at various international human rights conferences, most notably the 1968 Teheran Proclamation,⁴² the 1993 Vienna Declaration,⁴³ the 2000 United Nations Millennium Declaration⁴⁴ and the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Declaration) of 2001.

3.2.4 The International Covenants

3.2.4.1 *Background*

The translation of the aspirations set out in the Declaration into enforceable legal rights was seen as imperative in the development of an international human rights law standard.⁴⁵ A multilateral treaty would bind states to an enforceable legal standard on the basis of their consent. Furthermore, it would provide a means for the implementation and enforcement of these rights.

It was agreed that two covenants had to be drafted: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁶ This division, according to Henkin,⁴⁷ allowed the drafters to recognise the different natures of civil and political rights and socio-economic rights. The Covenant dealing with civil and political rights focuses on the rights of the individual and while the ICESCR emphasises the obligations of states in relation to the progressive realisation of socio-economic rights.⁴⁸

⁴² Proclaimed at the International Conference on Human Rights at Teheran on 13 May 1968.

⁴³ Adopted at the World Conference on Human Rights in Vienna 25 June 1993.

⁴⁴ General Assembly Resolution 55/2 of 8 September 2000.

⁴⁵ Pechota 33-36.

⁴⁶ Henkin 10. See also Pechota 41-43.

⁴⁷ Henkin 10.

⁴⁸ This is clear from the different textual formulations. For example: ICCPR art 6: 'Every human being has the inherent right to life'; ICESCR art 6: 'The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses to accept, and will take appropriate steps to safeguard this right.' It may well be argued that the drafting of two separate covenants for the so-called first generation and second generation rights strengthened the view that the former give rise to exclusively negative obligations while the latter only raise positive obligations for the state. This air-tight distinction has been discredited and it is widely accepted that both kinds of rights give rise to positive and negative obligations. See C Scott and P

The finalisation of the texts of the international covenants took place over a number of years. This was due to the ideological differences between the capitalist states and the socialist states concerning the 'relation of society to the individual, about his rights and duties, about priorities and preferences among them'⁴⁹ and the extensive consultation process followed by the UN in international law-making.⁵⁰ The human rights regime established through the Covenants had to have wide appeal and reflect consensus spanning major ideological and doctrinal differences.⁵¹

On 16 December 1966 the General Assembly accepted the two Covenants and the Optional Protocol to the ICCPR and these international law instruments were opened for signature.⁵² The initial response of states was slow. By 23 December 1975 the required 35th ratification of the ICCPR was made by Czechoslovakia and it entered into force on 23 March 1976. Similarly the ICESCR entered into force on 3 January 1976, three months after its ratification by Jamaica on 3 October 1975. By 18 April 2008 the ICCPR had 70 signatories and 161 member parties.⁵³ On the same date the ICESCR had 67 signatories and 158 member parties.⁵⁴ Both Covenants were signed by South Africa on 3 October 1994, but thus far South Africa has only ratified the ICCPR.⁵⁵

Both these international human rights treaties contain provisions relevant to the eradication of racism, namely those of equality and non-discrimination. The ICCPR deals pertinently with the rights to equality and non-discrimination while the ICESCR is founded on the equality principle in that it ensures equal entitlement to the rights it enumerates. I restrict my discussion to the provisions of the ICCPR below since these embody the commitment to equality more expansively.

Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *U of P L R* 1.

⁴⁹ Henkin 10. See also A Cassese 'The General Assembly: Historical Perspective' in P Alston *The United Nations and Human Rights: A Critical Appraisal* (1992) Clarendon Press: Oxford 29-32, 35ff.

⁵⁰ See Pechota 32-71 for an exposition of the drafting and acceptance history.

⁵¹ Pechota 36.

⁵² Pechota 39-64.

⁵³ United Nations '4. International Covenant on Civil and Political Rights New York, 16 December 1966' available at <http://www2.ohchr.org/english/bodies/ratification/4.htm> accessed on 18 June 2008.

⁵⁴ United Nations '3. International Covenant on Economic, Social and Cultural Rights New York 16 December 1966' available at <http://www2.ohchr.org/english/bodies/ratification/3.htm> accessed on 18 June 2008.

⁵⁵ The ICCPR was ratified on 10 December 1998.

3.2.4.2 *Equality and Non-discrimination in the ICCPR*

3.2.4.2.1 Provisions

The ICCPR is founded upon the commitment to respect for the inherent human dignity of all people.⁵⁶ Like the Charter and the Declaration it draws a link between the protection of equal and inalienable human rights and 'freedom, justice and peace'.⁵⁷

Many of the rights set out in this Covenant pertain to the individual. Positively formulated rights invoke the equality principle with references to 'every human being'⁵⁸ or 'everyone'.⁵⁹ Negative formulations do the same when they prohibit actions depriving the individual of certain goods or outlawed certain kinds of treatment of the individual.⁶⁰ In this the ICCPR is no different from the Declaration. The binding legal obligations flowing from the Covenant provide a different dimension to the equality principle it entrenches; the Covenant does not merely set out a moral commitment to equality, but it provides legal impetus to the commitment to equality.

A number of articles in the ICCPR concretise the commitment to equality which flows from the Charter through the Declaration. Article 2 of the Covenant places an obligation on member states to ensure equal recognition of rights of all individuals present in that state and to guarantee equal entitlement to the rights protected in the Covenant.⁶¹ The same article further prohibits distinction⁶² in this regard, and refers specifically to a number of grounds. Race is the prohibited ground mentioned first. Article 2(3) obliges member states to provide effective remedies for the violation of rights protected in the Covenant. The centrality of the commitment to equality is underscored by the inclusion of art 4 which provides for derogation of rights during a

⁵⁶ Preamble of the ICCPR.

⁵⁷ Preamble.

⁵⁸ Article 6(1).

⁵⁹ See for example art 9 and art 12.

⁶⁰ See for example arts 7 and 8.

⁶¹ Article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' This general provision is by art 3 which obliges member states to ensure equal enjoyment of civil and political rights to men and women.

⁶² The terms 'discrimination' and 'distinction' are used interchangeably in the context of the Covenant.

state of emergency. The derogation of rights is allowed only when it is required to deal with the emergency and may not 'involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin'. Articles 14 and 16 respectively deal with equality before the courts and tribunals and equal recognition as persons before the law. The dedication to racial equality and harmony is advanced in art 20(2) which prohibits the advocacy of national, racial or religious hatred and art 23, which protects the rights of children without discrimination.⁶³ Article 26 of the Covenant deals with equality before the law. Not only are all persons entitled to equal protection of the law, but the law of a member state has to provide for 'equal and effective protection against discrimination on any ground such as race'.⁶⁴

Concerning non-discrimination and equality, the ICCPR obliges member states to ensure that national legal systems ensure:

- equal entitlement to civil and political rights
- equality before the law
- prohibition of discrimination by the law
- equal and effective protection against discrimination.⁶⁵

3.2.4.2.2 Implementation and enforcement

Article 28 of the Covenant provides for the creation of a Human Rights Committee to oversee the implementation of the provisions of the Covenant by state parties. It consists of eighteen members 'who shall be of high moral character and recognised competence in the field of human rights'.⁶⁶ The members of the Committee are

⁶³ The grounds listed in art 23 are 'race, colour, sex, language, religion, national or social origin, property or birth'.

⁶⁴ Other grounds that are specifically listed in art 26 are 'colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

⁶⁵ Compare in this regard BG Ramcharan 'Equality and Nondiscrimination' in L Henkin (ed) *The International Bill of Rights* (1981) Columbia University Press: New York 250 who lists five related principles: equal enjoyment of rights; the general principle of equality and specifically gender equality; equality before the law and courts; equal protection of the law and the principle of non-discrimination.

⁶⁶ Article 28(2). Consideration is given to the inclusion of individuals with legal experience. Article 38 provides for members of the Committee to make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

elected⁶⁷ and do not serve on the Committee as plenipotentiaries, but serve in their personal capacity.⁶⁸ Only one national from a member state may serve on the Committee and ‘consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilisation and of the principal legal systems’.⁶⁹

The measures of implementation provided for in the Covenant are fourfold. The Covenant provides, in the first instance, for the submission of reports by member states on measures taken to give effect to the rights recognised in the Covenant.⁷⁰ The state parties’ reports are to ‘indicate the factors and difficulties, in any, affecting the implementation of the present Covenant’.⁷¹ Member states have to submit their reports within a year of becoming a member to the Covenant and thereafter at the request of the Committee.⁷² The Committee studies the state party reports⁷³ and responds to these through its own reports and appropriate general comments which are submitted to the state parties.⁷⁴ State parties are allowed to respond to the reports and comments of the Committee.⁷⁵ The Covenant further empowers the Committee to disseminate its reports and comments, together with state parties’ reports to the Economic and Social Council of the UN.⁷⁶ In the formulation of general comments and in responding to state party reports, the Committee provides important guidance for the interpretation of the obligations imposed by the Covenant.⁷⁷

The second pillar of enforcement allows for inter-state complaints in the event where a state party is of the opinion that another state party is not complying with the provisions of the Covenant.⁷⁸ Member states must specifically declare their

⁶⁷ Committee members are elected for a term of 4 years (art 32). See art 30 for details regarding the election of members.

⁶⁸ Article 28(3).

⁶⁹ Article 31.

⁷⁰ Article 40(1).

⁷¹ Article 40(2).

⁷² Article 40(1). Reports are submitted to the Secretary-General of the UN who transmits them to the Committee (art 40(2)). The Secretary-General may also transmit state party reports to specialised UN agencies after consultation with the Committee (art 40(3)).

⁷³ Article 40(4).

⁷⁴ Ibid.

⁷⁵ Article 40(5).

⁷⁶ Article 40(4).

⁷⁷ See 3.4.3 below.

⁷⁸ Article 41.

acceptance of this procedure and its use is restricted to those member states alone.⁷⁹ The Covenant provides for a detailed procedure to be followed in relation to inter-state complaints.⁸⁰ The Committee's task is to facilitate an understanding between the parties and to further respect for human rights. It does not have the authority to make a binding order and it merely provides support to member states to resolve their disagreement. This enforcement measure allows the Committee to play an important guiding/educational role regarding human rights, their interpretation and enforcement.

The third means of enforcement is individual communications which are provided for in the Optional Protocol to the ICCPR.⁸¹ Individual communications may only be directed to the Committee by individuals from member states which are parties to the Protocol.⁸² This provision necessarily restricts the value of this means of enforcement. Individual communications may only be submitted to the Committee after all available domestic remedies have been exhausted⁸³ and the matter must not be the subject of any other international investigation.⁸⁴ The Committee considers the complaint and response of the state party before it formulates a view which is sent to both the complainant and the state party involved.⁸⁵ The views formulated in respect of individual communications are important in providing guidance for the interpretation of the rights enumerated in the Covenant. As in the instance of inter-state complaints, the authority of the Committee is limited in respect of individual communications. The Committee requests compliance, but the effective implementation of the suggested remedy is up to the member state.

The fourth pillar in the implementation scheme is provided for in art 45 of the ICCPR. In terms of this article the Committee is to submit a report to the General Assembly of

⁷⁹ Article 41(1). For a detailed list of member states which made the declaration in terms of art 41 see United Nations 'Declarations Recognizing the Competence of the Human Rights Committee under Article 41' available at <http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsArt41ICCPR.pdf> accessed on 19 June 2008. South Africa has made the declaration in terms of this article and the procedure could be invoked by and against South Africa.

⁸⁰ See art 41.

⁸¹ This protocol came into force on 23 March 1976 and as of 5 March 2008 it had 111 members and 35 signatories: United Nations '5 Optional Protocol to the International Covenant on Civil and Political Rights New York, 16 December 1966' available at <http://www2.ohchr.org/english/bodies/ratification/5.htm> accessed on 19 June 2008. South Africa acceded to the protocol on 28 August 2002.

⁸² Article 1 of the Optional Protocol.

⁸³ Article 5(2)(b).

⁸⁴ Article 5(2)(a).

⁸⁵ Article 5.

the UN through the Economic and Social Council. The consideration of the report by the General Assembly places human rights affairs – and specifically the ICCPR – on the international agenda. Member states of the UN which are not parties to the Covenant are confronted with the work of the Committee and the challenges faced by other states in relation to human rights. Broader discussion of human rights issues raises awareness regarding human rights.

3.2.5 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

3.2.5.1 Background

This impetus for the drafting of this Convention came from a series of racist and anti-Semitic displays of racial and religious prejudice that took place in several countries during 1959-1960.⁸⁶ These incidents reminded the international community of the atrocities of World War II in which racism and ideas of racial superiority played a major role. In response to this, various UN bodies condemned the surge of racism and was it decided that a convention placing legal obligations on states to prohibit racism and religious intolerance had to be drafted and accepted.⁸⁷ After some deliberation it was decided to separate the issues of racism and religious intolerance.⁸⁸

In the build-up to the Convention, the General Assembly passed the United Nations Declaration on the Elimination of All Forms of Racial Discrimination in 1963.⁸⁹ This Declaration builds on the commitment to equality and non-discrimination set out in the Charter and the Universal Declaration.⁹⁰ It condemns racial discrimination as a denial of human dignity and ultimately as a threat to international peace.⁹¹ All forms of racial discrimination, whether from a governmental or private source, are prohibited.⁹² The

⁸⁶ Schwelb 996. For another exposition of the drafting history and process see Lerner 13-18. See also T Meron *Human Rights Law-Making in the United Nations A Critique of Instruments and Processes* (1986) Clarendon Press: Oxford 7-8.

⁸⁷ Schwelb 998-999.

⁸⁸ Schwelb 998-999; Lerner 14.

⁸⁹ Lerner 16.

⁹⁰ Preamble of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.

⁹¹ Article 1.

⁹² Article 2.

Declaration proclaims equality before the law without distinction according to race, colour and ethnic origin and it mandates the right to an effective remedy in the event of discrimination.⁹³ Education is asserted as an important tool in the eradication of racial prejudices and racial discrimination.⁹⁴ The Declaration furthermore condemns racial hate speech and the incitement of violence on the basis of race.⁹⁵ This Declaration does not create binding legal obligations for the member states of the UN. It sets out, in an aspirational tone, a commitment to racial equality and non-discrimination and it was instrumental in the request of the General Assembly to the Economic and Social Council to instruct the Commission on Human Rights to give 'absolute priority to the preparation of the draft international convention'.⁹⁶

The drafting process of the International Convention on the Elimination of All Forms of Racial Discrimination involved the Human Rights Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as the Third Committee of the General Assembly.⁹⁷ It took place at a time when the Human Rights Commission was working on the Covenants and the formulations of the provisions of the Covenants and the Convention fed into each other.⁹⁸ The drafting of the Convention occupied the different role players from 1963-1965; and, on 21 December 1965, the text of the Convention was approved by the General Assembly and the Convention opened for signature and ratification.⁹⁹ The relatively short drafting period emphasises the priority given to racial equality on the international agenda. Another indication of the priority given to racial equality in international law is the relatively short period within which the requisite number of ratifications of the Convention was attained. The Convention entered into force on 4 January 1969, a mere three years after it had been opened for signature and ratification.¹⁰⁰ By 21 April

⁹³ Article 7.

⁹⁴ Article 8.

⁹⁵ Article 9.

⁹⁶ Lerner 16.

⁹⁷ Schwelb 998-999; Lerner 16-18.

⁹⁸ Ramcharan 251.

⁹⁹ Schwelb 999.

¹⁰⁰ United Nations '2. International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 March 1966' available at <http://www.ohchr.org/english/countries/ratification/2.htm> accessed on 18 June 2008.

2008, the Convention had 173 ratifications and 85 signatories.¹⁰¹ South Africa signed this treaty on 3 October 1994 and ratified it on 10 December 1998.¹⁰²

3.2.5.2 *Provisions*

This Convention, according to Schwelb, represents ‘the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races’.¹⁰³ This commitment to the eradication of racial discrimination and to the attainment of racial equality is clearly embodied as an ideal in the preamble which condemns colonialism and its associated practices. The preamble links the Convention to the Charter, the Universal Declaration of Human Rights and the UN Declaration on the Elimination of All Forms of Racial Discrimination and the commitments to equality and non-discrimination set out in those documents. The link between racial equality and the maintenance of peaceful and friendly relations among nations is confirmed.

The Convention contains seven articles setting out its substantive provisions. Article 1 provides a definition of ‘racial discrimination’ and sets the framework for the application of the Convention. Racial discrimination is defined as

‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

This dense definition requires careful analysis because it covers a broad spectrum of actions and areas.¹⁰⁴ It broadens the concept of ‘race’ to include colour, descent, national or ethnic origin. The wide scope of the definition is underscored by the inclusion of ‘any distinction, exclusion, restriction or preference’ as manifestations of ‘racial discrimination’ and the broad fields of application – ‘political, economic, social, cultural or any other field of public life’. Articles 1(4) and 2(2) respectively exclude affirmative action policies from the definition of racial discrimination and require the

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Schwelb 1057.

¹⁰⁴ See 3.4 below.

implementation of affirmative action measures to ensure full and equal enjoyment of human rights and freedoms. It is interesting to note that the Convention requires affirmative action measures not to create separate rights for different racial groups and to be terminated when its objectives have been reached.

The general prohibition of racial discrimination and the obligations of state parties in relation to the prohibition of racial discrimination are provided for in art 2. Articles 3 (condemning racial segregation and apartheid), 4 (condemning the propagation of racial hatred and calling for the criminalisation of ideas of racial superiority) and 5 (providing for equality before the law and setting out an illustrative list of civil, socio-economic and cultural rights which are to be protected *sans* racial distinction) provide for specific elaborations of the general principles, while art 6 requires effective protection and remedies for acts of racial discrimination in municipal law. Article 7 seeks to address the underlying prejudices that result in acts of racial discrimination through education and dissemination of information to promote 'understanding, tolerance and friendship'.

The ICERD combines promotional elements with standard setting.¹⁰⁵ In relation to the promotional elements, the Convention requires the facilitation of understanding among races (art 2); the implementation of affirmative action measures to ensure full and equal enjoyment of human rights and freedoms (art 2(2)); the encouragement of integrationist multiracial organisations (art 2(4)) and the eradication of prejudice through teaching and education (art 7). The provision for teaching and education to eradicate prejudice has an important role to fulfil in the pursuit of racial harmony.¹⁰⁶ This provision supplements the legal prohibition of discrimination which cannot change the hearts and minds of people.¹⁰⁷

The standard-setting elements are evident from arts 2(1)(a) to (d) which prohibit state parties from engaging in acts of racial discrimination; sponsoring or supporting others

¹⁰⁵ Schwelb 1016.

¹⁰⁶ See also CERD General Comment 5: Reporting by State Parties (art 7) (14/04/77).

¹⁰⁷ S Farior 'The Neglected Pillar: the "Teaching Tolerance" Provision of the International Convention on the Elimination of All Forms of Racial Discrimination' (1999) 5 *ILSA Journal of International and Comparative Law* 291 at 293-294. At 294 the author refers to the words of Dr Martin Luther King Jr: 'It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless.'

in the commission of acts of racial discrimination; to review and amend governmental policies, laws and regulations which may be instrumental in perpetuating racial discrimination. They are required to prohibit racial discrimination by private individuals and bodies by all means.

3.2.5.3 *Implementation and Enforcement*

The vehicle for the implementation and enforcement of the Convention is the Committee on the Elimination of Racial Discrimination (CERD) created in art 8 of the Convention. It comprises 18 impartial experts of 'high moral standing' who serve on this Committee in their personal capacities. This treaty-based body is tasked with the consideration of state party reports on the legislative, judicial, administrative and other measures they have taken to give effect to the Convention. The Committee is to make suggestions and general recommendations in response to state party reports and state parties are allowed to respond to the suggestions and recommendations.¹⁰⁸

Furthermore, the Committee is involved in the implementation and enforcement of the Convention through its involvement in the conciliation process resulting from a complaint by one of the state parties in relation to another state party's alleged non-compliance with the provisions of the Convention.¹⁰⁹ Articles 11 to 13 of the Convention set out a staged process to be followed in the event of inter-state disputes. The Committee's involvement in the conciliation process evolves as the process unfolds – from serving as a 'post-box' in the first stage to active involvement in the search for an amicable solution to the dispute. In the attempt to find such an amicable solution, the Convention provides for the Committee to submit recommendations to the state parties involved which the parties may or may not accept.

Article 14 of the Convention provides for the implementation and enforcement of its provisions by means of individual communications to the Committee regarding racial discrimination. This procedure is only available to those individuals within the jurisdiction of state parties that declared their willingness to submit to such procedure.

¹⁰⁸ Article 9.

¹⁰⁹ Article 11.

Individuals and groups of individuals may use this procedure. Unlike the ICCPR, nongovernmental organisations are thus allowed to make use of this procedure. Domestic remedies must be exhausted by individuals or groups before they turn to this procedure. These include petitioning a national body entitled to receive and complaints of this nature. The state party involved is entitled to respond to the complaint and the Committee has to formulate suggestions and recommendations to resolve the dispute. The authority of the Committee in this regard is limited. Acts of racial discrimination perpetrated by states against individuals are condemned by the Committee, but the implementation of recommendations is up to the member states.

The last measures of implementation and enforcement provided for in the Convention are the annual reports of the Committee to the General Assembly. The annual report should include an exposition of its suggestions and general comments in response to state party reports (art 9(2)) and a summary of individual communications, state party explanations, comments and recommendations following the complaint (art 14(8)).¹¹⁰

3.3 HUMAN RIGHTS PROTECTION ON THE AFRICAN CONTINENT

3.3.1 Background

The Organisation of African Unity (OAU) came into existence in 1963 and its Charter emphasised the 'preservation of integrity and sovereign independence of African states'.¹¹¹ Initially the Organisation did not place a high priority on the protection of human rights,¹¹² but the possibility of creating a regional human rights tribunal or commission similar to those in existence in Europe or the Americas has been on and off the agenda of the OAU since 1961. These initiatives were often supported or organised by the International Commission of Jurists and the UN.¹¹³ The reality of

¹¹⁰ The annual report also has to include something of no relevance to the current study: a summary of petitions and reports from UN bodies in respect of dependent territories as well as the opinion and recommendations of the Committee in respect thereof (art 15(3)).

¹¹¹ Odinkalu 329. See also E Baimu 'Introduction to Africa's Continental Organisations' in C Heyns (ed) *Human Rights Law in Africa Volume 1* (2004) Martinus Nijhoff Publishers: Leiden 99.

¹¹² Dlamini 189, 193. See also A Lloyd and R Murray 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 *JAL* 165 at 166.

¹¹³ Dlamini 190-191.

wide-spread human rights abuses on the continent convinced the leaders of the OAU of the importance of human rights and the need to provide for the protection of human rights on the continent.¹¹⁴ In 1979 the first steps were taken in the development of an African regional human rights regime. A working group was set up to draft proposals for the creation of an African Commission for Human Rights.¹¹⁵ The draft prepared by the working group was approved by the Council of Ministers of the OAU in Banjul, the Gambia in January 1981 and later that same year by the Assembly of Heads of States of the OAU in Kenya.¹¹⁶ The African Charter on Human and Peoples Rights came into operation in 1986 when the requisite number of ratifications was reached.¹¹⁷ To date 53 African states have ratified the Charter.¹¹⁸ South Africa signed and ratified the Charter on 9 July 1996.¹¹⁹

3.3.2 Recent African Human Rights Developments

The protection of human rights on the African continent gained a new dimension with the transformation of the OAU into the African Union (AU) in May 2001 and the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 25 February 2004.¹²⁰ The Charter of the OAU made brief reference to human rights as these are protected in the Charter of the United Nations and the Universal Declaration of Human Rights;¹²¹ by way of contrast, the Constitutive Act of the African Union places the protection of human rights in the foreground.¹²² The Constitutive Act of the AU

¹¹⁴ Odinkalu 329; Dlamini 189.

¹¹⁵ Dlamini 192.

¹¹⁶ Dlamini 193.

¹¹⁷ A simple majority of the members of the Organisation was required.

¹¹⁸ African Union 'List of countries which have signed, ratified, acceded to the African Charter on Human and Peoples' Rights' available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf accessed on 18 December 2006.

¹¹⁹ *Ibid.*

¹²⁰ African Union 'Press Release 121/2003 The Protocol on the African Court on Human and Peoples' Rights to Come into Force Soon' available at http://www.africa-union.org/News_Events/Press_Releases/121protocol%20on%20African%20Court%20to%20come%20into%20force.pdf accessed on 19 December 2006. Reference to the role of the Court will be made below.

¹²¹ Organisation of African Unity Charter Preamble and art 1.

¹²² For an exposition of the background to the establishment of the African Union see Kindiki 97.

establishes a large number of new organs to replace the organs of the OAU.¹²³ The preamble to the Constitutive Act proclaims a determination to 'promote and protect human and peoples' rights and to consolidate democratic institutions and culture, and to ensure good governance and the rule of law'. Setting out the objectives of the Union, art 3 pays due heed to the UN Charter, the Universal Declaration and the African Charter on Human and Peoples' Rights. While the Act recognises national sovereignty,¹²⁴ it balances that principle with the need to maintain peace on the continent. One could even go as far as to say that the Act dilutes the sovereignty principle.¹²⁵ This is illustrated by the inclusion of art 4(h) of the Constitutive Act which allows the AU to intervene in a member state in instances of grave human rights abuses; war crimes, genocide and crimes against humanity. More proof of the centrality of human rights protection in the AU is found in another of the founding principles of the Union, namely 'respect for democratic principles, human rights, the rule of law and good governance'.¹²⁶

Respect for human dignity and human rights underpin the AU and its commitment to these ideals goes further than the OAU.¹²⁷ The failure of the drafters of the Constitutive Act to assign the duty to protect, advance and uphold human rights to a specific organ of the AU is, in the light of the above commitment, lamentable.¹²⁸ This omission is not an insurmountable obstacle in the road to the protection of human rights on the continent. The AU's incorporation of the human rights bodies that existed under the OAU, namely the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights of the Child fill the lacuna to some extent.¹²⁹ Specific roles in relation to human rights protection and advancement are also assigned to certain AU organs. The Economic, Social and Cultural Council of the African Union, the advisory organ of the AU mainly concerned

¹²³ Article 5(1) of the Constitutive Act provides for the creation of the Assembly of Union, the Executive Council, the Pan-African Parliament, the Court of Justice (per a decision of the Assembly in July 2004 this court and the African Court on Human and Peoples' Rights will be merged), the Commission (the secretariat of the AU), the Permanent Representative Committee, the Specialised Technical Committees, the Economic Social and Cultural Council and the Financial Institutions. Sub-article (2) creates the scope for the establishment of other organs by the Assembly.

¹²⁴ Article 4(g).

¹²⁵ Kindiki 106; M du Plessis 'The African Union' in J Dugard *International Law: A South African Perspective* 3rd edition (2005) Juta: Landsdowne 557.

¹²⁶ Article 4(m).

¹²⁷ Kindiki 101.

¹²⁸ Ibid.

¹²⁹ Kindiki 102.

with the involvement of civil society organisations in matters of governance, is designated to play a role in the 'promotion of human rights, the rule of law, good governance, democratic principles, gender equality and child rights'.¹³⁰ The Economic, Social and Cultural Council has a sectoral cluster committee on political affairs, which include 'human rights, rule of law, democratic and constitutional rule, good governance, power sharing, electoral institutions, humanitarian affairs and assistance, etc'¹³¹ to 'formulate opinions and provide inputs into the policies and programmes of the African Union'.¹³²

In accordance with art 5(2) of the Constitutive Act, the Assembly opted to create the Peace and Security Council of the AU.¹³³ This Security Council is to play a role in the detection, prevention and management of large-scale human rights abuses, particularly those of a violent nature, on the continent. To some extent this Council mirrors the Security Council of the UN for the African region.¹³⁴ The Protocol that established the Council echoes the importance of the observance of human rights for the maintenance of peace and security.¹³⁵ This sentiment is repeated in numerous articles of this Protocol.¹³⁶

The tension between national sovereignty and the need for the protection of human rights is also present in the guiding principles of this Council. Art 4(c) sets 'respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law' out as being among these principles and art 4(e) and (f) lay 'respect for the sovereignty and territorial integrity of Member States' and 'non interference by any Member State in the internal affairs of another' at the basis of the operations of the Council. In view of the provision contained in art 4(h) of the Constitutive Act of the AU referred to above, the seeming contradiction pales into

¹³⁰ Article 7(5) of the Statutes of the Economic, Social and Cultural Council of the African Union.

¹³¹ Article 11(1)(b).

¹³² Article 11(1).

¹³³ The Protocol Relating to the Peace and Security Council of the African Union entered into force on 26 December 2003 after being ratified by a simple majority of the member states of the AU. This Council replace the Mechanism for Conflict Prevention, Management and Resolution of the OAU.

¹³⁴ Article 17 of the Protocol Relating to the Peace and Security Council of the African Union provides for cooperation between the Peace and Security Council and the UN Security Council.

¹³⁵ Preamble of the Protocol Relating to the Peace and Security Council of the African Union.

¹³⁶ See for example, art 3(f), art 4 setting out the guiding principles of the Council, art 7 dealing with follow-up procedures of the Council, art 13(13) requiring training in international human rights and humanitarian law by members of the standing force and art 14 requiring restoration of the rule of law by the Council during peace-building.

insignificance. The Council is the body which recommends intervention in a member state in accordance with art 4(h) of the Constitutive Act.¹³⁷

The new African Union gives the highest priority to human rights protection and advancement, at least on paper.

The AU's commitment to human rights is furthered by its adoption and expansion of the OAU's New Partnership for Africa's Development (NEPAD).¹³⁸ NEPAD is essentially an African policy initiative to bring about economic development in order to eradicate poverty.¹³⁹ The central role of good governance, a commitment to the rule of law and the protection of human rights in this endeavour is acknowledged.¹⁴⁰ NEPAD is a programme in which African leaders undertake to uphold democratic practices and human rights in order to gain economically from a partnership with the developed world. The NEPAD document does not only recognise respect for human rights, democracy and the rule of law as prerequisites for development, but also foresees the active implementation or furtherance of these important constitutional principles and monitoring of the implementation of these principles.¹⁴¹

The African Peer Review Mechanism (APRM) has been developed to oversee the implementation of the objectives of NEPAD.¹⁴² APRM is a voluntary review mechanism in which states agree to peer review in order to assess their compliance with or progress in the agreed democratic, political, economic and corporate governance rules set out in the Declaration on Democracy, Political, Economic and

¹³⁷ Article 7(1)(e).

¹³⁸ For a brief exposition of the history of NEPAD see E Baimu 'Human Rights Mechanisms and Structures under NEPAD and the African Union: Emerging Trends Towards Proliferation and Duplication' (2002) *Occasional Paper 15* Centre For Human Rights, University of Pretoria available at http://www.chr.up.ac.za/centre_publications/occ15.html accessed on 7 January 2007. See also B Manby 'The African Union, NEPAD and Human Rights: the Missing Agenda' (2004) *HRQ* 983 at 998 for a critical appraisal of the human rights aspect in NEPAD. Manby also discusses other less publicised initiatives relevant to the protection of human rights on the African continent, like the Conference on Security, Stability, Development and Cooperation in Africa. For more particulars on this initiative see <http://www.dfa.gov.za/foreign/Multilateral/africa/cssdca.htm> accessed on 8 January 2007. See also Lloyd and Murray 168ff who point out that NEPAD and CSSDCA overlap and had been integrated to some extent.

¹³⁹ NEPAD para 1-8.

¹⁴⁰ NEPAD paras 49, 71, 79, 80.

¹⁴¹ NEPAD part VII.

¹⁴² The New Partnership for Africa's Development (NEPAD) African Peer Review Mechanism (APRM) available at <http://www.nepad.org/2005/files/documents/49.pdf> accessed on 8 January 2007.

Corporate Governance accepted by the AU in July 2002 pursuant to the NEPAD initiative.¹⁴³ The peer review mechanism requires governments to submit a self-assessment¹⁴⁴ to a group of 'eminent persons'¹⁴⁵ who are to determine whether there is compliance or progress in the process of compliance¹⁴⁶ with the goals of the Declaration – or at least the political will to comply with the goals of the Declaration.¹⁴⁷ In the absence of the political will to comply, the APRM document foresees 'constructive dialogue' and ultimately 'appropriate measures' to be taken by the Heads of State and Government of the AU.¹⁴⁸ The final stage of the review process involves distribution of the report of the eminent persons to various AU bodies and the African Commission on Human and Peoples' Rights.¹⁴⁹

NEPAD and the APRM strengthen existing human rights protection measures on the continent.¹⁵⁰ On the negative side it has to be noted that perhaps too many bodies and initiatives are involved in human rights protection and advancement on the continent. With the transformation of the OAU into the AU an opportunity for streamlining the African human rights regime was missed.¹⁵¹

Against this background of a politically complex African system for the recognition, protection and advancement of human rights, I turn to the specific legal provisions applicable on the African continent.

¹⁴³ The New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance is available at <http://www.nepad.org/2005/files/documents/2.pdf> accessed on 8 January 2007. Para 7-15 of this Declaration deals with issues of democracy and the protection and advancement of human rights.

¹⁴⁴ The Country Self Assessment for the African Peer Review Mechanism available at <http://www.nepad.org/2005/files/documents/156.pdf> accessed on 8 January 2007.

¹⁴⁵ APRM para 6.

¹⁴⁶ APRM para 17.

¹⁴⁷ APRM para 10, for the stages of the review process see paras 18-25.

¹⁴⁸ APRM para 24.

¹⁴⁹ APRM para 25.

¹⁵⁰ See Baimu who, in 2002, warned against unnecessary duplication and proliferation of human rights bodies on the continent.

¹⁵¹ Lloyd and Murray 179.

3.3.3 The African Charter on Human and Peoples' Rights (the Banjul Charter)

3.3.3.1 Provisions

The most important international law human rights document on the continent is the African Charter on Human and Peoples' Rights. New AU initiatives are important, but remain secondary to the Charter because the latter contains substantive and legally enforceable human rights provisions and also contains measures for their implementation. When it comes to matters of equality and non-discrimination, the provisions of the Charter provide content to the broad commitment to human rights protection set out in policy documents.

In its exposition of human rights provisions, the Charter draws to a large extent on the UN Charter and the Universal Declaration of Human Rights. There are, however, certain unique features.¹⁵² The Charter does not only protect individual rights like other international human rights documents do, but specifically enumerates group or collective (peoples') rights.¹⁵³ The important position awarded to the family by the Charter particularly stands out.¹⁵⁴ Furthermore, it not only includes human rights, but also sets out duties.¹⁵⁵ The duties pertain not only to the state to recognise and give effect to the rights set out in the Charter, but also to the individual in respect of her/his family, her/his community and her/his state.¹⁵⁶ The interdependence of civil and political rights; social, economic and cultural rights and the right to development are seen as fundamental.¹⁵⁷

¹⁵² See Umozurike 87ff.

¹⁵³ For the importance of collective rights and also the duties in the Charter, see Mutua 339.

¹⁵⁴ Article 18 and art 27.

¹⁵⁵ Preamble of the Charter and Chapter II.

¹⁵⁶ Mutua 368ff is of the opinion that the duties of the Charter can be classified as direct and indirect. A direct duty, according to the author, is to be found in art 29(4) which requires individuals to strengthen and preserve national solidarity. An example of an indirect duty is to be found in art 27(2) and amounts to a limitation on the enjoyment of rights.

¹⁵⁷ Ibid. Odinkalu sees the inclusion of all the generations of rights as an acknowledgement of the 'interconnectedness and seamlessness' of the rights contained in the Charter (341). It is furthermore interesting to note that the socio-economic rights are framed in a way that allows for their immediate realisation/enforcement.

The extensive use of clawback clauses is another distinguishing factor of the Charter.¹⁵⁸ Clawback clauses ‘entitle a state to restrict the granted rights to the extent permitted by their domestic law’.¹⁵⁹ These clawback clauses that are used in the Charter, instead of a general limitation clause, have been regarded with circumspection because they could be interpreted to allow for a member state to deny the rights of individuals.¹⁶⁰ On a more nuanced reading, it is possible to restrict the potentially harmful effect of these clauses by paying heed to the instructions set out in art 60 and art 61 of the Charter.¹⁶¹ These articles require the African Commission to draw on international law when interpreting the rights of the Charter.

The Charter contains numerous provisions directly relevant for equality and non-discrimination.¹⁶² The preamble draws a link between the undermining of ‘dignity and genuine independence ... and all forms of discrimination, particularly those based on race, ethnic group, colour ...’. Like the other international human rights documents, the Charter uses ‘everyone’ or ‘every individual’ in relation to the positive formulation of rights and ‘no one’ in relation to the negative formulation of rights. This underlying idea of equality is explicitly fleshed out in art 2 which provides for equal entitlement to the rights enumerated in the Charter without distinction as to race, ethnic group, colour etc. Equality before the law and equal protection and benefit of the law are provided for in art 3. Independence of the courts is guaranteed.¹⁶³ The Charter deals with discrimination against non-nationals by prohibiting any mass expulsion of non-national racial, ethnic or religious groups.¹⁶⁴ Article 13(2) provides for equal access of citizens to public services, while art 13(3) states that ‘every individual shall have the right of access to public property in strict equality of all persons before the law’. The duties set out in the Charter include the duty of individuals to ‘respect and consider his fellow beings without discrimination’.¹⁶⁵

¹⁵⁸ Examples of clawback clauses are in arts 6, 7, 8, 9, 10, 11, 12, 13 and 14.

¹⁵⁹ Dlamini 195.

¹⁶⁰ Ibid.

¹⁶¹ Uzomurike 29.

¹⁶² Other African human rights treaties (dealing, for example, with women’s, children’s or refugee’s rights) include similar non-discrimination and equality provisions, but for my purposes a consideration of the provisions of the Charter is sufficient.

¹⁶³ Article 26.

¹⁶⁴ Article 12(5).

¹⁶⁵ Article 28.

The equality provisions of the Charter do not only pertain to individuals; art 19 provides for the equality of peoples and condemns the domination of one people by another. The equality of peoples is further recognised in art 22 that guarantees the right to economic, social and cultural development of all peoples with due regard to their freedom and identity to 'equal enjoyment of the common heritage of mankind'. The provision contained in art 25 is also relevant to the current discussion: it places a duty on state parties to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood'.

3.3.3.2 *Implementation and Enforcement*

The Charter contains a number of implementation measures and these are amplified by the additional Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Charter establishes the African Commission on Human and Peoples' Rights as the body which oversees the implementation of its provisions by member states.¹⁶⁶ In July 2006 the African Court on Human and Peoples' Rights held its first meeting in Banjul, but it has yet to commence functioning.¹⁶⁷

The African Commission on Human and Peoples' Rights was established within the OAU (AU) to 'promote human and peoples' rights and ensure their protection in Africa.'¹⁶⁸ It consists of eleven members who serve in their personal capacity and who

¹⁶⁶ Article 30.

¹⁶⁷ African Union 'The Africa Court of Human and Peoples' Rights holds its first meeting in Banjul, the Gambia' available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Press_Releases/PRESS_RELEASE_JUDGES.doc accessed on 8 January 2007. On 20 March 2008 the Hironnelle Agency, Arusha reported that the Court would commence its work in June 2008: Anon 'African Human Rights Court to Start After June' available at <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=110757> accessed on 25 March 2008. See below for a discussion of the jurisdiction of the court.

¹⁶⁸ Article 30.

are known for their 'high morality, integrity, impartiality and competence'¹⁶⁹ concerning human rights.¹⁷⁰

Article 45 of the Charter sets out the mandate of the Commission, which, broadly speaking, can be divided into promotional, interpretative and protective functions.¹⁷¹ The promotional function includes the collection of information concerning human rights, research, organisation and participation in conferences and seminars on human rights, as well as the dissemination of information regarding human rights and collaboration with other human rights bodies and non-governmental organisations.¹⁷² This aspect of the Commission's task includes the consideration of and commenting on periodic state reports.¹⁷³ Article 45(3) of the Charter allows for the Commission to interpret a provision of the Charter at the request of 'a state party, an institution of the Organisation of African Unity (AU) or an African organisation recognised by the Organisation of African Unity'. This provision effectively empowers the Commission to hand down authoritative interpretations of the Charter; a function that has been likened to the granting of an advisory opinion.¹⁷⁴

The protective function of the Commission's work involves the consideration of communications. The Charter provides for inter-state communications in arts 47-54 and for 'other communications' in arts 55-59. The Charter provides for a two-tiered approach to interstate communications. The first tier (optional) involves merely notifying the Commission of the delivery of a notice by one state party to another regarding a violation of the provisions of the Charter by the state party.¹⁷⁵ The state parties involved should attempt to resolve their dispute amicably within three months, failing which the Commission may be involved in the second tier provided for in the

¹⁶⁹ Article 31(1).

¹⁷⁰ Only one national from a state may serve on the Commission (art 32). Articles 33-44 provide for procedural matters regarding the election of members of the Commission and conducting the affairs of the Commission.

¹⁷¹ Article 45. Murray chapter 2. Umozurike 70-85 distinguishes between promotional and protective functions only.

¹⁷² Umozurike 70.

¹⁷³ Article 62 requires the submission of reports on biannual basis 'on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'. The recommendations of the Commission are submitted to the Government and the Assembly of the Heads of State.

¹⁷⁴ Murray 25.

¹⁷⁵ Articles 47, 49.

Charter.¹⁷⁶ In its endeavour to resolve the dispute, the Commission may receive information from the state parties as well as from other sources.¹⁷⁷ The Commission should attempt to find an amicable solution for the dispute and present its findings and make recommendations to the Assembly of Heads of State in the form of a report.¹⁷⁸

In relation to 'other communications', the Charter is not specific¹⁷⁹ and there is no indication whether it is referring to individuals, groups or NGOs. The provision has been interpreted liberally by both the Commission and commentators.¹⁸⁰ The Charter and rules of procedure set out specific requirements for such communications¹⁸¹ and, as provided for in other international human rights documents, individual petitions may be filed only once national remedies have been exhausted.¹⁸² The Charter, however, is more flexible than other similar international human rights documents in this regard, because this requirement may be disposed of in instances of wide-spread and serious human rights abuses.¹⁸³ This progressive provision is somewhat neutralised by the stipulations regarding confidentiality contained in art 59 which could potentially render the work of the Commission less effective.¹⁸⁴

As in the instance of the Human Rights Committee and the Committee on Racial Discrimination, the African Commission has to rely on the willingness of states to implement their findings. It has to be noted that the work of the Commission has been negatively affected by limited resources.¹⁸⁵

In view of the limitations of the powers of the Commission, the members of the AU decided to establish an African Court for Human and Peoples' Rights¹⁸⁶ which came

¹⁷⁶ Article 48. By this stage all local remedies must have been exhausted, unless this would amount to undue delay or prolonging of the procedure (art 50).

¹⁷⁷ Articles 51, 52. The Commission has wide powers of information gathering (art 46). These include receiving information from NGOs, individuals, through on-site visits etc.

¹⁷⁸ Articles 52, 53.

¹⁷⁹ See Gumede 121ff.

¹⁸⁰ Umozurike 231.

¹⁸¹ Gumede 121-122.

¹⁸² Article 56. A decision as to the admissibility of a communication is taken by the Commission prior to engaging with its substance.

¹⁸³ Article 58. See Odinkalu 359ff.

¹⁸⁴ In terms of this article the Assembly of Head of States has the power to decide when information regarding a communication is to be released.

¹⁸⁵ Murray 12.

¹⁸⁶ See above. The Court had its first meeting and the judges for the Court have been appointed. For provisions regarding the composition of the court, the election of judges etc. see arts 11-25.

into being on 25 January 2004 with the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The preamble to the Protocol states that the Court is intended to 'enhance the efficiency of the African Commission' and its functions are seen as complementary to that of the Commission. Article 2 explicitly stipulates that the Court is to complement the protective mandate of the Commission. It is silent about the promotional aspect of the Commission's mandate and it may be concluded that the promotional aspect remains firmly within the purview of the Commission. Thus it is in respect of the interpretative and protective functions that the establishment of the Court will have an impact on the Commission and its functioning.

Article 4 of the Protocol empowers the Court to hand down advisory opinions on 'legal matters relating to the Charter or any other relevant human rights instruments' to member states of the AU, its organs or any African organisation recognised by the AU.¹⁸⁷ The Court may, however, not give an opinion on a matter that is being examined by the Commission. The Protocol envisions a complementary relationship between the Commission and the Court.¹⁸⁸ This is echoed in relation to the dispute resolution functions of the Court. The Commission is one of the entities granted standing before the Court,¹⁸⁹ and the Court may transfer cases to the Commission for its consideration.¹⁹⁰ O'Shea¹⁹¹ is sceptical about the transferral of cases (or complaints) from the one forum to the other, seeing it as an unnecessary complication.

The utility of the African Court is furthermore hampered by the standing provisions of the Protocol in relation to individual complaints. Standing is granted to a state party which has lodged a complaint with the Commission (or against whom a complaint was lodged) – a further indication of the overlap in jurisdiction between the Commission and the Court. Article 5(3) provides for the Court to allow NGOs observer status before it. The same article deals with the issue of individual complaints and stipulates that complaints from individuals will only be heard from nationals whose states had made the necessary declaration in that regard. The Protocol is unclear on the

¹⁸⁷ The text of the Protocol refers to the OAU.

¹⁸⁸ Article 8. See O'Shea 295 for criticism of this idea of complementarity.

¹⁸⁹ Article 5.

¹⁹⁰ Article 6(3).

¹⁹¹ O'Shea 295.

relationship between the Court and the Commission in terms of the protective mandate. This will affect the functioning of both the Court and the Commission and it is suggested that the relationship be clarified before the Court assumes duty.

The Protocol restricts the jurisdiction of the African Court on Human and Peoples' Rights to matters concerning the 'interpretations and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'.¹⁹² The Court has been set up on this basis, but its mandate will be amended in the near future. The Constitutive Act of AU provides for the establishment of a Court of Justice as a separate institution from the African Court on Human and Peoples' Rights. At the Third and Fifth Sessions of the Assembly of the AU in July 2004 and July 2005, it was decided to merge these two judicial institutions into a single court with comprehensive jurisdiction.¹⁹³ The Protocol relating to this merger was finalised in May 2006 and process of drafting the necessary legal instruments is underway.¹⁹⁴

The human rights regime on the African continent is in a state of flux. The gradual erosion (at least on paper) of the principle of national sovereignty is welcomed and the commencement of the functioning of the Court is awaited eagerly. For the moment, however, it is only the work of the Commission that can shed light on the legal standards for confronting complaints of racism on the continent.

¹⁹² Art 3.

¹⁹³ African Union 'Information Note on the First Meeting of the African Court on Human and Peoples' Rights' available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/CADHP/BACKGROUND_DOCUMENT_ON_THE_AFRICAN_COURT.doc accessed on 9 January 2007.

¹⁹⁴ African Union 'Press Release No 66/2008 Opening of the Meeting of Legal Experts' available at www.africa-union.org/root/UA/Actualites/2008/avr/CP%20EN%20QUESTIONS%20JURIDIQUES%2014-04-08.doc accessed on 18 June 2008.

3.4 THE STANDARDS SET BY INTERNATIONAL LAW

3.4.1 Background

In the preceding part of this chapter, I provided an exposition of the major international law provisions regarding equality and non-discrimination with reference to racial equality as these are relevant in dealing with complaints of racism. These provisions assist in setting the standards that South African law has to meet. But the language of rights (and thus the texts of international human rights documents) is imprecise.¹⁹⁵ This imprecision allows different role players to put forth different interpretations of rights from which a richer, more inclusive interpretation of rights could emerge. The following section shows how these rights have been interpreted by international bodies and commentators in an attempt to define an inclusive international benchmark.

3.4.2 The Centrality of Racial Equality in International Law

The foundational role that equality plays in international law is well-defined in relation to matters of race and the international community has denounced racial discrimination fiercely over the years. The UN's response to South Africa's policy of apartheid illustrates this point well. From 1946 until the demise of apartheid in the early 1990s, various UN organs and agencies accepted resolutions condemning South Africa's policy of racial segregation and rights allotment on the basis of race.¹⁹⁶ These resolutions led to the increasing international isolation of South Africa and produced a number of treaties and international declarations denouncing racial segregation; the most publicised of these being the International Convention on the

¹⁹⁵ Odinkalu 348 remarks: 'But if all rights were not imprecise, there would be no need to negotiate international treaties on them. Nor would there be any need to litigate contested interpretations of rights in national and international courts and tribunals. The interminable number of cases and law reports on civil and human rights around the world bear tribute to the universal impreciseness of all rights. It is precisely this attribute that makes it possible for each succeeding generation to adapt the language and framework of rights in legitimizing solutions to their problems.'

¹⁹⁶ For a list of selected UN documents in relation to apartheid see African National Congress 'Selected United Nations Documents Relating to the Struggle Against Apartheid 1946-1994' available at <http://www.anc.org.za/un/undocs.html> accessed on 9 December 2006.

Suppression and Punishment of the Crime of Apartheid,¹⁹⁷ the UNESCO Declaration on Race and Racial Prejudice¹⁹⁸ and the International Convention against Apartheid in Sports.¹⁹⁹ These responses are indicative of the value placed on racial equality in relation to the maintenance of international peace. International relations are influenced (even shaped) by the domestic policies of member states with regard to race.

The soured international relations that resulted from South Africa's policy of racial segregation caused international tension regarding its administration of the mandated territory of South West Africa/Namibia.²⁰⁰ On a number of occasions the apartheid government had to defend its case regarding Namibia before the International Court of Justice (ICJ).²⁰¹ In the course of these hearings the ICJ had to consider (at least to some extent) the compatibility of apartheid with the mandate South Africa held to govern over the territory.²⁰² The aim of the applicant countries (Liberia and Ethiopia supported in their endeavour by a number of UN member states) was to obtain a court order against South Africa concerning the implementation of apartheid in Namibia. A

¹⁹⁷ Adopted and opened for signature by the General Assembly on 30 November 1973 and entered into force 18 July 1976. As of 5 February 2002 this convention had 31 signatories and 101 parties: United Nations '7. International Convention on the Suppression and Punishment of the Crime of Apartheid New York 30 November 1973' available at <http://www.ohchr.org/english/countries/ratification/7.html> accessed on 19 June 2008.

¹⁹⁸ Adopted and proclaimed by UNESCO on 27 November 1978.

¹⁹⁹ Adopted and opened for signature by the General Assembly on 10 December 1985 and entered into force on 3 April 1988. As of 5 February 2002 this convention had 72 signatories and 58 parties: United Nations '10. International Convention against Apartheid in Sports New York 10 December 1985' available at http://www.unhcr.ch/html/menu3/b/treaty14_esp.htm accessed on 19 June 2008.

²⁰⁰ See J Dugard (ed) *The South West Africa/Namibia Dispute* (1973) University of California Press: Berkeley for details regarding the long drawn-out dispute regarding South Africa's occupation of the territory.

²⁰¹ In its 1950 Advisory Opinion, the ICJ held that the territory had to be administered in terms of the Mandate for South West Africa of 1920 (Dugard (1973) 128). After a complaint by Liberia and Ethiopia regarding the implementation of apartheid in South West Africa/Namibia, the ICJ made a preliminary enquiry into the matter and held, by a slim margin, in 1962 that it had jurisdiction to hear to the matter. In 1966 the Court handed down its decision on the merits in *South West Africa, Second Phase* 1966 ICJ Reports 6 in what had been called 'the most controversial decision in its history' (Dugard (1973) 292). South West Africa/Namibia was once again the subject of a matter before the ICJ in 1971 when the ICJ handed down its decision: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Reports 16 (Dugard (1973) 447).

²⁰² See Dugard (1973) 277ff. Article 2 of The Mandate for South West Africa provided as follows: 'The Mandatory (sic) shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory subject to such local modifications as circumstances may require. The Mandatory (sic) shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present Mandate.' The latter provision formed the basis of the applicant countries' application.

legally-enforceable court order would compel South Africa, in terms of the Charter, to abandon its official policy based on racial discrimination, at least in Namibia.²⁰³ The 1966 judgment of the ICJ in which the majority of the court found that Liberia and Ethiopia had had no legal right to approach the court, provided an opportunity for dissenting judges to comment upon the legality of apartheid within the mandate system.²⁰⁴ The dissenting opinion of Judge Tanaka²⁰⁵ stands out in its analysis of equality and non-discrimination pertaining to race and warrants closer scrutiny.

Judge Tanaka found that 'the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law'.²⁰⁶ Accordingly, the policy of apartheid, as applied in the territory of Namibia, had to conform to this rule. In analysing the scope of this rule of customary international law, the learned judge set his point of departure as the equal dignity inherent in every human being.²⁰⁷ In determining the meaning of the equality norm, Judge Tanaka refers to Aristotle's classic distinction between distributive and corrective justice.²⁰⁸ This requires that that which is equal should be treated equally and that which is different should be treated in accordance with that difference. Equality, according to the Judge, does not require identical treatment, and where circumstances require different treatment, failure to do so could result in inequality.²⁰⁹ In determining the circumstances under which different treatment would be permitted, reference should be made to the criterion of justice or reasonableness.²¹⁰ This requires that the differential treatment should not be arbitrary. This non-arbitrariness requirement applies only insofar as the objective fact of the differentiation is concerned, and the intention or motive to discriminate is, accordingly, not a prerequisite for a finding that the respondent has violated the legal norm in relation to equality and non-discrimination.²¹¹ According to the Judge '[e]quality [is] a principle and different treatment an exception, those who refer to the

²⁰³ Ibid.

²⁰⁴ Dugard (1973) 326.

²⁰⁵ Dissenting Opinion 568ff. References below are to the page numbers in Brownlie.

²⁰⁶ Dissenting Opinion 577.

²⁰⁷ Dissenting Opinion 588, 592 and 595.

²⁰⁸ Dissenting Opinion 588.

²⁰⁹ Dissenting Opinion 588-589.

²¹⁰ Dissenting Opinion 589.

²¹¹ Dissenting Opinion 590. At 591 the judge holds that the concept of 'race' has no scientific basis and that different treatment on that basis has no relevance for political or legal treatment.

different treatment must prove its *raison d'être* and its reasonableness'.²¹² Two considerations arise in relation to the criterion of reasonableness, namely whether the differential treatment is necessary to protect or benefit those treated differently and secondly whether the differential treatment harms 'the sense of dignity of the individual persons'.²¹³ In applying this reasoning to the facts, Judge Tanaka came to the conclusion that 'the practice of apartheid is fundamentally unreasonable and unjust'.²¹⁴

Judge Tanaka's exposition of the meaning and application of the right to equality and the prohibition of racial discrimination, while only of persuasive value, reverberates in later interpretations of these concepts in international law. The judge set a basis that has been referred to and used in many instances.²¹⁵

3.4.3 The Work of the Committees

While the International Court of Justice is granted jurisdiction in terms of art 22 of the International Convention on the Elimination of All Forms of Racial Discrimination to resolve disputes between states regarding the interpretation of that Convention, the Committee on the Elimination of Racial Discrimination has the authority to interpret the provisions of the Convention as they relate to the functions of the Committee.²¹⁶ The views formulated by the Committee for those purposes are not binding on the member states, but provide direction to states in respect of their reporting obligations.²¹⁷ The ICCPR does not confer any jurisdiction on the ICJ and its treaty body, the Human Rights Committee, has the function to interpret the provisions of that Covenant.²¹⁸ Both committees' general comments and decisions relating to individual communications are valuable in ascertaining the meaning of the equality principle and right in international law. The interpretative jurisdiction of the African Commission is similar to that of the committees insofar as the consideration of reports is concerned,

²¹² Dissenting Opinion 592.

²¹³ Dissenting Opinion 592.

²¹⁴ Dissenting Opinion 596-597.

²¹⁵ The analysis of Judge Tanaka is similar to the approach adopted by the South African Constitutional Court, see chapter 4.

²¹⁶ Meron 10.

²¹⁷ Ibid.

²¹⁸ Meron 85.

but it should be borne in mind that it also has the capacity to hand down authoritative interpretations of the Charter.²¹⁹

The UN Charter had sown the seeds for the international protection of human rights, specifically in relation to equality and non-discrimination. The human rights idea was developed in the UN Declaration and came to legal fruition through the drafting of the Covenants²²⁰ and the ICERD, and on a regional level, in the African Charter. Each of these documents contains equality and non-discrimination provisions that have been differently formulated. The complex drafting process for international law documents leads to the imprecise use of terminology. With reference to the ICCPR, Ramcharan states that the drafters used the terms 'equality, equality before the law, equality before the courts, equal protection of the law, equality of the sexes, nondiscrimination and nondistinction'²²¹ interchangeably. Accordingly, a holistic approach to interpretation of the rights contained in these documents is to be employed. This does not only apply to a single international human rights document, but also across documents. The Covenants and the ICERD were drafted at the same time by the Human Rights Commission. A single understanding of equality informed the drafting of all three documents.²²² In their interpretation of the equality and non-discrimination provisions, the various committees responsible for the interpretation of the treaties have referred to the provisions and interpretation of equality and non-discrimination included in other human rights documents.²²³ It is thus possible to say that a common understanding of the norm of equality has developed in international law. The African Commission specifically, relies on the interpretation of similar provisions by other international human rights bodies, like the Human Rights Committee,²²⁴ the European Court for Human Rights, the Inter-American Commission and the Inter-American Court on Human Rights. This is possible because of the similarity of the wording used in the Charter and the wording of the international law documents and because the explicit

²¹⁹ Article 45(3) of the African Charter and the discussion above at 3.3.3.1.

²²⁰ *SWM Broeks v The Netherlands* CCPR/C/29/D/172/1984 at para 12.3 where it was held that the equality provision of the ICCPR had its roots in the Universal Declaration.

²²¹ Ramcharan 251.

²²² *SWM Broeks v The Netherlands* CCPR/C/29/D/172/1984 para 12.1. See also Ramcharan 251.

²²³ See for instance CCPR General Comment 18: Non-discrimination (10/11/89) para 6.

²²⁴ In *Legal Resources Foundation v Zambia* 211/98 para 63 the African Commission explicitly referred to CCPR General Comment 18: Non-discrimination (10/11/89) when formulating its own understanding of the equality provisions in the Charter.

mandate of arts 60 and 61 of the African Charter enjoins the Commission to make use of international law in its interpretation of the provisions of the Charter.²²⁵

International law documents entrench equality as a right. In its interpretation of the Banjul Charter, the African Commission acknowledges a different dimension of equality. In *Purohit and Moore v The Gambia*²²⁶ the Commission remarked:

‘Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country.’

Equality, according to the Commission, does not only have to do with legal entitlements, fairness and justice, but it informs the spirit of the Charter. The same could be said for the other international law documents that acknowledge the inherent equal dignity of human beings as its foundation.²²⁷

Equality and non-discrimination are often regarded as positive and negative expressions of the same principle.²²⁸ In the positive expression, equality is protected as a self-standing right, e.g. art 26 of ICCPR. Positively framed, the right to equality is not restricted in order to secure equal entitlement to the rights enumerated in the particular treaty, but it applies in relation to all rights conferred by a particular national legal system.²²⁹ Other treaty documents restrict the application of equal entitlement to the rights enumerated in that particular treaty.²³⁰ Linking the right to equality to other enumerated rights in this way does not diminish the importance of equality, but it focuses the attention on the specific bearers of those rights.²³¹ The positive expression of the principle of equality is reinforced by the use of ‘everyone’ and ‘every person’ in relation to the rights set out in the particular document.

²²⁵ International law provisions have been used by the Commission to interpret the clawback clauses restrictively. See *Amnesty International v Zambia* 212/98 para 42 and *Legal Resources Foundation v Zambia* 211/98 para 58, 70.

²²⁶ 241/2001 para 49 (emphasis added).

²²⁷ This approach is in line with that of Judge Tanaka, as discussed above at 3.4.2.

²²⁸ Ramcharan 252; Bayefsky 1.

²²⁹ CCPR General Comment 18: Non-discrimination (10/11/89) para 12.

²³⁰ Bayefsky 3. The author refers to autonomous or subordinate formulations of the equality right.

²³¹ See for instance art 1 of the International Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990.

The negative expression of the principle, namely the prohibition of discrimination, supports the positive expression of equality. Discrimination, like equality, is notoriously difficult to define. Article 1 of the ICERD defines racial discrimination as

‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

In an attempt to clarify the meaning of the term ‘discrimination’ as used in the ICCPR, the Human Rights Committee approved the ICERD definition. This is a comprehensive definition and specifies not only what differential treatment would amount to discrimination, but also that discrimination need not be intentional (‘purpose or effect’). Any differentiation that nullifies or impairs the equal recognition or exercise of rights or freedoms would on the application of this definition amount to discrimination.

The definition of the ICERD recalls the idea espoused by Judge Tanaka that equal treatment is the norm and differential treatment an exception that requires justification. The Human Rights Committee has made it clear that equality does not require identical treatment in every instance²³² and that differential treatment will not necessarily amount to discrimination.²³³ Differential treatment that is reasonable and objective and that aims to achieve a legitimate purpose does not amount to discrimination.²³⁴ Reasonable and objective differential treatment is not arbitrary, but rationally connected to a legitimate purpose.²³⁵ The rationality requirement furthermore requires proportionality between the purpose sought and the differential treatment undertaken.²³⁶ It is the impact of the differential treatment that has to be

²³² CCPR General Comment 18: Non-discrimination (10/11/89) para 8.

²³³ CCPR General Comment 18: Non-discrimination (10/11/89) para 13. CERD General Comment 14: Definition of Discrimination (art. 1, par. 1) (22/03/93).

²³⁴ *Ibid.* See for instance *SWM Broeks v The Netherlands* CCPR/C/29/D/172/1984 para 13, *Danning v The Netherlands* (180/1984), ICCPR A/42/40 (9 April 1987) 151 para 13; *Malik v Czech Republic* (669/1995) ICCPR A/54/40 Vol II (21 October 1998) 291 para 6.5.

²³⁵ *Love et al v Australia* (983/2001) ICCPR A/58/40 Vol II (25 March 2003) 286 (CCPR/C/77/D/983/2001) in an individual opinion Mr Prafullachandra Natwalar Bhagwati states (302) that ‘[e]quality is antithetical to arbitrariness’.

²³⁶ *Gillot v France* (932/2000) CCPR/C/75/D/932/2000 (26 July 2002) para 13.2. See also CERD General Comment 14: Definition of Discrimination (art. 1, par. 1) (22/03/93) where reference is made to an ‘unjustifiable disparate impact’.

considered. The discrimination analysis employed by the committees shows an understanding of equality that accord with Judge Tanaka's ideal of relative (or substantive) rather than mathematical equality.

In the same vein, international law recognises the need for affirmative action to bring about equality.²³⁷ Preferential treatment of disadvantaged groups in an attempt to bring about equality is not in breach of the equality principle. It is to be noted that the Human Rights Committee views such preferential treatment to be temporary.²³⁸

International law recognises that state parties are not the only sources of discriminatory treatment. Article 2(1)(e) of the ICERD requires state parties to 'prohibit and bring an end, by all appropriate means, including legislation as required by the circumstances, racial discrimination by any persons, group or organisation'. The same sentiment is found in art 26 of the ICCPR which provides that 'the law shall prohibit any discrimination'. No particular definition is attached to discrimination perpetrated by individuals and the general definition commented on above would provide guidance. State party compliance will be determined with reference to measures (legislation and other measures) to deal with such complaints and effective remedies in the event of discrimination perpetrated by individuals acting without state authority.²³⁹

In the exposition and analysis of the international law relating to equality and non-discrimination, I have only briefly referred to the term 'race' and its uses in the international law documents. It was accepted, at the time of the drafting of the Covenants and ICERD, that the term 'race' had no scientific basis but it was nonetheless used because of its regular use to denote physical differences between people.²⁴⁰ Its use in the ICERD in conjunction with 'discrimination' leads to the definition of 'racial discrimination' discussed above. It should be noted that 'race' (as

²³⁷ CCPR General Comment 18: Non-discrimination (10/11/89) para 10.

²³⁸ Ibid.

²³⁹ Article 6 CERD and art 2(3) ICCPR. See for instance *Durmic v Serbia and Montenegro* 29/2003 CERD/D/68/D/29/2003 (8 March 2006).

²⁴⁰ See for instance UNESCO 'Statement on the Nature of Race and Race Differences' (1950) as referred to in UNESCO 'UNESCO's Contribution to the Struggle Against Racism, Racial Discrimination and Apartheid' (1981) available at <http://unesdoc.unesco.org/images/0004/000485/048588eb.pdf> accessed on 20 June 2008 3-4.

used in the ICERD) includes 'race, colour descent, or national or ethnic origin'. The Committee on the Elimination of Racial Discrimination has indicated that self-identification by the individual concerned should form the basis of any classification of a person as a member of a particular racial or ethnic group, unless justification to the contrary exists.²⁴¹ The Committee has also provided clarity on the use of the term 'descent'. 'Descent' as used in the Convention refers to racial descent on the one hand, but also to social stratification systems like the caste system in which status is inherited.²⁴² Where discrimination on the basis of membership to a specific caste is alleged, the stratification system will determine membership of a specific caste.

The principle of self-identification ties in closely with the link drawn between racial discrimination and xenophobia. In many countries, including South Africa, non-citizens often experience discrimination.²⁴³ The text of art 1(2) of the ICERD allows discrimination against non-citizens, but the Committee on the Elimination of Racial Discrimination advocates for a restrictive interpretation of the provision so as not to detract from the rights protected in the so-called international bill of rights.²⁴⁴ The call from the Committee in this regard is borne from the Durban Declaration in which xenophobia was recognised as one of the main sources of contemporary racism.²⁴⁵ Accordingly, the Committee calls for the application of 'ordinary' non-discrimination standards in relation to non-citizens. Differential treatment of non-citizens is only allowed if in accordance with an objective reasonable justification for differential treatment which furthermore also has to be proportional to the aim sought thereby. While this interpretation of these provisions of the ICERD may seem to widen the scope, it provides for standardisation of the threshold regarding discrimination.

The prohibition of racial discrimination in international law is not controversial, but the concomitant provisions regarding propaganda to incite racial hatred and the obligation to outlaw organisations engaging in such propaganda are more contentious.²⁴⁶ Article

²⁴¹ CERD General Comment 8: Identification with a particular racial or ethnic group (art. 1, par. 1) (22/08/90).

²⁴² CERD General Comment 29: Art 1, paragraph 1 of the Convention (Descent) (01/11/2002).

²⁴³ The xenophobic attacks of May 2008 in South Africa illustrate this point well. See in this regard Democracy and Governance Programme Human Sciences Research Council 'Citizenship, Violence and Xenophobia in South Africa: Perceptions from South African Communities' (June 2008).

²⁴⁴ CERD General Comment 30: Discrimination against non citizens (01/10/2004) para 2.

²⁴⁵ CERD General Comment 30: Discrimination against non citizens (01/10/2004).

²⁴⁶ See Lerner 55.

4 of the ICERD is concerned with propaganda and the promotion of ideas of racial superiority or attempts to justify or promote racial hatred. This article obliges state parties to criminalise the dissemination of racist ideas, incitement to racial discrimination and racial violence, to outlaw organisations engaging in the dissemination of such ideas and to prohibit public authorities or institutions from promoting or inciting racial discrimination. The meanings of the terms ‘propaganda’ and ‘dissemination’ as they are used in ICERD are not clear. It seems that the Committee does not construe these terms in narrow terms, i.e. linked to public promotion of ideas of racial superiority/inferiority. In *Sadic v Denmark*²⁴⁷ the Committee recommended that the state party ‘reconsider its legislation, since the restrictive constitution of “broad publicity” or “wider dissemination” required by article 266b of the Danish Criminal Code for the criminalization of racial insults does not appear to be fully in conformity with the requirements of articles 4 and 6 of the Convention’. This generous interpretation of the hate speech provisions of the Convention, is also borne out by the Committee’s insistence that all allegations of racial discrimination (which in the view of the Committee includes racist language) must be investigated thoroughly. The opinion of the Committee on the Elimination of Racial Discrimination in the matter of *Ahmad v Denmark*²⁴⁸ illustrates the point. The author of the communication indicated that a teacher and the school principal of his school referred to him and his friends as ‘a bunch of monkeys’ and that this insult was overheard by two other people, i.e. there was no wide dissemination or broad publication. The words used, according to the author, amounted to a racial insult and it was reported to the police to deal with in terms of the municipal criminal law applicable. The matter was not investigated by the police and the prosecuting authority refused to prosecute. The failure to engage the matter led to the complaint to the Committee. The Committee found that Denmark fell foul of its obligations in that the complaint was not thoroughly investigated. For purposes of the current discussion, the outcome is of secondary importance. What is important is that the Committee regarded an allegation of a racial insult in a closed context as sufficient to warrant an investigation.

²⁴⁷ *Sadic v Denmark* 25/2002 CERD/C/62/25/2002 (16 April 2002) para 6.8.

²⁴⁸ *Ahmad v Denmark* 16/1999 CERD/C/56/D/16/1999 (8 May 2000).

Tension often exists between rights – in the instance of dissemination of ideal of racial superiority the competing rights are that of racial equality and freedom of expression – and it is the task of the adjudicator to unravel the tension in the context of a specific case.²⁴⁹ A literal reading of art 4 of the ICERD does not leave much scope to the adjudicator to manage the tension. A reader is left with the impression that freedom of speech always has to bow to the right to equality and the Committee’s reading of the provisions of the Convention and other similar provisions in international law foresees no irreconcilable conflict between these competing rights.²⁵⁰ The view seems to be that the dissemination of ideas based on racial superiority or hatred, the incitement of racial hatred and the incitement of violence against racial groups, fall outside the scope of expression that deserves protection and failure by a member state to criminalise such conduct would amount to a breach of its international obligations.²⁵¹

A determination of whether the dissemination of ideas amounts to a breach of the Convention will necessarily be context-specific and guided by the sensitivities of the specific community. The need for a contextual consideration of such dissemination is clear from a consideration of the jurisprudence of the Committee. In *Hagan v Australia*²⁵² the complaint was that the grandstand of the sporting ground in Queensland was named the ‘E.S. “Nigger” Brown Stand’ and that this name was displayed on the stand. The complainant was offended by the term and tried through legal action to have the name that had been given to the stand in 1960, removed. His attempts in terms of municipal law had failed and he consequently approached the Committee in this regard. In the course of its opinion the Committee remarked:

‘The Committee considers that the use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into [account] (sic) the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.’²⁵³

²⁴⁹ See Lerner 56-60.

²⁵⁰ CERD General Comment 15: Organised violence based on ethnic origin (Art 4) (23/03/93) para 4.

²⁵¹ See *Jewish Community of Oslo and others v Norway* 30/2003 CERD/C/67/D/30/2003 (22 August 2005).

²⁵² *Hagan v Australia* 26/2002 CERD CERD/C/62/D/26/2002 (14 April 2003).

²⁵³ Para 7.3.

In addition to standard-setting, international law requires state parties to ensure effective remedies in the event of a violation of a human right.²⁵⁴ An effective remedy would ensure vindication of the right and would take into consideration the nature of the rights violation to ensure such vindication. Article 6 of the ICERD mentions 'just and adequate reparation or satisfaction for any damage suffered as a result of the discrimination' pertinently. International law does not prescribe whether a civil route damages claim or a criminal prosecution route (but for the requirement that the promotion of racist propaganda and organisations have to be criminalised) has to be followed. An effective remedy can take different forms and the complementary nature of criminal and civil law plays an important role in determining whether a remedy is 'effective' as required by art 6 of ICERD. The Committee on the Elimination of All Forms of Racial Discrimination held in its opinion in *BJ v Denmark*²⁵⁵ that

'... the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes. The victim is not necessarily entitled to compensation in addition to the criminal sanction of the perpetrator under all circumstances. However, in accordance with article 6 of the Convention, the victim's claim to compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self-esteem'.

This opinion and the emphasis placed by the Convention criminal sanctions,²⁵⁶ creates the impression that the first line of defence against racial discrimination lies in criminal law with civil sanctions forming a second tier. The Committee has further indicated that effective remedies include not only specific criminal provisions aimed at the eradication of racial discrimination, but that general criminal law provisions could also be relied upon.²⁵⁷ The provision of effective remedies is only possible if cases of alleged racial discrimination are investigated thoroughly.²⁵⁸

²⁵⁴ Article 2(3)(a) ICCPR and art 6 CERD.

²⁵⁵ *BJ v Denmark* 17/1999 CERD/C/56/D/17/1999 (10 May 2000) para 6.2.

²⁵⁶ Article 4 ICERD.

²⁵⁷ *Sadic v Denmark* 25/2002 CERD/C/62/25/2002 (16 April 2002) para 6.3.

²⁵⁸ See for instance *LK v The Netherlands* 4/1991 CERD/C/42/D/4/1991 (16 March 1993), *Habassi v Denmark* 10/1997 CERD/C/54/D/10/1997 (6 April 1999) and *Sadic v Denmark* 25/2002 CERD/C/62/25/2002 (16 April 2002).

3.5 CONCLUDING REMARKS

The exposition of the international and regional legal frameworks in relation to the advancement and protection of human rights illustrates the importance attached to human rights in general, and racial equality and non-discrimination in particular, in the international arena. The protection of human rights through the legal provisions of conventions and treaties is bolstered by political commitment to human rights, equality and the rule of law as embodied in the NEPAD and APRM initiatives of the African Union.

It is noteworthy that the international commitment to equality and non-discrimination gained momentum at the time when the Nationalist government of South Africa aimed to entrench its policy of racial discrimination (apartheid) by legislative means after two centuries of *de facto* and legal racial segregation. At the end of the twentieth century South African society and its institutions, fraught with deep racial and racist divisions, had to confront these international standards for the first time and translate these standards into laws that can address the divisions in society effectively. What are these international law standards?

In accordance with the principle of national sovereignty international law leaves a margin of discretion for states to determine how they will deal with racist behaviour in terms of the law. The margin of discretion is based on the acceptance of the universally recognised inherent equal dignity of human beings. Equal treatment of all individuals is set as the point of departure. Differential treatment of people of different races requires a legitimate purpose and justification. Differential treatment that impairs the fundamental dignity of a person is regarded as discrimination. International law proscribes racial hate speech and the propagation of racial superiority. Concerning legal responses to racist behaviour, international law requires thorough investigation of complaints by individuals and effective remedies in criminal law and civil law. The importance of determining cases within the context of the specific jurisdiction is recognised.

In its report to the Committee on Racial Discrimination, the South African government pinned many hopes of fulfilling its obligations in terms of ICERD on the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the Equality Act).²⁵⁹ In the course of the next chapters I consider the Act and its provisions closely before I return to consider the Act's compliance with international law standards in chapter 8.

²⁵⁹ South Africa Reports Submitted by States Parties Under Article 9 of the Convention: Third Periodic Reports of States Parties Due in 2004 [2 December 2004] CERD/C/461/Add.3 (19 May 2005).

Chapter 4

BENCHMARK II: THE SOUTH AFRICAN CONSTITUTIONAL STANDARD AND RACISM

4.1 INTRODUCTION

The international framework set out in the previous chapter provides a benchmark not only for the provisions and application of the Equality Act, but also for the constitutional provisions that may be relevant to complaints of racism. In this chapter I consider the scope of the constitutional right to equality and the concomitant prohibition of unfair discrimination for the purpose of standard-setting.

The meanings of ‘equality’ and ‘non-discrimination’ as philosophical and legal concepts are hotly contested – with courts and commentators ascribing different meanings to them. My aim in this chapter is to provide an interpretation of the applicable constitutional provisions that is workable and appropriate within the current South African context.

The starting point for such an interpretation is the text of the Constitution. In this chapter I consider the Constitutional Court’s interpretation of the relevant constitutional provisions in order to critique the Court’s interpretation constructively. This is done for the purpose of standard-setting for legislation that deals with complaints of infringements of the equality right. In view of the focus on racism in this thesis, I link the discussion of the identified standards to complaints of racism.¹

¹ This does not mean that the identified standard would not be applicable in relation to other prohibited grounds.

4.2 EQUALITY IN THE CONSTITUTIONAL FRAMEWORK

4.2.1 Background

The equality right as protected in the Constitution has to be understood within the context of the Bill of Rights and the Constitution as a whole.² The Constitution, in turn, has its own broader context within which it has to be interpreted. The political history of South Africa and the drafting history of the Constitution provide the contexts for this interpretation.³ The interpretation of rights entrenched in the Constitution furthermore has to take place within the framework of the agenda of transformation and social justice envisioned by the Constitution.⁴

4.2.2 Constitutional provisions

Equality is introduced into the South African constitutional framework by the preamble of the Constitution which lists its objectives. Insofar as equality is concerned, the preamble sets the Constitution as the foundation ‘for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’. Guided by this objective, s 1 lists the ‘the achievement of equality’ and ‘non-racialism and non-sexism’ among the founding values of our constitutional democracy.⁵ Equality as a value resonates through the text of the Bill of Rights with

² See for instance *Government of the Republic of South Africa v Grootboom* 2001 (1) SA (CC) paras 22-23.

³ Chapter 2 of this thesis provides an account of the history of the constitutional relevance of race in South African constitutional law.

⁴ Chapter 1 of this thesis sets out the link between law and social change, while chapter 5 (at 5.2) elaborates upon the meaning of transformative constitutionalism.

⁵ Section 1 reads:

1 Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

See the discussion of non-racialism in chapter 1.

s 7,⁶ s 36⁷ and s 39⁸ mentioning equality, together with the values of human dignity and freedom, as vital to the open and democratic society that South Africa aspires to be.

The first specific right enumerated in the Bill of Rights is the right to equality. Section 9 of the Constitution reads:

'9 Equality

(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.

6

7 Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

7

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

8

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

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

The significance of the right to equality is further highlighted by the inclusion of s 9 in the list of non-derogable rights in s 37 which provides for states of emergency. While this section allows for the permissible limitation of fundamental rights during a state of emergency in terms of an Act of Parliament, it specifically provides that such an Act may not allow for unfair discrimination on the basis of race, colour, ethnic or social origin, sex, religion or language.

An inventory of the constitutional provisions in respect of equality and non-discrimination at this stage of reading would be as follows:

- (1) Equal protection by the law is set as an objective of the constitutional project.⁹
- (2) As a value, equality, together with other constitutional values, has to inform the application, interpretation and limitation of all rights.
- (3) Equality, protected as a right, secures equal protection and benefit of the law and prohibits direct and indirect unfair discrimination by the state and individuals on listed and analogous grounds. The listed grounds include race, colour, ethnic or social origin.¹⁰ A presumption regarding the unfairness of the discrimination arises where a complainant makes out a *prima facie* case on the basis one of the listed grounds. A respondent may rebut the presumption of unfairness.
- (4) Subsection 2 of s 9 furthermore includes affirmative action measures designed to enhance the position of previously disadvantaged people in the definition of equality.
- (5) The Constitution also specifically requires the enactment of legislation to prevent or prohibit unfair discrimination. This legislation has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

While the inventory clearly shows that equality is central to the South African constitutional framework, it does not clarify its meaning. What does equal protection and benefit of the law mean and how does one ascertain whether discrimination is

⁹ Preamble.

¹⁰ See D Davis ‘Equality and Equal Protection’ in D van Wyk *et al* (eds) *Rights and Constitutionalism The New South African Legal Order* (1994) Juta: Kenwyn 208 who states that the listed grounds ‘point to human characteristics which are either immutable, such as race or age, are difficult to change, such as language or culture, or are so inherently part of human personality, such as belief, religion, or conscience, that they contribute to the shaping of identity’.

unfair? The answers lie in the interpretation of these provisions by the Constitutional Court (CC).

4.2.3 Equality through the Cases: the Constitutional Court

4.2.3.1 *Background*

The Constitutional Court started its work under the interim Constitution. Like the Constitution, the interim Constitution protected equality as a value and as a right. Equality ‘between men and women and people of all races’¹¹ underpinned the constitutional venture embarked upon in 1994. As a value, equality informed the interpretation¹² and limitation¹³ of rights entrenched in Chapter 3 of the interim Constitution; and as a right, it ensured equal protection and equality before the law and prohibited unfair discrimination. The Constitutional Principles which guided the drafting of the final Constitution contained numerous references to equality and non-discrimination, especially with reference to racial discrimination. In this way constitutional commitment to the eradication of racial inequality and discrimination was ensured.¹⁴

The equality provision in the interim Constitution, s 8, which differs from s 9 of the final Constitution, reads:

¹¹ Preamble of the interim Constitution.

¹² Section 35.

¹³ Section 33.

¹⁴ The relevant Constitutional Principles are: Principle I: ‘The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races’; Principle II: ‘Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution’; Principle III: ‘The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity’; Principle IV: ‘The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government’ and Principle V: ‘The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.’

'8 Equality

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience or belief, culture or language.

(3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) ...

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.'

Section 8 of the interim Constitution and s 9 of the Constitution (set out above at 4.2.2) are similar in outline, scope and structure and the early judgments of the Court in respect of equality, made with reference to the interim Constitution, are definitive for the Court's conceptualisation of the equality right.¹⁵ It should also be borne in mind that the Court has made its pronouncements in relation to the enforcement of the equality right against the state (or state organs) or legislative provisions alleged to be discriminatory, as opposed to the application of the right on a horizontal plane.

4.2.3.2 Early Pronouncements on Equality

In the early years of its existence the Constitutional Court dealt with equality in relation to fair trial procedures and requirements.¹⁶ In considering equality for these purposes, the Court recognised equality as a new constitutional imperative marking a definite

¹⁵ In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15 Ackermann J delivered his judgment under s 9 of the Constitution 'on the assumption that the equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim Constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions'.

¹⁶ For example *S v Zuma* 1995 (2) SA 642 (CC), *S v Mhlungu* 1995 (3) SA 867 (CC), *Coetzee v Government of South Africa* 1995 (4) SA 631 (CC), *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), *S v Ntuli* 1996 (1) SA 1207 (CC), *Bernstein v Bester* 1996 (2) SA 751 (CC). In *Ntuli* para 18 Didcott J explained the significance of equality in the fair trial context as follows: '[i]t suffices for the present to say that the guarantee [of s 8(1)] surely entitles everybody, at the very least to equal treatment by our courts of law.'

break with the past.¹⁷ Bringing about equality and ensuring equal protection by the law formed part of the agenda of change introduced in 1994. Equality before the law or equal treatment by the law was addressed pertinently in the case of *Makwanyane*.¹⁸ Equality considerations in this case turned on arbitrariness and elements of chance that played a role in the imposition of the death penalty.¹⁹ According to the Court, the numerous variables that had an impact on a decision of a presiding officer to impose the death penalty rendered such a decision arbitrary. The Court accordingly held that the death penalty breached the equality right and that the breach was not justifiable.

No pronouncements on discrimination were made in *Makwanyane* and, similarly, no definitive pronouncement on the relationship between sub-sections 1 and 2 of s 8 was made. However, the general remarks made about equality and its place within the constitutional framework, as well the authoritative exposition of the two-stage approach and its interpretation and limitation stages,²⁰ leave no doubt as to the importance of this judgment in the development of the South African equality jurisprudence.

4.2.3.3 *Towards a Definitive Interpretation*

In *Brink v Kitshoff*,²¹ the Court dealt with an equality challenge levelled at statutory provisions restricting the payment of benefits in terms of a policy (previously ceded to her by her husband) to a wife in the event of her husband's insolvency. Policies ceded by wives to husbands were not subject to the same restrictions. The unanimous judgment, authored by O'Regan J, recognised the importance of equality in the South African constitutional framework.²² The Judge noted that equality and non-discrimination are highly regarded as goals in both foreign²³ and international²⁴

¹⁷ See for instance *S v Mhlungu* 1995 (3) SA 867 (CC) para 8 per Mahomed J.

¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁹ Paras 48 and 51 per Chaskalson P and see also paras 152, 155, 156 and 163 per Ackermann J where the judge links equality before the law with the rule of law and dismisses arbitrary action as a breach of equality. See also para 185 per Didcott J para 214 per Kriegler J and paras 262, 273 and 274 per Mahomed J.

²⁰ On the two-stage approach see *S v Makwanyane* 1995 (3) SA 391 (CC) paras 100-104.

²¹ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

²² Para 33.

²³ Paras 35, 37 and 39.

law. But she added that s 8 of the interim Constitution demanded interpretation within its own particular context and history.²⁵ Accordingly, to reach the goal of equality, racial discrimination which dominated the South African legal and social landscape prior to 1994 and other forms of discrimination that have led to patterns of group disadvantage and harm should be eradicated.²⁶ This judgment also highlights important overlaps of patterns of disadvantage, especially in relation to race and gender.²⁷ This first judgment on unfair discrimination laid the foundation for the Court's later expansion of its unfair discrimination analysis by identifying patterns of group disadvantage as the target of s 8.

About a year after the *Brink* judgment, the Court delivered the decision of *Fraser v Children's Court, Pretoria North*.²⁸ The Court was confronted with a challenge to legislation differentiating between fathers of children born from certain unions (not marriage) and fathers of children born from other unions (marriages, customary marriages and Muslim marriages). Mohamed DP accentuated the centrality of equality to the constitutional project,²⁹ but added little to the development of equality jurisprudence in general. Like *Brink*, the *Fraser* judgment articulated the need for limitation analysis once it has been established that unfair discrimination had taken place.³⁰

The early judgments of the Court placed equality at the centre of our constitutional endeavour. The Court indicated that equality not only entails equal treatment in the formal sense, but it demands a consideration of the impact of the differentiating

²⁴ Para 34.

²⁵ Paras 39 and 40.

²⁶ Paras 41, 42 and 43.

²⁷ Para 44.

²⁸ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

²⁹ At para 20 the learned judge states: 'There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.' This sentiment was shared in numerous subsequent judgements. Kriegler J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) echoed this sentiment: 'The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.' (para 74) In *Van Heerden v Minister of Finance* 2004 (6) SA 121 (CC) para 24 Moseneke J held: 'Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality — a duty which binds the judiciary too.'

³⁰ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) para 20.

provision on the complainant. The Court focused on patterns of disadvantage as violations of the constitutional prohibition of unfair discrimination.

The next two judgments in which the Court was confronted with equality challenges contributed more to the development of a uniform approach to the application of s 8 of the interim Constitution. The judgments in *Prinsloo v Van der Linde*³¹ and *President of the Republic of South Africa v Hugo*³² were handed down on the same day. In *Prinsloo* the majority of the Court acknowledged the need for gradual development of an own equality jurisprudence while recognising the value of international and foreign jurisprudence in doing so.³³ Context was held to remain all important in the process of determining whether differentiation amounts to unequal treatment or discrimination 'in the constitutional sense'.³⁴ The text of s 8 was said to be the product of South Africa's history of inequality.³⁵ According to the majority, this section referred to equality positively ('equality before the law and equal protection of the law') and negatively (insofar as it prohibited direct and indirect unfair discrimination).³⁶ While the two sides of the equality concept were acknowledged, the judges were quick to add that this does not require their compartmentalisation.³⁷ The majority identified differentiation to be 'at the heart of equality jurisprudence in general and ... the s 8 right or rights in particular'.³⁸ Section 8 distinguishes between discrimination that is unfair and discrimination that is not unfair.³⁹ The latter is necessary in any modern society and involves classification that is rational, non-arbitrary and that does not manifest 'naked preferences'.⁴⁰ Accordingly, a rationality analysis – one that determines whether there is a rational relationship between the differentiation in question and the governmental purpose sought thereby – lies at the basis of the application of the equality provision.⁴¹ However, the presence of a rational connection does not provide immunity to a challenge of unfair discrimination as rational differentiation could still amount to unfair

³¹ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

³² *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

³³ Paras 18-20.

³⁴ Para 17. See also paras 20 and 21.

³⁵ Para 21.

³⁶ Para 22.

³⁷ *Ibid.*

³⁸ Para 23.

³⁹ *Ibid.*

⁴⁰ Para 25. Such differentiation is termed 'mere differentiation'.

⁴¹ Para 26.

discrimination in terms of s 8(2).⁴² Section 8(2) furthermore contained listed grounds on which discrimination was presumed to be unfair and unspecified grounds for which unfairness had to be proven.⁴³ In assigning a meaning to unfairness, the judges relied on the history of South Africa in which the 'humanity of the majority of the inhabitants of this country was denied'.⁴⁴ Unfair discrimination in s 8(2), construed within the context of the whole of s 8, according to the judges, 'principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.⁴⁵ Support for this view was found in the views of Ronald Dworkin (who maintains that the right to equality means the right to be treated as equals) and the Supreme Court of Canada in the case of *Egan v Canada* (which asserts the inherent equal dignity of people).⁴⁶ While dignity and equal concern and respect for the fundamental dignity of people were placed at the centre of prohibition of unfair discrimination, the Constitutional Court judges acknowledged that other forms of differentiation could 'affect persons in a comparably serious manner' which may amount to a breach of s 8(2).⁴⁷

Hugo and *Prinsloo* complement each other. Goldstone J's majority judgment in the *Hugo* case took s 8(2) and its prohibition of unfair discrimination as its point of departure.⁴⁸ The sentiments of *Prinsloo* concerning dignity were repeated.⁴⁹ In regard to determining unfairness, Goldstone J expressed ideas which are reminiscent of the views expressed in *Brink*. Of crucial importance to the determination of unfairness is a consideration of the impact of the discrimination on the complainants in the context of the case. In the words of Goldstone J:⁵⁰

'Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.'

⁴² Ibid.

⁴³ Para 28.

⁴⁴ Para 31.

⁴⁵ Ibid.

⁴⁶ Para 32.

⁴⁷ Para 33.

⁴⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 33.

⁴⁹ Para 41.

⁵⁰ Ibid.

According to the judge, one has to consider, the complainant group, the nature of the power in terms whereof the discrimination was effected and the nature of the interests affected by the discrimination in order to determine whether the impact was unfair.⁵¹

The consolidation of the approaches in *Brink, Hugo and Prinsloo* came in the case of *Harksen v Lane NO*.⁵² Goldstone J, writing for the majority, provided the following inventory for analysis in terms of s 8:⁵³

- '(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).'

In determining whether the impact of the discrimination is unfair, Goldstone J set out the following non-exhaustive list of factors to be considered objectively and cumulatively: (a) the position of the complainants in society and whether they have suffered from patterns of disadvantage in the past; (b) the nature of the provision or power that discriminates and the purpose it seeks to achieve and (c) with due regard

⁵¹ Para 43.

⁵² 1998 (1) SA 300 (CC). See also *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 22.

⁵³ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

to the aforementioned factors and any other relevant factor, the 'extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental dignity or constitutes and impairment of a comparably serious nature'.⁵⁴

With this formulation the Constitutional Court's approach to equality matters became more or less settled.⁵⁵ It has been endorsed and applied (or at least referred to) in the majority of cases dealing with an alleged breach of the equality right.⁵⁶ The context and facts of the particular case remain determinative in view of the emphasis placed on the impact of the discrimination on the complainant.

4.2.3.4 Formulaic Application of the Harksen Test

The drafters of the Equality Act relied on the *Harksen* test in the formulation of the test for unfairness set out in the Act, as discussed in 5.3.1.4.1. This test (s 14 of the Equality Act) is not very clear, as is evident from that discussion. Does the problem lie with the *Harksen* test?

The *Harksen* test, and the Constitutional Court's dignity-centred approach as set out in *Prinsloo* and *Hugo*, have informed many high court decisions in which the equality

⁵⁴ Para 52.

⁵⁵ Albertyn and Goldblatt (2006) 2-3 note that the Court's approach has become more nuanced and value-centred since the formulation of the *Harksen* test. This view is not contested, but until a definitive reformulation of the test is made it remains the basis for s 9 analysis.

⁵⁶ See for example *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) para 15; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 22; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 17; *Jooste v Score Supermarket* 1999 (2) SA 1 (CC); *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC) para 12; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 32; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 24; *Minister of Defence v Potsane* 2002 (1) SA 1 (CC) para 43-44; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 20; *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 24; *Jordan v S* 2002 (6) SA 642 (CC) para 57 (endorsement and application by minority, the majority of the Court did not endorse or apply the *Harksen* test); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 68, 72; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 25, 80, 99, 11, 120, 121, 131 where the Court endorsed the *Harksen* test in relation to unfair discrimination matters but noted its unsuitability for analysis in terms of s 9(2); *Mabaso v Law Society of the Northern Provinces* 2005 (2) SA 117 (CC) para 38; *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 48; *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 42; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 34 (endorsement by majority) and para 112 (by minority).

right was at stake.⁵⁷ In some instances the high courts recognised the utility of the test and used it with success to ensure vindication of the equality right.⁵⁸ Other applications of the test were less successful and confirm the view regarding the complexity of the test.⁵⁹ To illustrate the difficulties with (or challenges posed by) the test which justify a re-evaluation thereof, I briefly consider the application thereof in two high court matters.

In *Ernst & Young v Beinash*,⁶⁰ Fevrier AJ was confronted with a constitutional challenge to the validity of the Vexatious Proceedings Act 3 of 1956, based on s 9 of the Constitution. In dealing with the challenge to the Act, the judge referred to *Brink, Prinsloo, Hugo and Harksen*⁶¹ and proceeded to set the *Harksen* analysis out in full.⁶² The judge considered all the stages of the analysis. In view of his findings in respect of the first two stages a consideration of the limitation analysis was unnecessary.⁶³ Instead of viewing the *Harksen* test as an aid or guideline, the presiding officer in this matter viewed and used it as a checklist. While the facts of this matter allowed for a mechanical application, complex matters may not do so. In highly emotional cases of alleged racial discrimination a sensitive nuanced approach would be more suitable. The judgment in the case of *Satchwell v President of the Republic of South Africa*⁶⁴ illustrates the complexity and opaque nature of the *Harksen* test very well. Kgomo J

⁵⁷ For example: *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W); *Ernst & Young v Beinash* 1999 (1) SA 1114 (W); *Port Elizabeth Municipality v Rudman* 1999 (1) SA 665 (SE); *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C); *Hoffmann v South African Airways* 2000 (2) SA 628 (W); *Mhleka v Head of the Western Transvaal Regional Authority*; *Feni v Head of the Western Transvaal Regional Authority* 2001 (1) SA 574 (Tk); *Harris v Minister of Education* 2001 (8) BCLR 769 (T); *United Greyhound Racing and Breeders Society v Vrystaat Dobbela en Wedren Raad* 2003 (2) SA 269 (O); *J v Director-General, Department of Home Affairs* 2003 SA 605 (D); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C); *S v M* 2004 (3) SA 680 (O); *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C); *Robinson v Volks NO* 2004 (6) SA 288 (C); *Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (C).

⁵⁸ See for example Heher J's application of the test in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) and Hussain J's application thereof in *Hoffmann v SAA* 2000 (2) SA 628 (W). While Hussain J may perhaps be criticised for the emphasis he placed on commercial interests, his application of the test was sound.

⁵⁹ See also CRM Dlamini 'Equality or justice? Section 9 of the Constitution revisited (part 1)' (2002) 27 *TRW* 14 and CRM Dlamini 'Equality or justice? Section 9 of the Constitution revisited (part 2)' (2002) 27 *TRW* 15.

⁶⁰ 1999 (1) SA 1114 (W).

⁶¹ 1141F-G.

⁶² 1142A-F.

⁶³ 1142-1145E; 1146J-1147H.

⁶⁴ 2001 (12) BCLR 1284 (T).

set out the *Harksen* test in full.⁶⁵ He then proceeded on the basis of the presumption created in s 9(5) for the listed grounds to consider the unfairness of the discrimination which was contested by the respondent. During the course of this consideration the judge commented:⁶⁶

‘The discrimination is unwarranted, dehumanising, stereotypical, unjustified and consequently unfair. Having found that the respondents have discriminated unfairly against Satchwell the next step (sic) is to determine the gravity of the impact that the discrimination has on the complainant and others in her situation.’

The sequence of analyses proposed in *Harksen* lost all significance in this matter. Kgomo J found the discrimination to be unfair and unreasonable before he considered the impact (central to the determination of unfairness) of the discrimination.

While these two judgments do not represent all encounters with the *Harksen* test, they clearly illustrate that the analysis is more complicated than might appear at first glance. At first glance, the staged-approach on the *Harksen* test seems clear enough; depending on the facts of the case, one starts with the enquiry set out in the first stage before moving to the enquiries proposed in the later stages. The two examples discussed above provide enough evidence to justify a re-evaluation of the test. In *Satchwell* the court lost sight of the prescribed sequence and reached a conclusion before considering all the stages of the test, while the judgment in *Ernst & Young* illustrates that a scripted test could be used as a checklist, disregarding the demands made by the facts of a particular case.

The translation of the *Harksen* test into legislative standards proved to be as problematic as is evident from the discussion at 5.3.1.4. So I intend to reconsider the *Harksen* test with a view to improving its application in litigation and, more importantly, for the purposes of this thesis, to set a standard for legislation which has to give effect to the constitutional commitment contained in s 9. Each of the stages of the *Harksen* test is considered in turn.

⁶⁵ Para 13.

⁶⁶ Paras 22-23.

4.2.4 *Harksen and Beyond*

4.2.4.1 *Harksen and Beyond: the Rationality Analysis and s 9(1)*

According to the Court, s 9(1) ensures equal treatment of all persons in conferring benefits and imposing restraints on people.⁶⁷ Equality of treatment does, however, not require identical treatment. In his separate concurring judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁶⁸ Sachs J stated emphatically that:

‘uniformity can be the enemy of equality. Equality means equal concern and respect across difference.... Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference’.

Where differential treatment is allowed, such treatment has to be rationally connected to a legitimate governmental purpose. *Prinsloo* placed rationality at the root of the analysis in term of s 8 of the interim Constitution.⁶⁹ With the formulation of the *Harksen* test, the rationality analysis became a standard threshold test in matters concerning equality. In order to pass constitutional muster in terms of s 9(1), the differential treatment must be rationally connected to a legitimate governmental purpose; it must not be arbitrary or display ‘naked preferences’.⁷⁰ Rationally justifiable differentiation, termed ‘mere differentiation’,⁷¹ is acceptable in an open and democratic society.

The rationality analysis formed the basis of the Court’s findings in *Jooste v Score Supermarket*⁷² where it reiterated its previous stance regarding the neutrality of this form of analysis:⁷³

‘It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it

⁶⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

⁶⁸ Para 132. In his majority judgment Ackermann J expressed the same sentiment in para 22.

⁶⁹ Para 26.

⁷⁰ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 24.

⁷¹ Para 25.

⁷² 1999 (2) SA 1 (CC) para 11, 12.

⁷³ Para 17. The test was applied in a similarly neutral fashion by O’Regan J in *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 24.

is irrelevant to this enquiry whether the scheme chosen by the Legislature could be improved in one respect or another.’

Applied in this (objective/neutral) way, the rationality review analysis that the Court employs as the first step in applying the *Harksen* test does not add to or enhance the unfair discrimination analysis which follows in the second stage. This raises questions concerning the need to perform this rationality test as a threshold inquiry. Where an applicant alleges that s/he has been the victim of unfair discrimination, a court should determine whether that is indeed the case without engaging in the rationality analysis as a threshold inquiry. My suggestion is by no means that irrational differentiation is to be condoned, but rather that the rationality analysis should not be used as a threshold for the determination of unfair discrimination, especially where the allegation is that the perpetrator of the discrimination is an individual and not an organ of state.

Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁷⁴ seems to have recognised the superfluous nature of the rationality analysis as a threshold inquiry. He stated that the ‘rational connection inquiry would be clearly unnecessary in a case in which the Court holds that the discrimination is unfair and unjustifiable’.⁷⁵ While the judge’s recognition of the distinction between the rationality analysis and the unfair discrimination analysis is supported, his reasoning in this regard is open to criticism. In terms of the *Harksen* test, the rationality analysis is the first step to determine whether the equality right has been infringed, and only after that would a court engage in the two-stage unfair discrimination enquiry which is followed by the limitation analysis. Ackermann J’s reasoning turns this around – step one will not be followed if it is clear what the finding of the court would be in respect of steps two and three. At the same time, the learned judge could not have meant that prejudging a matter would justify an abandonment of the rationality analysis.

I would suggest that a court should engage the rationality analysis where an applicant alleges an infringement of her/his right to equality before the law and/or equal protection and benefit of the law. The respondent in such a matter would be an organ of state. Where an applicant alleges that s/he has been unfairly discriminated against

⁷⁴ 1999 (1) SA 6 (CC).

⁷⁵ Para 18. See also Ngcobo J in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 26.

and differential treatment has been identified, irrespective of the identity of the alleged discriminator, the unfair discrimination analysis should be utilised with the rationality analysis as part of the justification analysis.⁷⁶

Section 9 contains two distinct, but related aspects which require differently nuanced approaches that should, in the majority of instances, be considered independently. This reading of s 9 is in line with the identification of the positive and negative aspects of equality identified by the Court and alluded to above. Where a breach of both ss 1 and 3 is alleged, both analyses should be performed.⁷⁷ In instances of an alleged horizontal breach of s 9, the rationality analysis will not be appropriate in view of the nature of the right and the duty it imposes.⁷⁸

4.2.4.2 *Harksen and Beyond: Unfair Discrimination Inquiry*

The test in *Harksen* requires a two-stage analysis in relation to unfair discrimination. In the first instance the court has to determine whether 'discrimination' took place. The word 'discriminate' implies differentiation between groups or people. The jurisprudence of the Court has not indicated that s 9 requires a comparator in all instances of alleged discrimination.⁷⁹ The focus of the Court on the impact of the discrimination on the complainant seems to indicate that an identified 'dominant group'⁸⁰ would not always be necessary.⁸¹

⁷⁶ See the discussion of the relationship between s 9 and s 36 below at 4.2.4.5.

⁷⁷ See for instance *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) where the Court engaged only in the rationality analysis (paras 42-47) while the applicant raised argument both in terms of s 9(1) and s 9(3) (paras 3, 15 and 44). The Court was satisfied that it was unnecessary to engage in the unfair discrimination analysis because of its finding of an infringement of s 9(1). This judgment can be interpreted to support a view in favour of the rationality analysis as a threshold analysis, but a different reading, supporting my view, is possible. In my opinion, *Van der Merwe* acknowledges the distinct, but related natures of the rationality and unfair discrimination analyses. Albertyn and Kentridge 157 opined (in one of the first articles on s 8 of the interim Constitution) that s 8(1) and s 8(2) – the equal protection clause and the prohibition of unfair discrimination clause – are to be read in a complementary fashion while each of the two subsections was significant in itself. My proposed reading acknowledges the relation between the two subsections, but recognises their distinct *foci*.

⁷⁸ C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, M Bishop, J Klaaren, A Stein, M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2002) Juta: Kenwyn 35-29.

⁷⁹ On the difficulty to identify the appropriate comparator see Fredman 95ff.

⁸⁰ In *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 25 it was argued that a 'dominant group' was absent.

⁸¹ See 4.2.4.4 below.

In relation to the determination of whether discrimination took place, the Court has highlighted the importance of the listed grounds set out in s 9(3) and their relation to analogous grounds, such as HIV-status. What the listed and analogous grounds have in common is the ‘potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner’.⁸² The difference between listed and analogous grounds is also evident from the first issue to be determined, namely whether there was ‘discrimination’. Where the differentiation takes place on a listed ground, this is viewed as ‘discrimination’ in the constitutional sense. Differentiation on an analogous ground would have to impair the fundamental dignity of a complainant or affect her/him adversely ‘in a comparably serious manner’ in order to be viewed as discrimination.⁸³

The Constitution proscribes unfair discrimination and the Court has therefore set the determination of unfairness as the next concern. It is apposite at this stage to raise a concern about the Court’s interpretation of ‘discrimination’. The meaning of the word ‘discrimination’ could be interpreted as making or noting a difference between things or people or as making prejudicial distinctions between people.⁸⁴ The Court made it clear that it interprets ‘discrimination’ in the latter, negative sense.⁸⁵ Qualifying already pejorative differentiation with ‘unfair’ is unnecessary and could have implications for an applicant alleging unfair discrimination on an analogous ground. As interpreted by the Court, an applicant alleging unfair discrimination on an analogous ground has to prove that s/he has been discriminated against (in the negative sense) by showing that the effect of the differentiating treatment led to an impairment of her/his dignity or that it affected her/him in a comparably serious manner. Furthermore, the applicant has to prove the unfairness of that discrimination (in the negative sense) again with reference to its impact on her/his dignity or comparably serious affront. I return to an analysis of the centrality of dignity to the Court’s equality jurisprudence below.

The drafters of the Constitution chose to combine a list of prohibited grounds with a qualification of unfairness. This was born of a proposal regarding the future protection

⁸² *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 53. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 31.

⁸³ *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 53.

⁸⁴ *Oxford English Dictionary* 2 ed (1989) Oxford University Press: Oxford.

⁸⁵ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 31.

of human rights in South Africa made by a group of academics in the early 1990s. Corder *et al*⁸⁶ proposed a prohibition of unfair discrimination without reference to a list of grounds, with judges determining in each instance whether the discrimination is unfair. In their view the difficulties attached to the compilation of a list of prohibited grounds and the potential under-inclusiveness of such a list made the list-option unattractive.⁸⁷ Despite this warning, the drafters included a list of prohibited grounds and combined that with the unfairness requirement. The textual formulation of s 9(3) thus creates scope for confusion; and the Court opted for a complicated interpretation of the text by interpreting discrimination in the negative sense.

The Court's approach to unfair discrimination is, in general, commendable for its focus on the impact of the unfair discrimination on the complainant. This approach is termed a 'substantive approach' to equality as opposed to a 'formal approach'. A substantive view of equality takes social and economic conditions of groups and individuals into consideration when determining the meaning of equal treatment.⁸⁸ By way of contrast, a formal approach to equality ignores social and economic realities and 'presupposes that all persons are equal bearers of rights within a just legal order'.⁸⁹ The Court considers the impact of the discrimination in order to ascertain whether it is unfair or not. The impact is considered with reference to the factors set out above in relation to the *Harksen* test. For the purpose of convenience, I paraphrase them:

- (a) the position of the complainants in society and their vulnerability in society;⁹⁰
- (b) the nature and purpose of the discriminating provision or power and
- (c) with due regard to (a) and (b) and any other relevant factor, the extent to which the rights and interests of the complainants have been affected by the

⁸⁶ H Corder, S Kahanovitz, J Murphy, C Murray, K O'Regan, J Sarkin, H Smith and N Steytler *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) UCT Printing: Cape Town 30-32.

⁸⁷ TP Van Reenen 'Equality, Discrimination and Affirmative Action: An Analysis of Section 9 of the Constitution of the Republic of South Africa' (1997) 12 *SAPL* 151 at 156ff. See also LM du Plessis 'Evaluative Reflections on the Final Text of South Africa's Bill of Rights' (1996) *Stell LR* 283 at 295 and JD van der Vyver 'Gelykberegting' (1998) 61 *THRHR* 367 at 378.

⁸⁸ Albertyn and Kentridge 152; Albertyn and Godlbat (1998) 249ff; Freedman 315-316. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) paras 26 and 29 where the substantive and formal notions of equality are contrasted.

⁸⁹ Albertyn and Kentridge 152.

⁹⁰ In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 42 O'Regan J stated that the more vulnerable a group the more likely that a court would find that they have been discriminated against. See also Kende 746, 768.

discriminatory treatment and whether it has led to an impairment of their fundamental dignity or affected them in a comparably serious manner.⁹¹

The cumulative effect of this non-exhaustive list of factors has to be considered in order to determine whether the discrimination is unfair or not.

The Court's focus on the impact of the discrimination on the complainant ties in with the prohibition of indirect discrimination.⁹² Indirect discrimination takes place when seemingly neutral provisions have a discriminatory effect (impact) on the complainants. Direct discrimination is the overt differential treatment of members of a particular group based on their group membership and could follow as a result of a legislative enactment demanding such discrimination or as a result of the exercise of public or private power. The focus on the impact of the discrimination on the complainant furthermore makes it unnecessary to prove that a respondent had the intention to discriminate against the complainant.⁹³ In what follows I dissect the idea of the impact of the discrimination further by considering the identified factors in turn.

4.2.4.3 *The Impact of the Discrimination: Determining Fairness*

(a) The position of the complainants in society

The significance of historical contextualisation for constitutional interpretation was captured by the powerful rhetoric of Mahomed J in *Makwanyane*.⁹⁴

'All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a

⁹¹ Emphasis added.

⁹² *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 32. Direct and indirect unfair discrimination are explicitly outlawed in the Constitution.

⁹³ See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) paras 32, 43-44.

⁹⁴ 1995 (3) SA 391 (CC) para 262.

stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a "new order ... in which there is equality between ... people of all races". Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour (subject only to the obvious limitations of section 33). The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably (sic) recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; section 11(1) prohibits it. The past permitted degrading treatment of persons; section 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; sections 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; section 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property; section 26 expressly secures it. Such a jurisprudential past created what the postamble to the Constitution recognizes as a society "characterized by strife, conflict, untold suffering and injustice". What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting

"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".'

In matters dealing with equality, the Court has held that the history of South Africa is of particular importance in the interpretation of the provision.⁹⁵ This pronouncement is important in the light of the pervasive and foundational role that racialism and racism have played in South African history as discussed in chapter 2. The historical contextualisation goes further than simply providing a background for the interpretation of the equality provision. The history of our country, according to the Court, displays patterns of disadvantage. The racial past has contributed to the vulnerability of groups which is significant in the assessment of the impact of discrimination on individuals. For example, the Court has considered the history of the

⁹⁵ See for example O'Regan J in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) paras 40-43.

enactment of the Black Administration Act in *DVB Behuising*,⁹⁶ *Moseneke*,⁹⁷ and *Bhe*⁹⁸ as determinative of the unfair impact of its legislative provisions on black people as a group.⁹⁹ While the differentiating legislative provision targeted in *Mabaso*¹⁰⁰ was neutral on the face of it, its exclusion of the applicant and similarly situated individuals was rooted in the homeland policy. The historical distinction between South Africa and the homelands 'reinforces and perpetuates a pattern of disadvantage ... [and] has the potential to impair the fundamental human dignity of those adversely affected'.¹⁰¹ Accordingly the legislative provision was held to have an unfair impact on the complainant.

The Court has similarly turned to the history of South Africa in *Walker*¹⁰² in its assessment of the impact of the indirect discrimination on the complainant. In summarising the scope and effects of apartheid, Langa DP noted that apartheid not only had a negative impact on the dignity of black people, but that it had also been to the economic and infrastructural advantage of white people.¹⁰³ History has not revealed Mr Walker, a white person, as an economically disadvantaged or vulnerable individual, but this finding did not exclude a consideration of other factors as indicative of his vulnerability.¹⁰⁴ The vulnerability of black people as a group lies in the fact that the group has been subjugated and deprived of opportunities and benefits in the past.¹⁰⁵

⁹⁶ *Ex Parte Western Cape Provincial Government and Others; In Re: DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (1) SA 500 (CC) para 41.

⁹⁷ *Moseneke v The Master of the High Court* 2001 (2) SA 18 (CC) paras 20-22.

⁹⁸ *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) paras 60-68.

⁹⁹ See Kende 746, 757. See also OM Fiss 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107 at 147ff.

¹⁰⁰ *Mabaso v Law Society of the Northern Provinces* 2005 (2) SA 117 (CC) para 38.

¹⁰¹ *Ibid.*

¹⁰² *Walker v Pretoria City Council* 1998 (2) SA 363 (CC) paras 45-47.

¹⁰³ Para 46.

¹⁰⁴ See below.

¹⁰⁵ On the issue of oppression or subjugation, see specifically *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 22 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 35.

In determining vulnerability, a consideration of past patterns of disadvantage and subordination is important, but other considerations may also be indicative of the position of a group in society as vulnerable.¹⁰⁶

Membership of a minority group seems to be a further consideration in determining vulnerability.¹⁰⁷ In *Walker* Langa DP accepted that the complainant's membership of a racial minority rendered him politically vulnerable.¹⁰⁸ Similarly the Court has identified gays and lesbians,¹⁰⁹ permanent residents¹¹⁰ and refugees¹¹¹ as vulnerable political minorities. Minority groups are specifically 'reliant on the Bill of Rights for their protection'.¹¹²

Pieterse¹¹³ maintains that '[s]tereotypes originate when differentiating characteristics (positive and negative) believed to be synonymous with a particular group are by analogy ascribed to all group members, whether they in fact possess the characteristics or not'. Prejudice against members of a particular group reflects bias against that group, while stigmatisation entails a description of a particular group as reprehensible.

In dealing with vulnerability flowing from preconceived ideas, the Court accepted, without much discussion, that gays and lesbians have suffered as a result of stereotyping and prejudice in the past and that they accordingly form a vulnerable group in our society.¹¹⁴ Children born out of wedlock were found to be similarly

¹⁰⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 44: 'Vulnerability in turn depends to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past disadvantage is so important.'

¹⁰⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 112 per O'Regan J: 'The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.'

¹⁰⁸ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 48.

¹⁰⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 1 (CC) para 25.

¹¹⁰ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 71 and *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) para 20.

¹¹¹ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 28. Kondile AJ discussed the vulnerability of foreigners and refugees before engaging the equality analysis.

¹¹² *Ibid.*

¹¹³ M Pieterse 'Stereotypes, Sameness, Difference and Human Rights: Catch 22?' (2001) 16 *SAPL* 93 at 94. See also M O'Sullivan 'Stereotyping and Male Identification: "Keeping Women in Their Place"' (1994) *Acta Juridica* 185 at 187ff.

¹¹⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 20-27. See also *Minister of Home Affairs v Fourie* 2006 (1) 524 (CC) para 49.

vulnerable in *Bhe*.¹¹⁵ In *Hugo*¹¹⁶ the issue of stereotyping concerned the Court in a rather unique way. The majority judgment of Goldstone J,¹¹⁷ as well as the judgments of Mokgoro J¹¹⁸ and O'Regan J,¹¹⁹ viewed the stereotype about parental roles which informed the Presidential Act as acceptable because they accepted it as true. Mokgoro J specifically noted her discomfort with the stereotype, but held that the greater societal goal served by the legislation based on the stereotype, weighed heavier than her discomfort. Kriegler J¹²⁰ dissented sharply and held that the stereotypical view of women as primary care-givers 'is a root cause of women's inequality in our society'.

Not all stereotyping, prejudice and stigmatisation are rooted in the past. The prejudice suffered by those living with HIV is of more recent origin, but that does not make the prejudices suffered by this group less serious. The Court's rejection of prejudice against, and the stigmatisation of, HIV-positive people centred on its regard for the equal human dignity of all human beings.¹²¹ New patterns of marginalisation and exclusion hinging upon attributes like HIV-status are as constitutionally unacceptable as the old ones based on race.

The marginalisation and the stigmatisation of women working as prostitutes did not convince the majority of the Court in *Jordan* of their vulnerability. Ngcobo J, for the majority, held that such women choose to diminish their standing in the eyes of the

¹¹⁵ *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) para 59.

¹¹⁶ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). The President informed the Court that his motivation for pardoning women offenders who had children under the age of 12 was to ensure that the children were looked after. The stereotype which informed the President's decision is that women are the primary care-givers of children.

¹¹⁷ Para 47.

¹¹⁸ Para 106.

¹¹⁹ Paras 109-115.

¹²⁰ Para 80.

¹²¹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 28: 'Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised.... Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating.' See also para 37: 'Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice.... Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place.' (emphasis added)

community.¹²² Their vulnerability and the prejudice they suffer are the result of their choice of occupation. Accordingly the Bill of Rights cannot help them. This finding by the Court is regrettable in view of the limited choices available to these women and their lack of social and political power which often leaves them little choice but to work in the sex industry.¹²³ Like HIV-sufferers, gays, lesbians, foreigners and white South Africans (at least in some respects), sex workers are a vulnerable minority. The Court's failure to recognise their vulnerability entrenches stereotypes about and prejudices against sex workers.

In *Volks v Robinson NO*¹²⁴ the majority similarly focused on the choice that women in heterosexual cohabitation relationships have, namely, to marry or not to marry.¹²⁵ In this matter the vulnerability of the cohabiting women was at least acknowledged,¹²⁶ but deference to the legislature left this group of women, like the sex workers in *Jordan*, on the periphery of our society.

In positioning the complainant in society, the Court has, as indicated above, relied upon an assessment of historical patterns of disadvantage and subordination, and considered minority status, prejudice, stereotyping and stigmatisation as indicative of vulnerability. Is the approach of the Court adequate to guard the interests of the vulnerable in our society? The cases of *Jordan* and *Volks* show that different judges come to different conclusions when considering the same facts, issues and evidence. While the divergence of opinion is not condemned, I suggest that sensitivity to the nature of history and a cautious approach to stereotypes, stigma and prejudice¹²⁷ could refine the analysis of the Court and ultimately contribute to the eradication of discrimination in our society. I return to the issue of prejudice and stereotyping below.

¹²² *Jordan v S* 2002 (6) SA 642 (CC) para 16. O'Regan J and Sachs J dissented and held sex workers to constitute vulnerable group (para 66).

¹²³ See R Krüger 'Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case' (2004) 20 *SAJHR* 138.

¹²⁴ 2005 (5) BCLR 446 (CC).

¹²⁵ Para 58. In a dissenting judgment O'Regan J and Mokgoro J found the discrimination in this matter to be unfair. The separate dissenting judgment of Sachs J also found the discriminatory exclusion of women in cohabiting relationships to be unfair.

¹²⁶ Paras 63-66.

¹²⁷ See also Young 42-48 who argues for the conceptualisation of groups as social relations defined by a sense of identity. This argument, while useful in analysing social and political reality, has limited application in litigation where litigants necessarily advance a more 'essentialised' version of their group and their membership in that group to show prejudice, stereotyping, marginalisation or stigmatisation.

(b) The nature and purpose of the discriminating provision or power

The second factor used in the determination of the impact of the discrimination on the complainant considers the purpose of the discriminating provision and whether it is aimed at impairing the fundamental dignity of the complainant or whether it serves an important societal goal, such as the advancement of equality for all.¹²⁸ In *Hugo*¹²⁹ it was held that the important societal goal served by the Presidential Act, namely to benefit vulnerable groups of prisoners – mothers of young children, disabled prisoners and young people – indicated to the majority that the discrimination against the complainant, a widowed father, was not unfair.¹³⁰ Subsequent Constitutional Court judgments utilised this factor, the nature and purpose of the discriminating provision, seemingly without difficulty to determine fairness/unfairness.¹³¹

A consideration of the purpose of the differentiating provision and the nature thereof are different enquiries. The former relates to the rationale for the differentiating treatment or provision, while the latter concerns the impact on the dignity of the complainant as explained below.

In view of my proposal for an adaptation of the *Harksen* analysis,¹³² a consideration of the nature of the discriminating provision or power would play a role when considering the indignity caused by differential treatment. The purpose of the discriminating treatment would play a role in the determination of unfairness. The consideration of the purpose sought by the differentiating treatment is similar to the rationality analysis discussed above and the enquiry envisioned in terms of the limitation analysis discussed below. It has been submitted above that the rationality analysis is redundant as a threshold analysis in cases of unfair discrimination. That does not mean that the purpose sought by the differentiating treatment is irrelevant in cases of

¹²⁸ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 51.

¹²⁹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

¹³⁰ See the criticism of Kriegler J at para 78.

¹³¹ *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC) para 23; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 49; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 1 (CC) para 26; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) paras 34-35; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) paras 55-56; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 74.

¹³² See 4.2.4.7 below.

unfair discrimination.¹³³ If the purpose (in the case of direct discrimination) is to perpetuate oppressive power relations, it would be relevant in the determination of unfairness as explained below.

(c) The effect on the interests of the complainant and the impairment of dignity

The determination of unfairness ultimately depends on whether the Court finds that the fundamental dignity of the complainant has been impaired by the discrimination or a comparably serious affront has resulted because of the discrimination. Factors (a) and (b) are taken into account when considering the impact of the discrimination on the interests of the complainant and assessing whether her/his dignity has been impaired by the differentiation.¹³⁴ This formulation means the interest protected by the equality right is that of human dignity. The dignity-centred approach of the Court relies directly on L'Heureux-Dubé J's minority judgment in *Egan v Canada*¹³⁵ where the judge analysed the purpose of the Canadian equality right as follows:

[E]quality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'

In *Prinsloo*, the Court linked L'Heureux-Dubé J's view on the purpose of the constitutional equality right with Dworkin's exposition in *Taking Rights Seriously*¹³⁶ in which he postulated the right to be treated as an equal as more fundamental than the right to equal treatment. Treatment as an equal entails the 'right ... to be treated with

¹³³ See D Réaume 'The Relevance of Relevance to Equality Rights' (2006) 31 *Queen's LJ* 696.

¹³⁴ See *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 52.

¹³⁵ [1995] 2 SCR 513 para 36 referred to in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 32 and *Christian Education v Minister of Education* 2000 (4) SA 757 (CC) para 42. L'Heureux-Dubé J deemed a thorough analysis of the equality right in this case necessary in light of the divergent interpretations accorded to the right in earlier cases (para 32). See also Taylor 37: 'With the move from honor to dignity has come the politics of universalism, emphasizing the equal dignity of all citizens, and the content of this politics has been the equalization of rights and entitlements. What is to be avoided at all costs is the existence of "first-class" and "second-class" citizens'.

¹³⁶ R Dworkin *Taking Rights Seriously* (1977) London: Duckworth 227. The Court also referred to this text in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 32.

the same respect and concern as anybody else'.¹³⁷ The Court interprets differential treatment which denies a complainant's entitlement to equal concern and respect as a denial of her/his dignity and thus a breach of his/her right to equality. What does dignity in this context mean? Dworkin does not use the term 'dignity' explicitly in his formulation, but Canadian and South African judges inferred dignity from his formulation. Indications are that 'dignity' in this sense refers to the Kantian understanding of dignity – 'the unconditional and incomparable worth' of inherent in all humans and independent from their situations in life.¹³⁸ Whereas such a formulation refers to 'objective' dignity which is not dependant on the subjective feelings of the complainant, the Court has indicated otherwise on occasion:¹³⁹

'No members of a racial group should be made to feel that they are not deserving of equal concern, respect, consideration and that the law is likely to be used against them more harshly than others who belong to other race groups.'

Shortly after the Court's identification of the role of dignity in equality analysis, Albertyn and Goldblatt,¹⁴⁰ Davis¹⁴¹ and Fagan¹⁴² criticised the Court's analysis. Albertyn and Goldblatt¹⁴³ lamented the retreat from the consideration of 'patterns of disadvantage' in the determination of the unfairness of discrimination in favour of a dignity-centred analysis. This dignity-centred analysis, according to the authors, focuses on the individual and ignores the patterns of disadvantage and harm that are at the root of inequality in our society. An approach to equality that gives adequate weight to 'disadvantage, vulnerability and harm', has, according to Albertyn and Goldblatt greater transformative capacity and is thus more suitable.¹⁴⁴

¹³⁷ See also ES Anderson 'What is the Point of Equality?' (1999) 109 *Ethics* 287 at 288-289: 'The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.'

¹³⁸ Moreau 34.

¹³⁹ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 81 (emphasis added).

¹⁴⁰ C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248. See also Albertyn and Goldblatt (2006) for a more positive assessment of the Court's equality jurisprudence.

¹⁴¹ DM Davis 'Equality: the Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398.

¹⁴² A Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *SAJHR* 220.

¹⁴³ Albertyn and Goldblatt 254-261. See also Albertyn and Goldblatt (2006) where the authors note that the dignity-centred approach has been enhanced by a consideration of the value of equality.

¹⁴⁴ Albertyn and Goldblatt (2006) 2 note that the Court's use of dignity in its equality jurisprudence was extended in subsequent cases (since *Harksen*) to include 'a more group-based, material concerns'.

In his criticism of the Court's dignity-centred approach in relation to unfair discrimination, Fagan argued that this analysis lacked a sound foundation.¹⁴⁵ In formulating an alternative analysis, the author relied on a well-known article by Westen¹⁴⁶ who forcefully argued that equality is a concept devoid of any meaning which requires definition with reference to other moral concepts since it has no meaning on its own. Against this background, Fagan concluded:¹⁴⁷

‘An act unfairly discriminates if and only if it confers benefits or imposes burdens on some but not others and in doing so infringes either an independent constitutional right or a constitutionally-grounded egalitarian principle.’

The answer, for Fagan, to Amartya Sen's¹⁴⁸ now famous question – ‘Equality of what?’ is thus equality of entitlement to rights.¹⁴⁹

Davis' criticism of the Court's equality jurisprudence took a different angle. Davis noted with regret that the Court's dignity-centred analysis amounted to an acknowledgement of equality as an ‘empty’ concept.¹⁵⁰ By defining equality with reference to the value of dignity, the Court according to Davis, rendered the equality right meaningless and used dignity as a stop-gap.¹⁵¹ Davis contested the meaninglessness of equality. Equality on its own has meaning, according to Davis, and is important in the South African constitutional framework. Davis argued:¹⁵²

¹⁴⁵ Fagan 233. The text of the interim Constitution did not, according to the author, demand an interpretation of the equality that centred on dignity.

¹⁴⁶ P Westen ‘The Empty Idea of Equality’ (1982) 95 *Harvard LR* 537.

¹⁴⁷ Fagan 233.

¹⁴⁸ A Sen ‘Equality of What?’ Tanner Lecture Series: Stanford University (22 May 1979) available at <http://home.sandiego.edu/~babber/globalethics/senequalityofwhat.pdf> accessed on 25 June 2008.

¹⁴⁹ This view coincides with a view expressed in one of the first articles published on the right to equality in a South African law journal: T Loenen ‘The Equality Right in the South African Constitution: Some Remarks from a Comparative Perspective’ (1997) 13 *SAJHR* 401. In response to ‘equality of what?’ the author responded at 405: ‘[I]n the legal sphere part of this question has been answered by the development and formulation of fundamental or human rights, both civil and political rights, and social, economic and cultural rights. Together they form a set of norms, values and aspirations at the top of the hierarchy of legal norms. The realisation of those rights is what law ultimately should try to guarantee and achieve. Within this set of rights it is precisely the principle of equality which demands that striving for the optimal realisation of fundamental rights will include all citizens. Thus the South African Constitution itself forms the main frame of reference for interpreting and applying the principle of equality’.

¹⁵⁰ Davis 412. Davis also referred to Westen's article, but contested its conclusions.

¹⁵¹ Davis 413.

¹⁵² Davis 413-414.

‘The Court needs to look at equality as a value which seeks to promote a democratic society that recognizes and promotes difference and individual as well as group diversity and thereby commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens.’

The interest protected by the right to equality is equality itself and Davis wanted the Court to rethink its jurisprudence to reflect that sentiment.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁵³ Davis had an opportunity to challenge the Court’s dignity-centred approach to equality when he appeared on behalf of the Centre for Applied Legal Studies which was admitted as an *amicus curiae* before the Court.¹⁵⁴ From Sachs J’s response, I deduce that Davis argued that the value of dignity ought to underpin the right to dignity as protected in s 10 and that s 9 should be viewed as protecting the interest of equality. Sachs J responded as follows:¹⁵⁵

‘Contrary to the Centre’s [Centre for Applied Legal Studies] argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under s 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under s 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It could also be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.’

Sachs J further defended the dignity-centred approach to equality by noting that ‘the equality principle and the dignity principle should not be seen as competitive but rather as complementary’.¹⁵⁶

¹⁵³ 1999 (1) SA 6 (CC).

¹⁵⁴ This was prior to Davis becoming a judge. At the time Davis was an academic involved with the Centre for Applied Legal Studies.

¹⁵⁵ Para 124.

¹⁵⁶ Para 125.

Chaskalson CJ¹⁵⁷ and Ackermann J¹⁵⁸ also defended the pivotal role of dignity in our society in academic lectures. Both did so especially in relation to the equality right in the light of the historical denial of human dignity in South Africa. Chaskalson CJ¹⁵⁹ noted the close link between the Court's view of substantive equality and dignity:

'[t]o be consistent with the underlying values of the Constitution, equality must also include equality of worth, requiring everyone be treated with equal respect and with equal concern....'

Ackermann J proposed a conceptualisation of dignity in the Kantian tradition set out earlier.¹⁶⁰ Whereas apartheid denied black South Africans their 'priceless inner worth and dignity',¹⁶¹ democratic constitutionalism aims to revive the respect for the 'innate, priceless and inalienable human worth' of all humans who are 'at the very least entitled to be treated as moral subject and not as mere objects; as subjects with absolute and inherent value and therefore as moral subjects of equal value'.¹⁶²

In an article rebuffing the academic criticisms of Albertyn and Goldblatt, Davis and Fagan, Cowen¹⁶³ supported the Court's use of the dignity-centred equality analysis. Dignity, according to the author, acknowledges human beings as rational agents able to participate in public life and make individual choices.¹⁶⁴ An understanding of equality with this assertion at its core is flexible and it gives transformative value to the equality right.¹⁶⁵ Dignity, furthermore, pertains not only to individuals, but also relates to collective concerns.¹⁶⁶ The approach of the Court is flexible and sound and deserves, according to Cowen, further exploration and discussion. I agree with Cowen's assertion. Moreover, the dignity-centred approach to the equality right also

¹⁵⁷ A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193.

¹⁵⁸ LWH Ackermann 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *ZaöRV* 537.

¹⁵⁹ Chaskalson 202. The Court has also noted this link in its jurisprudence, see for instance *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 1 (CC) para 30 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) para 31.

¹⁶⁰ Ackermann 540.

¹⁶¹ *Ibid.*

¹⁶² Ackermann 542.

¹⁶³ S Cowen 'Can Dignity Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34. Kende 766 is of the view that the Court does not overemphasise the role of dignity in its equality jurisprudence.

¹⁶⁴ Cowen 42-45. See also O'Regan 88.

¹⁶⁵ Cowen 48ff.

¹⁶⁶ Cowen 50.

carries international law approval as is evidenced by Judge Tanaka's dissenting judgment in the judgment of the International Court of Justice in *South West Africa, Second Phase*.¹⁶⁷

Cowen's challenge for further exploration and discussion needs to be taken up. I attempt to do so below, at 4.2.4.4.

(d) Comparably Serious Affront

In *Walker*¹⁶⁸ Langa DP stated that the policy of the City Council to pursue claims against white defaulters had an impact that was as serious as an impairment of their dignity. The facts of the particular case led the learned judge to come to this conclusion and it is not possible to list instances which would amount to a comparably serious affront to an invasion of dignity since the facts of a case will be determinative in this regard.

4.2.4.4 *Developing Harksen: Dignity-centred Analysis Refined*

I have pointed out above that the origins of the Court's dignity-centred analysis can be traced back to L'Heureux-Dubé J's minority judgment in *Egan*. L'Heureux-Dubé J's in-depth analysis of s 15 of the Canadian Charter in *Egan* was prompted by her unease at the existence of a number of divergent interpretations of the provision.¹⁶⁹ Section 15 of the Canadian Charter provides:

'15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

¹⁶⁷ See 3.4.2.

¹⁶⁸ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 81.

¹⁶⁹ *Egan v Canada* [1995] 2 SCR 513 para 32.

Subsequent to the *Egan* judgment, the Canadian Supreme Court restated its guidelines for discrimination analysis in *Law v Canada (Minister of Employment and Immigration)*.¹⁷⁰ *Law*¹⁷¹ requires a complainant to establish differential treatment in the first instance. Secondly, it must be shown that the differential treatment is based on a listed or analogous ground. Thirdly, it has to be shown that the differential treatment amounted to discrimination, or put differently, that it infringed the dignity of the complainant.

For current purposes it is the third leg of the *Law* analysis that is important. It confirms the centrality of dignity in the Canadian discrimination analysis¹⁷² and incorporates L'Heureux-Dubé J's views as expressed in *Egan*. In formulating the guidelines in *Law*, Iacobucci J identified the purpose of s 15 to be:¹⁷³

'to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration'.

The Judge continued by explaining what he meant by human dignity in the context of s 15:¹⁷⁴

'[T]he equality guarantee in s 15(1) is concerned with personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. ... Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which the person legitimately feels when confronted with a particular law.'

The text of the equality provision in the Canadian Charter is different from the South African s 9. The Charter outlaws discrimination as opposed to the prohibition of unfair discrimination in the South African Constitution. Both texts rely on listed grounds and the courts have acknowledged the existence of analogous grounds in both

¹⁷⁰ [1999] 1 SCR 497. The judge also emphasised that this exposition is to be used as a guideline and not in a mechanical fashion as a rigid test for discrimination. See also para 6.

¹⁷¹ See Moreau 56 for a summary of the *Law* guidelines.

¹⁷² *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 para 88.

¹⁷³ Para 51.

¹⁷⁴ Para 53.

jurisdictions. But it is the similar central role assigned to dignity in the equality analysis that opens up a rich academic discussion¹⁷⁵ for South African academics wishing to investigate the possibilities created by a dignity-centred approach to equality.

My aim is to consider two constructive critiques of the use of dignity within Canadian equality jurisprudence, in an attempt to identify guidelines that could be translated in legislation which are to be applied by presiding officers in lower courts (sitting as equality courts) in dealing with alleged violations of the equality right.

The equality right – as protected in terms of the Equality Act and applied in equality courts – may be applied vertically and horizontally. In his academic defence of the Court’s dignity-centred approach, Ackermann J¹⁷⁶ stated that the dignity-centred unfair discrimination analysis would be suitable for application in horizontal relations in terms of s 9(4). In view of the fact that the dignity-centred approach focuses on the impact of the discrimination (rather than the source thereof), I agree with Ackermann J’s broad assertion. While it has to be borne in mind that the Canadian Charter applies only vertically, my reliance on the Canadian insights aims to cover both the vertical and horizontal application of the right for purposes of standard-setting.

It has to be noted that the South African Constitutional Court’s use of the dignity-centred analysis is clouded. De Vos explains:¹⁷⁷

[T]he concept of human dignity [as used in matters of unfair discrimination] then becomes rather open-ended and I would argue, should be viewed as a rhetorical device deployed by the court in an attempt to anchor is (sic) equality jurisprudence in a “fundamental value”. The concept of “fundamental human dignity” thus seems not to operate as a rigid litmus test for determining discrimination but merely acts as a rhetorical guiding light – a catch-all phrase to capture the idea of humans as equally capable and equally deserving of concern, respect and consideration.’

¹⁷⁵ See for instance D Gilbert ‘Time to Regroup: Rethinking Section 15 of the Charter’ (2003) 48 *McGill LJ* 627 and the references given by the author in note 5.

¹⁷⁶ Ackermann 550-554.

¹⁷⁷ P de Vos ‘The Centrality of Human Dignity’ in J Vande Lanotte, J Sarkin and Y Haeck *The Principle of Equality: A South African and Belgian Perspective* (2001) Maklu: Antwerpen 142.

It is this imprecision that needs to be unravelled in order to provide clearer guidelines for dealing with infringements of the equality right under the Equality Act.

Denise Réaume¹⁷⁸ and Sophia Moreau¹⁷⁹ both interrogate the dignity analysis adopted by the Canadian Supreme Court in *Law*, an analysis not dissimilar to the *Harksen* test, with a view to modifying and refining it. While their interpretations and analyses of the *Law* guidelines differ, a common thread is to be found in their respective contributions. Réaume¹⁸⁰ begins her analysis by reflecting upon the interest that the equality right is meant to protect. The Supreme Court of Canada has identified this interest as dignity. Réaume notes that this has been controversial and accepts the challenge posed by this identification. She aims to give meaning to 'dignity' which has been termed a 'vacuous concept'. Moreau's¹⁸¹ starting point is similar. Instead of asking questions about the interest protected by the right to equality, she asks what the nature of the wrong is when the individual's right to equality is not respected. In giving meaning to the concept of dignity as it informs the right to equality and in identifying the wrongs of inequality, the authors identify four similar manifestations of infringements of dignity or wrongs committed when the equality right is infringed.

Both authors accept that equality has to do with the distribution of resources in society.¹⁸² The resources concerned with are not only goods capable of being owned, like moveable and immovable property, but also political and social power. Access to property and political and social power enable people to participate meaningfully in society.¹⁸³ The equality right is thus fundamental in any participatory democracy where human agency is valued.¹⁸⁴

¹⁷⁸ D Réaume 'Discrimination and Dignity' in F Faraday, M Denike and MK Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (2006) Irwin Law: Ontario 123.

¹⁷⁹ S Moreau 'The Wrongs of Unequal Treatment' in F Faraday, M Denike and MK Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (2006) Irwin Law: Ontario 31.

¹⁸⁰ Réaume 123-124.

¹⁸¹ Moreau 31.

¹⁸² Moreau 32 and Réaume 124.

¹⁸³ See Taylor 41.

¹⁸⁴ Dworkin's view of the complementarity of liberty and equality is supported by such a view of equality: R Dworkin *Sovereign Virtue* (2002) Harvard University Press: Cambridge 134ff. See also Taylor 56-61; M Walzer 'Comment' in A Gutman *Multiculturalism* (1994) Princeton University Press: Princeton 99.

Both authors ask their readers to re-think dignity within the equality analysis. While Réaume's approach asks for a substantive reconceptualisation of dignity within the context of the *Law* analysis, she accepts the potential for giving substance to equality rights provided by a dignity-centred analysis.¹⁸⁵ On this basis she proceeds to identify three forms of indignities that manifest themselves in this context:

- (a) stereotype;
- (b) prejudice and
- (c) 'exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions of life with dignity'.¹⁸⁶

Moreau's objection to the *Law* guidelines is more fundamental. Without discarding *Law* altogether, she pleads, overall, for a more nuanced approach in the application of the equality right, based on the nature of the wrong that infringed the right.¹⁸⁷ The wrongs of unequal treatment identified by Moreau, remind one of Réaume's indignities. These wrongs are those:

- (a) based on prejudice and stereotyping.¹⁸⁸
- (b) that perpetuate oppressive power relationships.¹⁸⁹
- (c) that leave some individuals without access to basic goods¹⁹⁰ and
- (d) that diminish the complainant's feelings of self-worth.¹⁹¹

This group of wrongs listed in (d) must exist alongside either one of the other identified groups of wrongs, since the subjective feelings of hurt of a complainant are insufficient for a finding of a breach of the equality right.

Moreau insists that the different wrongs require consideration of different contextual factors, and that not all of the wrongs are necessarily relational.¹⁹² According to this view, it is not necessary to identify a comparator where unequal treatment results in the perpetuation of unequal power relations.

¹⁸⁵ Réaume 142.

¹⁸⁶ Réaume 143.

¹⁸⁷ Moreau 62. The list of wrongs provided by Moreau should not be seen as a closed list (50).

¹⁸⁸ Moreau 35-39.

¹⁸⁹ Moreau 40-43.

¹⁹⁰ Moreau 44-49.

¹⁹¹ Moreau 49-50.

¹⁹² Moreau 58-59.

There is clearly an overlap between Réaume's indignities and Moreau's wrongs. Prejudice, stereotyping, oppression and the denial of basic resources are at the root of discrimination. These views also fit the South African legal landscape. *Hoffmann*, the *National Coalition* cases, *Bhe* and *Khosa* and *Moseneke* respectively reflect the indignities/wrongs identified.

In adapting the dignity-centred analysis of the Court as formulated in *Harksen* for the purpose of standard-setting, I rely on Réaume's understanding of the different indignities flowing from unequal treatment as modified by Moreau's insight into the impact of unequal power relations as this plays out between individuals. Instead of using *Harksen* as a tick-list, a re-engagement with the challenges posed by discrimination in our society could benefit from the more nuanced Canadian proposals. When it comes to the determination of fairness, instead of merely asking whether, ultimately, the discriminatory provision or conduct impaired the fundamental dignity of the complainant, I would suggest a refinement of the question. To determine whether the dignity of the complainant was harmed, one should ask whether the discriminatory provision or conduct harmed the dignity of the complainant in that it

- (a) is based on prejudice or stereotype;
- (b) perpetuates oppressive power relations; or,
- (c) in conjunction with (a) and (b), diminishes the feelings of self-worth of the complainant.¹⁹³

These are considered in more detail below.

I have already discussed the Court's use of stereotype for the purpose of determining the position of the complainant in society.¹⁹⁴ Its consideration for that purpose and for purposes of the determination of fairness is the same. Stereotype connotes disregard for the individual by attributing characteristics, either negative or positive, to the individual on the basis of her/his membership of a group which supposedly shares certain characteristics.¹⁹⁵ Stereotype wrongs the complainant because the stereotype

¹⁹³ The wrong or indignity that pertains to socio-economic rights as identified by these authors places an obligation on the state which can be enforced by placing reliance on the socio-economic rights entrenched in the Constitution. I therefore excluded this indignity or wrong from this discussion.

¹⁹⁴ See 4.2.4.6.

¹⁹⁵ Moreau 35 and Réaume 150-151.

does not correspond to the actual situation (it is untrue); it amounts to a denial of autonomy (stereotypes are imposed) or amounts to a public declaration of inferiority (in the case of negative stereotypes).¹⁹⁶ Prejudice is borne of a belief in the inferiority of persons or a group of persons and amounts, as such, to an indignity.¹⁹⁷ The dignity that is infringed by stereotyping or prejudice is the 'objective' (Kantian) dignity.

Oppression breeds and maintains repressive power relations. Oppression can take many forms. Young¹⁹⁸ views oppression as structural:

'Its causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional roles and the collective consequences of following those rules.'

Oppression manifests itself in different forms in society.¹⁹⁹ Exploitation and marginalisation are two better known forms of oppression. Exploitation of a racial group, for example, is premised upon the assumption 'that members of the oppressed racial groups are or ought to be servants of those, or some of those, in the privileged group'.²⁰⁰ Marginalisation takes place when a complainant is treated as insignificant in society and disempowered (socially and politically) as a result of such treatment. Other forms of oppression identified by Young are powerlessness, cultural imperialism and systemic violence. Powerless people, to whom Young refers, are those without any autonomy and who have to accept decisions taken for them.²⁰¹ Young's exposition of cultural imperialism as a form of oppression ties in with her earlier identified marginalisation, but it applies on the level of culture. Cultural imperialism involves 'the universalization of a dominant group's experience and culture, and its establishment as the norm'.²⁰² Through cultural imperialism 'the other' is identified and ostracized, and often stereotypes are born. When groups live in constant fear of violent attacks because of their membership of a group, the threat of systemic violence clearly marks oppression and the existence of oppressive power

¹⁹⁶ Moreau 35.

¹⁹⁷ K Appiah 'Stereotypes and the Shaping of Identity' (2000) 88 *Cal LR* 48 at 50 who notes a link between bigotry and stereotyping, but maintains that the two also exist separately. See also 1.2.

¹⁹⁸ Young 41.

¹⁹⁹ Young 48ff.

²⁰⁰ Young 52.

²⁰¹ Young 57.

²⁰² Young 59. See also Fredman 13-15.

relationships. Differentiating treatment which has the purpose or effect of perpetuating oppressive power relations infringes upon the right to equality.

I have pointed out in 4.2.4.6 that, like the Canadian Supreme Court, the Constitutional Court has (at least on some occasions) opted for a subjective view of dignity, based on the feelings of the complainant. The Constitutional Court's interchangeable use of the objective and subjective views of dignity is problematic. I am not suggesting that the subjective feelings of the complainant are irrelevant in the determination of unfair discrimination, but would rather suggest that they should be accorded a minimal role. If the determination of a breach of the constitutionally protected equality right hinged purely on the subjective feelings of the complainant, the analysis would be no different from a common law determination regarding the infringement of the *dignitas* of a plaintiff by a defendant.²⁰³ An indication that the feelings of the complainant were hurt (subjectively), together with either of the indignities listed in (a) or (b) should enable a presiding officer to make a finding regarding unfair discrimination for the purposes of s 9(3).

I have not addressed the Court's assertion that a 'comparably serious affront' may also lead to a finding of unfairness.²⁰⁴ In my view, unfair discrimination will manifest itself, in the vast majority of instances, in the form of the indignities discussed above. The facts of a particular matter must be considered to determine whether the complainant was affected in a way that is similarly serious to an affront of her/his fundamental dignity. This option is thus not excluded, but is at the same time not emphasised.

4.2.4.5 *Limitation*

The structure of the Bill of Rights in the interim Constitution led the Court, in its first judgment, to lay down a standard two-stage approach of adjudication.²⁰⁵ When it came to a challenge based on the equality right, the Court similarly relied on the two-

²⁰³ See H Botha 'Equality, Dignity and the Politics of Interpretation' (2004) 19 *SAPL* 724.

²⁰⁴ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 81. See 4.2.4.6.

²⁰⁵ *S v Zuma* 1995 (2) SA 642 (CC) para 21.

stage approach.²⁰⁶ *Prinsloo, Hugo* and, ultimately, *Harksen* developed the analysis in terms of s 8 to include, in the first instance, a rationality analysis, and in the second, the unfair discrimination analysis, with the limitation analysis to follow in instances where there was a finding that unfair discrimination had taken place.²⁰⁷ Herein lies the concern. Is it possible that unfair discrimination – that impairs the fundamental dignity of the complainant or affects her/him in a comparably serious manner – is justifiable in an open and democratic society based on human dignity, equality and freedom?²⁰⁸ Are the criteria for determining unfairness different from the criteria used for determining justification of an infringement of the right?

The limitation analysis proposed by the court involves a ‘proportionality exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused’.²⁰⁹ While this exposition of O’Regan J seems straight-forward, the application of this analysis in matters of unfair discrimination has posed difficulties.²¹⁰ It has been suggested that the unfairness enquiry and the justification enquiry are separate enquiries involving different considerations.²¹¹ The question we need to ask then is ‘what is the difference between fairness and reasonableness’?²¹² Van der Vyver²¹³ suggests that fairness relates to the interests of the persons or groups of persons affected by a differentiating provision (the impact of the discrimination), while the reasonableness enquiry focuses on the basis and purpose of the differentiation, with the fairness enquiry preceding the reasonableness enquiry. While it is said that different considerations are at stake in the different stages, Rautenbach’s²¹⁴ identification of the similarity of the

²⁰⁶ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) paras 44-46.

²⁰⁷ See for instance *Harksen v Lane NO* 1998 (1) SA 300 (CC) paras 53-54.

²⁰⁸ Mokgoro J’s minority judgment in *Hugo* is the only judgment in which it was held that unfair discrimination was reasonable and justifiable. See Iles 90-91.

²⁰⁹ *Brink* para 46.

²¹⁰ See for instance *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). In the majority of cases where the Court found that unfair discrimination had taken place the judges dealt with the limitation analysis in a few short sentences or paragraphs, leaving the impression that this analysis is not too serious. See for example *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 58-60.

²¹¹ Rautenbach 575-580; Albertyn and Kentridge 175-176. See also Loenen 410; Albertyn and Goldblatt (2006) 16; Iles 90-91.

²¹² Van der Vyver 378. See also the judgment of Kriegler J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 77 where he criticised the majority for confusing the two enquiries.

²¹³ Van der Vyver 379.

²¹⁴ Rautenbach 578 notes that the determination of unfairness requires a consideration of the nature of the right, the purpose of the limitation (discrimination) and the nature and effect of the discrimination on

considerations employed by the Court, points in the opposite direction. The purpose of the differentiating/discriminating provision, for instance, features time and again. When one considers the *Harksen* test with its first enquiry being the rationality analysis (concerning the governmental purpose of the differentiation), it becomes clear that the Court put the cart before the horse and later wanted the same horse to pull the cart! According to the *Harksen* test, the purpose served by the differentiation has to be considered in stage one (the rationality analysis), stage two (when considering the impact of the discrimination) and stage three (the limitation analysis). Once a court has found that a statutory provision serves a legitimate governmental purpose in the first stage of the enquiry it is difficult to see that it could reach a different conclusion when engaging the limitation analysis. And so would the identified purpose of a provision remain the same when considered in the second stage of the analysis (determining the impact of the discrimination). The purpose sought by a differentiating provision or by differentiating treatment may be relevant for both the fairness and reasonableness enquiries.

A clear identification and separation of the factors used in the determination of unfairness and the factors used to determine the justification of unequal treatment would ensure legal certainty.²¹⁵ But in view of the similarity of the factors considered in relation to unfairness and reasonableness, it is submitted that a more holistic or nuanced approach be taken to the two-stage approach insofar as unfair discrimination matters are concerned.²¹⁶ This suggestion does not require a complete abandonment of the unfairness and reasonableness enquiries as separate enquiries, but merely sensitivity to the overlap of the determining factors.

It may be argued that such a separation of the factors used in the unfairness analysis and the reasonableness analysis is of fundamental importance because of the shift of onus in matters of unfair discrimination. Where the alleged unfair discrimination is on

the complainant and that these are the same factors that the Court considers when engaging the limitation analysis. See also Iles 91.

²¹⁵ S Martin 'Balancing Individual Rights to Equality and Social Goals' (2001) 80 *CBR* 299 at 362 who argues in favour of a 'principled approach to balancing', thereby expressing her support for a clear enunciation of principles applicable at the various stages of the equality analysis.

²¹⁶ In a different context Sachs J suggested in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 46 that the two-stage process should not be followed and applied in a mechanical way. The same caveat should be applied in relation to unfair discrimination matters.

a listed ground, as in the instance of racial discrimination, the proposed nuanced approach would have no impact on the onus. The complainant has to establish *prima facie* that s/he has been the victim of discrimination after which a presumption of unfairness arises which the respondent may rebut. The complainant carries the burden of proof in the first instance and the respondent in the second. The respondent would, similarly, be the party who wishes to justify the discrimination. A court could thus conveniently deal with the latter two analyses in a holistic fashion in which the respondent has the onus. In instances of analogous grounds such a holistic approach would have to be approached with great circumspection in view of the fact that the complainant also carries the burden to prove unfairness.

4.2.5 Unfair Discrimination Analysis Refined

In order to identify clear standards that could serve as a guide to presiding officers of equality courts in dealing with complaints under the Equality Act, I propose an adaptation of the *Harksen* analysis to be used as a set of guidelines,²¹⁷ rather than a test. In providing an inventory of guidelines, I rely on my analysis of the *Harksen* test (above) and propose an adaptation of the Court's dignity-centred analysis. For purposes of this thesis, I relate the guidelines specifically to instances of racial discrimination:

- (a) The complainant must establish that s/he has been subjected to differentiating treatment.
- (b) The complainant must establish that the differentiating treatment was based on race. Such differentiating treatment will then amount to discrimination which is presumed to be unfair in terms of ss 5.
- (c) The respondent may then rebut the presumption of unfairness. Unfairness refers to the impact of the discrimination. In line with my analysis of the dignity-centred approach above, I propose a determination of the unfairness of the discrimination with reference to the impairment of the dignity (in the objective or Kantian sense) of the complainant in that it:

²¹⁷ Guidelines are less rigid than a test and not prescriptive. For purposes of standard-setting, guidelines are preferred to a prescriptive test.

- (i) is based on prejudice or stereotype;
- (ii) perpetuates oppressive power relations; or
- (iii) in conjunction with (i) or (ii) diminishes the feelings of self-worth of the complainant.

The consideration of these factors focuses on the indignities that are at the core of unfair discrimination. It is submitted that these factors incorporate a consideration of the situation of the complainant and her/his group within broader society and are in line with a substantive approach to equality.

(d) The unfairness and justification (or limitation) analyses are not to be separated into two completely distinguishable enquiries. A nuanced approach is suggested in this regard, with due consideration of the purpose and nature of the differentiating treatment insofar as the impact of the discrimination is concerned and in relation to the reasonableness thereof.

4.3 CONCLUDING REMARKS

The discussion and analysis of the South African constitutional standard set out in this chapter warrants reflection on two points. Firstly, the South African constitutional standard, as set out in the Constitution and interpreted by the Constitutional Court, needs to be weighed against the international law standard identified in chapter 3 insofar as the broad commitment to racial equality is concerned and for the purpose of determining whether the equality right has been infringed. The second point relates to my restatement of the analysis in the *Harksen* judgment.

The constitutional commitment to the attainment of equality and the eradication of unfair discrimination on a variety of grounds, including race, echoes the international law emphasis regarding the importance of racial equality for purposes of securing peace. More pertinently, there is congruence between South African and international law standards insofar as the protection of a person's inherent equal dignity and worth by the equality right.

International law proscribes discrimination, while the South African Constitution proscribes unfair discrimination. I have pointed out that this formulation in the South

African Constitution complicates the application of the provision in view of the pejorative interpretation attached to the term 'discrimination' by the South African Constitutional Court. This, however, does not mean that the Constitution falls foul of the international standard, since the outcomes of analyses in terms of international law and South African law, focusing on the impact of the differential treatment on the fundamental dignity of the person, would be the same.

The goals and standards set in the South African Constitution in relation to racial equality and the interpretation thereof meet the international law standards. I consider the specific violations of racial equality as prohibited in the ICERD in relation to the provisions of the Equality Act in chapter 8.

The constitutional commitment to equality is all-pervasive. L'Heureux-Dubé J urges lawyers to learn to speak the language of equality.²¹⁸ This call may seem to be extreme, and numerous lawyers schooled in the tradition of formalistic legal reasoning may balk at the idea. But L'Heureux-Dubé J's underlying message ought to be taken to heart: if we commit ourselves to the constitutional ideal of equality, it must inform all our reasoning and our behaviour. The contested meaning of equality, and by implication non-discrimination, requires us to give meaning to equality by identifying the interests that we want to protect in the benefit of all in society. If we choose that to mean to turn on the inherent equal dignity of all human beings, our political, social and legal choices and actions must reflect that commitment.

In this chapter I have argued in favour of a dignity-centred, contextualised interpretation of equality and non-discrimination for purposes of standard-setting. A dignity-centred interpretation of equality and non-discrimination provides clear guidelines in that it prohibits stereotypical and prejudicial denial of benefits or the imposition of burdens; the perpetuation of oppressive power relations which infringe the dignity of the complainant objectively and, in addition to either of the former, hurts the subjective feelings of victims. I consider the provisions of the Equality Act in relation to these identified standards in chapter 8.

²¹⁸ C L'Heureux-Dubé 'Making a Difference: the Pursuit of Equality and a Compassionate Justice' (1997) 13 *SAJHR* 335 at 336ff. See also C L'Heureux-Dubé 'A Conversation About Equality' (2000) *Denv J Int'l Pol'y* 65 at 74ff; C L'Heureux-Dubé 'Conversations on Equality' (1999) 26 *Man LJ* 273.

Chapter 5

THE EQUALITY ACT AND ITS PROVISIONS

5.1 INTRODUCTION

Section 9(4) of the Constitution requires the enactment of legislation to give effect to the constitutional commitment to equality and non-discrimination. This legislation has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act). In this chapter I provide an exposition and analysis of the reactive provisions of the Equality Act against the background of transformative agenda of the Constitution and in relation to other relevant legal provisions.

This chapter aims to assess whether this legislation has the potential to contribute meaningfully to the creation of an egalitarian society and to restore the common humanity of all South Africans insofar as these are threatened by racist behaviour and attitudes. For this purpose, I consider the meaning of transformative constitutionalism as envisioned by the Constitution, the background to the drafting of the Equality Act and the specific provisions of the Equality Act that are relevant for complaints of racism.

The Equality Act does not exist or operate in a legal vacuum. For this reason I consider the relevant comparable common law and statutory provisions which may be appropriate in complaints relating to racist behaviour.

5.2 TRANSFORMATIVE CONSTITUTIONALISM AND THE EQUALITY IDEAL

I set out the relationship between law and social change in chapter 1. In what follows I explore the notion of transformative constitutionalism which guides the change envisioned by the Constitution.

The political negotiations of the early 1990s between representatives of the apartheid system and those of the liberation movements culminated in the acceptance of the interim Constitution. This constitution can be described as a transitional constitution because it had a limited life-span and was meant to facilitate the change from the authoritarian apartheid system to one that is liberal democratic. As such, the interim Constitution was a product of political change and had the additional task of guiding change while forming the basis for government during the time of transition.¹

Under the heading 'National Unity and Reconciliation' the postamble (or post-script) to the interim Constitution introduced the metaphor of itself as a bridge:

'This Constitution provides 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 of opportunities for all South African, irrespective of colour, race, class, belief or sex.'

This famous metaphor describing the interim Constitution as a bridge, was developed in 1994 in an article by Etienne Mureinik in the *South African Journal on Human Rights*² His interpretation of the metaphor portrayed the Bill of Rights as the chief strut in the constitutional bridge which was to facilitate change from a culture of authority under apartheid to a culture of justification required in terms of the interim Constitution.³ In the new dispensation, persuasion, rather than coercion was to inform the exercise of power.⁴ On this reading, the political transition required a fundamental transformation or re-invention of the institutions and legal culture of South Africa in the light of the liberal-democratic ideals set out in the Constitution.⁵ The interim Constitution was thus not only a transitional constitution set to guide political change,⁶

¹ Teitel 191.

² E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

³ Mureinik 32. For a criticism of this linear view of change see Van der Walt (2001) 59-60. On the transformative role to be played by a Bill of Rights see also A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1 at 4ff.

⁴ Mureinik 32.

⁵ On the meaning of the term 'legal culture' see Klare 166ff. See also Van der Walt (2001) 61ff and AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1 at 17ff.

⁶ The interim Constitution contained Constitutional Principles which provided the blueprint for the drafting of the final Constitution (Schedule 4).

but also a transformative constitution aimed at fundamental restructuring of society and its institutions.⁷

The 1996 Constitution⁸ builds on the transformative theme of the 1993 Constitution and in its preamble the commitment to transformation is confirmed. The Preamble states that the Constitution has been adopted to ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights [and to] improve the quality of life of all citizens and free the potential of each person’.

This Constitution is, like its predecessor, committed to liberal democratic ideals⁹ but it could be argued that the constitutional commitment goes further than classic liberal democratic ideals. Classic liberal rights, like freedom of movement, expression and association, are protected and the Constitution is committed to equality before the law and political rights. The constitutional text can be interpreted to espouse a commitment to an “empowered” model of democracy’ in which social change of the deeply divided and unequal South African society is of paramount importance.¹⁰

The capturing of ideals in the preamble of the Constitution and commitment thereto through the enactment of the Bill of Rights is but a beginning. Constitutional democracy in South Africa requires a commitment to transformative constitutionalism which, in the words of Karl Klare,¹¹ is:

‘a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in a historical context of conducive

⁷ L Lessig *Code: and other Laws from Cyberspace* (1999) Basic Books: New York 213: ‘There are two types of constitutions, one we could call codifying, and the other transformative. A codifying constitution tries to preserve something essential from the constitutional or legal culture in which it is enacted – to protect that culture against changes in the future. A transformative constitution (or amendment) does the opposite: it tries to change something essential in the constitutional or legal culture in which it is enacted – to make life different in the future, to remake some part of the culture.’

⁸ The Constitution of the Republic of South Africa, 1996 was adopted by the Constitutional Assembly on 8 May 1996 in accordance with the procedure set out for its adoption in the interim Constitution. The interim Constitution required the final Constitution to be certified as compliant with the Constitutional Principles by the Constitutional Court before it could come into operation.

⁹ Teitel 5. See also Mureinik 31-32 and 38.

¹⁰ Klare is of the view that the Constitution is ‘post-liberal’ in nature. The post-liberal view encapsulates an ‘empowered’ model of democracy (152) which emphasises the social role of the constitution in transformation (153).

¹¹ Klare 150. The author also notes that transformation requires a change in the formalistic legal culture of South Africa (167). See also Freedman 320 and Kok (2007) chapter 2 where the author extensively analyses the role of law in social transformation.

political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law⁷.

Klare's exposition captures the essence of the transformation required by the Constitution.¹² The promise of equality, freedom and human dignity would be meaningless without the delivery of social justice.¹³ The repeal of apartheid legislation alone cannot restore humanity or bring about equality. Transformation is a multi-faceted process which requires a change of and in the institutions and culture of South Africa. Transformation is an ongoing process which requires job creation, education and the delivery of medical services, the payment of social security benefits and the provision of better living conditions through access to land, housing, water and food for all.¹⁴ The first aspect of the fundamental change mandated by the Constitution entails the improvement of the socio-economic well-being of the many disadvantaged South Africans whose interests were not protected under colonialism and apartheid.¹⁵ The second aspect of the transformation is that of changing the behaviour of South Africans insofar as this is patterned on the racist policies and ideas of the past and manifests itself in its different forms of behaviour which undermines the fundamental dignity of people.¹⁶ Both these aspects of transformation aim to enhance the

¹² See Langa 353 who states: 'It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.' Langa, the Chief Justice of South Africa, identifies the creation of a 'truly equal society' as the constitutional objective. This entails addressing socio-economic inequalities and a rejuvenation and change of the legal culture. In his minority judgment in *Hugo v President of the RSA* 1997 (1) SA 1 (CC) para 74, Kriegler J remarked: 'The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.' See also Mosekene 315. These sentiments are also shared by Albertyn and Goldblatt 248-249.

¹³ PN Langa 'Equality Provisions of the South African Constitution' (2001) 54 *SMU LR* 2101 at 2102.

¹⁴ Van der Walt 68.

¹⁵ See chapter 2.

¹⁶ Langa 353 and Klare 167ff focus on a change in legal culture demanded by the Constitution. This will affect legal practitioners and members of the judiciary. To my mind this is but one aspect of the broader culture that has to change and be reinvented from time to time. See also R Cotterrell *Law's Community: Legal Theory in Sociological Perspective* (1995) Clarendon Press: Oxford. Cotterrell 252 states: 'law is extensively used today not only to control behaviour, but also for controlling influences on attitudes.' It is important in this regard to note that Cotterrell identifies law as it is experienced as power and in its function of setting aspirations such as justice or compliance with the rule of law.

fundamental dignity of all human beings who then will be able to participate meaningfully in state and society.¹⁷

According to Klare, transformation requires a fundamental change in the political and social institutions of the country as well as a restructuring of power relations in a 'democratic, participatory and egalitarian direction'.¹⁸ The acceptance of constitutional democracy in South Africa by the adoption of the interim and final Constitutions demonstrates that law shapes government and the political institutions which play a role in the process of governance. Social institutions and power relationships between individuals are traditionally viewed as belonging to the private sphere in which people are free to manage their affairs in accordance with their own convictions. The South African Constitution strips the so-called private sphere of its immunity to the constitutional ideals of equality, freedom and dignity.¹⁹ Patterns of disadvantage, discrimination and oppression are perpetuated not only through state action, but also through the actions of individuals.²⁰ For many South Africans, the state-sanctioned overlordship that white people enjoyed prior to 1994 is alive despite the advent of constitutional democracy and the loss of state sanction in that regard.²¹ This means that inter-personal relationships and communication between black and white South Africans are often conducted without reference to constitutional ideals of equality and dignity.²²

Constitutional commitment to the eradication of inequality and unfair discrimination is commonly couched in general terms. Legislation aiming to realise the goals of equality generally refines the constitutional commitment to equality by providing

¹⁷ See Kok (2008) 124-125. See also O'Regan 88.

¹⁸ Pieterse (2005) 164 identifies three transformative projects envisioned by the Constitution. These are firstly in relation to restitution or remediation of past injustice, secondly in relation to the fulfilment of rights and thirdly in relation to a change in legal culture. See also Auerbach 1233

¹⁹ Sections 7 and 8 of the Constitution. Section 9(4) prohibits unfair discrimination by individuals on the grounds listed in s 9(3). See also Pieterse (2005) 155 at 160-161.

²⁰ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 145 per Kriegler J (minority judgment in which Didcott J concurred): 'No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits.' See also paras 125 and 135 per Kriegler J and paras 157,161 and 163 per Madala J. See also Young 41ff.

²¹ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 145. See also *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 83.

²² *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 83.

specific formulas to deal with unfair discrimination.²³ However, care should be taken in formulating such legislative provisions. Réaume warns against piecemeal legislative responses to discrimination in society which are formulated without recourse to a general theory of equality. Instances of outlawed discrimination are often highlighted in legislation to the exclusion of general principles from that legislation.²⁴ The incorporation of a principled approach in legislation will allow presiding officers in courts concerned with such matters to deal with different and ever-changing forms of discrimination.²⁵ The current investigation ponders this point: does the Equality Act represent a constitutionally compatible, principled yet refined, approach to equality and non-discrimination that is sufficiently responsive to ever-changing forms of behaviour that undermine the constitutional commitment to equality?

5.3 THE LEGISLATIVE BUILDING BLOCKS OF A NEW SOCIETY

Many statutes have been passed by Parliament since 1994 concerning the improvement of living conditions. For example, legislation dealing with land restitution,²⁶ the upgrading of land tenure,²⁷ the facilitation of access to housing²⁸ and the provision of social assistance²⁹ to those in need have been passed.³⁰ The second aspect of the transformation process identified above, aims at eradicating behavioural patterns modelled on past discriminatory policies and practices. Parliament has enacted the Equality Act and the Employment Equity Act (EEA)³¹ to address this transformational goal. These Acts oblige the state and society to embrace the equality ideal and to change behavioural patterns forged in the past.³²

²³ AW Heringa 'Standards of Review for Discrimination: The Scope of Review by the Courts' in T Loenen and PR Rodrigues (eds) *Non-discrimination Law: Comparative Perspectives* (1999) Martinus Nijhoff Publishers: The Hague 25 at 32-33.

²⁴ Réaume 122. See Kok (2008) 138-139 who is of the view that the Act meets the requirement set out by Réaume.

²⁵ Réaume (2002) 125.

²⁶ Restitution of Land Rights Act 22 of 1994.

²⁷ Extension of Security of Tenure Act 62 of 1997

²⁸ Housing Act 107 of 1997.

²⁹ Social Assistance Act 13 of 2004.

³⁰ For a more complete (but dated) list of statutes passed since 1994 see Gutto chapter 2.

³¹ Act 55 of 1998.

³² It can be argued that the Equality Act aims to address both aspects of transformation. I believe that the latter aspect gets more attention in the reactive provisions of the Act, as is evident from the

In what follows, the goals and rights-creating provisions provided for in the Equality Act are considered against the background of the drafting history of the Act in order to determine whether the Act has the potential to contribute meaningfully to the constitutionally envisioned transformation.

5.3.1 The Equality Act

5.3.1.1 *Drafting history*

In an attempt to combine expertise and insights from wide consultation on the equality legislation envisioned in s 9(4) of the Constitution,³³ the Department of Justice and Constitutional development and the South African Human Rights Commission combined forces to set up the Equality Legislation Drafting Unit in late 1998.³⁴ The Unit proceeded to draft the legislation envisioned in s 9(4) of the Constitution, read with item 23 of Schedule 6 of the Constitution, before the deadline of 4 February 2000.³⁵ With limited time at its disposal, the Drafting Unit convened expert conferences and public awareness workshops.³⁶ By July 1999, the Unit had produced a framework document which was then passed on to a drafting team which presented

provisions of the Act as discussed in 5.3.1.4. For a different perspective, see Kok (2007) chapter 3 who places emphasis on the role of the Act in relation to systemic inequality. The author is of the view that complaint-driven litigation as envisioned in the Act has limited potential in addressing systemic inequalities.

³³ The Promotion of Equality and Prevention of Unfair Discrimination Bill [B57-1999] was introduced in terms of GN 2399 of 1999 in GG 20572 of 25 October 1999. The notice made it clear that the bill was introduced to give effect to s 9(4) of the Constitution. During the debates in Parliament it became clear that the Department of Justice and Constitutional Development also wanted to address s 9(2) concerns by means of this legislation: *Debates of the National Assembly 21-26 January 2000 (Hansard)* 467 and *Debates of the National Council of Provinces 26-28 January 2000 (Hansard)* 250.

³⁴ The launch of the Unit took place on 25 May 1998: Human Rights Commission 'Government-appointed Unit to Unveil Anti-discrimination Legislation Plans for Year 2000, 22 May 1998' available at http://www.info.gov.za/speeches/1998/98526_0x7869810641.htm accessed on 5 July 2007. See also South African Human Rights Commission Fourth Annual Report December 1998 – December 1999 62. The Unit was housed at the head offices of the SAHRC. The Unit was co-ordinated by Professor Johann van der Westhuizen, then of the University of Pretoria. The other members were Advocate Sicelo Mthethwa and Dr Lindelwa Ntutela, a sociologist. See Gutto 18-20 for an exposition of the structure and functioning of the Equality Legislation Drafting Unit.

³⁵ The Constitution came into operation on 4 February 1996.

³⁶ Albertyn, Goldblatt and Roederer 2. The public awareness workshops included a national consultative conference.

a draft bill to Cabinet later that year.³⁷ After its publication in the Government Gazette on 25 October 1999,³⁸ the Bill was tabled in Parliament. An *ad hoc* joint parliamentary committee was established to refine the Bill before its second reading.³⁹ This committee was tasked to prepare a more streamlined version of the Bill by January 2000 for submission in Parliament.⁴⁰ This included a consideration of written and oral submissions from civil society.⁴¹ With only a few days to spare before the deadline of 4 February 2000, the National Assembly and the National Council of Provinces engaged in a brief debate on the Bill. Proponents of the Bill hailed its transformative capacity, with the Minister for Justice and Constitutional Development pronouncing as follows during the second reading debate:

[T]his is yet another legislative milestone and in some circles, indeed, this Bill is regarded in importance as only second to the Constitution. It is intended to strengthen the legal basis for further transforming our society.⁴²

Opponents of the Bill criticised the inclusion of provisions regarding the promotion of equality and the provision regarding ministerial designation of presiding officers,⁴³ which was subsequently amended in 2002.⁴⁴ At the end of January 2000 the Bill was passed with an overwhelming majority by both houses of Parliament and submitted to the President for assent.⁴⁵ The President assented to the Act on 2 February 2000.

This account of the drafting history of the Act shows that it was finalised under great pressure. Accordingly, the drafting of some sections leaves much to be desired.⁴⁶ These drafting issues will be highlighted in the course of the discussion. This

³⁷ Albertyn, Goldblatt and Roederer 2. Gutto 20 captured a sense of urgency in his account of the events.

³⁸ GN 2399 of 1999 in GG 20572 of 25 October 1999.

³⁹ *Debates of the National Assembly 20-29 October 1999 (Hansard)* 1411.

⁴⁰ The minutes of the committee meetings are available at <http://www.pmg.org.za/minutes.php?q=2&comid=80&PHPSESSID=237d79473493f0fdd2d93fe4af485ab0> accessed on 9 July 2007. In its original form the Bill was highly problematic. It dealt with unfair discrimination in different sectors in separate clauses and contained a detailed definitions clause.

⁴¹ This is evident from the minutes of the committee meetings.

⁴² *Debates of the National Assembly 21-26 January 2000 (Hansard)* 380.

⁴³ See for instance the address by Ms M Smuts in the National Assembly: *Debates of the National Assembly 21-26 January 2000 (Hansard)* 389-391.

⁴⁴ Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002.

⁴⁵ *Debates of the National Assembly 21-26 January 2000 (Hansard)* 476-480 and *Debates of the National Council of Provinces 26-28 January 2000 (Hansard)* 251.

⁴⁶ Albertyn, Goldblatt and Roederer 3; Plasket 4; Vogt 202-204. See also *Debates of the National Assembly 21-26 January 2000 (Hansard)* 359 and *Debates of the National Council of Provinces 26-28 January 2000 (Hansard)* 81 referring to the Report from *Ad Hoc* Joint Committee concerning the Bill.

exposition of the drafting history illustrates furthermore that the legislature pinned its hopes for transformation on this Act; the constitutional ideals of equality and non-discrimination were to 'come home' with the Act. Are these ideals indeed furthered by the Act?

A small number of the Act's provisions were brought into operation on 1 September 2000.⁴⁷ The provisions of the Act relating to the prohibition of unfair discrimination came into operation on 16 June 2003⁴⁸ and regulations providing for the application of the provisions were promulgated at the same time.⁴⁹ The provisions of the Act regarding the promotion of equality are still not in operation.

5.3.1.2 *The Goals of the Equality Act, its Interpretation and Application*

The Equality Act is boldly committed to the transformation of South African society. The Preamble records this clearly in setting out the basis and goals of transformation that the legislation pursues. The Preamble casts the scope of the Act wide in relation to the transformation it wishes to bring about. The provisions of the Act are to address systemic inequalities and unfair discrimination that manifest themselves in the institutions of society and the practices and attitudes of South Africans insofar as these 'undermin[e] the aspirations of our constitutional democracy'.⁵⁰ These constitutional aspirations are mentioned explicitly: 'human dignity, equality, freedom, and social justice in a united, non-racial and non-sexist society where all may flourish'. The Preamble also specifically records the international legal obligations that South Africa has undertaken in respect of the promotion of equality and prevention of unfair discrimination. Specific reference is made to the obligations flowing from the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.⁵¹

⁴⁷ GN 54 of 2000 in GG 21517 of 1 September 2000. This notice brought sections 1, 2, 3, 4(2), 5, 6, 29 (with the exception of subsection (2)), 32, 33 and 34(1) into operation.

⁴⁸ GN 49 in GG 25065 of 13 June 2003. This notice brought sections 4(1), 7 – 23, 30, 31 (with the exception of subsection (7)) and 34(2) into operation.

⁴⁹ GN 764 in GG 25065 of 13 June 2003.

⁵⁰ See 5.2 above.

⁵¹ See 3.2.5.

The society that the Act envisages for South Africans is 'a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'.⁵² In confronting racism and unfair racial discrimination, a balance should be struck between extending the recognition of differences and showing equal concern and respect for all people through the recognition of the fundamental equal dignity of all people. It is indeed the recognition of difference that acknowledges the inherent equal dignity of all human beings.⁵³ The Act aims to affirm this equal dignity of people through its provisions which aim to rid society of the 'structures, practices and attitudes'⁵⁴ that undermine dignity.

With the transformative goals are set out in the Preamble, in addition, the Act contains a section with the heading 'Objects of Act'.⁵⁵ The objects set out in this section echo the transformative ideals set out in the Preamble: the Act is 'to give effect to the letter and the spirit of the Constitution'.⁵⁶ But the section goes on to set out more particular 'objects' of the Act. These include the provision of measures to 'facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds or race, gender and disability',⁵⁷ procedures to determine the circumstances under which discrimination is unfair,⁵⁸ to provide remedies to victims of unfair discrimination, hate speech, harassment 'and persons whose right to equality has been infringed'.⁵⁹ Other objects relate to the promotion of equality⁶⁰ and the compliance with international law obligations.⁶¹ The objects of the Act as set out in this section have to be taken into account when the Act is applied.⁶²

⁵² Preamble of the Equality Act.

⁵³ Taylor 39-41, 59. Young 42-48. Young's argument regarding the importance of groups (in providing space for collective identities) in society supports the recognition of groups in society. See also S Fredman 'Combating Racism with Human Rights' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) Oxford University Press: Oxford 13 ; Pieterse 366.

⁵⁴ Preamble.

⁵⁵ Section 2.

⁵⁶ Section 2(b).

⁵⁷ Section 2(c).

⁵⁸ Section 2(d).

⁵⁹ Section 2(f).

⁶⁰ Section 2(e) and (g).

⁶¹ Section 2(h).

⁶² Section 3(1)(b).

The Act binds the State and all persons⁶³ and prevails in the event of conflict arising between the Act and other law, bar the Constitution which prevails over the Act in the event of a conflict.⁶⁴ However, the Act does not apply ‘to any person and to the extent to which the Employment Equity Act applies’.⁶⁵ The jurisdictional difficulties that arise because of this provision are discussed in chapters 6 and 7.

The Act distinguishes between its application and interpretation.⁶⁶ Albertyn, Goldblatt and Roederer⁶⁷ explain the difference between application and interpretation as follows:

[Application] is a more general category and refers to any person operating in terms of the Act, including judicial officers, state officials, private bodies and persons. Interpretation is the task of judicial officers, although litigants and their representatives would need to be aware of the guiding principles for purposes of preparing their cases.’

Plasket⁶⁸ maintains that this distinction is ‘senseless and purposeless’ and concludes that the attempt of Albertyn, Goldblatt and Roederer to explain the difference is unsuccessful. Those applying the Act (the broader category according to Albertyn, Goldblatt and Roederer) must ‘interpret’ the provisions of the Act to give effect to the Constitution and its provisions regarding the promotion of equality through legislative and other means, as well as the Preamble, objects and guiding principles of the Act to fulfil the ‘spirit, purport and objects of this Act.’⁶⁹ Those interpreting the Act ‘may be mindful’ of a relevant law or code of practice in terms of a law, international law and comparable foreign law and the context of the dispute and purpose of the Act.⁷⁰ It is unclear why judicial officers should pay heed to ‘code[s] of practice’.⁷¹ More astonishingly, binding international law and ‘any relevant law’ are dealt with under the same rubric as such (non-binding) codes. Instead of elucidating the process of interpretation, this section confuses readers. The distinction between interpretation and application remains unclear.

⁶³ Section 5(1).

⁶⁴ Section 5(2).

⁶⁵ Section 5(3). See 6.3.1.1.

⁶⁶ Section 3(1) and section 3(2) deal with application and interpretation respectively.

⁶⁷ Albertyn, Goldblatt and Roederer 17.

⁶⁸ Plasket 9.

⁶⁹ Section 3(1).

⁷⁰ Section 3(2) and (3).

⁷¹ Plasket 9-10.

The interpretive maze deepens when one turns to the next section aimed at guiding the adjudication process in terms of the Act and its application. Section 4 of the Act contains 'guiding principles'. It provides for adjudication to be guided by the principles of (1) expeditious and informal processing of cases which enhances participation by the parties; (2) access to courts and other dispute resolution forums; (3) the rules and procedures provided for in s 19; (4) the combination of restorative measures with measures of deterrent nature and (5) the development of skills and capacity of those applying the Act. How the last 'principle' has to inform the adjudication process is unclear.⁷²

The inclusion of sections setting out the objects of legislation and guidelines for its interpretation and/or application has become standard practice in the democratic South Africa.⁷³ On the significance of such sections, Du Plessis comments:⁷⁴

'It is as if the legislature is urging the interpreters of legislative texts (the courts in particular) to let go of the conventional literalist-cum-intentionalist shibboleths of statutory interpretation, and to opt for more constructive systematic and especially purposive (and purposeful) readings of statutory texts instead. The legislature is, in other words, seeking to minimise the interpretive effects of the conventional order of primacy of the canons of statutory interpretation'.

What are the implications of these oddly-drafted provisions for the Equality Act? Those engaging with the Act (in the parlance of the Act, those applying and those interpreting the Act), thus have to do so within the spirit of transformation and the constitutional commitment (and that of the Act) to bring about equality in our deeply-divided and unequal society. The purpose sought by the Act and its provisions is the fundamental transformation of our society in a 'democratic, participatory and egalitarian direction'. Any judicial officer engaging with the provisions of the Act has to do so within the constitutional framework aimed at transformation of our society in an egalitarian direction.

⁷² Plasket 9.

⁷³ Du Plessis 243.

⁷⁴ Du Plessis 243. See also Plasket 10 who states in relation to s 3 dealing with interpretation: '[This section] certainly leaves much to be desired but there is something of a bottom line that can be inferred in spite of the best efforts of the drafters to hide it: whatever else the drafters intended, they wanted the Act to be interpreted purposively and generously.'

5.3.1.3 *The Structure of the Act*

The transformative goals of the Act are supported by two pillars, the prohibition of unfair discrimination, hate speech and harassment and 'prohibition of dissemination and publication of information that unfairly discriminates' on the one hand; and the promotion of equality on the other. The second pillar is by far the more controversial one of the two and to date this chapter of the Act has not been brought into operation.⁷⁵ In providing for the promotion of equality, the Act places a general obligation on the state and on all persons to promote equality.⁷⁶ These two pillars can be viewed as reactive and proactive responses to the challenges posed by inequality and unfair discrimination. This thesis is only concerned with the reactive provisions. These are explored against the background of the transformative goals of the Act and with particular reference to racism.

5.3.1.4 *Reactive Provisions of the Act*

Complaints in terms of the Equality Act 'must be considered within the four corners of that Act'.⁷⁷ The Equality Act was enacted to give effect to the constitutional right to equality and was not meant to be a re-statement of s 9.⁷⁸ The provisions of the Act 'may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution'.⁷⁹ A brief scrutiny of the reactive provisions contained in Chapter 2 of the Act shows that the Act goes beyond s 9 in its prohibition of behaviour that offends the right to equality. I consider each of these in turn to determine their scope and constitutionality.

⁷⁵ In an address to the Equality Indaba on 24 June 2004, the Deputy Minister of the Department of Justice and Constitutional Development, Mr Johnny de Lange, announced that the chapter of the Act dealing with the promotion of equality was to commence on 9 August 2004. This chapter has not been put into operation. The regulations pertaining to the promotion of equality have been promulgated by GN 563, GG 26316 (30 April 2004). See also GN 743 of 2004, GG 26316 (30 April 2004) in which the regulations were published and comments thereon were invited.

⁷⁶ Section 24. The rest of this chapter deals in more detail with the obligations of the state and private persons and bodies in respect of the promotion of equality.

⁷⁷ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40.

⁷⁸ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 43.

⁷⁹ *Ibid.*

5.3.1.4.1 Unfair discrimination

The Act contains a general prohibition of unfair discrimination⁸⁰ which has to be understood with reference to its definitions of equality and discrimination. Equality is defined to include ‘the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and [it] includes *de jure* and *de facto* equality and also equality in terms of outcome’.⁸¹ Equality of opportunity and equality of outcome are often pitted against each other.⁸² The definition proposed in the Act opts for a view of the two stances as complementary. This view of equality is in accordance with the transformative agenda of the Constitution and the substantive view of equality taken by the Constitutional Court in its interpretation of the constitutional right to equality.⁸³

Discrimination in terms of the Act, ‘means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds’.⁸⁴ In *MEC for Education: KwaZulu-Natal v Pillay*⁸⁵ the Constitutional Court (unanimously on this point) found it unnecessary to decide whether this definition of discrimination requires a comparator, i.e. whether discrimination as prohibited in the Act is always relational.⁸⁶ The wording of the definition in the Act suggests that a comparator (whether real or represented by an unspoken standard) is required. What the Act views as discrimination is the imposition of burdens (or obligations or disadvantage), directly or indirectly, on a complainant that are not imposed on others not belonging to the complainant’s group. In other words, with reference to the withholding of benefits, in comparison to non-members of the particular group, e.g. the race group of the complainant, certain benefits, opportunities or advantages are/were denied the complainant because of

⁸⁰ Section 6.

⁸¹ Section 1.

⁸² A Phillips ‘Defending Equality of Outcome’ (2004) 12 *Journal of Political Philosophy* 1.

⁸³ See for instance *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) paras 26 and 29 where the substantive and formal notions of equality are contrasted. See also *Albertyn and Kentridge* 152; *Vogt* 197. See 4.2.4.2.

⁸⁴ Section 1.

⁸⁵ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 44 per Langa CJ and para 164 per O’Regan J.

⁸⁶ See 4.2.4.4.

her/his membership of the particular group. The Act requires a comparison of the position of the complainant, as a member of a particular group, in relation to that of non-members of that particular group.

The Act prohibits unfair discrimination. Section 14, which is 'not a model of clarity',⁸⁷ provides for a complex list of factors that has to be considered when determining the fairness or unfairness of discrimination.⁸⁸ The section correctly excludes affirmative action measures from being viewed as unfair.⁸⁹ Section 14(2) provides the factors to be considered for the determination of fairness: the context, the factors listed in s 14(3) and 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'.⁹⁰ These considerations in the determination of fairness are loosely based on the factors which the Constitutional Court identified as determinative of the unfairness of discrimination in *Harksen*,⁹¹ bundled with reasonableness considerations as provided for in s 36 of the Constitution.⁹² *Harksen* concerned the application of the right to equality as entrenched in the Constitution, while a consideration of unfair discrimination in terms of the Act must take the formulation of equality and non-discrimination in the Act into consideration.⁹³

⁸⁷ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 168. O'Regan J notes that this poorly drafted section 'is ... not particularly helpful to a court faced with the determination of what constitutes fairness'.

⁸⁸ Section 14(2) urges the presiding officer to take the context, the list of factors in ss (3) and 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned' into account when determining fairness. One would think that any presiding officer would take the context into account when adjudicating.

⁸⁹ Section 14(1). *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 28.

⁹⁰ The last factor which is one of the three 'main' considerations in the determination of fairness contains in itself considerations pertaining to fairness and reasonableness which further complicates the interpretation of this section.

⁹¹ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 51. See the discussion of the factors 4.2.4.6. Section 14 lists the factors identified in *Harksen* without a consideration of the Constitutional Court's emphasis on the impact of the discrimination as a central concern. So, for instance it lists the impairment of dignity, the position of the complainants in society and whether the discrimination serves and achieves a legitimate purpose as factors separate to a consideration of the impact or likely impact of the discrimination on the complainant.

⁹² See *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 70. Erasmus J in *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (Eq) para 25 stated in relation to the factors listed in s 14 that 'not all the criteria there mentioned are applicable in all cases, nor do those that are relevant necessarily bear the same weight in the enquiry. Each case is to be decided on its own particular facts and circumstances'.

⁹³ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40. *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 96-97.

Section 14(3) lists the following factors: (1) whether the discrimination impairs or is likely to impair the dignity of the complainant; (2) the impact or likely impact of the discrimination on the complainant; (3) the position of the complainant in society and whether the complainant suffers from patterns of disadvantage or belongs to such a group; (4) the nature and extent of the discrimination; (5) whether the discrimination is systemic in nature; (6) whether the discrimination serves a legitimate purpose; (7) the extent to which the discrimination achieves its purpose; (8) whether less restrictive and less disadvantageous means are available to achieve the purpose; and (9) whether the respondent has taken reasonable steps to address disadvantages arising from the listed grounds and to accommodate diversity.

The list of factors includes both fairness and reasonableness considerations as these were distinguished in *Harksen*.⁹⁴ The *Harksen* analysis placed the value of human dignity at the centre of the analysis in relation to a determination of the impact of the discrimination on the complainant, i.e. as determinative of fairness.

In its restatement of these factors in the Act, the legislature assigned no specific priority to any of the factors listed. So for instance, it lists the consideration of the impairment of dignity as a factor that exists alongside the consideration of the impact of the discrimination. The drafters clearly attempted to canvass all relevant factors fully, but managed to formulate a dense and complicated section which is difficult to apply. In chapter 8 a recommendation is made in order to simplify this test in accordance with the analysis of the constitutional standard in chapter 4. It is, however, the task of the courts to apply this section as it stands in a way that is constitutionally defensible.⁹⁵ O'Regan J's interpretation of the list of factors contained in s 14(3) as 'suggestive of a proportionality analysis' is the best way to make sense of

⁹⁴ Section 14(3)(h) provides for a consideration of whether there are less restrictive and less disadvantageous means to achieve the purpose and s 14(3)(i) requires a consideration of whether reasonable steps have been taken to address the disadvantage which arises from a prohibited ground or to accommodate diversity. In *Harksen* (at para 53-54) the Constitutional Court reiterated its stance on adjudication in two distinct stages, namely an interpretation stage and a limitation stage in the event where it has been established that a right has been infringed. In equality matters this has led to a consideration of fairness in stage one and reasonableness in stage two. It is difficult to see how unfair discrimination could be found to be reasonable. See Rautenbach 575-580 and Van der Vyver 378-379. The conflation of the two kinds of considerations is furthermore evident from the inclusion of s 14(2)(c). See 4.2.4.8.

⁹⁵ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 70.

the provision.⁹⁶ A presiding officer determining whether discrimination is unfair would thus have to weigh up the impairment of dignity, impact of the discrimination, position of the complainant, nature and extent of discrimination and whether it is systemic in nature against the (legitimate) purpose of the discrimination, the extent to which it achieves its purpose, the availability of less restrictive means to attain the purpose and the steps taken to address disadvantage and to facilitate reasonable accommodation of diversity.⁹⁷

Apart from these general provisions regarding unfair discrimination, s 7 deals specifically with the prohibition of unfair discrimination on the basis of race. This section contains a list that starts by classifying the propagation of racial superiority or inferiority or dissemination of such ideas and the incitement or participation in racial violence as racial discrimination.⁹⁸ Kok⁹⁹ states that this subsection:

‘would fit more comfortably into section 10 [dealing with hate speech]. Is it really “discrimination” to air the view that one race is better than another, or to encourage racial violence? The other examples listed in section 7 of what would constitute “unfair racial discrimination” all boil down to the withholding of benefits of the imposing of disadvantages’.

In view of my interpretation of hate speech and harassment as forms of impairment of the dignity interest protected by the equality right closely related to unfair discrimination as discussed below, the inclusion of this subsection under the heading ‘unfair discrimination’ is not overly problematic. However, it should be noted that such propagation, in terms of its placement in the Act, will have to be proven unfair, while hate speech and harassment are exempted from the unfairness determination.¹⁰⁰

Other instances of unfair racial discrimination listed in s 7 are the engagement in activities that promote (or are intended to promote) racial exclusivity;¹⁰¹ excluding

⁹⁶ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 137.

⁹⁷ My refinement of the *Harksen* analysis at 4.2.5 sets clearer standards in relation to s 9 that would make for clearer legislative standards. See also chapter 8.

⁹⁸ Section 7(a).

⁹⁹ Kok 297. See also Teichner 353.

¹⁰⁰ Section 15.

¹⁰¹ Section 7(b). In its finding in the complaint of *K Katopodis v Forum for Black Journalists* GP/2008/0161/L BIOS (9 April 2008) the SAHRC referred to subsections (b) and (c) of s 7 in the course of finding that the exclusion of white journalists from membership of the Forum constituted a violation of

members of a certain race group under a seemingly legitimate rule or practice but which aims at the retention of exclusive control by a particular race group;¹⁰² the provision of inferior services to a particular racial group¹⁰³ and the denial of access to opportunities, including access to services or contracts for delivering services or 'failing to accommodate the needs of such persons'.¹⁰⁴ The last example is unclear. One could guess that this subsection deals with tenders or procurement, but who 'such people' are, is not clear. The s 7 examples imply that the discrimination is relational because they clearly envision a dominant groups and a subservient or excluded racial group.

What is the purpose of this list of incidents that would constitute unfair racial discrimination? The list of instances is provided as examples of unfair discrimination on the basis of race.¹⁰⁵ The list plays a similar educative role to the illustrative list of unfair practices in certain sectors as found in s 29.¹⁰⁶ A complainant still has to provide *prima facie* proof of the discrimination before the onus shifts to the respondent to prove that the discrimination did not take place or that the discrimination was not on one of the prohibited grounds.¹⁰⁷ If it has been established that the discrimination had taken place, the respondent may prove that the discrimination was not unfair with reference to s 14. The respondent carries a full burden in this regard and not merely an evidentiary burden.¹⁰⁸

the equality right. The Forum's right to freedom of association did not justify unfair racial discrimination and it was requested to reconsider its membership requirements.

¹⁰² Section 7(c).

¹⁰³ Section 7(d).

¹⁰⁴ Section 7(e).

¹⁰⁵ Albertyn, Goldblatt and Roederer 56. But see Kok 305 for a contrary view, namely that these instances are *prima facie* instances of discrimination.

¹⁰⁶ Albertyn, Goldblatt and Roederer 104. The list in s 29 plays a further role in that it provides an initial working list for the Equality Review Committee.

¹⁰⁷ Section 13(1).

¹⁰⁸ See CHW Schmidt and DT Zeffert (updated by DP van der Merwe) 'Evidence' in WA Joubert (ed) *LAWSA Vol 9 2nd edition* (1996) Butterworths: Durban para 839 for an explanation of the difference between a full burden of proof and an evidentiary burden.

5.3.1.4.2 Hate Speech and Related Provisions

Rules regulating hate speech are at the centre of the clash that arises between the right to freedom of expression and the right to equality in democratic states.¹⁰⁹ It is perhaps for this reason that many commentators view hate speech as a form of (unfair) discrimination which violates the right to equality.¹¹⁰ According to this line of argument, hate speech is seen as a form of expression that exceeds the bounds of acceptable expression in a democratic and open society because it does not further the goals of free expression and because it infringes unjustifiably upon the right to equality of a complainant.¹¹¹

Hate speech impairs the fundamental dignity of a person, in both the subjective and objective senses. The effect of hate speech – the impairment of dignity – is similar to that of unfair discrimination as identified by the Constitutional Court and endorsed in this thesis. But it is doubtful whether, on this basis, one could accept hate speech as a form of unfair discrimination as it is dealt with in the Act. Unfair discrimination, in terms of the Act, requires a comparator.¹¹² Hate speech, in terms of the Act (and generally), does not require a comparator. The fact that the Act deals with unfair discrimination and hate speech as separate concepts means that the Act recognises a distinction between these concepts, but that it acknowledges the connection between

¹⁰⁹ Neisser 336. See also SA Smith 'There's Such a Thing as Free Speech and It's a Good Thing Too' in RK Whillock and D Slayden (eds) *Hate Speech* (1995) Sage Publications: Thousand Oaks 227 at 227-229; S Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *SAJHR* 102 at 118-119.

¹¹⁰ Albertyn, Goldblatt and Roederer 4; Neisser 342; Gutto 151; M Banton 'The Declaratory Value of Laws Against Racial Incitement' in S Coliver *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992) Article 19: London 349 at 351. Hartzenberg J in *Strydom v Chiloane* 2008 (2) SA 247 (T) para 16 held that 'racially discriminatory conduct is more serious than hate speech, but hate speech is one of the elements of discriminatory conduct'.

¹¹¹ Free expression is traditionally regarded to serve four important goals: It (1) assists self-development, (2) furthers the search for the truth, (3) makes self-government possible and (4) serves as a safety-valve in that it allows the dissatisfied in society to vent their dissatisfaction without resorting to anti-social and violent means of displaying disapproval: Neisser 344ff. See also K Govender 'The Freedom of Speech' (1997) 1 *HR & Const LJ of Southern Africa* 20. On the importance and purposes of freedom of expression in a democratic society, see *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 26-27; *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 7, *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC) para 37; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) paras 26-28; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 2; *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) para 23; *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA) para 25; *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1287.

¹¹² See 5.3.1.4.1.

these concepts insofar as they turn on the impairment of the dignity interest in violating the equality right. It is this kinship between hate speech and unfair discrimination that mediates the tension Kok identifies in the inclusion of the propagation of racial superiority as a form of unfair discrimination. The effect of such propagation and the effect of hate speech are the same – oppressive power relations are perpetuated and the complainant’s dignity (subjectively and objectively) is impaired. The Act, however, requires that the propagation of racial superiority or inferiority meets a further requirement, namely that it is unfair within the framework provided for by s 14. Insofar as ‘ordinary’ hate speech is concerned, the Act does not require that its unfairness be proven.¹¹³

A further indication of the recognition of the distinction between, but acknowledgment of, the similarity of hate speech and unfair discrimination in the Act, is to be found in s 12 of the Act, which prohibits the dissemination, broadcasting, publication or display of any advertisement or notice that could reasonably be construed or understood to demonstrate a clear intention to discriminate unfairly against any person subject to the proviso¹¹⁴ which also applies to s 10. The proviso allows *bona fide* engagement in artistic creativity, academic or scientific inquiry or fair and accurate reporting in the public interest. The inclusion of this section completes the full frontal confrontation of behaviour that undermines the dignity interest that is protected by the equality right: the Act outlaws conduct that amounts to unfair discrimination or harassment; it prohibits the publication of notices or advertisements which could reasonably be construed to demonstrate an intention to discriminate unfairly (s 12) and it also prohibits speech that is harmful or hurtful (s 10). These are similar insofar as each undermines the equality right of the complainant and thus impair her/his fundamental dignity, but they take different forms and have to meet different requirements as stipulated in the Act. I return to a discussion of s 12 below.

A discussion of the merits or demerits of outlawing or regulating hate speech is unnecessary for current purposes.¹¹⁵ Hate speech is constitutionally offensive and,

¹¹³ Section 15.

¹¹⁴ Section 12 also contains a specific reference to s16 of the Constitution.

¹¹⁵ For a pre-constitutional era discussion see R Suttner ‘Freedom of Speech’ (1990) 6 *SAJHR* 372. See also Sachs 22 and the response to Sachs’s proposition that the propagation of hatred on the basis of race is to be outlawed in the democratic South Africa by D Meyerson “No Platform for Racists”:

insofar as the provision for the prohibition of hate speech in the Act complies with the constitutional prohibition of hate speech its inclusion in the Act, is incontestable.¹¹⁶ Where it exceeds those boundaries, the limitation of the constitutional right to freedom of expression must be justified in terms of s 36 of the Constitution. The Constitution clearly excludes hate speech from the protection afforded to free expression. Section 16(2)(c) excludes the ‘advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm’ from the constitutional protection afforded to free expression. The requirements for the exclusion of expression from the protection of s 16(1) on the basis of it constituting hate speech are thus two-fold:

- (a) the expression amount to the advocacy of hatred based on race, ethnicity, gender or religion and
- (b) that must constitute incitement to cause harm.

Any regulation of hate speech that goes beyond these two requirements must then fall within the purview of a s 36(1) limitation of the right protected in s 16(1).¹¹⁷

Section 10 of the Equality Act outlaws hate speech. In doing so it sets out two requirements:

- (a) the publication, propagation, advocating or communication of words based on a prohibited ground
- (b) that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred is prohibited.¹¹⁸

A cursory reading of this provision makes it clear that s 10 goes further than the exclusion provided for by s 16(2) of the Constitution, making it necessary to determine whether the limitation of s 16(1) by s 10 is justifiable in terms of s 36(1) of the

What Should the View of Those on the Left Be?’ (1990) 6 *SAJHR* 394; A Cockrell “No Platform for Racists”: Some Dogmatism Regarding the Limits of Tolerance’ (1991) 7 *SAJHR* 339.

¹¹⁶ See *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 43. A constitutional challenge to the provisions of the Act arises if the provisions of the Act violate s 9 or infringe upon another entrenched right.

¹¹⁷ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA (CC) para 34; *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) paras 17-22; Devenish 97-100; Currie and De Waal (2001) 374-375; Teichner 351-352.

¹¹⁸ Subsection 2 of s 10 provides for possible criminal prosecution of such conduct.

Constitution or capable of being read down so as to ensure constitutional compliance.¹¹⁹ Section 7(1) deals with the propagation of racial superiority or inferiority and will have to be dealt with similarly.

Before attempting to engage in the justification analysis or reading down of the Act's hate speech provisions, it is necessary to determine the extent to which these provisions constitute a limitation of s 16(1) not covered by s 16(2). The first and most noticeable departure from the exclusion provided for in s 16(2) by s 10 lies in the extension of the prohibited grounds. Section 16(2) restricts the prohibition of the advocacy of hatred to four grounds, while s 10 includes all the prohibited grounds listed in s 1 of the Act.¹²⁰ Of this expansion, Currie and De Waal¹²¹ have the following to say:

‘This makes hate speech into a prohibition of discriminatory speech, making it difficult to see what additional purpose the specific prohibition of discriminatory speech in s 12 of the Act is intended to serve.’

It has to be determined whether the inclusion of further prohibited grounds in relation to hate speech is a justifiable limitation of free expression as contemplated in s 16(1).¹²² Section 16(2) prohibits hate speech on the basis of race and race is included as one of the listed grounds in the Act on the basis of which hate speech is prohibited. The historical significance of race as a ground is thus acknowledged by the Constitution and the Act.¹²³ For the purpose of this discussion relating to racial

¹¹⁹ Albertyn, Goldblatt and Roederer 89, 94-97; Plasket 11-13; Teichner 357. Kok 299-300 is of the opinion that the reasonableness requirement provides adequate boundaries to the wide formulation of the provision and holds that the section is saved from unconstitutionality by a purposive interpretation in the light of dignity considerations.

¹²⁰ Section 1 lists the prohibited grounds as:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground found in paragraph (a).

¹²¹ Currie and De Waal (2005) 379.

¹²² See Teichner 379.

¹²³ See discussion below. In *Myers v SAPS* [2004] 3 BALR 263 (SSSBC) para 21 the arbitrator (SH Christie) remarked as follows: ‘Racist remarks are insulting and hurtful. As Judge Zondo stated in *Crown Chickens* the word “kaffir” is not an “ordinary” insult. In South African history it is notoriously emblematic of the degrading treatment meted out by whites to black people over many years of

hate speech, it is unnecessary to engage with this issue fully, but the existence of potential constitutional challenge in respect of the inclusion of more grounds is acknowledged.

Section 16(2)(c) prohibits the advocacy of hatred while s 10 of the Act goes further in prohibiting forms of expression other than advocacy – publication, propagation or communication – of hateful (or as required by the Act, hurtful or harmful) words. Would this pass constitutional muster? The word ‘advocacy’ is defined in the *Oxford English Dictionary* as ‘to plead or raise one’s voice in favour of; to defend or recommend publicly’.¹²⁴ Currie and De Waal interpret ‘advocacy’ as ‘to propose or to call for it, to make a case for it’.¹²⁵ ‘Advocacy’ is more than the mere publication or utterance; it seems that the Constitution excludes expression that promotes and advances hatred from constitutional protection. While ‘publication’ or ‘propagation’ of ideas or words connote their dissemination to a wider (public) audience, ‘communication’ does not necessarily involve the same.¹²⁶ The Act thus goes further than the constitutional exclusion by prohibiting the mere conveyance of words based on a prohibited ground that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or promote hatred. This extension thus has to be subjected to the constitutional limitation analysis.

Section 16(2)(c) prohibits the advocacy of ‘hatred’. The word ‘hatred’ is explained in the *Oxford English Dictionary* to mean ‘[t]he condition or state of relations in which one person hates another; the emotion or feeling of hate; active dislike, detestation, enmity, ill-will, malevolence’.¹²⁷ In *Keegstra*,¹²⁸ the Canadian Supreme Court, per Dickson CJ for the majority, explained the meaning of ‘hatred’ in the context of the hate speech prohibition in the Criminal Code of Canada as follows:¹²⁹

‘Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with

apartheid.’ Zondo J’s dictum is at para 39 of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp* 2002 (2) BLLR 493 (LAC). See also Motala and Ramaphosa 370.

¹²⁴ *Oxford English Dictionary* 2 ed (1989) Oxford University Press: Oxford.

¹²⁵ Currie and De Waal (2005) 375.

¹²⁶ *Oxford English Dictionary* 2 ed (1989) Oxford University Press: Oxford.

¹²⁷ *Oxford English Dictionary* 2 ed (1989) Oxford University Press: Oxford.

¹²⁸ *R v Keegstra* [1990] 3 SCR 697.

¹²⁹ *R v Keegstra* [1990] 3 SCR 697 at 777.

vilification and detestation. As Cory J.A. stated in *R. v. Andrews, supra*, at p. 179:

Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)].

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.'

The advocacy of an extreme dislike and detestation is required by s 16(2)(c). Insofar as s 10 also deals with words based on a prohibited ground that are hurtful, harmful or incite harm, it possibly goes beyond the exclusion created by s 16(2)(c). Harm, in the context of s 16(2) could either be interpreted restrictively or widely. A restrictive interpretation would limit 'harm' in this context to physical harm.¹³⁰ This approach confines the exclusion created by the Constitution significantly. In line with the approach of the Canadian Supreme Court in *Keegstra*¹³¹ and the convincing arguments of Critical Race Theory scholars,¹³² I support a wider view of the harm

¹³⁰ Teichner 355-356 and the viewpoints discussed there.

¹³¹ *R v Keegstra* [1990] 3 SCR 697 at 746-747: 'First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence,' and, 'The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.'

¹³² See, for instance, CR Lawrence III 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' (1990) *Duke LJ* 432 at 452-453, 458-466. Lawrence identifies three forms of injury (harm) flowing from racist hate speech: psychic injury, reputational injury and denial of equal opportunity. Of the first kind of injury, he states: 'Psychic injury is not less an injury that being struck in the face, and it is often far more severe. *Brown* [the famous segregation case] speaks directly to the psychic injury inflicted by racist speech in noting that the symbolic message of segregation affected the "hearts and minds" of Negro children "in a way unlikely ever to be undone." Racial epithets and harassment often cause deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a victim's life. Many victims of hate propaganda have experienced physiological and emotional symptoms ranging from rapid pulse rate and difficulty in breathing, to nightmares, post-traumatic stress disorder, psychosis and suicide' (462, footnotes omitted). See also MJ Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) *Mich LR* 2320; D Erickson 'Trampling on Equality – Hate Messages in Public Parades' (1999-2000) 35 *Gonzaga LR* 465 at 485-489.

caused by hate speech.¹³³ The incitement to harm provided for by s 16(2)(c) does, on this reading, relate to physical harm and harm to dignity.¹³⁴ Hate speech is often not aimed at inflicting physical harm. The harm caused by hate speech is psychological or emotional. It further not only harms complainant, but hate speech is also detrimental to society as a whole in that scope for the perpetuation of oppressive power relations is created.¹³⁵ In this broad analysis of the term 'harm', s 10 is congruent with the constitutional exclusion and is it unnecessary to consider the limitation analysis in this regard or to read this provision down.

The hurdle s 16(2)(c) poses for s 10 of the Act does not only relate to the different forms of harm flowing from hate speech. A more serious challenge is posed by the second requirement for constitutional exclusion from freedom of expression, namely that the advocacy of hatred must constitute an incitement to cause harm. The Act clearly requires less than this. What is prohibited in terms of the Act is the utterance (advocacy, propagation, communication) of words that cause harm or hurt on the one hand, and the utterance of words that incite harm or promote or propagate hatred on the other. The first prohibition relates to the hurt caused by words and it is not restricted to the incitement to cause harm as provided for in s 16(2)(c). Currie and De Waal¹³⁶ propose a reading of s 16(2)(c) of the Constitution 'to exclude protection for speech which in itself is intended to cause harm and not merely speech which is intended to incite an audience to cause harm to a target group'. Such a reading will make a consideration of the limitation analysis unnecessary because the constitutional provision will be read to align with the broader provision contained in the Act. This interpretation is strained and it is suggested that the provisions of the Act be tested against the limitation provision (s 36) insofar as they constitute an infringement of the right to freedom of expression. Incitement to cause harm, on the one hand, and harm or hurt on the other, are different effects of hate speech.

¹³³ This approach was also followed by the South African Human Rights Commission in *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1292D-1293H.

See also Currie and De Waal (2001) 375; Lee (2001) 848; DT Meyers 'Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech' (1995) 14 *Law and Philosophy* 203 at 215.

¹³⁴ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1292I-J, relying on *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA (CC) paras 32-33.

¹³⁵ See G Cowan, M Resendez, E Marshall and R Quist 'Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom' (2002) 58 *JSI* 247 at 248.

¹³⁶ Currie and De Waal (2001) 375.

A further constitutional hurdle facing the Act lies in the formulation 'that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; promote and propagate hatred'. Albertyn, Goldblatt and Roederer¹³⁷ opine that the test set by this phrase is not strictly one of intention, but that it requires a consideration of whether a reasonable person could interpret the words as demonstrating a clear intention to be hurtful or harmful. This threshold is lower than the one set by the Constitution in s 16. Teichner maintains that this formulation amounts to a 'loose mens rea requirement [which] may therefore result in the prosecution of those who have no intention to harm'.¹³⁸ Does the perceived inadequacy of the fault element render the hate speech provision unconstitutional? In matters of unfair discrimination, fault is irrelevant, whether in the form of intention or negligence. To the extent that the Act then does not require intention, it is in line with the approach taken to accountability for unfair discrimination, thus emphasising the similarity between these two ways of undermining equality. The pervasiveness of racism in our society can be interpreted to require strict liability in relation to racial hate speech.¹³⁹ The Act does, however, set a threshold – the presiding officer must objectively be convinced of 'a clear intention' on the part of the speaker to hurt, harm or to incite harm or to promote or propagate hatred.

From the above it is clear that s 10 of the Act goes beyond the constitutional exclusion created in s 16(2)(c) in a number of ways: it includes more prohibited grounds in relation to hate speech than s 16(2)(c) allows for;¹⁴⁰ it prohibits the mere conveyance of hateful words; it provides for the prohibition of harm that results from the utterance of words and does not restrict the prohibition to advocacy of hatred that constitutes incitement to cause harm and, lastly, it provides for the consideration of the probable views of a reasonable person of the effects of the uttered words. Where these constitute a limitation of the right to freedom of expression, they have to be subjected to the limitation analysis or construed alternatively to ensure constitutional compatibility.

¹³⁷ Albertyn, Goldblatt and Roederer 92-93. See also Teichner 354.

¹³⁸ Teichner 380.

¹³⁹ See Lee (2001) 860 and the viewpoints discussed there.

¹⁴⁰ This will not be discussed in view of the focus of this thesis on racism and racial discrimination. Race and ethnicity are listed in the s 16(2)(c) exclusion and in s 10.

An alternative construction of the potentially unconstitutional provisions contained in s 10 of the Act could result from reading this section down through the proviso contained in s 12 of the Act. Albertyn, Goldblatt and Roederer¹⁴¹ propose a reading of the proviso in s 12 as an expanded version of s 16(1)(a) of the Constitution which protects freedom of the press, media, artistic and academic expression, and s 16(1)(b) which protects the freedom to receive and impart ideas thereby narrowing the scope of s 10 to bring it in line with the constitutional right to freedom of expression. Kok¹⁴² is even more optimistic about the possibilities created by the proviso of s 12 and views this section as providing a possible defence to a complaint of hate speech. Teichner¹⁴³ doubts the validity of the reading proposed by Albertyn, Goldblatt and Roederer and maintains that the s 12 proviso cannot be equated to the broad protection provided for in s 16(1) of the Constitution. His conclusion is that s 10 infringes upon the constitutional protection of freedom of expression and that it has to be subjected to the limitation analysis. The s 12 proviso narrows the scope of s 10, but whether it is enough to bring this section within the purview of the exclusion provided for in s 16(2) is doubtful: forms of expression other than artistic creativity, academic and scientific inquiry and fair and accurate reporting in the public interest or the publication of an advertisement, notice or information in accordance with s 16 of the Constitution are not exempted by the proviso. Section 10 of the Act, at least insofar as indicated above, runs the risk of constituting an unjustifiable limitation of the right to freedom of expression.

Teichner¹⁴⁴ engages in a detailed limitation analysis, setting out and discussion each of the s 36 factors. Ultimately the limitation analysis requires proportionality between freedom of expression on the one hand and equality and dignity on the other. The latter two, whether considered as rights or values, justify the inclusion of hate speech provisions in the Act,¹⁴⁵ but it is the extent of the limitation on freedom of expression that complicates the analysis. There are, no doubt, drafting issues with s 10. A favourable and generous interpretation of the provisions, in line with the spirit purport

¹⁴¹ Albertyn, Goldblatt and Roederer 93-94.

¹⁴² Kok 299.

¹⁴³ Teichner 357-358.

¹⁴⁴ Teichner 359ff.

¹⁴⁵ See Kok 300.

and object of the Bill of Rights,¹⁴⁶ could make this provision workable despite the difficulties created by careless drafting. Presiding officers applying this provision of the Act should be aware of these difficulties and construe the provisions of the Act in line with the constitutional imperatives relating to freedom of speech, equality and dignity.¹⁴⁷

On this note, it is apposite to pause and consider whether the mere utterance of racial slurs like 'kaffir', 'hotnot', 'coolie' could be regarded as hate speech in view of the South African racial past. The Promotion of Equality and Prevention of Unfair Discrimination Bill¹⁴⁸ contained a clause which outlawed 'the use of language which is recognised as being, and is intended in the circumstances to be, hurtful and abusive, including amongst others, the use of words such as "kaffir", "kaffer", "kaffermeid", "coolie", "hotnot" and their variations' as forms of 'racial discrimination or racism'. This clause did not make it into the Act.

The question now is whether the use of these words amount to racial hate speech which is prohibited in the Equality Act. In the labour context, several forums have condoned disciplinary action against employees who uttered racial slurs with or without the intention to be hurtful or abusive. What attracts liability in the employment context is the mere utterance of the epithet, with fault playing a secondary role.¹⁴⁹ In *Gouws v Chairperson, Public Service Commission*¹⁵⁰ Revelas J held:

¹⁴⁶ Section 39(2) of the Constitution.

¹⁴⁷ See *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40. For purposes of this thesis that considers the application of the Equality Act at the level of the lower courts it is important to bear in mind that magistrates' courts are not allowed to pronounce on the constitutional validity of law and that they are to decide challenges on the assumption that the law is constitutionally valid: s 110 of the Magistrate's Court Act 32 of 1944.

¹⁴⁸ [B57-1999] clause 8(e).

¹⁴⁹ See also *Ciliza v Minister of Police* 1976 (4) SA 243 (N) where James JP remarked that 'Members of the public of all races are entitled to be treated with courtesy by the police, and if their dignity is impaired by the improper use of insulting or denigratory words they are entitled to receive monetary compensation' (at 249G). In *casu* the use of the word 'kaffir' by a police officer to address the plaintiff was held to be injurious. Didcott J in *Mbatha v Van Staden* 1976 (4) SA 243 (N) stated: 'The tirade's worst feature was the use of the epithet "kaffir". Such alone can amount to an actionable wrong, according to the decision of the Full Bench here in *Ciliza v Minister of Police and another*. Everything depends, of course, on the context in which the word is uttered. Settings which make it innocuous can no doubt be imagined. Ordinarily, however, that is not the case when, in South Africa nowadays, a Black man or woman is called a "kaffir" by somebody of another race. Then, as a rule, the term is a derogatory and contemptuous one. Its usage in this part of the world has seen to that, whatever its original connotations may have been. With much the same ring as the word "nigger" in the United States, it disparages the black race and the person concerned as a member of that race. It is deeply offensive to Blacks. Just about everyone knows that by now. The intention to offend can therefore be

‘The word “kaffer”, particularly if used by a white person referring to a black person, and if uttered directly at a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed “hate speech”.’

I share this sentiment. Racial epithets have become hate speech inflicting racial abuse.¹⁵¹ People often use racial slurs without plotting violence or annihilation, but because they perceive the other person a lesser human being. Thus by using racial slurs people undermine the fundamental dignity of people and perpetuate views of racial superiority and inferiority that stem from the past.¹⁵² The deep hurt caused by these epithets justify labelling their use ‘hate speech’. Racist hate speech defies the constitutional ideals of dignity and equality and serves no legitimate constitutional purpose.

Section 15 provides that there is no need to prove unfairness in instances of complaints of hate speech and harassment. Section 13, providing for the burden of proof in matters of unfair discrimination, explicitly refers to discrimination, and is silent on the subject of complaints relating to hate speech (and harassment). Two interpretations regarding the burden of proof are thus possible – that s 13 applies in matters of hate speech, thus shifting the burden to the respondent once the complainant has made out a *prima facie* case, and the second interpretation is that s 13 does not apply – which means that the complainant carries the burden to prove her/his case on a balance of probabilities. On the interpretation that s 13 applies, the respondent has, once a *prima facie* case has been made out, to prove that the words were not uttered or that they did not relate to a prohibited ground. No other defences

taken for granted, on most occasions at any rate.’ But compare *S v Tanteli* 1975 (2) SA 772 (T) where it was held that the word ‘kaffir’ was offensive but that the complainant did not suffer an *iniuria*. The outdated views expressed in *Tanteli* would not hold in court today.

¹⁵⁰ (2001) 22 ILJ 174 (LC). See also *National Union of Metalworkers of SA v Siemens Ltd* (1990) 11 ILJ 610 (ARB).

¹⁵¹ Zondo JP in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp* 2002 (2) BLLR 493 (LAC) equated the use of racial slurs (in this matter the word ‘kaffir’ was used by the respondent with reference to a co-worker) with racial abuse (para 26) indicative of an attitude embedded in a culture of subordination and exploitation of black people (para 36). The learned judge emphasised that such utterances and their effects are to be viewed against the background of our history of racism and racial abuse (para 39). See also *Myers v SAPS* [2004] 3 BALR 263 (SSSBC).

¹⁵² See 1.2 and 4.2.5.

would be available. The second interpretation would allow for the respondent to raise the defences ousting wrongfulness similar to such defences raised in relation to *iniuria* claims under common law.¹⁵³ The latter interpretation is to be preferred in view of the interpretative presumption that statutes do not amend the common law more than is necessary¹⁵⁴ and in view of the importance of freedom of expression in the constitutional state.¹⁵⁵ If the legislature intended s 13 to apply an explicit provision in this regard would have been included in the Act.

Section 12 of the Act prohibits the dissemination and publication of information that discriminates unfairly. In terms of its provisions 'no person may

- (a) disseminate or broadcast any information;
 - (b) publish or display any advertisement or notice,
- that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section'.

Albertyn, Goldblatt and Roederer¹⁵⁶ rightly point out that this section is perplexing. It draws a link between unfair discrimination and freedom of expression and invokes the hate speech exclusion as provided for in the Constitution. But its inclusion in the Act means that the legislature distinguished this kind of conduct from hate speech. Albertyn, Goldblatt and Roederer's interpretation of this provision is the best way to make sense of this section. They state that, 's 12 only prohibits the dissemination and publication of such information that both (1) could reasonably be understood to demonstrate a clear intention to discriminate unfairly against any person, and (2) amounts to either propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.¹⁵⁷ An application of s 12 on this reading will, in the first instance, require an inquiry as to whether the information was published or disseminated as stipulated in s 12(a) or (b); secondly, whether this information could

¹⁵³ See 5.5.1.

¹⁵⁴ Du Plessis 177ff.

¹⁵⁵ See note 111 above.

¹⁵⁶ Albertyn, Goldblatt and Roederer 100.

¹⁵⁷ Albertyn, Goldblatt and Roederer 101.

reasonably be understood or construed to demonstrate a clear intention to discriminate unfairly within the meaning of discrimination and the test for unfairness as provided for; and lastly, whether the information amounts to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. A respondent may raise the defences mentioned in this section: i.e. that the publication or dissemination of the information is *bona fide* engagement in artistic creativity, academic and scientific inquiry or that it amounts to fair and accurate reporting in the public interest. The complexity of s 12 renders its application problematic in view of the fact that this section brings together two of the forms of behaviour dealt with in the Act, namely unfair discrimination and hate speech, and then combines it with issues pertaining to freedom of expression. I deal with the interaction between the Act and the common law below and this further highlights the complexity of this section insofar as defences are concerned.¹⁵⁸

5.3.1.4.3 Harassment

The Equality Act addresses a further form of conduct or speech that undermines fundamental dignity. Section 11 specifies in a single sentence that '[n]o person may subject any person to harassment'. The definitions section of the Act contains a comprehensive definition of harassment. It provides that:

'harassment means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which relate to –

- (a) sex, gender or sexual orientation; or
- (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group'.

Prior to the enactment of the Equality Act, harassment as a legal concept in South African law was best known in the field of labour law. As in the rest of the world, in South African labour law research and litigation on harassment focused on sexual harassment in the workplace. This form of harassment, viewed as discrimination

¹⁵⁸ See the discussion of the common law of delict at 5.5.

within the scope of Title VII of the Civil Rights Act of the United States of America, gained international prominence in the second half of the previous century.¹⁵⁹ The South African Employment Equity Act (EEA)¹⁶⁰ follows the American example by prohibiting harassment is a form of unfair discrimination.¹⁶¹ To view harassment as discrimination or not is a deliberate legislative or judicial choice.¹⁶² In the context of South African labour law, the legislature has spoken clearly: harassment on a prohibited ground is a form of unfair discrimination and, in order to succeed with a claim against an employer on this basis, the requirements of the EEA must be met.¹⁶³ The Equality Act is different: the legislative choice exercised in this instance distinguishes harassment from unfair discrimination outside the workplace.¹⁶⁴ While the similarity between harassment and unfair discrimination is not denied, the Equality Act clearly views harassment as a social ill that exists alongside unfair discrimination.¹⁶⁵ Unfairness plays no role in matters of harassment in terms of the Equality Act.¹⁶⁶ What then constitutes harassment in terms of the Act? What are the elements that must be proven in terms of the definition set out in the Act?

¹⁵⁹ American feminists, relying on the success of the civil rights movement in respect of the plight of African-Americans, sought to draw analogies between the oppression and exploitation of black people and women: C MacKinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) Yale University Press: New Haven. MacKinnon argued that women suffered as a result of sexual harassment because they are women (27, 161 and 191). This is the result of the institutionalised subservient position that women hold in society which undermines their rights and ability to self-determination (7, 10 and 95). As such then, sexual harassment constitutes discrimination because women are women. MacKinnon's book appeared for the first time in 1976 and its publication coincided with a survey in the popular press on the intimidation of women at work: S Mayeri 'A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective' (2000-2001) 110 *Yale LJ* 1045 at 1056. See also A Bernstein 'Law, Culture and Harassment' (1993-1994) *U of P LR* 1227 at 1227. MacKinnon and other activists' arguments found favour with the American courts who endorsed the view of harassment as discrimination: Bernstein 1235. For criticism of this view see EF Paul 'Sexual Harassment as Sex Discrimination: A Defective Paradigm' (1990) 8 *Yale L & Pol'y Rev* 333 and J Dine and B Watt 'Sexual Harassment: Moving Away from Discrimination' (1995) 58 *MLR* 343. Two manifestations of sexual harassment have crystallised over the years in American law: so-called *quid pro quo* harassment ('sleep with me or you will lose your job') and hostile environment harassment in which the perpetrator(s) makes the working environment unpleasant to the extreme by (in the context of sexual harassment) telling crude jokes, making sexually suggestive comments or movements or displaying pictures or items which are sexually explicit: Dine and Watt 347. See *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252 at 1283 and the US authorities listed there.

¹⁶⁰ Act 55 of 1998.

¹⁶¹ Section 6(3). The wisdom of this provision has been questioned: Grogan 129; Garbers 375. But see C Cooper 'Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination' (2002) 23 *ILJ* 1 at 21ff. See also *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC) at 2377E-F.

¹⁶² Garbers 372.

¹⁶³ See Grogan 129-130 for a discussion of the requirement.

¹⁶⁴ Garbers 397.

¹⁶⁵ Garbers 398.

¹⁶⁶ Section 15.

The definition as contained in s 1 prohibits unwanted conduct. Does this mean that speech or words would not be considered to constitute harassment? Guidance in this regard can be taken from labour law.¹⁶⁷ Neither the EEA nor any other labour law legislation contains a definition of harassment. The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace¹⁶⁸ does not have a strict definition for sexual harassment but it provides a list of ‘factors to establish sexual harassment’.¹⁶⁹ It states that ‘physical, verbal or non-verbal conduct’ could constitute sexual harassment. ‘Verbal conduct’ is said to include ‘unwelcome innuendoes, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person’s body made in their presence or to them, unwelcome and inappropriate enquiries about a person’s sex life, and whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text’. The Code is not binding and it only provides guidelines.¹⁷⁰ It is submitted that the approach taken in the Code, to view harassment as including conduct other than physical advances (insofar as sexual harassment is concerned), is sound.

Support for a wide interpretation of what ‘conduct’ constitutes harassment is also found in the Domestic Violence Act¹⁷¹ which deals with harassment in a different context. The Domestic Violence Act, in keeping with the context of domestic abuse, emphasises harassment as repeated watching, phoning, contacting and so forth.

¹⁶⁷ See for instance *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC), *Christian v Colliers Properties* [2005] JOL 13888 (LC) and *Piliso v Old Mutual Life Assurance Co (SA) Ltd* [2007] JOL 18897 (LC). Although *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) (decision of the court *a quo*) and *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA) were not decided on labour law principles the matter related to sexual harassment in the workplace.

¹⁶⁸ The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (2005) as published pursuant to the Employment Equity Act 55 of 1998 in GN 1357 in GG 27865 of 4 August 2005. This Code amended the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (1998) (published in GN 1367 in GG 190449 of 17 July 1998) published pursuant to s203 of the Labour Relations Act 66 of 1995 which contained similar provisions (items 3 containing the definition and 4 setting out forms of sexual harassment). A further two of the codes published pursuant to EEA contain provisions regarding harassment: Code of Good Practice on the Employment of People with Disabilities (GN 1064 in GG 23718 of 19 August 2002) and Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN 1358 in GG 27866 of 4 August 2005). The Code relating to the employment of people with disabilities makes explicit reference to the Code of Good Practice relating to matters concerning sexual harassment. The Code dealing with employment equity provides a brief explanation of harassment (item 19.2.2) and notes that harassment is a ‘very serious offence’ (item 19.3.3).

¹⁶⁹ Item 5.

¹⁷⁰ *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) at 2379A.

¹⁷¹ Section 1 of Act 116 of 1998 1.

What is clear from the definition of harassment in the Domestic Violence Act is that harassment can take many forms. The domestic abuse context requires repetition of the behaviour (more so than in the labour law context) in a way that induces fear in a complainant.

Foreign legislation and case law also bear out a wide interpretation of conduct when it comes to matters of harassment. In the United Kingdom, the Protection from Harassment Act, 1997 deals with the protection of complainants from harassment and similar conduct. This Act does not define harassment, but prohibits a 'course of conduct that amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other'.¹⁷² The Act defines conduct to include speech.¹⁷³

Not only legislatures, but also courts with sparse legislative guidance on the interpretation of harassment, have come to the conclusion that harassment could take the form of words or deeds. Dickson CJ in *Janzen v Platy Enterprises Ltd*¹⁷⁴ in determining the meaning of sexual harassment within the scope of a legislative prohibition of sex discrimination in Canada, remarked:¹⁷⁵

'Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.'

¹⁷² Section 1(1) of the Protection from Harassment Act, 1997. This section applies in England and Wales. A differently worded section, applicable in Scotland, is set out in s 8(1): 'Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amount to harassment of another [which] is intended to amount to harassment of that person; or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.'

¹⁷³ Section 7(4) which applies in England and Wales and s 8(3) which applies in Scotland.

¹⁷⁴ [1989] 1 SCR 1252.

¹⁷⁵ *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252 at 1282S.

According to this line of argument, harassment on any ground can be in the form of mere words. In addition, the words or actions must meet the other specifications provided for in the definition. I deal with the other requirements below.

To be regarded as harassment, the words or conduct of the respondent must, in the first instance, be unwanted. This is a general stipulation that must be met in all cases of harassment in terms of the Equality Act. This means that a complainant must communicate, in some way, to the alleged harasser that her/his words or actions are unwelcome. The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace¹⁷⁶ elaborates the notion of 'unwelcome conduct' which may be useful in the determination of the meaning of 'unwanted' as used in the definition contained in the Equality Act. According to the Code, there are different ways of communicating one's disapproval of the conduct of the harasser; these include 'walking away or not responding to the perpetrator'.¹⁷⁷ Interestingly enough, the Code also allows for the communication of the disapproval through a third party where the harassed individual has 'difficulty indicating to the perpetrator that the conduct is unwelcome'. In such cases the assistance of colleagues, management, a counsellor, family member or friend may be sought to convey the message.¹⁷⁸ It is submitted that this approach to the understanding of 'unwanted' in the context of the definition of the Equality Act provides adequate guidance. Either verbal or non-verbal objections (which may even be passive) communicated by the harassed person herself/ himself or verbal objections when someone approaches the perpetrator on behalf of the harassed person would satisfy the legislative requirement.

The unwanted conduct must be persistent or serious. Persistence in this context reminds of the definition of harassment set out in the Domestic Violence Act where repetition of the unwelcome behaviour is required. The dictionary definition of the word 'harass' conveys the idea of repeated annoyance.¹⁷⁹ In the United Kingdom the

¹⁷⁶ The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (2005) as published pursuant to the Employment Equity Act 55 of 1998 in GN 1357 in GG 27865 of 4 August 2005.

¹⁷⁷ Item 5.2.1 of the Code.

¹⁷⁸ Item 5.2.3 of the Code.

¹⁷⁹ *Oxford English Dictionary* 2 ed (1989) Oxford University Press: Oxford. 'Harass' means 'to wear out, tire out, or exhaust with fatigue, care, trouble, etc; to harry, lay waste, devastate, plunder; to trouble or vex by repeated attacks; to trouble, worry, distress with annoying labour, care, perplexity, importunity, misfortune, etc; to scrape or rub'. Repeated incidences of harassment over a period of

Protection from Harassment Act provides protection only when the harassing conduct has taken place on two occasions.¹⁸⁰ A serious single incident of harassment will however also satisfy the requirements of the Equality Act.¹⁸¹ This approach taken by the drafters of the legislation echoes the approach taken by the Labour Court in the case of *Christian v Collier Properties*¹⁸² where the Court held that a serious single incident of sexual harassment resulting in the dismissal of the complainant justified compensation for both the unfair dismissal and the breach of the EEA insofar as the sexual harassment was concerned. The Code of Good Practice referred to earlier also provides that a 'single incident of unwelcome sexual conduct may constitute sexual harassment'. It is important to note that the facts of the particular case will be determinative. Prolonged subjection to unwelcome words or conduct or a serious single incident of harassment would satisfy the legislative requirements, provided that the other requirements have been met.

The definition requires further that the conduct (1) demeans and humiliates, (2) creates a hostile or intimidating environment or (3) is calculated to induce submission by actual or threatened adverse consequences. Requirements (2) and (3) are well-established in case law and articles related to harassment as will be evident from the discussion below. Requirement (1) captures the feature that harassment shares with unfair discrimination, namely the impairment of fundamental dignity.¹⁸³ The short definition of Lord Nicholls of Birkenhead in *Marjowski v Guy's and St Thomas' NHS Trust*,¹⁸⁴ given in the English law context, captures all the requirements of the definition of harassment in the South African Equality Act. He stated:¹⁸⁵

'Harassment, means in short, engaging in unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another person.'

time were dealt with in the cases of *Intertech Systems (Pty) Ltd v Sowter* (1997) ILJ 659 (LAC), *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC), *Grobler v Naspers Bpk* 2004 (4) SA 220 (C); *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA)

¹⁸⁰ Section 7(3) applicable in England and Wales and s 8(3) applicable in Scotland.

¹⁸¹ See Albertyn, Goldblatt and Roederer 99.

¹⁸² *Christian v Colliers Properties* [2005] JOL 13888 (LC).

¹⁸³ See *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252 at 1284.

¹⁸⁴ *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 24

¹⁸⁵ Para 32.

Harassment is then all of this: it degrades and humiliates through unwanted actions or speech based on a prohibited ground as provided for in requirement (1). Alternatively, harassment has the effect of creating a hostile or intimidating environment. Hostile environment harassment as referred to in requirement (2) above, in the context of labour law, refers to the creation of a work environment in which an employee 'finds it difficult to work' because of, again in the matters of sexual harassment, offensive jokes, pictures, innuendos and so forth, not necessarily directed at the complainant, but affecting the workplace in a negative manner.¹⁸⁶ In this instance there is no denial of benefits to the complainant relative to others, i.e. no discrimination, but harassment has taken place affecting the complainant negatively. It is possible to see how hostile environment harassment can manifest itself in a neighbourhood or a block of flats, where the constant use of, for example racial epithets (which would amount to hate speech as a separate complaint), could create a hostile or intimidating environment.

Requirement (3) is to be interpreted as so-called '*quid pro quo*' harassment, in which the harassed person, in the instance of unwanted sexual advances, surrenders to the unwanted advances in fear of losing a usually a job-related benefit.¹⁸⁷ One could foresee that a complainant may suffer the denial of a benefit outside the work environment as a result of unwanted conduct or words, amounting to harassment, on the part of, for example, a lessor who refuses to let an apartment to a black person on account of race. In such an instance harassment will amount to discrimination, provided that the requirements regarding seriousness are met. This is, however, not the case in instances of harassment that humiliates or degrades or hostile environment harassment.

Whose perspective counts in cases of harassment, that of the perpetrator or that of the complainant? Should the court concern itself exclusively with the subjective experiences of the complainant, or should the 'reasonable person' provide the threshold? Garbers¹⁸⁸ believes that the provisions of the Act are unclear in their guidance by incorporating perspectives of the complainant ('demeans' and

¹⁸⁶ AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke and EML Strydom *Essential Labour Law* 4th ed (2005) Labour Law Publications: Centurion 208.

¹⁸⁷ Albertyn, Goldblatt and Roederer 99. *Christian v Colliers Properties* [2005] JOL 13888 (LC). For a discussion of the interplay between the Equality Act and the EEA see 6.3.1.1.

¹⁸⁸ Garbers 397-398.

‘humiliates’) on the one hand and requiring intention to harass (‘calculated to induce’) on the other. While the text may be unclear by not stipulating whose perspective has to be considered, the implications of the text are clear. The court has to combine a subjective and an objective approach in such matters. It stands to reason that the subjective feelings and experiences of the complainant have to be taken into consideration, but that this subjective approach needs to be tempered by requiring that the conduct amounted to harassment, viewed objectively.

The provisions of the Act are also unclear in relation to fault. Is negligent harassment a possibility in terms of the Act or does a complainant have to prove intention on the part of the respondent? The use of terminology like ‘calculated to induce’ seems to suggest that intention is required; that there is knowledge of unlawfulness and a direction of the will on the part of the respondent.

The definition of harassment set out in the Equality Act gives priority to the grounds of sex, gender and sexual orientation because of the prevalence of these forms of harassment.¹⁸⁹ But harassment based on other grounds, such as race, for instance, is also outlawed in terms of the definition and is not less serious than sexual harassment. Albertyn, Goldblatt and Roederer¹⁹⁰ note that the emphasis is on group membership or perceived group membership when it comes to matters of harassment. Harassment of a person which is not based on group membership or perceived group membership of the complainant would not found a complaint in terms of the Act, but it might be a cause of action in terms of the law of delict.

In matters of harassment the burden of proof rests on the complainant. In 5.3.1.4.2 I discussed the issue of the burden of proof in relation to complaints of hate speech. In the absence of clear legislative direction the same will apply in relation to complaints of harassment.

¹⁸⁹ Albertyn, Goldblatt and Roederer 99.
¹⁹⁰ Albertyn, Goldblatt and Roederer 99.

5.3.1.4.4 Stock-take: Reactive Provisions of the Act

The purpose of the Equality Act is to facilitate the transformation of a deeply unequal society in an egalitarian direction by addressing attitudes, practices and systemic inequalities. When racism is involved, the question arises as to whether the Act, given its provisions, is capable of combating racist behaviour¹⁹¹ effectively.

In light of my analysis of the reactive provisions of the Act set out above, the response to the question would be a tentative 'yes'. While there are indeed drafting issues and poorly formulated sections, the underlying purpose of the Act has merit in view of our racist and racialist past (set out in chapter 2). Law has a role to play in the facilitation of social change, but all hopes for change cannot be pinned on the law.¹⁹² The Act seems to realise that the interest that the equality right should protect, is that of human dignity and that this interest can be harmed in different ways. Therefore, insofar as racist behaviour is concerned, the Act concerns itself with the different manifestations of racist behaviour. So one sees, for example, that unfair racial discrimination, racial hate speech, the dissemination and publication of information that discriminates unfairly on the basis race are prohibited and racial harassment is similarly outlawed. The net is thus cast widely in an attempt to rid our society of racism in many of its guises.

Ubi ius, ibi remedium. In order to assess fully whether the transformative ideals are within the reach of the Act, I now turn to consider the remedies that are provided for in terms of the Act.

¹⁹¹ See 1.2.

¹⁹² See 1.3.1.1 and 5.2.

5.4 EQUALITY ACT REMEDIES AND ORDERS

The wording of s 21 of the Act allows the court to make ‘an appropriate order in the circumstances’ and then goes on to provide a list of examples of ‘appropriate orders’.¹⁹³ The remedies or orders that are provided for in the Act are not constitutional remedies in the ordinary sense, i.e. remedies following a finding of constitutional invalidity, but their purpose and effect are similar to those of constitutional remedies. Constitutional remedies seek to vindicate the fundamental right that was infringed and to deter further infringements of that right.¹⁹⁴ To serve this purpose, constitutional remedies are required to be forward-looking, community-oriented and structural, rather than backward-looking, individualistic and corrective or retributive.¹⁹⁵ The proceedings in terms of the Act also reflect the corrective (or restorative) and backward-looking nature of the law of delict. The remedies and orders provided for in the Act thus have to strike a balance between these two extremes. The overlap or divergence from general nature of constitutional remedies will be highlighted in the discussion of each of the remedies as listed in the Act.

5.4.1 Interim orders

In the absence of specific provisions in the Act and its Regulations pertaining to interlocutory proceedings and interim orders, the provisions of the Supreme Court Act and Magistrate’s Court Act and their rules apply in the equality court. Interlocutory proceedings in which interim orders are given¹⁹⁶ include a wide variety of possible orders ranging from matters of procedure¹⁹⁷ to the granting of an interdict *pendente lite*.¹⁹⁸

¹⁹³ The use of the word ‘including’ in s 21 is indicative of the fact that the list provided is not a closed list.

¹⁹⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 94, 96; *Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC) para 38; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 80.

¹⁹⁵ Currie and De Waal (2005) 195-198.

¹⁹⁶ Erasmus and Van Loggerenberg note to s 49.

¹⁹⁷ For a list of interlocutory orders that are regarded as not appealable see Erasmus and Van Loggerenberg 351-353.

¹⁹⁸ Erasmus and Van Loggerenberg 350.

In matters arising from the Equality Act one could foresee circumstances under which the complainant may wish to obtain an interim interdict against a respondent who discriminates against her/him unfairly or subjects her/him to hate speech or harassment on a regular basis. The complaint form (Form 2, discussed in Chapter 6) used in matters arising from the Equality Act, other than the form used in instances of an application for a protection order in terms of the Domestic Violence Act,¹⁹⁹ does not explicitly provide for a motivation regarding the urgency of the matter, i.e. for expressing a need to obtain an interim order. In instances where the complainant is unrepresented and the clerk fails to explain the remedies available under the Act adequately, unfair discrimination, harassment and hate speech may be prolonged unnecessarily. The brief mention of an 'interim order' in part E of Form 2 creates the impression that a separate application for such an order is unnecessary. The procedure set out in the Act and Regulations does not provide for the granting of relief pending the finalisation of the hearing and the wording of s 21 provides that an interim order may be made after an inquiry (the hearing of evidence and presentation of argument) has been held.

It is submitted that a complainant would be entitled to an order granting her/him interim relief pending the finalisation of the inquiry if s/he were to apply for such relief using the rules of procedure applicable in civil matters²⁰⁰ or, alternatively, by applying for the interim relief using the complaint form. In the latter instance it would seem that the order granting interim relief could only be granted at the directions hearing, since s 21 requires that an interim order be made after an inquiry was made. This reading is supported when one contrasts the provisions of the Domestic Violence Act with those of the Equality Act. The application form for a protection order in terms of the Domestic Violence Act highlights the potential urgency of an application,²⁰¹ while such emphasis is absent in the instance of the complaint form under the Equality Act. A less formalistic (or pedantic) reading of the Equality Act would allow substance to triumph over form and allow a presiding officer to grant interim relief upon receipt of the complaint form (and possibly after hearing the complainant) but prior to notice to the respondent, as in the instance of the granting of an interim interdict under the

¹⁹⁹ Act 116 of 1998. See Form 2 part 6 (Regulation 4 of the Regulations under the Domestic Violence Act 116 of 1998 as published in GN R1311 of 5 November 1999).

²⁰⁰ See 6.3.1.1.

²⁰¹ See also s 5(2) and s 5(3) of the Domestic Violence Act.

ordinary rules applicable in the magistrate's court.²⁰² Where an application for interim relief in the form of an interim interdict is made the requirements for such relief must be met: (i) a *prima facie* right; (ii) a well-founded apprehension of irreparable harm if the interim relief is not granted but the final relief is granted; (iii) that the balance of convenience favours the granting of the interim interdict and (iv) that no other satisfactory remedy is available.²⁰³ Where such an interim interdict is granted, the order must be served on the respondent and s/he must be given the opportunity to present argument and evidence before the court to refute those of the complainant.

5.4.2 Declaratory orders

The power of a high court to grant declaratory orders stems from the common law and s 19(1)(a)(iii) of the Supreme Court Act.²⁰⁴ In terms of the common law and the Supreme Court Act, this remedy is a discretionary remedy that is granted only when it is appropriate to do so in the circumstances of the particular case.²⁰⁵ The decision to grant a declarator is made in two stages: first it is decided whether the applicant is a person with an interest in an 'existing, future or contingent right or obligation'²⁰⁶ and secondly, whether the circumstances demand the exercise of a court's discretion to grant the order.²⁰⁷

'A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief such as mandatory or prohibitory orders, but they may also stand on their own. ... It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the Legislature, the decision as to how best the law, once stated, should be observed.'²⁰⁸

²⁰² Magistrate's Court Rules, rule 55(9).

²⁰³ LTC Harms *The Civil Procedure in Magistrates' Courts* (2007) LexisNexis Butterworths 27–16.

²⁰⁴ Act 59 of 1959. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 55.

²⁰⁵ For a discussion of the requirements in terms of s 19(1)(a)(iii) of the Supreme Court Act see *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality* 2001 (4) SA 1144 (C) 1153-1154.

²⁰⁶ Section 19(1)(a)(iii) of the Supreme Court Act.

²⁰⁷ *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality* 2001 (4) SA 1144 (C) 1153A-B.

²⁰⁸ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 107-108.

These words of O'Regan J capture the usefulness of declaratory orders in matters of a constitutional nature. While the application of the provisions of the Equality Act and adjudication in terms of this legislation are not constitutional matters *per se*, the constitutional roots of the Act and the nature of the provisions it contains, require similar considerations.²⁰⁹ The statutory and common law approach to declaratory orders as remedies in constitutional matters may serve as a useful guide in relation to such orders in terms of the Equality Act, but the specific issues arising from the application of the Act in matters of unfair discrimination, hate speech and harassment may require further consideration.²¹⁰

Declaratory orders provide clarity and are forward-looking remedies with the capacity to strike wider than just the parties before the court. These features make this kind of remedy very suitable in adjudication of matters under the Act.

5.4.3 Orders making a Settlement Agreement an Order of Court

The procedure for making a settlement agreement an order of a magistrate's court is set out in rule 27(6)-(8) of the Magistrate's Court Rules. It entails that the parties apply to court, after the entry of appearance but prior to the delivery of judgment, to record the terms of settlement. The court may also make the settlement an order of court. Such an application is on notice, either in writing or orally in the presence of both parties. The court must be presented with a written signed document which sets out the terms of the settlement. The court then notes that the dispute has been settled and the proceedings are stayed. The same procedure will apply in respect of settlement agreements in relation to disputes under the Equality Act. The specific terms of the settlement may or may not be made an order of the court. Where the terms of the agreement are made an order of the court, the matter is *res iudicata*²¹¹ and, in the event of non-compliance with the terms of the agreement, the judgment creditor has to make use of the execution procedures provided for in the Magistrate's Court Act and Rules.

²⁰⁹ See Jagwanth 212-213.

²¹⁰ See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 106.

²¹¹ HJ Erasmus and DE van Loggerenberg *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume II* 9th edition (1996) Juta Cape Town 27-2.

Where the court notes the settlement, but the application has not included a request to the court to make the terms of the settlement an order of court, the situation is different. The effect of the court's notice of the settlement is that the matter is stayed, but not *res iudicata*. The party to whom performance is due in terms of such a settlement agreement, may in the event of non-fulfilment of any of the conditions of the settlement approach the court by way of motion on notice to request judgment in terms of the settlement.²¹² This application may be upheld or dismissed by the court, or the court may set aside the settlement and give directions as to how the matter is to be conducted in future.²¹³

Settlement agreements may deal with past and future aspects and may or may not be structural, forward-looking and community-oriented.

5.4.4 Damages

5.4.4.1 General and Special Damages

In specifically providing for the payment of damages as a remedy for a breach of the provisions of the Act,²¹⁴ the legislature recognised the adverse personal impact of unfair discrimination, hate speech and harassment which exists alongside the wider constitutional interests served by regulation of such behaviour. In some instances an award of damages, a backward-looking remedy, would be the only effective remedy to vindicate the right at stake and to deter further infringements.²¹⁵

The damages that a complainant may claim for unfair discrimination, harassment or hate speech include damages relating to past or future financial loss and damages for impairment of dignity, pain and suffering or emotional and psychological suffering. For past and future financial loss, the complainant has to provide proof of the extent of her/his damages, e.g. that s/he did not conclude a lucrative business deal because of

²¹² Rule 27(9).

²¹³ Rule 27(10).

²¹⁴ Section 21(2)(d).

²¹⁵ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 100.

the unfair discrimination on the basis of race that s/he suffered at the hands of the respondent. The extent of the financial benefit that s/he lost out on must be proven.²¹⁶ Damages for hurt feelings – impairment of dignity, pain and suffering or emotional and psychological suffering – is more difficult to calculate.²¹⁷ The amount awarded will be determined by the presiding officer after taking into consideration the circumstances of the particular case.²¹⁸

In the absence of clear legislative guidelines, equality courts should take their guidance from awards made in respect of similar delictual claims. In relying on the awards of damages made in terms of common law, cognisance must be taken of the difference between delictual remedies and remedies of a constitutional nature.²¹⁹ An award of damages may be seen as a backward-looking remedy which addresses the effects of unfair discrimination, hate speech or harassment. It is suggested that awards of damages should be used in a manner which effectively influences the behaviour of respondents – if need be, awards of damages should be substantial to change the behaviour of the particular respondent and other potential respondents. Insofar as the impairment of dignity of the complainant is concerned, the facts of the particular case are determinative of the award. Presiding officers of the equality courts should be provided with judgments from other equality courts to guide them in making awards.

5.4.4.2 *Awards of Damages to Organisations*

The provision that allows the presiding officer in an equality court to make an award for the payment of damages to an appropriate body or organisation, after hearing both parties; or, in the absence of the respondent, after hearing the views of the complainant, is a forward-looking and community-oriented remedy.²²⁰ By providing for the payment of an amount to a body or organisation that has the capacity to influence members of the society to change their behaviour (for example, to be more tolerant of

²¹⁶ Neethling, Potgieter and Visser (2006) 195-196, 202-205.

²¹⁷ Neethling, Potgieter and Visser (2006) 195, 221-226; Van der Walt and Midgley 152-153.

²¹⁸ Van der Walt and Midgley 152-153.

²¹⁹ See *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) para 20 for an exposition of the different aims of delictual and constitutional remedies.

²²⁰ Section 21(2)(e).

people of different racial groups) the amount that a respondent pays has a wider effect than ameliorating the hurt feelings of the complainant. In determining such an amount, the considerations listed in 5.4.4.1 above are of importance.

5.4.5 Prohibitory and Mandatory Orders and Structural Interdicts

The Equality Act specifies that the court may grant an order restraining a respondent from discriminating unfairly or that it may make an order directing the respondent to take specific steps to stop the unfair discrimination, hate speech or harassment.²²¹ Other orders of a mandatory nature that are specified in s 21(2) are: orders to make specific opportunities and privileges which were unfairly denied available to the complainant;²²² orders for the implementation of special measures to address the unfair discrimination, hate speech or harassment that had taken place²²³ and orders directing the reasonable accommodation of a group or class of persons by the respondent.²²⁴

The orders of a prohibitory or mandatory nature must provide effective and meaningful relief to the complainant addressing the specific infringement caused by the actions of the respondent in the light of the transformative ideals of the Act. The decision to award such an order will be based on the facts of the particular case.²²⁵

Currie and De Waal list the elements of a structural interdict in relation to the governmental breach of a constitutional obligation.²²⁶ These elements would be similar in relation to structural interdicts under the Equality Act, bearing in mind that the respondent in breach of her/his duties under the Act may be a natural or juristic person acting without state authority. Disputes relating to the promotion of equality, the part of the Equality Act which is not yet in operation, may be particularly suited to this kind of remedy as would instances of systemic breach of the provisions of the Act.

²²¹ Section 21(2)(f).

²²² Section 21(2)(g).

²²³ Section 21(2)(h).

²²⁴ Section 21(2)(i).

²²⁵ See *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 76.

²²⁶ Currie and De Waal (2005) 218.

The elements are:²²⁷ (1) a declaration that a respondent is in breach of one or more of the provisions of the Equality Act, (2) an order to comply with the provisions of the Act; (3) an order directing the respondent to produce a report to set out what steps s/he has taken and will take in future to fulfil her/his obligations in terms of the Act; (4) an opportunity to the complainant to respond to the report and (5) hearing of the matter and in the event of the report being satisfactory it is made an order of the court.

Furthermore, s 21(4) of the Equality Act allows an equality court to refer a matter during or after an inquiry to a constitutional institution for further investigation in relation to matters of systemic unfair discrimination, hate speech or harassment. Such a referral also addresses systemic violations of the provisions of the Act in a manner that does not seek to punish but to address the root of the systemic violation.²²⁸

5.4.6 Unconditional Apologies

The Act specifically provides for an unconditional apology as a remedy.²²⁹ An apology as a remedy for the infringement of the *dignitas* of a plaintiff is not unknown in our common law. In recent years, the *amende honorable*, a remedy from Roman or ecclesiastical law which involves a declaration by the wrongdoer acknowledging that s/he had indeed published the defamatory words or uttered the words which impaired the dignity of the plaintiff and an apology from the wrongdoer for wrongfully infringing the *dignitas* of the plaintiff, has been revived through academic interest and in litigation.²³⁰

²²⁷ In what follows I have adapted the elements identified by Currie and De Waal (2005) 218 for application in relation to the Equality Act.

²²⁸ See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 50.

²²⁹ Section 21(2)(j).

²³⁰ JR Midgley 'Retraction, Apology and Right to Reply' (1995) 58 *THRHR* 288 at 289; J Neethling 'Herlewing van die *Amende Honorable* as Remedie by Laster – *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W)' (2003) 66 *THRHR* 329 and J Neethling 'Laster: die *Amende Honorable*, Apologie en die *Quantum Solatium* – *Young v Shaikh* 2004 (5) SA 46 (K)' (2004) 67 *THRHR* 698. See also *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W); *Young v Shaikh* 2004 (5) SA 46 (C); *Naylor v Jansen*; *Jansen v Naylor* 2006 (3) SA 546 (SCA); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 359 (O).

In the context of the law of defamation, Mokgoro J and Sachs J, in their respective minority judgments in the case of *Dikoko v Mokhatla*,²³¹ placed great emphasis on restorative justice, *ubuntu-botho* and respect for dignity as the basis for an unconditional apology as an alternative remedy to an award of damages in defamation cases. The restoration of relationships through sincere apology made in the spirit of *ubuntu* should, according to these judges, be afforded more prominence because of the emphasis placed in our Constitution on the inherent dignity of people. Both Constitutional Court judges furthermore specifically refer to the provision for an unconditional apology as a remedy under the Equality Act.²³²

The remedy of an unconditional apology provided for in the Equality Act does not share the history of the *amende honorable*, the two aspects of this legislative remedy will be the same as that of the *amende honorable*. An unconditional apology under the Act will entail (1) a declaration from the respondent acknowledging that s/he had offended the dignity of the complainant by discriminating against her/him unfairly, publishing or disseminating information that could reasonably be regarded discriminating unfairly, harassing her/him, subjecting her/him to hate speech (2) a sincere apology from the respondent for the unfair discrimination, publication, hate speech or harassment that caused the impairment of the dignity of complainant. This remedy may stand on its own or may be utilised in conjunction with any of the other remedies provided for in the Act.

In view of the fact that the *amende honorable* is known in cases where the *dignitas* of a person has been infringed through the utterance or publication of words by another, it is more likely that the remedy under the Act will be requested and awarded in cases of hate speech, than in instances of unfair discrimination or harassment.

An unconditional apology is a forward-looking remedy in the sense that it is aimed at the restoration of relations between the complainant and respondent.

²³¹ Per Mokgoro J paras 62-70 and per Sachs J paras 105, 107, 108-121.

²³² Mokgoro J para 68 fn 68 and Sachs J para 118. Sachs J mentions an unconditional apology as a remedy only in relation to hate speech. There is no indication in the Equality Act that such an apology may not be ordered in respect of unfair discrimination or harassment. The circumstances of the particular case will obviously indicate whether such a remedy is appropriate in a case of hate speech, unfair discrimination or harassment.

5.4.7 Policy/practice Audit Orders

Like structural interdicts and referral orders,²³³ policy audit orders provide an effective means to address systemic violations of the provisions of the Act. In an instance where the evidence points to the existence of general unfair racial discrimination prevailing in a particular housing complex, for example, such a policy audit would allow a full discovery of the extent to which the policies of the particular complex further or allow racial discrimination. This remedy can be linked to the powers of the Commission of Gender Equality (CGE),²³⁴ the South African Human Rights Commission (SAHRC)²³⁵ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities²³⁶ to investigate issues of relevance to their particular mandates. In the instance of the CGE it is stated that this body has the task to 'monitor and evaluate policies and practices' of organs of state, statutory and public bodies and private businesses, enterprises and institutions,²³⁷ and in the instance of the SAHRC, it is mandated to 'monitor and assess the observance of human rights' and 'to investigate and to report on the observance of human rights'.²³⁸ The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities has the power to 'monitor, investigate and research any issue concerning the rights of cultural, religious and linguistic communities'.²³⁹ In the event where an equality court orders an audit of a policy or practice of a respondent, it is likely that such audit will be undertaken by the CGE, SAHRC, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities or a similar institution. It is suggested that the audit of a policy or practice by any of these bodies will be performed in terms of their own powers on the understanding that a report needs to be made to the court that ordered the audit.

²³³ See 5.4.12.

²³⁴ Commission on Gender Equality Act 39 of 1996, s 11(1).

²³⁵ Human Rights Commission Act 54 of 1994, s 7 and the Constitution of the Republic of South Africa, 1996, s 184(1) and (2).

²³⁶ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 19 of 2002, s 5.

²³⁷ Commission on Gender Equality Act 39 of 1996, s 11(1).

²³⁸ Constitution of the Republic of South Africa, 1996, s 184(1) and (2).

²³⁹ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities 19 of 2002, s 5(1)(e).

5.4.8 Deterrent Orders

The Act provides for a remedy of a deterrent nature which may include a recommendation to an authority to suspend or revoke the licence of a respondent who discriminated unfairly against the complainant or subjected the complainant to harassment or hate speech as is prohibited in terms of the Act.²⁴⁰ It has to be noted that the court may not revoke or suspend the licence on its own accord in terms of this provision, but that it may make a recommendation to the authority in question. The authority has to comply with its own regulatory framework when making the decision to suspend or revoke the licence of a respondent who has been found to be in breach of the provisions of the Equality Act.

5.4.9 Submission of Matters to the Director of Public Prosecutions

In instances where the conduct of the respondent could possibly result in criminal conviction, the presiding officer may direct the clerk of the court to refer the matter to the Director of Public Prosecutions having jurisdiction in the particular area.²⁴¹ The referral of the matter takes place in terms of the court order made by the presiding officer. The Director of Public Prosecutions has to decide whether the respondent is to be prosecuted for committing a common law offence, such as *crimen iniuria*, or any relevant statutory offence.²⁴² The statutory rights protected in the Act and the criminal provisions exist alongside each other and pursuit of either avenue does not exclude the other.

²⁴⁰ Section 21(2)(l).

²⁴¹ Section 21(2)(n).

²⁴² In 2004 the Department of Justice and Constitutional Development published a bill entitled 'The Prohibition of Hate Speech Bill, 2004'. The proposal was to criminalise public advocating of hatred on a variety of grounds, including race. The draft bill envisioned a fine or imprisonment of up to three months or both as a suitable penalty for a first conviction, while a second or further conviction could lead to imprisonment of up to six years and or a fine. See 5.5.2 below.

5.4.10 Costs Orders

Cost orders in constitutional litigation are rarities. In *Ferreira v Levin*,²⁴³ Ackermann J held that the general discretion that a court has a common law to award costs to the successful party may be less appropriate in constitutional litigation because of the ‘chilling effect’ such cost orders would have on litigants. The learned judge continued to note that constitutional litigation that is carried out in the interest of the broader public should generally not attract adverse costs orders. Litigation in terms of the Equality Act should be viewed in a similar light.

The Act allows for appropriate costs orders to be made against any party.²⁴⁴ The Regulations in terms of the Act elaborate: as a general rule each party is to pay her/his own costs, unless the presiding officer directs otherwise.²⁴⁵ It further allows for the making of costs order against a complainant who is absent from a directions hearing without adequate reason,²⁴⁶ and against a respondent who is absent from such a hearing without adequate reason.²⁴⁷

It is submitted that the discretion of a presiding officer to award costs in a matter before the equality court must be exercised sparingly. Costs orders against unsuccessful complainants may discourage other potential complainants from approaching the equality court and thus diminish the potential impact of the Act.

5.4.11 Compliance Orders

The Act empowers a presiding officer of an equality court to order any party to a suit to comply with a provision of the Act. It stands to reason that a respondent who has been found to be discriminating unfairly, harassing the complainant or subjecting her/him to unfair discrimination is in breach of one or more of the provisions of the Act.

²⁴³ *Ferreira v Levin* NO 1996 (1) SA 984 (CC) para 155.

²⁴⁴ Section 21(2)(o).

²⁴⁵ Regulation 12(2). The specific wording of the provision does not allow a presiding officer to make an adverse costs order against an *amicus*, but does not preclude the presiding officer from awarding costs to the *amicus*.

²⁴⁶ Regulation 12(3)(a)(ii).

²⁴⁷ Regulation 12(4)(b)(ii).

An order from the court to direct such a respondent to desist from her/his non-compliance could be appropriate in some instances, especially if such an order had to be combined with any of the other orders provided for in the Act. While addressing unfair discrimination, hate speech or harassment that took place in the past, compliance orders are aimed at directing the future behaviour of a respondent.

5.4.12 Referral Orders, Investigation and Alternative Dispute Resolution

The Act recognises that undermining the dignity of complainants (in different ways through unfair discrimination, the publication of information that discriminates unfairly, hate speech or harassment) is sometimes of a persistent nature or that it could be systemic. In such instances, the Act creates the scope for the involvement of the Chapter 9 institutions to conduct further investigation. A presiding officer is allowed to refer a matter – during or after the inquiry – to any of the constitutional institutions if s/he is of the opinion that the failure to comply with the provisions of the Act is persistent or of a systemic nature.²⁴⁸ This provision involves chapter 9 institutions in a proactive and meaningful way and is further enhanced by the stipulation that a presiding officer may refer any matter in the equality court to a constitutional institution or an appropriate body for alternative dispute resolution. Such an order creates space for constructive dialogue between the parties to address not only the symptoms of unfair discrimination, hate speech and harassment, but the underlying causes.²⁴⁹

²⁴⁸ Section 21(4).

²⁴⁹ See in general Bohler-Müller and 5.4.7 above.

5.5 RELEVANT COMMON AND STATUTORY LAW PROVISIONS

5.5.1 Law of Delict

Nothing in the Equality Act precludes institution of proceedings in terms of the common law of delict.²⁵⁰ A person who has been discriminated against unfairly, or who has been the victim of hate speech, harassment or the dissemination or publication of information that discriminates unfairly, does not have to rely on the provisions of the Act for relief. Insofar as s/he is able to frame her/his case successfully within the requirements in terms of the law of delict, s/he is entitled to relief in terms of the common law. In what follows I consider the overlap between the law of delict and the provisions of the Act and point out where the requirements in terms of the Act and in terms of the law of delict diverge.²⁵¹

In the law of delict, the nature of the harm dictates the action that a plaintiff will employ. Where a person suffers financial loss because of the wrong of another, s/he will proceed to institute the *actio legis Aquiliae* against the wrongdoer with a claim for special damages which must be proven.²⁵² The wrong common to unfair discrimination, harassment, hate speech and the publication or dissemination of information that discriminates unfairly constitutes an *iniuria* in terms of the common law; that is an infringement of the personality rights of the plaintiff. This is actionable in terms of the *actio iniuriarum*. In what follows I consider the nature of the *iniuriae* protected under common law and relate these to the comparable provisions set out in the Equality Act.

Personality rights protect the *corpus* (body),²⁵³ *fama* (good name)²⁵⁴ and *dignitas* (dignity).²⁵⁵ An unlawful and intentional²⁵⁶ infringement of any of these personality

²⁵⁰ *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) para 23.

²⁵¹ Kok (2008) 138 points out that it the reactive provisions of the Act can be viewed as quasi-constitutional delicts created by legislation. My view regarding the complementarity of the reactive provisions of the Act and the law of delict confirms this view.

²⁵² See the discussion at 5.4.4 above.

²⁵³ Neethling, Potgieter and Visser (2005) 25-26. The authors include the right to physical freedom. See also Van der Walt and Midgley 48.

²⁵⁴ Neethling, Potgieter and Visser (2005) 27; Van der Walt and Midgley 48.

²⁵⁵ Neethling, Potgieter and Visser (2005) 27-28; Van der Walt and Midgley 48. *Dignitas* includes the protection of one's feelings (28-29), privacy (29-36) and identity (36-38). See *Khumalo v Holomisa*

interests will give rise to liability in terms of the *actio iniuriarum*. The common law protection afforded to these personality interests is further strengthened by the entrenchment of fundamental rights aimed at the protection of similar interests in the public and private spheres: the rights to life, privacy, dignity and freedom and security of the person.²⁵⁷ The constitutional entrenchment of these rights and the influence of constitutional values on the interpretation of the common law ensure that the protection afforded by the common law accords with the constitutional standards regarding the protection of rights.²⁵⁸

In his minority judgment in *Minister of Posts and Telegraphs v Rasool*²⁵⁹ Gardiner AJA quoted extensively from De Villiers on *Injuries* to explain the meaning of *dignitas* as it is protected by the common law:

[B]y *dignitas* is meant “that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, dis-esteem or contempt. The rights here referred to are absolute or primordial rights; they are not created by, nor dependant for their being upon any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to tranquil enjoyment of his piece of mind, secure against ... degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such a right”.’

An infringement of a person’s *dignitas* at common law entails an intentional insult of a person or an intentional subjection of the person to degrading behaviour thereby hurting the subjective feelings of dignity or self-respect of the individual.²⁶⁰ In instances of unfair racial discrimination, the personality interest harmed by the conduct of the wrongdoer is the *dignitas* of the plaintiff who suffers humiliation and insult as a

2002 (5) SA 401 (CC) para 27, *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) para 11 and *NM v Smith* 2007 (5) SA 250 (CC) para 27, 147.

²⁵⁶ Traditionally intention is the requisite form for liability under the *actio iniuriarum*. However, recent judgments of the SCA (*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) and *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA)) and the CC (*NM v Smith* 2007 (5) SA 250 (CC)) have postulated that liability based on negligence may be appropriate for liability under the *actio iniuriarum* in future, depending on the facts of the particular case.

²⁵⁷ Neethling, Potgieter and Visser (2005) 74-75. See also Burchell 329.

²⁵⁸ Section 39(2) of the Constitution. *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) paras 37, 39.

²⁵⁹ 1934 AD 167 at 190.

²⁶⁰ *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at para 10-14. Neethling, Potgieter and Visser (2005) 192.

result of the unfair discrimination.²⁶¹ The *dignitas* of the plaintiff is also harmed by racial harassment,²⁶² racial hate speech which is derogatory and deeply offensive.²⁶³ While harassment could also involve the infringement of the *corpus* of the complainant or her/his privacy, an aspect of her/his *dignitas*, and hate speech and the publication or dissemination of information that discriminates unfairly could potentially involve the infringement of the *fama* of a person, the common denominator which binds the wrongs together is that they constitute an infringement primarily of the *dignitas* of the plaintiff in each instance.

I have pointed out at 5.3.1.4 that unfair racial discrimination, racial hate speech, harassment on the basis of race and the publication or dissemination of information that discriminates unfairly on the basis of race as provided for in the Act, undermine the fundamental dignity of the complainant insofar as dignity (in the constitutional sense) is concerned. Burchell maintains correctly that there is complementarity between the common law concept of *dignitas* and the constitutional right and value of dignity, which is wider in its scope and application than the *dignitas* protected under common law.²⁶⁴ This complementarity does not mean that the two conceptions are identical. In terms of the common law, a plaintiff has to satisfy the specific requirements as provided for in the common law in order to be successful in her/his claim.²⁶⁵ *Iniuriae* take different forms depending on the nature of the personality interest involved and over the years specific requirements for actions based on specific forms of *iniuriae* have developed.²⁶⁶ In view of the commonality of the

²⁶¹ Neethling, Potgieter and Visser (2005) 77 refer to the case of *Jacobs v Waks* 1992 (1) SA 521 (A) where Botha AJ held that racially discriminatory rules could infringe upon the *dignitas* of a person (at 541-542). See also *Purshotam Dagee v Durban Corporation* (1908) 29 NLR 391 where Bale CJ held that the measure for damages arising out of breach for contract in the particular matter required a consideration of the *contumelia* suffered by the plaintiff, an Indian man who was removed from a tram after he refused to move from the front of the tram which was reserved for white passengers.

²⁶² In *Grobler v Naspers Bpk* 2004 (4) SA 22 (C) and *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA) the plaintiff was successful in holding her employer vicariously liable for the sexual harassment she endured at the hands of a trainee manager in the service of the employer.

²⁶³ See 5.3.1.4.2 above.

²⁶⁴ Burchell 329.

²⁶⁵ *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) para 14.

²⁶⁶ Where a claim is based on the invasion of privacy as the form of *iniuria* involved, the plaintiff has to prove the following: (1) impairment of his/her privacy, (2) wrongfulness and (3) intention on the part of the defendant: *NM v Smith* 2007 (5) SA 250 (CC) para 55. The requirements for an action based on defamation are: (1) the wrongful, (2) intentional, (3) publication, (4) of a defamatory statement (5) concerning the plaintiff. Once it has been established that a defamatory statement concerning the plaintiff was published by the defendant, presumptions concerning wrongfulness and intention arise which the defendant may rebut: *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18.

infringement of *dignitas* as the *iniuria* in matters of discrimination, hate speech, harassment or the publication/dissemination of information that discriminates unfairly, I focus my attention on the requirements to be met by a plaintiff in such matters.

In order to be successful with a claim based on an injury to the *dignitas* of the plaintiff, s/he has to prove that a (1) wrongful act of the defendant (2) caused her/him to suffer an impairment of her/his dignity through a violation of her/his subjective feelings.²⁶⁷ The plaintiff needs to prove that her/his subjective feelings have been violated by the conduct of the defendant in order to be successful with her/his claim.²⁶⁸ In such matters a wrongful act will be an offensive or insulting verbal or written communication addressed to the plaintiff (by the defendant) of which the wrongfulness will be assessed objectively with reference to the reasonableness criterion.²⁶⁹ This means that the conduct of the defendant will be tested against the prevailing norms of society in order to determine whether it is wrongful.²⁷⁰ Once established to be wrongful, the conduct will be presumed to have been accompanied by the *animus iniuriandi* on the part of the defendant.²⁷¹ In other words, it is then presumed that the defendant was conscious of the wrongfulness of her/his conduct and directed her/his will to the commission of the wrongful act.²⁷² This presumption may be rebutted by the defendant.²⁷³ The defendant may raise defences which include privilege, truth and

²⁶⁷ *Delange v Costa* 1989 (2) SA 857 (A) per Smalberger JA at 860I-861D. Innes CJ in *R v Umfaan* 1908 TS 62 at 66-77 set the requirements for *iniuria* out as follows: 'If we look at the essentials of *iniuria* we find – as pointed out by De Villiers in his *Law of Injuries*, which is a mine of information on this subject – that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy. Chief Justice De Villiers says (p.27): "With these ingredients to hand, it will be found that there are three essential requisites to establish an action for injury. They are as follows –

(1) an intention on the part of the offender to produce the effect of his act; (2) an overt act which the person doing is not legally competent to do; and which at the same time is (3) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.'" Nugent JA in *Grütter v Lombard* 2007 (4) SA 89 (SCA) para 10 quotes this passage with approval. See also *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) where the constitutional compatibility of the test in *Delange* is confirmed (para 29). This decision was confirmed on appeal by the Supreme Court of Appeal: *Dendy v University of the Witwatersrand* 2007 (5) SA 382 (SCA).

²⁶⁸ *Delange v Costa* 1989 (2) SA 857 (A) 861D-E.

²⁶⁹ *Delange v Costa* 1989 (2) SA 857 (A) 861C, 862E.

²⁷⁰ *Delange v Costa* 1989 (2) SA 857 (A) 862E-F and see *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) paras 27-29.

²⁷¹ *Delange v Costa* 1989 (2) SA 857 (A) 861D.

²⁷² Neethling, Potgieter and Visser (2005) 197.

²⁷³ *Delange v Costa* 1989 (2) SA 857 (A) 861D. Smalberger JA used the term 'recognised grounds of justification' (at 861D) with reference to the rebuttal of the presumption of the *animus*. Grounds of justification pertain to defences against wrongfulness. It is submitted that the learned judge's use of the

public interest, and fair comment, private defence, necessity, statutory or official capacity or consent to exclude the wrongfulness of her/his conduct²⁷⁴ or, in the rebuttal of the presumption regarding the *animus*, put forth a defence excluding fault (intention), for instance mistake or jest.²⁷⁵

How do the common law requirements differ from those which are set out in the Act? A comparison between the provisions of the Act and the common law requirements show that the major difference pertains to the fault requirements. Insofar as unfair discrimination is concerned, the Act outlaws acts with discriminatory purpose or effect. The intention to discriminate is not required by the Act, which makes the task of a complainant in terms of the Act easier when compared to that of a plaintiff in terms of the common law.

In matters of hate speech, the Act does not clearly require intention on the part of the respondent, but requires the complainant to convince the court that the words could 'reasonably be construed to demonstrate a clear intention to be hurtful, harmful' etc. As with the common law, it seems that the words objectively viewed must be insulting (or even more than insulting – conveying hatred) and unlike the common law, the Act does not explicitly require that the particular complainant suffers a subjective impairment of his/her dignity through the violation of her/his feelings.

The provisions of the Act regarding the fault element in harassment are unclear, as commented upon in 5.3.1.4.3. I concluded that the wording of the definition 'calculated to induce' seems to be indicative of intention on the part of the harasser. Under the Equality Act the complainant must thus prove intention on the part of the respondent on a balance of probabilities.

The Equality Act does not aim to replace the common law. When considering the provisions in terms of the Act, it is necessary to bear the presumption that statute law does not alter the existing law more than necessary in mind.²⁷⁶ This requires that the

words 'grounds of justification' is to be construed generously so as to include defences which will exclude wrongfulness and defences which will exclude fault (intention).

²⁷⁴ Neethling, Potgieter and Visser (2005)196; Van der Walt and Midgley 125ff.

²⁷⁵ Neethling, Potgieter and Visser (2005) 164-166; Van der Walt and Midgley 162-164.

²⁷⁶ Du Plessis 177.

Act 'must be read to be capable of co-existing with the common law in *pari materia*'.²⁷⁷ Where the Act does not alter the common law explicitly, the comparable common law provisions can be relied upon in relation to the Act. Common ground and common interests inform both the Act and the common law regarding *iniuriae*.²⁷⁸ The Act marks a deliberate legislative choice to give priority to certain wrongs with own definitions and own rules which are complemented by the common law.

5.5.2 Criminal law

The Act does not exclude or limit the application of criminal law. If a particular incident could give rise to a complaint in terms of the Act and it could justify a criminal conviction, the two could exist side by side.²⁷⁹ There are common law crimes and statutory criminal provisions that could be applicable in relation to racist behaviour.

5.5.2.1 Common Law Crimes

Civil wrongs pertaining to the *corpus*, *fama* or *dignitas* of a person could also give rise to criminal liability provided that the elements of the different crimes can be proven beyond a reasonable doubt.²⁸⁰ Where the *corpus* of another is impaired in an unlawful and intentional manner, the perpetrator is guilty of assault.²⁸¹ If the *fama* of another is impaired through the intentional publication of material which impairs the reputation of another, the crime involved is criminal defamation.²⁸² Unlawful and intentional

²⁷⁷ Du Plessis 178.

²⁷⁸ In *Tarloff v Olivier* 2004 (5) BCLR 521 (C) Blignault and Yekiso JJ took cognisance of the existence and provisions of the Equality Act which was not in operation at the time of their judgment in recognising the seriousness of the *iniuria* flowing from hate speech based on religion.

²⁷⁹ Section 10(2) of the Equality Act clearly envisions that the civil remedy provided for in the Act in respect of hate speech and possible criminal proceedings in terms of the common law of legislation stemming from the same incident, exist side-by-side. In fact, the provision permits the presiding officer to direct the clerk of the equality court to submit the matter to the Director of Public Prosecutions for possible criminal prosecution.

²⁸⁰ Snyman 453.

²⁸¹ Snyman 453.

²⁸² Snyman 453, 459; Burchell and Milton 741.

impairment of the *dignitas* and privacy of another constitutes the crime of *crimen iniuria*.²⁸³

The unjustifiable denial of benefits or the imposition of burdens on one person relative to another on the basis of race (unfair discrimination as set out in the Act) does not give rise to criminal liability as the law currently stands, unless of course, the facts of the particular case show, for instance, that the complainant has been assaulted. The impairment of a person's dignity through the use of derogatory or insulting language, tied to a person's race, could give rise to criminal liability in the form of *crimen iniuria* or criminal defamation. The facts of a particular case of harassment may also disclose the crime of assault. It has been pointed out above in relation to claims in terms of the common law of delict that the use of racial slurs could also amount to defamation provided that publication thereof to third parties took place and the good name of the plaintiff was negatively affected in the eyes of the community. Criminal law similarly provides criminal defamation.²⁸⁴ For current purposes and because of the greater likelihood of the facts serving before an equality court disclosing the crime of *crimen iniuria* it is considered in more detail.

5.5.2.1.1 *Crimen iniuria*

It is important to note that 'a *crimen iniuria* necessarily also constitutes an *iniuria* for purposes of the *actio iniuriarum*, but conduct which does not constitute *crimen iniuria* does not necessarily exclude private law *iniuria*'.²⁸⁵ Criminal and civil law clearly overlap where it comes to liability for the impairment of another's dignity. For the current purpose, it is necessary to consider the responses of criminal law to what is called hate speech in terms of the Equality Act.

²⁸³ Snyman 453; Burchell and Milton 746.

²⁸⁴ Snyman 459; Burchell and Milton 741.

²⁸⁵ Neethling, Potgieter and Visser (2005) 193. See also Snyman 458; Burchell and Milton 747.

Crimen iniuria is defined as the unlawful, intentional impairment of the dignity of another and its application is restricted to serious violations of dignity.²⁸⁶ Burchell and Milton²⁸⁷ explain the relevance of criminal law in this regard:

‘[S]ome insults to the dignity of a person are so gross as to evoke public outrage and to call for public denunciation through the criminal law.’

In order to secure a conviction on a charge of *crimen iniuria* then, it has to be established that the conduct of the accused constitutes, objectively viewed, a serious breach of the convictions of society pertaining to the dignity of its members. Do racial epithets used to address a complainant qualify as serious impairment of her/his dignity?

In *S v Mostert*²⁸⁸ the court considered the constitutional position of dignity as a right and a value²⁸⁹ and the history of South Africa in terms of relations between black and white South Africans²⁹⁰ as central considerations in the assessment of the impairment of the dignity of the complainant. In *Mostert’s* case the court upheld the conviction of the appellant on a charge of *crimen iniuria* where the appellant, a white man, called his black male colleague ‘a piccanin’. This racial epithet, according to the judge, infringes upon the dignity of the complainant²⁹¹ in a less serious manner than the word ‘kaffir’ would,²⁹² but it nonetheless offends the dignity of the complainant by calling him, an adult, a child.²⁹³ This, according to Theron J,²⁹⁴

‘is the equivalent of calling him a boy, and in this instance, a black boy. It was not uncommon during the apartheid era for white people to refer to their black

²⁸⁶ Snyman 458; Burchell and Milton 747. See also the remarks of Theron J in *S v Mostert* 2006 (1) SACR 560 (T). The judge stated: ‘*Crimen iniuria* consists in the unlawful and intentional violation of the dignity or privacy of another, in circumstances where such violation is not of a trifling nature.’ (571b, emphasis added). The learned judge also referred to the reservations regarding the seriousness requirement expressed by Thirion J in *S v Bugwandeem* 1987 (1) SA 787 (N) which was approved of by Van der Reyden J in *S v Steenberg* 1999 (1) SA SACR 594 (N). Theron J left the debate at that and proceeded to analyse the seriousness of the racially derogatory term ‘piccanin’ in the light of the South African Constitution and its emphasis on the right to dignity.

²⁸⁷ Burchell and Milton 747.

²⁸⁸ *S v Mostert* 2006 (1) SACR 560 (T).

²⁸⁹ 571b-c.

²⁹⁰ 573a-e.

²⁹¹ 573b-c.

²⁹² 572i.

²⁹³ 573a-b.

²⁹⁴ 573a-b.

adult employees as girls or boys. Referring to black adults as boys or girls emphasised the superiority and domination of white people over black people’.

Racial epithets such as these thus entrench racist ideas based on unequal power relations.²⁹⁵

The gravity with which the use of racially derogatory terms, in particular the word ‘kaffir’, is considered by our criminal courts is illustrated well by the case of *Steenberg*.²⁹⁶ The uncontroverted evidence of the (white) appellant was that he and two other white men were standing at a bar in a canteen discussing the terms ‘kaffir’ and ‘mlungu’ in the South African context and the sensitivities surrounding especially the first term. While standing there, the complainant, a black man, entered the canteen whereupon the appellant greeted the complainant by saying ‘Good afternoon, kaffir’, in Zulu and added to that, in Zulu, that he (the appellant) is a ‘shaven white pig’. The complainant left without hearing the last part of the appellant’s greeting. Van der Reyden J confirmed the conviction of the appellant on a charge of *crimen iniuria*, holding that a determination of whether an *iniuria* warrants a conviction on a charge of *crimen iniuria* entails a value judgment.²⁹⁷ The prevailing norms in our society require, according to the judge, that a person who utters the word ‘kaffir’ with the necessary intention, be convicted of *crimen iniuria*.²⁹⁸ Intention in the form of *dolus eventualis* is sufficient to warrant such a conviction.²⁹⁹ This form of intention requires subjective foresight by the accused of the consequences (hurt and humiliation in this instance) of his actions and acceptance thereof by carrying out his actions despite this foresight.³⁰⁰ The derogatory and offensive nature of the term is widely known. As long ago as 1982, Didcott J in the case of *Mbatha v Van Staden*³⁰¹ stated:

‘Everything depends, of course, on the context in which the word is uttered. Settings which make it innocuous can no doubt be imagined. Ordinarily, however, that is not the case when, in South Africa, nowadays, a Black man or woman is called a “kaffer” by someone of another race. Then, as a rule, the term is a derogatory and contemptuous one. Its usage in this part of the world has seen to that, whatever its original connotations may have been. With much

²⁹⁵ See 4.2.4.7 regarding the wrongs of this inequality.

²⁹⁶ *S v Steenberg* 1999 (1) SACR 594 (N).

²⁹⁷ 596F.

²⁹⁸ 597C.

²⁹⁹ 597E-F.

³⁰⁰ 597E-F.

³⁰¹ 1982 (2) SA 260 (N) 263H-I (emphasis added).

the same ring as the word “nigger” in the United States, it disparages the Black race and the person concerned as a member of that race. It is deeply offensive to Blacks. Just about everyone knows that by now. The intention to offend can therefore be taken for granted, on most occasions at any rate.'

One could thus conclude that the offensiveness and derogatory nature of racial epithets are widely known and that the use of racial epithets is against the convictions of society. An accused who addresses a black person in this way would have a difficult time in raising a defence that excludes intention, while it is possible that a ground of justification exclude wrongfulness, for instance, consent may successfully be raised.

5.5.2.1.2 Statutory Crimes

The now repealed Black Administration Act of 1927 contained a provision that prohibited any person from uttering words or doing something 'with the intent to promote any feeling of hostility between Natives and Europeans' and provided for a criminal offence in this regard.³⁰² This provision and similar subsequent statutory offences created by the white minority Parliament was aimed at the repression of any opposition to the policy of segregation and apartheid to which successive governments subscribed.³⁰³ None of these provisions have survived the transition to democracy.

The Riotous Assemblies Act, dating back to 1956, survived the transition to democracy insofar as it created a statutory offence relating to the incitement to public violence.³⁰⁴ This provision could well apply to instances in which the Equality Act would be applicable. Where a person engages in racial hate speech which incites members of the public to inflict harm on members of a particular racial group, a

³⁰² Section 29(1) of the Black Administration Act 38 of 1927. Upon conviction a person could be sentenced to imprisonment for up to a year or to a fine of £100 or both.

³⁰³ See for instance s 1 Riotous Assemblies Amendment Act 19 of 1930 and s 62 of the Internal Security Act 74 of 1982.

³⁰⁴ Riotous Assemblies Act 17 of 1956, s 17: 'A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.'

complaint in terms of the Equality Act and a criminal charge in terms of the provisions of the Riotous Assemblies Act could exist side by side.

The provisions of the Regulation of Gatherings Act³⁰⁵ could similarly be applicable in situations where the Equality Act applies. Section 8(5) of the Regulation of Gatherings Act provides more specifically for the prohibition of the display of banners and placards, speeches and singing, or engagement in any other action which incites hatred of persons or groups of persons based on differences in culture, race, sex, language or religion.³⁰⁶ Both the Riotous Assemblies Act and the Regulation of Gatherings Act will only be relevant in instances where the incitement to violence or hatred took place in a public place, and in the instance of the Regulation of Gatherings Act the offence is tied to events taking place during a gathering.

The Films and Publications Act³⁰⁷ creates offences relating to publications, films and entertainments or plays which amount to propaganda for war, incitement to imminent violence or the advocacy of hatred based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.³⁰⁸ This section provides that the context of the particular publication, play or film be taken into consideration when determining whether the creator thereof has committed an offence. *Bona fide* scientific, documentary, dramatic, artistic, literary publications, plays or films are exempted from this criminal ban, as are publications, films or plays which amount to *bona fide* discussion, argument or opinion about matters concerning religion or belief or matters of public interest are similarly exempted. In circumstances where a person pursues hate speech through public means like a film, play or publication, it is possible that a complaint may be lodged in terms of the Equality Act and prosecution in terms of the Films and Publications Act may be undertaken.

It will be recalled that the Convention on the Elimination of All Forms of Racial Discrimination in art 4 requires member states to criminalise hate speech and

³⁰⁵ Act 205 of 1993.

³⁰⁶ The offence is created by s 12(c) of the Act. Section 12 provides that a person convicted of such an offence is liable to a fine of a maximum of R20 000 or one year imprisonment or both.

³⁰⁷ Act 65 of 1996.

³⁰⁸ Section 29. A person convicted of this offence may be sentenced to five years' imprisonment, a fine or both.

organisations pursuing racist agendas.³⁰⁹ In 2004 the Department of Justice and Constitutional Development attempted to fulfil that obligation and to give further effect to the hate speech provisions contained in the Equality Act with its publication of the Draft Prohibition of Hate Speech Bill, 2004 which provided for the criminalisation of public hate speech. To date no bill to this effect has been tabled in Parliament.

The possibility of criminalising acts of unfair discrimination has formed the subject of an undated draft research report published by the Department of Justice and Constitutional Development.³¹⁰ This report recommends selective criminalisation of acts of unfair discrimination, limiting the criminalisation to 'those, which the police are in a position to enforce, and those whose enforcement would not be unreasonable'³¹¹ with specific emphasis on 'discrimination based on hatred and racialism such as hate speech ... while other acts of unfair discrimination be left to be dealt with by the remedies outlined in the Equality Act'.³¹² No steps in this direction have been taken to date. The lack of specific legislation to combat and punish hate crimes and speech was lamented by the Committee on the Elimination of Racial Discrimination in its October 2006 concluding observations in relation to South Africa's report.³¹³

5.6 CONCLUDING REMARKS

In this chapter I have explored the framework established in the Equality Act against the background of transformative constitutionalism. The Equality Act prohibits various forms of behaviour which offend the right to equality and thus undermine the fundamental dignity of people. Do these provisions represent a general, flexible and principled approach to equality and non-discrimination that will be effective in dealing

³⁰⁹ See 3.2.5.

³¹⁰ See DOJ & C Equality Research – draft document available at http://www.doj.gov.za/2004dojsite/eqact/other%20docs/research/eqc_criminalisation_dec%20draft_15_01_%20pm%20eqc%20reseach.pdf accessed on 19 September 2007. See also presentation by the SAHRC 'Research on PEPUDA Equality Legislation Project 20 May 2003' accessed at [http://www/doj.gov.za/EQCact/erd/eqc_erc_erc%20workshop_slide%20presentation%2020%2005\)2004.pdf](http://www/doj.gov.za/EQCact/erd/eqc_erc_erc%20workshop_slide%20presentation%2020%2005)2004.pdf) date of access 2 May 2008.

³¹¹ 'Equality Research – draft document' 36.

³¹² 'Equality Research – draft document' 37.

³¹³ CERD Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination CERD/C/ZAF/CO/3 (19 October 2006) para 14.

with racism in its different forms? From the analysis in this chapter it is clear that the Act contains a general and principled approach, but that the formulation of some of the provisions leaves much to be desired.

The formulations contained in the Act to prohibit offending behaviour are not models of clarity. Presiding officers of equality courts (at the level of magistrates' courts) are to deal with the Act as if it were constitutional. A generous and purposive approach to interpretation provides scope for an interpretation of these provisions in accordance with the Constitution and its transformative vision. The prohibition of unfair discrimination, publication or dissemination of information that discriminates unfairly, hate speech and harassment together with the remedies provided for in the Act create the potential to contribute to social change in an egalitarian direction. This will require a proactive and sensitive approach on the part of presiding officers faced with complaints under the Act who are to interpret the dense formulations of the Act in a way that serves the transformative vision set of the Act and that is constitutionally compatible. Common law and statutory law provisions that may be appropriate in relation to complaints of racist behaviour provide a comparable framework for the operation and application of the Act.

For the desired change to come about as a result of litigation in terms of the Act, complaints must be brought to the equality courts and the procedure to deal with complaints under the Act has to facilitate smooth, quick and effective litigation. I consider the means to structures and procedures for implementation of the Act in chapter 6.

Chapter 6

THE OPERATIONAL FRAMEWORK OF AND SUPPORT STRUCTURES FOR THE EQUALITY COURTS

6.1 INTRODUCTION

The reactive provisions of the Equality Act can contribute to transformation in an egalitarian direction only if they are used effectively. In the previous chapter I discussed the provisions of the Equality Act pertaining to unfair discrimination, hate speech, harassment and the publication of information that discriminates unfairly. These provisions are set in the Equality Act to found litigation. In this chapter I consider the provisions of the Equality Act which provides for the equality courts and their operation.

Expert and executive oversight of the provisions of legislation directed at social change, and relating to the implementation of such legislation, is important. This is acknowledged in the Equality Act. The Act creates the Equality Review Committee which reports and makes recommendations to the Minister of Justice and Constitutional Development regarding the provisions and implementation of the Act. I consider the role and impact of this committee to date as part of this chapter.

The Equality Act envisions that the process of social change be driven largely by litigation, but it also provides for resolution of disputes involving the equality right through other means. The amicable resolution of disputes under the Act and the raising of public awareness regarding equality matters, are some of the tasks of the Commission for Gender Equality and the South African Human Rights Commission and other Chapter 9 institutions. I consider the role of these institutions in relation to the Act as part of this chapter that sets out the operational framework of the Act. In this chapter I also include a brief discussion of the resource constraints faced by these courts to provide context for the discussion of the courts' handling of cases in chapter 7.

6.2 EQUALITY COURTS AND FUNCTIONARIES

6.2.1 Courts Enforcing the Equality Act

Section 16 provides that every high court is an equality court in its area of jurisdiction. Magistrates' courts are designated as equality courts by the Minister of Justice, after consultation with the heads of the administrative regions.¹ Equality courts are not separate courts as provided for in s 166(e) of the Constitution, but the Equality Act confers extended jurisdiction to high courts and magistrates' courts to sit as equality courts.² This means that high courts and magistrates' courts sitting as equality courts retain the jurisdiction that they ordinarily have and gain additional jurisdiction in relation to equality matters as provided for in the Act.³

A large number of magistrates' courts were designated as equality courts in March 2004.⁴ The Report of the Portfolio Committee of Justice and Constitutional Development that followed on Parliament's Equality Review Campaign indicates that 220 magistrates' courts were designated as equality courts by October 2006 and that a further 146 were to be designated in 2007/2008.⁵ There is no indication of how many of these courts are functioning.

The presiding officers in these courts are respectively designated by the Judge President of that particular high court or the head of the administrative region, in the

¹ Section 16(1)(c). The Minister of Justice and Constitutional Development forms administrative regions through the grouping together of magisterial (districts after consultation) by the publication of a notice in the Government Gazette: Magistrates' Court Act 32 of 1944, s 2(2).

² *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads* Case No 2/2008 (unreported judgment of the Bhisho Equality Court) paras 5-18 per Froneman J. But see *Manong & Associates v Department of Transport in the Eastern Cape* Case No 928/06 (unreported judgment of the Bhisho Equality Court) per Pillay J for a contrary interpretation. In *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) para 10 the SCA indicated that a high court sitting as an equality court cannot refer a matter to the high court since it cannot refer a matter to itself.

³ Froneman J in *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads* Case No 2/2008 (unreported judgment of the Bhisho Equality Court) held that the high court sitting as an equality court has the power of administrative review.

⁴ GN 878 in GG 25091 (13 June 2003) as amended by GN 383 in GG 26178 (26 March 2004). The website of the Department of Justice and Constitutional Development provides a list of 'Equality Structures: Equality Courts' and lists 47 courts. (The information is available at www.doj.gov.za accessed on 4 July 2008.)

⁵ National Assembly Committee Reports [No 34-2007] Fourth Session Third Parliament 655.

instance of magistrates' courts.⁶ The presiding officers in these courts must have undergone a training course in respect of the Act and equality matters.⁷ The Equality Act stipulates that '[o]nly a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an equality court'⁸ may preside over matters brought before an equality court in terms of the Act. The Act also provides for the appointment of clerks specifically for the equality courts. The clerks are, like the presiding officers, required to undergo training.⁹ Before I turn to the operational provisions in the Act and its regulations, it is necessary to consider whether the training provided to presiding officers and clerks are adequate preparation for their roles as set out in the Act. I focus on the training of magistrates as equality court presiding officers.¹⁰

6.2.2 Judicial Training in terms of the Equality Act

Magistrates sitting as presiding officers in terms of the Equality Act are judicial officers with the task of upholding the law and the Constitution 'without fear, favour and prejudice', independently and without any interference.¹¹ In order to serve the purposes of strengthening judicial independence, competence and accountability through judicial training, various international programmes on judicial education have focused on 'mastery of legal knowledge, development of professional skills and acquisition of judicial disposition' in order to build judicial competence to 'institutional performance of courts'.¹² 'Acquisition of judicial disposition' as a learning objective requires judges and magistrates to undergo social context or sensitivity training in respect of diversity issues. This does not necessarily refer only to presiding officers

⁶ Section 16(1)(b) and s 16(1)(d). Initially the Act provided for the designation of presiding officers by the Minister. This was widely regarded as a breach of the separation of powers and undermining the independence of the judiciary; see for example Plasket 7-8. The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002 amended this section to reflect the current position.

⁷ Section 16(2).

⁸ Section 16(2).

⁹ Section 17(1) and (2).

¹⁰ See Kok (2007) chapter 4 where the author discusses the build-up to and the management of the training for presiding officers prior to the establishment of the equality courts. According to the author the process was not well managed and as a result the initial training sessions were affected by the lack of proper coordination. See also 6.6.2.1.

¹¹ Section 165(2) of the Constitution.

¹² L Armytage 'Training of Judges: Reflections on Principle and International Practice' (2005) 2 *EJLE* 21 at 28.

acquiring knowledge and skills pertaining to the law regarding equality and discrimination, but also that presiding officers be exposed to ‘the other’ – be that people of different races, ethnic groups or members of the opposite sex.¹³

The Equality Act sets two objectives in respect of the training courses for presiding officers which coincide with the objectives of the international programmes identified above. The objectives are to provide social context training for presiding officers on the one hand, and on the other hand the objective is to provide uniform norms, standards and procedures which must be observed in the performance of functions in terms of the Act.¹⁴ The Equality Act thus embraces the idea of equality training in the widest sense, relating to sensitizing and familiarising presiding officers with the structures, powers and procedures in terms of the Equality Act.

6.2.2.1 *The Bench Book for Equality Courts*

6.2.2.1.1 Background

The Equality Act recognises the importance of judicial control in relation to matters of judicial education. Section 31(4) of the Act stipulates that the Chief Justice, in consultation with Judicial Service Commission and Magistrates Commission, is responsible for the development of content of training courses to build a ‘dedicated and experienced pool of trained and specialised presiding officers’. Prior to the coming into operation of the equality courts in June 2003, the Judicial Service Commission, together with the Magistrates Commission participated not only in the development of the content of the training course, but also in the facilitation of the training programmes for judges and magistrates in terms of the Act.¹⁵ The framework

¹³ L Armytage ‘Judicial Education on Equality’ (1995) 58 *MLR* 160 at 183. See also M Banton ‘Judicial Training in Ethnic Minority Issues in England and Wales’ (1998) 24 *JEMS* 561.

¹⁴ Section 31(4).

¹⁵ Judicial Service Commission *Annual Report* (2004) 3 available at http://www.doj.go.za/2004dojsite/reports/judicial_ar_2004.pdf accessed on 21 September 2007. In the ‘Acknowledgements’ section of the *Bench Book* mention is made of the contribution of the Centre for Applied Legal Studies (Wits), a Technical Team and a Technical Support Team from Australia. The 2001 *Annual Report* of the Commission for Gender Equality (21, 44) reflects that this Commission was involved in the compilation of the training manual and initial training of judicial officers. See also Kok (2007) chapter 4.

for the training programme took the form of the *Bench Book for Equality Courts*. This *Bench Book* has not been updated since its first publication¹⁶ and is still used in the training of presiding officers for the equality courts.

No specific designation regarding the facilitation of training has been made in terms of the Act, and the training of magistrates as presiding officers for the equality courts is undertaken by Justice College.¹⁷ The typical duration of a training course for magistrates as presiding officers of the equality courts is four days.¹⁸ During this short course presiding officers are expected to come to grips with constitutional law on equality and non-discrimination, the provisions of the Act and their application and with broader considerations relating to the social context within which the Act applies. The short time available for training of presiding officers necessarily means that discussions and analyses of the issues will be limited.

The *Bench Book* forms the backbone of the training for presiding officers in the equality courts, while 'case studies, group work and sharing of experience' are listed as methodologies employed.¹⁹ The material for the training course includes 'handouts, equipment, Bench Books and CD'.²⁰ I focus my discussion on the judicial training of presiding officers of the equality courts on the *Bench Book* as it forms the backbone of the training and also serves as reference work.

¹⁶ Act 52 of 2002. The lecturer in charge of the training of magistrates at Justice College, Mr Sono, informed me telephonically on 17 September 2007 that the training manual for presiding officers had not been updated since its initial publication.

¹⁷ Justice College was established in 1957 as by the Department of Justice and this College provided training to magistrates, prosecutors and other civil servants working in the Department of Justice with the College falling under the authority of the Department of Justice: KD Kruger *The Training of Judicial Officers at Justice College* (2002) Unpublished paper. The informal arrangement in terms whereof this institution provided training for magistrates in earlier years has been formalised to some extent by the indirect reference to 'continuous training of judicial officers in the respective lower courts' in s 4(c) the Magistrates Act 90 of 1993. This Act established the Magistrates Commission and set 'continuous training' out as one of the objects of the Magistrates Commission. The Regulations in terms of the Act, published under GN R361 in GG 15524 (11 March 1994), formalises the position of Justice College as provider of training for magistrates indirectly.

¹⁸ The Department of Justice and Constitutional Development Branch: Justice College *Work Programme 1 April 2007 to 31 March 2008* 5-6. This programme sets out four training sessions for presiding officers of Equality Courts during this period held at different centres.

¹⁹ The Department of Justice and Constitutional Development Branch: Justice College *Work Programme 1 April 2007 to 31 March 2008* 5-6.

²⁰ Ibid.

6.2.2.1.2 The *Bench Book*: an Assessment

a. Introduction

The *Bench Book* provides a wide overview of the constitutional framework, comparative and international law and the provisions and application of the Act.²¹ It is intended as a non-prescriptive guide to the application of the Equality Act and presiding officers are expected to read more widely when confronted with matters under the Act.²² Readers of the manual are reminded that the facts of a particular case will determine whether the provisions of the Act have been breached.²³

The content of the *Bench Book* is divided into six parts, with the introductory parts providing the constitutional and legal context within which the Act is to be construed.²⁴ The provisions and application of the Act are discussed in some detail. The *Bench Book* concludes with a general discussion of judicial responsibility and ethics.

b. Legal and Social Context

The *Bench Book* deals with equality and non-discrimination as constitutional principles in a systematic fashion – setting out the constitutional imperative, the meaning of the terms within the constitutional framework and by illustrating the meaning thereof with reference to examples.²⁵ The importance of context in the determination of the fairness or unfairness of discrimination is underlined with emphasis placed on the impact of the discrimination upon the complainant.²⁶

²¹ *Bench Book* 2.

²² *Ibid.*

²³ *Ibid.*

²⁴ Part A – Introduction to the *Bench Book* 1-5; Part B – Background and Constitutional Framework; Part C – Overview of the Act and Concepts Underlying the Prohibitions and Mandates of the Act; Part D – Applying the Act; Part E – Grounds of Discrimination and Part F – Values, Ethics and Techniques.

²⁵ *Bench Book* chapter 2.

²⁶ *Bench Book* 13.

Against the background of this conceptual framework, the *Bench Book* considers social context, diversity and inequality in South Africa in a few short pages, providing an exposition of the extent and impact of past discrimination. The focus is on racial discrimination, the effect it has on South African society and the implication that this legacy has for adjudication.²⁷ The broad legal and historical picture painted in the first few chapters provides the background to the consideration of the equality jurisprudence of the Constitutional Court.²⁸

The background picture is completed with an exposition of the role and importance of international and foreign law in the interpretation and application of South African law.²⁹ The exposition of the legal and constitutional context incorporates some aspects of the social context within which the Act has to be construed.³⁰ While this does not amount to social context training *per se*, it sensitises the presiding officers to the importance of broader considerations – like historical disadvantage – when it comes to matters involving equality and the Equality Act.

The concluding part of the *Bench Book*, dealing with judicial independence, judicial accountability and responsibility, ethics, values and techniques, provides a broader context in relation to the application of the Act, and specifically sets out a range of practical tools in respect of the equality and non-discrimination in the broader sense and in relation to the protection of these in terms of the Equality Act.³¹ The concluding part not only contributes to the provision of a social context for the interpretation of the Act, but it provides useful practical information and advice which could assist presiding officers, many of whom are relatively unfamiliar with constitutional law and human rights litigation.

c. Unpacking the Equality Act

²⁷ *Bench Book* chapter 3.

²⁸ *Bench Book* chapter 4.

²⁹ *Bench Book* chapter 5.

³⁰ *Bench Book* 16-23.

³¹ *Bench Book* 178-191.

The *Bench Book* provides an overview of the Act in which it emphasises the role of the Act in addressing the legacy of the unequal past through the eradication of unfair discrimination and ultimately it points to the role of the Act in the attainment of social justice.³² The *Bench Book* sets out the sections of the Act and provides a brief discussion of each section in an attempt to guide presiding officers in their interpretation and application of the Act. It is necessary to make a few remarks about some of the discussions in order to note some of the shortcomings of the *Bench Book*:

(a) On interpretation and application

While the discussion of the inter-relation between the Equality Act and the EEA in the *Bench Book* may prompt presiding officers to look further or at least to establish whether the higher courts have provided definitive guidance, the discussion of other problematic sections relating the guiding principles³³ and the complex interpretation provision³⁴ (as discussed in 5.3.1.2) is too superficial. The discussions do not encourage presiding officers to come to terms with the drafting difficulties embodied in these sections. So for instance, is no explanation provided of what it means to be 'mindful of any relevant law or code of practice in terms of law',³⁵ which is set to have equal value to international law (which is often binding) and foreign law (of persuasive value only) when it comes to the interpretation of the Act.

(b) On the Equality Act and its interaction with the Employment Equality Act

Section 5(3) of the Equality Act provides that the Equality Act does not apply to a person to whom and the extent to which the Employment Equity Act applies. The authors of the *Bench Book* note the difficulty inherent in this formulation and state that the courts will have to provide clarity on this point.³⁶ The Act has now been in place for a number of years and the insertion of references to specific case law in the *Bench Book* would be invaluable.

³² *Bench Book* 51-53. See 5.2.

³³ *Bench Book* 59-60.

³⁴ *Bench Book* 61-62.

³⁵ *Bench Book* 61.

³⁶ *Bench Book* 56. See 6.3.1.1 and the discussion of the equality court cases in chapter 7.

(c) On core concepts

Relatively detailed discussions of the core concepts – equality, unfair discrimination, hate speech, dissemination and publication of information that unfairly discriminates, harassment and the promotion of equality in the way that these are used in the Act – are provided.³⁷ The comments of the authors in relation to these concepts provide guidance as to the interpretation and subsequent application of these provisions. The discussions of unfair discrimination, hate speech, dissemination and publication of information that unfairly discriminates and harassment are strung together by the link that each shares the right to equality.³⁸ The discussions that are provided do not go to the core of these concepts. For someone trained in law, but unfamiliar with human rights adjudication, the short discussions would be informative but insufficient as a reference when adjudicating upon such matters. This is problematic when one considers the inadequacy of the library facilities at many magistrates' courts. The Equality Act deals with matters of considerable constitutional importance which are relatively unfamiliar to many equality court presiding officers operating at the level of the magistrate's court. In view of the provisions of s 170 of the Constitution and s 110 of the Magistrates' Courts Act, magistrates have had little cause to consider constitutional law issues specifically.

(d) On procedural issues

The *Bench Book* sets out the provisions relating to the procedure to be followed in the directions hearing and the inquiry, and explains the interaction between the ordinary court rules and those applicable in the high courts and magistrates' courts respectively, and the specific procedures to be followed in the equality courts in a helpful manner.³⁹ The guidance provided in that regard is considerable. In relation to procedure, emphasis is placed in the *Bench Book* on the more inquisitorial nature of

³⁷ *Bench Book* 66-82.

³⁸ *Bench Book* 66-67.

³⁹ *Bench Book* 83-84, 91-93, 104-105, 111.

the proceedings in which the presiding officer (often in relation to an unrepresented party) has to play an important role in facilitating the proceedings in such a manner as to further the interests of justice. This may even require a deviation from the court rules, provided that the views of the parties are canvassed and no-one is prejudiced by the deviation.⁴⁰ Useful, but brief discussions of the nature of the remedies that an equality court may grant,⁴¹ the prosecution of appeals and reviews from the equality courts,⁴² the criminal law implications of the Act⁴³ and the prohibited grounds set out in the Act,⁴⁴ are provided in the *Bench Book*.

d. *Bench Book* Balance Sheet

The *Bench Book* deals with the important aspect of social context in a few short pages by providing an overview of the historical and social context within which the Act applies. The importance of the legacy of South Africa's racial past in the adjudication of matters involving unfair discrimination, hate speech and harassment cannot be overstated. Social context is shaped by history – patterns of disadvantage and inequality stem from earlier policies and practices, as was argued in chapter 2.

Broader considerations are also at stake. This much is acknowledged in the *Bench Book*.⁴⁵ In a diverse society like ours, just and fair adjudication requires presiding officers to be able to transcend their own backgrounds and prejudices and reflect a 'much deeper understanding of the characteristics of the different people who come before the courts'.⁴⁶ This statement, reproduced in the *Bench Book*, points to the

⁴⁰ *Bench Book* 111, 113.

⁴¹ *Bench Book* 139-141.

⁴² *Bench Book* 142-143.

⁴³ *Bench Book* 144-145.

⁴⁴ *Bench Book* 147-176.

⁴⁵ *Bench Book* 22-23.

⁴⁶ Judicial Studies Board *Equal Treatment Bench Book* (1999) 1 as quoted in *Bench book* 23. This United Kingdom *Bench Book* is different from its South African counterpart in that it deals with equal treatment in general and not as it is provided for in a single statute. Where specific legislation outlaws discrimination on a certain ground, that legislation is discussed in relation to the specific ground in the JSB *Bench Book*. This *Bench Book* also contains information providing guidance to presiding officers as to how diversity is to be managed in the court system (and specifically contains a section on race and the justice system), the role of poverty and social exclusion in society and how to assist unrepresented litigants in court matters. The JSB *Bench Book* contains statistics about the population and the different groups it consists of and a statistical and qualitative appraisal of the experiences of

challenge faced by adjudicators when considering the social context within which decisions are to be made, but does not tell presiding officers how to go about in doing this. Social context education is complex. It should also deal, for example, with cultural and religious plurality and introduce presiding officers to 'the other', while warning against resorting to stereotypes, cultural essentialising, and by explaining the fluid nature of groups in society.⁴⁷

A comprehensive approach to social context education will empower presiding officers with the necessary skills to identify systemic disadvantages and stereotypes and to avoid perpetuating these inadvertently through their interaction with litigants and in their judgments.⁴⁸ Successful social context training is not an easy task. Instruction (whether it takes the form of formal lectures or informal discussions) about race, cultures, religions and the nature of groups in society shed some light, but the value reflection upon one's own group-affiliations,⁴⁹ on the one hand, and facilitated introductions of members of the judiciary to members of different societal groups, on the other hand, are perhaps even more important.⁵⁰ The success of the latter means of sensitising is remarkable. Experiences in Canada, described by Mahoney,⁵¹ and in England and Wales, described by Banton,⁵² attest to the benefits of familiarising presiding officers with the community that they serve and introducing the community to members of the judiciary whom they may often see as outsiders to their community. A similar programme as part of the training in terms of the Equality Act would be beneficial to both the community and members of the judiciary. The benefits from such meetings will on the long run outweigh the cost thereof, since such facilitated interaction no doubt carries a high price tag.

The *Bench Book* has not been updated since its initial publication. Regular (bi-annual or at least annual) updating thereof is of utmost importance to sustain sound

these groups of the courts and justice system. The social context set out in this *Bench Book* paints a fuller picture of English and Welsh societies than the South African *Bench Book*.

⁴⁷ See also Lawrence 111ff; Mahoney 814ff.

⁴⁸ L Smith 'Judicial Education on Context' (2005) 38 *UBC LR* 569 at 575; Mahoney 814-815; Lawrence 115-116.

⁴⁹ Lawrence 132.

⁵⁰ Mahoney 815-816; Banton 561.

⁵¹ KE Mahoney 'The Myth of Judicial Neutrality: the role of Judicial Education in the Fair Administration of Justice' (1996) 32 *Willamette LR* 758.

⁵² M Banton 'Judicial Training in Ethnic Minority Issues in England and Wales' (1998) *Journal of Ethnic and Migration Studies* 561.

development of our equality court jurisprudence. More recent Constitutional Court judgments regarding equality and non-discrimination are not reflected in the *Bench Book*, nor are examples of judgments from equality courts included as part of this reference book. The cost and effort of regular (annual) updates cannot be ignored, but the practical benefit of accessible and quick references is fundamentally important for the success of these courts.

6.2.3 Training of clerks

The training of clerks is important in view of the pivotal role foreseen for these functionaries in the Regulations to the Act.⁵³ In fact, the Act provides that no proceedings may be instituted in an equality court unless ‘a presiding officer and one or more clerks are available.’⁵⁴ Clerks perform administrative functions relating to the court process and have to assist illiterate or unrepresented complainants in completing the forms. Clerks must also be able to explain the rights and remedies available under the Act.⁵⁵ In the course of the discussion relating to the operational provisions under the Act, the functions of clerks will be set out in more detail.

The Act stipulates that clerks have to be appointed for all equality courts from the ranks of people who have completed a training course specifically designed for clerks of the equality courts.⁵⁶ This training course has to deal with social context on the one hand, and uniform norms, standards and procedures that clerks have to observe in terms of the Act, on the other.⁵⁷ The development and implementation of the training course for clerks have to be overseen by the Director-General of the Department of Justice and Constitutional Development.⁵⁸ The *Resource Book for Equality Courts* was prepared by the Judicial Service Commission and the Magistrates Commission (no date provided) with a revision of the text in November 2003 by Behari and Kok, respectively a magistrate and lecturer at Justice College, and an academic at Pretoria

⁵³ Regulations in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 GN R764, GG 25065 (13 June 2003) as amended by GN 563, GG 26316 (30 April 2004).

⁵⁴ Section 16(1). Emphasis added.

⁵⁵ Regulation 5

⁵⁶ Section 17(1) and (2).

⁵⁷ Section 31(6).

⁵⁸ Ibid.

University. Training of clerks of equality courts at magistrate's court level is currently facilitated by Justice College.⁵⁹

The text of the *Resource Book* is succinct and clear. The learning objectives pertaining to social context and the Act are plainly addressed and clerks are provided with clear guidance as to their responsibilities in relation to each of the stages of litigation. The schematic representation of the process⁶⁰ and the detailed checklist⁶¹ provide meaningful and practical guidance to clerks of equality courts. It is submitted that the *Resource Book* attains the learning objectives set out in the Act,⁶² although the social context part of the *Resource Book* could be amplified, as has been suggested in relation to the *Bench Book*.

6.3 OPERATIONAL FRAMEWORK

6.3.1 Preliminary and General Issues

Equality courts operate with specialist jurisdiction within the existing court structure as pointed out in 6.2.1 above. Consequently, many of the rules and procedures applicable within the existing court structure apply in the equality courts as well.⁶³ The Equality Act stipulates that the rules of the high courts and the magistrates' courts, respectively, will apply in the equality courts in terms of the appointment and functions of officers, the issue and service of process, the execution of judgments or orders, the imposition of penalties for non-compliance with court orders and contempt proceedings, and also the provisions pertaining to jurisdiction (subject to the provisions of the Act). This is applicable provided that the Regulations to the Equality Act do not regulate these matters⁶⁴ and requires an integration of rules and provisions regulating the ordinary court process with the specific rules relating to the equality

⁵⁹ Department of Justice and Constitutional Development Branch: Justice College *Work Programme 1 April 2007 to 31 March 2008* 21.

⁶⁰ *Resource Book* 38 in relation to the pre-hearing procedure and 53 in relation to the duties of clerks.

⁶¹ *Resource Book* 58-66.

⁶² The training provided to clerks has been criticised by some of the clerks: SAHRC 'Equality Review' 14-15. The clerks indicated a need for ongoing training. See also 6.6.2.1 and chapter 7.

⁶³ Section 19(1).

⁶⁴ Section 19(1).

courts. In relation to jurisdiction, standing and legal representation, all important preliminary considerations, the Act modifies the existing rules significantly, especially in the instance of magistrates' courts sitting as equality courts. I discuss each of these issues below.

6.3.1.1 *Jurisdiction*

In relation to the geographical jurisdiction of magistrates' courts sitting as equality courts, the rules ordinarily applicable in this regard will apply, provided that a magistrate's court has been designated as an equality court for the particular district.⁶⁵ The Magistrate's Court Act contains extensive provisions in relation to jurisdiction in respect of persons⁶⁶ and in respect of causes of action arising within the jurisdictional area of the magistrate's court.⁶⁷ In relation to the provisions of the Equality Act this usually would mean that the cause of action – the unfair discrimination, hate speech or harassment – had arisen within the area of jurisdiction of the magistrate's court designated as an equality court.⁶⁸ An alternative (but less likely) scenario in the light of the nature of the complaints would be that the complainant had to institute proceedings in the equality court for the area where the respondent is residing or carrying on business as provided for in the Magistrate's Court Act.

The Equality Act increases the powers of magistrates' courts sitting as equality courts significantly in respect of the remedies such courts may grant.⁶⁹ So for instance, the Act allows magistrates' courts sitting as equality courts to make monetary awards exceeding the monetary jurisdiction of a magistrate's court.⁷⁰ Where such an award is made, it is subject to confirmation by a high court with jurisdiction in the matter.⁷¹ In relation to the nature of the cause of action that may be adjudicated upon by a lower court, the Equality Act has opened up a new constitutional avenue for lower courts

⁶⁵ Section 16 (1)(b).

⁶⁶ Act 32 of 1944, s 28.

⁶⁷ Section 29.

⁶⁸ It is also possible that a group of magisterial districts are bundled together for purposes of designation of an equality court.

⁶⁹ Section 21. See 5.4 for discussion of the remedies under the Equality Act.

⁷⁰ Section 20(3).

⁷¹ Section 20(3).

which allows courts at this level to engage proactively with the complex constitutional right to equality.

Insofar as the jurisdiction of the equality courts is concerned, special attention must be paid to the s 5(3) of the Equality Act which states that the Equality Act does not apply if and to the extent that the Employment Equity Act (EEA) applies. Members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence or the directors and staff of Comsec are not deemed to be employees under the EEA.⁷² In the event of complaints of unfair discrimination arising from the workplace of members of these bodies, the provisions of the Equality Act will apply and their complaints must be dealt with by the equality courts. Where a complaint of unfair discrimination does not concern a member of such state institutions, a simplistic reading of s 5(3) of the Equality Act would result in the conclusion that the matter should be dealt with in terms of labour law. This may seem uncomplicated, but the practical application of this section shows that the reality is more complex, as is evident from the case analysis in chapter 7. Where and how does this confusion arise?

The EEA places an obligation on all employers to promote equal opportunity in the workplace through the elimination of unfair discrimination in employment policies and practices.⁷³ Section 6 of the EEA, on the other hand, provides that 'no person' may unfairly discriminate, directly or indirectly against an employee in an employment policy or practice on the grounds listed which include race. For the EEA to apply, it thus has to be established that the parties are in an employment relationship and that the alleged unfair discrimination took place in terms of 'an employment policy or practice' against an employee.⁷⁴ The EEA defines 'employment policy or practice' very widely.⁷⁵ The question arises whether a single incident of alleged unfair

⁷² Section 4(3) EEA.

⁷³ Section 5 EEA. Emphasis added.

⁷⁴ In instances where an employee suffers discrimination or harassment at the hands of a colleague, the EEA places obligations of the employer to take 'the necessary steps to eliminate the alleged conduct and to comply with the provisions of the Act' (s 60(2)). The employer may incur liability where he/she fails to take the necessary steps to ensure compliance (s 60(3)), but will not be held liable if he/she proves that all steps that were 'reasonably practicable' to ensure compliance with the Act were taken (s 60(4)).

⁷⁵ Section 1 EEA: "employment policy or practice" includes, but is not limited to –
(a) recruitment procedures, advertising and selection criteria;

discrimination or harassment, the latter being regarded as a form of unfair discrimination in terms of the EEA, could be viewed as ‘a practice’ which will bring the matter within the purview of the EEA. If not, will the Equality Act apply?

The term, ‘employment practice’ as it is used in the current Labour Relations Act⁷⁶ and in the EEA has not been interpreted by the Labour Court. ‘Practice’ as the term was used in the Labour Relations Act of 1956,⁷⁷ was interpreted by the now defunct Industrial Court to include a single act.⁷⁸ If this interpretation of the Industrial Court is still good law, as I think it is, all incidents of alleged unfair discrimination or harassment in the workplace in which an employee complains of discrimination or harassment by her/his employer or a fellow employee, are to be dealt with in terms of the EEA – provided that its requirements are met. Should the alleged discrimination or harassment have been the result of something other than an employment policy or practice, the EEA, as the provision currently stands, will not apply, but the Equality Act or the common law will apply.⁷⁹

The EEA makes it clear that disputes about discriminatory dismissals have to be dealt with in terms of the Labour Relations Act.⁸⁰ Such dismissals are regarded as

-
- (b) appointments and the appointment process;
 - (c) job classification and grading;
 - (d) remuneration, employment benefits and terms and conditions of employment;
 - (e) job assignments;
 - (f) the working environment and facilities;
 - (g) training and development;
 - (h) performance evaluation systems;
 - (i) promotion;
 - (j) transfer;
 - (k) demotion;
 - (l) disciplinary measures other than dismissal; and
 - (m) dismissal.

⁷⁶ Labour Relations Act 66 of 1995, specifically chapter VIII.

⁷⁷ Labour Relations Act 28 of 1956 (repealed).

⁷⁸ *Mahlangu v Hotels, Inns & Resorts (Pty) Ltd t/a Southern Sun Group Hotels: Holiday Inn (Sandton)*[1995] 11 BLLR 57 (IC) 59. See also *Marievale Consolidated Mines Ltd v The President of the Industrial Court* 1986 (7) ILJ 152 (T) 165D, where the Supreme Court held similarly. Grogan 89-90.

⁷⁹ The case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd* [2007] JOL 18897 (LC) makes for interesting reading in this regard. The applicant, Ms Piliso, was harassed at her workplace by an unknown person (or persons). She reported this to management who, in the opinion of the Court, failed to take the necessary steps to ensure a safe environment. Ms Piliso put forth three alternative complaints against her employer: in terms of the EEA, in terms of the law of delict on the basis of vicarious liability and lastly she claimed that her constitutional rights in the workplace have been violated (para 3). In view of the fact that the identity of the perpetrator was unknown, the complaints in terms of the EEA and law of delict failed, but she was successful on the grounds of a breach of her constitutional rights and was awarded constitutional damages. The Equality Act was not raised.

⁸⁰ Section 10(1) of the EEA.

automatically unfair⁸¹ and must be referred to the bargaining council for the particular sector or the Commission for Conciliation, Mediation and Arbitration, in the absence of a bargaining council for conciliation,⁸² failing which the matter must be referred to the labour court for adjudication.⁸³ In the instance of a dismissal based on alleged unfair discrimination, the Equality Act does not apply and must the matter be dealt with in terms of labour law.

The EEA does not prohibit hate speech and hate speech is not specifically included in the prohibition of unfair discrimination provided for in s 6 of the EEA. Hartzenberg J in *Strydom v Chiloane*,⁸⁴ when confronted with a determination of whether the Equality Act applies to complaints of hate speech in the workplace, stated that ‘the question to be decided is what the statement complained of in this case, really constitutes’.⁸⁵ According to the Judge ‘racially discriminatory conduct is more serious than hate speech, but ... hate speech is one of the elements of discriminatory conduct’.⁸⁶ The learned Judge continued:⁸⁷

‘Where the conduct constitutes the more serious of more than one complaint, and that conduct falls within the ambit of s 6 of the EEA the correct forum to deal with the matter is the labour court.’

Hartzenberg J’s interpretation of the jurisdictional difficulty requires a presiding officer to consider the words complained of to determine whether they are serious enough to constitute discriminatory conduct.⁸⁸ If such a finding is made, the matter is to be dealt

⁸¹ Section 187(1)(f) of the Labour Relations Act of 1995.

⁸² Section 191(1). The dispute must be referred within 30 days of the dismissal.

⁸³ Section 191(5)(b).

⁸⁴ 2008 (2) SA 247 (T).

⁸⁵ Para 10.

⁸⁶ Para 16.

⁸⁷ Para 17.

⁸⁸ In this regard the Judge referred to *Lebowa Platinum Mines Ltd v Hill* [1998] 7 BLLR 666 (LAC). The (white) respondent in *Lebowa Platinum Mines* was alleged to have uttered the words ‘bobbejaan kaffir’ in relation to a black co-employee. The Labour Appeal Court stated that the finding that the respondent had used the word ‘bobbejaan’ in respect of his co-employee ‘was manifestly serious’ (para 12). The Court further noted that ‘[n]ot only was the respondent’s use of the word insulting and abusive, but in the circumstances that obtained, the word was also undoubtedly racist in its connotation’. The Labour Appeal Court quoted extensively from Wallis’ *Labour and Employment Law* para 25 in support: “It does not suffice to explain these cases [of disciplinary action taken against employees acting in racially offensive ways] on the ground that the employees concerned were acting in breach of specific provision of a disciplinary code. Such incidents in the frequently highly charged racial or political atmosphere of the workplace can be extremely detrimental to working relationships and disruptive of the entire business operation. It is submitted that a further foundation for the disciplinary action taken in these cases is an extension of the duty of respect owed to superiors by all employees. Such an extension

with in terms of labour law. If not, hate speech in the employment context is to be dealt with in terms of the Equality Act.⁸⁹

Hartzenberg J's finding in *Strydom v Chiloane* is based on his view that hate speech is a form of discrimination. I have discussed this view of hate speech more fully at 5.3.1.4.2 and came to the conclusion that the Equality Act does not prohibit hate speech as unfair discrimination, but rather as a related infringement of the equality right not dependent on a comparator as is required by the definition of unfair discrimination contained in the Act. Does this conclusion mean that hate speech in the employment context falls outside the scope of the prohibition of unfair discrimination under the EEA? Cooper and Lagrange⁹⁰ noted in 2001 that the absence of specific provisions relating to hate speech in the EEA seems to indicate that such matters will fall under the Equality Act. The conflicting interpretations by the academic writers on the one hand, and Judge Hartzenberg on the other, are indicative of the complexity and ambiguity of the labour law/Equality Act overlap.

A further indication of the overlap/confusion between labour law and the Equality Act is evident from s 29. Section 29 of the Equality Act contains an 'illustrative list of unfair practices in certain sectors'. Under the heading 'Labour and employment', scenarios are included that typically arise in the employment context. Section 5(3) rules the application of the Equality Act out in instances where labour law applies. It unfortunately seems as if the drafters of the legislation were confused about the jurisdictional division too.

involves the recognition of the interdependence of all people engaged in the enterprise and is consistent with any reasonable concept of the importance of human dignity and society.”

⁸⁹ Hartzenberg J added that even if his decision that the equality court did not have jurisdiction was wrong, and that dual jurisdiction was possible, 'it seems to me that the magistrate should have heeded to the provisions of s 49 of the EEA and recognised that the labour court has exclusive jurisdiction to decide the question of jurisdiction. He should, in terms of s 20 of PEPUDA [the Equality Act], have referred the matter to the labour court. The result would have been that the whole dispute that was argued before him would not have been before him at all'. I respectfully submit that this reasoning is based on an incorrect reading of the effect of s 5(3) and s 20 of the Equality Act. The effect of s 5(3) is to oust the jurisdiction of equality courts in labour law matters. Section 20 allows an equality court to refer matters to alternative *fora* only in instances where the equality court and the alternative forum both have jurisdiction (see the discussion at 6.4.3 below). In instances where s 5(3) applies, an s 20 referral will not be competent.

⁹⁰ See also C Cooper and R Lagrange 'The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act' (2001) 22 *ILJ* 1532 at 1540.

My discussion and analysis of the cases from the equality courts in chapter 7 show clearly that there is confusion about the jurisdictional overlap between equality courts and labour law *fora* that requires clarification. As a result of this confusion, many complainants are left without remedies. *Strydom v Chiloane* provides some clarity, but intervention from the legislature is required to stipulate explicitly that hate speech in the employment context is to be dealt with as if it were unfair discrimination under the EEA, as is done in relation to complaints of harassment in the workplace.⁹¹

6.3.1.2 Standing

At common law, and in relation to the civil claims adjudicated upon by the magistrates' courts, a restrictive approach to standing is followed. The requirement is that the rights of the person approaching the court have been personally adversely affected by the wrong allegedly committed by the defendant/respondent.⁹² In relation to direct application of a constitutional right, the approach to standing is significantly broader.

In order to establish standing in terms of the Constitution, s 38 requires an applicant to allege that a right in the Bill of Rights has been infringed or is threatened and that there is sufficient interest in the remedy sought which is demonstrated with reference to one of the categories set out in that section.⁹³ Section 38 lists the following categories: (1) persons acting in their own interests, (2) persons acting on behalf of another who cannot act in his/her own name; (3) persons acting as a member, or in the interest of a group or class of persons, (4) persons acting in the public interest and (5) an association acting in the interest of its members. In order to determine whether a particular litigant has standing to approach the court, the court has to consider the facts of the particular matter.⁹⁴ The broad approach to standing when it comes to application of the Bill of Rights has been approved by our courts on numerous occasions.⁹⁵

⁹¹ Section 6(3).

⁹² Currie and De Waal (2005) 80; Devenish 194.

⁹³ *Ferreira v Levin NO* 1996 (1) SA 984 (CC) paras 165, 166, 168 (per Chaskalson P) and 229, 230 (per O'Regan J).

⁹⁴ *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 231.

⁹⁵ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 473C and 474D-H; *Municipality of the City of Port Elizabeth v Prut* 1996 (9) BCLR 1240 (E) 1246-1247; *South African*

Section 20(1) of the Equality Act draws on the constitutional formulation in relation to standing and also extends standing to the South African Human Rights Commission or the Commission for Gender Equality.⁹⁶ There is, however, a marked difference between the constitutional formulation regarding standing and s 20(1) of the Equality Act. For standing in terms of the Constitution, the person approaching the court has to allege the infringement of or threat to a right in the Bill of Rights, and demonstrate sufficient interest in the remedy sought with reference to the categories listed, as set out above. Standing requirements in terms of the Equality Act are different. It is accepted that the right at stake is the right to equality. For someone to establish standing in terms of the Equality Act, the crucial issue would be to demonstrate her/his interest in the matter with reference to the categories listed. It is not explicitly required that the complainant establishes standing with reference to the categories while linking this to a requested remedy.

In order to comprehend the extent to which the common law position is altered, it is necessary to consider the categories as they are set out in the Equality Act in more detail. For the purpose of the Equality Act, a person is defined to include a juristic person, a non-juristic entity and a group or category of persons.⁹⁷

(1) any person acting in their own interest

This category of people awarded standing in terms of the Equality Act is easy to understand. A person who maintains that s/he has suffered unfair discrimination, harassment or hate speech at the hands of another will meet this requirement. It is submitted that a person who alleges that her/his right to equality has been infringed by unfair discrimination, hate speech or harassment on the part of the respondent will be

Association of Personal Injury Lawyers v Heath 2000 (10) BCLR 1131(T) 1147-1148; *Ngxusa v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E) 1327C-D; *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa* 2001 (4) SA 1184 (SCA) para 13; *Van Rooyen v The State* 2001 (4) SA 396 (T) 424; *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2003 (3) BCLR 228 (C) 318-319; *Lawyers for Human Rights v Minister of Home Affairs* 2003 (8) BCLR 891 (T) 893; *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) paras 14 and 17; *Highveldridge Residents Concerned Party v Highveldridge TLC* 2003 (1) BCLR 72 (T) paras 13, 24 and 25; *Campus Law Clinic (UKZN Durban) v Standard Bank of SA Ltd* 2006 (6) SA 103 (CC) para 20; *E N v Government of the RSA* 2006 (6) SA 575 (D) para 10.

⁹⁶ See also Albertyn, Goldblatt and Roederer 7-10.

⁹⁷ Section 1(1).

allowed standing. In order to establish standing, no proof of the infringement is necessary. Sufficient information must be placed before the court to substantiate the allegation.

(2) any person acting on behalf of another person who cannot act in their own name

The wording of the Act provides little guidance as to how a complainant should proceed when acting on behalf of another. It is suggested that a person laying a complaint of unfair discrimination, harassment or hate speech on behalf of another who is unable to act in her/his own name must place the information before the court. This information should set out the reasons for the inability of the other person to act in own name and to show that the person consented to the proceedings or would have consented had s/he been capable of consent; or that s/he would have brought the application, or laid the complaint herself/himself had s/he been able to do so.⁹⁸

(3) any person acting as a member of, or in the interests of, a group or class of persons

Class or group litigation allows a court to deal with the claims, or in the instance of the Equality Act, complaints of similarly situated complainants to be adjudicated simultaneously without the need to join each member of the class separately.⁹⁹ This is beneficial for members of a class since it saves time and money. It is important that those members of the class who wish not to be bound by the findings of the court be given an opportunity to opt out,¹⁰⁰ in view of the fact that the court order would otherwise bind all members of the class and that the matter would be *res iudicata* for all the members of the class unless they have opted out. In relation to the Equality Act it is possible to foresee that members of a particular group or class identified by one of the prohibited grounds – race – suffer similar denial of benefits or opportunities which could open the door to a complaint on behalf of a class of people. Sufficient

⁹⁸ *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) 311E-F and 311H-312A.

⁹⁹ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa* 2001 (4) SA 1184 (SCA) para 4; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) para 7. See in general *Ngxusa v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E); Devenish 194.

¹⁰⁰ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa* 2001 (4) SA 1184 (SCA) para 4; Devenish 194.

information to identify the class members must be placed before the court as well as information regarding notification given to the members and the option to opt out.

(4) any person acting in the public interest

A complaint regarding unfair discrimination, harassment or hate speech may be brought by a person in the public interest. Where a person claims to be laying a complaint in the public interest, the basis of that complaint is wider than in the instance of a class action.¹⁰¹ As in respect of matters concerning the infringement of any of the rights enshrined in the Bill of Rights, the question arises: what is in the public interest? The eradication of unfair discrimination, harassment and hate speech is in the public interest, but that does not mean that every complainant could and should cast the basis of her/his claim for standing this wide. In each instance where a person claims to be acting in the public interest, the equality court will be obliged to consider this basis on which standing is claimed in the light of the facts and context of the particular matter. Sufficient information in this regard must be placed before the court.

In her minority judgment in *Ferreira v Levin NO*,¹⁰² O'Regan J put forward a list of factors to be considered when determining whether a person is genuinely acting in the public interest. These factors are:

- (a) whether there is another reasonable and effective manner in which the challenge can be brought
- (b) the nature of the relief sought and the extent to which the relief is of general and prospective application
- (c) the range of persons or groups directly or indirectly affected by any order of the court
- (d) the opportunities the persons or groups had to present evidence before the court.

In *Lawyers for Human Rights*,¹⁰³ this list of factors was approved by the majority of the Court, but Yacoob J noted that other factors may also be considered when

¹⁰¹ Currie and De Waal (2005) 89-90.

¹⁰² *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 234.

determining whether a person litigates in the public interest. Yacoob J added the degree of vulnerability of the people affected, the nature of the right that stands to be infringed and the consequences of further infringements as further considerations.¹⁰⁴ It is submitted that a consideration of these factors will also be determinative of whether a person acts in the public interest in relation to complaints under the Equality Act.

(5) any association acting in the interests of its members

In order to secure standing on this basis in constitutional matters, it is unnecessary for an association to show that it has an existence separate from its members as was required at common law.¹⁰⁵ Any voluntary association, even an association without legal personality,¹⁰⁶ which can show in relation to the Equality Act that it is acting on behalf of its members in a matter of unfair discrimination, harassment or hate speech, will succeed in establishing standing on this basis. This broad basis for standing is supported by the definition of 'person' in s 1 of the Equality Act to include a 'non-juristic entity'. Legal personality separate from that of the people making up the group or association, is thus not a prerequisite for standing in terms of the Act. Once again, sufficient information needs to be placed before the court regarding the association and the interests of its members.

(6) the SAHRC or the CGE

The Human Rights Commission and the Commission for Gender Equality have special roles to play in the eradication of unfair discrimination as provided for in the Equality Act and the legislation expanding on the powers and functions of these institutions guarding constitutional democracy.¹⁰⁷ The provision allowing standing to these bodies

¹⁰³ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 18. See also *Campus Law Clinic (UKZN Durban) v Standard Bank of SA Ltd* 2006 (6) SA 103 (CC) para 21.

¹⁰⁴ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 18.

¹⁰⁵ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2006 (6) SA 66 (T) para 24.

¹⁰⁶ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2006 (6) SA 66 (T) para 25. See also *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2003 (3) BCLR 288 (C) 318-319.

¹⁰⁷ In relation to litigation: s 20(1)(f). Both these chapter 9 institutions, as well as a host of other courts, bodies, institutions, tribunals or forums may serve as alternative forums in terms of the Act and receive referrals from presiding officers in the equality courts (s 20(3)). A specific role in relation to the promotion of equality is also foreseen for these constitutional bodies. Section 25(2) provides: 'The South African Human Rights Commission and other relevant constitutional institutions may, in addition to any other obligation, in terms of the Constitution or any law, request any other component falling within the definition of the State or any person to supply information on any measures relating to the

in matters before the equality courts has to be understood in conjunction with the roles of these bodies in relation to the investigation and resolution of human rights disputes through alternative dispute resolution mechanisms in their respective fields and their roles as 'alternative forums' as provided for in the Equality Act. In addition, it has to be borne in mind that these bodies may provide legal representation to litigants in the equality courts, in which case the SAHRC or CGE will not be the litigant, but the legal representative of the complainant. Section 20(1)(f) allows for these bodies to be litigants, in own right, in matters of unfair discrimination, harassment or hate speech. These roles are different and will require careful monitoring and planning on the parts of the bodies. The self-assessment of these bodies in relation to their tasks and performance is discussed at 6.5.2 below.

6.3.1.3 Representation in the Equality Courts

The Regulations to the Equality Act introduce a novel concept into South African court procedure in respect of representation in equality courts. Regulation 10(9) provides that a party may be represented during the proceedings by an attorney, an advocate or by any person of her/his choice. This provision opens the door to lay representatives appearing on behalf of litigants in equality courts. It broadens the access to justice for many poor litigants who do not qualify for legal aid, or who, alternatively, are not represented by the SAHRC or CGE or simply those who do not

achievement of equality including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes.'

Section 25(3) provides:

'In addition to the powers and functions of the constitutional institutions these institutions are also competent to -

- (a) assist complainants in instituting proceedings in an equality court, particularly complainants who are disadvantaged;
- (b) conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of this Act or cases of unfair discrimination, hate speech or harassment referred to them by an equality court;
- (c) request from the Department, in the prescribed manner, regular reports regarding the number of cases and the nature and outcome thereof.'

The promotion of equality would also require the South African Human Rights Commission to receive equality plans as are envisioned by the Equality Act (s 25(4)(b)) from Ministers responsible for governmental departments which it must deal with in consultation with the Commission for Gender Equality (s 25(5)). The annual report of the SAHRC is also to include an assessment of the extent to which unfair discrimination on the grounds of race, gender and disability persists in South Africa and to set out recommendations as to how to address the problem (s 28(2)). The provisions relating to the promotion of equality (s 25 – s 28) are not yet in operation.

wish to obtain legal representation.¹⁰⁸ Few lay representatives have access to legal sources or a law library and adequate knowledge about the legal process on the part of such representatives is often limited. This may be detrimental to the case of the litigant.¹⁰⁹ It is for this reason that the Regulations allow the presiding officer to inform a litigant who is represented by a lay representative of the unsuitability of the representative in the opinion of the presiding officer.¹¹⁰ The presiding officer is also obliged, in terms of Regulation 10(5)(e), to inform an unrepresented party at the directions hearing of her/his right to legal representation at own expense or, if s/he is not in a position to afford legal representation, that s/he may apply for legal aid and that s/he may approach institutions like the SAHRC, CGE and a variety of non-governmental organisations for legal representation. These provisions in terms of the Equality Act are as 'litigant-friendly' as possible. Lay representatives (and unrepresented litigants) should be encouraged to make use of the research facilities available at magistrates' courts and the offices of institutions like the SAHRC.

6.4 LITIGATING UNDER THE EQUALITY ACT

6.4.1 The Nature of the Proceedings

The Equality Act and the Regulations promulgated in terms of the Act set out a relatively simple procedure to deal with matters of unfair discrimination, hate speech, harassment and the publication of information that discriminates unfairly.¹¹¹ The Act and Regulations do not provide for every procedural eventuality that may arise during the proceedings and, accordingly, they provide for the rules of the high court and magistrate's court to apply insofar as no provision is made by the Act or its Regulations.¹¹² In applying these rules, a presiding officer must pay homage to the guiding principles in relation to adjudication under the Act.¹¹³ This means that cases

¹⁰⁸ *Hopf v The Spar Group (Build It Division)* [2007] 4 All SA 1249 (D) para 23.

¹⁰⁹ See Galanter 114 who states that '[p]arties who have lawyers do better'.

¹¹⁰ Regulation 10(9)(b).

¹¹¹ Section 4(1)(a) and Regulation 10(1)-(3). Expeditious and informal proceedings and participation by the parties are set as guiding principles. See *Hopf v The Spar Group (Build It Division)* [2007] 4 All SA 1249 (D) paras 15-20.

¹¹² Section 19 and see also Regulation 10(7) in relation to the law of evidence.

¹¹³ Section 4(1). See also 5.3.1.2 where the difficulty in applying the other 'guiding principles' set out in s 4 was discussed.

must be processed expeditiously and informally in a manner that facilitates participation by the parties.¹¹⁴ In fact, where it comes to matters of procedure, Regulation 10(5)(d) permits the presiding officer to allow deviations from the ordinary procedures, after hearing the views of the parties on the deviations, where they are in the interests of justice and no one is prejudiced by them. There is thus ample scope for the presiding officer to conduct the proceedings in a more inquisitorial manner and to involve herself/himself actively in the process of ascertaining the true state of affairs in each particular case.

6.4.2 Assessors

The possible involvement of assessors at the insistence of the parties or the presiding officer in equality court hearings broadens the capacity of these structures for public involvement.¹¹⁵ This is clearly acknowledged by Regulation 14 which sets out the factors to be considered by a presiding officer when determining whether it is in the interest of justice to summons an assessor. This regulation compels the presiding officer to take account of the cultural and social background of one/both parties, their educational background, the seriousness of the complaint and any specific interests that the community (or any specific community) has in the matter before the court or any other relevant consideration that may point to the desirability to involve an assessor in the matter. Assessors must be 21 years old, of sound mind and body and resident in the area for which they will serve as assessors.¹¹⁶ An assessor must be respected in her/his community and be involved in the affairs of the community and have knowledge about the social and cultural milieu of the particular community.¹¹⁷ Certain criminal convictions and being a politician or public servant preclude a person from being appointed as an assessor.¹¹⁸

¹¹⁴ Section 4(1)(a).

¹¹⁵ Section 22. Subsection 1 of this section provides that one or two assessors may be summoned to assist the court in 'any proceedings in terms of the Act'. Assessors appointed in terms of the Act are deemed to members of the court (s 22(1)) and are to contribute to the court's deliberations by deciding matters of fact (s 22(2) and (3)). The remainder of s 22 and Regulations 13, 14, 17 and 18 pertain to other matters concerning assessors, including recusal and death of an assessor.

¹¹⁶ Regulation 13(a). It is unclear whether the soundness in body requirement will exclude physically disabled persons from being assessors.

¹¹⁷ Regulation 13(b) and (c).

¹¹⁸ Regulation 13(d), (e) and (f).

The appointment of assessors allows the presiding officer to contextualise matters of unfair discrimination, hate speech and harassment and to make this Act meaningful within a particular community by involving members of that community. This more 'open' approach, coupled with innovative investigation techniques (including *in loco* inspections) as are suggested in the *Bench Book*,¹¹⁹ create scope for involving members of the community and the litigants proactively in resolving matters of unfair discrimination, hate speech and harassment, as envisioned by the Act and Regulations. In my view, such application of the Act has the potential to contribute meaningfully to social change in an egalitarian direction.¹²⁰

6.4.3 Before the Inquiry: Complaint and Directions Hearing

The complainant completes the complaint form (form 2) setting out his/her own details, those of the respondent and the particulars regarding the complaint and the relief sought.¹²¹ The form requires a complainant to provide 'full details of the complaint, the date of the incident(s) and the particulars of possible witnesses'. In addition to this, the form peculiarly requires a complainant to state 'which right has been violated and the reasons why you think such right was violated'. The Equality Act aims to protect and enhance the right to equality through the prohibition of different forms of violation of this right. It is not suggested that this right is isolated in terms of its protection in the Equality Act, but that its infringement is the basis for the application of the Act. The infringement of any other right would require the institution of proceedings in a different forum.¹²²

¹¹⁹ *Bench Book* 186-187.

¹²⁰ See 5.2.

¹²¹ Section 20(2) and Regulation 6(1). See also form 2. The information discussed below is taken from Part E of Form 2.

¹²² In *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) the *amicus* argued that the right to freedom of expression had to be considered as a self-standing right which had been infringed. This submission was contested by the applicant (and the school governing body) on the basis that the Equality Act formed the basis of the litigation and that it dealt only with the right to equality (para 93). Langa CJ, on behalf of the majority, responded as follows to the contention (para 94): 'It is unnecessary in this case to decide whether it is possible to rely directly on the right to freedom of expression under the Equality Act, or whether the ban on the nose stud is an unjustifiable limit on that right. It suffices to say that the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair.'

A complainant is also required to state how the infringement of her/his right has affected her/him and provide particulars of and attach any documents which substantiate the complaint. Lastly, this section of the form requires a complainant to state the relief s/he seeks. The explanation to this section reads as follows: 'Please indicate what assistance you require. The court may make an interim order, declaratory order, an order for the payment of damages, an order that an unconditional apology be made etc'. Without adequate explanation, the unrepresented litigant will be at a loss. This form must be amended and the assistance available under the Act must be set out more systematically. So, for instance, should a separate section of the form be devoted to interim relief, indicating clearly that this form of relief may be granted immediately without hearing the case of the respondent.¹²³ Clerks should also be in a position to explain the remedies under the Act.

No fees are payable for the institution of these proceedings.¹²⁴ Once form 2 has been completed, it is submitted to the clerk of the court.¹²⁵ The clerk of the court has the responsibility to inform unassisted or unrepresented complainants of the right to legal representation or assistance by constitutional institutions or NGOs; the clerk must furthermore inform the person of the rights and remedies s/he has in terms of the Act and assist the person further by explaining the procedure and reading and explaining documentation to her/him.¹²⁶ The importance of the role of the clerk cannot be overstated. The instructions given to complainants in form 2 are cryptic and, without the assistance of a trained clerk or a legal representative, many complainants will be left in the lurch.¹²⁷

Within seven days of the receipt of a complaint set out in form 2, the clerk has to notify the respondent of the complaint against her/him by means of the service of the notice

¹²³ See 5.4.1 above, the discussion of the cases in chapter 7 and see chapter 8.

¹²⁴ Regulation 12(1).

¹²⁵ Regulation 6(1). The clerk is also to open a file for the matter and number it with a consecutive number of the year (Regulation 5(a)). This information must also be reflected in a register in which the particulars of cases are recorded, the case number, the relief requested, the outcome and date of the inquiry and outcome of appeal/review or finding of alternative forum if applicable (Regulation 5(b)).

¹²⁶ Regulation 5(f).

¹²⁷ See 6.6.2.1 below.

contained in form 3.¹²⁸ The respondent has ten days to respond to the complaint and on receipt of a response from the respondent or when the time limit for the submission of a response has expired,¹²⁹ the clerk has to place the matter before the presiding officer within three days. The presiding officer has seven days within which to determine whether the matter is to be heard in the equality court or whether it should be referred to another forum to be dealt with it in terms of the other forum's powers.¹³⁰ In making this decision, the presiding officer must take into account the personal circumstances of the parties, the physical accessibility of the alternative forum, the needs and wishes of the parties (especially those of the complainant) and the views of the relevant functionary at the intended alternative forum.¹³¹ Further considerations relating to the decision to transfer matters, are the nature of the proceedings and whether the proceedings could facilitate the development of jurisprudence.¹³² These considerations mean that the presiding officer cannot take the decision to transfer a matter lightly. Where a complainant has approached the equality court, there is an indication that s/he relies on that institution to resolve her/his dispute. No provision is made for oral submissions from the parties in this regard, and the written information supplied in the complaint form and the response thereto are meant to address this adequately.¹³³ I believe that the scant information provided in these documents does not paint the full picture. The presiding officer has to exercise her/his discretion to refer the matter cautiously in light of the limited information provided which could contain no information on the issue of referral.¹³⁴

An equality court will only refer matters over which it has jurisdiction and where it is of the opinion that the other forum will deal with the matter more effectively.¹³⁵ The referral of a matter to an alternative forum takes place in terms of a court order with

¹²⁸ Regulation 7 sets out that this notice must be served personally by the sheriff of the court or by the clerk of the court, or that service may take place by means of registered post or facsimile or email. In the instance of service by registered post, facsimile or email proof must be kept and where service by means of facsimile or email took place, the original form must be sent to the respondent by registered post.

¹²⁹ Regulation 6(2).

¹³⁰ Section 20(3) and (5).

¹³¹ Section 20(4).

¹³² Section 20(4).

¹³³ *Bench book* 101.

¹³⁴ See *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) para 9. See also the discussion of the cases in chapter 7.

¹³⁵ *Bench Book* 101. *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) paras 7 and 10. A decision that the matter is to be dealt with by the equality court is not appealable (para 6).

the equality court clerk formally submitting the matter to the alternative forum and informing the parties of the decision of the presiding officer to refer the matter to an alternative forum.¹³⁶ The alternative forum has to acknowledge receipt of the referral¹³⁷ and report back to the clerk within 60 days after the referral on the progress made in the matter¹³⁸ and inform the clerk of the equality court immediately of the resolution of the matter where this has been attained.¹³⁹ Should the alternative forum refer the matter back to the equality court,¹⁴⁰ the matter has to be dealt with in accordance with the instructions of the equality court in this regard.¹⁴¹ Usually this will entail calling parties to a directions hearing according to the procedure set out below.¹⁴²

Should the court decide to hear the matter, or in the event of a matter being referred back to the equality court by an alternative forum, the clerk of the court is to assign a date for a directions hearing and notify the parties accordingly.¹⁴³ The purpose of a directions hearing is to deal with matters of procedure and administration.¹⁴⁴ No evidence is presented at the directions hearing, but parties may provide their views on procedural issues.¹⁴⁵ The order made by the presiding officer deals only with practical procedural issues as set out in the regulations.¹⁴⁶ These are issues pertaining to:¹⁴⁷

- (i) discovery, inspection and exchange of documents
- (ii) interrogatories
- (iii) admission of facts or documents
- (iv) limitation of disputes
- (v) joinder of parties,

¹³⁶ Section 20(5) and Regulation 6(4) and (8).

¹³⁷ Regulation 6(9).

¹³⁸ Regulation 6(10).

¹³⁹ Regulation 6(11).

¹⁴⁰ Regulation 6(12). The referral from the alternative forum to the equality court must set out the reasons for referring the matter back to the equality court.

¹⁴¹ Regulation 6(13). The instructions must be given within seven days.

¹⁴² Regulation 6(14) and Regulation 6(6).

¹⁴³ Section 20(3)(b) and Regulation 6(5) and (6). Notice of the directions hearing must be served personally on the parties by the clerk or the sheriff of the court (Regulation 7(3)).

¹⁴⁴ Regulation 10(5)(a). Matters of procedure which arise during the course of the inquiry must be dealt with as per regulation 10(11). This subregulation requires a party wishing to obtain an order pertaining to procedural matters to bring a motion application to this effect, after notification of the parties and the court.

¹⁴⁵ Regulation 10(5)(c).

¹⁴⁶ Regulation 10(5)(c).

¹⁴⁷ The list is set out in Regulation 10(5)(c)(i)-(xiii). The order in which these are reflected in the list set out differs from the order in the regulations.

- (vi) interventions by *amicus curiae*
- (vii) service of documents other than provided for in the regulations
- (viii) amendments
- (ix) filing of affidavits
- (x) provision of further particulars
- (xi) procedures relating to urgent matters
- (xii) the manner in which evidence will be presented at the hearing, specifically whether information will be delivered orally or in the form of an affidavit
- (xiii) the date, place and time of future hearings.

In instances where both or either one of the parties is not legally represented, the directions hearing fulfils the important role of informing the parties of the procedure that has to be followed. In the instance of unrepresented parties, the presiding officer is obliged to explain the procedures and the importance of following the procedures to the parties. While the Magistrate's Court Act and Supreme Court Act and their respective rules provide a framework for conducting the proceedings, the guiding principles discussed earlier, and Regulation 10(d) in particular, allow deviation from these rules in the interests of justice, provided that no one is prejudiced by the deviation. This enables presiding officers to shape the procedures of the equality courts in a way that is less formalistic and less intimidating (especially for unrepresented parties), but it will require presiding officers to be more flexible in their approach to rules of procedure while maintaining a strong commitment to fairness and justice in these matters.¹⁴⁸

A detailed discussion of the procedural matters listed above is not necessary for current purposes, as issues relating to procedural matters will be case-specific. It is, however, necessary to make a few brief remarks about some of these issues, specifically as these issues pertain to equality courts at magistrate's court level:

(a) *Amicus*

¹⁴⁸ If the affairs were to be conducted more formally, it would not mean that the Act had been contravened: *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads* Case No 2/2008 (unreported judgment of the Bhisho Equality Court) para 20.

The Regulation set out above opens the door for intervention by an *amicus curiae* in equality court cases, irrespective of whether the equality court is a high court or a magistrate's court. The figure of the *amicus*, while known and used in different ways, had been rarely discussed in legal texts prior to the advent of constitutional democracy.¹⁴⁹ After 1994, and specifically in relation to constitutional litigation, the figure of the *amicus* has become more prominent, while discussions of its role remained limited. The frequency of *amicus* interventions in Constitutional Court matters provides evidence of the usefulness of a friend of the court, especially in matters of constitutional nature which affects the wider public.

The inherent jurisdiction of the high court allows these courts to admit *amici*.¹⁵⁰ While the common law provisions pertaining to the power to admit *amici* still remain, Rule 16A of the Uniform Court Rules now lists definite requirements for intervention by *amicus* when constitutional issues are at stake. A detailed consideration of the requirements in terms of the rule is not necessary for the current discussion. It is important to note that the rule specifically places an obligation on an applicant or a plaintiff to give notice of her/his raising a constitutional issue which must be displayed on a notice board at the court by the registrar of that court. This allows interested parties to take note of constitutional issues before the high court in which they may wish to intervene as *amici*. The Equality Act and the regulations promulgated in terms of that Act make no specific provision for *amicus* interventions and it is submitted that Rule 16A will apply in that instance in view of the fact that unfair discrimination, hate speech and harassment as set out in the Equality Act concern the constitutional right to equality.¹⁵¹

The figure of the *amicus* is not provided for by the Magistrate's Court Rules and, as creatures of statute, these courts' jurisdiction is limited to those matters specifically enumerated in legislation. One could thus deduce that few magistrates are familiar with the role and requirements for *amicus* intervention. Intervention as a party is different from intervention as an *amicus*. The latter requires no direct and substantive

¹⁴⁹ Murray 240-241.

¹⁵⁰ See for instance *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 254.

¹⁵¹ It may be argued that the application of this rule will slow proceedings in the equality court down. This is indeed true, but when one considers the application of the Equality Act as legislation giving effect to a constitutional right, it has to be acknowledged that the involvement of the Constitution is a given.

interest by the *amicus*¹⁵² as is required in the case of the former.¹⁵³ The fact that the *amicus* is unknown at the magistrate's court level, spells no bright future for its regular use in the equality courts at magistrate's court level. The absence of specific rules in this regard further reduces the utility of the figure at this level.¹⁵⁴

The attempt to facilitate greater public involvement in matters concerning unfair discrimination, hate speech and harassment by allowing for *amici* is to be welcomed. An *amicus* intervenes in matters on the basis of information regarding cases made available to members of the public by means of publication on the court's notice board. The absence of such publication regarding equality court cases at magistrate's court level renders this attempt at greater public involvement fruitless.

(b) Evidence and Witnesses

Regulation 10(6) specifically provides that an affidavit made by a witness 'may be allowed as evidence to the same extent as oral evidence unless a party objects thereto', provided that it is in writing, signed by the deponent and it contains a declaration by the deponent that the contents are true to the best of her/his knowledge or belief and that s/he is aware of the fact that perjury is a criminal offence. Such a statement must be provided to the other party at least seven days before the hearing and the witness may be subpoenaed to appear in court and be cross-examined if the presiding officer deems it desirable.¹⁵⁵

The law of evidence, as it applies in civil proceedings, applies in the equality courts, unless otherwise provided.¹⁵⁶ Mere technicalities pertaining to the law of evidence are not to prevail over fairness, the right to equality and the interests of justice in matters

¹⁵² Murray 256-257.

¹⁵³ Erasmus and Van Loggerenberg's discussion of Rule 28-2 and the authorities cited there.

¹⁵⁴ The provision contained in s 21(5) of the Equality Act cannot fill this gap in view of the fact that the figure of the *amicus* is not dealt with by the Magistrate's Court Rules. This subsection reads: 'The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders and interdicts.' The detailed nature of the rules required to ensure proper and efficient functioning of the figure of the *amicus* means that it cannot be dealt with on a case-by-case basis and that general rules must be provided.

¹⁵⁵ Regulation 10(6)(b).

¹⁵⁶ Regulation 10(7).

before the equality courts.¹⁵⁷ This bold provision aims to place substance above form, and it challenges presiding officers to move beyond the confines of the law of evidence which provides security and certainty. Such boldness will require some guidance to be given to presiding officers. The *Bench Book* does not provide such guidance and, in the absence of guidance, it is unlikely that presiding officers will venture from the position of security provided by the rules regarding evidence.¹⁵⁸

Both parties may call witnesses at the hearing and the court may also direct that a witness be called to testify.¹⁵⁹ The process for securing the attendance of witnesses at the hearing is provided for in Regulation 8 in terms whereof the clerk issues a subpoena which must be served on the witness. Witnesses are entitled to witness fees and reasonable and substantiated travel and subsistence expenses incurred for the purpose of attending the hearing.¹⁶⁰ Witnesses giving oral evidence are to be sworn in or affirm the truth of their evidence.¹⁶¹ Witnesses may also be required to produce any book, document, statement or object relating to the matter.¹⁶² A party or her/his representative may cross-examine the witnesses who testify on behalf of the other party.

(c) The Environment, Record-keeping and Status of Judgments

All equality court proceedings are to be conducted in an open court unless the court directs otherwise in the interests of the administration of justice.¹⁶³ The environment within which the proceedings are conducted must be, where possible and appropriate, conducive to participation by the parties.¹⁶⁴ One could interpret this requirement to mean that the atmosphere must not be threatening; or one could interpret this to mean that the formal arrangement of court furniture, as is done for purposes of hearing civil and criminal matters, is inappropriate when complaints under the Act are to be considered. The latter interpretation is favoured by the Department of Justice and

¹⁵⁷ Regulation 10(7).

¹⁵⁸ See 6.2.2.1.

¹⁵⁹ See Regulations 8(2) and 8(4)(d).

¹⁶⁰ Regulation 8(4).

¹⁶¹ Regulation 10(8).

¹⁶² Regulation 8(3).

¹⁶³ Section 19(2).

¹⁶⁴ Regulation 10(3).

Constitutional Development.¹⁶⁵ The basis for this interpretation is the assumption that litigants will find such an informal furniture arrangement less intimidating and thus more conducive to their participation in the proceedings. This is not a correct interpretation of the Act's requirements. It is important to note that the Act requires the proceedings to be less formal: no specific requirement is set in relation to the arrangement of court furniture. A formal court setting may be used for equality court proceedings because such a setting does not necessarily mean that the proceedings will be formal.¹⁶⁶

Equality courts are courts of record.¹⁶⁷ Proceedings must be recorded by the presiding officer or by a person appointed by the presiding officer either mechanically or in shorthand.¹⁶⁸

Failure by a complainant to attend a directions hearing or the inquiry itself without reasonable excuse may result in dismissal of the complaint and an adverse cost order against such complainant, provided that the presiding officer is satisfied that the complainant received proper knowledge of such a hearing.¹⁶⁹ The respondent could pay an even higher price for failure to attend the proceedings of the equality court. Apart from an adverse costs order that may follow from such failure for the respondent, the court may order the continuation of the proceedings in the absence of the respondent which leaves the court with only one version of the events.¹⁷⁰

The effect of a judgment of the equality court is the same as that of a high court or a magistrate's court in a civil matter. This means that the execution of an equality court judgment will take place in the same way as the execution of a high court or magistrate's court judgment¹⁷¹ and that the same sanctions for non-compliance with court orders, or relating to the obstruction of execution or judgments or orders and for contempt of court will apply in the equality courts.¹⁷²

¹⁶⁵ See 6.6.2.2 below.

¹⁶⁶ Formal proceedings are not prohibited in terms of the Act: *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads* Case No 2/2008 (unreported judgment of the Bhisho Equality Court) para 20.

¹⁶⁷ Regulation 10(4).

¹⁶⁸ Regulation 10(4).

¹⁶⁹ Regulation 12(3).

¹⁷⁰ Regulation 12(4).

¹⁷¹ Section 19(1)(c).

¹⁷² Section 19(1)(d).

6.4.4 The Inquiry

The inquiry into whether the respondent discriminated unfairly against the complainant, or subjected her/him to harassment or hate speech or whether the respondent has published information that discriminates unfairly against the complainant, will take place at the place and time determined at the directions hearing. Postponements of the inquiry are only allowed in compelling circumstances.¹⁷³ As all other stages of the proceedings in the equality courts, the inquiry has to be conducted in accordance with the guiding principles relating to expeditious and informal processing of cases with emphasis on participation by the parties.¹⁷⁴ The Act and Regulations do not prescribe the format of the proceedings. In the absence of such a prescription, the format prescribed by the court rules for civil proceedings are to be used,¹⁷⁵ tempered by the requirement in respect of informality.¹⁷⁶

Where a magistrate's court sits as an equality court, Rule 29 of the Magistrate's Court Rules will apply *mutatis mutandis* in relation to how the inquiry is to be conducted.¹⁷⁷ The requirements regarding the participation of the parties and the level of informality, as well as the specific provisions in the Equality Act relating to the burden of proof, will require some relaxation and/or adaptation of the rules. This means that both complainant and respondent may address the court by way of introduction, stating the issue to be decided.¹⁷⁸ After these brief introductory statements, the complainant calls her/his evidence. Witnesses called by the complainant may be cross-examined by the respondent,¹⁷⁹ whereupon the complainant may re-examine her/his witness to clear up issues arising from cross-examination. After presenting her/his evidence, the complainant closes her/his case.

¹⁷³ Regulation 10(12).

¹⁷⁴ Section 4. See also Regulations 10(1) – 10(3)

¹⁷⁵ Section 19.

¹⁷⁶ See 6.4.3 and 6.6.2.2.

¹⁷⁷ See Van Loggerenberg and Erasmus 29-2 for a discussion of sections of the Magistrates' Court Act and other relevant rules pertaining to the trial.

¹⁷⁸ Rule 29(3) of the Magistrates' Court Rules; see Van Loggerenberg and Erasmus 29-4.

¹⁷⁹ Regulation 10(10)(a).

It will be recalled that the complainant has to make out a *prima facie* case of discrimination upon which a full burden of proof shifts to the respondent to show, on a balance of probabilities, that the discrimination did not take place, was not on one of the prohibited grounds or that it was not unfair.¹⁸⁰ In cases of hate speech or harassment, the complainant carries the burden of proof to show, on a balance of probabilities that hate speech or harassment has taken place in fact and in law, as per the requirements set out in the Act.¹⁸¹

After the closing of the case of the complainant, the respondent is similarly afforded an opportunity to make out her/his case by calling evidence. After the presentation of evidence by the respondent, her/his case is closed and argument follows during which the complainant highlights the evidence supporting her/his contention regarding unfair discrimination, hate speech, harassment or the publication of information that discriminates unfairly and the respondent that evidence opposing such a conclusion. The complainant has a right of reply.¹⁸²

Rule 29(13) allows a magistrate in a civil trial to question witnesses. The nature of equality court proceedings demands of presiding officers to descend into the arena in inquisitorial fashion and to facilitate participation by the parties in an attempt to further the goals of the Act. Litigants may, despite the attempts of the Act, still experience the court procedures as intimidating. Presiding officers must therefore take care to explain the process to unrepresented litigants to ensure that they understand the process. After the presentation of evidence and argument, the presiding officer is to make an appropriate order in the circumstances. These remedies and orders are discussed at 5.4.

6.4.5 Appeals, Reviews and Referrals from Equality Courts

¹⁸⁰ See 5.3.1.4.1.

¹⁸¹ See 5.3.1.4.2.

¹⁸² Rule 29(14).

Section 23 of the Equality Act provides for appeals and reviews from an equality court to a higher court. Such higher court is stipulated in the Act to be 'the High Court having jurisdiction or the Supreme Court of Appeal, as the case may be'.¹⁸³ A high court hearing an appeal from an equality court at magistrate's court level does not sit as an equality court, but it exercises its appeal jurisdiction as it would in a civil matter.¹⁸⁴ The Supreme Court of Appeal similarly exercises its ordinary appeal jurisdiction and does not sit as an equality court when it hears an appeal from an equality court at the high court level. The Act also stipulates that an appeal may lie directly to the Constitutional Court, subject to the rules of that court.¹⁸⁵

A party aggrieved by the decision of an equality court must notify the clerk of the court and the opposing party of the appeal within 14 days of the order being made.¹⁸⁶ Such a notice must be in writing and set out whether the whole or a specific part of the order is being appealed. The finding of fact or application of law that is contested must be indicated and the basis of the appeal, where appropriate, must be provided.¹⁸⁷ A cross-appeal, complying with the same requirements, may be noted within 15 days of the appeal being noted.¹⁸⁸

The Equality Act provides for the automatic review of the decision of a magistrate sitting as a presiding officer in an equality court that finds that unfair discrimination on an unspecified ground has taken place.¹⁸⁹ The Act further provides that the Minister of Justice and Constitutional Development may refer a stated case to the Constitutional Court or the Supreme Court of Appeal on the interpretation of unspecified grounds of discrimination where conflicting interpretations are forthcoming from the equality courts.¹⁹⁰ Referrals by the Minister are thus limited. Conflicting interpretations of other provisions of the Act cannot be resolved through such referral and an authoritative interpretation based on an appeal or review from the Supreme Court of

¹⁸³ Section 23(1).

¹⁸⁴ Section 23(7)(a). This will mean that the judges who preside over the appeal may not necessarily have undergone training in terms of the Equality Act: *Hopf v The Spar Group (Build It Division)* [2007] All SA 1249 (D) paras 14 and 21.

¹⁸⁵ Section 23(3). This will require compliance with rules 19 and 20 of the Constitutional Court.

¹⁸⁶ Regulation 19(1).

¹⁸⁷ Regulation 19(2).

¹⁸⁸ Regulation 19(2) and (3).

¹⁸⁹ Section 23(5). See also regulation 20 which sets out the procedure applicable in such an instance.

¹⁹⁰ Section 23(4).

Appeal or the Constitutional Court would have to be relied upon by high courts and magistrates' courts faced with the interpretation of some of the more cloudy provisions of the Act. All equality court and appeal court decisions relating to the Act must be reported. It would be impossible for the Minister (insofar as conflicting interpretations of unspecified grounds are concerned) or any other litigant (concerning conflicting interpretation of any other provisions) to pick up on these conflicts unless the matters are reported. To date very few decisions from the high courts sitting as equality courts¹⁹¹ have been forthcoming which means that lower courts are left without proper guidance. The lack of guidance results in conflicting interpretations taking place at magistrate's court level as is evident from the discussion in chapter 7.

6.5 SUPPORT FOR THE EQUALITY COURTS

The equality courts will only contribute to the transformative goals set in the Act, if they are supported and promoted adequately. To this end the Equality Act gives specific mandates to the Equality Review Committee and selected Chapter 9 institutions. I consider these in turn.

6.5.1 Equality Review Committee

Section 32 of the Equality Act provides for the establishment of the Equality Review Committee (ERC). This Committee has seven members who are appointed by the Minister of Justice for terms of five years and who may be reappointed when their terms expire.¹⁹² The members of the Committee are: a senior appropriately qualified judicial officer, the chairpersons of the SAHRC and CGE respectively, a representative of civil society, an expert in the field of human rights (specifically in relation to the right to equality), one member of the National Assembly and the National Council of Provinces respectively.¹⁹³ The ERC is tasked by the Equality Act to advise the

¹⁹¹ The only reported judgments of high courts sitting as equality courts are *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC) and *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC).

¹⁹² Section 32 and s 33(3).

¹⁹³ Section 32(a)-(e).

Minister of Justice and Constitutional Development about the operation of the Act, to advise the Minister on laws that have implications for equality and to submit reports to the Minister on the operation of the Act in which it indicates whether the Act meets its aims and in which it recommends how the Act could be improved.¹⁹⁴ Other tasks assigned to it must also be performed.¹⁹⁵ Administrative support to the ERC is supplied by the Department of Justice and Constitutional Development.¹⁹⁶

On 1 September 2000, the then Minister of Justice and Constitutional Development published a government notice to appoint the members of the ERC.¹⁹⁷ The terms of these members, in accordance with the Act, expired on 31 August 2005. To date no new appointments to this Committee have been made. The Committee has prepared a number of draft reports,¹⁹⁸ which are not available for public consumption. In view of the fact that the Committee has yet to submit a final report to the Minister on any of the aspects set out above, the impact of this body in relation to the implementation and application of the Equality Act has been negligible.

6.5.2 The Role of Chapter 9 Institutions in relation to the Equality Act

Various references have been made to the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE) insofar as these bodies play a role in terms of the Equality Act. So, for instance, I considered the specific standing

¹⁹⁴ Section 33(1).

¹⁹⁵ Section 33(1)(d). So, for instance does the Act provide (s 34) that the ERC is obliged to investigate and recommend within one year as to whether the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status are to be included as listed prohibited grounds. Section 34 of the Act came into operation on 16 June 2003 which meant that the report was due by 16 June 2004. So far, none of the reports of the ERC have been made public.

¹⁹⁶ Section 33(5).

¹⁹⁷ GN 874 in GG 21517 of 1 September 2000.

¹⁹⁸ Nongogo 33-36. The briefing document of the Directorate Victim Support and Specialised Services of the Department of Justice and Constitutional Development which was presented to the Portfolio Committee on Justice and Constitutional Development, the Joint Monitoring Committee on Children, Youth and Persons with Disabilities and the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women as part of its Equality Review Campaign (October 2006) sets the ERC Draft Reports as dealing with (1) additional prohibited grounds (s 34); (2) criminalization of acts of unfair discrimination; (3) discrimination and the insurance industry and (4) monitoring the implementation of the Act and operation of the equality courts.

provision in relation to the SAHRC and the CGE and the roles these bodies could play in the instance of a referral of a matter from the equality court.¹⁹⁹

The ordinary functions of these bodies, that of research and investigations of complaints regarding human rights violations and the promotion of a human rights culture, tie in with their functions of under the Act and the broad constitutional mandate of these organisations to nurture constitutional democracy.²⁰⁰ Chapter 5 of the Equality Act, which has not yet been put into effect, deals with the promotion of equality. This chapter places obligations on the SAHRC and 'other relevant constitutional institutions' to gather information relating to the achievement of equality from any organ of state or any person.²⁰¹ Constitutional institutions like the SAHRC and the CGE are further empowered in terms of this chapter to assist complainants (particularly indigent complainants) to institute proceedings in the equality courts, to conduct investigations in matters referred to them by the equality court and to request regular reports from the Department of Justice and Constitutional Development (DOJ & C) regarding the number, nature and outcome of cases heard by these courts.²⁰² The SAHRC and the CGE will also play a role in the monitoring of the equality plans that are provided for in this chapter of the Equality Act.²⁰³

The failure on the part of the Minister of Justice to bring chapter 5 of the Act into operation has not resulted in complete inaction on the part of the GCE and SAHRC in promoting the Act amongst members of the public. From the annual reports of the SAHRC and the GCE, one can deduce that these organisations have been involved in

¹⁹⁹ See 5.4.12 and 6.3.1.2 above.

²⁰⁰ So for instance, the SAHRC launched investigations and produced reports on a variety of issues in which unfair discrimination and equality are pertinent considerations: various reports on the issue of racism have been published, for example, *Racism, 'Racial Integration' and Desegregation in South African Public Secondary School* (1999); *Faultlines* (2000); *National Conference on Racism: Final Report* (2001); *Inquiry into Human Rights Violations in Farming Communities* (2003); *Report on the Issue of Road Closures, Security Booms and Related Matters* (undated); *Report on Inquiry into Voluntary Associations* (undated); *Freedom of Expression* (2006); *Report of the Open Hearing on Xenophobia and Problems Related to It* (undated). The SAHRC is furthermore also obliged to collate information from the different organs of state in relation to the measures taken to realise socio-economic rights (s 184(3) of the Constitution). It is submitted that the investigations and reports of the SAHRC in relation to these issues are relevant for the right to equality and the eradication of unfair discrimination.

²⁰¹ Section 25(2).

²⁰² Section 25(3) and see regulation 23

²⁰³ Section 25(5) and see regulations 24-25.

the promotion of the Equality Act.²⁰⁴ The DOJ & C has also been involved in public information drives on the Act.²⁰⁵ The publicity drives of the SAHRC, CGE and the DOJ & C have not resulted in a steady flow of cases into these courts.²⁰⁶ The reasons for the under-utility of these structures are varied and have formed the topic of a number of inquiries.²⁰⁷ The lack of public knowledge of the existence of these courts is possibly one of the main reasons for their under-utilisation.²⁰⁸

The SAHRC assisted a number of litigants in the equality courts, and was successful in the many of these cases.²⁰⁹ The pivotal role that the SAHRC has played in litigation in the equality courts is also borne out by the Review Report of Chapter 9 institutions.²¹⁰ However, the Review Committee on the Chapter 9 institutions could not give the same positive feedback in relation to the CGE²¹¹ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in relation to their involvement in matters before the equality courts.²¹² Very few, if any, matters have been dealt with by any of these institutions as a result of a referral from an equality court.²¹³

If the Equality Act is to have a meaningful impact in our society, its goals are to be pursued proactively, both inside and outside the courts. There is little evidence of a proactive stance on the part of all the Chapter 9 institutions in respect of the Act. While it may seem as if considerable time and money have already been spent on informing the public of their rights, what has been done is not enough.

²⁰⁴ CGE *Annual Report* 2004-2005 39, 40, 45, 49, 53 and 61; *Annual Report* 2005-2006 29, 33, 34 and 38. SAHRC *9th Annual Report 2004-2005* 12, 31, 33, 41, 44 and 45. See also SAHRC 'Equality Review' 5.

²⁰⁵ DoJ & C *Annual Report* 2003-2004 14 and 47; *Annual Report* 2004-2005 13 and 44; *Annual Report* 2005-2006 14, 35 and 58; *Annual Report* 2006-2007 14, 37 and 40. See also Nongogo 28-32.

²⁰⁶ The available statistics date back to 2006 and come from a variety of sources. So for example, does the DoJ & C reflect a total of 362 cases reported between January and August 2005: Nongogo 18.

²⁰⁷ See the reports discussed at 6.6 below.

²⁰⁸ See for example *Chapter 9 Institutions Report* 179 and see 6.6.2.3 below.

²⁰⁹ See SAHRC *8th Annual Report* 2003-2004 4 and 29; *9th Annual Report* 2004-2005 25; *10th Annual Report* 2005-2006 28.

²¹⁰ *Chapter 9 Institutions Report* 175-176.

²¹¹ *Chapter 9 Institutions Report* 149-151.

²¹² *Chapter 9 Institutions Report* 136, 138.

²¹³ See SAHRC 'Equality Review' 21 where it is stated that no matters have been referred to the SAHRC. But see SAHRC *10th Annual Report* 2005-2006 28 where it is stated: 'We continued to receive referrals from the Equality Court but at a very minimal scale i.e. only two cases have been referred'. See also *Chapter 9 Institutions Report* 151 in relation to the CGE.

When the promotional aspect of the Act is brought into operation, there will be an obligation on the state to promote and achieve equality.²¹⁴ This will necessarily involve raising awareness regarding equality issues and educational programmes aimed at the eradication of inequality and unfair discrimination. The SAHRC and other constitutional institutions will play an active role in these promotional programmes²¹⁵ which will hopefully have a broader impact than the litigation-driven change in terms of the reactive provisions of the Act.

6.6 RESOURCE ISSUES

6.6.1 Background

In what follows I consider the resource obstacles faced by the equality courts in order to determine whether these structures are capable of realising the goals set out in the Act. For the purpose of this section, I rely heavily on the work done by Institute for Democracy in South Africa (Idasa),²¹⁶ the Centre for the Study of Violence and Reconciliation (CSVR)²¹⁷ and the South African Human Rights Commission.²¹⁸ Brief references will also be made to the Department of Justice and Constitutional Development's 'Briefing to the Parliamentary Portfolio Committee on the Equality Court Project and Progress in the Implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act'²¹⁹ and the report by the Portfolio Committee on Justice and Constitutional Development that formed part of the Equality Review Campaign launched by Parliament in 2006.²²⁰ The Equality Review Campaign

²¹⁴ Section 24(1).

²¹⁵ Section 25.

²¹⁶ S Seedat 'Equality Courts A Report by PIMS-SA at Idasa' (2005) available at http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D771%26oplang%3Den%26PID%3D44%26OTID%3D2 accessed on 6 September 2006.

²¹⁷ P Lane 'South Africa's Equality Courts: An Early Assessment' (2005) Race and Citizenship in Transition Series: Centre for the Study of Violence and Reconciliation available at <http://www.csvr.org.za/papers/paprctp5.htm> accessed on 6 September 2006

²¹⁸ SAHRC 'Parliamentary Equality Review Process' (16 October 2006) available at <http://www.pmg.org.za/docs/2006/061016sahrc1.pdf> accessed on 23 November 2007.

²¹⁹ L Nongogo 'Briefing to the Parliamentary Portfolio Committee on the Equality Court Project and Progress in the Implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act' (undated) 18 available at <http://www.pmg.org.za/viewminute.php?id=8330> accessed on 23 November 2007.

²²⁰ Portfolio Committee on Justice and Constitutional Development *Report on hearing conducted by the Portfolio Committee on Justice and Constitutional Development on the occasion of the review by the*

involved a review of the equality legislation and its implementation by the Portfolio Committee on Justice and Constitutional Development, the Joint Monitoring Committee on Children, Youth and Persons with Disabilities and the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women and Gender. The report of the Portfolio Committee was tabled in April 2007, while the reports of the other committees are still outstanding.²²¹

Before discussing the impediments as identified in these reports, it is necessary to provide a brief background to each of the reports upon which this section is based and specifically to note the dates of publication of each report. The Centre for the Study of Violence and Reconciliation established a Transition and Reconciliation Programme in 1994.²²² Over the years 'the programme has engaged in various research and intervention projects which seeks (sic) to explore the relationship between conflicts of the past, reconciliation, violence prevention and justice, in order to contribute to building sustainable reconciliation and the prevention of conflict, violence and intolerance in South Africa, on the continent and internationally'.²²³ The work in the programme is centred on themes, one of which is 'Race and Citizenship in Transition'.²²⁴ As part of this bigger theme, Philipa Lane, a former intern at the Centre, produced a report entitled 'South Africa's Equality Courts: an Early Assessment' in 2005. This report was completed within eighteen months of the establishment of the first equality courts and presents an appraisal of the early days in the existence of these courts. The report sets out the legal framework for the operation of these courts as provided for by the Equality Act without detailed discussion or analysis of the provisions. In addition, it provides a detailed exposition of three of the first matters in which complaints were made to the equality courts. The report concludes with inferences drawn from the case studies and information obtained through interviews with role players like clerks, officials of the Department of Justice and Constitutional Development and litigants.

Parliament of South Africa on aspects of equality in our society -16 October 2006 (12 April 2007) Announcements, Tablings and Committee Reports No 34 – 2007.

²²¹ Email communication from M Philander (Parliament) 19 May 2008.

²²² CSVR 'Transitional Justice Programme' available at http://www.csvr.org.za/index.php?option=com_content&task=blogcategory&id=5&Itemid=43 accessed on 18 November 2008.

²²³ Ibid.

²²⁴ Ibid.

A similarly early report, also published in 2005, came from Idasa. Shameela Seedat of the Political Information and Monitoring Service at Idasa conducted research into 'the establishment and functioning of the [equality] courts, investigating their level of operation, staff and staff training, complaints procedure, and the nature and outcomes of complaints'.²²⁵ The report drew on information gathered from various equality courts in October 2003, February 2004 and October 2004.²²⁶ Like the CSVR report, this report sets out the legal framework for the operation of the equality courts.²²⁷ It does so on a basis that is very similar to that of the CSVR report, namely by setting out the provisions of the Act without any detailed discussion or analysis thereof. Of more direct relevance to the current discussion is the section 'Findings on the Equality Courts',²²⁸ on which I rely below in setting out the resource constraints. This section of the report relies on direct reports regarding the functioning of these courts from people working in these structures, i.e. presiding officers and clerks.

The SAHRC has been involved in the drafting of the legislation which established these courts, litigation in these courts and through the membership of its chairperson of the Equality Review Committee.²²⁹ The legislative link between this institution and the equality courts places the SAHRC in a position to appraise the work and functioning of these courts meaningfully. The October 2006 report of the SAHRC, which was prepared as part of the Equality Review Campaign, sets out a wide variety of issues pertaining to the equality courts. It provides an assessment of the performance of the equality courts since their inception but also notes the importance of the role of mediation in resolving matters of unfair discrimination, thus advocating the use of not only litigation, but also of alternative dispute resolution methods to resolve such matters.

The Department of Justice and Constitutional Development (DOJ & C) also reported on the functioning of the equality courts and the implementation of the Equality Act to the parliamentary committees steering the Equality Review Campaign. The briefing document of the Department explains the organisational arrangements within the

²²⁵ Seedat 1.

²²⁶ Ibid.

²²⁷ Seedat 17 (part 2 of the report).

²²⁸ Seedat 3 (part 1 of the report).

²²⁹ Section 32(b) of the Equality Act. See also 6.5.2 above.

Department insofar as these affect policy formulation and the development of guidelines and uniform standards for the equality courts.²³⁰ Furthermore, it discusses aspects relating to resource allocation, designation of further equality courts, equipment and furniture for the courts, wheelchair accessibility, human resources and training, case statistics and public awareness campaigns.

6.6.2 Constraints impeding on the Optimal Functioning of the Equality Courts

A consideration of the reports listed in 6.6.1 shows a clear overlap in the identification of constraints preventing the smooth functioning of the equality courts. For the sake of convenience, I cluster different issues together under the headings 'Staffing Issues', 'Logistical Issues' and 'Lack of Public Awareness'.

6.6.2.1 Staffing Issues

The reports highlight two main issues pertaining to staffing issues, namely the inadequacy of training and the proliferation of tasks for both clerks and presiding officers.²³¹ It is appropriate to elaborate upon each of these points. Both the Idasa and CSVN reports mention that the training provided to clerks was perceived to be inadequate by some clerks. It has been pointed out in 6.2.3 above that clerks play a pivotal role and that their functions extend beyond mere administration in relation to equality court matters. If these officials lack the necessary skills, the functioning of the equality court system is jeopardized, since their functions are to advise prospective litigants, to assist illiterate litigants in completing the forms and to ensure that court files are in order and brought to the attention of the presiding officer within the applicable time frames.

The lack of confidence experienced by some clerks in relation to their functions in terms of the Act is not exclusive to these functionaries. Presiding officers are similarly

²³⁰ Nongogo 2.

²³¹ Lane 9, 11; Seedat 15; SAHRC 'Equality Review' 14; Nongogo 7, 22, 25 and 27. In the remainder of this section I provide a synthesis of these references and only include specific references where the source is explicitly relevant.

reluctant to engage with the Act because of their unfamiliarity therewith.²³² The Department of Justice and Constitutional Development seems to be aware of criticisms raised against the training provided to presiding officers and clerks in terms of the Act. As a result, meetings have been arranged with a variety of stake holders (Justice College and the Chapter 9 institutions) to facilitate revision of the training material and courses.²³³

The second issue pertaining to staffing issues revolves around the multiplication of tasks and responsibilities of presiding officers and clerks. Human resources in the South African court structure are already thinly spread. In January 2007, a total of 36 559 cases were classified as 'backlog cases' – with 166 of these being high court cases, 20 125 being regional magistrate's court cases and 16 268 being district magistrate's court cases.²³⁴ It is a well known fact that magistrates' courts are the main points of access to justice in South Africa.²³⁵ Given that the majority of criminal and civil matters are dealt within these structures and that magistrates' courts also function as maintenance courts and children's courts, the concerns that arise as a result of the additional burdens imposed through the provisions of the Equality Act are understandable. The DOJ & C is well aware of this human resource challenge and has responded by appointing permanent clerks to the various equality courts.²³⁶ Permanent clerks have no other administrative responsibilities and are able to spend all their time on equality court matters. The Department's response addresses only the human resource aspect concerning clerks. Magistrates have numerous other responsibilities, and the additional task of presiding over complex equality matters within an unclear legislative framework and with minimum training, may be

²³² SAHRC 'Equality Review' 14.

²³³ Nongogo 25, 27.

²³⁴ PA du Rand 'National IJS Case Backlog Reduction Strategy – 28 March 2007' available at [http://www.npa.gov.za/UploadedFiles/Pieter%20du%20Rand.ppt#530,11,Backlog Statistics – 2006/07](http://www.npa.gov.za/UploadedFiles/Pieter%20du%20Rand.ppt#530,11,Backlog%20Statistics%20-%202006/07) accessed on 7 June 2007.

²³⁵ According to statistics published by the Treasury in the 'National Expenditure Survey 1999' 2 620 327 criminal cases and 1 502 635 civil cases were entered in the lower court for the years 1996/1997. For the same years, 1 499 criminal cases were entered and 107 196 applications were received by the high courts. High courts also dealt with civil appeals (836), criminal appeals (379 from district magistrates' courts and 567 from regional magistrates' courts) and 27 027 reviews during that same period: Treasury 'National Expenditure Survey 1999' available at www.treasury.gov.za/documents/budget/1999/nes/vote_24.pdf accessed on 11 June 2007 188. More recent statistics are not readily available.

²³⁶ Nongogo 21-24.

experienced as overwhelming.²³⁷ In its recommendations flowing from the Equality Review Campaign, the Portfolio Committee on Justice and Constitutional Development recommended that the staffing issues be addressed through continuous training of presiding officers and ‘appropriate’ training for support staff.²³⁸

6.6.2.2 *Logistical Issues*

The view of the Department is that the Act calls for ‘cases to be heard in an informal boardroom-like setting and not in a criminal court room setting’.²³⁹ The Act requires ‘expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings’.²⁴⁰ As a result of the Department’s interpretation of the provision, a considerable amount of money has been spent on boardroom furniture.²⁴¹ The Department’s interpretation is an incorrect interpretation of this principle. The manner in which proceedings are to be conducted is required to be informal, not the setting. An informal boardroom-like setting may encourage parties to participate more freely in the proceedings, but it is not a *sine qua non* for the operation of these courts.²⁴² In my view, the revenue could have been spent effectively had the focus been on efficient and adequate training of court officials and on public awareness.

6.6.2.3 *Public Awareness*

The single most important obstacle identified in the reports is that of lack of public awareness regarding the Equality Act and the equality courts.²⁴³ Despite attempts to raise public awareness,²⁴⁴ awareness levels regarding the courts still remain low. Linked to this obstacle is the lack of understanding among some court officials

²³⁷ SAHRC ‘Equality Review’ 14-15.

²³⁸ *Portfolio Committee Report* 661.

²³⁹ Nongogo 13. In an undated document ‘Minimum Requirements for a Equality Court to Comply with Provisions of Equality Act’ prepared by Nongogo indications are given that the set-up of an equality court is like that of a board room. See 6.4.2.3 above.

²⁴⁰ Section 4(1)(a).

²⁴¹ Nongogo 13.

²⁴² See Lane 27; Seedat 14.

²⁴³ Lane 27, 29; Seedat 5, 22.

²⁴⁴ See 5.2 above.

regarding the equality court being housed at the magistrates' courts.²⁴⁵ An ongoing and thorough information drive among court officials, in the first instance, and among members of the public, in the second instance should be launched. This view is shared by the Portfolio Committee on Justice and Constitutional Development in its recommendations.²⁴⁶ In response to this lack of awareness, the Department has decided to involve other stakeholders, like the Legal Aid Board, the SAPS, health and social workers and teachers in raising awareness regarding the Act.²⁴⁷ In addition, the Department has planned to invest in promotional material, including posters and booklets, as well as the translation of the Act into all official languages.²⁴⁸

From the above it is clear that there are some practical problems that need to be overcome to ensure the smooth functioning of the equality courts. These can be addressed only after a thorough assessment of the extent of these problems has been made. The Equality Review Campaign launched by Parliament could be a useful starting point in this regard.

6.7 CONCLUDING REMARKS

Change driven by litigation is only possible if complaints are received by the courts and if the courts which are to process the complaints function effectively in terms of the prescribed rules. This chapter considered both the issues of functionality and support of and the procedural framework established for the equality courts to deal with complaints under the Equality Act.

Access to justice was clearly foremost in the mind of the drafters of the Equality Act, hence the provision for the designation of magistrates' courts as equality courts. If such a venture is to succeed, magistrates and clerks who have to perform functions in terms of the Act must be empowered to do so through training; and court officials must be given the opportunity – time-wise and duty-wise – to engage with the provisions of

²⁴⁵ Seedat 13. There furthermore seems to be a lack of proper signage at the Equality Courts: Nongogo 32.

²⁴⁶ *Portfolio Committee Report* 661; Nongogo 29.

²⁴⁷ Nongogo 30

²⁴⁸ *Ibid.* It is interesting to note that less than R1m was spent on the promotion of the Act during 2006/2007 while R6m was spent on furniture.

the Act. The possibility for meaningful engagement seems slim within the already over-burdened court system.

The partial relaxation of procedure in the equality courts is similarly problematic. Magistrates and clerks receive brief training on the Act and its application. 'Informal and expeditious' processing of cases is only set as a guiding principle in the Act without specific rules being formulated regarding the conducting of affairs in the equality court. This will mean that magistrates will fall back on that which they know – the formal rules of the magistrates' courts. Despite the good intention to relax procedure and to get members of the community to resolve their disputes surrounding the equality right in a constructive manner, the final result may well be formal litigation in which adherence to the procedural rules may be determinative.

The Equality Act is relatively new and should as such be supported and promoted by the governmental department responsible for the legislation and by the Chapter 9 institutions. It is evident from the discussion above that some effort has been made in this regard, but the steps taken to raise public awareness are inadequate. When chapter 5 of the Act comes into operation a general obligation to promote equality will rest on the state and on individuals.

Chapters 5 and 6 provide an exposition of the Act, its goals and provisions and operational framework, as well as the problems related to each of these aspects. The discussion up to now has considered 'law in books' as opposed to 'law in action'. In chapter 7 I consider 'law in action' by setting out and analysing the processing of complaints by selected equality courts.

Chapter 7

THE INTERPRETATION AND APPLICATION OF THE EQUALITY ACT BY SELECTED EQUALITY COURTS AT MAGISTRATE'S COURT LEVEL

7.1 INTRODUCTION

Academic analysis of legal texts through the application of the conventions of legal interpretation serves several purposes; and among them is the goal to provide clear guidelines to those who apply the law. For litigants, however, the question is whether those who are at the coal face, such as judges, or more pertinently in the context of this thesis, magistrates, are interpreting and applying legislation correctly; that is in ways that serve the objectives of the legislation.

In the previous two chapters I considered the provisions of the Act and its operational framework. In this chapter I put these to the test through an exposition and analysis of the racism complaints dealt with by selected equality courts in order to determine whether practice matches theory.

7.2 CHOICE OF COURT SITES

I had two main considerations when identifying the court sites for collecting information, namely, an adequate volume of cases processed at the particular court and a geographical spread of the magisterial districts. It was also important that the selected court sites should be easily accessible. I identified the four major South African metropolitan areas, Tshwane, Johannesburg, eThekweni and Cape Town as the areas of research. There is more than one magisterial district in each of these city areas and I restricted my selection of court sites to the magisterial district within each of these city areas with the highest volume of cases.

Equality court case statistics are hard to come by. In December 2006 the Department of Justice and Constitutional Development (DoJ & C) provided me with a document entitled 'Monitoring and Evaluating the Implementation of the Operation of Equality Courts: Training of the Presiding Officers and Clerks as Well as the Cases Reported'.¹ This document set out the number and nature of the cases for January to August 2005. As part of its submission in the Parliamentary Equality Review Campaign, the South African Human Rights Commission (SAHRC), in October 2006, provided statistics regarding complaints made to the equality courts, but no indication is given as to the applicable time period.² These sets of statistics were, at the time of the court site selection, the most comprehensive available on equality court matters.

The statistics provided by the DoJ & C listed the nature of complaints made to the equality courts under a number of headings, of which racism was one. The usefulness of this classification system was restricted since hate speech and harassment were listed separately without an indication of the grounds on which the incidents allegedly had taken place. According to the DoJ & C's statistics, the magistrate's court for the district of Pretoria in the Tshwane city area reported the highest number of complaints for that area, namely 78 of which 25 related to racism. The magistrate's court for the district of Johannesburg had the highest number of cases in the Johannesburg City area, namely 32 of which 13 related to racism. In the eThekweni area the magistrate's court for Durban reported a total of 83 cases of which 33 related to racism. In the city of Cape Town, the report reflects a total of 15 complaints lodged at the Kuils River Equality Court with seven of these relating to racism, making this the court with the most cases (and most racism complaints) in the area of the City of Cape Town.

The statistics provided by the SAHRC contain no specific information regarding the nature of the cases heard, but confirms that the highest volume of cases for the magisterial districts of Johannesburg and Pretoria in their respective cities.³ The SAHRC report reflects a total of 22 cases for the magisterial district of Cape Town, while Kuils River is not included on the list. The equality court for Kuils River sits at

¹ Unpublished. These statistics (without the breakdown in respect of the nature of the cases) were also included in the briefing document to Parliament: Nongogo 18-20.

² SAHRC 'Equality Review' annexure.

³ It indicates a total of 77 cases for Pretoria and 54 for Johannesburg.

Blue Downs and all the equality court files are kept there.⁴ The latter is listed as having received a single complaint in the SAHRC report. The SAHRC statistics for eThekweni are similarly sketchy with an indication that statistics for the Durban magisterial district were unavailable.

On the basis of the information available to me, I identified the equality courts for the districts of Pretoria, Johannesburg and Durban as sites to visit to collect information. Insofar as the city of Cape Town was concerned, the picture was hazier: statistically there was no clear frontrunner. I visited both the equality court for the district of Cape Town and the equality court sitting at Blue Downs to determine the number of cases first hand.⁵ I found that the number of complaints involving racism was higher in Cape Town than in Kuils River. On this basis I decided to include the information from the Cape Town court in this analysis.

Prior to visiting each of the identified courts, I contacted the chief magistrate of each court to explain the purpose of my research. I was referred to the court manager and ultimately to the clerk of the equality court who facilitated access to the equality court files.⁶ I then worked through all the court records made available to me to identify the cases based on complaints of racism. Depending on the complexity of the matter, I either made notes (in less complex matters) or obtained copies of the court files (in more complex matters). Some months later I returned to each court site to verify (or update) the information collected.⁷ For this research I did not conduct interviews with any of the role players (presiding officers, clerks or litigants) and the analysis set out below is based on the information that I extracted from the court files, including written judgments and transcribed judgments.⁸ The classification of the nature of the

⁴ Telephonic interview with Mr Mia, court manager at Kuils River Magistrate's Court, on 6 March 2008.

⁵ I visited the Cape Town Equality Court for the first time on 16 August 2007, with a follow up visit on 26 May 2008. I visited the equality court at Blue Downs on 12 and 13 March 2008.

⁶ For the greater part the court officials were helpful and accommodating. On one or two occasions court managers (and officials of the Department) required more information about me as a researcher in view of what they termed the 'sensitive nature of the cases involved'.

⁷ I visited the Pretoria Equality Court on 15 May 2007 and 23 January 2008. My visits to the Johannesburg Equality Court took place on 19 May 2007 and again on 25 and 28 January 2008. I visited the Durban Equality Court on 28 September, 1 and 2 October 2007 with the second visit on 6,7 and 8 February 2008. The Cape Town research visits took place on 16 August 2007 and 26 May 2008.

⁸ In terms of Regulation 10(4) of the regulations in terms of the Act (GN563 of GG26416 of 30/4/2004) the equality court is a court of record. Regulation 10(4)(b) further provides that 'the proceedings at an inquiry must be taken down in shorthand or recorded by mechanical means and may be transcribed only if the presiding officer so directs or where required by the Act'. Where no written judgment was on

complaints set out below is based upon the version of the facts presented by the complainant on the complaint form.

7.3 THE NUMBER AND NATURE OF CASES INVOLVING COMPLAINTS OF RACISM

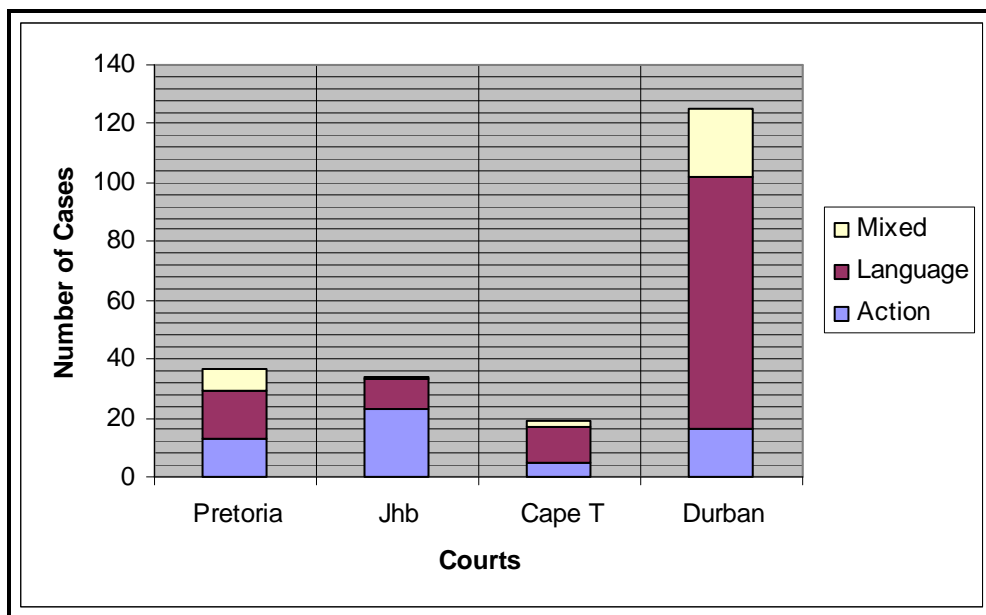
Available court files for the period 16 June 2003 to 31 December 2007 were reviewed. Complaints made prior to 31 December 2008 were taken into consideration for the purpose of establishing the total number of complaints. Only judgments delivered prior to 31 December 2007 were taken into consideration for the purpose of this analysis.

For the purpose of classification, I divided the matters into two main categories, namely complaints involving some action which harmed the dignity interest protected by the equality right of the complainant as set out in the Act on the latter's version (e.g. denial of benefits or harassment through conduct) and complaints involving the use of language which impaired the dignity interest of the complainant according to her/his version (e.g. hate speech, the publication or dissemination of information that discriminates unfairly or verbal harassment). In some instances the allegations contained elements of both categories and so I identified a third group as 'mixed' matters. These broad categories were chosen because form 2 does not require complainants to indicate the nature of their complaints with reference to the sections of the Act and consequently complaints are broadly set out in the affidavits without reference to the provisions of the Act.

The graph below provides a summary of the complaints relating to racism in the different equality courts.

the file, I requested the presiding officer to direct that the proceedings be transcribed for this research. My requests were met with positive responses in the majority of instances.

Figure 1: Number and Nature of Cases



For the period (16 June 2003 to 31 December 2008) the available court files for the district of Pretoria reflected that a total number of 37 complaints involving racism. Of the 37 matters, 13 concerned some action impairing the dignity of the complainant according to her/his version, while 16 concerned complaints of hate speech, with the remaining eight matters concerning elements of both. By 31 December 2007 none of the matters was outstanding.

A total number of 34 complaints involving racism were made to the Johannesburg Equality Court for the period concerned. Of these, 23 involved actions impairing the dignity of the complainant and ten concerned the use of racist language. Two matters concerning racist actions had not been finalised by 31 December 2007 and one matter concerning racist language had not been finalised by 31 December 2007. One complaint made to this equality court involved aspects of both action and language infringing the rights of the complainant under the Act.

Since the inception of the courts in June 2003 until 31 December 2007, 19 complaints involving racism were made to the Cape Town Equality Court. Of the 19 complaints five involved complaints of impairment of the equality right of the complainant through some action, while the majority, 12 complaints, involved the use of racist language

and a further two complaints involved a combination of language and action. By December 2007 three of the 19 matters had not been finalised and their outcomes have thus not been considered.

For the period under consideration, a total of 125 complaints concerning racism have been reported to the Durban Equality Court. The vast majority of these complaints, 86, concerned the use of racist language, while 16 concerned some action which impaired the dignity interest of the complainant. A further 23 matters concerned both language and actions impairing the complainant's rights. Two matters concerning the use of racist language, one matter concerning racist actions and one mixed complaint had not been finalised by 31 December 2008.

The limited number of court sites considered for the purpose of the current research makes it impossible to draw general inferences concerning practices in all equality courts at the level of magistrates' courts, although one can isolate practices that ought or ought not to apply throughout the system. The concluding section of this chapter aims to identify the successes and failures common to the selected equality courts for the purpose of suggesting improvements to the Act and court system in general.

My analysis of the judgments focuses on the interpretation of the provisions of the Act and their application rather than on the weight attached to evidence adduced in a specific case.

7.4 KEY TO CASE REFERENCING

For ease of reference I assigned codes and numbers to the cases that are presented in the tables below:

- PA Pretoria Equality Court, complaint involving action
- PL Pretoria Equality Court, complaint involving language
- PM Pretoria Equality Court, mixed complaint involving action and language
- JA Johannesburg Equality Court, complaint involving action
- JL Johannesburg Equality Court, complaint involving language

- JM Johannesburg Equality Court, mixed complaint involving action and language
- CA Cape Town Equality Court, complaint involving action
- CL Cape Town Equality Court, complaint involving language
- CM Cape Town Equality Court, mixed complaint involving action and language
- DA Durban Equality Court, complaint involving action
- DL Durban Equality Court, complaint involving language
- DM Durban Equality Court, mixed complaint involving action and language

In the following sections, when analysing the cases, I refer to all cases using the code followed by a number (PA5, or JL10, for example); but where cases are discussed in more detail I refer to the case name as well to facilitate identification (e.g., *Kollapen Narandren v JH du Preez* (PA1)).

7.5 THE PRETORIA EQUALITY COURT

7.5.1 Complaints involving Impairment of the Dignity Interest through Actions

The Pretoria Equality Court received 13 complaints involving the impairment of the dignity interest through actions. Perhaps the most striking aspect of this category of complaints made to the Pretoria Equality Court is that not a single one of these matters proceeded to the inquiry stage. So, insofar as the development of equality court jurisprudence is concerned, the contribution of this court is marginal. Instead, the question to answer is whether the inhibiting factor that kept the Pretoria Equality Court from engaging with the Act was resource-related, jurisdictional and/or a result of the legal framework set by the Act. Table 1 below provides a summary of the matters included in this category.

Table 1: Pretoria Equality Court Complaints involving Racist Actions

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PA1	001/03	<i>Kollapen Narandren</i>	<i>JH du Preez</i>	Resp, hairdresser refused to cut Compl's hair	Service industry	Form 3 served Settlement agreement, acknowledgement of unfair discrimination and impairment of dignity, apology and payment of R10 000 damages and undertaking to train staff to deal with all kinds of hair
PA2	007/03	<i>T Nkhwashu</i>	<i>Doring en Rosie Kleuterskool</i>	Child of Compl denied a place in nursery school	Education	Form 3 served Directions hearing Settlement agreement , unconditional apology to be published in newspaper
PA3	01/04	<i>RN Rahlogo</i>	<i>A Human (area manager Santam)</i>	Compl transferred and white consultant appointed in his place	Work context	Form 3 not served Court: labour law matter
PA4	08/04	<i>TW Singiswa</i>	<i>AME Oberholzer</i>	Compl referred to black employee in bank rather than to consultants who usually deal with inquiries	Banking	Form 3 served Directions hearing Court: dismissed complaint at directions hearing on merits; costs awarded to respondent
PA5	13/04	<i>M Martin</i>	<i>Nu Metro Cinemas</i>	Dispute about leave benefits which were denied to Compl, allegedly on discriminatory basis	Work context	Form 3 served Court: dismissed complaint on papers, matter dealt with in terms of labour law
PA6	15/04	<i>TM Marnies</i>	<i>DA Johnson</i>	Allegation of racial discrimination, unclear statement	Unclear	Form 3 not served Court: cause of action outside jurisdictional area
PA7	003/05 also numbered 02/05	<i>HR Dewrance</i>	<i>Damelin Education Group</i>	Vague complaint about dispute regarding money paid for which receipt reflected lesser amount. Compl alleged discrimination on basis of race	Education	Form 3 not served Court: no <i>prima facie</i> discrimination, to pursue civil claim
PA8	003/05	<i>MTM Tuntulwana</i>	<i>Minister of Defence</i>	Compl as former member of Transkei Defence Force complained of denial of opportunities for promotion and racist attitudes of some instructors	Military	Form 3 not served Court: matter to be dealt with by Minister after protocol was followed

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PA9	07/05	<i>N Mashiane</i>	<i>JJ Hattingh</i>	Compl owner of home in complex with predominantly white occupants. Differential treatment in that complaints of Compl not dealt with; Afrikaans language used in meetings excluded complainant from participation	Residential	Form 3 served Directions hearing Settlement agreement to respect the property rights of complainant and to conduct meetings in English unless majority of those present decide otherwise
PA10	013/05	<i>R Strauss</i>	<i>Pam</i>	Resp, a hairdresser, refused to cut Compl's hair	Service industry	Form 3 not served Status unclear
PA11	20/05	<i>WB Mokone</i>	<i>Department of Correctional Services</i>	C imprisoned. Differential treatment of white and black prisoners with privileges awarded to former group	Correctional facility	Form 3 not served Status unclear
PA12	08/06	<i>A Mokoaditoe</i>	<i>Meadow Glen Home Owners' Association</i>	Compl owner of home in complex with predominantly white occupants. Differential treatment in that white owners were given permission to exceed building restrictions, while same denied Compl	Residential	Form 3 served Court: dismissed on papers
PA13	11/06	<i>F Agbai</i>	<i>National Director of Public Prosecutions and MEC for Correctional Services (Min N Balfour)</i>	Compl, a Nigerian national, previously convicted of money laundering offences, alleged racial discrimination because he experienced difficulties in establishing and running his business	Business/ Crime	Form 3 not served Court: no <i>prima facie</i> discrimination, to pursue review or appeal of sentence/conviction

The complaints in PA10 and PA11 did not proceed to the inquiry stage since the relevant forms (form 3 and form 2) were not served on the respondents or no returns of service were filed. Neither of these files contained any record indicating that the lack of service had been investigated or queried by the clerk of the court. Prior to the issuing of form 3 in PA6 the presiding officer indicated that the cause of action had arisen outside the jurisdictional area of the court. Therefore this matter did not proceed any further. PA7 and PA13 did not proceed because the presiding officer held that the facts of the matters did not disclose *prima facie* cases of discrimination. In these matters, the presiding officer held so prior to the issuing and service of form 3. PA3 and PA5 were shelved on the basis of the complaints involving an employee-employer relationship between the complainant and the respondent. In PA3, a recommendation from the presiding officer prior to service of form 3 meant the end of

the matter, while a similar fate followed for PA5 after service of form 3 and the receipt of the response from the respondent who indicated that the matter was dealt with in terms of labour law.

The reasons for the lack of progress in relation to these matters were resource-related and jurisdictional. Lack of proper management and administration of the files meant that clerks did not follow up on matters sent for service, while the provisions of s 5(3) in relation to the exclusion of the application of the Act in the instances where the EEA applies ousted the jurisdiction of the equality court.⁹

PA1, PA2 and PA 9 were brought to conclusion before the inquiry stage as a result of settlement agreements concluded between the parties. The settlement agreements in PA1 and PA2 were made orders of the court, while the status of the agreement in PA9 is unclear. While these settlement agreements meant that the court did not develop its jurisprudence in relation to matters of unfair discrimination, these agreements illustrate how equality courts and the Equality Act can contribute to the constitutional ideal of transformation in an egalitarian direction. The contribution to transformation is tangible in each instance; the respective respondents acknowledged that they had breached the equality rights of the respective complainants, they apologised and the parties agreed upon a mutually acceptable remedy. In *Kollapen Narandren v JH du Preez* (PA1) the respondent acknowledged that the complainant had suffered unfair racial discrimination and an impairment of his dignity at the hands of the respondent when the complainant was refused a haircut at a salon belonging to the respondent. The respondent apologised and undertook not to discriminate in a similar fashion in future by ensuring that all his staff was trained to cut different textures of hair. The respondent furthermore undertook to pay R10 000 to a charity of the complainant's choice. This settlement agreement furthermore incorporated steps to address the cause of the unfair discrimination in that it required the SAHRC to liaise with the Hairdressing Bargaining Council and service providers 'to determine the feasibility of insisting that all hairdressing courses should equip trainees to cut the hair of all South Africans'. This report was to be submitted to the Equality Court by 15 December 2005. There was no copy of such a report on the court file. In *T Nkhwashu v Doring*

⁹ See 6.3.1.1 and 7.9.

en Rosie Kleuterskool (PA2) the settlement agreement contained an apology by the respondent and an undertaking to publish an apology in a newspaper which was duly done. In *N Mashiane v JJ Hattingh* (PA9), the parties agreed to rely on the relevant legislation to protect the interests of home owners living in the complex and to make meetings accessible to the complainant by translating the proceedings if need be.

Two other matters which I have included in this broad category, are to be considered individually since their unique facts resist clustering them with other matters included in this category.

In the matter of *TW Singiswa v AME Oberholzer* (PA4), the complaint was that inferior service had been provided to the complainant on account of his race at a bank of which the respondent was the manager. The respondent was cited in her personal capacity. At the directions hearing the parties – the respondent being represented and the complainant appearing in person – addressed the court at length on the merits of the matter. The presiding officer dismissed the complaint because the complaint revealed no *prima facie* case of discrimination as was argued by the respondent's representative. The scheme of the Act does not provide for the merits of a case to be addressed at the directions hearing. The unrepresented complainant was thus not given an opportunity to adduce evidence in support of his complaint and lack of compliance with the scheme of the Act is problematic.

The last matter in this category, *MTM Tuntulwana v Minister of Defence* (PA8), involved a former member of the Transkei Defence Force which had been incorporated into the South African National Defence Force after 1994. The complaint was that former members of the homelands' defence forces had been overlooked or sidelined when it came to promotions in the National Defence Force. The founding affidavit of the complainant alleged racism on the part of some of the instructors in the National Defence Force. Prior to the issuing of form 3, the presiding officer indicated that the matter was to be dealt with by the Minister of Defence 'after protocol was followed'. No reasons were advanced for this decision. It is clear that the Employment Equity Act does not apply in this instance.¹⁰ The refusal of the court to

¹⁰ See 6.3.1.1.

engage the matter left the complainant without a chance to secure a remedy in terms of the Act.

7.5.2 Complaints involving the Impairment of the Dignity Interest through the use of Racist Language

The vast majority of complaints received by the Pretoria Equality Court involved the use of racist language in different contexts. As in the instance of actions impairing the dignity of the complainant none of the complaints made to the Pretoria Equality Court reached the inquiry stage. Table 2 below provides an overview of the complaints.

Table 2: Pretoria Equality Court Complaints involving Racist Language

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PL1	02/03	EP Mazibuko	S vd Westhuizen and D vd Westhuizen	Racially demeaning language, unclear statement	Work context	Form 3 not served Court: complaint unclear
PL2	04/04	ZA Tukulo	C Nauschutz	Compl called a 'kaffermeid' by Resp who also dismissed Compl	Work context	Form 3 served No further progress
PL3	007/04	S Thivhleli	G van Staden	Compl called 'a kaffir' by Resp on two occasions	Work context	Form 3 served Settlement agreement, damages of R2000
PL4	18/04	KS Xokswa	K Bhamjee	Compl told to 'go to black president for salary' by Resp	Work context	'No service' return for service of form 3 Unclear
PL5	21/04	JM Khoza	A Vermeulen	Resp said to Compl 'you are sitting on your ass, kaffir'	Work context	Form 3 not served Court: Labour Court matter; recommend <i>crimen iniuria</i> charge
PL6	23/04	KW Moloantoa	RPGHR Services	Resp refers to employees as 'kaffirs' and called them 'baboons' and 'stupid'	Work context	Form 3 not served Court: Labour Court matter; recommend <i>crimen iniuria</i> charge
PL7	12/05	TS Maluleke	Ocean Basket	Resp told Compl that 'black people can never work as waiters'	Work context	Form 3 not served Court: labour law matter

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PL8	25/05	<i>FK Tshinguta</i>	<i>EN Maluleke</i>	Resp made xenophobic remarks towards Compl	Work context	Form 3 not served Court: matter to be taken up with employer
PL9	25/05	<i>PM Mbatha</i>	<i>F Nana</i>	Resp called Compl 'a kaffir'	Social	Form 3 served Court: on papers, matter struck off roll and referred to family advocate
PL10	26/05	<i>EK Moeketse</i>	<i>JG van Aswegen</i>	Resp called Compl 'a baboon'	Banking	Form 3 served Court: cause of action outside jurisdictional area
PL11	29/05	<i>MO Mphahlele</i>	<i>N Mthimunye</i>	Resp said to Compl that he was 'behaving like a white person'	Wage negotiations	Form 3 not served Court: not equality court matter
PL12	02/06	<i>KM Maahlo</i>	<i>C Apple</i>	Compl called 'a kaffir' and 'a bitch' by Resp	Work context	Form 3 not served Status unclear
PL13	03/06	<i>A Mabena</i>	<i>A Roux</i>	Resp called Compl 'a baboon'	Work context	Form 3 not served Court: labour law matter
PL14	07/06	<i>J Mabena</i>	<i>Kalie</i>	Resp called Compl 'a kaffir' and insulted him by saying 'umsunu ka nyoko' (Your mother's backside)	Work context	Form 3 not served Status unclear
PL15	02/07	<i>MP Molala</i>	<i>CJ Prinsloo</i>	Resp called Compl's child 'a baboon'	Residential	Form 3 served Written apology
PL16	10/07	<i>LS Manaka</i>	<i>W du Plessis</i>	Resp called Compl 'an animal', or said that 'he was not a human being'	Work context	Form 3 served Court: dismissed on papers

The work context proved to be the most fruitful context for complaints regarding racist language, with 12 complaints (PL1, PL2, PL3, PL4, PL5, PL6, PL7, PL8, PL12, PL13, PL14, PL16) arising in this context. I use the term 'work context', instead of the narrower term 'employment context' because the affidavits of the complainants do not always clearly indicate whether the complainants' relationships to the respective respondents were ones of employment or whether they were working as independent contractors. To enable equality courts to deal effectively with complaints arising in the work context more facts are to be supplied. So, for instance, the nature of the

relationship between the parties should be indicated pertinently.¹¹ The exposition of the cases illustrates the difficulties that arise when little or no information about the work relationship is provided.

The relevant forms concerning the complaint in PL1 were not served since the presiding officer indicated that more information was required prior to it being sent for service. No further information was recorded on the file. In a further six of the 12 matters concerning the use of racist language in the work context listed above (PL2, PL3, PL4, PL12, PL14, PL16), the Pretoria Equality Court was willing to take the matters up. This is evident from the instructions given by the presiding officer to the clerk to issue of form 3. The documents were served in three of these six matters (PL2, PL3, PL16), with a 'no service' return filed in one other instance (PL4) and no returns of service received in the two remaining matters (PL12, PL14). Of the three matters in which progress was thus possible (PL2, PL3, PL16), one was settled (PL3) with the complainant receiving R2 000 in damages from the respondent who (temporarily on the respondent's version) employed the complainant. In PL2 the return of service was filed, but no further developments were recorded.

LS Manaka v W du Plessis (PL16) warrants more discussion. The complainant indicated that the respondent had said to him that he was not a human being. The complainant interpreted the words used by the respondent (a manager in his place of employment) as a racist insult because he felt that it meant that the respondent viewed him as an animal. Form 3 was served on the respondent, who, in response, provided details to explain the words he had used and the background to the exchange. The background to the exchange was, according to the respondent, the complainant's dismissal from employment following a disciplinary hearing in which the complainant had been found guilty of assaulting a fellow employee. The words used by the respondent were: 'If you are a human being, you will understand....' The respondent explained that he had tried to appeal to the complainant's humanity through his use of these words and that he had had no intention to impair the dignity of the complainant. The respondent added that English was his third language. The respondent stated that the owner of the company had apologised to the complainant

¹¹ See 7.9 and chapter 8.

and tried to explain the context in which the words were used to him. On consideration of the complaint and the response thereto in terms s 20(3), the presiding officer noted that the words of the respondent had to be considered in their context and he dismissed the complaint. The fact that intention is not required in terms of s 10 of the Act did not prompt the presiding officer to direct the clerk to set a date for a directions hearing, neither did the fact that the exchange had taken place in the employment context elicit any response from the presiding officer.

The routes suggested by the presiding officer, prior to the issuing and service of form 3 in the remaining matters arising from the work context were two-fold. In five of these matters (PL5, PL6, PL7, PL8, PL13), upon reading form 2, the presiding officer suggested that the complainant in each instance ought to deal with the matter in terms of labour law. It was suggested that the complainant approach her employer to complain about the xenophobic remarks of her fellow employees (PL8); that the complainant approach the CCMA, Labour Court or Department of Labour to file her/his complaint there (PL5, PL6, PL7, PL13); and in two other cases, that the complainant lay criminal charges against the respondent (PL5, PL6).

There is no logical explanation for the Pretoria Equality Court's differential treatment of the complaints of hate speech arising in the work context. One would at least expect consistency within a particular jurisdiction regarding a response to a particular kind of complaint. I return to discuss this issue below at 7.9.

The remaining matters involving the use of racist language arose from different contexts and it is necessary to consider these more closely. The complaint in PL15 arose because of strained relations between the parties who lived in close proximity to one another. The complaint was that the respondent had called the complainant's child a 'baboon'.¹² The complainant requested an unconditional apology. In his

¹² On the use of the term 'baboon' in the context of a claim of defamation see *Mangope v Asmal* 1997 (4) SA 277 (T) 286I-287B: 'The definition of baboon in *Chambers Twentieth Century Dictionary* is given as:

"n. large monkey of various species, with long face dog-like tusks, large lips, a tail, and buttock-callosities; a clumsy, brutish person of low intelligence."

Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described

response to the complaint, the respondent explained his words and indicated that he had no intention to impair the dignity of the complainant and his child. The respondent thus contended that the context in which the word had been used, meant that it did not amount to hate speech and that it did not impair the dignity interest of the complainant or his child. The respondent nonetheless apologised for the word used and this apology was accepted. The order of the court indicated that an unconditional apology was to be made in writing. With that the matter was concluded.

The remaining four matters (PL9, PL10, PL11) involving the use of racist speech were not dealt with by the court for a variety of reasons.

The complaint in PL9 was that the respondent had called the complainant a 'kaffir' in the course of a telephone call. After service of form 3, the respondent retorted that the complainant had had an affair with her (respondent's) husband and that the complainant had called her a 'coolie bitch'. On reviewing the complaint, the presiding officer indicated that the matter be struck off the roll and referred to the family advocate. The complaint was not formally referred to the family advocate. The basis for the informal referral is unclear.

In PL10 the complaint was that the respondent called the complainant a 'baboon' when the complainant, a clerk in a bank, tried to serve the respondent who insisted on being served in Afrikaans. Form 3 was served on the respondent. The response of the respondent was that, in the first instance, the Pretoria Equality Court had no jurisdiction to hear the matter since the cause of action arose outside its area of jurisdiction. He furthermore explained what he had said and tendered an apology.¹³ Upon reviewing the matter in terms of the prescribed procedure, the presiding officer indicated that the Pretoria Equality Court had no jurisdiction to deal with the matter, but noted that the complainant had to be informed of the apology tendered by the respondent. It is unclear whether this was done.

as a human being. It will depend on the circumstances and on the views of those to whom the words are addressed. It follows, I think, that the words are capable of a defamatory meaning.'

¹³ The respondent denied that he had the intention to impair the dignity of the complainant and he indicated that he said to the complainant 'moet nou nie 'n bobbejaan wees nie...' meaning that the complainant should not to insist on helping him, but should call someone who could help him in Afrikaans. See note 12 above.

PL11 is by far the thorniest complaint. The complainant in this matter represented the employer during wage negotiations where the respondent represented the interests of union members as a member of the union. Towards the end of the meeting and according to the complainant, in relation to a matter wholly unconnected to the negotiations, the respondent told the complainant that he was 'behaving like a white person'. Both parties were black, according to apartheid racial classification. The presiding officer indicated that this was not a matter for the equality court and advised that the parties were to seek other legal remedies. The complainant indicated that he suffered emotionally and psychologically and 'endured feelings of degradation and worthlessness'. According to the complainant, words based on a prohibited ground (race) were directed at him with the intention to be hurtful or to promote or propagate hatred. Does that not constitute a case which the respondent has to answer? The presiding officer in this instance did not view the matter in this light.

7.5.3 Complaints involving the Impairment of the Dignity Interest through Actions and Language

Eight complaints involving both actions and language that harmed the dignity interest of the complainant were received by the Pretoria Equality Court. No inquiries were held into any of these complaints. Table 3 provides an overview of the complaints.

Table 3: Pretoria Equality Court Mixed Complaints

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PM1	09/04	<i>S Tsakana</i>	<i>P Visser</i>	Resp called Compl 'a kaffir', accused Comp of theft and set dogs on Compl	Work context?	Form 3 not served Court: clerk to inform complainant that charges of <i>crimen iniuria</i> and assault be laid
PM2	020/04	<i>ZA Ismail</i>	<i>Dean and Mrs G Boniface</i>	Compl called 'a fucking bitch and a black woman' by Resps who threatened to have her killed	Work context	Form 3 not served Court: recommend charge of <i>crimen iniuria</i> and intimidation
PM3	002/05	<i>TG Phiri</i>	<i>JD Bouers</i>	Resp unduly critical of work done by Compl, owner of small black company, use of 'fowl' [foul] language	Building industry	Form 3 not served Court: matter to be referred to Labour Court

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
PM4	04/05	<i>PMS Moleke</i>	<i>Veronica</i>	Compl called 'a black bitch' by Resp who threatened to shoot her and told Compl 'to go to the township'	Residential	Form 3 not served Court: recommend: charges of <i>crimen iniuria</i> , intimidation or application for interdict
PM5	10/05	<i>MI Kudu</i>	<i>J Jansen van Rensburg and P du Plessis</i>	Compl called 'a kaffir' by Resps who assaulted him and forced him 'to accept' that he was 'a kaffir'	Unclear	Form 3 not served Court: criminal matter
PM6	06/06	<i>BR Sikonela</i>	<i>D Olivier</i>	Resp said that Compl was not a good worker, Resp called Compl 'a kaffir' and harassed him	Work context	Form 3 not served Court: labour law matter
PM7	12/06	<i>S Malouw</i>	<i>J Swanepoel, J Lourens and J Greyling (on behalf of Life Health Care Group)</i>	Resps used the words 'fucking kaffir' and harassed Compl	Work context	Form 3 not served Court: labour law matter
PM8	01/07	<i>MH Mofokeng</i>	<i>R von Hagen</i>	Resp threatened to slap Compl and called Compl 'rubbish'	Work context	Form 3 not served Court: labour law matter

Form 3 was not served on the respondents in any of the matters. The presiding officers who reviewed form 2 according to the practice in that court, were of the opinion that none of the matters were equality court matters. There were two standard responses involving informal recommendations to pursue the avenues of criminal law and labour law.

The presiding officers reviewing the complaints in PM1, PM2, PM4 and PM5 advised the complainants to approach the SAPS with their complaints. This advice was given despite the clear indication in the Act that its provisions exist alongside any relevant criminal proceedings.¹⁴

The presiding officers scrutinising the complaints in PM3, PM6, PM7 and PM8 concluded that these matters had to be dealt with in terms of labour law. There was no inquiry into the nature of the relationship between the parties in any of the instances.

¹⁴ See 5.4.9 and 5.5.2.

7.6 JOHANNESBURG EQUALITY COURT

7.6.1 Complaints involving Impairment the Dignity Interest through Actions

The majority of racism complaints to the Johannesburg Equality Court concerned complaints regarding the denial of benefits or opportunities or the provision of inferior services on the basis of race. The majority of these matters did not proceed to the inquiry stage. Table 4 below provides an overview of the matters.

Table 4: Johannesburg Equality Court Complaints involving Racist Actions

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
JA1	01/04	Manong & Associates (Pty) Ltd	The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission	Procurement policy of Resp unfairly discriminating against black engineering firms of which Compl is one	Procurement	Form 3 served Directions hearing Inquiry Judgment in favour of complainant
JA2	06/04	T Singiswa	J March (FNB Manager)	Compl removed from bank when he entered to make enquiry	Banking	Form 3 served Settlement agreement
JA3	07/04	TM Singiswa	JN de Freitas	Compl harassed and humiliated when he went into Resp's supermarket	Commerce	Form 3 served Settlement agreement
JA4	08/04	Manong & Associates (Pty) Ltd	Johannesburg Road Agency, The Managing Director, Jhb Road Agency, Mayor, City of Jhb and Auditor-General	Procurement policy of Resp unfairly discriminating against black engineering firms of which Compl is one	Procurement	Form 3 served Adjourned <i>sine die</i>
JA5	10/04	TM Singiswa	H Banks (Standard Bank)	Compl's business proposal rejected by Resp, allegedly on basis of race	Banking	Form 3 not served Status unclear
JA6	On same file as 10/04 Un-numbered	TM Singiswa	C Saunders	Compl harassed by security guards at shopping centre managed by Resp	Commerce	Form 3 not served Status unclear

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
JA7	02/05	VP Whyte	J Maree of Standard Bank	Complaint regarding exclusion of South Africans of Chinese descent from BEE	Work context	Form 3 served Court: labour law matter
JA8	05/05	TM Singiswa	SAHRC	Resp refused to represent compl in equality court	Legal representation	Form 3 served Court: complaint vague; internal remedies must be exhausted
JA9	09/05	TM Singiswa	Liberty Group Properties Pty Ltd	Compliant that Resp has no programme in place for advancement of previously disadvantaged individuals	Business	Form 3 served Court: no cause of action under Act
JA10	13/05	I Dethanie	DH Botha, Du Plessis and Kruger Inc	Compl, employed in law firm as messenger, did work of articulated clerk, not remunerated accordingly. Compl alleged that this was racially discriminatory	Work context	Form 3 served Court: labour law matter
JA11	16/05	MD Kaunda	Galaxy World	Compl requested to move from bench in arcade managed by Resp, alleged that it was because he was black	Commerce	Form 3 served Directions hearing Inquiry Judgment complaint dismissed
JA12	17/05	AR Vajeth	A Griffith	Compl denied benefits in profit-sharing BEE deal by Resp	Business	Form 3 served Court: no cause of action disclosed on papers
JA13	20/05	KT Smith	Minister of Agriculture	Compl previously denied loan from Land Bank, complaint of racial discrimination against previously disadvantaged individuals by Resp	Governmental service delivery	Form 3 not served Court: no cause of action disclosed
JA14	21/05	VP Whyte	Standard Bank	Complaint regarding exclusion of South Africans of Chinese descent from BEE	Work context	Form 3 served Court: labour law matter
JA15	22/05	VP Whyte	Minister of Trade and Industry	Complaint regarding exclusion of South Africans of Chinese descent from BEE	Statutory exclusion	Form 3 not served, incorrect details
JA16	23/05	VP Whyte	Financial Sector Charter Service	Complaint regarding exclusion of South Africans of Chinese descent from BEE	Statutory exclusion	Form 3 not served, incorrect details
JA17	24/05	VP Whyte	Minister of Trade and Industry	Complaint regarding exclusion of South Africans of Chinese descent from BEE	Statutory exclusion	Form 3 not served, incorrect details
JA18	28/05	M Seema	The Chairperson and Trustees of River Mews; and Mr and Mrs Cannon	Compl owner of house in complex with predominantly white occupants represented by Resp. Allege differential treatment on racial basis	Residential	Incomplete form 3 served Court: complaint unclear; procedural issues
JA19	33/05	TM Singiswa	S van Vollenhoven and Dali Mpofo of the SABC	Compl wanted to produce a documentary on white Afrikaners and Resp declined contract for its production	Business	Form 3 served Court: no cause of action under the Act
JA20	08/06	AR Vajeth	Minolta SA	Compl denied benefits in profit-sharing BEE deal by Resp	Business	Form 3 served Court: no cause of action disclosed

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
JA21	09/06	RM Mollo	CEO SAHRC	Compl requested information from Resp and alleged that he was denied access to the information on the basis of race	Information requested	Form 3 served Court: no cause of action under the Act
JA22	02/07	J Jennifer (SAHRC)	Glenvista High School (Principal Mr M Robinson)	Son of Compl excluded from Resp school rugby team that went on overseas tour because 'he is of colour'	Education	Form 3 served Directions hearing Settlement agreement regarding criteria for selection of teams
JA23	Un-numbered Papers of file 02/07	SAHRC representing D Hirohito	Back of the Moon Restaurant and Audreo de Almeida	Compl (Hirohito) denied access to restaurant by Resp Referral from SAHRC	Business	Status unclear

7.6.1.1 Complaints not Advancing to the Inquiry Stage

Settlement of three complaints (JA2, JA3, JA22) brought an early end to these matters. The settlement agreements in the JA2 and JA3 contain an undertaking from the complainant (the same person in both cases) to withdraw his complaints and to address any issue he may have with either of the respondents to the respondents personally. The settlement agreement in JA22 addressed the core issue of the alleged unfair discrimination more directly, without an acknowledgement on the part of the respondent that his behaviour amounted to unfair discrimination. The complaint revolved around the non-selection of the complainant's son for a school rugby team that was to tour overseas. The complainant contended that his son had been overlooked on the basis of race. The matter was settled when the parties agreed that race was not the only relevant criterion for the selection of sports teams and that teams in future would be selected by a representative panel. This agreement serves the purpose of transformation as envisioned in the Act. The focus is on the future and on taking steps to eradicate unfair discrimination within the particular context.

The complaints in JA5, JA6, JA13, JA15, JA16 and JA17 proceeded no further than the filing of form 2. No reason for the lack of progress is evident from the files relating to the complaints in JA5 and JA6. In JA13 a note from the presiding officer prior to service of the papers, indicated that the complaint did not disclose grounds for the application of the Equality Act. In the matters of complainant *Whyte* (JA15, JA16 and

JA17) incorrect addresses for the respondents were provided and no progress was possible.¹⁵ There was no indication on any of the files that attempts had been made to obtain more information or clarity regarding these complaints.

In JA 18 no progress was made, save for an attempt to serve form 3. On review of the papers, the presiding officer noted that the papers had not been served properly and he held that this failure prevented there being a case before the court. The matter was not followed up by the clerk after this ruling from the presiding officer.

JA7, JA10 and JA14 came to an abrupt end after form 3 had been served and the respondents reacted to the complaints. In each of these instances the Johannesburg Equality Court refused to engage the matter because of lack of jurisdiction. The complaints in these matters stemmed from employment relationships between the complainant and respondent, a point extensively canvassed by the respondents in each instance.

Form 3 was served in six further matters (JA8, JA9, JA12, JA19, JA20, JA21) which did not proceed to the inquiry stage. The complaints were dismissed after the receipt of reactions from the respondents for different reasons, ranging from a failure to exhaust internal remedies (JA8) and the lack of a cause of action under the Equality Act (JA9, JA12, JA19, JA20, JA21).

Form 3 was served on the respondent in JA4, a directions hearing was held and the inquiry commenced but was later postponed *sine die* by consent.

The status of the complaint in JA23 is unclear. The papers reflecting this referral from the SAHRC was inside file 02/07 and contained no indication that the matter was being pursued.

¹⁵ The Transvaal Provincial Division's judgment of 18 June 2008 in *Chinese Association of South Africa v Minister of Labour* case number 59251/2007 (unreported) held that South African Chinese people fall within the ambit of the definition of 'black people' as provided for in the EEA and the Broad-Based Black Economic Empowerment Act 53 of 2003.

7.6.1.2 Judgments

Inquiries proceeded in two matters, JA1 and JA11. In *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission* (JA1), the complainant challenged the procurement policy of the Department of Transport of Gauteng as being unfairly discriminating against black engineering firms. The other matter that proceeded to the inquiry stage was that of *Kaunda v Galaxy World* (JA11). I will discuss these in turn.

The complainant firm in *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission* (JA1) is no stranger to litigation. Several matters of similar, but not identical, ilk have been instituted by the complainant firm in courts – equality courts and high courts – around the country.¹⁶ In the matter before the Johannesburg Equality Court, the complainant firm alleged that the respondents' policy for the appointment of consulting engineers discriminated unfairly on the basis of race in that it denied opportunities to black-owned engineering firms. A second complaint was that the non-appointment of the complainant, in terms of the policy and practices of the respondents, amounted to unfair racial discrimination in contravention of the Equality Act. The second complaint turned on the omission of the name of the complainant firm on the panel list used by the Department for procurement purposes.

The presiding officer recorded his findings in a detailed written judgment in which the policy applied by the Department of Transport was evaluated for compliance with the legal framework for procurement contracts that has its roots in s 217 of the

¹⁶ *Manong & Associates v Director General: Department of Public Works* [2004] 1 All SA 673 (C); *Manong & Associates v City of Cape Town* [2007] 4 All SA 1452 (C); *Manong & Associates v Department of Transport in the Eastern Cape Province* case number 928/06 Equality Court (Bhisho High Court) unreported judgment; *Manong Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport* case number 2/08 Equality Court (Bhisho High Court) unreported judgment.

Constitution.¹⁷ The presiding officer concluded that the Department's policy was irrational insofar as the appointment of structural engineers was concerned and therefore had to be subjected to an audit.¹⁸ In the estimation of the presiding officer, the panel list system utilised by the respondents, and specifically the application thereof in procurement, warranted re-evaluation which could take the form of an audit as envisioned in the Equality Act. Against this background, the presiding officer turned to consider whether the respondent had discriminated unfairly against the complainant.

The court relied on the constitutional framework for the analysis of unfair discrimination, namely, a consideration of whether differentiation had taken place in the first instance, and secondly, whether the differentiation amounted to unfair discrimination as provided for in the Constitution.¹⁹ Based on the facts, it was found that the policy differentiated between historically disadvantaged (HDI) firms and non-historically disadvantaged firms 'without a discernable rationale for doing so'.²⁰ The omission of the name of the complaint firm from the panel list used by the Department further complicated matters since it excluded the complainant firm from possible award of contracts. The complainant relied on s 7 of the Equality Act which prohibits the exclusion of persons of a race group under seemingly legitimate rules and which also prohibits the denial of opportunities on the basis of race. The respondent's attempt to justify the differentiation on the basis that it provided skills transfer, was not accepted since pairing of HDI and non-HDI firms had not taken place.²¹ The effect of the differentiation was to allow for bigger, more lucrative contracts to be awarded to non-HDI firms, while HDI firms had to be content with doing smaller, less lucrative projects.²² Because the discrimination was on the basis of race, the court held that '[i]t automatically follows that the discrimination is unfair: section 13(2)(a)'.²³ It was held that it was not necessary for the complainant firm to show that it would have been appointed to act as structural engineers in specific instances; in fact, the court held

¹⁷ *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission* 01/04 (written judgment).

¹⁸ Para 28.

¹⁹ Paras 29-34.

²⁰ Para 34.

²¹ Paras 36-37.

²² Paras 36-38.

²³ Para 47.

that the onus would be on the respondent to show that it would have appointed another HDI firm as opposed to the non-HDI firm that it had appointed in numerous instances.²⁴ The presiding officer thus concluded that the complainant had suffered unfair discrimination.

Both complaints were thus upheld and the issue of a suitable remedy, specifically in relation to the audit of the Department's policy and in relation to the payment of damages in terms of the Act, became pertinent.²⁵ The procurement policy was referred to the SAHRC for auditing, specific time frames were set for the submission of the policy to the Commission and for the receipt of a report from the Commission as to their findings.²⁶ On the question of damages, the court held that the complainant proved no financial loss as a result of the actions of the respondent and that, accordingly, it could not be compensated for financial loss.²⁷ In respect of compensation for what was termed 'damages in respect of the impairment to dignity, pain and suffering or emotional and psychological suffering as a result of the unfair discrimination',²⁸ the court held that it was necessary to pierce the corporate veil. Manong and Associates, the court held, was a juristic person, made up of human beings (natural persons), which had the authority to bring the complaints as an agent acting on behalf of its shareholders.²⁹ The conduct of the respondent impaired the dignity of the individuals concerned (the natural persons who made up the juristic person) and for that, compensation was justified.³⁰ An amount of R50 000 was awarded.³¹ No order was made as to costs.³²

This early judgment of the Johannesburg Equality Court is important. The court boldly took on the responsibilities placed on it in terms of the Equality Act.³³ The Equality

²⁴ Paras 44, 47.

²⁵ Para 51.

²⁶ Paras 4, 5 and 15(a) (judgment dated 10 December 2004).

²⁷ Para 48 (judgment 7 October 2007).

²⁸ Para 6 (judgment dated 10 December 2004).

²⁹ Paras 8, 10 and 11.

³⁰ Para 12.

³¹ Paras 15, 15(b).

³² Paras 15(c).

³³ A similar challenge brought before the Bhisho High Court sitting as an equality court was brought to an early halt by the presiding officer who held that a challenge to the procurement policies of an organ of state was a constitutional matter over which the equality courts have no jurisdiction: *Manong & Associates v Department of Transport in the Eastern Cape Province* case no 928/06 Equality Court (Bhisho High Court) unreported judgment see pages 10, 12, 13 and 17 of the unreported judgment.

Act clearly envisions that equality courts are to engage with complex constitutional issues which involve unfair discrimination perpetrated by organs of state or private actors through their policies and practices.³⁴ In doing so, the equality courts are to apply the scheme of analysis provided for in the Act. This scheme is based on the Constitutional Court's interpretation of s 9 (also s 8 of the interim Constitution), but is distinguishable from the constitutional analysis put forth by the Constitutional Court in that a specific definition of discrimination is included in the Act, and in that s 14 provides the criteria to determine unfairness.

In *Manong's* case, the presiding officer in the Johannesburg Equality Court relied on the scheme set forth by the Constitutional Court in relation to s 9 with minimal reference to the factors listed in s 14 insofar as the determination of fairness was concerned. The reason for this is not clear from the judgment. The absence of strict adherence to the legislative scheme may point to the unnecessary complexity of the framework for analysis provided for in the Act as discussed in 5.3.1.4.1.

The law regulating government procurement is rooted in s 217 of the Constitution. Procurement is meant to serve as a policy tool contributing to the ideal of transformation.³⁵ The principles to be furthered through procurement policies are those of fairness, equity, transparency, competitiveness and cost-effectiveness. A thorough audit of the respondent's policy can assess whether these principles have been adhered to within the framework set for procurement in the Preferential Procurement Policy Framework Act.³⁶ The remedy of the Johannesburg Equality Court which involved an audit of the respondent's procurement policy, clearly looks to the future and is aimed at the prevention of unfair discrimination by the respondent in future. It thus serves the transformative goals of the Act.

More controversially, the presiding officer decided to award damages to a corporate entity on the basis of the infringement of the dignity of its shareholders. Currie and De

³⁴ In *Manong & Associates v City of Cape Town and others* [2007] 4 All SA 1452 (C) it was held that a complaint of unfair discrimination arising from administrative action could be adjudicated upon in terms of the Equality Act despite the fact that the same complaint would also be justiciable under the Promotion of Administrative Justice Act 3 of 2000 in a different forum.

³⁵ P Bolton *The Law of Government Procurement in South Africa* (2007) LexisNexis Butterworths: Durban 251, 254 and see chapter 10 of this publication.

³⁶ Act 5 of 2000.

Waal point out 'that the Constitutional Court has indicated that juristic persons are entitled only to a reduced level of protection [afforded by the Bill of Rights] as compared to natural persons'.³⁷ The authors elaborate:

'Of greater significance, in our view, is the relationship between the activities of the juristic person and the fundamental rights of the natural persons who stand behind the juristic person. In other words, juristic persons are not in and of themselves worthy of protection, but they become so when they are used by natural persons for the collective exercise of their fundamental rights.'³⁸

If the award of damages to the complainant firm in *Manong's* case is evaluated in this light – as also explained by the presiding officer – criticism thereof diminishes. Clearly the shareholders of the complainant firm as previously disadvantaged individuals aimed to exercise their right to equality as previously disadvantaged individuals by approaching the equality court through the juristic person through which they conduct business. It is thus logical that the dignity interests of the shareholders of the complainant firm as individuals were impaired through the actions of the respondents. In this instance, all the shareholders of the company were black.

The second judgment from the Johannesburg Equality Court is that of *MD Kaunda v Galaxy World* (JA11). The complainant alleged that he was subjected to unfair racial discrimination when he was requested to leave a certain area of an entertainment centre managed by the respondent. The complainant's version was that he was asked to leave because he was a black person. Before the court he testified that an employee of the respondent told him that 'black people were not allowed to sit at that spot because they commit theft'.³⁹ The respondent denied these allegations.⁴⁰ Before evaluating the evidence, the court considered the requirements of the Act:

'[T]he Complainant is required to first establish a prima facie (sic) case of discrimination, in this case on the ground of race, where after (sic) the onus shifts to the Respondent to establish one of various defences. Mainly, firstly that the act complained of did not occur and secondly that the discrimination was not unfair.'⁴¹

³⁷ Currie and De Waal (2005) 38. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) para 18.

³⁸ Currie and De Waal (2005) 38.

³⁹ *Kaunda* (transcribed judgment) 1.

⁴⁰ *Kaunda* (transcribed judgment) 2.

⁴¹ *Kaunda* (transcribed judgment) 2.

In the course of evaluating the conflicting versions of the complainant and respondent, the presiding officer remarked that the version of the complainant seemed improbable in the light of all the evidence adduced.⁴² The presiding officer added that the complainant had not approached the court in good faith⁴³ and he dismissed the complaint with costs,⁴⁴ having followed the usual principle applicable in civil cases, namely, that the successful party is entitled to costs.⁴⁵ The award of costs in this matter may be questioned in view of the fact that the general rule set out in the Regulations provides for each party to pay her/his own costs.⁴⁶ Nonetheless, the presiding officer's approach to the provisions relating to unfair discrimination was correct. In his assessment the evidence presented no *prima facie* case of discrimination, which meant that the complaint had to be dismissed.

7.6.2 Complaints involving the Impairment of the Dignity Interest through the use of Racist Language

Few complaints involving the use of racist language were made to the Johannesburg Equality Court. Table 5 below provides an overview.

⁴² *Kaunda* (transcribed judgment) 5-6.

⁴³ *Kaunda* (transcribed judgment) 7.

⁴⁴ *Kaunda* (transcribed judgment) 7.

⁴⁵ *Kaunda* (transcribed judgment) 7.

⁴⁶ See 5.4.10.

Table 5: Johannesburg Equality Court Complaints involving Racist Language

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
JL1	05/04	<i>A Zulu</i>	<i>V Pillay (Justine Avon)</i>	Resp subjected Compl to race and gender discrimination. Resp said that Compl was 'stupid', 'incompetent', 'loud mouthed' and that she was to 'get her rights from the ANC, because there were none' [at the workplace]	Work context	Form 3 served Court: labour law matter; cause of action outside jurisdictional area
JL2	11/04	<i>BS Moamoga</i>	<i>I Khota</i>	Resp called Compl 'a kaffir'	Business (Independent contractor)	Form 3 not served Court: procedure in Act to be followed; labour law matter
JL3	01/05	<i>G Shabe</i>	<i>G Mackett (Housing Dept Jhb City Council)</i>	Resp called Compl 'a kaffir'	Governmental service delivery	Form 3 served Status unclear
JL4	15/05	<i>SB Moloji</i>	<i>B Pickford</i>	Resp called Compl 'a boy' and 'an animal'	Residential	Form 3 not served Court: cause of action outside jurisdictional area
JL5	18/05	<i>G Khanna</i>	<i>B Schmidt</i>	Resp said to Compl that she was 'Indian trash' and that she had 'to go back to India'	Residential	Incomplete form 3 served, rectified No further progress
JL6	03/06	<i>L Martins, F van Staden and E Mostert</i>	<i>B Sei, S Thompson, C Playandi and D Matsebi</i>	Resps said that they did not want white supervisors, 'white bitches'	Work context	Form 3 served Court: labour law matter
JL7	06/06	<i>M Nxusani</i>	<i>Mr Bashir</i>	Resp referred to Compl as 'a baboon's brother'	Work context	'No service' return for service of form 3 No further progress
JL8	07/06	<i>SN Ngwane</i>	<i>Owner, Manager of Speedy Luggage</i>	Resp called Compl 'a kaffir'	Commerce	Form 3 served Matter pending as at 31/12/07
JL9	01/07	<i>RP Shivambu</i>	<i>G Evans</i>	Compl called 'a camphor' by Resp	Work context?	Incomplete form 3 served Court: no proper service, directions cannot be given
JL10	03/07	<i>Yuling Helen Xia</i>	<i>E Horn</i>	Resp said to Compl that she (Compl) 'was not stupid like other Chinese people'	Business	Form 3 served Court: complaint not found by facts determined on papers

Only JL8 proceeded to the inquiry stage and at the time of my follow-up visit to the court this matter was still pending. Consequently it will not be discussed further.

Procedural and jurisdictional issues brought an early end to most of the other matters. In JL1 and JL4 it was held that the Johannesburg Equality Court lacked territorial jurisdiction because the causes of action arose outside its jurisdictional area. In JL1 form 3 was served on the respondent and the matter was considered by the presiding officer for a determination in terms of s 20(3)(a) when he held that the court lacked

territorial jurisdiction. The determination regarding jurisdiction in JL4 was made prior to service of form 3.

A mix of procedural and other complications prevented JL2 and JL9 from proceeding to the inquiry stage. In JL2 the clerk placed the complaint before the presiding officer prior to service of form 3. The presiding officer indicated that this was procedurally incorrect since service had to take place before the matter was to be considered by the presiding officer. The complaint in JL9 was placed before the presiding officer after service but, upon reviewing the complaint, the presiding officer indicated that the statement founding the complaint had not been sworn. The presiding officer refused to give directions in light of this deficiency. No further progress was noted on either of the files.

A 'no service' return ended the matter in JL7. In JL5, service of an unsworn statement left the matter limping. This was corrected at a later stage, but since then no progress has been recorded. In JL3, form 3 was served and the presiding officer indicated that a date for a directions hearing had to be set. No further progress was recorded on the file.

The confusion brought about by the jurisdictional grey area between the Employment Equity Act and Equality Act also arose in the Johannesburg Equality Court.⁴⁷ In two of the matters referred to earlier (JL1, JL2) the presiding officers remarked that, in addition to the territorial jurisdiction it lacked or the procedural problems that existed, the matters had to be dealt with in terms of labour law. The same was held in JL6 in which a complaint was made in respect of language used by co-workers of the complainants.

An underlying commercial dispute between the complainant and the respondent in *Yuling Helen Xia v E Horn* (JL10) caused the presiding officer to remark that the context in which the exchange between the parties took place meant that the respondent's remark did not amount to hate speech. The presiding officer held that 'the objectionable phrase does not amount to words that can be considered to be hate

⁴⁷ See 6.3.1.1 and see 7.9 below.

speech that would constitute incitement to cause harm'.⁴⁸ This ruling was made when the presiding officer reviewed the matter in terms of s 20(3) of the Act. The complainant alleged that the respondent had said that the complainant was not stupid like the Chinese people from China.⁴⁹ In addition to the comment in relation to the merits of the case, the presiding officer remarked that the complaint's claim to pursue the matter on behalf of 'all Chinese people' was not founded by facts if the matter.⁵⁰

7.6.3 Complaints involving the Impairment of the Dignity Interest through Actions and Language

Improper service of form 3 in the one matter which contained aspects of racism through both actions and language meant that no progress was made with regard to this complaint. No further developments were recorded on the file. Table 6 below provides more detail regarding this complaint.

Table 6: Johannesburg Equality Court Mixed Complaints

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
JM1	32/05	<i>TM Singiswa</i>	<i>Broll Apexi Properties</i>	Hate speech and discrimination (unclear)	Business	Form 3 served? Status unclear

⁴⁸ *Xia* (written judgment) para 6.

⁴⁹ *Xia* (written judgment) para 2.

⁵⁰ *Xia* (written judgment) paras 4-5.

7.7 THE CAPE TOWN EQUALITY COURT

7.7.1 Complaints involving the Impairment of the Dignity Interest through Actions

Few complaints of this nature were made to the Cape Town Equality Court. Table 7 below provides an overview.

Table 7: Cape Town Equality Court Complaints involving Racist Actions

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
CA1	01/03	<i>MG Pillay</i>	<i>M Cronje and I Coetzee</i>	Resp denied Compl access to night club	Recreation	Form 3 served Settlement agreement
CA2	04/05	<i>AE Clausen</i>	<i>SAHRC</i>	Resp refused to investigate Compl's complaint	Chapter 9 Institution	Form 3 served Court: no cause of action under the Act
CA3	07/05	<i>JN Faasen</i>	<i>SAHRC</i>	Resp dismissed Compl's complaint regarding racial classification	Chapter 9 Institution	Form 3 served Court: complaint dismissed on papers, lack of substance
CA4	05/06a b	<i>NNP Ntuli</i> <i>NNP Ntuli</i>	<i>B Edwards</i> <i>Virgin Active</i>	Compl witnessed and intervened in altercation between Resp1 and a cleaner employed by Resp2. Complaint of harassment	Recreation	Form 3 served Directions hearing Inquiry Court: complaint dismissed, lack of standing
CA5	08/06	<i>L Sylvester</i>	<i>JL Singers</i> <i>(Jowell Cape Transport)</i>	Unclear complaint	Business	Form 3 served Directions hearing Pending as at 31/12/07

7.7.1.1 Complaints not Advancing to the Inquiry Stage

The complaint in the high-profile matter of *MG Pillay v M Cronje and I Coetzee* (CA1)⁵¹ was one of the first to be made to any equality court in South Africa. The complainant alleged that he had been denied access to a night club on the basis of his race. The matter was resolved when the parties concluded a settlement agreement which was

⁵¹ *MG Pillay v M Cronje and I Coetzee* 01/03. The court file made available to me set out the complaint and against the two respondents who worked as 'bouncers' at the club. Media reports indicated that the club was cited as a respondent and that a settlement agreement was concluded between the club and the complainant in terms whereof the club was to change its access policy and pay R10 000 to an organisation dedicated to fighting racism and homophobia. I was not able to access this settlement agreement or, for that matter, any of the court documents pertaining to the complaint against the club. M Gophe 'Equality Court Orders City Night Club to Pay Up' *Cape Argus* (11 February 2004) 2; A Kassim 'Equality Court Finds Gay Club Guilty of Racism' (11 February 2004) 3.

made an order of the court. In their unconditional apology, which formed part of the settlement agreement, the respondents acknowledged that access to the night club was denied to the complainant on the basis of race. They acknowledged the unlawfulness of their actions and the hurt and impairment of dignity that it had caused. The settlement agreement furthermore stipulated that each of the respondents were to make a payment of R1 500 to an organisation dedicated to the combating of prejudice against lesbian, gay, bisexual, transgendered and intersexed communities, as nominated by the complainant. The parties also agreed that the complaint would withdraw the criminal charges laid against the respondents. The resolution of the dispute between the parties did not contribute to the development of an equality court jurisprudence, but it can be said that the agreement between the parties furthered the transformative goals of the Act. The complainant had suffered an impairment of his dignity and this was ameliorated by the unconditional apology made to him. At the same time the respondents had to take responsibility for their actions and acknowledge the hurt that they had caused. The agreement that damages were to be paid to an organisation served as a real reminder to the respondents of the price to be paid for unfair discrimination.

The complainants in CA2 and CA3 were aggrieved by the refusal of the SAHRC to investigate their respective complaints. Form 3 was served on the SAHRC in both instances. The complainant in CA2 alleged that the refusal of the SAHRC amounted to discrimination against him on the basis of conscience, political belief and race. The SAHRC's response was that the complaint to the equality court had not disclosed any discrimination and the presiding officer, on scrutiny of the documents, dismissed the complaint on this basis. In CA3 the complaint was directed at the use of racial classification. In its response to the complainant (prior to his lodging a complaint to the equality court) the Commission indicated that racial classification was necessary for the purpose of redressing past injustices and that it thus was not *per se* objectionable. In its response to the Cape Town Equality Court, the SAHRC indicated that the complainant was to appeal internally to the SAHRC and it added that the complaint did not disclose any discrimination as required in terms of the Act. The presiding officer dismissed the complaint for 'lack of substance' on the papers.

7.7.1.2 *Judgments*

The complainant in *NNP Ntuli v Virgin Active and B Edwards* (CA4) approached the Cape Town Equality Court as a result of an incident that took place in the Virgin Active Gymnasium in Tableview. The complainant alleged that she witnessed and intervened in an altercation between the respondent and a cleaner in the employ of Virgin Active and that the altercation had been motivated by racism on the part of the second respondent. The complaint against the first respondent was dismissed on the papers, but proceeded against the second respondent to the inquiry stage, upon which judgment was delivered.

The complaint against the second respondent was one of harassment on the basis of race.⁵² The evidence presented to the court reflected two conflicting versions regarding the events on the day in question.⁵³ In the course of the judgment the presiding officer stated:

‘In evaluating the evidence before the Court, this Court is enjoying [enjoined] to consider the evidence that has been presented in its entirety as well as the scope values and the objectives of the Equality Court Act.’⁵⁴

The presiding officer found that the second respondent’s treatment of the cleaner had been motivated by racism and the fact that she was a cleaner. The respondent’s treatment of the cleaner, according to the presiding officer, amounted to harassment.⁵⁵ The complainant, however, had not been harassed by the second respondent. The presiding officer declined to interpret the alleged assault of the complainant by the second respondent as harassment.⁵⁶ No evidence was placed before the court regarding the inability of the cleaner to act in her own name and the presiding officer declined to award standing to the complainant to act on behalf of the cleaner.⁵⁷ The complaint was therefore dismissed and each party had to pay her own costs.⁵⁸ The presiding officer added that ‘it would be ideal’ for the second respondent to apologise

⁵² *Ntuli* (transcribed judgment) 4.

⁵³ *Ntuli* (transcribed judgment) 5-7.

⁵⁴ *Ntuli* (transcribed judgment) 8.

⁵⁵ *Ntuli* (transcribed judgment) 11-13.

⁵⁶ *Ntuli* (transcribed judgment) 12.

⁵⁷ *Ntuli* (transcribed judgment) 14.

⁵⁸ *Ntuli* (transcribed judgment) 15.

to the cleaner for the indignity that the latter had suffered at the hands of the respondent. This judgment of the Cape Town Equality Court reflects a correct interpretation of the rules of standing as set out in the Act. The suggestion of the presiding officer that the second respondent should apologise to the cleaner furthers the transformative ideals of the Act even though it does not come in the form of a court order.

7.7.2 Complaints involving the Impairment of the Dignity Interest through the use of Racist Language

Twelve complaints of this nature were made to the Cape Town Equality Court as detailed in table 8 below.

Table 8: Cape Town Equality Court Complaints involving Racist Language

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
CL1	03/04	<i>N Gwebu</i>	<i>E Weidemann</i>	Resp made 'discriminating remarks' about Compl's 'language, background' and 'race'	Work context	Form 3 served Court: labour law matter; Referred to CCMA
CL2	06/05	<i>NO Cupido</i>	<i>Hotline Admin Services</i>	Compl complained of racism in workplace, use of word 'kaffir'	Work context	Form 3 served Court: labour law matter
CL3	08/05	<i>VH Dyantjies</i>	<i>Mr Moller</i>	Resp called Compl 'useless'	Work context	Form 3 served Court: complaint dismissed on papers
CL4	09/05	<i>P September</i>	<i>J Allen</i>	Compl called a 'slim kaffer' (a 'clever kaffir') by Resp	Work context	Form 3 served No progress, reason unclear
CL5	09/05	<i>R Mpumelelo</i>	<i>R Boia</i>	Resp dismissed Compl unfairly when he indicated that Compl's management of Resp's restaurant attracted too many 'black' customers	Work context	Form 3 not served Status unclear
CL6	10/05	<i>WC Koorts</i>	<i>Table Mountain Aerial Cableway and J Harrison</i>	Verbal harassment and use of word 'kaffir' in relation to Compl's partner in workplace by Resp	Work context	Form 3 served Written notice of withdrawal
CL7	10/05	<i>CJ Barron</i>	<i>Min of Safety and Security Captain Vokwana</i>	Compl wanted to report crime, wanted to speak to someone in Afrikaans since he is not fluent in English. Resp refused to help him and made comments like 'you coloureds were assisted by the white people' [during apartheid]	Policing	Service? No progress, reasons unclear

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
CL8	01/06	<i>J Mfecana</i>	<i>K Hansa</i>	Resp said that Compl was a 'kaffir [who] is trying to be clever' and that Compl was 'a fucking kaffir'	Work context	Form 3 served Court: labour law matter, referred to CCMA
CL9	02/06	<i>General Workers Association on behalf of F Siswana and another</i>	<i>E du Plooy</i>	Resp called Compl's 'kaffirs' and dismissed them	Work context	Form 3 served Court: labour law matter
CL10	06/06	<i>JN Faasen</i>	<i>Die Burger</i>	Publication of the word 'boesman' by Resp amounts to hate speech, the word means 'orang-utan'	Media	Form 3 served Pending as at 31/12/07
CL11	10/07	<i>JN Faasen</i>	<i>FCB (South Africa)</i>	Advertisement by Resp which depicts San people humiliating and demeaning as it sets them out to be backward and ignorant	Advertising	Form 3 served Court: complaint dismissed on papers
CL12	13/07	<i>CM van der Wielen</i>	<i>A Frey and T Sivell</i>	Resps caused Compl to be dismissed when they said that Compl said that he 'is not a stupid black nigger'	Work context	Form 3 served Note from clerk that Rs to respond Unclear status

The complaint in CL9 was pending on 31 December 2007 and is thus not considered further.

The status of four of the remaining 12 matters (CL4, CL5, CL7, CL12) is unclear. With the exception of CL7, the complaints in these matters arose in the work context. Form 3 was served on the respondents in CL4 and CL12, but no further progress was recorded on either of the files. In CL5 and CL7 form 3 was not served, but both files contained documents that indicated that the respondents were aware of the complaints. In CL5 the complainant filed documents that he received from the CCMA which indicated that the respondent had tendered an apology in full and final settlement of their dispute. In CL7 a letter from the state attorney representing the second respondent indicated some knowledge on the part of the second respondent regarding the complaint. No clear reasons for the lack of progress in these cases were recorded on the file.

The complaint in CL6 was withdrawn in writing after the service of form 3 and the receipt of a response from the respondents who denied the allegations of verbal abuse and harassment.

Five of the six remaining complaints arose in the workplace (CL1, CL2, CL3, CL8, CL9). The approach of the Cape Town Equality Court was not consistent in dealing with these matters; some were referred formally to other forums, while others were not. In *N Gwebu v E Weidemann* (CL1) the complainant alleged that the respondent made some statements during the course of a key performance appraisal meeting in the workplace which amounted to discrimination on the basis of race, gender, background and language. The respondent contended that the equality court did not have jurisdiction to hear the matter in view of s 5(3) of the Equality Act. The court handed down a written judgment on jurisdiction after it had heard the parties on this issue at the directions hearing. The court held that it had to consider the intention of the legislature in its enactment of this section in view of the potential overlap between the Equality Act and the Employment Equity Act (EEA).⁵⁹ The court noted that the 'legislature must have foreseen that potentially many disputes concerning discrimination would originate in the workplace'.⁶⁰ Disputes arising in the context of employment should be dealt with in terms of labour legislation that provides for alternative means of dispute resolution which are not available in the equality court.⁶¹

The intention of the legislature was not for the equality court to become a substitute for the CCMA or labour court.⁶² Thus, in order to determine whether a matter is to be dealt with by the CCMA or equality court, the presiding officer set up a test. The test proposed by the presiding officer, would require one to determine whether the CCMA or Labour Court could deny jurisdiction if a matter was to be placed before it.⁶³ If either of these forums could deny jurisdiction, the equality court would have jurisdiction, and if these labour forums could not deny jurisdiction, the equality court would not have jurisdiction. The presiding officer noted that this had to be determined on a case-by-case basis and that instances could exist in which a labour forum could have jurisdiction only in respect of certain aspects of a matter and not in respect of others. This would mean that the equality court would have to deal with those aspects that fell outside the jurisdiction of the labour forums.⁶⁴ In the current instance, the presiding officer held that the CCMA had jurisdiction to deal with a complaint of

⁵⁹ *Gwebu* 4.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Gwebu* 5.

⁶⁴ *Ibid.*

discrimination arising from a key performance appraisal, since the latter fell within the definition of an 'employment policy of practice' as required by s 6 of the EEA.⁶⁵ On the basis of this finding, the presiding officer referred the complaint formally to the CCMA as per form 5 (giving effect to s 20(5)) contained in the regulations to the Equality Act.⁶⁶

The thorough analysis undertaken by the presiding officer is to be welcomed. The presiding officer's analysis accords with that of Hartzenberg J in *Strydom v Chiloane*⁶⁷ as discussed at 6.3.1.1. But the presiding officer's suggestion that an equality court may have to deal with certain aspects of a complaint arising in the workplace while the Labour Court or CCMA has to deal with the labour issues amounts to compartmentalisation and unnecessary duplication. To avoid such a situation clear guidance is needed, either from a high court or through legislative clarification. The decision to refer the matter formally in terms of s20(5) is furthermore at odds with the interpretation of this section that envisions a formal referral of matters by equality courts only in instances where these courts would have jurisdiction parallel to the jurisdiction of the forum to which the matter is referred.⁶⁸

The Cape Town Equality Court also ordered a formal referral in the matter of CL8. In two other matters in which the complaints also arose in the workplace (CL2, CL9), no such formal referrals were made despite the rulings indicating that the matters were to be dealt with in terms of labour law. To complicate matters further, the court dismissed the complaint in CL3 which involved racial hate speech in the workplace because the information provided was not sufficient to substantiate the allegation. The ruling in the latter matter creates the impression that the court would have dealt with the matter had sufficient information been supplied, as it did in relation to the complaints in CL4 and CL12 discussed earlier.

The three diverse responses by the Cape Town Equality Court to complaints arising from the workplace indicate that the provisions of the Act are unclear and require amendment, or, that clear direction must at least be provided to presiding officers.

⁶⁵ *Gweba* 5-6.

⁶⁶ *Gweba* 6.

⁶⁷ 2008 (2) SA 247 (T).

⁶⁸ See 6.4.3.

The last matter that I included in this category, CL11, was dismissed on the papers. The complainant in this matter alleged that the depiction of San people by the respondent in a television advertisement perpetuated a negative racial stereotype of them. The advertisement, he alleged, depicted San people as primitive and this was humiliating and degrading. The respondent denied these allegations and relied upon a ruling by the Advertising Standards Authority relating to a similar depiction of the San in another advertisement which was held not to be discriminatory. In its ruling the equality court held that the 'depiction of the advert does not necessarily suggest that a specific person is stupid. Portraying people in their natural way of living does not amount to discriminatory (sic)'.⁶⁹ The court's reliance on a previous similar ruling is sound. In view of the fact that the complaint was about an advertisement it would seem that a ruling from the Advertising Standards Authority would be appropriate to deal with the matter and a referral to the Authority would have been competent.

7.7.3 Complaints involving the Impairment of the Dignity Interest through Actions and Language

Two matters were included in this category as set out in Table 9 below.

Table 9: Cape Town Equality Court Mixed Complaints

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
CM1	01/05	<i>FG Prince and CJ Prince</i>	<i>VJ Ngrini and others</i>	Resp called Compl's 'kaffirs' and assaulted them; harassment (verbal and through conduct)	Residential	Form 3 served Court: cause of action outside jurisdictional area
CM2	12/07	<i>NA Kheswa</i>	<i>PG Gela</i>	Resp made racist remarks towards Compl, forced her to walk and take trains in dangerous areas, said to her 'to go to church and pray you turn white'	Work context (SAPS)	Form 3 served Pending as at 31/12/07

CM2 was pending as at 31 December 2007 and is thus not discussed. Form 3 was served on the respondent in CM1 and the respondent filed a written response. On the date set for the directions hearing it was established that the cause of action arose in

⁶⁹ The presiding officer mentioned discriminatory act/actions specifically.

the jurisdictional area of the Atlantis Equality Court. The papers in the matter were sent to the Atlantis Equality Court.

7.8 DURBAN EQUALITY COURT

By far the greatest number of complaints involving racism was made to the Durban Equality Court. This court has engaged with the provisions of the Act in a considerable number of cases as discussed and analysed below. For this analysis I rely on the written judgments prepared by the presiding officers and transcriptions of the mechanically recorded judgments.⁷⁰ I also consider those matters that did not proceed to the inquiry stage and the reasons for the early end to these matters.

It has to be noted that the practice in the Durban Equality Court, as in the instance of the Pretoria Equality Court, is for the clerk to place the complaint before a presiding officer prior to the issuing of form 3. This is presumably done to ensure that the complaint is indeed one for the equality court, which, as pointed out before, could be indicative of the inadequacy of the training provided to clerks.

7.8.1 Complaints involving the Impairment of the Dignity Interest through Actions

I included 16 complaints in this category. Table 10 below provides an overview.

⁷⁰ My requests to the presiding officers involved to direct transcription of the judgments (as required by Regulation 10(4)(b)) for purposes of this research were generally met with positive responses which meant that the judgments were transcribed according to my request. The presiding officer in DL28 (see table 11 below) was not willing to direct transcription of the judgment concerned. In another instance my request was approved, but no transcription was forthcoming despite numerous requests to the clerk of the court to make the recording available (DL18). These judgments are consequently not discussed. In DL12 and DL44 the company responsible for transcription of the recorded judgments could not find any recorded judgments and neither did I find written judgments on the files. It is possible that inquiries were not held (this possibility was indicated by the presiding officer in an email communication to me). These matters are not discussed further.

Table 10: Durban Equality Court Complaints involving Racist Action

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DA1	12/04	<i>P Jorgensen</i>	<i>Chief Magistrate of Durban</i>	Compl white magistrate who was not considered for promotion	Work context (Judiciary)	Form 3 served Complaint withdrawn
DA2	34/04	<i>NG Nzimande</i>	<i>National Commissioner of Police</i>	Harassment and discrimination on basis of race and HIV status during public protest in which Compl and others participated	Public protest	Form 3 not served Court: formal referral to high court
DA3	68/05	<i>F Majozi</i>	<i>Mr Mansoor and Manager Siayaya Security</i>	Resps denied Compl access to flat which she rented	Residential	Form 3 served plus interim order to allow C access to flat Return day, adjourned <i>sine die</i>
DA4	78/05	<i>FS Ismail</i>	<i>Body Corporate Bridge Park</i>	Resp evicted Compl from business premises, allegation of racist bias	Business	Form 3 not served Court: referred to alternative forum SAHRC
DA5	16/06	<i>N Joubert</i>	<i>G Adriaanse</i>	Compl not allowed to install landline in flat (Resp supervisor of block) while white occupants were allowed to install phones	Residential	Form 3 served Directions hearing Inquiry Judgment complaint dismissed
DA6	35/06	<i>A Maharaj</i>	<i>National Horseracing Authority</i>	Compl suspended as trainer by Resp, allegation of racism	Horseracing	Form 3 served Directions hearing Inquiry Judgment special plea upheld
DA7	50/06	<i>P Patterson</i>	<i>D Koen</i>	Compl subjected to differential treatment by Resp, member of board of trustees of flat where Compl and Indian partner lives insofar as parking spaces were concerned	Residential	Form 3 served Directions hearing Settlement agreement, apology
DA8	52/06	<i>NH Mqadi</i>	<i>Legal Aid Board and S Singh</i>	Compl required legal representation, approached Resp. Resp required funding from the Legal Aid Board to represent Compl. Compl of view that R did not want to assist him on basis of his race	Legal representation	Form 3 served Directions hearing Inquiry not finalised, note that it was to be continued Status unclear
DA9	55/06	<i>Moodley's Spar</i>	<i>Spar KZN</i>	Resp group had no BEE policies in place and poor communication with black members of the group of which Compl was one	Business	Form 3 served Directions hearing, removed from roll – possible settlement
DA10	59/06	<i>AR Dawoojee</i>	<i>RA Bouman</i>	Compl of view that Resp subjected him to differential treatment on basis of race when he was requested to take less favourable parking bay in complex	Residential/ Rental	Form 3 served Directions hearing, default judgment Application for rescission set down, Matter settled and complaint withdrawn
DA11	68/06	<i>LA van den Heuvel</i>	<i>Mr and Mrs Balagoayen</i>	Unclear statement, broad allegations of racism	Residential	Form 3 not served Court: no cause of action under Act as complaint stands (vague)
DA12	36/07	<i>ZV Mkize</i>	<i>Edgars Chatsworth</i>	Differential treatment of Compl, customer by store manager of Resp on basis of race and harassment	Commerce	Form 3 served Directions hearing Pending as at 31/12/07

Code	Case No	Complainant	Respondent	Complaint (as set out by complainant)	Context	Outcome/Status
DA13	47/07	JL Monaunwa	Group Managing Director (Edgars)	Compl allege racial discrimination in that store assistant persistently addressed him in Zulu while he spoke English	Commerce	Form 3 served? Status unclear
DA14	69/07	BE Gerber	Dunmarsh Investment and another	Rental contract required occupants of premises to be white as in terms of apartheid legislation	Rental	Form 3 served Directions hearing Settlement agreement
DA15	74/07	Y Lokotho	ZH Harrow	Complaint of sexual harassment by R, when C resisted, R told her that he does not like black people and that black people are stupid	Work context	Form 3 sent for service to SAPS, not served Address of respondent unknown to complainant
DA16	77/07	NR Nkosi	Mrs Vermaak, Durban High School Governing Body	Zulu as taught at school fails to accommodate first language speakers, discrimination against African children alleged	Education	No service of form 3 as at 31/12/07 Pending

The three matters (DA8, DA12, DA16) that were pending at 31 December 2007 are not discussed further.⁷¹

7.8.1.1 Complaints not Advancing to the Inquiry Stage

In DA15 form 3 was not served on the respondent. The papers were sent to the SAPS for service, but a subsequent note on the file indicated that the respondent had moved and that the new address was unknown to the complainant. No further developments were recorded on the file.

Form 3 in DA11 was not served. In his review of the complaint prior to service, the presiding officer noted that the complaint as set out in form 2 was too general to be accommodated in terms of the Equality Act. The founding affidavit of the complainant painted a picture of a strained relationship between neighbours in which racist overtones had played a role in the treatment of the complainant by the respondents. No specific incidents of unfair racial discrimination or racial hate speech were highlighted which caused the presiding officer to draw his conclusion. If form 2 were

⁷¹ The status of the first of the three matters (DA8) is uncertain, but in view of the last notice on the file I regard this matter as pending. The complaint involved an allegation of the denial of benefits and opportunities on the basis of race by the Legal Aid Board and the attorney who was to deliver the services to the complainant. At the directions hearing stage the second respondent was unavailable and it was indicated on the file that the hearing was to continue.

to require complainants explicitly to list specific incidents that had violated their rights under the Act similar situations can be avoided.⁷²

In DA13 the complainant complained that his rights under the Act had been violated when a shop attendant persisted in her use of Zulu in response to the English questions posed to her by the complainant. Lack of particulars regarding the alleged violations caused the matter to stall and no further developments were recorded on the file. I have included this complaint in this category (racist actions) because the complainant indicated that he had suffered unfair discrimination on the basis of race. A further consideration of this matter is unnecessary in view of the fact that it has not progressed to the inquiry stage.⁷³

The complaint in DA3 was that the respondents, representing respectively the landlord and security company regulating access to the building, denied access to a flat to the complainant, a tenant. The complainant alleged that she was subjected to unfair discrimination and harassment on the basis of race. After the complaint had been filed, it was placed before a presiding officer for consideration according to the practice in the Durban Equality Court. Without any specific request thereto, the presiding officer issued an interim order directing the respondent to allow the complainant access to the flat and to refrain from insulting, discriminating and harassing the complainant and her family. The interim order stipulated a return date and was served on the respondent with form 3. On the return date the respondents filed their responses and denied all allegations of discrimination. The first respondent indicated that access to the flat had been obtained in contravention of the rules of the building. The filing of the response was recorded by the presiding officer and it was noted that the respondent did not appear on the return day. The matter was adjourned *sine die* and the presiding officer stipulated that the matter could be reinstated in the event of further complaints. No further developments have been recorded on the court file.

⁷² See chapter 8.

⁷³ It would have been interesting to see whether the presiding officer would have dealt with the complaint as constituting unfair racial discrimination or, for that matter as unfair discrimination on any other ground. It also raises the question whether the presiding officer could ascribe a different nature to the treatment complaint of, i.e. whether s/he could find that the respondent contravened s 12 rather than s 7 despite the formulation of the complaint in terms of unfair racial discrimination.

In DA2 and DA4 the presiding officer maintained that the complaints could be dealt with more appropriately in different forums. It is interesting to note that both matters had been referred to the alternative forums prior to service of form 3. In terms of the order of proceedings set out in Regulation 6, a decision to refer a matter must be taken after service of form 3 and receipt of the response, plus three days (in which the clerk must place the matter before a presiding officer). Alternatively, such a decision may be made after the expiry of the period for the response (10 days) plus the three days allowed for the clerk to place the matter before a presiding officer. The question thus arises whether the presiding officer had the authority to refer the matter prior to service, given s 20(3) and Regulation 6(7). It would seem that such a referral is to be deemed a recommendation rather than a formal referral in terms of the Act. A formal referral obliges the alternative forum to report back on the progress made in relation to the referred matter.⁷⁴

In DA2 the presiding officer referred the matter to the high court because, in his view, the equality court at the level of the magistrate's court did not have jurisdiction to hear the matter.⁷⁵ The matter was referred to the high court without a requirement that the high court was to report the progress in the matter to the clerk of the Durban Equality Court. The complaint involving allegations of unfair discrimination and harassment of the complainants on a variety of grounds, including race, by members of the SAPS during a public protest held by members of the Treatment Action Campaign. DA4 was referred to the SAHRC with a request that the Commission report back within 60 days of receipt of the complaint. More than two and a half years after the complaint had been referred, the court file contained no record of such a report. It is significant that the basis of the referral in this matter also seems to have been a lack of jurisdiction. The complaint involved a commercial dispute between the complainant and respondent pertaining to the occupation of business premises. According to the version contained in the complaint, racism on the part of the respondent might have played a role in the termination of the contract. The affidavit of the complainant does not set out any specific incidents of unfair discrimination or hate speech which, according to the presiding officer, meant that the complaint fell outside the jurisdiction

⁷⁴ See 6.4.3.

⁷⁵ The presiding officer stated that the substantive issues raised by the complaint were not routinely heard in the magistrate's court.

of the Act. The presence of racial overtones caused the presiding officer to refer the matter to the Commission which, in his view, could possibly resolve the matter. The presiding officer also noted that the matter contained a private law element which was to be dealt with in the civil courts.

In these two matters the common trait is that the presiding officer, for different reasons, believed that the equality court lacked jurisdiction and decided to refer the matter to different forums on that basis. Referral to a different forum can only take place where the equality court has jurisdiction to hear the matter, but where the presiding officer is nonetheless of the opinion that the matter can be dealt with more effectively by another forum.⁷⁶ In these two instances this was not the case and the referrals seem to have taken place irregularly.

The complaints in DA1 and DA10 were withdrawn by the complainants. In DA1 the complainant, a white magistrate, alleged that he had not been considered for promotion because of his race. After form 3 had been served and the matter set down for a directions hearing, the complainant withdrew his complaint.⁷⁷ The complaint in DA10 was withdrawn on the day that the respondent applied for rescission of the default judgment that had been granted earlier without proper notice to him. The parties reached an agreement regarding the allocation of parking space which had given rise to the complaint. DA9 was removed from the roll at the directions hearing stage in view of a possible settlement between the parties.

The complaint in *P Patterson v D Koen* (DA7) involved the use of the property of which the respondent was a member of the board of trustees that was occupied by the complainant and his Indian partner. Prior to the inquiry, the respondent apologised for the treatment of the complainant. With the apology, the matter was resolved in a manner that provided the parties with an acceptable resolution of their dispute thus reaching the goals of the Act.

⁷⁶ See 6.4.3.

⁷⁷ A similar matter served before the South Eastern Cape Local Division of the High Court sitting as an equality court: *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (Eq).

The settlement agreement in the matter of *Gerber v Dunmarsh Investment (Pty) Ltd and Evenwell* (DA14) was made an order of court. In terms of the agreement reached, the respondent acknowledged that the refusal to let a flat to the complainant because her husband is Indian was 'unconstitutional and therefore unlawful'.⁷⁸ The lease agreement signed by the parties prior to occupation stipulated that 'the LESSEE acknowledges that he knows and understands that the premises can be let for occupation by member of the WHITE GROUP only and he hereby declares that he is a member of that GROUP in terms of ACT NO. 36 OF 1966, as amended'. The respondents apologised unconditionally for their conduct and undertook to pay an amount of R10 000 to the complainant as compensation. The settlement agreement between the parties further stipulated that the offending clause was unenforceable and to be deemed deleted from all existing lease agreements. It was furthermore agreed that a public notice to this effect had to be displayed 'prominently' on the building premises.

Simple settlement agreements concluded between parties have the potential to encapsulate the transformative agenda of the Act by eliminating possible future instances of unfair discrimination of the same nature by the same respondents. By apologising for their conduct, respondents acknowledge the wrongful nature of their behaviour and take responsibility for their actions. Where a settlement agreement includes an agreement to pay compensation to a complainant, it has a further direct impact on the respondent's pocket. This does not necessarily contribute to transformation as envisioned in the Act, but it potentially has a deterrent effect.

7.8.1.2 *Judgments*

I conclude this section on racist actions with an exposition and discussion of the two matters in which judgment was delivered.

In the matter of *N Joubert v G Adriaanse* (DA5), the complainant alleged that the respondent, as chairperson of body corporate of the building in which she lived, had

⁷⁸ No references to the provisions of the Equality Act were made in the settlement agreement.

discriminated unfairly against her on the basis of race and gender by failing to allow the installation of a private telephone line to her flat.⁷⁹ The presiding officer remarked that the complainant, in terms of s 13 of the Act, has to 'present a credible complaint that fits in with the Acts (sic) definition of discrimination'.⁸⁰ On the strength of the evidence presented to the court, the presiding officer held that the complainant had failed to do so. No *prima facie* case of discrimination had been made out against the respondent which meant that the respondent had no case to meet. The complaint was accordingly dismissed.⁸¹ The approach of the presiding officer to the adjudication of this matter falls squarely within the parameters set out by the Act and the concise judgment clearly records the reasons for the finding based on the evidence.

The other Durban Equality Court matter of this nature that proceeded to the inquiry stage was that of *AB Maharaj v The National Horseracing Authority of South Africa* (DA6). The court considered a point *in limine* raised by the respondent, as well as the merits of the complainant's case in its judgment. The point *in limine* related to a lack of jurisdiction on the part of the equality court because the alleged infringement took place before the commencement of the applicable sections (including the section in terms whereof the equality courts were established) of the Act. The presiding officer upheld the point *in limine* in view of the general rule against retrospectivity.⁸² This finding was upheld on appeal.⁸³

In her consideration of the merits of the case, the presiding officer relied on the interpretation of Erasmus J in the matter of *Du Preez v Minister of Justice and Constitutional Development*,⁸⁴ one of the very few reported cases of a high court sitting as an equality court. In *Du Preez*, Erasmus J held that it is in the first instance for the complainant to make out a *prima facie* case of discrimination, whereupon 'the discrimination was deemed to be unfair and the respondent then bore the onus of proving otherwise'.⁸⁵ On the facts of the *Maharaj* case, the presiding officer held that the complainant had failed to make out a case of discrimination and consequently,

⁷⁹ *Joubert 1*.

⁸⁰ *Joubert 4*.

⁸¹ *Joubert 4-5*.

⁸² *Maharaj 4*.

⁸³ *Maharaj v The National Horseracing Authority of South Africa* 2008 (4) SA 59 (N).

⁸⁴ 2006 (5) SA 592 (EqC).

⁸⁵ *Maharaj 6*; emphasis in the original.

there was 'no onus on the respondent to prove anything'.⁸⁶ On appeal, the Natal Provincial Division found it unnecessary to deal with the merits of the case.

Maharaj's case was decided on a technical point, but the presiding officer in the Durban Equality Court also pronounced on the merits of the case. She confirmed that the Act required a complainant to make out a *prima facie* case after which the onus rests on the respondent to show that the discrimination did not take place or that it was not unfair.

Noticeably, the judgments in DA5 or DA6 did not confront the dense unfairness analysis set out in s 14 of the Act, since the complainants in both matters had failed to make out a *prima facie* case.

7.8.2 Complaints involving the Impairment of the Dignity Interest through the use of Racist Language

By far the majority of complaints made to the Durban Equality Court falls into this category. Table 11 below provides an overview.

Table 11: Durban Equality Court Complaints involving Racist Language

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL1	03/04	ASM Singh	Du Bois	Resp said to Compl that Indians are unsuitable to keep and look after pets	Residential	Service of form 3 authorised Form handed to Compl No further progress
DL2	04/04	MJ Sane	D Young	Resp called Compl 'a noisy kaffir'	Residential /Work context? Unclear	Service of form 3 authorised Form handed to Compl No further progress
DL3	07/04	PN Cetswayo	P Botha	Resp called Compl 'a stupid black woman' [Compl initially applied for peace order but was referred to equality court]	Residential /Rental	Service of form 3 authorised Form handed to Compl's fiancé No further progress

⁸⁶ *Maharaj* 6.

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL4	08/04	<i>E Msomi</i>	<i>H Govender</i>	Resp called Compl 'a kaffir'	Work context? Unclear	Service of form 3 authorised Form handed to Compl No further progress
DL5	09/04	<i>Complainant</i>	<i>Respondent</i>	Resp said to Compl and other employees that 'the government is a monkey government', 'Thabo Mbeki is a baboon' and that 'Jacob Zuma is stealing money'	Work context	Form 3 served Directions hearing Inquiry Judgment in favour of Compl; unconditional apology
DL6	14/04	<i>Z Namba</i>	<i>K Busheen</i>	Resp called Compl 'a kaffir', 'shit' and 'Mpondo'	Residential	Form 3 served Directions hearing Inquiry. Judgment in favour of Compl; Resp ordered not to repeat conduct complained of and to pay fine of R1000 conditionally suspended for 3 yrs provided that Resp is not found guilty of hate speech
DL7	15/04	<i>C and A Higgens</i>	<i>B Ryan</i>	Resp called Compl 'boere' and 'whites', and subjected them to verbal abuse and harassment [Both parties applied for peace orders, granted against Resp]	Residential	Form 3 not served Court: particulars of discrimination must be given
DL8	16/04	<i>BG Maphumulo</i>	<i>II Sheik</i>	Resp called Compl 'a kaffir' and 'stupid'	Commerce	Form 3 served Directions hearing Inquiry Judgment in favour of Compl; unconditional apology
DL9	17/04	<i>ZC Memela</i>	<i>T Lues</i>	Compl called 'a fucking kaffir' by Resp	Unclear	Form 3 served Directions hearing Inquiry Judgment in favour of Compl; unconditional apology
DL10	18/04	<i>GA Gambushe</i>	<i>R Seetal</i>	Compl's son allegedly called 'a bloody kaffir' by Resp	Residential /Rental	Form 3 served Directions hearing, Compl absent and complaint dismissed
DL11	22/04	<i>S Duma</i>	<i>JB Adam</i>	Resp called Compl 'a kaffir', 'a bitch' and 'a prostitute'	Rental	Form 3 served Directions hearing agreement between parties to deal with merits Judgment in favour of Compl; unconditional apology
DL12	24/04	<i>K Naidoo</i>	<i>THM Richards</i>	Resp called Compl 'a coolie'	Residential	Form 3 served Directions hearing Inquiry at which evidence was led, but no judgment on file or recorded mechanically
DL13	28/04	<i>ZV Sithole</i>	<i>S Jackson</i>	Compl called 'a kaffir' by Resp	Commerce	Service of form 3 authorised Form handed to Compl No further progress
DL14	30/04	<i>OT Mkize</i>	<i>L Kirsten</i>	Resp called Compl 'an intelligent kaffir'	Work context	Form 3 served Directions hearing Inquiry Judgment, complaint dismissed
DL15	32/04	<i>CT Mthembu</i>	<i>E Olivier</i>	Resp swore at Compl and called him 'a kaffir'	Work context	Service of form 3 authorised No further progress

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL16	33/04	M Lankie	D Gordon	Resp said that 'these kaffirs from next door are using witchcraft to bewitch me [Compl] and my [Compl's] daughter'	Residential	Form 3 served Directions hearing Inquiry Judgment in favour of Compl, unconditional apology
DL17	42/04	SJ Maphalala	F Schutz	Compl served CCMA papers on Resp, his employer, who then called him 'a fucking kaffir'	Work context	Form 3 served Complaint withdrawn
DL18	02/05	ASM Magubane	D Jordaan	Resp called Compl 'a kaffir' and that Resp threatened him	Work context	Form 3 served Directions hearing Inquiry Judgment, complaint dismissed
DL19	03/05	T Mkize	O Largatzis	Resp called Compl 'a kaffir' and 'a son of a bitch'	Work context	Form 3 served Directions hearing Inquiry Judgment in favour of Compl; damages of R1000 awarded and Resp ordered to give Compl his certificate of service
DL20	07/05	GS Khosa	M Saeed and R Essay	Compl called 'a kaffir' by Resp1; Compl called 'a kaffir', 'a pig' and 'a dog' by Resp2	Work context	Form 3 served Directions hearing Inquiry Judgment in favour of Compl in respect of Resp2 and awarded R 3000 in damages
DL21	18/05	S Nkosi	D Mkize	Resp referred to Compl as 'amakwerekwere', said that Compl had tuberculosis and AIDS [Compl initially applied for peace order but was referred to equality court]	Residential	'No service' return for service of form 3
DL22	29/05	HI Donaldo	R Haripersad	Compl called 'a kaffir' by Resp who also harassed her after an argument about a coin	Commerce	Form 3 served Directions hearing Judgment in favour of Compl, unconditional apology to Compl and court, payment of damages R10000 to Compl
DL23	30/05	P Abelman	Mr Farouk	Resp said to Compl: 'you think you can park like in an Indian area' and 'you fucking bastard move your car'	Unclear	Form 3 served Apology tendered and accepted Complaint withdrawn
DL24	35/05	TN Mbhele	TD Mzoke	Compl's child called an 'Indian' and 'a coolie' by Resp	Unclear	Service of form 3 authorised Form sent to SAPS for service No further progress
DL25	36/05	D Naicker	Mr Garvey	Resp called Compl 'a coolie' and said that he (Compl) brought 'kaffirs' into the neighbourhood [Compl initially applied for peace order but was referred to equality court]	Residential	Service of form 3 authorised Form sent to SAPS for service No further progress
DL26	40/05	F Mdladla	E Smith	Resp said that Compl was making a noise, that Compl is 'a kaffir who must go to Umlazi and stay with other kaffirs'	Residential	Form 3 served plus interim order to stop interfering, abusing harassing Directions hearing Inquiry Judgment in favour of Compl, unconditional apology

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL27	42/05	<i>BJ Lokotwana and T Phangidawo</i>	<i>D Barkhuizen</i>	Resp called Compls 'baboons' and told them to 'fuck off'	Work context	Service of form 3 authorised Form sent to SAPS for service No further progress
DL28	43/05	<i>AH Sulliman</i>	<i>Z Rayazuddin</i>	Resp called Compl's family 'a bushman family' [Both parties approached a magistrate for peace orders]	Residential	Form 3 served plus interim order served to stop interfering, abusing, harassing Directions hearing Inquiry Judgment, complaint dismissed
DL29	44/05	<i>JT Zondi</i>	<i>P da Silva</i>	Resp called Comp; 'a thief', 'a fat ugly thing', 'a fat ass', 'a kaffir'	Work context	Form 3 served Complaint withdrawn
DL30	47/05	<i>A Jaraj</i>	<i>N Dodd</i>	Resp called Compl 'a coolie' and called Compl's staff 'kaffirs'	Unclear	Form 3 served plus interim order served to stop interfering, abusing, harassing, intimidating Compl and staff and to cease conduct that demeans and humiliates or creates hostile environment On return date, Compl absent, complaint dismissed
DL31	50/05	<i>N Nzimande</i>	<i>S Sewsunker</i>	Resp called Compl 'a kaffir'	Court administration	Form 3 served Directions hearing Settlement agreement, Resp to pay R 500 to Compl, matter adjourned <i>sine die</i>
DL32	56/05	<i>PB Ngubo</i>	<i>D Purmasir</i>	Resp called Compl a 'kaffir' and said that she stole cell phones and that she would poison him	Work context	Form 3 served Directions hearing, Resp absent, final order to cease objectionable conduct Resp responded later, no application for rescission
DL33	63/05	<i>FS Khuswayo</i>	<i>Y Moodley</i>	Resp called Compl (former employee) 'a kaffir'	Work context	Form 3 served Settlement agreement, apology and payment of R 1250 damages, matter removed from roll
DL34	65/05	<i>Z Khuswayo</i>	<i>LA Khan</i>	Resp referred to houses in area where Compl was building as 'kaffir houses'	Commerce	Form 3 served Directions hearing, C absent, complaint dismissed Misunderstanding as to date of hearing between clerk and C, attempt to contact C No further progress
DL35	71/05	<i>VD Petersen</i>	<i>GE Foster</i>	Resp called Compl 'a kaffir' [Compl initially applied for peace order but was referred to equality court]	Residential	Form 3 not served Status unclear
DL36	73/05	<i>AS Siyala</i>	<i>N Pillay</i>	Resp swore at Compl and called him 'a kaffir'	Advice services	Form 3 served Directions hearing, postponed for possible settlement Next date for appearance, none of parties present, matter adjourned <i>sine die</i>
DL37	83/05	<i>S Zuma</i>	<i>PG van Deventer</i>	Resp called Compl 'a kaffir'	Rental/ Residential	Form 3 served Directions hearing, matter postponed <i>sine die</i> by consent

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL38	89/05	<i>T Pretorius</i>	<i>R Petzer</i>	Resp called Compl, a contractor, 'a bushman' and Compl's employees 'kaffirs' (Same incident as 05/06 – DL42)	Building industry	Form 3 served Directions hearing Inquiry Judgment in favour of Compl, unconditional apology and damages of Resp of R2000 awarded
DL39	91/05	<i>BS Gwala</i>	<i>YM Mohamed and E Ramdere</i>	Compl called 'a kaffir' who thinks he is smart by Resp2. Compl complained to Resp1, who subsequently swore at him	Work context	Service Directions hearing Inquiry Judgment in favour of Compl and damages of R3000 awarded
DL40	01/06	<i>P Magubane</i>	<i>S Smith</i>	Resp said to Compl 'what are you looking at kaffir?'	Residential	Form 3 served Directions hearing Inquiry Judgment in favour of Compl, unconditional apology
DL41	04/06	<i>S Dube</i>	<i>S Westrom</i>	Resp called Compl 'a kaffir monkey'	Work context	Form 3 served Directions hearing Inquiry Judgment, complaint dismissed
DL42	05/06	<i>EB Sikakane and another</i>	<i>AR and N Petzer</i>	Compls employees of contractor, called 'kaffirs' by Resp (Same incident as 89/05 – DL38)	Building industry	Form 3 served Directions hearing, matter consolidated with 89/05 (DL44) insofar as evidence is concerned Inquiry Judgment in favour of Compl, unconditional apology and damages of R2000 awarded
DL43	07/06	<i>S Boyce</i>	<i>L Zietsman and G Clifford</i>	Resp called Compl 'kaffir bitch'	Residential	Form 3 served Directions hearing, parties decided to reconcile, Resps apologised, accepted, parties excused from further attendance
DL44	09/06	<i>MPR Ngubane</i>	<i>B Hilder and B Khan</i>	Resp called Compl 'a kaffir' and threw Compl's bag from the building when Compl was dismissed	Work context	Form 3 served Directions hearing Inquiry Note on file that judgment was given and complaint dismissed No written judgment on file and none recorded mechanically
DL45	11/06	<i>T Qwabe</i>	<i>V Shabangu</i>	Resp called Compl 'a bitch' and told her 'to go back to Mpondoland', and said that Compl must stop to encourage people to vote for ANC [Compl initially applied for peace order, requested to provide more information]	Residential	Form 3 not served Court: referred matter to IEC
DL46	19/06	<i>M Mhlongo</i>	<i>GH Azad</i>	Resp called Compl 'a kaffir' [Compl initially applied for peace order but was referred to equality court]	Work context	Form 3 served Directions hearing Inquiry commenced, postponed When resumed, Compl absent, complaint dismissed
DL47	22/06	<i>T Morris</i>	<i>L Wilson</i>	Resp swore at Compl and called him 'a kaffir'	Residential	Form 3 served Notice of directions hearing on file, no return of service for this notice No further progress

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL48	30/06	MC Khuzwayo	BPA Todd	Resp called Compl 'a kaffir'	Commerce	Form 3 served Directions hearing Settlement agreement, Resp to pay amount of money to Compl which it cost him to repair his car, agreement order of court
DL49	32/06	WN Mtembu	Mrs Moodley	Resp insulted and harassed Compl by saying that Compl did not belong in the neighbourhood because Compl is black [Compl initially applied for peace order but was referred to equality court]	Residential	Form 3 served Directions hearing, complaint withdrawn
DL50	33/06	J Stafylides	F Riddel	Resp called Compl a 'fucking kaffir', 'coolie' and 'Greek'	Residential	Form 3 served plus interim order served to stop harassing and intimidating Compl On return date, Resp referred to social workers for counselling and interim order extended Directions hearing Inquiry, Resp absent, final default order
DL51	44/06	N Mabaso	K and M Mall	Compl called 'kaffir' and 'dog' by grandson of employer	Work context	Form 3 served Several postponements Settlement agreement; Resp to pay R3000 damages and to apologise to Compl
DL52	47/06	SA Bhola	Harold (representing Balboa Finance)	Resp said to Compl 'you are just an Indian'	Unclear	Form 3 not served Court: more information required File not found on return visit
DL53	48/06	R King	B Bloem	Resp called Compl 'a kaffir' and said that Compl had AIDS [Resp applied for peace order]	Residential	Form 3 served Directions hearing Inquiry Absolution from the instance after Compl's case
DL54	63/06	BT Mbanjwa	M Roets and another	Resp called Compl 'a kaffir'	Work context	Service of form 3 authorised Form sent to SAPS for service No further progress
DL55	65/06	TB Moses	A Alfreds	Resp called Compl 'a stupid African kaffir'	Residential	Form 3 served plus interim order served to refrain from making derogatory remarks, insulting racial references; to refrain from physically harming Compl and family and warning that a failure to comply could lead to criminal charge of contempt Return date, written apology to Compl from Resp
DL56	70/06	M Dube	Mr and Mrs Murray	Resp called Compl 'a kaffir'	Work context	Form 3 served Directions hearing Inquiry Judgment complaint dismissed
DL57	71/06	MM Mkize	R Harkoo	Resp called Compl 'a fucking black guy' and made demeaning statements regarding his typing speed and slowness	Work context	Form 3 served Court: affidavit did not disclose complaint at that stage, may rephrase and submit again; labour law
DL58	75/06	T Selepe	M Chronzus and Wingtrot	Resps subjected Compl to racial abuse and swore at him	Work context	Form 3 served plus interim order to desist racial abuse Return date, no appearance for Resps, Default order in favour of Compl.

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL59	77/06	MM Mkize	R Harkoo	Compl stated that he was subjected to hate speech by Resp in that Resp called him lazy and slow	Work context	Form 3 not served Court: not a complaint of hate speech on facts and labour law applies
DL60	04/07	S Mtshali	Ms Queen and Mr Michael Stan	Resp dismissed Compl and called him 'a monkey'	Work context	Form 3 not served Clerk: insufficient details, affidavit not sworn No further progress
DL61	05/07	T Xuma	D Schneidermann	Resp said to Compl 'I hate you fucking kaffir' and dismissed him	Work context	Form 3 served Directions hearing, postponement for legal aid application by C Directions hearing, adjourned <i>sine die</i> by consent
DL62	08/07	O Nzama	Mr Ansen	Resp said to Compl 'I do not have time for you kaffir'	Work context	Form 3 served Directions hearing Inquiry, Compl absent, matter struck off roll
DL63	14/07	D Ngobese	M Conway	Resp swore at Compl, called him 'a kaffir' and 'a stupid black kerel [guy]'	Work context	Form 3 served Directions hearing, Compl absent, complaint dismissed
DL64	16/07	NP Nguobo	K Selling	Compl called 'a kaffir' by Resp, complaint that Resp 'always' swears at him	Work context	Form 3 served Notice of directions hearing sent for service to SAPS, no return No further progress
DL65	23/07	JL Jojo	Mr Olivier	Compl called 'kaffir' and 'mad tomboy' by Resp	Work context	Form 3 served Directions hearing, Compl absent, complaint dismissed Compl application for rescission, granted Next appearance, Compl absent, adjourned <i>sine die</i>
DL66	25/07	M Gcaleka	D Limalia	Compl called 'a donkey' by Resp	Work context	Form 3 served Legal representative of Resp requested indulgence until 28/3/07 No further progress
DL67	26/07	N Mtirara	T and A Kassim	Compl called 'a kaffir' by Resps who also referred to 'filthy kaffirs'	Residential	Form 3 served Directions hearing, settlement agreement, adjourned <i>sine die</i>
DL68	37/07	MP Barker	VB Barns	Resp insulted Compl and mocked Indian accent, Compl stated in statement that he wanted court to grant peace order	Residential	Form 3 not served Court: not case of discrimination; clerk directed to 'issue warning notice to respondent to appear before a magistrate'
DL69	38/07	B Khawula	J Auths	Resp called Compl 'a kaffir', 'a monkey' and 'asshole'	Residential	Form 3 served Settlement agreement between parties not be engage in behaviour as set out in affidavit, apology from Resp and undertaking not to contact Compl; matter adjourned <i>sine die</i>
DL70	45/07	S Kumar	W Frank	Resp called Compl 'a coolie'	Work context	Form 3 served Directions hearing, apology tendered, not accepted Inquiry, settlement agreement Resp to apologise and pay damages of R500 to Compl
DL71	46/07	M Cele	Mr Phillip	Compl called 'a kaffir' and 'stupid ' by Resp	Residential	Form 3 served Compl informed court that Resp had moved No further progress

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL72	52/07	S Phewa	GS Naidoo	Compl called 'a kaffir' by Resp	Work context/ Residential	Form 3 served Directions hearing, Compl absent on two occasions, complaint dismissed
DL73	55/07	M Nelson	CS Cele	Resp said that Compl's child was 'not black' and that Compl was 'ugly'	Social	Form 3 served Directions hearing, Compl absent, complaint dismissed
DL74	59/07	GM Mtimkulu	M Moreti	Resp called Compl 'a baboon'	Work context	Form 3 served Directions hearing, special plea of prescription raised by Resp; Inquiry on prescription, special plea upheld
DL75	60/07	AJ Smith	TJ Mgagi and another	Resps said to Compl that 'this is black man's country and no white man is going to rule here' and that Compl was to 'build on Bluff not in Wentworth,' and that Compl and her husband were 'rubbishes', 'dirty', 'jealous' and 'bad people' and 'from Satan' [Compl initially applied for peace order but was referred to equality court]	Residential	Form 3 served Directions hearing Inquiry Judgment in favour of Compl, unconditional apology
DL76	63/07	N Maharaj	A Vanner	Resp called Compl a 'collie [coolie] bitch' and 'a bushman', Resp also falsely accused Compl of having an affair with Resp's husband	Residential	Service of form 3 authorised Form sent to SAPS for service No further progress
DL77	65/07	WX Gcwabe	DM Omar	Resp called Compl 'a pig', 'a witch' and told her to 'go back to Holomisa country' and made derogatory remarks about government	Work context	Form 3 served Directions hearing, postponed more than once Complaint withdrawn
DL78	66/07	V Shezi	Mr Andre and Mr Mike	Resp called Compl 'a kaffir', and said that Compl 'needs to be fucked' whereafter Compl was dismissed	Work context	Form 3 served No further progress
DL79	68/07	D Nkanyiso	Mr Andre	Resp made unwanted sexual advances towards Compl and called him 'a kaffir'	Work context	Form 3 served No further progress
DL80	71/07	D Mthethwa	Patrick	Resp called Compl 'a kaffir' and said that he (Compl) 'was smelly'	Residential	Service of form 3 authorised Form sent to SAPS for service No further progress
DL81	73/07	TG Ntuli	Y Bux	Resp called Compl 'a racist' and 'useless' at school governing body meeting	Education management	Form 3 not served Court: case of <i>crimen iniuria</i> , Compl to approach SAPS
DL82	75/07	RW McConnell	C Wartmann	Resp referred to Compl's fiancée as a 'coolie concubine' in an sms to third party [Compl previously obtained peace order against R]	Residential	Form 3 not served Court: proof must be provided that sms sent by Resp Attempts to contact Compl unsuccessful
DL83	76/07	S Gumede	V Govender and another	Resp called Compl 'a worrying kaffir'	Work context	Form 3 not served Court: required explanation of long lapse of time before court was approached and whether CCMA was approached No further progress
DL84	81/07	A Mtimkulu	RB Lezar	Resp called Compl 'a kaffir', 'a sparrow' and told her 'to fuck off'	Work context	Form 3 served Resp apologised to Compl Complaint withdrawn

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DL85	82/07	<i>M Hlatswayo</i>	<i>K Ramadu</i>	Resp accused Compl of stealing his money, called her 'a kaffir' and 'a bitch' and dismissed her	Work context	Form 3 served Pending as at 31/12/07
DL86	83/07	<i>OZ Shezi</i>	<i>K Ramadu</i>	Same facts as 82/07	Work context	Form 3 served Pending as at 31/13/07

Judgment was given in 22 of the 86 matters that I have included in this category. The two matters (DL85, DL86) that were pending on 31 December 2007 and the two matters (DL12 and DL44) in which no record of a written judgment or mechanically recorded judgment could be found, as well as DL28 (not transcribed) are not discussed further. In accordance with the practice of the Durban Equality Court, the presiding officers had sight of the complaints prior to service.

7.8.2.1 *Complaints not Advancing to the Inquiry Stage*

A significant number of matters did not proceed beyond the completion of form 2 and the authorisation of the issuing of form 3 by the presiding officer before service. In 11 matters form 3 was issued and either handed to the complainant who had to effect service through the sheriff or SAPS (DL1, DL2, DL3, DL4, DL13) or it was sent directly to the SAPS for service (DL24, DL25, DL27, DL54, DL76, DL80). None of these files contained any indication that the papers had been served or that there had been an attempt to serve the papers. One could only surmise the reasons for this inaction. In the instances where the complainant was tasked to effect service, the inaction could either be ascribed to loss of interest in the matter on the part of the complainant or that the responsibility of facilitating the service of the documents was unduly onerous and/or expensive. Where the papers were not served by the SAPS, the reasons could be numerous – ranging from not having received the request to having lost the documentation – but the reasons remain unclear since no feedback was given to the clerk of the equality court in any of these instances.

The complaints in DL15 and DL35 did not progress beyond the filing of form 2 with the clerk of the equality court. The reasons for the inaction are unclear.

The relatively high number of matters that did not proceed because the form 3 had not been served does not mean that no attempts were made. Different reasons prevented the progress of a significant number of other matters. A no service return in the case of DL21 called matters to an early halt. The absence of the complainant at the directions hearing meant a similar fate for five matters (DL10, DL46, DL63, DL72, DL73) in which the presiding officers, relying on Regulation 12(3)(a)(i), dismissed the respective complaints. The complaint in DL30 was similarly dismissed when the complainant was absent on the return day set for an interim order that was served on the respondent together with form 3. But in DL62 the absence of the complainant at the directions hearing led to the matter being struck off the roll. No specific reason for the different outcomes was discernible from the court file. The dismissal of the complaint in such instances is more appropriate, as this is clearly set out in the legislation and Regulations.

In DL47, DL64, DL71, DL78 and DL79, form 3 was served on the respective respondents but no further progress in any of the matters was recorded on the file. In DL71 the complainant indicated to the clerk of the court that the respondent had moved away. In respect of the other matters the reasons for the lack of progress are not clear and it is similarly not clear whether further action is planned in respect of any of these matters.

A lack of clarity in the formulation of the complaint, or details regarding the offending incident stymied the progress in DL7, DL57, DL60, DL82 and DL83. In DL7 the complaint involved racial name-calling ('boere' and 'whites') by the respondent who was the neighbour of the complainants. The founding affidavit also indicated that both complainants and the respondent had applied for binding over orders against each other and that the respondent was warned not to breach the peace.⁸⁷ On review of the complaint, the presiding officer indicated that particulars of the discrimination must be given. Harassment or hate speech was not considered as potential causes of action under the Act, despite the complainants indicating specifically that the language

⁸⁷ See note 89 below.

used by the respondent infringed upon their rights. No further progress was recorded on the file.

The complaint in DL57 served before the equality court twice. After the complaint had been made to the court, form 3 (which indicated that the complaint related to unfair racial belittling) was served on the respondent. The response from the respondent was that the complainant was a disgruntled former employee who did not make it through his probation period. The respondent also indicated that the labour dispute had served before the CCMA. In the analysis in terms of s 20(3)(a) the presiding officer indicated that the equality court did not have jurisdiction over this matter and that the affidavit had not disclosed a complaint in terms of the Act. The presiding officer indicated that the complaint could be reformulated and resubmitted by the complainant. This was done. When the same complaint was considered by a presiding officer on the second occasion (DL59), it was held that the offending words complained of, namely, that the respondent had referred to the complainant as 'lazy' and 'slow', did not amount to hate speech. Prior to service of form 3, the presiding officer indicated that the word 'lazy' could not reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm or that it promotes or propagates hatred. The court furthermore indicated that the labour dispute fell outside its jurisdiction.

The other matters which required clarification did not proceed beyond the filing of the complaint and the scrutiny thereof by the presiding officer prior to the service on the respondent. In DL60, the complaint arose in the work context. The complainant indicated that his employer had called him 'a monkey' and had terminated his employment immediately following this insult. On reviewing the complaint, the presiding officer indicated that the particulars provided by the complainant were insufficient and he furthermore indicated that the affidavit setting out the particulars of the complaint had not been signed. Nothing further was recorded on the file. In DL82, the complainant indicated that the respondent, who lived in the same block of flats as the complainant, referred to his (the complainant's) fiancée as a 'coolie concubine' in an sms to a third party who informed the complainant of this message. On review of the complaint, the presiding officer indicated that proof must be provided that the respondent had sent the sms. A subsequent note on the file indicated that the clerk

had tried to contact the complainant, but had been unsuccessful in his attempts. The request for proof at that early stage of the proceedings is unclear in view of the fact that evidence is to be provided only at the inquiry. The complaint in DL83 arose in the workplace with the complainant indicating that he was working as a 'casualty' [a casual worker] who suffered racial hate speech at the hands of a co-worker. The complainant indicated that he reported the incident to the employer, who held a hearing which resulted in the complainant losing his job. The presiding officer who reviewed this complaint raised two queries, firstly relating to the lapse of time between the incident and the date of the complaint (two months) and secondly, the presiding officer wanted an indication of whether this matter had been taken up with the CCMA. After these entries on the file, no further progress was recorded.

The complaint in DL68 concerned the neighbourly relations of the complainant, a self-identified coloured male and his girlfriend who is Indian (according to him), and their white neighbours, the respondents. The affidavit in support of form 2 states that the complainant and his girlfriend are 'a mixed-race couple'. The complaint related to harassment and verbal abuse suffered at the hands of the respondents. The complainant set out a number of incidents in his affidavit which may or may not have had racial overtones and indicated that the respondent had breached the peace. The complainant also indicated that he had laid criminal charges relating to intimidation and *crimen iniuria* against the respondent. Upon reviewing the complaint prior to service, the presiding officer indicated that the complaint was not one of discrimination, but added that a warning notice was to be issued for the respondent to appear before a magistrate. No legal basis for the order is evident from the file, but one could assume that the warning notice referred to was based on s 384 of the Criminal Procedure Act of 1955⁸⁸ which provides for binding over of persons to keep the peace. The Equality Act does not provide for the handling of complaints in terms of the Act under the binding over procedure.⁸⁹ This order was made without a legal

⁸⁸ Criminal Procedure Act 56 of 1955.

⁸⁹ It is doubtful whether the binding over procedure as it currently stands is constitutional. The nature of the proceedings in terms whereof a person is bound over to keep the peace is administrative and quasi-judicial (*Williamson v Helleux and Another NO 1978 (2) SA (T) 352G-H*; see also JCM Roets 'Toepassing van a 384 van die Strafproseswet 56 van 1955' (1990) 25(2) *The Magistrate* 75-77) and the proceedings can result in the committal of a person who refuses or fails to provide recognizances. The quasi-judicial nature of the proceedings mean that an order in terms of this section is not appealable (*R v Limbada 1953 (2) SA 368 (N) 370A*) and that the grounds for review of such an order are restricted since the order is not that of an inferior court as required by s 19(1) of the Supreme Court

basis. In this matter it is unclear why the court did not consider the allegations of harassment or hate speech set out in the affidavit as causes of action. Complainants should be asked to identify the relevant sections allegedly contravened pertinently.⁹⁰

The status of the complaint in the DL52 is unclear. I came across the court file in the *SA Bhola v Harold (representing Balboa Finance)* (DL52) during my first research visit to the Durban Equality Court in late September 2007. The complaint form indicated that the respondent had said to the complainant that he was 'just an Indian'. The notes I made during that visit indicate that the presiding officer, upon reviewing the complaint form, indicated that more detail was required. When I wanted to review the progress on the file on my second visit to the court, the file was nowhere to be found. The status of this matter thus remains unclear.

When the matters in which the presiding officers requested further particulars are compared with some of the other matters which the court was willing to take up without clarification, the requests for clarification seem unnecessary. Many other complaints with similarly sketchy particulars were handled without requests for clarification. Where a complainant alleges the use of racial epithets without providing a clear exposition of the context within which it took place, the matters should be taken up by the court without reservation, with clarification being required at a later stage. The lack of clarity in the formulation of the complaint can be attributed to form 2 and its formulation. Similar issues can be avoided through the amendment of form 2, as suggested in chapter 8. A complainant should, for instance, be required to indicate the nature of the relationship between her/himself and the respondent specifically and should be required to provide the context within which the alleged unfair discrimination, hate speech or harassment took place. Clerks should accordingly be required to request complainants specifically to provide this information and this should be emphasised in the training of clerks.

Act 59 of 1959 (*Williamson v Helleux and Another* NO 1978 (2) SA (T) 353F-G). Numerous complaints were made to the Durban Equality Court as a result of a referral by a magistrate considering applications for binding over orders as is evident from the table above. On the compatibility of binding over orders with international human rights law standards see Law Commission (Law Com No 22) *Binding Over: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (1994) London: HMSO.

⁹⁰ See chapter 8. So for instance, should a complainant indicate whether his/her complaint is one of unfair discrimination, hate speech, harassment or the publication of information that discriminates unfairly. Clerks should be able to advise unrepresented complainants in this regard.

The complaint in DL81 was not taken up by the equality court because the presiding officer deemed it to be more suitable for determination in terms of criminal law. The complaint was that the respondent, in the course of a school governing body meeting, said that the complainant was 'useless' and 'a racist'. On reviewing the matter before service, the presiding officer noted that the matter was more one of *crimen iniuria* since the complainant indicated that his dignity had been impaired. The presiding officer instructed the clerk to advise the complainant to approach the SAPS. This appraisal by the presiding officer, which divorces criminal proceedings and proceedings in terms of the Equality Act from each other, is problematic. I have pointed out before that the Act clearly envisions criminal proceedings and its proceedings to exist side by side.⁹¹ The utterances of the respondent linked to race, could possibly be construed to be hurtful. Such a determination can only be made on consideration of the evidence. It seems as if the instruction to the clerk was based on a narrow interpretation of the hate speech provision contained in the Act.

A lack of progress is also evident in DL34, DL55 and DL66. In DL34, a misunderstanding between the complainant and the clerk of the equality court regarding the date of the directions inquiry led to the dismissal of the complaint. Subsequent to the discovery of the misunderstanding, the clerk tried unsuccessfully to contact the complainant to rectify the situation. In DL55, form 3 plus an interim order were served on the respondent who in turn filed an apology before the return date. No further progress was recorded on the file. In DL66, the legal representative of the respondent requested an indulgence from the court to enable him to prepare and file the respondent's response to the complaint. After this had been recorded on the file, no further steps were taken.

Default orders were granted in DL32, DL50 and DL58 because of the absence of the respective respondents. In DL32, the respondent did not respond to the complaint in time and an order in favour of the complainant was made which directed the respondent to cease his objectionable conduct. The respondent replied to the complaint after the order had been made, and denied the allegations of hate speech

⁹¹ See 5.4.9 and 5.5.2.

set out by the complainant. He did not apply for a rescission of the judgment, which meant that the judgment against him still stands. In DL50 the respondent was served with an interim order to desist her verbal abuse, intimidation and harassment of the complainants. On the return date the respondent attended court and the presiding officer indicated that the respondent was to be referred for counselling to social workers and extended the interim order. At the next appearance, the directions hearing, the respondent indicated that she was willing to apologise in writing and undergo counselling, whereupon the matter was postponed for the inquiry and the parties were warned to appear. On the date of the inquiry, the respondent was absent and a final order was made on the same terms as the interim order. The third matter involving a default order, DL58, concerned a complaint about racial harassment and abuse by co-workers. Form 3 was served together with an interim order directing the respondents to refrain from harassing, abusing or interfering with the complainant in any way. On the return date there was no appearance for the respondent and a final order was issued by the court on the same terms as the interim order.

DL45 was referred by the Durban Equality Court in terms of s 20(3) and Regulation 6(7). The parties to this matter lived in close proximity to one another. The founding affidavit painted a picture of political disagreement between the parties. In the light of the then upcoming local elections, the presiding officer, prior to service of form 3, referred the matter to the Independent Electoral Commission (IEC) which was to investigate the complaint and report back to the court within 7 days. There was no indication on the file that this had been done.

The *sine die* adjournment of a number of matters stopped their progress. Proceedings in DL36 and DL37 were postponed *sine die* in view of possible settlement between the parties. DL 43 and DL70 met the same fate after the parties had reached an agreement not to engage in the conduct complained of (racial name-calling) and apologies by the respective respondents. Were the conditions of the agreement to be breached in either of these matters, the matters could be re-enrolled. An apology by the respondent landlord for engaging in racial name-calling in DL67 and an undertaking by the complainant tenant to leave the premises that she had occupied led to a *sine die* adjournment of the complaint. In one further instance, DL61, the

matter was adjourned *sine die* by consent, without any reason recorded for the adjournment. The *sine die* adjournment of the matter in DL65 seems to be out of kilter with the matters set out above. In this matter the complainant was absent at the directions hearing which, under normal circumstances, would result in the dismissal of the complaint in terms of Regulation 12(3)(a)(i), unless an acceptable reason for his absence can be provided. In this instance the complaint had been dismissed before because of the absence of the complainant, who then successfully applied for rescission of the judgment. At the next appearance, which was to be the directions hearing, it was noted that the complainant was not available, but no reason for his absence was recorded. It would seem as if the sympathetic presiding officer had decided to give the absent complainant the benefit of the doubt and an opportunity to enrol the matter again.

Six matters (DL17, DL23, DL29, DL49, DL77, DL84) did not proceed to the inquiry stage because the complaints were withdrawn after service of form 3. Various reasons were given for the withdrawals. In DL23, the respondent's reply to form 3 that had been served on him was an unconditional apology which the complainant accepted. A similar resolution was possible in DL31 where the matter was adjourned *sine die* and where the respondent undertook to pay R500 in damages to the complainant whom she had called a 'kaffir'. The agreement made no specific provision for an apology, but in paying damages, the respondent had to take responsibility for the language she had used. In DL17 the complainant, a former employee of the respondent, alleged that the respondent called him a 'fucking kaffir' when he (respondent) was served with documents from the Department of Labour following a disciplinary hearing of the complainant. In response to the complaint, the respondent indicated that the complainant had admitted during his CCMA hearing that his complaint to the equality court had been fabricated. In response, the complainant withdrew the complaint.

The complaints that were withdrawn in DL29, DL77 and DL84 stemmed from the workplace and involved the use of racial epithets by the respective employers of the complainants. The indication in each instance is that the employment relationship was not terminated. The respondents (the employers) in DL77 and DL84 apologised for the language used. In DL29 a letter from the legal representatives of the respondent

to the clerk of the equality court indicated that the matter had been settled between the parties and a letter from the complainant setting out the voluntary withdrawal of the complaint was attached.

Settlement agreements between the parties caused several matters to come to an early end. Settlement agreements that are concluded with a view to address the root cause of the dispute – in this instance the racist use of language – further the transformative agenda of the Act. Disputes involving the use of racist language can also be resolved through settlement without addressing the root cause of the dispute, through merely closing the book on the past. Between these two extremes there are different variations.

The settlement agreement reached between the parties in DL69 was not aimed at the restoration of the relationship between the parties, but it included an undertaking not to engage in the behaviour complained of, an apology by the respondent and an undertaking by the latter not to contact the complainant. This kind of settlement agreement addresses the root cause of the offending behaviour and incorporates steps to avoid repetition of the offending behaviour.

The settlement agreement between the parties in DL33 meets the objects of the Act in a round-about fashion. The complainant alleged that the respondent, his former employer, had called him 'a kaffir' when he approached the respondent about the payment of his wages. The complainant laid a charge of *crimen iniuria* against the respondent who was found guilty and sentenced to the payment of a R3 000 fine (payment deferred) or imprisonment of four months. By the time that the matter served before the equality court, the criminal matter had been decided. In response to the complaint made to the equality court, the respondent apologised in writing for his utterance and undertook not to repeat this. In addition, he paid an amount of R1 250 to the complainant to settle the matter. With this the matter was settled. The settlement agreement satisfies the spirit of the Equality Act in that it resolved the dispute between the parties and elicited an acknowledgement of responsibility on the part of the respondent. A similar settlement agreement was reached in DL70. Anyone in a similar position is unlikely to repeat their offending behaviour.

The settlement agreement concluded between the parties in the matter of DL48 represents the other side of the spectrum, with the respondent refusing to admit liability, but still agreeing to the payment of money to the complainant. Such settlement agreements close the book on the past but fail to address the cause of the dispute between the parties. They succeed in bringing the litigation to conclusion, but leave the transformation agenda of the Act in the lurch.

The settlement agreement in DL51 represents the middle-ground between the earlier discussed extremes. The respondent offered the payment of a sum of money without admission of liability and in full and final settlement of the dispute. When the matter was considered by the court after the offer had been made, it was agreed to increase the amount initially offered in settlement and to include an apology from the respondent to the complainant as part of the settlement agreement.

7.8.2.2 *Judgments*

In the majority of instances where the Durban Equality Court gave judgment, the presiding officers produced written judgments. I was able to obtain transcriptions of the mechanically recorded judgments of a number of other cases after securing the necessary direction for transcription from the presiding officers.⁹² I consider the judgments chronologically in order to identify and analyse trends emerging from the judgments. The discussion and analysis focus on the interpretation of the legal provisions of the Act relating to racist speech, rather than on the weight attached to the evidence delivered.

The judgment of the Durban Equality Court in *Complainant v Respondent* (DL5) was one of the first judgments of that court. The presiding officer interpreted the shift of the onus relating to complaints of unfair discrimination to be applicable in matters of hate speech. According to the presiding officer, s 13 applies to complaints of hate speech under the Act; a complainant has to make out a *prima facie* case of hate speech, following which the respondent bears 'the onus of gainsaying this on a

⁹² See note 70 above.

balance of probabilities'.⁹³ The only way in which this can be done, according to the presiding officer, is to prove that the statement was not made, since the Act does not provide for other defences.⁹⁴ The respondent in this matter was found to have said the following:

‘Look at your government now. That government is a real monkey government and does not provide anything for you. Thabo Mbeki is the biggest baboon that is controlling the other monkeys like Jacob Zuma who is stealing his money’.⁹⁵

Defences of jest, fair comment or political criticism were held not to be applicable in relation to complaints under s 10.⁹⁶ In assessing the fault element, the presiding officer stated unequivocally that the subjective intention of the respondent was irrelevant.⁹⁷ He stated, ‘[W]hat is pivotal is the subjective impact and effect of the words on the complainant, and whether these elicit the responses set out in sub-paragraphs a, b and c.’⁹⁸ The latter numbering refers to the sub-paragraphs of s 10 which, according to the presiding officer, had to be read disjunctively,⁹⁹ i.e. the court should objectively assess whether the words used by the respondent have an effect on the complainant that is (a) hurtful or (b) harmful or incites harm or (c) which promotes or propagates hatred. In doing so, the presiding officer did not limit himself to the words used by the respondent, but also took into consideration the innuendo which accompanied the words. Viewed in this light, the presiding officer held that the complainant suffered hurt as a result of the racial slur of the respondent that was directed at members of the group of which the complainant was a member.¹⁰⁰ The remedy for the transgression of s 10 was held to be a written unconditional apology which had to be filed with the clerk of the court within seven days of the court order.¹⁰¹ The presiding officer stipulated that the written apology had to measure up to the standard set by Curlewis J in *Ward Jackson v Cape Times Ltd.*¹⁰² I have pointed out

⁹³ *Complainant 3*. The court directed that the parties were not to be identified.

⁹⁴ *Ibid.*

⁹⁵ *Complainant 1-2*.

⁹⁶ *Complainant 3*.

⁹⁷ *Complainant 4*.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Complainant 5*.

¹⁰² 1910 WLD 257. The relevant *dictum* is set out in the equality court judgment: ‘An apology should not only contain an unreserved withdrawal of all imputations made, but should also contain an expression of regret that they were ever made. A mere retraction cannot be called a full and free apology’: *Complainant 4-5*.

in 5.3.1.4.2 that s 13 ought not to apply in relation to complaints of hate speech. Such a reading of the Act is not directed explicitly and it leaves a respondent with very few defences. Defences gainsaying wrongfulness, as discussed, should at least be considered as a possibility. The remedy granted in this matter (an unconditional apology) serves the transformative goals of the Act and is welcomed.

The complaint in *Z Namba v K Busheen* (DL6) involved the strained relationship between a complainant, a tenant, and her landlords, the respondents. The court emphasised that its judgment related only to the specific incident complained of and that the general relationship between the parties fell outside of the scope of the court's jurisdiction.¹⁰³ The complainant alleged that the respondents used the terms 'kaffir', 'shit' and 'Mpondo' in relation to her and her family. The court found that these words were used by the respondents and that the effect of the words was hurtful.¹⁰⁴ In a surprising move, the presiding officer went on to state:

'I am ... going to order ... that Mr Bancee [is] guilty of having used the offensive words mpondo and kaffir [and] ... that the only reasonable sentence that a Court can give under these circumstances is a fine, because even if this matter, even if I have to refer this matter to the criminal Courts, they would consider a fine, but that is just going to be a duplication because all of the evidence that will have to be given in that court is the same evidence that this Court has heard'.¹⁰⁵

Upon this finding of guilt, the court then fined the respondent R1 000 with the alternative of 30 days' imprisonment, suspended for three years on condition that the respondent was not found guilty of hate speech again.¹⁰⁶ It is clear that the presiding officer misconstrued the powers granted to him under the Equality Act. This complaint was dealt with as if it were a criminal matter. The remedies provided for in the Act are civil in nature and no provision is made for conviction of a respondent or the imposition of a sentence.

BG Maphumulo v Il Sheik (DL8) also concerned s 10 of the Act. The complainant alleged that the respondent called her a 'stupid kaffir' in the course of an argument

¹⁰³ *Namba* (transcribed judgment) 1.

¹⁰⁴ *Namba* (transcribed judgment) 4.

¹⁰⁵ *Namba* (transcribed judgment) 4-5.

¹⁰⁶ *Namba* (transcribed judgment) 5.

about a lay-by purchase in a shoe shop where the respondent tended to customers. The respondent denied using these words. The presiding officer made it clear that the standard of proof applicable in the Equality Court was that of a balance of probabilities¹⁰⁷ and he found that the version of the complainant regarding the utterance of the offensive words was more probable than the blanket denial of the respondent.¹⁰⁸

From this basis the presiding officer proceeded to set out how s 10 of the Act was to be applied.¹⁰⁹ In the first instance it has to be noted, according to the presiding officer, that the subjective intention of the respondent is irrelevant in the determination.¹¹⁰ What is crucial is the 'objective intention' as assessed by the court.¹¹¹ This is determined by looking at the circumstances and the words used by the respondent.¹¹² The second step, according to the presiding officer, is to determine the effect of the words with reference to the subsections of s 10, namely, to determine whether the words had a hurtful or harmful effect or whether they promoted or propagated hatred.¹¹³ In this instance it was found that the words had a hurtful effect.¹¹⁴ The respondent was found to have committed hate speech. The presiding officer set out the remedies requested by the complainant as a fine, an apology and a referral for criminal prosecution.¹¹⁵ Because of the request for a fine, the court deduced that damages (in terms of s 20(1)(d)) were being requested. The presiding officer took note of the financial position of the respondent and his inability to pay damages and accordingly held that this was not an appropriate remedy in this instance.¹¹⁶ Furthermore, the presiding officer also held that it was not appropriate 'to impose a fine' in this instance.¹¹⁷ Insofar as the request for a referral for criminal prosecution was concerned, the court noted that the respondent had been clinically diagnosed as

¹⁰⁷ *Maphumulo* (transcribed judgment) 2.

¹⁰⁸ *Maphumulo* (transcribed judgment) 3.

¹⁰⁹ *Maphumulo* (transcribed judgment) 3-5.

¹¹⁰ *Maphumulo* (transcribed judgment) 4.

¹¹¹ *Maphumulo* (transcribed judgment) 5.

¹¹² *Ibid.*

¹¹³ *Maphumulo* (transcribed judgment) 6.

¹¹⁴ *Maphumulo* (transcribed judgment) 5-6.

¹¹⁵ *Maphumulo* (transcribed judgment) 5.

¹¹⁶ *Maphumulo* (transcribed judgment) 5-6.

¹¹⁷ *Maphumulo* (transcribed judgment) 6.

a schizophrenic and that the chances of successful prosecution were slim because of his mental condition.¹¹⁸ The court refused to refer the matter on this basis.

One cannot but wonder whether the diminished mental capacity of the respondent ought not to have been scrutinized more closely before the respondent was found to have transgressed s 10.¹¹⁹ The presiding officer held that an appropriate remedy would be a written unconditional apology which met the requirements of such an apology in law and which had to be submitted to the court within a stipulated time.¹²⁰ This judgment sets out a different approach to the burden of proof than the one applied in DL5 and DL6, namely that of the ordinary standard in civil matters which is in line with my reading thereof, as explained above. The Durban Equality Court does not display consistency in its approach to the burden of proof in hate speech matters and clarification has to be provided by a higher court or by the legislature.

The short judgment of the Durban Equality Court in *ZC Memela v T Lues* (DL9) deals largely with the disputed facts of the matter. The complaint was that the respondent had said to the complainant, 'Remember you are a fucking kaffir do not tell me anything.' The respondent denied having said these words.¹²¹ The court found that the version of the complainant was more probable and that the respondent was unsuccessful in 'discharging the onus of disproving that the words were used'.¹²² The effect of the words on the complainant was one of hurt and humiliation which, according to the presiding officer, was evident from the steps taken by the complainant to report the matter to the respondent's employers.¹²³ The respondent was found to have contravened s 10 and ordered to apologise unconditionally in

¹¹⁸ Ibid.

¹¹⁹ For instance, to be held liable in delict for defamation a defendant has to commit a voluntary act. A voluntary act is one that was subject to the control of the actor's will at the time of the conduct. Van der Walt and Midgley 64 state: 'An infant and an insane or intoxicated person [therefore] usually have the mental capacity to act. If, however, a person's insanity or degree of intoxication is of such a nature that there is no control over his or her bodily movements, such movements become involuntary and can therefore not be considered as conduct for the purposes of delictual liability.' The degree of mental illness of the respondent could have impacted on his ability to act and should have been subjected to more rigorous investigation. See also Neethling, Potgieter and Visser (2006) 24 and 109ff pertaining to the exclusion of fault as a result of mental illness, which, in view of the interpretation of the court regarding intention would not be an issue.

¹²⁰ *Maphumulo* (transcribed judgment) 6-7.

¹²¹ *Memela* 1.

¹²² *Memela* 2.

¹²³ Ibid.

writing.¹²⁴ The presiding officer stipulated that the respondent had to admit that he had used the words, acknowledge the hurtfulness of the words, retract the words and apologise unconditionally.¹²⁵ This judgment reflects the approach discussed earlier, relating to the burden of proof (as used in DL5 and DL6).

The similarly short judgment in *S Duma v JB Adam* (DL11) reflects the interpretation of the court that s 13 of the Act applies in matters of hate speech. The complainant has to make out a *prima facie* case of hate speech, upon which the respondent, in order to escape liability, has to prove that the event complained of did not take place.¹²⁶ In this instance the complainant was successful in making out a *prima facie* case of hate speech by presenting evidence that the respondent had called her a 'bitch, a prostitute and a kaffir'.¹²⁷ The respondent was unsuccessful in discharging the onus placed on him and was found to have transgressed s 10. The respondent was ordered to apologise unconditionally and, as in DL9, the requirements for the written apology were stipulated.¹²⁸

The parties in *OT Mkize v L Kirsten* (DL14) were co-workers. The complainant alleged that the respondent had called him 'an intelligent kaffir' in the course of a discussion about work. The respondent denied this. In assessing the evidence presented before the court, the presiding officer applied the civil standard of proof when confronted with two conflicting versions to dismiss the complaint.¹²⁹ The court did not apply s 13 in relation to this complaint and was willing to deal with a complaint of hate speech that had arisen in the workplace.

The parties in *M Lankie v D Gordon* (DL16) were neighbours. The complaint was that the respondent had called the complainant and the members of her household 'kaffirs' who engaged in witchcraft to bewitch the respondent.¹³⁰ The summary of the evidence set out in the written judgment clearly paints the picture of squabbling

¹²⁴ *Memela* 3.

¹²⁵ *Ibid.*

¹²⁶ *Duma* 3.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Mkize* (transcribed judgment) 2.

¹³⁰ *Lankie* 1.

neighbours.¹³¹ The presiding officer found that the word ‘kaffir’ had not been used in relation to the complainant.¹³² He also found that the respondent had no right to make the statement pertaining to witchcraft in relation to the complainant in public.¹³³ Without stating the legal basis for his order, the presiding officer ordered the respondent to apologise in writing to the complainant for the statement relating to witchcraft.¹³⁴ It is unclear whether the reference to witchcraft was held to be hate speech and what the basis of the contravention of the Equality Act was in this instance.

The transcription of the judgment in *T Mkize v O Largatzis* (DL19) sheds some light on the interpretation and application of the provisions of the Act, but the finding of the court turned on the evidence. It is worth noting that the complaint arose in the workplace with the complaint alleging that the unprovoked respondent had said to him, ‘Hello son of a bitch and black kaffir.’¹³⁵ The respondent denied having said these words but admitted that he called the complainant ‘a bloody fool’.¹³⁶ In assessing the weight to be attached to the two conflicting versions as to words that were used, the court noted that the complainant was a single witness and that his version had not been corroborated in any fashion.¹³⁷ However, the court found that the respondent had indeed called the complainant ‘a bloody fool’ and held that this amounted to hate speech because of the hurtful effect of the words.¹³⁸ The respondent’s explanation of the work environment and the language used in that environment does, according to the court, ‘not exonerate him from the use and effect of those words because ... the Equality Act states is that the Court does not necessarily have to look at the intention with which the words were said, but the effect and impact of those words’.¹³⁹ The respondent was ordered to pay R1 000 in cash to the complainant¹⁴⁰ and provide him with a service certificate.¹⁴¹

¹³¹ *Lankie* 2.

¹³² *Lankie* 3.

¹³³ *Ibid*

¹³⁴ *Ibid*.

¹³⁵ *Mkize* (transcription) 2.

¹³⁶ *Mkize* (transcription) 3.

¹³⁷ *Mkize* (transcription) 5.

¹³⁸ *Mkize* (transcription) 6.

¹³⁹ *Ibid*.

¹⁴⁰ *Mkize* (transcription) 7.

¹⁴¹ *Mkize* (transcription) 8.

A number of questions arise from this judgment. The finding of the court turned on an admission of the respondent in relation to words not complained of. Is it for the court to step in and reformulate complaints or must the court concern itself with the formulated complaint set out in form 2? When a presiding officer steps into the fray and proactively assists complainants in the formulation of their complaints, their assistance could be viewed positively as compliance with the inquisitorial role given to presiding officer in terms of the Act. Yet, even if such a proactive stance were to be condoned or even welcomed, it would still be necessary to link the complaint with a prohibited ground. It is not clear how the words 'bloody fool' link with any of the prohibited grounds. This complaint arose in the context of an employment relationship and the court's order that the respondent was to provide the complainant with a service certificate, amounts to a remedy in terms of labour law. In this matter the equality court engaged a matter that should have been resolved in terms of labour law.

The complaint in the matter of *GS Khosa v M Saeed and R Essay* (DL20) arose in the workplace. The complainant requested an advance on his wages from the second respondent, who according to his version, then called him a 'pig', 'dog' and a 'kaffir'.¹⁴² The complaint against the first respondent was not set out in form 2 but was related during the complainant's evidence and determined by the court.¹⁴³ This complaint (against the first respondent) involved subsequent communications between the complainant and the first respondent during which, on the complainant's version, he was called a 'kaffir' by the first respondent.¹⁴⁴

In the course of his written judgment, the presiding officer was at pains to set out his interpretation of the shift of the onus to the respondent once a *prima facie* case had been made out by the complainant.¹⁴⁵ The presiding officer stated unequivocally that, in relation to any complaint in terms of the Act, the requirement is, in the first instance, that the complainant makes out a *prima facie* case whereupon the burden of proof moves to the respondent who has to show that 'the occurrence did not take place, or if

¹⁴² *Khosa* 1.

¹⁴³ *Khosa* 2.

¹⁴⁴ *Khosa* 3

¹⁴⁵ *Khosa* 4-5.

it did, that it is not based on one of the prohibited grounds'.¹⁴⁶ On the strength of this interpretation, the presiding officer held that no *prima facie* case had been made out against the first respondent, but that such a case existed in respect of the second respondent who had failed to discharge the onus.¹⁴⁷ The court took into consideration that the complainant had ceased all contact with the second respondent and, accordingly, held that payment of damages in the amount of R3 000 would be appropriate as a remedy in this instance.¹⁴⁸ This judgment recalls the approach of the Durban Equality Court in the majority of its judgments on hate speech regarding the application of s 13 to complaints of hate speech. I comment on this more extensively below at 7.9.

The complaint in *HI Donaldo v R Haripersad* (DL22) had its origins in a verbal exchange between the complainant and the respondent regarding a R5 coin which the respondent regarded as counterfeit. The respondent initially denied that he was the person who had been involved in this protracted exchange during which the complainant had been called a 'bitch' and a 'kaffir'. According to the version of the complainant, the exchange included a statement by the respondent that he did not care about South African law and its provisions regarding equality and non-discrimination.

The presiding officer held that the complainant had to make out a *prima facie* case of hate speech and harassment, upon which the burden of proof shifted to the respondent.¹⁴⁹ The court found that the complainant was successful in making out a *prima facie* case of hate speech and harassment which the respondent could not refute. This approach regarding the burden of proof echoes that of many of the earlier judgments, i.e. that s 13 applies in relation to all complaints under the Act. The presiding officer dealt extensively with the nature of the damages to be awarded in equality court matters.¹⁵⁰ In considering damages, the court held that it was important to emphasise the quasi-constitutional character of the equality court.¹⁵¹ From this premise, the court considered the request for damages under two headings, namely

¹⁴⁶ *Khosa* 5.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Khosa* 6.

¹⁴⁹ *Donaldo* (judgment on quantum) 1.

¹⁵⁰ *Donaldo* (judgment on quantum) 2-3.

¹⁵¹ *Donaldo* (judgment on quantum) 3.

patrimonial damages and proven financial loss, on the one hand, and non-patrimonial damages in relation to the impairment of dignity, emotional and psychological suffering, on the other. No patrimonial damages were proven.¹⁵²

In considering the award of non-patrimonial damages to the complainant, the court took the impact of the hate speech and harassment on the complainant into account from her perspective. The respondent was accordingly ordered to pay an amount of R10 000 in damages to the complainant in instalments of R1 000.¹⁵³ In addition to this, the respondent was ordered to apologise unconditionally in writing to the complainant for the words used.¹⁵⁴ The court order contained specific requirements in respect of the apology – the respondent had to admit that he had used the hurtful and harmful words, he had to retract the words and apologise unconditionally for their use.¹⁵⁵ The presiding officer further stipulated that a failure to submit the required apology within 21 days would result in a referral of a complaint of contempt of court to the Director of Public Prosecutions.¹⁵⁶

An interesting and perhaps educative and forward-looking addendum to the above remedies was added.¹⁵⁷ The complainant's testimony regarding the respondent's disrespect for South African law was accepted by the court. In response to this, the court ordered the respondent to address a letter of apology to the presiding officer of the Durban Equality Court in which he had to apologise for his utterances of disrespect for the law.¹⁵⁸ This letter had to assert the equality of everyone before the law and equal entitlement to protection by the law, as well as a statement setting out the respondent's commitment to the Constitution. The 21-day stipulation attached to the unconditional apology was also attached to this letter of apology.¹⁵⁹

¹⁵² It is interesting to note that the complainant included under this heading a claim for 'a number of sick-leave certificates from various medical practitioners in order to attend court hearings' (4). The court did not comment on this specifically but did not allow the claim for 'unsubstantiated medical costs' (5).

¹⁵³ *Donaldo* (judgment on quantum) 6.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Donaldo* (judgment on quantum) 7.

¹⁵⁸ *Donaldo* (judgment on quantum) 7.

¹⁵⁹ *Ibid.*

The parties in *F Mdladla v E Smith* (DL26) were neighbours. The complainant alleged that the respondent had said to her that she was a 'kaffir bitch' and that she should go and stay in Umlazi with other 'kaffirs' like herself.¹⁶⁰ The respondent denied having uttered these words.¹⁶¹ The approach of the presiding officer in this matter echoes that of matters discussed earlier concerning the application of s 13. In order to escape liability, all that the respondent could do was to prove, on a balance of probabilities, that the incident had not taken place.¹⁶² The testimony of the complainant was corroborated by another witness and the court held that the offensive words had been uttered and accordingly, that the respondent had contravened s 10.¹⁶³ The court remarked that the respondent had been convicted on a criminal charge relating to the same incident and that a heavy fine had been imposed.¹⁶⁴ In view thereof, the court found that an order to pay damages would be inappropriate.¹⁶⁵ The respondent was ordered to apologise unconditionally in writing to the complainant and it was stipulated that the apology had to include an undertaking not to use the offensive words again.¹⁶⁶ The apology had to be to the satisfaction of the clerk of the equality court and had to be signed in the presence of the clerk.¹⁶⁷

The complaints in the matters of *T Pretorius v R Petzer* (DL38) and *EB Sikakane v AR and N Petzer* (DL42) arose from the same incident and both involved the first respondent. The matters were heard and determined together. The complainants in the matters were respectively an independent contractor and his employees who did building alterations for the respondent at his house. The complainants alleged that they were called, among other things, 'hottentot', 'bushman', 'kaffir', 'fucking kaffir', 'whore' and 'cheeky kaffir bitch' in the course of an argument about the work done. The complainants also alleged that the respondent pushed Mr Pretorius around while insulting him. The respondent denied the allegations. The presiding officer considered the probabilities in her evaluation of the evidence and held that the complainants did prove that the respondents had directed hate speech at them 'on a

¹⁶⁰ *Mdladla* 1.

¹⁶¹ *Mdladla* 2.

¹⁶² *Mdladla* 3.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Mdladla* 3-4.

balance of probabilities'.¹⁶⁸ The presiding officer added, '[T]hat is the onus, same as in civil law, a balance of probabilities, and not a reasonable doubt, as in a criminal case.'¹⁶⁹ It clear that the standard applied in this matter is no different from the civil standard. Section 13 of the Act was thus not interpreted to provide for a shift in the burden of proof in matters of hate speech. The presiding officer held that the respondent's utterance that Mr Pretorius was 'a child of the devil' warranted an unconditional apology and payment of damages in the amount of R2000.¹⁷⁰ The relevant prohibited ground was not indicated. In respect of Ms Sikhakhane no clear finding is recorded as to which words constituted hate speech, but a similar remedy was awarded.

The complaint in the matter of *BS Gwala v YM Mohamed and E Ramdere* (DL39) arose in the workplace. The complainant alleged that he had been called and referred to by the second respondent (a manager) as a 'kaffir'. When he complained about this to the first respondent (his employer), he was told to ignore the behaviour of the second respondent. According to the complainant, he was subsequently, in another incident, verbally abused by the first respondent who had sworn at him, using words like 'fuck off', 'fucking hell' and 'devil'. His complaint was that of racial hate speech and harassment. In the course of his judgment the presiding officer explained the purpose and functioning of the equality courts in terms of the Act to the parties. The presiding officer stated,

'[T]he Court does not have the equivalent of a charge-sheet that for instance operates in the criminal courts. In other words there is not a particular issue that is highlighted that it could be said to be a charge that the respondent faces.'¹⁷¹

The court thus operates on a more informal basis than the ordinary courts, and the training of the presiding officer and clerk is important in the formulation and presentation of the case.¹⁷² This facilitated greater access to these courts. Against this background, the presiding officer set out the provisions regarding the burden of proof. He stated that the complainant

¹⁶⁸ *Pretorius* (transcribed judgment) 3.

¹⁶⁹ *Pretorius* (transcribed judgment) 3.

¹⁷⁰ *Pretorius* (transcribed judgment) 3.

¹⁷¹ *Gwala* (transcribed judgment) 1.

¹⁷² *Ibid.*

‘has to show to the Court, not prove, but show to the Court that certain acts took place that amount to discrimination. Once the complainant does this, the onus is on the respondent to prove on a balance of probabilities that the act did not take place.’¹⁷³

The court also emphasised that a complainant does not have to show ‘bad intention on the part of the respondent’.¹⁷⁴ In assessing the evidence, the court held that the version of the complainant was more probable and that the second respondent was unsuccessful in disproving the use of the offending words.¹⁷⁵ The same was held in respect of the words uttered by the first respondent.¹⁷⁶ The complaint (harassment on the basis of race) related to the working hours of the complainant, and on the evidence, it was held that the complainant had failed to make out a *prima facie* case. As a remedy for the hate speech, the respondents were ordered to pay an amount of R3 000 to the complainant within a stipulated time.¹⁷⁷ In this judgment, once again the court interpreted s 13 as being applicable to all complaints. But it went even further in that it equated all the complaints under the Act explicitly to ‘discrimination’.

In the matter of *P Magubane v S Smith* (DL40), the parties lived in the same block of flats and had never had any occasion to speak to each other before the incident that gave rise to the complaint. The complaint was that the respondent had used the words ‘fucking kaffir’ in relation to the complainant without any provocation.¹⁷⁸ The respondent denied having uttered these words.¹⁷⁹ The version of the complainant was corroborated by two witnesses.¹⁸⁰ The court accepted the evidence of the complainant and her witnesses and rejected that of the respondent and his witnesses.¹⁸¹ The respondent was found ‘guilty of using hate speech’.¹⁸² The court considered the financial and personal position of the respondent and held that an award of damages to the complainant would be inappropriate.¹⁸³ The court held that

¹⁷³ *Gwala* (transcribed judgment) 2.

¹⁷⁴ *Gwala* (transcribed judgment) 4.

¹⁷⁵ *Gwala* (transcribed judgment) 4.

¹⁷⁶ *Gwala* (transcribed judgment) 5.

¹⁷⁷ *Gwala* (transcribed judgment) 7.

¹⁷⁸ *Magubane* 2.

¹⁷⁹ *Magubane* 3.

¹⁸⁰ *Magubane* 2-3.

¹⁸¹ *Magubane* 4.

¹⁸² *Magubane* 4.

¹⁸³ *Magubane* 5.

the threat of criminal sanction bolstered the authority of the equality court which could refer matters to the criminal courts for prosecution.¹⁸⁴ The respondent was ordered to apologise unconditionally in writing to the complainant within a stipulated time. The court furthermore stipulated that the apology had to include a withdrawal of the hurtful words and an undertaking not to use the words again. The respondent was ordered to sign the apology in the presence of the clerk of the court who had to be satisfied with the contents. The court further added that failure to comply with the stipulations regarding the apology would result in the referral of the matter to the Director of Public Prosecutions for the institution of criminal proceedings.¹⁸⁵ The court used the remedies at its disposal effectively in this matter. The hurt caused by the offending words were addressed through the apology and the time-limit set for the apology was effectively imposed by the threat of the proverbial sword of Damocles presented by the referral to the criminal courts.

The written judgment of the Durban Equality Court in the matter of *S Dube v S Weston* (DL41) deals extensively with the evidence that was adduced at the hearing. The complainant alleged that he had been called a 'kaffir monkey' by the respondent in the course of the complainant's arrest for the possession of drugs. The respondent was present during the arrest in his capacity as the head of security of the premises occupied by the complainant.¹⁸⁶ The respondent denied the allegation of hate speech. In setting out the requirements of s 10 of the Equality Act, the presiding officer interpreted s 13 to apply in instances of hate speech.¹⁸⁷ The complainant has to make out a *prima facie* case of hate speech after which the respondent's only option is to prove, on a balance of probabilities, that the incident did not take place.¹⁸⁸ The court found that the complainant failed to make out a *prima facie* case which meant that there was no onus for the respondent to discharge.¹⁸⁹ The complaint was accordingly dismissed.

The complaint in the matter of *R King v B Bloem* (DL53) was one of hate speech in that the complainant alleged that the respondent had referred to her as a 'fat kaffir

¹⁸⁴ *Magubane* 4-5.

¹⁸⁵ *Magubane* 5.

¹⁸⁶ *Dube* 1.

¹⁸⁷ *Dube* 5.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Dube* 6.

bitch'. The respondent denied the allegation.¹⁹⁰ The presiding officer stated that the burden of proof is on a balance of probabilities, but added that this standard is 'slightly different' in cases concerning discrimination, in that it shifts to the respondent once a *prima facie* case is made out. Once a complainant has made out a *prima facie* case, 'the onus is on the respondent then to prove that there was no discrimination, no hate speech'.¹⁹¹ The presiding officer thus interpreted s 13 to be applicable to complaints of hate speech and discrimination; in fact, hate speech was equated to discrimination. In her evaluation of the evidence, the presiding officer stated that the two contradicting versions before her were equally strong and she ordered absolution from the instance.¹⁹² In view of the presiding officer's interpretation regarding the burden of proof such an order is not competent. In *Scheepers v Video and Telecommunications Services*¹⁹³ Eksteen J held that 'where ... the onus is on the defendant, there is no room for a decree of absolution from the instance, and any judgment given must be a final judgment as between the parties'. A person in the position of the respondent, who has discharged the onus placed on her, must gain the benefit of discharging the onus by a finding in her favour. Absolution from the instance would have been a competent order had the court interpreted s 13 not to apply to matters of hate speech.

The complaint in the matter of *M Dube v Mrs and Mr Murray* (DL56) arose in the workplace. The complainant alleged that the second respondent had called him a 'kaffir' during an argument regarding the performance of his duties. The court emphasised that its only focus was on the issue of hate speech.¹⁹⁴ The termination of the employment of the complainant and other labour-related issues that arose out of the same incident were not explored by the court. The presiding officer confirmed earlier readings regarding the interpretation of s 10 read with s 13, namely that the complainant – also in matters of hate speech – is required to make out a *prima facie* case, upon which the respondent has to show that 'the discrimination did not take place as alleged'.¹⁹⁵ The court held that the 'probabilities are not overwhelmingly in the favour of the complainant's version'¹⁹⁶ and that the respondents had been

¹⁹⁰ *King* (transcribed judgment) 3-4.

¹⁹¹ *King* (transcribed judgment) 1-2.

¹⁹² *King* (transcribed judgment) 4-5.

¹⁹³ 1981 (2) SA 490 (E) 491H-492A.

¹⁹⁴ *Dube* (transcribed judgment) 1.

¹⁹⁵ *Dube* (transcribed judgment) 1.

¹⁹⁶ *Dube* (transcribed judgment) 5.

successful in proving that ‘the discrimination’ did not take place. Accordingly the complaint was dismissed. This short judgment illustrates the complexities created when the hate speech is isolated from the labour law dispute through the application of the provisions of the Equality Act to a single aspect of the dispute. The entire dispute should have been dealt with in terms of labour law.¹⁹⁷ The difficulty created by the burden of proof is furthermore underlined by this judgment in which it was stated that the complainant had only to make out a *prima facie* case, but when it came to application, the ordinary civil standard was used.

The complaint in *GM Mtimkulu v M Moreti* (DL74) was dismissed by the presiding officer at the directions hearing on the basis of a special plea of prescription. The parties agreed to deal with the special plea at the directions hearing. The cause of action in this matter arose more than three years prior to the issuing of form 2 (and in the employment context).

In *AJ Smith v TJ Mgagi and another* (DL75) the complaint was that the respondents, neighbours of the complainant, had subjected her to hate speech in that she was told that ‘this is a black man’s country and no white man is going to rule here’.¹⁹⁸ The matter came before the equality court after the complainant’s application for an order to bind the respondents over in terms of s 384 of the Criminal Procedure Act of 1955 served before a magistrate who thought it more appropriate for the matter to be dealt with in terms of the Equality Act.¹⁹⁹ Further to the alleged racist statement set out above, the complainant alleged that she was told by the respondent to build a house on the Bluff and not in Wentworth and that the house of the complainants would be destroyed if it were built. Other offensive words that the respondents were alleged to have directed at the complainant were ‘rubbish’, ‘dirty’, ‘jealous’, ‘bad people’ and ‘Satan’.²⁰⁰ The written judgment of the court sets out the adduced evidence in detail.²⁰¹ The court found, on a balance of probabilities, that the offensive words were directed at the complainant by the second respondent.²⁰² In setting out the provisions

¹⁹⁷ See chapter 8.

¹⁹⁸ *Smith* 1.

¹⁹⁹ *Ibid.* See note 89 above.

²⁰⁰ *Ibid.*

²⁰¹ *Smith* 2-4.

²⁰² *Smith* 5.

of the Act in relation to hate speech, the presiding officer noted that s 10 does not set any requirement as to intention:

‘The test is whether a reasonable person would construe the speech as demonstrating “a clear intention”. This can be subjective and/or objective.’²⁰³

The court held that the complainant had been upset and hurt by the words and that the words amounted to hate speech. The presiding officer emphasised the purpose of the Act ‘to promote a culture of diversity based on equality, justice and freedom’. This is linked to the society envisioned in the preamble to the Constitution and the spirit of ‘ubuntu’. This required the parties, who were neighbours, to restore their neighbourly relations which had been harmed by the actions of the respondent.²⁰⁴ The appropriate remedy, accordingly, was found to be an unconditional written apology by the second respondent.²⁰⁵ The incorporation of ‘ubuntu’ is novel and commendable and the link drawn between the Act and the Constitution is fundamental to the transformation of our society in a more egalitarian direction. This judgment again reverted to the civil standard of proof, thus confirming the confusion that exists in respect of s 13 in relation to complaints of hate speech.

7.8.3 Complaints involving the Impairment of Dignity through Actions and Language

Twenty-three complaints involving allegations of racist actions and language were made to the Durban Equality Court during the period under consideration. Table 12 below provides an overview.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ *Smith* 6.

Table 12: Durban Equality Court Mixed Complaints

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DM1	06/04	S Mokoena	AJ de Bruin	Access to flat denied on basis of race/disability; Resp said to Compl that he had to 'ask Mandela/Mbeki for a house' and 'that there was no place for disabled people'	Residential/ Rental	Service of interim order to allow access to flat and to desist from abusing, swearing and harassing C Final order Unclear
DM2	40/04	SP Sithole	Mr Stuart	Resp called Compl 'a kaffir' and said to him that he (Resp) hated blacks; also set dogs on Compl and friends [Compl initially applied for peace order but was referred to equality court]	Residential/ Rental	Form 3 not served Status unclear
DM3	48/04	KM Ntuli	SKM Tewary	Resp disconnected water services to dwelling of Compl and called him 'a kaffir'	Residential	Service plus interim order not to harass Compl Directions hearing Judgment in favour of Compl to reconnect services
DM4	01/05	K van der Merwe	P John and D John	Compl and family called 'kaffirs' and 'half-breeds with AIDS' by Resp and daughter. Also allegations of assault (use of pepper spray)	Residential	Form 3 served Directions hearing Withdrawn by consent – settlement agreement made order of court, agreement to resolve differences amicably
DM5	16/05	NR Ngubane	Wakefield and Ms R Nel	Resp2 sent an sms to Compl to tell her 'to go back to the township' and called Compl a 'kaffir'	Commerce/ Rental	Service Directions hearing Judgment in favour of Compl, Res2 to apologise unconditionally and damages of R2000 to be paid to Compl
DM6	21/05	FD Mkize	D Kruger	Compl called 'a kaffir' by Resp who also assaulted him	Work context	Form 3 not served Court: no discrimination, harassment or inequality set out in affidavit; recommend Compl to follow up on initial complaint to SAPS
DM7	34/05	SS Ntshangase	J Hauser	Resp called Compl 'a kaffertjie' ['a small kaffir'] and said that he would kick him	Unclear	Form 3 served Directions hearing. Inquiry Judgment complaint dismissed
DM8	37/05	PT Zondo	E McAllister	Resp called Compl 'a kaffir', threw a stapler at her and told her 'to get out'	Work context	Form 3 served Directions hearing Inquiry Judgment in favour of Compl, Resp to apologise unconditionally and pay damages of R1000 to Compl
DM9	62/05	NP Zulu	KG Govender and Chetty	Resp1 called Compl 'a kaffir' and threatened Compl in relation to signing of papers	Work context/ Business?	Form 3 served No further progress Unclear
DM10	76/05	N Mqadi	S Lakhi	Resp provided inferior service to Compl, insulted him and said that he was 'an African' in demeaning way	Independent Complaints Directorate	Service Directions hearing Inquiry Judgment complaint dismissed, sent for special review to high court
DM11	92/05	V Nsele	R Kettle and Y Callaghan	Resp2 called Compl 'a kaffir' and Resp1 fired a shot at Compl	Residential	Form 3 served Directions hearing, Compl absent, complaint dismissed

Code	Case No	Complainant	Respondent	Complaint (As set out by complainant)	Context	Outcome / Status
DM12	18/06	<i>M Ntuli</i>	<i>C Jonker</i>	Resp said to Compl that 'black people think they are clever', called Compl a 'bloody kaffir' and assaulted him	Work context	Service of form 3 authorised Form sent to SAPS for service No further progress
DM13	20/06	<i>A Singh</i>	<i>K Hegter</i>	Resp said to Compl that they are 'Indian fuckers assholes' and assaulted Compl [Compl referred to earlier peace order granted against Resp]	Residential	Service of form 3 authorised Form sent to SAPS for service No further progress
DM14	58/06	<i>H Ndlovu</i>	<i>W Kuhn</i>	Resp called Compl 'a rubbish kaffir' and threatened to hit Compl	Residential	Form 3 served plus interim order served to refrain from harassing and intimidating Compl and to cease all conduct creating intimidating environment and not to injure Compl in person or property Return date, settlement agreement, Resp apologised and paid R250 in damages to Compl
DM15	60/06	<i>RZ Mzane</i>	<i>H Nel</i>	Preferential treatment on Indian police officers and subjection of black officers to racially demeaning language	Work context (SAPS)	Form 3 served? Status unclear
DM16	30/07	<i>SL Mnguni</i>	<i>JP Rechtsberger</i>	Resp swore at Compl and called workers 'freakies, frakies, vreekies', Compl unsure about meaning. Compl stated that Resp assaulted him	Work context	Form 3 served? Status unclear
DM17	31/07	<i>MN Mathetha</i>	<i>JP Rechtsberger</i>	Same facts and allegations as 30/07	Work context	Form 3 served Apology from Resp Status unclear
DM18	33/07	<i>NE Blose</i>	<i>T Howes</i>	Resp called Compl 'a kaffir' and searched his cupboard	Work context?	Form 3 served Directions hearing, court only to deal with complaint of hate speech Pending as at 31/12/07
DM19	35/07	<i>SP Ndimandu</i>	<i>J Niemand</i>	Resp saw Compl at CCMA offices, called him 'a khafula' ['a kaffir'] and photographed him	Work context?	Form 3 not served Court: more detailed affidavit required No further progress
DM20	40/07	<i>N Ngulubana</i>	<i>G D'Amico</i>	Resp called Compl 'a bitch' and 'a kaffir' and assaulted her	Work context	Form 3 served Court: cause of action arose outside jurisdictional area
DM21	54/07	<i>K Musawenkosi</i>	<i>P Dass</i>	Resp called Compl 'a kaffir' and set dogs on Compl	Unclear	Form 3 served No further progress
DM22	70/07	<i>N Mbele</i>	<i>Mr and Mrs Locket</i>	Resps, as supervisors of building where parties lived, refused to allow Compl to receive visitors and Resp2 said to Compl that she hated blacks because they had killed her husband. Compl was also called 'a prostitute' by Resp2	Residential	Form 3 served No further progress
DM23	72/07	<i>C Daniels-Khumalo</i>	<i>N Damon and others</i>	Resps called Compl 'a kaffir bitch', said that Compl used witchcraft and physically attacked Compl	Residential	Form 3 served? Note that Resps refused 'to sign for form 3' No further progress

DM18 was pending on 31 December 2007 and is not discussed further.

7.8.3.1 *Complaints not Advancing to the Inquiry Stage*

A significant number of the mixed complaints were not pursued to the inquiry stage. The reasons are diverse, ranging from vagueness of the complaint to the conclusion of a settlement agreement.

In two instances, DM6 and DM19, the presiding officer indicated prior to service that the complaints were vague or that particulars provided did not disclose a cause of action under the Act. In DM6, the complainant indicated that the respondent, a co-worker, had assaulted him and called him a 'kaffir'. The presiding officer indicated that the complaint did not fall within the purview of the Equality Act since the complaint did not involve discrimination, harassment or inequality. The presiding officer suggested that the complainant had to follow up on the earlier criminal charge laid against the respondent. The presiding officer's decision not to deal with this complaint seems to be at odds with the approach generally followed by the Durban Equality Court to engage complaints of hate speech that arise in the work place. The complaint in DM19 also seems to have a connection with the workplace, but lacks the detail to justify a firm conclusion in that regard. From the scant information provided by the complainant in his affidavit it appears that he met the respondent by chance at the CCMA offices where the latter proceeded to take a photograph of the complainant and called him a 'khafula'. On review of this complaint prior to service the presiding officer indicated that a more detailed affidavit was required. No further developments were recorded.

Service of form 3 was authorised in DM12 and DM13. The forms were sent to the SAPS for service, but no returns of service were filed. Form 3 was also not served in DM2 and no explanation for the inaction is evident from the file. No returns of service in respect of form 3 were filed in DM15, DM16 and DM 23. One can assume that form 3 was served in DM16 since the facts of that case are the same as that of DM17 in which form 3 was served. The complainants in DM16 and DM17 were co-workers who complained of verbal and physical abuse by the same respondent, their

supervisor. The file for DM17 contained a return of service and an apology by the respondent. It is not clear whether the apology was communicated to the complainant(s) and whether he (they) accepted the apology. The parties in DM23 lived in close proximity to one another. The complaint was that the respondents allegedly called the complainant 'a kaffir bitch', accused her of witchcraft and assaulted her. In her affidavit the complainant indicated that she had also laid criminal charges against the respondents. The respondents were present at Durban Magistrate's Court on the day of the criminal trial and were escorted to the office of the clerk of the equality court who wanted to serve form 3 on them. On the return of service, it was indicated that the respondents had refused to sign for form 3 because the complainant was absent from court and that the 'case [was] thrown out of court'. It is unclear whether the latter remark referred to the criminal matter or to the complaint before the equality court. The file contains no record of further steps taken in this matter.

The status of the complaints in DM9, DM21 and DM22 is unclear. In all these matters, form 3 was served on the respective respondents but no further progress was recorded on any of the files. In DM11, the absence of the complainant at the directions hearing led to a dismissal of the complaint in terms of Regulation 12(3)(a). Lack of territorial jurisdiction in DM20 brought the matter to an early halt.

In *S Mokoena v AJ de Bruin* (DM1) the complainant alleged that he had been denied access to his flat on the basis of his race and his disability. The court dealt with this complaint on an urgent basis and an interim order was served on the respondent to 'desist from abusing, swearing or harassing this complainant'. The court file also contains a final order to this effect without any indication as to further hearings. No additional documentation recording developments were filed.

The disputing neighbours who were the parties in *K van der Merwe v P John and D John* (DM4) agreed to resolve their differences amicably and had this agreement made an order of the court. The complainant alleged that his family had been subjected to racial name-calling and assault by the respondents, who in turn, alleged that the complainant's family had been the aggressors. The agreement between the parties looks to the future and has the potential to address not only the symptoms of

racial intolerance – racial hate speech and assault – but to go beyond that in a transformative fashion by acknowledging the parties as masters of their own destiny capable of addressing the cause of their dispute. The settlement agreement concluded by the parties in DM14 included some of the reconciliatory elements evident from the previously discussed settlement agreement. The respondent in DM14 took responsibility for his actions by acknowledging his transgressions and apologising unconditionally. In addition it was agreed that an amount of R250 was to be paid to the complainant as damages.

7.8.3.1 *Judgments*

The parties in *KM Ntuli v SKM Tewary* (DM3) were neighbours whose residences were interconnected. The complainant was a tenant of the property co-owned by the respondent and his (the respondent's) brother. The complainant alleged that the respondent had terminated the water and electricity supply to the complainant's part of the dwelling on account of his being black. The complainant furthermore alleged that the respondent had called him a 'kaffir'. On scrutiny of the complaint prior to service, the court issued an interim order against the respondent not harass the complainant, or to interfere with his lawful occupation of the premises. The complaint form and the interim order, setting out a return date, were served on the respondent at the same time. The respondent reconnected the electricity services after receipt of these documents.²⁰⁶ The respondent denied the use of the racial epithet or having harassed the complainant both in his response to the complaint and in his oral evidence. In oral evidence the complainant indicated that it was, in fact, the wife of the respondent who had used the offending term.²⁰⁷ The presiding officer held that the complaint of hate speech against the respondent was thus not proven.²⁰⁸ Insofar as the disconnection of the water supply was concerned, the presiding officer held that this was 'an interference with his [complainant's] lawful occupation' for which the court could 'direct reasonable accommodation which ... would include light and water supply'.²⁰⁹ Accordingly, the presiding officer directed the respondent to reconnect the water

²⁰⁶ *Ntuli* (transcribed judgment) 1.

²⁰⁷ *Ntuli* (transcribed judgment) 1.

²⁰⁸ *Ntuli* (transcribed judgment) 2.

²⁰⁹ *Ntuli* (transcribed judgment) 2.

supply of the complainant and stated that the costs had to be borne by the owners of the property in equal shares.²¹⁰

In making this order of 'reasonable accommodation' the presiding officer did not refer to a specific section of the Act, nor did she give any indication that the denial of the water service was on the basis of race. Section 7 of the Act includes an illustrative list of instances of unfair racial discrimination, as set out in 5.3.1.4.1. Subsection 4 of s 7 refers to the denial of access to services, as well as 'failing to take steps to reasonably accommodate the needs of such people'. Further mention of reasonable accommodation is made in s 21 which sets out the orders that an equality court may make. Section 21(2)(i) provides for an order 'directing the reasonable accommodation of a group or class of persons by the respondent'. This formulation indicates that such an order is aimed at remedying systemic denial of benefits or opportunities to groups or classes of people and is not aimed at addressing the situation in which an individual finds her/himself. It would thus seem that reliance on this provision would be inappropriate in this matter. However, where a denial of services has been proven to constitute unfair discrimination on the basis of race, an order to supply such services would be appropriate. The judgment contains no specific analysis of the denial of services as constituting unfair discrimination, which is unusual. The remedy granted in this matter was directed at the improvement of the living conditions of the complainant, but the lack of a clear indication as to the basis of order, unfair discrimination or otherwise, is problematic.

Judgment was also delivered in *NR Ncusane v Wakefield and R Nel* (DM5).²¹¹ The complaint against the first respondent was dropped prior to the inquiry.²¹² The complainant alleged that the second respondent had sent her an SMS which read as follows: 'You are a rude fucking black. No thank you, no goodbye. Go back to the township where you belong.' The complainant furthermore alleged that the second respondent, during a subsequent telephone conversation, had said to her, 'You fucking kaffir, if you don't want people to be rude to you, you shouldn't be rude to them

²¹⁰ *Ntuli* (transcribed judgment) 2.

²¹¹ A full transcription of the record was on the court file.

²¹² *Ncusane* (typed record) 1.

as well.²¹³ The presiding officer applied the civil standard and gave no indication that the complainant had to make out a *prima facie* case, upon which the onus would shift to the respondent.²¹⁴ The presiding officer found the version of the complainant to be more probable than that of the respondent.

Without explaining its reasoning, the court found that the words of the respondent in the sms relating to the complainant being a 'rude fucking black' who needs to 'return to the township' constituted unfair discrimination.²¹⁵ The words found used by the respondent during the telephone conversation with the complainant – 'You fucking kaffir, if you don't want people to be rude to you, you should not be rude to them as well' – amounted, according to the court, to hate speech.²¹⁶ The appropriate remedy for these infringements was an award of damages in the amount of R2 000 for the impairment of the complainant's dignity and diminished esteem and self-esteem (after the sms had been viewed by other people) and an order directing the respondent to apologise unconditionally in writing to the complainant.²¹⁷ It is noteworthy that the presiding officer relied on the civil standard in relation to the burden of proof in this matter. This highlights the uncertainty regarding the application of s 13 as is discussed below at 7.9.

The complainant in *SS Ntshangase v J Hauser* (DM7) alleged that the respondent called him a 'kaffertjie' ['a small kaffir'] and said that he would kick him. The respondent denied these allegations. The court stated that it had to determine, in the first instance, whether the words as alleged by the complainant, had been used.²¹⁸ In explaining the application of the burden of proof to the unrepresented parties before the court, the presiding officer noted that it was the duty of the respondent to show that it was more probable than not that the incident had not taken place.²¹⁹ This

²¹³ *Ncusane* (typed record) 58.

²¹⁴ *Ncusane* (typed record) 60.

²¹⁵ In the course of the proceedings regarding the remedy to be awarded in this matter, the presiding officer intimated that the message of the respondent to the complainant was that the latter did not belong in a 'white area' and that that message is unfairly discriminatory on the basis of race (*Ncusane* (typed record) 64-65).

²¹⁶ No clarification of the court's reasoning is provided, but one could take it that the presiding officer accepted that the use of the racial slur 'kaffir' is generally regarded as constituting hate speech (*Ncusane* (typed record) 61). See 5.4.9 and 5.5.2.

²¹⁷ *Ncusane* (typed record) 70-71.

²¹⁸ *Ntshangase* (transcribed judgment) 1.

²¹⁹ *Ibid.*

explanation could very well be interpreted to mean that the complaint itself constituted a *prima facie* case which shifted the onus to the respondent. But the presiding officer then continued to explain that the court was confronted with two contradicting versions, one of which – the respondent’s – bolstered by the evidence of another witness, while the version of the complainant stood uncorroborated.²²⁰ The court dismissed the complaint on the evidence. Despite its contrary explanation, the court’s application of the burden of proof seems to invoke a burden of proof on a balance of probabilities.²²¹ This judgment is yet another illustration of the confusion created by s 13 of the Act in relation to complaints of hate speech.

The parties in *PT Zondo v E McAllister* (DM8) were in an employment relationship. The complainant alleged that the respondent, her employer, had subjected her to harassment and hate speech on the basis of race. In respect of the allegation of hate speech, the respondent acknowledged that she used the word ‘kaffir’ in reference to the complainant, but all allegations regarding harassment were denied.²²² The presiding officer held that the ‘mutually destructive versions’ regarding the complaint of harassment made it impossible to determine the truth on this point. She accordingly made no ruling in respect of the complaint of harassment since neither of the parties’ versions contained improbabilities.²²³ In respect of the hate speech the court relied on the respondent’s admission that she had used the word ‘kaffir’. The presiding officer noted her apology for the use of this word in her affidavit and her evidence.²²⁴ The court accepted that this word constituted hate speech for which a remedy had to be determined. The presiding officer noted that the employment dispute had served before the CCMA, and that the CCMA had determined that the respondent should compensate the complainant financially, but she (the presiding officer) stated that the equality court was a different forum, intended ‘to service the community when incidents like this arise’.²²⁵ The presiding officer clearly did not view hate speech in the employment context to be beyond the jurisdiction of the equality court. The

²²⁰ *Ntshangase* (transcribed judgment) 2.

²²¹ For an exposition of the law applicable in such an instance see *Garzouzie v Smith* 1954 (3) SA 18 (O) 22E-F and for a more recent decision, *Stellenbosch Farmers’ Winery Group Ltd and another v Martell et cie* 2003 (1) SA 11 (SCA) para 11.

²²² *Zondo* (transcribed judgment) 1-2.

²²³ *Zondo* (transcribed judgment) 2.

²²⁴ *Zondo* (transcribed judgment) 2.

²²⁵ *Zondo* (transcribed judgment) 2-3.

respondent was ordered to apologise in writing to the complainant and to pay her an amount of R1 000 in damages for the hate speech.²²⁶

The complaint in the matter of *N Mqadi v S Lakhi* (DM10) involved an incident at the offices of the Independent Complaints Directorate in Durban of which the respondent is the director. The complainant lodged a complaint with the Directorate months before the incident and wished to meet with the respondent to obtain information regarding the ongoing investigation of his complaint.²²⁷ The complainant alleged that the respondent had said to him that she was 'fed up of Africans who invaded her office because there are junior investigators to attend to us'. The respondent denied any racial abuse or harassment of the complainant. In a fairly lengthy judgment the presiding officer dealt with two issues, namely the issue of 'equality of arms' in respect of legal representation and the complaint itself. Insofar as the issue of legal representation is concerned, the court discussed the transformation of the South African legal system post 1994; the importance of the courts in the protection of rights of the vulnerable members of society and the power imbalances that are present when a person is unrepresented in legal proceedings.²²⁸ The presiding officer noted that the complainant had been unsuccessful in his application for legal aid and then raised the question 'whether the non-representation by (sic) the complainant in fact did assure him of this right to a fair public hearing'.²²⁹ The court noted that the regulations oblige a presiding officer to inform a party to the litigation of her/his right to representation. But the court's power does not extend beyond this; it has no power to assist a litigant further to obtain legal representation once legal aid has been denied.²³⁰ In the estimation of the presiding officer, the absence of legal representation has implications for the fairness of a trial and, on this basis, the presiding officer decided to refer his

²²⁶ *Zondo* (transcribed judgment) 3.

²²⁷ The court deals with the evidence presented in detail: *Mqadi* (transcribed judgment) 12-17. The essential facts are summarised from these pages.

²²⁸ *Mqadi* (transcribed judgment) 2-6.

²²⁹ *Mqadi* (transcribed judgment) 8. The right of access to court protected in s 34 of the Constitution ensures 'a fair public hearing before a court' for any person with a dispute that can be resolved by the application of law. At 9 the court also made reference to the provision contained in s 35(3)(g) of the Constitution relating to the right to legal representation to accused persons and stated: 'The Court is of the mind that if such a rights vests in vests in (sic) favour of an accused person, why it ought not to also vest in a litigant in the Equality Court.' Later (12) the court rephrased the issue for review as follows: 'Now, the issue that the Court specifically refers for review is whether it can be said that the complainant did not fully participate in the proceedings, and whether this could have resulted in an unfair hearing, thereby not allowing him access to justice.'

²³⁰ *Mqadi* (transcribed judgment) 7-8.

judgment to the high court for special review of this issue.²³¹ The court was at pains to explain how the 'inequality of arms' impacted upon its decision on the merits.²³² The presentation of the complaint by the complainant was, according to the court, in the narrative style, while that of the respondent was 'distinctly legalistic'.²³³ Hence, 'the Court's dilemma was ultimately to determine what weight it was to attach to either of these two approaches'.²³⁴ Ultimately, the court held that the version of the respondent was supported by the evidence presented by the various witnesses, while that of the complainant was not. The complaint was accordingly dismissed.²³⁵ The court explained that this finding was 'provisional', subject to the finding on review by the high court.²³⁶ No order as to costs was made.²³⁷ At the time of writing the outcome of the review hearing was not available.

The judgment of the court in the *Mqadi* matter is noteworthy for its proactive stance on legal representation.²³⁸ There is, no doubt, merit in the presiding officer's observation regarding the differences in style of case representation between represented and unrepresented litigants. Presiding officers are trained in law; their jobs require them to apply legal standards to facts. The Equality Act sets legal standards, and while compassion for and empathy with the plight of the often unrepresented complainant may spark sympathy in the presiding officer, s/he remains confronted with the provisions of the Act that have to be applied to the evidence presented. The presiding officer in the matter of *Mqadi* was, by his own admission, persuaded by the 'legalistic' presentation of the matter on behalf of the respondent, while deeply aware of the difficulties faced by unrepresented complainants. This assessment of the unequal power relations that exist between represented and unrepresented litigants is, in my view, accurate.

The solution to this inequality manifesting itself in the equality court, as in other courts, is elusive. In criminal matters, the 'substantial injustice test' is used to determine

²³¹ *Mqadi* (transcribed judgment) 9.

²³² *Mqadi* (transcribed judgment) 11-12.

²³³ *Mqadi* (transcribed judgment) 11.

²³⁴ *Mqadi* (transcribed judgment) 12.

²³⁵ *Mqadi* (transcribed judgment) 16.

²³⁶ *Mqadi* (transcribed judgment) 19-20.

²³⁷ *Mqadi* (transcribed judgment) 19.

²³⁸ See also 6.3.1.3.

whether legal representation at state expense must be provided to unrepresented accused persons.²³⁹ It is accepted that substantive injustice would result if the accused faced the possibility of imprisonment without the option of a fine.²⁴⁰ In civil matters the issue is more complex. Brickhill²⁴¹ maintains that the notion of fairness in civil and criminal trials will overlap to some extent insofar as this is protected in s 34 of the Constitution. It would be necessary to determine what 'fairness' requires in the circumstances of the specific case.²⁴² This suggestion is sound. This assessment needs to be made by the equality court in each instance.²⁴³ Where it is found that the unfairness will result in a matter where a party is unrepresented, a legal representative should be appointed for the unrepresented party at state expense. A co-ordinated effort on the part of the Legal Aid Board, South African Human Rights Commission, the Commission for Gender Equality and other providers of legal services to the indigent community will be necessary in this regard.²⁴⁴ Care should also be taken that the involvement of legal representatives, or the presiding officers' preference for their involvement, should not be used to mystify the court process or to make it inaccessible through the use of legalese.

7.9 CONCLUDING REMARKS

In this chapter I presented a snapshot of the racism complaints made to South African equality courts. As I indicated in the introduction to this chapter, the question for litigants is whether the Equality Act is interpreted and applied correctly, i.e. in a way that furthers the objectives of the Act. In this section I address this question pertinently. For ease of reference I paraphrase the objectives of the Act as set out and analysed in chapter 5 (at 5.3.1.2) of this thesis. The Equality Act was promulgated to address the systemic inequalities and unfair discrimination that are present in our society and its institutions as these threaten 'the aspirations of our constitutional democracy'. These constitutional aspirations are: 'human dignity, equality, freedom, and social justice in a united, non-racial and non-sexist society

²³⁹ Brickhill 298 and the authorities discussed there.

²⁴⁰ *Ibid.*

²⁴¹ Brickhill 298.

²⁴² *Ibid.*

²⁴³ If need be the Act needs to be amended to reflect this additional function of the presiding officer.

²⁴⁴ See also SAHRC 'Equality Review' 8.

where all may flourish'.²⁴⁵ It is thus clear that the Equality Act was adopted to facilitate change 'in an egalitarian direction' in our society and its transformative objectives are supported by what I called reactive and promotional provisions.²⁴⁶ Insofar as the reactive provisions of the Act are concerned, s 2 stipulates that the Act seeks to eradicate unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability and that the Act sets out remedies for those whose rights under the Act has been infringed. My criticism of the specific reactive provisions of the Act is set out in chapters 5 and 6. Nonetheless, for purposes of this section I want to consider whether the selected equality courts considered collectively, given the Act and the resources available, have succeeded in realising the Act's goals. I will reflect on what worked and what did not work and comment on how the ill-functioning aspects can be improved.

The sample of racism complaints revealed certain trends regarding the nature of and contexts within which complaints arose. In Johannesburg the majority of complaints involved racist actions, specifically in relation to commercial and business opportunities. The majority of complaints made to the other selected equality courts involved the use of racist language in different contexts. The Durban Equality Court received the most complaints of this nature. Of the 86 complaints regarding racist language that this court received, 38 arose in the work context²⁴⁷ and a further 29 complaints involved strained relationships between landlord/tenant and/or neighbours. The relatively high number of complaints involving the use of racist language shows that this phenomenon still remains a problem in our society. If the Act were to be successful in addressing racist behaviour, it should address all complaints of racism, and specifically this kind of complaint, effectively and efficiently. The record of the selected equality courts is chequered as is evident from the discussion and analysis in this chapter.

Some of the judgments coming from the selected equality courts furthered the transformational agenda of the Act successfully by affirming the inherent equal dignity

²⁴⁵ Preamble to the Equality Act.

²⁴⁶ See 5.3.1.3. This thesis focuses on the reactive provisions of the Act.

²⁴⁷ I analyse the jurisdictional issues that arise below. I have included those instances in which I have indicated the context as 'work context/ residential' or 'work context' in this figure of 38.

of all people.²⁴⁸ Specific examples from the considered cases that come to mind are that of *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission (JA1)*, *Complainant v Respondent (DL5)*, *HI Donaldo v R Haripersad (DL22)*, *P Magubane v S Smith (DL40)*, *AJ Smith v TJ Mgagi and another (DL75)* and *NR Ncusane v Wakefield and R Nel (DM5)*. In these matters the equality rights of the complainants were vindicated and small-scale social change became a reality.²⁴⁹ In the majority of these cases, large sums of damages were not awarded which means that the Act was not viewed and applied as a quick ‘money-spinner’ for complainants. The Equality Act has its origins in the Constitution and the remedies contained in the Act are reminiscent, in some ways, of constitutional remedies.²⁵⁰ An award of damages is backward-looking by its very nature and this is a characteristic not generally regarded as suitable in constitutional matters.²⁵¹ In some instances (determined by the facts of a particular case) an award of damages may be the only meaningful way in which the rights of the complainant can be vindicated. In such instances an award of damages is appropriate. While essentially backward-looking, an award of damages could also be viewed as transformative in relation to a particular respondent where the award forces the respondent to change her/his behaviour to accord with the Equality Act to prevent similar complaints in future. The award in favour of the complainant firm in the case of *Manong* is a good example of this approach.²⁵²

In many of the judgments listed above, the respondents were required to apologise unconditionally for their racist behaviour. This remedy forces the perpetrators of racist behaviour to acknowledge their wrongdoing. The sincere apology that has to accompany the acknowledgment of wrongdoing also addresses the indignity suffered by the complainant effectively.²⁵³ This forward-looking remedy has the potential to

²⁴⁸ In chapter 4 of this thesis I argued that the dignity interest is at the core of the constitutional commitment to equality. The commitment to equality set out in the Equality Act should reflect a similar commitment to the dignity interest. See also 5.3.1.4. See also chapter 8.

²⁴⁹ See 1.3.1.1, 5.2 and 5.6.

²⁵⁰ See 5.4.

²⁵¹ See 5.4.4.

²⁵² The court also ordered a policy audit in this matter. This remedy was clearly intended to change the practice followed by the respondents in relation to procurement.

²⁵³ See 5.4.6.

restore the relationship between a complainant and a respondent and thus to contribute to transformation in this way. In many instances the court also required the respondents to undertake that they will not repeat their racist behaviour. The transformation brought about through unconditional apologies does not affect society as a whole but has an immediate impact on the litigating parties and potentially in their community/communities. This small-scale change vindicates the equality rights of complainants effectively and from the judgments it is clear that this remedy can be used effectively and with success.

Only a few of the complaints made to the selected equality courts ended in judgment. The fact that there are a number of judgments that reflect the commitment to change as envisioned in the Act is encouraging. These judgments must be counted as a measure of success for the Equality Act, the equality courts and the training provided in terms of the Act. The judgments illustrate that the Act and the courts have the potential to contribute meaningfully to social change as envisioned in the Act. This potential to contribute meaningfully to social change is important since it demonstrates that the Act can work as was intended.

The progressive settlement agreements that were concluded for instance in *Kollapen Narandren v JH du Preez* (PA1), *T Nkhwashu v Doring en Rosie Kleuterskool* (PA2), *MG Pillay v M Cronje and I Coetzee* (CA1), *Gerber v Dunmarsh Investment (Pty) Ltd and Evenwell* (DA14) and *K van der Merwe v P John and D John* (DM4) also display the potential of the Equality Act and the equality courts to contribute to social change. The settlement agreements in the first four cases listed here contained an acknowledgment on the part of the respondents of their transgression of the equality rights of the complainants, an apology and an undertaking not to repeat the offending behaviour. The settlement agreements in PA1 and CA1 were further bolstered by agreements to pay an agreed amount of money for damages to organisations. Damages paid to organisations have a wider and potentially greater transformative effect than damages paid to an individual.²⁵⁴ The settlement agreement in DM4 represents a further dimension of change and the restoration of relationships. The

²⁵⁴ See 5.4.4.2. The agreement in CA1 was that damages were to be paid to an organisation nominated by the complainant that is dedicated to combating prejudice against lesbian, gay, bisexual, transgendered and intersexed communities.

parties to this matter agreed to resolve their (existing and future) disputes amicably thus asserting their own agency. This settlement agreement was concluded as a result of a complaint made to the equality court and the success it represents can be attributed to the Act and its institutions.

The positive aspects highlighted above are largely overshadowed by the difficulties experienced by the equality courts and its officials.²⁵⁵ These difficulties range from file management to conflicting interpretations of the Act's provisions. I deal with each of these in turn and make suggestions as to how the difficulties may be overcome. I make specific recommendations in chapter 8.

The presiding officers of the Pretoria and Durban Equality Courts deemed it necessary to introduce an additional step to the prescribed procedure to be followed in the equality courts.²⁵⁶ This step involved the vetting of complaints by presiding officers prior to the issuing and service of form 3 on the respondents. This additional step was introduced to assist clerks and to ensure that only valid complaints were pursued. The proactive stance taken by the presiding officers in this regard is acknowledged, but one needs to question the reason for the introduction of this step more closely. The screening of complaints took place to assist the clerks who had undergone training in terms of the Act on the basis of which they presumably would have been able to determine whether a complaint belonged in the equality court or not. The need for this step thus points to unfamiliarity with the provisions and application of the Act on the part of the clerks. The training of clerks must address this aspect more pertinently. I have pointed out in 6.2.3 that the *Resource Book* for clerks is adequate, succinct and clear. It would thus seem that the training courses of clerks are too short and too superficial to acquaint clerks adequately with the provisions of the Act so as to enable them to assist prospective complainants meaningfully.²⁵⁷ If clerks were sufficiently familiar with the Act the additional step introduced by the presiding officers in Pretoria and Durban would have been unnecessary.

²⁵⁵ It has to be noted that several complaints were dismissed after inquiries had been held. The presiding officers cannot be faulted for such findings provided that the Act was interpreted and applied correctly.

²⁵⁶ See 6.4.3.

²⁵⁷ See 6.2.3 and 6.6.2.1.

It is evident from the discussion of the complaints made to the selected equality courts that comparatively few matters proceeded to the inquiry stage. In many instances form 3 was not served on the respondents and those files contained no notes explaining why the form was not served, or whether any follow-up inquiries were made to the complainants or to the SAPS responsible for service. This can be attributed to a lack of a proper file management system. Clerks should be trained specifically to manage their filing systems appropriately and to implement follow-up measures so as to ensure that complaints proceed to the inquiry stage. A finding as to whether the provisions of the Act have been transgressed can only be made after an inquiry was held and an inquiry can only be held after the forms have been served.

Bureaucratic failures jeopardize the right of access to justice of complainants and could discourage potential complainants from approaching the equality court. Clerks play a pivotal role in the functioning of the equality courts. The training of clerks should be ongoing and should address substantive and procedural issues central to the Act. Basic administrative skills should similarly be addressed.

In chapters 5 and 6 of the thesis I discussed and analysed the provisions of the Equality Act and concluded that some of the Act's provisions were imprecisely formulated. Vague or imprecise legislative provisions are difficult to interpret and apply. The conclusions reached in these chapters are borne out by what transpired in the selected equality courts. I discuss the confusion arising from the problematic formulations in turn.

A large proportion of the complaints made to the equality courts arose in the workplace.²⁵⁸ The responses of the equality courts to these complaints were diverse and the different equality courts also displayed internal inconsistencies in their handling of such complaints.²⁵⁹ In Pretoria, Johannesburg and Cape Town the equality courts were largely reluctant to hear such matters, holding that the complaint

²⁵⁸ 51% of the complaints made to the Pretoria Equality Court arose in the workplace, 21% of those made to the Johannesburg Equality Court arose in the workplace, with the figures for Cape Town and Durban at 53% and 41% respectively.

²⁵⁹ So for instance, was the Pretoria Equality Court willing to allow the service of form 3 in PL2, PL3, PL4, PL12, PL14 and PL16, but unwilling to allow the same in PL5, PL6, PL7, PL8 and PL13.

had to be dealt with in terms of labour law, with a few exceptions. The Durban Equality Court was generally willing to entertain such complaints, bar one or two.²⁶⁰

The uncertainty that results from the conflicting interpretation of s 5(3) of the Act hampers the effective functioning of the equality courts. Complaints regarding any infringement of the equality right that arise in the employment context are to be dealt with in terms of labour law, whether the complaint involves discriminatory action, harassment or hate speech.²⁶¹ Where such complaints arise between an independent contractor and the contracting party, the Equality Act will apply. My review of the complaints made to the selected equality courts revealed that complainants often only supplied scant information about their relationships to the respondents, using vague terms like 'my boss' and so forth. Inadequate information regarding the nature of the relationship between the parties makes it difficult to determine whether a matter belongs in the equality court or not. The presiding officers of the Pretoria, Johannesburg and Cape Town Equality Courts generally accepted that the relationship between the parties was one of employment where a work relationship was alleged by the complainant. The allegations made by the complainants were not interrogated and the presiding officers declined to deal with the complaints on the basis of the complainants' allegations. The presiding officers' decisions to exclude labour law disputes from the ambit of the Act are correct.²⁶² Labour law forums have been created and equipped to deal with labour disputes.

It is evident from the cases discussed that the complaints regarding the infringement of the equality right in the workplace often formed part of a greater labour dispute.²⁶³ The nature of the relationship between the parties should be clarified upfront and where an employment relationship exists or where the complaint arose in the employment context, the complainant should be advised to pursue the matter in terms of labour law. Where the information provided by the complainant does not clarify the position upfront, the respondent should be notified of the complaint and must be given the opportunity to respond on the issue of jurisdiction and to the merits of the

²⁶⁰ See for instance DL57 and DL59. See also note 262 below.

²⁶¹ See 6.3.1.1.

²⁶² The Durban Equality Court did not have the benefit of the precedent in *Strydom v Chiloane* 2008 (2) SA 247 (T) which was only reported in 2008, the absence of which can explain the court's general willingness to engage these complaints.

²⁶³ See for instance DM8.

complaint. The information provided by the complainant and the respondent should then enable the presiding officer to make a ruling on the issue of jurisdiction on the papers. The current uncertain position deprives potentially deserving complainants working as independent contractors of their remedies under the Equality Act. In chapter 8 I make specific recommendations to address this difficulty.

Section 20 of the Equality Act provides for the potential referral of complaints to alternative forums where such a forum can deal with a complaint more effectively than the equality court that was approached.²⁶⁴ A decision to refer a matter to an alternative forum is taken by the presiding officer after a response to the complaint has been received from the respondent (or the time period for the filing of the response has lapsed). The presiding officer is not to take the decision to refer a matter to an alternative forum lightly. The Act requires the presiding officer to consider, amongst other things, the circumstances of the parties and their needs and wishes. A presiding officer only has authority to refer a complaint to an alternative forum where the both the alternative forum and the equality court have jurisdiction. The latter point is explicitly highlighted in the *Bench Book*.²⁶⁵ It would seem as if the provisions of the Act are clear on this point. Application of these provisions proved more problematic. A relatively small number of the considered complaints were referred to alternative forums. The complaint in PL9 was formally referred to the family advocate after both the complaint and the response had been considered. This was done on the papers and the views of the parties were not canvassed in this regard. The complaints in CL1 and CL8 arose in the employment context. Both complaints were formally referred to labour law forums after service of form 3, receipt of the response thereto and consideration of the matter by the presiding officer.²⁶⁶ The complaints in DA2, DA4 and DL45 were all referred prior to service of form 3. In one way or another, all these referrals failed the standards set by the Equality Act: the views and personal circumstances of the parties were not taken into consideration by the presiding officers in PL9, DA2, DA4 and DL45 (in the last three instances the referrals were made prior to service) and in CL1 and CL8 the presiding officers ignored the fact that a referral was only competent where jurisdiction is shared. Presiding officers ought to

²⁶⁴ See 6.4.3.

²⁶⁵ *Bench Book* 101.

²⁶⁶ In CL1 the court was addressed on the issue of jurisdiction during the directions hearing.

familiarise themselves with the provisions of the Act and their interpretation before attempting to apply them. The publication and distribution of all equality court judgments would also assist in this regard.

A lack of intimate knowledge and familiarity with the provisions of the Equality Act is also evident from the numerous informal referrals of complainants to the SAPS,²⁶⁷ and the criminal conviction in terms of the Act in DL6. It is clear that the provisions of the Act exist alongside those of criminal law and that they do not aim to supplant criminal sanctions. The remedies in the Act are civil in nature and can never result in a criminal conviction. Such misinterpretations of the provisions of the Act point to inadequate knowledge of the Act. This cannot be attributed to information in the *Bench Book*,²⁶⁸ but is rather a result of unfamiliarity with the provisions of the Act. If specific presiding officers were to specialise in equality court matters, such misinterpretations could be avoided. Specialisation by presiding officers would also require continuing training on the Act. The publication and distribution of all equality court judgments to all equality court presiding officers would also provide guidance to presiding officer confronted with similar complaints.

In 5.3.1.4.1, I argued that the test for unfairness set out in s 14 of the Act is complicated and imprecise. While this section remains unchanged on the statute book, it has to be interpreted and applied to complaints serving before the equality courts. The test has to be used in conjunction with the definitions of ‘equality’ and ‘discrimination’ set out in the Act. The presiding officers of the equality courts have skirted the dense analyses in terms of s 14 by relying on the Constitutional Court’s test for unfair discrimination.²⁶⁹ The conclusions reached by employing the latter analysis are not wrong, but the fact that the section is not used, confirms my conclusion regarding its unnecessary complexity.²⁷⁰ The test for unfairness set forth in the Act should be uncomplicated and easy to apply to all complaints of discrimination. This will ensure legal certainty. In chapter 8 I recommend a simplification of the test to ensure uniformity in its application by all presiding officers in all equality courts.

²⁶⁷ See for instance PL5, PL6, PM1, PM2, PM4 and PM5.

²⁶⁸ See 6.2.2.1.

²⁶⁹ See for example *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Department, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission* (JA1).

²⁷⁰ See 5.3.1.4.1.

The Durban Equality Court was the only selected equality court where a significant number of complaints yielded judgments. In this court there were conflicting interpretations of the application of s 13 to complaints of hate speech under s 10. Section 13 of the Act is clear on the burden of proof in respect of complaints of unfair discrimination, but the position in relation to complaints of hate speech and harassment is unclear.²⁷¹ Section 13 mentions only 'discrimination' and is silent on the burden of proof to be applied in relation to complaints of hate speech and harassment. This omission caused some presiding officers to interpret this section to apply to complaints of hate speech (DL5, DL6, DL9, DL11, DL20, DL22, DL26, DL39, DL41, DL53, DL56) while other presiding officers applied the ordinary civil standard of proof to such complaints (DL10, DL14, DL19, DL38 and DL42, DL75). In instances where s 13 was interpreted to apply to complaints of hate speech, the complainant was required to make out a *prima facie* case of hate speech upon which the burden of proof shifted to the respondent who, in terms of that section, had limited options. The respondent's only option was to prove, on a balance of probabilities that the incident of hate speech did not take place or that the words used did not relate to one of the prohibited grounds. This interpretation means that defences of fair comment, truth, privilege or consent ousting wrongfulness could not succeed. This interpretation is incorrect. The Act distinguishes between hate speech, harassment and unfair discrimination, thus indicating that the equality right can be infringed in different ways.

The Act sets out different requirements for these different types of infringement. Most notable is the fact that complaints regarding hate speech and harassment are not subjected to an unfairness analysis in terms of s 14.²⁷² Section 13 does not apply to complaints of hate speech and harassment. The correct approach is to apply the burden of a balance of probabilities in respect of such complaints as would apply in civil matters. This interpretation does not place an onerous burden on a complainant in a hate speech or harassment matter since s/he has to prove, on a balance of probabilities, that the offending words were used. S/he further has to prove that a reasonable interpretation of the words demonstrates a clear intention to be hurtful, harmful or to promote or propagate hatred. The respondent to such a complaint then

²⁷¹ See 5.3.1.4.2.

²⁷² Section 15.

has the option to prove that the words were not uttered, that the words did not relate to a prohibited ground or that the utterance was not wrongful in the particular circumstances. This will place the respondent to such complaints in the same position as a respondent to a complaint of unfair discrimination. Authoritative interpretation by a high court or clarification of the position by the legislature is necessary.

Transformative constitutionalism requires the interpretation and application of the Equality Act's provisions in the spirit of transformation. The transformative agenda should permeate the administrative handling of complaints and the adjudication of these complaints to further the ideal of a more equal society. It is evident from the earlier discussion of some of the settlement agreements and judgments that there is awareness of this constitutional imperative. This demonstrates the transformative potential of the Equality Act and the equality courts. This awareness does not inform the administration, interpretation and application of the Act in all instances and this hampers the constitutional ideal. It would seem that the Act is viewed by clerks and presiding officers alike as just another piece of legislation which they apply mechanically. This clearly was not the intention of the drafters of this Act – they passed this legislation to address inequality squarely and at its roots.²⁷³ The Equality Act can be made to work, but this will require a concerted effort on the part of all the role players. My specific recommendations set out in chapter 8 aims to address the obstacles that hamper effective application of the Act.

²⁷³ See 5.2 and 5.3.1.

Chapter 8

CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

‘I think that it is helpful to conceive of equality as a language like every other: with rules of grammar and syntax, nuances, exceptions, and dialects. After all, a language is more than a form of communication. It is an embodiment of the norms, attitudes, and cultures that are expressed through that language. Learning a language and learning a culture go hand in hand.’¹

I made reference to L’Heureux-Dubé J’s call to learn the language of equality in 4.3. In this concluding chapter I want to return to her metaphor in considering the Equality Act. The language of equality has to be internalised (lived) to contribute meaningfully to social change in an ‘egalitarian direction’.² The question to be considered in this chapter is whether and how the provisions of the Equality Act and their application have contributed to the development and the internalisation of this language of equality and how the provisions and application of the Act can be refined to shape the language of equality. A consideration of the Act’s contribution to the language of equality also demonstrates the gap that exists between the provisions and the practice of the Act.³

8.2 THE EQUALITY ACT AND ITS APPLICATION IN THE INTERNALISATION OF THE ‘LANGUAGE OF EQUALITY’

8.2.1 The Roots of the ‘Language of Equality’

Learning the language of equality requires historical contextualisation, because it takes guidance from the mistakes of the past.⁴ In this thesis I considered the history of South African constitutional law insofar as it entrenched racial inequality and racial

¹ L’Heureux-Dubé 74.

² See 5.2. L’Heureux-Dubé 74 urges her readers to ‘try to think in terms of this new language’ (emphasis in original).

³ See 1.3.1.2.

⁴ L’Heureux-Dubé 75.

discrimination.⁵ If the Equality Act is to contribute to the internalisation of the language of equality, it should reflect due cognisance of past inequality and discrimination. Chapter 5 of this thesis set out a discussion of the objects and purpose of the Act. The preamble to the Act acknowledges our unequal and discriminatory past, thus rooting the Act and setting its goals in diametrical opposition to the past which was characterised by the systemic denial of opportunities and hierarchical racial (and other) categorisation. The basis of the language of equality as refined in the Act is thus sound.

8.2.2 Measuring Up: International and Constitutional Standards, the Equality Act and its Application

Contextualisation of the commitment to equality requires a pertinent consideration of the provisions of the Act and their application in relation to international law and constitutional standards. Although I have already indicated (at 4.3) that the constitutional commitment to equality measures up to the international law standard, it remains to be determined whether the provisions and the application of the Equality Act measure up to the international standard,⁶ in the first instance, and to the constitutional standard⁷ in the second instance. I consider the Act and its application in relation to these standards in turn.

The exposition of the international law standard in chapter 3 clearly shows that the commitment to racial equality and the eradication of racial discrimination in international law is comprehensive. International law allows states to contextualise their commitment to racial equality through recognition of the state's own realities in legislation concerning issues of race. International law recognises the inherent equal worth of people irrespective of race and it prohibits irrational or arbitrary differentiation on the basis of race. States are compelled to provide effective remedies (in civil and/or criminal law) to victims of racial discrimination and racial hate speech. This

⁵ Chapter 2.

⁶ Discussed in chapter 3.

⁷ Discussed and refined in chapter 4.

includes thorough investigation of complaints of allegations of racist behaviour or the use of racial hate speech.

The Equality Act was adopted to redress the legacy of South Africa's past. The Act does so by prohibiting the infringement of the equality right on the one hand; and through the promotion of equality, on the other. The provisions regarding the promotion of equality are not in operation and have not been discussed in this thesis. The flexibility of the international law standard allows for the extension of recognition to different ways in which the equality right can be infringed. The Equality Act provides for four ways in which the equality right can be breached, namely unfair discrimination, hate speech, harassment and the publication of information that discriminates unfairly. These illustrate the required comprehensive commitment to equality required by international law. The standard adopted in the Equality Act in relation to matters of unfair discrimination complies with the international standard in that the focus is placed on a consideration of the impact of the discrimination rather than on the intention of the discriminator. The definition of discrimination as contained in the Act is comprehensive, principled and flexible. The test for the determination of unfairness as provided for in s 14 is opaque⁸ and requires refinement as recommended below. The selected equality courts did not engage with the definition of discrimination or with s 14 on many occasions.⁹ This does not mean that the definition is inadequate, but rather points to a lack of complaints requiring its application or mere unfamiliarity with the Act's provisions as is evident from chapter 7.

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) condemns the propagation of racial superiority and the Committee on the Elimination of Racial Discrimination has interpreted this provision to include the use of racial epithets in a closed context. The Equality Act prohibits (racial) hate speech but does not criminalise it. This does not necessarily mean that South African law falls foul of the international law standard. The common law crime of *crimen iniuria* and the various statutory crimes on the books are adequate and South African law thus meets the international standard.¹⁰ The inquisitorial nature of

⁸ See 5.3.1.4.1.

⁹ See 7.9.

¹⁰ See 5.5.2.

the proceedings in equality courts requires presiding officers to take a proactive stance in determining the truth. The failure of the equality courts to engage with numerous complaints of racial hate speech as discussed in chapter 7 could be viewed as a breach of the international standard to investigate all allegations of racial abuse.¹¹ The reasons given by the courts for not dealing with these complaints were diverse and were often given without serious consideration of the often ill-described complaint as set out in form 2 or without hearing the views of the parties, or at least those of the complainant.

The prohibition of harassment and the publication of information that discriminates unfairly by the Act were deliberately chosen by the legislature, in addition to the legislative prohibition of unfair discrimination, so that specific requirements might be set for these contraventions of the equality right and the dignity interest it protects. In specifying that these kinds of behaviour are specifically prohibited, the legislature provided for comprehensive protection of the equality right which accords with the comprehensive international commitment to (racial) equality. Purposive interpretation and application of these sections by presiding officers in the equality courts have the potential to further the transformative ideal of the Act.

The South African Constitution commits state and society to the goal of attaining racial equality.¹² Equality, as a right and a value, has to inform all law and conduct. This commitment to equality recalls L'Heureux-Dubé J's view of equality as a language. The constitutional commitment to equality and the prohibition of unfair discrimination have been interpreted by the Constitutional Court to be concerned with the protection of the fundamental equal dignity of all people.¹³ The Act echoes this constitutional commitment to equality. The provisions of the Equality Act do not have to be identical to those of the Constitution, but still have to be constitutionally compatible. In chapter 5, I have indicated that many of the Act's provisions are problematic because the required standard has not been articulated clearly or, in the words of L'Heureux-Dubé J's language metaphor, because the rules of grammar and syntax set out in the Act are somewhat confusing. A constitutionally compatible purposive interpretation of the

¹¹ See 3.4.3.

¹² See chapter 4.

¹³ See 4.2.4.2, 4.2.4.3 and 4.2.4.4.

provisions of the Act is important for presiding officers operating at the level of the magistrates' courts since these courts are to apply all legislation as it stands. Such an interpretation is possible, but does not ensure uniform interpretation and application of the provisions of the Act. The confusion that arises from the imprecise formulations contained in the Act is evident from chapter 7. Unclear formulations led to different, even conflicting, interpretations of the provisions of the Act and they undermine the transformative role of the Equality Act and equality courts. I do not wish to repeat my commentary on the provisions of the Act here, but want to add that clarification of the provisions would be desirable and would enhance the potential of equality courts to contribute to transformation. I make specific recommendations below.

8.3 SPECIFIC RECOMMENDATIONS

Part E of Form 2 already requires complainants to provide full details of their complaints, the dates of the incidents, as well as a requirement to indicate 'which right has been violated and the reasons why you think the right was violated'. Clerks should be instructed to request details of the alleged violation specifically (i.e. complaints should describe specific incidents) and should also request complainants to indicate whether their complaint is one of unfair discrimination, hate speech, harassment or the publication of information that discriminates unfairly. It is evident from the discussion in chapter 7 that these particulars were often omitted. Such omissions can deprive otherwise deserving complainants of their remedies under the Act.

The Constitutional Court's formulation of a test to determine whether the constitutional right to equality was breached in the case of *Harksen v Lane NO*¹⁴ formed the basis of the legislature's formulation of the unfairness test set out in s 14 of the Equality Act. I have already indicated that s 14(2) and s 14(3) set out a complicated unfairness test. To my mind, more guidance would be provided to presiding officers in fewer words if the emphasis were correctly placed on the impact of the discrimination on the fundamental dignity of the complainant. Section 14(2) and (3) should be deleted from

¹⁴ 1998 (1) SA 300 (CC).

the Act and, in their place, the factors set out below should be included as the benchmark to determine unfairness:

- (a) whether the differentiating treatment is based on stereotype or prejudice associated with a prohibited ground (e.g. race), or
- (b) whether the differentiating treatment perpetuates unequal power relations that are associated with a prohibited ground (e.g. race) and
- (c) whether, in conjunction with either (1) or (2), the differentiating treatment hurts the subjective feelings of the complainant.

The need to reconsider the Act's unfairness test is also evident from my discussion of the cases heard by the equality courts. Presiding officers reverted to the Constitutional Court's formulation in *Harksen* to determine whether differential treatment was unfair. My suggestion for the amendment of s 14 would simplify the analysis by concentrating on the core interest the right is meant to protect, namely the fundamental equality dignity of people.

My discussion of the complaints made to the different equality courts clearly showed that the workplace provided fertile ground for racist language and behaviour. In this regard there are two important issues to be addressed in order to clarify the jurisdictional confusion between labour law and the Equality Act. The first issue is that the relationship between the parties should be clarified at the time when the complaint is made. The second issue is that hate speech should be included in the definition of unfair discrimination in the Employment Equity Act in order to ensure that all labour law complaints concerning the equality right are being dealt with by labour law forums.

The first of these two issues requires an amendment of form 2 (the complaint form). Part C of form 2 requires the complainant to provide particulars of the respondent. The particulars requested relate to the name, organisation, address and contact details of the respondent. A further question should be added to this section in which the complainant would have to explain her/his relationship to the respondent. Clerks must be alerted to the importance of this question and should be able to guide unrepresented complainants. This will require the training of clerks to address the

distinction between employment relationships and that of independent contractors specifically. I recommend that Part C be amended to include the following:

What is your relationship to the respondent? (For example, is the respondent your neighbour or a business associate or an unknown person or your employer or are you doing work for the respondent on a contract basis?)

This information will enable the court to determine whether the matter really belongs in the equality court. If the complaint arose in the employment context, the complainant should be referred to the CCMA or labour court immediately.

Complaints regarding the infringement of the equality right in the employment context are to be dealt with in terms of labour law. In chapter 7, I indicated that the responses of the different equality courts, especially in relation to complaints of racial hate speech, were varied as a result of the vague jurisdictional exclusion provided for in s 5(3) of the Act read with ss 5 and 6 of the Employment Equity Act. *Strydom v Chiloane*¹⁵ was only decided late in 2007. This precedent provides for the consideration of 'serious' hate speech in terms of labour law, but does not solve the jurisdictional conundrum completely. My recommendation is that all complaints of hate speech arising in the employment context are to be dealt with in terms of labour law which will avoid duplication, and which will save time and costs for the litigants and the courts. The facts of the cases that I discussed in chapter 7 often revealed that the complaint of hate speech in this context formed part of a greater dispute. This requires a uniform approach set out in legislation to ensure certainty. My recommendation is that s 6 of the Employment Equity Act is to be amended by the inclusion of subsection 4:

- (4) Hate speech used in relation to an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

¹⁵ 2008 (2) SA 247 (T).

The definitions section of the EEA must be amended to include the definition of hate speech which is similar to that of s 10 in the Equality Act. This will ensure consistency in different contexts.

A further recommendation relates to the amendment of form 2 to provide specifically for a request to grant interim relief. Part E of form 2 mentions 'interim orders' without requiring a complainant to provide a motivation for the requested remedy. It is recommended that an additional question be inserted in Part E of form 2 which deals specifically with requests for interim orders. This can be phrased in a way similar as in the complaint form for applications for protection order:

Indicate whether you require the court to grant an interim order against the respondent. You must submit reasons why the court should provide the interim order (For example, that the matter is urgent or that you will suffer undue hardship if the interim order is not made).

The complainant is to be informed that such an application for interim relief will be considered at the directions hearing since s 21 only allows an equality court to make an order after an inquiry has been held. Should the party require immediate relief, the clerk is to advise the complainant that an application for a rule *nisi* according to the ordinary court rules is to be made.

The equality courts can only function optimally if the functionaries, presiding officers and clerks are adequately trained. The discussion of the training of these functionaries in 6.2.2, 6.2.3 and specifically 6.6.2.1 points to inadequacies in the current training programme. It is recommended that the training manuals for both sets of functionaries be updated regularly and that the training sessions be extended (time-wise) and that training should include facilitated introductions to people of different cultures, races and backgrounds as discussed in 6.2.2.1.2.4. The ability of the equality courts to deal with sensitive issues such as race will also be enhanced through the involvement of assessors as is provided for in the Act.¹⁶

¹⁶ See 6.4.2.

Consistent interpretation and application of the provisions of the Equality Act will furthermore be enhanced by the publication and dissemination of the judgments of the equality courts, irrespective of whether judgment comes from a high court or a magistrate's court sitting as an equality court. Magistrates sitting as equality court presiding officers have little guidance in the form of high court precedents and, while not binding, the judgments of their peers may be useful in providing guidance as to the interpretation of the Act. The judgments must be made available as part of the training material of presiding officers and updates must be distributed regularly.

The Equality Act foresees an important role for the Equality Review Committee. I have pointed out (at 6.5.1) that the terms of the members of the Committee expired in 2005. It is recommended that the Committee be reconstituted, that the reports of the committee be made public and that the newly constituted Committee carries out its mandate in terms of the Act. This Committee has to report on the implementation of the Act and may make recommendations for its improvement to the Minister of Justice and Constitutional Development. The fact that this Committee is not functioning thus impacts negatively on the equality courts.

An extensive public information drive is necessary. Relatively few complaints have been made to the equality courts over the years. Complaints will only reach these courts if members of the public are aware of the existence of the Equality Act and its forums. Litigation-driven social change emanating from the equality courts can only be meaningful if a significant number of complaints are made and processed effectively. Informing the public about the Act and the equality courts is primarily the responsibility of the Department of Justice and Constitutional Development, the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE). It is recommended that these institutions coordinate their efforts with that of the Department in this respect to ensure effective use of resources in ongoing information drives in respect of the Act and the equality courts. Once the promotional aspect of the Act is in operation, a further direct obligation will be placed on the chapter 9 institutions in relation to the promotion of equality.¹⁷

¹⁷ See 6.5.2.

8.4 A Last Word

Mastering a language is not an easy task. The Equality Act contains certain problematic formulations and consequently the application of the Act has not been without complications. Does this mean that the Act and the equality courts amount to naught and must be abandoned? My discussion of the cases heard by the selected equality courts indicates that the Act has the potential to contribute to social change. Change driven by litigation will not necessarily be dramatic, but will affect the immediate community in which the judgment was made, thus steering change in the particular community in a more egalitarian direction. Such small-scale change is meaningful social change. There is another important reason for the retention of the Act and the equality courts. I commented on the role of law in bringing about social change in 1.3.1.1. The Equality Act 'serve[s] as a first step in transforming social realities It can validate injuries and, in some cases, deter or redress them'.¹⁸ Symbolically the Equality Act fulfils an important role: it affirms the commitment to equality in a practical fashion and creates the means to vindicate the fundamental equal dignity of all people. With some refinement, the Equality Act and equality courts, provided that public awareness is raised, have an important role to fulfil in our society.

¹⁸ PM Grotty 'Legislating Equality' (1996) 10 *Int J of Law, Policy and the Family* 317 at 318.