

SUBSTANTIVE EQUALITY AND PROOF OF EMPLOYMENT DISCRIMINATION

A critical analysis of the changing nature of the test for justification of discrimination
in employment

By

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SUMMARY

This dissertation is a journey through the legislative changes and case law in order to analyse and evaluate the changing nature of South African jurisprudence in respect of the notions of equality, discrimination and affirmative action and the manner in which these issues are proved and dealt with in our courts.

It focuses firstly on the emergence of the post-Wiehahn labour laws and the developing jurisprudence concerning discrimination in South Africa towards the end of a long period of isolation from the international world.

It witnesses the growing cognizance which was taken of international guidelines and their slow and gradual incorporation into our jurisprudence before the institution of the new democratic government, in the days when the country was still firmly in the grip of a regime which prided itself on its discriminatory laws.

It also deals in some depth with the new laws enacted after the first democratic government was installed, especially in so far as the Constitution was concerned. The first clutch of cases dealing with discrimination which were delivered by the Constitutional Court and their effects on decisions of the labour courts thereafter, are dealt with in great detail, indicating how important those judgments were and still are ten years later. A special chapter is devoted to the *Harksen* case, still a leading authority on how to deal with allegations of unfair discrimination.

Having traversed several of the judgments of the labour courts after *Harksen*, several observations are made in the conclusion of the study which, it is hoped, summarize the major areas of concern in respect of the task of testing claims of unfair discrimination arising in our Courts.

CHAPTER 1

INTRODUCTION

From the mid-Nineties in South Africa, our Labour Courts have dealt with discrimination and affirmative action claims on a regular basis. It is clear that, as the legislative and jurisprudential environment has matured and expanded, definite changes in the approaches adopted by the Courts to these matters have become evident.

Several watershed cases came before the Courts which facilitated the changes in approach, each with a unique contribution to the interpretation and analysis of aspects relating to equality, unfair discrimination and affirmative action matters.

Ten years ago, Christoph Garbers¹ posed the question as to how South Africa has dealt with issues concerning unfair discrimination, especially with regard to intractable problems such as: the shifting *onus* framework, the need for an applicant to establish a prima facie case before the *onus* shifts; the unavailability of evidence to establish such a prima facie case, especially in matters concerning alleged indirect discrimination and the need to break free from the formal equality paradigm.

The questions posed by Garbers almost ten years ago are still very relevant today, especially given the evolving jurisprudence of our Courts in matters concerning unfair discrimination and affirmative action in particular. A very appropriate question is still whether the emerging jurisprudence indicates that certainty has been reached by our Labour Courts about the substance of the right to equality and the right not to be unfairly discriminated against as well as the proof required to substantiate claims of employment discrimination, more specifically in cases involving affirmative action as a defence.

¹ Garbers C “*Proof and Evidence of Employment Discrimination under the Employment Equity Act 55 of 1998*” (2000) 12 SA Merc LJ 136.

Furthermore, the question arises too, as to whether the Courts have been faithful and consistent in their application of generally accepted and established principles, if such have in fact been formulated precisely.

The very purpose of the equality clause² itself has proven to be quite controversial and as a result the Constitutional Court commenced contextualising and developing a framework for the adjudication of discrimination claims in a clutch of cases commencing in 1996 through to 1999.³ The test developed in the *Harksen*⁴ case by the Constitutional Court was viewed thereafter for a period of time as the leading authority and became the traditional test in discrimination matters.

Cooper⁵ has argued that labour law jurisprudence on unfair discrimination “lacks coherence and clarity” and that one of the main reasons for that is the Court’s diverse approach to the standing of constitutional jurisprudence in shaping labour law.

The purpose of this dissertation is to evaluate exactly how, within the applicable legislative frameworks at the time, our Labour Courts have dealt with discrimination and, especially affirmative action matters, prior to *Harksen*, as well as, whether and how the Harksen formula has been applied when the Labour Court considered unfair discrimination cases where affirmative action was used as a defence. Leading trends in judicial reasoning on these issues will also be considered.

² Sections 8 and 9 of the Interim and Final Constitutions respectively.

³ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Harksen v Lane NO* 1998 (1) SA 300 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice (NCGLE 1)* 1999 (1) SA 6 (CC).

⁴ *Harksen v Lane NO* 1998 (1) SA 300 (CC).

⁵ Cooper C “A constitutional reading of the test for unfair discrimination in labour law” 2001 *Acta Juridica* 121 at page 129.

CHAPTER 2

LEGISLATIVE CONTEXT

In order to assess how the Courts deal with unfair discrimination claims it is important to have a clear understanding of the development and structure of modern employment discrimination law in South Africa.

2.1 THE CONSTITUTION

On 27 April 1994, the Interim Constitution⁶ was introduced. Three years later, the final Constitution was adopted.

Our Constitution,⁷ as the supreme law of South Africa, embraces the value of equality. It permeates the Constitution and all laws flowing from it. Central to the task of transformation of our society is the concept of equality – both as a value and as a right. “The value is used to interpret and apply the right ... the right is infused with the substantive content of the value.”⁸ Apart from the specific equality clause, Courts and other tribunals are also urged in the Constitution to: “Promote the values that underlie an open and democratic society based on human dignity, freedom and equality.”⁹ These values constitute the “soul” of the Constitution.¹⁰ Included in the concept of equality is the full and equal enjoyment of all rights and freedoms and, in order to promote that goal, measures to protect and advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken. The constitutional focus is therefore a forward-looking one. From the precise wording chosen, it is clear that the Constitution favours a notion of substantive equality.

⁶ Constitution of the Republic of South Africa (Act 200 of 1993) – Interim Constitution.

⁷ Constitution of the Republic of South Africa, 1996.

⁸ Albertyn C and Goldblatt B “*Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*” (1998) 14 SAJHR 248 at 249.

⁹ Sections 36(1) and 39(1)(a) of the Constitution.

¹⁰ Ngcukaitobi T “*Adjudicating Transformation in the Labour Courts – An Edifice on the Rise?*” (2007) 28 ILJ 1436 at 1438.

In attempting to deal with systemic inequality, proactive measures, coupled with the elimination of existing discrimination, constitutes the dualistic approach to the creation of a new egalitarian society adopted in the Constitution. As Moseneke, judge of the Pretoria High Court, stated in his Fourth Bram Fischer Memorial Lecture:¹¹ “...Courts should search for substantive justice, which is to be inferred from the foundational values of the Constitution. After all, that is the injunction of the Constitution – transformation. Central to that transformation is the achievement of equality.”

The Constitutional Court requires a purposive approach to interpretation, thereby seeking to adopt one which best supports and protects the fundamental values enshrined in the Constitution. As stated by Alibertyn and Kentridge:¹² “The purposive approach highlights the fact that the business of constitutional litigation and adjudication is primarily about assessing, weighing and balancing principles, values and policy considerations in the context of the broad purposes and commitments of the Constitution.”

Botha¹³ points out that it has been argued¹⁴ by Pieterse that “Section 9 demonstrates both the reliance of legal and constitutional discourse on potentially harmful social constructs, and the Constitution’s commitment to eradicate the stereotypes arising from those constructs.” As stated in the introduction, the purpose and interpretation of the equality clause has in itself been very controversial and the Constitutional Court has the task of contextualizing the concept of equality and developing a framework by means of which Courts can set about their task of dealing with discrimination claims – after all, there are many possible conceptualizations of equality.

¹¹ Moseneke D “*The Fourth Bram Fischer Memorial Lecture – Transformative Adjudication*” (2002) 18 SAJHR 309.

¹² Alibertyn C and Kentridge J “*Introducing the Right to Equality in the Interim Constitution*” (1994) 10 SAJHR 149.

¹³ Botha H “*Metaphoric Reasoning and Transformative Constitutionalism (Part 2)*” 2003 TSAR 20.

¹⁴ Pieterse “*Stereotypes, sameness, difference and human rights: catch 22?*” 2001 SA Public Law 92 at 102.

It is therefore only appropriate to commence an overview of the legislative framework with a brief consideration of each of the provisions contained in section 9, mindful of the fact that in *Prinsloo*¹⁵ the Constitutional Court said that it is neither desirable nor feasible to divide the equal treatment and non-discrimination components of section 9 into watertight compartments – the equality right is a composite right.

The fundamental aim of the elaborate equality clause is the removal of systematic discrimination and deeply entrenched patterns of group disadvantage. It is transformative and remedial in nature, focussed on the development of opportunities and resources for meaningful participation in society, as well as the protection, of those who have suffered from historical and systemic disadvantage.¹⁶ The very focus of the equality theme is to facilitate transformation of our society, to maximise human potential and development and to redress material imbalances.

Section 9 of the Constitution, known as the “equality clause” or provision, commences as follows:

“9 Equality

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

This sub-section deals with the principle of equality before the law and confers the right to equal protection and benefit of the law on everyone. It superficially appears to reflect a notion of formal equality, which, it is said, connotes sameness of treatment. According to De Vos,¹⁷ this section contains little more than a “guarantee of non-discrimination.” The formal notion entails treating all people in the same way, according to a neutral standard regardless of their own particular circumstances and

¹⁵ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

¹⁶ *Albertyn C and Goldblatt B* (1998) 14 SAJHR 248 at 254.

¹⁷ De Vos P “*Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*” (2000) 63 *THRHR* 62 at 64.

position in society,¹⁸ but fails to recognize patterns of deeply entrenched disadvantage and inequality in our society, inherited from the past. It entails a view that the constitution should be colour blind¹⁹ and therefore preferential treatment of anyone or any group would be inappropriate. Clearly a substantive notion argues that colour blindness would in fact produce inequality.

However, form must never be elevated over substance in interpretation. If one were to consider the context within which the law operates, “equal” treatment can seldom denote the “same” treatment. A purposive approach to constitutional interpretation to which the Constitutional Court has committed itself on several occasions therefore means that the equality clause must be read as grounded on a substantive notion of equality.²⁰ *Albertyn and Goldblatt*²¹ point out too that the terms “equal benefit of the law” entails a recognition of the fact that equality is not only a negative right, but “may well require positive measures to ensure that the goal of equality is achieved.”

A substantive approach to equality pays particular attention to the context in which an applicant asks a Court for assistance. The position of the applicant in society, his group affiliation and the history and background of his /her particular disadvantage is evaluated. The approach emphasizes the need not only to eradicate offending laws, but to actively take steps to remedy disadvantage and to facilitate redistribution.²² “Inequality has to be redressed and not simply removed.”²³ The Constitutional Court itself has endorsed this understanding of equality.²⁴ It stated as follows: “It is necessary to comment on the nature of substantive equality, a contested expression which is not found in either of our Constitutions. Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable

¹⁸ Cooper C “*The Boundaries of Equality in Labour Law*” (2004) 25 *ILJ* 813.

¹⁹ Harlan J in *Plessey v Ferguson* 163 *US* 537 (1896) at 559 as quoted by Smith N in “*Affirmative Action under the new constitution*” (1995) 11 *SAJHR* 84 at 87.

²⁰ Dupper O “*The Current Legislative Framework*” *Essential Employment Discrimination Law*.

²¹ *Albertyn C and Goldblatt B* (1998) 14 *SAJHR* 248 at 267.

²² Kok A “*The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the controversy*” 2001 *TSAR* 294.

²³ Kentridge J “*Equality*” in I M Chaskalson *et al Constitutional Law in South Africa* (1999).

²⁴ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated and unless remedied, may continue for a substantial time and even indefinitely. Like justice delayed, equality delayed is equality denied.”

Moseneke also quoted Alibertyn and Goldblatt²⁵ in his lecture:²⁶ “The contextual approach posits that legal enquiry in adjudication should be migrated from ‘abstract comparison of similarly situated individuals to an exploration of actual impact of the alleged rights violation within the existing socio-economic circumstances’. This is also another way of stating that transformative jurisprudence needs to contextualize violations within actual live conditions. Decisions on violation of constitutional rights must be seen in the context of socio-economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation which may be relevant. Also the historical context of the case must be heard.”

However, according to Alibertyn and Goldblatt²⁷ too, they view the Constitutional Court as having sought to define equality “by placing the value of dignity at the centre of the equality right. We do not agree with this, ... Dignity should be understood as enhancing the value of individual integrity and autonomy ...”

Section 9(1), according to the Constitutional Court, means that everyone is entitled, at least, to equal treatment by the Courts and that all are subject to the law which should be equally and impartially applied and administered. Section 9(1) was addressed by the Constitutional Court in the *National Coalition* matter²⁸ where it was held that: “...both in conferring benefits on persons and by imposing restraints on

²⁵ Alibertyn C and Goldblatt B (1998) 14 *SAJHR* 248.

²⁶ Moseneke D (2002) 18 *SAJHR* 309.

²⁷ Alibertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 254.

²⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice (NCGLE 1)* 1999 (1) SA 6 (CC).

state and other action, the state had to do so in a way which results in the equal treatment of all persons.”

De Vos²⁹ also points out that even cases of “mere differentiation” (differentiations necessary to run society efficiently) such would fall foul of both aspects of section 9(1) if it can be shown that the state did not act in a rational manner when differentiating between individuals or groups of individuals. He quoted the following passage from the *Prinsloo* case:³⁰ “(the state) should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve to legitimate governmental purpose.” What is required is that the state must function in a rational manner. The Constitutional Court also said in the *Prinsloo*³¹ matter: “Accordingly, before it can be said that mere differentiation infringes section 9, it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such a rational relationship, the differentiation would infringe Section 9.”

The exercise of state power must be rationally connected to the purpose for which such power was given. Section 9 requires that the differentiation in laws or conduct be rationally related to a legitimate purpose.

De Vos goes on to point out that this requirement of rationality is a very stringent test for any complainant to overcome. As long as the state can show a “rational relationship” between the purpose sought to be achieved (normally a legitimate government objective) and the means chosen, it will not infringe on section 9(1). The stringency of the test for section 9(1) therefore, according to De Vos, seems to suggest that complainants would be forced to frame their cases in terms of section 9(3), as a discrimination complaint.

²⁹ De Vos P 2000 63 *THRHR* 62.

³⁰ *Prinsloo v Van der Linde* supra.

³¹ *Prinsloo v Van der Linde* supra.

Albertyn and Goldblatt³² point out that in their view, a test for the procedural fairness component of “equal protection before the law” has not been developed within the Constitutional Court’s equality test

In section 9(2) the term “equality” is expanded upon to reflect a substantive conception thereof in the first part of the section through the wording “full and equal enjoyment of all rights.” It is important to note that the second part of the section, dealing with measures, was viewed as standing in opposition to the first. As put by Ngcukaitobi:³³ “ ... to achieve the second objective, one was presumed to be acting in breach of the first objective and thus required to justify such breach.” The assumption was initially that affirmative action measures were in themselves breaches of the right to equality and unfair discrimination which had to be justified.

“(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.”

The second part of the section makes it clear that taking of measures to advance and protect the previously disadvantaged - affirmative action - does not amount to an exception to the formal notion of equality, (as viewed by many commentators, especially in the early days) but serves as a means to attain it, through the use of the term “promote.” Rycroft³⁴ views the right to equality to have been “qualified” in this section by the right of the state and employers to implement affirmative action policies. He stresses the fact that the provision indicates that such policies “ensure” equality, rather than to limit the right to equality. “The measures are entirely consonant with a notion of substantive equality.”³⁵

³² Albertyn C and Goldblatt B (1998) 14 SAJHR 248 at 267.

³³ Ngcukaitobi T (2007) 28 ILJ 1436 at 1442.

³⁴ Rycroft A “*Obstacles to Employment Equity?: The role of judges and arbitrators in the interpretation and implementation of Affirmative Action policies*” (1999) 20 ILJ 1411.

³⁵ Cooper C (2004) 25 ILJ 813 at 832.

The words “measures designed” have been grappled with by the Courts and reliance has been placed on this section of the Constitution to read the term “designed” into the provisions of the Employment Equity Act³⁶ where it is not mentioned, other than in the definition section of that Act. The term design and the inference that it meant a written affirmative action plan, rapidly became a fertile source for disputes relating to the content, interpretation and manner of application of such plans.³⁷ Mureinik viewed the words “designed” as ambiguous and felt that a broad interpretation thereof should be adopted and that the means and not only the ends should be brought under judicial scrutiny. It has also been remarked³⁸ in the American context, that the problem of “innocent white victims” of affirmative action programs (“jammergevalle” in the South African context and a situation where such persons are left with less than what they could have had under conditions of genuine equality)³⁹ will become an important challenge in the future. The debate encompassed too, whether there had to be a rational connection between the measures applied and the end they were designed to achieve and what that meant in practice. In addition, who the beneficiaries of such measures could be, also became a contentious point. Furthermore, a central issue arose relating to whether affirmative action, in addition to being a defence for an employer, could become a “sword” in the hands of an applicant aggrieved at not being appointed to a position.

The need for restitutionary and remedial measures has been recognized not only in our legislation, but in society in general. It is accepted that identical treatment of people would in itself result in inequality. Furthermore, it is also important to note that the Constitution in itself only provides a minimum of protection. No constitutional complaint can be made if the legislature chooses to provide more protection. It is only if the legislature chooses to provide fewer rights than those prescribed in the Constitution, that such complaint may validly be made. The issue of the relationship between a statutory measure and its normative home, the constitutional mandate,

³⁶ Act 55 of 1998 (Hereinafter referred to as the EEA).

³⁷ Mureinik E “*A Bridge to Where: Introducing the Interim Bill of Rights*” (1994) 10 SAJHR 31 at 47.

³⁸ Fiscus R *The Constitutional logic of affirmative action* (1992).

³⁹ Brickhill J “*Testing Affirmative Action under the Constitution and the Equality Act: Comment on Du Preez v Minister of Justice & Constitutional Development & others*” (2006) 27 ILJ 1811 (E); (2006) 27 ILJ 2004.

has not been clearly defined, as pointed out by Du Toit.⁴⁰ This could be problematic with regard to statutes where there is a limitation of a basic constitutional right and the reliance to be placed on legislation purporting to give effect to a constitutional mandate. Where a basic right is limited in a statute such limitation must be interpreted restrictively. However, the constitution states clearly⁴¹ that a basic right may only be limited by a law of general application and must do so expressly. Such limitation must conform to the strict provisions of the limitations clause in Section 36 of the Constitution. Du Toit⁴² points out that it appears that many judgments dealing with affirmative action and discrimination “have relied heavily on the interpretations of s9 of the Constitution on the apparent assumption that such decisions are equally and directly applicable in the employment context. In fact, the two provisions are not identical.”

The meaning of the term “disadvantaged” has been intensely debated and was also controversial, especially since the target of affirmative action policies in the EEA are “designated” groups and, according to Rycroft,⁴³ the question might be posed as to whether “the EEA is tailored narrowly enough to meet the declared constitutional purpose that affirmative action measures must be ‘designed’ to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination.”

Grant and Small⁴⁴ have pointed out that in their view, it is problematic “to introduce into the concept of discrimination, the idea of alleviation of disadvantage without also challenging the very notion of equality in law.” However, Albertyn and Goldblatt⁴⁵ hold the view that: “Disadvantage and difference become key characteristics of equality... The intersectional nature of disadvantage (based on more than one ground) is therefore complex.” The precise legal status of the term and an evaluation

⁴⁰ Du Toit D “*The evolution of the concept of ‘unfair discrimination’ in South African labour law*” (2006) 27 *ILJ* 1311.

⁴¹ Section 36 of the Constitution of the Republic of South Africa, 1996.

⁴² Du Toit D (2006) 27 *ILJ* 1311 at 1312.

⁴³ Rycroft A (1999) 20 *ILJ* 1411 at 1413.

⁴⁴ Grant E and Small J “*Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court*” 51 2 *Northern Ireland Legal Quarterly* 174.

⁴⁵ Albertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 252.

of “disadvantaged” status has had to be considered. The fact that disadvantage plays a key role in determining discrimination is a very controversial and problematic one. However, it has been accepted that the term as used by the Constitutional Court has a wide and inclusive meaning and would encompass all forms of disadvantage – not only material deprivation and subjugation.

A further aspect regarded as problematic with regard to the section is that it does not distinguish one disadvantaged group or another as being more or less deserving of protection. It also links disadvantage to “persons or categories of persons” who have been disadvantaged and therefore has been viewed as focusing on collective disadvantage rather than on whether an individual at a personal level had actually been disadvantaged. Freedman⁴⁶ refers to an observation by Donald and Galloway⁴⁷ that this approach is based upon the idea that laws which single out individuals for disadvantageous treatment on the basis of a particular characteristic, contribute to the worsening of the lot of the entire group which is defined by that characteristic. An important consequence is therefore that the individual who is challenging the law begins to disappear from view and the group itself takes over the centre stage. The individual is simply seen as an instrument which brings the plight of the group to the Court: therefore group equalization rather than protection of individual rights.

The Constitutional Court in the *Van Heerden*⁴⁸ case dealt with the relationship between section 9(1) and 9(2) in the context of affirmative action measures. The Constitutional Court held that the high Court had misconceived the nature of the equality protection and that it had adopted a formalistic approach. It held that affirmative action measures are not a derogation from, but a substantive and composite part of the right to equality. If an affirmative action measure passed muster under section 9(2), the internal test, it could not be said to be presumptively unfair.

⁴⁶ Freedman W “*Understanding the Right to Equality*” (1998) 115 *SALJ* 243 at 251.

⁴⁷ Donald J and Galloway C “*Three models of (In)Equality*” (1993) 38 *Mc Gill LJ* 64 at 79 – 80.

⁴⁸ *Minister of Finance v Van Heerden supra*.

However, the view has been expressed that our Courts have not adopted this approach consistently.⁴⁹

Importantly, whilst it is widely accepted that the constitution encompasses the challenge of transformation, the end or means has eluded consensus⁵⁰ and therefore, whether the affirmative action clause constitutes an exception to or amplification of the equality provision would significantly affect and influence the interpretation of the clause.⁵¹ If the clause were to be viewed as an exception to legislation conferring human rights, it could lead to a narrow interpretation in line with the notion that such rights should be interpreted broadly in favour of those rights – in this case the right to equality. Such a view could also restrict legal and administrative measures applied in favour of the disadvantaged and result in a situation where privilege is entrenched rather than a situation where the disadvantage suffered in the past is remedied. Viewing the measure as an application of the right to equality, would lead to a generous and liberal interpretation of the equality clause.

The *onus* would also be affected because, if the measures were seen as an exception, the sponsors of the measures would have the *onus* of proving their legality. However, if the measures are viewed as a substantive part of equality, as they now are, the *onus* would shift to the complainant to challenge the legality of the measure or program. The *Van Heerden*⁵² case finally decided this issue.

“(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.”

⁴⁹ Ngcukaitobi T (2007) 28 *ILJ* 1436 at 1448.

⁵⁰ Albertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 249.

⁵¹ Smith N in “*Affirmative Action under the new constitution*” (1995) 11 *SAJHR* 84.

⁵² *Minister of Finance v Van Heerden supra*.

This section, known as the unfair discrimination provision, comprises a prohibition of unfair discrimination on certain listed grounds and analogous grounds. It contains an extensive list of prohibited grounds which have been generously construed by the Constitutional Court, for example: “Concept sexual orientation as used in section 9(3) ... must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bisexual, or transsexual and it also applies to the orientation of persons who might on a single occasion be erotically attracted to a member of their own sex.”

An analogous ground is, objectively, based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.

The Court has also given a broad expansive definition of human dignity.⁵³ It is impaired when a legally relevant differentiation deals with people as second-class citizens, demeans them, treats them as less capable for no good reason, violates an individual’s self esteem and personal integrity. According to De Vos, “dignity” is really a “catch-all phrase” to capture the idea of humans as equally capable and deserving of concern, respect and consideration.

The subjective feelings of the complainant are not decisive. It seems as if the Court regards differentiation as discrimination whenever it is based on a ground that the complainant cannot change or cannot reasonably be expected to change e.g. citizenship, marital status.

The Court has not hesitated to add to the listed grounds by finding discrimination on an analogous ground. It has done so “generously.”⁵⁴

⁵³ De Vos P 2000 63 *THRHR* 62 at 65.

⁵⁴ De Waal J “*Equality and the Constitutional Court*” (2002) 14 *SA Merc LJ* 141 at 150.

The characterization of the grounds in *Harksen*⁵⁵ is instructive to repeat here:

“What the specified grounds have in common is that they have been used (or misused) in the past (both in SA and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of persons based on such criteria which may, among other things, result in the construction of patterns of disadvantage, such as has occurred only too visibly in our history.”⁵⁶

In the *Harksen*⁵⁷ case, the Court postulated an analysis to determine whether differentiation amounts to unfair discrimination. In a further section in the dissertation, an analysis of the case will be conducted and therefore, the issues will only be briefly touched upon here.

Section 9(3) contemplates two categories of discrimination, of which each should be dealt with differently – listed grounds and analogous grounds. DuToit⁵⁸ usefully summarizes the history of the term “discrimination” in our law, as from the first case which dealt with it.⁵⁹ He also dealt with the interpretation of the term “unfair discrimination” by the Constitutional Court in terms of section 9 of the Constitution in the *Hoffmann*⁶⁰ matter. In that case, the Court regarded the enquiry as to whether the

⁵⁵ *Harksen v Lane NO supra*.

⁵⁶ *Harksen v Lane NO supra* at para 49.

⁵⁷ *Harksen v Lane NO supra*.

⁵⁸ Du Toit D (2006) 27 ILJ 1311.

⁵⁹ *Raad van Mynvakkbonde v Minister van Mannekrag* (1983) 4 ILJ 202 (T).

⁶⁰ *Hoffmann v SA Airways* [2000] 12 BLLR 1365 (CC).

differentiation (on the unlisted ground of HIV status) amounted to unfair discrimination as a single stage test and treated the term as a single concept.

In *Harksen*⁶¹ the Court cautioned against a narrow definition of the attributes and characteristics. It would look, in cases of analogous grounds, at whether the differentiation is based on attributes comparable to the specified grounds as quoted above, which have in common the following three characteristics: misuse in the past to categorise and oppress persons; the nature of the discriminating act and the purpose sought to be achieved by it; the potential to demean persons in their inherent humanity and dignity and having sometimes related to immutable biological attributes, or the associational life of humans, or to the intellectual, expressive or religious dimensions of humanity or a combination thereof.

The Constitutional Court clearly has in mind an open-ended process in which it might discover over time differentiations analogous to the specified grounds. The section is not a *numerus clausus*. Other factors may emerge over time. The intention is that factors and cumulative effects are objectively assessed. Proof of the intention to discriminate is not required.

As indicated in *Harksen*,⁶² infringement of dignity will be determined in the context of considering the impact of the discrimination on complainant. In order to establish context, Court will look at past and vulnerable group membership. It will also look at nature of the interest adversely affected by differentiation – the more fundamental the interest, the more likely that discrimination will be found to be unfair. The Court cannot make a determination in abstract, but must take into account the structural inequality in our society which protects and perpetuates the subordination of certain individual and groups in a society. The complainant cannot purely rely on injured feelings, which would not constitute enough to prove a claim of discrimination.

⁶¹ *Harksen v Lane NO supra*.

⁶² *Harksen v Lane NO supra*.

With regard to the “unfairness” aspect too, if the discrimination is based on a specified ground and is thus irrebuttably proved to be discrimination, it will be rebuttably presumed that the discrimination is unfair until the contrary is proved. The complainant must therefore prove on a balance of probabilities that the differentiation is on a specified ground for the irrebuttable presumption to kick in. The duty of the respondent then is to rebut the presumption of unfairness and to show that discrimination was in fact fair. If the discrimination is not internally justified, then the Court may proceed to the section 36 limitations clause enquiry where consideration of whether there is a legitimate social purpose proportional to the end sought to be achieved will be undertaken.

Where the discrimination is alleged to be on an unlisted ground, the applicant not only has to show, on a balance of probabilities, that the discrimination is on an analogous ground, but will also have to prove its unfairness.

Albertyn and Goldblatt,⁶³ as well as Kok,⁶⁴ question the presumption of discrimination when differentiation is proved to be on a listed ground. In their view, that approach “denudes discrimination of its prejudicial connotations by not requiring that prejudice be demonstrated” and “negates the pejorative meaning of “discrimination.” This view was, according to them, also held by Sachs J in the *Walker* case⁶⁵ where he stated: “There must be some element of actual or potential prejudice ... immanent in the differentiation otherwise there is no discrimination.” It is further pointed out by Albertyn and Goldblatt that the Court did recognise in its majority judgment in the case, however, that discrimination cannot be presumed. De Vos,⁶⁶ as pointed out by Kok, seems to interpret the Constitutional Court judgments so as to never allow for the possibility that differentiation on a listed ground may not constitute discrimination.

⁶³ Albertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 268.

⁶⁴ Kok A 2001 *TSAR* 294 at 295.

⁶⁵ *Pretoria City Council v Walker supra* at para 64.

⁶⁶ De Vos P 2000 63 *THRHR* 62 at 71.

Fagan⁶⁷ has argued that the unfair discrimination provision does not create an independent right of its own but “merely a procedural mechanism, namely a shift of onus.” According to him, the prohibition on discrimination is violated when an independent or egalitarian right conferred by one of the provisions of the bill of rights is conferred on some but not on others. A necessary and sufficient condition therefore for unfair discrimination would be that a differentiating act infringed on an independent constitutional right or constitutionally grounded egalitarian principle. He is of the view that the section enhances the protection of other fundamental rights.

Grant and Small⁶⁸ point out to that the term “on one or more grounds” in the section contemplates multiple ground applications. However, since discrimination is assumed on a single specified ground, it would be unnecessary to investigate any additional grounds. They opine that “if the Court were to persist in that approach, there would be little point in relying on multiple grounds, especially if additional grounds are unspecified.” In their view “it would lead to an impoverished and one-dimensional equality jurisprudence which fails to come to grips with the real experience of the victims of discrimination.”

With regard to direct and indirect discrimination, (which is not defined) it would be “direct” when law or conduct is, on the face of it, discriminatory. It would be “indirect” when the purpose or effect⁶⁹ of a law or conduct is discriminatory and where its impact disproportionately and negatively impacts a certain group of individuals in society. According to Dupper⁷⁰ the inclusion of both direct and indirect discrimination indicates that the concern lies not so much with the form of the conduct complained of, but with the consequences and impact thereof. Often indirect discrimination lies in administrative application of the statute and not in the law itself.⁷¹

⁶⁷ Fagan A “*Dignity & Unfair Discrimination: A value misplaced and a right misunderstood*” (1998) 14 SAJHR 220 at 224.

⁶⁸ Grant E and Small J 51 (2) *Northern Ireland Legal Quarterly* 174 at 183.

⁶⁹ *Pretoria City Council v Walker* at para 41.

⁷⁰ Dupper O *Essential Employment Discrimination Law* at 20.

⁷¹ De Waal J (2002) 14 SA Merc LJ 141 at 152.

Intent plays no role in determining unfairness, as to require proof of intent would place an onerous burden of proof on the applicant in such cases. As pointed out by McGregor⁷² “the pursuit of a laudable end does not preclude a finding of discrimination.” It would be sufficient to show that the purpose or effect of the law or measure indirectly discriminates. In another matter the Court held that it is necessary for the complainant to establish a causal connection between the law and the indirect discrimination suffered by the listed group. The complainant would be required to show an actual connection between the law and discriminatory impact and not merely that the law is “likely to result” in discrimination. Importantly, the Court insisted on judging the constitutionality of a statute with references to the circumstances that existed at the time of its adoption, in other words if a law is challenged the Court expects the complainant to show a causal connection between the law and the discriminatory effect without relying on evidence relating to the implementation of the law. The complainant had to show that at the time of its adoption, it was clear that the act would have discriminatory effects. It therefore did in fact require the applicant to show that the discrimination was intentional.

In the light of the *Walker*⁷³ case, however, this result should be avoided. The implementation of the law should be challenged before the law itself.⁷⁴

Finally, as clarified in the *Van Heerden*⁷⁵ case, the Constitutional Court has held that an affirmative action measure that passes muster under section 9(2) cannot amount to unfair discrimination under section 9(3).

“(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.”

⁷² McGregor M “*An Overview of Employment Discrimination Case Law*” (2002) 14 SA Merc LJ 157 at 171.

⁷³ *Pretoria City Council v Walker supra*.

⁷⁴ De Waal J (2002) 14 SA Merc LJ 141 at 153.

⁷⁵ *Minister of Finance v Van Heerden* [2004]12 BLLR 1181 (CC)

This section of the equality clause clearly further extends the applicability of the provisions in providing for horizontal application thereof. It also envisages that Parliament shall prepare national legislation to give effect to and to regulate the rights in the clause.

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

It is in this section of the clause that the presumption of *unfairness* arises when differentiation is established as being based on a listed ground. It pertains to both direct and indirect discrimination. Once discrimination has been established, the *onus* shift and the defendant must therefore then attempt to establish that that discrimination was not unfair.

It has been pointed out that the shifting *onus*, aids complainants. Very real problems exist in establishing even a *prima facie* case. However, problems do remain concerning exactly when the *onus* shifts.

However, an affirmative action measure cannot, according to the *Van Heerden*⁷⁶ judgment, attract this presumption of unfairness, but must merely pass muster under section 9(2). According to Brickhill⁷⁷ therefore, restitutionary measures should rather be approached under section 9(2) as outlined in the *Van Heerden*⁷⁸ case, than be treated as constitutionally suspicious under section 9(3) and presumed unfair under section 9(5).

Kok⁷⁹ points out that a burden of rebuttal is seemingly something less than a full *onus*. He refers to Schmidt⁸⁰ in support of that contention, but notes that other authors disagree, requiring the respondent to *prove* that the discrimination is not

⁷⁶ *Minister of Finance v Van Heerden supra*.

⁷⁷ Brickhill J (2006) 27 *ILJ* 2004 at 2012.

⁷⁸ *Minister of Finance v Van Heerden supra*.

⁷⁹ Kok A 2001 *TSAR* 294 at 301.

⁸⁰ Schmidt *Bewysreg* (1990) at 41 – 42.

unfair and believe that neither *onus* nor burden of proof seem appropriate in constitutional litigation and that a better term might be the American “showing.” In any event, it is viewed by Kok that both parties have to present legal argument as in constitutional matters the facts are rarely in dispute.

2.2 DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, (NO 111)

Three months after the final Constitution took effect in February 1997, South Africa ratified the ILO Convention 111 of 1958. However, its impact on our labour jurisprudence was evident well before then. “Informally, international labour standards were influential during the 1980’s when the Industrial Court developed its unfair labour practice jurisprudence. The Court frequently referred to ILO conventions and recommendations.”⁸¹

Conventions are not automatically binding and the ILO’s constitution provides that a member state may voluntarily ratify a convention. Once that is done, as it was in South Africa with Convention 111, the state is obliged to take action to give effect to the provisions of that convention e.g. through legislation. When South Africa adopted the Convention it committed to enacting legislation to promote equality of opportunity in employment and the elimination of discrimination in respect thereof. As a result, the EEA was enacted.

Convention 111 is known as one of the eight “core” standards identified by the ILO and establishes minimum standards in relation to discrimination in the employment field.

Our Constitution accords international law special status and requires the consideration and regard thereof when interpreting legislation – specifically so in the case of the Bill of Rights. Section 233 of the Constitution reads: “When interpreting

⁸¹ Van Niekerk A *et al* “*Law @ Work*” (2008) at 19.

any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

From its commencement, the Industrial Court was consistently guided by the meaning of discrimination as ascribed to it in international law. As pointed out by Du Toit,⁸² the convention was “a point of reference in defining discriminatory conduct amounting to an unfair labour practice.”

The Convention defines discrimination as including “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” The wording is clearly consistent with the interpretation of our Courts in general.

Article 1 section 1(2) further states: “Any distinction, exclusion or preference in respect of a particular job based in the inherent requirements thereof is *not deemed to be* discrimination.” (My emphasis). Du Toit⁸³ comments that affirmative action measures and measures dictated by the inherent requirements of a job, interpreted in compliance with the convention are not instances of “fair discrimination, but are altogether excluded from the ambit of “discrimination, whether “fair” or otherwise. These measures therefore derive their authority from statute and are sanctioned by Convention 111.

2.3 THE LABOUR RELATIONS ACT⁸⁴

Discrimination on the basis of sex, race or colour was already outlawed in 1981 by amendments to the LRA of 1956 as well as the Wage Act.⁸⁵

⁸² Du Toit D (2006) 27 *ILJ* 1311 at 1315.

⁸³ Du Toit D (2006) 27 *ILJ* 1311 at 1328.

⁸⁴ 66 of 1995 (Hereinafter referred to as the LRA).

⁸⁵ 5 of 1957.

“Unfair discrimination” as opposed to “discrimination” was introduced in the Labour Relations Amendment Act of 1988 where it was defined as follows:

“ ‘[U]nfair labour practice’ means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include ...

the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed.”

Of concern at the time was the introduction of the word “unfair” which gave rise to speculation that the legislature was trying to permit employers to discriminate where the Court considered it “fair” to do so. The concern proved unfounded. This controversial provision was, however, repealed in 1991 and the pre-1988 provisions restored.

The Labour Court continued the process and by the time the EEA came into effect the meaning of unfair discrimination was clear. According to Du Toit,⁸⁶ what remained to be clarified “was a proper and consistent formulation of what that concept embodied” as well as the use of consistent terminology in that regard.

The Labour Relations Act 66 of 1995 (“LRA”) was the centrepiece in the government’s five-year program to restructure and reform South Africa’s labour laws. It abandoned the open-ended unfair labour practice jurisdiction of the Industrial Court and redefined the term “unfair labour practice”.

It contains a number of provisions dealing with discrimination:

⁸⁶ Du Toit D (2006) 27 *ILJ* 1311 at 1314.

Section 187(1)

(1) "A dismissal is automatically unfair if the employer in dismissing the employee acts contrary to section 5 or if the reason for the dismissal is-

...

(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy

...

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

...

Section 187(2)

Despite subsection (1)(f)-

a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job;

a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

Before it was repealed by the Employment Equity Act on 9 August 1999, schedule 7 item 2(1)(a) of the LRA prohibited discrimination against employees, except for discriminatory dismissals. Importantly, applicants for work also received protection against discrimination under that section. It contained as the core of the residual unfair labour practice definition the prohibition of "unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

It is important to note that the Act did not define “unfair” or “arbitrary”. It was remarked at the time⁸⁷ that the term “unfair” in the context appeared to refer to the effect of the discrimination on the employee and that the term “arbitrary” implied a test as to whether the reason for the discrimination was sufficiently related to the “protectable interests” of the employer.

Item 2(2)(b) provided that an employer “is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination.”

A number of significant judgments dealing with the term “unfair discrimination” emanated from the Labour Court during the short period of time Item 2(1)(a) was applicable, however, the judgments were often inconsistent, the terminology used diverse and confusing, and the meaning of “unfair discrimination” has to be gleaned from an overview of the case law at the time.

As remarked by Dupper,⁸⁸ there was a “tight fit” between the anti-discrimination provisions in the LRA, the Schedule and the equality provisions of the Constitution. Support for the notion of substantive equality, the prohibition of both direct and indirect discrimination, as well as the provisions relating to affirmative action measures and inherent job requirements as justification grounds were apparent.

Cooper mentions the following areas of concern regarding labour law jurisprudence on unfair discrimination:⁸⁹ By the year 2001 it lacked coherence and clarity; the Court had a diverse approach to constitutional jurisprudence and its role in shaping labour law; sometimes only cognisance of the constitutional unfair discrimination test was

⁸⁷ Du Toit D *et al* *The Labour Relations Act of 1995 – a Comprehensive Guide*, 2nd Ed Butterworths (1998) Durban 432.

⁸⁸ Dupper O *Essential Employment Discrimination Law* 22.

⁸⁹ Cooper C 2001 *Acta Juridica* 121 at 129.

taken and in other instances the test was followed closely; sometimes the commercial needs of the employer were privileged. In all it appeared at that stage as if there was still uncertainty as to the degree to which constitutional jurisprudence should influence labour law. It has to be pointed out, however, that in labour law the approach to the establishment of grounds of discrimination was complicated at the time by the requirement that they be “arbitrary”.

A further very important difference between the Constitutional Court and the Labour Court has been in their analysis of justification for discriminatory conduct. For the Constitutional Court the impact on the individual and his dignity has been of primary importance. The Labour Court had neglected, according to Cooper,⁹⁰ “properly to interrogate the impact of the conduct on the employee and to allow commercial reasons for the impugned conduct to outweigh employee interests.”

Dikgang Moseneke, Judge of the Pretoria High Court (as he then was), stated during his delivery of the Fourth Bram Fischer Memorial Lecture in 2002,⁹¹ that: “Until 1994, the South African legal culture has been homogenous, conservative and predictable ... Courts should search for substantive justice which is to be inferred from the foundational values of the Constitution. After all that is the injunction of the Constitution – transformation. Central to that transformation is the achievement of equality. An egalitarian society would not be possible unless there is a total reconstruction of the power relations in society ... Transformative jurisprudence would support commitment to substantive equality.”

2.4 THE EMPLOYMENT EQUITY ACT

The preamble to the act describes the purposes thereof “to promote the constitutional right of equality and the exercise of true democracy, to eliminate unfair discrimination in employment, to ensure the implementation of employment equity to redress the

⁹⁰ Cooper C 2001 *Acta Juridica* 121 at 139.

⁹¹ Moseneke D (2002) 18 *SAJHR* 309.

effects of discrimination, to achieve a diverse workforce broadly representative of our people, to promote economic development and efficiency in the workforce and to give effect to the obligations of the Republic as a member of the International Labour Organization. The purpose of the EEA is further set out in Section 2 as being the promotion of equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

All the above suggests that the main thrust of the act is transformative in nature and the end goal is the achievement of substantive equality – nothing more and nothing less and that steps taken and measures employed to achieve the objectives should be proportionate to the goal.

Cooper⁹² notes that the purpose of the act places it more centrally within the notion of equality as developed by the Constitutional Court, although the wording of the provision does not specifically state as an objective, the giving of effect to the constitutional equality right. The notion of substantive equality is, however, explicitly stated in the definition of affirmative action in section 15(10) of the act, as one of its goals.

Section 3 states that the act must be interpreted in compliance with the constitution so as to give effect to its purpose and also in compliance with the international law obligations of South Africa, in particular those contained in the ILO Convention 111. The EEA consists of two main parts. The first (Chapter 2) replaces and refines item 2(1)(a) of schedule 7 of the LRA and the second (Chapter) imposes an obligation on designated employers to adopt and implement affirmative action programmes.

⁹² Cooper C 2001 *Acta Juridica* 121 at 125.

Chapter 2 of the act applies to all employees and employers as envisaged in the LRA and chapter 3, only to designated employers and people from designated groups. Importantly, through the provisions of section 9 applicants for employment are also included in respect of sections 6, 7 and 8 of the act.

Section 5 of Chapter 2 contains the prohibition of unfair discrimination which derives from the basic right to equal protection and benefit of the law contained in Section 9 of the Constitution, as well as the constitutional injunction that national legislation must be enacted to prevent or prohibit unfair discrimination. It reads as follows:

“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.” The extent of the positive measures to be taken, however, has been the subject of some controversy. The fact too, that section 5 states that employers must take steps to promote equal effort by eliminating unfair discrimination in policies and practices implies proactive action by an employer and militates against passivity until actual disputes are declared. Garbers⁹³ is of the view that the absence of action in anticipation may well found liability.

Section 6 contains the prohibition of unfair discrimination and reads as follows:

“(1) No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

It is not unfair discrimination to-
take affirmative action measures consistent with the purpose of this Act; or

⁹³ Garbers C (2000) 12 SA Merc LJ 136.

distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Harassment of 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).

A non-exhaustive list of nineteen grounds is provided. To the sixteen grounds listed in the Constitution, the EEA adds three – family responsibility, HIV status and political opinion.

Garbers⁹⁴ postulates that the omission of the term “arbitrary” in the prohibition implies that an alleged ground must be specified in order to determine whether it is analogous and comparable to any of the listed grounds – as is required in cases contemplated by the constitutional prohibition.

Grogan,⁹⁵ however, is of the view that the question as to whether the criterion relied upon must be analogous to a listed ground or whether it need merely be “arbitrary” and unjustifiable, is still unclear. He points out that if they have to be analogous, grounds such as “nepotism and “cronyism” would therefore not, without more, be linked to one of the listed grounds and would, as a result, not be embraced by section 6 of the Constitution.

McGregor⁹⁶ is of the opinion, that unlisted grounds must be analogous to the listed grounds and that they should not have “a life of their own”, unrelated to impairment of dignity. This, she contends, would be in violation of the basic requirements set out in the *Harksen*⁹⁷ test.

⁹⁴ Garbers C (2000) 12 SA Merc LJ 136 at 144.

⁹⁵ Grogan J *Workplace Law, 9th Ed* at 280.

⁹⁶ McGregor M (2002) 14 SA Merc LJ 157 at 170.

⁹⁷ *Harksen v Lane NO supra*.

Cooper⁹⁸ views the omission of the word “arbitrary” as wise and proposes that the common denominator of the grounds – listed and unlisted – should be “that the grounds are constitutive of human identity, and if manipulated, are capable of undermining an employee’s worth and value or his or her treatment as an equal or of causing harm in a comparably serious manner. In another paper,⁹⁹ Cooper states that the omission of the term “arbitrary” places it beyond doubt that labour law should follow the constitutional approach, with important consequences for the interpretation of “unfair discrimination” and meaning in fact that the range of conduct that will be proscribed would be narrower than when discrimination was still part of the LRA’s unfair labour practice regime.

McGregor¹⁰⁰ argues that there is no reason why an equality rights analysis is incapable of applicability to the labour field or that the employment context requires a different kind of approach. As far as determining unfairness is concerned, she states that in balancing the rights of employers and employees at this stage of an analysis into fairness, the Court could neglect to properly interrogate the impact of the conduct on the employee and to allow commercial reasons to outweigh employee interests.

Du Toit¹⁰¹ has contended that there has been lack of clarity in our labour law with regard to the relationship between a statutory provision and its underlying constitutional mandate in respect of the interpretation of statutory limitations on basic constitutional rights and the reliance to be placed on legislation giving effect to basic rights. He also argues that many Labour Court judgements have relied heavily on interpretations of section 9 of the constitution on the apparent assumption that such decisions are equally and directly applicable in the employment context and in section 6 of the EEA. He points out that the sections are not identical in the sense that the EEA is premised on the realities of the world of work, especially in regulating the defences available to an employer more precisely and more strictly than would be

⁹⁸ Cooper C 2001 *Acta Juridica* 121 at 138.

⁹⁹ Cooper C (2004) 25 *ILJ* 813 at 825.

¹⁰⁰ McGregor M (2002) 14 *SA Merc LJ* 157 at 170.

¹⁰¹ Du Toit D (2006) 27 *ILJ* 1311 at 1311.

possible or appropriate at the level of constitutional rule-making. He further states that the provisions of the EEA must be interpreted in compliance with the ILO Convention 111 and that “viewing the prohibition contained in s6 exclusively through the prism of S9 would thus obscure an important part of its meaning; it would (in the language of the Constitutional Court) bypass the legislation by seeking to construe the statutory prohibition on the basis of the constitutional provision that is being given effect to by the legislation, and to that extent is impermissible.”¹⁰² He states that interpreting the EEA in compliance with Convention 111, it must be concluded that the term “unfair discrimination” in section 6 “signifies nothing less, or more, than the term “discrimination” (on prohibited grounds) in Convention 111. “Unfair” in other words, emerges as an adjective describing the open-ended range of discriminatory grounds listed and unlisted, that are or might be prohibited in terms of section 6.”¹⁰³

Ngcobo J,¹⁰⁴ however, has said: “Our Constitution is unique in constitutionalizing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. The problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.” It is submitted that for the stated reasons, Ngcobo is indicating that the employment context is unique and specialized and may very well require different measures to effect fair outcomes. For that very reason, specific legislative enactments have been drafted to deal with employment related disputes as required by the constitution itself.

Nevertheless, the judgment in *Van Heerden*¹⁰⁵ emphatically states that affirmative action measures are not a derogation from equality but a substantive component thereof. Courts are instructed that whenever they interpret the law, they should do so

¹⁰² Du Toit D (2006) 27 *ILJ* 1311 at 1313.

¹⁰³ Du Toit D (2006) 27 *ILJ* 1311 at 1331.

¹⁰⁴ In *NEHAWU v UCT* (2003) 24 *ILJ* 905 (CC) at para 33.

¹⁰⁵ *Minister of Finance v Van Heerden supra*.

with a clear understanding that affirmative action measures are part and parcel of the right to equality and should be interpreted as such. To not do so would produce an absurd result. There can be no clearer indication that in affirmative action cases, interpretation should therefore be guided by Constitutional Court precedent and guidelines.

It has been held¹⁰⁶ that although the phrase “act or omission” is not used in section 6, it may be read into the term “employment policy or practice” as used in section 6 on the basis that it is in fact used in section 10(2) in describing the subject matter of a dispute about unfair discrimination.

Section 6 does not speak of an “employer”, but of “no person.” This indicates that the prohibition is not merely restricted to “employers” and would include other employees, colleagues, and persons related to the complainant in his/her broader employment environment. McGregor¹⁰⁷ is of the view though that such a party would have to be one that can apply policies or practices because section 6 clarifies that discrimination in policies and practices is what is outlawed.

The exact meaning of the term “unfair discrimination” in specifically the context of the EEA and employment has been the subject of much debate in the light of the definition thereof contained in ILO Convention 111 and that given to it by our Constitutional Court. The distinction between “differentiation” and “discrimination” too has also not been clarified adequately. Du Toit, in reviewing the judgment in the *Hoffmann v SA Airways*¹⁰⁸ matter submits that the approach of the Court in that case was “a model of clarity which avoids the complexities encountered”¹⁰⁹ in other judgments by treating “unfair discrimination” as a single concept. He points out that the ILO Convention 111 only concerns itself with discrimination that is impermissible, demeaning or subversive of human dignity. It takes only cognizance of “unfair

¹⁰⁶ *NUMSA v Gabriels (Pty) Ltd* [2002] 12 BLLR 1210 (LC) at par 47.

¹⁰⁷ McGregor M (2002) 14 *SA Merc LJ* 157.

¹⁰⁸ *Hoffmann v SA Airways supra*.

¹⁰⁹ Du Toit D (2006) 27 *ILJ* 1311 at 1323.

discrimination.” This issue, being central to the subject matter of this dissertation, will be addressed more fully below.

With regard to the elaborate provision (now repealed) which was contained in Item 2(2)(b) relating to measures designed to achieve adequate protection and advancement of the disadvantaged, the EEA has replaced the item with section 6(2)(a). The specific omission of the words “designed to” appear to indicate that the existence of a policy or plan no longer seems a pre-requisite for affirmative action measures to be deemed valid.

Section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that it is fair. However, as opposed to claims brought in terms of the Constitution and the manner in which it has been interpreted by the Constitutional Court, the EEA seems to provide for the *onus* to shift, also in cases where the allegation is not based on a listed ground. It appears therefore that the provision is in conflict with that provided for claims based on the Constitution. McGregor¹¹⁰ however is of the view that, as provided for in constitutional matters, where an applicant tries to establish a case on an unlisted ground in terms of the EEA, he has to prove not only the discrimination, but also its unfairness. Cooper¹¹¹ submits that by shifting the *onus*, the legislature has “reinforced the notion that any ground of discrimination has the ability to harm the employee or impair his dignity and therefore that the employer must accept the responsibility of proving that the actions are not unfair.”

Garbers¹¹² maintains that the “broad sweep” of the obligation on designated employers to implement affirmative action “will remove many a (potential) complaint of unfair discrimination from the sphere of litigation.”

¹¹⁰ McGregor M (2002) 14 *SA Merc LJ* 157 at 175.

¹¹¹ Cooper C 2001 *Acta Juridica* 121 at 145.

¹¹² Garbers C (2000) 12 *SA Merc LJ* 136 at 140.

Given the difficulties of proving a discrimination claim, especially in so far as the availability of proof is concerned, (more so in cases of indirect discrimination) the fact that information sharing and disclosure is part of the consultative processes at the workplace envisaged by the act (in sections 21,22 and 25), applicants may very well be enabled to properly consider their prospects and access relevant information.

It is also pointed out by Garbers¹¹³ that the EEA does not differentiate between direct and indirect discrimination in so far as the available grounds for justification is concerned – in contrast with the United Kingdom and the United States where more stringent justification tests are imposed on employers in cases of direct discrimination. However, he points out that: “the defence of an inherent requirement of the job shows a close resemblance to the stricter tests in America and Britain.”

Indirect discrimination in policy or practice at the workplace and proof of disparate impact may very well prove difficult to identify and substantiate. However, Garbers,¹¹⁴ referring to comments by Dupper,¹¹⁵ believes that the requirement should not constitute a problem as the use of the words “policy” and “practice” “already implies a broad approach” and an emphasis on decision-making. Furthermore, the definition of the terms is not exhaustive, providing the flexibility to complainants to identify particular offending provisions or conditions. The fact that the provision refers specifically to discrimination in an employment “policy” or “practice” demarcates the scope of the prohibition for purposes of the act, but as McGregor points out, the definition of policies and practices raises a number of questions e.g. does a once off decision by an employer qualify? She also refers to Dupper¹¹⁶ in support of the view that the definition is flexibly worded to give effect to the EEA outlawing discriminatory decision-making in the workplace rather than only within formal policies or practices. A practice can be founded on a single act or omission.

¹¹³ Garbers C (2000) 12 *SA Merc LJ* 136 at 144.

¹¹⁴ Garbers C (2000) 12 *SA Merc LJ* 136 at 145.

¹¹⁵ Dupper O “*Disparate Impact and Substantive Justice: The Lessons of comparative discrimination law for SA* (unpublished doctoral thesis” Harvard Law School (1999) at 243 – 247.

¹¹⁶ Dupper O Harvard Law School (1999) at 243 – 247.

Grogan¹¹⁷ also raises the issue of efficiency. He points out that apart from a fleeting reference to efficiency in the objectives and purpose of the act, its provisions do not deal with how efficiency must be reconciled with representivity or how much weight is to be attached to either concept if they happen to clash. Case law shows that there are indeed limits to a defence of affirmative action and that the constitutional obligation of efficiency, at least in the public service, must not be undermined through irrational pursuit of other objectives, such as representivity. The question is one of relativity.

A question which still remains to be finally answered is whether an employee has an enforceable right against an employer for allegedly failing to consider its obligations to affirmative action under the EEA and also whether the employer's failure to consider specific affirmative action measures to retain an employee who was "suitably qualified" in the context of a retrenchment would offend the provisions of the EEA. This issue, it has been remarked by Rycroft,¹¹⁸ "has a significance and history beyond South Africa"

He also remarked¹¹⁹ with reference to the EEA: "What appears to be happening is that the intentions of that Act are being diluted in the adjudicative process. Whilst this interpretative role of the judicial or arbitral process is ordinarily seen as an important one, the social and political implications of this will play out in the years to come."

¹¹⁷ Grogan J *Workplace Law, 9th Ed* at page 285.

¹¹⁸ Rycroft A "*Affirmative Action in Retrenchment: Thekiso v IBM South Africa (Pty) Ltd*" (2007) 28 *ILJ* 81 at 85.

¹¹⁹ Rycroft A (2007) 28 *ILJ* 81 at 1429.

2.5 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT¹²⁰

PEPUDA (the provisions of which take precedence over any other act, other than the Constitution)¹²¹ was enacted in 2000, flowing from the Constitution's section 9(4) and the dictate contained therein. PEPUDA came into effect on 16 June 2003. As is the case with the EEA, it was also enacted to promote equality and prevent unfair discrimination. Pursuant to the enactment, there was much controversy about the act, but according to Kok¹²² the controversy was misplaced as "there is nothing that the constitution does not cater for" contained in the act.

PEPUDA defines discrimination as:

"Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly:

imposes burdens, obligations or disadvantage on; or
withholds benefits, opportunities or advantages from,

any person on one or more of the prohibited grounds."

The prohibited grounds contained in PEPUDA are the following:

"race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

any other ground where discrimination based on that other ground
causes or perpetuates systemic disadvantage;
undermines human dignity; or

¹²⁰ 4 of 2000 hereinafter referred to as PEPUDA.

¹²¹ At section 5(2).

¹²² Kok A 2001 *TSAR* 294 at 294.

adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

It is apparent that the definition of discrimination has been extracted from Constitutional Court judgments. The test contained in subparagraph (b) is "slightly wider"¹²³ than that proposed in the *Harksen*¹²⁴ matter.

PEPUDA applies to all spheres of social activity, but specifically does not apply to any person to whom and the extent to which the EEA applies. This provision seems to mean that those employees excluded from the EEA e.g. members of the services, would be able to utilize PEPUDA with regard to workplace unfair discrimination claims. Independent contractors too, would be included. Chapter 3 of the EEA only applies to "designated" employers and their employees. Employees working for non-designated employers, it seems, would therefore have recourse to PEPUDA as well in respect of aspects of the EEA from which they are excluded.

It is this area – the extent to which the EEA applies – which may very well lead to confusion.

PEPUDA contains very detailed provisions relating to unfair discrimination – more so than the EEA. PEPUDA states that the discrimination complained of must be of a pejorative nature and could involve any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages on, or withholds benefits, opportunities or advantages from any person on one or more of the listed or unlisted grounds of discrimination. However, the provisions contained in the EEA, whilst not this detailed, are open-ended and capable of interpretation to provide a similar end.

¹²³ Kok A 2001 TSAR 294 at 295.

¹²⁴ *Harksen v Lane NO supra*.

With regard to the listed grounds, the EEA has nineteen whereas PEPUDA contains only the sixteen also contained in the Constitution. However, section 34 of PEPUDA requires that HIV status, family responsibility, family status, nationality and socio-economic status must be given special consideration for inclusion in the general list of prohibited grounds. Despite that, in both the acts the lists of prohibited grounds are open-ended. Kok¹²⁵ expresses the view that it would have been preferable to include the grounds in the definition of “prohibited grounds” rather than to have dealt with them via a directive principle

PEPUDA gives a detailed description of the grounds of race, gender and disability and also provides a detailed list (informative and exemplary in nature) of discriminatory practices, many of which relate to workplaces.

PEPUDA also provides the criteria to be taken into account in weighing up fairness. The list is extensive and includes elements of the constitutional test for fairness, as well as an enquiry into whether the discrimination justifiably differentiates between people according to objectively determinable criteria, intrinsic to the job concerned. It is anticipated that those factors may very well form part of the weighing up of fairness in matters based on the EEA.

Cooper and Lagrange¹²⁶ expressed concern regarding the importance of the development of a “coherent” labour jurisprudence. They submit that it would be important for section 5(3) of PEPUDA to be interpreted in a manner which would ensure that coherence, and for it to be clarified which forum would have the jurisdiction to define the scope of that provision. They also express concern about the possibility that “differences of interpretation of fairness between the two acts may emerge in relation to the nature and scope of economic arguments.”¹²⁷

¹²⁵ Kok A 2001 TSAR 294 at page 295.

¹²⁶ Cooper C and Lagrange R “*The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act*” (2001) 22 ILJ 1532 at 1533.

¹²⁷ Cooper C and Lagrange R (2001) 22 ILJ 1532 at 1539.

In respect of affirmative action, the EEA, geared specifically at the workplace, deals much more in detail and depth with the subject and supports the notion that PEPUDA does not play a major role in that regard. However, PEPUDA provides at Section 14(1):

“It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.”

It further provides the following at section 14(2):

“In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

the context;

the factors referred to in subsection (3);

whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria intrinsic to the activity to the activity concerned.”

Section 14(3) reads as follows:

The factors referred to in subsection (2)(b) include the following:

Whether the discrimination impairs or is likely to impair human dignity;

the impact or likely impact of the discrimination on the complainant;

the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

the nature and extent of the discrimination;

whether the discrimination is systemic in nature;

whether the discrimination has a legitimate purpose;
whether and to what extent the discrimination achieves its purpose;
whether there are less restrictive and less advantageous means to achieve the purpose;
whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
accommodate diversity.”

A further issue pointed out by Cooper and Lagrange¹²⁸ is the fact that PEPUDA's provisions on the promotion of equality are not as detailed as is the case in the EEA. It merely places a general responsibility of the State and all persons to promote equality. However, the issue, especially where the State is concerned, has already been addressed by the provisions of the EEA. Similarly, Section 27(2) of PEPUDA places an obligation on the state to develop regulations and other measures to promote equality. However, this is qualified through the statement that it would be required only where appropriate.

With regard to evidence to be led, PEPUDA expects less from an applicant than is expected in terms of the constitution. The applicant need only make out a *prima facie* case of discrimination before the *onus* shifts to the respondent.

It is imperative to note that the legislature chose not to draft one omnibus piece of equality or anti-discrimination legislation. As has been seen, it has followed a fragmented route, with several pieces of legislation dealing with the issue – the Constitution itself, the Labour Relations Acts, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. However, it is important that, with international developments in equality jurisprudence, our international law obligations (in particular in this context the ILO Constitution 111 of

¹²⁸ Cooper C and Lagrange R (2001) 22 *ILJ* 1532 at 1543.

1958) and parallel legislation, there must be a convergence between all the sources in order to ensure a coherent body of law governing equality and anti-discrimination issues. No individual piece of relevant legislation must be studied in isolation.

CHAPTER 3

PRE-HARKSEN

Having reviewed the legislative framework within which our courts have had to deal with matters relating to discrimination and affirmative action, the manner in which this was done prior to *Harksen*¹²⁹ forms the subject matter of this chapter.

It is important that case law relating to affirmative action is not reviewed in isolation as it emanates directly from and is inextricably linked to the ideal of equality and non-discrimination. Therefore, cases relating to matters concerning discrimination are also reviewed.

In the days prior to the new democratic dispensation, the country was characterized by a deeply polarized society. Discrimination and inequality were the most pertinent aspects of that polarization. It is a well recorded fact that the political scenario negatively impacted on the functioning of the legal system and the application of the law, but it is also a fact that in the sphere of industrial relations and labour law, positive developments and the application of egalitarian and democratic notions preceded similar changes in the socio-political sphere and significantly impacted upon the transformation process in general, but more specifically, on the content of eventual human- and labour rights legislation which were enacted after the adoption of our Constitution.

Despite the generally positive developments in the field of labour law and discrimination after the Wiehahn Commission¹³⁰ in the late Seventies, the heritage of the past clearly played a significant role during the transition period. Courts had to grapple with competing influences of the past, principles which up to that time had

¹²⁹ *Harksen v Lane NO supra.*

¹³⁰ Wiehahn Commission of Enquiry 1977.

simply been ignored by the legislature and hardly ever even mentioned in judgments, as well as new values and principles of the future.

Discrimination was dealt with initially, as will be seen, under the Industrial Court's unfair labour practice jurisdiction, which evolved through a case by case analysis as to whether alleged discrimination constituted an unfair labour practice.

3.1 Raad van Mynvakbonde v Minister van Mannekrag

The matter *Raad van Mynvakbonde*¹³¹ in which judgment was delivered during 1983, was a very early case dealing with the issue of discrimination in the context of the payment of sick leave for the first three days of illness. The granting of leave was at the discretion of the mine manager which resulted in mine officials being paid from the first day of illness whereas union members were not. It was alleged that often times no discretion was exercised by mine managers and that the issue constituted an unfair labour practice because of alleged discrimination between members of the trade union and officials at the mines.

The respondent indicated that the dispute was purely one about an improvement in conditions of employment, not an unfair labour practice. The matter had been the subject of negotiation and an agreement was reached that union members would not qualify for sick leave for the first three days.

The Court held that any "differentiation" in terms and conditions of employment could not, without more, be classified as unfair.

The case was decided at the time in terms of the Labour Relations Act 28 of 1956 as amended. The definition of an unfair labour practice then provided for the "impact" of an alleged unfair labour practice to be assessed.

¹³¹ *Raad van Mynvakbonde v Minister van Mannekrag supra.*

The Court also considered the intention of the parties as a factor in deciding whether or not less favourable conditions of service in the case of one group of employees would constitute discrimination and therefore an unfair labour practice. It held that conditions of service of one particular group may inevitably differ in certain respects from those of another group in the same industry because of differing work circumstances and duties. Today of course, intention plays no role in determining fairness or otherwise of a discriminatory action.

The test used by the Court to determine as whether a labour practice was unfair was to consider whether there was any injustice, prejudice, jeopardy or detriment in the given circumstances. It concluded that in that instance, the differentiation did not constitute an unfair labour practice. It is important to note that at that time, impact of an action was viewed as important, as it is still today.

Not surprisingly, the Court did not refer at all to the very important Article 1.2 of ILO Convention 98 which viewed acts calculated to cause prejudice by virtue of union membership as discriminatory and unfair. Clearly, since South Africa was not a member of the ILO at the time and not bound by the ILO's Conventions and Recommendations, that was probably the reason for no reference to those instruments.

3.2 MAWU v Minister of Manpower 1983 (3) SA 238

Another early important case, also dealt with in 1983 was *MAWU v Minister of Manpower*.¹³² The question to be decided was whether the Labour Relations Act 28 of 1956 as amended permitted the registration of a trade union on a sectional or racial basis. The registrar could limit the "interests" for which a union was to be registered to a class of employees identified by race, provided that such employees had industrial interests in common which were distinct from interests of other employees.

¹³² *MAWU v Minister of Manpower* 1983 (3) SA 238.

The Court found that mere difference in race did not justify the inference that each race had different industrial interests. In the absence of evidence to the contrary, industrial interests would be taken to be common to all employees, irrespective of race.

Consequently, the Court held that uniraical registration could not be granted on the basis of race alone.

3.3 SACWU v Sentrachem (1988) 9 ILJ 410 (IC)

A matter which received widespread public attention and consequent debate was that of *SACWU v Sentrachem*.¹³³ It concerned alleged wage discrimination based on race. Employees doing the same work were discriminated against in pay by race resulting in a situation where, in some cases, whites were earning twice as much as their colleagues of other races. It was found to be an unfair labour practice because any differentiation, if based on any criteria other than skill, would be unfair.

Remarkably, despite the fact that at the time there was no prohibition against discriminatory wage policies, the Industrial Court would not accept it and supported its findings by referring to the Wiehahn report: "There is no doubt that wage discrimination based on race or any other differences between the workers concerned, other than their skills and experience, is an unfair labour practice."¹³⁴

Furthermore, the Court referred to ILO Convention 111 and for the first time there was established, through the utilization of and reference to the ILO Convention, a general framework for identifying prohibited grounds of discrimination.

Upon reading the judgment, it seems clear that the basis of the decision is reflected in the following: "Discrimination has both a pejorative and a non-pejorative sense -

¹³³ *SACWU v Sentrachem* (1988) 9 ILJ 410 (IC).

¹³⁴ *SACWU v Sentrachem supra*.

the adjective 'unfair' settles the ambiguity. Not all forms of discrimination are prohibited. Employment is replete with distinctions made in the criteria for hiring, training, treatment, promotion and termination. Only the unacceptable face of discrimination is targeted by this unfair labour practice. The distinction between acceptable and unacceptable forms of discrimination is premised in comparative labour law on the inherent requirements of the particular job.”

The judgment also reflects that counsel for the applicant actually made very useful submissions in assisting the Court to arrive at a decision, e.g. referring to ILO Convention 111 of 1958 and its definition of unfair discrimination, also referring to the Wiehahn Commission and that the conventions and recommendations of the ILO would be useful guidelines in developing domestic labour legislation. Counsel also pointed out the Wiehahn Commission enjoined the State, employers and employees neither to practice nor allow discrimination or inequality in the field of labour and that the Commission had recommended that practices based on the principles of non-discrimination and equality be accepted and implemented.

The matter was subsequently taken on review to the Supreme Court¹³⁵ which, in respect of the acceptance of the “equal pay” principle, categorically affirmed per Coetzee J: “It was common cause between the parties that any practice in which a black person is paid a different wage than a white person doing the same job having the same length of service, qualifications and skills is a labour practice of wage discrimination based on race and it constitutes an unfair labour practice. Like them I have no doubt that that is a correct exposition of the law.”¹³⁶ It was clear that any difference in pay between white and black would be unfair if they had the same level of seniority, qualification or skills. It was also pointed out that a difference in pay would not be unfair if such difference was justified by a relevant reason, such as length of service, skill, qualification or productivity.

¹³⁵ *Sentrachem v John NO* (1989) 10 ILJ 249 (T).

¹³⁶ *Sentrachem v John NO supra* at 253.

It is correct that the *Sentrachem*¹³⁷ decisions serve as authority for the principle of equal pay for equal work in South Africa. Meintjes-Van der Walt¹³⁸ warns, however, that the definition limits its own application because it does not cater for occupations where certain groups e.g. blacks or women predominate. In such situations and occupations downward pressure is exercised on wages. Therefore “equal pay for equal work” does not overcome discrimination in a situation where there is a concentration of women in jobs considered to be typically female or typically black. In those situations there may simply be no comparator with which to prove wage discrimination.

3.4 Chamber of Mines of SA v Council of Mining Unions (1990) 11 ILJ 52 (IC)

The matter *Chamber of Mines of SA v Council of Mining Unions*¹³⁹ was decided on the then “new” (but short lived) definition of Unfair Labour Practice which came into effect on 1 September 1988, and which at par (i) of Section 1 of that Act prohibited unfair discrimination based on race, sex or creed.

The matter concerned Rule 20(1) of the Rules of the MEPPF (Mine Employees Pension Fund) which defined “employee”, for the purpose of the Rules, as: “Any male or female European person in the service of one of the employers represented by the Chamber.” What was discriminatory was the fact that some employees could not be members of the fund, solely on the basis of their race.

The Court faced, for the first time, the task of applying the new concept of unfair discrimination as contained in the LRA Amendment Act of 1988. The assumption was that racial discrimination, once established, was *ipso facto* unfair. The Court held that the doctrine of “separate but equal” (a notion upon which the philosophy of the government at the time was based) was inherently unequal, and that any labour practice resting on that doctrine amounted to racial discrimination. It held that there

¹³⁷ *Sacwu v Sentrachem supra* and *Sentrachem v John NO supra*.

¹³⁸ Meintjes-Van der Walt L “*Levelling the ‘paying’ fields*” (1998) 19 ILJ 22 at 25.

¹³⁹ *Chamber of Mines of SA v Council of Mining Unions* (1990) 11 ILJ 52 (IC).

was no scope for any notion of “fair racial discrimination” and considered racial discrimination absolutely impermissible, with or without the adjective of “unfair”.

The Court found that no reasons, other than racial, had been given for the fund to refuse to admit black, coloured and Asian skilled blue collar employees. It was also satisfied that the potential effect of the racially discriminatory practice could indeed create labour unrest. The Court also quoted, interestingly, from the judgment in the *Mine Surface Officials Association of SA*¹⁴⁰ matter where it was held that: “The Industrial Court is enjoined to consider the potential effect of the labour practice or change in labour practice under review.” Once again, the importance of the impact of the discriminatory practice was viewed as of cardinal importance and the Court held that it had a duty to strive, under its Unfair Labour Practice jurisdiction, to eradicate racial discrimination.

In addition, the Court also referred to and endorsed the views expressed in Baxter:¹⁴¹ “It was enunciated when the ‘separate but equal’ standard was still regarded as a reasonable political creed. But the second half of the twentieth century has witnessed a rejection of this notion and it has become accepted that, in matters of racial equality, separate can never be equal.”

3.5 Mineworkers’ Union v East Rand Gold and Uranium Co Ltd (1990) 11 ILJ 1070 (IC)

The case *Mineworkers’ Union v East Rand Gold and Uranium Co Ltd*¹⁴² was interesting for several reasons. It dealt with an employer’s refusal to conclude a recognition agreement with a racially exclusive union. The Court held that the principle in workplace should be equal advancement based on equal opportunities and merit without emphasis on race, colour or creed. The deciding factor had to be

¹⁴⁰ *Mine Surface Officials of SA v President of the Industrial Court* (1987) 8 ILJ 51 (T) at 67 E-F.

¹⁴¹ *Baxter Administrative Law* at 527.

¹⁴² *Mineworkers Union v East Rand Gold & Uranium Co Ltd* (1990) 11 ILJ 1070 (IC).

the person's ability to do the job. Once again the matter reflected the thinking of the time – non-racialism rather than equality was emphasized. Similarly, it is interesting to note that respondent's philosophy at the time was a "non-racial employment policy and equal opportunity philosophy." No hint of notions of substantive equality and affirmative action were evident at the time.

Counsel for the respondent submitted quite aptly that non-discrimination was the norm in contemporary developing industrial relations practice and that an examination of legislative changes to labour laws over the Eighties indicated an irreversible shift away from race-consciousness to non-racialism. The value of substantive equality was not part of the mind set at the time.

The Court aptly commented as follows: "South Africa stands on the threshold of a new future. Developments in the field of labour law and industrial relations during the 1980's, together with the current dynamic political and constitutional trends to establish a non-racial democracy, presage an era of hope and enlightenment for all our peoples. The governing principle in the work place must be equal advancement based on equal opportunities and merit without emphasis being placed on race, colour or creed. The deciding factor has to be a man's ability to do the job." Non-racialism, as opposed to equality in the substantive sense, was nevertheless still the goal.

It is quite evident from a reading of the cases during the Eighties, that as the decade drew to an end, courts were quite vociferous in their rejection of discriminatory practices, working towards non-racialism and willing to take into account international guidelines and practice to justify landmark decisions. However, the notion of substantive equality although evident in international jurisprudence and in the writing of authorities, especially in the USA, was not touched upon.

An important case, in the sense of sustaining the prevailing deference to an employer's operational requirements and reflecting an insensitivity to the imbedded

and pernicious discrimination against females on the grounds of sex, pregnancy and family responsibility in society and even within the courts at the time, was the *Collins*¹⁴³ case.

3.6 Collins v Volkskas Bank (Westonarea Branch) a division of ABSA Bank Ltd (1994) 15 ILJ 1398 (IC)

The applicant employee was pregnant and therefore legally obliged to take three months' maternity leave in terms of the Basic Conditions of Employment Act.¹⁴⁴ A collective agreement between the trade union and respondent contained a policy condition that prohibited employees from taking maternity leave within a period of 2 years after the termination of a previous period of maternity leave. The applicant's pregnancy fell within this period and after a request to be considered for maternity leave was rejected by the respondent, the applicant was forced to tender her resignation.

The Court held that conditions negotiated collectively are binding and enforceable against union members. In this case, maternity leave conditions were part of those terms of employment. Further, the court held it had a discretion to intervene or refuse to uphold agreements, but would only do so if an agreement resulted in a manifestly gross unfair labour practice. Today, it is submitted, a collective agreement on terms and conditions of employment, which permits or condones discrimination on any of the listed grounds would be viewed as grossly unfair, save where such discrimination could be justified on inherent requirements of a job, which in themselves would be subjected to the strictest of scrutiny.

It was held that commercial rationale existed to limit maternity leave because the respondent employed a large number of female employees. If there were no

¹⁴³ *Collins v Volkskas Bank (Westonarea Branch) a division of ABSA Bank Ltd* (1994) 15 ILJ 1398 (IC).

¹⁴⁴ 75 of 1997 (Hereinafter referred to as BCEA).

limitation, it could significantly disrupt the employer's operations. The Court therefore found that if a female's dismissal were justified by an employer's operational requirements then, although her dismissal would be indirectly discriminatory, it would not amount to unfair discrimination within the meaning of section 8(2) of the Interim Constitution.

It is submitted that if the matter came before the Labour Court today, the outcome would be entirely different. The finding that discrimination on the basis of sex and family responsibility would not be unfair if it were justified on grounds of operational requirements is highly questionable. The fact that sex discrimination is one of the first three listed grounds of prohibited discrimination in the Constitution is an indication of just how seriously it is viewed by the legislature. It is therefore only reasonable to believe that sex discrimination can never be justified on the grounds of operational requirements such as raised in this matter. However, this aspect of the judgment would not have been surprising at the time it was delivered, since great deference to employer prerogative and commercial rationale was still the norm. At the time too, family responsibility and pregnancy were not yet grounds "listed" as they currently are in both the EEA as well as PEPUDA. Nevertheless, the judgment reflects the prevalent insensitivity of that time to the fact that discrimination on the basis of family responsibility and pregnancy had become so entrenched into the bedrock of our society, that even courts did not hesitate to uphold practices which were clearly unfairly discriminatory on those grounds.

Business necessity and operational requirements, it would seem, are enough to turn discrimination into acceptable or fair discrimination in international codes and practice. However, it is the ease with which it was done in this case and the lack of absolutely compelling operational needs to justify it which, in hindsight of course, is a cause of concern. Clearly, only exceptional cases where factors constituting inherent requirements of a job are shown, should justify any form of discrimination.

However, just a year later, in 1995, the Court delivered an extremely well constructed and reasoned judgment in the case of *Association of Professional Teachers v Minister of Education*.¹⁴⁵

3.7 Association of Professional Teachers v Minister of Education (1995) 16 ILJ 1048 (IC)

The crux of the case was that married women teachers were excluded from an entitlement to housing allowances, based purely on their sex and marital status. The court held that such considerations were wholly irrelevant. The Court adopted a strict approach and stressed that differentiation on those grounds should be allowed only in very limited circumstances.

The Court remarked that it lacked Constitutional jurisdiction, but was nevertheless obliged, in terms of the Interim Constitution, to interpret the unfair labour practice definition with due regard to Chapter 3 of that Constitution, its spirit, purport and objects. It also held that it must have due regard to limitations placed on fundamental rights by the limitations clause in the Interim Constitution and had to strive to uphold the democratic values enshrined in the Interim Constitution.

It embarked on an extensive analysis of section 8 of the Interim Constitution, in particular the section dealing with the prohibition of unfair discrimination and also referred extensively to international case law and authorities on unfair discrimination. It viewed the insertion of the word “unfair” as a type of qualifier with the intention of limiting forms of discrimination which are outlawed, to those which are unfair.

It held that “in the employment relationship, discrimination or differentiation on the basis of what an employee is instead of what he or she does, should not be condoned”¹⁴⁶ and explained its reasoning in great detail and reverted to the

¹⁴⁵ *Association of Professional Teachers v Minister of Education* (1995) 16 ILJ 1048 (IC).

¹⁴⁶ *Association of Professional Teachers v Minister of Education supra* at page 1085.

distinction between differentiation and discrimination: “Where the effect of the differentiation is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms, it would constitute discrimination.”¹⁴⁷

Differentiation based on immutably personal characteristics e.g. sex or gender, would be permitted where it was prescribed by inherent requirements of a particular job. Where criteria for differentiation or classification are reasonably justifiable and objective, such differentiation would not necessarily constitute discrimination. However, if the differentiation had the effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons on an equal footing, of all rights and freedoms, it would constitute discrimination. The intention is to eliminate unjustified and arbitrary discrimination based on immutable personal characteristics. Differentiation prescribed by the inherent requirements of the job, however, should only be allowed in very limited circumstances. The Court held that the Constitution confirmed the view that not all forms of differentiation were outlawed, but only those branded as unfair. The drafters of Constitution intended a distinction between permissible and impermissible discrimination and unfair discrimination amounted to prejudicial differentiation.

The Court also dealt with the nature of direct and indirect discrimination.

It held further that a complainant is not required to prove an intention to discriminate.

This judgment extensively referred to case law, various authorities and ILO Conventions with regard to discrimination in employment and referred to the introduction of the Interim Constitution as signifying the birth of a free and democratic South Africa, with the new order placing a high emphasis on the freedom, equality and dignity of every individual citizen.

¹⁴⁷ *Association of Professional Teachers v Minister of Education supra* at page 1080.

Court enquired too, as to whether the Interim Constitution and its values were applicable to the case and found that the intention was that the values in the Constitution were universal and that therefore recourse to these values could not be ignored.

3.8 Motala v University of Natal 1995 3 BCLR 374 (D)

In *Motala v University of Natal*¹⁴⁸ the Court held that it was not unfair to restrict the number of Indian students at the university's medical school on the basis of a quota which favoured black students. The university's affirmative action program attempted to take into account the educational disadvantages to which students had been subjected to in certain school education departments. The policy was directed at determining the potential of each aspirant student and to evaluate the potential a student had to succeed in university studies. Accordingly the medical faculty evaluated the performance at school of African students in a different way to other students schooled under other education departments. This was viewed as unfair discrimination by the applicant party.

The court held that there was no doubt that Indians were decidedly disadvantaged by the apartheid system, however, evidence before the court established clearly that the degree of disadvantage to which African pupils were subjected under the four-tier system of education, was significantly greater than that suffered by their Indian counterparts. The Court therefore found that a selection system which compensates for that discrepancy would pass muster in terms of sections 8(1) and 8(2).

It was held that all courts are custodians of fundamental rights and that the effect of the constitution was to alter the relevant priorities of some entrenched fundamental rights. The right of equal access to educational institutions was guaranteed, but limited by the validation of otherwise unequal treatment on one of the listed grounds in the Interim Constitution.

¹⁴⁸ *Motala v University of Natal* (1995) 3 BCLR 374 (D).

The Court was satisfied that the policy of the university constituted a “measure designed to achieve the adequate protection and advancement of ... a group ... of persons disadvantaged by unfair discrimination”¹⁴⁹ within the meaning of that expression as used in section 8(3)(a) of the Constitution.

In so far as the *onus* was concerned, the Court stated that applicants had to establish the existence of a *prima facie* right, open to some doubt.

As stated above, the Constitutional Court’s jurisprudence on equality and discrimination was espoused in a “clutch” of early judgments¹⁵⁰ relating thereto. The first of these was the *Brink*¹⁵¹ matter, handed down on 15 May 1996 - the Constitutional Court’s first case on equality.

3.9 Brink v Kitshoff NO 1996 (4) SA 197 (CC)

The matter concerned the constitutionality of section 44 of the Insurance Act¹⁵² and alleged discrimination against married women by depriving them in certain circumstances of all or some of the benefits of life insurance policies ceded to them or made in favour of them by their husbands.

Mr Brink (the deceased husband of the applicant) ceded a life insurance policy to his wife, the applicant, in 1990. He died in 1994. Kitshoff, the executor of the estate and the respondent in the matter, demanded (in terms of the provisions of the Insurance Act) that the insurer pay into the estate of the deceased all but R30 000 of the proceeds of the life insurance. The assurer refused to do so.

The Insurance Act draws a distinction between married men and married women in that the provisions applied only to transactions in which husbands ceded policies to

¹⁴⁹ *Motala v University of Natal supra* at page 383C.

¹⁵⁰ *Supra* at fn 2.

¹⁵¹ *Brink v Kitshoff NO 1996 (4) SA 197 (CC)*.

¹⁵² 27 of 1943 (Hereinafter referred to as the Insurance Act).

wives. It did not apply to similar transactions by wives in favour of husbands. The reason advanced by the respondent for the provision, was to avoid fraud or collusion.

The Court held that equality had a very special place in the South African Constitution. Section 33(1) states that rights entrenched in chapter 3 may be limited only to the extent that it is justifiable in an open and democratic society based on freedom and equality, a recurrent theme in the Interim Constitution. Furthermore, the Interim Constitution required regard to international law to interpret the rights it entrenched.

The Court referred to concepts of equality before the law and discrimination which are widely used in international instruments e.g. Article 7 of the Universal Declaration of Human Rights 1948, Article 26 of the International Covenant on Civil and Political Rights 1966, International Convention on the Elimination of All Forms of Racial Discrimination 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1980, The Convention Against Discrimination in Education 1960 and the ILO Discrimination Convention 1958. It also referred to the Fourteenth Amendment of The Constitution of the United States of America which protects the right to equality – in fact, a precursor to equality provisions in many constitutions in the world.

The Court considered and explained the fact that the United States of America imposed different levels of scrutiny on different categories of legislative classification, the most stringent level of scrutiny being reserved for classifications based on race or nationality or those that invade fundamental rights. The intermediate level of scrutiny is applicable to gender or socio-economic rights and the third level merely requires a rational relationship to the legislative purpose. It was pointed out too that the Indian constitution protects equality and outlaws discrimination as does the Charter on Rights and Freedoms Article 15 of Canada.

The Court therefore stressed that the prohibition of discrimination is an important goal of governments and the international community. Importantly however, it held that interpretation of national constitutions reflected different approaches to the concepts of equality and non-discrimination. This is because of different textual provisions and different historical circumstances which resulted in different jurisprudential and philosophical understandings of equality.

The Court held that section 8 (of the Interim Constitution) was the product of our own particular history of inequality, stating that “the deep scars of this appalling program are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.”¹⁵³ The drafters of section 8 recognised that “systematic patterns of discrimination on grounds other than race have caused and may continue to cause considerable harm. For this reason section 8(2) lists a wide and not exhaustive list of prohibited grounds of discrimination”¹⁵⁴ It was thus recognised that discrimination can lead to patterns of group disadvantage and harm, is unfair and builds and entrenches inequality. The drafters thus proscribed such forms of discrimination and permitted positive steps to redress the effects.

The Court held that the Insurance Act disadvantaged married women and not married men. That constituted discrimination based on sex (a specified ground) and marital status (an unspecified ground).

Importantly too, the Court held that since sex was a specified ground, it was unnecessary to consider whether marital status would be a ground. It is submitted that this approach, might lead to there being little point in relying on multiple grounds, especially if any additional grounds are unspecified. The consequence of this, at the stage of the enquiry where fairness is considered would be that circumstances relevant to the overall experience of the applicant might not be taken into account.

¹⁵³ *Brink v Kitshoff NO supra* at para 40.

¹⁵⁴ *Brink v Kitshoff NO supra* at para 41.

The undesirable effect of this may well be an impoverished and one-dimensional equality jurisprudence which fails to come to grips with the real experience of victims of discrimination.

Furthermore, it appears from the judgment¹⁵⁵ that the Court views discrimination on the grounds of sex and race as more serious than other grounds of discrimination.

The Court held that discrimination based on sex had resulted in deep patterns of disadvantage, particularly acutely in the case of black women. Legal rules which discriminated against women, as they did *in casu*, were in breach of section 8(2), unless it could be shown that they fell within the terms of section 8(3). It had not been argued that they could be saved on that ground, but the question remained whether the rule could be justified in terms of section 33 (the limitations clause in the Interim Constitution).

Section 33 involved a proportionality exercise in which the purpose and effects of the provisions had to be weighed against the nature and extent of the infringement. *In casu* it was found that no reasonable basis for the constitutional breach caused existed, the purposes sought to be achieved did not require a distinction to be drawn between married women and married men and it could not be said to be reasonable and justifiable in the light of the purpose of the legislation.

O'Regan J¹⁵⁶ stated that: "... the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched." She stressed too¹⁵⁷ that: "Section 8 was adopted ... in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society."

¹⁵⁵ *Brink v Kitshoff NO supra* at paras 216J – 217C.

¹⁵⁶ *Brink v Kitshoff NO supra* at para 33.

¹⁵⁷ *Brink v Kitshoff NO supra* at para 42.

O'Regan also commented on the disadvantages suffered by black people in the past, showing that disadvantage did not relate solely to material matters, but may be suffered in relation to education, job opportunities and access to public amenities.

This dictum, it has been said, has been often used to indicate that the reversal of systemic discrimination and patterns of group disadvantage are the central characteristics of substantive equality. It is often invoked to support an argument that the term "unfair" was specifically inserted in the equality clause to provide a means of distinguishing mere discrimination (which may affect both advantaged and disadvantaged applicants) and discrimination against historically disadvantaged groups, which is unfair. Therefore discrimination is unfair when it is perpetrated against persons or groups of persons who have suffered historical or systemic disadvantage.

However, the *Hugo*¹⁵⁸ and *Prinsloo*¹⁵⁹ judgments thereafter, provided a more detailed analysis of the unfairness requirement in which the notion of historical disadvantage was not given such a perceived exclusive or controlling role.

Other commentators have held the view that in *Brink*¹⁶⁰ the Court does appear to accept group based historical disadvantage as the sole criterion relevant to the assessment of discrimination, but that, nothing in the judgment precluded other criteria from being relevant, and that such other criteria do emerge in subsequent cases.

On 3 June 1996 (two weeks after the *Brink*¹⁶¹ judgment) the Industrial Court handed down the *George v Liberty Life Association of Africa Ltd*¹⁶² judgment.

¹⁵⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

¹⁵⁹ *Prinsloo v Van der Linde supra*.

¹⁶⁰ *Brink v Kitshoff NO supra*.

¹⁶¹ *Brink v Kitshoff NO supra*.

¹⁶² *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC).

3.10 **George v Liberty Life Association of Africa Ltd (1996) 17 ILJ 571 (IC)**

In that matter, the applicant, an employee of the respondent company, had applied for appointment, but was unsuccessful because an affirmative action candidate had been selected.

The Court held that affirmative action, in its effect against the advantaged could not be held to be unfair. Affirmative action is a means to an end and not an end in itself. However, *in casu*, the applicant was successful because the respondent had advertised the position involved as “corporate only.” The respondent was to recruit firstly inside its own employee complement in accordance with its stated policy on recruitment. However, an affirmative action candidate from outside its ranks was appointed. The applicant had contended that he was suitable for the position and that the post should never have been advertised outside.

The Court found, in reviewing the placement policy of the respondent, that appointing a candidate from outside was inappropriate. The respondent was not entitled to have appointed an outsider when an internal candidate (such as the applicant) was suitable.

However, the court made no formal determination on the application of affirmative action in the case and only held that the failure to follow a placement procedure was an unfair labour practice. It stressed and emphasized the importance of proper “process.”

Until this case, neither the Constitutional Court nor the Supreme Court (at the time) had had to decide a situation where there was an apparent conflict between the prohibition on unfair discrimination and measures to advantage the disadvantaged. Nevertheless, the Court held that affirmative action was not a racially based remedial action, but a process of ensuring equal employment opportunities. Affirmative action

outweighed the injunction not to discriminate on basis of race and gender and was justified despite other candidates being discriminated against.

The Court also dealt with the notions of “positive” and “negative” discrimination, holding that negative discrimination constituted an unfair labour practice. It held that section 8(3) of the Interim Constitution created a right to be a beneficiary of measures designed to achieve the purpose set out in that section. That did not constitute a right to advancement of the disadvantaged. The specific wording of the section was of critical importance to the Court. It also mentioned that it would be necessary to see how the Constitutional Court would set about balancing the right not to be discriminated against on the grounds of race, with measures designed to restore equality and held that it would be highly unlikely that the Constitutional Court would conclude that the limitations clause, (which provided that section 3 rights may only be limited to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality) does not apply to section 8 where the limitations of these rights is encompassed within the same section.

The Court held that affirmative action measures were to be designed to eliminate inequality and to address systemic and institutionalized discrimination. Such measures are mechanisms to ensure eventual equal opportunities, a socio-political priority.

The Court was not inclined to view affirmative action as a universal value. It saw it strictly as a procedure, a strategy, a means to an end: “a measure to achieve a goal,”¹⁶³ a pragmatic necessity of temporarily accommodating a limited exception to the value of non-discrimination. Fairness and equity as well as other considerations including economic considerations, dictated that affirmative action in South Africa was an imperative which had to be permitted to outweigh the injunction not to discriminate on the basis of race and gender. The previously disadvantaged had to

¹⁶³ *George v Liberty Life Association of Africa Ltd* at page 593E.

be assisted to overcome their disadvantages so that society could be normalized. It held that if the *status quo* were maintained, in-built inequalities would be perpetuated.

The Court held further that even “grades of disadvantage” could be accommodated and quoted from M Banton¹⁶⁴ (a quote worth repeating): “As a means of combating discrimination, law works through the creation of protected classes; this may result in only rough justice, since not all members of a class are equally placed. One of the main criticisms of affirmative action in the United States has been that it has primarily benefited middleclass women and black people who were well able to look after their own interests and less deserving assistance than those trapped in the under class. The creation of privileged classes benefiting from quota hiring has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define classes so exactly that only the most deserving benefit, the short-run results may be open to criticism.” The Court held that personal circumstances (relating to personal disadvantage in the past) are relevant.

Managerial prerogative in appointment and its gradual erosion was also dealt with by the Court. It held that managerial prerogative was not unfettered and that there were procedural and substantive limitations to it. If a company undertook to follow certain processes in recruitment, it had to follow them.

3.11 PSA v Minister of Justice (1997) 18 ILJ 241 (T)

The *PSA v Minister of Justice*¹⁶⁵ matter was the first important Supreme Court decision on affirmative action policies and plans. It was handed down one month after the coming into effect of the final Constitution on 4 February 1997 and concerned the filling of thirty vacant posts in the offices of the Sate Attorney. The matter was extremely complex due to the multitude of legislative prescriptions, policy documents and provisions contained in subordinate legislation which had a bearing

¹⁶⁴ Banton M *Discrimination* (1994).

¹⁶⁵ *PSA v Minister of Justice* (1997) 18 ILJ 241 (T).

on the matter and which outlined the powers of functionaries with regard to appointment.

The Public Service Commission had issued directives granting the respondent a special dispensation to promote representivity in the department. The posts were advertised, indicating that the public service is an equal opportunity affirmative action employer. It indicated that it was the intention of the respondent, through the filling of the posts, to promote representivity in the public service and that preference would be given to candidates whose transfer/promotion/appointment would contribute thereto. The respondent decided to promote the constitutional objective of creating a representative public service by earmarking certain of the posts for representative candidates. Sixteen white male employees applied and were not interviewed. Female employees with significantly less seniority were appointed and as a result, the applicants alleged unfair discrimination and that their applications were not considered past the point of determining their race and gender.

As remarked by the Court, the facts relied on by the applicants were “starkly simple.”¹⁶⁶ None of the posts were created in terms of measures introduced for purposes of any process of making the public service more representative. Despite the qualifications and extensive experience of the applicants in the dispute, none had been appointed and none even interviewed. If their applications were considered at all, it was merely to reject them out of hand. The only persons employed by the respondent at the time and who were invited for interviews were three women, one of which had only qualified five years previously and who had only one year’s experience at the office of the State Attorney. If appointed she would jump several officers on the merit list. Furthermore, there was no indication from the respondent that any of the candidates actually recommended had similar or better qualifications than the applicants. To the Court, that created a picture which on the basis of logic, merit, efficiency and sensible administration was “astonishing.”¹⁶⁷

¹⁶⁶ *PSA v Minister of Justice supra* at page 245.

¹⁶⁷ *PSA v Minister of Justice supra* at page 253.

The respondents sought to justify its actions on the basis of affirmative action.

The Court held that the Constitution provides that there must be a public service that is “career orientated”, functions according to “fair and equitable principles”, and promotes an “efficient public service broadly representative of the South African community.” Qualifications, level of training, merit, efficiency and suitability of persons who qualified for appointment had to be taken into account. Despite that, measures to promote the objectives of section 212 of the Constitution were not prohibited. It was argued that the Public Service Act¹⁶⁸ set out criteria for appointment and that the term “suitability” permitted the identification and subsequent appointment of affirmative action candidates.

The Court held that the Constitution prohibited unfair discrimination, but did not preclude measures to achieve adequate protection and advancement of persons disadvantaged by unfair discrimination in the past. It viewed section 8(3) as an exception to section 8(2) and held that “measures” must be adequate and had to take into account the rights and legitimate expectations of the present incumbents.

The Court set aside the directives on administrative law grounds and on the basis that they did not constitute “designed measures”, but measures which were haphazard, random and over-hasty. It was found that the special dispensation amounted to nothing more than giving the department an untrammelled discretion to earmark posts for blacks, women and disabled people without any overall policy or plan. To the Court, representivity did not mean a mathematical percentage, but that, on a broad basis, all communities should be represented. The earmarking of posts was not expressly called for by the Constitution.

A special dispensation with no overall plan to promote representivity was found not to constitute “designed measures” and therefore gave the employer the unfettered discretion to earmark posts for blacks. In that regard, the respondent referred to

¹⁶⁸ Public Service Act, 1994 (Proclamation 103 of 1994) (Hereinafter referred to as the PSA).

figures to demonstrate that the public service inherited by the present government was notoriously unrepresentative of the South African community as a result of past discriminatory practices, particularly on the grounds of race and gender. There was thus an urgent need to make the public service in general and the Justice Department in particular more representative, particularly with regard to race and gender. As a result, it was argued, posts especially identified for the purpose would, by way of exception to the PSA's section 11 be filled in a way to promote greater representivity.

The Court found that the Public Service Commission's interpretation of section 11 could not be used to create greater representivity and that the department could not use other mechanisms because the rationalization process had at that time not yet been completed. That meant that the department would have had to continue making appointments in the old way without regard for the greater representivity. The department's view was that it would clearly have perpetuated and aggravated the lack of representivity and therefore the department obtained special dispensation to apply chapter B Special for the staffing of vacant posts on the pre-rationalized structures. It was noted too that at that time, the department had not registered a departmental program or management plan.

The Court held that there was no evidence that the respondent had complied with the requirements of a policy framework, no steps had been taken to promote the public service as a career among under-represented groups, there was no evidence of bursaries to the disadvantaged to enable recruitment into the public service and no attempt to promote appointments at entry level. Furthermore, there was no targeted recruitment or preference given to equal merit cases on the basis of representivity. There was also no evidence of special *ad hoc* measures formulated to provide for the appointment of candidates who were more suitable, if such appointment would improve representivity. No special training courses to enable prospective and serving members to meet the prescribed requirements and operational standards had been

provided or initiated. Also no explanation of any rational basis upon which a quota was used to fill the positions in question was provided to the Court.

The respondent had concluded that Section 11(1)(b) of the PSA, which provided that in making appointments or filling posts in the public service “only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment promotion or transfer in question and such conditions as may be determined or prescribed or as may be directed or recommended by the commission for the making of the appointment or the filling of the post shall be taken into account” permitted and required race and gender to be taken into account whenever necessary or appropriate to do so in order to promote a public administration broadly representative of the SA community. It was of the view that the constitutional imperative of representivity was one of the factors to be taken into account when considering suitability for appointment.

The Court, however, held that “suitability” in the public service did not go to race and gender. Only merit was required to be taken into account.

The Court referred to section 8 of the interim constitution and held that without discrimination there can be no unfair discrimination. The Constitution prohibited unfair discrimination.

The respondent’s case was that there was discrimination but that it was fair in the circumstances. The applicants had been discriminated against and therefore what was required was to rebut the unfairness of the discrimination.

A passage from Smith was quoted: “The literal wording of the South African clause does not appear to express an exception ... At the level of principle, the problem is that if affirmative action is an exception to the right to equality which does not require affirmative action and then sub-sec 8(3)(a) cannot be justified in terms of the principles that the constitution is based on. Moreover, our affirmative action clause

specifically states that its purpose is to enable people to enjoy all rights and freedoms fully and equally. That would be a strange claim for an instrument of social policy which effected a deviation from equality.”¹⁶⁹ However, the view held by the Court was that the express wording indicated it is an exception. The section laid down the limits to affirmative action and that it would not offend section 8(2). Affirmative action had to be judged against the requirements of sec 8(3)(a).

The respondent had argued that the applicants were not treated unfairly. However, the applicants’ applications were never considered past the point where their race and gender did not meet up with the preference established for the posts. Consideration of their applications went no further than refusing them on the basis of race and gender. The respondent argued that the process gave preference to black people and women because of section 212(2)(b) of the Constitution and the fact that black people and women were notoriously under-represented in the public service in general and in the department in particular. It was therefore of the view that the process accordingly constituted “a measure” as envisaged in section 8(3)(a) of the Constitution. Measures of that kind did not offend the prohibition of unfair discrimination.

The Court referred to Chaskalson *et al*¹⁷⁰ “The words ‘the adequate protection and advancement’ indicate that the end envisaged as well as the means employed is reviewable; that the measures adopted are not permitted to go beyond what is adequate. Naturally what is considered to be adequate is open to interpretation.” It was therefore held that to merely label certain measures as falling within the meaning of the constitutional provision would not suffice.

The respondent had also argued that the process followed by it was permissible and required by section 212 to promote a broadly representative public service. Furthermore, any public authority was entitled to adopt a policy and needed no

¹⁶⁹ Smith N (1995) 11 SAJHR 84 at 89.

¹⁷⁰ Chaskalson *Constitutional Law* 14 – 27.

statutory authorization to do so. The adoption of a guiding policy was not only legally permissible but in certain instances might be both practical and desirable. The Court referred to authorities from which it was clear that three principles governed policies of public authorities – they must be compatible with the enabling legislation; they must not totally preclude the exercise of a discretion; they must be disclosed to the person affected by the decision before the decision is reached.

The Court accordingly held that a public authority cannot adopt a policy *in vacuo* and stated that the question was what role policy can and did play in the affirmative action steps *in casu*. It stated that it was important to assess whether the requirements of section 8(3)(a) had been met. Submissions had been made with reference to authorities that despite equality clauses, the Court was nevertheless capable of accommodating affirmative action within the concept of equality and that the scope for review of the program actually adopted or the policies actually adopted was extremely narrow. The Court found that the authorities, however, did not exclude the possibility of review and that the Court's role was to decide whether the limit imported on a right or freedom was reasonable and justifiable. The Court quoted Chaskalson in the matter *S v Makwanyane*¹⁷¹ where he stated that: "In the balancing process the relevant considerations will include the nature of the right that is limited and its importance in an open and democratic society based on freedom and equality, the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. "

The Court held that "measures" cannot go beyond what is reasonable. The rights and interests of those persons affected by measures had to be taken into account.

It held that the test was whether affirmative action measures qualified as reasonable limitations on the prohibition of unfair discrimination. The Court therefore had to

¹⁷¹ *S v Makwanyane* 1995 (3) SA 391 (CC) at 104.

establish whether a measure was reasonable when tested against the strict scrutiny standard favoured by American jurisprudence.

The Court confirmed that restitutionary measures would be justified as fair discrimination and would be beyond the ambit of the constitutional prohibition against unfair discrimination.

It also considered the purpose of the provisions for restitutionary measures as identifying the limits of what may be justified as legitimate and devised a series of qualifications for determining whether an affirmative action policy would qualify as legitimate and as reasonable administrative action:

An affirmative action measure had to be designed to achieve adequate advancement;

There had to be a causal connection between the designed measures and the objectives and further, the measures adopted could not exceed what is adequate;

The goals and means employed had to be subject to review;

Due consideration had to be given to the rights of members outside the designated beneficiaries; and

Promotion of representation could not be at the expense of efficiency.

The decision in this case became the preferred authority for using the standard of reasonableness to qualify affirmative action policies as justifiable. "The measures must be designed to achieve something. This denotes ... a causal connection between the designed measures and the objectives."¹⁷²

The test connected to the strict scrutiny approach requires a demonstration that the differentiation on the grounds of race is a necessary means for the promotion of an overriding state interest. The strict scrutiny standard favours the standard of

¹⁷² *PSA v Minister of Justice supra* at para.

necessity, a rational relationship between the differentiation and a state interest would be inadequate.

The Court accordingly held that a rational connection was lacking when affirmative action resulted in the appointment of applicants whose manifest unsuitability would compromise another constitutional imperative that rested on the public service, e.g. to promote efficiency. The initiators of the policy bore the *onus* to prove that it did not constitute unfair discrimination: “The *onus* comes into operation as soon as there is prima facie proof of discrimination. This would also include discrimination in attempting to promote a more representative administration.”¹⁷³ The enquiry into the policy was held to be important because there had to be a rational basis for affirmative action to be fair. The manner of execution of the policy had to be scrutinised and both the end and means had to be reviewed.

The Court tried to balance three factors in its judgment: a) efficiency of the department; b) aspirations of the complainants; and c) the affirmative action policy.

The judgment has been viewed as illustrating a “parsimonious approach”¹⁷⁴ to affirmative action measures. The Court’s interpretation of the right to equality was both disjunctive and oppositional and the principle established was that affirmative action measures were in themselves unfair discrimination which had to be justified in order to be found to be fair. A failure to justify them rendered them unfair discrimination.

In the second of the “clutch” of cases, the Constitutional Court in *Hugo*¹⁷⁵ began to set out its understanding of a substantive equality right and the test for whether that right had been violated. The Court made many significant pronouncements in this case.

¹⁷³ *PSA v Minister of Justice supra* at para 306G.

¹⁷⁴ *Ngcukaitobi T* (2007) 28 *ILJ* 1436 at 1442.

¹⁷⁵ *President of the Republic of South Africa v Hugo supra*.

3.12 President of the Republic of South Africa v Hugo 1997 6 BCLR 708 (CC)

The applicant was a widower male prisoner with one son. The case was about the granting of a remission of sentence by the state president only to women prisoners with children under the age of twelve. The applicant would have qualified for remission, but for the fact he was a father not a mother.

The Constitutional Court handed down a majority judgment by Goldstone J, with Kriegler and Didcott JJ dissenting in their own separate judgements. Mokgoro and O'Regan JJ gave their own reasons for concurring, also in separate judgments.

Goldstone J held in the majority judgment that: "Where the power of pardon or reprieve is used on general terms and there is an 'amnesty' accorded to a category or categories of prisoners, discrimination is inherent. The line had to be drawn somewhere as there would always be people on the side of the line who did not benefit and whose positions were not significantly different from others who have benefited."¹⁷⁶ It had been argued that there was discrimination on the ground of sex but the discrimination was actually on combined grounds – sex and family responsibility. The Court referred to *Brink*,¹⁷⁷ where it was held that it was sufficient, if the discrimination is largely based on one of listed grounds, only to deal with that ground.

The Court held that because the alleged discrimination was on a listed ground, there was a presumption of unfairness. The respondent therefore had to rebut the presumption. In that regard it was submitted that the discrimination in favour of women was fair because mothers have a nurturing and caring role and it is generally accepted that mothers are the primary nurturers and care givers of young children. Primary bonding is with a child's mother and extends well into childhood. Given that the wellbeing of children is a particular concern generally in South Africa and given

¹⁷⁶ *President of the Republic of South Africa v Hugo supra* at para 31.

¹⁷⁷ *Brink v Kitshoff NO supra*.

that, in the experience of the National Director of the South African National Council for Child and Family Welfare, only a minority of fathers are actively involved in the nurturing of and caring for their children, (particularly with pre-adolescents) the purpose of the discrimination was fair.

The Court found the submissions to be based on generalizations, but accepted them as true – mothers did bear an unequal share of the burden of child rearing in South Africa. The Court found, however, that it could not ordinarily be fair to discriminate between women and men on that basis. The failure by fathers to shoulder their fair share was a primary cause for the situation which made it difficult for women to compete in job market. It was the cause of deep inequality experienced by women. The generalization on which the president relied was therefore a fact which is one of the causes of women's inequality.

It was held that it is unlikely that South Africa would achieve a more egalitarian society until such time that responsibilities were more equally shared between men and women. The generalization by the respondent did not answer the question as to whether the discrimination was fair. To use the generalization that women bear a greater proportion of the burdens of child rearing for justifying treatment that deprives women of benefits or advantages or imposes advantages upon them would therefore be unfair.

However, the Court found that that was not the case *in casu*. The fact that the individuals who were discriminated against by a particular action were not individuals who belonged to a class which had historically been disadvantaged, did not necessarily mean that the discrimination was fair. The prohibition against unfair discrimination sought not only to avoid discrimination against people who were members of a disadvantaged group. It sought more – that all human beings would be accorded equal dignity and respect, regardless of their membership of a particular group. That goal of the constitution should not be forgotten.

It was held that there is a need to develop a concept of unfair discrimination which recognizes that although society affords each human being equal treatment on the basis of equal worth, that goal cannot be achieved by insisting upon identical treatment in all circumstances. A thorough understanding of the impact of the discriminatory action upon the particular people concerned was essential to assess whether the overall impact was one which furthered the constitutional goal of equality or not. A classification which was unfair in one context might not necessarily be unfair in a different context.

The fact that there was no intent to discriminate unfairly and that the welfare of children was the goal was held not to be sufficient to establish that the impact of the discrimination upon fathers was not unfair. It was necessary to look not only at the group which had been disadvantaged, but at the nature of the power in terms of which the discrimination had been effected and also the nature of the interests which had been affected by the discrimination. The president had taken into account the perceived interests of the public as well and made his decision believing it would be in the public interest to do so.

The Court found that it is true that fathers of young children in prison were not afforded early release, but that did not restrict or limit their rights or obligations as fathers in any permanent manner and the effect of the discrimination was not to deny them their freedom. They could also still apply individually for the remission of sentence in any event. It could not be said that the president's action fundamentally impaired their rights of dignity or sense of equal worth.

The court thus agreed that the president's act in question discriminated on a specified ground, sex. It also agreed regarding the test for unfairness, but there were strong dissents based on the application of the test to the facts of the case. The majority held that men were not a historically disadvantaged group and that the aim of the provision was to benefit women who had been disadvantaged in the past and

that the action did not impair the fundamental dignity of the men concerned. However, the findings followed an almost mechanical application of the test.

Kriegler J was highly critical in his dissenting judgment. He acknowledged that the case was a hard and awkward one and commented that there was a critical of lack of evidence and reliance on perceptions and generalizations. He remarked that the president's act had "impressive provenance and charitable appearance"¹⁷⁸ but he was critical, especially in relation to the prominence given in the majority judgment to the conclusion that the act would benefit women on the assumption that women were the primary caregivers – an assumption which had in the past been the cause of women's inequality. Thus instead of reversing patterns of disadvantage, the provisions had the effect of perpetuating a particular view of women which had in the past operated to their detriment.

His view was that sex discrimination was a serious concern of the drafters of the constitution and that sex discrimination was "presumed" to be unfair as a result. That made it automatically a questionable action which required a persuasive rebuttal. It was pointed out that although in South Africa there were no levels of scrutiny as in the USA, it was nevertheless worth noting that race/sex/gender were given special mention in the Preamble of the Constitution and headed the list of grounds of discrimination therein. Therefore, it cannot be permitted that the burden be discharged with relative ease. The basis of Kriegler's dissent was that the rebuttal needed to "establish" fairness and that therefore rebutting factors could not in themselves be discriminatory. That would be objectionable and a perpetuation of discrimination or inequality could never be justified. An act which presupposed such conduct or relied on such conduct could never pass muster.

Kriegler J also pointed out that the further facts which could justify the actions were to be considered under the limitations clause and had to be distinguished from the section 8(4) (of the Interim Constitution) "fairness enquiry." Justification and fairness

¹⁷⁸ *President of the Republic of South Africa v Hugo supra* at para 73.

were two different things. The vindication of the perceived role of mothers in South Africa and the stereotyping in that regard cannot be accepted. “It is a relic and a feature of the patriarchy which the constitution so vehemently condemns.¹⁷⁹” Again, the importance of equality in South Africa was stressed. Equality is at the centre of the constitution and its “focus and organizing principle.”¹⁸⁰

Mokgoro J emphasised that treating men as less able parents constituted an infringement on their equality and dignity. Society should no longer be bound by the notions that a woman’s place is in the home and that fathers do not have a significant role to play in the rearing of young children. She was unpersuaded by the majority judgment’s emphasis on the vulnerable position of young mothers in South Africa and acknowledged that whilst they may generally be disadvantaged, there is no evidence that they are disadvantaged in the penal system in particular.

With regard to the limitations clause and the decision as to whether the limitation was reasonable and justifiable in an open and democratic society, the temporary denial of parenthood to fathers was justifiable with reference to the interests of the children whose mothers were released. There was no doubt that the aim of ensuring that young children were looked after was legitimate and fathers could still apply for remission of sentence on an individual basis. The issue was the impossibility of releasing all mothers and fathers at once.

In this case the court stated its understanding of the equality clause as follows: “The prohibition on unfair discrimination in the interim constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of

¹⁷⁹ *President of the Republic of South Africa v Hugo supra* at para 80.

¹⁸⁰ *President of the Republic of South Africa v Hugo supra* at para 74.

such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”¹⁸¹

The Court therefore was viewed as shifting its approach from group disadvantage to dignity as the centre of the right. In addition, it is thought that the law was inconsistently applied without distinguishing between the categories of people. Furthermore, the Court held that it was necessary to show intent to apply the law unequally.

Goldstone J’s description of equality as “according equal dignity and respect” tended to reduce the meaning of equality to the right to dignity, according to Alertyn and Goldblatt.¹⁸² The right to equality, according to Goldstone J, is defined by the value of dignity rather than the value of equality.

O’Regan’s focus on the severity of harm on the individual within the group suggested the correct method of enquiry into equality violations. She stated that the unequal division of labour between fathers and mothers was a primary source of women’s disadvantage in our society. It was therefore necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect thereof on the interests of those concerned. The more vulnerable the group adversely affected, the more likely the discrimination would be held to be unfair. The more invasive the nature of the discrimination upon the interests of the individuals affected by discrimination, the more likely it would be to be held unfair. Profound disadvantage lay in the social fact of the dominant role played by mothers in child rearing and in the inequality which resulted from it. Putting an end to it is a major challenge to be faced in our society. The harmful impact however, was not experienced by mothers in this case, but by fathers. That impact was far from severe and the effect of the discrimination was not a cause of substantial or permanent harm.

¹⁸¹ *President of the Republic of South Africa v Hugo supra* at para 41.

¹⁸² Alertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 258.

In this case, the Court adopted the contextual analysis approach with an emphasis on investigating the impact of the discriminatory action on the people concerned when determining the unfairness of the discrimination.

The major flaw of the judgments, according to Albertyn and Goldblatt,¹⁸³ was that they were unable to locate the complainant as a single father, within his social context and that they lost sight of the overlapping nature of social groups. A further problem was the lack of appropriate evidence in that regard.

In summary, Goldstone J at 729 G-H held: "Each case ... 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, a classification which is unfair in one context may not necessarily be unfair in a different context."

3.13 Prinsloo v Van der Linde 1997 6 BCLR 759 (CC)

The judgment in *Prinsloo*¹⁸⁴ was handed down on 18 April 1997, the same date as the judgment in *Hugo*.¹⁸⁵ It was the third Constitutional Court matter in which the notions of equality and discrimination were dealt with prior to the *Harksen*¹⁸⁶ case.

The matter concerned differentiation between defendants in veld fire cases as opposed to those in other delictual matters. Allegedly there was no rational basis to account for the difference. A second differentiation was argued to be the fact that the presumption of negligence applied only in respect of fires in non-controlled areas and not those spreading into controlled areas.

¹⁸³ Albertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 264.

¹⁸⁴ *Prinsloo v Van der Linde supra*.

¹⁸⁵ *President of the Republic of South Africa v Hugo supra*.

¹⁸⁶ *Harksen v Lane NO supra*.

The Court held that our country has diverse communities with different historical experiences and different living conditions. The impact of structured and vast inequality was still with us, despite the arrival of the new constitutional order and “While our country, unfortunately has great experience in constitutionalizing inequality, it is a newcomer when it comes to ensuring constitutional respect for equality – therefore court should be wary of laying down sweeping interpretations, but should allow the equality doctrine to develop slowly and hopefully surely”¹⁸⁷

The Court emphasised that the equality clause in the Interim Constitution was the product of our own particular history – a history which was particularly relevant to the concept of equality. When the clause is read, the concept of equality is referred to in different ways. Firstly, equality before the law seemed to be concerned with equality in treatment in the courts, the notion that no one is above or beneath the law and that all persons are subject to law impartially applied and administered. The equality clause described equality in the first section in the positive and in the second as a negative: –“No person shall be unfairly discriminated against ...”¹⁸⁸

It stated that the idea of differentiation (employing a neutral descriptive term) seemed to lie at the heart of the equality jurisprudence in general and of section 8 in particular. The clause dealt with equity in two ways – differentiation which does not involve unfair discrimination and differentiation which does. Differentiation of itself did not constitute discrimination. The term discrimination carried negative connotations which distinguished it from differentiation which is acceptable and very often essential. However, the use of the word ‘unfair’ to qualify discrimination in section 8(3) of the Interim Constitution begged the question as to whether, in that context, the term discrimination is not viewed as pejorative.

The Court held that an overview of the constitutional right to equality revealed that there are two categories of differentiation namely: differentiation “which does not

¹⁸⁷ *Prinsloo v Van der Linde supra* at para 20.

¹⁸⁸ Section 8(2) of the Interim Constitution.

involve unfair discrimination ('legitimate differentiation' and 'differentiation which does involve unfair discrimination.'"¹⁸⁹ It used the example of bona fide classifications by the government for the purpose of efficiency and the common good to identify the first category of differentiation. It held that it was impossible to govern effectively without differentiation and classifications which treat people differently and which impact on people differently – that constituted “mere differentiation”. Mere differentiation would be invalid only if there is no rational connection between the differentiation and a legitimate purpose. “In regard to mere differentiation the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is therefore to ensure that the State is bound to function in a rational manner ... Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 9”¹⁹⁰

The Court also pointed out that while rationality was necessary, it was not sufficient because the differentiation might still constitute unfair discrimination if the element in 8(2) were present. 8(2) was a section which dealt only with unfair discrimination by distinguishing two forms thereof and dealing with them differently.

The first form is discrimination on listed grounds. When there is *prima facie* proof of discrimination on a listed ground, the presumption of unfairness applies until the contrary is proved.

The second form is discrimination unlisted grounds and no presumption of unfairness applied. When read “in its full and historical context and in the light of the purpose of

¹⁸⁹ *Prinsloo v Van der Linde supra* at para 23.

¹⁹⁰ *Prinsloo v Van der Linde supra* at paras 25 and 26.

s8 as a whole and s8(2) in particular, the second form cannot be given such an extremely wide and unstructured meaning. Proper weight must be attached to the use of the word discrimination in 8(2). The section proscribes ‘unfair discrimination.’”¹⁹¹

The court however, firmly rejected a suggestion that discrimination has become a neutral term because of the addition of the word unfair. “The proscribed activity is not stated to be ‘unfair *differentiation*’ but is stated to be ‘unfair *discrimination*’. Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning related to the unequal treatment of people based on attributes and characteristics attaching to them ... the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity.”¹⁹²

“In our view unfair discrimination when used in this second form in s8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”¹⁹³

It further held that other forms of differentiation, which in some other way (not a fundamental dignity impairment) affected persons adversely in a comparably serious manner, may well constitute a breach of section 8(2)

This case was a rationality review under section 8(1) - the rule of law. In respect of “rule of law” there must be a rational relationship between the legislative scheme and achievement of a legitimate government purpose. In this matter the Court used a low level of scrutiny – the rational scrutiny review. It was however, not sufficient for the

¹⁹¹ *Prinsloo v Van der Linde supra* at para 29.

¹⁹² *Prinsloo v Van der Linde supra* at para 31.

¹⁹³ *Prinsloo v Van der Linde supra* at para 31.

complainant to show that the differentiation did not achieve its purpose. It had also to be shown that there was no rational basis for holding that the law could achieve its purpose. As long as the government could identify a purpose and as long as there was a rational basis for believing that the purpose could be achieved, there was no basis in arguing it could have been achieved in a different way. Also as long as there was a rational relationship between the method and object, it was irrelevant that the object could have been achieved in a different way. This did not mean that the particular differentiation might still not constitute unfair discrimination under the second form of unfair discrimination in section 8(2). However *in casu* the differentiation could not be seen as impairing the dignity of the applicant and there was no basis for concluding that the differentiation in some other “invidious way”¹⁹⁴ adversely affected such person in a comparably serious manner. It was clearly a regulatory matter to be adjudged according to whether or not there was a rational relationship between the differentiation and the purpose sought to be achieved by the act in question. The Court found that there had been no breach of the constitutional right to equality.

It has been stated that the court did not employ a two-stage analysis to the term unfair discrimination. It appears therefore that the court confused or conflated the two terms.

Fagan¹⁹⁵ is of the view that O’Regan and Sachs JJ in essence claim that dignity is at the heart of unfair discrimination based on their three point argument which goes as follows:

- “1. Unfair discrimination and not unfair differentiation is proscribed;
2. In South Africa discrimination is not synonymous with mere differentiation, to discriminate is not merely to differentiate, but rather to differentiate in a manner which impairs people’s dignity;

¹⁹⁴ *Prinsloo v Van der Linde supra* at para 41.

¹⁹⁵ Fagan A (1998) 14 *SAJHR* 220.

3. Unfair discrimination is if a person is treated differently in a way that impairs a person's dignity."

Fagan posed the question: "What makes differentiation unfair?" He stated that according to the judges, it is a sufficient condition for unfair discrimination that the differentiating action impairs dignity.

Didcott J's remarks at that time were indeed apt¹⁹⁶: "Not even then ... have we developed a complete and coherent jurisprudence on the subject of equality. Sooner or later, no doubt, we shall have to enunciate one. But so complex, so subtle and so delicate a task ought not to be undertaken in a case inappropriate for it. We may otherwise overlook nuances and implications of the principle to which our thoughts are not immediately attuned...It suffices for our purposes there, I consider, to say no more than this. Mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense."

The Court too pronounced on *onus* in civil cases and Didcott J quoted¹⁹⁷ extensively from authorities e.g. Wigmore: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations ... There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness." The location of onus in specific cases depends not on doctrinaire considerations but on wholly pragmatic ones.

Didcott J further also asked: "The first question concerns the relationship between the right to equality and equal protection under the law and the prohibiting of unfair discrimination on the other. It is whether the prohibition forms a corollary to the right which amplifies that or an independent and self contained provision."¹⁹⁸ He also asked whether the criterion of rationality suited the right alone while the one of

¹⁹⁶ *Prinsloo v Van der Linde supra* at para 52.

¹⁹⁷ *Prinsloo v Van der Linde supra* at para 55.

¹⁹⁸ *Prinsloo v Van der Linde supra* at para 57.

fairness fitted only the prohibition or whether both criteria were apt for each. He did not answer the questions as the case had failed and therefore the matter was not decided in that regard.

3.14 Leonard Dingler ER Council v Leonard Dingler (Pty) Ltd (1998) 19 ILJ 285 (LC)

On 3 October 1997, three days before the *Harksen*¹⁹⁹ judgment was handed down, the Labour Court delivered its extremely lengthy and well-reasoned judgment in the *Leonard Dingler*²⁰⁰ matter. Three retirement funds allegedly operated along racial lines. It was alleged that the company therefore practised direct and indirect discrimination on racial grounds. The indirect discrimination claim between weekly and monthly paid employees was conceded during argument.

The Court noted that some discrimination is permissible while other discrimination is impermissible. The notion of permissible discrimination was found to be in keeping with a substantive rather than formal approach to equality. The factors to be considered in a determination as to whether discrimination was unfair were considered by the Court. It conducted a lengthy and detailed review of the Constitutional Court's approach to the question and focussed extensively on the case background: "... the case by case approach to equality emphasising the actual context in which each dispute arises seems as appropriate to unfair labour practice disputes as to cases testing the constitutionality of legislation. With this in mind, testing the legitimacy of discrimination requires more than an enquiry into the group that suffered the discrimination. The effect of the discrimination on the group must be considered and also the power in terms of which the discrimination was effected."²⁰¹

¹⁹⁹ *Harksen v Lane NO supra*.

²⁰⁰ *Leonard Dingler E R Council v Leonard Dingler (Pty) Ltd (1998) 19 ILJ 285 (LC)*.

²⁰¹ *Leonard Dingler E R Council v Leonard Dingler (Pty) Ltd supra* at page 295 B-C.

Careful consideration of the context in which the dispute arose was also evident with the Court indicating that there was no fixed formula to apply mechanically to any given situation.

The Court held that the *onus* was on the applicant to show that discrimination existed. If it was indeed shown, the *onus* shifted to the respondent employer to show that the object of the practice was legitimate and the means of achieving it rational and proportional.

It also stated that the presence or absence of intention might be relevant only when the court decided on relief.

It is postulated by many commentators that a general fairness test for affirmative action was envisaged in the following statement by the Court:²⁰² “Discrimination is unfair if it is reprehensible in terms of the society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportionate and rational.” It appears to many to suggest that affirmative action measures which satisfy requirements are a complete defence to unfair discrimination.

The Court held that there was no objective justification for only permitting monthly paid staff to join the staff benefit fund. It constituted discrimination on an arbitrary ground and had the effect of nullifying or impairing the recognition, enjoyment or exercise of rights and freedoms by all persons on an equal footing. In the judgment, the Court referred extensively to academic authorities and Constitutional Court judgments in its discussion of the meaning to be given to the inclusion of the term “unfair” in item 2(1)(a) of ULP definition contained in the LRA. It held that the provisions sorted permissible from impermissible discrimination and noted that what is less clear is where to draw the line between permissible and impermissible

²⁰² *Leonard Dingler E R Council v Leonard Dingler (Pty) Ltd* at 295H.

discrimination. A case by case approach and an emphasis on the actual context in which a case arose would be deemed appropriate. Testing the legitimacy of discrimination required more than an enquiry into the group that suffered – the effect of the discrimination on the group had to be considered, as well as the power in terms of which the discrimination was effected. The “justification” enquiry lay at the heart and involved a consideration of context. However, the Court also pointed out, as had the Constitutional Court, that there was no fixed formula to apply mechanically.

The Court quoted Cameron J in *Holomisa v Argus Newspapers Ltd*,²⁰³ a defamation case, where it was held that the Constitution plants new values at the roots of our legal system, including values of equality, democracy, transparency of government and accountability.

The Court did not share counsel’s views that the mere willingness to right past wrongs made discrimination fair. It was the Black group that was discriminated against, a group that was and still is disadvantaged. No explanation had been offered for the object of the conduct and there was thus no objective justification for the discriminatory treatment or impact that resulted from the conduct.

The Court also noted that the European Court of Justice, in applying equality provisions in European law, had consistently held that equality rights may not be infringed by collective labour agreements.

The Court in addition discussed the serious and possibly insurmountable difficulties which would ensue if applicants in discrimination cases were required to prove that discrimination was unfair. Such an approach would eventually undermine the constitutional commitment to eradicate inequality. It was doubtful that the legislature intended that. Therefore the employer had to show that the object of the practice or policy was legitimate and that the means used were rational and proportional.

²⁰³ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

In this case, the Court did not require a restrictive statistical analysis which had marked indirect discrimination cases in the United States. The Court did not assess the size of the base-group of employees excluded from the fund but found that the number of black employees who qualified for membership was disproportionately low.

Du Toit²⁰⁴ at page 1325 stated that this case was arguably the most closely-reasoned judgment to be handed down in terms of Item 2(1)(a) and that it became the leading authority on concept of indirect discrimination thereafter.

More controversially however, the case has been cited as authority for the proposition that an employer, despite the two permitted grounds for discrimination in the ILO Convention, also had a general or residual fairness defence – a view not shared by many commentators, however.

Having reviewed the most important cases prior to *Harksen*²⁰⁵, it is clear that during that period, the courts grappled with a number of notions – differentiation as opposed to discrimination; “fair” and “unfair” discrimination; an understanding of a substantive equality right; employer prerogative, commercial rationale and operational requirements as factors justifying discrimination; the supremacy of a collective agreement and discriminatory provisions contained in them; degrees of disadvantage; whether affirmative action constituted an exception to the right to equality or not; the limits of affirmative action and more.

Despite grappling with notions of equality and discrimination, an excellent example of the fact that even our Courts were blind to certain embedded forms of discrimination, was the *Collins*²⁰⁶ case where discrimination on the ground of pregnancy appeared

²⁰⁴ Du Toit D (2006) 27 *ILJ* 1311 at page 1325.

²⁰⁵ *Harksen v Lane NO supra*.

²⁰⁶ *Collins v Volkskas Bank (Westonarea Branch) a division of ABSA Bank Ltd supra*.

not to have been seen as grossly unfair and where the employer's needs were deferred to.

It has also been pointed out by Cooper²⁰⁷ that: "The notion of fairness under the old labour law regime was one in which the employer and the employee were held in a strict balance. The old Industrial Court developed a body of rules in which equity was seen broadly as encompassing a balancing of employer and employee interests in order to achieve the Act's objective of labour peace." The notion of impartiality was emphasised.

Although impartiality is still central to the Act's provisions, the same scrupulous formalism is not required and would, in fact, derogate from the achievement of the objectives of equality through failing to take into account disadvantage. The Act's purpose is to balance interests between employer and employee. Cooper also points out²⁰⁸ that the Labour Courts now also need to take into account constitutional norms and values, including substantive equality, when considering the notion of parity. Generally, the old Industrial Court sought to balance the interests of employees and employers in order to achieve the goal of labour peace through "even-handedness."²⁰⁹

Initially, clearly in an environment where South Africa had been 'cut off' by the rest of the world, ILO Conventions and Recommendations and international law were not taken into account in arriving at decisions. It did not take long, however, for those foresighted judges and counsel increasingly to look to the outside world for guidance, despite the country not yet having emerged from its isolation and insular focus. The most noteworthy of these judgements must be the *Chamber of Mines*²¹⁰ where the Court emphatically renounced any form of racial discrimination in a time where the separate but equal philosophy was the position of the very repressive government.

²⁰⁷ Cooper C 2001 *Acta Juridica* 121.

²⁰⁸ Cooper C 2001 *Acta Juridica* 121.

²⁰⁹ Brassey *The New Labour Law: Strikes, dismissals and the unfair labour practice in South African Law* (1987) at 63.

²¹⁰ *Chamber of Mines of South Africa v Council of Mining Unions supra*.

Gradually, the courts appeared to become comfortable in dealing with equality in a substantive manner as opposed to the rigid focus on formal equality and pure merit in appointment, and the mere elimination of overt discrimination from laws and policies.

Du Toit²¹¹ remarked that: “In the often painstaking enquiry and incisive insights reflected in various judgments, many, if not all, of the elements of a concept of impermissible discrimination, subsumed in the subsequent constitutional mandate, were delineated.”

Once the Constitutional Court had delivered its first three discrimination judgments it was as if the South African jurisprudence on equality and discrimination in a constitutional state was rightly being positioned at a level equal to international standards. The judgments, grappling with very profound concepts, seemed to set a new tone for judicial thinking, lifting our jurisprudence out of its past with a new direction and emphasis on giving very real effect to the constitutional mandate of equality, dignity and freedom.

At that point in time, just prior to the *Harksen*²¹² judgment, and most aptly so, the Constitutional Court pointed out on more than one occasion that the equality doctrine had to be allowed to develop slowly and that the Court had to be wary of laying down sweeping interpretations or prematurely laying down tests.

However, soon thereafter, the Constitutional Court, did just that.

²¹¹ Du Toit D (2006) 27 *ILJ* 1311 at 1314.

²¹² *Harksen v Lane NO supra*.

CHAPTER 4

HARKSEN v LANE

In this extremely important judgment, the Constitutional Court did not state that it was giving effect to the intention of the Constitutional Assembly or that it was assigning an official meaning to the Constitutional text, but it is evident from the decision that the court was setting out what it considered to be the true meaning of the sections in question. In so far as its interpretation of the equality right was concerned, it was clearer in its directives, as the court clothed its findings as an authoritative guideline for the correct approach to and interpretation of section 8 of the Interim Constitution. In interpreting the section it referred extensively to especially its two earlier judgments in the *Prinsloo*²¹³ and *Hugo*²¹⁴ matters, expanding on those dicta.

It is clearly to be expected that a newly established Constitutional Court would attempt to develop jurisprudence and to create a measure of clarity and certainty about the new Constitution, particularly about contentious issues such as equality. In this matter, it did so, resulting in the Harksen test, which became the guideline for the interpretation of cases concerning equality and discrimination.

Judge Goldstone J delivered the judgment on 7 October 1997, with Chaskalson P, Langa DP, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J and Sachs J concurring. O'Regan J (Madala J and Mokgoro J concurring) and Sachs J delivered separate judgments, dissenting in part from the majority's judgment and holding that section 21 was an unconstitutional violation of section 8(2) of the Interim Constitution.

The matter concerned the right to equality before the law and the right not to be unfairly discriminated against in terms of section 8 in chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993. It had been alleged that section 21 of the

²¹³ *Prinsloo v Van der Linde supra*.

²¹⁴ *President of the Republic of South Africa v Hugo supra*.

Insolvency Act 24 of 1936 differentiated between the solvent spouse of an insolvent and other persons who might have had dealings with that insolvent.

The context of the case was the sequestration of the estate of Mr Jürgen Harksen. The applicant, Mrs Jeanette Harksen, was at that time married out of community of property to Mr Harksen. The first and second respondents were the trustees in the insolvent estate of Mr Harksen.

Mrs Harksen alleged that the provisions of section 21 were in violation of the equality clause of the Interim Constitution. More particularly it was contended that the vesting provision constituted unequal treatment of solvent spouses and discriminated unfairly against them; and that its effect was to impose severe burdens, obligations and disadvantages on them beyond those applicable to other persons with whom the insolvent had dealings or close relationships or whose property is found in the possession of the insolvent. Counsel for Mrs Harksen suggested that the provisions of section 21 constituted a violation of both section 8(1) (a denial of equality before the law and equal protection of the law) and section 8(2) (unfair discrimination).

The Court held that the differentiation did not infringe the right to equal protection of the law because the purpose of the impugned section was legitimate and the differentiation had a rational connection to that purpose. However, section 21 did constitute discrimination against solvent spouses, since the differentiation between a solvent spouse of an insolvent and other persons having dealings with that insolvent arose from attributes or characteristics as solvent spouses which had the potential to demean persons in their inherent humanity and dignity

The discrimination was held as not to be unfair because it was not affecting a vulnerable group which had suffered discrimination in the past. The purpose of the measure was not inconsistent with the underlying values protected by section 8(2) and because the inconvenience and the burden imposed by the section did not lead to impairment of

fundamental dignity and did not constitute an impairment of a comparably serious nature.

The Court considered an argument that section 21 was an unconstitutional violation of section 8(1) (right to equal protection of the law) and of section 8(2) (right not to be unfairly discriminated against) of the interim Constitution. It was contended that the vesting provision contained in the Insolvency Act constituted unequal treatment of solvent spouses and discriminated unfairly against them; and that its effect was to impose severe burdens, obligations and disadvantages on them beyond those applicable to other persons with whom the insolvent had dealings or close relationships or whose property was found in the possession of the insolvent.

It was held that section 21 differentiated between the solvent spouse of an insolvent and other persons who might have had dealings with the insolvent. It therefore became necessary to consider the governmental purpose of the section, whether that purpose was a legitimate one and, if so, whether the differentiation had a rational connection to that purpose.

Furthermore, the Court stated that while section 21 might have caused inconvenience, potential prejudice and embarrassment to a solvent spouse, and while those consequences might be described as drastic, they were not arbitrary or without rationality. The legislature had acted rationally in taking the view that the common law and the statutory remedies relating to impeachable transactions were insufficient to enable the Master or a trustee to ensure that all the property of the insolvent spouse found its way into the insolvent estate.

There was therefore found to be a rational connection between the differentiation created by section 21 of the Act and the legitimate governmental purpose behind its enactment. Moreover, reasonable procedures had been introduced to safeguard the interests of the solvent spouse in his or her property. It followed that section 21 did not violate s 8(1) of the interim Constitution.

As to whether section 21 violated section 8(2) of the Interim Constitution, it was held that, because the differentiation between solvent spouses and other persons was not on one of the specified grounds in s 8(2), there had to be an objective enquiry into whether it constituted discrimination on one of the unspecified grounds. This enquiry yielded an affirmative result. Other persons who had dealings with the insolvent or whose property was found in the possession of an insolvent were not affected in the same way. Their property did not become vested in the Master or the trustee and they were not burdened with the onus of proving what was their property before it was released to them. The differentiation did arise from their attributes or characteristics as solvent spouses, namely their usual close relationship with the insolvent spouse and the fact that they usually lived together in a common household. These attributes had the potential to demean persons in their inherent humanity and dignity.

With regard to the question as to whether discrimination was unfair, it was held that solvent spouses, was not a group which had suffered discrimination in the past and was not a vulnerable one. The measure gave effect to Parliament's duty to protect the public interest by protecting the rights of the creditors of insolvent estates. The purpose of the measure was not inconsistent with the underlying values protected by section 8(2). As to the effect of the discrimination on the solvent spouses, it was held that, while the statutory vesting of the property of the solvent spouse gave rise to inconvenience and burden, it was the kind of inconvenience and burden that any citizen may face when resort to litigation became necessary. The inconvenience and burden of having to resist such a claim was found not to lead to an impairment of fundamental dignity or to constitute an impairment of a comparably serious nature.

The Court laid down the following test²¹⁵ to determine the presence or otherwise of unfair discrimination:

Section 8(1) must be used to attack legislative provisions or executive conduct where it resulted in differentiation between groups in a manner that amounted to unequal treatment or unfair discrimination. Therefore, the first enquiry must be: Does the provision differentiate between groups?

If yes, then:

Is there a rational connection between the differentiation and a legitimate governmental purpose it is designed to achieve?

Is the purpose consistent with the underlying values protected by the equality clause?

Is there no evidence of arbitrariness or manifestations of “naked preferences” without legitimate government purpose?

If yes, then: it does **not** amount to a breach of s 8(1), but may nonetheless constitute unfair discrimination for the purposes of s 8(2).

Extensively referring to the judgment in the *Prinsloo*²¹⁶ the Court at this stage expressed its understanding of “mere differentiation” and stated that it is essential for government to regulate the affairs of its citizens extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. Differentiation which fell into this category very rarely constituted unfair discrimination and amounted to governmental action relating to a defensible vision of the public good. While the existence of such a rational relationship was a necessary condition for the differentiation not to infringe s 8, it was not a sufficient condition, for the differentiation might still constitute unfair discrimination.

²¹⁵ Hereinafter referred to as “the *Harksen* test”.

²¹⁶ *Prinsloo v Van der Linde supra*.

The enquiry would therefore proceed as follows:

Is the differentiation based on one of the listed grounds?

If yes, it is discrimination and presumed to be unfair, a presumption which may be rebutted.

If no, is the differentiation based on an alleged unlisted ground?

If yes, to constitute an unlisted ground, the ground would have to be analysed objectively against the following characteristics, analogous to the listed grounds:

- the differentiation is based on attributes or characteristics attaching to a group, used and abused in the past to marginalize and oppress such group or attributes related to immutable biological characteristics, the associational life of people, their intellectual, expressive or religious dimensions as persons or a combination thereof;
- the differentiation would have to have the potential to demean members of the group in their inherent humanity and dignity
- the group is a vulnerable group
- the group has been discriminated against in the past,
- the impact of the differentiation constitutes an impairment, (in comparison with the listed grounds) of a comparably serious nature
- the differentiation imposes severe burdens, obligations and disadvantages on the members of the group;
- the perpetuation of the discrimination could result in the construction of patterns of disadvantage.

If yes, it constitutes discrimination on an unlisted ground, but there is no presumption of unfairness. The applicant will have to prove unfairness.

According to the Court, again referring extensively to the *Hugo*²¹⁷ case, “the prohibition on unfair discrimination in the interim Constitution sought not only to avoid discrimination against people who are members of disadvantaged groups. It sought more than that. At the heart of the prohibition of unfair discrimination lay a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. ... To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.”²¹⁸

The Court further held that the prohibition of unfair discrimination in the Constitution provided “a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner.”²¹⁹ It was made clear that the unfairness stage of the enquiry focused primarily on the experience of the 'victim' of discrimination. In the final analysis, it is the impact of the discrimination on the victim that would be the determining factor regarding the unfairness of the discrimination.

In order to determine unfairness, various factors relating to the impact of the discrimination must be considered. The equality clause seeks to avoid discrimination against disadvantaged groups and that all persons be afforded equal dignity – dignity being the underlying consideration:

In looking at the group discriminated against, the following must be evaluated to determine fairness or otherwise:

- The nature of the power in terms of which the discrimination was effected

²¹⁷ *President of the Republic of South Africa v Hugo supra*.

²¹⁸ *Harksen v Lane NO supra* at para 41.

²¹⁹ *Harksen v Lane NO supra* at para 50.

- The nature of the interests affected;
- The experience of the “victim.”
- The adverse impact effected – it must be of a comparatively serious nature.

Impact is the determining factor at this stage of the enquiry and there is a specific “test” comprising of a number of considerations and factors to evaluate it. The cumulative effect of the factors must be examined and it is in respect of them that a determination must be made as to whether the discrimination is unfair:

- The position of the complainant and whether he/she has suffered from patterns of disadvantage in the past;
- The nature and purpose of the provision or power;
- The purpose sought to be achieved
- Whether there is a worthy and important social goal involved;
- The extent to which the discrimination has affected the rights or interests of the complainant(s);
- Whether there is an impairment of the fundamental dignity of the complainant(s);
- Whether the impairment is of a comparatively serious nature.

The Court held that the factors, assessed objectively, would assist in giving 'precision and elaboration'²²⁰ to the constitutional test of unfairness. They did not constitute a closed list. Other factors may well emerge as the Court's equality jurisprudence continued to develop.

If the discrimination is held to be unfair then the provision in question will be in violation of s 8(2).

One would then proceed upon the final leg of the enquiry as to whether the provision can be justified under s 33 of the interim Constitution, the limitations clause.

²²⁰ *Harksen v Lane NO supra* at para 51.

This will involve:

1. a weighing of the purpose and effect of the provision in question and;
2. a determination as to the proportionality thereof in relation to the extent of its infringement of equality.

It is apt to end the analysis of the case with reference to the separate judgments of O'Regan and Sachs. O'Regan referred to the *Kitshoff*²²¹ judgment where it was held as follows:

“Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4).”

She also quoted from the *Prinsloo*²²² judgment as follows:

“Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.”²²³

²²¹ *Brink v Kitshoff NO supra*.

²²² *Prinsloo v Van der Linde supra*.

²²³ *Harksen v Lane NO supra* at para 91.

She remarked²²⁴ that the Court had interpreted s 8(2) as “a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve and particularly where treatment is determined not by the needs or circumstances of particular individuals, but by their attributes and characteristics, whether biologically or socially determined.”

Judge Sachs, in his separate judgment,²²⁵ remarked that: “the path which this Court embarked upon in *Prinsloo v Van der Linde and Another and President of the Republic of South Africa and Another v Hugo*, and as confirmed in the judgment of Goldstone J in the present matter, requires it to pay special regard to patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself.”

He continued by stressing that “the incremental development of equality jurisprudence presaged by *Prinsloo* requires us to examine on a case by case basis the way in which a challenged law impacts on persons belonging to a class contemplated by s 8(2). In particular, it is necessary to evaluate in a contextual manner how the legal underpinnings of social life reduce or enhance the self-worth of persons identified as belonging to such groups.”

It is submitted that contrary to the view expressed by many, the test laid down by the Court in this matter, is not a simple two-part test. It comprises of a number of separate enquiries, each with its own set of complicated and unlimited criteria for consideration. Because the Constitution peculiarly prohibits “unfair” discrimination rather than discrimination *per se*, the Constitutional Court in *Harksen* developed an enquiry or test to determine unfair discrimination. Initially, it must be decided whether the provisions

²²⁴ *Harksen v Lane NO supra* at para 91.

²²⁵ *Harksen v Lane NO supra* at para 123.

challenged actually amount to discrimination and finally, the question of unfairness must be decided.

According to Goldstone J, differentiation on a specified ground renders it immediately discriminatory because “what the specified grounds have in common is that they have been used (or misused) in the past (both in SA and elsewhere) to categorise, marginalise and often oppress persons who have had or who have been associated with those attributes or characteristics. These grounds have the potential, when manipulated to demean persons in their inherent humanity and dignity.”²²⁶

Past disadvantage was not the only factor highlighted by court as common to specified grounds. It also highlighted the potential to demean persons in their inherent humanity and dignity. In fact, the court identified the latter as central to the determination of discrimination on an unspecified ground when it formulated the test as follows: “there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparatively serious manner.”²²⁷ Just what may affect someone in a manner comparably serious to the impairment of fundamental dignity or comparable to the effects of the listed grounds is yet to be fully worked out.

It may be argued that one of the strengths of the enquiry is that formal equality is determined firstly, while the unfairness enquiry later, is an opportunity to assess substantive equality. The absence of any real opportunity to consider disadvantage at the first stage is not significant, since it has greater relevance to the substantive impact which takes place at the later stage. However, this argument fails to take account of the potential impact of decisions at the first stage on the second. Because the first stage determines the scope and substance of the enquiry into unfairness at the second stage, decisions at the first stage have the potential to limit the substantive analysis.

²²⁶ *Harksen v Lane NO supra* at para 49.

²²⁷ *Harksen v Lane NO supra* at para 46.

In the evolving approach of the Constitutional Court, it is the impact on the victims of discrimination which must be examined to establish unfairness. The Court specifically stated that it was the cumulative effect of the factors which was to be considered in deciding the unfairness question.

To some commentators the *Harksen* test represented a shift in focus to a perceived privileging of the concept of dignity at the expense of equality. There was little discussion on the meaning of disadvantage, despite the fact that different types of disadvantage arise in the cases.

The judgment represented an attempt by the court to explicitly and emphatically reflect a substantive approach to equality. The proposed test or enquiry in itself is not, however, without problems. The identification of the range of factors which would be relevant to claims under the equality provision renders it vulnerable to criticism as both over-inclusive and imprecise.

According to McGregor²²⁸, it appears from the case that dignity is the underlying consideration in determining the reasons or grounds for making differentiation illegitimate and consequently discrimination.

Cooper²²⁹ indicated that the Constitution provides for the separate justification for the limitation of a right in the limitations clause. This involves an objective weighing up of the nature of the right against the nature, extent and purpose of the limitation and the less restrictive means to achieve the purpose. This justification process lies outside the determination of unfairness. She referred²³⁰ to Kentridge's view²³¹ that it would be difficult to envisage circumstances in which unfair discrimination could subsequently be justified. The distinction between the two enquiries (unfairness and the justification of

²²⁸ McGregor M 2002 14 *SA Merc LJ* 157 at 168.

²²⁹ Cooper C 2004 25 *ILJ* 813.

²³⁰ Cooper C 2004 25 *ILJ* 813 at 820.

²³¹ In M Chaskalson et al *Constitutional Law of SA* at 14-4.

unfairness) is that the former involves questions of political morality, whereas the latter involves prudential considerations.

The test for unfairness in labour law, according to Cooper²³², is similar to that in constitutional jurisprudence, with one main difference – the weighing up of the unfairness against the justification for the conduct takes place within a single enquiry. Thus the Court would examine the effect of the conduct on the complainant together with the justification for the conduct in order to decide finally whether there is unfair discrimination.

The Labour Court appears to have accepted that the role played by unfairness is to distinguish between permissible and impermissible discrimination e.g. in *Leonard Dingler*.²³³

According to Van der Walt,²³⁴ the Court in *Harksen*²³⁵ did not state that it was assigning an official meaning to the interim constitutional text, but that it is evident from the decision that the court was setting out what it considered to be the true meaning of section 8 of the Interim Constitution. The Court clothed its findings in this regard as an authoritative guideline for the correct approach to and interpretation of section 8.

It now remains to be assessed whether, after *Harksen*²³⁶ the Courts remained faithful to the test.

²³² Cooper C 2004 25 ILJ 813 at 828.

²³³ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd supra*.

²³⁴ Van der Walt A “Striving for the better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and FNB Decisions on the Property Clause” SALJ 854

²³⁵ *Harksen v Lane NO supra*.

²³⁶ *Harksen v Lane NO supra*.

CHAPTER 5

POST-HARKSEN

Since the *Harksen*²³⁷ judgment, the Constitutional Court has dealt with several matters concerning discrimination and affirmative action. It is important to review them in some depth as they indicate how the Court has elaborated upon the elements of the *Harksen* test, the applicable considerations and the relative weight to be attached to each.

5.1 Larbi-Odam v MEC for Education (North-West Province) 1998 (1) SA 745 (CC)

The first of these cases was the *Larbi-Odam* matter, decided on 26 November 1997. Mokgoro J delivered the judgment, with all the other judges concurring.

The essence of the matter was that teachers were denied permanent appointments because of their status as non-citizens of South Africa. Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Educators was viewed as being *ultra vires* its enabling legislation, the Educators' Employment Act 138 of 1994. The material portion of the Regulation provided that no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen.

The respondent had advertised the posts held by foreign teachers who were temporarily employed and issued such teachers with notices purporting to terminate their employment. The appellants submitted that the restrictions on their eligibility for permanent appointment amounted to unfair discrimination.

²³⁷ *Harksen v Lane NO supra*.

The eight appellants were foreign teachers temporarily employed in the North-West Province. Some of the appellants were permanent residents of South Africa. Some were married to South African citizens and had children born in South Africa.

The Court held that it was necessary to consider the issue of unfair discrimination in the light of the judgments dealing with equality and discrimination which it had previously handed down. The principles laid down in those cases had to be applied to the facts of this case.

The disadvantaged group in this case was foreign citizens. Because citizenship is an unspecified ground, the first leg of the enquiry required the Court to consider whether differentiation on that ground constituted discrimination. It involved an inquiry as to whether, in the words of *Harksen*:

“... 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.”²³⁸

The Court held that it had no doubt that the ground of citizenship did. Foreign citizens were a minority in all countries, and had little political muscle. Citizenship was a personal attribute which was difficult to change. The general lack of control over one’s citizenship had particular resonance for the Court in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. “Many became statutory foreigners in their own country under the Bantustan policy, and the legislature even managed to create remarkable beings called ‘foreign natives’. Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights, or the rights of their families”²³⁹

The Court also noted that some of the respondent’s staff had received threatening telephone calls and remarked that such incidents indicated the vulnerability of non-citizens generally. In addition, the overall imputation seemed to be that because

²³⁸ *Harksen v Lane NO* supra at para 53(b)(i).

²³⁹ *Larbi-Odam v MEC Education (North West Province)* at 757 A–F.

persons were not citizens of South Africa they were for that reason alone not worthy of filling a permanent post.

Given the above, the Court was of the view that the differentiating ground of citizenship in Regulation 2(2) was based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the Regulation.

It further held that to determine whether the discrimination in the case was unfair, regard had to be had primarily to the impact of the discrimination on the appellants, which in turn required a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved.

The power exercised in this case was a general power to prescribe regulations governing the terms and conditions of employment of educators nationwide. Regulation 2(2) affected employment opportunities, which were undoubtedly a vital interest. A person's profession was an important part of his or her life. Security of tenure permitted a person to plan and build his or her family, social and professional life, in the knowledge that he or she could not be dismissed without good cause. Conversely, denial of security of tenure precluded a person from exercising such personal life choices.

The Court therefore held that the unfair discrimination was not justified under section 33(1) of the interim Constitution. At this stage, it elaborated on the two factors mentioned in the limitation stage of the *Harksen* test which were the purpose and effect of the provision and a determination of the proportionality thereof.

The Court held *in casu* that the application of section 33(1): “. . . involved the weighing up of competing values, and ultimately an assessment based on proportionality. . . . In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the

desired ends could reasonably be achieved through other means less damaging to the right in question.”²⁴⁰ The Court therefore indicated what has to be taken into account in the balancing process.

The Court found that it was “simply illegitimate”²⁴¹ to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they had held, in some cases for many years, was too high a price to pay in return for increasing jobs for citizens.

The Court also held that differentiation on the ground of citizenship had the potential to impair dignity. The Court recognised that black non-citizens had been historically disadvantaged. Therefore historical disadvantage was used as a factor in determining the potential to impair dignity, thereby establishing discrimination.

In the *Harksen* test, the consideration as to whether a group had been discriminated against historically was listed as an independent factor to take into account whether there was discrimination. It was not listed as an indicator of impairment of dignity.

5.2 Langemaat v Minister of Safety and Security & others (1998) 19 ILJ 240 (T)

This judgment was indeed a very disappointing one. The matter concerned direct discrimination on the basis of marital status against gay and lesbian people. The Court did not address the issue, but based its judgment in the common law, simply ignoring any developments in equality law.

5.3 Pretoria City Council v Walker 1998 (2) SA 363 (CC)

In this case, the applicants alleged that the City Council had discriminated against them on race. The discrimination claim was based on fact that residents in previously white areas were paying more for electricity than residents in previously black areas.

²⁴⁰ *Larbi-Odam v MEC Education (North West Province)* at 759G.

²⁴¹ *Larbi-Odam v MEC Education (North West Province)* at 760F.

The respondent invoked a constitutional provision, the right not to be the unfairly discriminated against. The Court found that the full implications of this right, which was an aspect of the right to equality contained in section 8 of the interim Constitution, were complex. The section 8 right had been discussed in four prior judgments of the Court, namely, *Prinsloo v Van der Linde*,²⁴² *President of the Republic of South Africa v Hugo*,²⁴³ *Harksen v Lane NO*²⁴⁴ and *Larbi-Odam v MEC for Education (North-West Province)*,²⁴⁵ but was viewed by the Court as a subject which was still in need of further elaboration.

The Court held that the dispute had to be seen in the light of changes which had come about as a result of the adoption of a new constitutional order. The difficulties were compounded by the disparities and imbalances inherent in society which were the result of policies of the past.

The challenge facing the council from the beginning was to provide services and to treat all the residents within its jurisdiction equally. Those pre-existing disparities and the limited resources which the council had at its disposal meant that the task would be fraught with difficulties.

The Court found that it was clear that the council treated the respondent, together with the other residents of old Pretoria, in a manner which was different to the treatment accorded to the residents of Mamelodi and Atteridgeville, but held that the differentiation was, at least partly, an inherited one. The amalgamation that occurred resulted in a new relationship between areas which had been administered differently. "It was however a meeting of contrasts."²⁴⁶

The Court also stressed that not all differentiation amounted to discrimination as envisaged in section 8. It remained to be determined whether the differentiation constituted a violation of the right protected by section 8.

²⁴² *Prinsloo v Van der Linde supra*.

²⁴³ *President of the Republic of South Africa v Hugo supra*.

²⁴⁴ *Harksen v Lane NO supra*.

²⁴⁵ *Larbi-Odam v MEC Education (North West Province) supra*.

²⁴⁶ *Pretoria City Council v Walker supra* at para 24.

The Court quoted²⁴⁷ from *Prinsloo*²⁴⁸ where the following was stated:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.”

The Court stated that the two foci of section 8(1), the right to equality before the law and the right to equal protection of the law, were referred to in *Prinsloo* where it was stated, as had been said by Didcott J speaking for the Court in *S v Ntuli*,²⁴⁹ that “the right to equality before the law is concerned more particularly with entitling ‘everybody, at the very least, to equal treatment by our courts of law.’ . . . no-one is above or beneath the law and that all persons are subject to law impartially applied and administered.”

In the Court’s view, the rationality criterion adopted in *Prinsloo*²⁵⁰ should be equally applicable whether one were dealing with “equality before the law” or “equal protection of the law.” The Court was satisfied that the differentiation in the present case was rationally connected to legitimate governmental objectives. Not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources, during a difficult period of transition.

However, the Court stressed, that was not the end of the enquiry as differentiation that did not constitute a violation of section 8(1) might nonetheless constitute unfair discrimination for the purposes of section 8(2).

²⁴⁷ *Pretoria City Council v Walker supra* at para 27.

²⁴⁸ *Prinsloo v Van der Linde supra* at para 25.

²⁴⁹ *S v Ntuli* 1996(1) SA 1207 (CC) at para 18.

²⁵⁰ *Prinsloo v Van der Linde supra*.

The Court referred to *Harksen*²⁵¹ where it was held that the enquiry as to whether differentiation amounted to unfair discrimination was a two-stage one. It stated that section 8(2) prohibited unfair discrimination which took place “directly or indirectly” and pointed out that this was the first occasion on which the Court had had to consider the difference between direct and indirect discrimination and whether such difference had any bearing on the section 8 analysis as developed in the four judgments to which it had referred.

The Court held that the inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinced a concern for the consequences rather than the form of conduct. It recognised that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it did, that it fell within the purview of section 8(2). The emphasis which the Court placed on the impact of discrimination in deciding whether or not section 8(2) had been infringed was consistent with this concern.

It was found that the fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race might have meant that the discrimination was not direct, but it did not alter the fact that in the circumstances of the case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a “black area” and another known to be overwhelmingly a “white area,” on the grounds of geography alone. The effect of apartheid laws were that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. Its impact in the case was clearly one which differentiated in substance between black residents and white residents.

The Court held, with regard to the separate judgment of Sachs J in which the view was expressed that the differentiation in the present case was based on “objectively determinable characteristics of different geographical areas, and not on race” that it could not subscribe to that view or to the proposition that this was a case in which,

²⁵¹ *Harksen v Lane NO supra*.

because of history, a non-discriminatory policy had impacted fortuitously on one section of the community rather than another.

The Court found that the impact of the policy that was adopted by the council officials was to require the residents of old Pretoria to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst the residents of Atteridgeville and Mamelodi were not held to the tariff, were called upon to pay only a flat rate which was lower than the tariff and were not subjected to having their services suspended or legal action taken against them. It was held that the racial impact of the differentiation could not be ignored and that to do so was to place form above substance.

The council officials, according to the Court, knew that the effect of the policy would be discriminatory and that the residents of old Pretoria would be likely to object to it. The council did not rely on section 8(3) of the interim Constitution at the trial and did not then suggest that its officials had adopted the policy to which objection was taken in order to address the unfair discrimination of the past. It sought to justify the policy on the grounds that it was reasonable and the only practical way of dealing with the situation in the circumstances which existed. That was, the Court found, relevant to the enquiry whether the discrimination was “unfair.” It is submitted that it was really relevant to the justification stage of the enquiry, not the unfairness stage.

Differentiation on one of the specified grounds referred to in section 8(2) gave rise to a presumption of unfair discrimination. The presumption which flowed from section 8(4) applied to all differentiation on such grounds.

According to Sachs J, however, section 8(2) was triggered only by differentiation which imposed “identifiable disabilities” or threatened “to touch on or reinforce patterns of disadvantage” or “in some proximate and concrete manner threaten(s) the dignity or equal concern or worth of the persons affected”²⁵² and in the absence of such consequences, the presumption under section 8(4) did not arise.

²⁵² *Pretoria City Council v Walker supra* at para 35.

In the Court's view, that was contrary to the decisions of the Court in the four cases to which were referred, in which it was held that differentiation on one of the specified grounds set out in section 8(2) gave rise to a presumption of unfair discrimination. The Court could see no reason for distinguishing in that regard between discrimination which was direct and that which was indirect. Both were covered by section 8(4) and both were subject to the same presumption.

The Court then held that the enquiry into whether the presumption of unfair discrimination had been rebutted involved an examination of the impact of the discrimination on the respondent. The Court quoted from its judgment in *Hugo*²⁵³ where the following was stated:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”²⁵⁴

To determine whether the impact was unfair, the Court stated that it was necessary to look not only at the group which had been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.

With regard to the question whether intention had any relevance in the determination of unfairness, the Court noted that in none of the four judgments it had been suggested that intention to discriminate was an essential element of unfair discrimination.

²⁵³ *President of the Republic of South Africa v Hugo supra*.

²⁵⁴ *President of the Republic of South Africa v Hugo supra* at paras 41 and 43.

Consistent with the purposive approach that the Court had adopted to the interpretation of provisions of the Bill of Rights, it was held that proof of such intention was not required in order to establish that the conduct complained of infringed section 8(2).

The Court held of importance the interplay between the discriminatory measure and the person or group affected by it. It pointed out O'Regan J's remarks in *Hugo*:²⁵⁵

"The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."²⁵⁶

It held, however, that the respondent did belong to a racial minority which could, in a political sense, be regarded as vulnerable. It was precisely individuals who were members of such minorities who were vulnerable to discriminatory treatment and who, in a very special sense, had to look to the Bill of Rights for protection. When that happened, it held, a Court had a clear duty to come to the assistance of the person affected.

It was stressed however, that Courts should always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounted to the perpetuation of inequality and disadvantage to others, on the other.

There was however, no reasonable alternative to be pursued by the Council. The respondent did not suggest either that there was a better method of levying the charges nor did it challenge the validity or the amount of the flat rate in the tariff in question.

The Court was satisfied that the operation of the flat rate did not impact adversely on the respondent in any material way. There was no invasion of the respondent's

²⁵⁵ *President of the Republic of South Africa v Hugo supra*.

²⁵⁶ *President of the Republic of South Africa v Hugo supra* at para 112.

dignity nor was he affected in a manner comparably serious to an invasion of his dignity.

Section 8(3), the Court held, permitted the adoption of special measures which may be required to address past discrimination. In the present case, however, it was not part of the council's case that the policy of selective enforcement of arrear charges was a measure adopted for the purpose of addressing the disadvantage experienced in the past by the residents of Atteridgeville and Mamelodi. The reasons given for the policy were pragmatic.

The Court noted that the respondent and other residents of old Pretoria were not victims of past discrimination. A properly formulated policy to promote a culture of payment in areas in which there had been a culture of boycott would not have been aimed at impairing the respondent's interests in any way. If carefully formulated and implemented it could have been directed to the achievement of the "important societal goal"²⁵⁷ of transforming both the living conditions and culture of non-payment in Atteridgeville and Mamelodi, and that might well have been consistent with the goal of furthering equality for all. If such a policy had been formulated a court would have been in a position to evaluate it, to determine whether it met the requirements of fairness, and also to monitor its implementation. The ratepayers of Pretoria would also have been aware of and able to monitor the implementation of the policy.

It held that no members of a racial group should be made to feel that they were not deserving of equal "concern, respect and consideration"²⁵⁸ and that the law was likely to be used against them more harshly than others who belong to other race groups. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in the Court's view have affected them in a manner which was at least comparably serious to an invasion of their dignity. This was exacerbated by the fact that they had been misled and misinformed by the council.

²⁵⁷ *Pretoria City Council v Walker supra* at para 77

²⁵⁸ *Pretoria City Council v Walker supra* at para 81.

In the circumstances, the Court held that the presumption had not been rebutted and that the course of conduct of which the respondent complained of in this respect, amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution.

The Court then addressed the rights guaranteed in Chapter 3 of the interim Constitution and that they could be limited in terms of section 33(1) of the interim Constitution. A requirement of section 33(1) was that a right may only be limited by a law of general application. Since the respondent's challenge was directed at the conduct of the council, which was clearly not authorised, either expressly or by necessary implication by a law of general application, section 33(1) was found not applicable to the case.

Sachs J made the following points in his separate judgement:

For a question of indirect unfair discrimination under section 8(2) to be raised, something more had to be shown than differential impact on persons belonging to groups specified in section 8(2). To establish that the impact of the indirect differentiation was *prima facie* discriminatory on grounds specified in section 8(2), the measure had at least to impose "identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected."²⁵⁹

He failed to see how the decision not to issue summonses against persons in Atteridgeville and Mamelodi in any way threatened or was capable of imposing burdens or reinforcing disadvantage for the complainant, withholding benefits from him or undermining his dignity or sense of self-worth. It did not discriminate against him; it did not even reach him.

The concept of indirect discrimination, as Sachs J understood it, was developed precisely to deal with situations "where discrimination lay disguised behind

²⁵⁹ *Pretoria City Council v Walker supra* at para 115.

apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.”²⁶⁰ .

He explained that an undue enlargement of the concept of indirect discrimination would mean that “every tax burden, every licensing or town planning regulation, every statutory qualification for the exercise of a profession, would be challengeable simply because it impacted disproportionately on blacks or whites or men or women or gays or straights or able-bodied or disabled people.”²⁶¹ If the state in each such case were to be put to the burden of showing that differentiation was not unfair, the courts would be tied up interminably with issues that had nothing to do with the real achievement of equality and protection of fundamental rights as contemplated by section 8. Judicial review would “lose its sharp cutting edge and become a blunt instrument invocable by all and sundry in a manner that would frustrate rather than promote the achievement of real equality.”²⁶²

With regard to the application of the *Harksen* test, Sachs J stated that the less directly invasive the discrimination, the more substantial its legitimate social function, and the less it reinforced or created patterns of systematic disadvantage, the less likely was it to be unfair. The differential debt recovery measures were not taken because the inhabitants of old Pretoria were white. Nor did they in fact impose new burdens or disadvantages on the white inhabitants of Pretoria, who, as it happened in the circumstances were not a politically vulnerable minority, if that were relevant. Furthermore, looked at objectively, those measures could not be said to have impacted unfairly on them by reinforcing negative stereotypes or patterns of disadvantage associated with their skin colour, nor did they affect their dignity or sense of self-worth. “The fact that a complainant chose to wear the cap of a victim of race discrimination, does not mean that the cap fits.”²⁶³

The judgment in this case shows that determining whether an applicant’s claim is based on a specified or unspecified ground has important procedural implications

²⁶⁰ *Pretoria City Council v Walker supra* at para 115.

²⁶¹ *Pretoria City Council v Walker supra* at para 117.

²⁶² *Pretoria City Council v Walker supra* at para 118.

²⁶³ *Pretoria City Council v Walker supra* at para 132.

because of the reversal of the burden of proof in section 9(5). As the judgment shows too, evidence, scope of enquiry and outcome may be very different in the case of discrimination on a specified ground and in the case of an unspecified ground. The extent to which disadvantage features as a relevant consideration may differ depending on the ground being analysed.

The Court held that the respondent belonged to a racial minority, which could, in a political sense, be regarded as vulnerable. This was said in almost the same breath as noting that the applicant belonged to a group which had not been economically disadvantaged. The question then arises as to what exactly is the relationship between vulnerability and disadvantage.

Whilst the Court applied the *Harksen* test and explored additional features of the equality clause, it found there was a violation of the equality right on the basis of an invasion of personal individual dignity, not on the basis of material disadvantage, therefore it appears that the Court conflated dignity with equality.

Albertyn and Goldblatt²⁶⁴ have indicated their agreement with Sachs J where he argued that there must be some element of actual or potential prejudice imminent in the differentiation, otherwise there would be no discrimination. However they did not agree with his location of disadvantage within discrimination rather than unfairness. It is submitted that Sachs J was indeed correct. Under the discrimination enquiry of the *Harksen* test, burdens, disadvantages and obligations imposed by the discrimination are evaluated, whereas under the unfairness enquiry, patterns of disadvantage are looked into.

The case is actually a demonstration of what Sachs J stated: “Just as the transformation of our harsh reality is by its very nature difficult to accomplish, so it is hard to develop a corresponding and appropriate jurisprudence of transition.”²⁶⁵

²⁶⁴ Albertyn C and Goldblatt B (1998) 14 *SAJHR* 248 at 268.

²⁶⁵ *Pretoria City Council v Walkerat* para 101.

5.4 Louw v Golden Arrow Bus Services (Pty) Ltd (1998) 19 ILJ 1173 (LC)

The applicant, a coloured male, launched an application complaining that his employer had committed an unfair labour practice by discriminating against him on the grounds of his race. A white warehouse supervisor received a higher pay, allegedly on the basis of racial characteristics and contrary to the doctrine of equal pay for work of equal value.

It was submitted that at all material times the work performed by the applicant and the white colleague was of equal value; that the difference in salaries was disproportionate to the difference in the value of the two jobs; that the difference in salaries constituted direct discrimination against the applicant on the grounds of race, colour or ethnic origin because there was no justification for the difference; that the difference in salaries constituted indirect discrimination against the applicant on the grounds of race, colour or ethnic origin because the respondent applied factors in its pay evaluation that had a disparate impact on black employees. The factors were performance, potential, responsibility, experience, education, attitude, skills, entry level and market forces.

At the hearing it was submitted on behalf of the applicant that the respondent had “inherited racial discrimination in the past and that they have done nothing about it to date. ... their failure and their unfair labour practice and their unfair discrimination may well be no more than not correcting an historical, inherited racial discrimination situation.”²⁶⁶

The Court made several important observations.

It stated that intention was not relevant in the determination of whether there had been any unfair discrimination. However, intention or motive of the employer may however be relevant to the remedy which the court may impose.

²⁶⁶ *Louw v Golden Arrow Bus Services (Pty) Ltd* (1998) 19 ILJ 1173 (LC)

The Court referred to an article "*Developments in the Law: Employment Discrimination*"²⁶⁷ where it was stated:

"There are two main types of discrimination cases: disparate treatment and disparate impact. Disparate treatment cases concern employment practices or incidents that intentionally subject people to impermissible discrimination. Disparate impact cases involve neutral employment policies, such as competency tests, that have the unintended effect of discriminating against individuals who belong to a protected class."

The Court held that in order to discover whether there has been an unfair labour practice involving unfair discrimination, the elements of item 2(1)(a) had to be proved. The approach of the Constitutional Court as set out in the *Harksen* test had to be followed.

After considering the relevant factors, the Court concluded that it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds.

The Court found that there had to be a clear distinction between discrimination on permissible grounds and impermissible grounds. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment.

The Court proceeded to conduct an excellent analysis of pay discrimination case law and the opinions on the subject of authorities in the field. Furthermore, it also discussed the vexed question of *onus*.

In response to the proposed consideration of American approaches to the problem of pay discrimination, the Court held that it would not be helpful, especially because in

²⁶⁷ 1996 Harvard Law Review (May 1996) Vol 109 7 at 1580.

South Africa there was no requirement to prove intent. Furthermore, the *onus* was dealt with differently and: “Our law appears, correctly, to have turned its back on piecemeal adjudication and the shifting sand of shifting onuses. As Hoffman and Zeffert point out at 520: “The only stage at which the court will give a ruling is after it has heard all the evidence, and then it will simply decide whether the party who bore the onus has discharged it.”

The Court found that the pay differentials *in casu* were a result of a situation in which a number of factors played a role: performance, skills, potential, market factors, seniority position and even a steeper pay progression than the theoretical.

The Court remarked however the applicant had been subjected to discrimination since an early stage of his career. The court stated that it could take judicial notice of a “system of institutionalised racial discrimination which also permeated the world of employment and influenced the levels of jobs and the rate of pay. The threshold salary, if there was discrimination, would dog an employee for years.”

5.5 Kadiaka v ABI (1999) 20 ILJ 373 (LC)

After the liquidation of New Age, the company which bottled and sold Pepsi, ABI, the distributors of Coca Cola, took a decision at board level, not to employ any former New Age employees.

This decision was allegedly motivated by the need to maintain the morale of those ABI employees who had remained loyal to ABI and who had not succumbed to lucrative offers by New Age to entice them away.

Secondly, former New Age employees would not have the “passion for the Coca-Cola brand” which had been integral to the success of ABI.

Thirdly, ABI was shocked at the extent of fraud and theft prevalent throughout all staff levels at new Age prior to its closure. ABI felt that it could not trust ex-New Age employees.

Finally, there was also a reluctance to make use of the services of an employee of “a poor performing competitor”.

The applicant, a former new Age employee and a sales person, had applied for a position with the respondent, but had been unsuccessful.

The Court held that two constitutional values were involved: The right to equality including the right not to be unfairly discriminated against, and the right to fair labour practices. It believed it imperative to consider how the Constitutional Court had dealt with alleged unfair discrimination, bearing in mind that there is a difference between testing a law for constitutionality and considering whether the practice of an employer constituted an unfair labour practice.

Having stated that the Constitutional Court jurisprudence had to be considered in dealing with discrimination measures, the Court promptly utilized the test proposed by Bourne and Whitmore²⁶⁸ for determining indirect discrimination:

- “1. Has a requirement or condition been applied equally to both sexes or all racial groups?
2. Is that requirement or condition one with which a considerably small number of women (or men) or persons of the racial group in question can comply than those of the opposite sex or persons not of that racial group?
3. Is the requirement or condition justifiable irrespective of the sex, colour, race, nationality, ethnic or national origins of the person in question?
4. Has the imposition of the requirement or condition operated to the detriment of a person who could not comply with it?”

The Court held that unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. Even if there were a reason, the

²⁶⁸ Bourne C and Whitmore J *Race and Sex Discrimination* 1993 at para 2.45.

discrimination could be viewed as arbitrary if the reason was not a commercial reason of sufficient magnitude. The discrimination had to be balanced against societal values, particularly the dignity of the complainant and a society based on equality and the absence of discrimination

Ultimately, the court held that the respondent had made out a case that its refusal to hire former New Age employees “makes commercial sense. This is so because the ban is not vindictive. It is done to preserve the moral of ABI’s workforce, to discourage turncoats, to reward loyalty, to ensure commitment to the brand, to assure customers that ABI employees believe in Coke and all that it stands for and to avoid the taint of corruption. It is also for a limited period.”²⁶⁹

After commenting on the impact of the decision not to hire the applicant on him, the Court found that the “discrimination did not perpetuate any of the historical grounds of discrimination, it was not unfair or inimicable to the values of society as expressed in the Constitution. It does not infringe the dignity of the applicant to be told that his services are not required on account of his being an active member of a former rival, a rival which, I might add, had not been decisively vanquished at the stage the ban was imposed. The labour practice, although contrary to the interest of the applicant, is not grossly unfair towards him; he is a casualty of the commercial war. It is fair to the employer. It is not unfair to society at large.”²⁷⁰

This case really serves as an example of how easy it is to forget what discrimination is all about. The case served as an ideal one in which to apply the *Harksen* test, together with considerations appropriate to the employment context. However, apart from mentioning Constitutional Court jurisprudence in passing, the Court set about determining the matter in a very haphazard manner, first considering grounds for justification prior to establishing discrimination.

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

On 9 October 1998, the decision in the National Coalition for Gay and Lesbian Equality v Minister of Justice²⁷¹ was handed down by the Constitutional Court. Ackermann J delivered the judgment, which was concurred with by all the other judges in the matter.

In the case, section 20A of the Sexual Offences Act, 1957 was declared inconsistent with the Constitution and invalid. It concerned the constitutionality of a number of provisions criminalising gay sex and dealt with different types of disadvantage experienced by gay people including psychological harm.

Several passages from the judgement are worth quoting for their encapsulation of the reality experienced not only by gay persons, but probably by all groups subject to discrimination in any form:

“The desire for equality is not a hope for the elimination of all differences.”²⁷²

“The experience of subordination - of personal subordination, above all - lies behind the vision of equality.”²⁷³

“To understand ‘the other’ one must try, as far as is humanly possible, to place oneself in the position of ‘the other.’ It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are

²⁷¹ Hereinafter referred to as NCGLE 1.

²⁷² *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 22.

²⁷³ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 22.

handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.”²⁷⁴

The Court held that the impact of discrimination on gays and lesbians was rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.

The Court held that the impugned discrimination was on a specified ground. Gay men were a permanent minority in society and had suffered in the past from patterns of disadvantage. The impact was severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurred at many levels and in many ways and was often difficult to eradicate.

The nature of the power in question in the case, and its purpose, was to criminalise private conduct of consenting adults which caused no harm to anyone else. It had no other purpose than to criminalise conduct which failed to conform with the moral or religious views of a section of society.

The discrimination had, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

The Court confirmed that the discrimination was unfair and therefore in breach of section 9 of the Constitution.

The Court explained that for example, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, were not; it could in certain circumstances be a fatal combination. A context- rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example, the court held, would be “African widows, who historically have suffered discrimination as

²⁷⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 22.

blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.”²⁷⁵

Conversely, a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights.

The Court held that it had on a number of occasions emphasised the centrality of the concept of dignity and self-worth to the idea of equality.

The Court made reference specifically to what it called “an interesting argument.”²⁷⁶ The Centre for Applied Legal Studies had argued that the equality clause was intended to advance equality, not dignity, and that the dignity provisions in the Bill of Rights should take care of protecting dignity. The Court had been required to shift from what the Centre called “the defensive posture of reliance on unlawful discrimination under section 9(3)” to what it claimed to be an affirmative position of promoting equality under the broad provisions of section 9(1). Section 9(1) it was argued, had been reduced from “that of the guarantor of substantive equality to that of a gatekeeper for claims of violation of dignity.”²⁷⁷

Contrary to the Centre’s argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of a 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 section 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 also could be to members of groups subject to systemic disadvantage, such as farm workers in

²⁷⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 113.

²⁷⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 120.

²⁷⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 120.

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.

The Court countered that the equality principle and the dignity principle should not be seen as competitive but rather as complementary. “Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim... One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.”²⁷⁸

In this case, the Court's use of the term “disadvantage” had a wide and inclusive meaning. It also considered “vulnerability” of gays and lesbians as a “political minority.” It clearly demonstrated that there may be a close relationship or even an overlap between disadvantage and infringement of dignity, however it did not properly analyse the connection between the two concepts and the separate roles of those concepts and considerations in the *Harksen* test.

²⁷⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 120.

Clearly, the most important question raised by this case was: “What exactly is the relationship between disadvantage and vulnerability?” That question it appears, was answered in the following judgment of the Court.

5.7 Abbott v Bargaining Council for the Motor Industry (Western Cape) (1999) 20 ILJ 330 (LC)

Shocking poorly worded and reasoned judgment. It appears that what it attempted to convey was that an applicant for employment derives no right from a contractual or negotiated affirmative action policy. The question therefore arises whether people from disadvantaged groups have a legal right to be preferred over others or conversely, whether employers are under a legal obligation to favour the formerly disadvantaged.

“It was conceded by Mr Bozalek, in my opinion correctly in this case, that an applicant for employment derives no right from a contractual or negotiated affirmative action policy, as policies envisaged by this sub-item are called. It was however submitted that in assessing whether an applicant was a victim of a residual unfair labour practice the existence and scope of an affirmative action policy and the obligations which it placed on the employer are vital considerations. From an equity and labour relations point of view an employer should be bound by such a policy.”²⁷⁹

5.8 Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC)

The constitutionality of section 35(1) of the Compensation for Occupational Injuries and Diseases Act²⁸⁰ was challenged on the ground that it violated the right to equality in section 8(1) of the interim Constitution. The applicant contended that employees, by being deprived of the common law right to claim damages against their employers, are placed at a disadvantage in relation to people who are not employees and who retain that right. The equality challenge was not based on any of the specified grounds. The proposition was that section 35(1) was inconsistent with the interim Constitution in that its provisions violated the right to equality before the law

²⁷⁹ *Jooste v Score Supermarket Trading (Pty) Ltd supra* at para 43.

²⁸⁰ Act 130 of 1993.

and to equal protection of the law and the right not to be unfairly discriminated against, the right of access to courts and the right to fair labour practices.

In dealing with these contentions in the court *a quo* Zietsman JP had said:

“The question . . . is whether section 35 of the Act, which denies to employees the right to claim compensation from their employers, has a rational connection to the purpose of the Act. If not it constitutes unfair discrimination against employees.”²⁸¹

However, the Court *in casu* held that that approach was not consistent with the equality jurisprudence that had been developed by the Court in a series of cases over the preceding two years. The correct approach to cases in which there was alleged to be an infringement of sections 8(1) and 8(2) of the interim Constitution (or sections 9(1) and 9(3) of the 1996 Constitution), but in which the alleged differentiation was not based on a specified ground, was that outlined in the *Harksen* test.

The contention of the applicant was that the nature of the balance achieved by the legislature through the Compensation Act was in favour of the employer while the requirements of policy and the nature of the relationship between the employee and the employer indicated that a different balance would be appropriate. It was contended that the object of the Act was to provide compensation for workers, not to benefit employers. Section 35(1) benefited only employers. It was therefore not rationally related to the purpose of the legislation.

The Court, referring to its decision in *Prinsloo*²⁸² held that that argument fundamentally misconceived the nature and purpose of rationality review and attempted an analysis of the import of the impugned section without reference to the Compensation Act as a whole. It was clear that “the only purpose of rationality review was an inquiry into whether the differentiation was arbitrary or irrational, or manifested naked preference and it was irrelevant to that inquiry whether the scheme chosen by the legislature could have been improved in one respect or another.”

²⁸¹ *Jooste v Score Supermarket Trading (Pty) Ltd supra* at para 9.

²⁸² *Prinsloo v Van der Linde supra* at para 36.

The Court also remarked quite vociferously that: “The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined.”²⁸³

The Court thus held that section 35(1) of the Compensation Act was logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.

In so far as the attack on section 8(2) was concerned, it was held that there was no evidence of unfair discrimination, no contention in that regard and no apparent basis upon which unfair discrimination could have been said to exist.

5.9 IMAWU v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)

The post of Town Treasurer was externally advertised by the Respondent. Candidates had to have a relevant Bachelors degree or the equivalent qualification and at least a licentiate membership of the Institute of Municipal Treasurers and Accountants.

No appointment was made even though five candidates were short listed. The post was then re-advertised, a short list compiled and candidates subjected to an internal test drafted by the respondent’s Town Clerk, who was the previous Town Treasurer. A representative of the institute of Municipal Treasurers and Accountants evaluated both the test itself and the candidates.

The test targeted the knowledge and experience of the candidates of local government, their merit and potential ability. After conducting the test, a further short list of three candidates was compiled consisting of Mr Van der Berg, Mr Kruger and

²⁸³ *Jooste v Score Supermarket Trading (Pty) Ltd supra* at para 16.

Mr Masengana. The Executive Committee could not make a decision regarding the appointment and the short list of three was referred to the full Council for a decision.

The majority of the Council decided that affirmative action should be the only criteria and accordingly Masengana was appointed as Town Treasurer. There was consequently no dispute that the only consideration in Masengana's appointment was affirmative action.

It was submitted that the respondent did not comply with the provisions of the collective agreement on Equal Employment Practice and Affirmative Action for local government in the selection and appointment of Masengana and it had failed to develop and implement an affirmative action programme. Only individuals who had the necessary proficiency to successfully perform the duties of the post could be considered. It was submitted that from Masengana's CV it was clear that he did not possess the necessary experience in local government to qualify for appointment. It was submitted that he was appointed simply because he was black, thus ignoring merit and other requirements set out in the collective agreement.

The Court held that unfair discrimination is outlawed but that an employer, especially in the public service was empowered to adopt employment practices and policies that were designed to achieve the adequate advancement of persons or groups previously disadvantaged by unfair discrimination.

The Court held that affirmative action should not be applied in an arbitrary and unfair manner. It referred to comments by Cheadle²⁸⁴ where, in relation to section 8(3) (a) of the Interim Constitution the following is said:

"The interpretation of s 8(1) apart, S 8(3)(a) is designed to insulate from judicial review those measures designed to benefit individuals or groups who have been disadvantaged by unfair discrimination. Provided that the corrective measures comply with the internal requirements of section 8(3) (a), those measures will not be subjected to the rigours of section 33(1). The clause does have internal

²⁸⁴ Cheadle H *Fundamental Rights in the Constitution* (Juta) 1st edition at 60.

requirements. The use of the word “designed” clearly imports that there must be a rational connection between the means employed and the objects of the measures. The measures can only be directed to those groups or categories that are “disadvantaged” by unfair discrimination.”

The Court also referred to Du Toit’s²⁸⁵ echoing of the same sentiments:

“Measures are permitted if they are ‘designed’ to achieve the purposes set out in item 2(2)(b). The word ‘designed’ suggests that more than mere intention is required, though not necessarily that the measures should be likely to achieve their purpose. Section 9(2) of the Constitution must be read as permitting only those corrective measures which do not unduly prejudice the individuals or groups who are disadvantaged as a result.”

The Court therefore held that for affirmative action measures to survive judicial scrutiny, there had to be a policy or programme designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

The requirements ensured that there could be accountability and transparency. They ensured that there would be a measure or standard against which the implementation of affirmative action could be measured or tested and that no arbitrary or unfair practices occurred under the mantle of affirmative action.

The Court held that the Council’s collective agreement provided that local authorities and their employees had the right to determine their own affirmative action goals and time tables, suitable to their own circumstances.

However, despite a laudable collective agreement to facilitate affirmative action within local authorities, the respondent had done nothing envisaged by that agreement.

²⁸⁵ Du Toit *et al* *The Labour Relations Act of 1995* Butterworths 1998 2nd edition at 441.

The Court therefore held that the respondent could not consider affirmative action in appointments before it had complied with the agreement. As a consequence, in the absence of an affirmative action programme specifically designed in terms of the collective agreement, any appointment on purported affirmative action grounds would be illegitimate.

The court therefore had to consider whether the appointment of Masengana could be justified on other grounds and whether it did not discriminate unfairly against other applicants.

The Court found that the only consideration in the appointment of Masengana was the colour of his skin. The Court referred in this regard to the *Harksen* test in order to determine whether there was any unfair discrimination. It held that for affirmative action to succeed, merit and experience would remain relevant in so far as the applicants previously disadvantaged by unfair discrimination were concerned in their own group.

5.10 Hoffmann v SA Airways (2000) 21 ILJ 2357(CC)

This matter concerned the constitutionality of South African Airways' ("SAA") practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV).

The appellant had undergone a blood test as part of pre-employment testing and it had shown that he was HIV positive. As a result, the medical report read that the appellant was "H.I.V. positive" and therefore "unsuitable" for employment.

The appellant challenged the constitutionality of the refusal to employ him, alleging that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity and fair labour practices.

The respondent asserted that the exclusion of the appellant from employment had been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. It justified this

practice on safety, medical and operational grounds. It added that people who are HIV positive are also prone to contracting opportunistic diseases. There was a risk, therefore, that they might contract those diseases and transmit them to others. If they were ill with those diseases, they would not be able to perform the emergency and safety procedures that they were required to perform in the course of their duties as cabin attendants.

SAA emphasized that its practice was directed at detecting all kinds of disability that made an individual unsuitable for employment as member of a flight crew. However, the Court held that the assertions by SAA were inconsistent with the medical evidence tendered. .

The Court referred to the relevant provisions of the equality clause, contained in section 9 of the Constitution, and held that it had previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters had been in accordance with the *Harksen* test which it proceeded to outline in the judgment.

It held, with reference to the *Hugo*²⁸⁶ case, that at the heart of the prohibition of unfair discrimination was the recognition that under our Constitution all human beings, regardless of their position in society, had to be accorded equal dignity. That dignity was impaired when a person was unfairly discriminated against. The determining factor, as stated in the *Harksen* test regarding the unfairness of the discrimination, was its impact on the person discriminated against.

The Court stated that people living with HIV constituted a minority in our society. Society had, however, responded to their plight with intense prejudice and had subjected them to systemic disadvantage and discrimination. People living with HIV/AIDS were one of the most vulnerable groups in society, notwithstanding the availability of compelling medical evidence as to how the disease was transmitted.

²⁸⁶ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para 41

The Court opined that in view of the prevailing prejudice against HIV positive people, any discrimination against them could be interpreted as a fresh instance of stigmatization and it considered that to be an assault on their dignity. The impact of discrimination on HIV positive people was devastating. It was even more so when it occurred in the context of employment. It denied them the right to earn a living. For that reason, the Court stressed, they enjoyed special protection in law.

The Court therefore held that there could be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justified such discrimination.

The Court also emphasized in the judgment that HIV positive persons would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions - precisely the type of injury the Constitution sought to prevent. This was manifestly unfair.

With regard to the respondent's contention that its requirement was an inherent requirement for the job of cabin attendant and the High Court's finding that the commercial operation of SAA, and therefore the public perception about it, would be undermined if the employment practices of SAA did not promote the health and safety of the crew and passengers, the Court held that legitimate commercial requirements were an important consideration in determining whether to employ an individual. However, Courts had to guard against "allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society required the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. It referred to the judgment in *S v Makwanyane*: "Our Constitution protects the weak, the marginalized, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected."²⁸⁷

The Court stressed that the fact that some people who were HIV positive might, under certain circumstances, be unsuitable for employment as cabin attendants did

²⁸⁷ *S v Makwanyane supra* at para 88.

not justify a blanket exclusion from the position of cabin attendant of all people who were HIV positive.

The constitutional right of the appellant not to be unfairly discriminated against could not be determined by ill-informed public perception of persons with HIV.

The Court stated emphatically that: "Our constitutional democracy has ushered in a new era - it is an era characterized by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping."²⁸⁸

Finally, the Court held that in the circumstances, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. That conclusion, according to the Court, made it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution, or, as it was contended, whether people who are living with HIV ought not to be regarded as having a disability.

The Court made it clear that where health and safety were the justification for discrimination, objective medical evidence had to be provided as well as an individualized assessment of the individual concerned and his capacity to do the work. It stressed that HIV on its own was not sufficient to justify exclusion from employment.

It is to be noted that although the Court referred to the *Harksen* test, it did so without actually following it because it found that denial of employment to Hoffmann because of HIV status impaired his dignity and constituted unfair discrimination. It was

²⁸⁸ *Hoffman v SA Airways supra* at para 37.

therefore unnecessary for the Court to consider whether he had been discriminated against on the listed ground of disability as had been submitted.

The decision of Ngcobo J in this matter was really based on the vulnerability of people living with HIV and the prevailing prejudice against people living with HIV which was an assault on their dignity.

With regard to a defence against unfair discrimination, the Court held, as per the *Harksen* test, that the determining factor regarding unfairness was the impact of the conduct on the person discriminated against.

5.11 McInnes v Technikon Natal (2000) 21 ILJ 1150 (LC)

In 1995 the applicant was an employee of the Business Studies Unit of the respondent as its marketing manager. The renewal of the applicant's post, which was to become permanent, was advertised in November 1997. The applicant and a number of other candidates applied. Three candidates were short-listed. A selection committee interviewed the candidates. After some debate, two of the candidates, the applicant and one Mpanza, were found to be "appointable." By a majority the committee recommended the applicant. This recommendation was then sent to the Vice Principal Academic for his approval and onward transmission to the Human Resources Department. The Vice Principal however referred the recommendation back to the selection committee with a direction that it reconsider its recommendation in the light of the Technikon's Affirmative Action Policy. At the reconvened meeting the selection committee, although reaffirming its preference of the applicant, recommended Mpanza to the post. He was then appointed.

An agreement was then concluded with Mpanza in terms of which he was offered a salary much higher than the salary range for which the post had been advertised. This was done in order to get him to accept the post. When this salary was implemented he became the highest paid member of the Department, earning even more than the Head of Department.

The applicant alleged that she was unfairly dismissed from her employment with the respondent on the basis of the non-renewal of her contract of employment. She also alleged that she was unfairly discriminated against on the basis of her race and/or sex.

The Court stated that it had to conduct a two-stage enquiry. The first stage was to determine what the applicant's subjective expectation actually was in relation to renewal of her contract. The Court's conclusion was that the applicant reasonably expected to have her post renewed permanently.

The Court then focussed on whether affirmative action could constitute a fair basis for dismissing, as opposed to appointing, an employee. It stated that It appears clearly from sections 187 and 188 of the LRA, items 2 (1)(a) and 2 (2)(a) and (b) of part B of schedule 7, that affirmative action could not constitute a fair basis for dismissing, as opposed to appointing, an employee.

The Court held that it was clear that the applicant would have continued to be employed if she were Black rather than White and her dismissal was the result of the purported application by the respondent of Affirmative Action.

The Court also stated that the applicant was discriminated against on the basis of her race. The *onus* was therefore on the respondent to show that in preferring Mr Mpanza by reason of his race it was implementing its affirmative action policy. That would require an examination of the respondent's affirmative action policy in order to evaluate compliance with it.

The Court found that the fact that Mr Mpanza was Black gave him a distinct advantage. That factor had, however, to be balanced against the need to provide the highest standard of tertiary service to students. This could hardly have been achieved by appointing someone who had no previous teaching experience.

The Court found too, that the policy did not regard race as the sole criteria where two persons were "appointable". It also had in mind all the relevant factors and required a reasoned and balanced decision. If that decision resulted in the selected candidate

not being from the targeted group, reasons had to be given. The selection committee took into account the policy and weighed it against the respective merits of the two candidates. Having done so, they selected the applicant. However, their selection was not upheld subsequently.

Furthermore, the Court stated that there was no policy that candidates from the targeted group be paid more than other applicants. The policy document actually required the creation of a corporate culture of mutual acceptance, understanding, trust and respect, as well as emphasising the need to promote transparency and integrity and to ensure that public funds were optimally and prudently used. The agreement with Mr Mpanza to pay him more was thus in breach of the policy.

The Court accordingly found that the appointment of Mpanza was not in accordance with the policy and that the respondent had failed to justify the discrimination against the applicant.

This matter again demonstrated that where a plan is in effect, its terms should be followed. An employer could not go beyond its scope. Measures falling beyond the plan could not be considered. Furthermore, it was held that affirmative action discrimination cannot constitute a fair basis for dismissing, as opposed to appointing, employees. It was also found unfair for an employer not to implement and follow its own policy regarding affirmative action.

5.12 Middleton v Industrial Chemical Carriers (Pty) Ltd (2001) 22 ILJ 472 (LC)

In this matter, the failure by the respondent to pay the applicants, members of the salaried staff of the respondent, the same retrenchment packages and gratuities that were paid to the so-called payroll employees was alleged to be unfair discrimination.

The two categories of employees had substantively different conditions of service. Union members who were payroll employees were to be paid a gratuity, being the equivalent of two extra months' salary, upon retrenchment. The applicants contended that they were discriminated against on arbitrary grounds by not being retrenched and paid a package and gratuity.

It was common cause that AECI and ICC, the respondent party, had differentiated between the payroll employees and the salaried staff. The issue to be decided is whether the differentiation was unfair discrimination.

The Court referred extensively to case law, including but not limited to the relevant Constitutional Court decisions and decided to follow the approach laid down in those decisions. It is one of the few decisions where the Court actually, in an exemplary step by step and methodical manner, utilized the guidelines set down in the authoritative Constitutional Court decisions that had been delivered up to that time to assist it in arriving at a decision.

The Court held that this matter was clearly not a case where the impairment of the fundamental dignity of the applicants was in issue. Whether the differentiation affected the applicants in a comparably serious manner would therefore have to be considered.

The Court held that the differentiation between the conditions of service of the payroll and salaried staff employees was not arbitrary and unfair as the payroll employees' terms and conditions of employment were determined through collective bargaining. In all the circumstances there was a pre-existing valid basis for the differentiation between the payroll employees and the salaried staff.

The Court remarked that despite their complaint of being discriminated against, the applicants did not seek to be treated the same as the payroll employees in every respect. They were selective about the way in which they wanted their treatment to be equal to that of the payroll employees. In that regard, given the general inferiority of the payroll employees' conditions, the court remarked that implicit in the notion of unfair discrimination was the requirement of disadvantage and prejudice. It held that the payroll employees were in a weaker and less advantaged position than the salaried staff. The salaried staff was therefore not a "vulnerable group" and were not disadvantaged or prejudiced in relation to the payroll employees.

The Court found that it would be inappropriate to compare terms and conditions of employment of payroll and salaried employees without establishing a rationale as to why they should have been treated the same.

The Court had clearly followed the correct approach in deciding the matter. It first established discrimination, then considered whether it may have been justified.

5.13 Lagadien v UCT (2000) 21 ILJ 2469 (LC)

In this case, it was alleged that the respondent had unfairly discriminated, directly or indirectly, against the applicant on the basis of a lack of academic or tertiary qualifications.

The applicant had been appointed as Acting Co-Ordinator of the respondent's Disability Unit from 15 January 1998 to 14 April 1998. The respondent invited applications for the position of Head: Disability Unit through an advertisement which stated that to be considered the candidate would need proven skills in the identified fields and tertiary-level education together with personal experience of disablement. It also stated that applications from previously disadvantaged South Africans would be particularly welcomed.

The applicant, amongst others, applied for the post, but it was re-advertised. The applicant applied again but on this occasion was neither short-listed nor interviewed. The respondent appointed someone else to the post.

The applicant thereafter alleged unfair discrimination. She averred that her own competence for the position matched or exceeded that of Watermeyer, the initial successful candidate in all material respects save for his possession of tertiary academic qualifications.

The applicant's contention that she was unfairly discriminated against solely on the basis of her lack of tertiary education, was vociferously denied by the respondent. A successful candidate was deemed to be clearly the best applicant in terms of qualifications, skills and appropriate work experience for what was a senior position.

The reasons for the applicant's non-appointment was her lack of tertiary-level experience and that she was not the best applicant for the job.

In the hearing, the respondent further justified its decision by arguing that whilst a tertiary level of education was perceived to be an advantage, it was not the sole criterion. The critical issue was that of credibility with academic staff and counselling skills with students in an academic environment. The applicant had not worked in that context in an academic environment and this was the critical factor negating her appointment. She could not match the level of experience in that environment attained by Ms Magama, who was finally appointed to the position.

It was furthermore contended that the applicant's strengths and attributes were obvious and her candidacy was seriously and responsibly assessed. The decision to reject her was neither arbitrary, frivolous nor unfairly discriminatory.

The applicant contended that the discrimination was directed towards her, not in her individual capacity, but as a member of a class or group of persons who were disadvantaged, impliedly through circumstances beyond their control, by a lack of tertiary academic qualifications. It was, by its nature, indirect and was unfair in that it was exercised arbitrarily and capriciously.

The Court, with reference to numerous authorities, including the *Harksen* test, then dealt with the concept of indirect unfair discrimination, which could be brought about, *inter alia*, by a standard which could not be shown to be justifiable in the circumstances and which operated to the complainant's detriment because he or she could not comply with it."

The Court stated that it understood that the applicant was aggrieved and disappointed that she was not successful, but that that reaction did not render the conduct of the respondent unfair.

In this case once again, the Court first considered the justification for the alleged discrimination before considering whether discrimination had in fact occurred.

5.14 Ntai v SA Breweries (2001) 22 ILJ 214 (LC)

The applicants who were black persons, alleged that the practice of paying them lower salaries compared to their white counterparts, constituted unfair racial discrimination, alternatively arbitrary discrimination and therefore an unfair labour practice. In essence, the applicants contended that discrimination on the grounds of race could be found in the fact that they were black but earned less than two white employees who performed the same work.

The Court stated that the mere existence of disparate treatment of people of different race groups was not discrimination on the ground of race unless the difference in race was the reason for the disparate treatment. In referring to this principle, the Court again substantiated its reasoning through references to previous decisions.

With regard to onus too, the Court extensively referred to case law, both South African and English, accepting that a court would not be remiss if it exercised its discretion in favour of the alleged victim to establish a *prima facie* case and calling upon the alleged perpetrator of racial discrimination to justify its actions. A common sense approach was required.

The Court ultimately held that if an employer paid employees unequally on the basis of their race, it would clearly constitute discrimination on the grounds of race. However, it also meant that a mere differentiation in pay between employees who did similar work or work of equal value did not mean, in itself, that an act of discrimination was being perpetrated. It was only when such differentiation was based on an unacceptable ground that it became discrimination within its pejorative meaning.

The Court did remark, however, that the similarity of the jobs; the difference in race between the applicants and the two comparators; and the fact that the applicants were paid less than their comparators raised a very strong inference that race could very well be a probable explanation for the difference in remuneration. All of those facts were common cause.

On the basis of those common cause facts, a prima facie case of racial discrimination based upon unequal pay for similar work or work of equal value had been established by the applicants.

The respondent admitted that the discrepancy or differential in pay between the applicants and the two comparators was too big. However, denying that such anomalous gap in pay was caused by race, the respondent relied upon essentially three factors to explain the difference: performance based pay increments, the greater experience of the comparators and seniority through long service. Extensive evidence was led to justify this.

The Court noted that the respondent did not proffer those grounds of justification in order to justify a practice of racial discrimination. Operational requirements could namely never justify racial discrimination. The fact remained that the differential in pay was not caused by race.

The applicants' further contention that they were discriminated against upon arbitrary grounds was also dealt with by the Court with reference to the *Harksen* test.

The Court found that the applicants had failed to identify the specific ground upon which they alleged that they had been discriminated against. Therefore, in the absence of an identified unlisted ground it was impossible to determine whether the ground that was relied upon was comparable to the listed grounds.

With regard to the issue of indirect discrimination, especially in regard to the criterion of seniority, the Court stated that the overall onus to prove indirect discrimination lay with the applicants. It was not a burden of proof that could easily be complied with because evidence, usually of a statistical nature, would be required to show the disproportionate impact. However, it conceded, such impact might be more self-evident in a country whose past history could assist the alleged victims of indirect discrimination to establish at least a *prima facie* case.

5.15 National Coalition for Gay and Lesbian Equality v Minister of Justice (Unreported – Case no: CCT 10/99)²⁸⁹

The question to be decided was whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents.

The attack on the constitutional validity of the provision in question concentrated on the fact that it enabled preferential treatment to be given to a foreign national applying for an immigration permit who is the spouse of a person permanently and lawfully resident in the Republic, but not to a foreign national who, though similarly placed in all other respects, is in a same-sex life partnership with a person permanently and lawfully resident in the Republic.

In dealing with the equality challenge the Court indicated that it would follow the approach laid down by it in various of its judgments as collated and summarised in *Harksen*²⁹⁰ and as applied to section 9 of the Constitution in *NCGLE 1*.²⁹¹

In doing so, the court found that there was indeed differentiation and that it lay in the failure of the provision to extend to same-sex life partners the same advantages or benefits that it extended to spouses. However, it added, the discrimination in the provision constituted overlapping or intersecting discrimination on the grounds of sexual orientation and marital status, both being specified in section 9(3) and presumed to constitute unfair discrimination by reason of the presumption contained in section 9(5) of the Constitution. The Court referred to the dictum of Sachs J²⁹² in *NCGLE 1* with approval:

“One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the

²⁸⁹ For the purposes of referencing hereafter, in the footnotes the first *National Coalition* matter will be referred to as *NCGLE 1* and the second, as *NCGLE 2*.

²⁹⁰ *Harksen v Lane NO supra*.

²⁹¹ *NCGLE 1 supra*.

²⁹² *NCGLE 1 supra* at para 113.

evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly.”

The Court also agreed²⁹³ with the following observations by L’Heureux-Dubé J in *Mossop*:²⁹⁴

“This argument [of Lamer CJC] is based on an underlying assumption that the grounds of ‘family status’ and ‘sexual orientation’ are mutually exclusive. However . . . [i]t is increasingly recognized that categories of discrimination may overlap and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex . . . Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.”

As affirmed in NCGLE 1 “the determining factor regarding the unfairness of discrimination is, in the final analysis, the impact of the discrimination on the complainant or the members of the affected group. The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness.”²⁹⁵

The Court also stated that it has recognised that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Vulnerability in turn depended to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past

²⁹³ NCGLE 2 at para 40.

²⁹⁴ *Canada (Attorney-General) v Mossop* (1993) 100 DLR (4th) 658 at 720 – 721.

²⁹⁵ NCGLE 1 *supra* at para 19.

disadvantage was so important. In the present case there was significant pre-existing disadvantage and vulnerability.

This judgment explicitly recognised that an approach which is substantive and contextual requires account to be taken of the interrelationship between grounds of discrimination and the full impact of the discrimination on multiple grounds. The determination of unfairness proceeded on the basis of an investigation of the effect of discrimination on the applicants, both in relation to sexual orientation and in relation to their relationships. It suggested a growing awareness on the part of the court of the problem of overlapping grounds.

With regard to the relationship between disadvantage and vulnerability the court stated that disadvantage is an indicator of vulnerability which weighs in favour of a finding of unfairness.

It is also clear from the judgment that vulnerability is not entirely dependent on past disadvantage and can be proved in other ways.

The case also for the first time makes explicit the relevance of disadvantage to discrimination, holding, with reference to Canadian case law, that disadvantage is relevant because without an assessment of pre-existing disadvantage it is not possible for the Court to determine the full impact on the applicant of a measure subject to challenge.

In addition, the judgment also raises the vexed question of the relationship between disadvantage and the impairment of dignity, an issue hotly debated by South African commentators.

From the judgment it can be seen that the Court had begun to clarify the role and legal effect of disadvantage in determining unfairness, but the discussion in the case was very brief and the questions, such as the weight to be given to disadvantage in the *Harksen* test, and the exact nature of the relationship between disadvantage and the impairment of dignity, as separate elements of the test, remain.

5.16 Coetzer v Minister of Safety and Security (2003) 24 ILJ 163(LC)

This case dealt with the first claim to be heard by the Labour Court under the EEA. At the time, there was no precedent as to how a court should handle situations in which an employer overlooked qualified and suitable persons from non-designated groups when there was no competition at all from people from designated groups.

The Court held that the Constitution required efficiency from the SA Police Service. The question was whether efforts to promote representivity in the explosives unit were rationally balanced with efforts to change the demographics of the staff of the Unit.

The Court found that the refusal of the respondent to appoint the applicants was irrational.

The case confirmed that there are limits to which a plea of affirmative action can serve as a defence.

The Court held that in the public service, the goal of representivity had to be pursued rationally. The irrational pursuit of representivity at the expense of the public, rendered the discrimination against the applicants unfair,

The Court stressed that the circumstances of grievants were not the only factors to take into account. However, where unfair discrimination affected efficient service, the remedy had to be in the interests of and to the benefit of the South African public.

Given that the respondent would have made no appointments if there were no candidates from the disadvantaged group to consider, it had created an absolute barrier to the appointment of the applicants. That was impermissible.

The Court also found that If it has been agreed that an employment equity plan had to be drawn up and implemented, as it had been, that requirement had to be met where the employer wished to rely on the plan as a defence.

The Court stressed that there had to be a rational balance between remedial measures and efficiency in line with the constitutional requirement that the police services must discharge its duties effectively. Affirmative action in a case such as this, had to give way to efficiency.

In this judgment, the principle established in *PSA*²⁹⁶ was taken a step further. –It was indicated that not only was affirmative action on its own presumptively unfair, but the absence of a plan also rendered the employment decision unfair. Furthermore, the Court stressed that the requirements of equality had to be balanced against the constitutional requirement of efficiency

The Court remarked that the Constitution also requires that national legislation had to enable the police service to discharge its responsibilities effectively. The question was whether the SAPS' efforts to promote representivity in the explosives unit were rationally balanced with efforts to change the demographics of its staff.

The problem confronting the SAPS in the matter was that it had based its defence solely on its claim that it had conformed to the representivity requirements of the EEA. It did not address the efficiency requirement at all and therefore, its refusal to appoint the applicants was irrational.

The case confirmed there are limits to the extent to which a plea of affirmative action can serve as a defence to an action for unfair discrimination against white male employees. In the public service the goal of representivity has to be pursued rationally. Rationality can never be served where a public authority fails to make appointments at all simply because there were no affirmative action candidates. That became unfair to members of non-designated groups and the employer actually disadvantaged them as well as the broader public in the name of affirmative action.

²⁹⁶ *Public Servants' Association v Minister of Justice supra.*

5.17 **Stoman v Minister of Safety & Security (2002) 23 ILJ 1020 (T)**

In this important case, the Court held the following per Van der Westhuizen J:

" ... Some tension may in certain situations exist between ideals such as efficiency and representivity, and a balance then has to be struck. Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing arms. They are linked and often independent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in the situation where a society emerges from a history of unfair discrimination. The advancement of equality is integrally part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable, in responsible positions cannot be justified."

The applicant in the case had not been appointed to the post of commanding officer of SANAB at the then Johannesburg International Airport, instead a black person was appointed. The applicant had achieved the highest percentage mark of all the candidates but was not appointed because the respondent averred that it had been obliged to give effect to the SAPS employment equity plan.

The following are the most relevant points made by the Court in the very detailed and lengthy judgment:

There is constitutional recognition of affirmative action measures aimed at groups or categories to which beneficiaries belonged. The fact that an individual had himself, at a personal level, not been disadvantaged, was irrelevant. The Court referred to the *Motala*²⁹⁷ case where it was concurred that the Indian population group had in fact been disadvantaged, but where it was held that the degree of disadvantage of African pupils who had been subjected to the four-tier education system at that time,

²⁹⁷ *Motala v University of Natal supra.*

was significantly greater than that suffered by Indians. A selection system which therefore compensated for that did not run counter to the Constitution.

In so far as the allegedly competing values of representivity and efficiency were concerned, the ideal of efficiency was not in opposition to the constitutional requirement of representivity. Representivity considerations did not only come into play where candidates had the same merits. Such a situation would be too restrictive. However, the rationality requirement was very important in this regard and the appointment of persons who were totally unqualified or less than “suitably” qualified could never be justified. The Court also warned against an assumption that experience equated to efficiency. A balance had to be struck between efficiency and representivity. They were not to be viewed as competing and opposing aims. They were in fact linked and interdependent. A representative public service was a good in itself.

An equity plan had to be compliant with section 9(2) of the Constitution, There had to be a rational connection between the measures and the aim to be achieved. A “haphazard, random or overhasty” equity plan or policy could not constitute a “designed” measure. The Court pointed out the difference in wording between the interim and final Constitution where it now did not refer any longer to “adequate” protection and advancement of disadvantaged groups. The requirement therefore was no longer for a causal connection, but for a rational connection between the measures and the aim they sought to achieve.

Equality as envisaged in the Constitution was more than just formal equality and more than mere non-discrimination. The reason for affirmative action measures and their facilitation in the Constitution was to address the country’s history of deep racial inequality and other forms of systemic and systematic discrimination. Past discrimination had ongoing negative consequences even if the initial causes were eliminated. Equality had a remedial and restitutionary purpose. The aim was not to reward a disadvantaged employee or to punish persons like the applicant, but to diminish over-representation that his group had enjoyed in the past.

An important question which arose in the case was whether the affirmative action policy of the respondent was justifiable and acceptable within the context and wording of the Constitution. It had to constitute a measure which would promote the achievement of equality and there had to be a rational connection between the measures and the aims it sought to achieve. The Court also held that measures were reviewable. Proper plans and programs were required.

The Court found that the measures contained in the SAPS employment equity plan were *bona fide*. The procedure followed by the SAPS was however sloppy, but not so seriously so as to affect the legality of the process.

An important issue which arises from the case is the question as to how far the skills, experience or qualifications gap must be extended before the appointment of a less qualified or experienced black candidate becomes irrational and impeachable.

5.18 Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC)

In this extremely important judgment about which we have probably not yet heard the last, the applicant alleged that the decision of the respondent not to shortlist him for any of the three posts for which he had applied constituted unfair discrimination on the grounds of race, political belief, lack of relevant experience and/or other arbitrary grounds.

In the most controversial aspect of this judgment, the Court opined that if one were to have regard only to section 6 of the Act then one might be drawn to the conclusion that affirmative action was no more than a defence to a claim of unfair discrimination. Because of the controversial nature of the Court's findings in this regard, a substantial part of the judgment will be repeated below:

“Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. However, from the reading of the Act it appears that affirmative action is more than just a ‘defence’ in the hands of an employer and should not be confined to so limited a role in the elimination of unfair discrimination in the workplace. The definition of affirmative action in section

15 indicates a role for affirmative action that goes beyond the passivity of its status as a defence. ... It includes pro-activeness and self-activity on the part of the employer. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace.”

And further:

“The real answer however lies in the determination of who is making the claim of affirmative action. It may found a cause of action in the hands of one and defence in the hands of another. If one were to have regard only to section 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. In this sense, it serves as a shield. However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword.”

The Court then expanded on the reasoning behind its statements:

“Affirmative action has its roots embedded firmly in the Constitution of the Republic of South Africa (Act 108 of 1996) (“the Constitution”). Under the Constitution equality is a fundamental human right. Section 9(2) of the Constitution provides that “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.” In addition to this, section 9(4) of the Constitution provides that “national legislation must be enacted to prevent or prohibit unfair discrimination.” The Employment Equity Act is borne of this constitutional imperative. The right to equality as elaborated in section 9 of the Constitution moves well beyond the mere formal equality. Our constitution embraces and promotes the more thoroughgoing and challenging concept of substantive equality. In the absence of the full development of the concept of substantive equality our society will continue to be characterised by deep-rooted inequality and injustice. (In this regard see National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others 1999

(1) SA 6 (CC) at 38H-39D and Stofman v Minister for Safety and Security and Others (2002) ILJ 1020 at 1029-1030. See also President of the Republic of SA & Another v Hugo 1997 (4) SA 1 (CC)). The protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, by legislative and other measures is recognised by the Constitution as part of the right to equality. It is not fashioned as an exception to the right to equality. (In this regard see Du Toit et al in *Labour Relations Law: A Comprehensive Guide* (3rd ed) at 457) It is part of the fabric and woven into the texture of the fundamental right to equality in section 9 of the Constitution. In this sense, 'affirmative action' is more than just a defence or shield. If at all it be 'shield', it would be inconceivable that it is available only to those in our society who have power, namely employers. If this were the case then employees would, in so far as their full and equal enjoyment of all rights and freedoms is concerned, be at the mercy of an employer with no or no real remedy should the employer fail to promote substantive equality. "

It is difficult to conceive that the reasoning of the Court in so far as the nature of affirmative action, its purposes and its place in the notion of equality is concerned. However, as made clear in the *Dudley*²⁹⁸ judgment, the legal mechanism do not provide for affirmative action to be utilized as a sword in the hands of individual employees. It is submitted that it is merely a question of time before either at the instance of the Constitutional Court or at the initiative of the legislature, the law is in fact amended to permit the use of affirmative action as a sword.

With regard to the matter at hand, the Court found that There is no doubt that an employer may not discriminate unfairly against an employee. This right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in section 10 of the Constitution. This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified in the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly

²⁹⁸ *Dudley v City of Cape Town infra.*

discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group who is not “suitably qualified” as contemplated in sections 20(3) to 20(5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated an employee’s right not to be discriminated against. To this extent, affirmative action can found a basis for a cause of action.

The Court held that if an employer adopted an employment equity plan that regulated appointments and promotions, then the employees might have a legitimate expectation that the respondent would act in accordance with the plan.

It also held that on an analysis of the Constitution and the Act, the legislation did indeed provide for a right to affirmative action. The exact scope or boundaries of such a right was a matter that the Court held would have to be developed out of the facts of each case.

As stated, the judgment gave rise to a new debate as to whether or not an employee from a designated group could use the provisions of the EEA to support a claim for appointment in fulfilment of the objectives of the EEA.

5.19 Minister of Finance v Van Heerden (2004) 25 ILJ 1593 (CC)

In this case, the Constitutional Court departed from the established jurisprudence and set out a new approach to section 9(2).

Moseneke J on behalf of the majority, rejected the approach advocated in the *PSA*²⁹⁹ case and stated that affirmative action measures which properly fell within the requirements of section 9(2) of the Constitution were not presumptively unfair. Such remedial measures were not a derogation from, but a substantive and composite part of the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. The primary object was to promote the achievement of

²⁹⁹ *Public Servants’ Association v Minister of Justice supra.*

equality and therefore differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination was warranted, provided the measures were shown to conform to the internal test set by section 9(2).³⁰⁰

The Court stressed that it could not accept that the Constitution authorized measures, but also labelled them as presumptively unfair. Presuming unfairness in connection with such measures would require that the judiciary second guess the legislature and executive concerning the appropriate measures to overcome the effect of unfair discrimination. The Court therefore held that the enquiry had to be limited to assessing whether a measure fell within the ambit of section 9(2) of the Constitution.

The judgment dealt extensively with the content of the equality right and held that it included remedial or restitutionary equality. Therefore, measures taken under those notions were not a deviation from or invasive of the right to equality as guaranteed by the Constitution.

The Court held that the provisions of sections 9(1) and (2) were complementary and that measures falling under the section 9(2) requirement were not presumptively unfair and were not derogating from but forming a substantive and composite part of the equality protection envisaged by the provisions of section 9 and the Constitution as a whole. Differentiation aimed at protecting or advancing persons who had been disadvantaged warranted measures which could be shown to conform to the section 9(2) test.

It had to be shown, however, that measures purported to promote the achievement of equality had been designed to protect and advance persons disadvantaged by unfair discrimination.

The Court firmly rejected the strict scrutiny standard as applied in the United States of America and which had appeared to be viewed as appropriate by certain

³⁰⁰ Section 9(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."

authorities and judges. It established a new standard for qualifying legitimate and constitutional restitutionary measures which favoured a standard of rationality over reasonableness. The requirement of justifiable affirmative action policies still remained, but whereas, for example the *PSA*³⁰¹ case employed a standard of “reasonableness” to qualify a valid justification, in *Van Heerden*³⁰² the standard was shifted to one of rationality.

The Court laid down a three fold enquiry³⁰³ in order to deal with section 9(2) measures:

Does the measure target persons or categories of persons who had been disadvantaged by unfair discrimination? With regard to this, the majority judgment confirmed that measures chosen had to favour a group or category designated in section 9(2), although, it conceded, it would not be possible to precisely demarcate such groups or categories. However, the Court held that exceptions were insufficient and that the appropriate test for the legal efficacy of the scheme was whether an overwhelming majority of members of the favoured class were persons designated as disadvantaged by unfair exclusion.

Is the measure designed to protect or advance such persons or categories of persons? In this regard the Court held that remedial measures were directed at an envisaged future outcome and that therefore remedial measures must be reasonably capable of attaining that desired outcome. If the remedial measures could not qualify as being reasonably likely to achieve that outcome, then the measures would not satisfy the requirements of section 9(2) of the Constitution. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome would be to set a standard not required by section 9(2). Moseneke J held that section 9(2) did not set “a standard of necessity between the legislative choice and the governmental objective. Such a test would defeat the objective of s 9(2) of the Constitution, and render the remedial measure stillborn.”³⁰⁴ However, if the measures were “arbitrary,

³⁰¹ *Public Servants’ Association v Minister of Justice supra.*

³⁰² *Minister of Finance v Van Heerden supra.*

³⁰³ *Minister of Finance v Van Heerden supra* at para 37.

³⁰⁴ *Minister of Finance v Van Heerden supra* at para 42.

capricious or displayed naked preference³⁰⁵ they could hardly be said to be designed to achieve the constitutionally authorized end.

Does the measure promote the achievement of equality? This part of the enquiry required an appreciation of the effect of the measure in the context of the broader society. The constitutional vision on equality had to be borne in mind. A measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits, to the extent that the long-term constitutional goal of equality would be threatened. The Court emphasized that a measure should not constitute an abuse of power or impose such substantial and undue harm that long-term constitutional goals would be threatened.

Qualifying the measure under the threefold enquiry would constitute a complete defence against any challenge suggesting a violation of the constitutional equality provisions.

The Court also held that it is not necessary to establish that there is no less onerous way in which the remedial objective may be achieved.

In this case, the fact that rationality was used as a standard for establishing whether the measure promoted equality constitutes a clear departure from the approach advocated by Swart J in the *PSA* case. The Constitutional Court has now decided that the appropriate standard for testing the validity of a measure contemplated under section 9(2) of the Constitution is rationality, not reasonableness.

As stated above, and as extensively dealt with by Baqwa,³⁰⁶ the standard of reasonableness is typical of the strict scrutiny approach that has been used by American jurisprudence in the context of affirmative action disputes. The Constitutional Court appears to have rejected this approach “because of the differences between our society and American society - our equality jurisprudence differs substantively from the US approach to equality. Our respective histories,

³⁰⁵ *Prinsloo v Van der Linde supra* at para 69.

³⁰⁶ Baqwa D *The Resolution of Affirmative Disputes in the light of Minister of Finance v Van Heerden* (2006) 27 ILJ 67.

social context and constitutional design are incongruent and South African jurisprudence must be wary of importing inapt foreign equality jurisprudence. Another significant feature of American equality jurisprudence is the fact that it is founded on the values of formal rather than substantive equality.”³⁰⁷

In the context of mere differentiation, the Court held, the constitutional state had to guard against regulating in an arbitrary manner or displaying naked preferences which did not serve a legitimate governmental purpose. The object of this aspect of the equality guarantee was to ensure that the state functioned in a rational manner. Before mere differentiation infringed the right to equality, it had to be established that no rational relationship existed between the differentiation in question and the governmental purpose which was proffered to validate it.

The equality jurisprudence developed in the *Van Heerden*³⁰⁸ decision is clear in its rejection of the standard of reasonableness and the necessity for justifying legitimate constitutional restitutionary measures.

Brickhill³⁰⁹ comments³¹⁰ that an interesting aspect of the *Van Heerden*³¹¹ judgment was the composition of the group to be benefited by restitutionary measures. In the judgment, the majority approach required no more than an “overwhelming majority” of the benefited group to be persons disadvantaged by the unfair discrimination. The third leg of the test (i.e. the measure must promote the achievement of equality and therefore an appreciation of its effect in the context of our broader society) however required that the interest of the person or group excluded from the measure must come into play. He points out that it is important that this leg of the test protect such persons because if the measure meets section 9(2) then the enquiry ends there, without proceeding to section 9(3) to consider whether it discriminates unfairly. Clearly this step involves a weighing of interests (included v excluded groups), however it is not clear what the standard for this weighing is to be – the goal of

³⁰⁷ Baqwa D (2006) 27 ILJ 67 *supra* at 72.

³⁰⁸ *Minister of Finance v Van Heerden supra*.

³⁰⁹ Brickhill J “Testing Affirmative Action under the Constitution and the Equality Act: Comment on Du Preez v Minister of Justice and Constitutional Development (2006) 27 ILJ 1811 (E)” (2006) 27 ILJ 2004.

³¹⁰ Brickhill J (2006) 27 ILJ 2004 at 2011.

³¹¹ *Minister of Finance v Van Heerden supra*

substantive equality would preclude a measure that creates new disadvantage with a potentially long term effect.

5.20 Alexandre v Provincial Administration of the Western Cape Department of Health (2005) 26 ILJ 765 (LC)

In this case, the applicant's claim arose out of his unsuccessful application for appointment to the post of Director: Engineering and Technical Support with the respondent. He alleged that his non-appointment to the post amounted to unfair discrimination on the grounds of race, his application having been turned down in favour of a coloured male.

The Court firstly analyzed the applicable provisions in the EEA. It then referred to the *Van Heerden*³¹² case extensively in so far as the Constitution's vision of a concept of equality was concerned. Furthermore, The Court importantly pointed out what appears to be a general problem with discrimination matters referred to the Labour Court: "Although the present matter has been pleaded, constructed and argued within the parameters of the EEA, which has at its heart this conception of equality, an appreciation of the substantive and restitutionary notion mandated by the Constitution has been singularly absent in the parties' presentation of their cases."

The basis of the applicant's case was that by virtue of his experience and qualifications he was the most suitably qualified and skilled candidate for the post and was so far ahead of the successful candidate, Mathys, that the only reasonable inference to be drawn was that Mathys was appointed solely on the basis of his race and membership of a designated group.

To the extent that affirmative action considerations played any role, the selection panel, according to the evidence presented, had regard to the numerical targets contained in the respondent's employment equity plan in terms of which both white and coloured males were adequately represented, but considered the appointment of

³¹² *Minister of Finance v Van Heerden supra.*

a coloured male as preferable to that of a white male, because white males were significantly over represented, whereas coloured males were not.

The applicant, in giving evidence before the Court, made no bones about his distaste for the policy of employment equity, complaining that “White males have no future”.

The Court found that racial considerations brought to bear on the decision making process was to the effect that the appointment of a Coloured male would have a less negative impact on the numerical targets aiming at equitable representation of the designated groups. However, the figures also showed that in the White male category the target was significantly exceeded. Therefore, the conclusion by the respondent that the appointment of a Coloured male would have a less detrimental effect on targets was also correct. This was entirely consistent with taking affirmative action measures consistent with the purpose of the EEA and thus in accordance with section 6(2)(a) of the EEA.

The case again demonstrated that a complaint by a disappointed candidate could never be justified unless the affirmative action candidate was wholly or less than suitably qualified or demonstrably incapable. That being so, it in effect made the hurdle for any applicant so much more difficult to overcome.

5.21 IMAWU v City of Cape Town (2005) 26 ILJ 1404 (LC)

A blanket ban on the employment of diabetics as firemen was found by the Court to constitute unfair discrimination in terms of the EEA.

The respondent's refusal to employ persons belonging to a particular group, diabetics, was held to be outdated and based on irrational medical grounds. Such refusal was held by the Court to be enough to demean the dignity of members of that group.

The Court also held that the specific methodology to determine unfair discrimination as laid down in the *Harksen* test had to be followed in such enquiries under the EEA.

5.22 PSA obo Karriem v SAPS (2007) 28 ILJ 158 (LC)

In this matter it was alleged that the SAPS discriminated unfairly against Ms Karriem on the basis of race, alternatively relevant experience, when it failed to appoint her in the position of Chief Administration Clerk and appointed a Ms Kotze instead.

In a lengthy judgment, the Court made extensive reference to relevant authorities as well as applicable case law and concluded that no evidence was adduced by the that the SAPS had in fact appointed Ms Kotze by reason of the fact that she was a white female. The Court did not agree either, that in appointing a white as opposed to a coloured female by itself amounted to differentiation and explained the concept of differentiation. It stated that where two applicants competed for a position, the mere fact that the one was white and the other coloured, and the white person was appointed, could not amount to differentiation, nor to discrimination. What would required was evidence of conduct which constituted a difference in or between the two parties being made. Or a demonstration that no objective justification existed for the appointment of the one rather than the other.

The Court explained further that once differentiation had been shown, the two stage analysis as laid down in the *Harksen* test should follow to determine whether the conduct constituted unfair discrimination.

In the present case, the SAPS, through a process of assessment of the applications had not treated the two applicants for the particular position differently. It excluded Ms Karriem, or preferred Ms Kotze, because of the inherent requirements of the job. No evidence was presented by the applicant to show that the SAPS discriminated against Ms Karriem on the basis of her race.

The evidence that was adduced on behalf of the SAPS disclosed, in the view of the Court, an objective assessment and awarding of points under various topics to the respective candidates for the position. There was a proper weighing up of the skills the applicants had to do the job. There was a consideration of the formal qualifications, prior learning, relevant experience as well as the capacity of the applicants to acquire the ability to do the job within a reasonable time. Operational

requirements too, dictated that the person who would be appointed should immediately be able to do the job.

The Court had regard to what Trengrove AJ said in the *Mafomane*³¹³ matter:

"An allegation that an employer unfairly discriminated against an employee on the ground of race, involves at least three components. The first is that the employer differentiated by treating the particular employee less favourably than other employees. The second is that the employer made the differentiation on the ground of race. The third is that it was unfair for the employer to do so."

The Court finally held that there was no differentiation amounting to discrimination on the grounds of race.

In so doing, the Court cited with approval a passage from an article by Carole Cooper:³¹⁴

"It is not just any person from a designated group who may be the recipient of affirmative action measures relating to appointment or promotion, the person must be 'suitably qualified'. ... The 'suitably qualified' requirement should stand as an answer to those critics who hold that affirmative action necessarily means that individuals will be preferred because of their race, gender or disability per se, without an assessment of their competencies. It is clear that the Act does not support tokenism – indeed the code says as much – but requires that the appointee has the requisite skills, knowledge and qualifications to do the job or could acquire these in a reasonable period. Nowhere does the Act state that persons from designated groups have a pre-emptive right to appointment merely because they are so designated."

³¹³ *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 997 (LC) at para 56.

³¹⁴ Cooper C (2003) 24 *ILJ* i1307 at page 840 – 841.

5.23 Du Preez v Minister of Justice 2006 9 BCLR 1094 (SE)

This case was the first reasoned judgment of a High Court sitting as an Equality Court and reflects the problems to be encountered when required to deal with a claim of unfair discrimination based on implementation of an affirmative action policy instituted in terms of section 4 of PEPUDA.

The crisp issue was whether the short-listing criteria for appointments utilized by the respondent constituted unfair discrimination. The applicant in the matter was a magistrate who alleged that the criteria utilized were irrational, discriminatory and inequitable and in effect, constituted an absolute barrier to his appointment.

The Court pointed out that equality was at the heart of the Constitution. Unfair discrimination was indeed unequivocally proscribed in PEPUDA and also in the Constitution. However, the provisions of PEPUDA and the prescribed considerations therein, did not supplant test for constitutionality of an affirmative action measure, but gave substance to it.

The Court found that the short-listing formula of the respondent indeed raised an insurmountable obstacle for the complainant and as such constituted an absolute barrier to his appointment. In addition, since the discrimination was built into a departmental policy it was systemic in nature.

The Court remarked that the difference in wording between section 9(2) of the Constitution and section 14(1) of PEPUDA had to be reconciled, but held that PEPUDA and EEA were “sufficiently close for authority on the one to be of assistance in the interpretation and application of the other.”

Importantly, the Court adopted the *Harksen* test for unfair discrimination.

Erasmus J adopted the approach that differentiation on the prohibited grounds of race and gender attracted a presumption of unfairness in terms of section 13 of

PEPUDA even if the measure was being defended as one of affirmative action. In so doing, according to Brickhill, he erred.³¹⁵

In the light of *Van Heerden*,³¹⁶ this approach would be incorrect. Although the presumption of unfairness does not apply, that does not immunise restitutionary measures from constitutional review. Any such affirmative action measure still has to pass muster under section 9(2) as per the three stage enquiry envisaged in *Van Heerden*.³¹⁷

However, it is submitted by Van der Walt and Kituri,³¹⁸ that substantive equality recognises that systemic disadvantage still persists. In the light of the *Van Heerden* case the taking of restitutionary measures did not necessarily establish *prima facie* unfair discrimination. It was further submitted that the criteria did not necessarily establish a general absolute barrier – the purpose of the discrimination was legitimate and the goal of representivity was pursued in a rational manner. The short-listed candidates were not unsuitable and the respondent would not have made no appointment at all if there were no candidates from a designated group.

Tensions between Constitutional rights ought to be resolved using value judgments.

The Court also noted need to interpret PEPUDA's section 14(1) with sensitivity to constitutional values and objectives. Affirmative action measures had to be seen as essential and integral to the goal of equality and not as limitations of and exceptions thereto.

The Court found that there was unarguably a need for transformation in the judiciary and therefore that the discrimination had a legitimate purpose, but, it concluded, the short listing criteria involved the establishment of an absolute barrier.

³¹⁵ Brickhill J (2006) 27 *ILJ* 2004 at page 2010.

³¹⁶ *Minister of Finance v Van Heerden supra*.

³¹⁷ *Minister of Finance v Van Heerden supra*.

³¹⁸ Van der Walt A and Kituri P “The Equality Court’s View on Affirmative Action and Unfair Discrimination “ 2006 *Obiter* 674 at 679

One difficulty with the judgment was its failure to locate the right to equality in its proper place. The jurisprudence of Constitutional Court clearly states that equality must be determined by reference to history and the underlying values of the constitution.

5.24 Dlamini v Green Four Security (2006) 27 ILJ 2098 (LC)

The applicants in this matter were dismissed for their refusal to shave or trim their beards because of their religious beliefs.

The Court concluded that the applicants bore the *onus* of proving that the prohibition against trimming of beards was an essential tenet of faith in order to prove it was a violation of their right to religious freedom. If they were able to establish such indirect discrimination, the *onus* would shift to the respondent to justify its policy.

The applicants failed to prove that having a beard was an essential tenet of their faith and therefore failed to prove discrimination.

It was held that the company policy requiring security officers to be clean shaven indeed constituted an inherent requirement of the job. Security officers throughout the industry were required to be clean shaven.

The Court found that the requirement constituted a standard of neatness and was therefore not irrational.

5.25 Baxter v National Commissioner Correctional Services (2006) 27 ILJ 1833 (LC)

This matter confirmed that employers may take into account relative disadvantage of disadvantaged groups or the spread of employees from such groups in the workplace. It was found that the National Commissioner of the respondent had not properly applied his mind to merits of case and had failed to comply with the regulations governing promotion. He had also failed to record the reason for his decision, which, in itself, constituted a gross irregularity. When reasons were

ultimately given, they did not match up with the selection committee's recommendations.

5.26 Stojce v University of KZN (2006) 27 ILJ 2696 (LC)

The applicant's claim was brought in terms of section 6(1) of the EEA. He alleged that he was discriminated against when the respondents failed to appoint him to the post of lecturer in the engineering faculty.

The grounds on which he relied were, firstly, that he was discriminated against on the basis of his race. He was white and he alleged that the respondents preferred candidates of African, not necessarily South African, origin.

Secondly, he alleged that he was discriminated against on the grounds of language, because English was not his first language.

Thirdly, he was discriminated against on the unlisted ground of his qualification and tertiary teaching and research experience, which had not been taken into account or seriously and responsibly assessed.

After considering the evidence before it, the Court held that the respondent was entirely justified in refusing to appoint the applicant to the post of lecturer.

During the hearing, the applicant's representative persisted with the third unlisted ground of discrimination. The Court invited him to produce authority for his propositions. Apart from informing the Court that the authority was to be found in *Hugo*,³¹⁹ he was unable to assist the Court.

The respondent's representative submitted that a claim for unfair discrimination arose when two or more similarly-situated employees were treated differently. There was no other employee against whom the applicant compared himself. He conceded,

³¹⁹ *President of the Republic of South Africa v Hugo* supra.

however, that racism or any of the grounds of discrimination could still be proved if there were a subversive reason for prejudicial action against an employee.

The Court then referred to numerous Constitutional Court and Labour Court cases where unlisted grounds were considered as acts of discrimination if they were analogous to the listed grounds. It concluded that the test was that the differentiation had to impair the fundamental dignity of people as human beings because of attributes or characteristics attached to them. Not every attribute or characteristic qualified for protection against discrimination. The Court quoted Cooper:³²⁰ “Smokers, thugs, rapists, hunters of endangered wildlife and millionaires, as a class, do not qualify for protection. What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalisation, powerless, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination.”

The Court stated that an employee who relied on an unlisted ground as being discriminatory had to establish the differentiation, show that it defined a group or a class of persons. To warrant protection, the applicant had to show that the conduct complained of impacted on him as member of a class or group of vulnerable persons.

In this case, it was found, the applicant’s defining characteristics did not classify him as a member of a group. He simply did not satisfy the requirements for the post and the respondents were simply doing their job of evaluating him.

In the circumstances, the applicant failed to prove that his non-appointment was discriminatory on any of the grounds alleged. If there was any differentiation at all, it was to compare the requirements of the jobs with the suitability of the applicant to fulfil them. “That is the essence of the process of filling posts. Without such a process suitable candidates cannot be sifted from unsuitable candidates.”

³²⁰ Cooper D *Challenging Diversity* 2004 at 3.

5.27 Thekiso v IBM South Africa (PTY) Ltd (2007) 28 ILJ 177 (LC)

In this matter, the Court considered whether the employer's failure to consider specific affirmative action measures to retain a black female breached the general obligation on employers to implement affirmative action measures.

The applicant relied on section 15(2)(d) of the EEA which provides that affirmative action measures implemented by a designated employer must include measures to retain previously disadvantaged employees. The applicant argued that the employer was obliged to retain her in preference to whites, provided she was suitably qualified as envisaged in section 20(3) of the EEA.

Court viewed the applicant's argument as incompatible with the earlier *Dudley* judgment, in which it was held that section 3 of EEA did not bring about an individual right to affirmative action. Chapter 3 EEA could only be brought into operation in a collective environment.

The Court traversed earlier case law and rejected the *Harmse*³²¹ approach. Affirmative action was not an enforceable right. The logic of the *Dudley* decision was viewed as inescapable. The Court accordingly held that the failure to retain employees from designated groups can only be dealt with systematically and not on behalf of an aggrieved individual in a court.

Rycroft comments that: "Law makers may need to consider whether EEA needs rethinking."³²²

5.28 Mothoa v SAPS (2007) 28 ILJ 2019 (LC)

In this matter, the SAPS had advertised a newly created post for a Divisional Commissioner: Criminal Record and Forensic Sciences Services.

In response to the advertisement the applicant and seven others applied for the post. The selection committee met to consider the applications of the eight candidates.

³²¹ *Harmse v City of Cape Town supra.*

³²² Rycroft *Affirmative Action in retrenchment* at page 85

However, it was resolved to re-advertise the post due to the fact that not enough candidates with appropriate managerial experience applied. The committee also resolved to restructure the advertisement to ensure a large pool of candidates.

The post was re-advertised and fifteen people applied including the applicant. A panel, consisting of the National Commissioner and four of the Deputy National Commissioners, met thereafter to screen the applications. The minutes of the meeting record that all applications were considered by the panel. A shortlist was then compiled. From the shortlist two white males and two African males were short listed for interviews, but not the applicant.

The minute of the meeting of the panel identified the reason for the requirements of the position in clear and unambiguous terms. The SAPS were looking to recruit a person with appropriate material experience.

The shortlist of candidates were interviewed and scored. It was decided to recommend the appointment of Assistant Commissioner Du Toit. He was chosen specially because he was the most knowledgeable, displayed good performance in the environment, was very experienced and was thought to strategically be the best candidate for the post. It was also believed that he would be a strong and decisive manager that could effectively address and improve service delivery at the new division.

The committee approved the appointment of Du Toit. The National Commissioner also approved the appointment.

The Court noted that the applicant did not persist with the initial allegation that there was discrimination based on racial grounds in the appointment. It actually became his contention that the type of unfair discrimination he was complaining about did not fall within the listed grounds in terms of the EEA but fell within grounds which were not listed.

The Court therefore had to decide whether there was discrimination and more particularly whether the setting of a minimum requirement that the prospective applicant for a post be on level 14 was discriminatory.

The Court ultimately found that the applicant had failed to aver sufficient facts to indicate a basis for discrimination in terms of Employment Equity Act. Insofar as an applicant for employment relied on grounds not listed, it required proof of sufficient facts that the inconsistency complained of was indeed discriminatory in a pejorative sense.

Having analysed the facts at its disposal, the Court concluded that there was nothing discriminatory in the advertisement, nor was there any basis for the Court to interfere with the criteria set out by the SAPS for the position and advertisement.

The Court nevertheless dealt with the applicant's case premised on unlisted grounds of discrimination. In doing so it referred to *Prinsloo*³²³ where the Court stated the following:

"The proscribed activity is not stated to be unfair "differentiation" but stated to be "unfair discrimination". Given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning in relation to the unequal treatment of people based on the attributes and characteristics attaching to them".

It held that the applicant had not satisfied the Court as to why the fact that the minimum requirement was level 14 affected his human dignity.

The Court also stated that it agreed with Waglay J when he said the following in the *Ntai*³²⁴ matter:

"Where the differential treatment is not based on a listed ground, it is not sufficient merely to allege that the employment policy or practice in question is arbitrary; the complainant must allege and prove that the policy and practice is based on an

³²³ *Prinsloo v Van der Linde supra* at para 31.

³²⁴ *Ntai v SA Breweries supra* at para 44.

analogous ground to the listed ground. What therefore is required is that a complainant must clearly identify the ground relied upon and illustrate that it shares the common form of listed grounds, namely that it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable manner”.

On the issue of discrimination, it is not sufficient for a litigant to just allege discrimination. It is required of a litigant to substantiate that, that which he or she sees as treating him different from others amounts to discrimination legally defined.”

The Court remarked that although section 6 of the Employment Equity Act did not provide a closed list of grounds, that was not a licence to bring in all and everything that appears to be different from the other. There was nothing wrong in an employer requiring proven managerial experience in the filling of senior posts. For as long as that practice was not capricious, all it would be in order.

5.29 McPherson v University of KwaZulu-Natal 2008 2 BLLR 170 (LC)

This matter concerned a claim about alleged unfair discrimination the applicant was subjected to when the first respondent failed to consider his application for the position of Head of its School of Physics. There had been a merger of three campuses of the university and as a result there would be one Head for three campuses. All staff members of the three campuses were taken into the newly formed body, including staff who were on contract, similar to that of the applicant.

Subsequent to the merger, the respondent internally advertised some posts which included that of the Head of School of Physics. The advertisement for the Head of School of Physics had an eligibility requirement that any permanent academic member of staff of the first respondent, at the level of senior lecturer or above, was eligible for appointment. The consequence of the eligibility requirement was that it excluded any staff member who was not on a permanent appointment. The applicant who was on a fixed term contract was naturally excluded as an applicant for the post.

The applicant regarded the respondent's policy of exclusion as unfairly discriminatory and unjustifiable.

The respondent argued that the alleged discrimination did not fall within one of the prohibited grounds mentioned in section 6 of the EEA; that it was not in any sense designed, or likely to impair dignity and self respect; that it was not arbitrary and that there was a commercial rationale and need for the discrimination. Furthermore, it was argued that the provisions of the policy were to be measured against the operational requirements of the respondent, in the general situation and not to against its effect on individual cases. The policy had not been targeted at the applicant personally.

The applicant argued that the appointment was to be made in terms of the University's Employment Equity Policy which did not differentiate between contract and permanent employees. It furthermore defined "appointable" as a person who not only met the minimum requirements of the job, but who was likely to be successful in the job. It endorsed the principle of equal opportunity for all and prescribed that appointments were to be based on individual merit.

The respondent had made a generalised assumption that permanent employees were more likely to remain as functionaries within their respective departments after their tenure as Heads of School. A further assumption that followed was that contract staff would, by choice, not remain within their departments. However, the respondent produced no statistics justifying its assumptions.

In its analysis of the case, the Court held that the words "any permanent academic" constituted the basis for the claim premised on unfair discrimination or unfair labour practice.

The Court referred to sections 9 and 10 of the Constitution which prohibits discrimination anyone and which accords everyone inherent dignity and the right to have their dignity respected and protected. While the applicant had not sought to place reliance on any ground listed in section 9 of the Constitution, the Court stated

that it remained important to keep in mind the constitutional imperative against discrimination.

The Court then proceeded to deal with the matter by setting out the relevant factors to be taken into account in that process. As well as referring to South African case law extensive reference was also made to international law and relevant international guidelines and conventions.

It found the eligibility requirement discriminatory to the temporary staff members of the respondent and constituting an impairment of their dignity. The principle of continuity proffered by the respondent was, found by the Court, in any view, not convincing.

The Court held that it could conceive of no bar against a temporary staff member and especially the applicant who had achieved academic excellence and through extensive research work, had earned the respect of his peers. He was both an academic leader and a manager.

Upon consideration of the reasons proffered for the inherent operational requirements of the first respondent, the Court found none that it could regard as permanent attributes forming an essential element of such requirements. The reasons given, in the Court's view, came across as requirements based on the preferences of respondent's senior employees.

5.30 Strydom v Chiloane (2008) 29 ILJ 607 (T)

In this matter, the jurisdictions of the Labour Court and the Equity Court constituted a problem. The matter concerned racially discriminatory conduct and hate speech in the workplace arising from an altercation between two employees – the parties to the dispute.

The respondent instituted action against the appellant in the Equality Court for the district of Praktiseer in terms of section 20 of PEPUDA. He was allegedly offended

and insulted by the harsh words used with reference to him by the appellant and considered them to be discriminatory.

He contended that section 4(1) of the EEA provided that the EEA applied to all employees and employers. He therefore relied on section 5(3) of PEPUDA which provides: "This Act does not apply to any person to whom and to the extent to which the Employment Equity Act applies."

This aspect was argued before the magistrate. He held that indeed there were matters which had been reserved for decision by the Labour Court in terms of the EEA and not by the Equality Court. He found that what was complained of in this matter was "hate speech" and that the EEA did not provide for determination of such issues.

The appellant, however, argued on appeal, that the provisions of section 6 of the EEA are wide enough to allow the Labour Court to deal with the matter because it has to do with racial discrimination in the workplace.

The Court held that both the PEPUDA and the EEA were enacted because of the provisions of sections 9(3) and 9(4) of the Constitution.

The claim of the respondent in the Equality Court was not against the employer but against his co-employee, the appellant. In the Equality Court the relief to which he would be entitled was contained in section 21 of PEPUDA. He was clearly not entitled to an order, and the Equality Court was not empowered to make such an order against the employer, who was not a party to the proceedings, to dismiss or to take other action against the appellant.

The Court held that the magistrate was not wrong to find that the words complained of fell within the definition of "hate speech" as defined in section 10 of PEPUDA. The question however was whether he was right to conclude that, as a result, it fell outside the scope of matters that had to be dealt with by the Labour Court in terms of the EEA.

The words complained of were racially discriminatory and there was therefore no reason why the respondent could not institute action against the appellant in the Labour Court. There did not seem to be a reason why he could not have instituted proceedings against both the employer and the appellant, claiming different relief against the two defendants in the same action.

It is anticipated that in future, similar cases may arise where the incorrect forum is approached by applicants. It is an issue that, as pointed out in the *Du Preez*³²⁵ case requires clarification.

5.31 Dudley v City of Cape Town [2008] 12 BLLR 1155 (LAC)

The question for determination by the Court was whether an applicant for employment who is a member of “the designated group” as defined in section 1 of the EEA, who complains that a designated employer to whom such applicant for employment had made an application for employment has failed to comply with its obligations relating to affirmative action under Chapter III of the EEA may institute court proceedings to enforce such obligations prior to the exhaustion of the monitoring and enforcement procedure provided for in Chapter V of the EEA. The obligations referred to in this regard are a designated employer’s obligations to prepare an employment equity plan and/or to adhere to employment equity principles and/or to comply with its other specific obligations in terms of Chapter III of the EEA.

Another question to be decided was whether or not a designated employer’s failure to accord such applicant for employment preference in the filling of a vacant position constituted unfair discrimination.

The applicant believed she should have been given preference in the appointment because she was black and a woman and that in failing to give her preference, the respondent had breached its obligation to implement affirmative action. Its failure to apply affirmative action in her favour amounted to discrimination on the basis of race and/or gender in breach of section 6 of the EEA.

³²⁵ *Du Preez v Minister of Justice supra*.

Furthermore, the applicant alleged that the respondent, both in respect of her appointment and generally, failed to prepare a proper employment equity plan and/or to adhere to employment equity principles and/or to comply with its obligations in terms of Chapter III of the EEA.

The Court held that if the drafters of the EEA had intended that anyone who believed that a designated employer was failing to comply with its obligations under Chapter III could approach the Labour Court, prior to the exhaustion of the enforcement procedure provided for in Chapter V of the EEA, they would have provided a dispute resolution procedure in Part A of Chapter III in the same way that they provided such a procedure in Chapter II. The drafters of the EEA decided that, for non-compliance with a designated employer's obligations under Chapter III, the enforcement procedure set out in Chapter V would have to be exhausted first, thereafter leading to an adjudication process by the Labour Court if it became necessary.

The Court concluded that it was not competent for anyone to institute proceedings in the Labour Court in respect of an alleged breach of any obligation under chapter III of the EEA, prior to the exhaustion of the enforcement procedure provided for in Chapter V of the EEA.

With regard to the question as to whether a designated employer's breach of its obligation either under its own selection or affirmative action policy or under the affirmative action provisions of Chapter III of the EEA in filling a vacant post, for example in failing to prefer a black woman candidate to a white male candidate, constituted unfair discrimination, the Court held that the appellant was in effect saying that the respondent's failure to prefer her ahead of white male candidates constituted unfair discrimination. The Court stated that the purpose of affirmative action was *inter alia* to achieve employment equity in the workplace. The fact that the employer's failure to give an employee preference in the filling of a position did not constitute unfair discrimination, did not mean that such employee would have no cause of action at all. If, for example, such employee's employer was obliged to give him or her preference in terms of a collective agreement, the failure to give him or her preference would constitute a breach of such agreement even though it would not constitute unfair discrimination.

The Court stressed that the judgement did not affect her claim that the first respondent unfairly discriminated against her on grounds of race or colour or gender in that the only reason why she was not appointed to the position in question was that she was black or was a woman or both. However, that was not an issue for it to decide. Nor was the Court required to decide whether an individual had an enforceable right to affirmative action.

This rambling and repetitive judgment was a disappointing one – not so much in what the Court said, but more in respect of what it did not say. It left one with a sense that the *Dudley* matter has not yet been put to bed and that it will remain in the domain of the Courts, with the Constitutional Court possibly having the last word. It was probably in anticipation of this that the Appeal Court remained silent on the critical issues the matter raised and which remain in the forefront of legal debate.

5.32 Chizunza v MTN (Pty) Ltd [2008] 10 BLLR 940 (LC)

In this matter, a Zimbabwean employee was dismissed after having been charged and found guilty in a properly constituted and conducted disciplinary enquiry on charges of dishonesty and fraud.

After his dismissal he referred a dispute to the CCMA and subsequently to the Labour Court. In his statement of claim he raised, for the very first time, the allegation that his dismissal was arbitrary and based on victimization.

After dealing with jurisdictional matters which were also material to the matter, the Court, in the interests of justice, dealt with applicant's spurious claims of having been indirectly discriminated against on the basis of an unlisted and arbitrary ground.

The Court went to great pains to explain in detail and with reference to relevant Constitutional Court decisions, including the *Harksen* test, the difference between differentiation and discrimination and the stages of the enquiry to determine unfair discrimination on an unlisted ground.

The Court however held, at the end of its lengthy exposition of the law and the application thereof to the very scanty evidence at its disposal, that the applicant had not at all placed any evidence before it to substantiate a claim that the dismissal was discriminatory or that a discriminatory motive had played any roll in the dismissal at all. It held that the charges of fraud against the applicant found a basis in the evidence before the Court and that having considered that aspect of the matter, there was no basis to find that the procedure and decision to dismiss the applicant was based on any xenophobic motive.

In this matter once more, the representative of the applicant appeared totally ignorant of the applicable legislation in respect of every issue the Court had to deal with. It is evident that the very lengthy judgment which emanated from the hearing was directly an attempt by the Court to play the role of educator of those who appear before it. In itself, that is very laudable and commendable, however, it is once again a demonstration of the fact complained about by Pillay J, as mentioned earlier, that practitioners should assist the Court in coming to a finding through the submission of helpful argument which would contribute to the pool of knowledge to be applied in matters.

5.33 Gordon v Department of Health: KwaZulu-Natal [2008] 11 BLLR 1023 (SCA)

This matter concerns an appeal to the Supreme Court of Appeal.

The appellant had applied for the post of Deputy Director of Administration of the Grey's Hospital. He was found to be the most suitable applicant for appointment, but the Provincial Public Service Commission directed the respondent to appoint a black candidate instead, the appellant then instituted proceedings, alleging that he had been discriminated against on the basis of his race.

The Court, in a very well reasoned and detailed judgment, determined the first question – whether the appointment of a black candidate contrary to the recommendation by the selection panel – was immunised from judicial scrutiny merely by the respondent's say so that it was an affirmative action appointment in furtherance of the constitutional goal of employment equity. The respondent had argued that it was not obligatory to have a programme or policy or plan in place by means of which to advance those imperatives.

The Court traversed the provisions of the LRA, the interim Constitution as well as the Public Service Act, 1994. It also quoted appropriate sections from the *Van Heerden*,³²⁶ *Bato Star Fishing*,³²⁷ *ESKOM v Hiemstra*,³²⁸ *Shabalala*,³²⁹ *Stoman*,³³⁰ *Motala*,³³¹ *PSA*,³³² *IMAWU v Greater Louis Trichardt Transitional Local Council*³³³ and *Zuma*³³⁴ judgments prior to arriving at its judgment and in setting out its reasoning.

The Court held that on the basis of all the authorities referred to, our Courts have consistently focused on the question as to whether policies, plans or programmes put up as measures designed to promote equality were indeed capable of achieving that object. He referred to Moseneke J's judgment in the *Van Heerden*³³⁵ where it was held that measures were directed at an envisaged future outcome. Such measures had to be reasonably capable of attaining the desired outcome. If the remedial measures were arbitrary, capricious or displayed naked preferences they could hardly be said to be designed to achieve the constitutionally authorized end.

The Court also referred to the *PSA*³³⁶ judgement in so far as it held that remedial measures had to be designed to achieve the adequate protection and advancement of disadvantaged groups which was entirely different to haphazard and random action.

The Court therefore held that it cannot be disputed those measures found to pass judicial scrutiny were found to have been rationally connected to their objective. Plans and policies were subjected to scrutiny to determine if they were rationally connected with the constitutional imperative. Random action was not found capable of achieving the objective. Properly formulated plans, the Court stated, go a long way to satisfying the requirement of rationality and provide a basis upon which they could be measured.

³²⁶ *Minister of Finance v Van Heerden supra*.

³²⁷ *Bato Star Fishing(Pty) Ltd v Minister of Environmental Affairs and Tourism supra*.

³²⁸ *Hiemstra v City of Cape Town supra*.

³²⁹ *Shabalala v Attorney-Genera, Transvaal* 1996 (1) SA 725 (CC).

³³⁰ *Stoman v Minister of Safety and Security supra*.

³³¹ *Motala v University of Kwa-Zulu Natal supra*.

³³² *PSA v Minister of Justice supra*.

³³³ *IMAWU v Greater Louis TrichardtLocal Council supra*.

³³⁴ *State v Zuma* 1995 (4) BCLR 401 (CC).

³³⁵ *Minister of Finance v Van Heerden supra*.

³³⁶ *PSA v Minister of Justice supra*.

In so far as the merits of the matter were concerned, the court held that the appellant had been the victim of unfair discrimination in that the successful candidate had been appointed solely on the basis of his race without any policy or overarching plan of affirmative action in place and despite the recommendation of the selection panel.

The Court held that suitability had to be the criterion in appointment.

The appellant had shown that the failure to appoint him was inherently arbitrary and amounted to unfair discrimination.

CHAPTER 6

CONCLUSION

The *Harksen*³³⁷ judgment represented an attempt by the Constitutional Court to lay down principles, in the format of a comprehensive test, which were viewed as consistent with the overall purpose of the equality provision contained in the Constitution, against a backdrop of all the pervasive values of freedom, dignity and equality – values which cement the foundations of our Constitution and our nation. The consideration and application of the value laden test to matters where breaches of the equality clause are alleged, it was hoped, would guide judges and the broader community, in a structured and systematic manner, to evaluate, in each individual context, such disputes against relevant factors.

This was essential at the time as the concept of substantive equality was a notion which, it seems, was generally not familiar to our judges in the Eighties. That era, as shown through the case law, dealt with formal equality and a mere balancing of the scales between disputing employers and employees. There was no application of the notions of substantive equality or even of indirect discrimination. Furthermore, the Constitutional fabric required teasing out after the dawn of the new democracy in order that the provisions could be consistently applied.

*Harksen*³³⁸ is certainly still regarded as the authoritative guideline in so far as unfair discrimination matters are concerned. However, it is apparent that not all judges and practitioners actually apply the test in circumstances where it would have provided the ideal framework for analysis of the issues in dispute – a case in point was *Langemaat*³³⁹.. In many cases, where it does appear, it is used inappropriately, out of sequence or merely just referred to in passing and then not touched upon again. The only conclusion to draw from this is that practitioners and some judges find it too tedious and drawn out to apply or that they are simply unable to apply it due to its complexity and value-laden approach, requiring an often complex untangling of the

³³⁷ *Harksen v Lane NO supra.*

³³⁸ *Harksen v Lane NO supra.*

³³⁹ *Langemaat v Minister of Safety and Security supra.*

positions of the parties and an analysis of context which might not be readily apparent from the evidence led.

Given the critical role our courts have to fulfil in respect of transformative adjudication, the application of a test such as *Harksen*³⁴⁰ provides the ideal opportunity for our judges in their judgments to make relevant to ordinary people the very Constitutional values our nation holds dear and to show how they are interpreted and then applied to their lives. The *Harksen*³⁴¹ test facilitates such analysis and reflection, providing a backdrop of critical facets of the right to equality which can only enrich and deepen the quality of judgments relating to unfair discrimination matters structured and dealt with in accordance therewith.

It is however to be expected in a system such as ours, where lay persons have the right to appear on behalf of parties in certain circumstances. Clearly, they could not be expected to deal with their matters on that basis. The absence in many matters of representatives who are even aware of and familiar with e.g. the *Harksen*³⁴² test, is a matter alluded to by Judge Pillay, who remarked extremely aptly, that practitioners in their submissions have a duty to assist the Courts by means of well-researched and presented argument. It is clear from the reported cases that when certain practitioners appear, the quality of the ensuing judgment is at a much higher level than if the parties are not well represented. Where skilled practitioners have appeared in discrimination matters, the judgments have more normally referred to *Harksen*³⁴³ and other relevant authorities. However, there are exceptions. In the *Chizunza*³⁴⁴ matter – a case where the applicant's representative was clearly a lay person, the judge took the trouble to draft a very extensive judgment, explaining in great detail how he had arrived at his decision, together with explanations of all the applicable principles and relevant case law, including the *Harksen*³⁴⁵ test.

³⁴⁰ *Harksen v Lane NO supra.*

³⁴¹ *Harksen v Lane NO supra.*

³⁴² *Harksen v Lane NO supra.*

³⁴³ *Harksen v Lane NO supra.*

³⁴⁴ *Chizunza v MTN (Pty) Ltd supra.*

³⁴⁵ *Harksen v Lane NO supra.*

The test is of course not unproblematic. The large number of factors to take into account renders it vulnerable to criticism as being over inclusive and imprecise, However, it undoubtedly, through its application helps the avoidance of pitfalls.

It appears therefore that despite the fact that in very many judgments, the *Harksen*³⁴⁶ test is not applied or even mentioned, it still remains the authority and is utilized by Courts where the judge and / or practitioners appear to be more intent on applying the law to the facts rather than comparing versions to arrive at a decision.

As has been shown through the cases traversed, the questions of whether equality can and should be linked to concepts such as dignity, vulnerability and disadvantage, as well as the weight to be attached to such notions in arriving at a decision, are problematic. However, as the Constitutional Court has stated on many occasions, these issues will be clarified and crystalized through case by case analysis over a period of time. It is not possible, in a new and unique democracy such as ours, within a few years to come up with a clearly conceptualized statement of what constitutes the right to equality. Cases will continue to grapple with the content, depth and boundaries of the right through the passage of time.

The development of such a conceptualized “statement” has also not been facilitated by persistent problems relating to the availability and quality of evidence produced by parties in Court, by the relative inexperience of many laypersons who have the right to appear but who do not have the requisite skills or abilities to contribute meaningfully to a developing jurisprudence as remarked by Pillay J.

In so far as the subject matter of disputes is concerned, some issues, from a survey of the cases, will continue to remain on the forefront of legal debate and will continue to bedevil clarity when attempting to dispense justice in unfair discrimination matters.

The first issue relates to whether an individual employee has a right to affirmative action. Despite the judgment of the Supreme Court of Appeal, it is submitted that *Dudley*³⁴⁷ is not dead.

³⁴⁶ *Harksen v Lane NO supra.*

³⁴⁷ *Dudley v City of Cape Town supra.*

In South Africa, it appears, matters dealing with indirect discrimination will be very difficult to deal with due to a lack of precedent, general unavailability of statistics to employees who have the *onus* in such matters to prove that there is differentiation and that the differentiation amounts to indirect discrimination. The *Kadiaka*³⁴⁸ and *Harmse*³⁴⁹ cases demonstrate that all too readily. Sometimes, employers have access to statistics, skills, specialists and other sources of evidence which applicants simply cannot match in order to prove a claim of indirect discrimination. Again, the Courts will be in the middle of that foray.

The general lack of expertise concerning equality and discrimination matters have often resulted in parties arriving at Court with absolutely no basis for a claim at all. The fact that they managed to get into Court reflects that at the level of institutions such as the CCMA, there is also a lack of experience and knowledge about such disputes and parties are simply “processed” in order rather to present their facts to the Court. The *Alexandre*³⁵⁰, *Stojce*³⁵¹ and *Dlamini*³⁵² cases are examples of the problem.

In so far as affirmative action is concerned, it is increasingly the case that employers have reached their representivity targets, but nevertheless persist in applying policies to advance previously disadvantaged employees, at the expense of other applicants. It is submitted that in especially the Public Service sector, these situations will become more prevalent.

Despite the recent *Gordon*³⁵³ decision, it is submitted that the rationality and efficiency considerations will still persistently bedevil us, together with uncertainty as to the exact parameters of the meaning of “not wholly or totally unsuitable” as opposed to “suitable.” Until we have a definitive judgment from the Constitutional Court, incidents of “naked” preference and absolute barriers at the expense of efficiency will not taper off. It is submitted that such a definitive judgment is desperately needed as the implications of jettisoning efficiency are all too plainly to

³⁴⁸ *Kadiaka v ABI supra*.

³⁴⁹ *Harmse v City of Cape Town supra*.

³⁵⁰ *Alexandre v Provincial Admin of the Western Cape Department of Health supra*.

³⁵¹ *Stojce v University of KZN supra*.

³⁵² *Dlamini v Green Four Security supra*.

³⁵³ *Gordon v Department of Health: Kwa-Zulu Natal supra*.

be seen in the lack of service delivery – an issue which threatens the very basis of our democracy.

Despite the findings in *Hoffmann*³⁵⁴ (concerning HIV positive cabin attendants) and the *IMATU*³⁵⁵ cases concerning diabetics in the Fire Service, incidents of “blanket bans” will increasingly be brought to the Courts, living as we do in a society where, as Sachs J put it, we are still deeply suspect of any disabled group simply because they are unlike us. The Courts have, in this regard, a major role to play in helping our society to transform itself.

Despite its seemingly slow and hesitant development, our jurisprudence on the right to equality and unfair discrimination has certainly made its mark in the last decade.

³⁵⁴ *Hoffmann v SAA supra.*

³⁵⁵ *IMATU v City of Cape Town supra.*

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