



Has the *LM and Others v Government of the Republic of Namibia* case closed the door the on the claim of unfair discrimination by HIV positive women alleging to have been coerced or forced into being sterilised because of their HIV status?: A critical analysis of a possibility of a class action or a public interest action on behalf of South African women living with HIV who have been sterilised without their informed consent.

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DECLARATION

I, Lindiwe Rosetta Khumalo, hereby declare that this dissertation is my own original work unless specifically indicated otherwise in this text, and has not to my knowledge been submitted to any other University in full or partial fulfilment of the requirement of any other degree or qualification. All the information taken from the work of others has been acknowledged.

Signed at Pietermaritzburg on this day of February 2019.

Signature

L R Khumalo

DEDICATION

I dedicate this dissertation to my late parents, for your love and belief in my abilities and making sure that I went to school; I will forever be grateful to you. Although you never lived to see my progress and attend my graduations, I know you are looking down on me. I hope you are proud of the woman I have become over the years. More especially, to my late son, Liam Aphiwe Zibusiso, you have been an inspiration behind the achievement of this dissertation and I hope you are proud of mommy. Though I dearly miss you every day, I found peace in knowing that you are in a better place. I will always love you.

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ACRONYMS

ACHPRs	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
BoRs	Bill of Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CGE	Commission for Gender Equality
CHR	Commission on Human Rights
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Commission on Human Rights
ICCPRs	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCRs	International Convention on Economic, Social and Cultural Rights
ICW	International Community of Women Living with HIV/AIDS
MAPUTO PROTOCOL	Protocol to the ACHPR on the Rights of Women in Africa
NCFPP	National Contraception and Fertility Planning Policy and Service Delivery Guidelines
NSP	South African National Strategic Plan on HIV/AIDS
OATF	Oliver and Adelaide Tambo Foundation

PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PLWHIV	People Living with HIV
POWA	People Opposed to Women Abuse
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration of Human Rights

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Chapter One

Introduction

1.1 Background of the research topic

The population of South Africa is approximately 56,52 million people and presently, over 51% (28, 9 million) of the population are women.¹ Currently, South Africa experiences one of the largest Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS) epidemics² in the world. The overall HIV prevalence is estimated at a rate of 12.6% within the population of South Africa.³ According to a South African statistical release, in 2017, the total number of people living with HIV increased to 7,06 million compared to 4,94 million in 2002.⁴ Previous surveys on national HIV prevalence in South Africa have shown that the HIV epidemic is inordinately dispersed by age, sex, race, area, class and province.⁵ HIV affects all race groups but HIV prevalence is highest among black Africans as compared to other race groups.⁶

Furthermore, substantial differences in HIV prevalence exist between people who are living in urban and rural areas.⁷ People residing in the informal urban areas have a considerably higher HIV prevalence rate of 19.9%, compared to the rate of 13.4% in the informal rural areas in 2012.⁸ Disparities in HIV prevalence are also evident by province, with KwaZulu-Natal continuing to lead South Africa in HIV prevalence with a rate of 20.5% in 2005,⁹ which dramatically increased to 30.1% in 2012.¹⁰ The Western Cape has the lowest HIV prevalence

¹ Statistics South Africa 'Statistical release: Mid-year population 2017', available at <http://www.statssa.gov.za/publications/P0302/P03022017.pdf>, accessed on 30 December 2017.

² J Harries et al 'Policy maker and health care provider perspectives on reproductive decision-making amongst HIV-infected individuals in South Africa' (2007) 7 *BMC Public Health* 282.

³ Statistics South Africa 'Statistical release: Mid-year population 2017', available at <http://www.statssa.gov.za/publications/P0302/P03022017.pdf>, accessed on 30 December 2017.

⁴ Ibid.

⁵ Ibid.

⁶ O Shisana et al 'South African National HIV Prevalence, Incidence and Behaviour Survey 2012' (2014) 2 available at <http://www.hsrc.ac.za/uploads/pageContent/4565/SABSSM%20IV%20LEO%20final.pdf> accessed on 28 March 2016.

⁷ Ibid.

⁸ So far, this is most important study that has been done on HIV prevalence and it is for this reason that that the year 2012 is referred to. Shisana et al *ibid*.

⁹ *Ibid*. This study looked at the prevalence for a seven-year period between 2005 and 2012, which is why 2005 is referred to.

¹⁰ South African National AIDS Council 'HIV & AIDS and STI Strategic Plan for South Africa 2007-2011', (n.d.) 45, available at http://data.unaids.org/pub/ExternalDocument/2007/20070604_sa_nsp_final_en.pdf, accessed on 28 March 2016.

at 5.0%.¹¹ A combination of factors characterises the constant growth of the epidemic namely, risky sexual behaviours, sexual inequalities, population demographics, social deficiencies, migration, high population density, unemployment and unbalanced communities.¹²

Globally, over three million women are HIV positive.¹³ In Sub-Saharan Africa, in 2013, women constituted almost 60% of people living with HIV.¹⁴ In the year 2011, in this region, about 92% of pregnant women were HIV positive.¹⁵ In South Africa, in 2017, at least 17% of women in their reproductive age, that is, 15-49 years, are living with HIV.¹⁶

1.2 The impact of HIV on women

Women belong to the most vulnerable and marginalised groups in our society, and during their adolescence stage, are deprived of many of the privileges that young men have; namely, mobility and autonomy in the sexual reproductive realm.¹⁷ Moreover, women of reproductive age in South Africa are at great jeopardy of being infected with HIV.¹⁸ This is resultant from gender-based violence, which makes it difficult for these women to protect themselves against sexual abuse and being infected with HIV.¹⁹ In addition to the gender-based violence that women face, women living with HIV experience particular challenges aligned with their HIV status.²⁰ Worldwide, the occurrence of higher HIV infections among women is due to socio-economic, cultural and physiological reasons.²¹ Poverty, underdevelopment and the low status

¹¹ Shisana et al 'South African National HIV Prevalence, Incidence and Behaviour Survey 2012' (2014) available at <http://www.hsrc.ac.za/uploads/pageContent/4565/SABSSM%20IV%20LEO%20final.pdf> accessed on 28 March 2016.

¹² South African National Aids Council 'South Africa's National Strategic Plan (NSP) for HIV, TB and STIs: 2017 – 2022', (n.d.), available at http://sanac.org.za/wp-content/uploads/2017/05/NSP_FullDocument_FINAL.pdf, accessed on 28 December 2017.

¹³ J Martin '10 things everyone should know about adolescent girls and HIV on World AIDS Day' *Coalition for Adolescent Girls* available at <https://coalitionforadolescentgirls.org/world-aids-day/> accessed on 29 April 2016.

¹⁴ RC Dellar, S Dlamini and Q Abdool Karim (2015) 'Adolescent girls and young women: populations for HIV epidemic control' (2015) 18(1) *Journal of the International AIDS Society* 65.

¹⁵ G Ramjee and B Daniels 'Women and HIV in Sub-Saharan Africa' (2013) 10(30) *AIDS Research and Therapy* 1.

¹⁶ Statistics South Africa 'Statistical release: Mid-year population 2017', available at <http://www.statssa.gov.za/publications/P0302/P03022017.pdf>, accessed on 30 December 2017.

¹⁷ A Harrison 'Young people and HIV/AIDS in South Africa: prevalence of infection, risk factors and social context' in S S Abdool Karim and Q Abdool Karim (eds) *HIV/AIDS in South Africa* 2nd ed (2010) 308.

¹⁸ AS Muula 'HIV Infection and AIDS among young women in South Africa' (2008) 49(3) *Croat Medical Journal* 423; Harrison *ibid*; See also D Cooper 'In pursuit of social development goals and HIV-infected women's reproductive rights – South Africa as a case study' (2008) 22(75) *Agenda* 6-7.

¹⁹ Martin '10 things everyone should know about adolescent girls and HIV on World AIDS Day' *Coalition for Adolescent Girls* available at <https://coalitionforadolescentgirls.org/world-aids-day/> accessed on 29 April 2016.

²⁰ Southern Africa Litigation Centre 'Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights' (2013) available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Dismantling-the-Gender-Gap_FINAL.pdf accessed on 15 March 2016.

²¹ A Ramkissoon et al 'Options for HIV-positive women' (2006) 1 *South African Health Review* 316.

of women in our society are also core features of the epidemic in South Africa.²² A lack of knowledge of how to protect oneself from infection is one of the contributing factors to the high rate of HIV prevalence among these women in developing countries.²³ The Joint United Nations Programme on HIV/AIDS (UNAIDS) has found that in the sub-Saharan region, only 26% of adolescent girls have any actual knowledge about HIV transmission.²⁴ Harrison contends that in South Africa, gender roles and customary practices are also causes of the prominent gap between HIV awareness and social practices that influence young women's incongruent risk of HIV.²⁵

According to Essack and Strode,²⁶ the high HIV prevalence rates among women of reproductive age have implications for the public healthcare system.²⁷ Most women only come to know of their positive HIV status when they visit clinics or hospitals for antenatal check-ups.²⁸ In terms of the existing studies conducted, most women living with HIV continue to have a desire to bear children, despite the knowledge of their HIV positive status.²⁹ HIV can be vertically transmitted from mother to child and it may adversely affect the fertility of HIV positive women.³⁰

Globally, since the late 1990s, the prevention of mother-to-child transmission (PMTCT) of HIV has been an imperative.³¹ PMTCT, also known as the vertical transmission of HIV, refers to the transmission of the virus from the infected mother to a child during pregnancy, labour

²² 'South Africa's National Strategic Plan (NSP) for HIV, TB and STIs: 2017 – 2022' (n.d.), available at http://sanac.org.za/wp-content/uploads/2017/05/NSP_FullDocument_FINAL.pdf, accessed on 28 March 2016, 20.

²³ Ramkisson et al 'Options for HIV-positive women' (2006) 1 *South African Health Review* 316.

²⁴ Martin '10 things everyone should know about adolescent girls and HIV on World AIDS Day' *Coalition for Adolescent Girls* available at <https://coalitionforadolescentgirls.org/world-aids-day/> accessed on 29 April 2016.

²⁵ Harrison 'Young People and HIV/AIDS in South Africa: prevalence of infection, risk factors and social context' in S S Abdool Karim and Q Abdool Karim (eds) *HIV/AIDS in South Africa* 2nd ed (2010) 308.

²⁶ Z Essack and A Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations of HIV-positive women in South Africa' (2012) 26(2) *Agenda* 24.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Harries et al 'Policy maker and health care provider perspectives on reproductive decision-making amongst HIV-infected individuals in South Africa' (2007) 7 *BMC Public Health* 2.

³⁰ Essack and Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations of HIV-positive women in South Africa' (2012) 26(2) *Agenda* 25.

³¹ S Crede et al 'Factors impacting knowledge and use of long acting and permanent contraceptive methods by postpartum HIV positive and negative women in Cape Town, South Africa: a cross-sectional study' (2012) 12 (197) *BMC Public Health* 198.

and delivery or breastfeeding. Approximately 600 000 children are infected with HIV each year.³²

HIV positive women have to find the best ways in which to have children and reduce the transmission of the virus to their unborn babies during pregnancy.³³ Through PMTCT and antiretroviral therapy programmes, the chance of HIV positive women transmitting the virus is negligible, and women living with HIV can live long productive lives.³⁴ The PMTCT was presented as a solution to limit mother to child transmission and is still implemented in many countries in Africa. However, these countries still face difficulties in making the programme more accessible.³⁵

1.3 Description of the problem

Over the years, the HIV epidemic has continued to be both a health catastrophe and a source of human rights violations in South Africa and around the world.³⁶ People living with HIV (PLWHIV) experience various multifaceted challenges associated with stigma and discrimination.³⁷ These include discrimination in the employment sector³⁸ and the life insurance industry.³⁹ More recently, another form of discrimination whereby women living with HIV are being sterilised either forcibly or coercively, has made its presence felt.⁴⁰ Healthcare personnel have been defending this practice, claiming it to be necessary for the sake of public health.⁴¹ Public health interests must conform with human rights, so that fewer people will be infected with HIV, and those already infected, and their families, will be better able to

³² FAU Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM thesis, University of Mauritius, 2009) 5.

³³ Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf accessed on 15 March 2016.

³⁴ Essack and Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations of HIV-positive women in South Africa' (2012) 26(2) *Agenda* 26.

³⁵ Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM thesis, University of Mauritius, 2009) 6.

³⁶ BG Maughan-Brown 'Attitudes towards people with HIV/AIDS: Stigma and its determinants amongst young adults in Cape Town, South Africa' (2006) 37(2) *South African Review of Sociology* 166.

³⁷ N Ntlama 'The challenge for democracy: Doing justice for persons living with HIV/AIDS' (2004) 76, available at http://english.aifo.it/learning_materials/african_dreams_2004_essays.pdf, accessed on 10 January 2018.

³⁸ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), (2000) 21 ILJ 2357 (CC).

³⁹ Ntlama 'The challenge for democracy: Doing justice for persons living with HIV/AIDS' (2004) 76 available at http://english.aifo.it/learning_materials/african_dreams_2004_essays.pdf, accessed on 10 January 2018.

⁴⁰ P Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 2.

⁴¹ *Ibid.*

cope with HIV/AIDS when human rights are realised and protected, rather than when violated.⁴²

With the help of various organisations, women who have been victims of forced and coerced sterilisation have taken the litigation route for the courts to pronounce on the violation of their human rights through such sterilisation.⁴³ This has taken place in countries such as Slovakia,⁴⁴ Hungary,⁴⁵ Peru,⁴⁶ Chile,⁴⁷ Kenya,⁴⁸ South Africa⁴⁹ and Namibia.⁵⁰ Some of the cases are still underway in the courts,⁵¹ some have been finalised,⁵² and infringements of women's rights have been found by the courts in two jurisdictions.⁵³ However, the courts have failed to find that forced and coerced sterilisation practices violate the women's equality right and the right to be free from discrimination.⁵⁴

The decision of *LM and Others v Government of the Republic of Namibia*,⁵⁵ is the landmark case that deals with the forced sterilisation of women living with HIV in the sub-Saharan region. In this case, three Namibian women who were subjected to bilateral tubal ligation (BTL) without their informed consent in two public hospitals during the period of 2005 and 2007, claimed damages based on the alleged unlawful conduct.⁵⁶ The women also claimed that the sterilisations performed, formed part of an unlawful discriminatory practice against them on the basis of their HIV status and was in violation of their human rights as enshrined in the

⁴² UNAIDS *HIV/AIDS and Human Rights International Guideline: Third International Consultation on HIV/AIDS and Human Rights* (2003) available at http://data.unaids.org/publications/irc-pub02/jc905-guideline6_en.pdf, accessed on 10 January 2018.

⁴³ Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 2.

⁴⁴ *VC v Slovakia* (application no. 18968/07) 8 November 2011; *NB v Slovakia* (Application no. 29518/10) 12 June 2012 and *IG and Others v Slovakia* (Application no. 15966/04) 13 November 2012.

⁴⁵ *AS v Hungary* Communication No. 4/2004.

⁴⁶ See *Chavez v Peru* Report No. 66/00.

⁴⁷ *FS v Chile* Report No. 52/14.

⁴⁸ *SWK and Others v Médecins Sans Frontières and Others* Petition 605 of 2014 (High Court of Kenya, Nairobi) and *LAW and Others v Marura Maternity Nursing Home and Others* Petition 606 of 2014 (High Court of Kenya, Nairobi).

⁴⁹ *Isaac v Pandie* 2004 (4) SA 31 (T) and *Sithole v MEC for Health and Social Development and Others* (unreported case no. 1944/2012 Gauteng Local Division, Johannesburg).

⁵⁰ *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012).

⁵¹ *SWK and Others v Médecins Sans Frontières and Others* Petition 605 of 2014 (High Court of Kenya, Nairobi) and *LAW and Others v Marura Maternity Nursing Home and Others* Petition 606 of 2014 (High Court of Kenya, Nairobi).

⁵² *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012).

⁵³ Slovakia (European Court of Human Rights) and Namibia (Supreme Court of Appeal).

⁵⁴ Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 2.

⁵⁵ *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012).

⁵⁶ *Government of the Republic of Namibia v LM and Others* [2014] NASC 19 (3 November 2014) para 1.

Republic of Namibia Constitution⁵⁷ and in terms of common law.⁵⁸ The High Court found that the burden was on the State to prove, on a balance of probabilities, that the plaintiffs gave informed consent for the sterilisations, which the State failed to do, and therefore, the claim succeeded.⁵⁹

In respect to the claim of discrimination, the court found that the plaintiffs had an onus to prove on a balance of probabilities that they were unlawfully discriminated against, based on their HIV positive status.⁶⁰ The court further found that the plaintiffs failed to produce credible evidence to convince the court that the sterilisation procedures had been done on them merely because they were living with HIV and, therefore, the claim was dismissed.⁶¹ No further reasons were given for the dismissal of this claim.⁶² Moreover, the Supreme Court of Namibia upheld the High Court decision and referred the case to the court a quo to determine the quantum of damages.⁶³

It is as a result of the above decision that this dissertation seeks to question the evidentiary requirements that HIV positive women who have been sterilised either forcibly or coercively must prove, in order for the courts to be satisfied, that this practice is a form of discrimination against them based on their HIV positive status. The argument is that it is crucial that the courts recognise and find that forced and coerced sterilisation of the said group is discrimination. This is so because HIV positive women belong to a disadvantaged group and they need their human rights to be protected, and redress on the issue. Moreover, finding in their favour will bring transformation in our society and change the perceptions of people involved in discriminatory behaviours across a broader spectrum.⁶⁴ This will also help other people as well to realise that this is a serious violation of women's rights that must be addressed and investigated further in

⁵⁷ Articles 6, 7, 8 and 14 of the Namibian Constitution.

⁵⁸ *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012) para 6.

⁵⁹ *Ibid* para 71.

⁶⁰ *Ibid*.

⁶¹ *Ibid* paras 82-83.

⁶² C J Badul and A Strode 'LM and Others v Government of the Republic of Namibia: The first sub-Saharan case dealing with coerced sterilisations of HIV-positive women-Quo vadis' 2013 *African Human Rights Law Journal* 222.

⁶³ *Government of the Republic of Namibia v LM and Others* [2014] NASC 19 (3 November 2014) para 112.

⁶⁴ Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 8.

order to curb the problem. Generally, protecting human rights is vital in order to sustain the human dignity of PLWHIV and to keep operative, rights-based responses to HIV/AIDS.⁶⁵

Even though the majority of the court in the case of *VC v Slovakia*⁶⁶ dismissed the claim of the violation of article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms regarding discrimination, Judge Mijovic held to the contrary. In doing so, she observed that:

While I have no difficulty in sharing the majority's view that there have been violations of both Articles 3 and 8 of the Convention, to my regret, my opinion on the Article 14 complaint differs significantly from the conclusion reached by the majority. The Chamber decided that no separate examination of the complaint under Article 14 of the Convention was called for. To me, that complaint was the very essence of this case and should have been dealt with on its merits, with a finding of a violation of Article 14...I am compelled to disagree totally with the Chamber's finding and regret that the discrimination to which the applicant was clearly subjected is given scant attention in the judgment. Furthermore, ECRI expressed particular concern about reports indicating that Roma women had been, on an ongoing basis, subjected to sterilisation in some hospitals without their full and informed consent. To my mind, the applicant was "marked out" and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilizing her. In my view, that represents the strongest form of discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention.⁶⁷

1.3.1 An Overview of the allegations of forced or coerced sterilisation of HIV positive women

There have been allegations of forced and coerced sterilisation of HIV positive women globally and in South Africa.⁶⁸ The sub-Saharan Africa region is one of the most profoundly affected

⁶⁵ UNAIDS *HIV/AIDS and Human Rights International Guidelines: Third International Consultation on HIV/AIDS and Human Rights* (2003) available at http://data.unaids.org/publications/irc-pub02/jc905-guideline6_en.pdf, accessed on 10 January 2018.

⁶⁶ *VC v Slovakia* (application no. 18968/07) 8 November 2011.

⁶⁷ *Ibid* 44-47.

⁶⁸ LC McLaughlin 'The price of failure of informed consent law: Coercive sterilisations of HIV-positive women in South Africa' (2014) 32 *Law & Inequality* 69.

regions in the world.⁶⁹ Studies have been conducted in countries such as South Africa,⁷⁰ Namibia,⁷¹ Uganda,⁷² Kenya⁷³ as well as other countries like Chile,⁷⁴ on the nature of this practice. Forced sterilisation is a procedure whereby a person is sterilised without her knowledge or informed consent.⁷⁵ Coerced sterilisation takes place when misinformation, intimidation strategies, financial enticements or access to health services or employment are used to induce individuals into accepting the procedure.⁷⁶

The studies indicate that healthcare workers in healthcare facilities are the perpetrators of this HIV-related stigma and discrimination, thus violating the rights of the infected individuals.⁷⁷ For example, one HIV positive woman from Uganda who was sterilised in 2007 after becoming pregnant, recalls that when she went for a medical check-up:

“the doctor asked me why I was pregnant. I told him I want to have a third child. The doctor said: ‘you people living with HIV at times annoy us because you understand your situations but you come to disturb us.’ Then, I said to the doctor I am very sorry, I have a problem and cannot go anywhere else. The doctor said that they would begin to decide on our behalf.”⁷⁸

⁶⁹ Badul and Strode ‘LM and Others v Government of the Republic of Namibia: The first sub-Saharan case dealing with coerced sterilisations of HIV-positive women-Quo vadis’ 2013 *African Human Rights Law Journal* 223.

⁷⁰ A Strode, S Mthembu & Z Essack “‘She made up a choice for me’” 22 HIV-positive women’s experiences of involuntary sterilisation in two South African provinces’ (2012) 20(39) *Reproductive Health Matters* 1-9 and Essack and Strode “‘I feel like half a woman all the time’”: The impacts of coerced and forced sterilisations of HIV-positive women in South Africa’ (2012) 26(2) *Agenda* 24-34.

⁷¹ International Community of Women Living with HIV/AIDS ‘The forced and coerced sterilisation of HIV positive women in Namibia’ (2009) available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016.

⁷² International Community of Women Living with HIV ‘Eastern Africa, violation of sexual and reproductive health rights of women living with HIV in clinical and community settings in Uganda’ (2015) available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

⁷³ F Kasiva ‘Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya’ (2012) available at <http://kelinkkenya.org/wp-content/uploads/2010/10/Report-on-Robbed-Of-Choice-Forced-and-Coerced-Sterilisation-Experiences-of-Women-Living-with-HIV-in-Kenya.pdf>, accessed on 15 February 2016.

⁷⁴ Center for Reproductive Rights ‘Dignity denied: Violations of the rights of HIV-positive women in Chilean health facilities’ (2010) available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/chilereport_FINAL_singlepages.pdf, accessed on 15 February 2016.

⁷⁵ T Kendall and C Albert ‘Experiences of coercion to sterilize and forced sterilisation among women living with HIV in Latin America’ (2015) 18 *Journal of the International AIDS Society* 1.

⁷⁶ Ibid.

⁷⁷ Ibid 2.

⁷⁸ International Community of Women Living with HIV ‘Eastern Africa, violation of sexual and reproductive health rights of women living with HIV in clinical and community settings in Uganda’ (2015) 36, available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

In one of the Kenyan healthcare facilities, an HIV positive woman was sterilised as the hospital claimed that they had permission from her husband to sterilise her and she recalls the doctor telling her that:

“You people with the virus just disturb people. You will give birth to children and the way you have the virus, where will you take your children?”⁷⁹

It is contended that forced and coerced sterilisation of HIV positive women is gender related and a form of discrimination because of their HIV status.⁸⁰ The mere fact that there are only reports of coerced and/or forced sterilisation of HIV positive women (as opposed to men) suggests that these women face stigma and discrimination relating to their sex and gender, as no man living with HIV has been reported to have been sterilised.⁸¹ Studies have shown that there is a presence of negative attitudes by healthcare workers, and discriminatory remarks discourage women from accessing healthcare facilities.⁸² Some women felt as if the doctors were doing them a favour, and agreed to sterilisation out of fear and did not want to disappoint the doctor:⁸³

“the doctor was willing to help me, but he can only help me if I sign to sterilisation because he didn’t wish to see me in the hospital a year later with another request for abortion. I was sort of desperate, and I signed...to some degree I also felt that if I don’t sign I’d be disappointing this doctor, who has agreed to help me because others have refused” (Participant 15).⁸⁴

The forms of stigma and discrimination towards PLWHIV are generally seen as obstacles in the delivery of adequate healthcare, insufficient psychological and social support, and lack of proper medical treatment in South Africa.⁸⁵ The study findings of the Stigma Index reveal that 21% of the participants have experienced discrimination, 21% have been gossiped about, 15%

⁷⁹ Kasiva ‘Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya’ (2012) 10, available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016.

⁸⁰ Patel ‘Forced sterilisation of women as discrimination’ (2017) 38(15) *Public Health Reviews* 7.

⁸¹ Ibid.

⁸² S Gruskin, L Ferguson & J O’Malley ‘Ensuring sexual and reproductive health for people living with HIV: An overview of key human rights, policy and health systems issues’ (2007) 15(29) *Reproductive Health Matters* 6.

⁸³ Strode, Mthembu & Essack. “‘She made up a choice for me’” 22 HIV-positive women’s experiences of involuntary sterilisation in two South African provinces’ (2012) 20(39) *Reproductive Health Matters* 65.

⁸⁴ Ibid.

⁸⁵ South Africa National AIDS Council ‘The people living with HIV Stigma Index: South Africa 2014 summary report’ (2015) available at <http://www.stigmaindex.org/sites/default/files/reports/Summary-Booklet-on-Stigma-Index-Survey%20South%20Africa.pdf>, accessed on 24 February 2016.

verbally insulted and harassed, 10% excluded from social gatherings, 9% excluded from family activities and 8% have been physically harassed and/or threatened.⁸⁶ When the participants were asked to state the reasons for the overall HIV-related stigma and/or discrimination in the past year, 26% pointed out that it was their belief that people had no understanding of HIV transmission and were scared, while 18% specified that people were afraid of being infected with the virus.⁸⁷

In the studies that were conducted in South Africa,⁸⁸ Kenya⁸⁹ and Namibia,⁹⁰ participants reported that medical personnel sterilised them because of their HIV status and they were told that infected women must not have children. The following are examples from studies of the women's experiences:

“They just said a person with this disease is not allowed to have more children” (Participant 1).⁹¹

“They only told me that they will sterilize me because I was HIV-positive and I was never supposed to get another child” (Participant 19).⁹²

“The nurse came and picked my card and said ‘I can see in your file that you are HIV positive. You must have tubal ligation since HIV positive women are not supposed to give birth’” (Maureen).⁹³

“He (the doctor) said there was no need for me to continue having children since I was HIV positive” (Rebecca).⁹⁴

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Strode, Mthembu & Essack. “‘She made up a choice for me’” HIV-positive women's experiences of involuntary sterilisation in two South African provinces' (2012) 20(39) *Reproductive Health Matters* 1-9.

⁸⁹ Kasiva 'Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya' (2012) available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016

⁹⁰ International Community of Women Living with HIV/AIDS 'The forced and coerced sterilisation of HIV positive women in Namibia' (2009) available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016.

⁹¹ Strode, Mthembu & Essack “‘She made up a choice for me’” HIV-positive women's experiences of involuntary sterilisation in two South African provinces' (2012) 20(39) *Reproductive Health Matters* 3.

⁹² Ibid.

⁹³ Kasiva 'Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya' (2012) 6, available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016.

⁹⁴ Ibid 16.

“I asked the nurse why they were discriminating against me because of my HIV status, and she said ‘it is illegal for HIV positive women to have children’ (Nekesa).⁹⁵

“When I was groaning in pain, the doctor looked at my file and said to me, ‘woman you are still giving birth and you are HIV positive’?.”⁹⁶

“The hospital staff said to us you are not supposed to have more kids because there is no one supporting you. You cannot support yourself or your kids so it is best if you are sterilised” (Namibian woman living with HIV, 2008).⁹⁷

Some women reported that the healthcare workers presented the sterilisation procedure as an implied or expressed condition for obtaining medical assistance and benefits, including receiving milk for the prevention of vertical HIV transmission, caesarean section delivery and abortion.⁹⁸ The following are narratives by the women:

“I decided to consent for tubal ligation so that I could receive help for medicine and milk” (Aida)⁹⁹

“The nurse was very clear and told me that if sterilisation is not done then the baby would not get milk from the clinic. No tubal ligation, no milk.” (Nelly)¹⁰⁰

“I was admitted for a pregnancy and the doctor came to tell me I am HIV positive and I was confused and I took the poison (overdose. They say when we do this abortion we will also do BTL (bilateral tubal ligation). I say no I don’t want. If you don’t want it we cannot do abortion, I am stuck. Later, I agree to sign the form for operation – not my will.” (Namibian woman living with HIV, 2008).¹⁰¹

⁹⁵ Ibid 25.

⁹⁶ Ibid 2.

⁹⁷ International Community of Women Living with HIV/AIDS ‘The forced and coerced sterilisation of HIV positive women in Namibia’ (2009), available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016.

⁹⁸ Kendall and Albert ‘Experiences of coercion to sterilize and forced sterilisation among women living with HIV in Latin America’ (2015) 18 *Journal of the International AIDS Society* 4.

⁹⁹ Kasiva ‘Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya’ (2012) 22, available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016.

¹⁰⁰ Ibid 28.

¹⁰¹ International Community of Women Living with HIV/AIDS ‘The forced and coerced sterilisation of HIV positive women in Namibia’ (2009), available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016.

Another woman from Kenya said the doctor made her sign the consent form while in labour and recalled that:

“when they insisted on tubal ligation, I signed the documents so that they could attend to me and relieve me of the pain I was going through. I was not able to reach my husband as he had no phone”.¹⁰²

1.3.2 *LM and Others v The Government of Namibia*¹⁰³

i) Facts

The three plaintiffs instituted actions against the Namibian Government for damages alleging unlawful sterilisation performed on them by medical personnel without their informed consent.¹⁰⁴ The plaintiffs were all HIV positive women, and it was their allegation that coerced sterilisation was performed on them because of their HIV positive status.¹⁰⁵ The first plaintiff was LM, who was 26 years old when sterilisation was performed on her.¹⁰⁶ On 13 June 2005, LM delivered her third child by way of an emergency caesarean section at the Oshakati State Hospital.¹⁰⁷ She testified that prior to the operation, she was told by the nurse that she would be sterilised as all HIV positive women undergo the same procedure. While on a stretcher to the theatre, LM was given forms by the nurse, which she signed giving consent to the procedures.¹⁰⁸ She signed one document for the procedures, caesarean section and bilateral tubal ligation but she had no idea what these procedures meant.¹⁰⁹ LM was in labour and in severe pain when she signed for the operation. She did not ask any questions about the procedures as she felt compelled to go through with them. Neither did the medical personnel explain to her nor did the medical records show the type of information that was given to her before her consent was taken.¹¹⁰

¹⁰² Kasiva ‘Robbed of choice: Forced and coerced sterilisation experiences of women living with HIV in Kenya’ (2012) 2, available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016.

¹⁰³ *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012).

¹⁰⁴ *Ibid* para 1.

¹⁰⁵ *Ibid* para 2.

¹⁰⁶ *Ibid* para 33.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid*.

The second plaintiff was MI, who gave birth on 9 December 2007 by caesarean section at Katutura State Hospital, Windhoek and was sterilised at the same time.¹¹¹ MI was advised by the doctor that because of her HIV status and having given birth to her second child through caesarean section, she will be giving birth by operation.¹¹² She was also informed that she will be unable to give birth in future and was sterilised without counselling; she was also not given information about her being sterilised.¹¹³ Further, MI was told that if she did not agree to the sterilisation she would not be assisted with the birth of her child.¹¹⁴ She was then given documents to sign, both for the caesarean and sterilisation, and she testified that she did not understand what BTL in the second form meant and the nurse did not explain it to her.¹¹⁵ MI attested that she was made to believe that there was a rule in place, which said that HIV positive women must be sterilised.¹¹⁶

NH was the third plaintiff. She was unmarried, 46 years old and had seven children.¹¹⁷ On 13 October 2005, she assented to a caesarean section together with a bilateral tubal ligation.¹¹⁸ She signed a standard consent form to a caesarean procedure and a separate consent form assenting to the sterilisation.¹¹⁹ NH signed both consent forms while in prolonged labour and on a stretcher awaiting to go into theatre.¹²⁰ NH's hospital records indicated that she was booked for an elective caesarean because of her advanced age, her HIV status, the number of preceding deliveries and her long labour.¹²¹ The consent form comprised of a signed pro forma statement from the surgeon, which confirmed that he had clarified the process and its associated repercussions to NH.¹²²

(ii) Issues before the court

Both the High Court and Appeal Court had to determine first, whether the medical practitioners in the Government hospitals sterilised the plaintiffs without their informed

¹¹¹ *LM and Others v Government of the Republic of Namibia* para 40.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *LM and Others v Government of the Republic of Namibia* para 47.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* para 48.

¹²¹ *Ibid* para 51.

¹²² *Ibid* para 53.

consent. Second, whether the plaintiffs' sterilisations constituted a form of unlawful discriminatory practice against the plaintiffs because of their HIV positive status.¹²³

(iii) The High Court judgment

The first decision on the matter was made by the Namibian High Court. The court first dealt with the issue of informed consent. In determining whether informed consent was obtained from the plaintiffs before the procedures were performed, the court held that before assessing that, it had to establish whether adequate information was provided to the plaintiffs to enable them to make an informed decision.¹²⁴ In reaching its decision, the court examined the experts' evidence and the plaintiffs' testimonies. Then, the court held that the Government had failed to discharge the burden of proof placed on them to prove on a balance of probabilities that informed consent was given by the plaintiffs.¹²⁵ Therefore, the court found in favour of the plaintiffs in respect of the first claim.

In regards to the second claim that the sterilisations of the plaintiffs were as a result of unlawful discrimination against them because they were HIV positive, the court found that the onus was on the plaintiffs to prove such discrimination on a balance of probabilities.¹²⁶ Accordingly, the claim was dismissed on the grounds that there was 'no credible and substantial evidence' that sterilisations were performed on the plaintiffs simply because they were HIV positive.¹²⁷ The court did not provide further reasons as to the dismissal of the claim.

(iv) The Supreme Court judgment

Before examining the evidence led by the parties in the High Court proceedings, the Supreme Court recognised the relationship between informed consent and other rights enshrined in the Namibian Constitution, including the rights to dignity,¹²⁸ to physical integrity,¹²⁹ and to found a family.¹³⁰ The Court then held that, for women, deciding

¹²³ Badul and Strode '*LM and Others v Government of the Republic of Namibia*: The first sub-Saharan African case dealing with coerced sterilisations of HIV-positive women – *Quo vadis*' (2013) 13 *African Human Rights Law Journal* 220.

¹²⁴ *LM and others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012) para 16.

¹²⁵ *Ibid* paras 69, 71 and 77.

¹²⁶ *Ibid* para 82.

¹²⁷ *Ibid* para 83.

¹²⁸ Article 8(1) of the Namibian Constitution.

¹²⁹ Article 8(2)(b) of the Namibian Constitution.

¹³⁰ Article 14(1) of the Namibian Constitution.

whether to get sterilised or not is more of a personal decision than a mere written consent, and must be made freely and voluntarily.¹³¹

In relation to the first claim, the Court came to the same conclusion as the High Court that the appellants had failed to show on a balance of probabilities that the respondents had given informed consent for sterilisations.¹³² In reaching its decision, the Court relied on the absence of the hospital records indicating that medical practitioners had explained the nature and risks of the medical procedures before they were performed on the respondents. Therefore, no informed consent was obtained and the appeal was dismissed.¹³³

In relation to the claim of discrimination, the Supreme Court concurred with the observation made by the court a quo that found that there was no credible evidence presented by the women in support of that claim.¹³⁴ The Court utterly rejected the submission made by the respondents that an organised policy was put in place, to sterilise women living with HIV who were of childbearing age.¹³⁵

1.4 International legal framework

Generally, at a global level, human rights rules are set out in the Universal Declaration of Human Rights (UDHR). Most importantly, the UDHR advocates for fundamental principles such as non-discriminatory equality¹³⁶ and access to justice.¹³⁷ These human rights norms have been adopted in international treaties, including the International Covenant on Civil and Political Rights (ICCPR);¹³⁸ the Convention on the Elimination of Discrimination Against Women (CEDAW);¹³⁹ the Convention against Torture and Other Cruel, Inhuman or Degrading

¹³¹ *Government of the Republic of Namibia v LM and others* [2014] NASC 19 (3 November 2014) para 2.

¹³² *Ibid* para 107.

¹³³ *Ibid* para 108.

¹³⁴ *Ibid* para 2.

¹³⁵ *Ibid*.

¹³⁶ Articles 1, 2, 6 and 7 of the UDHR.

¹³⁷ Article 8 of the UDHR.

¹³⁸ The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession on 16 December 1966 and came into operation in 23 March 1976. South Africa signed the Covenant on 3 October 1994, and ratified on 10 December 1998 and came into force on 10 March 1999.

¹³⁹ The Convention on the Elimination of Discrimination Against Women was adopted on 18 December 1979, came into operation on 3 September 1981, South Africa signed the Convention on 29 January 1993 and ratified it on 15 December 1995.

Treatment or Punishment (CAT);¹⁴⁰ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁴¹ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁴² Like most states in Southern Africa that have dualist legal systems, South Africa has ratified the international treaties listed above. These are fundamental sources of international law and become binding on the State upon ratification.¹⁴³

The South African Constitution, under section 39(1), provides that the courts must take into account international law and may take into consideration foreign law when interpreting the Bill of Rights (BoRs).¹⁴⁴ Internationally, women's reproductive rights and equality rights are protected and provided for in terms of CEDAW and ICCPR.¹⁴⁵ An active response entails the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of every person, consistent with current international human rights values.¹⁴⁶

The UN Human Rights Committee which ensures compliance with the ICCPR, has indicated that a basic principle relating to the protection of human rights is formed by equality, non-discriminatory practices and protection of these rights by the law.¹⁴⁷ The Committee has stated that sterilising women without their consent is a violation of the right to be free from torture and other inhumane and degrading treatment.¹⁴⁸ In addition, Article 3 of the ICCPR provides for state parties to the Covenant to make sure that men and women have equal rights and equal

¹⁴⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984 and came into effect on 26 June 1987; South Africa signed the Convention on 29 January 1993 and ratified it on 10 December 1998.

¹⁴¹ The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature on 21 December 1965 and came into force on 4 January 1969, South Africa signed the Convention on 3 October 1994 and ratified it on 10 December 1998.

¹⁴² The International Covenant on Economic, Social, and Cultural Rights was adopted on 16 December 1966 and came into effect on 3 January 1976; South Africa signed the Covenant on 3 October 1994 and ratified it on 12 January 2015.

¹⁴³ Southern Africa Litigation Centre *Dismantling the gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

¹⁴⁴ Section 39(b) and (c) of the South African Constitution, 1996.

¹⁴⁵ Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

¹⁴⁶ UNAIDS 'HIV/AIDS and human rights international guidelines: Third International Consultation on HIV/AIDS and Human Rights' (2003), available at http://data.unaids.org/publications/irc-pub02/ic905-guideline6_en.pdf, accessed on 10 January 2018.

¹⁴⁷ E Durojaye 'Realising equality in access to HIV treatment for vulnerable and marginalised groups in Africa' (2012) 15(1) *PER* 217.

¹⁴⁸ C Zampas and A Lamačková 'Forced and coerced sterilisation of women in Europe' (2011) 114 *International Journal of Gynecology & Obstetrics* 163-4.

enjoyment of all political and civil rights as set out in the Covenant.¹⁴⁹ Article 2(1) of the ICCPR guarantees freedom from discrimination in respect of the listed prohibited grounds of discrimination.¹⁵⁰

The Committee on ESCR has found that the right to health comprises of the provision of healthcare services to everyone in a non-discriminatory way.¹⁵¹ The International Community of Women Living with HIV/AIDS (ICW) has recognised forced and coerced sterilisation of women living with HIV as a serious infringement of the fundamental human rights to bodily integrity, equality and informed consent.¹⁵² This is also a persistent practice of violence against women and a measure of a systemic technique of violation of sexual and reproductive rights of women living with HIV around the world.¹⁵³ Articles 2(2) and 3 of the ICESCR must be read together with Articles 2(1) and 3 of the ICCPR.¹⁵⁴

CEDAW sets out relevant law for the protection of women's rights and guaranteeing their right to equality and non-discrimination.¹⁵⁵ A fundamental principle of non-discrimination is found in Article 2 of CEDAW.¹⁵⁶ Furthermore, Article 12(1) of CEDAW solemnly requested States to put mechanisms in place in order to eliminate discrimination against women relating to accessing healthcare services, in order to ensure equality between men and women, including family planning services.¹⁵⁷ Article 16 of CEDAW provides for non-discriminatory healthcare

¹⁴⁹ International Community of Women Living with HIV/AIDS 'The forced and coerced sterilisation of HIV positive women in Namibia' (2009), available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016, 15.

¹⁵⁰ Article 2(1) of the ICCPR (own emphasis added).

¹⁵¹ Durojaye 'Realising equality in access to HIV treatment for vulnerable and marginalised groups in Africa' (2012) 15(1) *PER* 218. See also, Committee on Economic, Social and Cultural Rights *General Comment No.14: The Right to the Highest Attainable Standard of Health 22nd Session* (2002), available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDJmCOy%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL>, accessed on 10 January 2018.

¹⁵² International Community of Women Living with HIV/AIDS 'The International Community of Women Living with HIV Global Statement to the 58th Commission on the Status of Women: Reclaim the Right to Motherhood for Women Living with HIV' (2014) 1, available at <https://gcwa.unaids.org/news/icw-international-community-women-living-hiv-global-statement-58th-commission-status-women>, accessed on 31 March 2016.

¹⁵³ *Ibid.*

¹⁵⁴ Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

¹⁵⁵ Durojaye 'Realising equality in access to HIV treatment for vulnerable and marginalised groups in Africa' (2012) 15(1) *PER* 222.

¹⁵⁶ Article 2 of the CEDAW.

¹⁵⁷ Article 12(1) of CEDAW.

services, reproductive rights, and a right to be educated on such rights.¹⁵⁸ In *AS v Hungary*,¹⁵⁹ the CEDAW filed a complaint in regards to a Roma woman who was sterilised without her consent.¹⁶⁰ In this case, the Committee found that the Hungarian government had failed to protect AS's reproductive rights and, therefore, they were in violation of CEDAW.¹⁶¹

The Committee on the Elimination of Racial Discrimination (CERD) has pointed out that 'some customs of racial discrimination may be directed towards women precisely because of their gender, namely the coerced sterilisation of native women'.¹⁶² HIV positive women face persistent stigma and discrimination¹⁶³ that even further restrict their full and equal participation in society.¹⁶⁴ In the Czech Republic, in 2004, 10 Roma women lodged a complaint with the Czech Ombudsman, alleging that they had been involuntarily sterilised.¹⁶⁵ Since then, the Czech courts have heard of violations of reproductive rights in other similar cases.¹⁶⁶ *FS v Chile*¹⁶⁷ is a good example of the systemic problem of forced sterilisation of women in Chilean healthcare facilities.¹⁶⁸ FS was HIV positive and only 20 years old when she was coercively sterilised when she went for a caesarean section.¹⁶⁹ The Inter-American Commission on Human Rights (IACHR) in this case, found that failure by the State to examine the allegations of FS's sterilisation without her knowledge and consent and hold accountable those who were liable for this action, was a lack of urgent attention to real issues that affected its citizens.¹⁷⁰ The

¹⁵⁸ Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM Thesis, University of Mauritius, 2009) 39.

¹⁵⁹ *AS v Hungary* Communication No. 4/2004.

¹⁶⁰ Zampas and Lamačková 'Forced and coerced sterilisation of women in Europe' (2011) 114 *International Journal of Gynecology & Obstetrics* 165.

¹⁶¹ *Ibid.*

¹⁶² *Ibid* 164.

¹⁶³ KG Koodibetse 'HIV/AIDS stigma and discrimination in South Africa- still a problem' (2015) 105(9) *South African Medical Journal* 703.

¹⁶⁴ Center for Reproductive Rights 'Dignity denied violations of the rights of HIV-positive women in Chilean health facilities' (2010), available https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/chilereport_FINAL_singlepages.pdf, accessed on 15 February 2016.

¹⁶⁵ Zampas and Lamačková 'Forced and coerced sterilisation of women in Europe' (2011) 114 *International Journal of Gynecology & Obstetrics* 165.

¹⁶⁶ *Ibid.*

¹⁶⁷ *FS v Chile* Report No. 52/14.

¹⁶⁸ *FS v Chile* supra para 1.

¹⁶⁹ Center for Reproductive Rights 'Dignity denied violations of the rights of HIV-positive women in Chilean health facilities (2010), available at https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/chilereport_FINAL_singlepages.pdf, accessed on 15 February 2016.

¹⁷⁰ Inter-American Commission on Human Rights 'Report No. 52/14 Petition 112-09 Report on admissibility F.S Chile' (2014), available at <https://www.oas.org/en/iachr/decisions/2014/CHAD112-09EN.pdf>, accessed on 05 March 2016.

Commission also recognised that this might constitute a form of discrimination in a broader context.¹⁷¹

There has been some litigation on the issue of coerced sterilisation in some other countries based on ethnicity and race. In *Chavez v Peru*,¹⁷² the IACHR established that coerced sterilisation of women is an infringement of the right not to be treated in an inhumane way.¹⁷³ In *IG and Others v Slovakia*,¹⁷⁴ the court held that sterilisation of women without their knowledge or consent is a violation of their right to respect and dignity and constitutes treatment in a degrading manner.¹⁷⁵ In *VC v Slovakia*,¹⁷⁶ the court had to determine whether VC gave her consent to the sterilisation procedure and it found that VC did not give her consent voluntarily.¹⁷⁷ In *NB v Slovakia*,¹⁷⁸ the IACHR found that forcing the applicant into agreeing to sterilisation while in labour was an infringement of her right to physical integrity and ingenuous disrespect of her right to dignity.¹⁷⁹

1.5 Regional legal framework

Parties involved in human rights litigation in Africa, in particular relating to sexual reproductive rights, can use a number of regional treaties to advance their claims. These treaties include the African Charter on Human and Peoples' Rights (ACHPR or the African Charter), which operates as an international human rights tool aimed at protecting and promoting human rights and basic freedoms throughout the African continent.¹⁸⁰ The African Charter makes provision for the establishment of the African Commission on Human and Peoples' Rights (ACHPR).¹⁸¹ The African Commission aims to protect and promote human rights and monitors member states' compliance with the African Charter and the Protocol to the African Charter

¹⁷¹ Ibid.

¹⁷² *Chavez v Peru* Report No. 66/00.

¹⁷³ Article 5 of the American Convention on Human Rights.

¹⁷⁴ *IG and Others v Slovakia* (Application no. 15966/04) 13 November 2012.

¹⁷⁵ Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

¹⁷⁶ *VC v Slovakia* (Application no. 18968/07) 8 November 2011.

¹⁷⁷ Ibid.

¹⁷⁸ *NB v Slovakia* (Application no. 29518/10) 12 June 2012.

¹⁷⁹ Ibid.

¹⁸⁰ International Community of Women Living with HIV/AIDS 'The forced and coerced sterilisation of HIV positive women in Namibia' (2009) 20, available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016.

¹⁸¹ Article 30 of ACHPR.

on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol or Protocol on Women).¹⁸² South Africa is a member state of the African Charter, and ratified it on 9 July 1996.

The principle of non-discrimination is fundamental to the provisions in the African Charter. In terms of Article 2 of the African Charter, every person shall be eligible to:

to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status". Nonetheless, this article has not specifically provided for protection against discrimination based on HIV status.¹⁸³

The African Commission has not expressly pronounced whether discrimination based on HIV status is included under Article 2 of the African Charter.¹⁸⁴ In 2001, the African Commission in its Resolution on the HIV/AIDS pandemic, called upon states to give protection to the rights of PLWHIV.¹⁸⁵ Thereafter, the Commission established a committee to deal with the rights of PLWHIV and those affected by it.¹⁸⁶ Often, Article 2 is closely interpreted in relation to Article 3 of the African Charter, which protects the right to equality, and equal treatment of everyone in terms of the law.¹⁸⁷

The African Commission, in its 54th Ordinary Session in 2013, in Banjul, the Gambia, raised its concern about the number of allegations of forced and coerced sterilisations of women living with HIV, in particular in the State Parties to the African Charter.¹⁸⁸ It further declared that all practices of involuntary sterilisation were in violation of the equality right and right to non-discrimination and other rights protected by the African Charter and the Maputo Protocol and

¹⁸² Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ African Charter on Human and Peoples' Rights on the Rights of Women General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at <http://www.achpr.org/instruments/general-comment-two-rights-women/>, accessed on 11 January 2018.

¹⁸⁶ African Commission on Human and Peoples' Rights 'Resolution on the HIV/AIDS Pandemic – Threat against human rights and humanity' (2001), available at <http://www.achpr.org/sessions/29th/resolutions/53/>, accessed on 11 January 2018.

¹⁸⁷ Article 3 of the ACHPR.

¹⁸⁸ African Commission on Human and Peoples' Rights '260: Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services' (2013) 1, available at <http://www.achpr.org/sessions/54th/resolutions/260/>, accessed on 05 May 2016.

other regional and international human rights instruments.¹⁸⁹ The ACHPR called upon State Parties to introduce instruments to ensure that healthcare workers or medical institutions do not subject HIV positive women to pressure, or unjustified inducement or coercion to consent to sterilisation or other medical methods.¹⁹⁰ Furthermore, the ACHPR urged the State Parties to prepare resources and structures, legal assistance, and restitution for HIV positive women, the victims of such inhumane practices.¹⁹¹

Article 14 of the Protocol on Women requires the states to ‘ensure that the right to health of women, including sexual and reproductive health of women, is being respected and promoted’.¹⁹² In terms of this Article, the Protocol on Women has become the only international treaty on human rights to provide specific protection for women in relation to their HIV/AIDS status.¹⁹³ Women also have a right to fertility control, deciding on the number and spacing of their children, and deciding on a contraceptive method.¹⁹⁴ The ICW contends that if healthcare workers do not make sure that infected women make their own informed decisions, safely, comfortably and in a confidential manner, they are violating these women’s sexual and reproductive rights.¹⁹⁵ Article 18(3) provides that countries:

shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.¹⁹⁶

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM Thesis, University of Mauritius, 2009) 38.

¹⁹³ Article 14(1)(d) of the Protocol on Women.

¹⁹⁴ Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM Thesis, University of Mauritius, 2009) 38.

¹⁹⁵ Kendall and Albert ‘Experiences of coercion to sterilize and forced sterilisation among women living with HIV in Latin America’ (2015) 18 *Journal of the International AIDS Society* 1.

¹⁹⁶ Mamad *Forced Sterilisation of Women Living with HIV/AIDS in Africa* (unpublished LLM Thesis, University of Mauritius, 2009) 20.

1.6 South African legal framework

1.6.1 The final Constitution of the Republic of South Africa, 1996

In terms of the Constitution,¹⁹⁷ the Sterilisation Act,¹⁹⁸ the Choice on Termination of Pregnancy Act¹⁹⁹ and common law,²⁰⁰ a patient must provide informed consent for a medical procedure to be performed on her, including sterilisation.²⁰¹ Forced and coerced sterilisation of women living with HIV is a violation of a number of human rights that are enshrined in the Republic of South Africa's Constitution.²⁰² The Constitution is the supreme law of the land²⁰³ and many people rely on it when they litigate on matters relating to the violation of their human rights.

The BoRs significantly provides constitutional protections for every person.²⁰⁴ It protects even persons with HIV/AIDS.²⁰⁵ These rights include the right to equality,²⁰⁶ human dignity,²⁰⁷ and freedom of security.²⁰⁸ Section 12(2)(b) gives every human being a right to bodily and psychological integrity, including the right to take decisions relating to their reproductive activities and security of and control of their bodies.²⁰⁹ Further, section 9 of the Constitution concerns itself with the right to equality and non-discrimination of everyone in the country based on the prohibited grounds under this provision.²¹⁰ Since the adoption of the Constitution, the courts have adjudicated matters brought in terms of section 9.²¹¹ In doing so, the courts have interpreted and applied the equality clause, taking into consideration circumstances of each case. In addition, when interpreting this provision, the courts have laid down factors to take into account when one is faced with a case where unfair discrimination based on prohibited

¹⁹⁷ Sections 10, 12(2) of the Constitution of the Republic of South Africa, 1996.

¹⁹⁸ Sterilisation Act 44 of 1998.

¹⁹⁹ Choice on Termination of Pregnancy Act 92 of 1996.

²⁰⁰ *Stoffberg v Elliot* 1923 CPD 148; *Richter and another v Estate Hammann* 1976 (3) SA 226 (C) and *Castell v De Greef* [1994] 4 All SA 63 (C).

²⁰¹ Strode, Mthembu and Essack. "She made up a choice for me" 22 HIV-positive women's experiences of involuntary sterilisation in two South African provinces' (2012) 20(39) *Reproductive Health Matters* 2.

²⁰² Sections 9, 10, 12(2)(b) and 27 of the Constitution of the Republic of South Africa, 1996.

²⁰³ S 2 of the Constitution of the Republic of South Africa, 1996.

²⁰⁴ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

²⁰⁵ See the right to equality and other rights provided under chapter of the Constitution.

²⁰⁶ S 9 of the Constitution of the Republic of South Africa, 1996.

²⁰⁷ S 10 of the Constitution of the Republic of South Africa, 1996.

²⁰⁸ E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2005) 51, available at https://www.escri-net.org/sites/default/files/Cameron_-_Legal_and_Human_Rights_Responses_to_HIV-AIDS.pdf, accessed on 10 March 2016.

²⁰⁹ S 12(2)(b) of the Constitution of the Republic of South Africa, 1996.

²¹⁰ S 9(1)-(5) of the Constitution of the Republic of South Africa, 1996.

²¹¹ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC)

or analogous grounds is alleged.²¹² Further discussion on section 9 of the Constitution is in Chapter two of this dissertation.

1.6.2 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) provides protection to people living with HIV/AIDS.²¹³ The Act's main objection is to prevent unfair discrimination by private individuals or government institutions. Unfair discrimination on any one of a list of specific grounds is prohibited in terms of the Act.²¹⁴ In *Hoffmann v South African Airways*,²¹⁵ the Court included HIV status as a prohibited ground of discrimination (analogous) under s 9(3) of the South African Constitution, notwithstanding it not being specifically provided for in the section. PEPUDA also makes provision for the Equality Courts and the procedure and remedies that this court may order in the event where a complaint is brought before it.²¹⁶ Chapter three of this dissertation discusses this section in more detail.

1.6.3 Sterilisation Act, 44 of 1998

In terms of section 4 of the Sterilisation Act,²¹⁷ consent must be provided freely and voluntarily and may only be given in instances when the person giving the consent has:

- (a) been given a clear explanation and adequate description of the proposed plan of the procedure; and consequences, risks and the reversible or irreversible nature of the sterilisation procedure;
- (b) been given advice that the consent may be withdrawn any time before the treatment; and (c) signed the prescribed consent form.²¹⁸

1.6.4 The National Health Act 61 of 2003

According to section 27(2) of the Constitution, the State is required to take reasonable statutory and other measures within its available resources in order to achieve the progressive realisation of the right of the people of South Africa to have access to healthcare services, including

²¹² *Harksen v Lane NO* 1998 (1) SA 300 (CC) and *Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC).

²¹³ Section 30 of the Judicial Matters Amendment Act 8 of 2017.

²¹⁴ See Section 1(1)(xxiii) of PEPUDA.

²¹⁵ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); [2000] 12 BLLR 1365 (CC).

²¹⁶ See sections 16, 20, 21 and 31 of PEPUDA.

²¹⁷ Sterilisation Act 44 of 1998.

²¹⁸ S 4 of the Sterilisation Act, 44 of 1998.

reproductive healthcare,²¹⁹ thus, the National Health Act (NHA). The NHA also provides for and recognises the protection of human rights and promotion of equality in South Africa.²²⁰ The preamble of the Act recognises:

the socio-economic injustices, imbalances and inequities of health services of the past; the need to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights and the need to improve the quality of life of all citizens and to free the potential of each person.²²¹

Further, the Act aims to respect, promote and fulfil the rights of women in South Africa to the progressive realisation of their constitutional right of access to healthcare services, including reproductive healthcare.²²² Furthermore, according to section 7 of the Act, unless a patient or authorised person has given informed consent, a healthcare worker may not provide services to the patient.²²³ Subsequently, a person providing healthcare services must take all reasonable steps to obtain the patient's informed consent.²²⁴ Moreover, any person aggrieved by the manner in which he or she was treated at a health institution may lay a complaint in terms of the procedure established by the relevant Minister and have the complaint investigated.²²⁵

1.6.5 Policies on HIV/AIDS

1.6.5.1 South African National Strategic Plan on HIV/AIDS (NSP)

The NSP provides for the advocacy of zero discrimination associated with HIV.²²⁶ One of its objectives is to ensure and enable access to a legal framework that protects and promotes human rights in order to support the implementation of this policy. The NSP has identified the need to continuously assess obstacles to the access of services; experiences of stigma and discrimination and provide the framework for addressing such issues by aiming to reduce self-

²¹⁹ National Health Act 61 of 2003, preamble.

²²⁰ National Health Act 61 of 2003.

²²¹ National Health Act 61 of 2003, preamble.

²²² National Health Act 61 of 2003, s 2(c).

²²³ National Health Act 61 of 2003, s 7(1)(a).

²²⁴ National Health Act 61 of 2003, s 7(2).

²²⁵ National Health Act 61 of 2003, s 18(1)-(2).

²²⁶ SANAC 'National Strategic Plan on HIV, STIs and TB 2012-2016' (n.d.) 38, available at http://www.hst.org.za/sites/default/files/hiv_nsp.pdf, accessed on 10 March 2016.

reported stigma related to HIV and TB by at least 50%.²²⁷ According to Grant and Strode, there are laws in place which prohibit unfair discrimination, but these are limited.²²⁸

1.6.5.2 The National Contraception and Fertility Planning Policy and Service Delivery Guidelines (NCFPP)

The NCFPP guidelines have adopted the view that particularly during this HIV era, fertility and planning guidelines must be amended to enable the counselling of women of a reproductive age on their fertility intentions.²²⁹ Everyone should have access to accurate, unbiased information about all the available methods in order to make an informed choice.²³⁰ Clients should be provided with the contraceptive method/s that they request, subject to meeting relevant medical eligibility criteria and availability, combined with an assessment of their circumstances.²³¹

With South Africa facing the problem of growing rates of unintended pregnancies by girls of a reproductive age and women with HIV, long-acting reversible contraception amongst other effective contraceptive methods, which have the intended effect of reducing unwanted pregnancies, have been introduced.²³² A sterilisation procedure carried out without informed consent is unlawful in South Africa and counselling must be provided before and after the procedure is performed.²³³

1.7 Access to justice in terms of South African law by means of a class action or public interest action

The concept of access to justice has become central in our constitutional dispensation.²³⁴ This is provided for under section 34 of the Constitution.²³⁵ It is trite law that before a person approaches the court about a particular matter, he/she must have legal standing to bring such a

²²⁷ Ibid.

²²⁸ A Strode and B Grant 'A critical review of the extent to which the HIV/AIDS and Human Rights International Guidelines have been Implemented in the Southern African Development Community' (2007) 28 *Obiter* 70.

²²⁹ National Contraceptive Clinical Guidelines 'A companion to the National Contraception and Fertility Planning' (2012) 8, available at http://www.gov.za/sites/www.gov.za/files/Contraception_Clinical_Guidelines_28jan2013-2.pdf, accessed on 31 March 2016.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid 11.

²³³ Ibid 49.

²³⁴ M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure* 902.

²³⁵ Section 34 of the South Africa Constitution, 1996.

matter to court. Before the adoption of the Constitution, litigants were required to show sufficient interest in the case brought to court.²³⁶ This restricted litigants from bringing cases in a representative capacity.²³⁷ However, with the enactment of the Constitution, the rules of standing changed. Before moving on to what the Constitution says about the rules of standing, it is imperative to mention that the rules of the High Court allow for joinder, where more than one litigant is a party or has interest in the matter.²³⁸ According to Rule 10(1) of the Uniform High Court Rules:

any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.²³⁹

According to Rule 10(3), several defendants may be sued in one action, where the issue between the applicants and the defendant is dependent on the determination of the same question of fact or law.²⁴⁰

Section 38 of the Constitution provides for the enforcement of the rights clause.²⁴¹ The Constitution expressly provides for class action litigation under section 38(c). There has been litigation around this provision where the litigants were seeking suitable relief as a class.²⁴² In these cases, the courts have set out the guidelines that can be followed when dealing with class actions. The leading case in this regard is *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*.²⁴³

²³⁶ Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure* 903.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ Uniform Rules of the High Court available at [http://www.justice.gov.za/legislation/rules/UniformRulesCourt\[26jun2009\].pdf](http://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009].pdf), accessed on 12 March 2016.

²⁴⁰ *Ibid.*

²⁴¹ WR De Vos 'Is a class action a "classy act" to implement outside the ambit of the Constitution?' (2012) 4 *Journal of South African Law* 739.

²⁴² *Ibid* 747.

²⁴³ *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E).

The case of *Children's Resource Centre Trust v Pioneer Foods*,²⁴⁴ focused on the requirement of the certification of a class action. Although there has not been much literature on class actions brought based on HIV status discrimination, the case of *N and Others v Government of Republic of South Africa and Others (NO 1)*²⁴⁵ hinges on this matter. In this case, the applicants were fifteen HIV/AIDS positive prisoners (and the Treatment Action Campaign) incarcerated at the Westville Correctional Centre who needed antiretroviral (ARV) treatment.²⁴⁶

They instituted proceedings on their behalf and in the name of other HIV positive prisoners who needed ARV treatment as a class action.²⁴⁷ The respondents contested the *locus standi* of the applicants to seek relief on behalf of all prisoners living with HIV at Westville Correctional Centre.²⁴⁸ The Court found that the respondents' implementation of the laws and policies relating to the provision of adequate medical treatment to HIV/AIDS infected prisoners at Westville Correctional Centre was unreasonable in that:

- (a) it was inflexible;
- (b) it was characterised by unjustified and unexplained delays; and
- (c) some of the steps taken by the respondents after the institution of the present proceedings were irrational.²⁴⁹

Section 38(d) of the Constitution permits any person and members of civil society to bring matters to court in the public interest.²⁵⁰ For many years, organisations such as Lawyers for Human Rights,²⁵¹ Black Sash,²⁵² Section 27,²⁵³ Treatment Action Campaign,²⁵⁴ the Atlantic

²⁴⁴ *Children's Resource Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA).

²⁴⁵ *N and Others v Government of Republic of South Africa and Others (NO 1)* 2006 (6) SA 543 (D).

²⁴⁶ *N and Others v Government of Republic of South Africa and Others (NO 1)* supra 545.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid 562.

²⁵⁰ Section 38(c) and (d) of the Republic of South Africa Constitution, 1996.

²⁵¹ Lawyers for Human Rights 'Annual Report' (2006), available at <http://www.lhr.org.za/sites/lhr.org.za/files/LHR%20Annual%20Report%202006.pdf>, accessed on 26 February 2016.

²⁵² Black Sash 'Annual Report' (2014), available at <https://www.blacksash.org.za/images/docs/annualreport2014.pdf>, accessed on 26 February 2016.

²⁵³ Section 27 '2012-2013 Review' (2014), available at <http://section27.org.za/wp-content/uploads/2014/10/S27review2014web.pdf>, accessed 24 February 2017.

²⁵⁴ *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC).

Philanthropies,²⁵⁵ and University law clinics²⁵⁶ have participated in bringing about social change by helping various groups in accessing the courts where their rights have been violated, e.g. children, women and PLWHIV.²⁵⁷ For these organisations, when engaging themselves with this kind of litigation, it is very important that they design an appropriate strategy in order to achieve social change.²⁵⁸ Various strategies are used by these organisations in tackling human rights matters, providing access to justice to those who cannot afford litigation on their own, and bringing awareness and advocacy. In exploring these strategies, Chapter four of this thesis establishes whether these strategies may be useful and applicable when dealing with cases of coerced and forced sterilisation of HIV positive women in South African, either brought as a class action and/or a public interest action.

There is an abundance of literature on class actions and public interest litigation. However, little if any deal with bringing matters of the sexual reproductive rights of HIV positive women. This is what this thesis seeks to achieve.

1.8 Main questions of the study

The study aims to address the following questions:

1.8.1 Is forced and/or coerced sterilisation of HIV positive women a form of unfair discrimination in terms of both international and South African law?

1.8.2 What are the evidential requirements for proving unfair discrimination through forced and coerced sterilisation of HIV positive women by means of a class action and public interest litigation in the South African Equality Court?

1.8.3 What are the lessons that can be learnt from the *LM* case, international jurisprudence and South African judgments on equality matters?

²⁵⁵ S Budlender, SCM Gilbert and N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2017), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

²⁵⁶ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC).

²⁵⁷ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); [2000] 12 BLLR 1365 (CC).

²⁵⁸ YS Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 19.

1.9 Research design and methodology

The research method adopted in this thesis is desk-top study which provides the analysis and development of the literature on the topic that is already in existence. No empirical data is required for this research. The data is collected from existing published primary and secondary sources in order to provide information on the current law so that the research provides an informed analysis and recommendations to fill in the gaps in the current law. The sources that primarily constitute this thesis include case law, journal articles, books, internet sources, and existing legislation on the principles of equality and non-discrimination, forced and coerced sterilisation, HIV/AIDS and international and regional treaties on this topic. These sources are easily accessible from the internet and the University Library and databases.

Chapter Two

The right to equality and non-discrimination

2.1 Introduction

Prior to 1994 and the first democratic election in South Africa, all our constitutional dispensations¹ were based on inequality and discrimination.² In 1909, the first Constitution of the Union of South Africa was enacted.³ In terms of the South Africa Act, the Union of South Africa was made up of the British colonies of Transvaal, Natal, Cape of Good Hope and the Orange River Colony.⁴ The South Africa Act gave all power to whites and effectively disenfranchised the non-white majority.⁵

The South Africa Act also established parliamentary supremacy, which granted all political and economic powers to the white minority and ignored political aspirations of the black majority who were subjected to autocratic laws.⁶ Although it is outside the scope of this chapter to discuss all the discriminatory laws that were enacted against non-white people, it is worth mentioning a few of the Acts that were the mechanisms to oppress non-white people in South

¹ K Govender 'Equality and social justice: First draft discussion document, Equality- The South African perspective' (1997), available at <http://law.wustl.edu/Library/Guides/Equality/Gov-art4.html> accessed on 26 March 2016.

² I Currie and J de Waal *The Bill of Rights Handbook* 6th ed (2013) 211.

³ Govender 'Equality and social justice: First draft discussion document, Equality- The South African perspective' (1997), available at <http://law.wustl.edu/Library/Guides/Equality/Gov-art4.html> accessed on 26 March 2016.

⁴ *Ibid.*

⁵ Editors of *Encyclopedia Britannica* 'South Africa Act: South Africa 1909' *Britannica.com*, available at <https://www.britannica.com/event/South-Africa-Act> accessed on 28 March 2016.

⁶ P De Vos and W Freedman *South African Constitutional Law in Context* (2014) 10.

Africa.⁷ In 1958, the South Africa Amendment Act⁸ was adopted by Parliament.⁹ In terms of this Act, the judiciary had no powers to pronounce on any Act made by Parliament as invalid, unless it was concerning the two official languages at the time (English and Afrikaans).¹⁰

In 1961, South Africa became a Republic and a new Constitution was passed which recognised the system of parliamentary supremacy.¹¹ Thus, this new Constitution was no better than the others in that it disregarded the human rights of the affected majority in the Republic.¹² In 1983, the Republic of South Africa's Constitution¹³ came into effect extending the franchise to Indians and Coloureds.¹⁴ This Constitution provided for a Tricameral Parliament constituting of the House of Assembly that represented whites with 178 seats, the House of Delegates, which represented Indians with 85 seats, and the House of Representatives that represented

⁷ The Native Land Act 27 of 1913 (allowed territorial segregation and land dispossession of Africans who could only own 7% of the land and the rest was allocated to Europeans, see *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530; The Railways and Harbours Regulations, Control and Management Act 22 of 1916, (prevented non-whites from sitting in compartments regarded as first class in a train which were reserved for whites only, see *Rex v Abdurahman* 1950 (3) SA 136 (A) and *R v Lusu* 1953 (2) SA 484 (A)); the Native Urban Areas Act 21 of 1923 (granted power to local urban authorities to govern and control the movement of blacks into the cities and to issue licenses to Africans who wanted to move to an urban area, and blacks were restricted from owning freehold properties in these areas, see *In re Dube* 1979 (3) 820 N 821 (F) and *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W)); The Black Administration Act 38 of 1927 (created separate administration laws and proclamations which governed black areas, see *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2000 (4) BCLR 347; 2001 (1) SA 500 and *Moseneke and Others v Master of the High Court* 2001 (2) BCLR 103; 2001 (2) SA 18 (6 December 2000)); the Representation of Natives Act 12 of 1936 (it was passed to further limit the black franchise. In terms of this Act, Africans who lived in the Cape Province were put on the separate electoral roll, which gave them the right to elect three people to represent them in the Union House of Assembly and only two representatives in the Cape Provincial Council. They were removed from the normal electoral roll); the Separate Representation of Voters Act 46 of 1951 (it removed Coloureds from the ordinary voters' roll and introduced separate representation in Parliament and in the provinces in the Cape and Natal between the whites and non-white population, see *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A)); the Reservation of Separate Amenities Act 49 of 1953 (created separate social environments for whites and blacks, allocation of services and infrastructure, education, jobs etc); the Bantu Education Act 1953 (further restricted the blacks' educational system and educational facilities were separated and provided for in terms of race); the Group Areas Act 36 of 1966 (created residential segregation, promoted white privilege and prevented interracial contact and blacks could not transact on immovable property).

⁸ South Africa Amendment Act 1 of 1958.

⁹ De Vos and Freedman *South African Constitutional Law in Context* (2014) 11.

¹⁰ Ibid 12.

¹¹ Section 59 of the 1961 Constitution provided that Parliament was supreme and it held sovereign legislative authority all over the Republic and Parliament had all the power to pass laws of peace, order and good government of the Republic.

¹² De Vos and Freedman *South African Constitutional Law in Context* (2014) 12.

¹³ Republic of South Africa's Constitution Act 110 of 1983.

¹⁴ Govender 'Equality and social justice: First draft discussion document, Equality- The South African perspective' (1997), available at <http://law.wustl.edu/Library/Guides/Equality/Gov-art4.html> accessed on 26 March 2016. See also, De Vos and Freedman *South African Constitutional Law in Context* (2014) 14.

Coloureds with 45 seats.¹⁵ The black majority was not accommodated and totally excluded according to this dispensation, and they had their political aspirations catered for in terms of the homelands system which left them struggling for freedom.¹⁶

2.2 The Interim Constitution of the Republic of South Africa Act 200 of 1993

In November 1993, about twenty-six political formations convened at Kempton Park, near Johannesburg after the Convention for Democratic South Africa (CODESA) negotiations; they were tasked with the drafting of the interim Constitution.¹⁷ The interim Constitution was adopted to bring down the apartheid regime, pending the drafting of the final Constitution by the democratically elected Constitutional Assembly.¹⁸ The interim Constitution came into operation on 2 April 1994 to govern the first democratic elections and created a coalition of two major political parties¹⁹ to share interim governmental power for a five-year period.²⁰ The interim Constitution also contained a Bill of Rights that protected the rights guaranteed by international human rights conventions and covenants.²¹ For the first time in South African history, there was some recognition of equality between the racial groups. The preamble of the 1993 Constitution stated that:

...there is a need to create a new order in which South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms...in order to secure this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with solemn pact recorded as Constitutional Principles.²²

¹⁵ Govender *ibid.* See also, De Vos and Freedman *ibid.* 14-15.

¹⁶ De Vos and Freedman *South African Constitutional Law in Context* (2014) 15.

¹⁷ The Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁸ J Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 78. See also, De Vos and Freedman *South African Constitutional Law in Context* (2014) 19-20.

¹⁹ African National Congress and the National Party.

²⁰ Govender 'Equality and social justice: First draft discussion document, equality- The South African perspective' (1997), available at <http://law.wustl.edu/Library/Guides/Equality/Gov-art4.html> accessed on 26 March 2016. See also, De Vos and Freedman *South African Constitutional Law in Context* (2014) 20.

²¹ Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 79.

²² The preamble of the Constitution of the Republic of South Africa, Act 200 of 1993.

The Constitutional Court has clarified that at the heart of the interim Constitution lay commitment to equality.²³ Section 8 of the interim Constitution guaranteed the right to equality for every person in the Republic of South Africa.²⁴ In *Brink v Kitshoff*, the first case to deal with the equality clause, O'Regan J observed:

...section 8 is the product of our own particular history...Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', who constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme 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. Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. 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.²⁵

²³ Most of the Constitutional Court's equality cases dealt with section 8 of the interim Constitution: *Brink v Kitshoff* NO 1996 (4) SA 197 (CC), para 33; *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), (1997) 2 BCLR 153 (CC), para 20 and *President of Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), para 74.

²⁴ Section 8(1) every person shall have a right to equality before the law and to equal protection of law.

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

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

(b) ...

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

²⁵ *Brink v Kitshoff* NO (1996) 4 SA 197 (CC) para 40.

2.3 The Final Constitution of the Republic of South Africa, 1996

The year 1996 saw the completion of South Africa's constitutional revolution.²⁶ A democratically elected Constitutional Assembly (Parliament) adopted the final South African Constitution,²⁷ which created a sovereign and democratic country based on certain values such as human dignity, equality, non-racialism and non-sexism and constitutional supremacy and the rule of law.²⁸ In terms of section 2 of the Constitution, the Constitution is said to be the supreme law of the land.²⁹ The Constitution is said to be transformative in nature.³⁰ In addition to this, the Constitution was adopted to redress the inequalities in our society created by the ills of the past.³¹ In doing so, the Constitution introduced a Bill of Rights that sets out the range of human rights protected under the Constitution to facilitate social and economic transformation, while at the same time protecting the human dignity of all persons.³² Furthermore, the Constitution kept its commitment to the advancement of equality and equality for everyone, hence, the first substantive right in the Constitution, is the equality clause (section 9).³³

The focus of this chapter is the right to equality and non-discrimination. It will discuss equality in terms of international, regional and national law. It will also look at the interpretation of the equality clause in terms of the Constitutional Court's jurisprudence. In summary, it will comment on the extent to which the right to equality can assist PLWHIV, specifically women who have been discriminated against based on their HIV status, which led to their forced and coerced sterilisation.

2.4 Defining the right to equality

In the South African legal system, equality is a central and comprehensive concept, both as a constitutional value and as a fundamental human right.³⁴ The concept of equality being a constitutional value realises the purpose and focus of the Constitution of a democratic and a

²⁶ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 6.

²⁷ Constitution of the Republic of South Africa, 1996.

²⁸ See section 1 of the Republic of South African Constitution, 1996.

²⁹ Section 2 of the Republic of South African Constitution, 1996.

³⁰ De Vos and Freedman *South African Constitutional Law in Context* (2014) 36.

³¹ *Ibid.*

³² *Ibid* 319.

³³ This is what the chapter will focus on.

³⁴ C Albertyn and B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 249. See, S Jagwanth 'Expanding equality' 2005 *Acta Juridica* 131.

transformative country.³⁵ The concept of equality being regarded as a fundamental human right is considered as a tool for the achievement of substantive equality, which equality as a foundational value in the Constitution seeks to achieve for every person in South Africa.³⁶ The purpose of the equality right is to remedy the political and legal disadvantages created by the previous tyrannical and undemocratic government in our society.³⁷ Equality has been proven to be one of the most evasive and controversial concepts in the legal arena.³⁸ Over centuries, lawyers, philosophers and other writers have debated extensively with the aim of providing a proper definition of equality and what it ought to entail.³⁹ To date, no consensus has been reached on the clear and precise meaning of equality.⁴⁰ The notion of equality can be traced back to the times of Aristotle.⁴¹ Aristotle's philosophy was simply that 'likes must be treated alike and unlikes should be treated differently in proportion to their inequality.'⁴² For the purposes of this thesis, the focus is on two kinds of equality, namely, formal and substantive equality.

2.4.1 Formal equality

Generally, a difference is drawn between formal and substantive equality.⁴³ Formal equality is sameness of treatment.⁴⁴ Formal equality requires equal treatment despite differing positions and status of people.⁴⁵ This means that everyone must be treated in a similar manner before the law.⁴⁶ In other words, people must not be treated differently for arbitrary reasons, for example,

³⁵ Albertyn and Goldblatt *ibid.*

³⁶ Albertyn and Goldblatt *ibid.* See, *The President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), para 74.

³⁷ Albertyn and Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality (1998) 14 *SAJHR* 253. See, *Andrews v Law Society of British Columbia* [1989] 1 S.C.R 143 at 30 and *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), paras 60-61.

³⁸ T Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 402.

³⁹ LWH Ackermann 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *SAJHR* 600-1. A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611.

⁴⁰ Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611. Adoption of the UDHR shows some form of consensus between the debaters on the core elements of equality.

⁴¹ Ackermann 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *SAJHR* 600. This seemingly simple formulation of equality encompasses the modern notions of both formal and substantive equality.

⁴² Ackermann *ibid.*

⁴³ J de Waal 'Equality and the Constitutional Court' (2002) 14 *SA Merc LJ* 141.

⁴⁴ *Ibid.*

⁴⁵ C Albertyn and B Goldblatt 'Equality' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2nd ed (2008) 35-5.

⁴⁶ I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) 347.

gender, religion or race.⁴⁷ According to Devenish, formal equality is based on an acceptance that although all factors of inequality are divergent, the only relief is to treat all people the same.⁴⁸ Put differently, formal equality is inexpedient as it could in reality worsen the real inequalities that exist as a result of South Africa's apartheid era, including the injustices and constitutional discrimination.⁴⁹ Currie and de Waal contend that the problem with formal equality is that it does not take into consideration the economic and social differences between persons and groups.⁵⁰ It also does not require an assessment of the circumstances of a person or group, or the potential biased impact of the law on them.⁵¹ It simply requires that the law be applied equally without a consideration of context.⁵²

In the case of HIV positive women, application of formal equality will not make their lives easier as it fails to recognise their social or economic status and personal beliefs. Women face stigma, discriminatory social norms and stereotypes, particularly in a patriarchal society. As a result, formal equality fails to redress gender equality where women's rights are guaranteed and protected. The criticism of this approach is that in this way, formal equality does not address the structural inequality in our country.⁵³ In terms of the CEDAW, formal equality proclaims that women and men are equal and must be treated the same.⁵⁴ However, CEDAW has moved away from this narrow formal equality approach and elucidated that there is a need to address the primary underlying causes of discrimination and inequality against women in order to ensure they achieve their equal position in our society.⁵⁵

⁴⁷ Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611. In the landmark case of *Brown v Board of Education*, the US Supreme Court racial segregation of public schools and it found that the separation of educational facilities was inherently unequal and "segregation of white and coloured children in public schools has a detrimental effect upon the coloured children".

⁴⁸ GE Devenish *The South African Constitution* (2005) 49.

⁴⁹ Ibid.

⁵⁰ I Currie and J de Waal *The Bill of Rights Handbook* 6th ed (2013) 213.

⁵¹ Ibid.

⁵² Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 612.

⁵³ Ibid.

⁵⁴ S Cusack and L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 10.

⁵⁵ Ibid.

2.4.2 Substantive equality

On the other hand, substantive equality is the current preferred concept of equality.⁵⁶ In *Minister of Finance and Others v Van Heerden*, the Constitutional Court adopted the notion of substantive equality and held that:

This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is, therefore, incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability, the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages.⁵⁷

In determining whether constitutional guarantees of the right to equality are achieved, substantive equality takes into consideration the social and economic circumstances of the persons or groups.⁵⁸ As Aristotle stated, it requires those who are unlike to be treated according to their unlikeness.⁵⁹ Substantive equality seeks to uphold the spirit of human dignity and avoid capricious treatment of individuals or particular groups.⁶⁰ In achieving this goal, substantive equality accepts and recognises the inequalities created by past discrimination.⁶¹ The important decision of *Griggs v Duke Power*⁶² is the landmark US case on addressing the limitations of solitary dependence on the principle of equal treatment of all persons.⁶³ In this case, the employer had applied a uniform aptitude test to both white and African-American job

⁵⁶ Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 612.

⁵⁷ *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC), para 27.

⁵⁸ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 212.

⁵⁹ Ackermann ‘Equality and non-discrimination: Some analytical thoughts’ (2006) 22 *SAJHR* 600.

⁶⁰ Currie and de Waal *The New Constitutional and Administrative Law* (2001) 349.

⁶¹ Smith (2014) and T Deane believe that this is manifested through legal measures such as affirmative action, also known as positive discrimination. T Deane *The Constitutional Dimensions of Affirmative Action in SA* (2012) available at: <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf;jsessionid=4EC3A564077EEF81198DD37C46D14568?sequence=8> accessed on 22 June 2016.

⁶² *Griggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

⁶³ *Ibid.*

candidates.⁶⁴ However, since the African-American candidates had received substandard education in their segregated schools, the test in place potentially disqualified such candidates at a significantly higher rate compared to white candidates.⁶⁵ The court found that unless the requirement was made specifically for the execution of the particular job, equal treatment is discriminatory if fewer African-Americans could qualify.⁶⁶

According to Freedman, substantive equality has specific objectives that must be met.⁶⁷ These are:

- (i) substantive equality must aim to break the sequence of disadvantage related with out-groups;⁶⁸
- (ii) it must seek to promote respect for the equal dignity and worth of all persons, thus redressing stigma, stereotyping, humiliation and violence because of membership of an out-group;⁶⁹
- (iii) it must involve positive affirmation and celebration of identity within our society; and
- (iv) it should enable full participation in society.⁷⁰

An explicit commitment to redressing disadvantage, preventing social exclusion and facilitating positive participation for all require positive provision.⁷¹ Thus, substantive equality includes a positive duty on the part of the state.⁷² Furthermore, CEDAW embraces the concept of substantive equality and it requires that Member States take steps to guarantee the full advancement and development of women's rights and ensuring that those women's rights are fully realised.⁷³ It is submitted that application of substantive equality in our of HIV positive women will assist in accessibility of justice, better opportunities and treatment of women. This is because substantive equality takes into consideration the circumstances, structural

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 167: "First, substantive equality should aim to break the cycle of disadvantage associated with out groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail positive affirmation and celebration of identity within community, and, finally, it should facilitate full participation in society. An explicit commitment to redressing disadvantage, combating social exclusion and facilitating positive participation all require positive provision. Thus substantive equality, however its aims are specified, entails a positive duty on the part of the state."

⁶⁸ Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 167.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid 168.

⁷³ Article 3 and 24 of CEDAW.

constraints, and power inequality that these women find themselves in. Substantive equality also strengthens women's voices and participation in decision making, including sexual reproductive related issues. In that way, we will be moving away from historical health inequalities and towards radical transformation in recognition of women's autonomy when it comes to sexual reproductive rights.

2.5 Distinction between equality and human dignity principles

The right to equality is protected both in our Constitution⁷⁴ and in international conventions and covenants. The Universal Declaration of Human Rights (UDHR) has been accepted globally⁷⁵ and its principles have become part of states' national laws.⁷⁶ Although the UDHR does not define the human rights that it refers to, it has become a cornerstone interpretation of these rights.⁷⁷ In terms of the UDHR, all persons are "born free and equal in rights and dignity by virtue of being human beings".⁷⁸ In this classical formulation in article 1, the UDHR provides a model of the value of human dignity in people's daily lives and a significant connection between equality and dignity.⁷⁹ Furthermore, this bold assertion in the UDHR has put equality as a priority concept that has been incorporated into a range of constitutional and international instruments.⁸⁰

The recognition of human dignity, equality and freedom in the UDHR is a remedial response to the atrocities and crises that were faced by nations during World War II.⁸¹ According to Freedman and De Vos, the value of dignity is the cornerstone of the Constitution, including the

⁷⁴ Section 9 of the South African Constitution, 1996.

⁷⁵ L Weiwei 'Equality and Non-Discrimination under International Human Rights Law' (unpublished research notes, Norwegian Center for Human Rights, 2004) 19.

⁷⁶ JP Humphrey 'The implementation of international human rights law' (1978) 24 *New York Law Review* 32.

⁷⁷ Ibid 33.

⁷⁸ Article 1 of the Universal Declaration of Human Rights. More details on the Declaration will be provided and discussed later on in the chapter.

⁷⁹ The International Centre for the Legal Protection of Human Rights 'Non-discrimination in international law: A handbook for practitioners' (2011) 221.

⁸⁰ E Grant 'Dignity and equality' (2007) 7(2) *Human Rights Law Review* 300.

⁸¹ LWH Ackermann 'Equality and the South African Constitution: The role of dignity' Bram Fischer Memorial Lecture, held at Rhodes House, Oxford, 26 May 2000, 539.

rights enshrined in it.⁸² In terms of the Constitution, equality, dignity and freedom are concomitantly joined to each other and are a foundation of our new democratic society.⁸³

2.6 Discrimination based on HIV status

From the time of the outbreak of the HIV epidemic during the 1980's, PLWHIV have been subjected to discrimination and stigma in most aspects of their lives.⁸⁴ As a result, the discrimination and stigma they face adversely affects PLWHIV,⁸⁵ thereby increasing their vulnerability.⁸⁶ The claim that HIV/AIDS falls under one of the most stigmatised diseases of all times is no exaggeration.⁸⁷ Acts of discrimination and stigma are not new to public health especially in the South African context,⁸⁸ however, they have now become a social justice issue.⁸⁹ In 1987, under the apartheid government, the regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions were passed in terms of the Health Act 63 of 1977.⁹⁰ These regulations imposed hostile measures for people infected with HIV/AIDS.⁹¹ Annexure 1 of the Regulations mentioned AIDS as a communicable disease but

⁸² De Vos and Freedman *South African Constitutional Law in Context* (2014) 418. Section 1(a) of the Constitution, 1996. In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), para 41, the Court held 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. See also, *Egan v Canada* (1995) 29 CRR (2d) 79, 104-5. However, Albertyn and Goldblatt in their article (C Albertyn and B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 254) are of the view that the right to substantive equality in our law should be defined separately from the value of dignity but the meaning must be given primarily on the value of equality.

⁸³ Albertyn and Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 254.

⁸⁴ MD Mambulasa 'The ambit of prohibited grounds of discrimination: Comparative jurisprudence on HIV status and sexual orientation': Paper presented at the *Judicial Colloquium on the Rights of Vulnerable Groups*, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 6 and 7 March 2014 123.

⁸⁵ International Center for Research on Women 'Scaling up the response to HIV stigma and discrimination' (2016), available at <https://www.icrw.org/wp-content/uploads/2016/10/Scaling-Up-the-Response-to-HIV-Stigma-and-Discrimination.pdf>, accessed on 17 October 2016.

⁸⁶ Mambulasa 'The ambit of prohibited grounds of discrimination: Comparative jurisprudence on HIV status and sexual orientation' (2014) 123.

⁸⁷ E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 1 *Stellenbosch Law Review* 38.

⁸⁸ RO Valdiserri 'HIV/AIDS stigma: An impediment to public health' (2002) 92(3) *American Journal of Public Health* 341. Dos Santos et al. 'An explanatory survey measuring stigma and discrimination experienced by people living with HIV/AIDS in South Africa: The People Living with HIV stigma Index' (2014) 14(80) *BMC Public Health* 1.

⁸⁹ L Stemple 'Health and human rights in today's fight against HIV/AIDS' (2008) 22(2) *AIDS* 2.

⁹⁰ E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 1 *Stellenbosch Law Review* 49.

⁹¹ See regulations 2(1)(a)-(d), 3(1), 14(1), 14(3)(a) and (c) of 1987.

not HIV.⁹² Furthermore, in the same year, regulations were enacted in terms of the Admission of Persons to the Republic Regulation⁹³ Act 59 of 1972, rendering PLWHIV and AIDS ‘prohibited persons’.⁹⁴

South Africa as an underdeveloped country has not enacted specific HIV/AIDS laws.⁹⁵ Nonetheless, South Africa has addressed the HIV epidemic issue through other current legislation dealing with several forms of discrimination and government policies.⁹⁶ For instance, the Employment Equity Act⁹⁷ expressly outlaws unfair discrimination based on the ground of ‘HIV status’ in the employment sector.⁹⁸ The Constitutional Court, in the case of *Hoffmann v South African Airways*,⁹⁹ found that the conduct of the South African Airways (SAA) in refusing to employ Hoffmann as a cabin attendant, because of his HIV positive status, was an infringement of his right to equality and freedom from discrimination as protected under section 9 of the Constitution.¹⁰⁰ In arriving to this decision, the court observed as follows:

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society.¹⁰¹

⁹² See Annexure 1 of the Regulations, 1987.

⁹³ Admission of Persons to the Republic Regulation Act 59 of 1972.

⁹⁴ Cameron ‘Legal and human rights responses to the HIV/AIDS epidemic’ (2006) 1 *Stellenbosch Law Review* 50-51.

⁹⁵ R Elliot, L Utyasheva and E Zack ‘HIV, disability and discrimination: making the links in international and domestic human rights law’ (2009) 12(29) *Journal of the International AIDS Society* 10.

⁹⁶ Ibid.

⁹⁷ Employment Equity Act 55 of 1998.

⁹⁸ Section 6 of the Employment Equity Act 55 of 1998. Also see, section 30 of the Judicial Matters Amendment Act 8 of 2017.

⁹⁹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); [2000] 12 BLLR 1365 (CC).

¹⁰⁰ Ibid para 40.

¹⁰¹ Ibid para 28.

2.7 The international legal framework on equality

The values of equality and non-discrimination have been recognised in Africa and abroad in the form of international instruments focusing on human rights.¹⁰² The concept of equality is the foundation for the enjoyment, realisation, advancement and protection of human rights and has its origins in international human rights law.¹⁰³ The UDHR is referred to as a ‘common standard of achievement by all nations’ with one goal of equality and non-discrimination principles and enforcement of human rights.¹⁰⁴ In the preamble, the UDHR goes further, elucidates the value of equality, and reaffirms that all men and women have equal rights.¹⁰⁵ Thus, this has become the standard framework for equality in the sense that all persons must be treated equally, regardless of their gender, occupation and position they hold in the society.¹⁰⁶

The UDHR states that every human being is entitled to all the rights and freedoms within the Declaration ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁰⁷ Article 2 promotes human rights for every person free of discrimination.¹⁰⁸ There has been universal agreement that Article 2 is the cornerstone of the Declaration as it prohibits discrimination.¹⁰⁹ The UDHR refers to women’s rights.¹¹⁰ Even so, this universal recognition of non-discrimination does not explicitly mention HIV/AIDS status, only the term “other status” in the article, but as a human rights standard, the clause’s interpretation should include HIV/AIDS status.¹¹¹

¹⁰² E Durojeya ‘Realising equality in access to HIV treatment for vulnerable and marginalized groups in Africa’ (2012) 15(1) *Potchefstroom Electronic Law Journal* 216.

¹⁰³ Panos Institute Southern Africa ‘The right to equality and non-discrimination on basis of sexual orientation and gender identity in Zambia’ (2017), available at: <http://www.panos.org.zm/wp-content/uploads/2017/04/Panos-The-Right-to-Equality.pdf>, accessed on 02 January 2018.

¹⁰⁴ HH Pyne ‘International law and the rights of people living with HIV/AIDS’ in M Ainsworth, L Fransen & M Over (eds) *Confronting AIDS: Evidence from the Developing World* (1998) 87; R Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 60. See the Preamble of the UDHR.

¹⁰⁵ Preamble of the Universal Declaration of Human Rights, 1948.

¹⁰⁶ J Morsink ‘Women’s rights in the Universal Declaration’ (1991) 13 *Human Rights Quarterly* 255.

¹⁰⁷ Article 2 of the UDHR.

¹⁰⁸ Morsink ‘Women’s rights in the Universal Declaration’ (1991) 13 *Human Rights Quarterly* 229.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* 255.

¹¹¹ HH Pyne ‘International law and the rights of people living with HIV/AIDS’ in M Ainsworth, L Fransen & M Over (eds) *Confronting AIDS: Evidence from the Developing World* (1998) 87; see also, *Odafe and Others v Attorney-General and Others* (2004) AHRLR 205 (NgHC), 31.

Article 7 of the Declaration further provides that ‘everyone is equal before the law and entitled without any discrimination to equal protection under the law: ‘all are entitled to equal protection against any discrimination in violation of this declaration’.¹¹² This provision protects an autonomous, freestanding right to equality with two distinct elements to its content: ‘equality before the law and equal protection of the law’.¹¹³ The enshrinement of an autonomous right to equality has a significant value.¹¹⁴ For instance, in some jurisdictions, a separate and a distinct non-discrimination right that is not dependent on, and subsidiary to, other rights can be relied upon to reinforce equality in socio-economic spheres of life in respect of which the state does not recognise relevant rights.¹¹⁵ In this respect, it is permissible to say that the UDHR recognises both formal and substantive equality in a sense that while it mandates that everyone must be treated the same, it also proclaims the right to equality as a value in itself and as an indispensable aspect in achieving a fair and just ideal society.¹¹⁶

After the UDHR was adopted, two other human right treaties were drafted by the Commission on Human Rights (HRC), namely (ICCPR) and (ICESCR).¹¹⁷ These Covenants, together with the UDHR, form the International Bill of Human Rights.¹¹⁸ The ICCPR provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.¹¹⁹ This is the primary provision in the Covenant dealing with non-discrimination.¹²⁰ Subsequent case law has interpreted the meaning of Article 26.¹²¹ In *Broeks v The Netherlands*,¹²² the HRC took the view that the mere fact that Article 26 of the ICCPR requires legislation to be enacted prohibiting discrimination does not mean that it provides for an obligation regarding the matter, which may be provided for in the legislation.¹²³ However,

¹¹² Article 2 of the UDHR.

¹¹³ D Petrova ‘Article 7 – The Equality and Non-Discrimination Provision’ *Equal Rights Trust* (2016) 1, available at <http://www.equalrightstrust.org/resources/article-7-equality-and-non-discrimination-provision>, accessed on 02 January 2018.

¹¹⁴ *Ibid* 2.

¹¹⁵ *Ibid*.

¹¹⁶ D Petrova ‘The declaration of principles on equality: A contribution to international human rights’ (2008) 2 *The Equal Rights Review* 58.

¹¹⁷ United Nations Human Rights Office of the High Commissioner ‘Women’s rights are human rights’ (2014) 4.

¹¹⁸ *Ibid*.

¹¹⁹ Article 26 which also states that in respect of this, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹²⁰ *InteRights* ‘Non-discrimination in international law: A handbook for practitioners’ (2011) 27.

¹²¹ *Danning v the Netherlands* Communication No. 180/1984, ICCPR.

¹²² *Broeks v the Netherlands* Communication No. 172/1984, ICCPR.

¹²³ *Broeks v the Netherlands* *supra* para 12.4.

the HRC further held that in the event where such legislation is put into place, it must be compliant with Article 26.¹²⁴

Accordingly, Article 2 of the ICCPR requires each member to respect and make sure that all persons within its territory and material to its jurisdiction enjoy the rights realised in the Covenant ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹²⁵ These grounds of discrimination are the same as the grounds mentioned in the UDHR. The use of ‘other status’ in Articles 2 and 26 of the ICCPR presuppose that grounds of discrimination also cover additional grounds. In *Gueye v France*,¹²⁶ the HRC found that nationality was not expressly mentioned in the ICCPR, the ‘or other status’ words prohibited discrimination based on the grounds of nationality.

In terms of Article 3 of the ICCPR, every Member State is obligated to ensure that men and women have equal enjoyment of the rights set forth in the Covenant.¹²⁷ Subsequently, in the *Mauritius Women* case,¹²⁸ a group of 19 women lodged a complaint with the Human Rights Committee, relying on the Optional Protocol to the ICCPR.¹²⁹ In their complaint, they alleged that the Mauritius immigration laws (which limited the immunity from deportation to the wives of Mauritius citizens only) discriminated against them based on their gender.¹³⁰ The Committee found that the differential treatment was a form of discrimination and was in violation of Articles 2(1), 3 and 26 read together with Articles 17(1) and 23(1) of the Covenant.¹³¹ When looking at the articles from the Covenant, the obvious inference that one can draw is that the ICCPR refers to emphasise formal equality.¹³²

In the ICESCR, there are particular provisions in the Covenant that directly deal with equality issues.¹³³ Article 2(2) is regarded as the Covenant’s principal provision that deals with non-

¹²⁴ *Broeks v the Netherlands* supra.

¹²⁵ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at <http://www.refworld.org/docid/453883fa8.html>, accessed on 22 January 2017.

¹²⁶ Communication No. 196/1983, ICCPR.

¹²⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at <http://www.refworld.org/docid/453883fa8.html>, accessed on 22 January 2017.

¹²⁸ *Mauritius Women* Communication No. 35/1978.

¹²⁹ See also *Van Oord v The Netherlands* Communication No 658/1995 UN Doc CCPR/C/60/D/658/1995

¹³⁰ *Mauritius Women* Communication No. 35/1978.

¹³¹ Ibid.

¹³² UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at <http://www.refworld.org/docid/453883fa8.html>, accessed on 22 January 2017.

¹³³ InteRights ‘Non-discrimination in international Law: A handbook for practitioners’ (2011) 28.

discrimination and has been construed to be a ‘dependent’ guarantee of non-discrimination in respect of the ‘rights enunciated in the present Covenant’.¹³⁴ The Committee on Economic Social and Cultural Rights (CESCR) affirms and clarifies that Article 2(2) prohibits direct and indirect discrimination and requires the State Party to make sure that formal and substantive equality is achieved and enjoyed by disadvantaged and marginalised groups.¹³⁵

In terms of the Covenant, the State Party undertakes to guarantee that the rights set out in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹³⁶ The language used in this Article is the same as that used in Articles 2 and 26 of the UDHR and ICCPR respectively.¹³⁷

Article 12 of the ICESCR declares that everyone has a right to the enjoyment of the highest attainable standard of physical and mental health, and this is also linked to the principle of non-discrimination and equality.¹³⁸ The case of *Eldridge v British Columbia (Attorney-General)*¹³⁹ demonstrates the importance of substantive equality for disadvantaged groups in accessing healthcare services. In this case, the Canadian Supreme Court was asked to pronounce on sections 3, 5 and 9 of the Hospitals Insurance Act and its Regulations.¹⁴⁰ Furthermore, the Court found that there was an infringement of section 15(1) of the Canadian Charter of Rights as the hospitals failed to give medical interpreter services to the deaf.¹⁴¹ It was held that this failure was an infringement of the Canadian Charter and the deaf were adversely affected by this failure.¹⁴²

In 2000, the CESCR issued a General Comment no.14 relating to the right to health.¹⁴³ This innovative document offers respect, protection and fulfilment of the right to health by member

¹³⁴ Ibid 29.

¹³⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at <http://www.refworld.org/docid/4a60961f2.html>, accessed 28 February 2016.

¹³⁶ Ibid.

¹³⁷ InteRights ‘non-discrimination in international law: a handbook for Practitioners’ (2011) 29.

¹³⁸ E Durojeya ‘Realising equality in access to HIV treatment for vulnerable and marginalized groups in Africa’ (2012) 15(1) *Potchefstroom Electronic Law Journal* 218.

¹³⁹ *Eldridge v British Columbia (Attorney-General)* 1977 151 DLR (4th) 577.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Committee on Economic, Social and Cultural Rights ‘The right to the highest attainable standard of health (general comments) 11 August 2000 E/C.12/2000/4’ (2000), available at http://pfdc.pgr.mpf.mp.br/atuacao-e-conteudos-de-apoio/publicacoes/saude/comentario_14_ingles.pdf, accessed on 26 October 2016.

states.¹⁴⁴ In terms of this comment, accessibility of the health facilities must be a priority and be accessible without discrimination to every person, including to those living with HIV/AIDS as one of the marginalised and vulnerable groups.¹⁴⁵

The CEDAW guarantees the right to equality and non-discrimination.¹⁴⁶ Promotion of equality and prevention of discrimination in terms of CEDAW is focused mainly on women.¹⁴⁷ These rights are the backbone of the Convention.¹⁴⁸ According to article 1 of CEDAW, the term "discrimination" is the implication of 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or with an impact of invalidating or impairing the appreciation, enjoyment or exercise by every person, equal rights and freedoms'.¹⁴⁹

The Convention goes further than other conventions, covenants and national legislation dealing with the concept of discrimination.¹⁵⁰ The Convention covers both direct and indirect discrimination against women and emphasises the suffering that women went through in the past and which they continue to face today.¹⁵¹ Articles 1 to 5 and 24 of the Convention are regarded as substantive articles that show the States' commitment to values of equality and non-discrimination.¹⁵²

In the international arena, no legally binding document has been enacted to specifically govern human rights violations based on HIV/AIDS.¹⁵³ However, HIV-specific regulation is provided

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ For instance, article 12 which provides that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

¹⁴⁷ InteRights 'Non-discrimination in international law: A handbook for practitioners' (2011), 32.

¹⁴⁸ Cusack and Pusey 'Rights to non-discrimination and equality' (2014) 14 *Melbourne Journal of International Law* 4.

¹⁴⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at <http://www.refworld.org/docid/453883fa8.html>, accessed on 22 January 2017.

¹⁵⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, available at <http://www.refworld.org/docid/453882a7e0.html>, accessed on 22 January 2017.

¹⁵¹ A Byrnes 'Using gender-specific human rights instruments in domestic litigation: the Convention on the Elimination of all Forms of Discrimination against Women' in K Adams and A Byrnes (eds) *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (1999) 57.

¹⁵² Ibid.

¹⁵³ Elliot, Utyasheva and Zack 'HIV, disability and discrimination: making the links in international and domestic human rights law' (2009) 12(29) *Journal of the International AIDS Society* 7.

for in the International Guidelines on HIV/AIDS and Human Rights.¹⁵⁴ The emphasis of the Guidelines is that states should put in place laws governing or strengthening discrimination free laws, providing for the protection of the marginalised groups such as PLWHIV and disabled people.¹⁵⁵ The Guidelines also provide for the implementation of speedy and effective remedies in the administrative and civil forums catering for discrimination.¹⁵⁶

2.8 The regional legal framework on equality

The African Charter on Human and People's Rights (ACHPR)¹⁵⁷ promotes and protects human rights and freedoms on the African continent.¹⁵⁸ The African Charter also protects people against unfair discrimination and provides for equality before the law.¹⁵⁹ As a result, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights are empowered to deal with the implementation of the provisions set forth in the Charter.¹⁶⁰ Article 2 of the Charter states that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.¹⁶¹ Some of these grounds of discrimination are similar to those mentioned in the UDHR, ICCPR and ICESCR.

In the case of *Association Mauritanienne des Droits de l'Homme v Mauritania*,¹⁶² the African Commission held that addressing discrimination was very important:

Article 2 of the Charter lays down a principle that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities

¹⁵⁴ Joint United Nations Programme on HIV/AIDS & Office of the UN High Commissioner for Human Rights 'International Guidelines on HIV/AIDS and Human Rights' (2006), available at <http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf>, accessed on 28 November 2016.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ It was adopted by the Organization of African Unity (OAU) in 1981 and entered into force in 1986.

¹⁵⁸ Europe-Third World Centre 'The right to non-discrimination' (2011), available at: <http://www.cetim.ch/legacy/en/documents/bro13-discrim-A4cover-an.pdf>, accessed on 19 October 2016.

¹⁵⁹ Article 2 states that everyone shall be entitled to enjoy all the rights guaranteed by the Charter without distinction as to race, sex, political belief, religion belief and other status. Moreover, Article 3 states that all individuals shall be equal before the law and they shall be entitled to equal protection of the law.

¹⁶⁰ Europe-Third World Centre 'The right to non-discrimination' (2011), available at <http://www.cetim.ch/legacy/en/documents/bro13-discrim-A4cover-an.pdf>, accessed on 19 October 2016.

¹⁶¹ Similar to article 2 of the ICCPR.

¹⁶² Communication no. 210/98.

adopted by the General Assembly of the United Nations in resolutions 47/135 of 18 December 1992... From the foregoing, it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises.¹⁶³

In addition, Article 3 of the Charter states that ‘every person shall be equal before the law and shall have equal protection of the law’.¹⁶⁴ In terms of Article 18, the State shall guarantee the eradication of every form of discrimination against women and ensure the protection of the rights of women and children as postulated in international declarations and conventions. Article 19 also provides that all persons shall be equal; they shall enjoy the same respect and shall have the same rights.¹⁶⁵

The African Commission adopted a resolution on forced and coerced sterilisation of HIV women.¹⁶⁶ The resolution condemned all forms of stigma and discrimination in terms of access to, and provision of, health services in the context of HIV.¹⁶⁷ It also made it clear that all forms and practices of involuntary sterilisation violated women’s rights to equality and non-discrimination, dignity, liberty and security of the person, and freedom from torture, cruel, inhumane and degrading treatment, as well as the right to the highest attainable physical and mental health as enshrined in terms of regional and international human rights legal frameworks.¹⁶⁸

Moreover, the ACHPR has called upon Member States of the African Charter to make sure that the existing international medical and ethical principles of free and informed consent regarding all medical procedures, including sterilisation, are reflected in national laws and are enforced in the provision of healthcare services to HIV positive women.¹⁶⁹ Furthermore, the ACHPR called upon State Parties to put in place mechanisms to ensure that healthcare providers and/or

¹⁶³ *Mauritanienne des Droits de l’Homme v Mauritania*, Communication no. 210/98.

¹⁶⁴ See also section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁶⁵ Article 19 of the CEDAW.

¹⁶⁶ The African Commission on Human and Peoples’ Rights ‘Resolution on Involuntary Sterilisation and Protection of Human Rights in Access to HIV Services’ (2013), adopted at its 54th Ordinary Session held from 22 October to 5 November 2013, in Banjul, The Gambia.

¹⁶⁷ R Lee ‘African Commission condemns coerced sterilisation of HIV+ women’ *OSISA* 06 November 2013, available at <http://www.osisa.org/hiv-and-aids/regional/african-commission-condemns-coerced-sterilisation-hiv-women>, accessed on 15 December 2016.

¹⁶⁸ *Ibid.*

¹⁶⁹ The African Commission on Human and Peoples’ Rights ‘Resolution on Involuntary Sterilisation and Protection of Human Rights in Access to HIV Services’ (2013), adopted at its 54th Ordinary Session held from 22 October to 5 November 2013, in Banjul, The Gambia.

institutions do not subject HIV positive women to coercion, compulsion or unjustified inducement in order to secure consent for sterilisation or other medical procedures.¹⁷⁰

State Parties must ensure that HIV positive women are provided with all information on available HIV and reproductive health services in a language that they understand; ensure regular training of medical personnel on the protection of human rights in the perspective of healthcare, including the doctrines of informed consent and non-discrimination.¹⁷¹ It has been found that healthcare workers' attitude towards HIV positive women is one of the causes of the problem and they are the perpetrators of this HIV-related stigma and discrimination¹⁷². More importantly, the States must investigate allegations of involuntary sterilisation conducted on women living with HIV and practices involving health practitioners, institutions and all persons involved in cases of involuntary sterilisations of HIV positive women.¹⁷³

In 2008, a group of human rights and equality experts around the world adopted and signed The Declaration of Principles on Equality.¹⁷⁴ There was consensus on the 27 principles on Equality¹⁷⁵ after several debates and conferences held in attempts to reaffirm and develop the right to equality.¹⁷⁶ This was done in order to assist the legislators and judiciary of different jurisdictions around the globe in their implementations and interpretations of the promotion of equality and prevention of discrimination.¹⁷⁷ This Declaration is held to be a proclamation of

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Kendall and Albert 'Experiences of coercion to sterilize and forced sterilisation among women living with HIV in Latin America' (2015) 18 *Journal of the International AIDS Society* 1.

¹⁷³ The African Commission on Human and Peoples' Rights 'Resolution on Involuntary Sterilisation and Protection of Human Rights in Access to HIV Services' (2013), adopted at its 54th Ordinary Session held from 22 October to 5 November 2013, in Banjul, The Gambia.

¹⁷⁴ Petrova 'The declaration of principles on equality: A contribution to international human rights' (2008) 2 *The Equal Rights Review* 60.

¹⁷⁵ Principle 1 – The Right to Equality; Principle 2 - Equal Treatment; Principle 3 – Positive Action; Principle 4 – Right to non-discrimination; Principle 5 – Definition of discrimination; Principle 6 - Relationship between the Grounds of Discrimination; Principle 7 - Discrimination and Violence; Principle 8 - Scope of Application; Principle 9 - Right-holders; Principle 10 - Duty-bearers; Principle 11 - Giving Effect to the Right to Equality; Principle 12 - Obligations Regarding Multiple Discrimination; Principle 13 - Accommodating Difference; Principle 14 - Measures against Poverty; Principle 15 - Specificity of Equality Legislation; Principle 16 – Participation; Principle 17 - Education on Equality; Principle 18 - Access to Justice; Principle 19 – Victimisation; Principle 20 – Standing; Principle 21 - Evidence and Proof; Principle 22 - Remedies and Sanctions; Principle 23 - Specialised Bodies; Principle 24 - Duty to Gather Information; Principle 25 - Dissemination of Information; Principle 26 - Prohibition of Regressive Interpretation; and Principle 27 - Derogations and Reservations.

¹⁷⁶ Petrova 'The declaration of principles on equality: A contribution to international human rights' (2008) 2 *The Equal Rights Review* 61.

¹⁷⁷ Ibid 62.

the universal right to equality.¹⁷⁸ These Principles on Equality have been adopted from the UN Charter, UDHR and other international and regional covenants and Conventions.¹⁷⁹

2.9 The South African legal framework

Prior to 1994, no legislation protected the notion of equality in South African law. This has had a significant impact which is still felt today. Many argue that in South Africa, current inequality and poverty result from colonialism and the apartheid era.¹⁸⁰ The apartheid regime promoted the socio-economic development of white people at the expense of other races, especially black people, as they were almost entirely excluded from the formal economy and discriminated against in all aspects of communal life.¹⁸¹ The country's racial past has played a huge role in making certain groups more vulnerable than others.¹⁸² This historical context has clearly shaped our jurisprudence with the courts holding that these factors must be considered when assessing the effect of discrimination on complainants.¹⁸³ With the new era of democracy and constitutional dispensation, the right to equality is now protected in our Constitution.¹⁸⁴

2.9.1 The equality clause in section 9 of the Constitution of the Republic of South Africa, 1996

The preamble of the Constitution provides that:

the people of South Africa adopt the Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and

¹⁷⁸ Petrova 'The declaration of principles on equality: A contribution to international human rights' (2008) 2 *The Equal Rights Review* 62.

¹⁷⁹ *Ibid* 64.

¹⁸⁰ S Liebenberg and B Goldblatt 'The Interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) 23 *SAJHR* 335.

¹⁸¹ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 211.

¹⁸² As Judge O'Regan rightly observed in *Brink v Kitshoff* (1996) that "The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly ninety percent of the landmass of South Africa; senior jobs and access to schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted" para 40.

¹⁸³ R Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 120.

¹⁸⁴ Section 9 of the Constitution of the Republic of South Africa, 1996.

open society in which government is based on the will of the people and every citizen is equally protected by law.¹⁸⁵

Since its earliest judgments, the Constitutional Court has recognised the importance of the aspirational equality principles described in the preamble.

The interim Constitution rejected racial policies, segregation, apartheid and colonialism,¹⁸⁶ and the final Constitution has gone further by stipulating a provision for enacting legislation and policy to address the inequalities created by the apartheid regime.¹⁸⁷ It has been argued that our Constitution is a transformative Constitution and the value of equality is significant in achieving the objective of an equal society.¹⁸⁸ The right to equality is specifically catered for in section 9 of the Constitution, which consists of five subsections. The first provides for the classic formulation of equality, which gives a guarantee of every person being equal before the law and having the right to equal protection and benefit of the law.¹⁸⁹ The second provision includes mechanisms such as legislation and affirmative action to be put in place in order to promote equality and redress the inequalities of the past.¹⁹⁰

The third proscribes direct and indirect unfair discrimination by the state based on listed and analogous grounds.¹⁹¹ The fourth provides for the extended prohibition of unfair discrimination by private persons and calls for an enactment of the national statute to prevent or prohibit unfair discrimination.¹⁹² The last subsection provides for a presumption that discrimination by the state or private persons based on listed grounds is unfair unless proven otherwise.¹⁹³ These provisions show the State's commitment to transforming our country.¹⁹⁴ However, unequal

¹⁸⁵ Constitution of the Republic of South Africa, 1996.

¹⁸⁶ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 2.

¹⁸⁷ R Burger and R Jafta 'Affirmative Action in South Africa: An Empirical Assessment of the Impact on Labour Market Outcomes' (Crise Working Paper No.76) (2010), 4.

¹⁸⁸ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 214.

¹⁸⁹ Section 9(1) of the Constitution of the Republic of South Africa, 1996. Ackermann 'Equality and the South African Constitution: The role of dignity' (2000), Bram Fischer Memorial Lecture, held at Rhodes House, Oxford, 26 May 2000, 545.

¹⁹⁰ Section 9(2) of the Constitution of the Republic of South Africa, 1996. R Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 103.

¹⁹¹ Section 9(3) of the Constitution of the Republic of South Africa, 1996. Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 215.

¹⁹² Section 9(4) of the South African Constitution, 1996. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁹³ Section 9(5) of the Constitution of the Republic of South Africa, 1996.

¹⁹⁴ T Deane *The Constitutional Dimensions of Affirmative Action in SA* (2012) available at <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf;jsessionid=4EC3A564077EEF81198DD37C46D14568?sequence=8>, accessed on 22 June 2016.

treatment may be expected and accepted in the course of the transformation process.¹⁹⁵ An infringement of the constitutional right to equality is assessed in a three-tier inquiry.

2.9.2 The stages of inquiry

In *Harksen v Lane NO*,¹⁹⁶ the Constitutional Court developed a three-stage inquiry for equality. This is one of the first cases to deal with the value of equality and the Court articulated the instances where treating a person differently could amount to unfair discrimination. As per Goldstone J, the test was set out as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by

¹⁹⁵ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), para 74, “But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.

¹⁹⁶ 1997 (11) BCLR 1489 (CC). In this case, Jeanette Harksen was married out of community of property and her husband’s estate was sequestrated. She challenged the attachment of her property as being part of her husband’s estate on the following grounds: firstly, constitutionality of 21 of the Insolvency Act 24 of 1936 (which she argued that it discriminated against her on the basis of marital status, thereby infringing her right to equality); secondly that the attachment also violated her right not to have her property expropriated without compensation which provided for in terms section 28(3) of the Constitution. According to the majority judgment, section 21 was discriminatory but not unfair.

the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).¹⁹⁷

The first stage of the inquiry provides that no question of the infringement of the right to equality can be raised if no differentiation has been made.¹⁹⁸ Of importance is the establishment of whether differentiation of an individual or a group of persons amounts to discrimination.¹⁹⁹ If the answer is in the affirmative, the next step is to ascertain whether the discrimination is based on a prohibited ground or not.²⁰⁰ In terms of section 9(1), identical treatment is not a requirement.²⁰¹ This provision does not distinguish between mere differentiation and differentiation, which amounts to unfair discrimination but deals with rational differentiation.²⁰² This means that in a democratic state, in regulating the people's interests to some extent, different treatment is inevitable.²⁰³ In other words, the state must not govern in an arbitrary manner because that would be inconsistent per the rule of law and constitutional expectations of a democratic country.²⁰⁴ However, the different treatment must not be unfair, must not affect adversely on the people, and should be justified under the limitation clause.²⁰⁵

At this stage, it is imperative that one draws a distinction between a differentiation that is permissible on one hand and a differentiation that is prohibited by the Constitution.²⁰⁶ The

¹⁹⁷ *Harksen v Lane NO 1997 (11) BCLR 1489 (CC) para 53.*

¹⁹⁸ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 216.

¹⁹⁹ W Freedman 'Recent cases: Understanding the right to equality' (1998) 115 (2) *South African Law Journal* 245.

²⁰⁰ *Ibid.*

²⁰¹ Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 114. In *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)*, para 132: Sachs J observed that: 'uniformity can be the enemy of equality. Equality means equal concern and respect across difference... Equality therefore does not imply a levelling or homogenization of behaviour but an acknowledgement and acceptance of difference'.

²⁰² Ackermann 'Equality and the South African Constitution: The role of dignity' (2000), Bram Fischer Memorial Lecture, held at Rhodes House, Oxford, 26 May 2000, 545.

²⁰³ *Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)*, paras 23-4.

²⁰⁴ G Swart 'An outcomes-based approach to the interpretation of the right to equality' (1998) 13 *SAPR/PL* 221.

²⁰⁵ *Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)*, para 26.

²⁰⁶ Swart 'An outcomes-based approach to the interpretation of the right to equality' (1998) 13 *SAPR/PL* 221.

former is the one that does not amount to unfair discrimination. Therefore, differentiations are permissible if they do not aggregate to unfair discrimination.²⁰⁷ This means that differentiations which do not result in unfair discrimination based on listed and/or analogous grounds will not be in violation of s9(1) of the Constitution.²⁰⁸ The Constitutional Court referred to this as ‘mere differentiation’. In the *Prinsloo* case, the Court explained:

It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regards 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. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.²⁰⁹

In essence, in order to constitute a mere differentiation, differentiation must have a rational connection to the legitimate governmental objective and if that is not the case, the provision in question will be unconstitutional.²¹⁰ The reason for the differentiation must be provided and therefore, a causal nexus between the differentiation and the purpose pursued by the authority is required, otherwise, the differentiation will be in violation of 9(1).²¹¹ The standard in this regard is that of rationality.²¹² In terms of the ‘rational connection’ test, the court will assess the reason that the government provides for any law which differentiates between individuals or groups in order to determine whether it has a legitimate purpose.²¹³

*S v Ntuli*²¹⁴ is an example in our law where the court found that there was no rational connection to the differentiation and the governmental purpose. In this matter, section 305 of the Criminal Procedure Act,²¹⁵ read in conjunction with section 309 of the Criminal Procedure Act,²¹⁶ prohibited prisoners without legal representation from making appeals against their sentence

²⁰⁷ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 219.

²⁰⁸ De Vos and Freedman *South African Constitutional Law in Context* (2014) 429-30.

²⁰⁹ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), para 25.

²¹⁰ Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 616.

²¹¹ Devenish *The South African Constitution* (2005) 55.

²¹² *Ibid.*

²¹³ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 220.

²¹⁴ 1996 (1) SA 1207 (CC).

²¹⁵ Criminal Procedure Act 51 of 1977.

²¹⁶ *Ibid.*

or conviction by a magistrate's court, without a judge first certifying that there were sensible grounds for the appeal. The court found that this requirement was an infringement of the right to be treated equally before the law. These provisions differentiated between prisoners who have legal representation and those who do not. The Court could not find any rational link between the differentiations of represented and unrepresented prisoners and the legitimate purpose of avoiding hopeless appeals in our courts.

According to Krüger, in the case where the complainant alleges that he/she has been discriminated against, the court needs to identify unfair discrimination without considering the rationality test as a threshold inquiry.²¹⁷

In the *National Coalition for Gay and Lesbian Equality v Minister of Justice*,²¹⁸ Ackermann J observed as follows:

This does not mean, however, that in all cases the rational connection inquiry of stage (a) must inevitably precede stage (b). The stage (a) rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable.²¹⁹

The second leg of the test requires that the differentiation be based on the listed or unlisted grounds of discrimination. The Bill of Rights, in section 9(3) provides the grounds of discrimination.²²⁰ In terms of this provision, any differentiation founded on one of the grounds listed in the section is presumably unfair discrimination.²²¹ This kind of differentiation will impose a burden on people who were disadvantaged during apartheid and will impact on their human dignity.²²² In *Harksen v Lane NO*,²²³ Goldstone J explained the basis for having listed grounds of discrimination in as follows:

²¹⁷ Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 115.

²¹⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), para 18.

²¹⁹ See also *Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC), para 26. The Court found that "...it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state, or whether the practice in issue in this case was irrational".

²²⁰ Section 9(3) of the Constitution of the Republic of South Africa, 1996 states that: 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.

²²¹ J de Waal 'Equality and Constitutional Court' (2002) 14 *SA Mercantile Law Journal* 150.

²²² *Ibid.*

²²³ *Harksen v Lane NO* 1998 (1) SA 300 (CC).

What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize 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 people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.²²⁴

However, it must be clear that the grounds are not a closed list.²²⁵ The other grounds that are not specifically stated in the Constitution and the Equality Act are referred to as analogous. These include grounds such as citizenship²²⁶ and HIV-status,²²⁷ and they are also protected in terms of section 9 of the Constitution.²²⁸

Section 9(3) must be read in conjunction with section 9(5), which provides for the presumption that discrimination on any of the stated grounds will be unfair, unless the contrary is proven.²²⁹ A distinction must be drawn between cases in which differentiation on any of the listed grounds is contended, and those in which discrimination on analogous grounds is purported.²³⁰ In the former, unfairness will be presumed unless the defendant is able to prove fairness.

It is accepted in South African law that not every differentiation constitutes discrimination and, therefore, must be prohibited.²³¹ At this stage, it is of great importance that the author looks at what the Court has interpreted discrimination to mean and the link between discrimination and the value of equality in our law. The Constitution prohibits direct or indirect discrimination on

²²⁴ Ibid para 49.

²²⁵ C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 53.

²²⁶ *Larbi-Odam and Others v Member of the Executive Council for Education and Another* 1996 (12) BCLR 1612 (CC).

²²⁷ *Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC).

²²⁸ K Govender 'Equality, sexuality and taking rights seriously' (2008) 29 *Obiter* 7.

²²⁹ J Small and E Grant 'Equality and non-discrimination in the South African Constitution' (2000) 4 *International Journal of Discrimination and the Law* 55.

²³⁰ Ibid.

²³¹ Deane 'The constitutional dimensions of affirmative action in SA' (2012), available at <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf;jsessionid=4EC3A564077EEF81198DD37C46D14568?sequence=8>, accessed on 22 June 2016.

a horizontal level and mandates for the creation of legislation to combat unfair discrimination under section 9(4).²³² In the case of *Prinsloo v Van der Linde and Another*,²³³ the Court expressed the view that “‘discrimination’ has incorporated a specific pejorative meaning concerning the unequal treatment of persons based on attributes and characteristics ascribing to them”.²³⁴

From the description of ‘discrimination’, it is established that it can be direct or indirect.²³⁵ Indirect discrimination will be present when some rule or provision is in place and *ex facie* seems neutral, but when applied it impacts adversely on particular individuals or a group of individuals.²³⁶ Direct discrimination occurs when one is treated differently or unfavourably based on the grounds prohibited by the Constitution.²³⁷

Moreover, the equality clause also differentiates between unfair and fair discrimination. In the *Harksen* case, the court held that primarily, unfair discrimination can be defined as a differential treatment of people in a manner that impairs their ultimate dignity as human beings.²³⁸ Discrimination will be deemed to be fair if it is well founded relating to the purposes latent to the value of equality.²³⁹ The judgment in the *Hugo* case is a good example of what will constitute fair discrimination.²⁴⁰ In order for discrimination to be unfair, it must be ascertained whether the affected person belongs to a group that was disadvantaged in the past.²⁴¹ The court found that fathers who were imprisoned at that time had not been previously

²³² Section 9(4) of the Constitution of the Republic of South Africa, 1996. Legislation has been passed in the form of Act 4 of 2000 for these purposes.

²³³ 1997 (3) SA 1012 (CC).

²³⁴ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), para 31.

²³⁵ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

²³⁶ Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 292.

²³⁷ Deane *The constitutional dimensions of affirmative action in SA* (2012), available at <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf;jsessionid=4EC3A564077EEF81198DD37C46D14568?sequence=8>, accessed on 22 June 2016.

²³⁸ *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC), para 51-52.

²³⁹ TP van Reenen ‘Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa’ (1997) 12 *SAPR/PL* 156.

²⁴⁰ *The President of the Republic of South Africa and Another v Hugo* 1997 (2) SA 1 (CC): In 1994, the then President exercising his powers in terms of section 82(1)(k) of the interim Constitution, granted remission of sentence to all mothers who were incarcerated at the time and had children under the age of twelve. Hugo, a prisoner who also had a child under the said age, contended that President’s decision unfairly discriminated against him on the basis of gender. Indeed, the Court found that it was discrimination. However, it found that in the South African society, it is an acceptable norm that mothers are the ones responsible for the nurturing and rearing of the children. The order by the President was in favour of women prisoners and minor children, but it was not unfair discrimination. This was so because, women and disabled people belong to a vulnerable group of our society. There were a lot of fathers that were incarcerated, their release would result in a public outcry.

²⁴¹ Govender ‘Equality, sexuality and taking rights seriously’ (2008) 29 *Obiter* 9.

disadvantaged. In addition, the question must be asked whether the measure adopted is established to achieve a valiant and significant societal goal.²⁴²

In South African law, the complainant does not have to prove that law or conduct with a discriminatory effect was intended to discriminate.²⁴³ In other words, intention is not a requirement, as it would be in delictual or in criminal matters.²⁴⁴ In *Pretoria City Council v Walker*,²⁴⁵ it was found that the intention requirement would place a burden of proof on the complainant, particularly in cases of indirect discrimination.²⁴⁶ The onus of proving that there has been an act of unfair discrimination rests with the person alleging the discrimination.²⁴⁷ To put it differently, the complainant must prove that prima facie the law or conduct on analogous grounds is founded on attributes or characteristics which have the effect of impairing, or the prospective to impair, the ultimate dignity of persons as human beings, or they will be adversely affected in a relatively solemn manner.²⁴⁸

However, if the alleged discrimination is founded on a listed ground, the respondent shall prove that the discrimination was fair.²⁴⁹ In determining whether the discriminatory conduct has impacted unfairly on the complainant, certain factors must be taken into account. These are as follows:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal; and
- (c) the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.²⁵⁰

²⁴² Ibid.

²⁴³ de Waal 'Equality and the Constitutional Court' (2002) 14 *SA Mercantile Law Journal* 152.

²⁴⁴ Ibid.

²⁴⁵ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

²⁴⁶ Ibid para 43.

²⁴⁷ Section 13 of Act 40 of 2002.

²⁴⁸ *Harksen v Lane NO* supra, para 46.

²⁴⁹ Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 615.

²⁵⁰ *Harksen v Lane NO* supra, para 51.

In *Harksen's* case, the Court found that it was only rational that the onus must be cast upon the solvent spouse.²⁵¹

The Constitutional Court has developed extensive jurisprudence on the right to equality whilst being assisted by the High Courts.²⁵² In delivering these judgments, it is clear that the Constitutional Court has focused on substantive equality 'incrementally and cautiously'.²⁵³ This means that in each case, the Court must carefully and thoroughly understand the impact a discriminatory practice will have on the group of people affected so as to be able to decide whether the overall effect in that particular case will advance the objective and the principle of equality aimed to be achieved by the Constitution or not.²⁵⁴

Furthermore, in developing the jurisprudence, the Court has dealt with the equality value as a tool in remedying inequalities and disadvantages of South Africa's past.²⁵⁵ For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,²⁵⁶ the Court referred to equality as remedial or restitutionary equality.²⁵⁷ In support of this approach, Justice Ackermann observed as follows:

Section 9 of the 1996 Constitution, like its predecessor, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms." The State is further obliged "to promote the achievement of such equality" by "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination," which envisages remedial equality. This is not to suggest that principles underlying remedial equality do not operate elsewhere.²⁵⁸

²⁵¹ Ibid para 59.

²⁵² Deane *The Constitutional Dimensions of Affirmative Action in SA* (2012), available at <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf;jsessionid=4EC3A564077EEF81198DD37C46D14568?sequence=8>, accessed on 22 June 2016.

²⁵³ Govender 'Equality, sexuality and taking rights seriously' (2008) 29 *Obiter* 6.

²⁵⁴ *The President of the Republic of South Africa and Another v Hugo* 1997 (2) SA 1 (CC), para 41.

²⁵⁵ C Albertyn and B Goldbaltt 'Section 9 – the right to equality: Paper for presentation at the Constitutional Law of South Africa Conference, 29 March 2006' 2 available at http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf, accessed on 22 February 2018.

²⁵⁶ 1999 (1) SA 6 (CC).

²⁵⁷ Ibid paras 61-62.

²⁵⁸ See also *Brink v Kitshoff*, para 42, where the Court specifically provided that the equality clause cannot be only utilized as a tool to prohibit discrimination, but also to remedy the discriminatory practices of the past.

2.10 The relationship between the equality clause and the limitation clause

Section 36 of the BoRs sets out the criteria that need to be followed in justifying the differentiation in terms of the ground of discrimination or limitation of the rights enshrined in the Constitution. Subsequently, South African Courts apply a two-stage approach when adjudicating matters involving the limitation of human rights.²⁵⁹ The first stage is to determine whether the right in the BoRs has been violated.²⁶⁰ At this stage, the complainant must prove that he/she is protected under the ambit of the right in question.²⁶¹ Once it has been established that the right has been violated, the second stage is invoked. The second stage is the justification analysis. This stage relies on the factors stated in section 36(1) to determine whether the violation of the right is justified in an open and democratic society based on human dignity, equality and freedom. It has been argued that it is not easy to apply the two-stage analysis on the right to equality and limitation of this right upon violation.²⁶² Despite the difficulties, the Constitutional Court also takes into account section 36 in cases where the right to equality has been violated.²⁶³

2.11 The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

The Equality Act²⁶⁴ was enacted as required by section 9(4) of the Constitution.²⁶⁵ This is the primary legislation which aims to and gives effect to the constitutional equality clause as a whole.²⁶⁶ As a very determined piece of legislation, the Equality Act preamble provides the aims to be achieved:

the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.²⁶⁷

This will be discussed in more detail in the following chapter.

²⁵⁹ K Iles 'A fresh Look at limitations: unpacking section 36' (2007) 23 *SAJHR* 71.

²⁶⁰ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 217.

²⁶¹ E Klinck 'It takes three to tango: The right to equality, social security and constitutional law in South Africa' (2001) 3(2) *European Journal of Law Reform* 173.

²⁶² Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 218.

²⁶³ *Ibid.*

²⁶⁴ Act 4 of 2000, which came into effect in 1 September 2000.

²⁶⁵ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 244.

²⁶⁶ SBO Gutto *Equality and Non-Discrimination in South Africa* (2001) 123.

²⁶⁷ In terms of the Act, in order to achieve this aim, it prohibits unfair discrimination by the state and private persons, and by providing remedies for persons affected by unfair discrimination, and promotion of substantive equality. See also Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013), 244.

2.12 Conclusion

Universally, it has been accepted that the equality right is the fundamental human right that every human being enjoys. Not only it is a right that is extensively protected in terms of South African legislation, but, it is also a right that is protected and guarded nationally and internationally. Therefore, any violation of the right to equality without justifiable limitation is viewed in an extremely serious manner. Accordingly, any violation warrants a full examination into the circumstances and prejudices surrounding the violation of any person's right to equality. Of great importance are the underlying reasons and in most cases, stereotypes and prejudices that exist in order to perpetuate discrimination against certain individuals and/ classes of persons. Furthermore, conducting awareness and educating people about these grievous actions will help in order to address the problem. Such incidents must also be thoroughly investigated to find any systemic causes for prejudices and reasons for the discrimination be provided. People also need to be educated on the legal remedies which exist in order for there to be some kind of relief. In addition to being aware, it is extremely important to investigate what relief is claimable by women who have been sterilised either coercively or forcibly.

Chapter Three

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

3.1 Introduction

The previous chapter described how the equality clause under section 9 of the Constitution is a comprehensive right that affords protection against unfair discrimination.²⁶⁸ It incorporates equality for all persons and equal protection under the law for everyone.²⁶⁹ It also prohibits unfair discrimination in more or less every sphere of society, as it applies both vertically and horizontally.²⁷⁰ The right to equality also embraces freedom for all and aims at trying to achieve a transformative and democratic society.²⁷¹ The Promotion of Equality and Prevention of Unfair Discrimination Act²⁷² (hereafter PEPUDA or Equality Act) was enacted to give effect to s 9(4) and item 23(1) of Schedule 6 of the Constitution.²⁷³ These sections place an obligation on the State to assure that equality legislation was promulgated to give effect to section 9 of the Constitution.²⁷⁴

The Equality Act is one of a range of legislative endeavours to undo the effects of centuries of inequalities and injustices, race-based oppression and marginalisation created by social and legal segregation in South Africa.²⁷⁵ As a key legislative tool to the advancement of substantive equality, PEPUDA provides legal mechanisms to enforce the right to equality by prohibiting unfair discrimination and the removal of systemic barriers, which prevent progression towards

²⁶⁸ C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 1.

²⁶⁹ Ibid.

²⁷⁰ A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24(3) *SAJHR* 445.

²⁷¹ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 1.

²⁷² Equality Act 4 of 2000, parts of the Act came into effect on 1 September 2000, and the remainder on 16 June 2003.

²⁷³ I Currie and J de Waal *The Bill of Rights Handbook* 6th ed (2013) 244.

²⁷⁴ Ibid.

²⁷⁵ Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24(3) *SAJHR* 445.

a more equal society.²⁷⁶ It also describes positive measures to promote equality. In its preamble the Equality Act provides for:

the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.²⁷⁷

The apartheid regime in South Africa created deep social and economic disparities, which still exist today.²⁷⁸ The Equality Act seeks to prohibit unfair treatment of people in every aspect in our society.²⁷⁹ In instances where a person who alleges that he/she has been discriminated against, they must invoke the provisions of PEPUDA. Wherever there is a challenge regarding the constitutional validity of the Constitution, PEPUDA may not be used, the Constitutional Court may only be approached in these instances.²⁸⁰ PEPUDA provides a speedy way to resolve equality disputes.²⁸¹ South Africa is also one of the most deeply patriarchal countries in which women have been considered an inferior group in society, and this has occurred across all races.²⁸² The inequalities in terms of gender are also caused by the high levels of violence against women,²⁸³ which is a major challenge to the achievement of women's socio-economic equality in our society.²⁸⁴

Additionally, the HIV/AIDS pandemic is also a barrier that challenges women's socio-economic equality, not only in South Africa but in other countries as well, both regionally and internationally.²⁸⁵ As one of the vulnerable groups in our society, women, especially HIV infected women, continue to experience injustices and various forms of oppression, stigmatisation and discrimination relating to their HIV status, both in the public and private

²⁷⁶ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 1 and S Liebenberg and M O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 70.

²⁷⁷ The preamble of the Equality Act.

²⁷⁸ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 1.

²⁷⁹ The Act provides for unfair practices recognised in South Africa.

²⁸⁰ P De Vos, W Freedman and D Brand *South African Constitutional Law in Context* (2014) 452.

²⁸¹ This will be dealt with below under lodging a complaint of discrimination with the Equality Court 3.8.

²⁸² Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 1.

²⁸³ Liebenberg and O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 73.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

sectors.²⁸⁶ As discussed in the previous chapters, HIV positive South African women and other women from around the world, have been subjected to forced and/or coerced sterilisation in healthcare facilities which is a grave violation of their human rights.²⁸⁷ As a result of these human rights violations, HIV positive women need legal protection against the unfair discriminatory practices that they face. It is for this reason that this chapter aims to explore whether women living with HIV who allege that they have been coercively and/or forcibly sterilised can use the Equality Act as a means of claiming appropriate relief. In doing so, this chapter will also look at the procedure that the complainants need to follow in an Equality Court and the remedies that the courts can grant to the successful complainant.

3.2 Objectives of the Equality Act

The objectives of the Equality Act are aimed at transformation as it requires the State and others not only to end discriminatory practices but also to promote equality.²⁸⁸ It dictates that positive action be taken to eradicate unfair practices,²⁸⁹ and remedy past and present practices of subsidiary as well as institutionalised unfair discrimination and inequality in our society.²⁹⁰ In addition, PEPUDA aims to ensure that South Africa satisfies its international treaty obligations imposed by treaties such as CERD, ICCPR, ICSECR and CEDAW.²⁹¹ Under these treaties, South Africa has agreed to certain obligations to determine, administer and apply at the national level, internationally accepted rights, freedoms and obligations and responsibilities held by these treaties.²⁹²

3.3 Application of the Equality Act

According to section 5 of the Equality Act, the Act binds the State and all persons.²⁹³ The Act calls on the State and all persons to actively participate in the promotion of substantive

²⁸⁶ The AIDS Law Project *Submission on the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000: Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women & Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Children, Youth and Persons with Disabilities* 22 September 2006 available at <https://section27.org.za/wp-content/uploads/2010/04/Promotion-of-Equality-and-Prevention-of-Unfair-Discrimination-Act-2006-ALP.pdf> accessed on 23 December 2017.

²⁸⁷ N Diko 'Seeking redress...The Equality Court and HIV-related discrimination' 2012 ALQ 41.

²⁸⁸ Section 20 of PEPUDA.

²⁸⁹ LH Thejane *The Use of HIV Testing in the Workplace as the Basis for Possible Unfair Discrimination* (LLM Thesis, North-West University, 2015) 21.

²⁹⁰ Ibid.

²⁹¹ Section 2(h) of PEPUDA.

²⁹² SBO Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 153.

²⁹³ Section 5 (1) of the Equality Act.

equality.²⁹⁴ A 'person' in terms of the Equality Act encompasses a juristic person, non-juristic body, a group or category of persons'.²⁹⁵ According to Albertyn, Goldblatt and Roederer,²⁹⁶ the definition of 'the State'²⁹⁷ is wider than the one in the Constitution. The definition in the Equality Act includes:

any department of State or administration in section 5(2) of the Equality Act provides that if any conflict relating to a matter dealt with in the Equality Act arises between the Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending the Equality Act, the former should take precedent.²⁹⁸

This means that all disputes regarding unfair discrimination, except those that arise in the workplace, fall within the perimeters of PEPUDA.²⁹⁹ In the matters relating to discrimination in the workplace, the Employment Equity Act³⁰⁰ and Labour Relations Act³⁰¹ will be applicable.³⁰² Nevertheless, workers not covered by these two statutes in the employment sector are protected by the Equality Act.³⁰³

3.4 The Prohibition on Unfair Discrimination in terms of the PEPUDA

Section 6 of the Equality Act prohibits unfair discrimination by the state or private persons against individuals.³⁰⁴ This is a broad and very fundamental prohibition of unfair

²⁹⁴ Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform' (2008) 24(3) *SAJHR* 445.

²⁹⁵ A Kok 'Motor vehicle insurance, the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act' (2002) 18 *SAJHR* 65.

²⁹⁶ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 11.

²⁹⁷ Section 1(xxx) of PEPUDA.

²⁹⁸ J Barnard and A Kok 'A consumer's fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act' (2015) 78 *THRHR* 5.

²⁹⁹ In cases where discrimination is alleged whether based on the conduct of the state or individual or private institution, the complainant must rely on the provisions of the Equality Act. In the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC) (30 September 2005) para 437, Justice Ngcobo observed as follows: "where, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guarantees in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on Constitution without alleging that the Statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question..."

³⁰⁰ Employment Equity Act 55 of 1998.

³⁰¹ Labour Relations Act 66 of 1995.

³⁰² Section 5(3) of PEPUDA.

³⁰³ These include members of South African National Defence Force, National Intelligence Agency and the South African Secret Services and Independent Contractors.

³⁰⁴ Section 6 of PEPUDA.

discrimination.³⁰⁵ The horizontal application³⁰⁶ of section 6 means that unfair discrimination by private institutions or actors such as private hospitals is also prohibited.³⁰⁷

In terms of section 1 of the Equality Act discrimination means:

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.³⁰⁸

From this definition, three basic elements are clear, namely, (a) ‘an act or omission which may either be direct or indirect’; (b) ‘that causes harm by imposing a burden or withholding a benefit’; and (c) ‘on a prohibited ground’.³⁰⁹ A positive act means that certain measures are put into place in order to respond to the effects of past discrimination, for instance, affirmative action.³¹⁰ An act of omission occurs when one fails to act where there is a duty on them which has legal consequences. For example, in the *Eldridge v British Columbia (Attorney-General)*³¹¹ case, it was held that the Medical Services Commission and hospitals failed to provide a sign language interpreter where it was necessary for effective communication between disabled patients and the healthcare personnel.³¹² This was found to be an absolute violation of the rights of the deaf patients enshrined in section 15(1) of the Canadian Charter of Rights and Freedoms.³¹³ The failure to provide an interpreter discriminated against them as compared to other hearing patients.³¹⁴

In the definition of discrimination in the Equality Act, there are different forms of discrimination.³¹⁵ Firstly, there is direct discrimination which occurs when there is a direct connection between the prohibited ground and discrimination.³¹⁶ The *Hoffman*³¹⁷ case is a good

³⁰⁵ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 32.

³⁰⁶ Prohibition of discrimination between persons.

³⁰⁷ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 32.

³⁰⁸ Section 1 of PEPUDA.

³⁰⁹ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 33.

³¹⁰ Section 14(1) of PEPUDA.

³¹¹ *Eldridge v British Columbia (Attorney-General)* [1997] 3 S.C.R 624.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ This was illustrated in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), para 43.

³¹⁶ A Lølandsmo *Equality rights and democratic transition study of cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 12.

³¹⁷ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), (2000) 21 ILJ 2357 (CC).

example of direct discrimination as in that matter, the SAA excluded all HIV positive job applicants in terms of its internal recruitment policy.³¹⁸ The other form of discrimination is indirect discrimination which occurs when a seemingly innocent or neutral act or prerequisite has a harmful or prejudicial effect on a person or group recognised under the prohibited grounds of discrimination section.³¹⁹ Of importance in this instance, is the impact that the treatment has on that person or group.³²⁰ This was evident in the judgement of the *MEC for Education: KwaZulu-Natal and Others v Pillay*.³²¹ In this matter, a seemingly neutral school policy regarding the wearing of jewellery was found to have a disparate impact on Hindu girls who have a cultural practice of wearing a nose stud once they reach the age at which culturally they are regarded as women.³²²

For there to be discrimination, a person must have suffered some form of harm or prejudice.³²³ Discrimination in section 1 of PEPUDA is broadly defined and it echoes the definition set out by the Constitutional Court in the decision of *Harksen*.³²⁴ Discrimination in terms of this section must be disparaging in nature.³²⁵ Therefore, differential treatment alone does not necessarily amount to discrimination.³²⁶ Differential treatment will constitute discrimination only when it results in harm or prejudice and is, therefore, unjustifiable.³²⁷ The concepts of ‘discrimination’ and ‘unfair discrimination’ in the Constitution and PEPUDA, in the matters relating to constitutional and human rights in South Africa, are problematic.³²⁸ ‘Discrimination’ is used in most jurisdictions and then they rely on the courts to interpret and

³¹⁸ Ibid.

³¹⁹ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 34. Liebenberg and O’ Sullivan ‘South Africa’s new equality legislation, a tool for advancing women’s socio-economic equality?’ 2001 *Acta Juridica* 90-1.

³²⁰ Liebenberg and O’ Sullivan *ibid* 91.

³²¹ *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

³²² *Ibid* paras 73-78.

³²³ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 34.

³²⁴ *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC); Liebenberg and O’ Sullivan ‘South Africa’s new equality legislation, a tool for advancing women’s socio-economic equality?’ 2001 *Acta Juridica* 90.

³²⁵ C Cooper and R Lagrange ‘The application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act’ (2001) 22 *Industrial Law Journal* 1536.

³²⁶ Lølandsmo *Equality rights and democratic transition study of cases in South Africa’s Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 11.

³²⁷ *Ibid*.

³²⁸ Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 129.

determine whether the particular act can be dealt with by using the Constitution or the legislation.³²⁹

The definition of discrimination must be read together with the definition of ‘prohibited ground’ in section 1 of the Equality Act. In this definition, a distinction is made between listed and unlisted grounds.³³⁰ PEPUDA also provides for the grounds of discrimination and it must be noted that it is not a closed list. Section 1(1)(xxiii) states that the ‘prohibited grounds of discrimination, include 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.’³³¹ In *Harksen v Lane*³³², Goldstone J explained the basis for having listed grounds of discrimination:

What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize 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 people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.³³³

It should be noted that in the Equality Act, HIV status³³⁴ together with other grounds such as nationality³³⁵ and socio-economic status, family status and family responsibility were not mentioned as prohibited grounds of discrimination, although initially they were included in the Bill.³³⁶ Subsequent to the public participation process, the legislature created room for the

³²⁹ Ibid.

³³⁰ Section 1(1)(viii) of the PEPUDA.

³³¹ The grounds listed in the Act are similar to those listed in section 9 of the Constitution of the Republic of South Africa, 1996.

³³² *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC).

³³³ Ibid para 49.

³³⁴ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), (2000) 21 ILJ 2357 (CC).

³³⁵ *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1997 (12) BCLR 1655 (CC).

³³⁶ The AIDS Law Project ‘Submission on the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000’ (2006), available at <https://section27.org.za/wp-content/uploads/2010/04/Promotion-of-Equality-and-Prevention-of-Unfair-Discrimination-Act-2006-ALP.pdf> accessed on 23 December 2017.

consideration of inclusion of these grounds in the future.³³⁷ PEPUDA made provision for the institution of the Equality Review Committee (ERC) which had to investigate and make recommendations to the Minister regarding the inclusion of the excluded grounds within one year of the ERC coming into operation.³³⁸ Regardless of this provision, there were delays on the part of the ERC to finalise and submit recommendations made. Thereafter, authors and organisations such as the AIDS Law Project made suggestions on several documents,³³⁹ but all attempts seemed to be in vain. Seventeen years after the enactment of the Equality Act, an amendment to section 1 of PEPUDA has been made and HIV/AIDS status is now included in the definition of ‘prohibited grounds’.³⁴⁰

Furthermore, the Equality Act provides for additional criteria that can be used to determine whether an unlisted ground is a prohibited ground in terms of section 1(1)(xxiii).³⁴¹ It states that a prohibited ground may also include:

- (b) any other ground where discrimination based on that other ground:
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.³⁴²

The inclusion of a notion of systemic disadvantage is very important in order to address discrimination against women based on their socially and economically disadvantaged position in our society.³⁴³

³³⁷ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 81.

³³⁸ Section 34(1)(b) of the equality act.

³³⁹ AIDS Law Project ‘an examination of methods of protection proposed for HIV/AIDS in equality legislation’ (Research Brief for the Equality Legislation Drafting Unit) (1998); AIDS Law Project ‘Submissions on the Promotion of Equality and Prevention of Unfair Discrimination Bill’ (1999), and AIDS Law Project ‘Discrimination and HIV/AIDS’ (2003).

³⁴⁰ Section 30 of the Judicial Matters Amendment Act 8 of 2017. This states that section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the substitution for paragraph (a) of the definition of “prohibited ground” of the following paragraph:

“(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language **[and]**, birth and HIV/AIDS status; or’.

³⁴¹ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 55.

³⁴² Section 1(1)(xxiii)(b) of the Equality Act.

³⁴³ Liebenberg and O’ Sullivan ‘South Africa’s new equality legislation, a tool for advancing women’s socio-economic equality?’ 2001 *Acta Juridica* 92.

3.5 Establishing whether the discrimination is unfair

The Equality Act,³⁴⁴ in section 14 states that discrimination is only unlawful when it is regarded as ‘unfair’.³⁴⁵ Seemingly, there are two significant things to note when dealing with section 14. First, determining the effect that the denial of the discriminatory conduct by the respondent will have on the complainant.³⁴⁶ Second, whether such denial of discrimination is justified under the law.³⁴⁷ This section sets out a test which includes numerous factors that a court must take into account when determining whether the respondent has provided sufficient evidence to show that the discrimination is fair.³⁴⁸ Section 14(1) of the Equality Act is contextual in nature.³⁴⁹ It takes into consideration the history of the person complaining and the position they hold in society,³⁵⁰ and the need for measures to remedy and address the impacts of the past and systemic unfair discrimination and advancement of human dignity for every person.³⁵¹ Section

³⁴⁴ Section 14 of PEPUDA provides as follows: (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.

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

- (a) The context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

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

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant
- (c) 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;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to--

- (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

- (ii) accommodate diversity.

³⁴⁵ Lølandsmo *Equality rights and democratic transition study of cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 10.

³⁴⁶ P De Vos ‘The Promotion of Equality and Prevention of Unfair Discrimination Act and socio-economic rights’ (2004) 5(2) *ESR Review* 6.

³⁴⁷ *Ibid.*

³⁴⁸ Liebenberg and O’ Sullivan ‘South Africa’s new equality legislation, a tool for advancing women’s socio-economic equality?’ 2001 *Acta Juridica* 97.

³⁴⁹ De Vos, Freedman and Brand *South African Constitutional Law in Context* (2014) 454.

³⁵⁰ Section 14(3)(c) of the PEPUDA.

³⁵¹ Albertyn and Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *SAJHR* 248. See also, De Vos, Freedman and Brand *South African Constitutional Law in Context* (2014) 454.

14(2)-(3) of PEPUDA sets out the criteria for unfairness and the factors stated in these sections include elements that are taken into consideration in determining unfairness.³⁵²

According to Albertyn, Goldblatt & C Roederer, section 14(2)(a) refers to a ‘method of adjudication’ in which the effect that the act of discrimination has on people’s lives is understood and taken into consideration and systemic discrimination is addressed and catered for.³⁵³ This takes into account the relevant socio-economic status of individuals and a group of persons concerned and the historical background of each case.³⁵⁴ Section 14(2)(b) serves as a direction to the court dealing with discrimination matters to look at the factors as set out in section 14(3) in determining unfairness.³⁵⁵ Section 14(2)(c) of the Equality Act mandates the court to determine ‘whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned’.³⁵⁶ This provision recognises that some activities may require persons to have inherent attributes or characteristics not shared by anyone. For instance, in *Hugo’s* case,³⁵⁷ the majority of the Constitutional Court judges endorsed the decision of the then President Mandela in pardoning all imprisoned mothers who had children under the age of 12 years.³⁵⁸ This act discriminated against fathers who were also incarcerated who had children of the same age.³⁵⁹ This differentiation on the basis of gender was judged to be reasonable and justifiable in the circumstances.³⁶⁰ Likewise, the South African Law Reform Commission stated that being HIV negative would be an inherent job requirement of nurses required to be surrogate feeders to babies.³⁶¹

It should be noted that section 14(3)(a)-(c) of PEPUDA does not separate human dignity as a fundamental requirement as in the Constitutional Court jurisprudence.³⁶² In deciding whether the discrimination is fair or not, the courts have the discretion to take into account all relevant

³⁵² Currie and De Waal *The Bill of Rights Handbook* 6th ed (2016) 247.

³⁵³ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 42.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid* 43.

³⁵⁶ Section 14(2)(c) of the PEPUDA.

³⁵⁷ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC), 1997 (4) SA 1 (CC).

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ SALC (Project 85) *Fifth Interim Report on Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour* (2001).

³⁶² Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 44.

factors listed in section 14 of PEPUDA.³⁶³ Each case must be decided according to the individual facts and circumstances of that particular case. Section 14(3)(d)-(e) provides for the systemic kind of discrimination, whether it is direct or indirect and whether it has an impact only on the complainant or a group where the complainant belongs.³⁶⁴ Section 14(3)(f)-(i) of PEPUDA deals with the manner in which the court may weigh up the explanations and justifications provided by the respondent.³⁶⁵ In this instance, the court will look at the purpose of the discriminatory conduct and the connection between such an act or omission and the stated purpose of it.³⁶⁶ The court also takes into account the extent to which the respondent has sought to address the discrimination in question.³⁶⁷ If the court discovers that the respondent took reasonable steps to address discrimination, the court may order that he or she is not liable.³⁶⁸ In other words, the respondent is required to have taken positive steps to resolve the problem prior to the complaint being laid.³⁶⁹

The enquiry also requires a determination of whether there is a legitimate purpose behind the discriminatory conduct.³⁷⁰ In *Harksen's* case,³⁷¹ the court observed as follows:

If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2). One will then proceed upon the final leg of the enquiry as to whether the provision can be justified under section 33 of the interim Constitution, the limitations clause. This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.³⁷²

Currie and De Waal believe that the combination of these factors is sensible as it avoids gradual reasoning.³⁷³ They suggest that if the unfairness enquiry were to be separated from the limitation clause, it would result in non-systemic reasoning by the courts when applying the enquiry.³⁷⁴ Moreover, some of these factors relate closely to the enquiry raised in section 9(2)

³⁶³ De Vos, Freedman and Brand *South African Constitutional Law in Context* (2014) 454.

³⁶⁴ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 43.

³⁶⁵ *Ibid* 44.

³⁶⁶ *Ibid*.

³⁶⁷ *Ibid*.

³⁶⁸ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 44.

³⁶⁹ *Ibid*.

³⁷⁰ Section 14(3)(f) of the PEPUDA.

³⁷¹ *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC).

³⁷² *Ibid* para 52.

³⁷³ Currie and De Waal *The Bill of Rights Handbook* 6th ed (2016) 247.

³⁷⁴ *Ibid*.

of the Constitution.³⁷⁵ Although the Constitutional Court has not decided on this extensive interpretation, it is presumed that its analysis of cases dealing with sections 9(2)-9(3) and section 36 must be taken into consideration when dealing with section 14 of the Equality Act.³⁷⁶

3.6 Burden of proof

The term burden of proof, also referred to as onus of proof, can be defined as a duty to persuade the court that particular allegations are true upon conclusion of the trial.³⁷⁷ Generally, in civil matters, the applicable standard of proof is that cases must be proved on a balance of probabilities.³⁷⁸ This means that the party bearing the onus is required to convince the court that their case is more probable than that of the other party.³⁷⁹ At the beginning of the case, the burden of proof is determined and remains on the same party for the duration of the proceedings.³⁸⁰ Typically, in civil cases, the field of substantive law in which the concerned parties litigate, determines who bears the onus of proof and what requirements must be fulfilled in order to be successful.³⁸¹ In the event this does not happen, the principle ‘he who alleges must prove’ will be applicable.³⁸² According to Schwikkard and Van der Merwe, the burden of proof in a case will not automatically be borne by one party alone; however, all parties may bear the onus regarding different aspects of the matter.³⁸³

³⁷⁵ De Vos, Freedman and Brand *South African Constitutional Law in Context* (2014) 454.

³⁷⁶ Ibid.

³⁷⁷ A Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 34. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548, it was held that the burden of proof is ‘a duty which is cast upon the particular litigant, in order to be successful, of finally persuading the court that he is entitled to succeed on his claim or defence’.

³⁷⁸ Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 34.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ DT Zeffertt and AP Paizes *The South Africa Law of Evidence* 2nd ed (2009) 45-6. See also Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 35-6.

³⁸² Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 34. See also *Pillay v Krishna and Another* 1946 AD 946 at 952, where Davis AJA observed: “If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: where the person against whom the claim is made is not content with a mere denial of that claim, but set up a special defence, then he is regarded *quod* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states...as follows: ‘He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute’ ... The *onus* is on the person who alleges something and not on his opponent who merely denies it.”

³⁸³ PJ Schwikkard and SE Van der Merwe *Principles of Evidence* 4th ed (2015) 618.

3.7 Evidentiary burden

It is, therefore, important at this stage to note that a distinction must be drawn between the burden of proof and evidentiary burden.³⁸⁴ Evidentiary burden is defined as the duty on one party to give enough evidence for the presiding officer to call on the other party to answer.³⁸⁵ In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,³⁸⁶ Corbett JA held that an evidentiary burden is a ‘duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent’.³⁸⁷

From this definition, four things are clear: first, evidentiary burden is based on substantive law; its main objective is to govern the manner in which evidence must be adduced during trials.³⁸⁸ Second is that the evidentiary burden can rest on either party during the trial.³⁸⁹ Third is that the meaning of the term ‘*prima facie*’ must be borne in mind when dealing with evidentiary burden as in most instances, the latter is referred to in the context of the former.³⁹⁰ Lastly, it asks the question of who bears the evidentiary burden and when does it shift from one party to the other.³⁹¹ Evidentiary burden moves between the parties subject to the circumstances of each case.³⁹² In the event where the plaintiff has given sufficient evidence to prove a *prima facie* case, then the evidentiary burden shifts to the defendant and if he/she does nothing at this stage to rebut the plaintiff’s version, he/she runs the risk of losing the case.³⁹³

The burden of proof referred to under the Equality Act is different from the one used in disputes dealing with section 9 of the Constitution.³⁹⁴ The only instance in which PEPUDA refers to the burden of proof is with regard to allegations of unfair discrimination.³⁹⁵ This is set out in

³⁸⁴ The two terms must not be confused.

³⁸⁵ Schwikkard and Van der Merwe *Principles of Evidence* 4th ed (2015) 602.

³⁸⁶ 1977 (3) SA 534 (A).

³⁸⁷ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

³⁸⁸ Schwikkard and Van der Merwe *Principles of Evidence* 4th ed (2015) 617; Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 36.

³⁸⁹ Bellengere ... et al *The Law of Evidence in South Africa: Basic Principles* (2013) 36.

³⁹⁰ Ibid.

³⁹¹ Lølandsmo *Equality rights and democratic transition study of cases in South Africa’s Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 11.

Ibid.

³⁹² Ibid.

³⁹³ Ibid 37.

³⁹⁴ Barnard and Kok ‘A consumer’s fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act’ (2015) 17. Liebenberg and O’ Sullivan ‘South Africa’s new equality legislation, a tool for advancing women’s socio-economic equality?’ 2001 *Acta Juridica* 99.

³⁹⁵ Section 13 of the Equality Act.

section 13 of the Equality Act³⁹⁶ which states that if the complainant makes a mere *prima facie* case if he/she is ensuing the complaint on the basis of the discrimination on a prohibited ground,³⁹⁷ then no further proof of discrimination is required.³⁹⁸ In other words, there is a presumption of unfair discrimination that the respondent must rebut,³⁹⁹ the complainant is not required to prove a case of discrimination per se.⁴⁰⁰ This is to say, that the onus of proof then shifts to the respondent to show that the discrimination did not occur as per the complainants allegations; or the respondent's conduct is not based one or more of the prohibited grounds.⁴⁰¹ In the case of *Thembani v Swanepoel*,⁴⁰² Brooks J agreed with the decision taken in the court a quo and found that the shift of the evidential burden to the respondent to disprove evidence by the complainant is not offensive to the principles of fairness, equality rights and interests of justice in our law.⁴⁰³

Once discrimination has been proven, the burden is on the respondent to show that it is fair. The decision in *Du Preez v Minister of Justice and Constitutional Development & Others*⁴⁰⁴ is an illustration of this. In this case, a highly qualified white magistrate with 19 years' experience, applied for two advertised positions as a regional court magistrate and was unsuccessful.⁴⁰⁵ The complainant alleged that he was unfairly discriminated against due to the selection criteria used by the commission which excluded him from being considered for appointment to the

³⁹⁶ (1) If the complainant makes out a prima facie case of discrimination-
(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place-
(a) on a ground in paragraph (a) of the definition of prohibited grounds, then it is unfair, unless the respondent proves that the discrimination is fair;
(b) on a ground in paragraph (b) of the definition of prohibited grounds, then it is unfair-
(i) if one or more of the conditions set out in paragraph (b) of the definition of prohibited grounds is established; and
(ii) unless the respondent proves that the discrimination is fair.

³⁹⁷ As defined in s1 of the Equality Act.

³⁹⁸ Barnard and Kok 'A consumer's fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act' (2015) 17. Liebenberg and O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' (2001) *Acta Juridica* 99.

³⁹⁹ The respondent is required to prove that the discrimination is fair. See Bohler-Muller 'The promise of Equality Courts' (2006) 22 (3) *South African Journal on Human Rights* 387.

⁴⁰⁰ Liebenberg and O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 99.

⁴⁰¹ Ibid.

⁴⁰² *Thembani v Swanepoel* 2017 (3) SA 70 (ECM)

⁴⁰³ Ibid para 5.

⁴⁰⁴ *Du Preez v Minister of Justice and Constitutional Development & Others* [2006] 8 BLLR 767 (SE).

⁴⁰⁵ Ibid para 2.

Port Elizabeth Regional Court.⁴⁰⁶ This matter was decided according to the provisions of PEPUDA, since magistrates are not employees in terms of the Employment Equity Act.⁴⁰⁷ It was the respondent's argument that the selection criteria was justified by its policy of affirmative action.⁴⁰⁸ The court held that:

... although affirmative action measures do not necessarily disadvantage any other persons, inevitably, some measures will have an effect, such as when a person is preferred over another on the basis of race or gender in the appointment to a position for which both had applied. To escape constitutional invalidity, such measures must come within the protection afforded affirmative action by section 9(2) of the Constitution.⁴⁰⁹

Moreover, the Court found that in terms of sections 13 and 1 of the Equality Act, once the complainant has proven a *prima facie* case of discrimination on grounds of gender and race and the discrimination was deemed to be unfair, the respondent has the onus of proving otherwise in the circumstances.⁴¹⁰ Furthermore, the court held that the shortlisting criteria clearly discriminated against the complainant grounded on race and gender and, therefore, the exclusion was irrational.⁴¹¹ The respondents failed to prove that the discrimination was fair and the court gave the order that the posts be re-advertised.⁴¹²

Complainants may rely on discrimination based on an unlisted ground.⁴¹³ In such a case, discrimination is only unfair if one or more of the criteria set out in the definition of 'prohibited grounds' is satisfied as discussed in 3.4 above, unless the respondent proves otherwise.⁴¹⁴ This means that the complainant must prove that the allegations are more likely to be true based on all the evidence presented.⁴¹⁵ In both instances of discrimination, the Equality Act provides for the less strenuous burden of proof for the complainant.⁴¹⁶ The mere fact that now the *onus* shifts to the respondent does not qualify the complainant from leading evidence in respect of

⁴⁰⁶ *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC), para 8.

⁴⁰⁷ *Ibid* para 43.

⁴⁰⁸ *Ibid* para 9.

⁴⁰⁹ *Ibid* para 18.

⁴¹⁰ *Ibid* paras 21-22.

⁴¹¹ *Ibid* paras 28, 38-40.

⁴¹² *Ibid* paras 43-45.

⁴¹³ JJ Hahn 'Your guide to the South African courts: A step by step process to empower paralegals, community leaders and human rights educators' 2015 *International Senior Lawyers Project* 10.

⁴¹⁴ In terms of section 13 (1)(b)(ii), the respondent must also prove that the discrimination is fair.

⁴¹⁵ Hahn 'Your guide to the South African courts: A step by step process to empower paralegals, community leaders and human rights educators' 2015 *International Senior Lawyers Project* 10.

⁴¹⁶ Liebenberg and O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 100.

the enquiry established in section 13 of PEPUDA.⁴¹⁷ It is of vital importance that the complainant be given an opportunity to lead evidence rebutting evidence presented by the respondent. Furthermore, it is recognised that most of the time, important evidence will be held by the respondent; therefore, if the complainant were to prove from the outset a comprehensive case, this purpose will be defeated at all costs.⁴¹⁸

3.8 Lodging a complaint of discrimination with the Equality Court

The Equality Act makes provision for and has established Equality Courts as the primary enforcement tool within the Act.⁴¹⁹ In the case of *Woodways CC v Vallie*,⁴²⁰ Zondi J found that:

It is clear to me that the Act creates an informal and inexpensive platform for the adjudication of unfair discrimination disputes. It marks a shift from the conventional way of litigation, which emphasises elegance in the formulation of the pleadings. It creates a space for the victims of unfair discrimination to tell their stories so that systemic inequalities and unfair discrimination, which, as the preamble states, remain deeply embedded in social structures, may be eradicated. The promise of equality and easy access to justice, which the Act seeks to fulfil, would never be realised if litigants in unfair discrimination cases were expected to be meticulous in the manner in which they plead their causes of action.

These courts aim to maximise access to justice for people who have been victims of discrimination in South Africa.⁴²¹ Across the country, Equality Courts have been in operation since 2003.⁴²² The main purpose behind the introduction of the Equality Courts is to decide on matters which relate to violations of the right to equality, unfair discrimination and hate speech,⁴²³ with the idea of remedying the inequalities created by the apartheid era in our country

⁴¹⁷ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 51.

⁴¹⁸ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 51.

⁴¹⁹ *Ibid* 18.

⁴²⁰ *Woodways CC v Vallie* 2010 (6) SA 136 (WCC).

⁴²¹ Bohler-Muller 'The promise of Equality Courts' (2006) 22 (3) *South African Journal on Human Rights* 385.

⁴²² B Hauser 'The Equality Courts explained' *Policy.org*, 19 May 2011, 1, available at <http://www.polity.org.za/article/the-equality-court-explained-2011-05-19> accessed on 26 October 2017; Lølandsmo *Equality Rights and Democratic Transition Study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 11.

⁴²³ Hahn 'Your guide to the South African courts: A step by step process to empower paralegals, community leaders and human rights educators' (2015) 2.

in terms of gender, race and socio-economic matters.⁴²⁴ The 2016-2017 annual report compiled by the Department of Justice and Constitutional Development, reveals that nationally there were 558 matters registered in the Equality Courts in the 2015-2016 reporting period, as compared to the 480 registered matters during the 2016-2017 reporting period.⁴²⁵ This means that there has been a 14% decrease of matters registered in the financial year 2016/2017.⁴²⁶ Furthermore, the report shows that during the 2015-2016 period, 38% of unfair discrimination matters were reported, whereas 35% were reported in 2016-2017.⁴²⁷ This is followed by hate speech complaints at 21.9%, and harassment complaints being at 5%.⁴²⁸ The 38% were ‘not indicated’ matters.⁴²⁹ In terms of HIV/AIDS as the grounds of discrimination, the report shows an increase of 5.7% in matters reported in the 2016-2017 financial year, as compared to 2.5% in the 2015-2016 financial period.⁴³⁰

By default, all High Courts are designated Equality Courts and are empowered to adjudicate on matters relating to equality and unfair discrimination.⁴³¹ Furthermore, in terms of section 16 and subject to section 31 of the Equality Act, Magistrates’ Courts will have an Equality Court once the Minister has designated such subsequent to consultations with the administrative region concerned.⁴³² However, such jurisdiction can only be exercised once there is a presiding officer and clerks who have received training, have expertise and commitment to the values of equality and human rights⁴³³ regarding the operation of the courts of this nature.⁴³⁴ Generally, Equality Courts have jurisdiction to hear equality-related matters

⁴²⁴ Lølandsmo *Equality Rights And Democratic transition Study of Cases in South Africa’s Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 18; Hauser ‘The Equality Courts explained’ 19 May 2011, *Polity.org*. 1; Bohler-Muller ‘The promise of Equality Courts’ (2006) 22 (3) *South African Journal on Human Rights* 383.

⁴²⁵ South African Department of Justice and Constitutional Development *Annual Report (2016-2017)* 40.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ Hauser ‘The Equality Courts explained’ *Polity.org*, 19 May 2011, 1; Bohler-Muller ‘The promise of Equality Courts’ (2006) 22 (3) *South African Journal on Human Rights* 385.

⁴³² See sections 16 and 31 of the PEPUDA.

⁴³³ Bohler-Muller ‘The promise of Equality Courts’ (2006) 22 (3) *South African Journal on Human Rights* 385.

The training course is offered by the Justice College in Pretoria and it covers social context and diversity training as well as training on the unique procedures of the courts. See also P Lane ‘South Africa’s Equality Courts: An early assessment’ (2005), available at <http://wits.ac.za/csvr/papers/paprctp5.htm>, accessed on 26 October 2017.

⁴³⁴ Hauser ‘The Equality Courts explained’ *Polity.org*. 19 May 2011, 1.

and they follow the normal rules of jurisdiction⁴³⁵ proclaimed by the Magistrates' Courts Act⁴³⁶ and the Superior Courts Act⁴³⁷. Additionally, the jurisdiction of the Equality Courts extends to complaints made against private and legal persons.⁴³⁸ So far, there are three hundred and eighty two (382) designated Equality Courts around South Africa.⁴³⁹

In section 20, the Equality Act sets out the procedure which a person must follow when initiating a complaint in the Equality Court.⁴⁴⁰ Any person who wishes to initiate a complaint shall approach his/her nearest Magistrates' or High Court sitting as an Equality Court, and ask for the Equality Court where he or she will find a clerk of the Equality Court and notify the latter of his/her intention to initiate a complaint.⁴⁴¹ The clerk of the Equality Court is someone who has been appointed under section 17 of the Equality Act.⁴⁴² The clerk will then give the complainant Form 2 (See Appendix A for a copy of this form)⁴⁴³ to complete.⁴⁴⁴ Form 2 is used to commence any action in the Equality Court.⁴⁴⁵ When instituting the proceeding, the complainant does not bear costs⁴⁴⁶ and legal representation is not required in this proceeding.⁴⁴⁷ If the complainant needs assistance, the clerk will help in completing the form or a complainant

⁴³⁵ Section 19(1)(e) of PEPUDA; Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 19.

⁴³⁶ 32 of 1944.

⁴³⁷ 10 of 2013.

⁴³⁸ Lølandsmo *Equality Rights and Democratic Transition Study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 18.

⁴³⁹ Department of Justice and Constitutional Development *List of Designated Equality Courts* (2017), available at http://www.justice.gov.za/EQCact/eqc_courts.html accessed on 20 December 2017.

⁴⁴⁰ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 24.

⁴⁴¹ *Ibid* section 20(2).

⁴⁴² Section 17(1)(a): Subject to the laws governing the public service, the Director-General of the Department may, for every Equality Court, appoint or designate one or more officers in the Department, or may appoint one or more persons in the prescribed manner and on the prescribed conditions, as clerks of the Equality Court, who must generally assist the court to which they are attached in performing its functions and who must perform the functions as may be prescribed; (b): If a clerk of an Equality Court is for any reason unable to act as such or if no clerk has been appointed or designated for any Equality Court under paragraph (a), the presiding officer concerned may designate any competent officer in the Department to act as clerk for as long as the said clerk is unable to act or until a clerk is appointed or designated under paragraph (a), as the case may be.

⁴⁴³ See Appendix A.

⁴⁴⁴ Hahn 'Your guide to the South African Courts: A step by step process to empower paralegals, Community Leaders and Human Rights Educators' (2015) 6; Lølandsmo *Equality Rights And Democratic transition study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 19.

⁴⁴⁵ Hahn *ibid*.

⁴⁴⁶ Regulations on PEPUDA section 12(1).

⁴⁴⁷ W Holness and S Rule 'Barriers to advocacy and litigation in the Equality Courts for persons with disabilities' (2014) 17(5) *PELJ* 1916.

may approach the advice offices run by an NGO or the provincial offices of the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE).⁴⁴⁸

The complainant must provide his or her personal details, the relief or the remedy they are seeking, and they must state whether they have lodged the complaint with any other institution.⁴⁴⁹ Once the complainant has laid a complaint with the clerk, it is important that the respondent be notified of the complaint within seven (7) days.⁴⁵⁰ This is done by the clerk of the court who completes Form 3 for this purpose (See Appendix B for a copy of this form).⁴⁵¹ This is to give the respondent an opportunity to reply to the allegation made against him/her within ten (10) days after service.⁴⁵² The services of court processes in the Equality Court are free and the complainant does not have to pay any costs.⁴⁵³ These costs are borne by the state, unless the complainant appoints a legal representative, then he/she will have to pay out of their own pocket.⁴⁵⁴

Subsequently, the matter will be referred to a presiding officer within ten (10) days after a response is received from the respondent.⁴⁵⁵ Thereafter, the presiding officer has to make a decision as to whether the matter will be heard by the Equality Court or if it must be referred to a different and more appropriate forum.⁴⁵⁶ For instance, if the dispute involves discrimination in the place of employment and falls under the Employment Equity Act, it must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).⁴⁵⁷ According to section 20(4), there are certain factors that the presiding officer must take into consideration when making a decision as to whether the matter must be heard by the Equality Court with all the relevant circumstances, including:

- (a) the personal circumstances of the parties and particularly the complainant;

⁴⁴⁸ Hahn 'Your guide to the South African courts: A step by step process to empower paralegals, community leaders and human rights educators' (2015) 6.

⁴⁴⁹ Khulumani Support Group 'Speaking out using PEPUDA: A Khulumani Support Group Manual' (2011) 10, available at <https://www.khulumani.net/active-citizens/item/525-using-the-promotion-of-equality-and-prevention-of-unfair-discrimination-act-pepuda-a-khulumani-manual.html>, accessed on 26 October 2017.

⁴⁵⁰ Regulations on PEPUDA section 6(1).

⁴⁵¹ Regulations section 6 of PEPUDA. See Appendix B.

⁴⁵² Regulations section 6 of PEPUDA.

⁴⁵³ Regulations section 6 of PEPUDA.

⁴⁵⁴ Regulations on PEPUDA, section 12.

⁴⁵⁵ Hauser 'The Equality Courts explained' *Polity.org* 19 May 2011, 2.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 24.

- (b) the physical accessibility of any contemplated alternative forum;
- (c) the needs and wishes of the parties and particularly the complainant;
- (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law; and
- (e) the views of the appropriate functionary at any contemplated alternative forum.⁴⁵⁸

If the matter will be heard by the Equality Court, then the magistrate must set the matter down for a direction hearing.⁴⁵⁹ During the direction hearing, issues relating to the initiation of proceedings and other administrative and procedural matters are narrowed down and resolved and facts admitted by the parties are noted as such.⁴⁶⁰ According to section 4 of the Act read with regulation 10(1), the hearing should be informal and participatory.⁴⁶¹ In *George and Others v Minister of Environmental Affairs and Tourism*,⁴⁶² Erasmus J held that:

An integral part of the Equality Act, then, is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters. This objective itself goes to the essence of what equality is about because it emphasizes the need to make the judicial processes available to all, including the poor and oppressed who are usually the victims of unfair discrimination and inequality. The formal, adversarial, often expensive and potentially intimidating proceedings that prevail in an ordinary magistrate's court or High Court and which may act as a barrier to those seeking justice, have no place in an Equality Court.⁴⁶³

Once the direction hearing is finalised, the clerk must, within three (3) days, set a date for the hearing on the merits and all the parties must be clear on when this will take place.⁴⁶⁴ Generally, the hearing on the merits will follow the procedure normally adhered to in all cases where a magistrate must decide on the facts presented by the parties.⁴⁶⁵ The South African legal system is an adversarial system in which the presiding officers play a 'neutral umpire' role and ensure

⁴⁵⁸ Ibid.

⁴⁵⁹ Section 20(3)(b).

⁴⁶⁰ Hauser 'The Equality Courts explained' *Polity.org* 19 May 2011, 2; Lølandsmo *Equality Rights and Democratic Transition Study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 19. See also Regulations section 6(5) and 10(5)(a).

⁴⁶¹ See Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 27.

⁴⁶² *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC).

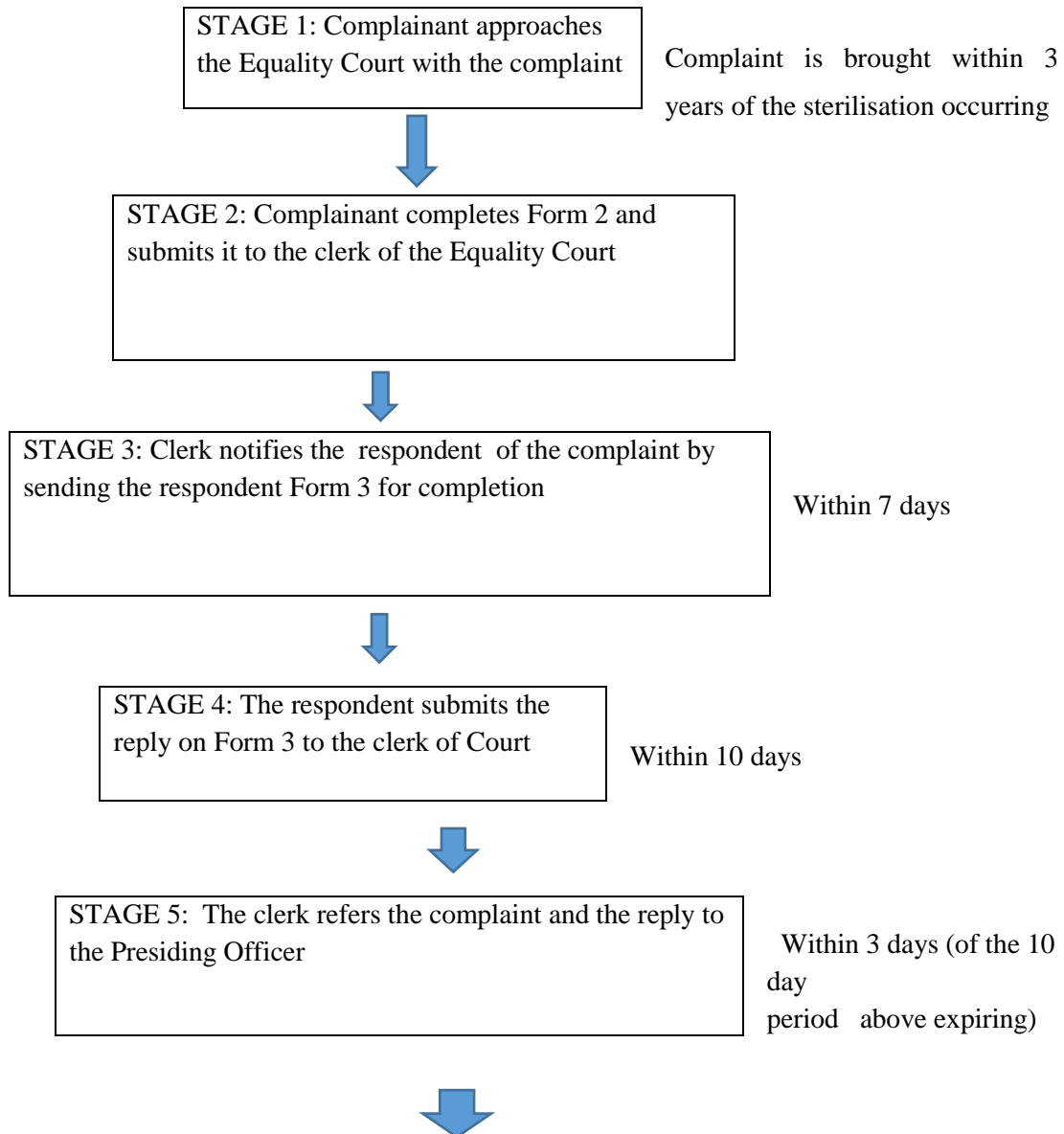
⁴⁶³ *George* supra para 12.

⁴⁶⁴ Hahn 'Your guide to the South African Courts: A step by step process to empower paralegals, community leaders and human rights educators' (2015) 23.

⁴⁶⁵ Ibid.

that the trial roles are adhered to, and makes a decision after listening to the evidence.⁴⁶⁶ In this regard, the presiding officer plays an active role and this assists in the accessibility of the Equality Court.⁴⁶⁷ This process takes no longer than thirty seven (37) days before the Directions hearing is held which is advantageous to the complainant who approaches the Equality Court in cases of discrimination.⁴⁶⁸

The diagram below outlines the process that must be followed when bringing a claim to the Equality Court:



⁴⁶⁶ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 27.

⁴⁶⁷ Hahn 'Your Guide to the South African Courts: A step by step process to empower paralegals, community leaders and human rights educators' (2015) 23.

⁴⁶⁸ Diko 'Seeking redress...The Equality Court and HIV-related discrimination' 2012 *ALQ* 42. See the Figure A.

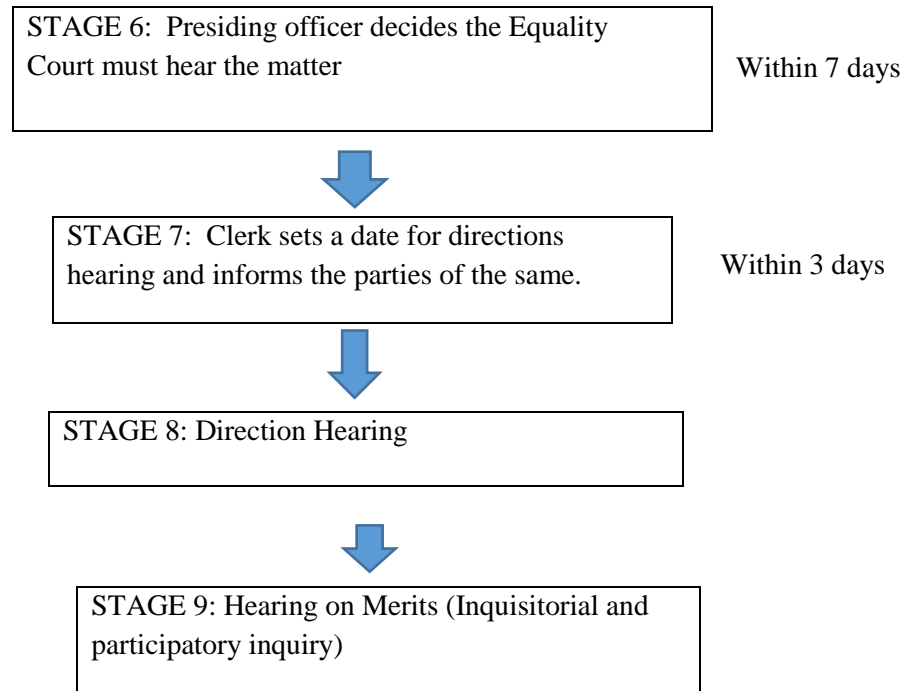


Figure A: Process in resolving a discrimination dispute using the Equality Court

3.9 Remedies for unfair discrimination by the Equality Court

Complainants who allege that their rights under the Equality Act have been violated, approach the Equality Court with the purpose of obtaining a particular relief from the court.⁴⁶⁹ Functions and powers of the Equality Court are set out in section 21 of the Equality Act. Section 21(1) gives power to the Equality Court to inquire into alleged discrimination, harassment or hate speech and make a determination whether such has occurred as per the complainant's allegations.⁴⁷⁰ Subsequent to the enquiry, the Equality Court is empowered to make an appropriate order.⁴⁷¹ An appropriate order in terms of the Equality Act includes a wide range of remedies which are set out with the purpose of addressing the restrictions that the judiciary comes across when making an appropriate order when dealing with discrimination cases.⁴⁷² It is argued that the remedies provided in the Equality Act are a combination of civil⁴⁷³ and

⁴⁶⁹ R Krüger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *The Equal Rights Review* 30; Krüger 'Combating racism and restoring dignity? A review of work of the Durban Equality Court 2003-2013' (2014) 12, available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Kruger.Rosaan.pdf> accessed on 26 August 2017.

⁴⁷⁰ Section 21(1) of PEPUDA; Krüger *ibid*.

⁴⁷¹ Section 21(2) of the Equality Act.

⁴⁷² Liebenberg and O' Sullivan 'South Africa's new equality legislation, a tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 101.

⁴⁷³ Sections 21(2)(a)-(c) and (o) of PEPUDA.

constitutional remedies.⁴⁷⁴ Whereas some of these remedies focus on the individual who brought the complaint,⁴⁷⁵ others are community-based remedies.⁴⁷⁶ Some of the remedies provided in section 21 are counteractive, deterrent⁴⁷⁷ and restorative in nature.⁴⁷⁸

Systemic remedies have become part of our law in dealing with cases of discrimination.⁴⁷⁹ Whilst some orders are forward-looking, focusing on regulating a respondent's future behaviour,⁴⁸⁰ some are backward-looking remedies aimed at addressing discriminatory behaviours emanating from the past.⁴⁸¹ These remedies, penalties and forms of punishment introduced by the Equality Act are not widely used in the legal system of South Africa.⁴⁸² In other words, the aim of the remedies is that the court may play an active role in ensuring that appropriate measures are taken in order to eradicate discrimination, thus educating the respondent (the wrongdoer) instead of passing punitive sanctions.⁴⁸³ Punitive orders that are given by the courts are a clear indication that our judiciary is prepared to change societal structures of inequality.⁴⁸⁴

The orders given by the Equality Court enjoy the same status as orders given in a civil action.⁴⁸⁵ However, in terms of PEPUDA this becomes a case only where it is appropriate.⁴⁸⁶ Section 21(4)(a) gives the court power to refer its apprehensions encountered during or after an inquiry, in any proceedings before it, to any constitutional institution for further investigation, mostly in the case of 'insistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment'.⁴⁸⁷ In addition, section

⁴⁷⁴ Krüger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *The Equal Rights Review* 31.

⁴⁷⁵ Sections 21(2)(f)-(h) of PEPUDA.

⁴⁷⁶ Krüger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *The Equal Rights Review* 31.

⁴⁷⁷ Section 21(2)(l) of PEPUDA.

⁴⁷⁸ Section 4(1)(d) of the Equality Act; Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 28.

⁴⁷⁹ D Allen 'Remedying discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *The University of Tasmania Law Review* 110.

⁴⁸⁰ Sections 21(2)(a), (e), (g), (i), (k) and (m) of PEPUDA.

⁴⁸¹ Sections 21(2)(b), (d) and (n) of PEPUDA.

⁴⁸² Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 168.

⁴⁸³ Lølandsmo *Equality Rights and Democratic Transition Study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 21.

⁴⁸⁴ *Ibid* 53.

⁴⁸⁵ Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 168.

⁴⁸⁶ Section 21(3) of the Equality Act.

⁴⁸⁷ In *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218; [2017] 4 All SA 234 (GJ) (18 August 2017), at para 67,

21(4)(b) provides that a court may refer any matter before it for mediation, conciliation or negotiation to any constitutional institution or appropriate body.⁴⁸⁸ For example, in the case of *Umlazi T Section*, the court ordered that the South African Police Services organise a community meeting within a month, requesting the Umlazi T section's residents to report more violations relating to the ban on women wearing pants in this Section.⁴⁸⁹

The presiding officers in the Equality Courts are required to deliver effective orders for the affected persons, which are appropriate and specific to a particular complaint.⁴⁹⁰ This must be done while taking into consideration the set of circumstances of each case.⁴⁹¹ Albertyn proposes that the innovation of the remedies provided for in the Equality Act require that special skills and resources be provided to the presiding officers to necessitate their effective engagement when deciding matters of inequality and discriminatory practice.⁴⁹² It is evident from the jurisprudence that to some extent our Equality Courts have effectively utilised these remedies. Although most of the cases that the courts have dealt with are hate speech matters, the orders given are relevant for the purposes of this chapter.

The Equality Court provides for a number of civil law remedies including interim relief,⁴⁹³ declaratory orders,⁴⁹⁴ and making a settlement agreement between the parties an order of the court.⁴⁹⁵ In *Gerber v Dunmarsh Investment (Pty) Ltd and Another*,⁴⁹⁶ the Durban Magistrate's Court confirmed the settlement agreement between the parties as an order of the court in which the respondent accepted and acknowledged that their refusal to lease a flat to the complainant on the basis that the husband was an Indian was 'unconstitutional and therefore unlawful'.⁴⁹⁷ The respondent apologised unequivocally for their conduct and undertook to pay the

Moshidi J held as follows: 'In the present case, this remedy brings to mind immediately the alleged conduct of the SAPS, as revealed by the evidence of POWA and MN, in failing to open cases by them and victims of the LGBTI community. For this reason, I deem it appropriate, if not obligatory, to refer these proceedings to the National Police Commissioner for further investigation and to report back to this Court.'

⁴⁸⁸ Section 21(4)(b) of PEPUA.

⁴⁸⁹ 'Apology won by 'pants' woman' *IOL News*, 10 April 2008, 1, available at <https://www.iol.co.za/news/south-africa/apology-won-by-pants-woman-396026>, accessed on 22 December 2017.

⁴⁹⁰ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (2001)* 28.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

⁴⁹³ Section 21(2)(a) of the Equality Act.

⁴⁹⁴ Section 21(2)(b) of the Equality Act.

⁴⁹⁵ Section 21(2)(c) of the Equality Act.

⁴⁹⁶ *Gerber v Dunmarsh Investments (Pty) Ltd and Another* (69/2007) [2007] ZAEQC 5 (14 November 2007). See also, *Kollapen v Du Preez* (EC 001/03) [2005] ZAEQC 1 (29 March 2005) para 1.

⁴⁹⁷ *Ibid.*

complainant a sum of R10 000 in compensation.⁴⁹⁸ Interim relief is an order of the court, which reserves or reinstates the status quo pending the final determination of the rights of the parties in the matter.⁴⁹⁹ This does not comprise a final determination of the rights in question nor does it affect said final determination.⁵⁰⁰ A declaratory order can be granted when an interested party makes an application to court seeking a declaration of what the law is on the particular issue.⁵⁰¹

According to section 21(2)(d) of the Equality Act, the respondent can be ordered to pay damages as a form of reparative justice to the complainant for loss suffered as a result of the respondent's conduct.⁵⁰² In the matter of *Donaldo v Haripersa*,⁵⁰³ it was held that the respondent must pay the complainant damages amounting to R10 000 in ten instalments of R1 000 each. Furthermore, in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*,⁵⁰⁴ the court ordered the respondent to pay the complainant an amount of R75 000 for the impairment of his dignity and emotional and psychological suffering and R 11 970 for loss of earnings.⁵⁰⁵ In *Nomasomi Gloria Kente v Andre van Deventer*,⁵⁰⁶ the court awarded the complainant damages of R50 000 after finding that she indeed experienced hate speech and harassment by her employer.⁵⁰⁷ On review, in *Them bani v Swanepoel*,⁵⁰⁸ the court confirmed the decision by the court a quo for an award of R100 000 as damages for having been called a 'kaffir'.⁵⁰⁹

Section 21(2)(e) provides for the compensation of damages as an award to a suitable organisation. In *ANC v Sparrow*,⁵¹⁰ the court ordered the respondent to pay damages in the sum of R 150 000 within 60 days of the date of service or publication of the order to the Oliver and

⁴⁹⁸ *Kollapen v Du Preez* supra paras 1-2.

⁴⁹⁹ D Harms *Civil Procedure in the Superior Courts* (2003) A5.6.

⁵⁰⁰ *Ibid.*

⁵⁰¹ S Pete *Civil Procedure: A Practical Guide* 3rd ed (2017) 479. See Harms *Civil Procedure in the Superior Courts* (2003) A4.18.

⁵⁰² Lølandsmo *Equality Rights and Democratic Transition Study of Cases in South Africa's Equality Courts* (unpublished LLM thesis, University of Oslo, 2006) 54.

⁵⁰³ *Donaldo v Haripersa* (29/05) [2007] ZAEQC 3 (5 January 2007).

⁵⁰⁴ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) (27 August 2008).

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Nomasomi Gloria Kente v Andre van Deventer* (EqC) (unreported case no 9/2013), (4 October 2014) Cape Town Magistrates Court.

⁵⁰⁷ P Williams 'Hate speech is a crime: Equality Court rules in favour of domestic worker' 2015 (March) *De Rebus*, available at www.derebus.org.za/hate-spaeech-is-a-crime/ accessed on 21 December 2017. See also TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1) *Agenda* 44.

⁵⁰⁸ *Them bani v Swanepoel* 2017 (3) SA 70 (ECM).

⁵⁰⁹ *Them bani v Swanepoel* supra para 2.

⁵¹⁰ *ANC v Sparrow* (10/16) [2016] ZAEQC 10 (June 2016).

Adelaide Tambo Foundation (AOTF).⁵¹¹ The OATF promotes non-racialism, tolerance, reconciliation and social economic upliftment in South Africa.⁵¹² Likewise, in the case of *Sonke Gender Justice Network v Malema*,⁵¹³ the court ordered the respondent to pay to People Opposed to Women Abuse (POWA), an organisation that gives shelter to abused women, an amount of R50 000.⁵¹⁴ This was also the case in the *Kollapen v Du Preez* matter where the complainant who is of Indian heritage, lodged a complaint with the Equality Court after he was refused a haircut at the barbershop on the basis that the respondent's staff were inexperienced with Indian haircuts.⁵¹⁵ The court ordered the payment of an amount of R10 000 in damages to the charity of the complainant's choice, payable in instalments of R500 per month.⁵¹⁶

In terms of PEPUDA, the Equality Court is given wide ranging powers to inhibit the repetition of unfair discrimination patterns and practices.⁵¹⁷ It is within the court's powers to make orders restraining unfair discriminatory practices or directing that specific steps must be taken in order to halt discriminatory behaviours, harassment or hate speech.⁵¹⁸ The case of *Kollapen* is an illustration of this point. *In casu*, the court ordered that in order for the respondent to cease a discriminatory practice he must pay R1000 per day for the training of his employees to cut hair for ethnic and indigenous groups.⁵¹⁹ Furthermore, in *Pillay and Another v Silver Club*,⁵²⁰ a complaint of discrimination based on race was lodged by the SAHRC on behalf of a coloured male, Pillay, who was assaulted outside the night club when he and his white partner were refused entry into the bar.⁵²¹ The matter was settled and the court confirmed the settlement holding that the respondent redraft the club's policies.⁵²² Payment of R10 000 in damages to the complainant and R3 000 to Siyazenzela, a non-profit organisation fighting prejudice and

⁵¹¹ *ANC v Sparrow* supra 53.

⁵¹² *ANC v Sparrow* supra.

⁵¹³ *Sonke Gender Justice Network v Malema* (2010) (2) BCLR 729 (EqC) [2010] ZAEQC 2; 02/2009 (15 March 2010).

⁵¹⁴ *Sonke Gender Justice Network v Malema* supra para 24.

⁵¹⁵ *Kollapen v Du Preez* (EC 001/03) [2005] ZAEQC 1 (29 March 2005).

⁵¹⁶ *Kollapen v Du Preez* supra para 3.

⁵¹⁷ De Vos 'The Promotion of Equality and Prevention of Unfair Discrimination Act and socio-economic rights' (2004) 5(2) *ESR Review* 8.

⁵¹⁸ Section 21(2)(f) of PEPUDA.

⁵¹⁹ *Kollapen v Du Preez* (EC 001/03) [2005] ZAEQC 1 (29 March 2005) para 4.

⁵²⁰ *Pillay and Another v Silver Club* (2004) Cape Town Equality Court, West Cape.

⁵²¹ *Pillay and Another v Silver Club* supra.

⁵²² Allen 'Remedying discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *The University of Tasmania Law Review* 111.

discrimination against gay, lesbian, bisexual, transgendered and inter-sexed communities nominated by Pillay, was ordered.⁵²³

Section 21(2)(g) provides for an order to make available specific opportunities and privileges unfairly denied to the complainant.⁵²⁴ Moreover, section 21(2)(i) permits the court to grant an order directing the respondent to take steps to reasonably accommodate a group or class of persons.⁵²⁵ These broad remedies were one the aspects that were considered by the Constitutional Court in a significant and first appealed decision from the Equality Court.⁵²⁶ In *MEC for Education: KwaZulu-Natal and Others v Pillay*,⁵²⁷ the Court found that the school unfairly discriminated against the complainant and ordered it to amend its dress code in order to reasonably accommodate the learner's cultural practices.⁵²⁸

Further remedies that the Equality Court is empowered to order include 'audits, special measures as well as reports to the court or another institution as to the progress made in implementing the remedies in order to address unfair discrimination'.⁵²⁹ In *Mkhize v Edgemoed High School*,⁵³⁰ the court dealt with the matter of racial harassment against a black learner who was insulted by a white learner and her mother at the school premises. The court ordered that the respondent attend a diversity-training programme, the SAHRC was to audit the school's policies and monitor the implementation of the order.⁵³¹

As indicated above, one of the mandates of the Equality Courts is to promote equality in both private and public spheres in society. In most of the judgments given by the court, an order for an unconditional apology seems to be central. Granting of this remedy by the court, as provided for in section 21(2)(j) of the Equality Act, shows the court's commitment to promoting equality in South Africa, thereby restoring human dignity to those affected by acts of discrimination.

⁵²³ A Kassiem 'Gay nightclub admits to racial discrimination' *IOL News*, 11 February 2004, available at <https://www.iol.co.za/news/south-africa/gay-nightclub-admits-to-racial-discrimination-122764> accessed 28 December 2017.

⁵²⁴ Section 21(2)(g) of PEPUDA.

⁵²⁵ Section 21(2)(i) of PEPUDA.

⁵²⁶ Allen 'Remedying discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *The University of Tasmania Law Review* 111; see also Krüger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *The Equal Rights Review* 35.

⁵²⁷ *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

⁵²⁸ *Ibid* paras 73-126.

⁵²⁹ Section 21(2)(h) and (k) of PEPUDA.

⁵³⁰ *Mkhize v Edgemoed High School*, Blue Down Equality Court, Western Cape, 3 December 2003.

⁵³¹ N Ntlama 'The Equality Act: Enhancing the capacity of the law to generate social change for the promotion of gender equality' (2007) 1 *Speculum Juris* 124.

By looking at the jurisprudence of the Equality Court regarding an unconditional apology, one can conclude on the seriousness of restorative justice in our courtrooms. In a recent judgment of the *Psychological Society of South Africa v Qwelane and Others*,⁵³² the court ordered that Qwelane render a written unconditional apology to the LGBTI community within thirty days of the court, or within such time, the parties may agree on, pursuant to concession and reach a settlement agreement regarding the contents of such apology.⁵³³ Moreover, the court ordered that the apology be published in one edition of a national Sunday newspaper or the equivalent circulation for publicity that the offensive comments had received leading to the complaint.⁵³⁴ Proof of the written apology was to be furnished to the court with immediate effect.⁵³⁵

According to section 21(2)(o), the court may order payment of the costs of the proceedings by the losing party and a compliance order with any provision in the Equality Act.⁵³⁶ In addition, the court is to award a deterrent of an appropriate ‘nature, including the recommendation to the appropriate authority, to suspend the licence of a person’.⁵³⁷ Further, the court may in terms of section 21(2)(l) ‘make an order directing the Clerk of the Equality Court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation’.⁵³⁸ For instance, in *Sparrow*’s⁵³⁹ case, the court directed the clerk of the Equality Court to submit the entire matter to the Director of Public Prosecutions KwaZulu-Natal to consider the possible institution of criminal proceedings referring to common law or relevant statute.⁵⁴⁰

⁵³² *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) (14 December 2016).

⁵³³ *Psychological Society of South Africa v Qwelane and Others* supra para 70.

⁵³⁴ *Psychological Society of South Africa v Qwelane* supra.

⁵³⁵ *Psychological Society of South Africa v Qwelane* supra. See also, *Donaldo v Haripersa* (29/05) [2007] ZAEQC 3 (5 January 2007) at 6; *Sonke Gender Justice Network v Malema* (2010 (7) BCLR 729 (EqC)) [2010] ZAEQC 2; 02/2009 (15 March 2010) para 24; *Thembanani v Swanepoel* (217044) [2016] ZAECMHC 37; 2017 (3) SA 70 (ECM) (12 September 2016) para 2; *Kollapen v Du Preez* (EC 001/03) [2005] ZAEQC 1 (29 March 2005) para 2; *Mkhize v Edgemead High School*, Blue Down Equality Court, Western Cape, 3 December 2003; *Pillay and Another v Silver Club* (2004) Cape Town Equality Court, West Cape and *Umlazi T Section* case.

⁵³⁶ Section 21(2)(p) of PEPUDA.

⁵³⁷ Section 21(2)(l) of PEPUDA.

⁵³⁸ Section 21(2)(n) of PEPUDA.

⁵³⁹ *ANC v Sparrow* (10/16) [2016] ZAEQC 10 (June 2016).

⁵⁴⁰ *ANC v Sparrow* supra 53.

3.10 Appeals and reviews

Section 23 of the Equality Act deals with appeals and reviews of the decisions made by the Equality Courts.⁵⁴¹ In terms of this section, an order made by an Equality Court can either be appealed or reviewed by a High Court or Supreme Court of Appeal having jurisdiction by an aggrieved party.⁵⁴² An aggrieved party may also appeal directly to the Constitutional Court, provided that the rules of the Constitutional Court have been complied with.⁵⁴³ Section 23(5)(a) makes provision for reviews to the High Court subject to a determination by the Magistrate concerning a ground of discrimination.⁵⁴⁴

3.11 Conclusion

PEPUDA is an important piece of legislation that has attempted to ensure that discrimination disputes can be resolved speedily at a local level. The Equality Act has created a unique procedure which enables complainants to approach the Equality Court without the assistance of a lawyer. PEPUDA is also premised on the principles of restorative and preventive justice. This enables the court to try and address the underlying issues that may have fuelled the discriminatory conduct. In this way, the legislation aims at trying to meet its transformative objectives which are described in the preamble.

⁵⁴¹ Albertyn, Goldblatt & Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 31.

⁵⁴² Section 23(1) of Act 4 of 2000. The case of *Thembanani v Swanepoel* 2017 (3) SA 70 (ECM) is an example of a review decision.

⁵⁴³ Section 23(3) of Act 4 of 2000. In terms of section 167(6) of the Constitution of the Republic of South Africa, 1996, national legislation or the rules of the Constitutional Court, must allow a person, when it is in the interests of justice and with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court.

⁵⁴⁴ Section 223(5)(a)-(c) of the Equality Act.

Chapter Four

Public Interest Litigation and Class Actions

4.1 Introduction

The inception of our constitutional dispensation in South Africa made it possible for different mechanisms to be used in civil proceedings in order to address inequalities created by the past.¹ Historically, the attainment of access to justice to which most South Africans, especially the poorest were previously denied,² remained an elusive concept.³ Litigation as a strategy in the enforcement of human rights is now ensured.⁴ However, constraints such as legal standing (hereinafter referred to as standing or *locus standi*) in certain circumstances have the effect of barring potential litigants from accessing the courts.⁵ The Bill of Rights provides for a wider approach than one in terms of common law to legal standing in cases where fundamental human rights are violated or threatened.⁶ Standing determines whether a litigant is allowed to seek relief before a court of law or a particular tribunal⁷ in respect of a particular issue.⁸

The concept of standing and the right of access to justice are largely interrelated.⁹ Access to justice is significant for the realisation of human rights.¹⁰ In the case of *Chief Lesapo v North West Agricultural Bank and Another*,¹¹ Mokgoro J emphasised this and held that:

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to

¹ CF Swanepoel 'The public-interest action in South Africa: The transformative injunction of the South African Constitution' (2006) 41(2) *Journal for Judicial Science* 29.

² T Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 590.

³ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzo and Others* 2001 (4) SA 1184 (SCA) para 6.

⁴ AK Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 408.

⁵ EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 548.

⁶ Section 38 of the Constitution of the Republic of South Africa, 1996..

⁷ Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 408.

⁸ L Chiduza and PN Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 3.

⁹ Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 408.

¹⁰ Chiduza and Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 4.

¹¹ *Chief Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999).

self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.¹²

Therefore, if judicial bodies apply laws regarding standing strictly, it is an inevitable truth that potential litigants will be denied access to justice.¹³

In most cases, marginalised groups in South Africa face difficulty in approaching the courts and accessing legal relief.¹⁴ Various barriers that preclude potential litigants from accessing justice in South Africa are poverty, race, gender, disability, geographical location of the courts, high costs of litigation, technicalities associated with court procedures, language barriers and illiteracy.¹⁵ With the introduction of the Constitution in South Africa, categories of persons who can approach the courts have been expanded. As a result, even the most impoverished groups can easily access justice when their rights have been violated or threatened.¹⁶ Through section 38 of the Constitution, legal action can be instituted on behalf of a class or group or in the public interest.¹⁷

This chapter aims to establish whether HIV positive women who have been sterilised either coercively or forcibly can litigate using class action proceedings or by utilising the public interest litigation (PIL) route. The first part of this chapter will look at the South African legal framework and cases that have come before our courts by means of a class action and PIL. Conversely, before embarking on the discussion of the legal framework regarding public

¹² *Chief Lesapo* supra para 22. In the case of *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) para 29, Jafta J observed as follows:- 'Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State. Our courts are mandated to review the exercise of any power by State functionaries, from the lowest to the highest ranking officials.'

¹³ Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 408; Chiduzo and Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 4.

¹⁴ SB Gericke 'Can a class action be instituted for breach of contract' (2009) 72 *Journal of Contemporary Roman Dutch Law* 305.

¹⁵ M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure* 905; S Liebenberg 'From the crucible of the Eastern Cape: New legal tools for the poor' Public Lecture delivered on 28 July 2014, Rhodes University Law Faculty.

¹⁶ Liebenberg *ibid*.

¹⁷ See section 38(c) and (d) of the Constitution of the Republic of South Africa, 1996.

interest actions and class action, it is very important to look at legal standing and how it has been interpreted by the South African courts over the years.

The South African Constitution makes provision for any person, including members of civil society such as human rights NGO's, to litigate on public interest matters.¹⁸ The second part of this chapter will examine the role played by several organisations that have been and are still involved in PIL and class action matters and are helping in the realisation of human rights for vulnerable and marginalised persons. Lastly, this chapter will look at the strategies that these organisations have used to achieve and sustain public interest and the interest of the members of the class and the challenges that have been faced therein.

4.2 *Locus standi*

The concept of *locus standi* or legal standing is difficult to define.¹⁹ This is because standing has been used to refer to different aspects which impact on the rights of a person who approaches a court for particular relief.²⁰ First, the doctrine of standing refers to the capacity of persons to litigate in a court of law.²¹ For example, minors and mentally challenged people lack capacity to approach the courts without assistance from parents, guardians or curators *bonis*.²² Second, *locus standi* refers to a person's right to present the matter to court for adjudication.²³ This means that the litigant's claim must be based on a right enforceable by him/her in terms of the law. Our focus will be on the second aspect of legal standing. Standing is regarded as a primary issue and is frequently dealt with before the merits of each case.²⁴ In *Wilson v Zondi*, Henning J held that:

A party who initiates legal proceedings, whether by petition, application or summons, must indicate in the commencing papers that he has *locus standi* to bring such proceedings. It would not

¹⁸ Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 413-414.

¹⁹ TR Ramagoma *Locus Standi in Environmental Litigation: A South African Perspective* (unpublished LLM Thesis, University of Natal, 1997) 4. *Locus standi* and standing will be used interchangeably throughout this chapter.

²⁰ C Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 131; Ramagoma *Locus Standi in Environmental Litigation: A South African Perspective* (unpublished LLM Thesis, University of Natal, 1997) 4.

²¹ Chiduzo and Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 3.

²² Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 131.

²³ *Ibid.*

²⁴ Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 408; Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 549.

be sufficient for the litigant merely to assert that he is legally entitled to institute the proceedings. Thus it is necessary for a guardian of a minor who sues in that capacity to allege the relationship. It is usually apparent from allegations contained in the initiating process that a party has *locus standi*. Once *locus standi* has been sufficiently averred, it may, of course, be put in issue for adjudication by the court. The court, after hearing the matter in dispute, will then decide whether the party who has brought the proceedings was entitled to do so at all.²⁵

The doctrine of *locus standi* is an integral part of our legal process and has been associated with a few challenges for both litigants and the judiciary around the world.²⁶ In terms of our common law, a litigant is required to show that he/she has a 'direct and substantial interest' in the matter.²⁷ In addition, the right in question must entitle him/her to approach and the outcome of the case must have a personal effect on him/her.²⁸ This has been said to be a restrictive approach as it prevents matters from being brought in the public interest.²⁹ India's Constitution is well known for its liberal and innovative approach to legal standing.³⁰ In 1982, in the case of *SP Gupta v Union of India*,³¹ Bhagwati CJ found that it was about time that a new approach was adopted when it comes to standing. *In casu*, the court held that:

Even in our own country we have recognised this departure from the strict rule of *locus standi* in cases where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the Court for judicial redress... It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of

²⁵ *Wilson v Zondi* 1967 (4) SA 713 (N) 717.

²⁶ Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 549.

²⁷ TR Ramagoma *Locus Standi in Environmental Litigation: A South African Perspective* (unpublished LLM Thesis, University of Natal, 1997) 1.

²⁸ See *Charanjit Lal v Union of India* AIR 1951 SC 41; TR Ramagoma *Locus Standi in Environmental Litigation: A South African Perspective* (unpublished LLM Thesis, University of Natal, 1997) 1.

²⁹ TR Ramagoma *Locus Standi in Environmental Litigation: A South African Perspective* (unpublished LLM Thesis, University of Natal, 1997) 4.

³⁰ Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 566.

³¹ *SP Gupta v Union of India* (1982) 2 SCR 365.

breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.³²

The common law position that most jurisdictions, especially in Africa, have adopted, originated from English law.³³ As a result of colonialism, a plaintiff must have a special sufficient interest in the subject for him/her to challenge such action in court.³⁴ In 1977, England adopted new rules of standing which introduced a judicial review procedure against public bodies.³⁵ When applying for judicial review, a person had to seek leave for a judicial review application.³⁶ Subsequent to leave being granted, the court must be satisfied that the applicant has legal standing if it finds that the applicant has a 'sufficient interest'³⁷ to bring the case in the name of the public.³⁸ In terms of Canadian law, the plaintiff had to show he/she was 'exceptionally prejudiced' by the legislation challenged as compared to any other person in the community.³⁹ Over time, the Supreme Court of Canada's jurisprudence developed this rule holding that the court must use it when deciding standing matters taking into account the relevant circumstances of each matter.⁴⁰ Thus, in the Canadian courts the plaintiff will be said to have *locus standi* if three requirements are met, '(i) that the action brought raises a legal issue serious in nature; (ii) the plaintiff has a genuine interest in the matter in question; and (iii) there is no other effective way in which the plaintiff can seek the relief in court'.⁴¹

³² *SP Gupta v Union of India* (1982) 2 SCR 365 at para 16-17.

³³ TI Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39(1) *Journal of African Law* 2.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 566.

³⁷ *Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 100.

³⁸ See *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696 at 702-711; Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 566.

³⁹ Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 566.

⁴⁰ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 595; see *Thorson v Attorney General of Canada* [1975] 1 S.C.R. 138 at 145 (The plaintiff must prove that their action raises a serious legal matter which is justiciable in terms of the law); *Nova Scotia Board of Censors v McNeil* [1978] 2 S.C.R. 662 (The Plaintiff must have no other practical way to resolve the matter except by seeking that particular remedy in a court of law); and *Minister of Justice v Borowski* [1981] 2 S.C.R. 575 at 575-576 (A person bringing an application must prove that he/she has a genuine interest in the matter). See also, *Finlay v Minister of Finance of Canada* (1989) 146 DLR (3d) 704.

⁴¹ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 595-6.

4.3 *Locus Standi* in terms of South African Law

4.3.1 Standing in terms of the traditional approach in South Africa

Preceding the enactment of the Interim Constitution in 1993, the common law governed legal standing in South African courts.⁴² According to the traditional approach, the South African courts adopted a restrictive viewpoint when dealing with standing matters.⁴³ This approach required a person initiating the matter in court to have a personal interest in which he/she was adversely affected.⁴⁴ This meant that the common law rule on standing catered only for adjudication between private parties whose personal interest was adversely affected by alleged violations.⁴⁵ In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, O'Regan J observed that:

Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief.⁴⁶

It can be deduced that if a person approaching the courts fails to show that he/she has a sufficient interest or is personally and adversely affected by the violation in question, the court will refuse standing.⁴⁷ In the case of *Roodepoort-Maraiburg Town Council*,⁴⁸ Stratford JA found that 'in cases where reading of the legislation in conjunction with the surrounding circumstances; make it clear that the prohibition of an act in question is in the interest of any person or a group of persons; the court can grant the relief for enforcement of a public right.'⁴⁹ The Judge further held

⁴² G Jephson 'Standing, class actions and the right of access to justice' (2014), available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Jephson.pdf>, accessed on 20 October 2017.

⁴³ Loots 'Standing to enforce fundamental rights' (1994) 10 *South African Journal on Human Rights* 49.

⁴⁴ Ibid.

⁴⁵ Jephson 'Standing, class actions and the right of access to justice' (2014), available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Jephson.pdf>, accessed on 20 October 2017.

⁴⁶ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) para 229.

⁴⁷ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 591.

⁴⁸ *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

⁴⁹ *Roodepoort-Maraiburg Town Council* supra at 96; followed the principle adopted in the case of *Patz v Greene & CO* 1907 TS 427 at 433.

that it was mandatory for the applicant to allege and prove that he has suffered personal harm or special damages because of the prohibited act in question.⁵⁰

In addition, the decision of *Wood and Others v Ondangwa Tribal Authority and Another*⁵¹ took an exception to the application of the traditional approach. *In casu*, the Appellate Division as it was then known, permitted a group of leaders who sought an interdict on behalf of a group of individuals who were illegally arrested, tried before a court of law and had their lives endangered because of their political associations.⁵² In granting *locus standi*, the Court held as follows:

Although the position is that in Roman-Dutch law no private person can proceed by a popular action as such, it is clear that the interdict *de libero homine exhibendo* is part of our law, and it only remains to be considered at whose request a Court will issue the interdict. The cause of action is *sui generis* because not only was the right to freedom protected by it but also "it is set in motion as a matter of duty". Nevertheless, *actiones populares* should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order. This approach is based on sound reason and is in accordance with our law. In such a case, the applicant would not purport to act "on behalf of the public" and would not; therefore institute what in Roman law was an *actio popularis*. He would be allowed to act on behalf of a detained person because he would satisfy the Court that the detained person could not make the application himself. This procedure would preserve what in Roman law was already considered of the highest value and no less regarded in Roman-Dutch law. The Court would, of course, require to be satisfied that the applicant had good reason for making the application and that the detained person would have made the application himself if it had been in his power to do so.⁵³

The significance of this decision is that the Appellate Division was willing to adopt a liberal attitude towards the rules of standing in order to enable it to get to grips with the subject matter that had to be determined.⁵⁴

4.3.2 *Locus Standi* under the Constitution

Prior to the adoption of the Constitution, when granting legal standing, South African courts took an individualised approach.⁵⁵ The enactment of the interim and final Constitutions

⁵⁰ *Roodepoort-Maraisburg Town Council* supra at 95.

⁵¹ *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A).

⁵² *Ibid.*

⁵³ *ibid* 310-313.

⁵⁴ C Loots 'Keeping locus standi in chains' (1987) 3 *South African Journal on Human Rights* 69.

⁵⁵ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 602.

introduced radical changes to the common law rules governing standing in South Africa.⁵⁶ This bold reform in our law was made in terms of section 7(4) of the interim Constitution⁵⁷ and section 38 of the final Constitution,⁵⁸ respectively.⁵⁹ With these clauses coming into effect, any person or organisation may approach the court for the enforcement of the rights enshrined in the Bill of Rights, regardless of the fact that the alleged violation of rights adversely and personally affected them.⁶⁰

4.3.2.1 A broad approach on standing under the Constitution

The courts have adopted a broad approach when interpreting the enforcement of a rights clause.⁶¹ The Constitutional Court's jurisprudence shows a clear stance of a liberal and broad approach when it comes to standing in order to uphold the effective enforcement of human rights. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,⁶² the Constitutional Court showed the importance of it developing the common law and adopting

⁵⁶ Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 566; Jephson 'Standing, class actions and the right of access to justice' (2014), available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Jephson.pdf>, accessed on 20 October 2017.

⁵⁷ This sub-section provided as follows:-

'(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by:-

(i) a person acting in his or her own interest;

(ii) an association acting in the interest of its members;

(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(iv) a person acting as a member of or in the interest of a group or class of persons; or

(v) a person acting in the public interest.

⁵⁸ This section provides that: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are:-

(a) Anyone acting in their own interest;

(b) Anyone acting on behalf of another person who cannot act in their own name;

(c) Anyone acting as a member of or in the interest of, a group or class of persons;

(d) Anyone acting in the public interest; and

(e) An association acting in the interest of its members.

⁵⁹ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 602.

⁶⁰ Loots 'Standing to enforce fundamental rights' (1994) 10 *South African Journal on Human Rights* 49.

⁶¹ Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 603.

⁶² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995).

a generous approach in order to fulfil its constitutional mandate of protecting human rights as provided for in the Constitution.⁶³ *In casu*, Chaskalson P for the majority observed as follows:

Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.⁸ Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution on which counsel for the Respondents based his argument. I will deal later with the terms of this section and the purpose that it serves.⁶⁴

Nevertheless, this far-reaching approach also has its own limitation on litigants as it only applies in matters where the violation alleged is the infringement of the rights contained in the Bill of Rights.⁶⁵ However, in the judgment of *Wildlife Society v Minister of Environmental Affairs*,⁶⁶ the Court noted that ‘even in instances where standing cannot be given to the applicants under section 7(4) of the Interim Constitution, and the legislation has imposed an obligation on a public body to take particular steps to protect the environment in the public interest, the applicant must be given standing in terms of common law to compel such public body to fulfil that obligation.’⁶⁷ There are two requirements that an applicant must meet when they wish to rely on section 38 of the Constitution, namely, a fundamental right must have been violated and the applicant must fall under one of the categories mentioned under this provision.⁶⁸

⁶³ I Currie and J de Waal *The Bill of Rights Handbook* 6th ed (2016) 73.

⁶⁴ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (6 December 1995) para 165.

⁶⁵ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2016) 74-75. See also, *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) and *Port Elizabeth Municipality v Prut NO* 1996 (4) SA 318 (E).

⁶⁶ *Wildlife Society v Minister of Home Affairs* (1996) (3) SA 1095 (Tks).

⁶⁷ *Wildlife Society v Minister of Home Affairs* supra at 1105.

⁶⁸ Ngcukaitobi ‘The evolution of standing rules in South Africa and their significance in promoting social justice’ (2002) 18 *South African Journal on Human Rights* 604.

4.4 Class Actions

4.4.1 Background and definition of class actions in South Africa

Historically, access to South African courts had been restricted in terms of the principle of *locus standi* or standing.⁶⁹ Before our courts could grant standing to the person litigating, the latter had to show a ‘personal, sufficient, and direct interest’ in the matter.⁷⁰ This was problematic as amongst others, representative organisations were denied the chance to litigate, as they could not prove legal standing because of their lack of a ‘direct interest’.⁷¹ This customary model of civil litigation was a clear limitation to social change as plaintiffs were not given an opportunity to seek legal redress for protection of their human rights through class actions.⁷²

Prior to the demise of apartheid in 1994,⁷³ class actions were relatively foreign under South African law.⁷⁴ The introduction of both the interim and final Constitutions provided acknowledgement and recognition to class actions in South Africa.⁷⁵ Nonetheless, the developments in this field of law in South Africa continue to be in an embryonic stage.⁷⁶ In 1998, the South African Law Reform Commission issued a report discussing class action and public interest actions procedures and made recommendations on the nature of these actions and further proposed a Draft Bill on the enforcement for such action in our law.⁷⁷ Despite the SALRC’s propositions, academic voices and the recommendations from a judicial commission of inquiry,⁷⁸ Parliament has not enacted legislation setting out the procedures to be followed

⁶⁹ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) 1.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² KM Robertson *An Analysis of the Class Action in South Africa* (unpublished LLM thesis, University of Pretoria) (2015) 10.

⁷³ WR De Vos ‘Is a class action a “classy act” to implement outside the ambit of the constitution?’ (2012) 4 *Journal of South African Law* 738.

⁷⁴ *Firststrand Bank Ltd v Chaucer Publication (Pty) Ltd* 2008 (2) SA 592 (C) para 22; see also *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza and Others* 2001 (4) SA 1184 (SCA) para 1; J Ripley-Evans and FN Del Valle ‘South Africa’ in R Swallow (ed) *The Class Actions Law Review* (2017) 152.

⁷⁵ Robertson *An Analysis of the Class Action in South Africa* (unpublished LLM thesis, University of Pretoria) (2015) 7.

⁷⁶ *Ibid.*

⁷⁷ De Vos ‘Reflections on the introduction of a class action in South Africa’ (1996) 4 *Journal of South African Law* 639.

⁷⁸ *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012) para 14.

when using class action and public interest actions and to give effect to section 38 of the Constitution.⁷⁹

Over the years, class actions have been part of, and used in other jurisdictions around the world, namely, in the United States of America,⁸⁰ England,⁸¹ Australia,⁸² Russia,⁸³ Canada,⁸⁴ Brazil,⁸⁵ and Zimbabwe.⁸⁶ Insofar as class actions are concerned, no statutory definition of it exists in South Africa.⁸⁷ However, there have been attempts to define class actions. In terms of the report by the SALRC, class action can be defined as:

an action instituted by a representative on behalf of class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all the members of the class, and which action is certified as a class action in terms of the proposed Act.⁸⁸ It is a device by which, a single plaintiff can pursue an action on behalf of all persons with a common interest in the subject matter of the action, and with the ruling of the court being binding upon all class members.⁸⁹

As defined by Professor Mulheron, the concept of class action means-

a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (“representative plaintiff”) may sue on his or her own behalf and on behalf of a number of other persons (“the class”) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (“common issues”). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the

⁷⁹ Robertson *An Analysis of the Class Action in South Africa* (unpublished LLM thesis, University of Pretoria) (2015) 7.

⁸⁰ The American federal class actions are governed by Rule 23 of the US Federal Rules of Civil Procedure of 1966 and class actions adjudicated at state courts are governed by Class Action Fairness Act of 2005.

⁸¹ In England class actions are regulated by the Civil Procedure Rules of 1998.

⁸² The Australian class action regime is governed by Part IVA of the Federal Court of Australia Act of 1976, which came into operation on 5 March 1992.

⁸³ In the Russian jurisdiction, private class actions are instituted in terms of the Arbitration Procedural Code and public and organizational class action are instituted under Civil Procedural Code.

⁸⁴ In Canada, class action procedures are dealt with in the Uniform Class Proceedings Act of 1996.

⁸⁵ Class actions in the Brazilian jurisdiction are conferred in terms of The Public Civil Action Act of 1985 and Brazilian Consumer Protection Code.

⁸⁶ In Zimbabwe enacted legislation dealing specifically with class action is the Class Actions Act of 1999.

⁸⁷ P Conradie and A Hofmeyr ‘South Africa’ in Global Legal Group et al. *The International Comparative Legal Guide to: Class & Group Actions* (2017) 122.

⁸⁸ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) vi.

⁸⁹ *Ibid* 6.

litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.⁹⁰

Moreover, Professor Silver asserts that a class action must not be mistakenly referred to as a joinder device but it is a representational device.⁹¹ In doing so, he pointed out that:

The class action is a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes them claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case. Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake ... Class members neither start out as parties nor become parties when a class is certified.⁹²

Even though the South African procedural system is derived from English law, class action rules have their roots in an American model.⁹³ According to this model, 'a class action

is a procedural tool, which empowers a large classification of persons to litigate collectively against the wrongdoer in the event their rights have been violated in a similar manner by the defendant.'⁹⁴

In America, before amendments class actions were governed by Federal Rule 23 of 1938 (now called Federal Rule of Civil Procedure 23).⁹⁵ The rules set out the procedure that must be followed when bringing a class action to court.

Previously, class actions were not recognised under common law in South Africa.⁹⁶ Subsequently, the need for class actions arose as society changed with the new law in place in

⁹⁰ R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) available at <https://books.google.co.za/books?id=rq3bBAAAQBAJ&printsec=frontcover&dq=The+Class+Action+in+Common+Law+Legal+Systems:+A+Comparative+Perspective&hl=en&sa=X&ved=0ahUKewjJw763kofYAhXPhRoKHV54CSwQ6AEIKDAA#v=onepage&q=The%20Class%20Action%20in%20Common%20Law%20Legal%20Systems%3A%20A%20Comparative%20Perspective&f=false> accessed on 7 December 2017.

⁹¹ Mulheron *ibid*.

⁹² C Silver 'Class actions – representative proceedings' (1999) *Encyclopedia of Law and Economics* 196.

⁹³ WLR De Vos 'Is a class action a classy act" to implement outside the ambit of the constitution' (2012) 4 *Journal of South African Law* 738.

⁹⁴ De Vos 'Reflections on the introduction of a class action in South Africa' (1996) 4 *Journal of South African Law* 639.

⁹⁵ E Hurter 'The draft legislation concerning public interest actions and class actions: the answer to all class?' (1997) 30 *Comparative and International Law Journal of Southern Africa* 306.

⁹⁶ Robertson *An analysis of the Class Action in South Africa* (unpublished LLM thesis, University of Pretoria) (2015) 7.

order to protect and promote human rights and redress the injustice of the apartheid regime.⁹⁷ Class actions in America also used civil rights, anti-trust and securities law infringements and played an effective enforcement role in those matters.⁹⁸ According to Weston, class actions empower representatives to seek redress for wide-reaching issues in society and to advance consent or organisation from other members of the class is not considered essential.⁹⁹ In this way, class action allows for aggregation of claims.¹⁰⁰

In terms of South African jurisprudence, there has been no clear definition of a class action. However, for the purposes of this dissertation, the above definitions provided by Mulheron and Silver will be accepted as it was endorsed in the judgment of *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*.¹⁰¹

At this point, it is imperative to note that the PIL is different from class action. In the 1950s, PIL appeared as an instrument to challenge the social injustices experienced by the underprivileged and needy in our society.¹⁰² Until the late 1990s, class actions were unprecedented in South Africa.¹⁰³ In so far as the two actions overlap, there is a distinction between PIL and class actions and this must be sustained with the two procedures being treated separately.¹⁰⁴ The most crucial distinction between PIL and class action is that the decision by made the court in a class action binds all members of the class and hence, the principle of *res judicata* is applicable to the members belonging to that class.¹⁰⁵ In PIL, the principle of *res judicata* is not applicable and the affected persons in whose name or interest the action is brought are not bound by the judgment that the court makes.¹⁰⁶

⁹⁷ Ibid.

⁹⁸ JS Emerson 'Class actions' (1989) 19 *Victoria University of Wellington Law Review* 184.

⁹⁹ MA Weston 'Universes colliding: The constitutional implications of arbitral class actions' (2006) 47 *William and Mary University Law Review* 1726.

¹⁰⁰ *Trustees for the Time Being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012) para 17.

¹⁰¹ Ibid paras 16-17.

¹⁰² J Handmaker 'Public interest litigation for refugees in South Africa and the potential for structural change' (2011) 27 *South African Journal on Human Rights* 65.

¹⁰³ Hurter 'The draft legislation concerning public interest actions and class actions: The answer to all class ills?' (1997) 30 *Comparative and International Law Journal of Southern Africa* 304.

¹⁰⁴ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) 7.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 8.

4.4.2 Class actions under the constitutional dispensation

South African law relating to the concept of class actions has developed in tandem with our constitutional supremacy regime coming into effect.¹⁰⁷ This innovative shift from the common law position was introduced by the interim Constitution and the final Constitution under section 7(4)(b)(iv) and 38(c), respectively.¹⁰⁸ These provisions entitle any person acting as a member of or on behalf of the class or group of persons, to approach the court alleging infringement of a right entrenched in the BoRs.¹⁰⁹ In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another*,¹¹⁰ the Supreme Court of Appeal recognised the constitutional prerogative that litigants may use a class action to enforce rights enshrined in the Constitution.¹¹¹ However, in 2013, the same court acknowledged the usefulness of a class action in non-constitutional matters. In the decision of *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*,¹¹² the Supreme Court of Appeal found that:

it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation.¹¹³

This decision was endorsed in the cases of *Mukaddam v Pioneer Foods (Pty) Ltd and Others*¹¹⁴ and *Nkala and Others v Harmony Gold Mining Company Limited and Others*.¹¹⁵

¹⁰⁷ Ripley-Evans and Del Valle 'South Africa' in R Swallow (ed) *The Class Actions Law Review* (2017) 152.

¹⁰⁸ De Vos 'Is a class action a "classy act" to implement outside the ambit of the constitution?' (2012) 4 *Journal of South African Law* 738.

¹⁰⁹ Section 38(c) of the Constitution of the Republic of South Africa, 1996.

¹¹⁰ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza and Others* 2001 (4) SA 1184 (SCA).

¹¹¹ *Ngxuzza* supra para 6.

¹¹² *Trustees for the Time Being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012).

¹¹³ *Ibid* para 21.

¹¹⁴ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) para 64.

¹¹⁵ *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) para 25.

In the decision of *Ngxuza*, the Supreme Court of Appeal provided leeway for litigants who desired instituting class actions in South African courts.¹¹⁶ The Court also laid down the essential requisites of a class action. These include:

- (i) the class must be so numerous that joinder of all its members is impracticable;
- (ii) there must be questions of law and fact common to the class;
- (iii) the claims of the applicants representing the class must be typical of the claims of the rest of the class; and
- (iv) the applicants through their legal representatives, will fairly and adequately protect the interests of the class¹¹⁷ and the class in this matter met all these requirements.¹¹⁸

Notwithstanding the establishment and recognition of class action in South Africa, the *Ngxuza* case provided slight direction as to the procedure for a class action litigation.¹¹⁹

In 2012, the Supreme Court of Appeal provided some clarity setting out procedural requirements of initiating a class action in South Africa. This was the case in the SCA decision of *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* in which the court provided answers to the uncertainty as to when and how a class action may be instituted. It transpired from this case that there are two stages of a class action namely, certification and valuation of the wrongdoer's liability.¹²⁰ This means that before issuing a summons, a class action must first be certified¹²¹ which authorises the proceedings.¹²²

¹¹⁶ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) para 6.

¹¹⁷ *Ibid.*

¹¹⁸ A Kok 'Has the supreme court of appeal recognized a general class action in South Africa? *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 BCLR 1039 (SCA)' (2003) 66 *Journal of Contemporary Roman-Dutch Law* 159.

¹¹⁹ D Hazel 'Litigation with class: Consideration a potential framework for class actions in Namibia' (2014) 6 *Namibia Law Journal* 21.

¹²⁰ J Rooney 'Class actions and public interest standing in South Africa: practical and participatory perspectives' (2017) 33 (3) *South African Journal on Human Rights* 409; *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) 35.

¹²¹ Ripley-Evans and Del Valle 'South Africa' in R Swallow (ed) *The Class Actions Law Review* (2017) 155.

¹²² South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) 38; Hurter 'Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure' (2000) 33 *Comparative and International Law Journal of Southern Africa* 42.

Certification is best described as the most important part of a class action which ensures that class proceedings are conducted appropriately.¹²³ In this way, the defendant is given an opportunity to show good cause as to why the class proceedings should not proceed. Further, it gives the defendant the opportunity to show why the matter should not be settled in instances where the claim has no merits.¹²⁴ This is to ensure that only feasible class action matters are brought to court for further adjudication.¹²⁵

As far as certification is concerned, the SALRC submits that it is necessary and recommends a two-stage approach.¹²⁶ This approach includes first, that the representative acting on behalf of the class must bring an application accompanied by an affidavit requesting the court to grant leave to initiate a class action.¹²⁷ Thereafter, the matter will proceed as a class action until finalised, when the court is satisfied that the action is appropriate in the circumstances and has certified its proceeding, thereby setting out the procedure to be followed.¹²⁸ De Vos accepts this approach and holds the view that it would be well-suited in South African civil procedure compared to a general approach.¹²⁹ The SALRC suggested the following criteria for certification:

- (a) evidence of the existence of an identifiable class of two or more persons;
- (b) the existence of a *prima facie* cause of action;
- (c) issues of fact or law which are common to the claims or defences of individual members of the class;
- (d) the availability of a suitable representative or representatives to represent the interests of the class; and

¹²³ Hurter 'Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure' *ibid*; E Hurter 'The class action in South Africa: *Quo Vadis?*' 2008 *De Jure* 295.

¹²⁴ *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012) para 24.

¹²⁵ Rooney 'Class actions and public interest standing in South Africa: practical and participatory perspectives' (2017) 33 *South African Journal on Human Rights* 409.

¹²⁶ Robertson *An analysis of the Class Action in South Africa* (unpublished LLM thesis, University of Pretoria) (2015) 26.

¹²⁷ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) 39.

¹²⁸ *Ibid*.

¹²⁹ De Vos 'Reflections on the introduction of a class action in South Africa' (1996) 4 *Journal of South African Law* 645.

(e) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.¹³⁰

In developing the common law, the decision of *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others*,¹³¹ set out non-exhaustive elements for certification as follows:

- (i) the existence of a class identifiable by objective criteria;
- (ii) a cause of action raising a triable issue;
- (iii) that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- (iv) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- (v) that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- (vi) that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- (vii) whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.¹³²

Similar requirements were accepted in the case of *Mukaddam*.¹³³ Jaftha J found that:

These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.¹³⁴

¹³⁰ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) 39.

¹³¹ *Trustees for the Time Being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012); *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) para 30.

¹³² *Trustees for the Time Being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012) para 26.

¹³³ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) paras 15-19.

¹³⁴ *Ibid* para 35.

The court further reasoned that the courts' power conferred upon them in terms of section 173 of the Constitution,¹³⁵ not only protects and regulates court procedures but also the courts' power to develop the common law in instances where it is necessary to do so for the sake of interest of justice.¹³⁶ As a result, the same standard must be applied in class action matters where certification is sought.¹³⁷ In spite of this, the fact that the court has, to some extent, developed and clarified some fundamental characteristics of the law concerning class action in South Africa, a number of inconsistencies and ambiguities seem to remain unresolved.¹³⁸ These include the procedure that must be followed to give notice to class members regarding class action proceedings.¹³⁹ Class actions can be brought in three ways, namely, opt-in, opt-out or bifurcated. In an opt-in action, every member of a class is required to actively consent to take part in a class action in order for him/her to benefit from, and be bound by, the outcome of such action.¹⁴⁰ In this action, potential class members expressly communicate with the legal representatives of a class and their interest to join the action as class members.¹⁴¹ The first case to use an opt-in action in South Africa was *Linkside and Others v Minister of Basic Education and Others*¹⁴²

In an opt-out action, the opposite of an opt-in action applies, whereby all members of a class benefit from and are bound by the result thereof except when they exclude themselves from being class members.¹⁴³ Opt-out actions are mostly used and are forthright in nature.¹⁴⁴ For instance, in the *Ngxuza* case, a class action consisted of tens of thousands of Eastern Cape disability grant recipients who chose not to opt-out of the class proceedings.¹⁴⁵ In

¹³⁵ This section provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice.

¹³⁶ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) para 34.

¹³⁷ *Ibid.*

¹³⁸ T Broodryk 'Giving notice to members of opt-out class action' (2017) 3 *Journal of South African Law* 498.

¹³⁹ *Ibid.*

¹⁴⁰ DE van Loggerenberg 'Enforcement of rights' in HJ Erasmus *Superior Court Practice* (2017) Vol 3 (RS4) at 9.

¹⁴¹ Rooney 'Class actions and public interest standing in South Africa: practical and participatory perspectives' (2017) 33 *South African Journal on Human Rights* 410.

¹⁴² *Linkside and Others v Minister of Basic Education and Others* (3844/2013) [2015] ZAECGHC 36 (26 January 2015) para 4.

¹⁴³ van Loggerenberg 'Enforcement of rights' in HJ Erasmus *Superior Court Practice* (2017) Vol 3 (RS4) at 9.

¹⁴⁴ Rooney 'Class actions and public interest standing in South Africa: practical and participatory perspectives' (2017) 33 *South African Journal on Human Rights* 409.

¹⁴⁵ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) para 22.

Mukaddam's¹⁴⁶ case, it was found by the Supreme Court of Appeal that only in exceptional circumstances would the court allow an opt-in action.¹⁴⁷ However, this judgment was upheld by the Constitutional Court, which found that:

A further error committed by the court was the finding that certification in an opt-in class action requires the applicant to show exceptional circumstances. The test of exceptional circumstances is at variance with the standard laid down by that court in *Children's Resource Centre*.¹⁴⁸

In a bifurcated class action, two stages are involved.¹⁴⁹ First, opt-out is a preliminary requirement in which all issues common to the class members are dealt with.¹⁵⁰ In the second stage, an opt-in process takes place whereby issues relating to the individuals in a class are dispensed with.¹⁵¹ This was evident from the decision of *Nkala* where the mineworkers asked to be permitted to implement an opt-out stage in which mineworkers on the mine's list were part of a class action and an opt-in process in which plaintiffs (including dependents) had to show that they or deceased mineworkers had contracted tuberculosis or silicosis.¹⁵² Mining companies opposed this claim, however, the court granted the use of the bifurcated process.¹⁵³

4.5 Public interest litigation

4.5.1 Defining public interest action

Public interest actions and class actions are important, as they have formed part of the global movement towards promoting access to justice. PIL is part of public law.¹⁵⁴ In terms of public law, the presence of personal or sufficient interest is not a requirement over and beyond public interest.¹⁵⁵ The concept of 'public interest' is based on the belief that in a free society all groups must have equal access to the legal system and be adequately represented if their human rights are being violated.¹⁵⁶ When all other channels of influence have proven futile, litigation is the

¹⁴⁶ *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

¹⁴⁷ *Ibid* para 14.

¹⁴⁸ *Ibid* para 55.

¹⁴⁹ *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) para 116.

¹⁵⁰ Rooney 'Class actions and public interest standing in South Africa: practical and participatory perspectives' (2017) 33 *South African Journal on Human Rights* 409.

¹⁵¹ *Ibid*.

¹⁵² *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) paras 117-118.

¹⁵³ *Nkala* supra paras 120-125.

¹⁵⁴ BJ Odoki 'Public interest litigation and the enforcement of human rights' (2003) 15 *Commonwealth Judicial Journal* 20.

¹⁵⁵ *Ibid*.

¹⁵⁶ F Kathree 'Public Interest law: its continuing role in South Africa' (2002) 15 *Advocates Forum* 33.

primary approach to follow for the purpose of protecting the rights of the vulnerable groups.¹⁵⁷ Through litigation, disadvantaged groups are empowered to participate fully and fairly in the matters that affect them in society.¹⁵⁸

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*¹⁵⁹ it was held that generally in the litigation of a public character, relief sought is forward-looking and applies universally so that it may directly affect people.¹⁶⁰ Moreover, the harm alleged may frequently be relatively diffuse or amorphous.¹⁶¹ PIL also helps challenge the existing laws and holds government structures accountable for omissions in fulfilling their constitutional obligations and preventing discriminatory practices against particular groups in our communities,¹⁶² and restoring human dignity where it has been denied.¹⁶³

Although the concept of PIL is widely used, there is no universal way of defining it.¹⁶⁴ It has been a difficult task to come up with a broadly accepted and comprehensive definition of PIL as various jurisdictions have applied a diversity of strategies in an attempt to define the concept of PIL.¹⁶⁵ However, for the purposes of this dissertation, it is important that a working definition is used. According to Badwaza, the narrow and technical definition of PIL is:

a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.¹⁶⁶

In India, the judgment of *People's Union for Democratic Rights v Union of India* found as follows:

¹⁵⁷ SL Cummings, L Scott and DL Rhode 'Public interest litigation: Insight from theory and practice' (2009) 36 *Fordham Urban Law Journal* 606.

¹⁵⁸ YS Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 13.

¹⁵⁹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995).

¹⁶⁰ *Ibid* para 229.

¹⁶¹ *Ibid*.

¹⁶² Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 13.

¹⁶³ J Otteh (ed) *Litigation for Justice: A Primer on Public Interest Litigation* (2012) 3, available at <http://accesstojustice-ng.org/Litigating%20for%20Justice.pdf> accessed on 3 November 2017.

¹⁶⁴ MJ Nkhata 'Public interest litigation and locus standi in Malawian Constitutional law: Have the courts unduly fettered access to justice and legal remedies?' (2008) 2 *Malawi Law Journal* 210.

¹⁶⁵ Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 13.

¹⁶⁶ HC Black *Black's Law Dictionary* (1990), available at http://www.republicsg.info/dictionaries/1990_black%27s-law-dictionary-edition-6.pdf, accessed on 4 November 2017.

PIL which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which essentially of an adversary character where there is a dispute between two parties, one making a claim or seeking relief against the other and that other opposing such claim or relief. PIL is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed.¹⁶⁷

The concept of PIL in the USA is that it is the practice by lawyers pursuing PIL to precipitate social change through court decisions that reform the rule of law, apply and implement laws already in existence and enunciate norms of the public.¹⁶⁸ The proposed definition of PIL by the South Africa Law Reform Commission (SALRC) is that it is:

an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest.¹⁶⁹

Ngcukaitobi suggests that PIL is an action adopted in order to achieve comprehensive goals and outcomes for the greater good of the public, including law reform protection for disadvantaged groups and promotion of their socio-economic rights and in other cases, physical benefit for vulnerable groups.¹⁷⁰

PIL is the reinforcement tool against the breach of the rights of the public.¹⁷¹ PIL also helps to realise the rights of vulnerable groups¹⁷² in our society.¹⁷³ PIL lawyers play a huge role in ensuring that the rights of minority groups are recognised.¹⁷⁴ Through PIL, the previously underrepresented and unrepresented groups are afforded legal representation.¹⁷⁵ According to Chief Justice Odoki of Uganda, PIL plays a huge role in protecting and enforcing the

¹⁶⁷ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235.

¹⁶⁸ B Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1281.

¹⁶⁹ South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) (v).

¹⁷⁰ Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) 29(1) *Advocates Forum* 35.

¹⁷¹ P Mishra and S Gupta 'A panacea in the mire: public interest litigation' (2014) 2 *Law Mantra* 1.

¹⁷² These groups include the poor, racial and ethnic minorities, consumers, women and children.

¹⁷³ T Davel 'Impact litigation as a tool to transform society and realise the most basic fundamental rights of women and children' (2006) 12 *Fundamina* 119.

¹⁷⁴ Kathree 'Public Interest law: its continuing role in South Africa' (2002) 15(3) *Advocates Forum* 32.

¹⁷⁵ G Kessler 'The economics of public interest litigation' (1976) 2 *Litigation* 13.

fundamental rights and freedoms of people.¹⁷⁶ PIL also demonstrates a significant endeavour to give a substantial meaning to human rights.¹⁷⁷ As a result, PIL plays and continues to play, a huge role in transforming our society, internationally, regionally and nationally.¹⁷⁸ PIL helps persons who have been denied an opportunity to voice their deprivations and infringements by government and society.¹⁷⁹ It also assists in guaranteeing and restoring human dignity and other constitutional rights that have been violated.

Some scholars believe that PIL dates back to the early African-American civil rights struggle in the United States.¹⁸⁰ As a result of the movement, the case of *Brown v Board of Education*¹⁸¹ produced the decision in which the US Supreme Court found that the segregation of public school students in terms of race, was unconstitutional.¹⁸² In India, some legal scholars argue that PIL must be referred to as social action litigation.¹⁸³ According to Baxi,¹⁸⁴ unlike PIL in the United States which focuses its attention on public participation in decision making by the government, the PIL movement from the Indian perspective deals with governmental oppression and anarchical society, especially against poor individuals living in the rural areas.¹⁸⁵

4.5.2 Public interest litigation in South Africa's pre-constitutional dispensation

It is a very difficult task to identify the precise period in which PIL began in South Africa.¹⁸⁶ Some believe that PIL dates back to the 1950s and this concept was revived in the 1980s.¹⁸⁷

¹⁷⁶ Odoki 'Public interest litigation and the enforcement of human rights' (2003) 15 *Commonwealth Judicial Journal* 20.

¹⁷⁷ V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *Sur-International Journal on Human Rights* 128.

¹⁷⁸ Nkhata 'Public interest litigation and locus standi in Malawian Constitutional law: Have the courts unduly fettered access to justice and legal remedies?' (2008) 2 *Malawi Law Journal* 211.

¹⁷⁹ Otteh (ed) *Litigation for Justice: A Primer on Public Interest Litigation* (2012) 1-2, available at <http://accesstojustice-ng.org/Litigating%20for%20Justice.pdf>, accessed on 3 November 2017.

¹⁸⁰ Cummings, Scott and Rhode 'Public interest litigation: Insight from theory and practice' (2009) 36 *Fordham Urban Law Journal* 606.

¹⁸¹ 347 US 483 (1954).

¹⁸² Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 25.

¹⁸³ S Derva 'Public interest litigation in India: A critical review' (2009) 1 *Civil Justice Quarterly* 26.

¹⁸⁴ Leading mooter on the topic of public interest litigation in India.

¹⁸⁵ U Baxi 'Taking suffering seriously: Social action litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107.

¹⁸⁶ Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) 29(1) *Advocates Forum* 36.

¹⁸⁷ S Golub 'Battling apartheid, Building a new South Africa' In M McClymont and S Golub (eds) *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (2000) 22, available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/ManyRoadstoJustice.pdf>, accessed on 18 September 2017.

However, Ngcukaitobi traces it back to the late 19th and early 20th centuries, during the final stages of the introduction of colonialism in South Africa.¹⁸⁸ He refers to this as the forgotten stories of the participations in PIL by African and Coloured lawyers who were litigating against the apartheid government, and oppressive policies and laws against black people. During the War of Mlanjeni in 1853 between the British and the Xhosa, the Xhosa's land was taken and dominated by the colonialists.¹⁸⁹ Between 1857 and 1858, the catastrophe of Nongqawuse shattered the Xhosa defiance when they killed thousands of their cattle.¹⁹⁰

In 1878, in the last frontier war, Cecil John Rhodes passed the Glen Grey Act, which prevented the Xhosa from embarking on military resistance to the British.¹⁹¹ In terms of this Act, the Xhosa were turned into a nation of labourers as compared to a sovereign nation, their land was divided amongst whites and they were restricted to owning cattle and were compelled to pay tax.¹⁹² In 1879, the Zulu won the victory of Isandlwana when they defeated the British. However their victory did not last for long as the King of the Zulus was captured and exiled between the periods of 1890-1897.¹⁹³ During this time, the land of the Zulus was put under colonial administration.¹⁹⁴ In 1906, the War of Bhambatha took place, as the Zulus refused to pay hut tax imposed by the colonialists; the Bhambatha warriors were executed after sham legal proceedings.¹⁹⁵ The defeat of the Xhosa and the Zulu was the beginning of an oppressive chapter in South African history as they could no longer resist the policies, laws and struggles imposed upon them by the colonial power.

The earliest case of PIL that the learned author Ngcukaitobi could trace, took place in 1845 brought by David Arnot.¹⁹⁶ The dissension arose between the Griqua community, the Afrikaners and the diamond diggers over the ownership of land, in which lay the diamond pastures of Kimberly.¹⁹⁷ Represented by Arnot, in the Land Court of the Griqualand West, the Griqua community based their claim on prior occupation. In his judgement, Justice Andries Stockenstrom rejected the Griqua's claim on the basis that they were nomadic peoples; their

¹⁸⁸ Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) 29(1) *Advocates Forum* 36.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) 29(1) *Advocates Forum* 37.

chief's jurisdiction was over people not of one fixed land or area. In a further matter of PIL, Alfred Mangena¹⁹⁸ brought legal proceedings in the public interest in the name of the Bhambatha warriors who were charged with treason.¹⁹⁹ Before their execution, Mangena appealed the Privy Council to override the death sentences against the warriors.²⁰⁰ Despite getting instructions from the warriors, Mangena pursued the matter in his own name but he represented the whole group of prisoners of war on the basis of public interest.²⁰¹ It was his argument during the trial, that was held before the military tribunal, that the tribunal erred, as it did not give the warriors sufficient procedural protection. However, the Privy Council ruled against Mangena and held that it lacked jurisdiction as the case was not heard in the ordinary court, the military tribunal, and the warriors were eventually executed.²⁰²

In 1911, Mangena and Pixley ka Isaka Seme²⁰³ formed the first African attorneys' partnership.²⁰⁴ Their practice was based not only in South Africa, it also operated in other countries such as Zimbabwe (formerly Rhodesia), Botswana (formerly Bechuanaland) and Swaziland. Seme became the attorney of King Sobhuza II of Swaziland. At the end of the Anglo Boer War, some of the Swazi's land was divided up and disposed of to the whites from South Africa. The matter went to the Privy Council and Seme represented the Swazi nation before the Council.²⁰⁵ The appeal was unsuccessful. Furthermore, in 1913, the Natives Land Act was enacted. This Act restricted black people from owning land. As a result, they were not allowed in the settlements that were designated for whites. Led by the African National Congress (ANC) (the then South African Native National Congress), black organisations resolved to send a delegation to England to make representations against the enactment of the Act and for the apartheid Government to repeal the Act.

Other black South African lawyers followed in Seme's footsteps, including Henry Poswayo, George Montsioa and Richard Msimang.²⁰⁶ Msimang opened his own law practice in Johannesburg and then later connected with Mangena. Msimang joined the ANC and held a leading position and was also involved in drafting the organisation's constitution. Msimang

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid 38.

²⁰⁶ Ibid.

and Solomon Plaatjies collected stories of people from across South Africa who were affected by the Natives Land Act. The stories were used as grounds for the government to withdraw the Act. Unfortunately, all these attempts were unsuccessful; the Act remained in operation. However, some progress was made as in 1936, a little concession was made for the excision of some pieces of land and that was listed in the form of a schedule in the Act.

During the 1950s, South Africa's society began its fight against apartheid laws which segregated the races and treated them unequally.²⁰⁷ Additionally, it was around this time that PIL really grew globally. PIL became one of the most important and useful means to challenge unjust laws.²⁰⁸ Interestingly, between the late 1970s and 1994, in South Africa, public interest lawyers took up the issues relevant at the time, and with success and the introduction of the Constitution, made their work and efforts more effective.²⁰⁹ Among the matters that these lawyers took up was the pass laws which prohibited black Africans from living in the cities; they were required to have permits unless exempted by statute.²¹⁰ As a result, in 1986 the pass laws were repealed.²¹¹

As mentioned above, public interest actions were essentially unknown in the South African legal landscape with very little legal precedent to work from.²¹² Amongst the ones that were brought and heard in court, some failed,²¹³ whilst others were presented successfully.²¹⁴ *Bagnall v The Colonial Government*²¹⁵ was the first case where the court had to establish whether the Roman Dutch principle of *actiones populares* was part of our law. This action allows an individual to bring a matter to court in the name of the public or in the public interest. In this instance, a taxpayer and secretary of the Manufacturers Association sought a declaratory order providing that the Treasurer-General was not entitled to permit any printed catalogues to be imported without payment of the duty as provided for in terms of the law.²¹⁶ In support of this claim, the plaintiff relied on the Roman law practice of *actiones populares*, which held the

²⁰⁷ Handmaker 'Public interest litigation for refugees in South Africa and the potential for structural change' (2011) 27 *South African Journal on Human Rights* 65.

²⁰⁸ *Ibid.*

²⁰⁹ G Budlender (n.d) 'Public interest law: The South African experience' 1, available at https://www.flac.ie/download/pdf/gbudlender_flac_061005.pdf, accessed on 4 November 2017.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 132.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Bagnall v The Colonial Government* (1907) 24 SC 470.

²¹⁶ *Bagnall* supra at 475.

idea that any private individual could bring an action to court for the benefit of the people.²¹⁷ The court utterly rejected the existence of public interest action in South African law.²¹⁸ The Court rejected this argument and held that this principle had become wholly obsolete under Roman Dutch law.²¹⁹

Moreover, *actiones populares* action had never been recognised in any South African court and was, therefore, not part of our law.²²⁰ In order to be consistent with the practice of our courts, De Villiers CJ emphasised that the plaintiff (who did not show that he was personally affected or suffered injury or damages as a result of the Treasurer-General's decision) was not entitled to get relief sought in the name of the general public.²²¹ This was because this kind of a matter was unheard of in any court in South Africa.²²²

In the case of *Patz v Greene & Co*,²²³ the court again dealt with the issue of actions in the public interest. In reaching a conclusion regarding this matter, the Court referred to the decision of *Chamberlaine v Chester and Birkenhead Railway Co*.²²⁴ In the Court's view, the applicant had *locus standi* but failed to provide clear proof that he had suffered any personal injury due to the respondent's conduct, although he made a *prima facie* case of actual injury.²²⁵ Furthermore, the Court found that the decision in *Chamberlaine* was not 'only good law, however common sense dictated that in the event where the prohibition by legislation is in the public interest, any member of the public would be entitled to approach a court for relief if he or she can prove they had sustained special damages'.²²⁶ In other words, the Court accepted that an action in the public interest was possible but that it could only be brought by persons with a direct, personal interest in the matter.

²¹⁷ *Bagnall supra*.

²¹⁸ Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 132.

²¹⁹ *Bagnall v The Colonial Government* (1907) 24 SC 470 at 476.

²²⁰ *Bagnall supra*.

²²¹ *Bagnall supra* 477.

²²² *Bagnall supra*.

²²³ *Patz v Greene & Co* (1907) TS 427.

²²⁴ *Chamberlaine v Chester and Birkenhead Railway Co* (1884) 18 L.J. Ex. 494 at 496; Pollock CB found that: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then, it is not necessary to allege special damage."

²²⁵ *Patz v Greene & Co* (1907) TS 427 at 438.

²²⁶ *Patz v Greene supra* at 433.

In *Dalrymple v Colonial Treasurer*,²²⁷ the Court dealt with the limitation of *locus standi* when it comes to litigation in the public interest. This case clearly highlights the constitutional dilemma that arises when the common law rules of standing in matters where issues affecting the public were at stake.²²⁸ *In casu*, the court referred to the non-existence and non-cognisance of *actio popularis* by the South African courts.²²⁹ The applicants brought an application for an interdict as members of the Legislative Council to prevent the Treasurer –General from making payments to members of parliament for a session as if it was an ordinary session, instead of an extraordinary one as per their resolution.²³⁰ The court found that the applicants as councillors did not have *locus standi*. Innes CJ observed as follows:

The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side: it is of equal force in regard to criminal procedure. Just as no man can claim damages in a civil action unless he has himself been injured, so no man may institute a private prosecution unless he has been specially affected by the crime. And the rule applies to wrongful acts, which affect the public, as well as to torts committed against private individuals. The acts complained of in this instance fall within the former category.²³¹ The only right the applicants could claim is the right to see that the public funds are not expended in contravention of the statute law of the land; in other words, a right arising from a breach of a statute dealing with a public matter. Such a breach would not, in accordance with the general principles of our law, entitle the applicants to sue unless they could aver and establish some damage to themselves personally, or the breach of some duty due to them, or the infringement of some right vested in them.²³²

4.5.3 Public interest litigation in South Africa in terms of the current Constitution

Section 38 of the Constitution (section 7(4) of the interim Constitution) provides a radical innovation to standing compared to the common law approach.²³³ Of crucial importance in this

²²⁷ *Dalrymple and Others v Colonial Treasurer* (1910) TS 372.

²²⁸ C Plasket 'Representative standing in South African Law' (2009) 62 *The Annals of the American Academy of Political and Social Science* 262.

²²⁹ *Dalrymple and Others v Colonial Treasurer* (1910) TS 372 at 387.

²³⁰ *Dalrymple* supra at 373.

²³¹ *Dalrymple* supra at 379.

²³² *Dalrymple* supra at 381.

²³³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (6 December 1995) para 229, O'Regan held J that: 'there can be little doubt that section 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted'; see also, *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004) para 14.

section is the provision that allows any person access to the courts for an appropriate relief acting in the public interest.²³⁴ In order for the applicant to be granted standing in the public interest, the court must be satisfied that he or she is ‘genuinely acting in the public interest’.²³⁵ The criteria of determining whether the person bringing the application is acting ‘genuinely in the public interest’ was laid out by the Constitutional Court in its key decision of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* on *locus standi* in a constitutional dispensation.²³⁶ *In casu*, O’Regan J observed as follows:

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case.²³⁷

Furthermore, O’Regan J held that looking at the special circumstances of the case, the applicants had shown that they were eligible to be granted standing to act in the interest of the public.²³⁸ According to Abebe, the purpose of the criteria laid down in this case was to ‘ensure genuineness of the applicants’ motives by stifling cases brought for personal or publicity or political reasons under the guise of the public interest.’²³⁹

In *Port Elizabeth Municipality v Prut NO and Another*,²⁴⁰ the Court interpreted section 38(d) of the Constitution. Relying on the *Ferreira v Levin* case, the Court found that two principles arise from this section. First, the Court must not rush to decline to exercise its jurisdiction concerning the enforcement of the right clause as enshrined in the Constitution, where the judgment will be in the public interest and where such may stop similar issues in the future.²⁴¹ Second, no valid reason could be given for refusing to grant a litigant standing in order to

²³⁴ Section 38(d) of the Constitution of the Republic of South Africa, 1996.

²³⁵ *Ferreira v Levin* supra para 234.

²³⁶ CF Swanepoel ‘The judicial application of the “interest” requirement for standing in constitutional cases: “A radical and deliberate departure from common law”’ (2014) 47(1) *De Jure* 70.

²³⁷ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) para 234.

²³⁸ *Ibid* 237.

²³⁹ Abebe ‘Towards more liberal standing rules to enforce constitutional rights in Ethiopia’ (2010) 10 *African Human Rights Law Journal* 414.

²⁴⁰ *Port Elizabeth Municipality v Prut NO and Another* 1996 (4) SA 318 (E).

²⁴¹ *Port Elizabeth Municipality v Prut* supra para d 325E.

protect an appropriate decision in regard to an act that affects his/her interests directly.²⁴² Melunsky J concluded as follows:

It is therefore not only a person whose rights are infringed or threatened who may apply for appropriate relief: it is sufficient if there is an allegation of an infringement of or a threat to a right. In the present matter, the respondents have raised an allegation of unfair discrimination in violation of s 8(2) of the Constitution and the same issue has a direct bearing on similar cases in which the municipality is interested and/or involved. The result is that there seems to be no reason for denying the appellant standing, not only because it is acting in its own interest but also because it is acting in the public interest. In this regard, it should be noted that it is clearly in the public interest to have clarity on whether the municipality's decision to write off more than R62m discriminates unfairly against other service-charge debtors or ratepayers. Furthermore, a decision once given in this application will not be academic: it will have an effect on all persons in the position of the two respondents. Moreover, and in the words of Chaskalson P at 1082F (para [164]) in *Ferreira*, there is 'a pressing public interest that the decision be given as soon as possible'.

In *Lawyers for Human Rights v Minister of Home Affairs*,²⁴³ Yacoob J embraced the criteria set out in *Ferreira v Levin*, and held that it is not a closed list.²⁴⁴ Furthermore, he added that 'the degree of vulnerability of the people affected; the nature of the right said to be infringed; as well as the consequences of the infringement of the right are also important considerations in the analysis'.²⁴⁵ In *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another*,²⁴⁶ the Constitutional Court accepted the factors set out in *Ferreira* and *Lawyers for Human Rights* decisions.²⁴⁷ In this case, the Campus Law Clinic brought an application for leave to appeal against a judgment of the Supreme Court of Appeal on the basis that it was in the public interest to do so in respect of the exceptional circumstances of the case.²⁴⁸ Essentially, proceedings from the beginning were motivated by judicial concern to ensure enforcement of warrants for sales in execution of properties where mortgage debtors were in default and that constitutional rights concerning access to adequate housing be taken into consideration.²⁴⁹ The Court accepted that the applicant had standing in bringing the

²⁴² *Port Elizabeth Municipality v Prut* supra.

²⁴³ *Lawyers for Human Rights v Minister of Home Affairs and other* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004).

²⁴⁴ *Ibid* para 18.

²⁴⁵ *Ibid*.

²⁴⁶ *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* (CCT1/06) [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) (31 March 2006).

²⁴⁷ *Ibid* paras 20-21.

²⁴⁸ The Campus Law Clinic was neither a party in the SCA's matter nor *amicus curiae*.

²⁴⁹ *Campus Law Clinic (University of KwaZulu-Natal Durban)* supra para 22.

application for leave to appeal.²⁵⁰ However, the application was dismissed on the basis that it was not in the interests of justice to grant leave to appeal as the substantive issue had not been properly dealt with.²⁵¹

4.6 Civil society driven public interest litigation

In many jurisdictions on the African continent including South Africa, developments and reform of the rule of law have fundamentally promoted access to justice.²⁵² Civil society organisations and other institutions specialising in human rights have contributed profoundly to the development of the rule of law and realisation of human rights through litigation.²⁵³ In South Africa, several NGOs such as the Legal Resources Centre (LRC),²⁵⁴ Lawyers for Human Rights (LHR),²⁵⁵ Black Sash and Section 27 have been involved in PIL and the provision of legal assistance to the most vulnerable communities.²⁵⁶ These organisations either litigate as parties or intervene as *amicus curiae* in the matter.²⁵⁷

The concept of *amicus curiae* is firmly established in the legal arena.²⁵⁸ Literally translated, this concept means ‘friend of the court’.²⁵⁹ In the South African context, *amicus curiae* plays an important role mainly in human rights litigation, particularly PIL by the human rights activists and civil society organisations.²⁶⁰ Factual material presentation by the *amicus curiae* assists the court in making rational and far-reaching decisions.²⁶¹ In participating as *amici*, NGO’s can support a party’s arguments in court proceedings and improve jurisprudence in a

²⁵⁰ *Campus Law Clinic (University of KwaZulu-Natal Durban)* supra.

²⁵¹ *Campus Law Clinic (University of KwaZulu-Natal Durban)* supra para 24.

²⁵² K Kakuru ‘Legal themes crossing sectors: Public participation, public interest litigation’ (2006) 13 *South African Journal of Environmental Law and Policy* 94.

²⁵³ L Chenwi ‘Litigating socio-economic rights through *amicus* briefs: Challenges and strategies’ (2009) 10 *Economic and Social Rights Review* 7.

²⁵⁴ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (5 July 2002).

²⁵⁵ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (CC); [1996] 2 CHRLD 164; 1995 (2) SACR 1 (CC) (6 June 1995)

²⁵⁶ Jaichand ‘Public interest litigation strategies for advancing human rights in domestic systems of law’ (2004) 1 *Sur-International Journal on Human Rights* 134.

²⁵⁷ Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 37.

²⁵⁸ A Spies ‘Considering the impact of *amicus curiae* participation on feminist litigation strategy’ (2015) 31 *South African Journal on Human Rights* 138.

²⁵⁹ Chenwi ‘Litigating socio-economic rights through *amicus* briefs: Challenges and strategies’ (2009) 10(1) *Economic and Social Rights Review* 8.

²⁶⁰ JC Mubangizi and DJ McQuoid-Mason ‘The role of university law clinics in public interest litigation, with specific reference to South Africa’ (2013) 38 *Journal for Juridical Science* 52.

²⁶¹ A Spies ‘Considering the impact of *amicus curiae* participation on feminist litigation strategy’ (2015) 31 *South African Journal on Human Rights* 137.

particular area of law.²⁶² An example of a successful intervention of a civil society as an *amicus curiae* is the case of *Minister of Health and Others v Treatment Action Campaign and Others*.²⁶³ In this judgment, the Constitutional Court clarified the law relating to the role played by *amici* in South African law and held that:

The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally, these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.²⁶⁴

Apart from NGO's, there are two other institutions that have an important role in the development of PIL,²⁶⁵ namely, University Law Clinics²⁶⁶ and Legal Aid South Africa (LASA).²⁶⁷ The clinical law movement in South Africa began in the 1970s which emerged from the desire of law students and academics to be engaged in bringing about social justice.²⁶⁸ The primary focus of law clinics is to provide legal education and training within law schools²⁶⁹ whilst providing legal advice and assistance to the poor communities who cannot afford legal services.²⁷⁰ Furthermore, LASA was founded on a *judicare* system in which private attorneys provide legal assistance in terms of the Legal Aid Act of 1969.²⁷¹ The Legal Aid Board was created under the Act, which is empowered to provide legal assistance to indigent members of society using a means test at the expense of the State.²⁷² As a result of the *judicare* system not producing ideal outcomes, LASA transformed to a salaried system, creating justice centres all

²⁶² Ibid 138.

²⁶³ *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC).

²⁶⁴ Ibid para 5.

²⁶⁵ Mubangizi and McQuoid-Mason 'The role of university law clinics in public interest litigation, with specific reference to South Africa' (2013) 38 *Journal for Juridical Science* 56.

²⁶⁶ Cummings, Scott and Rhode 'Public interest litigation: insight from theory and practice' (2009) 36 *Fordham Urban Law Journal* 625.

²⁶⁷ J Sarkin 'Legal aid: Promoting access to justice' (2002) 19 *Indicator SA* 41.

²⁶⁸ Mubangizi and McQuoid-Mason 'The role of university law clinics in public interest litigation, with specific reference to South Africa' (2013) 38 *Journal for Juridical Science* 48.

²⁶⁹ Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *Sur-International Journal on Human Rights* 135.

²⁷⁰ W de Klerk 'University law clinics in South Africa' (2005) 122 *South African Law Journal* 940.

²⁷¹ Sarkin 'Legal aid: Promoting access to justice' (2002) 19 *Indicator SA* 41.

²⁷² Ibid.

over the country including in rural areas, staffed by attorneys and supporting staff paid on a salary basis.²⁷³

With a variety of mechanisms available to provide legal aid to marginalised groups, South African rules of practice have implemented *pro bono* services by the legal profession.²⁷⁴ Literally translated, *pro bono publico* means ‘for the good of the people’.²⁷⁵ The term is used in the legal fraternity, to refer to free legal services or work undertaken at a discounted rate in order to assist vulnerable and marginalised communities who are frequently denied access to justice.²⁷⁶ Theoretically, the current South African law²⁷⁷ makes it mandatory for candidate attorneys and practicing attorneys to do *pro bono* work.²⁷⁸

4.7 Strategic litigation

There are numerous strategies that have been used by civil society in the course of PIL.²⁷⁹ These strategies have been employed in order to address social injustices against vulnerable and marginalised members of our community.²⁸⁰ There are various ways in which strategic litigation is defined. However, for the purposes of this dissertation, strategic litigation can be defined as ‘a way of bringing a matter to a court of law with an intention to impact beyond that particular case to bring about social change in the law, policy or practice in the benefit of the public’.²⁸¹ Strategic litigation is one measure of a broader campaign for social criticism and mobilisation, setting of legal precedents and raising awareness, and development for principles

²⁷³ Jaichand ‘Public interest litigation strategies for advancing human rights in domestic systems of law’ (2004) 1 *Sur-International Journal on Human Rights* 135.

²⁷⁴ McQuoid-Mason ‘The delivery of civil legal aid services in South Africa’ (2000) 24 *Fordham International Law Journal* 115.

²⁷⁵ S Kane ‘The definition of pro bono in law’ (2017), available at <https://www.thebalance.com/what-does-pro-bono-mean-2164411>, accessed on 04 February 2018.

²⁷⁶ *Ibid.*

²⁷⁷ Section 29 of the Legal Practice Act 28 of 2014, see also, Cape Law Society Rule 25 and KwaZulu-Natal Law Society Rule 27.

²⁷⁸ D Holness ‘Recent development in the provision of pro bono legal services by attorneys in South Africa’ (2013) 16 *Potchefstroom Electronic Law Journal* 536.

²⁷⁹ Nkhata ‘Public interest litigation and *locus standi* in Malawian Constitutional law: Have the courts unduly fettered access to justice and legal remedies?’ (2008) 2(2) *Malawi Law Journal* 209.

²⁸⁰ *Ibid* 211.

²⁸¹ Public Law Project ‘Guide to strategic litigation’ (2014), available at <http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>, accessed on 15 February 2016.

of accountability by those in power,²⁸² and norms of legality, regardless of success or loss in courts.²⁸³

Many organisations are involved in bringing about social change by helping various groups in accessing the courts where their rights have been violated, such as children,²⁸⁴ women and PLWHIV.²⁸⁵ It is very important for these organisations to design an appropriate strategy for their litigation process in order to achieve social change.²⁸⁶ The purpose of strategic litigation is to test the rule of law, acquire a distinctive interpretation²⁸⁷ and appropriate application of such law and which in some instances, may have a discriminatory impact on the members of a particular group.²⁸⁸ There are certain factors that organisations must take into consideration when undertaking strategic litigation. These factors include identifying the nature and extent of the problem, proper identification and organisation of clients or victims, deciding on the suitable forum for the cause of action, public information, advocacy and legal advice, public information, advocacy and legal advice, research and collection of documentation, co-ordination and organisation of partnerships with community allies, availability of resources, timing, identifying the impact of litigation and the remedy.²⁸⁹

4.7.1 Identifying the nature and extent of the problem²⁹⁰

Before commencing with PIL, it is of vital importance that the potential litigator not only identifies a general issue of concern but also the precise legal issues that must be determined before proceeding to the next stage.²⁹¹ Often, determination of a specific legal issue is because of efficient human rights monitoring.²⁹² This helps organisations in determining priority issues

²⁸² Centre for Child Law *Strategic Impact Litigation for Children Rights Report on Selected Cases 2004-2011* (2011) 3.

²⁸³ Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 9.

²⁸⁴ Centre for Child Law.

²⁸⁵ For instance, Open Society Foundation, Treatment Action Campaign in South Africa and Kelin in Kenya.

²⁸⁶ Badwaza *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (unpublished LLM thesis, University of Western Cape, 2005) 19.

²⁸⁷ Centre for Child Law 'Strategic impact litigation on children's rights in eastern and southern Africa' (2011), available at http://www.crin.org/en/docs/FileManager/Strategic_Impact_Litigation_Seminar_2011_Report.pdf, accessed on 24 February 2016.

²⁸⁸ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 8.

²⁸⁹ *Ibid.*

²⁹⁰ LA Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

that people face, and to have an understanding of serious and urgent matters of human rights violations. Further, these are most likely to be dealt with under PIL.²⁹³ The potential litigation must establish the extent of the problem; and whether the court can provide a solution upon adjudication.²⁹⁴ Moreover, it must be determined whether further advocacy has been done.²⁹⁵

4.7.2 Proper identification and organisation of clients or victims²⁹⁶

When initiating a public interest action, it is vital that the representatives choose the client carefully. It must be clear from the outset who the client is, whether it is an individual, a group of persons or an organisation with a direct interest in the matter being litigated.²⁹⁷ In PIL, a lasting social transformation is most likely to be achieved when an organisation is party to the proceedings in which it has a direct interest.²⁹⁸ Nonetheless, in cases where an organisation is litigating in a representative role, it is important that the client is actively involved in key decision-making.²⁹⁹

4.7.3 Deciding on the suitable forum for the institution of proceedings³⁰⁰

A litigator will have to decide whether legal proceedings will be instituted in a High Court or Magistrates' court or other relevant forum.

²⁹³ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

²⁹⁴ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 13.

²⁹⁵ *Ibid.*

²⁹⁶ Center for Reproductive Rights and AM Sood 'Litigating reproductive rights: Using public interest litigation and international law to promote gender justice in India' (2006), available at https://www.reproductiverights.org/sites/default/files/documents/media_bo_India1215.pdf, accessed on 26 February 2016. S Budlender, SCM Gilbert and N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

²⁹⁷ Center for Reproductive Rights and Sood 'Litigating reproductive rights: Using public interest litigation and international law to promote gender justice in India' (2006), available at https://www.reproductiverights.org/sites/default/files/documents/media_bo_India1215.pdf, accessed on 26 February 2016.

²⁹⁸ Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

²⁹⁹ *Ibid.*

³⁰⁰ Center for Reproductive Rights and Sood 'Litigating reproductive rights: Using public interest litigation and international law to promote gender justice in India' (2006), available at https://www.reproductiverights.org/sites/default/files/documents/media_bo_India1215.pdf, accessed on 26 February 2016.

4.7.4 Public information, advocacy and legal advice³⁰¹

A campaign on public information informs and teaches average people of their rights and this is considered a vital feature of human rights mobilisation and PIL.³⁰² Once people are educated about their human rights, development of strategic litigation in ensuring that these rights are realised is critical.³⁰³ This can be done by giving legal advice and taking the matter to court on their behalf.³⁰⁴ Advocacy is an essential element of social change and achieving ground-breaking precedents on human rights issues.³⁰⁵

It is imperative to train presiding officers and legal representatives on how PIL operates concerning its general application or on particular human rights violations.³⁰⁶ The reason behind this is that often, in many jurisdictions, the judiciary, attorneys and other participants lack or have little knowledge about PIL.³⁰⁷ Efficient training of the media as well is also crucial for the sake of proper coverage regarding the emergence of public interest cases.³⁰⁸

4.7.5 Research and collection of documentation³⁰⁹

Research is the most important aspect of successful PIL.³¹⁰ There are different kinds of research that have been proposed, namely factual and legal research. Factual research includes background information on human rights violations, public knowledge, beliefs and attitudes regarding the violations,³¹¹ and statistical information collected on the experiences and impact

³⁰¹ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

³⁰² Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid; Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

³¹⁰ Ibid.

³¹¹ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

of such violations on the victims.³¹² Legal research is pivotal.³¹³ It examines legal positions with regards to the particular problem by looking at existing national and international legal frameworks, jurisprudence, government policies, and views of the legal experts in the particular field of law, and available remedies that can be ordered by the judiciary.³¹⁴

4.7.6 Co-ordination and organisation of partnerships with community allies³¹⁵

It is essential that organisations bringing matters to court in the public interest co-ordinate and share information.³¹⁶ The coalition helps litigators to increase their knowledge in the subject matter, it increases the resources available³¹⁷ and prevents duplicate adjudication of similar issues.³¹⁸

4.7.7 Availability of resources³¹⁹

The anticipated length of the litigation, cost repercussions and implementation of the relief sought must be determined in the early stage of the public action.³²⁰

4.7.8 Timing³²¹

This is an essential feature in any litigation process, especially PIL.³²²

³¹² Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

³¹³ Ibid.

³¹⁴ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

³¹⁵ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 13; Young *ibid*.

³¹⁶ Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

³¹⁷ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 13.

³¹⁸ Young 'Public interest litigation: A brief guide for African communities and stakeholders' (2015), available at <http://www.acordinternational.org/silo/files/public-interest-litigation.pdf>, accessed on 24 February 2016.

³¹⁹ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 13.

³²⁰ Ibid.

³²¹ Budlender, Gilbert and Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2008), available at https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Atlantic-Philanthropies_Public-interest-litigation-SA-exec-summ.pdf, accessed on 26 February 2016.

³²² Ibid.

4.7.9 Identifying the impact of litigation³²³

Identifying the potential impact of litigation is important as it determines whether the litigator must continue with the litigation or not. This helps in identifying the group in the society that will benefit from the outcome of the proceedings in question.³²⁴ This also helps to identify the impact the proceedings will have on clients and their families and the change that it will bring in the broader context in the national, regional and international spheres.³²⁵

4.7.10 The remedy

The relief sought must be identified. It must be determined whether the remedy will address the substantial systemic violation of human rights.³²⁶ The remedy must also reflect the priorities of the victims of such violations.³²⁷ It must be determined whether the relief sought has been ordered in another court and the possibility of its implementation by the relevant authorities.³²⁸

4.8 Conclusion

Although PIL is not a new concept in the South African landscape, it has gained momentum since the inception of the interim Constitution in 1993. Not only did the interim Constitution provide for PIL, it also introduced the concept of class actions. Although section 38 of the Constitution provides for a class action and PIL to be brought in cases where a right in the BoRs has been violated, the *Mukkadam* has now bridged the gap by permitting for class actions to be brought in matters where a right not provided for in the BoRs has been infringed. The availability of these strategic litigation tools is invaluable in the South African context as it goes to the heart of access to justice. A key feature of PIL and class actions is the ability of its outcome to reach a greater number of women from the affected class. Litigating by way of PIL or class actions has very little or no financial implication for the affected class of women, who in this dissertation have been found to form the most vulnerable and marginalised groups in our community.

³²³ Open Society Foundations *Advancing Public Health through Strategic Litigation: Lessons from Five Countries* (2016) 14.

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

Chapter Five

Analysis

5.1 Introduction

The advent of constitutional democracy in South Africa is a transitional evolution from racial segregation, inequality and injustices that were faced by the majority of South African people.³²⁹ The South African Constitution is a transformative tool which addresses inequalities and injustices, thereby recognising social change and that the realisation of fundamental human rights are necessary if we are to achieve an equal society.³³⁰ In one of the landmark post-apartheid cases by the Constitutional Court, Kriegler J noted that:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organizing principle.³³¹

The Constitution gives pride of place to the right to equality which guarantees equal treatment and protection of every person in terms of the law and the right to be free from discrimination.³³² However, nearly twenty four years into democracy, the achievement of a discrimination free society based on social justice, democratic values and fundamental human rights³³³ remains a remote undertaking, if not a vision impossible. Despite the recognition of gender equality by the Constitution and the development of equality jurisprudence by the courts, women continue to face discrimination and substantial inequality in our society.³³⁴

This chapter critically examines the decision in the judgment of *LM*, and whether it closed the door on the claim of discrimination by the HIV positive women who allege to have been sterilised either coercively or forcibly. Firstly, it does this by assessing the impact of the dismissal of the equality claim in the *LM* case. Secondly, it critically examines the *LM*

³²⁹ RW Bauman and D Schneiderman 'Introduction: The South African Constitution in transition' (1996) 3 *Review of Constitutional Studies* 1.

³³⁰ J Small and E Grant 'Equality and non-discrimination in the South African Constitution' (2000) 4 *International Journal of Discrimination and the Law* 47.

³³¹ *The President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), para 74.

³³² Sections 9(1) and 9(3) of the Constitution of the Republic of South Africa, 1996.

³³³ The preamble of the Constitution of the Republic of South Africa, 1996.

³³⁴ K O'Regan 'The right to equality in the South African Constitution' (2013) 25 *Columbia Journal of Gender and Law* 113.

judgment by reviewing the extent to which an equality claim in the Equality Courts would or would not be successful. Thirdly, it critiques the possibility of such a claim being brought as a class action or a form of public interest action.

5.2 Women, equality and HIV-related discrimination

Since the inception of the Constitution, very few cases have been adjudicated relating to gender equality protecting women, especially black women who are one of the most vulnerable and disadvantaged groups in our society.³³⁵ Although the courts have been sympathetic towards women in its jurisprudence and have strongly articulated the notion of substantive equality, the lived reality of many women, particularly black women, has not changed.

Women living with HIV have an additional burden placed on them in that they often face not only discrimination based on gender and race, but also HIV. Often, women experience severe forms of stigma and prejudice resulting from HIV discrimination. The forms of HIV-related discrimination include violence, social exclusion, compulsory HIV testing without consent and proper counselling, lack of support and denial of healthcare and related services.³³⁶ More recently, in South Africa and around the globe, HIV positive women have been subjected to a discriminatory practice of forced or coerced sterilisation.³³⁷ This discriminatory practice

³³⁵ *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); *S v Baloyi* 2000 (1) BCLR 86 (CC); *S v Jordan* 2002 (11) BCLR 1117 (CC); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

³³⁶ International Center for Research on Women 'Scaling up the response to HIV stigma and discrimination' (2016), available at <https://www.icrw.org/wp-content/uploads/2016/10/Scaling-Up-the-Response-to-HIV-Stigma-and-Discrimination.pdf>, accessed on 17 October 2016.

³³⁷ A Strode S Mthembu & Z Essack "'She made up a choice for me'" 22 HIV-positive women's experiences of involuntary sterilisation in two South African provinces' (2012) 20 *Reproductive Health Matters* 1-9 and Z Essack and A Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations of HIV-positive women in South Africa' (2012) 26 *Agenda* 24-34; International Community of Women Living with HIV/AIDS *The Forced and Coerced Sterilisation of HIV Positive Women in Namibia* (2009), available at <http://www.icw.org/files/The%20forced%20and%20coerced%20sterilisation%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>, accessed on 15 February 2016; International Community of Women Living with HIV *Eastern Africa, Violation of Sexual and Reproductive Health Rights of Women Living with HIV in Clinical and Community Settings in Uganda* (2015), available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016; F Kasiva *Robbed of Choice: Forced and Coerced Sterilisation Experiences of Women Living with HIV in Kenya* (2012), available at <https://www.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilisation-experiences-of-women-living-with-hiv-in-kenya.pdf>, accessed on 15 February 2016; Center for Reproductive Rights 'Dignity denied: Violations of the rights of HIV-positive women in Chilean health facilities' (2010), available at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/chilereport_single_FIN.pdf, accessed on 15 February 2016 and T Kendall and C Albert 'Experiences of coercion to sterilize and forced sterilisation among women living with HIV in Latin America' (2015) 18 *Journal of the International AIDS Society* 1-9.

constitutes an infringement of sexual and reproductive rights of the women affected.³³⁸ In addition to dealing with difficulties resulting from their HIV positive status, such as deciding on how best to have their children and PMTCT during pregnancy, HIV positive women also experience hostile behaviour and judgemental attitudes by healthcare workers.³³⁹ HIV-related discrimination by healthcare personnel remains a prevalent problem in some jurisdictions.³⁴⁰ The results of the studies conducted on this human rights issue are evidence that HIV positive sexual and reproductive rights of women and their autonomy are being compromised. The women illustrate this, in the following narratives:

*“I had to put up with the judgemental attitude of the healthcare staff, including their disbelief that a woman with HIV would get pregnant.”*³⁴¹

One woman recalled the doctor saying, *“She should be careful when having sex and that she should not even think about getting pregnant.”*³⁴² Thereafter, the doctor was not willing to help her with the delivery of her baby and he told her that he *“refused to bring children with AIDS to the world.”*³⁴³

Many of the women felt that they were being judged simply because they were HIV positive. The discrimination and stigma against HIV positive women goes as far as others choosing on their behalf, the number and spacing of their children. One woman was advised by the nurses not to get pregnant again. Two years later, when she went to hospital for childbirth she recalls that:

*“the nurses shouted at me why I did not listen to their advice. I had her because I wanted a child in my life, the child is healthy and I don’t think she is infected.”*³⁴⁴

³³⁸ Southern Africa Litigation Centre *Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights* (2013), available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/11/Dismantling-the-Gender-Gap_FINAL.pdf, accessed on 15 March 2016.

³³⁹ International Community of Women Living with HIV/AIDS ‘The International Community of Women Living with HIV Global Statement to the 58th Commission on the Status of Women: Reclaim the Right to Motherhood for Women Living with HIV’ available at <https://gcwa.unaids.org/news/icw-international-community-women-living-hiv-global-statement-58th-commission-status-women>, accessed on 31 March 2016.

³⁴⁰ AVERT ‘HV Stigma and Discrimination’ (2017), available at <https://www.avert.org>, accessed on 06 February 2018.

³⁴¹ A Ramkissoo et al ‘Options for HIV-Positive women’ (2006) 1 *South African Health Review* 317.

³⁴² M G van Dijk et al ‘Health care experiences of HIV-infected women with fertility desires in Mexico: A qualitative study’ (2014) 25 *Journal of the Association of Nurses in Aids Care* 226.

³⁴³ Ibid.

³⁴⁴ Ramkissoo et al ‘Options for HIV-positive women’ (2006) 1 *South African Health Review* 317.

Discrimination against women living with HIV has a negative effect on the women's lives. Studies show that discrimination and other challenges that these women face affect their reproductive rights and motherhood.³⁴⁵ Studies also show that decision-making concerning child bearing is influenced by family and cultural commands, pressures from the healthcare workers and societal customs as bearing children raises a woman's status in the community.³⁴⁶ The inability to bear children impacts negatively on women as it means that they are unable to fulfil personal and cultural expectations.³⁴⁷ The following quotes illustrate this point:

*"My husband paid lobola and he must have a child"*³⁴⁸

*"if the in-laws paid lobola, they decide how many children, because they brought you to sustain the clan. Even if you have many children you should continue falling pregnant until you have a boy. If you don't have children you are less of a woman. You lose everything even your inheritance. I have five children and am expected to have another because I do not have a son."*³⁴⁹

Additionally, HIV positive women experience another form of discrimination in healthcare facilities, such as being kept away from HIV-negative patients. One woman from Chile remarked that she was separated from other women who had given birth who were placed together in one recovery room except for her. She recalls that she:

*"did not even receive visits from the nurse to bring me pills for the pain, because she walked through all the other rooms where there were more people, but it was like she forgot about me...the impact was very strong."*³⁵⁰

5.3 The impact of the discriminatory forced and coerced sterilisation on the dignity of HIV positive women

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ International Community of Women Living with HIV Eastern Africa 'Violation of sexual and reproductive health rights of women living with HIV in clinical settings in Uganda' (2015), available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

³⁴⁸ Ramkissoo et al 'Options for HIV-positive women' (2006) 1 *South African Health Review* 317.

³⁴⁹ Ibid.

³⁵⁰ Center for Reproductive Rights 'Dignity denied: Violations of the rights of HIV-positive women in Chilean health facilities (2010), available at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/chilereport_single FIN.pdf, accessed on 15 February 2016.

Informed consent is one of the primary principles in the healthcare of modern society.³⁵¹ Failure to take informed consent, before performing sterilisation on HIV positive women, is a violation of their reproductive rights. Infringement of the women's rights and refusal of sexual and reproductive rights services impacts immensely on HIV positive women and can be very devastating at times.³⁵² As a result, this undermines the women's dignity and autonomy as they are neither treated equally nor with respect. Furthermore, the forced or coerced sterilisation of HIV positive women affects their psycho-social and physical relationships with their partners, family and society.³⁵³ The narratives below illustrate this point:

*"Sometimes when I remember what I have been through and what cause it all; I burst in tears and cry. I feel I should separate from my husband. If it was possible, I would leave him because of the pain I am going through. I do not want him to suffer because of my problems; besides, I have lost sexual desire."*³⁵⁴

*"Sterilisation comes with other problems including psychological problems, emotional problems because the thinking that your tubes are nowhere, it also puts you down. It can cause psycho-social breakdown and reduces your productivity."*³⁵⁵

*"I avoid conversations about children because they hurt me...Uhm you avoid going to baby showers at all costs."*³⁵⁶

Moreover, some women suffer financial implications and loss of income because of the sterilisations. Below are the women's experiences:

"I lost a partner and income for support of my children. He did not provide for those children, he did nothing, he just dealt with those who do give birth...since I am not working, I have no one to

³⁵¹ International Community of Women Living with HIV Eastern Africa 'Violation of sexual and reproductive health rights of women living with HIV in clinical settings in Uganda' (2015), available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

³⁵² AVERT 'HV stigma and discrimination' (2017), available at <https://www.avert.org>, accessed on 06 February 2018.

³⁵³ International Community of Women Living with HIV Eastern Africa 'Violation of sexual and reproductive health rights of women living with HIV in clinical settings in Uganda' (2015), available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

³⁵⁴ Ibid.

³⁵⁵ International Community of Women Living with HIV Eastern Africa 'Violation of sexual and reproductive health rights of women living with HIV in Clinical Settings in Uganda' (2015) available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

³⁵⁶ Essack and Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations of HIV-positive women in South Africa' (2012) 26 *Agenda* 28.

*provide for these children of mine because that man threw me out with the child I had just delivered.*³⁵⁷

*“I no longer work the way I used to work. My husband abandoned us with the children. When you have a man, he might want you to give birth and so if you have been sterilised he will leave you for another woman who can give birth.”*³⁵⁸

*“My work has been affected I used to sell bales of cloth for someone but now they are too heavy, I quit the job.”*³⁵⁹

5.4 Forced and coerced sterilisation of HIV positive women as a form of discrimination and a violation of the right to equality

5.4.1 *LM and Others v Government of the Republic of Namibia*³⁶⁰

There has been only one decided case on the issue of forced or coerced sterilisation of women living with HIV. This is the judgment of *LM and Others v Government of the Republic of Namibia*. This case is discussed in Chapter one of this thesis. However, for the ease of reading, the matter concerned three HIV positive plaintiffs who were sterilised without their informed consent in two Namibian state hospitals.

5.4.1.1 Analysis of the court judgment on the claim of discrimination

Even though the *LM* decision affirms sexual and reproductive rights of HIV positive women, there is no doubt that the High Court and Supreme Court failed HIV positive women by dismissing the claim of discrimination on the ground of HIV status. This decision did not advance or provide any solution to the problem of forced and coerced sterilisation of HIV positive women as it simply avoided the issue. In essence, both the High Court and the Supreme Court held that women failed to discharge the onus of proving that there was discrimination against them.³⁶¹ However, no cogent reasons were provided for the dismissal of the claim of discrimination. Further, there was no guidance by the court on what would constitute admissible and relevant evidence in the circumstances.

³⁵⁷ Ibid 29.

³⁵⁸ International Community of Women Living with HIV Eastern Africa ‘Violation of sexual and reproductive health rights of women living with HIV in clinical settings in Uganda’ (2015), available at <http://www.icwea.org/wp-content/uploads/downloads/2015/11/ICWEA-Sexual-Reproductive-Health-Rights-Report-Uganda.pdf>, accessed on 15 February 2016.

³⁵⁹ Ibid.

³⁶⁰ *LM and Others v Government of the Republic of Namibia* [2012] NAHC 211 (30 July 2012).

³⁶¹ Ibid para 83 and *Government of the Republic of Namibia v LM* [2014] NASC 19 (3 November 2014) para 2.

It is submitted that it is common cause that the evidentiary burden rested on the women to prove discrimination on a balance of probabilities. The oral evidence provided by the plaintiffs on the issue of discrimination was never set out or evaluated by the courts. This means that at the end of the matter, we are still no clearer on how to prove a civil claim for unfair discrimination in the High Court. It is unclear if the evidence provided by the three plaintiffs was inadmissible, for example, hearsay (i.e. she overheard a nurse saying that all HIV positive women must be sterilised). Likewise, the judgment does not indicate why the women's own versions were irrelevant.

It is argued that a key failing in this otherwise landmark decision is that the court's focus on informed consent means that the decision revolved around medical negligence by the healthcare practitioners, but failed to address why this was only with HIV positive women. Thus, it makes the case indistinguishable from other medical negligence cases. The learned author Patel, eloquently articulates why precedent is needed on the issue of equality. She states that seeing this as an issue of unfair discrimination contextualises the issue and explains the underlying causes of this form of medical negligence.

5.5 The importance of the courts to hold that forced and coerced sterilisation of HIV positive women without their informed consent is a violation of their right to equality and a form of unfair discrimination

Forced and coerced sterilisation of HIV positive women is a human rights problem and it must be addressed accordingly. The outcome of the *LM* case on the claim of discrimination is unsatisfactory and this means that reproductive rights of HIV positive women continue to be violated and it leaves these women even more vulnerable, and it must re-evaluated. Patel suggests reasons why it is critical for the courts to find it as a violation of the right to be free from discrimination for women living with HIV:³⁶²

The first reason is that recognising and holding that the sterilisation of the women without informed consent was done for the reason that women belonged to a particular group deserving of non-discrimination protection, so realising that this problem is broad and a systemic discriminatory practice rather than an individualistic matter.³⁶³ Finding that forced and coerced sterilisation occurs because of discriminatory practices, will also bring change for structural

³⁶² P Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 7-9.

³⁶³ *Ibid* 7.

reform.³⁶⁴ The Equality Act does not explicitly recognise systemic discrimination as a distinct, self-standing cause of action.³⁶⁵ However, according to the learned author Kok, the Equality Act is well equipped to deal with claims alleging systemic discrimination and this can be driven by the use of class action and public interest litigation.³⁶⁶

Second, it is important to find that forced and coerced sterilisation is a violation of a non-discrimination rights in order to acknowledge and affirm the marginalisation of particular groups in our society.³⁶⁷ The acknowledgement of discrimination against HIV positive women from the courts will also send a message to the general public that discrimination is prohibited.³⁶⁸

Third, in order to effectively address the primary reasons for the practice of unfair discrimination, the court must find that forced and coerced sterilisation of women living with HIV is a violation of the right to be free from discrimination.³⁶⁹ This will change the perception of the perpetrators of the discriminatory practice.³⁷⁰

Inherently, forced and coerced sterilisation is a discriminatory practice. It is performed on women living with HIV in order to prevent them from procreating as they are perceived as less than ideal members of society.³⁷¹ The courts' failure to thoroughly investigate this discriminatory practice and find in favour of the women, misconstrues the essential nature of what this practice is all about and, therefore, does not address the problem at hand.³⁷² Further, it undermines the effect that the discriminatory practice has on the group targeted.³⁷³

Patel further makes a recommendation to the potential litigators, especially the NGO's representing the affected women on the issue of forced and coerced sterilisation. The following must be done in order to be successful with a claim of discrimination:

³⁶⁴ Ibid 8.

³⁶⁵ A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights on Human Rights* 463.

³⁶⁶ Ibid 464.

³⁶⁷ P Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 8.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid 9.

³⁷¹ Ibid 9.

³⁷² Ibid 9.

³⁷³ Ibid.

- (i) Include a claim that the right to be free from discrimination was violated in their legal papers.³⁷⁴
- (ii) Ensure the discrimination claim alleges discrimination on the basis of sex (if the facts support such a claim) and on any other basis such as health status or ethnic or racial affiliation.³⁷⁵
- (iii) Provide the court with detailed legal arguments and factual evidence supporting the discrimination claim.³⁷⁶
- (iv) Engage in documentation of other cases of forced and coerced sterilisation.³⁷⁷
- (v) Use advocacy strategies, such as raising awareness among the general public and engaging the media on the harm of forced and coerced sterilisation.³⁷⁸
- (vi) Consider requesting the court to issue structural remedies to address the systemic issues of discrimination in healthcare.³⁷⁹
- (vii) Ensure the remedies requested from the court reflect the desires of the affected women. For instance, it may be that the affected women prefer direct access to fertility services rather than mere monetary compensation.³⁸⁰

Moreover, when asked to pronounce on the issue of forced and coerced sterilisation the judiciary must be guided by the following:

- (i) Engage in a robust analysis of the discrimination claim.³⁸¹
- (ii) If the court determines there is insufficient evidence in the case at hand, then provide guidance on what type of additional evidence is needed.³⁸²

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 9.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Ibid 10.

³⁸² Ibid.

(iii) Consider structural remedies for addressing systemic discrimination in healthcare, including requiring the government to provide appropriate training of healthcare workers.³⁸³

(iv) Be open to considering granting alternative remedies to monetary compensation when appropriate and available.³⁸⁴

In order to curb the problem of discrimination, generally, medical practitioners, social and community healthcare workers must:

(i) Ensure that healthcare workers are well trained on informed consent.³⁸⁵

(ii) Ensure healthcare workers are trained on how to work with marginalized populations to ensure they are not subjected to discriminatory treatment.³⁸⁶

(iii) Develop internal complaint processes so that any violations can be identified and appropriately addressed quickly and fairly.³⁸⁷

5.6 The right to equality in the South African Constitution in addressing forced and coerced sterilisation of women living with HIV

Section 9 of the Constitution contains a substantial right to equality which everyone is entitled to,³⁸⁸ including women living with HIV. The stigmatisation, stereotypes and prejudices that PLWHIV experience are of recent origin, however, this does not mean that it should be taken less seriously than other disadvantages rooted in the past.³⁸⁹ Constitutionally speaking, the exclusion of and discriminatory conduct against PLWHIV are unacceptable, likewise the discriminatory attributes of the past such as race and ethnicity.³⁹⁰

The case of *Hoffmann v South African Airways*,³⁹¹ is the only decision in the Constitutional Court jurisprudence where the Court has had to pronounce on discrimination based on HIV

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Patel 'Forced sterilisation of women as discrimination' (2017) 38(15) *Public Health Reviews* 10.

³⁸⁷ Ibid.

³⁸⁸ Currie and de Waal *The Bill of Rights Handbook* 6th ed (2013) 244.

³⁸⁹ R Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD Thesis, Rhodes University, 2008) 123.

³⁹⁰ Ibid.

³⁹¹ *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); [2000] 12 BLLR 1365 (CC) (28 September 2000).

status. In determining whether the appellant (Hoffman) was unfairly discriminated against, the Court focused on the impact of the discriminatory conduct on him and whether his human dignity was impaired. In doing so, Ngcobo J emphasised the vulnerability of PLWHIV and how, as a minority group in our society, they have been subjected to stigmatisation and discrimination. Referring to the plight of PLWHIV, the learned Judge observed that society has responded with harsh prejudice and stigmatisation.³⁹² Further, the court held that pervasive perceptions about PLWHIV must be combated and society's prejudices could not be allowed to justify unfair discrimination against PLWHIV.³⁹³

When an equality complaint is lodged, different tests are applicable to different cases. Firstly, in instances where the complainant seeks a declaratory order on the validity of a statutory provision, the court must rely either on sections 9(1), 9(2) or 9(3) of the Constitution.³⁹⁴ Accordingly, the application of each section will be determined by the facts and circumstances of each case. For the reason of constitutional supremacy, relying directly on section 9 is required in matters where the invalidation of a statutory provision is sought.³⁹⁵ Secondly, in cases where the conduct of a public agent or a private institution is questioned on the basis of equality but does not concern legislative provision invalidation, the complainant must rely on the provisions of the Equality Act.³⁹⁶ This is as a result of the principle of subsidiarity which requires that the complainant who alleges infringement of his/her constitutional rights rely on the legislative provisions protecting that right.³⁹⁷ Nonetheless, when the complainant is challenging the constitutionality of a discriminatory act, they cannot rely directly on section 9 of the Constitution but may use PEPUDA which gives effect to this section.

Section 9(1) must be applied in instances where a statutory provision differentiates between persons or a group of persons, but the differentiation is not directly or indirectly based on one listed or analogous ground of discrimination as per section 9(3) of the Constitution.³⁹⁸ This will not be applicable in our scenario where HIV positive women have been subjected to forced or coerced sterilisation. This is because no legislative provision is being challenged.

³⁹² Ibid para 28.

³⁹³ Ibid paras 35-38.

³⁹⁴ De Vos and Freedman *South African Constitutional Law in Context* (2014) 429.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

Section 9(2) is applicable in cases where the provision in question aims at implementing a restitutionary measure. In such matters, the court first looks at the constitutionality of the restitutionary measure in terms of section 9(2). If the restitutionary measure in the legislative provision affirms a section 9(2) enquiry, then that will be the end of the constitutionality test. However, if the answer is in the negative, then the court moves on to section 9(3).

Section 9(3) is applied in cases where the distinction between persons or a group of persons is drawn directly or indirectly affecting one or more of the listed prohibited grounds or analogous grounds under this section.³⁹⁹ This is to say that as a complainant's claim must be based on discrimination, refer directly to section 9(3). In section 9(3) matters, the onus of proving that the discrimination alleged is unfair, rests on the defendant.⁴⁰⁰ HIV/AIDS status is not listed as a prohibited ground under section 9(3) of the Constitution. However, it is suggested that the word 'including' in section 9(3) shows that the list of grounds of discrimination is not a closed list and that discrimination on the other grounds not listed in the section may constitute discrimination. In order to determine whether there is discrimination based on an analogous ground, a test developed in the case of *Harksen* is applicable. Applying the test to our scenario of the claim of discrimination against HIV positive women, the court will have to ask the following questions:

- (i) First, whether the differentiation relates to the unequal treatment of HIV positive women based on other 'attributes and characteristics attaching to them' which are not related to the specified ground, but are however comparable to them.⁴⁰¹ In *Harksen*'s case, the court warned against application of narrow definition of 'attributes and characteristics'.⁴⁰²
- (ii) Second, whether this differentiation has the effect of treating HIV positive women differently in a way which 'impairs their fundamental dignity as human beings, who are inherently equal in dignity' or affects HIV positive women adversely in 'a comparably serious manner'.⁴⁰³

The recognition of the right to human dignity is foundational to the respect and realisation of other human rights entrenched in the Constitution. The right to human dignity is interrelated with the right to be treated equally and without discrimination. As it was held in *Hoffmann*'s case, HIV positive women belong to a vulnerable and marginalised group in our society. The mere fact that HIV positive women are sterilised without their informed consent should be a

³⁹⁹ Ibid.

⁴⁰⁰ De Vos and Freedman *South African Constitutional Law in Context* (2014) 429.

⁴⁰¹ *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 46.

⁴⁰² *Harksen* supra para 48.

⁴⁰³ *Harksen* supra para 46.

sufficient characteristic to prove discrimination to the Court because there has not been any scenarios of HIV negative women or HIV positive men who have been sterilised either coercively or forcibly. It is argued that this differentiation impairs the women's dignity as individuals who deserve to be treated equally before the law, with human dignity and respect for their human rights.

Once it has been established that HIV positive women are being treated differently, the onus lies on the defendant to show that the differentiation is justifiable in terms of the law. Proving whether discrimination is fair or not, is seemingly dependent on whether it impairs on the complainant's dignity.⁴⁰⁴ A non-exhaustive list of factors was set out in *Harksen* to determine whether discrimination impacted unfairly on the complainant.⁴⁰⁵ HIV positive women do not have to show the court that the medical personnel's conduct against them was intentional.⁴⁰⁶

Recognition of the right to equality in section 9 of the Constitution is a foundation of our legal system and should help redress the inequalities and stigma against HIV positive women. As good as this sounds, it does not seem to completely address the challenges that these women face. First, bringing a complaint of discrimination relying on the equality clause, specifically section 9(3), places a huge burden on the HIV positive women to prove discrimination. This is because HIV status is not listed in the specified prohibited grounds of discrimination. Second, worldwide, there have been no successful equality cases where HIV positive women have been sterilised without their informed consent. Still, the issue remains that women are left in the dark on what evidentiary requirement must be met in order to be successful in a claim of discrimination in the circumstances. Third, a claim of discrimination based on the equality right must be heard in the High Court. The disadvantage of this is that most of the complainants are poor and illiterate, which will make it difficult for them to approach the court because of the costs and the technicalities of the court process.

Nevertheless, this does not mean the end of options for HIV positive women and that they will be left with no redress. Section 9 of the Constitution mandates the enactment of the Equality Act which makes provision for the Equality Courts which is a much easier way of resolving equality disputes.

⁴⁰⁴ *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 49.

⁴⁰⁵ *Harksen* supra para 50.

⁴⁰⁶ J de Waal 'Equality and the Constitutional Court' (2002) 14 *South African Mercantile Law Journal* 152.

5.7 The role of the Equality Courts in addressing forced and coerced sterilisation and elimination of discrimination of women living with HIV in South Africa

The aim of the Equality Act is to eradicate discrimination created by the inequalities of the past in South Africa. In achieving this aim, the Act creates Equality Courts as a primary tool to advance the right to equality. In order to increase access to justice for the groups that are mostly affected by discrimination, innovative and creative procedural and evidential rules are applicable in the Equality Courts.⁴⁰⁷ It is submitted that in South Africa, the *LM* case has not closed the door on the claim of discrimination by women living with HIV who have been sterilised without their informed consent. This is because we have legislation, which specifically deals with claims of this nature.

5.7.1 Strengths

The proceedings in the Equality Courts are facilitated based on an inquisitorial approach. This provides ease of access for the victims of discrimination. For effective access to justice, the proceedings in the Equality Courts are speedy and informal which allows unrepresented litigants to seek relief with the help of the clerk of court.⁴⁰⁸ As a result, the proceedings in the Equality Court is less likely to be delayed because of procedural technicalities as the process takes up to 37 days. No legal representation is required when bringing a complaint in the Equality Court and there are no legal costs to be borne by the complainants, unless the parties elect to have representatives. This will be in favour of HIV positive women because of their generally low economic-status.

The Act prohibits unfair discrimination against any person or a group of persons based on prohibited grounds of discrimination. HIV/AIDS status has recently been added to the list of prohibited grounds in terms of the Act. This is a milestone progression in our law and an opportunity of immeasurable value for PLWHIV/AIDS in South Africa for access to the equality courts for discrimination redress based on their HIV status.

Section 13 of the Equality Act requires the complainant to prove a *prima facie* case of discrimination.⁴⁰⁹ Thereafter, the onus rests with the alleged perpetrator of the discriminatory conduct to prove that no discrimination took place,⁴¹⁰ or the discrimination was not based on a

⁴⁰⁷ N Bohler-Muller 'The promise of Equality Courts' (2006) 22 (3) *South African Journal on Human Rights* 385.

⁴⁰⁸ Section 4 of PEPUDA.

⁴⁰⁹ Section 13(1) of PEPUDA.

⁴¹⁰ Section 13(1)(a) of PEPUDA.

prohibited ground,⁴¹¹ or that the alleged discrimination was not unfair.⁴¹² The recent amendment to the Equality Act and the inclusion of the HIV/AIDS status as a prohibited ground of discrimination makes it easier for an HIV positive woman when lodging a complaint of discrimination because it is automatically presumed to be unfair unless the alleged respondent proves otherwise.⁴¹³ A woman living with HIV who has been sterilised without her informed consent only needs to show a *prima facie* case of discrimination on the part of the respondent.

The Equality Court is empowered to order a wide range of remedies for the complainant, including an unconditional apology by the respondent.⁴¹⁴ It is believed that ordering an apology as a remedy is educational to the perpetrators of discrimination in a sense that they can learn that unfair discriminatory practices in a democratic South Africa will not be tolerated. The ordering of this remedy is also indicative of the potential that the Equality Court has in empowering persons and communities by enhancing their psychological and physical well-being as victims of unfair practices in our society and dealing with the root source of the problem.⁴¹⁵

Furthermore, in terms of the Equality Act, the Equality Court has the power to award damages to the complainant for the loss suffered resulting from a discriminatory conduct on the part of the respondent. In most of the cases that have been to the Equality Courts, damages awarded were related to hate speech. In some cases, the damages were awarded to the organisations chosen by the complainant,⁴¹⁶ and in some cases to the individual complainants.⁴¹⁷ The issue of HIV discrimination is distinguishable to these other cases. Therefore, it is submitted that the Equality Court may grant compensation to an HIV positive complainant where the court is satisfied that she had suffered damages as a result of the forced or coerced sterilisation.

⁴¹¹ Section 13(1)(b) of PEPUDA.

⁴¹² Section 13(2) of PEPUDA.

⁴¹³ The AIDS Law Project *Submission on the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000: Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women & Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Children, Youth and Persons with Disabilities* (2006), available at <https://section27.org.za/wp-content/uploads/2010/04/Promotion-of-Equality-and-Prevention-of-Unfair-Discrimination-Act-2006-ALP.pdf>, accessed on 23 December 2017.

⁴¹⁴ *Psychological Society of South Africa v Qwelane* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) (14 December 2016).

⁴¹⁵ N Ntlama 'The Equality Act: Enhancing the capacity of the law to generate social change for the promotion of gender equality' (2007) 1 *Speculum Juris* 124.

⁴¹⁶ *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) and *Sonke Gender Justice Network v Malema* (2010) (2) BCLR 729 (EqC) [2010] ZAEQC 2; 02/2009 (15 March 2010).

⁴¹⁷ *Nomasomi Gloria Kente v Andre van Deventer* (EqC) (unreported case no 9/2013, 24 October 2014 Cape Town Magistrates Court) and *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) (27 August 2008).

5.7.2 Weaknesses

The existence of Equality Courts does not come without problems. First, the Equality Courts are relatively unknown to the people of South Africa, especially the poor and illiterate. This indicates that insufficient awareness programmes have been conducted and as such, limits access to and use of the Equality Courts. Second, there is no precedent by the Equality Court for HIV-related discrimination. Hopefully, now that HIV is a listed ground we will see more of these cases coming to court. Third, generally, Equality Court proceedings are conducted in an ‘open court’ unless the contrary is so directed. As a result, HIV positive women may be reluctant to approach the court because of further stigmatisation and discrimination they might be subjected to.

Fourth, although the Equality Court presiding officers and clerks have been provided with appropriate training, a once off training is insufficient. On-going training is needed in order to keep up with the current issues that South Africans face. In application to our scenario of HIV positive women, training of the presiding officer will help them to be sensitive to these women. There has not been decided cases on this issue, which makes it difficult for us to pin point whether the same prejudices will be shown to HIV positive women by the courts. It is for this reason that on-going training is suggested. Furthermore, the Department of Justice and Constitutional Development has not provided sufficient support, forums and spaces for learning for the presiding officers and clerks and sharing of insights, challenges and practice strategies in the Equality Courts’ settings.⁴¹⁸ There have been constant complaints about shortages of staff and in some instances, lack of resources to enable the proper working environment in the Equality Courts.⁴¹⁹

Lastly, although the Equality Court, as a special court, may develop its own rules, it is still subject to the rules applicable to the civil courts. Prescription will be a difficulty for the women to approach the courts with. For instance, the studies on sterilisation of HIV positive women conducted in South Africa are more than three years old and there has been no new research on whether this discriminatory practice is still on-going in our hospitals. The implication of this is that a relief that an HIV positive woman may seek in the Equality Court is limited to a claim of discrimination. This means that if the three years have passed after the cause of action

⁴¹⁸ TJ Powys ‘Benefit or impediment?: The operation of the Equality Courts in South Africa’ (2016) 30 *Agenda* 45.

⁴¹⁹ *Ibid.*

has arisen then the complainant cannot bring the matter to court. This is not in favour of the complainants in our scenario because some of the women would want the courts to grant them compensation.

5.8 Bringing a class action or public interest action in the Equality Court

Generally, the Constitution establishes a right of access to justice for the enforcement of the rights provided for in the BoRs.⁴²⁰ Despite this constitutional provision, accessing the justice system in South Africa is still a hurdle for poor people. Other factors that bar indigent people from accessing the courts are lack of knowledge of their human rights resulting from illiteracy, geographic location of the courts, procedural challenges and lengthy and delayed dispute resolution processes.⁴²¹

It is submitted that in an attempt to give effect to the enforcement of the rights clause, any person or an organisation may approach the Equality Court on behalf of a group or a class action or in the public interest. The value of using the Equality Courts by an organisation on behalf of the people affected by a discriminatory conduct, or challenging an equality issue in the public interest involves two things.⁴²² These include Equality Courts as a mechanism to achieve impact litigation and a tool to initiate advocacy and raising awareness.⁴²³ In this regard, the NGO's play a pivotal role in developing law on equality, and that is why we need more litigation in the Equality Courts as part of the vision to eradicate discrimination and inequality in our society.

5.8.1 Strengths

There are a number of reasons that support approaching the Equality Court as a class or in a claim of discrimination based on an HIV status. First, a class action and a public interest action will reach out to a number of women who have been subjected to forced or coerced sterilisation. Second, women belonging to a class will bear no legal costs because they will be assisted by an organisation specialising in these kinds of matters. Third, HIV status is a listed ground of

⁴²⁰ Section 34 of the Constitution of the Republic of South Africa, 1996.

⁴²¹ M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure* 913.

⁴²² Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30 *Agenda* 42-3.

⁴²³ *Ibid* 43.

discrimination in terms of the Equality Act, which makes burden of proof not too onerous for the complainants, as the respondent will have to prove that the discrimination is fair.

Fourth, working through an organisation will be beneficial for HIV positive women because the organisation will have skilled legal minds to drive the litigation process. It is submitted that an organisation is best placed to represent the litigants in a claim of discrimination before the Equality Court. Fifth, greater media coverage will be obtained when an organisation litigates on behalf of several HIV positive women as opposed to one woman approaching the court. As a result, this will have the effect of raising awareness amongst a greater group of persons and may prevent this practice from continuing.

Moreover, when an organisation approaches the Equality Court in the name of HIV positive women, it will set a precedent that will assist with future cases of HIV discrimination, in the Equality Courts. Seventeen years after the enactment of the Equality Act in South Africa, HIV status has been included as a prohibited ground. This is an indication that discrimination based on HIV status is still taking place and the legislature has deemed it prudent to add this ground, which makes it easier for the victims of discrimination to bring a claim to court. More importantly, legal professionals in the organisations are more familiar with court procedures and hence, have a good chance of obtaining a positive outcome.

5.8.2 Weaknesses

Litigation for social change also has its own challenges. The first is that of prescription. The prescription period is three years and organisations will be prevented from bringing a claim of discrimination after this period has expired. Funding is the most important factor when it comes to litigation for a greater good. Strategic litigation and planning for litigation is costly and this may become a major challenge for organisations involved in public interest litigation.⁴²⁴ However, some cases attract publicity and organisations will not be left completely helpless in the circumstances.⁴²⁵ This is because the media looks for interesting cases that will make headlines. In that way, donors also come on board considering publicity as a positive sign of that organisation's progress and approval of a sound strategy, thus encouraging continued funding.⁴²⁶ In some cases of strategic litigation, funding determines the ability to collect

⁴²⁴ D Cote and J Van Garderen 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *South African Journal on Human Rights* 173.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

information and evidence as it is often difficult and costly to attain.⁴²⁷ Moreover, finding the right clients may be difficult at times for the NGO's. Sometimes, clients may pull out of the litigation before it is finalised. Litigation in the public interest will go on regardless of the clients' unwillingness to proceed, as the NGO will be representing the public in general.⁴²⁸

5.8.3 Certification of a class action

It is my submission that HIV positive women who have been sterilised without their informed consent may make use of a class action as a litigation strategy in order to obtain legal relief and this may benefit them immensely. In doing so, an action claiming discriminatory practice against HIV positive women in general may be brought and the requirements laid down in the judgment of *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd*⁴²⁹ must be complied with.

For the purposes of this dissertation, the legal representative acting on behalf of the class must indicate that the class is identifiable by objective criteria.⁴³⁰ In our scenario, there will be no difficulty showing this as HIV positive women who have been forcibly or coercively sterilised between specific periods will form the class. Additionally, the cause of action must raise a triable issue.⁴³¹ In our case, the issue arising from the cause is the discriminatory practice of forced and coerced sterilisations by healthcare practitioners based on the women's HIV positive status and a violation of their right to equality.

A further requirement is that the desired relief depends on the adjudication of issues of law or fact or both, common to all members of the class.⁴³² The infringement of the right to equality and discriminatory practice of forced and coerced sterilisation will be common to all women forming the class. The common facts will be that the women were pregnant and HIV positive when they were subjected to discriminatory treatment in healthcare facilities.

Likewise, in the event where the relief sought is the payment of damages, the complainant must show to the court that there is an appropriate procedure for awarding damages to the members

⁴²⁷ Ibid 174.

⁴²⁸ Ibid.

⁴²⁹ *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012).

⁴³⁰ Ibid para 26.

⁴³¹ Ibid.

⁴³² Ibid.

of the class.⁴³³ In the current matter, the legal representatives will have to show the court that the personal circumstances of each HIV positive woman will determine the payment of compensation for pain and suffering because of the discriminatory treatment. Additionally, future medical expenses and claims for loss of income must be easily quantified. The court must be satisfied of the suitability of the nominated representative.⁴³⁴ It is this thesis's submission that the court may deem it necessary and appropriate that an NGO specialising in human rights litigation, represent and assist the affected women with their litigation process. Lastly, the court makes an enquiry into whether a class action is the most appropriate route to deal with the claims of the members of the class.⁴³⁵ It is submitted that the court may allow for a class action in the current matter, as more women will be accommodated in one action.

⁴³³ Ibid.

⁴³⁴ Ibid para 26.

⁴³⁵ Ibid.

Chapter Six

Conclusion

6.1 Introduction

The focal point of this thesis was to examine whether the judgment in *LM and Others v Government of the Republic of Namibia* closed the door on potential claims of discrimination by South African women living with HIV, alleging to have been coerced or forced into being sterilised because of their HIV status. This chapter concludes this thesis by assessing the possibility of either an individual or an NGO bringing a class action or a public interest action to the Equality Court on behalf of South African HIV positive women who have been sterilised without their informed consent. In summary, this chapter makes a number of findings, and conclusions that may be relevant when bringing an action to the Equality Court on behalf of HIV positive women in South Africa who have been sterilised without their informed consent.

This thesis was undertaken because the judgment by the Namibian Supreme Court in the case of *LM and Others v Government of the Republic of Namibia* failed to address this issue as an equality matter. In this case, there were two claims that the court was asked to pronounce on. The first was that of informed consent and the plaintiffs were successful in this regard. The second claim was for unfair discrimination based on their HIV status and this was dismissed by both the trial and appeal courts. In South Africa, Strode, Mthembu and Essack conducted a qualitative study documenting experiences of HIV positive women who had been sterilised without their informed consent. This study demonstrated that a number of HIV positive women perceived their sterilisations to be a violation of their sexual and reproductive rights and their right to equality. Although other studies have been conducted in the sub-Saharan region and around the world, the focus of this dissertation was to establish the effect the *LM* decision may have on potential discrimination complaints in South Africa considering our legal framework.

The research questions investigated in this study were:

- (i) Is forced and/or coerced sterilisation of HIV positive women a form of unfair discrimination in terms of both international and South African law?
- (ii) What are the evidential requirements for proving unfair discrimination through forced and coerced sterilisation of women based on their HIV status by means of a class action and public interest litigation in the South African Equality Court?

- (iii) What lessons that can be learnt from the *LM* case, international jurisprudence and South African judgments on equality matters?

In answering these questions, this thesis critically examined the relevant South Africa legal framework, focusing on the use of class actions and public interest litigation to bring claims of forced and coerced sterilisations of HIV positive women before the Equality Court. This thesis also referred in detail to the Namibian and Slovakian cases on sterilisation. Primary and secondary information sources were used in the undertaking of this study.

The first chapter provided the background to the topic, including an overview of the issue of forced and coerced sterilisation, described the primary statutes, relevant legal instruments and set out the research questions and methodology of the study. The second chapter provided the South African constitutional perspective of the right to equality and the context in which this right has been interpreted by the courts. Further, the chapter set out the international and regional legal framework for addressing unfair discrimination. Chapter three discussed the Equality Act, the operational procedure of the Equality Courts and the powers conferred on the presiding officers of this court under the Act. It also discussed the interpretation of the relevant provisions of the Act by the courts. Chapter four dealt with class actions and public interest litigation as a means to achieve access to justice by HIV positive women in South Africa. The previous chapter, Chapter five, provided a critical analysis of the decision in the *LM* case, the equality clause, the use of class actions and public interest litigation by NGO's in the Equality Courts in the name of HIV positive women who have been subjected to forced and coerced sterilisations.

6.2 The findings of this study

It is submitted that the following findings can be made from this study:

6.2.1 Forced and coerced sterilisation of HIV positive women is a form of discrimination and, therefore, is a violation of their right to equality and it impacts on their dignity

There are various forms of discrimination that PLWHIV face today. Stigma is associated with prejudice and a number of factors including poverty, gender based violence and indigenous norms and attitudes.¹

¹ South African National AIDS Council 'The People Living with HIV Stigma Index: South Africa 2014 Summary Report' (2015), available at www.sanac.org.za, accessed on 24 February 2016.

In the South African context, women, especially black women, have often been subjected to discrimination because of their low social status in our community. A further layer of discrimination is faced by HIV positive women. Across the globe, HIV positive women have been sterilised for discriminatory reasons.²

Two local studies conducted in South Africa show that HIV women have been the victims of forced and coerced sterilisations. Although there have been no further studies showing that the problem is still continuing, it is clear from the documented experiences of women that they have been subjected to discriminatory treatment in healthcare facilities in the past. Besides the studies there has been one matter settled out of court involving an HIV positive woman who was sterilised during a caesarean section.³ There have not been any other cases brought before our courts concerning this issue. It is submitted that the forced and coerced sterilisation of HIV positive women constitutes unfair discrimination and it is of vital importance that courts find as such. A finding will clearly move this issue from being simply one of the system failing to obtain proper consent to one which focuses on the root cause of such actions which is discrimination against women with HIV.

The literature shows that it is stigma and discrimination against PLWHIV that has a significant impact on them. It hinders the proper provision of healthcare services and hinders the management of the epidemic effectively.

6.2.2 HIV positive women have the right to equality under South African law

The South African Constitution contains a comprehensive BoRs that can be utilised to challenge and overturn discriminatory laws, policies and practices.⁴ The equality protection in the Bill of Rights is found in section 9, which comprehensively outlaws unfair discrimination. It does not list HIV as a ground of unfair discrimination but the Constitutional Court has recognised that discrimination against PLWHIV violates their dignity and is unlawful. Women also have legal protection against unfair discrimination based on their HIV/AIDS status in terms of PEPUDA.

² A Strode, S Mthembu & Z Essack. "“She made up a choice for me”²² HIV-positive women’s experiences of involuntary sterilisation in two South African provinces’ (2012) 20 *Reproductive Health Matters* 1-9; Z Essack and A Strode ““I feel like half a woman all the time”: The impacts of coerced and forced sterilisations of HIV-positive women in South Africa’ (2012) 26 *Agenda* 24-34.

³ *Sithole v The MEC for Health and Social Development & 3 Others* – unreported case no. 19744/2012 – High Court of South Africa, Gauteng Local Division, Johannesburg.

⁴ A Pillay ‘Access to justice in South Africa’ (2005) 17 *Florida Journal of International Law* 463.

6.2.3 Women living with HIV have the right to access to justice but in practice, the courts and the legal system are often out of the reach of the poor

Generally, the Constitution establishes a right of access to justice for the enforcement of the rights provided for in the BoRs.⁵ Despite this constitutional provision, it is still a hurdle for poor people to access the South African justice system. Other factors that bar indigent people from accessing the courts include a lack of knowledge of their human rights resulting from illiteracy, the geographic location of the courts, procedural challenges and in some instances lengthy and delayed dispute resolution processes.⁶

6.2.4 Legal redress for HIV positive women in the Equality Court

It is submitted that any forced or coerced sterilisation of women living with HIV in South Africa ought to be laid as a complaint in the Equality Court. From the studies conducted, it is apparent that HIV positive women require legal redress such as compensation for the sterilisation done for discriminatory reasons. The Equality Court is well-equipped to offer such redress to the affected women as they are specialised courts with the power to inquire into and resolve allegations of unfair discrimination on a range of grounds, including a person's HIV or AIDS status.

6.2.5 There are three different forms of complaints that could be made before the Equality Court

Legal redress in the Equality Court for women living with HIV who have been sterilised without their informed consent and simply because of their status may be effected in three ways. First, any affected woman may bring an individual claim. Second, an action in the name of a class of HIV positive women may be brought before the Equality Court. Lastly, an NGO may bring a complaint in the public interest. There is no substantial difference between these claims in the sense that depending on the circumstances, they all could be successful.

⁵ Section 34 of the Constitution of the Republic of South Africa, 1996

⁶ M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46 *De Jure* 913.

6.2.6 Although HIV positive women have rights and there is accessible legal redress available, there are still legal complexities in bringing a class action and public interest action in terms of PEPUDA

It is submitted that forced and coerced sterilisation of women living with HIV is a violation of human rights and must be treated as such by the courts. In many instances, where human rights have been violated, litigators turn to the courts in order to address the issue and obtain justice for the concerned victims. Litigation comes with its own set of complexities that may hinder access to justice for the affected individuals or groups.

As stated previously in this particular chapter, illiteracy is one of the key challenges that prevent the instituting of legal action by the affected persons. Generally, in terms of the studies referred to in this thesis, women are often not well informed of their human rights and that sterilisations performed on them interfered with these rights. As a result of their ignorance, no legal action could be taken by them in the circumstances.

Access to justice for HIV positive women comes with other difficulties resulting from societal stereotypes and discrimination against PLWHIV. The proceedings in the Equality Court are conducted in an 'open court'. As a result, women may be fearful of coming forward to seek legal redress because of the judgmental treatment they get from medical facilities and from people around them. In the circumstance, the women's privacy will be compromised as well.

When bringing a complaint of discrimination, women bear the onus of proving a *prima facie* case of discrimination based on their HIV positive or AIDS status. As easy as this may sound, the gathering of evidence in order to prove discrimination may become problematic for these women because of the difficulties in accessing medical records. It is unlikely that there will be any physical evidence to corroborate claims of discrimination. The only fact that may be established is that the medical practitioners were aware of her HIV status. It is unlikely that notes of the discriminatory reason for the sterilisation would be recorded. This may prevent the institution of legal action against the wrongdoers.

Internationally, regionally and nationally, no precedent has been set regarding a claim of discrimination. Even though cases in the Namibian and Slovakian jurisdictions have been brought to court, this does not put women living with HIV women who have been subjected to sterilisation without their informed consent and for a discriminatory reason, in any better position. The reluctance by the courts in finding that this practice violates women's rights to equality and to be free from discrimination, further reduces the low status of women in our

society. The sterilisation of women is often seen in a patronising way to be in their best interests because they already have children, or should not leave orphans. This defeats the purpose of access to justice for the most vulnerable and marginalised groups and a further violation of human rights that our legal system deems to protect.

Although the Equality Court is a specialised court, it is subject to the rules that apply in our civil courts. Prescription is a key challenge when one seeks to institute legal action. In our scenario, the claim of discrimination, which resulted in the forced or coerced sterilisation of a woman, must be brought within three years of the sterilisation. As discussed in this thesis, experiences of women in the studies conducted in South Africa show that some sterilisations were performed in a period more than three years before the women became aware of their rights. This leaves women with no relief even in the matters where there were prospects of success.

6.2.7 There are advantages of instituting a class action and public interest litigation in the Equality Court

The use of the Equality Court will increase access to justice as there are no costs associated with lodging a claim with the Equality Court. A class action or PIL can be used and the advantage of this approach is that the litigation will be linked to a broader advocacy strategy. Once women have received education on their rights, they may seek legal advice and the expertise of NGO personnel that will ensure success in the matter. This will help the affected women because NGO's have the resources to fund litigation processes.

The Equality Act has recently been amended to include HIV/AIDS status as a prohibited ground of discrimination. This is very helpful on the part of the complainant as the burden of proof shifts to the respondent to show that the discrimination is not unfair. This means that the conduct of the respondent is deemed to be discriminatory, unless proven otherwise.

6.3 Conclusions

Based on the above findings, this dissertation draws the following conclusions:

6.3.1 Women living with HIV would have good prospects of success in the Equality Court. The only disadvantage of using the Equality Court is that the women are unlikely to receive sufficient damages to pay for the reversal of the sterilisation procedure.

6.3.2 An Equality Court judgment in favour of a complainant(s) would significantly boost national and international advocacy on the issue of forced and coerced sterilisation of HIV positive women, as the focus will shift from the issue of informed consent to equality.

6.3.3 The *LM* case has made it difficult to bring a civil claim dealing with informed consent and equality as the equality part of this matter failed.

6.3.4 However, the *LM* case has not closed the door on the claim of discrimination in jurisdictions such as South Africa, which has specific equality legislation.

6.3.5 Even though in the South African context we could have a successful case, the remaining key problem would be prescription as many of the cases of sterilisation in the two studies conducted took place before the full roll out of antiretroviral drugs (ARVs) in 2006.

6.4 Summary

In conclusion, given that South Africa has specific equality legislation in place, which recognises that discrimination based on a person's HIV or AIDS status is unlawful, there are good prospects of success if a HIV positive woman were to complain that she had been sterilised for a discriminatory reason. This would be a global first and it could help and support both advocacy and litigation to protect the rights of HIV positive women in other jurisdictions. It would be particularly important, as it would demonstrate that it is not simply a failing of the health system to obtain consent but a deliberate act to stop HIV positive women from having children because of their status. Naming this shameful act of sterilisation as a form of discrimination could also help litigation in other jurisdictions where women are sterilised for other discriminatory reasons such as their ethnic status, race or position in society. Although this litigation would take the global fight against HIV-related discrimination further, given the Equality Court's limited set of civil remedies, it may appear to the affected women that they have not been given full redress, as it is unlikely that they would be awarded damages. In the Essack and Strode study, HIV positive women stated that they would want damages as many wanted the procedure reversed or they wanted assistance with conceiving in the future. Attempting to find a balance between the desires of the victims of this practice and the fight against discrimination will remain a complex one.

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7.2.5 Conventions/Covenants

1. ACHPR

Article 2

Article 3

Article 14(1)

Article 14(1)(a)

Article 14(1)(b)

Article 14(1)(c)

Article 14(1)(f)

Article 14(2)(a)

Article 14(2)(c)

Article 18(3)

Article 30

2. American Convention on Human Rights.

Article 5

3. CEDAW

Article 1

Article 2

Article 3

Article 12(1)

Article 16

Article 24

4. Convention for the Protection of Human Rights and Fundamental Freedoms

Article 14

5. ICCPR

Article 2(1)

Article 3

Article 26.

6. ICERD

7. ICESCR

Article 2(2)

Article 3

8. The Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol)

Article 14

Article 14(1)(d)

9. UDHR

Article 1

Article 2

Article 6

Article 7

Article 8