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# A critical analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: To what extent have the remedies available to the Equality Court been utilised in achieving the objectives of the Act?

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I, Alaika Alli, declare that:

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**ABSTRACT**

In 1994, after decades of inequality and oppression, South Africa ushered in a new age of democracy with the help of its interim and final Constitutions. At the core of these Constitutions stand the values of human dignity, equality and freedom. In order to give effect to these values, Parliament has passed a wide range of statutes over the past 25 years. Perhaps the most significant of these is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the 'Equality Act').

As its short title clearly indicates, the purpose of this Act is, *inter alia*, to promote equality and to prevent unfair discrimination. Insofar as the second goal is concerned, however, the short title is misleading. This is because a careful examination of the Equality Act shows that its purpose is not simply to prevent unfair discrimination, but also to prevent, prohibit and eliminate hate speech and harassment.

In order to achieve these various goals, the Equality Act makes provision for a new specialist court, namely the Equality Court. Apart from conferring the power on the Court to determine whether an act of unfair discrimination, hate speech or harassment has been committed, the Equality Act also confers a wide range of remedial powers on it. These remedial powers, which are set out in section 21, are varied in nature. While some look backwards and focus on remedying the individual harm suffered, others look forward and focus on preventing a recurrence of the harmful conduct.

Despite being able to draw on such a wide range of remedies, an examination of the reported and unreported judgments of the Equality Court indicates that in the overwhelming majority of cases, the Court has relied on three in particular, namely interdicts, damages and unconditional apologies. The aim of this thesis is to set out and critically discuss the manner in which the Equality Court has applied these three remedies

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## CHAPTER ONE: BACKGROUND AND OUTLINE OF RESEARCH PROBLEM

### 1.1 Introduction

Although the Constitution[1] recognises, protects and promotes a wide range of fundamental human rights, it can be argued that one of the most important of these is the right to equality. The reason for this is not difficult to find. The system of apartheid and its policy of racial discrimination deprived black South Africans of their human dignity, dispossessed them of their land and other resources and excluded them from the processes and systems of government.[2] The individual humiliation, economic and social hardship and legal and political exclusion black South Africans suffered during the apartheid era exerted an enormous influence on the drafters of the Constitution, who sought, not only to prohibit racial discrimination, but also to address its ongoing consequences.

The prominent role that equality plays in the Constitution is illustrated partly by the fact that it is the first substantive right guaranteed in the Bill of Rights, which is itself described as the cornerstone of our democracy. Section 9 of the Constitution thus provides that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 of the Bill of Rights is an all-encompassing equality right which upholds substantive equality as essential to our democracy. Substantive equality refers to equality in

[1] Constitution of the Republic of South Africa, 1996. Hereafter the 'Constitution'.
[2] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 1.

social and economic life and recognises that inequality is not only caused by differential treatment but also 'emerges from systemic group based inequalities that shape relations of dominance and subordination and material disparities between groups'.[3] To achieve substantive equality, section 9 further provides that national legislation must be enacted to prevent unfair discrimination. In response to this, the Promotion of Equality and Prevention of Unfair Discrimination Act[4] (the 'Equality Act') has been passed as a legislative tool to promote and fulfil the equality right.[5]

## 1.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

### 1.2.1 Introduction

The Equality Act is the national legislation required by section 9(4) of the Constitution, and therefore enjoys special constitutional prominence.[6] The long title of the Act,[7] together with the objects clause,[8] indicate that it Act has two main goals. The first is to promote equality and the second is to prevent, prohibit and eliminate unfair discrimination, hate speech and harassment.[9] The Act thus places a positive duty and responsibility, not only on the state, but also on civil society, traditional institutions and all persons to promote equality.[10]

In order to achieve these various goals, the Equality Act makes provision for a new specialist court, namely the Equality Court. Apart from conferring the power on this Court to determine whether an act of unfair discrimination, hate speech or harassment has been committed, the Act also confers a wide range of remedial powers on it. These remedial powers – which are set out in section 21(2) of the Act – are varied in nature. This is in accordance with the

[3] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 2.
[4] Act 4 of 2000.
[5] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 3.
[6] It also fulfils certain of South Africa's international treaty obligations.
[7] The long title reads as follows: 'To give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith'.
[8] Section 2.
[9] Preamble of the Equality Act.
[10] TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1*) Agenda* 37.

guiding principles set out in section 4(1)(d) of the Act which provide that corrective or restorative measures must be used in conjunction with deterrent measures.

In light of these principles, it is not surprising that some of the remedies set out in section 21(2) look backwards and focus on remedying the harm suffered by the victim, while others look forward and focus on preventing a recurrence of the harmful conduct by the wrongdoer. The purpose of this thesis is to investigate the nature and the purpose of these remedies as well as the manner in which the Equality Court has selected, interpreted and applied them in light of the aims and objects of the Equality Act.

Before turning to discuss the Equality Court and its remedial powers in more detail, however, it will be helpful to discuss briefly the manner in which the Equality Act regulates unfair discrimination, hate speech and harassment.

### 1.2.2 Unfair discrimination

#### *(a) Introduction*

Section 6 of the Equality Act provides that '[n]either the state nor any person may unfairly discriminate against any person'.[11] The concept of discrimination is defined very widely in section 1 of the Act as '[a]ny act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly: (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'.[12]

The 'prohibited grounds' referred to in paragraph (b) are also defined in section 1 of the Act. Section 1(1)(xxiii)(a) provides in this respect that the prohibited grounds are 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status'.[13]

[11] Fair discrimination is permitted in law. Tests have been developed to determine whether the discrimination can be regarded as fair in an open and democratic society. This will be explored further in the thesis.
[12] Section 1(1)(viii).
[13] HIV/AIDS status was included in the list of prohibited grounds following the enactment of the Judicial Matters Amendment Act 8 of 2017.

Apart from these enumerated grounds, section 1(1)(xxiii)(b) of the Equality Act goes on to provide that the prohibited grounds also include 'any other ground where discrimination based on that other ground:

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

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

Albertyn et al argue that the definition of unfair discrimination may be reduced to three essential elements. These are as follows:

- there must be a direct/indirect act or omission,
- which causes harm (either by imposing a burden or withholding a benefit),
- on a prohibited ground.[14]

Whilst the Equality Act lists many prohibited grounds, for the purposes of this thesis we will focus on three only, namely: race, gender and sexual orientation.

*(b) Race*

Historically, race has been the primary source of inequality in South Africa.[15] Apart from gender and disability, it is not surprising, therefore, that the Equality Act regulates unfair discrimination on the ground of race in much greater detail than any of the other prohibited grounds.

Unfair racial discrimination, therefore, is prohibited, not only in section 6 of the Equality Act, but also in section 7. Besides repeating the general prohibition against unfair racial discrimination in section 6, section 7 also identifies and prohibits certain specific forms of racial discrimination. These specific forms are as follows:

[14] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 33.
[15] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 56.

‘(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;[16]

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;[17]

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;[18]

(d) the provision or continued provision of inferior services to any race group, compared to those of another ace group;[19]

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons’.[20]

*(c) Gender*

Apart from race, gender has been another important source of inequality in South Africa. Like unfair discrimination on the ground of race, therefore, unfair discrimination on the grounds of gender is also prohibited, not only in section 6 of the Equality Act, but also in section 8.

Like section 7 of the Equality Act, section 8 also repeats the general prohibition against unfair discrimination on the grounds of gender in section 6 of the Equality Act and then goes on to identify and prohibit specific forms of unfair gender discrimination. These specific forms are as follows:

‘(a) gender-based violence;

(b) female genital mutilation;

(c) the system of preventing women from inheriting family property;

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

(f) discrimination on the ground of pregnancy;

(g) limiting women’s access to social services or benefits, such as health, education and social security;

[16] Section 7(a).
[17] Section 7(b).
[18] Section 7(c).
[19] Section 7(d).
[20] Section 7(e).

(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;

(i) systemic inequality of access to opportunities by women as a result of the sexual division of labour'.

*(d) Sexual orientation*

Unlike unfair discrimination on the grounds of race and gender, unfair discrimination on the ground of sexual orientation is not singled out for additional treatment by the Equality Act. Instead, sexual orientation is simply included in the list of prohibited grounds defined in section 1(a) of the Equality Act.

In other words, while the Equality Act does prohibit unfair discrimination on the grounds of sexual orientation in section 6, it does not go on to repeat this general prohibition in a separate section and neither does it identify and prohibit specific forms of unfair discrimination on the grounds of sexual orientation.

Despite the fact that sexual orientation is not singled out for additional treatment, the decision to include it as a prohibited ground, initially in the Constitution and, subsequently, in the Equality Act is significant. This is because South Africa was the first country in the world to put an end to discrimination on the basis of sexual orientation.[21]

South Africa is also a signatory to the 2008 United Nations Human Rights Council Resolution on Sexual Orientation and Gender[22] and has committed internationally, constitutionally and domestically to root out the scourge of unfair discrimination against Lesbian, gay, bisexual, trans, queer and intersex (LGBTQIAP+) groups.[23]

[21] Section 9(3).
[22] Adopted on 17 June 2011.
[23] TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1*) Agenda* 37.
[23] Section 16 of the Judicial Matters Amendment Act.

Furthermore, South Africa made world headlines when it allowed the conclusion of a civil union/partnership irrespective of the sex of the parties.[24] The Civil Union Act[25]came into effect one year after the delivery of judgment and resulted in South Africa becoming the fifth country in the world to legislate same sex marriages.[26]

Even with these advancements, challenges to the realisation of the right to equality of sexual minorities remain.[27] These include the systemic unfair discrimination against people whose sexual orientation is not specifically or expressly recognised and represented in many local languages and persistent criminal hate speech and acts against lesbians, gays, bisexuals, transgender, intersex, asexual and pansexual persons.[28]

### 1.2.3 Hate speech

While unfair discrimination is prohibited in section 6 of the Equality Act, hate speech is prohibited in section 10. This section reads as follows:

'(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to:

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation'.

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[24] *Minister of Home Affairs and Another v Fourie and Another*; *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* 2006 (1) SA 524 (CC). See also TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa'(2016) 30(1) *Agenda* 36-48.
[25] Act 17 of 2006.
[26] See TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1) *Agenda* 36 37 for a more detailed discussion.
[27] South African Human Rights Commission (SAHRC) 'Equality roundtable dialogue' (2014). Available at https://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf, accessed on 04 February 2019.
[28] Ibid. Hereafter referred to as 'LGBTQIAP+'.

Section 10 must be read with section 12 which prohibits the dissemination and publication of information that unfairly discriminates. This section reads as follows:

'No person may:

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.'

Although hate speech is not defined in the Act, its meaning is determinable with reference to the objects of the Act when read together with section 10 and the section 12 proviso.[29] Kruger argues in this respect that hate speech may be defined as 'a form of expression that exceeds the bounds of acceptable expression in a democratic and open society because it does not further the goals of free expression and because it infringes unjustifiably upon the right to equality of a complainant'.[30]

### 1.2.4 Harassment

Harassment is prohibited in section 11 of the Equality Act which states simply that '[n]o person may subject any person to harassment'. Harassment itself is defined in section 1 of the Act as 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to:

(a) sex, gender or sexual orientation; or

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group'.[31]

[29] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 90. Albertyn et al. also state that Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 can be used to define the concept.
[30] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 162.
[31] Section 1(1)(xiii).

As Kruger points out, the Equality Act is unique as it distinguishes harassment from unfair discrimination and views it as a 'social ill that exists alongside unfair discrimination'.[32]

Like the definition of unfair discrimination, Albertyn et al argue that the definition of harassment may be reduced to three essential elements. These are as follows:

- unwanted persistent or serious conduct,
- which negatively impacts a person,
- and is related to the one of the prohibited grounds.[33]

Finally, it is important to note that unfairness plays no role as harassment can never be fair.[34]

### 1.3 The Equality Courts

#### 1.3.1 Introduction

As pointed out above, the Equality Act does not simply prohibit unfair discrimination, hate speech and harassment. In addition, it also creates an alternative system of courts, namely the Equality Courts.

The Equality Act provides in this respect that all High Courts are automatically designated as Equality Courts, but more importantly affords the bulk of adjudicative powers relating to equality matters to the Magistrate's Courts.[35] The Department of Justice designates Magistrate's Courts as having jurisdiction to entertain equality matters once presiding officers and staff of such Courts receive the appropriate training.[36]

The purpose of the Equality Courts is to resolve matters specifically relating to unfair discrimination, hate speech and harassment, with a view toward removing the social and

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[32] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 176.
[33] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 99. This has been accepted as the elements of harassment by Kruger (see R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 174-181).
[34] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 98.
[35] Section 10.
[36] Ibid.

economic inequalities which were generated in the country's history of colonialism, apartheid and patriarchy.[37] The operation of the Equality Courts, therefore, is intrinsic to the functioning of the Equality Act.

Although the decision to create a new system of Equality Courts was based on several grounds, one the most important is the fact that access to justice is severely limited in South Africa as a result of a number of factors. These factors include the geographic location of courts, the physical inaccessibility of courts, the lack of knowledge of rights, procedural hurdles, the intimidating nature of the courts, and the cost of litigation.[38]

In order to address the factors, the drafters of the Equality Act included a number of provisions in the Act aimed at facilitating access to the Equality Courts. Among these are the fact that lawyers are not needed in Equality Courts, although their use is not banned. Also, unlike many South African courts, no fees are required to place a case before an Equality Court. Originally, Equality Courts were intended to be located in all Magistrate Court buildings throughout the country to reduce travel costs for people living outside of major cities.

### 1.3.2 Remedies

Apart from the aforementioned innovative steps, the Equality Act also contains an unusually long and open list of remedies that may be utilised by the Equality Courts. These remedies are set out in section 21 of the Act. This section reads as follows:

'(2) After holding an inquiry, the court may make an appropriate order in the circumstances, including:

(a) an interim order;

(b) a declaratory order;

(c) an order making a settlement between the parties to the proceedings an order of court;

[37] Preamble of the Equality Act.

[38] M Nyenti 'Access to justice in the South African social security: Towards a conceptual approach' (2013) 44 *De Jure* 911 and D Kaersvang 'Equality Courts in South Africa: Legal Access for the Poor' (2008) 15(2) *The Journal of the International Institute* 4. Available at https://quod.lib.umich.edu/j/jii/4750978.0015.203/--equality-courts-in-south-africa-legal-access-for-the-poor?rgn=main;view=fulltext, accessed on 30 January 2019. See also C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 5 and W Holness 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 7(5) *PER* 1907. Available at http://dx.doi.org/10.4314/pelj.v17i5.04, accessed on 04 February 2019.

(d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;

(e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;

(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;

(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;

(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;

(i) an order directing the reasonable accommodation of a group or class of persons by the respondent;

(j) an order that an unconditional apology be made;

(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;

(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;

(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;

(n) 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;

(o) an appropriate order of costs against any party to the proceedings;

(p) an order to comply with any provision of the Act.

(3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate.

(4) The court may, during or after an inquiry, refer:

(a) its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation;

(b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

(5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.'

In her thesis, Hellum argues that this wide range of remedies invites the Equality Courts to be creative and encourages it to play an active role in ensuring that appropriate measures are taken to uphold the objectives of the Equality Act and eradicate unfair discrimination, hate speech and harassment.[39] Unfortunately, Hellum argues further, an examination of the case law shows that the Equality Court has failed to utilise most of the remedies listed in section 21 of the Act. Instead, it has limited itself largely to three remedies in particular, namely 'an unconditional apology', 'interim orders' and the 'payment of damages'.[40]

### 1.4 The research question

As pointed out above, Hellum argues that even though the Equality Act provides for a wide range of remedies, an examination of the case law shows that the Equality Court has limited itself largely to three in particular, namely 'an unconditional apology', 'interim orders' and the 'payment of damages'. This somewhat surprising and disappointing finding gives rise to a number of complex and difficult questions. Among these are the following:

- First, what is the nature and purpose of the section 21(2) remedies?
- Second, which of the section 21(2) remedies are most commonly utilised by the Equality Courts?
- Third, how have the Equality Courts interpreted and applied the section 21(2) remedies they are utilising?
- Fourth, what are the implications of the Equality Courts' remedial jurisprudence for the aims and objects of the Equality Act?

The purpose of this thesis is to investigate the nature and purpose of the section 21(2) remedies and to critically analyse the remedial jurisprudence of the Equality Courts in light of the aims and objects of the Equality Act.

More specifically the purpose of this thesis is to:

- set out and discuss the nature and purpose of the remedies listed in section 21(2) of the Equality Act;

[39] A Hellum *Equality rights and democratic transition: Study of cases in South Africa's Equality Courts* (Unpublished Thesis, University of Oslo, 2006) 49.
[40] Ibid.

- set out and discuss the manner in which the Equality Courts have selected, interpreted and applied the section 21(2) remedies; and
- critically analyse the remedial jurisprudence of the Equality Court and evaluate the implications of this jurisprudence for the aims and objects of the Equality Act.

### 1.5 The purpose of the thesis

Despite the enactment and implementation of the Equality Act, discrimination in South Africa remains deeply embedded in practices and attitudes. This is evident from the continuing scourge of equality cases that are reported in the media and cases that are brought before the courts by marginalised groups such as women, the LGBTQIAP+[41] community, foreign nationals and the urban and rural poor.[42]

This thesis critically assesses the extent to which the Equality Act is achieving its goals whilst identifying any shortfalls within the legislation. Further, it assesses the Equality Courts as an instrument of the Act and, in particular, it focuses on the interpretation and implementation of the section 21(2) remedies by the Equality Courts. A critical assessment of a body of Equality Court cases will be conducted in pursuit of such information.[43]

Essentially, the thesis seeks to update the current academic literature available on the topic whilst fuelling the available information on remedial measures granted to the Equality Courts.

### 1.6 The research methodology

The thesis is a product of doctrinal research in the form of a 'gap study'.

The methodology used was a purely doctrinal approach of the law. The essential features of doctrinal scholarship involve 'a critical conceptual analysis of all relevant legislation and case

[41] Lesbian, Gay, Bisexual, Transgender/Transsexual, Queer/Questioning, Intersex/Inclusive, Asexual/Ally, Pansexual.
[42] See generally TJ Powys 'Benefit or impediment?: The operation of the Equality Courts in South Africa' (2016) 30(1*) Agenda* 36.
[43] Focusing on a High Court level.

law to reveal a statement of the law relevant to the matter under investigation'.[44] Doctrinal research is characterised by the study of legal texts and is often colloquially described as 'black-letter law'.[45] Information was gathered from a variety of sources including textbooks, refereed journals, conference papers, media article, case law and legislation.

The thesis used doctrinal methodology to gain deeper understanding into the Act and its courts and present relevant findings as to the deficiencies of such. An analysis of a select body of Equality Court cases was conducted[46] to specifically highlight the approach by the Equality Courts in relation to remedies for cases of unfair discrimination, hate speech and harassment. The thesis also seeks to clarify the persistent challenges to the advancement of the right to equality in South Africa and propose workable improvements in light of the objectives of the legislation.

### 1.7 The structure of the thesis

*Chapter One: Background and outline of the thesis*

The background of this thesis is set out in Chapter One. Apart from the background, the research question, the research methodology, the structure of the thesis and the limitation of the thesis are also set out in Chapter One.

*Chapter Two: Historical background*

Some of the key features of the apartheid system are set out and discussed in Chapter One. Besides the key features of apartheid, the transition from apartheid to democracy is also set out and discussed in this Chapter.

[44] TC Hutchinson 'Valé Bunny Watson? Law librarians, law libraries, and legal research in the post-internet era' (2014) 106(4) *Law Library Journal* 584.
[45] P Chynoweth 'Legal research in the built environment: A methodological framework' (2008). Available at http://usir.salford.ac.uk/12467/1/legal_research.pdf, accessed on 01 February 2019.
[46] The analysis will be conducted using a list of questions devised as a test by the writer to objectively assess the approach taken by the courts in relation to remedies.

*Chapter Three: The Equality Act*

The aims and objects of the Equality Act are set out in Chapter Two. In addition, the statutory provisions prohibiting unfair discrimination, hate speech and harassment are also set out and discussed in this Chapter.

*Chapter Four: The Equality Court*

The structure and jurisdiction of the Equality Court are set out in Chapter Three. Apart from the structure and jurisdiction of the Equality Court, the presiding and other officers of the Equality Court are also set out and discussed in this chapter

*Chapter Five: Section 21(2) remedies*

The manner in which the courts have interpreted and applied section 21(2) of the Equality Act is set out and discussed in Chapter Five. This analysis is also located in a discussion of the types of remedies recognised in the South African legal system and the manner in which remedies can be classified.

*Chapter Six: Recommendations and conclusion*

This chapter provides a general overview of the recommendations identified within the thesis in order to support the efficient functioning of the Equality Act and its tools.

## 1.8 Limitations and delimitations

The thesis was limited in scope as it does not include other transformation Acts[47] beyond the realm and discussion of the Equality Act. The thesis focuses exclusively on the Equality Act as it has been described as 'the most important Act to have been passed by the South African Parliament second only to the Constitution'.[48] The Act deals with the promotion of equality

[47] In the legislative sphere, the following Acts have been passed, among others: Broad-Based Black Economic Empowerment Act 53 of 2003, Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.
[48] AJ Kok *A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Unpublished thesis, University of Pretoria, 2007) 28.

by state and non-state entities, prevention of unfair discrimination, harassment and hate speech. This thesis, however, only focuses on three grounds of unfair discrimination (race, gender and sexual orientation), hate speech and harassment.

The thesis covers a discussion of the Equality Courts as a cog of the Equality Act whilst providing specific attention to the section 21(2) remedies of the Court. In conducting the analysis, only desktop research was carried out as the scope and scale of the thesis did not allow interaction with litigants, court officials or other personnel. In relying on the intended method of research, some of the concerns which arose were accessibility to information as not many databases highlight the Equality Court judgments, as well as the extent of the information available as most cases are unreported or settled out-of-court.[49] Being a gap study, a concern which arose for the writer is that the information available is retrospective in nature and illustrate trends rather than the present situation.

### 1.9 Conclusion

The Equality Act serves as a first step in transforming social realities. The Act plays a vital role in affirming South Africa's commitment to equality in a practical fashion. Although significant progress has been made, with some refinement the Act and equality courts, will better achieve its objectives. This thesis supports and enriches the available knowledge about the Equality Act and Equality Courts' remedies. The thesis also provides greater awareness of the social issues which the Equality Act seeks to address.

[49] The South African Human Rights Commission's 2017 Annual Report, for example reveals that whilst 43 cases were reported in 2017, in only 18 were written judgements handed down (see South African Human Rights Commission *Annual Report 2017* (2017). Available at https://www.sahrc.org.za/home/21/files/Annual%20Report%202018.pdf, accessed 08 February 2019.

## CHAPTER TWO: HISTORICAL BACKGROUND

'*Those who do not remember the past are condemned to repeat it*' – George Santayana

### 2.1 Introduction

South Africa has a long and sad history of racial discrimination. Although this history can be traced back to the initial occupation of the Cape by the Dutch colonists in 1652,[50] the rigid and systematic implementation of racial segregation on a nation-wide scale only began following the introduction of apartheid by the National Party government in 1948.[51] The purpose of this chapter is to set out and discuss some of the key features of the apartheid system. This is because the prominent role the right to equality plays in the Constitution can be understood partly as a response to the horrors of apartheid. In addition, the purpose of this chapter is also to briefly set out and discuss the transition from apartheid to democracy.

### 2.2 The birth and growth of apartheid

#### 2.2.1 Introduction

As pointed out above, the system of apartheid was introduced by the National Party after it won the general election in 1948.[52] The system of apartheid was derived from the theoretical ideas developed primarily by Hendrik Verwoerd, who became the Prime Minister in 1958. Verwoerd's ideas were subsequently adopted by the infamous Sauer Commission and then by the National Party itself. It is, consequently, not surprising that Verwoerd is known as the 'architect of apartheid'.[53]

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[50] NL Clark and WH Worger *South Africa: The Rise and Fall of Apartheid* 2ed (2011) 1. The Dutch colonists were able to colonise the Cape as a result of their superior weaponry and advanced infrastructure and instruments. Unfortunately, the Dutch colonists brought preconceived opinions about the indigenous people with them and regarded the indigenous people as 'savage and inferior' (R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 18).

[51] The term 'apartheid' literally means 'apartness' in Afrikaans. See South African History Online 'A history of Apartheid in South Africa'. Available at https://www.sahistory.org.za/article/history-apartheid-south-africa, accessed on 23 October 2019.

[52] E Oliver and W.H Oliver 'The Colonisation of South Africa: A unique case' (2017) 73(3) *HTS Teologiese Studies/ Theological Studies* #. Available at https://doi.org/10.4102/hts.v73i3.4498, accessed on 18 February 2019.

[53] JJ Venter 'H.F. Verwoerd: Foundational aspects of his thought' (1999) 64(4) *Koers* 415.

Verwoerd believed in the innate superiority of Western culture and that white people (both Afrikaans and English speaking) as a single unit had to lead development in South Africa.[54] Such a practice, although inherently racists, did not fit the formal sense of the word.[55] The undertone of racism was astutely disguised in National Party dialogues which emphasised the importance of 'the purity of God-created ethnicity'.[56] Verwoerd, being a trained psychologist, was able to internalise his ideas into the minds of those who followed him.[57]

Under his leadership, 'apartheid' was run as a policy of 'separate development'.[58] His philosophy operated on the pretence that a person ought to be engaged in the upliftment of his/her own ethnic group. Thereafter, the more developed (whites) would influence the less developed (people of colour) through political and economic interaction.[59] Apartheid was based in four essential ideas:

- First, all South Africans were classified as white, black, coloured or Asian (Indian).
- Second, those South Africans who were classified as white were regarded as civilised and superior and thus were entitled to have absolute control over the state.
- Third, white interests prevailed over other races' interests and the state was not obligated to provide equal facilities for subordinate races.
- Fourth, the white racial group, comprised of both the Afrikaans- and English-speaking whites, was viewed as a single unit. This differed from the stance taken on the Africans who were sub-divided into ten distinct nations.[60]

In order to achieve these ideals, the National Party government passed tens of thousands of laws.[61] For the sake of convenience, these laws have been divided loosely into two broad categories, namely those that established and promoted so-called 'grand apartheid' and those that established and promoted 'petty apartheid'. Grand apartheid was aimed at segregating South Africans on a political and territorial basis by dividing the surface area of the country into geographically separate racial zones each with its own political authority. The idea was

[54] Ibid.
[55] R Ross *A concise history of South Africa* 2ed (2008) 124.
[56] Ibid.
[57] R Ross *A concise history of South Africa* 2ed (2008) 125.
[58] JJ Venter 'H.F. Verwoerd: Foundational aspects of his thought' (1999) 64(4) *Koers* 417.
[59] Ibid.
[60] L Thompson *A History of South Africa: Revised Edition* (2000) 190.
[61] NL Clark and WH Worger *South Africa: The Rise and Fall of Apartheid* 2ed (2011) 48.

that these separate racial zones would eventually become independent states.[62] Petty apartheid was aimed at segregating South Africans in their day-to-day lives by creating separate racially based personal, recreational and social facilities and institutions.[63]

### 2.2.2 Grand apartheid

Although the creation of separate and racially based geographical zones may be traced back to the pre-apartheid Black Land Acts of 1913[64] and 1936,[65] the political and territorial segregation of black and white South Africans intensified following the introduction of apartheid. Among the most notorious measures that were passed to promote grand apartheid were the following:

- the Population Registration Act;[66]
- the Black Authorities Act;[67]
- the Promotion of Black Self-Government Act;[68] and
- the Group Areas Act.[69]

The Population Registration Act required every South African to be classified and registered from birth in accordance with the racial classifications created by the Act. Initially, the Act created three different racial classifications, namely black, white and coloured. Later, Asian (Indian) was added as a fourth classification. The Act was regarded as one of the pillars of apartheid. This is because the classifications created by it underpinned almost every subsequent apartheid statute.

The Black Authorities Act provide for separate political structures for black South Africans by establishing traditional authorities for each ethnic group in the areas set aside by the Land Acts. It thus laid the basis for the policy of separate development. This Act was later supplemented by the Promotion of Black Self-Government Act which established a process

[62] R Ross *A concise history of South Africa* 2ed (2008) 126.
[63] Ibid.
[64] Black Land Act 27 of 1913.
[65] Development Trust and Land Act 18 of 1936
[66] 30 of 1950
[67] 68 of 1951.
[68] 46 of 1959.
[69] 41 of 1950. This Act was repealed and replaced by the Group Area Act 77 of 1957 which in turn was repealed and replaced by the Group Areas Act 36 of 1966.

in terms of which each ethnic area could be transformed in an independent nation. Black South Africans would then exercise their civil and political rights in these nations and not in the rest of South Africa, where whites would reign supreme.

The Group Areas Act was aimed at establishing segregated residential areas in urban areas for each race group and at controlling the acquisition, occupation and use of these areas. The designation of land as a group area set aside for a particular race group implied that a person falling outside that race group was prohibited from owning, occupying or using land in that area for any purpose (at least without a permit). It was practically impossible (because of registration requirements) to acquire ownership of land in contravention of this Act.

### 2.2.3 Petty apartheid

Once the mechanisms of racial classification were in place, an extensive body of legislation[70] was implemented to promote petty apartheid. These measures included:

- the Prohibition of Mixed Marriages Act,[71] which prohibited inter-racial marriages between whites and all other race groups;
- the Immorality Act,[72] which prohibited inter-racial sex between whites and all other race groups;
- the Reservation of Separate Amenities Act,[73] which directed that all races would have separate amenities (parks, public toilets, benches, etc.); and
- the Bantu Education Act[74] and Extension of University Education Act,[75] which worked together to exclude blacks from the national education scheme and provided a separate body to control the provision of educational services. This resulted in fewer resources, inequalities in state subsidies and the eventual closure of many black schools.[76]

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[70] See generally M Horrell 'Legislation and race relations: a summary of the main South African laws which affect race relations' (1971). Available at https://www.sahistory.org.za/archive/legislation-and-race-relations-a-summary-of-the-main-south-african-laws-which-affect-race-relations, accessed on 18 February 2019.
[71] Act 55 of 1949.
[72] Act 21 of 1950.
[73] Act 49 of 1953.
[74] Act 47 of 1953. This Act is described as being one of the most despised measures of the apartheid government as it set a clear limit on black aspirations. It also affirmed the government's commitment to stifling the black community as it presented black education as a privilege whilst white education was compulsory (see S Dubow *Apartheid 1948-1994* (2014) 118).
[75] Act 45 of 1959.
[76] White schools were given 16 times as much money for teacher salaries and supplies.

### 2.2.4 Other forms of discrimination

During apartheid, gender discrimination in South Africa was also rife due to deeply rooted ethnic traditions and cultures which perceive women as inferior to men. As Meer has stated, while gender oppression might not have been an integral part of apartheid, the system confirmed these values and integrated them into its legal system.[77] Evidence of gender inequalities are present from the debates of the 1980s which arose from the struggle for female equality and criticised them as possibly interrupting the struggle to end apartheid.[78] Many of the misogynistic beliefs of the time stemmed from what the colonisers and eventually the National Party government mistakenly believed Christianity stood for.[79]

Another ground of oppression was homosexuality. The LGBTQIAP+ community has been described as being 'forgotten during the apartheid era'.[80] During the apartheid era gay men, lesbian women and other sexual minorities were categorised as criminals and rejected by society as outcasts and perverts.[81] The condemnation of homosexuality existed as a consequence of radical religious beliefs.[82] As Weeks points out, the provisions of the Immorality Act contained broad restrictions which included sexual acts associated with homosexuality.[83] Given that apartheid outlawed anything that did not fall under the narrow criteria of 'Boer culture', there is no doubt that Weeks is correct.[84]

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[77] F Meer 'The Future for Women' (1992). Available at https://unesdoc.unesco.org/ark:/48223/pf0000090693/PDF/090699engo.pdf.multi.nameddest=90693, accessed on 18 February 2019.
[78] S Hutson 'Gender Oppression and Discrimination in South Africa' (2007). Available at https://dc.cod.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1026&context=essai, accessed on 18 February 2019.
[79] D Pushparagavan 'The History of LGBT legislation' (2014). Available at https://www.sahistory.org.za/article/history-lgbt-legislation, accessed on 19 February 2019.
[80] Ibid.
[81] H de Ru 'A Historical Perspective on the Recognition of Same-Sex Unions in South Africa' (2013) 19(2) *Fundamina* 226. An example of the degree of prejudice is prevalent from the practice of gay white men being accused of being child molesters and subsequently arrested.
[82] See M Gevisser and E Cameron *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) for a detailed account of personal experiences of the LGBTQIAP community during apartheid.
[83] See generally J Weeks *Sex, Politics and Society: The Regulation of Sexuality Since 1800* 2ed (1981). The Act refered to 'persons' having sex with other 'persons'. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).
[84] Boer Culture was based on Dutch ideals which mimic church teachings. Pushparagavan supports this interpretation in his article by quoting from Leviticus 18:22 'do not lie with a man as one lies with a woman; that is detestable'. See also NH Carrim *Human rights and the construction of identities in South African education* (Unpublished Thesis, University of Witwatersrand, 2007).

### 2.2.5 Consequences of apartheid

From the legislative sphere it is clear that apartheid encouraged not just separation based on a false sense of superiority of whites, but also inequality at the expense of blacks and other people of colour. Whites were given privileges whilst blacks and other race groups lived in constant fear and oppression. Apartheid augmented inequality, not only by institutionalising racism, but also by perpetuating prejudice in other areas including sexism and heterosexism.[85]

The consequences of apartheid were far-reaching and still exist today. The complete disregard for black lives saw overcrowding in the homelands, the breakdown of families, senseless violence and the death of many people. The legacy of an economy built on un-educated and under-paid workers has resulted in grinding poverty which means South Africa lacks both skilled labourers and a large consumer class.[86] Apartheid left South African society divided and in need of measures to address the legacy of the past injustice.[87]

## 2.3 The demise of apartheid

### 2.3.1 Introduction

From the late 1970s the apartheid system began to break down. The National Party government could no longer keep up with economic demands and changing social circumstances whilst still retaining a monopoly of political power.[88] A combination of internal and external pressures placed immense pressure on the system.

By this point in time the economy had come to be dominated by the manufacturing sector and the National Party government was forced to acknowledge the growing incompatibility between its segregation policies and capitalism.[89] Complex manufacturing technologies required a skilled and semi-skilled workforce while apartheid essentially prevented the

[85] NH Carrim *Human rights and the construction of identities in South African education* (Unpublished Thesis, University of Witwatersrand, 2007) 101.
[86] NL Clark and WH Worger *South Africa: the rise and fall of apartheid* (2004) 117.
[87] R Kruger Racism and law: Implementing the right to equality in selected South African equality courts (Unpublished Thesis, Rhodes University, 2008) 55.
[88] N Worden *The making of modern South Africa* 4ed (2007) 134.
[89] Ibid.

majority of the country's people from acquiring the necessary skills. Although these skills could be found among whites, white men were conscripted into the South African Defence Force for ever increasing periods of time. This left the country with unskilled labourers who were unable to serve the needs of capitalism.

Further pressure on the system emerged from the introduction of the Bantu Homelands Citizenship Act[90] which provided that all Africans were to be given citizenship in self-governing Bantustans.[91] To implement these laws, the police force was frequently required to evict and forcibly remove people from their homes in 'white' South Africa and relocate them to designated sites in their particular Bantustan. Whilst the government viewed this as a necessary measure, the white population was less enthusiastic. A reported 50 percent of whites expressed explicit opposition to this change, whilst 40 percent were critical of the fact that too many resources were tied into establishing and developing the Bantustans.[92] By 1982, the National Party had started to lose the support of an increasing number of whites.[93]

Whilst the morale of the white population was low, black resistance was growing in numbers and strength. The 1960s and 1970s saw the imprisonment of many of the prominent black activists. This show of force radicalised further opposition from black people, especially the semi-skilled youth who began to promote the Black Consciousness Movement.[94] The Movement started from members of liberation organisations[95] and sought to promote racial awareness and solidarity amongst black people who would then fight for freedom.[96] In 1983 black frustrations boiled over into unremitting opposition against the National Party's plans for a 'constitutional reform'.[97] Clark suggests that this backlash became the beginning of the 'final downfall of apartheid'.[98]

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[90] Act 26 of 1970.
[91] LM Eades *The End of Apartheid in South Africa* (1999) 77.
[92] Ibid.
[93] Andries Treurnicht was a former member of the National Party who formed the Conservative Party to oppose the government's so-called 'power-sharing'. Many white people aligned themselves with his objectives and thus support for the National Party was lost making the government more susceptible to the political pressure of the time. See N Worden *The making of modern South Africa* 4ed (2007) 135.
[94] NL Clark and WH Worger *South Africa: The Rise and Fall of Apartheid* 2ed (2011) 68.
[95] Such as the African National Congress, the Pan Africanist Congress, the United Democratic Front, and the National Forum Committee. In 1959 Robert Sobukwe broke away from the ANC to form the PAC. Many of Sobukwe's ideas influenced the Black Consciousness Movement which developed in South Africa in the 1970s.
[96] See generally RH Davis *Apartheid Unravels* (1991) for a more detailed recollection of the features of the Black Consciousness Movement.
[97] NL Clark and WH Worger *South Africa: The Rise and Fall of Apartheid* 2ed (2011) 68.
[98] Ibid.

The increased domestic pressure gained international attention and lead to economic sanctions against South Africa. This had a significant effect as South Africa's economy was reliant to a large degree on foreign capital. The country was also exceptionally vulnerable as it required imports of heavy machinery and natural oil. A spiral of decline emerged from the political unrest which was now fueled further by international condemnation. The United Nations (UN) consistently criticized South Africa's political system and demanded political reform. The General Assembly passed a resolution which required member states to break diplomatic relations, close ports to South African ships and boycott South African trade.[99] This shadow of disapproval grew larger and darker when the Security Council imposed an arms embargo on the country after declaring the activities and policies of the National Party government to be a danger to international peace and security.

In addition to pressure from the UN, further measures were taken by the international community. These included the following:

- Approximately two hundred US companies disinvested from South Africa between 1984 and 1989.
- Several European countries suspended direct investments with South Africa in 1985 and 1986.
- Certain European countries took further measures, such as banning exports, tightening visa requirements, and ending sporting ties.
- International banks imposed financial sanctions by refusing to grant new loans and by binding South Africa to stricter repayment terms on existing loans.[100]

In addition to economic sanctions, foreign countries began to report more frequently and televise the violence within the country as a psychological measure to curb interest in South Africa and, in so doing, they also provided a platform for the voice of the Black Consciousness Movement.

[99] LM Eades *The End of Apartheid in South Africa* (1999) 84.
[100] Ibid.

### 2.3.2 The end of apartheid

Both internal and international pressure took a toll on the National Party government. By the late 1980s many of the apartheid laws were repealed. In 1989, the National Party elected FW de Klerk as their new leader. One major step taken by him was lifting the ban on the liberation organisations. This was shortly followed by the release of Nelson Mandela from prison which marked the beginning of negotiations between the National Party and the liberation organisations which spanned two years. The outcome of these negotiations was a national vote for political power.

The end of apartheid did not come easily. The National Party dedicated extensive resources to disrupt support for the liberation organisations. In March 1990 police opened fire on a crowd of 50 000 ANC supporters.[101] From this point onwards, white supremacist groups began orchestrating shootings and bombings at mosques, synagogues, members of the ANC, and anti-apartheid newspapers. This was stimulated by de Klerk's parliamentary opposition to Mandela's ideas in which he suggested that Mandela's ideas would suppress minorities.[102]

Violence continued right up to the first democratic elections in April 1994. South Africa nevertheless elected its first democratic government under the presidency of Nelson Mandela. From these elections, came the interim Constitution[103] as the fundamental law of South Africa until it was superseded by the Constitution[104] on 4 February 1997.

## 2.4 The interim Constitution

The post-apartheid era was ushered in with the introduction of the interim Constitution which marked the end of the apartheid era, at least from a constitutional and legal perspective.[105] This was not seen as a final Constitution but rather as an interim measure

[101] This became known as the Sebokeng massacre in which 11 lives were lost and 400 people were injured. NL Clark and WH Worger *South Africa: The Rise and Fall of Apartheid* 2ed (2011) 113.
[102] Ibid.
[103] Constitution of the Republic of South Africa, Act 200 of 1993.
[104] Constitution of the Republic of South Africa, 1996.
[105] See generally FT Endoh 'Democratic constitutionalism in post-apartheid South Africa: the interim Constitution revisited' (2015) 7(1) *Africa Review*, 67-79. Available at https://doi.org/10.1080/09744053.2014.990769, accessed on 26 February 2019.

while the Constitutional Assembly negotiated and drafted a final Constitution.[106] It is trite that a Constitution should be a people's document.[107] This means that the document should give effect to the will of people and act as both a decisive influence for good and a general moral compass in society. The interim Constitution was a long and detailed document of 222 printed pages with wide-ranging provisions which borrowed from the United States as well as parts of Europe.[108] The document was rigid. Any proposed amendments required a majority vote of two-thirds of attendees at a joint sitting of both houses of Parliament.[109] This was aimed at protecting the supremacy of the Constitution which would be undermined if left vulnerable to the ordinary legislative process.

South Africa utilised the interim Constitution as the first-leg of a two-stage process in the pursuit of democracy. In the preamble, the goal was set to create an order in which 'all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. As Mureinik famously observed, the commencement of the new constitutional era in South Africa, with a supreme Constitution and an entrenched Bill of Rights, represented a bridge from a culture of authority towards a culture of justification.[110]

The Bill of Rights was a unique and far-reaching cog which afforded every person fundamental rights, including the right to be treated equally. This was in sharp contrast to the institutionalised discrimination of South Africa's past. The ideas of the interim Constitution are central to a democracy as they strengthen the position of the so-called minority groups whilst maintaining the ideal of a constitutional state.[111] The right to equality was guaranteed in section 8 of the interim Constitution.[112] Section 8 is similar to the provisions of section 9 of

[106] South African History online *Drafting of the Final Constitution* (2017). Available at https://www.sahistory.org.za/article/drafting-final-constitution#endnote-12, accessed on 05 March 2019.
[107] D Basson *South Africa's interim Constitution: Text and Notes* (1994) 19.
[108] L Thompson *A History of South Africa: Revised Edition* (2000) 257.
[109] Ibid.
[110] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1993) 10 *SAJHR* 32.
[111] Ibid.
[112] This section provided as follows:
'(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

the Constitution in outline, scope and structure. However, the provisions in the Constitution do appear more refined.[113]

## 2.5 The Constitution

### 2.5.1 Drafting of the Constitution

The drafting of the Constitution can be divided into three distinct time periods:[114]

(a) the May 1994 negotiations leading up to the May 1996 deadline for finalising the Constitution;[115]

(b) the first Constitutional Court certification process (started in May 1996 and ending on 6 September 1996 when the Court delivered judgment refusing to certify the new text); and

(c) the second round of negotiations in late September 1996 and early October 1996, leading to certification of the amended text by the Constitutional Court on 4 December 1996.[116]

Chapter 5 of the interim Constitution directed the drafting of the Constitution. On 8 May 1996 the Constitutional Assembly completed a draft of the Constitution which consisted of most of the interim Constitution provisions, but there were differences which made them controversial to each other.[117] The structure of government was immediately impacted even

(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 freedom.
(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
(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'.

[113] See below.

[114] J Sarkin 'The Drafting of South Africa's Final Constitution from a Human-Rights Perspective' (1999) 47(1) *The American Journal of Comparative Law* 67 69.

[115] This phase closed on 8th May 1996 (the day of the adoption ceremony).

[116] See generally J Sarkin 'The Drafting of South Africa's Final Constitution from a Human-Rights Perspective' (1999) 47(1) *The American Journal of Comparative Law* 67-87 for greater detail.

[117] One of the differences was that the Government of National Unity would be replaced by a majoritarian government in the national elections. The Final constitution was to extinguish power sharing and the party who received majority vote would then appoint cabinet members and other officials without having to consult with the National Assembly minority parties.

before the Constitution was approved or implemented.[118] It was agreed that the draft Constitution would thus have to be scrutinised by the Constitutional Court which referred it back to the Constitutional Assembly for revision on certain aspects as it failed to incorporate all 34 Constitutional Principles of the interim Constitution.[119]

The revised Constitution came into force on 4 February 1997. Given South Africa's history of oppression and human rights violations, it was essential that the final Constitution offered maximum protection to human rights. The Bill of Rights in the Constitution thus, guided by international intervention, includes and protects more rights than the Bill of Rights in the interim Constitution.

### 2.5.2 International considerations

Prior to the interim Constitution the protection of human rights in South Africa had not received the consideration it enjoyed generally in the international community. One possible reason for this was that South Africa followed the principle of parliamentary sovereignty which allowed Parliament to pass legislation that violated human rights and was contrary to international human rights standards.[120] With the transition to democracy, international law came to the forefront in the interpretation of human rights for two reasons:

- first, the Bill of Rights contains provisions similar to international law which holds extensive literature on the interpretation of these rights, and
- second, courts are obligated[121] by section 39(1)(b) of the Constitution[122] to consider international law when interpreting the Bill of Rights. Moreover, South Africa is

[118] The indicators of this was when the NP announced that they would resign from the Government of National Unity but still tried to assure their supporters that they would maintain an active role in the National Assembly and in politics. See South African History online *Drafting of the Final Constitution* (2017). Available at https://www.sahistory.org.za/article/drafting-final-constitution#endnote-12, accessed on 05 March 2019.
[119] Ibid.
[120] BV Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* (Unpublished Thesis, Stellenbosch University, 2010) 14.
[121] Section 35(1) of Chapter 3 of the Interim Constitution provides that in interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law. This was later replaced by section 39(1)(b) of the Final Constitution.
[122] Section 39(1)(b) of the Final Constitution refers to courts, tribunals and forums as obligated to consider international when interpreting any provision in the bill of rights. The reason for this approach is that, in drafting the bill of rights, lawyers and politicians had to consult international and foreign law in order to draft the bill of rights. See generally AJ Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1997).

bound by international agreements signed and ratified as these impose obligations on the country which have to be fulfilled.

The Bill of Rights in both the interim Constitution and the Constitution was drafted to align with specific international human rights instruments. Strong reliance was placed on the Universal Declaration of Human Rights (UDHR),[123] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[124] the International Covenant on Civil and Political Rights (ICCPR), [125] the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples Rights (ACHPR).[126] Whilst a detailed analysis of these instruments falls beyond the scope of this thesis, it is necessary to note that the first three instruments strive to protect individual human rights and are referred to as the international bill of rights. The incorporation of these instruments in the Constitution is evident from a number of provisions which not only seek to echo the international approach in protecting individual human rights, but also specifically aim to correct the injustices and oppression of the past by providing constitutional mechanisms with which to promote equality and in so doing prevent unfair discrimination.

### 2.5.3 Constitutional provisions relating to equality and non-discrimination

The preamble of the Constitution recognises the injustices of the past and guarantees the protection and promotion of human rights to the benefit of all South Africans. In order to uphold this together with the international principles and obligations, various provisions have been enacted.[127] The most important of these is the right to equality guaranteed in section 9 of the Constitution.

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[123] Adopted by the General Assembly of the United Nations, Resolution 217(III) of 10 December 1948, UN doc A/810.
[124] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.
[125] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.
[126] Kruger refers to the African Charter on Human and People's rights as being 'the most important human rights document on the continent'. R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 79. See also D Prevost 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) 24 *South African Yearbook of International Law* 211-23 for a more detailed discussion about the adoption of these conventions.
[127] See generally sections 7, 36 and 39 of the Constitution.

Section 9 has two key goals: The first is to promote equality and the equal protection of the law and the second is to prohibit unfair discrimination by both the state and private persons. The first goal is articulated in section 9(1) of the Constitution and the second in sections 9(3) and 9(4). Section 9(3) prohibits unfair discrimination by the state and thus applies vertically, while section 9(4) prohibits unfair discrimination by private persons and thus applies horizontally. Section 9(4) also provides that national legislation must be passed 'to prevent or prohibit unfair discrimination'.

The promotion of equality guaranteed in section 9(1) is supplemented by section 9(2) of the Constitution which requires the state to take positive steps to address the deep social and economic inequalities that exist in South Africa and which were brought about largely as a result of racial discrimination during the colonial and apartheid eras. As the Constitutional Court stated in *Minister of Finance v Van Heerden*,[128] restitutionary measures are mandated by section 9(2) as part of a 'credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'. Restitutionary measures, therefore, are 'a vital component of our transformative constitutional order'.[129]

In order to enhance the prohibition against unfair discrimination, section 9(5) of the Constitution provides that discrimination on any of the grounds expressly listed in section 9(3) is automatically presumed to be unfair, 'unless it is established that the discrimination is fair'. The practical effect of this provision is that it relieves the victim of the burden of proving that discrimination on a listed ground is also unfair. Instead, it placed the burden of doing so on the perpetrator.

The significance of the right to equality is further highlighted in section 37 of the Constitution which protects the section 9 right as non-derogable even at times of emergency. Whilst the section allows for an Act of Parliament to limit the operation of fundamental rights during a state of emergency, it specifically provides that such an Act may not allow for unfair discrimination on the basis of race, colour, ethnic or social origin, sex, religion or language.

[128] *Minister of Finance v Van Heerden* 20004 (6) SA 121 (CC) at para 25.
[129] See *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) at para 1.

The equality right is also subject to the limitations clause contained in section 36 of the Constitution which states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
    (a) the nature of the right;
    (b) the importance of the purpose of the limitation;
    (c) the nature and extent of the limitation;
    (d) the relation between the limitation and its purpose; and
    (e) less restrictive means to achieve the purpose.

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

The formulation of section 36 provides a commendable effort to create a fair test by balancing relevant factors. However, it is important that, in implementation, courts are stricter whenever previously disadvantaged or sensitive groups are negatively affected.[130]

### 2.6 Conclusion

The discussion delivered above indicates that discrimination has deep roots in South Africa. A racist hierarchy, which was reflected in law, was established from the earliest colonial settlement of South Africa. This discrimination spread throughout South Africa and included all areas of life such as sexuality and gender. Inequality and discrimination persevered throughout South Africa transcending decades and breeding an intolerant society. Law was instrumental in this process of institutionalising inequality and discrimination in South Africa. Through the medium of apartheid laws, barriers were created between the white people and those who strayed from the Western, Christian ideals brought by the colonisers. The restrictive laws, however, were inefficient in addressing an ever-changing society whilst still favouring white people. As the system began to breakdown, the promise of a new South Africa emerged.

[130] T Loenen 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13(3) *SAJHR* 413. See also *Brink v Kitshoff* 1996 (4) SA 197 (CC) for a more detailed discussion.

A new and democratic South Africa emerged inheriting a legacy of a racism and division of its population, both in law and society. The new constitutional dispensation is tasked with the challenged to overcome the unequal cleft of South African society. It is trite that law was one of the most vital means by which inequality was entrenched in our society and thus now, in a post-apartheid society, it has the task of addressing and transforming the inequality.

International law provisions aimed at the eradication of discrimination and inequality were established and lend quite nicely to South African law. It provides a standard in respect of equality and non-discrimination which serves as a benchmark for South African law. The constitutional commitment to the attainment of equality and the abolition of unfair discrimination on a variety of grounds mirrors the stance of international law. More significantly, there is congruence between international law standards and the new South African approach in relation to the protection of a person's inherent equal dignity and worth by the equality right.

A summary[131] of the Constitutional provisions in respect of equality and non-discrimination can be presented as follows:

- Equal protection by the law is emphasised as an objective of the Constitution.
- Equality, together with other constitutional values, has to inform the application, interpretation and limitation of all rights.
- The right to equality secures equal protection and benefit of the law and prohibits direct and indirect unfair discrimination by the state and individuals on listed and related grounds.
- Section 9(2) furthermore includes measures designed to enhance the position of previously disadvantaged people in the pursuit of equality.
- The Constitution specifically requires the enactment of legislation to prevent or prohibit unfair discrimination. This legislation has taken the form of the Equality Act which adds meaning to the equality clause as contained in section 9.

[131] See R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 103.

## CHAPTER THREE: THE EQUALITY ACT

'*Men are born equal but they are also born different*.' – Erich Fromm

### 3.1 Introduction

Given South Africa's discriminatory past, it is not surprising that section 9(4) of the Constitution imposed an obligation on Parliament to enact national legislation to prevent or prohibit unfair discrimination. This obligation was fulfilled when Parliament passed the Equality Act. The purpose of this chapter is to set out and discuss the provisions of the Equality Act in the light of the Constitution and in relation to its own objectives. In addition, the purpose of this chapter is also to locate the Equality Act in the current context of South Africa.

### 3.2 The history of the Equality Act

The responsibility for fulfilling the obligation imposed on the state by section 9(4) of the Constitution was initially allocated to the Department of Justice, which adopted an innovative and inclusive procedure for drafting the Equality Act.[132] Instead of carrying out the responsibility of doing so itself, the Department – together with the South African Human Rights Commission – established an Equality Drafting Unit (EDU).[133] The EDU, which was launched in May 1998, was tasked with drafting a detailed framework document before 4 February 2000.[134]

In executing its mandate, the EDU sought to utilise a broad range of resources[135] through the establishment of theme groups and the commissioning of papers on a variety of topics, which allowed input from various groups regarding the framework document.[136] By July 1999, the

[132] Albertyn et al. note that, despite the flaws in the Equality Act, it was drafted with due regard to the constitutional and public significance which it holds (see C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002)).
[133] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 2.
[134] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 150.
[135] Such as researchers, experts, non-governmental organisations, and even individuals.
[136] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 2.

EDU produced and handed over the framework document to a drafting team, appointed by the Minister, who presented a draft bill to Cabinet later that year.[137]

On 25 October 1999, the Cabinet approved bill was published in the *Government Gazette* and introduced in the National Assembly.[138] After it was introduced in the National Assembly, the bill was referred to an *ad hoc* committee appointed by Parliament for detailed consideration. As a part of this process, the *ad* hoc committee was also required to facilitate public participation by inviting the public to submit written and oral comments to it. The *ad hoc* committee was given a deadline of January 2000.[139]

During the process of public participation, the bill was subject to extensive criticism by a broad range of bodies from all sides of the political spectrum.[140] As a result of these criticisms, the *ad hoc* committee, together with the Minister's drafting team and independent experts, reshaped the bill.[141] These changes and revisions, however, did not affect the core substance of the bill and the concept of substantive equality that it sought to promote remained largely unchanged.[142]

The bill was passed by both houses of Parliament at the end of January 2000 and then submitted to the President for his assent and signature. The President assented to the bill on 2 February 2000 and some of its provisions were brought into operation on 1 September 2000.[143] The remaining provisions and especially those relating to the prohibition of unfair discrimination were brought into operation almost three years later on 16 June 2003.[144]

This exposition of the drafting history of the Equality Act illustrates that it was finalised under extreme time-constraints. It is for this reason that the Equality Act is imperfect in

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[137] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 150-151.
[138] The Promotion of Equality and Prevention of Unfair Discrimination Bill [B57-1999] was introduced in terms of GN 2399 of 1999 in GG 20572 of 25 October 1999.
[139] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 2.
[140] Ibid.
[141] SB Gutto *Equality and Non-discrimination: The Political Economy of Law and Law Making* (2001) 21.
[142] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 3.
[143] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 152.
[144] Ibid.

certain aspects.[145] These drafting concerns will be discussed further in the thesis. The account of the drafting history exposes the hopes of the legislature for transformation through the use of the Equality Act. This intention is further present in the Equality Act's objectives.

### 3.3 The aims and objects of the Equality Act

The aims and objects of the Equality Act are set out in the preamble and the objects clause. The preamble, which refers explicitly to the transformatory goals which the Equality Act seeks to achieve,[146] states, *inter alia*, that:

'[t]he consolidation of democracy in our country requires 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;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;

…

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'

The transformatory goals referred to in the preamble are echoed in the objects clause. This clause states that the objects of the Equality Act are:

'(a) to enact legislation required by section 9 of the Constitution:
(b) to give effect to the letter and spirit of the Constitution. In particular:
    (i) the equal enjoyment of all rights and freedoms by every person:
    (ii) the promotion of equality;

[145] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 3.
[146] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 152.

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair:

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(g) to set out measures to advance persons disadvantaged by unfair discrimination:

(h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.'[147]

In light of these provisions, Kok contends that the purpose of the Equality Act is to stand as an avenue for the wishes of Parliament in order to send a strong moral message that it views discrimination as a social evil.[148] He then elaborates on this statement by arguing that the legislature may wish to reach into the hearts and minds of its subjects in order to affect fundamental changes in basic social relationships through the enactment of the Equality Act.[149]

In support of his argument, Kok draws on the work of Gutto who defines 'social legislation' as 'laws directed at normalising the abnormalities of the past and/or extending the boundaries of policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are reduced to a minimum and democratic values permeate all social relations'.[150] Albertyn et al., however, argue that the Equality Act merely

[147] Section 2.
[148] A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or Legislature driven Societal Transformation?' (2008) 19 *Stell LR* 124.
[149] Ibid.
[150] SB Gutto *Equality and Non-discrimination: The Political Economy of Law and Law Making* (2001) 8. Kok distinguishes between anti-discrimination, social and transformative legislation. He then draws uses each of these terms interchangeably to refer to the Equality Act as (he states) all these 'types' of transformation may be identified from various provisions in the Act.

seeks to provide a legal mechanism with which to address and remedy unfair discrimination.[151]

### 3.4 The two pillars of the Equality Act

As we have already seen the transformative goals of the Equality Act rest on two pillars, first, the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment and, second, the promotion of equality. The provisions regulating the first pillar are set out in Chapter Two of the Equality Act and the provisions regulating the second pillar are set out in Chapter Five of the Equality Act.

Chapter Two is divided into seven sections. The first four sections prohibit unfair discrimination both generally (section 6) and on the specified grounds of race, gender and disability (sections 7, 8 and 9 respectively). The remaining three sections prohibit hate speech, harassment and the dissemination and publication of unfair discriminatory information that unfairly discriminates (sections 10, 11 and 12 respectively).

The prohibition of unfair discrimination will be discussed first, followed by the prohibition of hate speech and harassment.

### 3.5 The general prohibition of unfair discrimination

#### 3.5.1 Introduction

The general prohibition of unfair discrimination is regulated by section 6 of the Equality Act and simply provides that neither the state nor any private person may unfairly discriminate against any other person.

This provision mirrors those set out in section 9(3) and section 9(4) of the Constitution. In both instances the prohibition applies to the state and individuals and only prohibits *unfair* discrimination. It is, therefore, important to distinguish between these two concepts.

[151] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 3.

### 3.5.2 Discrimination

Discrimination is defined in section 1 of the Equality Act as:

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

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'.

The 'prohibited grounds' referred to in paragraph (b) are also defined in section 1. This section provides that the prohibited grounds are:

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

(b) any other ground where discrimination based on that other ground:

  (i) causes or perpetuates systemic disadvantage;

  (ii) undermines human dignity; or

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

Although the grounds listed under the Equality Act are wider than those listed in the Constitution, given the purpose of the Equality Act, it is submitted that the extended list and open-ended provisions are necessary to afford wider protection to victims of unfair discrimination and respond to changes in society without the delays usually associated with amending legislation.

As Albertyn et al point out, the concept of discrimination may be viewed in two different ways. The one view, they argue, places emphasis on 'different treatment'.[152] Under this approach, any different treatment on any of the prohibited grounds would be discrimination. Thus it is wrong to use 'arbitrary characteristics'[153] to treat people differently. The alternate view, however, places emphasis on the 'harmful impact'.[154] In terms of this approach the test

[152] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 32.
[153] Ibid. Such characteristics would include race, gender or sexual orientation. Albertyn et al. highlight that such a view would also regard affirmative action as discrimination.
[154] Ibid.

would be *whether the different treatment has resulted in harm or prejudice*. Different treatment can be good in the same way that treating people equally should be discriminatory if it results in a harmful result. The laws of South Africa are egalitarian in nature[155] and thus the second view is adopted by and necessary to the interpretation of the Equality Act.

### 3.5.3 Unfair discrimination

Unlike discrimination, the Equality Act does not define unfair discrimination. It does, however, regulate the manner in which fairness and unfairness may be determined.

Section 14(1) of the Equality Act begins in this respect by providing that discrimination will not be unfair if it is 'designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons'. In other words, discrimination is not unfair if it amounts to affirmative action.

Section 14(2) then goes on to state that when it comes to determining whether the respondent has proved that discrimination is fair, the following criteria must be taken into account: first, the context; second, the factors referred to in section 14(3); and third, 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'.

Finally, section 14(3) lists the factors referred to in paragraph (b) above. These factors include:

'(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;

[155] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). In this judgment, the Constitutional Court held that '[t]he South African Constitution is primarily and emphatically an egalitarian Constitution… in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle' (at para 74).

(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'.[156]

These provisions are loosely based on the approach adopted by the Constitutional Court in *Harksen v Lane NO*,[157] together with the reasonableness considerations of section 36 of the Constitution.[158] It is important to note that not all of the criteria mentioned in section 14 of the Equality Act are applicable in every cases, nor do those that are relevant necessarily bear the same weight in the enquiry. Each case has to be decided on its own particular facts and circumstances.[159]

The 'context' referred to in section 14(2)(a) of the Equality Act includes the existing South African social, economic and political circumstances when the specific case is heard.[160] This is a fairly established approach in South Africa, and one that has been endorsed by the Constitutional Court on many occasions.[161]

Kok criticises section 14(2)(c) as being a 'clumsy attempt by the drafters of the Act … to distinguish between 'discrimination' and 'mere economic differentiation''.[162] Further criticisms arise from the case of *MEC for Education: Kwazulu-Natal v Pillay*,[163] where O'Regan J noted that 'this poorly drafted section is … not particularly helpful to a court faced with the determination of what constitutes fairness'. It is submitted that this subsection is vague and subtracts from the protection offered by the Constitution in section 9.

[156] Section 14(3).
[157] 1998 (1) SA 300 (CC) at para 51.
[158] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 158.
[159] *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (Eq) at para 25.
[160] AJ Kok *A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Unpublished Thesis, University of Pretoria, 2007) 148.
[161] See generally *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 41.
[162] AJ Kok *A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Unpublished Thesis, University of Pretoria, 2007) 148.
[163] 2008 (1) SA 474 (CC).

Most of the criteria set out in section 14 are similar to those found in *Harksen v Lane NO*. The *Harksen* analysis established that to determine fairness, one must place the value of human dignity at the centre of the analysis and weigh it in relation to a determination of the impact of the discrimination on the complainant.[164] A similar approach is adopted by the courts in applying the criteria listed in section 14 of the Equality Act.[165] It is submitted that despite the explicit list of criteria to be considered, the test remains relatively indeterminate.[166] Nevertheless, the courts are tasked with applying this section as it stands in a way that is 'constitutionally defensible'[167].

Finally, it is important to note that the question of onus is dealt with in section 13 of the Equality Act. According to this section, where a complainant makes out a prima facie case of discrimination, the respondent must either prove that the discrimination did not take place or that the conduct does not relate to one or more of the prohibited grounds.[168] Section 13(2) further provides:

> 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.'[169]

### 3.6 The prohibition of unfair discrimination on the ground of race

The prohibition of unfair discrimination on the ground of race is regulated by section 7 of the Equality Act. Section 7 provides in this respect that:

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[164] *Harksen v Lane NO* 2008 (1) SA 474 (CC) at paras 53-54.
[165] It is unnecessary to delve further into this analysis for the purposes of this thesis as the factors have been fairly well explained by previous authors over the past two decades of the existence of the Act. For this discussion see generally AJ Kok *A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Unpublished Thesis, University of Pretoria, 2007).
[166] See generally AJ Kok *A* socio-*legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Unpublished Thesis, University of Pretoria, 2007) and Loenen, T 'The Equality Right in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 *SAJHR*.
[167] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 70.
[168] Section 13(1) of the Equality Act.
[169] For a summary of this procedure see C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 52.

'Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including:

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.'

Given that South Africa has a long history of racial discrimination, it is not surprising that the Equality Act does not simply prohibit unfair discrimination on the basis of race, but goes much further and prohibits several of the diverse ways in which racial discrimination manifests itself in society. By placing greater emphasis on racial discrimination and outlining various actions that are prohibited, the Equality Act provides additional protection insofar as racial discrimination is concerned.

While the decision to prohibit some of the ways in which racial discrimination manifests itself is welcome, a number of criticisms may be levelled against section 7 of the Equality Act. One of these is that section 7(a) appears to be misplaced and should rather have been included under section 10 which prohibits hate speech.[170] In addition, it appears to prohibit racially based hate speech more expansively than section 16(2) of the Constitution does.[171]

Academic authors are in disagreement as to the most appropriate way to interpret and implement section 7(a). Albertyn et al believe that section 7(a) is a duplication of section 10 and could be regarded as an alternative vehicle for regulating racist hate speech.[172] It is

[170] A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' (2001) 9 *TSAR* 297. See also GS Vogt 'Non-discrimination on the Grounds of Race in South Africa – With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) 45 *JAL* 196-209.

[171] J Botha & A Govindjee 'The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2016) 32(2) *SAJHR* 303.

[172] C Albertyn, B Goldblaat & C Roederer (eds*) Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (2001) 58. See also a similar discussion in A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' (2001) 9 *TSAR* 297, and R Kruger

submitted, however, that this position is problematic as it would amount to an inconsistency in application because section 15 of the Equality Act exempts hate speech from a determination of fairness.

It is further submitted that the provision has a valuable role to play and thus should be interpreted to mean that the dissemination of ideas of racial superiority or hatred is prohibited if its intended effect is to incite racial discrimination or violence against a target group of persons.[173] This approach enables a proper implementation of the provisions whilst ensuring that the Equality Act is interpreted in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination.[174]

The remaining provisions of sections 7 are fairly straight forward as they all relate to the imposition of disadvantage or the withholding of an advantage based on race which operates in line with the Constitutional Court's definition of 'discrimination'.[175] It is submitted that section 7 plays an educative role in order to assist the Equality Courts.

Despite the extensive prohibitions of the Constitution and the Equality Act, racism is still rife in South Africa. In 2018, the South African Human Right Commission received 486 'race-related' complaints which amounted to almost 10% of complaints about rights violations.[176] In 2017, a report by the Solidarity Research Institute analysed and commented on various cases of hate speech and racism that attracted media attention.[177] In its finding, the Institute noticed a rising trend of 'systemic racial discrimination against white people' which is 'creating a climate where it is becoming dangerously common to apply racial discrimination against minorities'.[178] Apart from the instances of racism covered in the cases themselves, a

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*Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 159-163.

[173] See J Botha & A Govindjee 'The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2016) 32(2) *SAJHR* 303 for support of this position.

[174] Ibid.

[175] A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' (2001) 9 *TSAR* 298.

[176] J Kane-Berman 'The SAHRC and race'. Available at https://www.politicsweb.co.za/opinion/the-sahrc-and-race, accessed on 10 May 2019.

[177] Many of these cases are discussed in great detail in Chapter 5. It is, therefore, unnecessary to duplicate such discussion. To access the cases and discussion see E Brink and C Mulder 'How the response to black and white racism differs' (4 April 2017). Available at https://www.politicsweb.co.za/documents/how-the-response-to-black-and-white-racism-differs, accessed on 10 May 2019.

[178] E Brink and C Mulder 'How the response to black and white racism differs' (4 April 2017). Available at https://www.politicsweb.co.za/documents/how-the-response-to-black-and-white-racism-differs, accessed on 10 May 2019.

further hidden discrimination revealed itself from the study. In its conclusion, the Institute remarked that 'the fact that open incitement to slaughtering white people did not remotely receive the same coverage as a racially driven description of black people, speaks volumes'. It is submitted that the trend observed by the Institute is as a consequence of a misdirected and emphatic focus solely on racism against the backdrop of the history of the country. It is further submitted that a more holistic and egalitarian view would be to not only consider the history of the country but also the objectives of the equality legislation. The trend identified inevitably results in more polarisation and racial separation and thus it is necessary that all instances of racism be dealt with equal and consistent fervor.[179]

### 3.7 The prohibition of unfair discrimination on the ground of gender

The prohibition of unfair discrimination on the ground of gender is regulated by section 8 of the Equality Act. Section 8 provides in this respect that:

'Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including:

(a) gender-based violence;
(b) female genital mutilation;
(c) the system of preventing women from inheriting family property;
(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
(f) discrimination on the ground of pregnancy;
(g) limiting women's access to social services or benefits, such as health, education and social security;
(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
(i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.'

Like racial discrimination, South Africa also has a long history of gender discrimination. Therefore, it is not surprising that the Equality Act does not simply prohibit unfair discrimination on the basis of gender, but goes much further and prohibits several of the diverse ways in which gender discrimination manifest itself in society. It thus provides

[179] Ibid.

additional protection in relation to gender discrimination. The provisions of section 8(a)-(i) are fairly well understood in the context of South Africa and it is unnecessary to re-evaluate them in-depth.[180] It is, however, submitted that the provisions of section 8(a) and (b) fit uncomfortably into unfair discrimination and would be better dealt with as forms of harassment.

It is necessary to highlight the emphasis the drafters place on 'females', 'women' and 'girls' in section 8. Although the overall crime rate decreased between 2013/14 and 2016/17, violent crimes against women increased drastically between 2015/16 and 2016/17.[181] In light of these facts, it is submitted that section 8 serves an important purpose. However, it can still be criticised on two grounds:

- first, the legislation has a place in South Africa but the increase in crimes against women leaves it open to criticism that the law only exists in theory and is not actively achieving its purpose; and
- second, the Constitution and other legislation (including the Equality Act) is often described as egalitarian in nature. Egalitarianism supports the equality of *all* people, without an emphasis on a particular group.

Having addressed the initial point in the paragraph above, it is necessary to turn to the second point. Benatar in his book *The Second Sexism* illustrates some of the ways in which males are victims of disadvantage and discrimination.[182] He acknowledges that sexism against women and girls is still a more severe problem in most parts of the world, but also argues that a more egalitarian viewpoint would be to also recognise the discrimination which befalls men and boys.[183] Some examples which he discusses include male disadvantage in terms of child custody in divorce cases and paternity leave. He also cites relevant studies which illustrate that males are less likely to be treated leniently than females when being sentenced by a court.[184] It is submitted that Benatar's stance, although controversial, should be considered.

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[180] For a brief discussion of each provision see A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' (2001) 9 *TSAR* 297. See also GS Vogt 'Non-discrimination on the Grounds of Race in South Africa– With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) 45 *JAL* 196.
[181] 'Crime against women in South Africa' (June 2018). Available at http://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf, accessed on 13 May 2019.
[182] See generally D Benatar *The Second Sexism: Discrimination Against Men and Boys* (2012).
[183] Ibid.
[184] Ibid.

According to an article published in 2018, 30% of South Africa's women and 18% of its men have been victims of unwanted sexual advances in the workplace.[185] It is submitted that by only emphasising the plight of women, the Equality Act violates the egalitarian values of the Constitution and this should be addressed. Reform of South African equality legislation is long overdue and in delaying such the legislature violates not only gender rights, but also the egalitarian values of the Constitution and democracy.

In understanding section 8, it is important to understand the ground of gender and its relation to the ground of sex. Although Kentridge correctly argues that, in interpreting the Equality Act, rigid distinctions should not be observed as this could potentially exclude groups of people from the operation of the Equality Act, it is also necessary to highlight that this approach could potentially defeat the purpose of recognising sex and gender as separate grounds.[186]

There are indeed differences between biological sex and the socio-cultural aspects of gender roles that are learned during social interaction. The biological difference between males and females is the most fundamental distinction in society.[187] However, the dichotomy of 'maleness' and 'femaleness' are largely determined by social perceptions and culture, rather than biology.[188] Gender is a social construct which often filters into public policy and thus it is necessary for the policy to keep updated with the changes in society. Recent years have found great social awareness for gender identities which operate across a spectrum,[189] rather than on a binary scale.[190] The vulnerability of these gender identities to unfair discrimination are undeniable.[191] Legislation is yet to respond to the need to understand and recognise these

[185] A Kock 'Gender discrimination and sexual harassment in the 21st century – What does the law say?' (16 November 2018). Available at https://www.golegal.co.za/gender-discrimination-law/, accessed on 14 May 2019.
[186] C Albertyn, B Goldblaat & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (2001) 61.
[187] Equality legislation drafting unit 'Preliminary research reports and proposals regarding a framework on equality legislation for South Africa: discussion document 3' (1998) 18.
[188] Ibid 18-19.
[189] These identities include: gender non-comformists, non-binary gender identities, and gender-fluid identities.
[190] See generally E Mamacos 'Are South Africans ready for gender-neutral birth certificates?' (30 April 2018). Available at https://www.w24.co.za/SelfCare/Wellness/Mind/are-south-africans-ready-for-gender-neutral-birth-certificates-20180430, accessed on 13 May 2019.
[191] See SAHRC 'Research Brief on Gender and Equality in South Africa 2013 - 2017'. Available at https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf, accessed on 27 August 2019.

identities in the interest of inclusivity and spirit of non-sexism and provide them with explicit legal protection.[192]

Despite the failure on the part of legislation to respond to the aforementioned needs, judicially there appears to be progress in the understanding and appreciation of the sensitivity of gender minorities. In the case of *September v Subramoney*,[193] the applicant was a transgender prisoner being held at a male prison in Caledon. She applied to the Western Cape High Court sitting as the Equality Court for an order the departments of Justice and Correctional Services to allow her to dress as a woman, even though she was in a male prison.[194] September argued that she had been harassed by prison officials who forced her to dress and behave like a man. In support of her application, Lawyers for Human Rights also argued that the system had singled her out and subjected her to harassment and unfair discrimination which was in direct contradiction to the Equality Act. In response to these arguments, the defendants argued that in terms of the legal framework September was male and that her treatment had been consistent with that of other males. It followed, therefore, that she had not been harassed or unfairly discriminated against. In her reply, September argued that she did not need to undergo surgical transition to be defined as transgender because a person's identity is subjective. The Equality Court found in favour of September and held that the actions of the departments amounted to unfair discrimination. Whilst the final decision itself is welcomed, the failure of the courts to comment on the binary system of gender recognition in South Africa has been heavily criticised.

Regarding the above matter, De Vos has explicitly expressed support for September and criticised the legislation. He is further quoted as having said 'while the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act do not explicitly prohibit unfair discrimination based on gender identity, they do allow courts to find there is discrimination on grounds that are similar to those listed. This is such a case'.[195] It is submitted that although the courts may use alternate grounds to protect the interests of gender

[192] See *Kos and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90 at para 20, where the Court noted that 'the literature on transgenderism describes that there is an all too common tendency to conflate sex, gender and sexuality, which is misconceived'.
[193] (EC10/2016) [2019] ZAEQC 4.
[194] 'Who is Jade September, and why does she want to stay in a men's prison?' (27 December 2018). Available at https://www.iol.co.za/capeargus/news/who-is-jade-september-and-why-does-she-want-to-stay-in-a-mens-prison-18366421, accessed on 13 May 2019.
[195] Ibid.

minorities, the existence of a legislative gap can potentially be exploited. De Vos goes on to state that where discrimination occurs on gender identity, transgender individuals are a vulnerable group and the impact of the discrimination will be severe. It is submitted that this case is a clear indication of the Equality Act's shortfall in responding to societies needs in relation to gender discrimination. Gender identities across the spectrum exist as an additional ground on which discrimination may occur and the Equality Act has failed to provide explicit adequate protection to those who may be affected.

### 3.8 The prohibition of unfair discrimination on the grounds of sexual orientation

Although long-standing grounds of discrimination such as race, gender and disability persist, the changing nature of social relations over time have given rise to newer forms of discrimination, including on the basis of gender identity and sexual orientation.[196] Discrimination is thus a moving target that requires constant re-evaluation to ensure that everyone enjoys equal protection under any measures taken to combat discriminatory practices and achieve the goals of equality and dignity for all. Unlike race, gender and disability, sexual orientation is not given any additional protection by the Equality Act. Instead, the general prohibitions that operate in terms of sections 6, 10, and 11 apply to unfair discrimination on the grounds of sexual orientation.[197]

The concept of sexual orientation is not defined in the Equality Act itself but an article written by Justice Cameron states that 'sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex'.[198] It is submitted that 'sexual orientation' must be given a reasonably generous interpretation and

[196] SAHRC 'Research Brief on Gender and Equality in South Africa 2013 - 2017'. Available at https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf, accessed on 27 August 2019.

[197] The focus of this thesis on the prohibited ground of sexual orientation is necessary for purposes of the gap study in order to highlight that 20 years since its inception, the Equality Act has failed to respond to social changes. The relevance of sexual orientation under a current discussion of inequality is far greater than that of disability.

[198] E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450. This definition was also used in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

include the orientation of persons who are bi-sexual, transsexual and also persons whose sexual orientation fall on a spectrum, such as asexuals and pansexuals.[199]

Despite the protection granted to the community by the Constitution and the Equality Act, 40% of the LGBTQIAP+ community know someone who has been murdered for being or suspected of being a non-heterosexual.[200] The hostility faced by the LGBTQIAP+ community can be traced back in part to the apartheid era of South Africa and thus exists as a tragic consequence of the system. When we consider the history of apartheid, two aspects come to mind: the state's systematic institutionalisation of exclusionary and discriminatory structures through law; and, in the context of religious matters, a distinct bias in favour of Christianity.[201]

During the apartheid era, section 20A(1) of the Sexual Offences Act[202] criminalised any act between males at a party if such act was calculated to stimulate sexual passion or to give sexual gratification. This was punishable by a maximum fine of R4 000 or two years' imprisonment or both.[203] The Sexual Offences Act further prohibited 'immoral or indecent' acts between men and boys under the age of nineteen.[204] In 1988 the prohibition of 'immoral or indecent' act was extended to include acts between women and girls under the age of nineteen.[205] Discrimination against same-sex individuals was evident since the heterosexual age of consent was sixteen.[206] It is submitted that this separation of the regulation of sexual acts as it existed in the apartheid era can be equated to the current Civil Union Act.[207] It is further submitted that the creation of an apartheid-style separate 'civil partnership' for same-sex couples confirms that the law does not consider such unions equal in status to those of

[199] See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 21.
[200] M Morris 'LGBT community still faces high levels of violence - report' (04 December 2017). Available at https://www.news24.com/Analysis/lgbt-community-still-faces-high-levels-of-violence-report-20171204, accessed on 14 May 2019.
[201] H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *Fundamina* 225.
[202] 23 of 1957.
[203] Section 22(g).
[204] Section 14(1)(b).
[205] Section 14(3)(b).
[206] H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *Fundamina* 225.
[207] 17 of 2006.

heterosexual partners. De Vos and Barnard criticise the Equality Act as a legislative insult to the LGBTQIAP+ community.[208]

Believers of various religions[209] strongly oppose the lifestyles of the LGBTQIAP+ community. Moreover, it is often contended that 'homosexuality is a non-African social construct of the west', and thus to engage in such conduct jeopardizes black community values.[210] With regards to the former, the Constitutional Court has held that the religious beliefs of some cannot be used to determine the constitutional rights of others.[211] The latter assertion is a rather contentious issue as contemporary anthropological studies prove that same sex relations have always existed in Africa.[212] Nevertheless, challenges to a hetero-sexist normative hierarchy are still met with violent contempt. According to a five-year report by the Hate Crimes Working Group, 35% of hate crimes reported come from the LGBTQIAP+ community making them the most discriminated against group in South Africa.[213]

It is submitted that a revision of the legislation as it relates to affording equality and protection against unfair discrimination to LGBTQIAP+ individuals is required. As illustrated above, the community is currently placed in an exceptionally vulnerable position and the current legislative mechanisms are a feeble attempt to address the problem. Moreover, the sexual orientation of bisexual, asexual, and pansexual individuals should be given greater recognition and active undertakings are required to facilitate their inclusion in the legal, political and social sphere.

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[208] P de Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga' (2007) 124(4) *SALJ* 811.
[209] Such as Christianity and Islam.
[210] R Jenkins 'Gender and Sexuality in South Africa and the Production of Systemic Inequalities' (2013) 3(8) *Journal Research in Peace, Gender and Development* 143.
[211] *Minister of Home Affairs v Fourie and another* 2006 (1) SA 524 (CC).
[212] Ibid.
[213] J Anderson 'What is happening to LGBT+ rights in South Africa?' (9 February 2018). Available at https://www.pinknews.co.uk/2018/02/09/what-is-happening-to-lgbt-rights-in-south-africa/, accessed on 16 May 2019. Research conducted by the South African Institute of Race Relations reports that Black members of the community are most likely to be victims of physical violence (8%, against 7% nationally); white individuals appear most likely to be verbally insulted (45% against 39% nationally); and Asian individuals are most likely to experience abuse from a family member (11% against 7% nationally) (see M Morris 'LGBT community still faces high levels of violence - report' (04 December 2017). Available at https://www.news24.com/Analysis/lgbt-community-still-faces-high-levels-of-violence-report-20171204, accessed on 14 May 2019).

### 3.9 The prohibition of hate speech

Apart from prohibiting unfair discrimination, section 10 of the Equality Act also prohibits hate speech on any of the prohibited grounds identified in section 1 of the Equality Act. This section provides that:

'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to:

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.'

The proviso to section 12 states that:

'bona fide engagement in artistic creativity, academic or scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section'.

A careful examination of section 10 read with the proviso to section 12 demonstrates that publishing, propagating, advocating or communicating 'words' is prohibited if:

- they are based on one or more of the prohibited grounds listed in the Equality Act;
- they are objectively considered to be hurtful, harmful, incite harm or propagate hatred (the intention of the person who utters the words is irrelevant); and
- they do not fall into the proviso to section 12. In other words, they are not communicated for the purpose of bona fide artistic creativity, academic and scientific inquiry and the like.[214]

As the points set out above illustrate, the scope and ambit of section 10 is very wide. It has, therefore, been criticised for going far beyond the scope of section 16(2) of the Constitution, which excludes hate speech from the scope and ambit of the right to freedom of expression guaranteed in section 16(1).[215] This criticism is based on a number of grounds.

[214] P Williams 'Hate Speech is a crime Equality Court rules in favour of domestic worker' (2015) *De Rebus* 27.

[215] Section 16 reads as follows:

'(1) Everyone has the right to freedom of expression, which includes:

(a) freedom of the press and other media;

One of these is that the Equality Act prohibits what has been termed 'harmful conduct in the air'.[216] This means that words can constitute hate speech if construed by another as being offensive even if the person towards whom the offending words were directed at remains unaffected.

Another criticism is that the phrase '*that could reasonably be construed to demonstrate a clear intention*' is much broader than the section 16(2) of the Constitution which prohibits only actual incitement.[217] Furthermore, it is contended that the term 'hurtful' can have far-reaching consequences and is significantly wider than the section 16(2) harm.[218]

The scope of section 10 is also much wider than that of section 16(2). Hate speech under the Constitution is restricted to four prohibited grounds namely, race, religion, ethnicity and gender, whilst the Equality Act hate speech extends to all of the prohibited grounds listed under section one. An important question that arises is whether section 16(2) can be interpreted to encompass the additional prohibited grounds referred to in section 10(1). If it can, then the additional prohibited grounds referred to in section 10(1) do not infringe section 16(1) of the Constitution and do not have to be justified in terms of the limitation clause. If it cannot, then the additional prohibited grounds referred to in section 10(1) do infringe section 16(1) and will have to be justified in terms of the limitation clause.

Teichner points out that two opposing arguments may be made in this respect. On the one hand, it could be argued that section 16(2) must be interpreted to encompass the additional prohibited grounds referred to in section 10(1) because the courts are required to interpret the

(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extent to:
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.

[216] RF Haigh 'South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression' (2006) *Washington University Global Studies Law Review* 201.

[217] AB Hatchet *Hate speech in South Africa: What our Constitution demands* (Unpublished Thesis, University of Johannesburg, 2012) 66.

[218] For a more detailed discussion see S Teichner 'The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000: The Good, the Bad and the Ugly' (2003) 19 *SAJHR* 355-357.

Bill of Rights in a manner that promotes the values that underlie an open and democratic society and the prohibition of hate speech on the additional prohibited grounds does exactly that. On the other hand, it could be argued that section 16(2) must be interpreted not to encompass the additional prohibited grounds referred to in section 10(1) because the drafters of the Constitution deliberately restricted the scope of section 16(2) to race, religion, ethnicity and gender in order to protect the sanctity of the right to freedom of expression.[219]

It is submitted that the latter approach is to be the preferred. This is because the additional prohibited grounds referred to in section 10 of the Equality Act are very wide and consequently do have the potential to make serious inroads into the right to freedom of expression. They should, therefore, be subject to the strict standards of review provided in the limitation clause.

Although the Supreme Court of Appeal appears to have accepted the former argument in *Qwelane v South African Human Rights Commission*,[220] it still went on to find that section 10(1) of the Equality Act unjustifiably infringes the right to freedom of expression guaranteed in section 16(1) and, consequently, was unconstitutional and invalid.

In this case, the appellant – who was a well-known journalist and anti-apartheid activist – published a homophobic opinion piece in a national tabloid newspaper called the *Sunday Sun*. After the opinion piece was published, the SAHRC instituted proceedings against the appellant in the Equality Court. It sought an order declaring that the appellant's opinion piece infringed section 10(1) of the Equality Act because it was hurtful, incited harm and propagated hatred against homosexuals and thus constituted hate speech on the prohibited ground of sexual orientation. The appellant then applied to the High Court for an order declaring section 10(1) read together with section 1 and section 12 to be unconstitutional and invalid on the grounds that it was vague and overbroad and thus unjustifiably infringed the right to freedom of expression guaranteed in section 16(1) of the Constitution. After both cases were consolidated into a single hearing, the Equality Court/High Court dismissed the constitutional challenge and found that the opinion piece did constitute hate speech and, consequently, that the appellant had infringed section 10(1).

[219] S Teichner 'The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000: The Good, the Bad and the Ugly' (2003) 19 *SAJHR* 354.
[220] 2020 (2) SA 124 (SCA).

After the Equality Court/High Court handed down its decision, the appellant appealed to the Supreme Court of Appeal. This time the Court accepted the appellant's argument that section 10(1) of the Equality Act was vague and overbroad and thus unjustifiably infringed section 16(1) of the Constitution. In arriving at this decision, the Court began by pointing out that if the speech prohibited by section 10(1) of the Equality Act fell into the four corners of section 16(2)(c) of the Constitution, it was not protected by section 16(1) and the prohibition in section 10(1) did not infringe section 16(1). The opposite was also true. If the speech prohibited by section 10(1) did not fall into section 16(2)(c), it was protected by section 16(1) and the prohibition in section 10(1) did infringe section 16(1) and would have to be justified in terms of the limitation clause. The first issue that had to be determined, therefore, was whether the speech prohibited by section 10(1) fell inside or outside section 16(2)(c).

Insofar as this issue was concerned, the appellant argued that section 10(1) of the Equality Act did fall outside section 16(2)(c) of the Constitution for three reasons.

First, while section 16(2)(c) prohibited expression that advocated hatred based only on race, ethnicity, gender and religion, section 10(1) went further and prohibited speech that advocated hatred based on the additional characteristics listed in section 1 of the Equality Act, including sexual orientation.[221] Although sexual orientation was not one of the characteristics listed in section 16(2)(c), the Supreme Court of Appeal held, the Constitution imposed an obligation on the state to protect LGBTQIAP+ people against speech which advocated hatred on the basis of sexual orientation. Given this obligation, it could not be said that section 10(1) fell outside section 16(2)(c) simply because it prohibited speech that advocated hatred on the basis of sexual orientation.[222]

Second, while section 16(2)(c) prohibited expression on the narrow grounds that it 'advocated hatred' and 'constituted incitement to cause harm', section 10(1) went further and prohibited speech on the broad grounds that that could 'reasonably be construed to demonstrate a clear intention to (a) be hurtful, (b) be harmful or to incite harm, or (c) promote or propagate hatred'.[223] Apart from the fact that the grounds set out in paragraphs (a), (b) and

[221] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at para 54.
[222] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 59-60.
[223] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at para 61-63.

(c) of section 10(1) had to be read disjunctively and, therefore, were wider than those set out in section 16(2)(c),[224] the Supreme Court of Appeal held, the words 'reasonably be construed' also replaced the stricter objective test in section 16(2)(c) with a more lenient subjective one in section 10(1). Given that these differences were extensive, it followed that section 10(1) fell outside section 16(2)(c).[225]

Third, while section 16(2)(c) prohibited expression that '[advocated] hatred' and 'constitute[d] incitement to cause harm', section 10(1) went further and prohibited speech that 'published, propagated, advocated and communicated not only 'hatred' and 'incitement to cause harm', but also speech that was 'hurtful'.[226] The problem with including speech that was hurtful in section 10(1), the Supreme Court of Appeal held, is that the word hurtful refers primarily to hurt emotions and feeling and does not rise to the level of harm or hate.[227] In addition, it is accepted in most comparable foreign jurisdictions and by South African commentators that the right to freedom of speech should include words that are hurtful or offensive. In light of these findings, it followed once again that section 10(1) fell outside section 16(2)(c).[228]

After finding that section 10(1) of the Equality Act did fall outside section 16(2) of the Constitution and, consequently, that it infringed section 16(1), the Supreme Court of Appeal turned to consider whether this infringement could be justified. After a careful examination of the approach followed in comparable foreign jurisdictions, the Court found that it could not and declared section 10(1) to be unconstitutional and invalid.

The hate speech provisions under the Equality Act are often referred to as being three-fold. Sections 10 and 12 are joined by section 7(a), which prohibits racist speech as a form of unfair discrimination. This section forms part of the unfair discrimination prohibition under the Equality Act, thus illustrating the intersection between hate speech and unfair discrimination. The fact that the Equality Act deals with unfair discrimination and hate speech as separate concepts means that it recognises a distinction between these concepts, but

[224] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 64-65.
[225] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 66.
[226] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 68.
[227] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 68.
[228] *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) at paras 69.

still acknowledges the connection insofar as they turn on the impairment of the dignity interest in violating the equality right.[229]

### 3.10 The prohibition of harassment

Harassment is prohibited in section 11 of the Equality Act. This very short section simply provides that 'no person may subject any person to harassment.' This section must be read together with the definition of harassment in section 1 of the Equality Act. Section 1 defines harassment as:

'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to:

(a) sex, gender or sexual orientation, or

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.'

As Albertyn et al point out, this definition may be reduced to three essential elements, namely:

- unwanted persistent or serious conduct,
- which negatively impacts a person, and
- is related to one of the prohibited grounds.[230]

Although harassment is also prohibited by the Employment Equity Act[231] and the Domestic Violence Act,[232] section 11 goes much further than both of these statutes and extends harassment beyond the confines of employment and domestic relations.[233] It also acknowledges the serious nature of harassment by dispensing with the narrow requirement of 'a pattern' as is required by the Domestic Violence Act.

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[229] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 162-163.
[230] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 99.
[231] 55 of 1998.
[232] 116 of 1998.
[233] Harassment under the Equality Act can occur on any of the listed grounds.

The term 'conduct' in the definition of harassment should be interpreted broadly to include verbal, physical, suggestive and other gestures.[234] In order to constitute harassment, however, these different forms of conduct must be 'unwanted'. This means that a complainant must have communicated, in some way, to the alleged harasser that the words or actions are unwelcomed.[235] When it comes to defining the concept of 'unwanted' conduct, some assistance may be derived from the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.[236] According to the Code, there are different ways of communicating one's disapproval which include subtle measures such as 'walking away or not responding to the perpetrator'.[237] The Code also allows for the communication of the disapproval through a third party.[238]

Apart from being unwanted, the Equality Act provides that the conduct in question must also be persistent or serious in order for it to constitute harassment. As Albertyn et al correctly point out, the term 'serious' is value-laden and each individual person's subjective experience must be assessed so as to not perpetuate stereotypes.[239] This interpretation is also supported by Kruger.[240]

The definition of harassment also requires that the conduct in question demeans, humiliates, or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences related to the prohibited grounds.[241] This requirement captures the impairment of dignity as a shared feature between harassment and unfair discrimination.[242]

Garbers criticises this provision of the Equality Act on the ground it incorporates perspectives of the complainant ('demeans' and 'humiliates'), on the one hand, whilst requiring intention

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[234] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 99.
[235] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 178.
[236] Published in GN 1357 in GG 27865 of 4 August 2005.
[237] Item 5.2.1 of the Code.
[238] Item 5.2.3 of the Code.
[239] C Albertyn, B Goldblatt & C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) 99.
[240] See generally R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) for a more discussion.
[241] A discussion of all of the listed prohibited grounds is beyond the scope of this thesis. Three grounds, therefore, have been selected and are discussed further under 3.6.
[242] See *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252 at 1284.

to harass ('calculated to induce'), on the other.[243] It is submitted that this criticism is misplaced as the implications of the text are clear. The court has to combine a subjective and an objective approach in which the subjective feelings and experiences of the complainant have to be given consideration whilst balanced against an objective assessment of the conduct.[244]

The scope and ambit of harassment was considered by the Equality Court in *Sonke Gender Justice Network v Malema*.[245] In this case, the respondent gave a public address at the Cape Peninsula Technikon in Cape Town. During this address he made the following statement:

'When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you.'[246]

After making this statement, the respondent was accused of hate speech and harassment by the complainant. In his defence, the respondent argued that his statement was not offensive to gender equality and neither did it amount to hate speech or harassment. Instead, it constituted fair comment and was thus protected by section 12 of the Equality Act.

The Equality Court rejected these arguments and found in favour of the complainant. It began its analysis by examining whether the respondent's statement amounted to hate speech and, after finding that it did, whether it also amounted to harassment. Insofar as this aspect was concerned, the Court relied heavily on the evidence given by Ms Lisa Vetten, who was called as an expert witness for the complainant.

In her evidence, Ms Vetten testified that 'the comments made by the Respondent rely upon generalisations about women, rape and consent which reinforce rape myths and that he is abrogating to himself the prerogative of deciding what does and does not constitute rape.

[243] C Garbers 'Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems' (2002) 14 *SA Merc LJ* 397-398.
[244] Kruger supports this interpretation (see R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008)).
[245] 2010 (7) BCLR 729 (EqC). See generally A Bizimana *Gender Stereotyping in South African Constitutional Court Cases: an Interdisciplinary Approach to Gender Stereotyping* (unpublished LLM thesis, University of Pretoria, 2015).
[246] *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 2.

Myths and stereotypes are typically created by groups dominant in society. Thus, when men proclaim what is and is not sexual violence, and justify their reasoning with rape myths, they reinforce men's dominance and perspectives at the expense of women equality.'[247]

In light of this expert evidence, the Equality Court found that the respondent's statement clearly demeaned and humiliated women and especially rape survivors, that it did so on the grounds of gender and/or sex and that it was serious. It could, therefore, be classified as a form of harassment. The Court thus ordered the respondent to make a public apology and to pay damages in the amount of R50 000 to the People Opposed to Women Abuse (POWA).[248]

The prohibition of harassment in the Equality Act has been enhanced by the enactment of the Protection from Harassment Act.[249] According to its long title and preamble, the purpose of this Act is to provide persons who are suffering from harassment with an effective remedy by entitling them to apply to a magistrates' court for a protection order against harassment. The notion of 'harassment' is defined very broadly in section 1 of the Act as conduct that causes harm[250] or inspires a reasonable belief that harm may be caused to the complainant or a related person,[251] or that amounts to sexual harassment of the complainant or a related person.

Conduct that causes harm or inspires a reasonable belief that harm may be caused, occurs when the respondent unreasonably:

(i) follows, watches, pursues or accosts the complainant or a related person or loiters outside of or near the place where the complainant or a related person resides, studies or works;

(ii) communicates with the complainant or a related person, either verbally or electronically, irrespective of whether a conversation ensues; or

(iii) sends, delivers or causes the delivery of letters, telegrams, packages, facsimiles, electronic mails or other objects to the complainant or a related person or leaves them where they will be found by or given to the complainant or a related person.[252]

[247] *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 17.
[248] *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 22.
[249] 17 of 2011.
[250] Harm is defined in section 1 of the Act as 'any mental, psychological, [physical or economic harm'.
[251] A related person is defined in section 1 of the Act as 'any member of the family or household of the complainant'.
[252] Section 1.

Conduct that amounts to sexual harassment occurs when the respondent:

(i) pays unwelcome sexual attention to the complainant or a related person and knows or who should reasonably know that it is unwelcome;

(ii) engages in unwelcome behaviour of a sexual nature, or makes unwelcome suggestions, messages or remarks of a sexual nature, to the complainant or a related person and which objectively offend, intimidate or humiliate the complainant or a related person;

(iii) promises the complainant or a related person a reward for complying with a sexually orientated request; or threatens the complainant or a related person with reprisal for refusing to comply with a sexually orientated request.[253]

### 3.11 The promotion of equality

Apart from preventing, prohibiting and eliminating unfair discrimination, hate speech and harassment, the Equality Act is also aimed at promoting equality. The provisions regulating the promotion of equality are set out in Chapter Five of the Equality Act. This Chapter is divided into six sections (section 24 to 29).

Section 24 begins by imposing a general duty on the state and private persons to promote and, in the case of the state, to achieve equality. The duty imposed on the state is set out in more detail in section 25, while the duty imposed on private persons is set out in more detail in section 26 (although these provisions apply only to those private persons who are operating in the public sector). Section 28 sets out special measures to promote equality with regard to race, gender and disability and section 29 contains an illustrative list of unfair practices in certain sectors.

The concept of 'equality' is defined in section 1 of the Equality Act, which states that equality encompasses the 'full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.[254] This definition encompasses the concept of substantive equality. A substantive approach to equality takes cognisance of the context in which a litigant asks a court for

[253] Section 1.
[254] Section 1.

assistance by analysing the position of a particular litigant in society, the group to which he belongs and the history of the particular disadvantage. This approach emphasises the need, not only to abolish discriminatory laws but also to actively remedy disadvantage and to redistribute social, economic and political power.[255]

The South African Human Rights Commission plays an important role in monitoring the duty to promote equality. It is empowered to request information from the state or any person on any measures relating to the achievement of equality, including the extent of their compliance with legislation and codes of practice and it may assist complainants, conduct investigations and make recommendations to Equality Courts.[256]

When applying the Equality Act, Equality Courts must have regard to section 5 of the Act which deals with the application of the Act. Section 5 provide in this respect as follows:

'(1) This Act binds the State and all persons.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.

(3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies.'

It is important to note that despite the emphasis placed on the state and private persons operating in the public sector, section 5 makes it clear that the provisions of the Equality Act apply to 'all persons', apart from those governed by the Employment Equity Act. The Equality Act also overrides any other Act, except the Constitution or an Act amending the Equality Act.[257]

[255] A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' (2001) 9 *TSAR* 295.
[256] S Jagwanth 'Expanding equality' (2005) *Acta Juridica* 146-147.
[257] This reaffirms the statement by Gutto who refers to the Act as 'one of the most important pieces of social legislation in the new democratic South Africa' (see SB Gutto *Equality and Non-discrimination: The Political Economy of Law and Law Making* (2001)).

### 3.12 Conclusion

This chapter sought to provide a background as to the objectives and relevant provisions of the Equality Act. Almost two decades since its inception, the Equality Act is yet to undergo any reform to address the ever-changing needs of society. Given South Africa's history, it is unlikely that legislation alone can cure a social illness but the mechanisms created under the Equality Act are a commendable effort which, once effectively revised and utilised, will yield promising results. The guarantee of democratic tolerance for all South Africans, however, still remains somewhat illusory.

## CHAPTER FOUR: THE EQUALITY COURT

'*The judicial system is the most expensive machine ever invented for finding out what happened and what to do about it*.' – Irving R. Kaufman

### 4.1 Introduction

Apart from promoting equality and preventing unfair discrimination, the Equality Act also establishes Equality Courts, makes provision for the appointment of presiding officers and clerks of these courts and regulates their procedures, powers and functions. The decision to establish Equality Courts may be traced back to concerns about the accessibility of aggrieved persons to judicial structures in order to adjudicate matters.[258] When establishing the Equality Courts, a number of considerations were taken into consideration. Among these were the potential for equality issues to be marginalised if existing courts were completely excluded, the cost of introducing an entirely new system of courts, the need to separate of the investigation and adjudication of complaints and the accommodation of appeal procedures.[259]

The Equality Act anticipated and addressed these concerns by introducing the Equality Courts as an inexpensive tool to be used in the achievement of equality and the eradication of unfair discrimination. The Act also requires a more active role by presiding officers while simplifying the procedure that have to be followed by litigants. This chapter seeks to provide a brief background to the Equality Courts while analysing and commenting on the role of such structures.

### 4.2 The Equality Courts

Although their purpose is to interpret and apply the provisions of the Equality Act, the Equality Courts are not special courts envisaged in section 166(e) of the Constitution. This is because the Act has not created an entirely new court. Instead, it has simply extended the

[258] See D Kaersvang 'Equality Courts in South Africa: Legal Access for the Poor' (2008) 15(2) *The Journal of the International Institute.* Available at https://quod.lib.umich.edu/j/jii/4750978.0015.203/--equality-courts-in-south-africa-legal-access-for-the-poor?rgn=main;view=fulltext, accessed on 30 January 2019.
[259] Equality legislation drafting unit 'Preliminary research reports and proposals regarding a framework on equality legislation for South Africa: discussion document 3' (1998) 79.

jurisdiction of the High Court of South Africa and selected Magistrates' Courts to adjudicate complaints that arise under the scope of the Act.

As the points set out above indicate, the Equality Act has adopted a broad approach towards the High Court and simply designated 'every High Court [as] an equality court for the area of its jurisdiction'. Unfortunately, it has not adopted the same broad approach towards the Magistrates' Courts. Instead, it makes provision for a somewhat complex process in terms of which selected Magistrates' Courts must be designated as Equality Courts.

Section 16 of the Equality Act begins in this respect by providing that every High Court is an Equality Court in its area of jurisdiction.[260] Magistrates' Courts, however, are selectively designated as Equality Courts by the Minister of Justice.[261] This means that the High Court and select Magistrates' Courts designated as Equality Courts are conferred with extended jurisdictional powers in relation to equality matters.[262] The decision of the Minister in relation to the appointment and jurisdiction of Magistrates' Courts as Equality Courts is not finite and may be amended when necessary.[263]

Despite the intricacies involved with appointing functioning Equality Courts, substantial progress has been made in this respect. In 2019, for example, the Department of Justice and Constitutional Development reported that a total of 383 Magistrates' Courts had been designated as Equality Courts.[264]

[260] Section 16(1)(a).
[261] Section 16(1)(c). The Minister may designate a Magistrates' Court as an Equality Court only after consulting with the head of an administrative region defined in section 1 of the Magistrates' Courts Act 32 of 1944, or the magistrate at the head of a regional division established for the purpose of adjudicating civil disputes.
[262] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 210. Equality Courts, therefore, are not separate courts as provided for in section 166(e) of the Constitution.
[263] Section 16(1)(c)(iii) and (v).
[264] Department of Justice and Constitutional Development 'List of Designated Equality Courts' (04/06/2019). Available at http://www.justice.gov.za/contact/lowercourts-sheet-eqc.pdf, accessed on 24 June 2019. This can be compared to the findings by Kruger whereby 220 Equality Courts were established by 2006 with little indication of having any functioning (see R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 210).

### 4.3 The presiding officers of the Equality Court

Given that it has not established an entirely new court, it is not surprising that the Equality Act also provides that the Equality Court must be staffed by existing judges and magistrates. This does not mean, however, that every judge or magistrate who is on active duty is automatically qualified to serve as an Equality Court judge.[265]

Insofar as judges are concerned, the Equality Act provides that 'any judge may be designated in writing by a Judge President as a presiding officer of the Equality Court of the area in respect of which he or she is a judge'.[266] Insofar as magistrates are concerned, the Act distinguishes between district magistrates and regional magistrates who adjudicate civil matters.

Insofar as district magistrates are concerned, the Equality Act provides that the 'head of an administrative region' must 'designate in writing any magistrate or additional magistrate as a presiding officer of the Equality Court.[267] An 'administrative region' is group of District Magistrates' Courts that have been joined together by the Minister of Justice for administrative purposes.[268]

Insofar as regional magistrates who adjudicate civil matters are concerned, the Equality Act provides that the magistrate at the head of a regional division established for the purposes of adjudicating civil matters must designate in writing any such magistrate as a presiding officer of the Equality Court.[269]

Besides conferring the power on Judges President, the heads of administrative regions and the heads of regional divisions adjudicating civil matters to appoint presiding officers, the Equality Act also imposes an obligation on them to do so. In this respect it provides that Judges President and the heads of administrative regions must take all reasonable steps within

[265] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 210-211.
[266] Section 16(1)(b).
[267] Section 16(1)(d).
[268] Section 2(2) of the Magistrates' Courts Act 32 of 1944. The 'head of an administrative region' is the magistrate designated as such by the Minister, after consulting the Magistrates Commission (see section 1 of the Magistrates' Courts Act).
[269] Section 16(1)(d).

available resources to designate at least one presiding officer for each equality court within his or her area of jurisdiction.[270]

A presiding officer must perform the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law.[271]

### 4.4 The clerks of the Equality Court

Apart from presiding officers, the Equality Act also makes provision for the appointment of clerks of the Equality Court as well as for their powers and functions.

Insofar as their appointment is concerned, section 17 of the Equality Act provides that 'the Director-General of the Department of Justice may, for every Equality Court, appoint or designate one or more officers in the [Department of Justice], or may appoint one or more persons in the prescribed manner and on the prescribed conditions, as clerks of the Equality Court.[272]

Before a person may be appointed as a clerk of the Equality Court, however, he or she must 'complete a training course as clerk of an Equality Court'.[273] This training course must be developed and implemented by the Director-General with a view to building a dedicated and experienced pool of trained and specialist clerks.[274]

In order to achieve this goal the specialised training must provide social context training and uniform norms, standards and procedures which must be observed in the performance of functions in terms of the Act, by providing social context training for presiding officers and uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers.[275]

[270] Section 16(1)(3).
[271] Section 16(5).
[272] Section 17(1)(a).
[273] Section 17(2).
[274] Section 31(6). The Director-General must compile and keep a list of every officer or person who has completed the training course (section 17(3)).
[275] Ibid.

The overarching role of the clerks is to assist the Equality Courts to which they are attached to perform their functions. Apart from this general role, the Equality Act provides that the clerks must also perform the specific functions that may be prescribed by the Minister.[276] Specific functions have in fact been prescribed by the Minister and may be found in the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination.[277]

### 4.5 Standing

As pointed out above, one of the reasons for establishing Equality Courts is to broaden access to the courts. Given this goal, it is not surprising that the Equality Act has taken a generous approach to standing. It thus provides that proceedings under the Act may be instituted by a wide range of persons. These are as follows:

First, a person acting in his or her own interest.[278] A person who alleges that their interest has been infringed through any of the prohibited actions listed in the Equality Act would be granted standing. Although no proof of the infringement is necessary, sufficient information must be placed before the court to substantiate the allegation.[279]

Second, a person acting on behalf of someone who cannot act in his or her own name.[280] The Equality Act provides little guidance as to how a complainant should proceed when acting on behalf of another. It is suggested that a person laying a complaint in terms of the Act on behalf of another must satisfy the requirements set out by the Supreme Court of Appeal in *Wood v Ondangwa Tribal Authority*.[281]

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[276] Section 17(1)(a).
[277] See Regulation 5 of the Regulations Relating to the Promotion of Equality and the Prevention of Unfair Discrimination GN R764, *GG* 25065 (13 June 2003). Some of the functions are set out later in this chapter.
[278] Section 20(1)(a).
[279] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 229.
[280] Section 20(1)(b).
[281] *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) at para 311E-F and 311H-312A. In this case the Court held that the person acting on behalf of another must place information before the court which sets out the reasons for the other person's inability to act in his or her own interest and that such a person has consented to the proceedings or would have consented had s/he been able to do so and/or has lodged or would have lodged the complaint had he or she been able to do so.

Third, a person acting on behalf of or in the interests of a group or association.[282] In order to act on behalf of a group, notification must be given to the members of the group as well as the option to 'opt out'. In addition, sufficient information to identify the class members must be placed before the court.[283]

Fourth, any person acting in the public interest.[284] When a person claims to be acting in public interest, the basis is wider than in the instance of a class action.[285] In *Ferreira v Levin NO and others*[286] O'Regan J put forward a list of factors to be considered when determining whether a person is genuinely acting in the public interest. These factors are as follows:

- 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 the relief is of general and prospective application;
- the range of persons or groups directly or indirectly affected by any order of the court; and
- the opportunities the persons or groups had to present evidence before the court.[287]

Fifth, any association acting in the interests of its members.[288] Any voluntary association, even an association without legal personality can show in relation to the Equality Act that it is acting on behalf of its members.[289] This broad basis for standing is supported by the definition of 'person' in section 1 of the Act which includes 'non-juristic entities'.

Last, the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE).[290] These two institutions have special roles to play in the eradication of inequality and discrimination. These bodies may act as litigants or provide legal representation.[291]

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[282] Section 20(1)(c).
[283] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 230.
[284] Section 20(1)(d).
[285] I Currie & J De Waal *The Bill of Rights Handbook* 5 ed (2005*)* 89-90.
[286] 1996 (1) SA 984 (CC) at para 234.
[287] In *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) this list was approved, but Yacoob J noted that other factors may also be considered (para 18).
[288] Section 20(1)(e).
[289] *Highveldridge Residents Concerned Party v Highveldrigde TLC* 2006 (6) SA 66 (T) at para 25.
[290] Section 20(1)(f).
[291] The roles of these bodies are discussed in more depth later on in the chapter.

A careful examination of section 20(1) of the Equality Act, shows that the drafters relied heavily on section 38 of the Constitution (the Bill of Rights standing clause).[292] There are, however, important differences between the approach taken towards standing by the Equality Act and the Constitution. Perhaps the most significant is that while a person who wishes to enforce the Bill of Rights must not only allege that a right in the Bill of Rights has been infringed or threatened, but must also demonstrate a sufficient interest in the remedy sought with reference to the categories listed,[293] a person who wishes to enforce the Equality Act simply has to demonstrate an interest in the matter with reference to the categories listed.[294] A person who wishes to enforce the Equality Act, therefore, does not have to establish standing in relation to the requested remedy. This is a relaxation of the requirements under the Constitution.[295] With regards to this broad standing, Currie and De Waal note that the Bill of Rights has introduced a generous approach.[296] This is further supported in the case of *Ferreira v Levin NO,*[297] where Chaskalson P said the following:

'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'.[298]

Thus, given the nature of the protected interest i.e. the rights enshrined in the Bill of Rights, the liberal approach to grant standing to a wider range of persons is a necessary step in achieving the greater purpose of the Equality Act and in upholding the Constitution itself.

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[292] Section 38 lists the following categories:
(1) persons acting in their own interests;
(2) persons acting on behalf of another who cannot act in his/her own name;
(3) persons acting as a member, or in the interest of a group or class of persons;
(4) persons acting in the public interest; and
(5) an association acting in the interest of its members.
[293] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 228.
[294] Ibid.
[295] The deviation from the constitutional norm can be excused based on the need for ease of accessibility to the Equality Courts.
[296] I Currie & J De Waal *The Bill of Rights Handbook* 5 ed (2005*)* 75.
[297] 1996 (1) SA 984 (CC).
[298] Ibid at para 165

### 4.6 Representation

Apart from adopting a generous approach towards standing, the Equality Act also seeks to promote access to the Equality Court by allowing complainants to appear without legal representation.[299] However, if a party wishes to be represented, regulation 10(9) extends the traditional realms of representative power to an attorney, an advocate or to any person of choice. This allows lay-persons to provide representation. In so doing, access to justice is afforded to many poor litigants who do not qualify for legal aid, those unaware of the role of the SAHRC or CGE in representation, and/or those who do not wish to obtain legal representation.[300] As the Department of Justice itself states, however, such persons should be advised and encouraged to seek assistance from the SAHRC and the CGE as these bodies have been established in terms of the Constitution to 'assist complainants in bringing complaint to the equality courts and to conduct investigations into cases and advise complainants'.[301]

### 4.7 Litigation

Besides identifying the categories of persons who may institute proceedings, the Equality Act also prescribes the manner in which a complaint may be lodged. It provides in this respect that a complainant must, in the prescribed manner, notify the clerk of the Equality Clerk of his or her intention to do so.[302]

The manner in which a complainant must notify the clerk has in fact been prescribed by the Minister and may be found in the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination.

These regulations provide that the complainant must complete a complaint form.[303] In this form, the complainant must set out his or her particulars and those of the respondent; state how the infringement has affected her or him; and provide particulars of and attach any

[299] Department of Justice and Constitutional Development 'Equality Courts'. Available at http://www.justice.gov.za/EQCact/eqc_faq.html, accessed on 28 June 2019.
[300] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 233.
[301] Ibid.
[302] Section 20(2).
[303] Regulation 6(1).

documents which substantiate the complaint. The complainant must also indicate the remedy he or she is seeking.[304]

The clerk of the Equality Court is expected to provide assistance to complainants by providing them with information regarding the Equality Act and the procedure of the Equality Courts. Within seven days of receiving a complaint, the clerk must notify the respondent, who has 10 days to respond.[305] If the respondent exercises his or her right to reply, the clerk must send a copy of this reply to the complainant within seven days.[306]

The clerk must also refer the matter to the presiding officer who must decide if the matter should be heard in the Equality Court or referred to an alternative forum.[307] In making this decision the presiding officer must take into account:

- the personal circumstances of the parties and particularly the complainant;
- the physical accessibility of any contemplated alternative forum;
- the needs and wishes of the parties and particularly the complainant;
- 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
- the views of the appropriate functionary at any contemplated alternative forum.[308]

If the matter is referred to an alternative forum, all the information must be presented to that forum to allow it to hear the matter within a reasonable time.[309] If the matter is not referred to an alternative forum, the presiding officer must refer it back to the clerk to assign a date for the 'direction hearing'.[310]

[304] Ibid.
[305] Western Cape Government 'Equality Courts'. Available at https://www.westerncape.gov.za/node/51896, accessed on 28 June 2019.
[306] Ibid.
[307] Section 20(3).
[308] Section 20(4).
[309] Regulation 6(7). See also Western Cape Government 'Equality Courts'. Available at https://www.westerncape.gov.za/node/51896, accessed on 28 June 2019.
[310] Section 20(3)(b).

The direction hearing allows the parties and the Equality Court to map the way forward in relation to the complaint.[311] The presiding officer will establish what is not in dispute; explain to the parties what is going to happen; determine if an interpreter is needed; and set a date for trial.[312]

At the trial, the burden is on the complainant to prove his or her case on a balance of probabilities. If the complainant is successful, he or she is entitled to a remedy.[313] The sorts of remedies that the Equality Court may make are set out in section 21 of the Equality Act itself.

A decision made by an Equality Courts may be taken on appeal either to the High Court or the Supreme Court of Appeal.[314] Regulation 19(1) provides that the appeal must be made within 14 days of the order by delivery of a notice of appeal to both the clerk and the complainant or the respondent, as the case may be. The notice of appeal must be completed in writing and:

- state whether the whole or only a specific part of the order is being appealed against;
- set out fully the finding of fact or the ruling of law appealed against; and
- where appropriate, set out the order or orders or part thereof against which the appeal is directed and the grounds on which the appeal is founded.[315]

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[311] R Kruger 'Small Steps to Equal Dignity: The Work of the South African Equality Courts' (2011) 7 *The Equal Rights Review* 30.
[312] Western Cape Government 'Equality Courts'. Available at https://www.westerncape.gov.za/node/51896, accessed on 28 June 2019. These are not the only powers of the presiding officer at the directions hearing. Regulation 10(5)(c) states that the presiding officer may make an order in respect of:
(i) discovery, inspection and exchange of documents;
(ii) interrogatories;
(iii) admission of facts or of documents;
(iv) the limiting of disputes;
(v) the joinder of parties;
(vi) *amicus curiae* interventions;
(vii) the manner of service of documents not provided for in the regulations;
(viiii) amendments;
(ix) the filing of affidavits;
(x) the giving of further particulars;
(xi) the place and time of future hearings;
(xii) procedures to be followed in respect of urgent matters; and
(xiii) the giving of evidence at the hearing, including whether evidence of witnesses in chief is to be given orally or by affidavit, or both.
[313] The remedies are discussed in greater detail in Chapter 6.
[314] Section 23.
[315] Regulation 19(2)(a)-(d).

Once the appeal has been noted, it will be conducted under the ordinary rules of appeal. In other words, the court will act as a court of appeal and not as an Equality Court.[316] The appeal court can make any such order as it may deem fit.[317]

Sections 23(3) and 23(4) of the Equality Act allow for appeals to be taken directly to the Constitutional Court. Appeals to the Constitutional Court are instituted by the Minister for cases where there exists some conflict in the interpretation of 'prohibited grounds' or other ambiguous provisions of the Act.[318]

### 4.8 Alternative forums

The Equality Courts are one of several institutions that have jurisdiction to hear complaints arising under the Equality Act. The SAHRC and the CGE are also authorised in terms of their enabling Acts[319] to deal with complaints relating to inequality and unfair discrimination. These bodies are also recognised as 'alternative forums' under the Equality Act.

Both these institutions have made a commendable effort to carry out their duties and uphold the Equality Act. The CGE reports that during 2018, 891 cases were opened and almost 83% of these cases were closed.[320] Similarly, the SAHRC achieved 21 out of 28 of its annual targets for 2017/2018. Despite these successes, there still exists room for improvement. 'If the Equality Act is to have a meaningful impact in our society, its goals [must] be pursued proactively, both inside and outside the courts'.[321]

Bodies such as the SAHRC and the CGE should, beyond their roles in adjudicating matters, raise awareness regarding equality issues and conduct educational programmes aimed at eradicating inequality and unfair discrimination. Going back to the objectives of the Equality Act, in changing the views of society, litigation-driven change is insufficient and these Chapter 9 Institutions should be more active in driving change at a social level.

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[316] Regulation 7.
[317] Section 23(2).
[318] Section 23(4).
[319] The Human Rights Act 54 of 1994 and the Commission on Gender Equality Act 39 of 1996.
[320] This can be compared to the 715 cases which were opened in the previous year. Centre for Gender Equality 'Annual report 2017/208'. Available at http://www.cge.org.za/wp-content/uploads/2014/09/CGE-Annual-Report-2018-Final-web.pdf, accessed on 28 June 2019.
[321] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 250.

## 4.9 Conclusion

The enforcement of the Equality Act exists in the creation and function of the Equality Courts. Change driven by litigation is only possible if complaints are received by the courts and if the courts which are to process the complaints function effectively. It seems that since the inception of the Act, a number of developments have occurred in relation to the Equality Courts including the establishment of the courts at the Magistrates' Courts level, training of the personnel, and an increase of cases which the courts and the Chapter Nine institutions hear. The Equality Courts deviate from traditional litigation processes by including a direction hearing before trial, allowing an extended list of representatives, and by reducing fees payable by the complainant. Given the importance of their roles against the backdrop of the history of the country, it is not surprising that the equality courts have been granted such flexibility.

## CHAPTER FIVE: THE SECTION 21(2) REMEDIES

*'Law without remedies is like a broken pencil. Pointless.'* – Michael Bishop

### 5.1 Introduction

As we have already seen, section 21 of the Equality Act makes provision for a wide range of remedies. Despite making provision for such a wide range of remedies, a careful examination of the Equality Court's existing case law shows that the most common remedies granted by the Court are interdicts, damages and unconditional apologies.[322] The purpose of this chapter is to set out and discuss the manner in which the courts have interpreted and applied these three remedies. Before turning to do so, however, it will be helpful to locate this analyses in a discussion of the types of remedies recognised in the South African legal system and the manner in which remedies can be classified.

### 5.2 Remedies under different areas of law

#### 5.2.1 Introduction

As mentioned above, before turning to set out and discuss the manner in which the courts have interpreted and applied section 21 of the Equality Act, it will be helpful to briefly discuss the types of remedies recognised in the South African legal system. This discussion is limited to criminal sanctions, delictual remedies and constitutional measures. This is because the remedies set out in section 21(2) of the Equality Act are drawn largely from these three branches of the law.[323]

#### 5.2.2 Criminal sanctions

*(a) Introduction*

[322] This is discussed later in this Chapter.
[323] In terms of section 21(2)(n) and Equality Court may refer a matter to the Director of Public Prosecutions in order to initiate criminal proceedings. It can thus be argued that criminal sanctions also form part of the section 21 remedies but an Equality Court will not have discretion to impose a criminal sanction.

After an accused person has been convicted of a crime, he or she must be sentenced. A sentence includes any measure which is applied by the court and finalises a criminal matter.[324] A punishment, however, is an unpleasant experience imposed by the court after conviction.[325] Some sentences do not constitute punishment, but most forms of punishment will be sentences.[326] Terblanche highlights that irrespective of the terminology, all sentences should take into account the main purposes of criminal sanctions, namely retribution, deterrence, prevention and rehabilitation.[327] Section 276(1) of the Criminal Procedure Act[328] contains a list of 'sentences' which may be imposed by a court. These include imprisonment, a fine, correctional supervision and committal to a treatment centre. Each will be discussed in turn.

*(b) Imprisonment*

Imprisonment is the confinement of an offender in a prison for a duration of time as ordered by a court.[329] Imprisonment is a drastic measure as it takes away a person's liberty. The duration of the term of imprisonment depends on various factors such as statutory guidelines and the jurisdictional limits of a court. Section 284 of the Criminal Procedure Act stipulates that no sentence of imprisonment should be less than four days.[330]

Although courts are constantly urged by society to impose imprisonment liberally, Terblanche argues that imprisonment is not as successful in curbing crime as believed by its supporters.[331] It is submitted that imprisonment is merely a temporary measure as most prisoners will be released after serving for the stipulated time. This stance is supported in *S v D*[332] where the court pointed out:

[324] SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 374.
[325] Ibid.
[326] An example of a sentence that does not constitute punishment would be detainment of the convicted person until the rising of the court (see SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 375).
[327] Ibid. See also G Kemp et al *Criminal Law in South Africa* 3ed (2018) 25-27.
[328] 51 of 1977.
[329] SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 245.
[330] Unless the sentence is for imprisonment until the rising of the court.
[331] SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 390.
[332] 1995 (1) SACR 259 (A) at 264d-e.

'Even if imprisonment has no permanent detrimental effect on a prisoner, it means loss of employment, temporary, if not permanent, loss of wife and family, the risk of contamination and impaired ability to get further employment.'

The many disadvantages weighed against the possible advantages of imprisonment illustrate that although somewhat effective, the courts are correct to take a precautionary stance when imposing a sentence of imprisonment. Given the four-fold focus of criminal sanctions and the overall focus of an egalitarian democracy, intermediate measures should always be sought before implementing more severe ones. This attitude is also reflected in many statutes which not only stipulate the maximum sentence term for imprisonment, but offer the payment of a fine as an alternate measure.

*(c) A fine*

A fine is the most common sentence imposed by the criminal courts and involves ordering an offender to pay an amount of money to the State as a punishment for the crime committed.[333] Most statutes include a penalty clause to assist courts in deciding on the amount to impose, but fines can also be imposed for any common law crime. Some courts are bound by jurisdictional limits. A district magistrates court can impose a fine below R200 000, whilst a regional magistrates court can impose a fine between R200 000 and R400 000.[334]

When exercising their discretion in relation to the imposition of fines, courts will take into account the nature and severity of the crime as well as the financial means and access thereto of the offender.[335] The main purpose of the fine is to punish the offender by creating a financial difficulty which worsens the quality of life for the offender. Another purpose is to accommodate situations where the imposition of imprisonment is regarded by a court as 'too severe'.[336] However, this is countered by the fact that non-payment of the fine results in imprisonment.[337]

[333] SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 391.
[334] In line with the current jurisdictional limits for these courts.
[335] SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 391.
[336] The purpose would therefore be to keep the offender out of prison. See also SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 297.
[337] The position is explained in *S v Van Rooyen* 1994 (2) SACR 823 (A). The *Van Rooyen* decision was criticised in *S v Seola* 1996 (2) SACR 616 (O) at 622c-d.

A large portion of the South African population is indigent and this threatens the efficacy of the fines system. Given the time delays and expense that can be incurred during a proper assessment of the financial position of the accused, presiding officers tend to implement a point-of-departure fine without taking into account the means of the offender. Terblanche suggests that the point-of-departure system should not be implemented to assess the actual amount but rather the extent of the punishment.[338]

*(d) Correctional supervision*

Correctional supervision is a sentence which is served by the offender within the community and under the control and supervision of correctional officials, subject to conditions which have been set by the court or the Commissioner of Correctional Services.[339] The imposition of correctional supervision usually takes the form of house arrest, monitoring or community service.[340] It is regarded as a high penal measure as it restricts the freedom of the offender, however, the court does have the discretion to lessen the restriction of the sentence. The purpose of correctional supervision is to provide a mediatory step that will contribute to the reintegration of offenders as law abiding citizens into communities by ensuring that they are rehabilitated, monitored and accepted by communities.[341]

Correctional supervision was introduced in South Africa in 1991 by the Correctional Services and Supervision Matters Amendment Act.[342] It received high praise as a form of punishment as it does not remove the offender from the community wherein he lives and works (countering the disadvantage of imprisonment) but still limits the freedom of the offender whilst directing him/her into activities that will better improve his or her contribution to society.[343] In the case of *S v Omar,*[344] the court described correctional supervision as an

[338] For example, an offender who has 10 times the means of another deserves 10 times the punishment. This is the approach in Germany (see SS Terblanche 'Die Boete as straf in die Duitse reg' (2008) 19 *Stell* LR 347-373).
[339] Department of correctional services 'Correctional supervision'. Available at http://www.dcs.gov.za/?page_id=317, accessed on 02 October 2019.
[340] See SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 397 for a more detailed discussion.
[341] Department of Correctional Sservices 'Correctional supervision'. Available at http://www.dcs.gov.za/?page_id=317, accessed on 02 October 2019.
[342]122 of 1991.
[343] SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 317.
[344] 1993 (2) SACR 5 (C) at 13d.

'excellent and acceptable alternative… to imprisonment' which has 'regard to the present-day emphasis on the rehabilitation and reformation of offenders'.

Although correctional supervision can be used in conjunction with any other form of punishment, the rehabilitative value of the measure alone is impressive. It is submitted that given the egalitarian values of South Africa's democracy, correctional supervision is a remarkable measure which balances the need for punishment and the interests of the offending person whilst still serving the greater community.

*(e) Committal to a treatment centre*

Section 296 of the Criminal Procedure Act allows for the committal of an offender to a treatment centre in addition to or in place of any other sentence. The provision applies to persons who fall within section 21(1)[345] of the old Prevention of and Treatment for Substance Abuse Act.[346] Although this Act no longer exists, the validity of the provision remains and the meaning can still be ascertained.[347] The purpose of this provision is to provide rehabilitation to offenders for personal shortfalls (such as drug addiction or alcohol dependency) insofar as it threatens the welfare of said person or their family.

The nature of this measure is akin to that of imprisonment as the offender loses his/her liberty for a period of time. Despite the criticisms of this measure,[348] it is submitted that this sanction has an important role to play. In the case of *S v Harman,*[349] the court highlighted that this measure is less of a sentence and more of a court order which has substantial benefit for the offender. It is important to note that committal also serves a higher public interest. A recent

[345] Section 21(1) states: 'Whenever there is lodged with or made before a public prosecutor a sworn declaration in writing by any person, including any social worker, alleging that any other person who is within the area of jurisdiction of the magistrate's court to which such prosecutor is attached, is a person who is dependent on drugs and in consequence thereof squanders his means or injures his health or endangers the peace or in any other manner does harm to his own welfare or the welfare of his family or fails to provide for his own support or for that of any dependant whom he is legally liable to maintain, the clerk of the court shall, at the request of the public prosecutor, issue and deliver to a police officer a summons to be served on such person calling on him to appear before a magistrate within such area at a time and place stated therein, or if the public prosecutor does not request the issue of such a summons, a magistrate of the court in question may, on the application of the public prosecutor, issue a warrant directing that such person be arrested and as soon thereafter as practicable be brought before a magistrate within such area.'
[346] 20 of 1992.
[347] See SS Terblanche 'The sentence' in JJ Joubert (ed) *Criminal Procedure Handbook* (2017).
[348] See SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 209-218.
[349] 1991 (1) SACR 326 (C) at 327i.

study published in the *South African Medical Journal* reported that one out of every five adults in South Africa abuses substances.[350] A further study by the South African Police Services reveals a 10.5% increase in drug-related crimes between 2017 and 2018.[351] Rehabilitation is thus a fundamental step to combat crime and serve the objectives of the Constitution.

*(f) Mitigating and aggravating factors*

Many factors play a role before, during and after the commission of a crime which may influence the sentence and punishment. A court has the power to exercise its discretion and take into account a variety of factors when identifying aggravating and mitigating factors. These would usually depend on the circumstances of each case. Premeditation, lack of remorse and the seriousness of the crime all operate as aggravating factors.[352] Importantly, racism and hate crime also act as important aggravating factors. In *S v Van Wyk*,[353] the court rejected the argument that the offender was brought up in a racist environment and stated:

'there comes a time in the life of a nation when it must… identify such practices as pathologies and seek consciously, visibly and irreversibly to reject its shameful past.'

Mitigating factors include characteristics such as youth, ill health, remorse and the absence of previous offenses. Although the factors should be balanced, it is often found that aggravating factors outweigh the mitigating factors.[354]

5.2.3 Delictual remedies

*(a) Introduction*

[350] L Ramphele 'There are 10 million South Africans abusing substances' (17 August 2018). Available at http://www.capetalk.co.za/articles/315840/there-are-10-million-south-africans-abusing-substances, accessed on 18 July 2019.
[351] SAPS 'Crime stats 2017/2018'. Available at https://www.saps.gov.za/services/crimestats.php, accessed on 18 July 2019.
[352] SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 209-218.
[353] 1992 (1) SACR 147 (NmS) at 173c.
[354] SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 210.

Delictual remedies operate differently to criminal sanctions. The general purpose of delictual remedies is either to compensate the victim for the loss suffered or to prevent harm or further harm from occurring. Although the Constitution can be used to develop new remedies, the normal remedies available to a victim include an interdict, damages and a retraction and apology. Each will be discussed in turn.

*(b) Interdict*

An interdict is an order of court which can take one of two forms, namely a prohibitory interdict and a mandatory interdict.[355] A prohibitory interdict restrains a person from continuing a wrongful act or committing a threatened wrongful act.[356] A mandatory interdict, on the other hand, requires positive conduct on the part of the wrongdoer to cease the continuation of the wrongful act.

In order to obtain an interdict, the victim must prove:

- a clear right;
- an actual or threatened infringement of the right; and
- the absence of another suitable remedy.[357]

Even if all the requisites are met, a court still has the discretion to not grant the interdict. In general, an interdict will not be granted in instances where the harm is minimal, it is capable of being reduced to a monetary value for which an award of damages would suffice, and/or if the granting of the interdict would be oppressive to the respondent.[358]

It is submitted that an interdict is a necessary and succinct remedy that serves an important function. It allows for immediate relief without requiring extensive resources[359] and does not place an excessive burden on the wrongdoer (when exercised correctly). It is, however, necessary to highlight that the interdict strays from the typical compensatory nature of delictual remedies and only provides relief in the form of averting the wrongful (or impending wrongful) act.

[355] J Neethling and JM Potgieter *Law of Delict* 7ed (2015) 269.
[356] JC van der Walt and JR Midgley *Principles of Delict* 3ed (2005) 212.
[357] M Loubser et al *The Law of Delict in South Africa* 3ed (2017) 525.
[358] JC van der Walt and JR Midgley *Principles of Delict* 3ed (2005) 212. See *RM v RB* 2015 (1) SA 270 (KZP).
[359] Such as further investigations into the financial situation of the wrongdoer.

*(c) Damages*

A person who has been harmed as a result of the unlawful conduct of another person can claim delictual damages in the form of compensation from the wrongdoer. Delictual damages may be claimed from the wrongdoer in terms of either the *actio legis aquilia* or the *actio iniuriarum*. Damages can be claimed in terms of the *actio legis acquilia* when the harm takes the form of patrimonial loss and in terms of the *actio iniuriarum* when the harm takes the form of an infringement of the victim's personality rights.[360]

It is important to distinguish delictual damages from constitutional damages because they have different goals. In the case of *Dendy v University of the Witwatersrand,*[361] the court held that delictual damages are aimed at compensating a person for the harm or loss he or she has suffered as a result of the wrongdoer's unlawful conduct, while constitutional damages are aimed at vindicating the rights guaranteed in the Constitution and at preventing further future infringements.[362]

Damages themselves can be divided into two categories, namely special damages and general damages. Special damages refer to those damages that are specified and proven by a victim. It is the amount awarded for quantifiable loss. General damages, on the other hand, are awarded by a court in estimation of the total value of loss, which includes both patrimonial and non-patrimonial loss as well as the cost of the probable consequences that can materialise from the actions of the wrongdoer. The assessment of general damages lies in the discretion of the court.[363]

Calculating damages involves a two-step process: First, the court must identify and establish the nature and extent of the harm that has been suffered; and, second, the court must quantify the harm.

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[360] See *Kumalo v Cycle Lab* (Pty) Ltd (31871/2008) [2011] ZAGPJHC 56. The thesis singles out the *actio iniuriarum,* rather than the Aquillian action, due to its nature which closely relates to the underlying purpose of The Equality Act which also seeks to protect a person's dignity to the extent that it can be impaired by hate speech, unfair discrimination and harassment.
[361] 2005 (5) SA 357 (W).
[362] Para 20.
[363] M Loubser et al *The Law of Delict in South Africa* 3ed (2017) 487.

The quantification of non-patrimonial loss is a speculative process as courts have no precise guidelines to assist them in tallying the final amount.[364] Depending on the circumstances of a case, the court can assess factors such as the age and lifestyle of the victim, the extent and duration of the harm and any other relevant factor as considered in previous cases.[365] Loubser et al. highlight that in awarding damages for non-patrimonial loss, the courts take a conservative approach.[366]

It is submitted that a remedy of damages serves the primary purpose of a delictual action, namely to compensate a victim for the harm suffered. The assessment of damages is a rather involved process which requires active participation and the exercise of discretion from the courts in order to ensure that the final award of damages is fair to both sides. The courts, however, seem to be failing in exercising their discretion by taking a more conservative approach to non-patrimonial damages. Given the extensive case law available, it is submitted that clearer guidelines should be developed as actions for non-patrimonial loss are not new to South African law.

*(d) Retraction and apology*

Under the law of delict, a retraction of the offending words or conduct coupled with an apology operates as a mitigating factor to reduce the award of damages. A retraction signifies that the defendant revokes the offending statement whereas an apology operates as an instance of remorse for having committed the wrong.[367] Although the two can operate as mutually exclusive, a retraction and apology is usually sought together.[368]

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[364] Ibid 515.
[365] See JC van der Walt and JR Midgley *Principles of Delict* 3ed (2005) 228.
[366] M Loubser et al *The Law of Delict in South Africa* 3 ed (2017) 517. See also *De Jongh v Du Pisanie* NO [2004] 2 All SA 565 (SCA) at para 60-61 and *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at para 535-536.
[367] See W Vandenbussch 'Rethinking non-pecuniary remedies for defamation: The case for court-ordered apologies' (31 August 2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766, accessed on 04 October 2019.
[368] A more detailed discussion of retraction is not necessary for the purpose of this thesis and therefore will not be assessed in greater depth. For more information on retractions see M Loubser et al *The Law of Delict in South Africa* 3ed (2017) and W Vandenbussch 'Rethinking non-pecuniary remedies for defamation: The case for court-ordered apologies' (31 August 2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766, accessed on 04 October 2019.

In order for the apology to be accepted, it must comprise of a full and frank withdrawal of the offending words or conduct, as well as some expression of regret.[369] 'An apology should be fair and full and be given equal publicity; it must be made within a reasonable amount of time, be unreserved and must not be withdrawn'.[370] A distinction between full and partial apologies should be acknowledged. According to theorists, apologies consist of different facets: an affirmation or acknowledgment of fault; an expression of regret, remorse or sorrow; a willingness to repair and a promise to adapt future behaviour.[371] Whereas partial apologies would consist of few, but not all of these elements, full apologies would incorporate all or the majority of them.[372]

Apology as a remedy was previously believed to be abrogated by disuse, but since 2002 the remedy has reappeared – although courts are reluctant to accept it to its full extent.[373] It is submitted that apology as a remedy has a valuable role to play in upholding *Ubuntu* and thus should be given greater attention in order to develop it as a remedy rather than merely a mitigating factor.[374]

An apology is often regarded as being an effective mechanism to reconcile the parties and avoid further harm by requiring some form of remorse and reform on the part of the wrongdoer. Although an apology may be insufficient in certain instances,[375] it is submitted that apologies in our law still serve an important purpose. Apologies serve as a critically

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[369] JC van der Walt and JR Midgley *Principles of Delict* 3ed (2005) 216.
[370] Ibid.
[371] W Vandenbussch 'Introducing Apology Legislation in Civil Law Systems. A New Way to Encourage Out-of-Court Dispute Resolution' (23 August 2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237528, accessed on 04 October 2019.
[372] Ibid.
[373] See *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W), *Young v Shaikh* 2004 (3) SA 46 (C) and *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). See also D Milo 'It's hard for me to say I'm sorry: Apology as a Remedy in the South African Law of Defamation' (2012) *Journal of Media Law* 11-16.
[374] In line with sections 173 and 39(2) of the Constitution. In the case of *Dikoko* v *Mokhatla* 2006 (6) SA 235 (CC), Justice Mokgoro held that 'the focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *Ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant' (at para 69).
[375] See *Young v Shaikh* 2004 (3) SA 46 (C). It is argued that widespread harm caused by publication to a great number of recipients substantially outweighs the restorative value of retraction and apologies (see W Vandenbussch 'Rethinking non-pecuniary remedies for defamation: The case for court-ordered apologies' (31 August 2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766, accessed on 04 October 2019.

significant behavioural determinant and a means to rebuild social harmony in the community.[376]

On this note, the court in the case of *Le Roux v Dey*[377] highlighted the purpose of the apology:

'Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.'[378]

The above view was supported by Mokgoro J and Sachs J who argued that given their wide discretion in granting remedies, courts should be pro-active in encouraging apology and mutual understanding wherever possible.[379]

### 5.2.4 Constitutional measures

The Constitution introduced an entrenched and extensive Bill of Rights. In *Fose v Minister of Safety and Security*,[380] the Constitutional Court encouraged the courts to be innovative in developing remedial tools for the effective assertion of constitutional rights. A remedial tool is a mechanism which is employed by a court to repair an infringement of rights suffered by a victim.[381]

[376] W Vandenbussch 'Rethinking non-pecuniary remedies for defamation: The case for court-ordered apologies' (31 August 2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766, accessed on 04 October 2019.
[377] 2011 (3) SA 274 (CC).
[378] *Le Roux v Dey* 2011 (3) SA 274 (CC) at para 202.
[379] See *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paras 68- 69.
[380] 1997 (3) SA 786 (CC) at para 69.
[381] P de Vos and W Freedman *South African Constitutional Law in Context* (2014) 390.

The types of remedies which may be granted by a court are governed by the Constitution. Sections 8(2),[382] 8(3)[383] and 39(2)[384] of the Constitution all encourage the courts to develop and use the common law when granting remedies, taking into account the nature and extent of the right. Courts are thus granted broad remedial discretion in deciding on a just and equitable order.[385] The wide discretion granted to the courts was emphasises by the Constitutional Court *Fose v Minister of Safety and Security* when it stated that:

'in exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of the constitutional infringement and strike effectively at its source'.[386]

Sections 38[387] and 172(1)[388] of the Constitution further provide the courts with the power to develop and grant other forms of 'appropriate relief'. It is thus submitted that courts are given a wide discretion when granting remedies. To ensure that a remedy amounts to being 'appropriate relief', the courts are required to conduct a balancing process guided by the following four objectives:

- to remedy the wrong;
- to deter future violations;

[382] Section 8(2) provides: A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
[383] Section 8(3) provides: When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
[384] When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
[385] See *Janse van Rensburg NO v Minister of Trade and Industry* NO 2001 (1) SA 29 (CC) at para 28.
[386] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at para #.
[387] Section 38 provides: '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 persons 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'.
[388] Section 172(1) provides: 'When deciding a constitutional matter within its power, a court:
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including:
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii)an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'.

- to make an order that can be complied with (i.e. does not overburden the wrongdoer); and
- to make an order that is fair to those who may be affected by the relief.[389]

Although the courts frequently rely on common law remedies, they have also used the wide discretion conferred upon them by the Constitution to develop unique constitutional remedies.[390] Among these are the following:

- Interdicts: As mentioned before, interdicts either compel or prohibit certain behaviours from a defendant. Structural interdicts are an additional mechanism developed by the Constitutional Court to supervise governmental steps taken to comply with the Constitution.[391]

- Constitutional damages: Damages can either be paid to compensate a person for harm which was caused by another or to mitigate future loss from the action of the other person. The probability of a successful award for constitutional damages is relatively slim.[392] However, the need for this remedy still exists as it is appropriate in cases where no other form of relief would achieve the goal of vindicating the right and it may be necessary to encourage victims to report on human rights violations.[393]

- Meaningful engagement: This remedy involves a dialogue between the parties to a dispute in order to identify and achieve certain objectives. It operates almost like a negotiation in order to identify the most appropriate course of action to satisfy both parties to the dispute. It is submitted that this remedy is a progressive one as it promotes participatory democracy, transparency and accountability.[394]

Constitutional law remedies thus aim at protecting the rights of individuals and seek to achieve the vindication of fundamental rights in order to promote the values of an open and

[389] *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para 45. See also C Okpaluba 'Developing the Jurisprudence of Constitutional Remedies for Breach of Fundamental Rights in South Africa: An Analysis of Hoffman and Related Cases' (2017) 32(1) *Southern African Public Law* 1-26.
[390] K Hofmeyr 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125(3) *SALJ* 525.
[391] K Roach 'Crafting remedies for violations of economic, social and cultural rights' in J Squires et al *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 113.
[392] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* 2012 (2) SA 104 (CC) and *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).
[393] P de Vos and W Freedman *South African Constitutional Law in Context* (2014) 412.
[394] Ibid.

democratic society based on freedom and equality and respect for human rights.[395] Given the entrenched importance granted to the rights listed in the Bill of Rights, constitutional remedies also seek to punish those who have infringed fundamental rights in a particularly gross fashion whilst simultaneously preventing any future infringements of rights.[396] The Constitutional Courts further acknowledge that at the heart of a dispute lies the harm caused to a plaintiff and thus remedies have been developed to address the harm caused to the plaintiff as a consequence of an infringement of rights.[397]

## 5.3 The classification of remedies

### 5.3.1 Introduction

Jimenez argues that "ostensibly distinct remedies" (e.g. apologies, damages, interdicts) can be divided into one or more broad remedial categories. These remedial categories are related to one another and are distinguished from each other on the basis of the remedial interests they serve, for example restoration, retribution, coercion and protection. [398]

The remedial interests served by these categories focus either on the victim (usually the plaintiff) or the wrongdoer (usually the defendant) and they do so from an *ex ante* perspective or *ex post* perspective. An *ex ante* perspective focusses on remedies issued prior to the commission of the wrongful act (e.g. an interdict), while an *ex post* perspective focusses on remedies issued after a wrongful act has been committed (e.g. damages).[399]

### 5.3.2 The remedial categories

The four broad remedial categories these remedial interests give rise to are as follows:

- The first category focuses on the victim from an *ex post* perspective. These remedies are restorative in nature. They are aimed at restoring the victim of wrongful conduct

[395] Preamble of the Constitution.
[396] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at para 17.
[397] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at para 17.
[398] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1312.
[399] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1313.

to the position he or she occupied before the harm. A common restorative remedy is an order of specific performance.[400]

- The second category focuses on the wrongdoer also from an *ex post* perspective. These remedies are retributive in nature. They are aimed at punishing the wrongdoer for the harm he or she has already caused. A common retributive remedy is a fine or imprisonment.[401]

- The third category focuses on the wrongdoer from an *ex ante* perspective. These remedies are coercive in nature. They are aimed at deterring future potential wrongdoers from engaging in harmful conduct. A common deterrent remedy is an order of contempt of court.[402]

- The fourth and last category focuses on the victim from an *ex ante* perspective. These remedies are protective in nature. They are aimed at protecting the victim from threatened harmful conduct before it actually takes place. A common protective remedy is a prohibitory interdict.[403]

It is interesting to note that the remedial interests reflected in the first (restorative interests) and third categories (coercive interests) are at the forefront of the debate between corrective justice scholars who argue that remedies ought to provide just compensation to victims of wrongful conduct and land and economics scholars who argue that remedies ought to deter potential future wrongdoers.[404]

Similarly, it is also interesting to note the remedial interests reflected in the second category (restorative interests) and the third category (coercive interests) are at the forefront of the debate between scholars who are argue that the criminal law must serve a retributive purpose and those who argue that it must serve a deterrent purpose.[405]

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[400] Ibid.
[401] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1314.
[402] Ibid.
[403] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1315.
[404] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1316.
[405] M Jimenez 'Remedial consilience' (2013) 62(5) *Emory Law Journal* 1309 1317.

### 5.3.3 Equality Act remedies

The different categories identified by Jimenez provide a useful framework within which section 21(2) of the Equality Act may be analysed. In this respect, it is submitted that the remedies listed in section 21(2) may be divided among the four categories as follows:

- First, the remedies listed in paragraph (d),[406] paragraph (g),[407] paragraph (i)[408] and paragraph (j)[409] are aimed at restoring the victim to the position he or she was in before the harmful conduct and may be classified as restorative remedies.

- Second, the remedies listed in paragraph (d),[410] paragraph (e),[411] paragraph (n)[412] and paragraph (o)[413] are aimed at punishing the wrongdoer for the harm he or she has already caused and may be categorised as retributive remedies.

- Third, the remedies listed in paragraph (a),[414] paragraph (i), paragraph (k),[415] paragraph (l),[416] paragraph (m)[417] and paragraph (p)[418] are aimed at deterring future wrongdoers from engaging in wrongful conduct and may be classified as deterrent remedies.

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[406] Paragraph (d) makes provision for 'an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question'.
[407] Paragraph (g) makes provision for 'an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question'.
[408] Paragraph (i) makes provision for 'an order directing the reasonable accommodation of a group or class of persons by the respondent'.
[409] Paragraph (j) makes provision for 'an order that an unconditional apology be made'.
[410] Paragraph (d) makes provision for 'an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question'.
[411] Paragraph (e) makes provision for 'after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation'.
[412] Paragraph (n) makes provision for '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'.
[413] Paragraph (o) makes provision for 'an appropriate order of costs against any party to the proceedings'.
[414] Paragraph (a) makes provision for 'an interim order'.
[415] Paragraph (k) makes provision for 'an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court'.
[416] Paragraph (l) makes provision for 'an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person'.
[417] Paragraph (m) makes provision for 'a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order'.
[418] Paragraph (p) makes provision for 'an order to comply with any provision of the Act'.

- Fourth, the remedies listed in paragraph (b),[419] paragraph (f),[420] paragraph (h)[421] and paragraph (i) are aimed at protecting the victim from threatened wrongful conduct and may be categorised as protective remedies.

Although the remedies listed in section 21(2) of the Equality Act are spread out among all four remedial categories, the majority focus on the wrongdoer rather than the victim and, more particularly, focus on the deterring wrongdoers from engaging in wrongful conduct in the future. In other words, the majority of section 21(2) remedies focus on the wrongdoer from an *ex ante* perspective.

Despite the fact that section 21(1) appears to favour deterrence over the other remedial categories, this category has not featured as prominently in the case law as might have been expected. As a careful examination of the Equality Act jurisprudence illustrates, the courts have relied heavily on three remedies in particular, namely interdicts, damages and unconditional apologies.

Instead of looking forward and focusing on deterring wrongdoers from engaging in wrongful conduct in the future, therefore, the courts have predominantly look backwards and focused on restoring the victim or punishing the wrongdoer. Given that the majority of cases have focused on individualised acts of hate speech rather than systematic patters of unfair discrimination, this backward looking focus on individual victims and wrongdoers is not surprising.

Having discussed the types of remedies recognised in the South African legal system and the manner in which remedies can be classified, we may now turn to set out and discuss the manner in which the courts have interpreted and applied the interdicts, damages and unconditional apologies.

[419] Paragraph (b) makes provision for 'a declaratory order'.
[420] Paragraph (f) makes provision for 'an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment'.
[421] Paragraph (h) makes provision for 'an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question'.

### 5.4 Interdicts

The power of the Equality Courts to grant interdicts is contained in section 21(2)(f). An interdict is a summary remedy ordered by courts when someone needs protection of his or her rights against unlawful interference or the threat of unlawful interference. Interdicts can operate to stop/prevent a person from acting/taking action (prohibitory), to force a person to act/take action (mandatory) or to order a person to return to the applicant that which he/she was deprived off (restitutionary). Interdicts are not a new concept in our law and have been implemented extensively as delictual and constitutional remedies which enhances our understanding of interdicts as they exist under the Equality Act. Although the purpose of the interdict under the Equality Act is similar to that of its constitutional counterpart i.e. vindication of the fundamental right that was infringed and to deter further infringements of that right, the remedies of the Equality Act are standalone and should not be disguised as mere constitutional remedies.[422]

In order to better understand the role of the interdict as a remedy, the case of *Afri-Forum and Another v Malema and Others*[423] can be examined. In this case, Afri-Forum approached the Equality Court for an order prohibiting Mr Julius Malema (the leader of the African National Congress Youth League at the time) from singing a struggle song entitled '*Awadubula ibhulu*'[424] at public events. When deciding this case, the judge set out the historical context of the song, the meaning of the word 'Boer', the struggle against the oppressive apartheid regime, and South Africa's journey to a democratic constitutional era.[425] Afri-Forum claimed that singing the song caused systemic disadvantage for Afrikaners, undermined their dignity and propagated hatred and violence against them.[426] Malema and the ANC, however, defended the song by arguing that it holds a place in South African history as a liberation song intended to symbolise the destruction of oppression and the apartheid regime.[427] The Equality Court rejected this argument and found that the singing of the song by Malema

[422] Support for this view can be found in R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 183.
[423]2011 (6) SA 240 (EqC).
[424] Which translates to 'shoot the boer'.
[425] M du Plessis, S Pudifin, and G Penfold 'Bill of Rights Jurisprudence' (2011) 1 *Annual Survey of South African Law* 105.
[426] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at para 49.
[427] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at para 53.

constituted hate speech as described in the Equality Act.[428] In line with this, the respondents were interdicted from singing the song.[429]

Critics of interdicts as a form of remedy highlight that although interdicts appear effective on the surface, one may still continue with the offending conduct in private or in circumstances where it is difficult or impossible to anticipate and prevent such conduct.[430] In response to this criticism the Court in *Afri-Forum* stated that interdicts encourage people to pursue new ideals and find a new morality.[431] The Equality Court also highlighted that interdicts, especially in the context of equality legislation regulate future conduct and sets the moral standard to which members of society must adhere.[432]

A number of academic authors have criticised the *Afri-Forum* judgment on the grounds that the Equality Court minimised the factual complexity of the case, first, by deciding which facts are legally relevant, and, second, by reducing their meaning to a simple judgment of legal or illegal.[433] It is submitted, however, that the decision is forward-thinking and goal-centred. The interdict was a necessary step for South Africa's democracy to flourish and it is further suggested that in honouring South African history, it is not necessary to *lick old wounds*.

### 5.5 Damages

The payment of damages under the Equality Act operates on two levels: monetary compensation paid to a person[434] and punitive damages payable to a charity.[435] This balances individual justice with the educative aims of the Act, whilst still serving the wider interests of the community. In the case of *Donaldo v Haripersa*,[436] the Equality Court highlighted that the

[428] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at para 109.
[429] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at para 112. The decision was appealed to the Supreme Court of Appeal, however, the parties reached a settlement agreement, which was made an order of court the following day, substituting the order of the Equality Court.
[430] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at paras 109- 110.
[431] *Afri-Forum and Another v Malema and Others* 2011 (6) S 240 (EqC) at para 110.
[432] Ibid.
[433] See generally N Buitendag and K van Marle '*Afriforum v Malema*: the limits of law and complexity' (2014) 17(6) *PER* 2893-2914. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812014000600021, accessed on 02/08/2019.
[434] Section 21(2)(d).
[435] Section 21(2)(e).
[436] (29/05) [2007] ZAEQC 3.

concept of damages is founded in the civil court practice, and thus although Equality Courts are quasi-constitutional, they apply the civil standard of adjudication. Visser and Potgieter define 'damages' as 'the diminution as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved'.[437]

Payment of damages to a victim are not new in South African law. It serves a similar function to damages as included under delictual claims for personality infringements and constitutional damages for the vindication of guaranteed rights. Damages that are paid to an individual achieves restorative justice whilst acknowledging the victim's dignity. The damages that a complainant may claim under the Equality Act includes past or future financial loss and damages for impairment of dignity, pain and suffering or emotional and psychological suffering.[438] In deciding on the final amount, a court should have regard to the circumstances of each case taking into account relevant factors, including the financial situation of the respondent.[439] An example of this is the decision in *Donaldo v Haripersa,* where the Equality Court had to decide on the amount of damages to award after finding the respondent guilty of infringing section 13 of the Equality Act. In this case the Court only upheld the complainant's claim for impairment of her dignity and emotional and psychological suffering. It refused to take into account medical costs as they were unsubstantiated. A final award of R10 000 paid in monthly instalments of R1 000 a month was granted.

Section 21(2)(e) of the Equality Act is a new remedy that provides for punitive damages which can be paid to a relevant body or organisation. It is submitted that such a remedy is commendable as a forward-looking and community-orientated device. The amount that a respondent pays has a wider effect in assisting victimised groups and encouraging a more tolerant society. It is further submitted that this remedy is especially useful in cases whereby the harassment, unfair discrimination and/or hate speech constituted a public attack either by victimising a group of people rather than an individual or by publication to a wide audience

[437] PJ Visser and JM Potgieter *Law of Damages* (1993) 22.
[438] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 187.
[439] Ibid.

which could potentially incite further intolerance. In such circumstances, payment of the money to a relevant organisation can be used to further the interests of the victimised groups.

An example of the application of section 21(2)(e) of the Act, can be found in the case of *Sonke Gender Justice Network v Malema.*[440] In this case the respondent (Mr Malema) was accused of violating the provisions of the Equality Act while addressing members of the public at a technikon in Cape Town. The offending words were:

'When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you.'[441]

The Equality Court in this case found the utterances by Mr Malema amounted to both hate speech and harassment and ordered him to pay R50 000 to People Opposed to Women Abuse, as sought by the complainants. It is submitted that although the decision itself cannot be faulted, the Court in this case failed in carrying out its objectives as it did not apply its mind to determining the quantum of damages. Merely rubber-stamping the plea of the complainant was a languid act on the part of the Court which defeated its very purpose.

The approach adopted in *Sonke Gender Justice Network* can be compared with the approach adopted in *African National Congress v Sparrow*,[442] which concerned a Facebook entry posted by Ms Penny Sparrow which was deemed to amount to hate speech. The offending post read:

'These monkeys that are allowed to be released on New Year's Eve and onto public beaches, towns, etcetera, absolutely have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I am sorry to say that I was among the revellers and all I saw was black on black skins. What a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try but think they can voice opinions about statute and their way. Dear, oh, dear, from now on I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same, pick, drop and litter.'[443]

[440] 2010 (7) BCLR 729 (EqC).
[441] *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 2.
[442] (01/16) [2016] ZAEQC 1.
[443] *African National Congress v Sparrow* (01/16) [2016] ZAEQC 1 at para 33.

The remarks made by Ms Sparrow was not targeted at an individual but rather victimised an entire group, namely black people. When deciding the case, the Equality Court had regard to previous decisions of hate speech as well as the history of racism directed towards black people. The Court granted an award of damages in the sum of R150 000 payable to the Oliver and Adelaide Tambo Foundation which promotes non-racialism and tolerance, reconciliation and social economic upliftment in South Africa.[444] In arriving at this amount the Court noted that although it is difficult to assess the monetary value of injured feelings, awards should generally be restrained but serve as a deterrent. Unfortunately, no further indication was given as to the manner in which the Court arrived at the final amount nor the factors considered when deciding on the recipient organisation. The Court's failure to indicate which factors it took into account was criticised in *South African Human Rights Commission v Khumalo*,[445] which described the judgment as 'crude and underserving of endorsement'[446].

It is submitted that damages as a remedy has an important role to play in promoting the objectives of the Equality Act. Whilst both sections 21(2)(d) and (e) have illustrated a clear role to play, the courts' generally uninspired approach needs to be revised. Equality Courts were granted extensive discretion in awarding damages and should be more active in doing so. A commendable effort can be seen in *South African Human Rights Commission v Qwelane*,[447] where the Equality Court, upon finding a cartoon to amount to hate speech, ordered an amount of Rl00 000 be paid as damages to promote and raise awareness of the LGBTQIAP+ community. This decision is applauded as the Court awarded the damages to the SAHRC. Given the role of the Chapter Nine Institutions, it is submitted that courts should award damages to these Institutions and direct them to use the money to further the specific interests of the groups affected. It is further submitted that clearer guidelines and more consistent factors need to be employed when calculating an award of damages as the current approach can be criticised as being a 'thumb-suck'[448] intended to merely soothe society's indignation rather than actually eliminate the problem.

[444] 53.
[445] [2019] 1 All SA 254 (GJ).
[446] *South African Human Rights Commission v Khumalo* [2019] 1 All SA 254 (GJ) at para 111.
[447] (44/EQJHB) [2011] ZAEQC 3.
[448] 2019 (1) SA 289 (GJ).

### 5.6 Unconditional apologies

Section 21(2)(j) of the Equality Act provides for an 'unconditional apology'. Where a person's dignity and bodily integrity is impaired, a difficulty arises in trying to restore what has been lost. Despite this difficulty the law seeks to restore it as far as possible by developing the device of 'an apology'.[449] An unconditional apology under the Equality Act requires:

- a declaration from the respondent acknowledging that she/he had infringed the dignity of the complainant by discriminating against her/him unfairly, publishing or disseminating information that could reasonably be regarded as discriminating unfairly, subjecting her/him to hate speech and/or harassing her/him; and
- a sincere apology from the conduct.[450]

The view taken in developing the remedy is that an award of damages is insufficient to assuage *iniuriae*, however, the remedy can be used in conjunction with any other appropriate remedy.[451]

An unconditional apology shifts the focus from a punishment for unfair discrimination, hate speech or harassment to an operational tool to promote equality both at an individual and a societal level. The role that an apology plays for a society was highlighted in the case of *South African Human Rights Commission v Khumalo*.[452] In this case a complaint was laid after the respondent violated the provisions of the Equality Act by publishing the following offending comments on social media on the 7th of January 2016:

'cleanse South Africa of all whites. We must act as Hitler did to the Jews. I don't believe any more that the is a large number of not so racist whit people. I'm starting to be sceptical even of those within our Movement ANC. I will from today unfriend all white people I have as friends from today u must be put under the same blanket as any other racist white because secretly u (sic) all are a bunch of racist fuck heads. as we already seen.'[453]

[449] See generally *Naylor v Central News Agency* 1910 WLD 189 for more information about the initial emergence of this device.
[450] R Kruger *Racism and law: Implementing the right to equality in selected South African equality courts* (Unpublished Thesis, Rhodes University, 2008) 191.
[451] JR Midgley 'Retraction, Apology and Right to Reply' (1995) 58 *THRHR* 289.
[452] 2019 (1) SA 289 (GJ).
[453] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) at para 10.

On the 8th of January the respondent apologised for the above comments by saying:

'I would like to aplogiese (sic) to the Gauteng Government for my emotional comments that I made on a public platform. I further want to apologise to the ANC for the comments I made that do not reflect the ideologies of a Democratic society that are out ideals.'[454]

In deciding the matter, the High Court criticised the apology made by the respondent as being 'hollow' due to his subsequent actions.[455] The respondent argued that the utterances did not amount to hate speech yet provided what would otherwise be a sufficient apology. The actions of the respondent amounted to a tacit withdrawal of the apology and the court suggested that his apology was not for the wrongdoing but rather the publicity and consequences which is attracted.[456] Given that the aim of the Equality Act is to identify and eradicate unfair discrimination, hate speech and harassment, it is necessary that a person who commits such an act admits and appreciates the error of her or his actions before issuing the 'unconditional apology'.

Unconditional apologies under the Equality Act are forward-looking and aim at the restoration of relations between the complainant and respondent. It is submitted that apologies are an important cog in South Africa's democracy as the narrow the social divide by encouraging tolerance and understanding. Apologies also require a more active role by the respondent which is unique when compared with other remedies where the courts make the biggest decisions.

It is important to note that the application of an apology under the Equality Act operates differently to that under the law of delict. Whilst an apology in delict is viewed as a mere mitigating factor, the Equality Act views an apology as a full and appropriate remedy. This inconsistency is confusing when deciding on the status of the device in our law. In the case of *South African Human Rights Commission v Qwelane*,[457] the High Court found that the publication of a homophobic article and cartoon by Mr Qwelane amounted to hate speech and infringed the Equality Act. The Court then exercised its discretion and noted that in spite of the extensive list of available remedies, an order of costs and an unconditional apology, will

[454] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) at para 39.
[455] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) at para 27.
[456] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) at para 43.
[457] 2018 (2) SA 149 (GJ).

be sufficient. It is submitted that the Court took a rather mild approach in this case and did not apply its minds to the relevant facts, namely that the LGBTQIAP+ community is historically disadvantaged and vulnerable in our community, the publication reached a number of people which could incite additional hatred towards the community, the publication discredited and criticised the constitution for being inclusive of all sexualities. Thus, as seen in previous decisions, it would have been appropriate to award damages in addition to ordering the respondent to issue an apology. Although unconditional apologies have an important role to play in achieving the goals of our equality legislation, it is still insufficient as a standalone remedy.

### 5.7 Conclusion

The wide range of remedies listed in section 21(2) of the Equality Act are a commendable and innovative step taken by the legislature to achieve justice for the victims, punish wrongful conduct whilst rehabilitating the perpetrator and guarantee the underlying values of our democracy. As illustrated above, many of the remedies previously existed in our law but the Equality Act blurs the boarders between the different branches of law drawing on each and representing them in the remedies list. Further, Parliament took into account the subjectivity of each case and affords a great deal of discretion to the courts outside of the listed remedies. However, section 21(2) is not without fault.

Despite these avenues, the courts have limited themselves to three remedies only whilst few courts have reasoned their decisions in doing such. In order to give proper effect to the Equality Act and achieve its objectives, the courts need to take on a more active role when reasoning their decisions and illustrate some exercise of their wide discretion granted by the Act in relation to the remedies. Furthermore, the interpretation of the remedies digresses slightly from that of its counterparts in other legal spheres. On the one hand, this establishes the originality of the Equality Courts and is in line with their wide discretion, however, this can also lead to operational problems due to inconsistency. It is thus submitted that Equality Courts should revise and better reason their approaches to the remedies, taking into account existing attitudes.

## CHAPTER 6: RECOMMENDATIONS AND CONCLUSIONS

*'South Africans have no concept of time and this is also why we can't solve poverty and social problems… It's now 10 years since the fall of the Apartheid government and we cannot blame apartheid for being tardy'* – Nelson Mandela

### 6.1 Introduction

Democracy in South Africa was ushered in with the adoption of the interim and final Constitutions. Given South Africa's appalling history of exclusion, oppression and intolerance, it is not surprising that the new democratic dispensation sought to protect the rights of its citizens through an entrenched Bill of Rights. One of the most important rights protected in the Bill of Rights is contained in section 9, namely the right to equality. In order to give effect to this right, Parliament passed the Equality Act which sets out a number of provisions aimed at eradicating unfair discrimination, hate speech and harassment while promoting equality.

Due to South Africa's crippling system of apartheid, the Equality Act includes a number of novel devices which are aimed at correcting the imbalances of the past, assisting vulnerable social groups and working towards the egalitarian society envisaged by the Constitution. Section 21 of the Equality Act is an extraordinary legislative tool consisting of an extensive list of remedial measures. However, its implementation has been unjustifiably limited. It is submitted that the introduction of the Equality Act and its devices were a laudable effort to drive social change by finding innovative ways to internalise equality in the hearts and minds of the nation, however, the failure to respond to social changes and inadequate application of remedial measures have lead the Equality Act and its devices to become archaic.

### 6.2 Filling in the gap

Whilst a large part of South Africa's equality legislation needed to be guided by historical contextualisation, it is also necessary for the legislation to respond to social changes so as not to create an issue of reverse inequality, thus perpetuating an inescapable cycle. As previously stated, the Equality Act was drafted under severe time constraints which resulted in the Act being rather inelegant. Since its inception 20 years ago, the Act has only seen minor revisions

but no efforts have been made to correct the bigger problems. Not only does the Equality Act violate the egalitarian views of the Constitution, it also lacks any indication of an intention by Parliament to reconcile the Equality Act with such views. It is submitted that such nonchalance is an affront to South Africa's democracy and thus it is necessary for Parliament to revisit the Act to fill in the gaps. A thorough revision of the Equality Act should be conducted in order to facilitate a move towards a more egalitarian society. Such can be achieved through measures such as the inclusion of all identified groups of the LGBTQIAP+ community under the protection of the Act, a more open approach to issues of gender inequality and a greater sensitivity to issues of race.

Apart from the obvious shortfall in the operation of the Act, Parliament also fell short in the administration of the Equality Act. In drafting the Act and its aims, Parliament failed to include defined targets and timeframes against which the efficacy of the Act can be measured. It is submitted that in order to address this the Act needs to identify specific goals against distinct timeframes taking into account that a transition to true equality involves changes the hearts and minds of society which takes years and a number of additional resources.[458] In carrying out the latter it is important to mention that Equality Courts will play a vital role but cannot be viewed as the sole means.

### 6.3 Equality Courts and their functioning

In order for the Equality Act to have a meaningful impact in our society, its goals must be pursued proactively by both the legislature and the courts. The Equality Courts were an innovative tool devised by the Act to drive social change. Over the past two decades the establishment and functioning of the Equality Courts has seen impressive and steady improvement. However, the concern still remains that if the purpose of the Equality Act was actually being fulfilled through the operation of the Equality Courts, the number of cases reported would be decreasing and thus the operation of the Equality Courts would also diminish. When faced with this problem, one must consider the manner in which the Equality Courts operate. Whilst the Equality Courts exist as necessary judicial structures, their

[458] In his article, Hepple identified five generations of legislation used by Britain in order to transition from an intolerant society to one based on liberation and equality. Although one cannot simply deploy equality measures between countries as equality legislation is not a one size fits all, it is submitted that the time periods and interim measures taken by Britain could inform the transformation of South Africa's Equality Act (see B Hepple 'The New Single Equality Act in Britain' (2010) 5 *The Equal Rights Review* 11).

existence alone cannot hinder prohibited conduct. In carrying out their duties, Equality Courts are tasked with identifying and applying the most relevant remedies in order to uphold the purpose of the Act. Thus the issue of achieving the Equality Act's purpose does not lie directly in the operation of the Equality Courts but rather the usage of relevant remedies as created under the Act.

### 6.4 The usage of remedies

The Equality Act has been described as an innovative piece of legislation which created a number of devices to assist it in reaching its objectives. One such device was the extensive list of remedies granted to the Equality Courts. As previously illustrated, despite this extensive list of remedies, Equality Courts tend to hover between three distinct remedies, namely interdicts, damage and unconditional apologies. The Equality Court's implementation of select remedies have not been sufficiently justified and may be regarded as inappropriate as the disuse of the other remedies illustrates a failure on the part of the Equality Courts to exercise their discretion and creativity as encouraged under the Act.

As previously discussed the remedies enjoy wide legal accommodation, but there does exist a discrepancy in the operation of the remedies between the different legal realms.[459] Whilst it can be argued that different branches of the law have different purposes and thus the different treatment of these remedies is not surprising, it is submitted that problems can arise when interpreting the role of a particular remedy in South African law. It is also submitted that given their long existence, the usage of remedies in other legal realms should be given greater emphasis in shaping the approach to the Equality Act remedies. Further, by developing an understanding and appreciation of the section 21 remedies, Equality Courts will be more confident in their appropriate usage. This is central to achieve not only the overarching purposes of the Equality Act but also the egalitarian values envisioned by the Constitution.

[459] For example, unconditional apologies act as mere mitigating factors in delict but under our equality legislation it is accepted as being a full and favourable remedy.

## 6.5 Conclusion

At its inception, the Equality Act was a necessary and impressive piece of legislation which illustrated a step in the right direction for a country emerging out of decades of intolerance and inequality. Since then, however, the Act has failed to keep to date with social changes and maintain its prestige in our law. Whilst the provisions of the Act do need to be revised, more importantly, in order to achieve the goals of the Act, the devices of the Act, specifically the remedies of the Equality Courts, need to be actively effected. The extensive list of remedies has withstood the past two decades and remains an innovative but severely under utilised tool. Furthermore, Equality Courts should be more creative when implementing section 21 as it has great potential in relation to achieving the purposes of the Act. The revision of the Equality Act together with the commitment of the Equality Courts in exercising and properly articulating their section 21 discretion can steadily achieve the purpose of the Equality Act without straying from the egalitarian values highlighted by our Constitution.[460]

[460] See also A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609-632.

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