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EMPLOYMENT EQUITY AND ANTI
DISCRIMINATION LAW:
THE EMPLOYMENT EQUITY ACT
12 YEARS ON
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Introduction

- The Employment Equity Act [\[1\]](#) (“EEA”) was promulgated as part of a broader, deliberate and more comprehensive approach ‘*to establish a society based on democratic values, social justice and fundamental rights*’ in terms of which ‘*every citizen is equally protected by the law*’[\[2\]](#).
- In order to understand the nature and purpose of the EEA, it is necessary to understand the broader constitutional right to equality.

[\[1\]](#) Act 55 of 1998

[\[2\]](#) See the preamble to the 1996



- *“The 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 as its centre. Equality is our Constitution’s focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.”[\[1\]](#)*
- It is in this context that our law has taken phenomenal steps. The cases, at least at the level of the Constitutional Court, demonstrate far reaching and substantive, as opposed to formalistic, approaches to the concepts of dignity, equality and discrimination in almost all of its facets.

[\[1\]](#) Hugo para [74]



The Constitutional Right to Equality

- The concept of equality, in its infancy, began as a contested issue^[1]. The contest was between a formalistic approach to the concept on the one hand, and a substantive approach, on the other hand.
- Formal equality, it is said, is premised on the assumption that all persons are equal bearers of rights and any aberration of this right can be rectified by ensuring the simple extension of the same rights and entitlement to all, irrespective of the historical or contextual nuances or indeed of the social or economic disparities between people^[2]. In this sense, formal equality simply aims to ‘remove’ the inequality.

^[1] Carole Cooper, A Constitutional Reading of the Test for Unfair Discrimination in Labour Law, Acta Juridica (2001) pgs 121 – 146 at page 127

^[2] De Waal, Currie & Erasmus, The Bill of Rights Handbook (4th ed) page 200.



- The substantive approach to equality, on the other hand, does not presuppose a just social order or the equality of persons in a neutral sense. It requires a deliberate acknowledgement and assessment of historical differences and discrimination in order to meaningfully address inequality. In this sense, substantive equality seeks to ‘redress’ the inequality^[1].
- The Constitutional Court has, it appears, adopted a purposive approach to constitutional interpretation by applying a substantive interpretation of the concept of equality. In *Hugo* ^[2] the Constitutional Court stated as follows:

^[1] Janet Kentridge, “Equality”, in Chaskalson et al (eds) Constitutional Law of South Africa 1999 at para 14 (“Kentridge”)

^[2] Hugo para [41]



- *The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity regardless of their membership of particular groups.....”*
- Embedded in this approach is the recognition that the goal of equality cannot always be achieved by insisting on identical treatment in all circumstances. According to the Constitutional Court:



- *“We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”^[1]*

^[1] Hugo at para [41]



Section 9 of the Constitution

- Sections 9(3) and 9(4) of the Constitution sets the ‘mould’ for all legislative provisions prohibiting discrimination^[1]. It provides:
 - (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
 - (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National Legislation must be enacted to prevent or prohibit unfair discrimination.

^[1] Dupper and Garbers, Employment Discrimination: A Commentary in Thompson & Benjamin (eds) South African Labour Law, CC1 – 16 (“Dupper & Garbers”).



- In terms of section 9(5) of the Constitution, the respondent is given the first opportunity to justify its conduct. In terms thereof, the respondent is required to demonstrate that its conduct, even though discriminatory, is not unfair. If the respondent fails on that score, it has a second opportunity to demonstrate that even though such conduct constitutes unfair discrimination, it is nevertheless justifiable in terms of section 36(1) of the Constitution.



The two stage analysis

- In light of the provisions of section 9(3), (4) and (5), an understanding of Goldstone J's infamous two stage analysis - to establish whether the relevant legislative provision or the conduct complained of is unfairly discriminatory - is pivotal.
- The first enquiry is whether the impugned provision or conduct differentiates between people or categories of people. If it does so differentiate, it is necessary to enquire whether '*there is a rational connection between the differentiation in question and the legitimate purpose ... it is designed to achieve*'^[1]. If there is no such rational relationship, then the differentiation amounts to discrimination. However, if there is a rational relationship, it is still necessary to determine whether, despite such rationality, the differentiation nevertheless amounts to discrimination.

^[1] Harksen para [43]



- The second enquiry is whether the differentiation amounts to unfair discrimination. This process involves a two stage analysis: 1) Does the 'differentiation' amount to 'discrimination?' and 2) If so, does it amount to 'unfair discrimination?'

The first stage:

- If the 'differentiation' is on the basis of one or more of the specified grounds, then the 'differentiation' constitutes discrimination.



- If the ‘differentiation’ is not on a specified ground, then ‘*whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner*’[\[1\]](#).
- the determination as to whether there has been ‘differentiation’ on the basis of specified or unspecified ground must be answered objectively[\[2\]](#).

[\[1\]](#) Harksen para [54]

[\[2\]](#) Harksen para [48]



The second stage:

- *If the 'differentiation' amounts to 'discrimination', does it in fact amount to 'unfair discrimination'?*
- *If the discrimination is on a specified ground, then it is presumed to be unfair.*
- *If the discrimination is on an unspecified ground, then the onus is on the complainant to establish the 'unfairness'.*
- *Given the Constitutional Court's recognition that 'discrimination' has acquired a particular pejorative meaning unfair discrimination on an unspecified ground effectively means treating persons differently in a way which impairs their fundamental dignity as human beings.*



- in order to determine the ‘unfairness’, if any, of discrimination on an unspecified ground, various factors must be considered, including: a) the position of the complainants in society and whether they have suffered historically from patterns of disadvantage; b) the nature of the provision or power and the purpose sought to be achieved by it^[1]; c) any other relevant factors including the extent to which the provision or conduct has limited the rights of the complainants or whether it has impaired their fundamental human dignity or constitutes impairment of a comparably serious manner^[2].

^[1] Harksen para [52]- if for instance its purpose is not aimed at impairing the fundamental dignity of the complainants, but is aimed rather at achieving a worthy, noble or societal goal, this factor may have a significant influence on the outcome of the enquiry as to whether the complainants have suffered any impairment at all

^[2] Harksen para [52]



The third and final leg of the enquiry deals with the justification

- Once the discrimination is held to be unfair, the final enquiry is whether the provision can be justified in terms of section 36(1) of the Constitution.
- This, the Constitutional Court indicates, '*will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality*'[\[1\]](#).
- This proportionality exercise is focussed on the purposes, actions, reasons, extent and necessity of the respondent's conduct.

[\[1\]](#) Harksen para [53]



- According to *Larbi-Odam* a precondition to the applicability of section 33(1) [36(1)] is that the limitation of a right must occur by a “*law of general application*”[\[1\]](#).

[\[1\]](#) Larbi-Odam para [27]



The EEA

- Issues of discrimination against applicants for employment and employees (other than discriminatory dismissals) is regulated by Chapter 2 of the EEA since 9 August 1999.
- Section 6 of the EEA prohibits unfair discrimination and provides as follows:
 1. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth;



2. It is not unfair discrimination to –
 - a) take affirmative action measures consistent with the purpose of this Act; or
 - b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

3. Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).



- The prohibition against unfair discrimination in the EEA^[1] mirrors that of section 9 of the Constitution, and in addition includes three further specified grounds: family responsibility, political opinion and HIV status.
- Both lists of specified grounds are not exhaustive as they are premised on the assumption that there may be other grounds of similar character by the use of the word ‘including’.
- Furthermore, the provision of ‘arbitrary grounds’ in the LRA has thankfully been omitted in the EEA.
- It is at the level of justification of the discriminatory acts that the LRA and the EEA differ from the equivalent provisions in the Constitution.

^[1] Section 6



The test for unfair discrimination in labour matters

- The preamble to the EEA accordingly not only sets the scene for the application of the constitutional jurisprudence in respect of its equality provisions to the EEA, it also creates the potential for the development of such jurisprudence to matters that may be intrinsically employment related.
- It is not surprising then that the *Harksen test* has been decisively applied by the Constitutional Court on two occasions in employment related matters: first in *Larbi-Odam*^[1] and then in *Hoffman*^[2].

^[1] 1998 (1) SA 745 (CC)

^[2] (2000) 21 ILJ 2357 (CC)



- In contrast, the Labour Court’s jurisprudence regarding the appropriate test has, in the main, been indecisive, confused and in most parts silent on the test, if any, used in determining whether discrimination exists, and if so, whether such discrimination amounts to unfair discrimination.
- The first and perhaps the most seminal case that emerged from the Labour Court’s jurisprudence in this area, is that of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others*^[1].
- the Labour Court embraced the Harksen test in relation to determining whether ‘differentiation’ amounts to ‘discrimination’, and in assessing when discrimination on specified and unspecified grounds becomes ‘unfair’ discrimination.

^[1] (1998) 19 ILJ 285 (LC) (“Leonard Dingler”)



The EEA's provisions on justifying unfair discrimination

- In terms of the *Harksen test*, the respondent is required to demonstrate that its conduct, even though discriminatory, is not unfair. If the respondent fails on that score, it has a second opportunity to demonstrate that even though such conduct constitutes unfair discrimination, it is nevertheless justifiable in terms of section 36(1) of the Constitution.
- According to *Larbi-Odam* a precondition to the applicability of section [36(1)] is that the limitation of a right must occur by a “*law of general application*”^[1].

^[1] *Larbi-Odam* para [27]



- In this regard the respondent must demonstrate that the discrimination is ‘*reasonable and justifiable in an open and democratic society*’, taking all relevant factors into account including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and, less restrictive means to achieve such purpose.
- In terms of section 6 of the EEA, the respondent arguably also has two opportunities at justification: the first being the same as the general defence of ‘fair discrimination’ in *Harksen*, and the second comprising of two specific defences innate to employment matters, that being affirmative action measures or matters inherent to the requirement of a job^[1].

^[1] Section 6(2) of the EEA



- the justification in terms of section 36(1) of the Constitution must be equally applicable to employment matters subject to the precondition established by *Larbi-Odam*.
- However, the Labour Court in *Leonard Dingler* collapses the ‘fairness’ and ‘justification’ enquiries, separated by *Harksen*, into one process, and it appears to apply the proportionality test in the absence of a ‘law of general application’:
- “*The justification requirement lies at the heart of the enquiry into unfair discrimination and involves a careful consideration of the context in which the dispute arises. There is no fixed formula to be applied mechanically.*”
-



- *Discrimination is unfair if it is reprehensible in terms of society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational."*^[1]
- According to Dupper and Garbers^[2], in terms of this formulation, if an employer can demonstrate that "the employment policy or practice has a legitimate object and that the means used to achieve that object are proportional and rational, the impugned discrimination will be held not to be unfair".

^[1] Leonard Dingler page 295

^[2] Dupper and Garbers, CC1-30



- Implicitly Dupper and Garbers argue that the ‘justification’ enquiry in *Harksen* in respect of a ‘law of general application’ has, in labour matters, effectively been replaced by a different justification enquiry in *Leonard Dingler* in respect of an ‘an employment policy or practice’, albeit in a collapsed form.
 - This contention is clearly incorrect. First, the Constitutional Court has repeatedly applied^[1] the *Harksen* test by separating the ‘fairness’ and ‘justification’ enquiries and there is a compelling reason why these enquiries should not be collapsed for the purposes of section 6 of the EEA.
- ^[1] See *Harksen*, *Larbi Odam*, *National Coalition*, and *Lesbian & Gay Equality Project*, amongst others



- Janet Kentridge explains that each level of the enquiry is occupied by different considerations:

“At the centre of the notion of ‘unfair’ discrimination in section 9(3) is the holder of the right, the position of that person in society, and the kind of harm suffered by that rights claimant. In contrast, the limitation on rights imposed by section 36(1) is focussed on the purposes, actions and reasons of government, and not the rights holder. The shift in perspective is critical.”^[1]

^[1] Janet Kentridge, 14-43



- Secondly, in terms of the ‘*fairness*’ enquiry in *Harksen*, in order to determine the ‘*unfairness*’, if any, of discrimination on an unspecified ground, various factors must be considered, including: a) the position of the complainants in society and whether they have suffered historically from patterns of disadvantage; b) the nature of the provision or power and the purpose sought to be achieved by it^[1]; c) any other relevant factors including the extent to which the provision or conduct has limited the rights of the complainants or whether it has impaired their fundamental human dignity or constitutes impairment of a comparably serious manner^[2].

^[1] *Harksen* para [52]- if for instance its purpose is not aimed at impairing the fundamental dignity of the complainants, but is aimed rather at achieving a worthy, noble or societal goal, this factor may have a significant influence on the outcome of the enquiry as to whether the complainants have suffered any impairment at all

^[2] *Harksen* para [52].



- This enquiry is focussed on the '*holder of the right*' and the harm suffered by that '*rights claimant*'.
- In terms of the '*justification*' enquiry, this '*will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality*'[\[1\]](#). This enquiry is focussed on the infringer of the rights.
- In any event, both enquiries are broadly similar except that they are assessed from the legal end of either the holder or the infringer's telescope.

[\[1\]](#) Harksen para [53]



- It is arguably the similarity in these enquiries that led the Labour Court in Leonard Dingler to use the language of ‘*proportionality*’ - more commonly used in the justification enquiry - in the context of determining whether the act of discrimination in that case^[1] constituted unfair discrimination.
- Accordingly, and in the context of the EEA, the Labour Court in Leonard Dingler applied the *Harksen test* in circumstances that did not warrant a ‘*justification*’ enquiry either on the basis of section 36(1) of the Constitution or sections 6(1)(a) or (b) of the EEA. It did not, in the circumstances ‘collapse’ the ‘fairness’ and ‘justification’ enquiries into one enquiry.

^[1] Leonard Dingler page 96 – limiting membership of the staff benefit fund to monthly paid employees and indirectly discriminating against black employees



- Many of the reported judgements^[1] from the Labour Court, since *Leonard Dingler*, have either expressly or implicitly applied the *Harksen test*. Noticeably, many of the judgements have purported to apply the *Harksen test* without demonstrating the precise manner of its application^[2].
- This is largely because the majority of the cases have dealt with disputes of direct or indirect discrimination on specified rather than unspecified grounds.

^[1] See generally cases referred to in footnotes 66 to 76

^[2] See for example: SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd (2006) 27 ILJ 1204 (LC); McPherson v University of KwaZulu-Natal (2008) 29 ILJ 674 (LC)



- Where the courts have, on occasion, attempted to apply the *Harksen test* with some specificity, the attempts have either confused the different enquiries^[1]

^[1] See: Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC), where the court confused the discrimination inquiry with the unfairness inquiry; Lagadien v University of Cape Town (2000) ILJ 2469 (LC) where the court, in dealing with the claim of unfair discrimination on an unspecified ground, also confused the discrimination inquiry with the unfairness inquiry, and in addition, did not consider the impact of such discrimination on her dignity or any adverse impact in a comparable way. See also Wallace v Du Toit (2006) 27 ILJ 1754 (LC) where the Labour Court took the view that 'pregnancy' was not an inherent requirement of the job of an au pair, and accordingly found that there had been unfair discrimination on the grounds of pregnancy. The Court accordingly confused the 'fairness' enquiry with the 'justification' enquiry.



- or have lacked clarity and precision^[1]. Occasionally, the Labour Court appears to have applied the test correctly^[2].

^[1] See for instance: Woolworths (Pty) Ltd v Whitehead (2000) 21 ILJ at 571 (LAC); McPherson v University of KwaZulu-Natal (2008) 29 ILJ 674 (LC)

^[2] See for instance: Middleton v Industrial Chemical Carriers (Pty) Ltd (2001) 22 ILJ 472 (LC); Ntai & Others v SA Breweries Ltd (2001) 22 ILJ 214 (LC); Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC)



Nature of the discrimination Disputes in labour matters

- The vast majority of the disputes dealt with discrimination on the basis of the specified grounds in the EEA. Most of these have involved discrimination on the basis of race^[1]

^[1] Crown Chickens (Pty) Ltd v Kapp & Others (2002) 23 ILJ 863 (LAC); NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home (2004) 25 ILJ 2195 (LAC); SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd (2006) 27 ILJ 1204 (LC); SACWU & Another v NCP Chlorchem (Pty) Ltd (2007) 28 ILJ 1308 (LC); Stojce v University of KZN (Natal) (2006) 27 ILJ 2696 (LC)



- pregnancy^[1], marital status^[2],

^[1] Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC); Botha v A Import Export International CC (1999) 20 ILJ 2580 (LC); Woolworths (Pty) Ltd v Whitehead (2000) 21 ILJ 571 (LAC); Stokwe v Department of Education EC (2005) 26 ILJ 927 (LC); Uys v Imperial Car Rental (Pty) Ltd (2006) 27 ILJ 2702 (LC)

^[2] Western Cape Education Department v George (1996) 17 ILJ 547 (LAC); Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC); Botha v A Import Export International CC (1999) 20 ILJ 2580 (LC); Wallace v Du Toit (2006) 27 ILJ 1754 (LC)



- age[1], family responsibility[2], language[3],

[1] HOSPERSA obo Venter v SA Nursing Council (2006) 27 ILJ 1143 (LC); Botha v Du Toit Very & Partners CC [2006] 1 BLLR 1 (LC); Evans v Japanese School of Johannesburg (2006) 27 ILJ 2607 (LC)

[2] Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA (2007) 28 ILJ 627 (LC)

[3] Stojce v University of KZN (Natal) (2006) 27 ILJ 2696 (LC)



- sexual orientation[1], religion[2], political opinion[3],
- disability[4] and HIV/AIDS[5]. Relatively few cases of discrimination based on ‘unspecified’ grounds were also heard by the courts[6].

[1] Atkins v Datacentrix (Pty) Ltd (2010) 31 ILJ 1130 (LC); Strydom v Nederduitse Gemeente Moreleta Park (2009) 30 ILJ 868 (EqC SE).

[2] FAWU & others v Rainbow Chicken Farms (2000) 21 ILJ 615 (LC); Dlamini & others v Green Four Security (2006) 27 ILJ 2098 (LC); Strydom v Nederduitse Gemeente Moreleta Park (2009) 30 ILJ 868 (EqC SE)

[3] Germishuys v Upington Municipality (2000) 21 ILJ 2439; Walters v Transitional Local Council of Port Elizabeth (2000) 21 ILJ 2723 (LC).

[4] Willemse v Patelia NO & others (2007) 28 ILJ 428 (LC); Standard Bank of SA v CCMA & Others (2008) 29 ILJ 1239 (LC); Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC).

[5] Hoffmann v SA Airways (2000) 21 ILJ 2357 (CC).

[6] Leonard Dingler; Stojce v University of KZN (Natal) (2006) 27 ILJ 2696 (LC); McPherson v University of KwaZulu-Natal (2008) 29 ILJ 674 (LC); Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC).



Direct discrimination

- In the context of direct discrimination on the basis of race, the court in Leonard Dingler held that such discrimination occurs because of their race or on the basis of some characteristic specific to members of that race^[1].
- In determining whether there is discrimination on one of the specified grounds, the House of Lords has established a simple ‘but for’ test^[2].
- Lord Goff in James v Eastleigh Borough

^[1] Leonard Dingler, page 289

^[2] R v Birmingham City Council ex parte EOC [1989] AC 1155; James v Eastleigh Borough Council [1990] 2 AC 751



- Council^[1] articulated the test in the context of sex discrimination as follows:

“Cases of direct discrimination ... can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex? This simple test possesses the double virtue that, on the one hand, it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex and on the other hand it avoids, in most cases at least, complicated questions relating to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms.”

^[1] [1990] 2 AC 751



- In *Woolworths (Pty) Ltd v Whitehead*^[1], only Zondo AJP expressed support for the ‘but for’ test. Apart from this indicator, it is unclear what test has been applied by the Labour Courts^[2] for this purpose.

^[1] (2000) 21 ILJ 571 (LAC) at 580D-E.

^[2] In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) the court indicated the following test: “*The mere existence of disparate treatment of people of , for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment*” [para 26]. Later in the judgement, the Court indicates that : “*This raises the question whether the impermissible unfair discrimination ... must be the sole cause of the discrimination not whether it is enough that it be a cause*” [para 29]. It is apparent that the Court, in attempting to establish a test of sorts, confuses the discrimination inquiry with the unfairness inquiry. See also *Ntai & Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC)



Indirect discrimination

- Indirect discrimination is intended to capture practices that are fair in form but discriminatory in operation.
- Indirect discrimination is intended to reflect the concept of ‘disparate impact’ discrimination recognised by the US Supreme Court in its famous decision in *Griggs v Duke Power Co* (1971) 401 US 424.
- In this case black employees claimed that the employer’s practice of requiring a high school diploma or success in an IQ test as a condition of employment in particular jobs discriminated against them on the basis of race, as a disproportionate number of black people were excluded or rendered ineligible as a consequence.



- The Supreme Court found that neither the high school completion requirement nor the general intelligence test had any relevance or demonstrable relationship to the successful performance of the jobs for which it was used.
- In articulating the prohibition on indirect discrimination, it stated as follows:

“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favour an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.....



- *What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”[\[1\]](#)*
- The Griggs case demonstrates the capacity of the principle of indirect discrimination “*to go beyond the formalistic approach associated with the regulation of direct discrimination (i.e. the requirement to treat like cases alike) and to challenge practices which serve to perpetuate the effects of past disadvantage and unequal life chances*”[\[2\]](#).

[\[1\]](#) Grigg 429-430

[\[2\]](#) McColgan, Discrimination Law – Text, Cases and Materials, page 73



- Despite the virtues of the concept of indirect discrimination, there have been very few cases brought in our courts on this basis^[1].
- It is also apparent from the cases that exist, that the concept of indirect discrimination is inherently statistical. Given that our case law is very undeveloped in this area, it is difficult to assess the future approach of our courts in determining the level and extent of the statistical data that will be required for a successful claim.

^[1] For instance, see: Leonard Dingler; Dlamini & Others v Green Four Security (2006) 27 ILJ 2098 (LC); McPherson v University of KwaZulu-Natal (2008) 29 ILJ 674 (LC); Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC)



- In unfair discrimination cases, statistics if available, could establish disparate treatment quickly and decisively. In South Africa however, unlike other jurisdictions such as the USA and the UK, the availability or the reliance of such statistics could potentially raise challenges for litigants and the courts.
- It is accordingly unlikely that the concept of unfair discrimination in SA will reach the same level of technical sophistication as it has in the USA and the UK. In the circumstances a more flexible approach to this concept must, in appropriate circumstances, be developed.



- In *Leonard Dingler*, the employees argued that the restriction of membership of the staff benefit fund to monthly paid employees had a disparate impact on black employees. The evidence indicated that of the approximately 50 monthly paid employees, only eight were black^[1].
- In this case however, the company conceded that the distinction between monthly and weekly paid employees for the purposes of membership of the staff benefit fund indirectly discriminated against the employees on the basis of race^[2]. In the context of this concession, the court found it unnecessary to embark on a detailed statistical analysis to determine the extent of the disparate treatment and went on to hold that the number of black employees who qualified for membership of the staff benefit fund was disproportionately low^[3].

^[1] *Leonard Dingler*, page 293

^[2] *Leonard Dingler*, Page 292

^[3] *Leonard Dingler*, page 293



- It is possible to argue, as Dupper and Garbers do^[1], that the Labour Court in *Leonard Dingler* adopted a flexible approach to the matter in circumstances where the disparate treatment was sufficiently large not to be considered trivial or minimal. However, in light of the available statistical data provided to the Court and the company's concession about the impact of the restriction on its black employees, it was simply unnecessary for the Court to adopt a more technical or analytical approach.
- Whether our courts will continue to adopt a flexible approach to this matter will ultimately depend on the nature of the practice or conduct complained of and the means required to establish the disparate treatment.

^[1] Dupper and Garbers, CC1-43



Defences to discrimination

Inherent requirements for the job

- The defence of ‘inherent job requirement’ (“the defence”) emanates from the ILO’s Discrimination (Employment and Occupation) Convention No 111 of 1958. The Convention provides that “*any distinction, exclusion, preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination*[\[1\]](#)”.

[\[1\]](#) Article 1(2)



- In adopting [\[1\]](#) this Convention, South Africa articulated the provision in section 6(2)(b) of the EEA as follows:

“It is not unfair discrimination to – distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”.

- The interpretation of this defence by the Labour Court has, despite its clear terminology, caused some problems. Whilst some cases have given the *defence* a restrictive meaning, one judgement [\[1\]](#) has confused the nature and purpose of this *defence* with the ‘*justification*’ enquiry [\[2\]](#) set out in section 36 of the Constitution.

[\[1\]](#) Van Niekerk et al, Law @ Work, first edition, page 133



- In its proper context, the *defence* could arguably be given:
 - 1) an expansive interpretation, on the one hand, which could amount to an escape clause for employers facing discrimination suits^[1]; or
 - 2) a restrictive interpretation, on the other hand, to ensure that the recurrent themes of prejudice, preconceptions and stereotyping are eliminated in the workplace.
- The judgements of the US Supreme Court in two decisions reflects such contrasting interpretations.

^[1] Melanie Naidu, The 'Inherent Job Requirement' Defence – Lessons from Abroad, (1998) 10 SA Merc LJ.



- In Griggs the US Supreme Court adopted the principle of “*business necessity*” as the “*touchstone*” of the justifiability enquiry. In practical terms the Court indicated that this meant that the contentious high school diploma requirement and the use of intelligent quotient tests must be shown to relate to the performance of the job for which such requirements were needed.
- Ten years later, in Wards Cove Packing Co v Atonio^[1], a less liberal Supreme Court set the standard much lower than that of “*business necessity*”, and indicated that the “*touchstone*” of the enquiry is “*a reasoned review of the employer’s justification for his use of the challenged practice*”.

^[1] 490 US 642 (1989)



- The Court did not however venture to determine the parameters of such a reasonableness inquiry except to indicate in broad terms that *“a mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practised through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster...”*^[1].
- In South Africa, the defence that only requirements inherent or inimical to the particular job may be regarded as justifiable, is progressive both at the level of principle and practice.

^[1] At 659



- At a principled level, no anti-discrimination law requires an employer to employ unqualified or unsuitable candidates, but effective anti-discrimination law must insist that the criteria for particular posts genuinely measure competence and prohibits prejudice, preconceptions and stereotyping.
- At a practical level, the defence is realistic because it encourages employers to make practical appraisals of job content and requirements, of credentials and minimum qualification criteria.
- As early as 1995 and prior to the promulgation of the EEA, the Industrial Court in *Association of Professional Teachers & Another v Minister of Education & Others*^[1], remarked that this defence should only be allowed in ‘*very limited circumstances*’.

^[1] (1995) 9 BLLR 29 (IC) at page 60.



- In at least two decisions, the Labour Court has adopted a restrictive interpretation to the *defence*. In *Whitehead v Woolworths*^[1], the Court indicated that the ‘inherent requirement of the particular job’ implied that the job itself must have some “*indispensable attribute*” which “*must relate in an inescapable way to the performing of the job required the requirement must be so inherent that if not met an applicant would simply not qualify for the post*”.

^[1] (1999) 20 ILJ 2133 (LC) at 2141 – 2142. This decision was based on the defence as it appeared in item 2(2)(c) of Schedule 7 to the 1956 Act.



- In *Independent Municipal & Allied Workers Union & another v City of Cape Town*^[1], the Labour Court held that the term ‘inherent’ has been interpreted as “*existing in something, a permanent attribute or quality; forming an element, especially an essential element, of something, essential*”^[2].

^[1] (2005) 26 ILJ 1404 (LC)

^[2] At 1440. The Court quotes this definition of the term ‘inherent’ from *Du Toit et al, Labour Relations Law (4 ed Butterworths) at 569*



- In *Dlamini & others v Green Four Security*^[1], the applicants were security guards who were dismissed after refusing to shave their beards in terms of the employer's dress code which required all of its employees to be neatly dressed and to have a clean shaven facial appearance at all times. The applicants claimed that they had been discriminated against on the basis of their religious beliefs. They belonged to the Baptized Nazareth Group which, they alleged, did not allow them to shave or trim their beards.

^[1] (2006) 27 ILJ 2098 (LC)



- The Court set out an analysis similar to the *Harksen* test, but added an additional stage to the justification enquiry premised on section 36(1) of the Constitution: if the rule is found to be an inherent requirement of the job, it might still be discriminatory if the impact was not ameliorated by a reasonable accommodation or modification of the rule, or an exemption of the employees from it^[1].
- Such a proportionality exercise is clearly absent in the EEA, and is inapplicable unless there exists a limitation to a right by a “*law of general application*”.

^[1] At 1078C



- Secondly, the *defence* is focussed primarily on the inherent requirements of the particular job and not on ‘reasonable accommodation’, ‘modification’ or ‘exemptions’ of any rules.
- Thirdly, and perhaps more importantly, the Court fails to articulate the basis of its misplaced import of the proportionality exercise in circumstances that clearly require only the application of the defences set out in section 6(2)(a) and (b).



Affirmative Action Measures

- Section 6(2)(a) of the EEA provides that it is not unfair discrimination to –

“take affirmative action measures consistent with the purposes of the [this] Act”.

Affirmative action measures is defined in section 15 of the EEA as *“measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer”.*



- This definition raises more questions than it provides answers^[1], and the nature and ambit of its application will, almost inevitably, be the subject of future judgements.
- The circumstances in which the defence is likely to succeed has been the subject of many decisions which have contributed to a jurisprudence that is both admirable and progressive.
- The following principles have emerged from this jurisprudence. First, affirmative action measures must be applied in a manner that is both rational and fair^[2].

^[1] Van Niekerk et al, Law @ Work, first edition, page 134

^[2] Solidarity obo Barnard v SAPS Case No: JS455/07 (PJ Pretorius AJ)



- The need to ensure that such measures are not applied unfairly or arbitrarily was first articulated by Mlambo J in *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*^[1]. He said:

- *There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:*

19.1 There must be a policy or programme through which affirmative action is to be effected;

^[1] (2000) 21 ILJ 1119 (LC) at 1125B. See also *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC) which established similar rules in dealing with affirmative action measures in the context of the rules of the Political Office-Bearers Pension Fund for members who became parliamentarians after the new constitutional order in terms of which different categories of members with different employer contributions were created. The test established by the Constitutional Court in this matter is similar to Mlambo J's test but more comprehensive



19.2 The policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination;

20 In the Court's view there are good reasons for these requirements. These requirements ensure that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme.



- The requirement of rationality was endorsed by the High Court in *Stoman v Minister of Safety and Security and Others*^[1] that there has to be a rational connection between the affirmative action measures and the aim that they are designed to achieve^[2]. Accordingly, a policy or practice that is “*haphazard, random or overhasty could not be described as measures designed to achieve anything*”^[3].

^[1] 2002 (3) SA 468 (TPD)

^[2] At 478F/G-G/H

^[3] Stoman at 480A/B-B/C



- In line with the principle of rationality our Courts have held that:
- the refusal to promote an employee in circumstances where an employment equity plan was not yet in existence constituted unfair discrimination^[1];
- shortlisting formula aimed at excluding members of a particular race was essentially discriminatory and irrational^[2];

^[1] Public Service Association of SA obo Helberg v Minister of Safety and Security & Another (2004) 25 ILJ 2373 (LC)

^[2] Du Preez v Minister of Justice & Constitutional Development & others (2006) 27 ILJ 1811 (SE)



- a refusal to promote an applicant on the basis of an imperative to promote representivity and in the absence of a specific affirmative action plan constituted unfair discrimination^[1];
- a refusal to promote an applicant on the basis of the application of an affirmative action measure in circumstances where the employer's affirmative action targets had been reached and the applicant was the best candidate for the post, was arbitrary and unfair^[2];

^[1] Coetzer & Others v Minister of Safety & Security & Another (2003) 24 ILJ 163 (LC)

^[2] Willemse v Patelia NO & others (2007) 28 ILJ 428 (LC); Reynhardt v University of South Africa (2008) 29 ILJ 225 (LC)



- the refusal to promote an applicant in consequence of an erroneous application of an employment equity plan was arbitrary and unfairly discriminatory^[1];
- employment policies or programmes which afforded absolute preference to members of designated groups who met the minimum job requirements were not compatible with the variety of factors that needed to be taken into account for an employment decision to meet the constitutional requirements of fairness and proportionality^[2].

^[1] Baxter v National Commissioner: Correctional Services & Another (2006) 27 ILJ 1833 (LC)

^[2] Du Preez v Minister of Justice and Constitutional Development (2006) 27 ILJ 1811 (SE) at 1831 para [40]



- **Secondly**, affirmative action measures must be applied with due consideration of the affected individual's rights to equality, dignity and the principles of fairness^[1]
- It would accordingly be inappropriate to apply the numerical goals of an employment equity plan without due consideration of the particular circumstances of individuals potentially adversely affected by a decision, including the person's employment history, record of performance, skills and qualifications^[2].

^[1] See: Solidarity obo Barnard v SAPS Case No: JS455/07 (PJ Pretorius AJ); Minister of Finance & Another v Van Heerden 2004 (6) SA 121 (CC).

^[2] Solidarity obo Barnard v SAPS Case No: JS455/07 (PJ Pretorius AJ); Du Preez (2006) 27 ILJ 1811 (SE) at 1831 para [40]



- **Thirdly**, in the event that a post cannot be filled by an applicant from a designated group because a suitable candidate from that category cannot be found, “*promotion to that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group*”^[1].
- **Fourthly**, in appropriate circumstances, the imperatives of ‘*efficiency*’ and ‘*service delivery*’ in the Public Service, are factors that must be taken into account in the implementation of an employment equity program^[2]. It is at the level of this principle that the tension in balancing representivity in the public service with requirements of efficiency and service delivery are most transparent.

^[1] Solidarity obo Barnard Case No: JS455/07 (PJ Pretorius AJ) para [25.4]

^[2] Public Servants Association of South Africa & Others v Minister of Justice 1997 (3) SA 925 (T); Stoman 2002 (3) SA 468 (TPD); Coetzer (2003) 24 ILJ 163 (LC)



- Swart J in the *Public Servants Association*^[1] case was of the view that ‘efficiency’ and ‘representivity’ were principles that were diametrically opposed to each other and that::

“representivity cannot be pursued as an objective in vacuo at the cost of other constitutional requirements..... To my mind a broadly representative public administration can, in terms of s 212, not be promoted at the expense of an efficient administration..... If, for instance, in the case of preferring blacks to whites where all have broadly the same qualifications and merits, on a properly controlled and rational basis, representivity will be promoted but not at the cost of efficiency.....”^[2].

^[1] 1997 (3) SA 925 (T)

^[2] 1997 (3) SA 925 (T) at 989J-990H



- The fallacy in Swart J's argument regarding the exclusivity of the processes aimed at achieving efficiency on the one hand, and representivity on the other hand was recognised by Van Der Westhuizen J in the *Stoman*^[1] case where he said:

^[1] 2002 (3) SA 468 (TPD) at 482G-H



“Some tension may in certain situations exist between ideals such as efficiency and representivity, and a balance then has to be struck. Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing arms. They are linked and often independent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications or merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a history of unfair discrimination. The advancement of equality is integrally part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable, in responsible positions cannot be justified.”



- affirmative action could found a cause of action, the overwhelming majority of cases^[1] have held that affirmative action is merely a shield in the hands of the employer who implements such measures, and not a ‘sword’^[2] in the hands of an applicant from a designated group who has not been appointed or promoted to a post.

^[1] Dudley v City of Cape Town (2004) 25 ILJ 305 (LC); Cupido v Glaxosmithkline SA (Pty) Ltd (2005) 26 ILJ 868 (LC); Public Servants Association obo Karriem v SA Police Service & another (2007) 28 ILJ 158 (LC); Thekiso v IBM South Africa (Pty) Ltd (2007) 28 ILJ 177 (LC); Dudley v City of Cape Town (2008) 29 ILJ 2685 (LAC).

^[2] A term coined by the Labour Court in Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC). See also Carole Cooper, The Boundaries of Employment Equity, (2003) 24 ILJ 1307, where she discusses the issues raised by the judgment in *Harmse*.



Sexual Harassment

- There have been relatively few cases dealing with sexual harassment, and the jurisprudence in this area is largely under-developed. Judgements that have emanated from the Labour Court have, in the main, lacked clarity in respect of the some of the key areas of this topic.

Harassment as a form of discrimination

Section 6(3) of the EEA provides that harassment is a ‘form of unfair discrimination’^[1] and it is as such “prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)”.

^[1] *The description of harassment as a ‘form of discrimination’ has effectively eliminated the numerous debates held in other jurisdictions as to whether it constitutes discrimination on one or more of the specified grounds, particularly ‘sex’ or ‘gender’. In this regard, see: Bamforth et al: Discrimination Law: Theory and Context, 1st ed (2008) pages 448 – 481.*



Test for sexual harassment

- *Item 4 of the Code, purports to establish a “test for sexual harassment”. In terms thereof, ‘sexual harassment’ is ‘unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace taking into account all of the following factors:*
 - *whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*
 - *whether the sexual conduct was unwelcome;*
 - *the nature and extent of the sexual conduct; and*
 - *the impact of the sexual conduct on the employee.”*



- *To the extent that item 4 amounts to a test, it is poorly articulated and substantially vague in content. The test is, in its introductory part, premised on the notion that such conduct must constitute ‘unwelcome conduct of a sexual nature’ and it is to that extent indicative of a subjective approach.*
- In order to determine whether such *unwelcome conduct* amounts to a violation of the ‘*rights of an employee and constitutes a barrier to equity in the workplace*’, four additional factors must be present: of these, item 4.2 (unwelcome conduct) is a repetition of the introductory requirement, and item 4.4 (the impact of such conduct) cannot be determined without assessing the nature and extent of the sexual conduct (item 4.3).



- In any event, items 4.3 and 4.4 are arguably matters to be determined on an objective basis. In order to give some credence to the ‘test’ established in item 4, in the form of a stretched and strained interpretation, it is at best a subjective objective test.
- The judgements from the Labour Court have not dealt with the issues that emanate from item 4 even in circumstances where it has concluded that that the facts amount to sexual harassment^[1].

^[1] See Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC); Piliso v Old Mutual Life Assurance Co (SA) Ltd & others (2007) 28 ILJ 897 (LC); Mokoena & another v Garden Art (Pty) Ltd & another (2008) 29 ILJ 1196 (LC); Potgieter v National Commissioner of the SA Police Services & another (2009) 30 ILJ 1322 (LC)



- It is critical however that the test and its content are corrected in the Code and that future judgements articulate clearly the nature of the test and the manner of its application, for the development of this area of the law.

Vicarious liability

- For the purposes of ‘harassment’ in an employment context, a complainant has the option, in appropriate circumstances, to rely on the principles of vicarious liability, in order to lodge a simultaneous claim against the employer.



- The Constitutional Court explains the rationale for the principle of vicarious liability in the following terms:

“An important one is the desirability of affording claimants efficacious remedies for harm suffered. Another is the need to use legal remedies to incite employers to take active steps to prevent their employees from harming members of the broader community. There is a countervailing principle too, which is that damages should not be born by employers in all the circumstances, but only in those circumstances in which it is fair to require them to do so”[\[1\]](#).

[\[1\]](#) N K v Minister of Safety and Security (2005) 26 ILJ 1205 (CC) at 1217 para [A].



- This rationale is encapsulated in the provisions of section 60 of the EEA which sets out the basis upon which an employer could be held liable for the acts of its employees. In terms of section 60(1), if an employee contravenes a provision of the EEA^[1], the alleged conduct must be brought to the attention of the employer “immediately”. In such event, the employer is obliged, in terms of section 60(2), to consult all the relevant parties and to take the necessary steps to eliminate the alleged conduct.

^[1] This might be any conduct in contravention of any of the specified grounds and not necessarily sexual harassment



- In the event that the employer fails to take the necessary steps and it is established that the employee had contravened the relevant provision, the employer must, in terms of section 60(4) of the EEA, be deemed also to have contravened that provision. If the employer is *“able to prove that it did all that was reasonably practicable to ensure that the employee would not act”* in contravention of the Act, then the employer will not be liable for the conduct of that employee. Section 60(4) accordingly constitutes a basis for an employer to escape liability for the conduct of its employees if it can prove that it undertook reasonable steps to ensure that its employees would not contravene the Act.



- The jurisprudence from the Labour Court in interpreting the provisions of section 60 of the EEA has, thus far, established the following:
 - In the event that the employer turns a blind eye to complaints of sexual harassment, the Court will have no hesitation in concluding that the employer is vicariously liable in terms of section 60(3) of the EEA for the acts of sexual harassment committed by its employee: *Ntsabo v Real Security CC*[\[1\]](#).

[\[1\]](#) (2003) 24 ILJ 2341 (LC)



- In *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others*^[1] the applicant's claims for holding the employer vicariously liable on the basis of section 60 of the EEA were unsuccessful as the identity of the employee perpetrator could not be established^[2].

^[1] (2007) 28 ILJ 897 (LC)

^[2] at 905 B – G; and 906 C - H



- In Mokoena and Another v Garden Art (Pty) Limited and Another^[1], the Court held that where an employer was aware of sexual harassment and failed to take steps to eliminate it, and a further act of sexual harassment took place, the employer cannot escape liability in terms of section 60 of the EEA. However, the Court went on to say that where there is only one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of section 60 of the EEA^[2].

^[1] (2008) 29 ILJ 1196 (LC)

^[2] At 1220 para [42] of the Judgment



- The Labour Court's jurisprudence has yet to deal with the issue of vicariously liability in comprehensive fashion. The parameters as to what will constitute sufficient or reasonable steps by the employer in order to avoid liability in terms of section 60 remains largely uncharted territory. Apart from the provisions of section 60 of the EEA, an employee also has the option to rely on the common law principles of vicarious liability. In *N.K. v Minister of Safety and Security*^[1], the Constitutional Court for the first time dealt with the concept of vicarious liability from a common law perspective in the context of the statutory duties of the Minister of Safety and Security.

^[1] (2005) 26 ILJ 1205 (CC)



- According to the Constitutional Court, two questions should be asked:

“The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee’s state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively...”



- *That question is whether, even though the Acts have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability."*[\[1\]](#)

[\[1\]](#) Page 1221 para D - G



- In the context of the factual circumstances of that case, the Court considered the following important facts which pointed to the closeness of that connection:
 - The policemen all had a statutory and constitutional duty to prevent crime and protect members of the public. That duty is also a duty which rests on their employer;
 - In addition to the general duty to protect the public, the three policemen had offered to assist the applicant and she had accepted their offer;
 - The conduct of the policeman who had repeatedly raped her constituted a simultaneous commission and omission, the commission was the brutal rape and the omission was their failure to protect her from harm^[1].

^[1] Pages 1228 – 1229 of the Judgment



- Although this case was determined in the context of the statutory duties of members of the South African Police, the case does establish the broad parameters of the common law principles of vicarious liability which might be helpful in any further interpretations of the concept by the Labour Court.



- In addition, there is it appears a further basis on which an employee could rely on the employer's liability in such circumstances.
- In *Media 24 (Ltd) and Another v Grobler*^[1], the Supreme Court of Appeal found it unnecessary to deal with the company's vicarious liability in the context of sexual harassment. Instead, it held the company liable on the basis of its breach of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment. In this regard, the SCA held that it was well settled that an employer owes a common law duty to its employees to take reasonable care for their safety.

^[1] (2005) 26 ILJ 1007 (SCA)



- In this regard, the Court was of the view that this duty could not be confined to an obligation to take reasonable steps to protect employees from physical harm caused by what may be called physical hazards. The duty also included a duty to protect employees from psychological harm caused, for example, by sexual harassment by co-employees.



Religion

- The recognition of the right to freedom of religion in the Constitution assumes an immensely complex character when there are competing rights against which that freedom must be assessed. The analysis and evaluation of such rights is difficult *“first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way”*^[1].

The Constitutional context

- *Section 9(3) and (4) prohibits unfair discrimination on the basis of ‘religion’, ‘conscience’ or ‘belief’. Section 6(1) of the EEA repeats the prohibition.*

^[1] De Waal, Currie & Erasmus, The Bill of Rights Handbook (5th ed) page 343 where they quote with approval the views of Denise Meyerson in Rights Limited (1997) 1



- Section 15(1) of the Constitution protects the *freedom of religion* together with the *freedom of conscience, thought, belief* and *opinion*. The freedom of religion incorporates the freedom to reject religious beliefs^[1] and opinions. At a conceptual level, section 15(1) protects the freedom of belief or the non-belief in religion.

Section 31 of the Constitution recognises the manifestation of religious beliefs as an individual and communal right.

^[1] De Waal, Currie & Erasmus, The Bill of Rights Handbook (5th ed) page 338



- The protection of religion in its conceptual sense appears unrestrained. In its manifest or public sense however, its protection as a public right is contingent on its compatibility with other constitutive terms.^[2]
- divide between personal belief and public manifestation is often difficult to make.
- Despite this difficulty, the Constitutional Court has repeatedly supported the constitutional values of diversity and pluralism because they affirm the right of the people to:

^[2] Karl F Stychin, Oxford Journal of Legal Studies, Vol 29, No 4 (2009), pages 729 - 755



“..... be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.[1]

[1] Christian Education SA at page 773. See also S v Lawrence 997 (4) SA 1176 (CC) and National Coalition for Gay and Lesbian Equality 1999 (1) SA 6 (CC)



- It is precisely the recognition of the pluralism and diversity of our society that the practice of religion and its impact on other rights becomes more acute. In this context section 31 provides that the right to practice a religion may not be exercised in a manner inconsistent within the provision of the Bill of Rights.
- In determining whether religious beliefs and practices are worthy of protection, the Constitutional Court has undertaken three main enquiries in the context of the proportionality exercise. First, it has sought to determine whether the particular practice forms part of the relevant religious doctrine^[1].

^[1] Christian Education SA 2000 (4) 757 (CC); and Prince 2002 (2) SA 794 (CC)



- Second, it has in the context of other competing rights, enquired into the content of such religious practices, and where such beliefs or practices undermine the key constitutional values of dignity, equality and freedom, it has restricted the religion^[1].
- Third, it has in the name of pluralism and diversity sought to debate the possibility of creating an exemption to applicable legislation for religious believers, where this is possible and practical^[2].

^[1] See footnote 134. See also Carl F Stychin. Faith in the Future: Sexuality, Religion and the Public Sphere, in Oxford Journal of Legal Studies, Vol 29, No 4 (2009) at 730 where he says that once religion enters the public, it is a qualified right which is limited by liberalism's other tenets, such as potential harm to non-believers.

^[2] In Prince for instance, a substantial part of the judgment is dedicated to the practicalities of creating an exemption for Rastafarians to smoke cannabis in pursuit of their religious beliefs, before the Court concluded that it was impractical in the circumstances. See also MEC for Education, Kwa-Zulu Natal & Others v Pillay 2008 (1) SA 474 (CC).



THE EMPLOYMENT CONTEXT

- In light of the Constitutional Court's jurisprudence referred to above, the pertinent question in the employment context is: whether it is appropriate to grant religious associations exemptions from the anti-discrimination provisions in the LRA and the EEA in order to permit them to discriminate on the prohibited grounds? Whereas the *Prince* and *Christian Education* cases focussed on the appropriateness of exemptions from other competing rights established in a statute, an exemption, if any, in the employment context would amount to an infringement of a fundamental right in the Bill of Rights.
- Given the complexity of religions, there is perhaps merit in a contextual approach to religious issues raised in an employment context. There are many religions in South Africa, each with its own beliefs, practices and rituals.



- Each religious association is, in line with that religion's central tenets or principles, arguably entitled like any other employer, to develop appropriate criteria for the appointment and promotion of employees in its establishment.
- Such criteria might differ from one religion to the next. It is nevertheless conceivable that some religions might restrict eligibility for posts to males only, and or to males who are necessarily members or believers of that particular religion.
- From the religious end of the legal telescope, as opposed to the secular end, such criteria might qualify as an '*inherent requirement of a job*'[\[1\]](#).

[\[1\]](#) Section 6(2)(b)



- If so, should the religious association be entitled to apply such criteria *carte blanche* at every level of its establishment, or should it be restricted to positions of religious leadership?
- In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*^[1] the Equality Court had to determine whether the Church should be entitled to terminate the services of a contract^[2] music teacher on the ground of sexual orientation because he was living in a homosexual relationship^[3].

^[1] 2009 (4) SA 510 (T)

^[2] The matter was determined on the basis of the Equality Act (Act 4 of 2000) since the teacher was an independent contractor. The principles established by this case are informative of a possible approach to ward such matters in the event of a dispute brought in terms of the LRA or indeed the EEA.

^[3] Such conduct went against the doctrines of the Church.



- The Church admitted the discrimination but contended that it was fair by relying on the constitutional right to freedom of religion. It was common course that the applicant did not occupy a position of spiritual leadership in the Church, nor was he a member or employee of the Church. He was, in all respects, removed or distanced from the Church and its activities. He taught music not religious doctrine^[1].
- Basson J commenced his legal analysis by pronouncing on the centrality of the right to equality in the constitutional value system. In this regard he cited the decision of *Minister of Education and Another v Syfrets Trust Limited NO and Another*^[1] and in particular the dictum of Moseneke J in which he said:

^[1] Strydom page 518



“Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance”.[\[1\]](#)

- In relation to the right to religious freedom and its status against the right to equality, Basson J took the view that it is the constitutional right to equality that is foundational to the constitution and that the constitution will counteract rather than reinforce unfair discrimination.[\[2\]](#) Accordingly, and on the assumption that the equality right will almost inevitably trump any other right, he proceeded to determine the matter in favour of the applicant.

[\[1\]](#) Strydom page 514

[\[2\]](#) Strydom page 516 para 14.



- In *Strydom*, the judge was at pains to emphasise the following factors which, in its view, surgically separated the applicant from the religious leadership of the Church and from its activities. In this regard, the Court took cognisance of the following facts:
 - 1) during the interview for the post, the applicant was simply asked whether he had a personal relationship with God and his commitment to the values of the Church was not questioned;
 - 2) on analysis of the hierarchy of the Church, the applicant was placed at the '*very bottom of Church leadership*';
 - 3) the applicant was not a member or employee of the Church, nor did he participate in the activities of the Church;
 - 4) it was not part of the applicant's job description to become a role model for the Church;



5) there was not a shred of evidence that the applicant wanted to influence the students or any other Church member about homosexuality; 6) the applicant wanted to keep his homosexual relationship to himself, as a private matter and did not even want to discuss the issue with the leadership of the Church^[1]. On the basis of these facts the Court held that the Church had unfairly discriminated against the applicant.

^[1] Strydom page 518



- Religious associations are generally guided by broad principles of faith some of which are central to the religion and others peripheral. The existence and interpretation of religious principles and doctrines and the extent and parameters thereof are best left to the ecclesiastical experts^[1].
- Religious associations, their institutions, affairs and activities are guided by their interpretation of such doctrines and principles. And, it is possible, that whilst a Church may regard every facet of its operations as an essential part of its religious purpose, a Court might not.

^[1] See Minister of Home Affairs v Fourie 2006(1) SA 524 where Sachs J recognised this difficulty in the following terms at 560E-G: “*Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexuals. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.*”



- In this context, to require a Church to distinguish between positions of religious leadership and those that are not, is a requirement that is fundamentally fallacious because it requires a religious organisation to apply a standard established by secular law which is diametrically opposed to its system of beliefs and operation.
- Consider, the approach of the Canadian Supreme Court in *Caldwell et al v Stuart et al*^[1], which dealt with the refusal of a Catholic school^[2] to renew the employment contract of a Catholic teacher - who taught commercial subjects and mathematics - because she married a divorced Methodist man in a civil marriage, which contravened the rules of the Church concerning divorce.

^[1] [1984] 2 SCR 603

^[2] Known as the St Thomas Aquinas High School



- The Court held that the school was entitled to impose the faith requirement and consequently to discriminate against her on the basis of her failure to comply with a tenet of the Church. The Court held that::

“To carry out the purposes of school, full effect must be given to this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education”.[\[1\]](#)

[\[1\]](#) Caldwell page 618



- In dealing with the relevance, if any, of the teacher to the proximity of religious activities, the Court found that:

“The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programmes. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic...”

.....The right to preserve the religious basis of the school and in so doing to engage teachers who by religion and by the acceptance of the Church’s rules are competent to teach within the requirements of the school. This involves and justifies a policy of preferring Roman Catholic teachers who accept and practice the teaching of the Church”.[\[1\]](#)

[\[1\]](#) Caldwell at 624 and 628 respectively



- The factual reality was that Mrs Caldwell taught commerce and mathematics, not religious doctrine. The Canadian Supreme Court took cognisance of the relevant Catholic doctrines, adopted a holistic approach to the manner in which religious activities are organised and implemented, and accepted the role of a Catholic teacher in that context without requiring evidence of Mrs Caldwell's leadership status within the Catholic Church or school or indeed her proximity to its religious activities.
- Having said that however, perhaps the fundamental distinguishing feature between the Strydom and the Caldwell cases, is that Strydom did not have a provision in his contract which required his conformity to the doctrines of that Church, whereas Caldwell's contract did.



- Notwithstanding the difference, the religious beliefs and the rules established by the Church in Strydom's case implicitly required Strydom's adherence and conformity to such rules and practices.^[1]
- Whilst there may still be merit in determining, from one contextual setting to the next, a distinction between the type of work conducted by employees in a religious environment, such as the distinction drawn by Basson J in *Strydom* between a typist with that of a teacher in a religious school, it is submitted that the Court had approached the matter on the implicit assumption that the right to freedom of religion is subverted to the right to equality and then sought to justify this approach by finding the appropriate facts to determine the matter in favour of the applicant.

^[1] See Patrick Lente for a more detailed discussion of the Canadian approach to such matters which is guided by the Caldwell decision.



- According to this line of reasoning, the outcome of the matter was decided at the level of legal principle and at a stage at which the Court formed the view that the right to equality was the foundational value of the constitution and that the “*Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation*”^[1], rather than at the stage of balancing or reconciling the rights of the parties. Basson J had unfortunately, but effectively, formulated internal limits to the scope of freedom of religion in circumstances where competing rights would have best been served by a balancing exercise.

^[1] Strydom page 516H



CONCLUSION

- Disputes about discrimination necessarily involve difficult questions of constitutional and statutory interpretation and the balancing of competing rights. For that reason, each case requires a careful analysis of the facts and an equally considered application of those facts to the law.
- The Labour Court should, in the interests of a progressive and incremental development of the law on employment equity, apply the law on a case by case basis in the context in which each dispute arises.



- However, in adopting a cautious approach, it is both necessary and imperative for the Labour Court to demonstrate: 1) its application of the tests developed by the Constitutional Court to the facts before it; and 2) its development of such tests, in appropriate circumstances, to matters that are innately employment in nature. From a jurisprudential point of view, the Constitutional Court has demonstrated the importance of the application of the Harksen test in different factual circumstances^[1].

^[1] See Larbi-odam and Hoffman



- There is much work that is still needed to clear the confusion in respect of the *Harksen* test and its appropriate application in employment matters. Our jurisprudence in the application of the anti-discrimination in labour matters is, after 12 years, still in its infancy. Its development will depend on the nature of the cases brought to the Labour Court, and perhaps more importantly on the judgements that emanate from that quarter.

END.