EMERGING FROM THE SHADOWS?

WITS SCHOOL OF LAW

SOUTH AFRICAN RESEARCH CHAIR IN EQUALITY, LAW & SOCIAL JUSTICE

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THE EQUALITY COURTS IN SOUTH AFRICA

A Research Report of the NRF South African Research Chair in Equality, Law and Social Justice, School of Law, University of the Witwatersrand

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CONTENTS

1. INTRODUCTION

The Equality Courts were introduced in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (often abbreviated as PEPUDA, but referred to in this Report as the Equality Act). They were expected to provide accessible and efficient access to justice for those seeking redress for unfair discrimination, harassment and hate speech. As prescribed by s 9(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution),[1] the Equality Act would bring the Constitution to the person in the street by enabling them to challenge inequality and discrimination in their daily lives. In terms of the rules of 'subsidiarity', the Equality Act is the first port of call for complainants who experience unfair discrimination, harassment and hate speech by private persons and the State.

When it was enacted in 2000, it was believed that the Equality Act would be widely used and play a central role in addressing inequality and discrimination in our society. The reality has been different, as the uptake of the Act has been disappointingly uneven. Nevertheless, as discussed in this Research Report, the Equality Courts have offered redress on a small and large, private and public, scale and developed a substantial body of jurisprudence over twenty years.

This Research Report documents the preliminary findings of research by the South African Research Chair in Equality, Law and Social Justice. This research project was initiated to add to our understanding of the Equality Courts and their practical and normative roles in interpreting and enforcing equality: Who comes to the Equality Courts, and what kind of redress do they seek? How do these courts interpret (in) equality and the trio of offences of unfair discrimination, harassment and hate speech? What are the differences, if any, between claims and remedies in Equality Courts in the Magistrates' Courts and High Courts? What kinds of remedies do the courts offer? How have the courts evolved over the years? To begin to answer these questions, this project has collected an archive of about 660 cases from the Equality Courts in Magistrates' Courts and High Courts, as well as appeals and reviews in the Supreme Court of Appeal (SCA) and the Constitutional Court. This Research Report is the initial, broad documentation of those findings. The next phases will develop the theory of Equality Courts, their evolution, role and jurisprudence.

The Report is structured as follows. First we introduce the Equality Act (Part 2) and Equality Courts (Part 3). In the latter section, we first set out the number of courts and cases before summarising their jurisdiction, procedures and remedial powers. In Part 4 we evaluate the cases in the Courts, first by describing how they were collected and then by evaluating the kinds of cases at Magistrates' Court and High Court level, followed by the Chapter 9 Institutions, and the SCA and Constitutional Court. In Part 5 we provide a brief overview of key cases and the evolving jurisprudence under different prohibited grounds – race, gender, disability, sexual orientation, religion/culture and language, and the additional ground of poverty. This is followed by a brief analysis of remedies in Part 6. We conclude in Part 7 by summarising our findings and posing questions for future research.

[1] Section 9(4) reads: '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'.

2. INTRODUCING THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

Parliament enacted the Equality Act to give effect to s 9, read with item 23(1) of Schedule 6, of the Constitution. The Act is a self-consciously transformative document whose preamble states that it:

endeavours to facilitate the transition to a democratic society united in it 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.

Its objects in s 2 include the following:

- to promote equality and eliminate unfair discrimination, hate speech and harassment.
- to provide for procedures for the determination of circumstances under which discrimination is unfair; and
- to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.

All persons seeking redress and remedy for unfair discrimination, harassment and hate speech may approach the Equality Court established in terms of the Act.[2]

All persons seeking redress and remedy for unfair discrimination, harassment and hate speech may approach the Equality Court established in terms of the Act.

[2] Sections 3, 4, 5 & 16.

The character of these courts is captured in the Guiding Principles, which state that proceedings are meant to be expeditious and informal, allowing for the participation of parties,[3] and remedies are to be corrective, restorative and deterrent in nature.[4] The Act is to be applied in these Courts with due regard to:

> the existence of systemic discrimination and inequalities [in South Africa], particularly in respect of race. gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and […] the need to take measures at all levels to eliminate such discrimination and inequalities.[5]

Equality Courts are granted all ancillary powers necessary or reasonably incidental to the performance of their functions and the exercise of their powers,[6] including the power to grant interim orders, declaratory orders, orders making a settlement between parties an order of court, orders for the payment of damages to a complainant or orders restraining unfair discriminatory practices.[7]

Every Magistrates' Court and High Court is an Equality Court for its area of jurisdiction,[8] presided over by a magistrate or judge respectively. Prior to 2017, only judges and magistrates who underwent training to be a presiding officer of an Equality Court were assigned Equality Court matters.[9] Following the amendment,[10] training is no longer compulsory to preside over an Equality Court matter instituted in terms of the Equality Act. The judge president of a High Court and an administrator of a Magistrates' Court, may, in writing, designate any judge or magistrate as a presiding officer of the Equality Court of the area in which they are a judge or magistrate. Although no longer compulsory, Magistrates' Court and High Court judgments suggest that Equality Court matters are still assigned to judges and magistrates who did undergo training (possibly because they have experience in Equality Court matters). In addition, the South African Judicial Education Institute is obliged to develop and implement training courses in order to build a dedicated and experienced pool of specialised magistrates and judges to ensure effective application and implementation of the Equality Act and the effective running of Equality Court proceedings.[11]

[3] Section 4(1)(a) and (b). See *Maharaj v Gold Circle (Pty) Ltd [2017] ZAKZPHC 47; [2018] 1 All SA 760 (KZP) (Maharaj GC).*
[4] Section 4(1)(d).
[5] Section 4(2)(a) & (b).
[6] Section 21(5).
[7] Section 21(2).
[8] See s 16(1)(a) and Annual Report 2009/2010, The Department of Justice and Constitutional Development, 21. https://www.justice.gov.za/reportfiles/anr2009-10.pdf.
[9] See s 16(2) prior to it being deleted by s 31(c) of the Judicial Matters Amendment Act 8 of 2017.
[10] Ibid, and s 16(1)(b) and (d).
[11] Section 31(4).

Clerks are required to undergo training before being designated an Equality Court clerk by the Director-General of the Department of Justice and Constitutional Development (DoJ).[12]

In addition to establishing Equality Courts, the Equality Act, together with their respective empowering Acts,[13] empowers the South African Human Rights Commission (SAHRC) and other Chapter 9 Institutions, such as the Commission for Gender Equality (CGE), to assist complainants in instituting proceedings in an Equality Court and/or conduct investigations into complaints of unfair discrimination, hate speech or harassment.[14]

3. THE EQUALITY COURTS

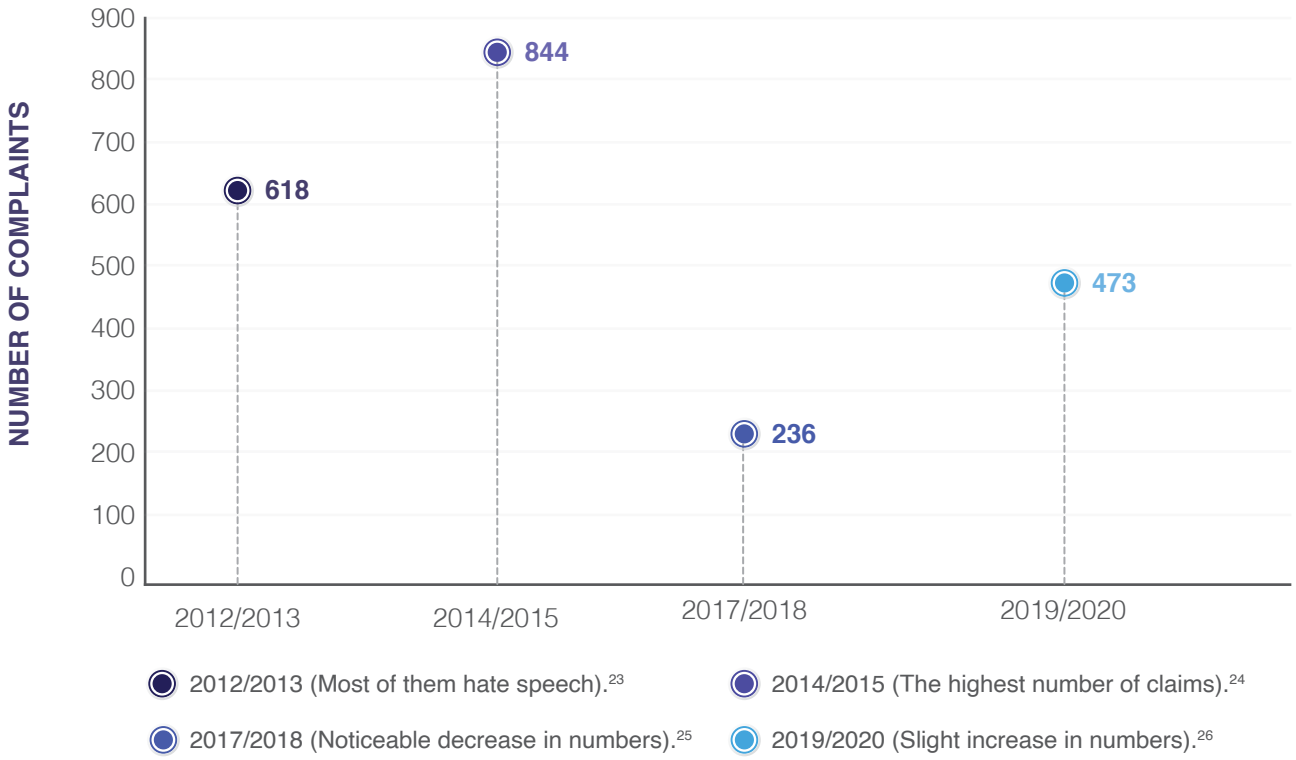
The Equality Courts are critical to the effective functioning of the Equality Act and this research sought to document and understand the extent to which they are used, the kind of cases that are brought before them by members of the public, and the nature of redress obtained. This section briefly introduces the Courts.

3.1 The Numbers

When the Equality Act was implemented, there were high expectations that it would be widely used. The reality has been disappointing. In their first year of operation in 2003, the Equality Courts fell far short of the DoJ's target of 1.5 million people accessing the Courts. By the end of the 2003/2004 financial year, the DoJ had increased the number of Equality Courts at Magistrates' Court level from 47 to 220 and had trained 800 magistrates.[15] However, the number of complaints received totalled 75.[16] By 2007/2008, there was one less Equality Court[17] but a significant increase in complaints received.[18] Most of the complaints (88) were laid in Mpumalanga.[19] Across the provinces, the majority (74) were claims of hate speech; with only two claims of gender inequality.[20]

[12] Section 17(1)(a) and 17(2).
[13] The South African Human Rights Commission Act 40 of 2013 (SAHRC Act) & the Commission for Gender Equality Act 39 of 1996 (CGE Act).
[14] Sections 13(3) of the SAHRC Act, s 11(1)(e) of the CGE Act.
[15] Annual Report 2003/2004, The Department of Justice and Constitutional Development, 14. https://www.justice.gov.za/reportfiles/anr2003-04.pdf.
[16] Ibid.
[17] There were 219 courts. See Annual Report 2007/2008, the Department of Justice and Constitutional Development (AR 07/08) 56. https://www.justice.gov.za/reportfiles/anr2007-08.pdf.
[18] There were 169 complaints in total. Ibid, 57.
[19] Ibid.
[20] Ibid.

During the 2009/2010 financial year, the DoJ designated all Magistrates' Courts as Equality Courts and embarked on a countrywide Equality Court awareness campaigns to educate the public of the existence of these Courts and how they could be utilised.[21] Despite this effort, the DoJ did not report on the Equality Courts for the next two financial years.[22]



The following table illustrates the available statistics on numbers of courts and cases.

YEAR	EQUALITY COURTS	COMPLAINTS/CASES REPORTED
2003/2004	220	75
2004/2005	220	not reported
2005/2006	220	not reported
2006/2007	220	169
2007/2008	219	169
2008/2009	219	447
2009/2010	382 [27]	508
2010/2011	382	not reported
2011/2012	382	597
2012/2013	382	618

[21] Annual Report 2009/2010, The Department of Justice and Constitutional Development, 21. https://www.justice.gov.za/reportfiles/anr2009-10.pdf.
[22] See Annual Reports for 2010/2011 and 2011/2012, The Department of Justice and Constitutional Development
[23] Annual Report 2012/2013, The Department of Justice and Constitutional Development, 27. https://www.justice.gov.za/reportfiles/anr2012-13.pdf.
[24] Annual Report 2014/2015, The Department of Justice and Constitutional Development, 36. https://www.justice.gov.za/reportfiles/anr2016-17.pdf.
[25] Annual Report 2017/2018, The Department of Justice and Constitutional Development, 33. https://www.justice.gov.za/reportfiles/anr2017-18.pdf.
[26] Annual Report 2017/2018, The Department of Justice and Constitutional Development, 44. https://www.justice.gov.za/reportfiles/anr2018-19.pdf.
[27] In 2009/2010, all Magistrates' Courts had been designated Equality Courts.

YEAR	EQUALITY COURTS	COMPLAINTS/CASES REPORTED
2013/2014	382	612
2014/2015	382	844
2015/2016	382	558
2016/2017	382	480
2017/2018	382	236
2018/2019	382	473
2019/2020	382	621

The annual reports,[28] and the matters reviewed, show that only a small percentage of claims lodged make it to a hearing or trial. The majority of claims are referred to an alternative forum, withdrawn or dismissed.

3.2 Awareness and Access

Equality Courts have become accessible over time. The first Equality Courts began operation in 2003, with 47 'first phase' Equality Courts based at Magistrates' Courts.[29] By 2010, the 382 Magistrates' Courts in South Africa had all been designated as Equality Courts.[30] Although being designated an Equality Court in 2010, the Heidelberg Magistrates' Court only began receiving Equality Court complaints towards the end of 2018.[31]

While small research projects have been undertaken to try to ascertain the effectiveness of the Equality Courts,[32] no data exists on the prevalence of public knowledge of the Equality Court. Since the courts began operation, the DoJ has only once reported on awareness campaigns to educate the public on the existence of the Equality Courts and how to access them. This was in 2009/2010.[33] It is assumed that with the advent of social media and the Courts' responses to racist incidents – concerning respondents such as Penny Sparrow and Adam Catzavelos – more people have become aware of their existence.

During the course of 2020, we visited three Gauteng Magistrates' Courts and struggled to find the Equality Court clerk's office. While the other specialised courts – such as Family, Maintenance and Small Claims Courts – are well sign-posted, the Equality Courts are not.[34] Based on all the other signage for specialised courts, a visitor to the court, who does not have access to a list of Equality Courts or who does not ask around, may assume that the specific Magistrates' Court does not have an Equality Court as one of its specialised courts.

[28] See the annual reports referred to in notes 23 to 26 above.
[29] L Botha & A Kok 'An empirical study of the early cases in the pilot Equality Courts established in terms of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000' (2019) 19 *African Human Rights Law Journal* 317–336, 319–320.
[30] AR 09/10 (see note 21 above) and the Department of Justice and Constitutional Development's list of Equality Courts accessed at: https://www.justice.gov.za/EQCact/eqc_courts.html.
[31] *Gary Domingos Pereira v Jaco Kritzinger* [2018] ZAEQC 1, Magistrates' Court for the District of Lesedi Sitting as an Equality Court, held at Heidelberg.
[32] Botha & Kok (note 29 above) and R Kruger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *Equal Rights Review* 27, 39.
[33] AR 09/10 (see note 21 above).
[34] Based on visits to the Johannesburg District Magistrates' Court, the Pretoria District Magistrates' Court, and the Heidelberg Magistrates' Court.

Once you locate the office of the Equality Court clerk, you are able, with the guidance of the clerk, to lodge an Equality Court claim on the prescribed Form 2.[35] A complainant's Equality Court experience is, unless they can afford legal representation, entirely dependent on the Equality Court clerk, their accessibility, knowledge and expertise, including whether they serve more than one special court and have received the obligatory training.[36]

3.3 Jurisdiction

The Equality Court is a specialised court established by the Equality Act and exists only within the bounds of the Act, its Regulations,[37] and its Code of Practice.[38] When a High Court or Magistrates' Court sits as an Equality Court, it does not do so as a general High Court or Magistrates' Court with all the powers and limitations of those courts. When sitting as an Equality Court, its jurisdiction does not go beyond the Equality Act.[39] While the Magistrates' Court Act 32 of 1944 and the regulations to the Supreme Court Act 59 of 1959,[40] play a part, it is limited and determined by s 19(1) and regulation 10(5)(d) of the Equality Act.

Consequently, for a claim to be within the jurisdiction of an Equality Court, it must fall within 'the four corners' of the Equality Act.

As pointed out by the Constitutional Court in *MEC for Education: KZN v Pillay*:

> [C]laims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.[41]

To be within the jurisdiction of an Equality Court, a claim must fall within the 'four corners' of the Equality Act.

[35] Section 20(1)-(3) and regulation 6(1) of the Regulations relating to the Promotion of Equality and Prevention of Unfair Discrimination published under Government Notice 764, *Government Gazette* 25065 of 13 June 2003 (the Regulations).

[36] This was the case at the Equality Court at the Heidelberg Magistrates' Court, where the clerk for the Equality Court was also the Small Claims Court clerk and informed us that she had not yet received Equality Court training.

[37] The Regulations (note 35 above).

[38] Annexure C to the Regulations.

[39] *Manong & Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA para 50, 54 and 60 (*Manong 369/08*).

[40] Rules Regulating the Conduct of the Proceedings of the Several and Provincial and Local Divisions of the High Court of South Africa published under Government Notice R.48 of 12 January 1965 and known as the Uniform Rules of Court.

[41] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC), 40 (*Pillay*).

The principle of subsidiarity expressed here has often been ignored by parties and courts alike. For example, in *Solidariteit v Minister of Basic Education*,[42] a claim of unfair discrimination against a state bursary scheme was incorrectly brought and defended under the Constitution.[43] More recently, the Western Cape High Court case of *September v Subramoney*[44] incorrectly treated the Equality Act and the Constitution as if they were interchangeable. On the other end of the spectrum, the Constitutional Court, in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa*,[45] rejected the appellants' challenge on unfair discrimination because it was not instituted in the High Court as an Equality Court matter. The Court used this as one of two reasons, to avoid the difficulty of having to balance the highly emotive and divisive rights of religious freedom and equality.

In terms of s 19(3) of the Equality Act, 'a Magistrates' Court sitting as an Equality Court is not precluded from making orders contemplated in the Act that exceed its monetary jurisdiction subject to confirmation by a High Court judge having jurisdiction'. It is therefore only necessary to institute a matter under the Equality Act in the High Court when instituting action against the State or where there is an additional challenge or counterchallenge that falls outside of the Equality Act and that is not within the jurisdiction of a Magistrates' Court. In such cases, the High Court consolidates the matter and sits as both an Equality Court, with an allocated Equality Court case number, and as a High Court, with a High Court case number. For example, in the recent matter of *Cape Bar v Minister of Justice and Correctional Services*[46] the applicant brought a challenge of unfair discrimination under the Equality Act and a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the doctrine of the legality. Another example is *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services*,[47] in which the SAHRC instituted a claim of hate speech, in terms of s 10 of the Equality Act, against Qwelane, and Qwelane instituted a counter-challenge, challenging the constitutionality of s 10 of the Equality Act.

Lastly, the Equality Act does not apply retrospectively. The Equality Court does not have the jurisdiction to adjudicate claims based on happenings that occurred before the enactment of the Equality Act. In *Maharaj v National Horseracing Authority of Southern Africa*, the KwaZulu-Natal High Court, sitting as a court of appeal in a decision from the Equality Court, held as follows:

> The legislature could never have intended that the Equality Courts take up causes which arose prior to their establishment. There is no indication in the Act itself of this. Indeed, the indications are that it is to operate prospectively […] As indicated above, the appellant calls upon us to find that the legal effect of the conduct he relies on brands the respondent as an organisation which is guilty of institutional race discrimination. In my opinion, an Equality Court is not competent to adjudicate on or grant relief in respect of conduct that occurred prior to the Act coming into operation.[48]

[42] *Solidariteit v Minister of Basic Education* Case No. 58189/2015 High Court (Gd), 8 November 2017 (*Solidariteit*).

[43] *Solidariteit* ibid para 75. See C Albertyn 'Getting It Right in Equality Cases. The Evaluation of Positive Measures, Groups and Subsidiarity in *Solidariteit v Minister of Basic Education*' (2018) 135 *South African Law Journal* 403.

[44] *September v Subramoney* [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (*September*).

[45] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* [2015] ZACC 35; 2016 (2) SA 1 (CC).

[46] *Cape Bar v Minister of Justice and Correctional Services* [2020] ZAWCHC 51 *(Cape Bar)*.

[47] *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* [2017] ZAGPJHC 218; [2017] 4 All SA 234 (GJ) *(Qwelane GJ)*.

[48] *Maharaj v National Horseracing Authority of Southern Africa* 2008 (4) SA 59 (N) para 58–59.

3.4 Procedure

A fundamental characteristic of Equality Courts is that they should offer meaningful access to justice:

> It is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.[49]

This idea is captured in the 'Guiding Principles' of the Equality Act, which include the following principles of adjudication and procedure:

> In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
>
> (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings
>
> (b) access to justice to all persons in relevant judicial and other dispute resolution forums
>
> (c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation
>
> (d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature
>
> (e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.[50]

In terms of s 20(2), a person wishing to institute proceedings in the Equality Court is obliged to notify the clerk of the court, in the prescribed manner, of their intention to do so. The clerk, in turn, is obliged, in terms of s 20(3)(a), to 'refer the matter to a presiding officer of the Equality Court in question who must […] decide whether the matter [should be dealt with by] the Equality Court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum, which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions'.

If the magistrate or judge decides that the matter will be heard, the clerk of the Equality Court must 'assign a date for the hearing of the matter'. In making a decision as to the appropriate forum, the presiding

[49] *Manong 369/08* (note 39 above) para 53.
[50] Section 4(1).

officer 'must […] take all relevant circumstances into account',[51] including those listed in s 20(4), which include the needs and wishes of the parties, particularly of the complainant.

In terms of regulation 10(5)(b), 'at a directions hearing, the presiding officer must give such directions in respect of the conduct of the proceedings as he or she deems fit'. After hearing the parties, the presiding officer may make an order in respect of a range of issues, including discovery, interrogatories, admissions, the limiting of disputes, the joinder of parties, *amicus curiae* interventions, the filing of affidavits, the giving of further particulars, the time and place of future hearings, procedures to be followed in respect of urgent matters and the giving of evidence at the hearing, including whether evidence of witnesses is to be given orally or by affidavit or both.[52]

Regulation 10(5)(d) provides that in order to give effect to the guiding principles contemplated in s 4 of the Equality Act, and in dealing with how the enquiry is to be conducted, the presiding officer 'must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes for the purpose of supplementing this regulation where necessary, but may in the interest of justice and if no-one is prejudiced deviate from these procedures after hearing the views of the parties to the proceedings'.

Regulation 10(7) states that, 'save as is otherwise provided for in these regulations, the law of evidence, including the law relating to competency and compellability, as applicable in civil proceedings, applies in respect of an enquiry: Provided that in the application of the law of evidence, fairness, the right to equality and the interest of justice should, as far as possible, prevail over mere technicalities'.

In *Maharaj v Gold Circle (Pty) Ltd*,[53] a case on appeal from the Equality Court sitting at the Durban Magistrates' Court, the KwaZulu-Natal High Court criticised a magistrate for the way he conducted proceedings in an Equality Court matter, saying:

> There is no point in saying anything more on this aspect other than to say that it fills one with a sense of disquiet. What the learned magistrate appeared to have forgotten completely is the fact that he was sitting as an Equality Court in which he was ordinarily required to approach the complaint before him with some sensitivity and with a measure of dignity. He failed to appreciate that complaints that generally serve before the Equality Courts have all to do with unfair discrimination, hurt feelings, lost opportunities and a loss of dignity and respect arising out of one or more of the prohibited grounds referred to in Chapter 2 of the Equality Act. He failed to appreciate that the proceedings in such courts are less formalistic allowing for hearings to take place expeditiously and to facilitate the full participation of all parties concerned […] It is not clear why the learned magistrate adopted this attitude […] Whatever the position, I hold that his attitude rendered the proceedings unfair from the start and on this basis alone the matter should be remitted to start afresh before a different judicial officer.[54]

[51] Section 20(3)(b).
[52] Regulation 10(5)(c).
[53] *Maharaj GC* (see note 3 above).
[54] Ibid 52.

3.5 Remedies

Access to justice means little without meaningful and workable remedies. Section 21(2) is one of the most flexible and innovative sections of the Act, offering a broad range of remedies. It authorises the Equality Court 'to 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

(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.

In addition, the Equality Court may 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.

The research suggests that the most popular remedies in the Equality Courts (in Magistrates' Courts) are – in the following order – an unconditional apology (s 21(2)(j)), payment of damages to the complainant (s 21(2)(d)) and payment of damages as an award to an appropriate body (s 21(2)(e)). See further below.

4. THE CASES – PRELIMINARY FINDINGS

A central part of this research was to understand the kinds of cases brought (the nature and basis of the claims) and the redress achieved (the remedy granted). This section sets out the preliminary information and findings from three Magistrates' Courts where primary data was collected, as well as copies of Magistrates' Courts files shared by other researchers; reported cases in the High Courts, SCA and Constitutional Court; Chapter 9 Institutions and media reports.

4.1 Cases: Sources and Courts

The cases were collected from the Equality Courts at the Johannesburg, Pretoria and Heidelberg Magistrates' Courts. At the Pretoria and Heidelberg courts, we were able to access all the files, while the Equality Court clerk at the Johannesburg Magistrates' Court limited the timeframe for collection, thus limiting the number of files that could be collected.

Outside of our visits to the Equality Courts, copies of Equality Court matters or files, from various courts across the country, were shared with us by Anton Kok, who had undertaken prior research on the Equality Courts, and we accessed a number of cases from the Southern African Legal Information Institute (SAFLII). Legal research resources: LexisNexis and Juta did not have additional cases to those on SAFLII and those obtained via the courts and Professor Kok; and the Equality Court cases referred to in Legalbrief were available on SAFLII.

In total, 677 court cases were collected, with 12 SAHRC findings. The breakdown of the total number of cases collected, by court, is as follows:

Province	Court	District/Region	Cases/Files	Totals
Eastern Cape	High Court	Bhisho	2	8
		Grahamstown	1	
		Mthatha	3	
		Port Elizabeth	2	
	Magistrates' Court	**None**	**0**	**0**
Free State	High Court	Bloemfontein	1	1
	Magistrates' Court	None	0	0
Gauteng	High Court	Johannesburg	13	25
		Pretoria	12	
	Magistrates' Court	Heidelberg	13	209
		Johannesburg	169	
		Pretoria	26	
		Roodepoort	1	
KwaZulu-Natal	High Court	Durban	3	5
		Pietermaritzburg	2	
	Magistrates' Court	Durban	425	427
		Port Shepstone	1	
		Scottburgh	1	
Limpopo	High Court	None	0	0
	Magistrates's Court	None	0	0
Mpumalanga	High Court	None	0	0
	Magistrates' Court	Belfast	13	43
		Middleburg	10	
		Nelspruit	15	
		White River	1	
		Witbank	4	
Northern Cape	High Court	Kimberley	1	1
	Magistrates' Court	None	0	0

Province	Court	District/Region	Cases/Files	Totals
Western Cape	High Court	Cape Town	11	11
	Magistrates' Court	Cape Town	11	13
		Kuils River	1	
		Victoria West	1	
Supreme Court of Appeal			11	11
Constitutional Court			5	5
South African Human Rights Commission			12	12

4.2 Cases in Equality Courts in the Magistrates' Courts

Due to the deliberate informality and accessibility of the Equality Court, particularly at Magistrates' Court level, complainants and consequences of complaints vary, although the core content of complaints remains largely unvaried.

The complainants range from indigent persons who struggle to articulate their complaints, and who are completely dependent on the assistance of the Equality Court clerk, through middle class professionals, to political parties, ministers and international tribunal judges with expert legal representation.

There is unfortunately a regular stream of complaints in the Magistrates' Court relating to hate speech and discrimination on the ground of race, mainly for use of the 'K-word' or a complainant being called a monkey or a baboon. It appears from cases and complaints reviewed that the majority of these complaints are settled or finalised with a written unconditional apology or a damages payment of between R100 and R500.[55]

With more high profile or publicised acts of hate speech and unfair discrimination on the grounds of race or gender – such as in the cases of *ANC v Penny Sparrow*;[56] *NM v Shannon Ferreira,*[57] in which a mother and daughter were found to have racially abused and physically assaulted a scholar at Edgemead High School; and *Sonke Gender Justice Network v Malema*[58] – damages amounted to tens of thousands of rands and were in the form of awards to an organisation or body.[59]

The complainants range from indigent persons who struggle to articulate their complaints, and who are completely dependent on the assistance of the Equality Court clerk, through middle class professionals, to political parties, ministers and international tribunal judges with expert legal representation.

[55] In accordance with ss 21(2)(j) and (d) of the Equality Act.
[56] *ANC v Penny Sparrow* ZAEQC 01/2016 District Magistrates' Court of Umzinto (held at Scottburgh) *(Sparrow)*.
[57] *NM v Shannon Ferreira* (01/03) [2004] ZAEQC 1 District Magistrates' Court of Kuils River.
[58] *Sonke Gender Justice Network v Malema* (EqC) [2010] ZAEQC 2 District Magistrates' Court of Johannesburg (*Sonke Gender Justice*).
[59] In accordance with s 21(2)(e) of the Equality Act.

In addition, the Magistrates' Court ordered that specific steps be taken by the respondents to correct their discriminatory behaviour or prevent the behaviour in future.[60] In the case of *Sparrow*, the clerk of the Equality Court was directed to submit the matter to the Director for Public Prosecutions for the possible institution of criminal proceedings.[61]

In terms of discrimination on the grounds of religion, the Magistrates' Courts mostly see complaints of anti-Semitism, which have resulted in orders for written unconditional apologies and sensitivity training.

An outlier is *MEC for Education: KZN v Pillay*,[62] which started out in 2005 as *Pillay v KZN MEC of Education*,[63] in the Equality Court sitting at the Durban Magistrates' Court. The Magistrates' Court, the High Court and ultimately the Constitutional Court had to decide whether the discrimination by Durban Girls' High School on the grounds of religion and culture was fair or unfair.

In terms of discrimination on the grounds of religion, the Magistrates' Courts mostly see complaints of anti-Semitism, which have resulted in orders for written unconditional apologies and sensitivity training.

In the early days of the Equality Court, a notable number of complaints concerned HIV/AIDS accusations, where the complainant was accused of being positive or having their HIV/AIDS status revealed by a co-worker or community member, without the complainant's consent.

Complaints that get referred to more appropriate fora, in accordance with s 20(3)(a) of the Equality Court, are mainly employment and labour related.

A drawback of the deliberate accessibility of the Equality Court sitting at Magistrates' Court level is that some complainants use it to lodge complaints against every person or institution they believe has done them an injustice.

At the Heidelberg Magistrates' Court, one complainant lodged seven of the entirety of thirteen complaints lodged at this Court by December 2019; and between 2004 and 2005 one complainant lodged eleven complaints at the Johannesburg Equality Court. Some of the respondents included the National Intelligence

[60] In accordance with s 21(2)(f) of the Equality Act.
[61] In accordance with s 21(2)(n) of the Equality Act.
[62] *Pillay* (note 41 above).
[63] *Pillay v KZN MEC of Education* ZAEQC 61/2005 District Magistrates' Court of Durban.

Agency, the SAHRC, the City of Johannesburg Metropolitan Municipality, First National Bank (FNB) and the manager of the Fontana Chicken in Hillbrow.

4.3 Cases in Equality Courts in the High Courts

In addition to hearing appeals from the Magistrates' Court, as mentioned in subsection 3.3 above, cases are instituted in the High Court sitting as an Equality Court, when instituting action against the State; or cases are instituted or transferred to the High Court where there is an additional challenge or counterchallenge that falls outside of the Equality Act and is not within the jurisdiction of a Magistrates' Court.

Unlike the Magistrates' Court, where complainants and defendants often do the paperwork and representation themselves, with the help of the Equality Court clerk and presiding officer, parties in the High Court are most likely to be legally represented by an attorney and an advocate.

Examples of cases instituted against the state or more broadly against an organ of state, and so instituted in the High Court as court of first instance, include the cases of *Social Justice Coalition v Minister of Police*,[64] in which the Social Justice Coalition and Equal Education Law Centre challenged the allocation of policing resources (discussed in more detail later); *Osman v Minister of Safety and Security*,[65] in which a Somali shop owner alleged that members of the South African Police Service unfairly discriminated against him on the grounds of ethnicity and social origin by failing to assist him in removing goods from his shop during the 2008 xenophobic attacks; and *Ginindza v Speaker of the National Assembly*,[66] in which the applicants claimed they were unfairly discriminated against because the national government continued to contribute to the pension funds of former members of Parliament/TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) but not to their own pension fund, despite them also being former members of the Parliament/TBVC states.

In cases such as those listed above, the relief sought is a declaratory order[67] in which the Equality Court instructs the state or organ of state to take particular action to correct the unfair discrimination.

Cases where there were additional legal issues that fell outside the Equality Act ambit include those in which, in addition to a claim of unfair discrimination under the Equality Act, the applicants also brought a claim for judicial review under PAJA or the common law principle of legality. These cases include *Cape Bar v Minister of Justice and Correctional Services*;[68] *Gelyke Kanse v Chairman of the Senate of the University of Stellenbosch*,[69] in which a voluntary association promoting the equal treatment of Afrikaans challenged the university's 2016 language policy, which increased course offerings in English and not

[64] *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC) *(Social Justice Coalition)*.
[65] *Osman v Minister of Safety and Security* (EC09/2008) [2010] ZAEQC 1 (15 December 2010).
[66] *Ginindza v Speaker of the National Assembly* (1538/2015) [2016] ZAGPPHC 91 (19 February 2016).
[67] In accordance with sections 21(2)(d), (f), (h), (k) and (m) of the Equality Act.
[68] *Cape Bar* (note 46 above).
[69] *Gelyke Kanse v Chairman of the Senate of the University of Stellenbosch* 2018 (1) BCLR 25 (WCC); [2018] 1 All SA 46 (WCC).

those in Afrikaans, as discriminating on the grounds of language; or the *Manong* cases[70] in which the applicants, Manong & Associates, challenged the tender requirements for construction and engineering contracts advertised by various organs of state and alleged that they do not comply with the Preferential Procurement Policy Framework Act 5 of 2000 and, consequently, the Equality Act in that they failed to promote equality.

The other cases instituted in or transferred to the High Court call upon the Court to interpret s 10 (read with s 12) of the Equality Act, which defines or determines hate speech, and determine whether s 10 should be read conjunctively or disjunctively in determining whether hate speech falls within the confines of s 10, such as the *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*.[71]

Lastly, the case of *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services*,[72] was transferred to the High Court when the defendant, accused of hate speech under s 10 of the Equality Act, challenged the constitutionality of s 10 (read with s 12) of the Equality Act. Both *Masuku* and *Qwelane* were taken on appeal to the SCA and the Constitutional Court. *Masuku* was heard in the Constitutional Court in 2019 and, at the time of writing, judgment was not yet handed down. The July 2021 Constitutional Court judgment in *Qwelane* is discussed in detail in subsection 5.4.

4.4 Cases in Chapter 9 Institutions

Chapter 9 institutions play an important role in implementing, enforcing and defending the Constitution and the Bill of Rights.

Both the SAHRC and the CGE are competent to assist complainants in instituting proceedings in an Equality Court,[73] as well as to conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of the Equality Act, or cases of unfair discrimination, hate speech or harassment.[74]

The South African Human Rights Commission

Section 184(2) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights and to take steps to secure appropriate redress where these have been violated. In terms of the South African Human Rights Commission Act 40 2013 (the SAHRC Act), such steps include undertaking investigations,[75] making findings,[76] issuing recommendations,[77] engaging in mediation, conciliation or negotiation to 'resolve any dispute; or […] to rectify any act or omission, emanating from or constituting a violation of or threat to any human rights',[78] and when necessary, to 'bring proceedings in a competent court or tribunal in its own name on behalf of a person or a group or class of persons'.[79]

Chapter 9 institutions play an important role in implementing, enforcing and defending the Constitution and the Bill of Rights.

[70] See *Manong & Associates (Pty) Ltd v City of Cape Town* [2010] ZASCA 169; 2011 (2) SA 90 (SCA) ; 2011 (5) BCLR 548 (SCA); [2011] 2 All SA 383 (SCA); *Manong & Associates (Pty) Ltd v Minister of Public Works* [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA); and *Manong SCA 369/08* (note 39 above) *(Manong* cases*)*.

[71] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2017] 3 All SA 1029 (EqC, J); 2018 (3) SA 291 (GJ).

[72] *Qwelane GJ* (note 47 above).

[73] Subsection 25(3)(a) of the Equality Act.

[74] Subsection 25(3)(b) of the Equality Act.

[75] Section 13(3) of the SAHRC Act obliges the SAHRC to investigate any complaint of an alleged human rights violation and, if there is substance to the complaint, to assist the complainant and other affected persons to secure redress.

[76] Ibid.

[77] Section 13(1)(a)(i) of the SAHRC Act.

[78] Section 14 of the SAHRC Act.

[79] Section 13(3)(b) of the SAHRC Act.

The findings of the SAHRC are presented in an 'inquisitorial' form, almost reading like an opinion provided to a client by an attorney or advocate (legal practitioner), rather than a judge.

The Commission on Gender Equality

The CGE has not used its powers of investigation to make findings in terms of the Equality Act.[80] It has instituted applications in the Equality Court on behalf of complainants or joined Equality Court matters as *amicus curiae*. Peculiarly, the research revealed two matters instituted in the Equality Court sitting at the Cape Town Magistrates' Court, where the applicants, who both instituted claims in terms of s 7 of the Act – unfair discrimination based on race – were represented by the CGE.[81]

4.5 Cases on Review and Appeal – the SCA and Constitutional Court

Of the complaints lodged in Equality Courts, only a small number go on appeal or review to the SCA and/or Constitutional Court.

The cases that go on appeal to SCA and/or the Constitutional Court have included *Pillay*,[82] *Lourens v Speaker of the National Assembly of Parliament*,[83] *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies*,[84] cases in which the courts are asked to interpret whether actions, inaction and expression amount to unfair discrimination and hate speech as defined in the Equality Act.

Appeals that go to the SCA and not to the Constitutional Court have included the *Manong* cases,[85] *Gold Circle (Pty) Ltd v Maharaj*[86] and *Dean of the Law Faculty of the University of North-West v Masisi*,[87] where the SCA was required to determine whether the Equality Court (sitting at a High Court) had the jurisdiction to hear the complaint, that is whether the Equality Court was the correct forum for the complaint to be assessed.

In the *Qwelane* case,[88] the SCA and the Constitutional Court had to decide on the constitutionality of s 10 of the Equality Act.

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[80] An employee in the CGE legal department confirmed that the Commission has never made or issued findings in terms of the Equality Act. It rather institutes applications in the Equality Court on behalf of a complainant.

[81] See *Leonard Sylvester v Jowells Transport* (08/2006) and *Ndayishimiye Aridi Amipi v Management of Bronx Nightclub* (04/2008).

[82] *Pillay* (note 41 above).

[83] *Lourens v Speaker of the National Assembly of Parliament* [2016] 2 All SA 340 (SCA) (*Lourens*).

[84] *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* [2018] ZASCA 180; 2019 (2) SA 194 (SCA); [2019] 1 All SA 608 (SCA).

[85] *Manong* cases (note 70 above).

[86] *Gold Circle (Pty) Ltd v Maharaj* (1313/17) [2019] ZASCA 93.

[87] *Dean of the Law Faculty of the University of North-West v Masisi* [2014] ZASCA 2; 2014 (6) SA 61 (SCA).

[88] *Qwelane v South African Human Rights Commission* 1 All SA 325 (SCA); 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) (*Qwelane*). The matter was heard by the Constitutional Court on 22 September 2020, and judgment was handed down in July 2021. See subsection 5.4 of this report for a full discussion.

5. EVOLVING JURISPRUDENCE

This section provides an overview of the evolving jurisprudence in Equality Courts. As stipulated in the Act, applications in the Equality Court are lodged on one, or more, of seven bases relating to unfair discrimination, harassment and hate speech:

Section 6	Prevention and general prohibition of unfair discrimination
Section 7	Prohibition of unfair discrimination on ground of race
Section 8	Prohibition of unfair discrimination on ground of gender
Section 9	Prohibition of unfair discrimination on ground of disability
Section 10	Prohibition of hate speech
Section 11	Prohibition of harassment
Section 12	Prohibition of dissemination and publication of unfair discriminatory information that unfairly discriminates

Hate speech (s 10) applications are always based on a prohibited ground, and therefore often intersect with s 7, 8 and 9. 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).[89]

Claims of hate speech are also always accompanied by claims of harassment (s 11). Below, we provide a snapshot of this jurisprudence, organised by the following grounds of discrimination and harassment: race, gender, disability, sexual orientation, religion/culture and language, and the additional ground of poverty.

5.1 Race

Unfair discrimination claims based on race, and on hate speech on the grounds of race abound. There are publicly known incidents such as those of Sparrow, Catzavelos and Matthew Theunissen,[90] and then there are many that happen far too often and make it to the Magistrates' Courts around South Africa but are not publicised.

[89] As defined in s 1 of the Equality Act.
[90] See section 5 of this report.

Other famous Equality Court cases based on race include *AfriForum v Malema*,[91] in which the Gauteng Local Division found that the words 'Awudubula bhulu, Dubula amabhunu baya raypha' amounted to hate speech against South Africa's white minority.

In 2006 at least two applications were instituted at the Cape Town Magistrates' Equality Court, against different newspapers in the Mother City, for using the term 'Boesman'. The applicants alleged that the term constituted hate speech against Coloured people. In *Jacobus Faasen v Die Burger*,[92] the magistrate was swayed by the opinion of the San Council which felt that the term was not hurtful or harmful. Faasen attempted to take the case on appeal to the High Court, but it was dismissed because the appellant did not follow the appeal procedure outlined in the Equality Act. Angelo Louw refers to the *Faasen* case and the continued use of the term, particularly its obvious derogatory use by Welkom Mayor Nkosinjani Speelman. Louw writes:

The use of the k-word is so severely restricted in our country because it was acknowledged by the Constitutional Court in *SARS v CCMA* (2017 (1) SA 549 (CC) to be 'the worst insult that can ever be visited upon an African person in South Africa'. There are no grey areas; it is not to be used to describe another person, by law.

> The '*B-word*' carries that same weight in the coloured community, and should hold the same restrictions on its usage regardless of so-called intent, or its adoption into vernacular languages under apartheid rule – after all, we have evidently made great progress in phasing out this type of language.[93]

On 13 February 2018, a magistrate for the Ubombo Equality Court found that remarks made by Enki Slade, owner of Sodwana Bay Guest Lodge, contravened s 9 and s 10 of the Constitution and s 6, 7 and 10 of the Equality Act. The remarks made were, in respect to a booking request:

> We do not accommodate blacks or government employees any longer Sodwana Bay Guest House
> Enki Andre M Slade
> The Book of Revelation 10 […][94]

Following the remarks above, Slade was interviewed by radio station Vuma FM. During the interview, he stated the following:

1. We work according to God's law, and according to God's law, we have to have some sort of segregation between the creation that He left here […] The law you have in South Africa is Satan's law.

2. Black people were servants, and the Bible made it very clear […] his Bible said he could not mix with another race […]

3. We do not have the same blood, skin, hair, and there are about 300 differences between you and me […]

4. You are classified in the Bible as an animal, you are not homo sapiens.

5. Black people were not people […][95]

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[91] *AfriForum v Malema* [2011] ZAEQC 2.

[92] *Jacobus Faasen v Die Burger* (06/2006), Equality Court at Cape Town Magistrates' Court.

[93] A Louw 'The Word "Boesman" Falls Into The Same Category As The K-Word And Must Be Outlawed' (2020) *Daily Maverick* 20 April https://www.dailymaverick.co.za/opinionista/2020-04-20-the-word-boesman-falls-into-the-same-category-as-the-k-word-and-must-be-outlawed

[94] See para 10.

[95] Ibid.

Slade took the magistrate's finding on review in terms of s 23(5)(a) of the Equality Act.[96] The review application was heard by Judges Steyn and Ploos van Amstel, in the KwaZulu-Natal High Court, in Durban (the Review Court).[97]

Slade argued, among other things, that the presiding officer in the court a quo, failed to understand his religious contentions; failed to sufficiently recognise his right to human dignity, freedom and equality; and failed to give sufficient recognition to his right to freedom of expression. Slade also stated that the 'order issued by the court a quo is unlawful and unfair. It punishes "the Son of God for doing His work, for being a witness of the truth"'.[98]

The Review Court held that the proceedings in the court a quo could not be criticised for not being in accordance with the prescripts of the Equality Act.[99] The magistrate's judgment showed that the evidence was duly evaluated and that the provisions of the Equality Act were correctly observed and adhered to, and that Slade failed to persuasively challenge it on any misdirection of fact or law.[100]

In respect of Slade's religious views and right to freedom of religion, the Court held that the right to religious freedom:

> does not grant the right to discriminate against other human beings in the name of such a belief system. Simply put, the right to religion and freedom of association cannot be used as tools to destroy the right to equality and human dignity. The respondent's biblical beliefs that blacks are inferior to whites, less intellectual than whites and less human than whites are not only demeaning in the extreme but is without any substance. The conduct of [Slade] can never be tolerated in an egalitarian, democratic society based on human dignity.[101]

In 2007, the lease agreement for the Dunmarsh Building, a residential block in Durban, still had a clause that read:

> The LESSEE acknowledges that he knows and understands that the premises can be let for occupation by members of the WHITE GROUP only and he hereby declares that he is a member of that GROUP in terms of ACT NO. 36 OF 1966, as amended.

Despite this obvious discrimination, the owners, Dunmarsh Investments (Pty) Ltd, attempted to enforce that clause by not allowing a person of colour to rent an apartment in Dunmarsh. The Equality Court, in the Durban Magistrates' Court,[102] declared the clause 'unlawful, unconstitutional and unenforceable' and ordered that it be deleted from all lease agreements and that all residents and visitors be notified, via public notice, that the clause was unconstitutional and unenforceable.

In *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries* (*Coastal Links*),[103] Coastal Links Langebaan, a voluntary community association of 'small scale' net-fishers, launched a joint application in terms of the Equality Act (in the High Court sitting as an Equality Court) and PAJA (in the High Court) against the Department of Agriculture, Forestry and Fisheries and Environmental Affairs and South African and West Coast National Parks. The complainants alleged that a 2005 Netfishing Policy that excluded the complainants from fishing in Zone B[104] of the Langebaan Lagoon constituted indirect

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[96] Section 23(5)(a) reads: 'If a presiding officer in a Magistrates' Court makes a determination relating to a ground of discrimination referred to in paragraph (b) of the definition of 'prohibited grounds', the decision must, after the finalisation of the proceedings and in the prescribed manner, be submitted to the High Court having jurisdiction for review'.

[97] *Isimangaliso Wetland Park v Sodwana Bay Guest Lodge* (01/2017) [2018] ZAKZDHC 60 (30 November 2018).

[98] See para 12.

[99] Paragraphs 14–18.

[100] Ibid.

[101] See para 22, with reference to *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 32; *Minister of Home Affairs v Fourie (Doctors for Life International and others, Amici Curiae) Lesbian and Gay Equality Project v Minister of Home Affairs 2006* (1) SA 524 (CC) para 60.

[102] *Bronwyn Eller Gerber v Dunmarsh Investments (Pty) Ltd and S T Evenwel* (69/2007) ZAEQC DBN Mag Court.

[103] *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries* [2016] ZAWCHC 150; [2017] 2 All SA 46 (WCC).

[104] 'By way of explanation Zone A, which is at the northernmost end of the lagoon and which feeds into Saldanha Bay, is a so-called 'controlled multi-use' zone where recreational and commercial line-fishing and commercial and traditional net-fishing is allowed, together with other activities such as boating, and yachting. Zone B is a so-called 'restricted' zone where the right to fish can only be obtained on the issue of the necessary permit and where boating under motor power is generally not allowed. Zone C is an 'exclusion' zone and sanctuary where no access whatsoever is allowed either on foot or by boat'. *Coastal Links* ibid para 6.

unfair discrimination on the ground of race in terms of the Equality Act, and was arbitrary and irrational in terms of PAJA.[105]

The complainants argued that the exclusion or imposition of the condition in their permits and exemptions were arbitrary and irrational. The complainants challenged the scientific basis for the exclusion, and argued that the restriction unfairly discriminated against them on the grounds of race by perpetuating past patterns of discrimination. The Court found the policy to be both irrational[106] and unfair race discrimination. The basis for the latter is briefly summarised below.

Sher AJ found that the disproportionate effects of the Netfishing policy on the historically disadvantaged black fishers constituted indirect racial discrimination.[107] This was unfair as the effects were severe. Many of those excluded 'relied on net-fishing for a significant proportion of their gross annual income'[108] and were members of a community of 'historically disadvantaged black fishermen whose ancestors used to live adjacent to the lagoon before they were removed from the area by the apartheid regime as part of its spatial planning'.[109] Despite the 'laudable intention' of the policy, its 'effect [was] to discriminate unfairly, on a racial basis'.[110]

Unfortunately, by the time the judgment was handed down in *Coastal Links*, the Department of Agriculture, Forestry and Fishing and the Department of Environmental Affairs had arrived at a common understanding that the entire lagoon would become a no-take zone. Sher AJ therefore held that it would be totally inappropriate to grant the applicants the right to fish in Zone B. According to Sher AJ:

> The best that the Court [could] do, with due respect and deference, [was] to urge those with the necessary expertise and skill in the Departments concerned, to engage with the applicants, who have apparently registered as a small-scale fishing community in terms of the SSF Policy, with a view to arriving at a fair and suitable accommodation in terms of which they are granted some rights to fish, of a sort, in such areas as the experts may deem to be suitable, and on such terms and conditions as may be deemed to be appropriate in the light of the various factors which need to be taken into account including the applicants' historical claim to traditional fishing rights, the imperatives of transformation and the need for ecological conservation whilst also allowing for sustainable utilisation and development of the resources concerned.[111]

Similarly, to *Coastal Links*, Manong & Associates, a civil engineering firm, instituted several applications as a complainant in the Gauteng,[112] Western Cape[113] and Eastern Cape High Courts[114] sitting as Equality Courts against different local, provincial and government departments. It alleged that procurement procedures and requirements at these departments discriminated on the ground of race. The result of these applications were SCA judgments confirming the jurisdiction of the High Court sitting as an Equality Court, and the type of matters it could hear.[115] The most the complainants got out of these applications and appeals was *obiter dictum* from Navsa JA, who advised the High Court of the specialisation of the Equality Court and the wide-reaching application of the Equality Act and found that they did not properly investigate the fairness of the requirements of the 'prior roster' procurement system, listing a number of factors that the High Court should have considered.[116] Unfortunately, the matter was remitted back to the High Court for reconsideration through proper application of the Equality Act.

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[105] *Coastal Links* ibid para 81.

[106] The judge found the policy irrational on a number of grounds. It 'appears to have been simply the result of the mechanistic application of a policy position adopted in 2001 without an annual application of the mind, on an individual merit basis, in respect of each and every one of the applicants'. Further, it was 'a decision which was arrived at without any consideration for important information that should have been obtained and taken into account'. The judge concluded that: 'In allowing certain fishermen to exercise rights in the self- same lagoon in which it was alleged that others could not do so for conservation and ecological reasons, the imposition of the restrictive condition occurred arbitrarily and irrationally'; *Coastal Links* ibid para 80.

[107] *Coastal Links* ibid para 84.

[108] Ibid para 29 referencing para 8.1(b) of the 2005 Netfishing Policy.

[109] Ibid para 85.

[110] Ibid para 85.

[111] Ibid para 87.

[112] *Manong & Associates (Pty) Ltd v Minister of Public Works* [2008] ZAGPHC 306.

[113] *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town* [2008] ZAWCHC 62; 2009 (1) SA 644 (EqC); and *Manong & Associates (Pty) Ltd v City of Cape Town* [2009] ZAWCHC 138.

[114] *Manong Associates (Pty) Ltd v Eastern Cape Department of Road and Transport* [2008] ZAEQC 2; 2008 (6) SA 434 (EqC); *Manong & Associates (Pty) Ltd v Department of Transport in the Eastern Cape Province* [2007] ZAEQC 1; 2008 (6) SA 423 (EqC).

[115] *Manong* cases (note 70 above).

[116] *Manong & Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport* [2009] ZASCA 50; 2009 (6) SA 589 (SCA) ; [2009] 3 All SA 528 (SCA) para 73–94.

5.2 Gender

The most well-known Equality Court case on gender is probably the Sonke Gender Justice one.[117]

In a fairly uninspiring decision, the magistrate evaluated political leader Julius Malema's statement relating to Fezekile Ntsukela Kuzwayo and the Zuma rape trial:

> 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.[118]

He concluded that it amounted to hate speech on the ground of gender as Malema's words 'could reasonably be construed as hurtful, harmful and demeaning to women'[119] and did not fit within the exclusions to hate speech set out in s 12 of the Equality Act.[120]

In a 2005 decision from the Durban Magistrates' Equality Court, Magistrate Abrahams, with the assistance of an assessor, Dr T Magwaza, then a senior lecturer in gender studies at the University of KwaZulu-Natal, adjudicated an application of unfair discrimination and harassment on the basis of gender against Independent Newspapers, where the complainant was serving as an intern. In this case, the Court carefully identified and assessed the gender inequalities and imbalance of power at play. In assessing whether the discrimination was fair, the Court referred to the disadvantaged position of the complainant based on her need for 'work experience to advance her career prospects', the fact that she had no bargaining power as she was 'at risk of losing her temporary position'; the differences in age and seniority; the use of African cultural arguments against her (the 'African way of imposing an unwelcome advance on a woman, merely by virtue of her womanhood'); and the 'atmosphere […] conducive to the practice of patriarchy [that] existed'.[121] The Court found that the respondent's conduct demeaned the complainant 'in her womanhood, dignity and self-esteem' and that the respondent's conduct during the hearing – claiming that the complainant was just trying to 'fleece' him – further served to diminish her self-esteem.[122]

The magistrate added that had Independent Newspapers remained a party to the complaint, he would have had no problem 'holding it accountable not only as an employer, but also to order an audit of its own internal supervisory procedures that could allow for the occurrence of such conduct and for not providing recourse mechanisms for those who may potentially find themselves in the Complainants position'.[123]

Section 8 was also recently invoked, together with s 7, by the Cape Bar in *Cape Bar v Minister of Justice and Correctional Services*,[124] when it challenged the constitutionality of the provisions relating to the composition of Provincial Councils of the Regulations and Rules published under the new Legal Practice Act 28 of 2014 because it only allowed for the appointment of one black woman, while still reserving space for one white man.

In the SAHRC matter of *Pieter Hall v Superspar Belhar*,[125] the complainant was told by the Superspar (Spar) security guard that he could not enter the store with the messenger bag he was carrying, as the

The most well-known Equality Court case on gender is probably the* Sonke Gender Justice *one.

[117] *Sonke Gender Justice* (note 58 above).
[118] Ibid para 12.
[119] Ibid para 17.
[120] Ibid para 18.
[121] *Nteyi v Ndiyane* (82/2005), Equality Court held at the Durban Magistrates' Court para 15.
[122] Ibid.
[123] Ibid para 17.
[124] *Cape Bar v Minister of Justice and Correctional Services* [2020] ZAWCHC 51.
[125] *Pieter Hall v Superspar Belhar* WC/2009/0562 SAHRC. Published in the SAHRC's Investigative Reports Vol 1 13–19. https://www.sahrc.org.za/home/21/files/1%20SAHRC%20Investigative%20Reports%20VOLUME%20ONE%2025062015%20TO%20PRINT.pdf (Hall).

Spar only allowed entry to women who were carrying handbags. Hall then asked if his sister, who was with him, could carry his bag in the store, to which the security guard answered, 'Yes, because she is a woman'.[126] The complainant's sister informed the SAHRC that the security supervisor advised her 'it was […] Spar company policy that no man is allowed inside the Superspar with a bag, because men were more likely to steal'.[127]

Hall then laid a complaint with the SAHRC who engaged with the management and owner of the Spar.[128] The manager of the Spar confirmed, via telephone, that the store had an unwritten policy with respect to men carrying bags. In terms of the policy, men were not allowed to enter the Spar unless 'they hand in their bags at the designated parcel counter'.[129] The owner of the store then sent a formal response informing the SAHRC that the official policy of the store was that customers were required to hand in their bags for storage while shopping in the Spar, unless it was a laptop bag (when it would be subject to inspection) or ladies' handbags.[130] This policy, according to Spar management, had been developed as a deterrence after a number of thefts and assaults in the Belhar area.[131]

The SAHRC found that the policy violated s 9(3) of the Constitution by unfairly discriminating on the ground of gender.[132] The policy was inconsistently applied. The SAHRC directed that Spar issue a written apology to Hall, erect signage displaying its bag policy, train staff to inform customers of the policy and amend its policy to so that it was gender neutral and applied to bag size only.[133]

In the matter *Gangadayal v Harrison (obo FNB)*[134] the complainant alleged that a specific FNB branch's security policy (of only searching men who try to enter the branch) unfairly discriminated on the ground of gender. FNB apologised to Gangadayal and offered to reimburse him for the cost of travel to the FNB branch. Gangadayal accepted the apology and the complaint was withdrawn.

In *September v Subramoney*,[135] in 2016, Jade September, a transwoman and inmate at Malmesbury Medium Correctional Centre (MCC), lodged a complaint of unfair discrimination in the Equality Court, Western Cape Division of the High Court, against the head of the Helderstroom Correctional Centre, the Head of the MCC, the Minister of the Department of Justice and Correctional Services, and the National Commissioner of Correctional Services.[136]

In her application/complaint, September asked the Court for an order allowing her to express her gender identity while in the correctional centre.[137] She advised the Court that although she was anatomically a man, her gender expression was that of a woman.[138] She intended to undergo sex reassignment surgery in the future, so she could 'live more fully'[139] as a woman but, until such time, her gender expression could only be expressed through hair, clothes, make-up and by self-identifying and being referred to as a woman.[140] However, she claimed that while incarcerated, the respondents denied her the right to express her gender identity by preventing her from wearing long, feminine hairstyles, make-up and women's underwear.[141] September also alleged that the respondents did not refer to her as a woman.[142] The complainant further stated that she was detained in segregation (solitary confinement), at HCC, as punishment for trying to express her gender identity.[143]

September alleged that the respondents' actions constituted unfair discrimination under the Equality Act, on the ground of gender.[144] Inter alia, she sought a declaratory order against respondents that the failure or refusal to allow her to express her gender constituted unfair discrimination under s 8 of the Equality Act.[145]

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[126] *Hall* ibid para 2.2.
[127] *Hall* ibid para 2.4.
[128] *Hall* ibid paras 2–3.
[129] *Hall* ibid para 3.1.
[130] *Hall* ibid para 3.3.
[131] *Hall* ibid para 3.4.
[132] *Hall* ibid para 5.6.
[133] Ibid para 6 –7.
[134] *Gangadayal v Harrison (obo FNB)* 57/2010 in the Durban Magistrates' Court sitting as an Equality Court.
[135] *September* (note 44 above).
[136] *September* ibid paras 1–8.
[137] *September* ibid.
[138] *September* ibid para 1.
[139] *September* ibid para 16.
[140] *September* ibid.
[141] *September* ibid paras 19, 22, 25 and 36.
[142] *September* ibid para 33.
[143] *September* ibid para 33–36.
[144] *September* ibid para 9.
[145] *September* ibid.

She asked the Court for an order directing the respondents to amend the Standing Order on Personal Hygiene that prevented her from expressing her identity and that they be directed to allow her to wear women's underwear and make-up, and be addressed as a woman and through the use of the female pronoun.[146] In addition, she asked for an apology.[147]

The respondents argued that they had not discriminated against September, as she was biologically and legally male.[148] They argued that the complainant's gender identity was limited to her genital and reproductive anatomy and the complainant's assigned gender identity at birth.[149] They further argued that she was prosecuted as a male, and is legally registered as a male in her identity document.[150] Further, if there were discrimination, it was not unfair, they said, as their actions were necessary to prevent the sexual abuse of September: 'the applicant's request for communal access to other male prisoners whilst the applicant express herself as a female, would expose the applicant to sexual violence, because "male rape is undeniable reality of incarceration"'.[151]

The Court agreed with the complainant's argument 'that it is entirely normal for her, as a transgender female, to want to transition socially'[152] by presenting herself as a woman.[153] The Court further agreed that until such time as the complainant is able to undergo gender-reassignment surgery, her presenting herself as a woman is the only way to express her gender identity.[154] The Court concluded that the right to equality was at the centre of the matter, as well as how it relates to the right to dignity and the right to freedom of expression:[155]

> Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.[156]

In the end, it was ruled that the neutral application of the rules to all inmates at the HCC did not make provision for transgender inmates and amounted to unfair discrimination on the ground of gender identity (more commonly referred to as 'gender expression'),[157] thus adding an additional ground to the listed grounds. The Court issued the declaratory orders as sought by the complainant. The Court directed that the Standing Order on Personal Hygiene be amended and that the respondents take reasonable steps to give effect to the applicant's constitutional rights by either keeping the applicant in a single cell in a men's prison, or transferring her to a single cell at a women's facility.[158] In both she should be allowed to express her gender identity 'safely and securely'.[159] Finally, the respondents were ordered to introduce transgender sensitivity training for all Department of Correctional Services' employees.[160]

[146] *September* ibid.
[147] *September* ibid.
[148] *September* ibid para 41.
[149] *September* ibid para 41. According to the Acting Director of Correction Administration, a prisoner is managed in terms of the personal details appearing on the warrant of detention. For example, if a prisoner is identified on the warrant as a man, he will be treated as one while in detention. Where a person's sex is altered in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003, that person will be treated in accordance with their altered sex. This is based on the fact that such a person's sex would have been altered on the birth register. The treatment of a prisoner is therefore in accordance with the details on the birth register. No provision is made for persons who have commenced treatment for a sex alteration but before a change on the population register occurred. *September* ibid para 54–56.
[150] *September* ibid para 42.
[151] Ibid para 52.
[152] *September* ibid para 112.
[153] *September* ibid.
[154] *September* ibid.
[155] *September* ibid paras 113–121.
[156] Ibid para 121, citing *National Legal Services Authority v India* WP (Civil) 604 of 2013 para 1.
[157] *September* ibid para 149.
[158] *September* ibid para 164.
[159] *September* ibid.
[160] *September* ibid.

5.3 Disability

Although the Equality Act specifically lists discrimination on the ground of disability in the same category as race and gender, thereby acknowledging it to be as systemic as racism and sexism, very few persons have lodged disability complaints. The single Equality Court case and the SAHRC cases point to the systemic manner in which disability is side-lined in equality matters.

In *Singh v Minister of Justice and Constitutional Development*,[161] the Equality Court found that the Magistrate's Commission's criteria for the appointment of magistrates were discriminatory, both in requiring a valid drivers' licence as a compulsory requirement and in not actively promoting the appointment of persons with disabilities. Judge Ledwaba, as he then was, held that '[t]he Constitution promotes a diverse and legitimate judiciary. Section 9(2) read with the Equality Act clearly places a complementary duty on the State to take active measures to promote the equality of people with disabilities'.[162] Thus, the Court held, s 174(2), which sets out the criteria for the appointment of judicial officers, must be interpreted to include disability as a ground to be considered and promoted.[163] While s 174(2) only refers to race and gender, 'it is clear that it uses these as indicators of diversity […] A restrictive interpretation of section 174(2) […] effectively cuts out a significant section of the population […] from representation within the judiciary'.[164] The Court advised that disabled people constituted five percent of the population in South Africa, but that only sixteen of the hundreds of magistrates in South Africa are persons with disabilities.[165]

In support of this interpretation, Judge Ledwaba referred to a lecture given by former Chief Justice Ngcobo in 2010, in which he stated:

> [Section 17 4 (2)] echoes the preamble of the Constitution which declares that [w]e, the people of South Africa […] [b]elieve that South Africa belongs to all who live in it, united in our diversity. The importance of diversity to public confidence in the judiciary cannot be gainsaid. It underscores the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. Diversity on the bench promotes confidence in judges in many ways. When a litigant comes before court and sees from time-to-time people reflective of his or her own background and experience it engenders confidence that he or she can get a fair trial. It also promotes confidence because it facilitates the taking into account of different perspectives.[166]

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[161] *Singh v Minister of Justice and Constitutional Development* [2013] ZAEQC 1; 2013 (3) SA 66 (EqC).
[162] Ibid para 24.
[163] Ibid para 26.
[164] Ibid para 30.
[165] Ibid.
[166] Ibid para 28.

In *Lubbe Viljoen v University of Pretoria*,[167] the complainant alleged that the University of Pretoria (UP) failed to reasonably accommodate his disability, mitochondrial cytopathy,[168] while he was studying towards his honours degree, and this negatively affected his academic career.[169] The SAHRC, in response, investigated the disability policies of UP, to find that no formal policy was in place at the time of Viljoen's enrolment.[170] Rather, it applied various informal guidelines as and when required, via its 'Unit for Students with Special Needs'.[171] The SAHRC found that the lack of policy violated s 28 of the Equality Act.[172] According to the SAHRC, the absence of a clear policy prejudiced students, as it limited their ability to 'effectively plan and order [their] conduct' to make use of whatever 'protections' they could access to limit prejudices that may be suffered as a result of a disability.[173]

By 2013, after consultation with the SAHRC, UP had a formally adopted student disability policy drafted in consultation with various stakeholders and widely communicated it and made it accessible to all students, including those with disabilities.[174]

In addition, the SAHRC referred the complaint, with its findings on university disability accommodations policies to the Department of Higher Education and Training (DHET) advising that it undertake an audit of disability policies at all higher education institutions in order to ascertain compliance with constitutional obligations, as well as obligations in terms of the International Covenant on the Rights of Persons with Disabilities.[175] The SAHRC also advised that DHET provide all institutions of higher learning with best practice guidelines by December 2015.[176]

5.4 Sexual Orientation

Cases involving the right not to be unfairly discriminated against on the ground of sexual orientation often come up against the constitutional right to freedom of religion, and involve a careful right-balancing assessment.

In 2005, in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*,[177] the complainant instituted action in the Equality Court against the Dutch Reformed Church (NGK) in Moreleta Park, alleging that the Church unfairly discriminated against him on the ground of sexual orientation. It was common cause, in this matter, that the complainant's contract with the church, to teach music to students, was unilaterally terminated on the basis that he was involved in a same-sex relationship.[178] The question before the Court was whether the NGK could prove that its discrimination on the ground of sexual orientation was fair.[179] The NGK had to persuade the court that the right to religious freedom outweighed the constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation.[180]

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[167] *Lubbe Viljoen v University of Pretoria* GP/2012/0677. https://www.sahrc.org.za/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lubbe%20Viljoen%20-%208%20April%202015.pdf.

[168] 'Mitochondrial Cytopathy results in the mitochondrial cells becoming fatigued, requiring recovery periods in order to become functional again. Symptoms of the disease include but are not limited to fatigue, temporary visual impairments such as double vision and loss of focus, severe migraines, cramping and muscle pains, weakness of the nerves and kidney dysfunction. It is not unusual for all cells in the body to be affected and symptoms manifest when an organ or muscle becomes exhausted.' *Lubbe Viljoen* ibid para 3.1.4.

[169] Ibid para 3.1.7.

[170] Ibid para 5.1.

[171] Ibid.

[172] Ibid para 8.9.

[173] Ibid.

[174] Ibid paras 8.9.3. and 9.3.

[175] Ibid para 9.2.

[176] Ibid.

[177] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAEQC 1; (2009) 30 ILJ 868 (EqC).

[178] Ibid paras 1 and 6.

[179] Ibid para 7.

[180] Ibid

The NGK argued that religious freedom protected a sphere of activity related to the appointment to leadership positions persons who had to support and live according to its core doctrine,[181] including subscribing to its view on same-sex relationships.[182] As they considered the complainant to be in a 'spiritual leadership' position, the NGK was of the view that he could not live in a same-sex relationship (but had to remain celibate).[183]

The court found that the NGK provided no evidence to support their argument that the complainant, an independently contracted music teacher, occupied a 'spiritual leadership' position in the Church. According to the court:

> There was not a shred of evidence that the complainant had to teach Christian doctrine. On the contrary, the Christian foundations were taught at the 'kunste-akademie' by ministers of the church. The complainant mostly taught issues around music (also technical issues). In the event, the complainant's work involved no religious responsibilities at all.[184]

The Court found that the complainant was merely an independent contract worker who 'was in a sense removed from' the NGK as he was not even a member of the Church (but of the Dutch Reformed Church in Africa), and thus did not participate in the activities of the NGK.[185]

The Court found in this case the position of music teacher did not require the teacher to be a role-model for the NGK and also that there was no evidence of the complainant attempting to influence the students in the music class or anyone else at the NGK.[186] In fact, according to the Court, the complainant regarded his sexual orientation as private and did not want to discuss it with anyone.[187]

> The Court therefore held that:
>
> the impact on religious freedom of not granting the [NGK] an exemption from the anti-discriminatory legislation [was] minimal […] On the other hand, being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality and dignity, protected as one of the foundations of our new constitutional order.[188]

In what must be the longest-running Equality Court challenge, the SAHRC, after receiving in excess of 300 complaints, instituted action against journalist Jonathan Qwelane for hate speech and harassment on the ground of sexual orientation after he wrote an article, published on 20 July 2008 in the *Sunday Sun*, which read:[189]

> The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their 'lifestyle' and 'sexual preferences'. There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month – you'd better believe this – a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views […] Homosexuals and their backers will call me names, printable and not, for stating as I have always

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[181] Ibid para 15.
[182] Ibid.
[183] Ibid.
[184] Ibid para 17.
[185] Ibid para 20.
[186] Ibid para 22.
[187] Ibid.
[188] Ibid para 25.
[189] *Qwelane* (note 88 above) paras 4–6.

> done my serious reservations about their 'lifestyle and sexual preferences', but quite frankly I don't give a damn: wrong is wrong! I do pray that someday a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the constitution of this country, to excise those sections which give licence to men 'marrying' other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to 'marry' an animal, and argues that this constitution 'allows' it?[190]

The SAHRC argued that Qwelane's article amounted to hate speech and unfairly discriminated on the grounds of sexual orientation and marital status. On hate speech, it argued that, as per s 10 of the Equality Act, the article intended to hurt, harm and/or incite harm against persons who identify as LGBTIQ+.[191] It argued further that various other constitutional rights were violated.

After Qwelane failed to defend the application, the magistrate found in favour of the SAHRC.[192] Qwelane then applied for a rescission order and entered a counter-claim challenging the constitutionality of s 10 of the Equality Act, arguing that it extended beyond the parameters of s 16 of the Constitution (freedom of expression) and was therefore unconstitutional.[193]

The matter was transferred to the Gauteng High Court, where the Equality Court and the constitutionality challenges could be consolidated. After several delays, the matter proceeded before Moshidi J in 2017.[194.] In respect of the overbreadth constitutional challenge, the court held that s 10(1), read as a whole, was not an overbroad stifling of the constitutional right to freedom of expression, but a 'reasonable and justifiable limitation of the right to freedom of expression […] because the hate speech […] and extent of the harm that could be caused by speech of the kind prohibited by s 10(1) of the Equality Act, by far outweighs the limited interests of speakers in nevertheless communicating such speech'.[195]

Moshidi J concluded that the SAHRC had succeeded in making the case, on the balance of probabilities, that the offending statements amount to hate speech as contemplated in s 10(1) of the Equality Act.[196] He found the offending statements hurtful (in the sense of severe psychological impact) and harmful and with the potential of inciting harm towards the LGBTQI+ community, and also that it plainly propagated hatred towards them.[197]

The SCA disagreed and held that s 10 was to provide powers broader than s 16, but this had not been done in a constitutionally sound manner. It was therefore unconstitutional.[198] It granted parliament eighteen months to amend the Equality Act and put in place a reading of s 10(1) that, according to the SCA, fell within the bounds of s 16 of the Constitution:

> 10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.[199]

In July 2021, the Constitutional Court handed down judgment to find s 10(1) unconstitutional only to the extent that it includes reference to hurtful speech, and provided an interim reading that excised this reference pending legislative correction.[200] It went on to confirm that the article was harmful, incited harm and propagated hatred against the LGBTQI+ community, and thus constituted hate speech under PEPUDA.

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[190] Ibid para 4.
[191] Ibid para 7.
[192] *South African Human Rights Commission v Jon Qwelane* [2009] ZAEQC 44 Equality Court of South Africa sitting at the Johannesburg Magistrates' Court.
[193] *Qwelane GJ* (note 47) para 2
[194] Ibid.
[195] Ibid paras 61–65.
[196] Ibid para 53.
[197] Ibid.
[198] *Qwelane v SAHRC* [2019] ZASCA 167.
[199] Ibid para 96.
[200] *Qwelane v SAHRC* [2021] ZACC 22.

5.5 Religion/Culture

One of the most well-known religion/culture cases that, like *Qwelane*, originated in the Equality Court at Magistrates' Court level is *Pillay*.[201]

The case revolved around the prohibition of, or lack of exception for, the wearing of a nose stud for South Indian cultural purposes by learner, Sunali Pillay, by Durban Girls' High School.

In deciding whether or not to make a jewellery-wearing exception for Pillay, the School informed the various courts that it consulted with, and accepted the advice of, 'recognised experts in the field of human rights and Hindu tradition [who] advised that [the School] was not obliged to allow Sunali to wear the nose stud'.[202] Despite being informed that the MEC for Education in KwaZulu-Natal supported the School's decision, Pillay chose not to remove the nose stud and, instead, institute action in the Equality Court.[203]

The matter then went on appeal, all the way to the Constitutional Court, which, in having the final 'say', found the School's Code of Conduct to have indirectly, unfairly discriminated on the ground of culture and/or religion. The Court held that by normalising 'mainstream' piercings (an act of expression of identity), such as earrings, it indirectly excluded identity expression, through piercing, of other non-mainstream minority cultures.[204]

The Court held that the expression of one's identity was inseparable from one's dignity. The Court held:

> Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity, precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.[205]

In response to the School relying on 'expert opinion', and taking the view that the nose-stud was voluntary and not obligatory, the Court held that religious and cultural practices are 'not monolithic'[206] and that these practices may:

> differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song, and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being in the world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from the outside […] Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.[207]

The Constitutional Court held that according to evidence presented to it, 'culture and religion are malleable' and that culture informs religion and vice versa.[208] It stressed against 'the temptation to force [grounds of discrimination] [religion and culture] into neatly self-contained categories'.[209] Part of enforcing one's freedom and dignity, according to the Court, included choosing one's religious practices voluntarily and not through force or coercion.[210]

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[201] *Pillay* (note 41 above).
[202] Ibid para 8.
[203] Ibid para 9.
[204] Ibid para 44.
[205] Ibid para 53.
[206] Ibid para 54.
[207] Ibid.
[208] Ibid para 60.
[209] Ibid.
[210] Ibid para 64. See also, Woolman 'Dignity' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006) 36–11.

5.6 Language

Although several cases have challenged the language policies (the reduction in the use of Afrikaans) at the Universities of the Free State, Pretoria and Stellenbosch, none of them were instituted in the Equality Court in terms of the Equality Act. Rather, they were challenged through applications for judicial review. In *Lourens v Speaker of the National Assembly of Parliament*,[211] the complainant alleged that Parliament's practice 'in relation to the language used for legislation, and the rules of Parliament' constituted unfair discrimination on the ground of language, as bills and legislations were not published in all eleven official languages.[212] He asserted that Bills were being introduced into Parliament, published and sent to the President for signature, only in English.[213] The complainant sought an order 'requiring Parliament and the Minister to take steps to comply with their obligation to publish all national legislation in all 11 official languages within a reasonable period'.[214]

Lourens' application in the Equality Court held at the Western Cape High Court was dismissed,[215] as was the SCA application.[216] None of the legislation the complainant referred the Court to required that legislation be translated into all official languages, and where it required the usage of two official languages, that obligation fell on the executive and not the legislature.[217] The complainant's complaint was thus too broad and misdirected at the incorrect respondent.

5.7 Additional Ground of Poverty

In *Social Justice Coalition v Minister of Police*[218] the Western Cape High Court established or rather defined a new ground of discrimination: economic status/poverty. In this case, the Social Justice Coalition, Equal Education and the Nyanga Community Policing Forum challenged the allocation of Police resources in the Western Cape, by the Provincial Commissioner, alleging that it unfairly discriminates against black and poor people on the basis of race and poverty (an intersectional ground).[219]

In this case, the alleged unfair discrimination focussed on how, exactly, national and provincial government allocated police resources, in the Western Cape, and whether it directly or indirectly discriminated on the grounds of race and socio-economic status.

In summary, government argued that allocation of resources, by the Provincial Commissioner of the Western Cape, was neither race nor class based and that it merely allocated police resources based on the data on the number of reported crimes, stored on the South African Police Services' (SAPS) Crime Administration System, crime trends and patterns, and its theoretical human resource requirement (THRR)[220] policy system.[221] The respondents argued that, counter to the applicants' arguments, which are summarised below, the system they have (or had) in place 'ensure[d] that police stations in lower economically resourced areas [had] a higher ratio of police officers to serve them'.[222]

[211] *Lourens* (note 83 above).
[212] Ibid.
[213] Ibid.
[214] Ibid para 5.
[215] *Lourens v Speaker of the National Assembly and Others* (EC08/12) [2014] ZAEQC 2; 2015 (1) SA 618 (EqC).
[216] Ibid para 35.
[217] Ibid para 32–35.
[218] *Social Justice Coalition* (note 64 above).
[219] Ibid para 2.
[220] The THRR system 'is said to have been developed to calculate the number of posts per level required to perform the duties associated with police stations. It presents the ideal number of employees to be placed at a specific police station. The THRR is projected as dynamic and evolving as well as being multi-faceted. In terms of the THRR provision has to be made for: (a) community service centres; (b) crime prevention/sector teams; (c) custody management; (d) additional service points; (e) operational support, which includes court services, exhibit management and general enquiries such as firearms (licence enquiries); and second hand goods and firearms; liquor and second hand goods ('FLASH'); (f) investigation of crime; and (g) support services, including general administration, financial / human and supply chain management'. Ibid para 21.
[221] Ibid paras 17–22, 24.
[222] Ibid para 23.

The complainants' arguments, with reference to information provided before the Khayelitsha Commission of Inquiry (Khayelitsha Commission),[223] drew attention to the flaws of the SAPS allocation system, stating that the Commission found:

> the system used by SAPS for determining the THRR was highly complex; was neither publicly available or debated, even within SAPS or by the key oversight bodies, such as the National Parliament and the Provincial Legislature; that data provided by police stations and used to calculate the THRR was not necessarily accurate; and that the weighting attached to different environmental factors may result in over- or under-estimation of the policing implications of these factors to Khayelitsha and other areas which are occupied predominantly by Black and poor people.[224]

The complainants' expert, Dr Jean Redpath, pointed out that, essentially, the state was allocating resources based 'solely on reported crime'.[225] This was a problem because it only took into account one aspect of policing (detective service),[226] and did not take into account severe under-reporting in poorer, under-resourced areas, as compared with wealthier areas.[227] Dr Redpath stated that 'actual violent crime rate[s]' were a better guide to resource needs.[228]

In respect of evidence of actual allocation of police resources to poorer townships, Dr Redpath provided evidence she gave at the Khayelitsha Commission, which had:

> requested her to compare Police officer allocation to indicators of poverty and informal housing. She did this by combining the data on actual numbers obtained for the Western Cape and KwaZulu-Natal […] she was able to determine that areas with a high percentage of electricity and piped water availability per household usually had a high percentage of formal housing. The converse, according to her, was also true: Informal or rural housing was, in turn, indicated by lower levels of electricity and water provision […] [Historically,] poorer black people tend to live in informal settlements characterised by lower levels of service provision. Using this data, Redpath concluded that service provision levels were a reliable indicator of the racial demographics of an area. She further found that when comparing the trends relating to provision of Police resources per 100 000 people to levels of service provision (percentage piped water and electricity), there was a statistically significant relationship between the variables. This data, according to Redpath, showed that lower levels of service provision were associated with lower levels of Police resourcing.[229]

The Court found discrimination on the grounds of race and poverty and in terms of fairness held that even though the THRR system aims to be neutral, by design and application, it indirectly discriminates against persons who are black and living in poor black townships.[230]

The issue of remedy was postponed to a later date. That hearing, however, did not take place. The complainants and respondents remain in negotiations regarding a suitable remedy.[231]

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[223] The Khayelitsha Commission was appointed by the then Premier of the Western Cape, Helen Zille, to investigate allegations of police inefficiency in Khayelitsha township, and the breakdown in relations between the Khayelitsha community and the police. The commissioners were former Constitutional Court Justice Kate O'Regan and former National Director of Public Prosecutions Vusi Pikoli. GroundUp 'GroundUp: Understanding the Khayelitsha Commission of Inquiry' (2014) *Daily Maverick* 21 January. <https://www.dailymaverick.co.za/article/2014-01-21-groundup-understanding-the-khayelitsha-commission-of-inquiry/>

[224] Ibid para 26.

[225] Ibid para 45.

[226] Ibid.

[227] Ibid paras 48–49.

[228] Ibid para 45.

[229] Paras 52–53.

[230] Ibid para 94.

[231] Information provided by Dallie Weyers, former Social Justice Coalition employee, in November 2020.

5.8 In the Court of Public Opinion

For respondents like Sparrow,[232] Theunissen[233] and Catzavelos,[234] whose (alleged) hate speech was published and widely shared on social media platforms and reported in the media, damage (rightly or wrongly) was done through mass public reprimand and shaming months before their matters came before the SAHRC and/or the Equality Court.

By the time Sparrow's matter came before the Umzinto (Scottburgh) District Magistrates' Court in June 2016, she had already gone into hiding.[235]

Within days of Catzavelos' video being posted, in August 2018, offended and angry social media users started sharing information about his proprietary interests and his and his wife's employment. The Smokehouse and Grill in Braamfontein, in which he had minor shareholding, was forced to close due to protests by the public and the Economic Freedom Fighters.[236] His other businesses interests distanced themselves from Catzavelos.[237] His family dismissed him from St. Georges Fine Foods, where he worked,[238] and Nike stores in Johannesburg and Cape Town closed their doors for fear of backlash when it became known that Catzavelos' wife was a merchandiser for Nike.[239] Catzavelos settled the Equality Court matter with the SAHRC in August 2019, and sentence in his *crimen injuria* case was only handed down in March 2020.

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[232] On New Year's Day in 2016, Penny Sparrow wrote in a Facebook post: 'These monkeys that are allowed to be released on New Year's eve and New Year's day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others' (sic). 'I'm sorry to say that I was amongst the revellers and all I saw were black on black skins what a shame. I do know some wonderful and thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions and get their way of dear,' she continued. '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 and drop litter,' Sparrow added. See Facebook posts here: https://citizen.co.za/news/south-africa/927765/kzn-estate-agent-calls-black-people-monkeys.

[233] Theunissen took to Facebook in 2016 to vent about Sports Minister Fikile Mbalula's blanket ban on South African sports associations from hosting major international events. Mbalula forbid the national netball, cricket, athletics and rugby associations from bidding to host any events in their respective sporting codes due to their failure to meet transformation targets. Theunissen tweeted, 'So no more sporting events for South Africa. I've never been more proud than to say our government are a bunch of KAFFIRS. Yes I said it so go fuck yourselves you black fucking cunts'. See Facebook post here: https://mg.co.za/article/2016-05-03-twitter-erupts-after-matthew-theunissen-racist-rant-goes-viral.

[234] In 2018, Catzavelos recorded a video while on a Greek beach saying, 'Not one kaffir in sight, fucking heaven on earth. You cannot beat this!' The video can be viewed here: https://www.youtube.com/watch?v=pn_KmjCINP8

[235] *ANC v Penny Sparrow* ZAEQC 01/2016 District Magistrates' Court of Umzinto held at Scottburgh 3.

[236] https://www.timeslive.co.za/news/2018-09-09-smokehouse-and-grill-restaurant-forced-to-close-in-wake-of-catzavelos-racism-scandal/.

[237] https://www.timeslive.co.za/news/south-africa/2018-08-22-restaurant-group-cuts-ties-with-adam-catzavelos-family-business-after-k-word-video.

[238] https://qz.com/africa/1366680/adam-catzavelos-racist-rant-nike-other-businesses-distance-themselves/; https://albertonrecord.co.za/186136/whats-happened-since-adam-catzaveloss-racist-video-rant-went-viral.

[239] https://qz.com/africa/1366680/adam-catzavelos-racist-rant-nike-other-businesses-distance-themselves/; https://albertonrecord.co.za/186136/whats-happened-since-adam-catzaveloss-racist-video-rant-went-viral.

6. REMEDIES

As noted above, the most used remedies in the Equality Courts (Magistrates' Courts) are – in the following order – an unconditional apology, payment of damages to the complainant and payment of damages as an award to an appropriate body.

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6.1 21(2)(j): An Unconditional Apology

Unconditional apologies have a long history in South African law with their terms set out in the 1910 case of *Ward Jackson v Cape Times Ltd*.[240] This states that an apology has to include 'an unreserved withdrawal of all imputations made, but should also contain an expression of regret that they were ever made. A mere retraction cannot be called a full and free apology'.

In practice, unconditional written apologies have to be sent to the applicant and to the Equality Court clerk for the presiding officer to approve. There are no cases, from the ones perused in this research, where apologies were not approved (or required to be rewritten) or were rejected by an applicant.

6.2 21(2)(d): Payment of Damages to the Complainant

Despite the section stating that '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', the research only revealed one case where an evidentiary assessment of loss was actually carried out.[241] In three cases the magistrate did take into account the financial circumstances of the respondent.

Amounts that respondents have been ordered to pay in the Magistrates' Courts range from R300 to R10 000. Damages may be paid off in a single or more than one instalment, to be determined by the presiding officer. In practice, respondents who are ordered to pay damages to the applicant have to give cash or a bank guaranteed check to the clerk of the Equality Court for the applicant to collect from the clerk. In more recent cases, the Equality Court clerk provided respondents with banking details of the applicants, and payments could be made through electronic fund transfer, with the respondent sending proof of payment to the Equality Court clerk as well as the applicant.

[240] *Ward Jackson v Cape Times Ltd* 1910 WLD 257 263.

[241] In *Ndayishimiye Aridi Amipi v Management of Bronx Nightclub* (04/2008), Cape Town Magistrates' Equality Court. In this matter, Magistrate Lekhuleni did not award the personal damages sought as he was not satisfied that the affidavit of the complainant rose up to the level of proving damages as required by our law. He held that the evidential material submitted by the complainant was insufficient to prove his damages or to enable the Court to assess the quantum of his damages.

6.3 21(2)(e): Payment of Damages as an Award to an Appropriate Body

This award is usually requested by applicants/complainants who have instituted action on the grounds of hate speech based on race, sexual orientation or gender. There is no calculation used in deciding how much to claim. The only reference for applicants in deciding how much to claim is based on previous Equality Court awards. The financial circumstances of the complainant are not taken into account. For example, in *ANC v Penny Sparrow*,[242] the respondent's daughter (who appeared on the respondent's behalf after the respondent 'went into hiding') informed the presiding magistrate that her mother, at the time of the application, was a pensioner with no other income, but that did not inform the decision on the amount of what was referred to as a 'sanction'. What informed the decision was assessing the egregiousness of the racist hate speech in relation to previous cases and the sanction ordered. In ordering a payment of R150 000 to the Oliver & Adelaide Tambo Foundation, the Court reasoned as follows:

> In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EC) the North Gauteng High Court sitting as an Equality Court *inter alia* awarded an amount of R75 000 for the impairment of the complainant's dignity as well as emotional and psychological suffering for having been unfairly discriminated against on the ground of sexual orientation.
>
> In *Sonke Gender Justice Network v Malema* the Magistrates' Court sitting as an Equality Court in Johannesburg under case number 2/2008 ordered the respondent to pay R50 000 damages for his utterances constituting hate speech and harassment.
>
> In *NG Kempton v André van Deventer* the Magistrates' Court in Cape Town sitting as an Equality Court under case number 9/2013 ordered the respondent to pay R50 000 damages for hate speech which was racially motivated.
>
> The above cases were in my view comparatively less serious than the present matter.
>
> I am in agreement with counsel for the complainant that an appropriate award should, amongst other things, be determined in the light of the prevailing conditions, taking into account that in the more than 20 years that South Africa has become a democratic state racism is still pervasive in our society and that the time has come for courts to act more decisively.
>
> At the same time, I bear in mind that because it is difficult to assess the monetary value of injured feelings, awards should generally be restrained but should also at the same time serve as a deterrent.[243]

[242] *ANC v Penny Sparrow* (01/2016), Equality Court at Scottburgh Magistrates' Court.

[243] Ibid 50. There are no notes with the full case citations, as the published version is a transcription of the hearing.

6.4 21(2)(h): Special Measures to Address Unfair Discrimination or Hate Speech

An order that often accompanies an unconditional complaint and the payment of damages as an award to an appropriate body is an order made in terms of s 20(2)(h) in which the respondent is ordered to attend anger management training,[244] sensitivity training[245] or counselling.[246] In such cases, the cost of the training or counselling is borne by the respondent, who has to provide proof of attendance to the clerk of the Equality Court.

6.5 21(2)(f), (g), (h), (i), (k) and (m): Remedies against the State

In cases against the State, such as *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries*[247] and *Social Justice Coalition v Minister of Police*,[248] where the applicants challenged the State's policies and their implementation of policies, the applicants requested extensive declaratory and structural orders, which included requesting the courts to approve state policy. While the Equality Courts are willing to declare policies and the implementation discriminatory, they are not prepared to, in line with *Bato Star*[249] and the separation of powers doctrine, determine the contents of the amended policies.

6.6 21(2)(n): Referral to the Director of Public Prosecution

In many of the hate speech cases read, after adjudication in the Equality Court, and a finding of hate speech, the matter gets referred to the prosecuting authority in order for a respondent to be charged for committing *crimen injuria*.

6.7 21(2)(o): Costs

Given the informal nature of the Equality Court and not wanting to discourage members of the public from coming forward when they have been victims of unfair discrimination, the courts, in most cases, order that each party pay their own costs, or give 'no order as to costs'. This is so even when an applicant fails to prove any discrimination, hate speech or harassment.

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[244] *Timothy Trengove Jones v Elvira Oelofse* (09/2016), Johannesburg Magistrates' Equality Court.

[245] *September* (note 44 above). In this case, the judge ordered that the Department of Justice and Correctional Services 'introduce transgender sensitivity training for all Department of Correctional Services' employees as part of the training of new employees, and a specific course for current employees'.

[246] *NM v Shannon Ferreira* (01/2003), Blue Downs Magistrates' Equality Court.

[247] *Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries* [2016] ZAWCHC 150; [2017] 2 All SA 46 (WCC).

[248] *Social Justice Coalition v Minister of Police* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC).

[249] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC).

7. CONCLUSION AND FUTURE RESEARCH

The Equality Courts have slowly gained traction and begun to emerge from the shadows, especially the more dominant use of section 9 of the Constitution. Yet they still have some way to go.

After an optimistic beginning, based on the belief that the transformative aspirations of the Equality Courts would be realised for members of the public who brought their claims to the courts, the reality has been a slow and incremental development of the courts, their usage and jurisprudence. In this respect, the early, more pessimistic, evaluations of the courts as failing in their transformative aims are correct, but perhaps premature. It takes time for institutions to embed themselves, for the public to access them and for the jurisprudence to develop. As this Report suggests, the Equality Courts have slowly gained traction and begun to emerge from the shadows, especially the more dominant use of s 9 of the Constitution. Yet they still have some way to go.

The Act seeks to offer both individual and systemic redress, the former in accessible fora, the latter aiming to dismantle the deeply embedded effects of 'past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy'. It is a big ask, but our evidence is that the Act is proving flexible enough to do both. As this Report suggests, a pattern is emerging across the different kinds of Equality Courts and dispute resolution fora, with the Magistrates' Courts generally offering more individualised redress and dignity to the person in the street (often concerning race discrimination/ hate speech and resulting in apologies and small damages awards), and the more systemic matters of inequality beginning to reach the High Courts.

Here we find claims against the State, more difficult legal questions and dual claims (including those that fall outside of the Equality Act). In addition, the SCA and Constitutional Court are beginning to address some of the trickier jurisprudential and interpretive questions, most recently (although not finalised at the time of writing) on the definitions of hate speech in the Act. Finally, the SAHRC is beginning to develop its own jurisprudence on questions such as hate speech, while the CGE has not yet really developed the potential of the Equality Act and Courts on gender equality issues.

Understanding the overall trajectory and potential of the Equality Act, Courts and jurisprudence within and across different institutions are important areas for future research, and the next phase of the research of the Equality Courts Project of the SARChI Chair will pursue this in more detail.

Central to the development of the Equality Courts and their jurisprudence is knowledge of the courts both among the public (which has been assisted by the high-profile race cases in recent years) and lawyers. However, in the past, it is lawyers who have often circumvented the Equality Courts and Equality Act to (incorrectly) bring cases under s 9 of the Constitution. With greater clarity on the doctrine of subsidiarity and the dual jurisdiction of the Equality Courts and High Courts in matters that cross legislative boundaries, more cases are brought to the Equality Courts, and in more innovative ways.

As a result, a discrete 'Equality Act' jurisprudence is slowly beginning to emerge, even if it remains in its early stages. Tracking this and discussing its further development will be a second theme of research for the Equality Courts Project of the SARCHI Chair, as will be our explorations of the transformative aspirations of the jurisprudence, such as the emergence of new grounds of discrimination (poverty, sex/gender) and the use of evidence on indirect discrimination. A further area of research, highlighted by this Report, will be the use of the Equality Act to challenge race-based socio-economic and redistributory decisions.


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EMERGING FROM THE SHADOWS?

THE EQUALITY COURTS IN SOUTH AFRICA

WITS SCHOOL OF LAW | SOUTH AFRICAN RESEARCH CHAIR IN EQUALITY, LAW & SOCIAL JUSTICE

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