EQUALITY AT WORK: THE ROLE OF THE JUDICIARY IN PROMOTING TRANSFORMATION

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INTRODUCTION

South Africa's Constitution[2] recognises the extent to which disadvantage attaches to race, gender, and other group characteristics. It further expressly prescribes a regulatory framework for substantive equality.[3] The statutes and statutory provisions that have emerged from it may consequently be described as 'transformative' laws which, as Kok aptly puts it, are intended both to reduce social and economic disparities between demographic groups and to transform the 'hearts and minds' of South Africans.[4] While legal institutions may be inherently limited in their ability to effect such transformation,[5] an analysis of case law suggests that further barriers to transformation are imposed by the current text of the law as well as by poor judicial interpretations thereof.[6] Many decisions of the Labour Court suggest that judges gravitate towards a narrow interpretation of equality, conceiving of unfair discrimination and affirmative action as oppositional rather than mutually reinforcing.[7] Similarly concerning is the Court's conservative attitude to remedies in workplace discrimination disputes. If substantive equality is to be facilitated through adjudication, the courts should be more mindful of their role in the transformation project.[8]

The hurdles identified, in the cases analysed, fall into two broad categories of obstacle to achieving sustained transformation in South African workplaces. While interrelated, these categories concern separable aspects of the current system; they are further populated by

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[1] Institute of Development and Labour Law, Faculty of Law, University of Cape Town.
[2] Constitution of the Republic of South Africa, 1996.
[3] Section 9(2) of the Constitution provides that '[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.
[4] Anton Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?' (2008) 19 *Stellenbosch L Rev* 122 at 124-5; T Cohen 'The Efficacy of International Standards in Countering Gender Inequality in the Workplace' (2012) 33 *ILJ* 19 at 35.
[5] See Anton Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?' (2008) 19 *Stellenbosch L Rev* 122. See also Sandra Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005 21 *SAJHR* 163 at 168 where she points out that '[l]itigation is victim initiated and bipolar, and therefore both random and limited to the information produced by the litigants.'
[6] Note that, for the sake of confining the case review to a manageable number, only matters in which the alleged discrimination was related to the employee's race or gender, were analysed.
[7] This is contrary to the Constitutional Court's decision in *Minister of Finance & another v Van Heerden* (2004) 25 *ILJ* 1593 (CC).
[8] KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 171.

various distinct subcategories. The first category covers difficulties related to the principal statutes[9] governing employment equity and workplace discrimination in South Africa. Included amongst these are problems with both the formal wording of these acts, and the manner in which their provisions have been interpreted to date. The second set of obstacles arises from the poverty of the judiciary's approach to remedies in these disputes. These categories (and sub-categories) are discussed in turn below.[10]

LEGAL COMPLEXITIES, LACUNAE AND ANOMOLIES

Various textual difficulties with the relevant pieces of labour legislation exist. Starting with section 5 of the EEA, an appraisal of the problems associated with this legislation,[11] as well as those arising from judicial interpretations thereof, follows.

1. Section 5 of the EEA

Section 5 of the EEA currently reads:

> 'Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.'

The section is found in chapter 2 of the Act and accordingly regulates the behaviour of *all* employers, regardless of their designated status.[12] Thus, it has the potential to effect change in all workplaces across the country. Unfortunately, however, the courts have historically either disregarded the section entirely, or interpreted it in an unduly restrictive sense. Where it has been raised, rather than construing the section in light of the Act's over-arching purpose of promoting transformation and eradicating unfair discrimination at every level, the courts have seen it as one compelling employers to simply abolish formally discriminatory policies, and to satisfactorily respond to individual acts of unfair discrimination at work. This interpretation is inadequate in (at least) two respects. First, it neglects the section's emphasis

[9] The Employment Equity Act 55 of 1998 (EEA or Act) and the Labour Relations Act 66 of 1995 (LRA).
[10] Note that what follows is by no means a closed list; these are but some of a selected set of difficulties with the current system; further difficulties undoubtedly exist too. For recent academic analysis in this regard see C Garbers 'The Prohibition of Discrimination in Employment' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future* (2012) 18; O, Dupper & C, Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' 2012 *Acta Juridica* 244; Gaibie 'Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 years on' (2011) 32 *ILJ* 19-52; and Ngcukaitobi 'Adjudicating Transformation in the Labour Courts – an Edifice on the Rise' (2007) 28 *ILJ* 1436-1454.
[11] Primarily with the EEA, and to a lesser extent, with the LRA.
[12] Chapter 2 applies to all employers, in contrast to chapter 3 of the EEA, which applies to designated employers only; see, in this regard, sections 1 and 12 of the EEA.

on promoting equal employment opportunities. As the Court in *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* held:

> 'There is no doubt that employers are required to take steps in advance, and to be proactive, in the elimination and prevention of unfair discrimination'.[13]

In other words, the Act imposes a duty on employers to pre-empt discrimination in their workplaces, rather than merely respond to it. That they fulfil this duty is crucial to meeting the EEA's objective of promoting veritable transformation at work. Courts must therefore be alive to this obligation when interpreting and applying its provisions. Secondly, the prevailing construction confines policies and practices to cleanly identifiable programmes and systems, and overt forms of discriminatory conduct.[14] Discriminatory cultures, as well as more opaque barriers to change, are accordingly omitted from its scope. Yet, this is contrary to the EEA's very definition of 'employment practices', which expressly includes 'working environments'.[15] Precisely why courts have adopted this restrictive conception of section 5 is unclear.

Whatever their reason for doing so, the result is that the section's reach has been limited to discrete incidents of discrimination, which are capable of proof in court.[16] It has not been extended to affirmative action cases at all, let alone been construed as imposing a duty on employers to be proactive in their attitudes to promoting equal opportunity and transformative organisational cultures. As presently understood therefore, the section's impact, scope and application are responsive rather than preventative, and fall disappointingly short of the Act's vision of facilitating substantive and transformative change.[17] Given the ambitions and spirit of the EEA, and the desperate need for substantive equality in South Africa, whether this position can be countenanced is doubtful. While legislative amendment may help to clarify the potential of section 5 to advance equality, the courts are responsible for interpreting the law consistently with the Act and the Constitution, and so the task of appositely conceptualising the section's ambit ultimately lies with them.

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[13] *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* (2007) 28 *ILJ* 897 (LC) para 77.

[14] Consider in this regard C Garbers 'The Prohibition of Discrimination in Employment' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future* (2012) 18 at 24.

[15] Section 1 of the EEA; *Piliso* para 77.

[16] Whether in the form of employees' or managerial staff's conduct, or in formal policies. See Garbers at 24 and A Rycroft 'Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies' (1999) 20 *ILJ* 1411.

[17] See, in this regard, the preamble to the EEA.

2. Sections 6(1) and 6(2) of the EEA are viewed as oppositional and Chapters 2 and 3 as dichotomous

Section 6(1) of the EEA applies to *all* employers and prohibits unfair[18] discrimination in any employment policy or practice on any arbitrary ground; the Act goes on to list specific grounds[19] which would be considered to be unfair reasons upon which to base a decision. The Act then provides, in s 6(2), that it is not unfair discrimination to:

'(a) take affirmative action measures consistent with the purpose of this Act; or

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

As the discussion on s 5 above suggests, excluding affirmative action from the remit of unfair discrimination should be seen in the context of South Africa's Constitutional mandate for substantive equality. As such, an argument is made that 'affirmative action appears not as an exception to the right to equal treatment, nor as a species of *prima facie* unfair discrimination … but as a means of achieving substantive equality.'[20] In other words, the Labour Courts should not conceptualise affirmative action merely as a 'defence' to allegations of unfair discrimination; rather affirmative action is integral to equality. However, the rhetoric of affirmative action as a defence and as an exception to unfair discrimination prevails in judicial reasoning; this has been strengthened by the dichotomy which has emerged between Chapters 2 of the EEA (which prohibits unfair discrimination) and 3[21] (which imposes a duty

[18] The inclusion of the word *unfair* before 'discrimination' has given rise to debate and uncertainty as to whether the Act envisaged a general fairness defence. However, as s 3(d) of the EEA requires the Act to be interpreted in compliance with the ILO Discrimination in Respect of Employment and Occupation Convention (111), it is broadly accepted that 'unfair discrimination' in the EEA means the same as 'discrimination' as used in the Convention. Consequently, there is no general fairness defence. See in this regard, Du Toit 'The Evolution of the Concept of "Unfair Discrimination" in South African Labour Law' (2006) 27 *ILJ* 1311; and Du Toit 'The Prohibition of Unfair Discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in Dupper & Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2008: Cape Town, Juta): 139.

[19] The listed grounds (in s 6) are 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

[20] D Du Toit and M Potgieter 'Labour and the Bill of Rights' in *Bill of Rights Compendium* (2007) at para 4B29. See also Ngcukaiobi 'Adjudicating Transformation in the Labour Courts – an Edifice on the Rise' (2007) 28 *ILJ* 1436.

[21] Whereas Chapter 2 of the EEA, which prohibits unfair discrimination, is applicable to *all* employers, Chapter 3, which imposes a duty to implement affirmative action, is applicable to *designated* employers only. A 'designated employer' is an employer who employs 50 or more employees; or who employs less than 50 but whose business meets or surpasses a threshold turnover; and an organ of staff or an employer bound by the terms of a collective agreement (s 1 of the EEA). In terms of Chapter 3 (s 13), designated employers must implement affirmative action measures for people from designated groups and must, in consultation with

to implement affirmative action).[22] The unfortunate impact of this has been to restrain, if only unconsciously, the courts from giving proper effect to a substantive notion of equality.

This dichotomy, upheld by the Labour Appeal Court in the *Dudley*[23] decision, has the effect of barring the most disadvantaged employees from designated groups[24] from founding a cause of action for unfair discrimination on the basis of an employer's failure to properly implement affirmative action policies. The resulting deleterious effects on the transformation project are evident in case law, recent examples of which include the Labour Court and the Labour Appeal Court decisions in the *Barnard* matter.[25] Barnard – the preferred candidate for the post, to which no one was appointed – was at least able to found a cause of action before the court (and successfully so in the case of the Labour Court decision). However, it remains uncertain and (given the prevailing jurisprudence) unlikely, that the two suitably qualified black applicants for the advertised post in *Barnard*, who (both courts agreed) were clearly appointable, would have succeeded in doing the same.

It is incongruent that candidates from a non-designated group,[26] or from groups that, in the hierarchical structure of disadvantage, have suffered the least disadvantage of the designated

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employees, prepare an employment equity plan and report to the Director-General of the Department of Labour on progress made in implementing its employment equity plan.

[22] See *Dudley v City of Cape Town and another* (2004) 25 *ILJ* 305 (LC); *Dudley v City of Cape Town and another* (2008) *ILJ* 2685 (LAC); *Public Servants Association on behalf of Karriem v SA Police Service & another* (2007) 28 *ILJ* 158 (LC); *Cupido v GlaxoSmithKline SA (Pty) Ltd* (2005) 26 *ILJ* 868 (LC); and, in the context of retrenchments, see *Thekiso v IBM South Africa (Pty) Ltd* (2007) 28 *ILJ* 177 (LC).

[23] The *Dudley* decision is in contrast with that in *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC). In the *Harmse* case the City of Cape Town had decided not to short-list the applicant employee who had applied for any one of three posts advertised by the City. The applicant, who was a Black African, alleged that he had been unfairly discriminated against on the basis of race, political beliefs (he was not a member of the ruling party), lack of relevant experience and/or other grounds and that the city council had failed to apply s 20 of the EEA in considering his application. In response an exception to the statement of claim was raised by the employer, arguing that the applicant had failed to disclose a cause of action, in part because the applicant had relied on chapter 3 of the Act. The court considered the question whether affirmative action is merely a "defence, or a 'shield', and concluded that 'having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword' [para 44] and hence an applicant from a non-designed group could found a cause of action on this basis. However the idea of affirmative action as a sword was soon unseated by the Labour Court in the *Dudley* case. The applicant in the *Dudley* case was a black female medical doctor who applied for the post of Director: City Health and indeed was already acting in that capacity. Three candidates were shortlisted, including the applicant. Ultimately a white male medical doctor, Dr Toms, was appointed. The Labour Court disagreed with the conclusion in the *Harmse* case, arguing that the court in that decision 'has not sufficiently maintained the distinction between Chapters II and III' (para [75]), concluding that if affirmative action measures have not been applied by an employer that is an issue for enforcement in terms of Chapter III of the Act and not Chapter II. The Labour Appeal Court in *Dudley v City of Cape Town* [2008] 12 BLLR1155 (LAC) confirmed that there is no individual right to affirmative action.

[24] 'Designated groups' are defined in s 1 of the EEA as 'black people, women and people with disabilities.'

[25] *Solidarity obo Barnard v SA Police Service* (2010) 31 *ILJ* 742 (LC) and *South African Police Services v Solidarity obo Barnard* [2012] ZALAC 31.

[26] See for example A Rycroft 'Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies' (1999) 20 *ILJ* 1411 where he indicates, at

groups,[27] may have access to the court on the basis that an affirmative action measure is 'unfair and irrational,' yet, following the *Dudley* decision,[28] the most vulnerable of the designated groups must be content with the dispute resolution mechanisms in chapter 5.[29] As the later discussion thereof reveals, these mechanisms involve a convoluted process that assumes the competence and capacity of the Department of Labour and its inspectors, neither of which is assured. The groups which the EEA was intended to advance are those made most vulnerable by the complexities of the legislative framework. This suggests that courts need to engage in deeper judicial reflection on the meaning of unfair discrimination in the context of substantive equality[30]

Even if applicants are able to found a cause of action in unfair discrimination, meaningful workplace transformation is often frustrated by the burdens of proof in establishing discrimination.

3. The burden of proving discrimination

Legal complexities relating to problems of proof are varied. As Garbers points out:

1415, that the vast majority of litigants are white males. Consider too the discussion on the anomaly between section 186(2) of the LRA and the absence of an 'affirmative action cause of action' in the EEA, below.

[27] Consider for example the relatively privileged position of white woman. See for example the Labour Court decision in the *Barnard* case.

[28] Here it was held that 'if due affirmative actions (sic) measures have not been applied by a designated employer that gives rise to an enforcement issue under Chapter III and not an unfair discrimination claim under Chapter II.' At para 75. Prior to this, in the *Harmse* matter it was held that '…sections 20(3) to (5) read with Chapter II do indeed provide for a right to affirmative action. The exact scope or boundaries of such a right is a matter that will have to be developed out of the facts of each case.' At para 49.

[29] Which is discussed below.

[30] Courts should reflect on whether the formulation and understanding, in the *Dudley* case, of affirmative action in terms of Chapter 3 of the EEA, as 'programmatic and systematic' with a methodology that is 'uncompromisingly collective' (para 49) has unduly restricted the meaning of affirmative action and constrained the courts from intervening in cases in which substantive equality is at stake. Juxtaposing affirmative action as a matter of public interest against an 'individual right' to equality does not do justice to the notion of substantive equality. This is not to suggest that courts should necessarily, and simply, be intervening to appoint or promote certain candidates on the basis of affirmative action, but that, given the national imperative for distributive justice and the importance of transformation, the courts have an obligation at least to ascertain, and interrogate, the employer's justification for excluding a member or members of a disadvantaged groups and to respond and intervene in workplaces where it is evident from the litigation at hand that transformation has been compromised. Judicial reasoning should not be overly deferential to the employer's decision-making, and the courts should not feel constrained from pronouncing upon affirmative action measures, whether invoked in terms of Chapter 2 or Chapter 3 of the Act.

> 'Firstly, discrimination … requires a decision-making process based on differentiation and distinction (comparison); an unacceptable reason (cause), as well as a link between the distinction and the unacceptable reason (causation).'[31]

In addition, he notes that '[i]n South Africa it is still accepted that the employee bears the burden of proving the differentiation, the ground and the link'[32] and that 'placement of the onus to show fairness or justify discrimination on the employer does not address the problem of crossing the 'discrimination-hurdle' to begin with'.[33]

Applicants are further constrained by the prevailing judicial construction of unfair discrimination requiring the alleged discriminatory conduct to be overt. Case law,[34] however, clearly indicates that while employees may have legitimate claims for discrimination at some level, the alleged acts are often not considered sufficiently flagrant as to justify imposing liability on their employers.[35] Naturally, the line between trivial discrimination, which should not give rise to liability, and implicit, but nonetheless harmful, acts of discrimination, may be difficult to draw.[36] Still, courts should be aware of the detriment which may be caused by the effects of repetitive, albeit slight, acts of discrimination in the workplace.[37] In turn, they should be cautious of defining discrimination (and dismissing employees' allegations thereof), purely with reference to the nature of the discrimination itself. Instead, when

[31] C Garbers 'The Prohibition of Discrimination in Employment' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future* (2012) 18 at 19.
[32] Ibid at 21.
[33] Ibid at 40.
[34] Particularly in the area of gender related discrimination.
[35] Consider, for example, *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] 5 BLLR 428 (LC), where the employee failed to establish that sexual harassment (and so gender discrimination) had taken place. According to the Court, the employee's testimony was poor and unreliable and so, sexual harassment had not been proven. Yet, when the Court's report of her testimony is read in light of the employee's qualifications and societal position (as a cleaner), the picture it paints is of a vulnerable employee, who was not well advised in drawing up her statement of claim (or referral forms), or in presenting evidence in court. She was then subjected to extensive cross-examination by an advocate, but represented only by a trade union official. In strict legal terms, the Court's conclusion that sexual harassment had not occurred might have been correct. Yet, in light of her plain disadvantage in presenting and proving her case, the outcome seems unjust. It further demonstrates the difficulty of establishing discrimination, of an adequately overt nature as to ensure its acknowledgment in Court; *Mokoena* paras 4 onwards & 52.
[36] Consider, in this regard, Wade's attention to unconscious bias and implicit messages of discrimination; CL Wade 'Transforming Discriminatory Corporate Cultures: This is not just Women's Work' (2006) *Maryland Law Review* (65(2)) 346 at 369-377; see also MP Rowe 'Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity' (1990) *Employee Responsibilities and Rights Journal* 3(2) 153.
[37] See for example Banks, Patel and Moola, 'Perceptions of inequity in the workplace: Exploring the link with unauthorised absenteeism' (2012) *SA Journal of Human Resource Management* (10(1)), 8 pages; 'Hard-to-prove' subtle discrimination, as Rowe explains, establishes 'mechanisms of prejudice against persons of difference [which] are usually small in nature, but not trivial in effect." Rowe, 'Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity' (1990) *Employee Responsibilities and Rights Journal* 3(2) 153-163.

determining whether discrimination occurred, adequate attention should be paid to the degree to which the (allegedly discriminatory) conduct in question adversely affected the relevant employee.[38]

Employers that seek to rely on affirmative action in response to allegations of unfair discrimination are required to demonstrate that their decision is 'in line with a rational, coherent employment equity plan intended to redress inequitable representation in the workplace'.[39] At times, judicial interpretations of this requirement have enabled ritual compliance by employers.[40] Given the limitations of ritual compliance in promoting substantive equality, however, courts should guard against this. To do so, they should be careful not to over-emphasise technical requirements, or to adopt an overly deferential approach when the employer's conduct amounts to mere mechanical compliance.[41] Instead, in cases involving substantive equality, courts ought to ascertain the employer's justification for decisions that have negative distributive effects for disadvantaged groups. Finally too, in their decision-making processes, judges should deal with perceived unfairness, failing which the transformation project may be jeopardised.

Related to the difficulties employees may experience in establishing discrimination, is the Act's complete statutory exemption of employers from liability, where they have taken adequate steps to remedy it.[42] The exemption, as well as the obstacles to transformation which it presents, are appraised below.

[38] Where evidence of such conduct exists, the possibility of directing employers to implement policies aimed at changing working environments and corporate cultures should be considered by the courts.

[39] *Munsamy v Minister of Safety and Security and another* [2013] ZALCD 5 para 18. See also *Gordon v Department of Health: Kwa-Zulu Natal* (2008) 29 *ILJ* 2535 (SC) and *IMATU v Greater Louis Trichardt Transitional Local Council* (2000) 21 *ILJ* 1119 (LC) and the *Barnard* matter.

[40] The shortcomings of which are well documented; see, for example, *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (2007) 28 *ILJ* 1774 (LC) where Pillay J remarks that '[m]echanical compliance with the prescribed processes is not genuine compliance with the letter and spirit of the EEA. Compliance is not an end in itself. The employer must systematically develop the workforce out of a life of disadvantage. Disadvantage of all kinds is targeted by the EEA.' At para [108]. On the notion of 'ritual' compliance see Haines, who articulates 'ritualism' as 'following rules with little sense of why they are there' as a key social challenge. F Haines *The Paradox of Regulation: What Regulation can Achieve and What it Cannot* (2011) at 9.

[41] Ibid.

[42] Section 60(4) of the EEA.

4. Section 60 of the EEA

Section 60 of the Act imposes liability on employers for contraventions of the EEA's provisions, which are committed by their employees.[43] In terms of the section, once the contravention has been brought to the attention of the employer,[44] the employer is obliged to 'consult all relevant parties and … [to] take the necessary steps to eliminate the alleged conduct.'[45] Where employers fail to do so, they are deemed to have committed the discriminatory act themselves. In terms of the section, employers may nonetheless escape liability where they are able to show that they 'did all that was reasonably practicable to ensure that the [relevant] employee would not act in contravention of this Act.'[46]

The effect of section 60 is to impose a form of statutory vicarious liability on employers. It accordingly ought to benefit employees who are subjected to discriminatory acts by their colleagues.[47] In so far as it offers employers an opportunity to avoid liability by responding appropriately to allegations of discrimination, it is fair to them too. Simultaneously, it should encourage employers to adequately address discrimination related grievances, which are raised by their employees. Yet, due to the courts' confined conception of employers' obligations under the section,[48] and their ostensible reluctance to interfere with managerial

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[43] The section reads: '60 Liability of employers

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed to have contravened that provision.
(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

[44] While the section holds that employees who have experienced discrimination must bring it to the attention of their employers 'immediately', this requirement has been appropriately relaxed at times; consider, for example, *Ntsabo*, where the Court states that the term 'immediately,' should not be interpreted as obliging employees to do so within minutes of the discriminatory act (in that case, sexual harassment) occurring; *Nstabo* para 91. According to it, were the provision construed in this way, it would ignore the nature of harassment claims as inherently sensitive and confidential; it would further discount other pertinent considerations, including, the vulnerability of so many harassed employees and their likely fears of victimisation, should they report the incidents to their employers.
[45] Section 60 (2) of the EEA.
[46] Section 60 (3) & (4) of the EEA.
[47] Particularly where proceeding against the offender him or herself is unlikely to yield relief.
[48] In *Mokoena*, the Court went as far as to state that liability under the section only arises where, after discrimination 'has been brought to the attention of the employer…and, as a result of the employer's inaction, further …[discrimination]… takes place…'; *Mokoena* para 42. The implication is that to found liability, the

prerogative,[49] employees frequently fail to reap the section's rewards.[50] Thus, despite proof of discrimination, they may be left without a remedy. While part of the difficulty with section 60 arises from the courts' construction of it, its problems extend to the remedies commonly awarded (or not awarded), in cases in which it is raised. The first of these concerns is discussed here, and the second under the paragraphs on remedial deficits below.

Looking to the courts' formulation of section 60, what appears is that an employer's mere calling of a disciplinary hearing and imposition of some sanction (however lenient it may be), is regularly deemed sufficient to meet the standard of doing all that was 'reasonably practicable to eliminate' the discrimination in question.[51] The matter of *Potgieter v National Commissioner of the SAPS & another*[52] illustrates the shortcomings of this model well.

Potgieter involved a case of sexual harassment,[53] committed by one employee of the South African Police Service ('SAPS') against another. After the victim had brought the harassment to her employer's attention, the offender was called to a disciplinary hearing, found guilty of harassment, and fined R600 (half of which was suspended).[54] This did not appease the victim however. As a result, she[55] instituted proceedings against her employer for failing to comply with section 60 of the EEA.[56] Given that its fine of R600 (which was effectively reduced to

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employee must show that they have suffered at the hands of discrimination at least twice and that there is a causal link between the employer's failure to respond to the allegations and the second incident of discrimination. In so far as it allows employers to escape liability, purely on the basis that an offender is not a repeat offender, the legitimacy of this approach is questionable.

[49] Consider, for example, *Potgieter* and *Finca.*

[50] For another example of a case in which the employee did not succeed, see *Makoti v Jesuit Refugee Service SA* (2012) 33 *ILJ* 1706 (LC).

[51]This is in spite of cases such as *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* (2007) 28 *ILJ* 897 (LC), in which the Court proposed that the measures which employers could reasonably be expected to take, to address sexual harassment in the workplace (and comply with 'minimum fair labour standards'), included the conduct of a prompt and comprehensive investigation into the circumstances of the harassment, the provision of adequate counselling and psychological services for the affected employee, and the taking of all further reasonable steps to eliminate the possibility of recurrences; *Piliso* paras 78-80. While admittedly in *Piliso*, the employer was held liable for breaching its Constitutional duty to ensure a safe working environment for its employees, rather than in terms of section 60 of the EEA, the Court's proposals as to what employers may reasonably be expected to do, remain pertinent. The employee's cause of action was grounded in sections 23(1) of the Constitution, read with section 38 thereof; *Piliso* para 89.

[52] *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC); see also *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC).

[53] The sexual harassment took the form of verbal name-calling and a kiss (or arguably at least an attempted kiss); *Potgieter* paras 24-25 & 27-29.

[54] *Potgieter* para 52; R600 equates to approximately $50.

[55] Sometime later, and only after resigning from the SAPS in fact.

[56] Specifically, she contended that her employer had delayed in addressing the problem; failed to keep her complaint confidential; failed to remove the offender from the station; imposed too lenient a sanction on him; failed to respond adequately to another employee's verbal harassment and failed to timeously refer her for help; *Potgieter* para 49.

R300) was relatively meagre, and so unlikely to positively influence the offender's future behaviours and attitudes towards women,[57] the victim's distress is understandable.

Still, the Court did not agree, concluding instead that the employer's response was quite reasonable.[58] The implication is that the sexual harassment committed in *Potgieter* was neither particularly serious, nor deserving of more than a slap on the wrist. Precisely how unwanted attempts at kissing female employees do not constitute a serious offence, however, is inexplicable.[59] When coupled with the offender's regular verbal abuse of the victim, the severity thereof is only endorsed. The fact that, in all probability, the employee worked in a male dominated environment – which evidence suggests may well encourage a culture of gender discrimination at the workplace – does too.[60]

Given these factors, the Court's laissez-faire and accommodating approach to the employer's response is particularly disappointing.[61] Whether ordering the employer to pay the employee compensation, or to impose a heavier sanction on the offender, was justified, is debatable. Nonetheless, some form of intervention at the employer's stations was clearly warranted. By neglecting to consider the possibility of ordering the SAPS to initiate broad gender sensitivity training at the relevant stations, to counsel the offender accordingly,[62] or to implement any other transformative mechanism for change, the Court again fell short of its Constitutional obligation to promote substantive equality and transformation in South African workplaces.[63]

In addition to these difficulties of proof and accountability, is the dissent between various provisions of the EEA and the LRA. A discussion thereof follows.

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[57] It further suggests that the employer did not take the harassment particularly seriously.

[58] *Potgieter* paras 50-60. Compare its approach to that adopted by the Court in *Piliso* paras 77-80.

[59] In this instance, the harassment had seemingly led to the employee developing post-traumatic disorder; *Potgieter* paras 27-34.

[60] In fact, evidence was adduced at the hearing of earlier incidents of sexual harassment having occurred at the employee's station, again indicating the possibility of a culture of discrimination there; *Potgieter* paras 24-25 & 27-29. Consider in this regard CL Wade 'Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination' (2001-2002) *Tul L Rev* (76) 1461; see also Wade (2006); Rowe; and for empirical evidence of this in the South African context see for example HR Lloyd & MR Mey 'Gender differences in perceptions of workplace progression: an automotive industry case study' (2007) 11 *Southern African Business Review* 95.

[61] Consult too *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] 5 BLLR 428 (LC).

[62] Or any other comparable measure of relief.

[63] Section 9 of the Constitution, read with the preamble to the EEA; Klare at 171. On the cost of not adequately addressing inequality in the workplace see for example J Banks, C Patel, M Moola 'Perceptions of inequity in the workplace: Exploring the link with unauthorised absenteeism' (2012) *SAJHRM* Vol 10(1): 1-8.

5. The anomalies associated with affirmative action under the EEA and unfair labour practices under section 186(2) of the LRA

While historically, as the consideration above explains, reliance by designated employees on the EEA's provision for affirmative action as a direct cause of action has failed, the subject remains hotly contested. The principal reason for the controversy is ostensibly the current model's failure to promote the objectives of the Act and the Constitutional promise of substantive equality. This paper does not seek to engage in a debate about the legal legitimacy of applying affirmative action as a 'sword'. What it points out, nevertheless, is the anomaly between the existing approach to confining the use of affirmative action to matters in which it is raised by employers as a defence, and the LRA's separate provision for employees to proceed against their employers on the basis of an unfair labour practice relating to promotion.

To understand the anomaly, it is necessary to explain certain aspects of the legislation in question. First, both the LRA and the EEA provide remedies to 'employees', as defined.[64] However, only the EEA extends its definition of employee to include applicants for jobs. In turn, under the Act, both internal and external applicants are (theoretically) protected from acts of unfair discrimination in prospective employers' recruitment processes.[65] In contrast, the LRA's application does not extend to applicants but is strictly limited to employees in existing employment relationships.

The EEA's broad ambit is aimed at protecting all persons who may be affected by discriminatory recruitment procedures; by so doing, it concurrently hopes to advance employment equity. Yet, under the present understanding of the relationship between chapters 2 and 3 of the Act, neither internal[66] nor external applicants may proceed against potential employers for neglecting to consider relevant factors in the appointment process, whether those factors include their demographic characteristics or otherwise.[67] Only where an applicant is able to establish that the employer's failure to do so was discriminatory, may they

[64] See section 1, read with section 9 of the EEA and section 213 of the LRA.
[65]Refer, in this regard, to chapter 2 of the EEA.
[66] As recently demonstrated in as the decision in *Minister of Safety and Security and another v Govender* [2012] 1 BLLR (LC). Govender unsuccessfully applied for three rounds of promotion and argued that if the employer had adhered to the agreed employment equity plan, he would have been preferred for appointment. The court found that although a breach of s 6 of the EEA had been alleged, that a case had not been made out on s 6 and that ' it was not competent to pursue an individual claim based on unfair discrimination on account of the employer's failure to adhere to an employment equity plan until the enforcement provisions provided in Chapter V of the Employment Equity Act had been exhausted'. (para 23)
[67] As a black, female or disabled employee in terms of the EEA.

take action under the EEA. As noted above, however, adducing the evidence necessary to succeed in such a claim is notoriously difficult.[68] Very few employers adopt formally discriminatory policies in their appointment processes. On the contrary, to the extent to which employers do hold such policies or discriminatory attitudes, they are likely to do so surreptitiously or even unconsciously. Thus, evidence thereof is rarely accessible to affected applicants or the courts. The probability therefore, of designated applicants succeeding in unfair discrimination claims under the EEA, is minimal.[69]

This should be compared to the LRA's provision of a remedy for existing employees to claim from their employers, where the employer's promotion policies and processes were unfair.[70] Employees, who proceed on this basis, are not required to link the unfairness to a discriminatory ground. As such, internal employees seeking promotion (or even appointment to higher positions) are afforded an alternative cause of action, on which to claim that the relevant employer's recruitment processes and policies were unfair. To succeed, employees need show only that the employer acted inconsistently, irrationally or, in some other way, unfairly. When compared to the EEA's requisite that the allegedly unfair conduct of prospective employers be linked to a specified ground of discrimination, the contrast in evidentiary burdens is stark. Consequently, internal applicants for positions may readily succeed in actions brought under the unfair labour practice provisions of the LRA,[71] while external applicants may not.[72] Given the object of the EEA to enhance transformation, this is an irony worthy of rectification.[73] While ideally this should be achieved through legislative

[68] This is borne out well by the case law, which clearly indicates the difficulties associated with proving claims of unfair discrimination against potential employers (and/or the fact that the employee in question was suitably qualified);Garbers (2012) at 40.
[69] Ironically, non-designated employees are more likely to succeed. In fact, the prevalence of cases in which non-designated employees contest the allegedly discriminatory policies of prospective or current employers attests to this. The ironic effect of the EEA's unenforceable provisions for affirmative action therefore, is that while it legitimately shields non-designated employees from undue and irrational acts of unfair discrimination, it simultaneously bars the very people it was designed to protect from progressing in the workplace.
[70] Section 186 (2) of the LRA.
[71]Although these claims must be brought before the CCMA and not the Labour Court; consequently the Labour Court will not take jurisdiction over the claim, as the applicant in the *Govender* case discovered.
[72] Bearing in mind that in the vast majority of cases, employers who fail to assertively apply affirmative action measures in their appointment policies and processes, or who actually engage in unfair discrimination in such procedures, are unlikely to leave accessible evidential trails behind them; consult, in this regard, O Dupper & C Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' 2012 *Acta Juridica* 244.
[73] In brief, designated, internal employees have an effective right of recourse against their employers for failing to account for their demographic statuses in the employers' appointment and promotion procedures, but designated, external employees do not.

amendment to the Act,[74] in the absence thereof, judges ought to consider alternative interpretations of the relationship between chapters 2 and 3 thereof.

Adding to these dissolutions with the system for designated employees, are various problems with the dispute resolution processes associated with Chapter 3 disputes, which are contained in Chapter 5 of the EEA titled monitoring, enforcement and legal proceedings. These are discussed in the section below.

6. Chapter 3 dispute resolution processes[75]

Chapter 3 of the EEA compels designated employers to implement affirmative action measures for suitably qualified people from designated groups. Designated employers must, in consultation with employees, prepare an employment equity plan and report to the Director-General of the Department of Labour on progress made in implementing its employment equity plan.[76]

Affirmative action measures are defined in the Act as being 'measures designed to ensure that *suitably qualified people* from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'.[77] The Act goes on to indicate that 'a person may be suitably qualified for a job as a result of any one of, or any combination of that persons – (a) formal qualifications; (b) prior learning; (c) relevant experience; or (d) capacity to acquire, within a reasonable time'.[78]

In the event of non-compliance with Chapter 3 of the Act, an employee, or a trade union representative, for monitoring purposes,[79] may bring such non-compliance to the attention of, among others, a labour inspector; the Director-General of the Department of Labour; or the CCMA.[80] In order to compel an employer to comply with certain provisions of the Act, a labour inspector has certain powers of entry and inspection,[81] and to request and obtain a written undertaking to comply[82] from an employer.[83] Where the employer refuses to give a

[74] Possibly by including a provision in the EEA for unfair labour practices.
[75] The dispute resolution processes for Chapter 3 disputes are set out in Chapter 5 of the EEA.
[76] Section 13 of the EEA.
[77] Section 15 of the EEA. Italics our emphasis.
[78] Section 20 of the EEA.
[79] Section 34 of the Act.
[80] The Commission for Conciliation, Mediation and Arbitration.
[81] Section 35 of the Act.
[82] The inspector must have reasonable grounds to believe that the employer has failed to –
(a) consult with employees as required by section 16;

written undertaking or fails to comply with the undertaking, the labour inspector may issue a compliance order which may include the imposition of a fine in the event that the employer fails to comply with the order.[84] The employer may object to a compliance order,[85] and may appeal to the Labour Court against a compliance order.[86] If a designated employer does not comply with a compliance order, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.[87]

The opportunities for the courts to intervene in Chapter 3 matters are therefore constrained by the dispute resolution mechanisms established by the Act. Yet, case law[88] reveals that capacity constraints within the Department of Labour hamper the ability of the Department to contribute in a meaningful way to workplace discrimination; if anything, in fact, evidence suggests that efforts by the Department of Labour to facilitate transformation have quite the opposite effect.[89] Given the current structure of the Act, the extent to which judicial intervention can ameliorate this is nonetheless debatable.[90] Still, judges who adopt an approach which is mindful of the transformation project may be able to overcome some of

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(b) conduct an analysis as required by section 19;
(c) prepare an employment equity plan as required by section 20;
(d) implement its employment equity plan;
(e) submit an annual report as required by section 21;
(f) publish its report as required by section 22;
(g) prepare a successive employment equity plan as required by section 23;
(h) assign responsibility to one or more senior managers as required by section 24;
(i) inform its employees as required by section 25; or
(j) keep records as required by section 26.

[83] Section 36 of the Act.

[84] Section 37 of the Act, which prescribes the detail that must appear in the compliance order.

[85] Section 39 of the Act.

[86] Section 40 of the Act.

[87] Section 37 of the Act.

[88] See *Director-General, Department of Labour & another v Comair Ltd* [2009] 11 BLLR 1063 (LC), where the Labour Court set aside the Director-General of the Department of Labour's recommendation that an order be issued declaring Comair in breach of certain obligations in terms of Chapter 3 and that Comair by fined an amount of R900 000 for non-compliance. The Court noted that the DG's recommendation 'briefly states what the obligation of the employer is …. [f]ollowed by a cryptic outcome and a recommendation … [which], for the best part, merely rely on the relevant provisions of the EEA.' (para 42) The Court concludes that 'the recommendation by the DG does not reflect that there has been an application of mind to the matter.' (para 43) It is unclear to what extent the Chapter 5 mechanisms are used for the advancement of substantive equality. While they may be used to secure compliance, or to attempt to secure compliance, whether they in fact contribute toward the transformation project remains a matter of debate.

[89] For a sense of the prior Minister of Labour's insensitivity and crude approach to matters of transformation see Yvonne Erasmus and Yoon Jung Park 'Racial classification, redress and citizenship: the case of the Chinese South Africa' (2008 68 *Transformation* 99.

[90] See in this regard *Director-General of the Department of Labour v Jinghua Garments (Pty) Ltd* (2007) 28 *ILJ* 880 (LC) and *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (2007) 28 *ILJ* 1774 (LC). Although the courts largely confirmed the Department of Labour's recommendations in these cases, to date neither of these organisations have complied with their obligations in terms of the EEA, which raises suspicion that these organisations may have used alternative business structures to circumvent the EEA and other labour law obligations.

the difficulties posed by these structural constraints; doing so would require them to consciously focus on the role of the courts in facilitating substantive equality, and to properly consider the full range of remedies available to them in EEA disputes.[91] Should they fail to, however, the deficits of the existing model will endure. Contributing to these structural problems is the courts current attitude to remedies, the deficiencies of which are explored in the section below.

REMEDIAL DEFICITS

In addition to the difficulties arising from the legislation itself, the courts' approach to remedies in workplace discrimination disputes, is problematic. In many instances, the remedies awarded by them are either inappropriate or inadequate.[92] These remedial deficits appear in two forms. First, relief may not be awarded in cases in which it arguably ought to have been. Secondly, the nature of the relief granted may be unsatisfactory. Each of these deficiencies is addressed in turn below.

1. Cases in which relief is not awarded

Cases evincing the first type of deficit may be further subdivided into two categories. The first sub-category covers matters in which the employer is immunised from liability by section 60 of the EEA. In these cases, employees' claims fail, not on account of the absence of discrimination, but instead due to the reasonableness of their employer's response thereto.[93] Thus, despite the establishment of workplace discrimination, employees may be precluded from claiming relief.[94]

As alluded to above, employers who have simply called offending employees to formal disciplinary hearings and duly imposed some form of sanction on them (in case of guilty findings), have commonly been found to have met the standard of doing all that is

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[91] The powers of the Labour Court in terms of s 50 of the EEA are extensive.

[92] This is in spite of the Labour Courts' extensive powers under section 158 of the LRA, and to only a slightly lesser degree, under section 50 of the EEA. The breadth of these powers was expressly recognised in *Biggar* para 22. Thus there is nothing to stop them from creating new remedies.

[93] In terms of section 60(4) of the EEA, as discussed above. As *Makoti v Jesuit Refugee Service SA* (2012) 33 *ILJ* 1706 (LC) illustrates, they may fail as a result of the victim's response to the discrimination too. In brief, in *Makoti*, despite being sexually harassed by one of the organisation's directors, the employee failed to institute a grievance against him in line with the employer's formal policies therefor. Instead she attempted to deal with the harassment of her own accord. As a result, the Court held, her employer had not been given a proper opportunity to respond to the problem; it was accordingly exempt from liability under the EEA; *Makoti* paras 7-16 & 64.

[94] As alluded to above, while fair to employers in part, in order to escape liability under the Act, they need only comply with section 60(4) of the EEA, the requisites of which are oft leniently interpreted, enabling mere technical or formalistic compliance by employers..

'reasonably practicable to eliminate the discrimination'.[95] In turn, they are exempt from liability.[96] Where the employer in question has followed this route, the victim of the discrimination has little choice but to accept its chosen course of discipline, regardless of the efficacy thereof.[97] Seemingly therefore, beyond disciplining individual offenders, where discrimination occurs, employers are not required to take further action in their workplaces. Such action may well be unnecessary in certain organisations. Yet, in many, this is not the case. In fact, one employee's discriminatory attitude (and related conduct) may well represent that of many, indicating a broader problem with the employer's organisational culture.[98] Change may accordingly be vital. As such, in cases where discrimination is shown, but the employer is exempt from relief on account of its supposedly adequate response thereto, the possibility of some form of judicial intervention[99] should still be considered.

The second sub-category under this header concerns cases in which discrimination has not been proved. In these matters, the employee's claim will invariably fail. This may arise from the frivolous or unfounded nature of the claim, or it may result from the judiciary's limited construction of section 5 of the EEA. As the latter deficit is addressed above, the discussion which follows covers only the former.

Frivolous and unsubstantiated claims for unfair discrimination abound in the case law.[100] Naturally, some of these claims are brought opportunistically. However, where they are not – and the claimants hold genuine beliefs of discrimination, albeit unjustified ones – they recount the prevalence of fears of discrimination in South Africa.

While, again, it may not be fair to employers to award monetary relief in cases where the claim lacks merit,[101] perceived discrimination may be just as harmful to an employee's dignity, morale and work performance, as actual discrimination is.[102] To the extent to which

[95] Section 60(4) of the EEA.
[96] See the discussion of *Potgieter* above, for example, where only a fine of R600 (half of which was suspended) was imposed by the employer on an employee found guilty of sexual harassment). Consider too *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC).
[97] Generally speaking, courts will refrain from imposing an alternative sanction on the offender. Consider, for example, *Finca*, where the Labour Court noted that it did not have the power to dismiss the offending employee despite ostensible justification therefore.
[98] Consider the case of *Makoti*, for example. See also *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC), as discussed above.
[99] Albeit perhaps not in monetary form.
[100] Examples include *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC); *Transport & General Workers Union & another v Bayete Security Holdings* (1999) 20 *ILJ* 1117 (LC); *Louw v Golden Arrow Bus Services (Pty) Ltd* (2001) 22 *ILJ* 2628 (LAC).
[101] Consider C Garbers 'The Prohibition of Discrimination in Employment' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future* (2012) 18 at 40.
[102] Consider in this regard A Rycroft & T Thabane 'Racism in the Workplace' (2008) 29 *ILJ* 43.

such perceptions generate further dissent and misunderstandings between racial and other groups at work, they surely require remedy.[103] Evidence of genuinely held beliefs of discrimination, even if not proven in court, should accordingly be taken more seriously. Whereas it is not suggested that employers be compelled to pay monetary compensation to employees who simply fear or perceive workplace discrimination, it is proposed that alternative forms of relief, directed at addressing employees' fears, at least be considered.[104]

2. The nature of relief awarded

The second deficiency in the courts' attitude to remedies is that, where relief is awarded, it consistently takes the form of monetary compensation. Where monetary compensation is awarded together with another remedy, the latter is often capable of formalistic compliance by employers; alternatively, it comprises an order that the employer simply comply with its existing obligations under the EEA.[105] The adequacy of these non-monetary remedies is doubtful for various reasons.

For one, given the harm caused by discrimination to a person's dignity and esteem,[106] the reparatory impact of monetary relief may be questioned. Secondly, as the Court in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others*[107] observed, in discrimination disputes, judicially determined remedies are often inappropriate; negotiated resolutions by the parties themselves should therefore be preferred.[108] Finally, and particularly where the amounts awarded are small,[109] whether monetary remedies actually affect employers' future actions, policies and practices is dubious. In cases where employees have been discriminated against by fellow employees, the ability of such relief (without more) to realise transformative changes in the employer's workplace is even more doubtful. As such, traditional judicial remedies in discrimination disputes need to be expanded and

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[103] See for example Banks, Patel and Moola, 'Perceptions of inequity in the workplace: Exploring the link with unauthorised absenteeism' (2012) *SA Journal of Human Resource Management* (10(1), 8 pages. See also Rowe, 'Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity' *Employee Responsibilities and Rights Journal* (1990) Vol 3, No 2, 153-163.

[104] For possible means of doing so, consider A Leonard & AF Grobler 'Exploring challenges to transformational leadership communication about employment equity: Managing organisation change in South Africa' (2006) *Journal of Communication Management* (10(4)) 390.

[105] In such cases, the relief awarded consequently adds nothing to the employer's existing duties.

[106] Refer, in this regard, to Wade and Rowe.

[107] *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 *ILJ* 285 (LC).

[108] In part on account of the sensitive nature of these disputes; *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 *ILJ* 285 (LC) at 301 – 302. See also in this regard *Association of Professional Teachers & another v The Minister of Education* (1995) 16 *ILJ* 1048 at 1090-1098.

[109] As they frequently are; consider, for example, *Biggar*.

redesigned; doing so should enable and facilitate substantive transformation in a more meaningful way. It may further assist the victims of discrimination to truly repair their damaged selves.

The case of *Biggar v City of Johannesburg, Emergency Management Services*[110] exemplifies the inadequacy of remedies so often awarded in workplace discrimination disputes.

In *Biggar*, the employee and his family were subjected to severe and persistent racial abuse by the employee's colleagues.[111] Despite the employee repeatedly complaining about the abuse to both the Director of Operations and various station commanders, the employer did little more than scold the offenders.[112] While the Court acknowledged the inadequacy of the employer's response and so, upheld the employee's claim,[113] it refused to order the employee's transfer to an alternative station, despite his express request therefor. Instead, it merely ordered the employer to consider vacant posts for which the employee would qualify; investigate new acts of racial discrimination; 'initiate disciplinary action against any alleged perpetrator if justified';[114] and institute disciplinary proceedings against all parties to violent acts occurring at its workplace.[115] As compensation for the discrimination, it awarded the employee only 3 months' salary. Considering the pernicious nature of the racial abuse, and the Court's extensive power to determine the quantum of compensation payable,[116] this is a relatively minor sum. If anything, it sends the message that, while employers will be liable for failing to comply with section 60, their punishment may not be harsh.

In addition, in so far as the Court ordered the employer to take more appropriate action against perpetrators of discriminatory (and violent) acts at its workplace, it did no more than restate its existing obligations under the Act. Given that the employer had historically failed to comply with those obligations, there was no reason to believe that it would perform better in future, however. Arguably, a more effective measure of relief would have been to order the employer to introduce racial sensitivity training for its employees, and to appoint a mediator to conciliate the relevant parties' dispute.[117] Had the Court done so, the organisational culture

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[110] [2011] 6 BLLR 577 (LC).
[111] Culminating in the assault of his son; *Biggar* paras 2-14.
[112] *Biggar* paras 4-5; other action taken was to call a meeting of the employee and the perpetrators (at which witnesses favourable to the latter's case only were invited); *Biggar* paras 10-14.
[113] *Biggar* 17-20.
[114]And failing which to advise the claimant of its reasons (in writing) for not doing so; *Biggar* para 31.
[115] It further ordered that the employer pay the employees' costs on an attorney and client scale; *Biggar* para 31.
[116] The breadth of which it explicitly recognised; *Biggar* para 22; section 50 of the EEA.
[117] Consider, in this regard, the chairperson's suggestions in *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC) paras 32-34; see also A Leonard & AF Grobler

of the Brixton Fire Station might well have experienced a substantive and transformative change. It is highly regrettable therefore that the Court did not.

Comparably, in *Ntsabo v Real Security CC*,[118] the employee – a security guard – had been subjected to extreme forms of sexual harassment,[119] on repeated occasions, by her immediate supervisor.[120] Despite reporting the incidents to her employer, her employer did nothing to remedy them.[121] In a claim for unfair discrimination[122] under the EEA,[123] she was awarded Constitutional damages,[124] in the sum of R70 000. Whereas the Court's judgment is insightful, thorough and respectfully alive to the harm caused to employees by such incidents,[125] its failure to order more meaningful relief is disappointing.[126] One can only hope that, its sentiments, along with those of the Court in matters such as *Leonard Dingler,* are given better effect to in future cases.

3. Remedial deficits in affirmative action cases

Although the objective of affirmative action is to promote the interests of disadvantaged groups, affirmative action cases, in light of the *Dudley* decision, arise predominantly[127] when an individual from a non-designated (or least disadvantaged) group claims that he or she has not been appointed or promoted as a result of unfair discrimination[128] and the employer's

'Exploring challenges to transformational leadership communication about employment equity: Managing organisation change in South Africa' (2006) *Journal of Communication Management* (10(4)) 390; NE Reichenberg 'Best Practices in Diversity Management' (2001) *United Nations Expert Group Meeting on Managing Diversity in the Civil Service* at 2.

[118] [2004] 1 BLLR 58 (LC).

[119] The harassment was severe; her allegations included that her supervisor had touched her 'breasts, thighs, buttocks, genitals and [had] ultimately simulat[…ed] a sexual act on her resulting in [him] ejaculating on her skirt. He also made certain unwanted sexual proposals to the applicant.'; *Nstabo* at 60.

[120] *Nstabo* at 60.

[121] *Ntsabo* at 92-95.

[122] In the form of her employer's complete failure to address her complaints of abuse.

[123] *Nstabo* at 61.

[124] Note that these were awarded as Constitutional damages, rather than as damages under the EEA, as the employer was unable to hold her employer under the Act. Both for *contumelia* (in the amount of R50 000) and to cover the medical expenses required to treat the psychological effects of the abuse (in the amount of R20 000); *Nstabo* at 102. As she had also claimed for constructive dismissal under the LRA, the Court ordered her the maximum amount permissible, being 12 months salary; *Ntsabo* at 102.

[125] See particularly *Nstabo* at 93,

[126] This was in spite of its recognition of employers' obligations under the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace ('CGPHSH'), to respond to sexual harassment by implementing (amongst other things): 'educative procedures… informing its employees of the impact of principles relating to the upkeep of notions such as dignity, sensitivity, gender rights, etc, and to avoid harassment itself.' Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GenN 1357 of 2005 (*GG* 27865 of 4 August 2005); the Code was issued in accordance with section 54 of the EEA. For further insights into its provisions, refer to *Ntsabo* at 94-95. Despites its relevance to sexual harassment disputes, few courts raise it.

[127] The *Dudley* decision has barred individuals relying on affirmative action as a cause of action.

[128] On the basis of race, gender, and infrequently on the basis of disability.

defence is that fair and rational implementation of affirmative action measures underlies the decision not to appoint or promote that individual.[129] Where the employer's defence fails typically the overlooked candidate is appointed to the post or is awarded monetary compensation.

This restricted scope for affirmative action cases to be brought before the courts exacerbates a growing concern that affirmative action measures are likely to reach those least in need. The primary beneficiaries of affirmative action tend to be those applicant or employees who are better educated and 'more privileged' within the categories of disadvantage.[130] This contributes toward a growing resentment of affirmative action. Frequently those who benefit, or who are perceived to benefit, from affirmative action seek recognition on the grounds of merit and not as a result of a classification of disadvantage.[131] Many feel stigmatised, while members of non-designated groups (who are at least in a position to challenge affirmative action appointments) feel discriminated against.[132] This resentment has great potential to impact negatively on individual wellbeing and on productivity and job satisfaction in the workplace, ultimately undermining the objectives of the EEA which include, not only the achievement of a diverse and representative workforce, but also the promotion of economic development and efficiency in the workforce.[133] Issues regarding transformation and diversity clearly need to be better managed in, and beyond, South African workplaces.[134]

Judges, in their decision-making in affirmative action cases need to be mindful of and responsive to this practical context.[135] Judges must also consider all of the objectives of

[129] The *Barnard* decision in the Labour Court and the Labour Appeal Court, as discussed above, illustrate this approach and the negative consequences for those who were most disadvantaged by apartheid.
[130] See Marie McGregor *The Application of Affirmative Action in Employment Law with Specific Reference to the Beneficiaries: A Comparative Study* (2005) LLD Thesis, UNISA 7.
[131] See generally CA Op't Hoog, HG Siebers & B Linde 'Affirmed identities? The experience of black middle managers dealing with affirmative action and equal opportunity policies at a South Africa mine' (2010) 34 *SAJHR.*
[132] For empirical evidence on general perceptions on race and gender discrimination in South African workplaces see for example HR Lloyd and MR Mey 'Gender differences in perceptions of workplace progression: an automotive industry case study' (2007) *Southern African Business Review* Vol 11(3): 95-120; Paul Bowen, Keith Cattell & Greg Distiller 'South African quantity surveyors: issues of gender and race in the workplace' (2008) 15(1) *Acta Structilia* 1; and Nina Berezowski, Hazel Bothma and Suki Goodman'Reverse discrimination: a facet of sexual discrimination? A micro-focus on the legal profession' (2003) *South African Journal of Labour Relations:* 107 – 27. See also CA Op't Hoog, HG Siebers & B Linde 'Affirmed identities? The experience of black middle managers dealing with affirmative action and equal opportunity policies at a South Africa mine' (2010) 34 *SAJHR.*
[133] *Preamble* EEA.
[134] See for example Pascal S. Zulu & Sanjana B Parumasur 'Employee perceptions of the management of cultural diversity and workplace transformation' (2009) 35 *SA Journal of Industrial Psychology* 1.
[135] The increasing tension around affirmative action is reflected in the media almost daily. Recent controversy around the use of nation as opposed to provincial demographics in the Western Cape Department of

transformation and should reflect on the impact of their decision-making on these objectives. Judges should not limit their enquiry to a narrow scrutiny of the textual justifications for an employer's appointment or promotion, and remedies should not be limited to compensation or ordering an employer to appoint or promote an applicant. The Labour Court is empowered broadly to 'make any appropriate order.'[136] Hence Judges, in an effort to facilitate sustainable transformation within workplaces might consider remitting matters back to the employer with guidelines to facilitate transformative settlement and instructions to report back to the Court; or the CCMA may be approached to conduct an investigation and to report to the Court.[137] Judicial intervention may also empower education and communication[138] within affected workplaces.

Similar judicial creativity should be considered in those cases brought by the Department of Labour in terms of employer non-compliance with Chapter 3. Substantive equality is a Constitutional imperative and Judges, whether in the case of employer or Department of Labour decisions, should therefore guard against overly deferential decision-making.

The social, economic and political importance of how affirmation action cases are resolved by the courts should not be underestimated. How Judges respond to disputes before them has the potential to impact on social cohesion and economic development and thus while the role of the Courts in transforming society may be a limited one, Judges should nevertheless take their responsibility seriously and should use their powers wisely.

CONCLUSION

Workplace equality, at both the formal and substantive level, is critical to redressing the injustices of Apartheid. In so far as promoting equality is prescribed by the Constitution, courts must account for this when resolving labour disputes. Naturally, achieving and advancing equality is easier said than done. The degree to which equality may be realised through judicial intervention is further limited. Still, these limitations should not discourage

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Correctional Services has been reported as 'fostering racial antagonism' between Africans and coloureds. *LegalBrief* 20 April 2013.

[136] Both s 158 of the LRA and s 50 of the EEA enable this.

[137] Ibid.

[138] See for example A Leonard & AF Grobler 'Exploring challenges to transformational leadership communication about employment equity: Managing organisation change in South Africa' (2006) *Journal of Communication Management* (10(4)) 390.

the courts from enabling equality as far as the law legitimately allows.[139] Courts should be proactive in their endorsement of conceptions of the EEA,[140] which corroborate the Constitution's call for substantive equality;[141] where innovative remedies are required to achieve this, the courts should consider alternatives to those traditionally awarded to employees. Regrettably, to date, most courts have failed to do either.

Possible future considerations by the courts are proposed in this paper.. Amongst those which have been suggested are reconceptualising section 5 of the EEA; dispensing with the oppositional view of sections 6(1) and (2) of the Act (with a concurrent questioning of the relationship between chapters 2 and 3 of the Act);[142] easing the burden of proving discrimination by expanding the existing model of conduct which qualifies as discrimination; recounting, and actively engaging with, the constraints of the Department of Labour as a mechanism for change; and reviewing the courts' broad powers under the EEA (and the LRA)[143] to both fashion more meaningful and sustainable remedies and to intervene where intervention may not ordinarily seem due.[144] Should these measures be adopted by the courts, transformation at work may ultimately be enabled.

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[139] Pillay confirms that Judges have an important role to play in transformation, but that this must achieved through the 'application of legal principles' and 'disciplined judicial method'; D Pillay 'Giving Meaning to Workplace Equity: The Role of the Courts' (2003) 24 *ILJ* 55 at 57

[140] And related statutes.

[141] Sections 1 and 9 of the Constitution; note also the preamble to the EEA.

[142] This should simultaneously address the anomaly between section 186(2) of the LRA and the EEA's lack of provision for unfair labour practice claims to be instituted by employees (under the Act). Would it help here? Wouldn't this require legislative intervention? Should we talk this through?

[143] See section 50 of the EEA and section 158 of the LRA respectively.

[144] Such as cases in which, while discrimination is proved, the employer was exempt from liability on account of its compliance with section 60 of the EEA.