

**The meaning of "Arbitrary ground"
in section 6 of the Employment
Equity Act 55 of 1998**

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SOLEMN DECLARATION

I hereby declare that the dissertation entitled: **The meaning of "arbitrary ground" in section 6 of the *Employment Equity Act 55 of 1998***, is my original work. I further declare that I have not submitted this product to any institution previously. This product is submitted to the North-West University in partial fulfilment of the requirements for the degree Master of Laws in Labour Law.



RTC SEBOLAO

Date: 01 June 2021

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"For I know the plans I have for you", declares the Lord, "plans to prosper you and not to harm you, plans to give you hope and a future".

Jeremiah 29:11

Let Your will be done.

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ABSTRACT

With the certification of the *Constitution of the Republic of South Africa, 1996* (hereinafter the *Constitution*), came a commitment to transform the country from the social ills that were present under the sovereignty of the apartheid government to an egalitarian society, which recognises the fundamental rights of all persons. This was to be done through substantive equality by considering the personal experiences and circumstances of the individuals and groups. The *Constitution*, thus, entrenches the right to equality in section 9 and the right to fair labour practices in section 23, which includes the right not to be subjected to unfair discrimination in the workplace. The *Constitution* further states in section 1(a) that the Republic of South Africa is founded upon the values of human dignity, the achievement of equality and advancement of human rights and freedoms.

The *Employment Equity Act 55 of 1998* (hereinafter the *EEA*) was enacted to give effect to the right to equality and to eradicate unfair discrimination in the working environment. The Act places a strict prohibition against all forms of direct or indirect unfair discrimination and allows a claimant to bring forth a claim for unfair discrimination on a ground that may not be listed in the provision, provided that the ground is analogous to the listed grounds. In 2014, the *Employment Equity Amendment Act 47 of 2013* introduced the phrase "or any other arbitrary ground" after listing the prohibited grounds in section 6(1) of the *EEA*. This amendment has led to various interpretations since the Explanatory Memorandum to the amendments does not provide much clarity on the purpose of the particular amendment.

The first possible interpretation of the amendment is that it creates a third ground of unfair discrimination. Secondly, the amendment may refer to the requirement of rationality. Thirdly, the amendment may be synonymous to "one or more grounds" or "unlisted grounds". This study investigates these possible interpretations against the background of the existing principles of the Constitutional Court. It indicates that the first interpretation cannot be accepted because unfair discrimination cannot be found solely on the basis of the ground being capricious or arbitrary. The ground

must go further than just being arbitrary; it must have the potential to impair the fundamental human dignity of the complainant or affect them adversely in a comparably serious manner. The study then indicates that the second interpretation is rendered redundant as the enquiry on unfair discrimination already encompasses the rationality requirement. Therefore, the amendment can only be understood as being a synonym for unlisted grounds, and this is supported by the amendment in section 11 of the Act which differentiates between listed and arbitrary grounds, arbitrary being a synonym for unlisted grounds.

This study draws attention to the significant role of human dignity in equality jurisprudence which is employed at various stages of the test to establish unfair discrimination. The determining factor of unfairness in this regard is the impact of the discrimination on the complainant or the affected group. The goal of the prohibition against unfair discrimination is to create a society wherein every person is granted equal dignity and treated with respect, irrespective of the social group they belong to.

This study concludes that the amendment made to the *EEA* should be read as referring to the unlisted grounds. This means that the test for unfair discrimination based on an arbitrary ground remains the same – in addition to proving irrationality, the complainant must prove that there is impairment of human dignity.

Keywords: arbitrary grounds, arbitrariness, unfair discrimination, equality, human dignity

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LIST OF ABBREVIATIONS

AHRJ	African Human Rights Journal
AJIL	American Journal of International Law
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation, Mediation and Arbitration
CC	Constitutional Court
EEA	Employment Equity Act
EJIL	European Journal of International Law
GJT	Global Jurist Topics
GG	Government Gazette
ILJ	Industrial Law Journal
IJCL	International Journal of Constitutional Law
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
MLR	Modern Law Review
NEHAWU	National Education, Health and Allied Workers' Union
NZLR	New Zealand Law Reports

NDLR	Notre Dame Law Review
Pty Ltd	Proprietary Limited
SA	South Africa
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALR	South African Law Review
SAMWU	South African Municipal Workers' Union
SAPL	Southern African Public Law
StellLR	Stellenbosch Law Review

Chapter 1

Introduction

1.1 Background

The *Constitution of the Republic of South Africa, 1996*¹ grants everyone the right to equality in section 9. It stipulates that legislative and other measures that protect and advance victims of unfair discrimination may be taken to promote the achievement of equality.² Equality is a notion that also finds application in the workplace. There is a need to create equal opportunities of employment to ensure the full enjoyment of rights. Section 9(4) of the *Constitution* provides for the passing of national legislation that prevents or prohibits unfair discrimination. Thus, the *Employment Equity Act* 55 of 1998³ was enacted to promote equal opportunities and fair treatment in the workplace and, in so doing, give effect to the constitutional right to equality in the employment realm.⁴ It further aims to apply affirmative action measures to improve the level of representation of certain groups in the workplace of designated employers.⁵

Regarding the maintenance of equality in the workplace, section 6 of the *EEA* expressly prohibits discrimination in the workplace. It states that:

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

Section 6(1) broadens the list of discriminatory grounds provided for by the *Constitution* in section 9(3). Since the legislative amendments in 2014, the section includes the phrase "or any other arbitrary ground" to the listed grounds. Given that there is no explanation provided for this phrase, there has been some debate

¹ The *Constitution of the Republic of South Africa, 1996* (hereinafter the *Constitution*).

² Section 9(2) of the *Constitution of the Republic of South Africa, 1996*.

³ The *Employment Equity Act* 55 of 1998 (hereinafter the *EEA*).

⁴ Section 2(1) of the *Employment Equity Act* 55 of 1998.

⁵ Section 2(1) of the *Employment Equity Act* 55 of 1998.

as to what constitutes "arbitrary grounds". The question that arises is whether or not the amendment implies that arbitrariness in itself qualifies as a ground for which discrimination can be established.⁶ If so, discrimination could be found where the employer's conduct is merely irrational and unjustified.⁷ If not, then the traditional test should be applied to the concept.⁸ The Court in *Harksen v Lane No*⁹ laid down the test for discrimination, stating that the ground relied upon must be akin to the listed grounds of discrimination. This means that the conduct complained of must have the potential to impair the fundamental human dignity of the complainant or affect them "adversely in a comparably serious manner".¹⁰ Human dignity has been accorded a superseding value in matters relating to discrimination by the Constitutional Court as a consequence of the history of the country where people were treated as if they had no inherent worth.¹¹

In *Chitsinde v Sol Plaatjie University*,¹² the Labour Court accepted that "arbitrary" in section 6(1) of the *EEA* could be premised on the mere irrational conduct of the employer that is without any justifiable reason. (The principles relied upon by the Court are discussed in the subsequent paragraphs). Although the Court held that the applicant failed to discharge the onus of proof in terms of section 11(2), it expressed its support for the broad interpretation of the phrase as suggested by Du Toit (see below).¹³

Du Toit¹⁴ states that courts have already accepted that grounds analogous to the listed grounds may also be unfair, therefore:

⁶ *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 14.

⁷ *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 16.

⁸ *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 15.

⁹ *Harksen v Lane No* 1998 SA 300 (CC) para 49 (hereinafter the *Harksen* case).

¹⁰ *Harksen v Lane No* 1998 SA 300 (CC) para 49; Naidoo 1 March 201 <http://www.derebus.org.za/employment-law-update-narrow-v-wide-interpretation-of-the-term-an-arbitrary-ground/>.

¹¹ *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC) para 31; *Harksen v Lane No* 1998 1 SA 300 (CC) para 50.

¹² *Chitsinde v Sol Plaatjie University* 2018 10 BCLR 1012 (LC) para 31 (hereinafter the *Chitsinde* case).

¹³ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 681; Du Toit 2014 *ILJ*.

¹⁴ Du Toit 2014 *ILJ*.

...the reintroduction of the provision of discrimination on 'arbitrary' grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant.¹⁵

One of the main purposes of the *EEA* is to eliminate unfair discrimination. Du Toit¹⁶ states that to achieve this and avoid the possibility of the insertion being superfluous, the term "arbitrary" must broaden the meaning of unfair discrimination. This can only be done if the term is given the same meaning as accorded in *Kadiaka v Amalgamated Beverage Industries*¹⁷ where the Labour Court held that arbitrary means "capricious" or not for a valid reason.¹⁸ In support of the broader interpretation, Du Toit¹⁹ is of the opinion that if such an interpretation is adopted to the meaning of arbitrary, the scope will be expanded from "grounds that undermine human dignity to include grounds that are merely irrational".

Du Toit²⁰ further supports this point of view by applying section 11 of the *EEA*, which regulates the burden of proof. Section 11(2) states:

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

- a) the conduct complained of is not rational;
- b) the conduct complained of amounts to discrimination;
- c) the discrimination is unfair.

Du Toit²¹ states that the requirement in paragraph (c) might be challenging if the phrase "arbitrary ground" in section 6(1) is meant to add a class of "purposeless" or irrational grounds to the unfair prohibited grounds. If an employee has proven that the said conduct of the employer is both irrational and discriminatory, such conduct cannot be found to be fair.²² If paragraph (c) requires irrational conduct to be proven unfair in terms of the same yardstick recognised with the existing grounds of unfair discrimination, which is the impairment of human dignity, there

¹⁵ Du Toit 2014 *ILJ* 2626.

¹⁶ Du Toit 2014 *ILJ* 2627.

¹⁷ *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) (hereinafter the *Kadiaka* case).

¹⁸ *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) para 42; Du Toit 2014 *ILJ* 2627.

¹⁹ Du Toit 2014 *ILJ* 2627.

²⁰ Du Toit 2014 *ILJ* 2627.

²¹ Du Toit 2014 *ILJ* 2627.

²² Du Toit 2014 *ILJ* 2627.

would be no distinction between "arbitrary grounds" and unlisted grounds.²³ This would render the insertion by the 2014 amendment redundant. Du Toit²⁴ states that unfairness, in section 11(2)(c), should be comprehended as the aggregate effect of the employer's conduct, which is irrational and discriminatory as contemplated by paragraphs (a) and (b) and thus requires no further proof.

However, following the judgment in the *Chitsinde* case, the Labour Court heard the matter of *Naidoo and Others v Parliament of the Republic of South Africa*²⁵ and expressed its support for the narrow approach in interpreting the provision. The Court held that:

More specifically, section 6(1) of the *EEA* does not prohibit differentiation, arbitrariness or arbitrary discrimination; it prohibits unfair discrimination on an 'arbitrary ground'. It prohibits discrimination through the phrase 'or on any other arbitrary ground' and not 'any arbitrary ground'.²⁶

The Court also considered earlier decisions where it was expressed that, although conduct may be irrational or unlawful, it may not necessarily amount to discrimination if it is not proven further.²⁷ Irrationality, alone, is not sufficient to establish discrimination based on an arbitrary ground. Additionally, the Court held that an arbitrary ground is synonymous with an unlisted ground. Therefore, the test to establish discrimination should be as set out in the *Harksen* case.²⁸ The Court concluded that in terms of the Explanatory Memorandum,²⁹ the purpose of the amendment to section 6(1) of the *EEA* was to bring it in line with section 187(1)(f) of the *Labour Relations Act* 66 of 1995.³⁰ The Court held that the same

²³ Du Toit *et al Labour Relations Law: A Comparative Guide* 699.

²⁴ Du Toit *et al Labour Relations Law: A Comparative Guide* 670.

²⁵ *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) (hereinafter the *Naidoo* case).

²⁶ *Naidoo v Parliament of the Republic of South Africa* 2019 40 ILJ (LC) para 34.

²⁷ *Sethole and Others v Dr Kenneth Kaunda District Municipality* 2018 1 BLLR 74 (LC) para 72; *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* 2016 37 ILJ 2872 (LC); *Ndundula and Others v Metrorail – Prasa (Western Cape)* 2017 2 ILJ 2565 (LC).

²⁸ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 36; *Harken v Lane No* 1998 1 SA 300 (CC).

²⁹ Explanatory Memorandum to the 2012 *Employment Equity Amendment Bill*, published in *Government Gazette* 6799 dated 19 October 2012.

³⁰ *Labour Relations Act* 66 of 1995 (hereinafter the *LRA*).

Harksen test was applied to establish discrimination on an arbitrary ground within the context of the *LRA*.³¹

The above decisions may indicate that there is not much clarity as to how the amendment to section 6(1) should be interpreted. The cases were heard by the same court within the same year, yet the principles adopted were far removed from one another.

This study aims to examine the meaning accorded to the phrase "arbitrary ground" in section 6(1) of the *EEA* and identify which of the methods of interpretation recognised by the courts should be adopted to give effect to the underlying right to equality in section 9 of the *Constitution*. Further, it aims to critically analyse the varying decisions and uncertainty that may be brought by these decisions. In addition, the study aims to identify possible solutions or suggestions to the uncertainty caused by the varying decisions.

1.2 Research question

How do courts interpret the concept "arbitrary ground" in section 6(1) of the *Employment Equity Act* 55 of 1998?

1.3 Research methodology

The qualitative research method was applied in this study. It focused on analysing literature, case law and legislation applicable to the research question. The study also consulted electronic sources. The sources consulted have provided in-depth knowledge on the concept of unfair discrimination and how it relates to the concept of arbitrary grounds. The *dictums* established through the case law consulted have been significant in determining the scope of the phrase "arbitrary grounds". The interpretation of the phrase is largely informed by the principles developed and upheld by the Constitutional Court.

³¹ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC) para 39; *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 (LAC).

1.4 Framework of the study

Chapter 1 of this study provides a background introduction of the amendments to section 6(1) the *EEA* and how South African courts have interpreted these amendments. This chapter also establishes the research question sought to be answered in this study.

Chapter 2 investigates the jurisprudence relating to equality in South Africa and how the final *Constitution* has been employed to develop a new constitutional order which upholds the democratic values and rids the injustices of apartheid. It distinguishes between formal and substantive equality and indicates which of the two is best suited in the new constitutional order. Lastly, this chapter consults the constitutional and legislative provisions as well as case law relating to equality and unfair discrimination and why they are essential when interpreting the provisions.

Chapter 3 introduces the amendments made to section 6(1) of the *EEA* and establishes that the insertion of the phrase "or any other arbitrary ground" may be ambiguous. It then investigates the possible interpretations that may be applied to the phrase, indicating which is likely to complement the constitutional and legislative framework dealing with unfair discrimination. Further, it looks at the amendment made to section 11 of the *EEA*, dealing with the burden of proof, read in conjunction with the amendment to section 6(1) of the Act. This chapter then assesses the recent judgment of the Labour Court in *Naidoo and Others v Parliament of the Republic of South Africa*³² determining the scope of the amendment and drawing attention to the link between unfair discrimination and human dignity.

Chapter 4 takes an in-depth look at the relationship between human dignity and the right to equality. It establishes the scope of human dignity and its role as both a foundational value and a constitutional right. Most importantly, the chapter indicates how intertwined and interdependent the two concepts are and how difficult it would be to consider one without the other.

³² *Naidoo and Others v Parliament of the Republic of South Africa* 2019 40 ILJ 864 (LC).

Chapter 5 concludes the discussions made in the previous chapters. It summarises these discussions and provides an answer to the research question.

Chapter 2

Equality jurisprudence in South Africa

2.1 Introduction

To determine the scope of the 2014 amendment³³ to section 6(1) of the *EEA*, introducing the phrase "or any other arbitrary ground" to the list of prohibited grounds based upon which unfair discrimination may take place, it is crucial to engage the history of equality in South Africa and investigate the need to establish legislation in this regard. Additionally, it is necessary to consider the prohibition of unfair discrimination against mere differentiation. Determining the scope of the above amendments against this background allows one to assess whether the third ground of discrimination was introduced or whether the phrase is synonymous to the existing terms of unlisted or analogous grounds.

2.2 The notion of equality in South Africa

2.2.1 A "historic bridge"

The history of South Africa is characterised by gross violations of human rights and humanitarian principles.³⁴ The apartheid regime resulted in a "rigid system of economic and social segregation", which had a lasting effect on those who were disadvantaged by the legal order.³⁵ However, the country saw a change when opposing political parties united to bargain on a new constitutional order which saw a democratic government where all people could enjoy fundamental human rights. This commitment was acknowledged in the Preamble of the *Constitution of the Republic of South Africa 200 of 1993*³⁶, where it stated that there was a need to have a sovereign and democratic country where men, women and people of diverse races are able to enjoy and exercise their fundamental rights and freedoms

³³ *Employment Equity Amendment Act 47 of 2013*, GG No.37238 16 January 2014.

³⁴ *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 5.

³⁵ *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 5.

³⁶ Hereinafter the interim *Constitution*.

equally.³⁷ The interim *Constitution* was seen as a "historic bridge" between the past and a future that recognised human rights and fairness for all, regardless of personal characteristics, paving the way for the equality clause in the final *Constitution*.

2.2.2 Substantive and formal equality

The notion of equality is divided into two concepts: formal and substantive equality. Formal equality reflects the traditional view of equal treatment and application of the law for all (irrespective of one's background), commanding that people who are similarly situated must be treated similarly.³⁸ It is in this regard that formal equality is criticised. It fails to appreciate the diversity in groups of persons and instead of redressing the past, it may strengthen discrimination.³⁹

In favour of substantive equality, the Constitutional Court in *President of the Republic of South Africa v Hugo*⁴⁰ recognised that even though the goal is to afford all persons with equal treatment, requiring that people from all walks of life be treated identically hinders the achievement of that goal.⁴¹ To achieve social justice, the law must take into account the different circumstances in which people are placed in their daily lives. The Constitutional Court in *Brink v Kitshoff*⁴² stated that unfair discrimination against people of a certain group disadvantages and harms the group, thus entrenching inequality in that group - the equality clause must seek to prevent discrimination and redress the disadvantage caused.⁴³

In employment, substantive equality plays a correspondingly important role. The Labour Court in *Stoman v Minister of Safety and Security*⁴⁴ stated that one could not readily assume that people are in equal positions or that measures which distinguish between them will automatically amount to unfair discrimination, upon

³⁷ Preamble and section 8 of the interim *Constitution*.

³⁸ Van Niekerk *et al Law@work* 115.

³⁹ Kentridge "Equality" 14-4; For instance, it does not consider the privileges in the workplace that may enable one employee to have an advantage or benefit over a group of employees who cannot realise these benefits.

⁴⁰ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC).

⁴¹ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 729F-G.

⁴² *Brink v Kitshoff* 1996 4 SA 197 (CC).

⁴³ *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42; Fredman 2016 *IJCL* 727.

⁴⁴ *Stoman v Minister of Safety and Security & Others* 2002 23 *ILJ* 1020 (LC).

considering the history of discrimination.⁴⁵ Measures that differentiate between persons may be used as a tool to combat inequality; however, these measures must pass certain criteria. Therefore, employers are not barred from distinguishing between employees or groups thereof, as mere differentiation is not proscribed.

2.2.3 Transformative constitutionalism

The *Constitution* seeks to move away from a culture of authority to one of justification.⁴⁶ It is a measure of transformation from parliamentary sovereignty to democracy. The concept of transformative constitutionalism is described as follows:

...a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law...In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes...⁴⁷

The Constitutional Court recognises and accepts this notion as evident in the judgment of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*⁴⁸ where it stated:

In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.⁴⁹

The *Constitution's* role is to move the country from a history cladded by inequality and the impairment of fundamental human rights to a new constitutional order where the *Constitution* is above all law and the rights of all are entrenched and protected, and citizens are afforded equal opportunities. Therefore, the new

⁴⁵ *Stoman v Minister of Safety and Security & Others* 2002 23 ILJ 1020 (LC) paras 31-35.

⁴⁶ Mureinik 1994 *SAJHR* 32.

⁴⁷ Klare 1998 *SAJHR* 150; Davis and Klare 2010 *SAJHR* 408-412.

⁴⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 SA 490 (CC).

⁴⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 74.

constitutional order is corrective and gives effect to democratic values which are accorded a high value by the *Constitution*. Transformative constitutionalism lends itself to labour law through measures such as affirmative action. The Constitutional Court states that South Africa's constitutional democracy seeks to redress previous conflicts and provide substantive equality for those who have been disadvantaged. However, this is to be done in a manner that does not unduly impair the dignity of those concerned.⁵⁰

The *Constitution* certainly undertakes to ensure transformation in South Africa. Equality legislation must portray this commitment. When the legislature proposed the amendment to section 6(1) of the *EEA*, it ought to be done in line with the goal to ensure substantive equality for all. Therefore, the interpretation of this amendment must be informed by the principle of transformative constitutionalism and substantive equality to ensure that the prime goals of both the *Constitution* and the *EEA* are realised.

2.3 The South African constitutional and statutory framework vis á vis equality in the workplace

2.3.1 Constitutional provisions relevant to labour law

Section 1 of the *Constitution* commands the democracy of South Africa, which is founded upon the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism". The *Constitution* is given supreme status as the highest law in the country, invalidating law (including labour law) or conduct that go against it.⁵¹ It further states that the Bill of Rights is the foundation of democracy, granting human rights to all and underscoring the democratic values.⁵² Moseneke J in *Minister of Finance & another v Van Heerden*⁵³ stated that equality plays two significant roles in the constitutional

⁵⁰ *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 28-33; Albertyn 2015 SALJ 715-716.

⁵¹ Section 2 of the *Constitution of the Republic of South Africa*, 1996.

⁵² Section 7(1) of the *Constitution of the Republic of South Africa*, 1996.

⁵³ *Minister of Finance & Another v Van Heerden* 2004 12 BLLR 1181 (CC).

order – it is a fundamental right entrenched in the Bill of Rights as well as a fundamental value, a benchmark to which all law must be tested for constitutional validity.⁵⁴

Section 9 of the *Constitution* grants everyone the right to equality and equal protection and benefit of the law.⁵⁵ This requires that measures be taken to ensure full and equal enjoyment of rights.⁵⁶ Section 9(3) gives a list of grounds on which discrimination is presumed automatically unfair as these grounds have been historically used to relegate and subjugate certain categories of persons.⁵⁷ It recognises two forms of differentiation: differentiation that does not unfairly discriminate and differentiation that unfairly discriminates. The Constitutional Court in *Prinsloo v Van der Linde*⁵⁸ distinguished between the two. The former, or mere differentiation, is tested against the rationality requirement, necessitating a rational link between the differentiation and its purpose. The latter relates to differentiation based on the listed grounds, which impairs the dignity of the complainant or adversely affects them in a comparably serious manner.⁵⁹ *In casu*, the Court held that mere differentiation must be accompanied by a "further element" in order to qualify as unfair discrimination.⁶⁰ The further element in this regard would be the impact of the differentiation on the affected group causing a violation of the fundamental human dignity.⁶¹ In the absence of this additional element, the differentiation will not amount to unfair discrimination, even though it is proved to be irrational.

The Constitutional Court in the *Harksen* case⁶² established the following test to determine unfair discrimination:

⁵⁴ *Minister of Finance & Another v Van Heerden* 2004 11 BCLR 1125 (CC) para 22; Albertyn and Fredman 2015 *Acta Juridica* 433.

⁵⁵ Section 9(1) of the *Constitution of the Republic of South Africa*, 1996.

⁵⁶ Section 9(2) of the *Constitution of the Republic of South Africa*, 1996.

⁵⁷ *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 50.

⁵⁸ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) (hereinafter the *Prinsloo* case).

⁵⁹ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) paras 23 - 26.

⁶⁰ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 24.

⁶¹ Rautenbach and Fourie 2016 *TSAR* 112.

⁶² *Harksen v Lane No* 1997 11 BCLR 1489 (CC); This case was decided under the interim *Constitution*.

- a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - i. Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable manner.
 - ii. If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
- c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim *Constitution*).⁶³

The first stage of the *Harksen* test gives rise to the rationality test, against which every law or conduct must be reviewed.⁶⁴ Section 9(1), dealing with mere differentiation, applies this test and the conduct complained of is justified through a rational connection with a legitimate purpose (this is before the general limitation clause is applied).⁶⁵ The absence of such a rational connection will render the differentiation arbitrary.⁶⁶ The crux of the relationship between rationality and differentiation was shown in the *Prinsloo* case where the Court prohibited arbitrary or "naked" preferences which have no link to a legitimate purpose and required the State to act rationally in order to avoid infringing the equality clause.⁶⁷

⁶³ *Harksen v Lane No* 1997 1 BCLR 1489 (CC) para 53.

⁶⁴ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 65.

⁶⁵ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 26; *Harksen v Lane No* 1997 1 BCLR 1489 (CC) para 42; Rautenbach 2010 TSAR 771.

⁶⁶ *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 85.

⁶⁷ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 25.

The Bill of Rights applies both vertically and horizontally. State organs as well as all persons, including juristic persons, are bound to observe fundamental rights.⁶⁸ The *Constitution* further entrenches the right to fair labour practices in section 23, which includes a prohibition against discrimination in the workplace.⁶⁹ The Constitutional Court held that this right requires the accommodation of both the interests of the employer and employee, and building an employment relationship that is fair to both parties.⁷⁰ Considering the conflicting interests between employers and employees, certain rights are bound to be limited; thus a balancing act must be taken to ensure substantive equality. In this regard, *prima facie* reasons must be advanced as to why one right should be favoured over the other, giving rise to the proportionality test.

The Constitutional Court in *S v Makwanyane*⁷¹ which was decided under the interim *Constitution* stated that a limitation of constitutional rights adopts the proportionality test as it involves the balancing of competing values.⁷² The Court went further to explain the *dictum* provided in the Canadian case of *R v Oakes*⁷³ where the Supreme Court gave three requirements of the proportionality test, namely: existence of a rational connection between the measure and the objective sought to avoid arbitrariness; the measure should not impair the right or freedom significantly; and the effects of the measure and the objective must be proportionate.⁷⁴

The *Constitution* provides that all entrenched rights must be limited in terms of the limitation clause in section 36. When a court is tasked with evaluating competing rights to determine which deserves more protection, the analysis must be taken with due regard to the democratic values protected in the *Constitution*. The limitation of the right must be done in a manner that is both reasonable and

⁶⁸ Section 8 of the *Constitution of the Republic of South Africa*, 1996; Henricho Religious discrimination 123.

⁶⁹ Van Niekerk *et al Law@work* 41 – 44.

⁷⁰ *NEHAWU v University of Cape Town & Others* 2003 24 ILJ 95 (CC) para 40.

⁷¹ *S v Makwanyane* 1995 3 SA 391 (CC).

⁷² *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

⁷³ *S v Makwanyane* 1986 19 CRR 308.

⁷⁴ *R v Oakes* 1986 19 CRR 308; *S v Makwanyane* 1995 3 SA 391 (CC) para 105.

justifiable considering the factors provided in section 36, including the extent of the limitation and the purpose it seeks to achieve.

Fundamental rights must be interpreted in a manner that best gives effect to the purpose sought to be achieved by the *Constitution*.⁷⁵ The values enshrined by the *Constitution* are precedent when interpreting rights. The interpretation clause in section 39 of the *Constitution* states the following on interpretation:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Constitutional Court in the *Makwanyane* case stated that the Bill of Rights must be accorded an interpretation that is "generous" and "purposive" and gives effect to the values that underlie the Constitution.⁷⁶ The interpretation advances the purpose of the right and the protection granted by statute.⁷⁷ This approach to interpretation seeks to achieve unity and democracy in South Africa.⁷⁸ It reflects the lives of South Africans and the purpose which the *Constitution* seeks to achieve. In *S v Mhlungu*,⁷⁹ the Constitutional Court stated that the *Constitution* must be "broadly, liberally and purposefully" interpreted in order to achieve its goals and give effect to the fundamental values.⁸⁰ An interpretation that takes into account the values of human dignity, equality and freedom is necessary to ensure the achievement of social justice.⁸¹ If the right to equality is interpreted restrictively, beneficiaries will not enjoy the full protection and enjoyment of the right. The right

⁷⁵ Section 39(2) of the *Constitution of the Republic of South Africa, 1996*.

⁷⁶ *S v Makwanyane* 1995 3 SA 391 (CC) para 9.

⁷⁷ *R v Big M Drug Mart Ltd* 1985 13 CRR 64 para 103.

⁷⁸ Steinmann 2016 *PER/PELJ* 17-19.

⁷⁹ *S v Mhlungu* 1995 3 SA 867 (CC).

⁸⁰ *S v Mhlungu* 1995 3 SA 391 (CC) para 8.

⁸¹ Henricho Religious discrimination 144.

must be given a meaning that gives expression to the values of the *Constitution* to ensure that the goal of transformative constitutionalism is achieved.

Many of the constitutionally entrenched rights have been given effect to through the enactment of legislation. A litigant who seeks to enforce the right is required to rely on the legislation as a primary source in terms of the principle of constitutional avoidance. Only when the legislation is insufficient or falls short of the constitutional standard, will the *Constitution* be consulted to guide the interpretation thereof, including the *EEA*.⁸² The 2014 amendments to section 6(1) of the *EEA* must be interpreted against the background of constitutional values. Considering that the *EEA* is also silent on the definition of unfair discrimination, the values and principles that the *Constitution* is founded upon must inform the interpretation thereof. The Constitutional Court requires legislation to be interpreted in context and taking into account the "social and historical background" of the Act.⁸³ Therefore, amendments to the provisions of the *EEA* must be interpreted in a manner that gives effect to the values of human dignity, equality and freedom as well as in a manner that promotes the spirit, purport and objects of the Bill of Rights. Therefore, the phrase "or any other arbitrary ground" must be granted a generous and purposive interpretation that is informed by the core values of the *Constitution*.

The *Constitution* further adopts an international law friendly approach. Courts, tribunals and forums are required to consider international law when interpreting the Bill of Rights.⁸⁴ Section 233 of the *Constitution* requires courts to prefer a reasonable interpretation that is in line with international law over one that is not when interpreting legislation. The Constitutional Court states that international agreements and customary international law can be used to further understand and provide a blueprint for interpreting legislation.⁸⁵

⁸² *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) 51.

⁸³ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

⁸⁴ Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

⁸⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 35; Henricho *Religious discrimination* 145.

2.3.2 International instruments relating to unfair discrimination

One of the most important international law sources for interpreting employment provisions are the conventions and recommendations of the International Labour Organisation.⁸⁶ In the context of unfair discrimination, *ILO Convention 111 on Discrimination (Employment and Occupation)* of 1958, which was ratified by South Africa in 1997 is applicable.⁸⁷ The Convention defines discrimination as a "distinction", "exclusion" or "preference" made on characteristics that may invalidate or prejudice employment opportunities. This definition is important as the *Constitution*, and the *EEA* both lack a definition. The Convention acknowledges the possibility of expanding the prohibited grounds by member states.⁸⁸ The Convention requires member states to put into place appropriate policies that aim to eliminate discrimination at domestic level.⁸⁹ The expansion enabled South Africa to introduce the element of unfairness to the enquiry to focus on the impact of the differentiation on the complainant – the violation of human dignity.⁹⁰ The ILO enables member states to apply its conventions in a manner that best suits its domestic law. Although this definition is a guide to inform a definition of unfair discrimination, member states retain the discretion to determine which grounds will be prohibited.

2.3.3 Legislative provisions relating to unfair discrimination

The extensive legislative framework addresses inequality in the workplace and promotes the notion of social justice; in line with the principle of transformative constitutionalism. The right to equality is given statutory protection by the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, which prohibits unfair discrimination on an overall basis. It seeks to give effect to the constitutional right to equality by promoting and protecting equality and human dignity as well as ensuring equal enjoyment of rights and freedoms. However, it is

⁸⁶ *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC) para 1174.

⁸⁷ Department of Labour 2012 <https://pmg.org.za/files/docs>.

⁸⁸ Article 1(1) of *International Labour Organisation Convention 111*.

⁸⁹ Article 2 of *International Labour Organisation Convention 111*.

⁹⁰ Garbers and Le Roux 2018 *StellLR* 242.

expressly excluded from the employment relationship.⁹¹ Thus, the right to equality in the workplace and fair labour practices have been given effect to through the *EEA* and the *Labour Relations Act 66 of 1995*.⁹²

2.3.2.1 The Labour Relations Act 66 of 1995

The purpose of the *LRA* is to promote "economic development, social justice, labour peace and the democratisation of the workplace" by giving effect to section 23 of the *Constitution* and by aligning itself with the public international obligations of the State and it must be interpreted in this regard.⁹³

Section 185 of the *LRA* grants employees the right not to be unfairly dismissed or subjected to unfair labour practices. It further gives a list of conduct that qualifies for dismissal.⁹⁴ Of relevance to this study, section 187 makes it an automatically unfair dismissal where an employer dismisses an employee based on the grounds therein. Section 187(1)(f) states that it is automatically unfair to dismiss an employee for reasons relating to the employer's unfair discrimination against the employee based on the grounds listed therein, as well as any other arbitrary ground. Thus, this is not a closed list and provision is made for possible grounds analogous to the listed grounds. The test in this regard is whether the differentiation has the potential to injure the fundamental human dignity of the employee.⁹⁵ Although the study is primarily focused on the meaning of "arbitrary ground", it is necessary to mention that the *LRA* provides two possible defences in section 187(2). A dismissal may be fair if it relates to the inherent requirements of the job or when the employee reaches the normal retirement age.

⁹¹ Section 2 and 5 of *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

⁹² The *Labour Relations Act 66 of 1995* (hereinafter the *LRA*).

⁹³ Section 1 and 3 of the *Labour Relations Act 66 of 1995*.

⁹⁴ Section 186 (1) of the *Labour Relations Act 66 of 1995*.

⁹⁵ Basson *et al* *The New Essential Labour Law Handbook* 122.

2.3.2.2 The Employment Equity Act 55 of 1998

The *EEA* is the main legislation seeking to eliminate discrimination in the workplace.⁹⁶ It aims to achieve equality through the promotion of equity in employment by eradicating unfair discrimination and adopting affirmative action measures.⁹⁷ This purpose resonates with the natural imbalance of power that is inherent in the employment relationship. The interpretation of the Act is provided for in section 3, which requires compliance with the *Constitution*, the applicable codes of good practice, international law obligations and the objects of the Act.

Section 5 of the *EEA* is very important as it places a positive duty on every employer to eliminate unfair discrimination in the workplace by creating and promoting equal opportunities. This duty compels employers to take steps to ensure that people from certain groups are reasonably accommodated in the workplace.⁹⁸ The prohibition against unfair discrimination is stipulated in section 6 of the Act, and of relevance is section 6(1) which reads as follows:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

As stated above, the *Constitution* creates a rebuttable presumption of unfairness in cases where discrimination is alleged on a listed ground, but there is no presumption when discrimination is alleged on an unlisted ground. This distinction is also recognised in the *EEA*. Section 11 of the Act requires employers who are faced with allegations of unfair discrimination based on the listed grounds to show that the discrimination was rational and fair.⁹⁹ However, when the discrimination is alleged on an arbitrary ground, the onus falls on the complainant to identify the discriminatory ground and prove that the conduct was irrational and amounted to

⁹⁶ Van Niekerk *et al Law@work* 119.

⁹⁷ Section 2 of the *Employment Equity Act* 55 of 1998.

⁹⁸ Van Niekerk *et al Law@work* 232.

⁹⁹ Section 11(1) of the *Employment Equity Act* 55 of 1998.

unfair discrimination.¹⁰⁰ Therefore, both the *Constitution* and the *EEA* prohibit differentiation that is both irrational and unfair and not mere differentiation.

Before its enactment, equality in the workplace was solely regulated by item 2(1)(a) of Schedule 7 of the *LRA* which prohibited direct and indirect unfair discrimination against employees on any arbitrary ground, including but not limited to the listed grounds.¹⁰¹ The phrase "arbitrary ground" was interpreted by the Labour Court in *Kadiaka v Amalgamated Beverage Industries*¹⁰² as "the general or primary ground" of discrimination, as distinct from the listed grounds, and understood "arbitrary" to mean "capricious or proceeding merely from whim and not based on reason or principle".¹⁰³ The Judge *in casu* went further to explain that:

In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly (as emphasised repeatedly by the Constitutional Court) the dignity of the complainant and a society based on equality and the absence of discrimination.¹⁰⁴

The Constitutional Court in the *Prinsloo case* explained the crux of the prohibition on unfair discrimination, in its pejorative meaning, as the "unequal treatment of people based on attributes and characteristics attaching to them" and that owing to the country's history, where most were denied their humanity and inherent worth, it refers to differentiation that prejudices one's fundamental human dignity.¹⁰⁵ In

¹⁰⁰ Section 11(2) of the *Employment Equity Act* 55 of 1998; *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) paras 11-13; *TQWU v Bayete Security Holdings* 1994 4 BLLR 401 (LC) para 4.

¹⁰¹ Item 2(a) of Schedule 7 of the *Labour Relations Act* 66 of 1995 provided: (1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving – (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility (own emphasis added); Du Toit and Potgieter *Unfair Discrimination in the workplace* 11.

¹⁰² *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC).

¹⁰³ *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) para 42.

¹⁰⁴ *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) para 43.

¹⁰⁵ *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC) para 31; This principle was confirmed in *Harksen v Lane No & Others* 1998 1 SA 300 (CC) para 50.

terms of this analysis, unfair discrimination largely relates to the "denigration of human dignity" and not merely a lack of reason or arbitrariness.

2.4 Conclusion

The apartheid regime and its violation of fundamental human rights have left the country in destitute. Those who were disadvantaged by apartheid laws are unable to participate fully in society and realise their full potential. This is not parallel to the principles of substantive equality and transformative constitutionalism which require the personal circumstances of disadvantaged groups to be considered when applying the equality clause in order to ensure that they can fully realise their rights. The *Constitution* does not recognise the authoritative system that trumps the entrenched rights but rather seeks to ensure that the democratic values of human dignity, equality and freedom are recognised.

An amendment to the legislative provisions dealing with equality must be understood in a manner that gives effect to the objects of the *Constitution*. The Constitutional Court remains consistent on the scope of unfair discrimination within the context of the *Constitution*, the *EEA* and *LRA*. Differentiation that does not injure human dignity or affect one in an adversely similar manner amounts to mere differentiation, while differentiation that does impact human dignity amounts to unfair discrimination. Whether or not the differentiation is based on a listed or unlisted ground only comes into play when the onus of proof is discharged. To arrive at the scope of the amendment, it must be interpreted in a generous and purposive manner that is less restrictive, and that ensures that the spirit, purport and objects of the Bill of Rights are recognised.

The chapter that follows considers how the phrase "or any other arbitrary ground" may be interpreted against the background of case law.

Chapter 3

The 2014 amendments to the Employment Equity Act

3.1 Introduction

As was introduced in the previous chapter, the *Employment Equity Amendment Act* 47 of 2013 introduced several amendments to the *EEA* in 2014, particularly section 6(1) of the Act. Of importance to this study is the insertion of the phrase "or any other arbitrary ground" in section 6(1) and the relevant changes made to section 11 of the Act. These amendments have created some uncertainty regarding the provisions of the *EEA* and the scope of unfair discrimination. This chapter aims to examine the extent of the role of these amendments in the test for unfair discrimination. It investigates the possible interpretations that can be adopted and determines whether there is a suitable interpretation that should be applied. The right interpretation in this regard is one that is informed by constitutional values and principles, stressing human dignity, equality and freedom.

3.2 Section 6(1) of the EEA

The amendment to section 6(1) included the phrase "or any other arbitrary ground" after the list of prohibited grounds identified. The section now reads as follows:

No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.

Before the amendment, section 6(1) was drafted in a manner similar to section 9(3) of the *Constitution*, adding only three more grounds, namely: family responsibility, HIV status and political opinion. Furthermore, before the amendment, the legislature had already identified that the list of grounds for discrimination was not a closed list through the use of the word "including".¹⁰⁶ The legislature used the

¹⁰⁶ Rautenbach and Fourie 2016 *TSAR* 117.

term "analogous" grounds to describe a ground that could be used as a differentiating criterion in the test for unfair discrimination in addition to the listed grounds.¹⁰⁷ Analogous grounds were understood as having the same characteristic as the listed grounds – they had the potential to impair the fundamental human dignity of people as human beings, or to affect them adversely in a comparably serious manner.¹⁰⁸ Unfair discrimination could be alleged on both listed and unlisted grounds. Therefore, the question that arises, which also forms the basis of this study is what the meaning of the phrase "or any other arbitrary ground" is and what purpose it is subsequently supposed to serve when legislation had already provided for unlisted or analogous grounds in the test for unfair discrimination. The *Explanatory Memorandum* to the amendments provides two reasons thereto:

The amendment proposed to section 6(1) seeks to clarify that discrimination is not only permitted on a ground listed in that section but also on any other arbitrary ground. This change would create consistency with the terminology used in section 187(1)(f) of the *Labour Relations Act*, 1995 (Act No. 66 of 1995), that prohibits discriminatory dismissals.¹⁰⁹

It may have been unnecessary for the legislature to insert the amendment to section 6(1) given the existence of "including" in the scope of the provision which already acknowledged unlisted grounds and courts had established a test to identify the unlisted grounds.¹¹⁰ There appears to be no reason for this amendment as provision was evidently already made for applicants to bring forth a claim based on a ground that was not recognised in the section. In order to clarify this position, the *Explanatory Memorandum* stipulates that the amendment was intended to create consistency between section 6(1) of the *EEA* and section 187(1)(f) of the *LRA*. The *LRA* prohibits unfair discrimination through dismissals for reasons relating to the prohibited grounds by stipulating:

...that the employer unfairly discriminates against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion,

¹⁰⁷ Rautenbach and Fourie 2016 *TSAR* 117.

¹⁰⁸ *NUMSA v Gabriels (Pty) Ltd* 2002 12 BLLR 1210 (LC) para 19.

¹⁰⁹ Memorandum on objects of *Employment Equity Amendment Bill*, 2012 [B 31B-2012] para 3.3.1.

¹¹⁰ Rautenbach and Fourie 2016 *TSAR* 118.

conscience, belief, political opinion, culture, language, marital status or family responsibility.

Three possible explanations have been provided for the amendments by Rautenbach and Fourie,¹¹¹ namely: a third ground of unfair discrimination has been established; the insertion may reflect the requirement of rationality; or, the phrase may be a synonym for "one or more grounds" or "unlisted ground".¹¹² These three possible reasons are discussed below.

3.2.1 *"Or any other arbitrary ground" as a third ground of unfair discrimination in addition to the listed and analogous grounds*

The amendment could firstly indicate that unfair discrimination may be prohibited on the listed and unlisted grounds, as well as any other arbitrary grounds. Given the close relationship between discrimination and the notion of dignity, the scope of an "arbitrary ground", as a ground on its own, is likely to prove itself controversial, according to Van Niekerk *et al.*¹¹³ Grounds that relate to workplace needs, commercial rationale or operational requirements, and lack of tertiary qualifications may not amount to "arbitrary grounds" in that they do not impair a person's dignity but maybe irrational or capricious, and thus arbitrary.¹¹⁴

The extent to which the amendment could create an additional third ground has received criticism; however, it has also received some favour too. Du Toit¹¹⁵ is of the opinion that a third ground has been established.¹¹⁶ He relied mainly on the Labour Court judgment in *Kadiaka v Amalgamated Beverage Industries*,¹¹⁷ where the Court interpreted "arbitrary" as "capricious or proceeding merely from whim and not based on reason or principle".¹¹⁸ Du Toit¹¹⁹ states firmly that if the reintroduction of "arbitrary grounds" in section 6(1) of the *EEA* is interpreted as referring only to

¹¹¹ Rautenbach and Fourie 2016 *TSAR*.

¹¹² Rautenbach and Fourie 2016 *TSAR* 119 - 125.

¹¹³ Van Niekerk *et al Law@work* 127.

¹¹⁴ McGregor 2002 *SAMLJ* 170-171; Van Niekerk *et al Law@work* 127.

¹¹⁵ Du Toit *et al Labour Relations Law: A Comprehensive Guide*.

¹¹⁶ Du Toit 2014 *ILJ* 2623.

¹¹⁷ *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) (hereinafter the *Kadiaka* case).

¹¹⁸ *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) para 42.

¹¹⁹ Du Toit 2014 *ILJ* 2626.

the already existing unlisted grounds, the amendment will be rendered redundant and fall short of its objective to eliminate unfair discrimination. Du Toit¹²⁰ states that it makes no sense why the legislature would revert back to a term which it had previously discarded in 1998 when item 2(1)(a) of Schedule 7 of the *LRA* was replaced by the *EEA*. Instead, the term should be accorded the same meaning as ascribed in the *Kadiaka* case, thus expanding the scope of prohibition "from grounds that undermine human dignity" (in terms of the prescribed test) to include those that are merely irrational.¹²¹

The Court in *Kadiaka* however, did not stop there; it went further on to state that:

...without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly (as emphasised repeatedly by the Constitutional Court) the dignity of the complainant and a society based on equality and the absence of discrimination.¹²²

The general basis of this explanation by the Labour Court is similar to the formulation in section 9 of the *Constitution*. There must be a rational connection between all differentiations and a legitimate purpose. Where a rational connection exists, if the said differentiation also impairs human dignity, the factors of the general limitation clause must be met in order to justify the differentiation.¹²³

Garbers and Le Roux¹²⁴ conversely propose that Du Toit's analysis creates a right to rational differentiation, indicating that equality jurisprudence places a prohibition against "discrimination" and not "differentiation". The right to equality before the law in section 9(1) of the *Constitution* relates to irrational differentiation, while section 9(3) to (5) is a direct prohibition against unfair discrimination. Differentiation under section 9(1) will only qualify as discrimination if it occurs on one or more of the grounds (listed or unlisted) as recognised in section 9(3) to (5). Further, section

¹²⁰ Du Toit 2014 *ILJ* 2626.

¹²¹ Du Toit 2014 *ILJ* 2627.

¹²² *Kadiaka v Amalgamated Beverage Industries* 1999 20 *ILJ* 373 (LC) para 43.

¹²³ Rautenbach and Fourie 2016 *TSAR* 121.

¹²⁴ Garbers and Le Roux 2018 *StellLR* 257.

6(1) of the *EEA* prohibits unfair discrimination on an "arbitrary ground" and does not prohibit "differentiation", "arbitrariness", nor "arbitrary discrimination".¹²⁵ Concerning this distinction, the Constitutional Court in *Hassam v Jacobs No & Others*¹²⁶ stated that:

The *Constitution*, as the jurisprudence of this Court demonstrates, prohibits the breach of equality not by mere fact of difference but rather by that of discrimination. This nuance is of importance so that the concept of equity is not trivialised or reduced to a simple matter of difference.¹²⁷

The above formulation indicates that the prohibition against unfair discrimination goes beyond mere differentiation. Discrimination cannot be simply established solely on arbitrariness; the complainant must identify a discriminatory ground. An example of the confusion between "arbitrariness" (irrational differentiation) and an "arbitrary ground" (an existing reason for the differentiation) is seen in *South African Municipal Workers' Union obo Nhlanhla / Hibiscus Coast Municipality*¹²⁸ where the commissioner appeared to have been prepared to find unfair discrimination based merely on the conduct being arbitrary and illogical. The following was stated:

It is not possible to state the ground on which they were discriminated against, save to say it appears to have been entirely arbitrary. Discrimination may be unfair if the ground can be shown to be 'arbitrary' in the sense of it being random, illogical, subjective or otherwise unjustifiable, even if it is not clearly related to any particular attribute or characteristic of the complainant.¹²⁹

A complainant of unfair discrimination cannot merely allege that the employer's conduct was discriminatory without identifying the ground of such discrimination. The complainant is required to prove that the differentiation injured their dignity, as "injured feelings" are not enough to establish discrimination.¹³⁰ Discrimination is thus related to the characteristics of the complainant, contrary to the view of the commissioner in the above case. As established by the Labour Appeal Court in *New*

¹²⁵ Garbers and Le Roux 2018 *StellLR* 257.

¹²⁶ *Hassam v Jacobs No & Others* 2009 5 SA 572 (CC).

¹²⁷ *Hassam v Jacobs No & Others* 2009 5 572 (CC) para 29.

¹²⁸ *South African Municipal Workers' Union obo Nhlanhla / Hibiscus Coast Municipality* 2016 7 BALR 715 (CCMA).

¹²⁹ *South African Municipal Workers' Union obo Nhlanhla / Hibiscus Coast Municipality* 2016 7 BALR 715 (CCMA) para 26.

¹³⁰ *Mothoa v SA Police Services and Others* 2007 28 ILJ 2019 (LC).

*Way Motor and Diesel Engineering (Pty) Ltd v Marsland*¹³¹ the crux of the enquiry is as follows:

...did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent?¹³²

The above qualifies what is known as unfair discrimination in the pejorative sense – in essence, the core of the enquiry must be the impact of the conduct complained of on the complainant, it must impair their fundamental human dignity. An employee who alleges unfair discrimination based on an unlisted or arbitrary ground is required to show that the differentiation made by the employer was based on a ground that has the potential to impair human dignity, and thus amounts to unfair discrimination. The employee must identify the discriminatory ground and cannot simply rely on the arbitrary conduct of the employer to establish discrimination.¹³³

An interpretation of the above-mentioned issue creates difficulty when considered against the *dictum* laid down in *Prinsloo* and the *Harksen case*.¹³⁴ It would require the formulation of a new test for unfair discrimination where discrimination could be found solely on arbitrariness.

3.2.2 The insertion of "or any other arbitrary ground" may reflect the requirement of rationality limitation

The term "arbitrary" in the amendment could also imply the lack of a rational connection with a legitimate purpose, which would then refer to the rationality test.¹³⁵ The requirement for rationality demands that in any differentiation, there must be a "rational relation with a legitimate purpose".¹³⁶ The absence of rationality in the test for unfair discrimination will render the conduct arbitrary or capricious,

¹³¹ *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC).

¹³² *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC) para 25.

¹³³ *Farhana v Open Learning Systems Education Trust* 2011 32 ILJ 2128 (LC) para 25.

¹³⁴ *Prinsloo v Van der Linde & Another* 1997 3 SA 1012; *Harksen v Lane No* 199 1 SA 300 (CC); See footnotes 56 -61 above.

¹³⁵ Rautenbach and Fourie 2016 TSAR 121.

¹³⁶ Rautenbach and Fourie 2016 TSAR 121.

making the whole enquiry impermissible and making it unnecessary to determine whether there is a violation of human dignity or not.¹³⁷ It may not have been necessary to insert the phrase "or any other arbitrary ground" in section 6, given that the *Harksen* test already encompasses the rationality test.¹³⁸

3.2.3 "Or any other arbitrary ground" as a synonym for "one or more ground" or "unlisted ground"

The phrase "or any other arbitrary ground" may be used as a general description including both the listed and unlisted grounds, as is the case in section 187(1)(f) of the *LRA*, and as intended by the Explanatory Memorandum. However, the provisions are not identical. Section 187(1)(f) employs the phrase as a general description of the prohibited grounds. In contrast, section 6(1) employs the general description of "one or more grounds" and distinguishes between the listed grounds or other arbitrary grounds. The intention would have been achieved if the same formulation in the *LRA* was applied to the *EEA* – that is if the phrase was used as a general description in the *EEA* and the latter was discarded.¹³⁹ This interpretation would fail when applied to section 11, which makes a distinction between unfair discrimination on "a ground listed in section 6(1)" and unfair discrimination on "an arbitrary ground".

The Labour Appeal Court in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*¹⁴⁰ held that the test for an arbitrary ground not provided for in section 187(1)(f) is the same as the test for establishing an unlisted ground in section 9 (3) of the *Constitution*.¹⁴¹ Thus, when section 6(1) is interpreted in consideration with section 11(2), the phrase "arbitrary ground" may refer to unspecified or unlisted grounds.¹⁴² This interpretation was followed in the case of *Ndudula v Metrorail*¹⁴³

¹³⁷ *Weare v Ndebele NO and Others* 2009 1 SA 600 (CC) para 46, *Harksen v Lane No & Others* 1998 1 SA 300 (CC) para 53, Rautenbach and Fourie 2016 *TSAR* 121.

¹³⁸ Garbers and Le Roux 2018 *StellLR* 259; See footnote 57 above.

¹³⁹ Rautenbach and Fourie *TSAR* 122.

¹⁴⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 (LAC).

¹⁴¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 (LAC) paras 24-26.

¹⁴² Rautenbach and Fourie 2016 *TSAR* 122.

¹⁴³ *Ndudula v Metrorail* 2017 7 BLLR 706 (LC) (hereinafter the *Ndudula* case).

where the Labour Court held that the addition of the phrase "or any other arbitrary ground" did not add a new category of unfair discrimination to the prohibited grounds but is "synonymous with unlisted grounds".¹⁴⁴

The distinction between listed grounds of discrimination on the one hand, and unlisted or arbitrary grounds on the other, relates mainly to the burden of proof only in respect of the listed or specified grounds of discrimination. It does not alter the existing test for unfair discrimination.

3.3 Section 11 of the EEA

It is necessary to consider the amendment to section 11 of the *EEA* as it provides a test for unfair discrimination as amended in section 6. Both sections were amended in 2014 and include the phrase "arbitrary ground". The onus of proof, as amended in section 11, reads:

- (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –
 - a) did not take place as alleged; or
 - b) is rational and not unfair, or is otherwise justifiable.
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
 - a) the conduct complained of is not rational;
 - b) the conduct complained of amounts to discrimination; and
 - c) the discrimination is unfair.

The position of the previous provision on the onus of proof required the complainant to show that the differentiation was connected to a listed or unlisted ground and once that was done, the employer was required to justify the discrimination.¹⁴⁵ In terms of the amendment, in cases where discrimination is based on listed grounds, the onus of proof lies on the employer to show that the alleged conduct did not take place or was justifiable. However, the onus is reversed in cases of arbitrary grounds. The burden lies on the employee to show that the conduct is irrational, it amounts to discrimination and the discrimination is unfair.

¹⁴⁴ *Ndudula v Metrorail* 2017 7 BLLR 706 (LC) para 102.

¹⁴⁵ *Mangena v Fila SA (Pty) Ltd* 2010 ILJ 622 (LC) para 6.

Du Toit states that his approach is supported by paragraph (a) and (b) of section 11(2) which establish the rationality and discrimination tests, respectively.¹⁴⁶ With regards to para (c), he states that a measure that is already shown to be "irrational" and "discriminatory" can rarely be fair and that any additional unfairness that an employee would have to prove should rather be decided by the courts.¹⁴⁷ Rautenbach and Fourie state that it makes no sense within a legal and practical view to require an employee to prove discrimination and the unfairness thereof, in addition to having proved the irrationality of the conduct.¹⁴⁸ This is said to be the outcome of an intersecting relation between unfair discrimination and mere differentiation.¹⁴⁹

This approach, however, falls short of an important leg in the test for unfair discrimination. The Constitutional Court in *President of the Republic of South Africa v Hugo*¹⁵⁰ explained that the crux of the prohibition against unfair discrimination was to create a society of equal dignity and worth for all, and it placed dignity at the centre of unfairness.¹⁵¹ The Court stated that the determining factor for unfairness was the impact of the discrimination on the complainant.¹⁵² This was to be determined taking into account the following factors: the position of the complainant in society and whether they have been previously disadvantaged; the nature of the provision and the goal sought to be achieved by it; and the extent of the discrimination on the interests of the complainant and whether their fundamental human dignity has been impaired or has there been an impairment of a comparably serious manner.¹⁵³

¹⁴⁶ Du Toit 2014 *ILJ* 2627.

¹⁴⁷ Du Toit 2014 *ILJ* 2627

¹⁴⁸ Rautenbach and Fourie 2016 *TSAR* 124.

¹⁴⁹ Rautenbach and Fourie 2016 *TSAR* 124.

¹⁵⁰ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC).

¹⁵¹ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41; *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 50.

¹⁵² *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 43; *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 50.

¹⁵³ *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 51.

The above *dictum* draws a close link between dignity and unfairness. It shows that the right to equality protects human dignity.¹⁵⁴ Thus, it may be challenging to formulate an approach that enables complainants to establish unfair discrimination without requiring them to prove the unfairness thereof. In the quest to find the meaning of the phrase "or any other arbitrary ground", it must be understood that the said ground must bear the potential to impair the fundamental human dignity, an important element of unfair discrimination.

3.4 Interpretation in terms of Naidoo and Others v Parliament of the Republic of South Africa¹⁵⁵

The Labour Court recently shed light on how the phrase "or any other arbitrary ground" should be interpreted, considering the above three possible interpretations.

3.4.1 Facts

The applicants, all members of the Parliamentary Protection Services, brought a wage discrimination claim in terms of section 6(4) of the *EEA* before the Labour Court. This was based on the appointment of new staff members who earned more than the applicants. The new candidates were drawn from the South African Police Services, and thus earned higher than the applicants who lacked the experience.¹⁵⁶

3.4.2 Legal question

All in all, the Labour Court had to establish whether the capricious, baseless, unfair, unreasonable and unjustifiable wage difference represented an arbitrary ground for discrimination in terms of section 6(4) read in conjunction with section 6(1) of the *EEA*.¹⁵⁷

¹⁵⁴ Kruger 2011 *SALJ* 496-497.

¹⁵⁵ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 BLLR 291 (LC).

¹⁵⁶ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) paras 1-7.

¹⁵⁷ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 8.

The Court had to first determine what "arbitrary ground" in section 6(1) of the *EEA* meant and secondly, whether the applicants' claim was based on an unlisted ground.¹⁵⁸

3.4.3 *Ratio decidendi*

The Labour Court acknowledged that the phrase "arbitrary ground" raised two possible interpretations: a narrow and a wide interpretation.¹⁵⁹ The latter establishes a third ground of discrimination in addition to the recognised two, listed and unlisted.¹⁶⁰ In terms of the former approach, "arbitrary ground" is a ground analogous to the recognised listed grounds, possessing the same characteristics or potential to impair the fundamental human dignity or adversely affect one in a comparably serious manner.¹⁶¹

The Labour Court relied on the *dictum* in *Pioneer Foods (Pty) Ltd v Workers Against Regression*,¹⁶² affirming the narrow interpretation. In *casu*, the discrimination claim was based on unequal pay on the grounds of length of service. The Labour Court reaffirmed the *Harksen* test, stating that discrimination is established in cases where the differentiation is based on an unlisted ground, on whether or not the differentiation has the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner.¹⁶³ It held that the pay disparity did not constitute arbitrary differentiation and the length of service was not an unlisted ground in terms of the test. In addition, there was a rational connection between the length of service as a criterion to determine pay and the purpose of rewarding long service and loyalty of long-standing employees.¹⁶⁴ It further held that length of service when used as a differentiating criterion, does not denigrate human dignity as required in the test. The Labour Court held that even if

¹⁵⁸ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 9.

¹⁵⁹ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 13.

¹⁶⁰ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 14.

¹⁶¹ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 15.

¹⁶² *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) (hereinafter the *Pioneer Foods* case).

¹⁶³ *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) para 55.

¹⁶⁴ *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) paras 56-58.

the amendment served to expand the scope of discrimination as proposed by Du Toit, length of service was not arbitrary.¹⁶⁵

The Labour Court further considered the case of *Ndudula*, which was also based on wage disparity and considered the amendment. Here, the Court held that the phrase "arbitrary ground" does not establish a ground of differentiation but merely describes the lack of a rational connection with a legitimate purpose.¹⁶⁶ The Court further rejected the approach proposed by Du Toit and concluded that "arbitrary ground" is a mere synonym for "unlisted grounds, unspecified grounds or grounds analogous to the listed grounds".¹⁶⁷

The Labour Court then considered the case of *Sethole v Dr Kenneth Kaunda District Municipality*,¹⁶⁸ which also entailed a claim of unfair discrimination based on an arbitrary ground. The Court held that arbitrariness was analogous to the grounds listed in section 6(1) of the *EEA* in that they have the potential to impair or prejudice *dignitas*.¹⁶⁹ The Labour Court further held that "arbitrary" in section 6(1) of the *EEA* was a different concept to "irrationality" or "unlawfulness". It explained that conduct may be irrational or unlawful but would not necessarily constitute discrimination if it did not possess the "further element" as stated in the *Prinsloo* case - which is the impairment of the fundamental human dignity of the complainant.¹⁷⁰

The Labour Court also considered the judgment in *Chitsinde v Sol Plaatjie University*¹⁷¹ where the Court agreed with Du Toit that the amendments broadened the scope of discrimination. However, it found that the applicant failed to discharge the onus in terms of section 11(2) of the *EEA*, and although he was differentiated, the differentiation was not arbitrary.¹⁷²

¹⁶⁵ *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) para 60.

¹⁶⁶ *Ndudula v Metrorail – PRASA (Western Cape)* 2017 7 BLLR 706 (LC) paras 93-94.

¹⁶⁷ *Ndudula v Metrorail – PRASA (Western Cape)* 2017 7 BLLR 706 (LC) para 103.

¹⁶⁸ *Sethole v Dr Kenneth Kaunda District Municipality* 2018 1 BLLR 74 (LC).

¹⁶⁹ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 25.

¹⁷⁰ *Sethole v Dr Kenneth Kaunda District Municipality* 2018 1 BLLR 74 (LC) para 72.

¹⁷¹ *Chitsinde v Sol Plaatjie University* 2018 10 BLLR 1012 (LC).

¹⁷² *Chitsinde v Sol Plaatjie University* 2018 10 BLLR 1012 (LC) paras 31-39.

The Labour Court found in favour of applying the narrow approach, stating the following reasons:

1. It ought to follow the judgments in *Pioneer Foods* and *Ndudula* which held that arbitrary grounds were synonymous with the grounds analogous to the listed grounds and the test for discrimination remained the impairment of fundamental human dignity.¹⁷³
2. The Court was reluctant to follow the *Chitsinde* case as authority for applying the wide interpretation as the Court therein did not consult the cases of *Pioneer Foods* or *Ndudula*.¹⁷⁴
3. The Court further stated that section 6(1) did not prohibit differentiation, arbitrariness or arbitrary discrimination but rather prohibited unfair discrimination based on an arbitrary ground. It is important that the conduct complained of bear the potential to injure human dignity.¹⁷⁵
4. The Court stated that, in terms of the Explanatory Memorandum, the amendment to section 6(1) sought to bring the section in line with section 187(1)(f) of the *LRA* where "arbitrary ground" was understood as a ground that has the potential to impair the fundamental human dignity or adversely affect one in a comparably serious manner.¹⁷⁶
5. The Court concluded that arbitrary itself did not constitute a ground of discrimination including a general right to differentiation that was rational. If so, it would open a lot of cases in that regard. The Court stated that "the differentiation tail should not wag the discrimination dog".¹⁷⁷

3.4.4 Decision

The Court found that the applicant was unable to prove that the grounds relied upon for arbitrary discrimination were analogous to the listed grounds. It further

¹⁷³ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 31.

¹⁷⁴ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 32.

¹⁷⁵ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) paras 33-38.

¹⁷⁶ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 12 BLLR 1181 (LAC); *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 39.

¹⁷⁷ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 40.

failed to establish that the grounds relied upon had the potential to impair fundamental human dignity.¹⁷⁸ The Court further held that arbitrary conduct did not create a ground of discrimination; conduct that is based on a ground that is analogous to the listed grounds is actionable.¹⁷⁹

3.5 Conclusion

The amendments made to the *EEA* in relation to unfair discrimination have proved themselves ambiguous. Various interpretations may be derived from the phrase "or any other arbitrary clause", namely: the introduction of a third ground of discrimination; reference to the rationality requirement; and the amendment as a synonym for unlisted grounds.

The argument that the amendment introduces a third ground upon which discrimination may be established is challenged by Constitutional Court decisions which, *inter alia*, state that unfair discrimination is not founded on mere differentiation. The conduct complained of must have the potential to impair the fundamental human dignity of the complainant or affect them in a comparably serious manner. This is referred to as unfair discrimination in the pejorative sense. This draws attention to the fundamental role which the impact of the differentiation plays in the enquiry. The second possibility that the amendment may be referring to, the rationality test, is also met with the challenge of redundancy as the test was already recognised in the enquiry. The third possibility is also not without fault as it is drafted in a manner that defeats its proposed intention. The last two possibilities are also subject to the *dictum* in the *Prinsloo* and *Harksen* cases, meaning the complainant must prove the conduct has the characteristics to impair fundamental human dignity.

It is evident that there is a significant relationship between equality and dignity. The following chapter seeks to investigate the link between the two concepts to determine whether they can be independent of one another. In order to find a

¹⁷⁸ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 45.

¹⁷⁹ *Naidoo and Others v Parliament of the Republic of South Africa* 2019 3 BLLR 291 (LC) para 48.

meaning for the phrase "or any other arbitrary ground", it is necessary to determine the scope of human dignity as an interest protected by the right to equality and whether unfair discrimination can exist independently of this value, thus enabling a complainant to establish unfair discrimination by merely proving irrationality and not unfairness.

Chapter 4

The relationship between human dignity and the right to equality

4.1 Introduction

In accordance with the goal to achieve substantive equality, human dignity is featured in the test to determine whether the principle of equality is observed to its uttermost potential. The Constitutional Court stated that the goal of the prohibition against discrimination is to create a society in which every person is granted equal dignity and is treated with respect, notwithstanding the social group in which they belong.¹⁸⁰ The principle of equality seeks to prohibit treatment that impairs the fundamental human dignity of persons or which adversely affects one in a comparably serious manner.¹⁸¹ This is to ensure that people are not treated as less than human because of their inherent characteristics.¹⁸²

Bearing in mind the link between dignity and equality, it is necessary to investigate the relationship between the two concepts and how they are employed to achieve transformative constitutionalism in a wounded society. This chapter explores the role and purpose of the element of dignity in equality jurisprudence and determine whether it is possible to separate the two notions and find unfair discrimination without proving impairment of dignity. This will aid the underlying question to determine the meaning of "arbitrary ground" and whether the amendment to section 6(1) of the *EEA* creates a third ground where discrimination could be determined on an arbitrary ground that does not require proving the impairment of human dignity.

4.2 What is human dignity?

The *Constitution* lacks a precise definition for human dignity despite the vital constitutional role which it plays. Dignity is recognised as a "utilitarian ideal", a

¹⁸⁰ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) paras 728H – 729B.

¹⁸¹ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 31.

¹⁸² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 129.

fundamental value in most constitutions and a basic principle invoked to protect all persons.¹⁸³ However, it has not always been smooth sailing for the notion. In the *Harksen* case, the Constitutional Court explained dignity as a "notoriously elusive concept" which needed "precision and elaboration".¹⁸⁴ It has also been labelled as a "subjective" and "abstract" concept.¹⁸⁵ The notion of human dignity was best described by the Canadian Supreme Court in the judgment of *Law v Canada (Minister of Employment and Immigration)*,¹⁸⁶ which stated the following:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a persons legitimately feels when confronted with a particular law.¹⁸⁷

Given the above, the elusiveness of the notion of dignity does not prevent the violation thereof to be recognised.¹⁸⁸ Every person is born with inherent dignity, which must be recognised and respected by all and any treatment that is degrading or humiliating constitutes an impairment of the said dignity.¹⁸⁹

¹⁸³ Schachter 1983 *AJIL* 848-849; Steinmann *Human Dignity* 149.

¹⁸⁴ *Harksen v Lane* No 1998 1 SA 300 (CC) para 50, quoting the Canadian Court in *Egan v Canada* 1995 29 CRR (2d) para 106.

¹⁸⁵ *R v Kapp* 2008 SCC 41 para 22, the Canadian Supreme Court stated that dignity was too "subjective" and "abstract" to be used as a legal test and that it had become burdensome on equality claimants to prove, which defeats the purpose it was intended to achieve. The concept has thus been left to positive law to determine through interpretation. Davis J states that the Constitutional Court has allowed dignity to become a concept which can be shaped and determined in whatever manner required by the judiciary, what he calls "judicial Legoland". Dignity has become a difficult concept to define, leaving it to the courts to provide a definition, through interpretation. The challenge could be the "degree of judicial discretion" given to courts to provide a meaning and the possible "ideological manipulation" that the notion could be subjected to.

¹⁸⁶ *Law v Canada (Minister of Employment and Immigration)* 1999 170 DLR 4th 1 SCC.

¹⁸⁷ *Law v Canada (Minister of Employment and Immigration)* 1999 170 DLR 4th 1 SCC para 53.

¹⁸⁸ *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) para 16.4.

¹⁸⁹ *S v Makwanyane* 1995 3 SA 391 (CC) para 111; *S v Williams* 1995 3 SA 632 (CC) para 35; Currie and De Waal *The Bill of Rights Handbook* 272,273.

The abstract nature of human dignity relates to the fact that it represents different ideas and ideologies to various worldviews. Further, the meaning and scope of infringement may be defined differently by diverse groups.¹⁹⁰ Countries are unique and have different reasons to justify why humans must be treated with respect.¹⁹¹ Against this background, it is difficult to expect the constitutional recognition of human dignity to bring about a uniform application of the concept. However, what can be deduced from the notion is that human dignity is at the core of human rights and is also a fundamental value informing constitutional development.¹⁹²

In South Africa, human dignity is recognised as one of the foundational values of the legal system. It is a concept applied by the *Constitution* to steer the country to transformation. In various ways, it is an attempt to redress the past and pave the way for the future.¹⁹³ Albertyn and Goldblatt¹⁹⁴ explain that transformation requires the obliteration of all systemic forms of sovereignty and the creation of equal opportunities to enable all people to realise their full potential in society. The High Court in the judgment of *Rates Action Group v City of Cape Town*¹⁹⁵ confirmed that the *Constitution* was a "blueprint" that guides the country from an inegalitarian past to a society wherein all persons live in dignity.¹⁹⁶ Its role is best described by Beylvelde and Brownsword¹⁹⁷ who stated that:

Dignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human rights (particularly concerned with the conditions of self-respect); sometimes defining the subjects of human dignity, at other times defining the objects to be protected; and sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination.

The Constitutional Court explained that dignity recognises the intrinsic worth of all persons and entitles the bearer to be treated as worthy of respect and concern.¹⁹⁸

¹⁹⁰ Shultziner 2003 *GJT* 5.

¹⁹¹ Steinmann *Human Dignity* 153.

¹⁹² Article 1 of the *Universal Declaration of Human Rights* (1948); Ackerman 2004 *NZLR* 648.

¹⁹³ The Postamble to the interim *Constitution* describes the final Constitution as "a historic bridge" the injustices of Apartheid and a peaceful future founded on the recognition of human rights and the development of equal opportunities for persons of all backgrounds.

¹⁹⁴ Albertyn and Goldblatt 1998 *SAJHR* 248-249.

¹⁹⁵ *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C).

¹⁹⁶ *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) para 100.

¹⁹⁷ Beylvelde and Brownsword 1998 *MLR* 661-662.

¹⁹⁸ *S v Makwanyane* 1995 3 SA 391 (CC) paras 328-329.

Concerning unfair discrimination, it commands the recognition of all persons as valuable members of society with equal dignity, regardless of their position in society.¹⁹⁹

4.2.1 *The basic elements of human dignity*

Although it might be challenging to define, human dignity is a characteristic of human life. It is also evident that it has various functions to play. It may be employed as a right, as a principle or as a legal value.²⁰⁰ Human dignity comprises of the following three basic elements in the protection and adjudication of rights.²⁰¹

4.2.1.1 Everyone has inherent dignity

Dignity can be described as an "attribute of humanity".²⁰² At its core lies the "inalienable, inherent and intrinsic worth" of every person.²⁰³ It resonates with one's uniqueness. This is referred to as the "ontological claim".²⁰⁴ It is an essential value that cannot be "gained or lost" and demands respect from the state and all other individuals.²⁰⁵ Human dignity is inherent to all persons simply because they are human.²⁰⁶ Kant's view is that dignity lies in one's autonomy and that no one should be treated as a means to an end but as an end in themselves.²⁰⁷ The Constitutional Court confirmed this view in *S v Dodo*²⁰⁸ stating the following with regards to the concept:

Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as end in themselves, never merely as means to an end.²⁰⁹

¹⁹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 28; *S v Dodo* 2001 3 SA 382 (CC) 35.

²⁰⁰ Hughes Human Dignity and Fundamental Rights in South Africa and Ireland 67; Steinmann *Human Dignity* 159.

²⁰¹ McCrudden 2008 *EJIL* 679; Botha 2009 *SLR* 189-190; Rao 2011 *NDLR* 186-189.

²⁰² Steinmann *Human Dignity* 160.

²⁰³ *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) para 5.

²⁰⁴ McCrudden 2008 *EJIL* 679.

²⁰⁵ *S v Lawrence* 1997 4 SA 1176 para 168; *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 24; Steinmann *Human Dignity* 163,164.

²⁰⁶ *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 24.

²⁰⁷ Kant *The Metaphysics of Morals* (1797) 435, as explained by Ackermann 2004 *NZLR* 649.

²⁰⁸ *S v Dodo* 2001 3 SA 382 (CC) 423.

²⁰⁹ *S v Dodo* 2001 3 SA 382 (CC) 423 para 38.

As a result, the Constitutional Court has placed dignity at the centre of equality. It states that apartheid laws were a denial of inherent dignity.²¹⁰ Therefore, the new constitutional order requires an affirmation of the equal worth of all and the protection of inherent dignity of all.²¹¹

4.2.1.2 The recognition and respect of one's inherent dignity

The guarantee of human rights is accompanied by a demand for respect and equal treatment of persons.²¹² According to Kant, every individual has the right to be respected, and they must respect the dignity of others.²¹³ This *dictum* was applied and confirmed in relation to substantive equality by the Constitutional Court in *South African Police Service v Solidarity obo Barnard*²¹⁴ where it stated the following:

...this idea also gives effect to another Kantian way of understanding dignity – that it asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves. Measures to further substantive equality recognise this and embrace the importance of advancing societal members' welfare, material position and interests. The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all.²¹⁵

Dignity, thus, requires that people live in such a manner that recognises and respects the autonomy of each person without being ill-treated in such a manner that is degrading or humiliating.²¹⁶ In this sense, dignity is interlinked with societal views and relationships.²¹⁷ This notion is explained by Rao²¹⁸ as "dignity as recognition", which not only protects individualism but also requires the harmonising of the conflicting interests of the individual and his society.²¹⁹ In this sense, one's rights may be trumped by the dignity of the community as this element seeks to

²¹⁰ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 32.

²¹¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

²¹² Section 7(2) of the *Constitution of the Republic of South Africa*, 1996.

²¹³ Kant *Groundwork of the Metaphysics of Morals* 436, as explained by Ackerman 2004 *NZLR* 650; Section 10 of the *Constitution of the Republic of South Africa*, 1996.

²¹⁴ *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC).

²¹⁵ *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 175.

²¹⁶ Chaskalson "Human Dignity as a Constitutional Value" 134.

²¹⁷ Steinmann *Human Dignity* 181.

²¹⁸ Rao 2011 *NZLR* 259.

²¹⁹ *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 166 - 167.

balance the interests of individuals and their communities.²²⁰ Inherent dignity and dignity as recognition are parallel notions; however, the latter goes further by requiring the respect and recognition of all individual and group differences.

4.2.1.3 The state must respect the inherent dignity of all

The third element of human dignity is referred to as the "limited-state" claim and requires the state to create adequate living conditions for its people.²²¹ Here, the State is required to realise the inherent dignity of people through the advancement of socio-economic rights. Chaskalson J²²² said that there is no dignity in lives lived without the basic needs of life and the ability of one to provide for themselves without socio-economic assistance.

Equal human dignity requires the state to create minimum conditions of living which can be achieved through socio-economic rights. The State is required to respect, protect, promote and fulfil the rights in the Bill of Rights and take reasonable legislative measures within its available resources to realise these rights progressively.²²³

4.3 Human dignity as a foundational value

The *Universal Declaration of Human Rights* (1948) states that the core of freedom, justice and peace lies in the recognition of inherent dignity and equal rights.²²⁴ This stance appears to have largely informed constitutional development in South Africa. The *Constitution* is expressly based on the founding values of human dignity, the achievement of equality and advancement of human rights and freedoms.²²⁵ It further refers to the Bill of Rights as the foundation of democracy and upholds the democratic values of human dignity, equality and freedom.²²⁶ It is referred to as

²²⁰ Botha 2009 *SLR* 186 - 188; Rao 2011 *NDLR* 221 - 226.

²²¹ Steinmann *Human Dignity* 203.

²²² Chaskalson 2000 *SAJHR* 204.

²²³ Section 7(2) of the *Constitution of the Republic of South Africa, 1996*; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83.

²²⁴ Preamble of the *Universal Declaration of Human Rights* (1948).

²²⁵ Section 1(a) of the *Constitution of the Republic of South Africa, 1996*.

²²⁶ Section 7(1) of the *Constitution of the Republic of South Africa, 1996*.

one of three "conjoined, reciprocal and covalent values" that lay at the base of this country.²²⁷ As expressed in the previous chapters, these values seek to redress injustices and create substantive equality for all.²²⁸

The interim *Constitution* did not recognise dignity as a value but only as a right.²²⁹ It is only after the decision of the Constitutional Court in *S v Makwanyane*²³⁰ that it was adopted and underscored as a foundational value in the preparation of the final *Constitution*. The Court further stated that at the core of the new constitutional order was the recognition and protection of the human dignity of all citizens, doing away with the denial that was prevalent during the apartheid era.²³¹

The role of human dignity as a value is engaged in numerous aspects of the law. The *Constitution* requires courts and tribunals to promote the founding values of human dignity, equality and freedom when interpreting the Bill of Rights.²³² It is further employed in the limitations clause, requiring the limitation of any fundamental right to be justified in a transparent society based on human dignity, equality and freedom.²³³

Human dignity in its role as a constitutional value, represents social goals and concerns that courts are tasked with when interpreting constitutional provisions and challenging these provisions to ensure transformation in society and equal dignity for all.²³⁴ The commitment to human dignity and prohibition against discrimination are coexistent and intertwined. As a value, it assimilates three important functions: it is the source of constitutional rights; it informs the interpretation of these rights,

²²⁷ *S v Mamabolo* 2001 3 SA 409 (CC) para 41.

²²⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 322; *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35; *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 143; Currie and De Waal *The Bill of Rights Handbook* 272.

²²⁹ The *Constitution of the Republic of South Africa Act* 200 of 1993.

²³⁰ *S v Makwanyane* 1995 6 BCLR 655 (CC) (hereinafter the *Makwanyane* case).

²³¹ *S v Makwanyane* 1995 3 SA (CC) para 329.

²³² Section 39 of the *Constitution of the Republic of South Africa*, 1996.

²³³ Section 36 of the *Constitution of the Republic of South Africa*, 1996.

²³⁴ *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 1 SA 765 (CC) paras 8-9; Steinmann Human Dignity 219.

and it determines the proportionality of legislation in the limitation of rights.²³⁵ In essence, it establishes what the law "ought to be", doing away with legal positivism which directs "what the law is".²³⁶

4.4 The right to dignity as a constitutional right

Human dignity is not only a foundational value upon which the *Constitution* is founded; it is also a constitutional right that is justiciable and enforceable.²³⁷ Section 10 of the *Constitution* states that "everyone has inherent dignity and the right to have their dignity respected and protected". The entrenchment of this right is in recognition that every person has value and worth and can contribute as a member of society.²³⁸

The right to human dignity protects the "intrinsic worth" of all persons.²³⁹ Through the use of the term "inherent", it is understood that dignity is an element of life and not a benefit granted by the State.²⁴⁰ The right is not earned and can neither be abandoned. The right to human dignity is manifested in one's ability to exercise all their other rights freely and it is the cornerstone of the other entrenched rights.

Often when there has been an impairment of human dignity, the primary infringement is of a more specific right, such as the right to equality.²⁴¹ The Constitutional Court has laid down strict requirements in this regard that one must rely directly on a more specific right as opposed to the more general right to human dignity when enforcing a right.²⁴² The right to dignity may only be relied upon

²³⁵ *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35.

²³⁶ Steinmann *Human Dignity* 128

²³⁷ *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35.

²³⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1574 (CC) para 28.

²³⁹ *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35.

²⁴⁰ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC) para 48; Chaskalson 2000 SAJHR 196.

²⁴¹ *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 35.

²⁴² *Nokontyana v Ekxuhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) para 50.

entirely if there is no other specific right in the Bill of Rights to protect the interest sought to be protected.²⁴³ This is because society is constantly evolving, and new forms of indignities are recognised. Therefore, the right to human dignity is interpreted to protect these injustices.²⁴⁴

The crux of section 10 is that every human being is born with inherent self-worth regardless of any circumstances in which they are placed and therefore, should be treated accordingly.²⁴⁵ It celebrates the uniqueness of human beings as individuals and not as representatives of the group – this represents the view that the right to human dignity is associated with a person’s identity. However, dignity can be viewed in a much broader view going beyond the individuality of the bearer. Dignity allows one the opportunity to realise their full potential and experience complete freedom, thus, promoting self-actualisation. This view was echoed by Ackerman J’s maxim in *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others*²⁴⁶ stating:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential... An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction.²⁴⁷

The scope of the right to human dignity is broad and includes a number of values such as a person’s right to reputation, their right to a sense of self-worth and the right to privacy. The correlation of these values proves that human dignity does not only relate to one’s sense of self-worth but also affirms one’s worth in society.

²⁴³ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2013 12 BCLR 1429 (CC).

²⁴⁴ Brand, Freedman and De Vos *South African Constitutional Law in Context* 339.

²⁴⁵ *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 98.

²⁴⁶ *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others* 1996 1 SA 984 (CC).

²⁴⁷ *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others* 1996 1 SA 984 (CC) para 49.

4.5 The relationship between dignity and equality

South African equality jurisprudence places dignity as a *grundnorm*.²⁴⁸ It is employed in the interpretation of equality and determination of unfair discrimination in section 9(3) of the *Constitution*. In addition, it also informs the statutory prohibition in section 6(1) of the *EEA*.²⁴⁹ Section 9 protects individuals from differentiation that is based on the listed or unlisted grounds that have the potential to impair fundamental human dignity. This stems from the *Constitution's* goal to achieve transformation in society, particularly substantive equality.²⁵⁰

The role played by dignity in equality jurisprudence is manifested in three ways in the prohibition against unfair discrimination.²⁵¹

Firstly, dignity is employed to determine whether discrimination has occurred in an unlisted ground. The Constitutional Court will find in the affirmative if the discrimination is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings or to adversely affect them in a comparably serious manner.²⁵²

Secondly, dignity is employed to determine whether discrimination, based on a listed or unlisted ground, is unfair. The enquiry on unfairness largely focuses on the impact of the discrimination on the complainants and others who are in a similar situation.²⁵³ The unfairness of the discrimination will be found if the differentiation

²⁴⁸ *Brink v Kitshoff NO* 1996 4 SA 197 (CC); *Prinsloo v van der Linde* 1997 3 SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Harksen v Lane NO* 1998 1 SA 300 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC); *Pretoria City Council v Walker* 1998 2 SA 363 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Hoffmann v South African Airways* 2000 1 SA 1 (CC); *Dawood v Minister of Home Affairs*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC); *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC); Cowen 2001 SAJHR 34.

²⁴⁹ Section 39(2) of the *Constitution of the Republic of South Africa*, 1996; Section 3 of the *EEA*.

²⁵⁰ Section 1 of the *Constitution of the Republic of South Africa*, 1996; *Brink v Kitshoff NO* 1996 6 BCLR 752 paras 41-42.

²⁵¹ *Harksen v Lane NO* 1998 1 SA 300 (CC) paras 46-47.

²⁵² *Harksen v Lane NO* 1998 1 SA 300 (CC) para 47.

²⁵³ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 47; Cowen 2001 SAJHR 36.

is based on a ground, listed or unlisted, that impairs fundamental human dignity or adversely affect one in a comparably serious manner.²⁵⁴ The Constitutional Court in the *Harksen* case noted that to determine unfairness, various factors have to be taken into account. These factors include: the class of the group that has been disadvantaged and whether they have suffered patterns of group disadvantage before; the nature of the power effecting the discrimination and the purpose sought to be achieved by it; and the nature and extent of the interests affected, in other words, whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.²⁵⁵ Thus, the impact that the discrimination has on the complainant will be the determining factor of the unfairness of the discrimination.²⁵⁶

Thirdly, dignity may be relevant in determining whether unfair discrimination found in a law of general application, is nevertheless justifiable under the limitations clause.²⁵⁷

4.6 What constitutes a violation of human dignity for purposes of unfair discrimination?

Equality jurisprudence does not provide clarity on what constitutes a violation of dignity for purposes of unfair discrimination. The Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*²⁵⁸ explained that the violation of dignity in this regard is not the same as the violation of dignity under section 10 of the *Constitution*, as it is based on the impact on a previously disadvantaged group.²⁵⁹ The Constitutional Court in *Brink v Kitshoff No*²⁶⁰ suggested that the prohibition on unfair discrimination was adopted as a guard against creation

²⁵⁴ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 47.

²⁵⁵ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 50; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 para 43.

²⁵⁶ *Harksen v Lane No* 1998 1 SA 300 (CC) para 50.

²⁵⁷ Section 36 of the *Constitution of the Republic of South Africa, 1996*; *Harksen v Lane NO* 1998 1 SA 300 (CC) para 50.

²⁵⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).

²⁵⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 124; McConnechie Unfair Discrimination 19.

²⁶⁰ *Brink v Kitshoff* 1996 4 SA 197 (CC) para 42.

or perpetuation of patterns of group disadvantage.²⁶¹ The Court further expanded this approach in the *Harksen* case where it stated that:

We have interpreted section 8(2) as a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such pattern of discrimination can occur where people are treated without the respect that individual human beings deserve.²⁶²

It is evident from the above that the prohibition against unfair discrimination is to eliminate and prevent the entrenchment of disadvantage in groups of persons. The courts consider the following factors to determine whether or not there has been a violation of human dignity: by considering what the law expresses about the disadvantaged group, whether the discrimination has impaired the group's sense of self-worth and by concluding that the discrimination creates "severe forms of social-economic disadvantage".²⁶³ These factors show the ways in which the patterns of group disadvantage may be perpetuated to impair equal dignity.²⁶⁴

In establishing the violation of dignity in discrimination cases: firstly, there must be differential treatment based on group characteristics. Secondly, the differentiation must be disproportionate, meaning that the purpose of the discrimination is outweighed by its impact on the group member's interests. Thirdly there must be a threat to create or perpetuate patterns of group disadvantage primarily, but not exclusively, by expressing impermissible messages about the disfavoured group or by creating or entrenching socio-economic disadvantage.²⁶⁵ All three are necessary conditions for establishing the violation of dignity. None are individually sufficient, but together they are jointly sufficient for this finding.

²⁶¹ Cowen 2001 *SAJHR* 48-49.

²⁶² *Harksen v Lane No* 1998 1 SA 300 (CC) para 91.

²⁶³ McConnechie Unfair Discrimination 27.

²⁶⁴ McConnechie Unfair Discrimination 21-27.

²⁶⁵ McConnechie Unfair Discrimination 56.

4.7 *The limits to human dignity*

The elevation of the notion of dignity in equality jurisprudence has sparked extensive debate over the past years.²⁶⁶ One of the criticisms on the dignity-centred approach is that it is individualistic in nature. Critics state that the core of dignity which is to abolish the effects of stigma, humiliation, stereotyping and prejudice does not reach the goals of substantive equality to redress social and economic disadvantage, promote participation and affirm difference through structural and institutional change. Further, it does not mitigate any conflicts between dignity and other values informing substantive equality.²⁶⁷

Such an approach is said will direct the courts' focus away from substantive equality towards the less favoured formal equality. Cohen²⁶⁸ consults international instruments in this regard, indicating that international law recognises dignity as a basis of rights protecting both individual and collective interests as well as social and economic interests. Therefore, dignity is the basis of a wide range of rights protected by the international community. Dignity, as shown above, comprises of a subjective element focusing on how one feels about themselves and others, as well as the objective element focusing on how people treat each other in their communications, and the interaction between public and private individuals in society.²⁶⁹ The notion of *ubuntu* is behind the objective element of dignity-recognising human worth and respect for the dignity of every person. *Ubuntu*²⁷⁰ is a concept recognised by the *new constitutional order* and has been elevated by the Constitutional Court in the *Makwanyane* case affirming that members of society

²⁶⁶ Albertyn & Goldblatt 1998 *SAJHR*; Fagan 1998 *SAJHR*; Cowen 2001 *SALJ*; Botha 2004 *SAPL*; Albertyn; Fredman 2015 *Acta Juridica*; Pieterse 2008 *SAJHR*; Botha 2009 *SAJHR*.

²⁶⁷ Albertyn & Fredman 2015 *Acta Juridica* 431; Albertyn & Goldblatt 1998 *SAJHR*; Davis 1999 *SALJ* 412. ²⁶⁸ Cowen 2001 *SAJHR* 49-50.

²⁶⁸ Cowen 2001 *SAJHR* 49-50.

²⁶⁹ Cowen 2001 *SAJHR* 50.

²⁷⁰ *Ubuntu* was expressly recognised in the interim Constitution in its post-amble that the adoption of the Constitution was, *inter alia*, to promote *ubuntu* and eradicate victimisation. Although the final constitution does not expressly make reference to *ubuntu*, but its consistent reference to human dignity can be accepted as reference to *ubuntu*.

must reciprocate the same respect, dignity, value and acceptance to each other.²⁷¹

The Constitutional Court drew the link between dignity and *ubuntu* by stating:

While recognising the unique worth of each person, the *Constitution* does not presuppose that a holder of right is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.²⁷²

The Constitutional Court has developed jurisprudence that proves progression in equality jurisprudence on dignity in its collective nature, discharging the criticism that a dignity-centred approach is individualistic. The dignity-centred approach has shaped the society in issues such as sexual orientation, prohibiting unfair discrimination and allowing same-sex couples the right to enter into legal marriages.²⁷³ Further, in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*,²⁷⁴ the Constitutional Court held that the barring of permanent residents from social grants was unconstitutional. These cases prove that dignity does not only serve an individualistic purpose but also observes the relational claim or dignity as recognition element which recognises individual and social interests and thus can address material disadvantage and systemic disadvantage.²⁷⁵

4.8 Conclusion

Human dignity has been employed by the *Constitution* to redress previous social injustice and steer the country towards transformation. The Constitutional Court states that a situation-sensitive approach that focuses on the circumstances of people must be adopted in order to achieve substantive equality.²⁷⁶ Such an approach requires all members of society to be granted equal dignity. This means that all persons must be seen as valuable members of society who are equal in

²⁷¹ *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

²⁷² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 12 BCLR 1517 (CC) para 117.

²⁷³ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

²⁷⁴ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

²⁷⁵ Botha 2009 SAJHR 4; Ackermann 2006 SAJHR; Cowen 2001 SAHJR.

²⁷⁶ *President of the RSA v Hugo* 1997 6 BCLR 708 (CC) para 729-G.

worth and are able to live up to their full potential. Although human dignity is a concept that is difficult to define, it is at least certain that each person has inherent worth which must be respected and protected.

The *Constitution* places dignity as one of the democratic values in the country, requiring courts to apply the value when interpreting and limiting rights, including the right to equality. Courts cannot shy away from this value as it is fundamental to the society sought to be created in the new constitutional order. As a right, human dignity seeks to protect the inherent value of individuals to ensure that no person is subjected to treatment that is both humiliating and degrading. Therefore, human dignity, in its role as a value and a right, is important to achieve the fundamental goals of the *Constitution*.

Inequality jurisprudence, human dignity is consulted to ensure that all persons are recognised as equal in worth, and their dignity is not diminished. It is employed at various stages of the prohibition against unfair discrimination to determine whether the discrimination is based on the grounds that have the potential to impair fundamental human dignity or adversely affect them in a comparatively serious manner and to determine whether the discrimination is unfair.

The prohibition against unfair discrimination seeks to ensure that there is no treatment against certain groups in society which are irrational and disproportionate, and which entrench existing disadvantage in these communities.

The relationship between equality and human dignity is, therefore, fundamental in South Africa. Both notions are interdependent, and one informs the content of the other. The right to equality cannot be understood without considering the position of the individual or group in society and the social disadvantage experienced by the group. Therefore, the link between the two concepts is undeniable, and the right to equality cannot exist without the influence of the value of human dignity.

As stated above, the meaning of the phrase "or any other arbitrary ground" in section 6(1) of the *EEA* is as contemplated by the Labour Court in the *Naidoo* case. The Court labelled the legislation as "constitutionally mandated legislation" implying

that it will be informed by the Constitution. The narrow interpretation referring to the analogous grounds should be preferred over the broad interpretation suggested by Du Toit where arbitrariness itself is a ground. This approach was also adopted by the Labour Court in the *Ndudula* case.²⁷⁷ The Court expressly stated that Parliament had no intention to create a third group of grounds. Therefore, discrimination is created on the grounds that affect human dignity. In conclusion, arbitrary in section 6(1) of the *EEA* is akin to the analogous grounds.

²⁷⁷ *Ndudula and Others v Metrorail – PRASA (Western Cape)* 2017 38 ILJ 2565 (LC).

Chapter 5

Conclusion

5.1 Introduction

Discrimination in South Africa remains one of the many societal issues that need to be addressed. Whether it is based on one of the listed grounds or grounds analogous to the listed grounds, it is prevalent in society and cannot go unnoticed. Discrimination in the workplace is equally rampant and detrimental to those affected.

Discrimination laws in employment are informed mainly by the equality provision in section 9 of the *Constitution*.²⁷⁸ The adoption of the *Constitution* as the supreme law of the Republic was to establish a society that is inclusive and rids all of the political, economic and social divisions of the past. This society is one that is premised on democratic values, social justice and fundamental human rights and further improves the quality of the lives of all citizens and unleashes the potential of each individual.²⁷⁹ These values must be recognised in society as well as in the working environment.

The goal of this study was to provide some clarity on the amendment to section 6(1) of the *EEA* introducing the phrase "or any other arbitrary ground". This is to afford employees who seek to institute an unfair discrimination claim based on an "arbitrary ground" with the correct interpretation and scope of the provision. This was to be done by consulting the necessary *dictums* laid down by various courts which have developed possible interpretations relating to the amendment and to ascertain which interpretation is appropriate and should be adopted.

²⁷⁸ See para 2.3 above.

²⁷⁹ See para 2.3 above.

5.2 Findings

The Constitutional Court has laid down important principles relating to unfair discrimination within the constitutional context.²⁸⁰ These principles have largely informed the manner in which labour law legislation is interpreted in cases dealing with unfair discrimination. They are applied unequivocally by the Commission for Conciliation, Mediation and Arbitration, the Labour Court and the Labour Appeal Court. The meaning of the phrase "or any other arbitrary ground" in section 6(1) of the *EEA* is informed by how discrimination within the constitutional context is understood, taking into account the important principles contained therein.²⁸¹ However, the meaning of discrimination can only be understood once the impact and consequences of the infringement of the right to equality are addressed and resolved.²⁸²

As indicated in chapter 2, equality jurisprudence does not deny the possibility of legitimate differentiation. In the workplace, it may be legitimate to allocate a different pay scale depending on the length of service or complexity of a job, to apply a different criterion for the entitlement of benefits such as promotion, UIF payments and pension payments and to appoint one above another based on the difference in qualification and skill. It is only when the differentiation is unjustified and based on grounds that impair fundamental human dignity that unfair discrimination is present.²⁸³

An employee can allege unfair discrimination based on a ground listed in section 6(1) and may also allege unfair discrimination based on a ground that is not listed therein. This has a direct effect on the onus of proof in section 11. When unfair discrimination is alleged on a listed ground, the employer is required to prove that the said discrimination did not take place as alleged or that it was justifiable. When unfair discrimination is alleged on an unlisted, or arbitrary ground, the complainant

²⁸⁰ See para 3.2.1 above.

²⁸¹ See para 2.3.1 above.

²⁸² See chapter 3 above.

²⁸³ See para 2.3.1 above.

is required to prove that the differentiation is irrational and amounts to unfair discrimination.²⁸⁴

The *dictum* pertaining to the difference between mere differentiation and unfair discrimination which has been cemented by the Constitutional Court is clear. South African courts have applied it in matters concerning section 9 of the *Constitution* and section 6 of the *EEA*.²⁸⁵ Therefore, the meaning of the phrase "or any other arbitrary ground" must be understood within this context. In this study, it was found that the arbitrary ground must be subjected to the same objective test established in the *Prinsloo* case and *Harksen* case to determine whether unfair discrimination has been established.²⁸⁶

The Constitutional Court in the *Prinsloo* case began by distinguishing between legitimate differentiation and differentiation that is constitutionally impermissible, thus, categorising between differentiation that amounts to unfair discrimination and differentiation which does not amount to unfair discrimination.²⁸⁷ Mere differentiation is legitimate unless it is proven that there is no rational relationship between the differentiation and the purpose it is intended to achieve. For mere differentiation to constitute unfair discrimination, a rational relationship is a necessary condition. However, it is not sufficient – the differentiation must amount to unfair treatment based on characteristics or attributes that have the potential to impair the fundamental human dignity of persons or adversely affect them in a comparably serious manner.²⁸⁸ As laid down by the Constitutional Court, the proscribed conduct is unfair discrimination and not unfair differentiation.

It has been established in this study that various possible interpretations are raised for the phrase "or any other arbitrary ground". It is important to note that before the 2014 amendments to section 6(1) of the *EEA*, the provision already made

²⁸⁴ See para 2.3.2.2 above.

²⁸⁵ See again *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 26; *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 53; See para 2.3.1 above.

²⁸⁶ See para 2.3 above.

²⁸⁷ See para 2.3.1 above.

²⁸⁸ See para 2.3.1 above.

provision for unfair discrimination to be alleged on an unlisted ground through the use of the word "including".²⁸⁹ It identified that the listed grounds, as well as the grounds analogous to the listed grounds, could be used as a differentiating criterion in the test for unfair discrimination. Subsequently, this leads to the section being ambiguous to readers. The Explanatory Memorandum to the amendment does not provide much clarity on the purpose of the amendment. Therefore, it was necessary to investigate these possible interpretations.²⁹⁰

In terms of the first interpretation, the phrase "or any other arbitrary ground" could create a third ground of unfair discrimination in addition to the listed and unlisted grounds as proposed by author Du Toit.²⁹¹ The author relies on the interpretation by the Labour Court in the judgment of the *Kadiaka* case which defined the term "arbitrary" as meaning "capricious" or "proceeding merely from whim and not based on reason or principle".²⁹² Du Toit argues that if the amendment is interpreted as referring to unlisted grounds, it would be rendered redundant and will serve no purpose. Instead, the amendment should expand the scope of the prohibition against unfair discrimination to include grounds that are merely irrational and not only limited to grounds that impair human dignity. However, as established in chapter 3 above, this interpretation will create a right to rational differentiation, contrary to the *dictum* that has already been established that the prohibition is against unfair discrimination and not against differentiation or arbitrariness. Therefore, the test to establish unfair discrimination based on an arbitrary ground remains the same as that laid down by the Constitutional Court and established in the constitutional context. Although there must be a rational link between the differentiation and the purpose sought to be achieved, the differentiation must also be based on grounds that denigrate human dignity in order to potentially qualify as unfair discrimination.

²⁸⁹ See para 3.2 above.

²⁹⁰ See para 3.2 above.

²⁹¹ See para 3.2.1 above.

²⁹² See para 3.2.1 above.

The amendment may also be interpreted as referring to the rationality prerequisite in the enquiry.²⁹³ In terms of this requirement, there must be a rational link between the differentiating criterion and a legitimate purpose. The absence of such a link will render the differentiation irrational and arbitrary. As seen in the *Harksen* case, this requirement is already encompassed in the test to determine unfair discrimination.²⁹⁴ Therefore, it is unnecessary to consider this interpretation as it already forms part of the enquiry. The amendment will again be rendered redundant in this regard.

The inclusion of the phrase "or any other arbitrary ground" may be understood as synonymous to "one or more ground" or "unlisted ground".²⁹⁵ In terms of the former, the phrase would be understood as a general descriptor of both listed and unlisted grounds, bringing the section in line with section 187(1)(f) of the *LRA* as intended by the Explanatory Memorandum.²⁹⁶ However, as indicated above, this interpretation would fail when applied to section 6(1) which uses the phrase "one or more grounds" and makes a distinction between listed and unlisted grounds, as also seen in section 11 dealing with the onus of proof.²⁹⁷

In terms of the latter approach, if the amendment in section 6(1) is read with section 11(2), the amendment then refers to unspecified or unlisted grounds. This would then be in line with the Labour Court in the judgment of the *Ndudula* case which found that the amendment does not create a new category of prohibited grounds but is merely synonymous with unlisted grounds.²⁹⁸

As indicated in chapter 3 above, legal scholars argue that complainants should not have to prove unfairness of the discrimination, if they have already proved the irrationality of the conduct. However, as seen above in paragraph 3.3 read with chapter 4, there is an essential link between unfair discrimination and dignity. The

²⁹³ See para 3.2.2 above.

²⁹⁴ See para 2.3.1 above.

²⁹⁵ See para 3.2.3 above.

²⁹⁶ See para 3.2.3 above.

²⁹⁷ See para 3.2.3 above.

²⁹⁸ See para 3.2.3 above.

Constitutional Court in *President of the Republic of South Africa v Hugo*²⁹⁹ placed dignity at the core of unfairness. It held that the goal of the prohibition against unfair discrimination is to create a society that is equal in dignity and worth.³⁰⁰ The impact of the discrimination on the complainant is an important factor in determining unfairness. To assess the impact of the discrimination on the complainant, it is necessary to consider the following factors: the position of the complainant in society and whether they have been previously disadvantaged; the nature of the provision and the goal sought to be achieved by it; the extent of the discrimination on the interests of the complainant and whether their fundamental human dignity has been impaired or there has been an impairment of a comparably serious manner.³⁰¹

Human dignity is an important component of unfair discrimination. Although it has been difficult to accord meaning or definition to the notion of human dignity, it is accepted that every individual is born with inherent human worth and dignity which must be recognised and respected by all and any treatment that degrades or humiliates anyone impairs their dignity.³⁰² In South Africa, human dignity is both a founding value which informs constitutional development and is also at the core of other rights. The Constitution also recognises and entrenches the right to human dignity in the Bill of Rights. This serves as recognition of the intrinsic worth of all persons and that each individual is born with equal value and worth and is capable of contributing to society.³⁰³ The Constitutional Court in the *Makwanyane* case held that the protection of human dignity was at the centre of the new constitutional order, to prevent or eliminate the impairment of human dignity that was prevalent during apartheid. The value of human dignity plays significant functions: it is a source of constitutional rights; it informs the interpretation of rights. It also plays a role in determining the proportionality of legislation that limit constitutional rights.

²⁹⁹ 1997 6 BCLR 708 (CC).

³⁰⁰ See para 3.3 read with chapter 4 above.

³⁰¹ See para 3.3 above.

³⁰² See para 4.2 above.

³⁰³ See para 4.4 above.

What can be deduced is that human dignity is employed in equality jurisprudence to ensure that all persons are recognised as equal in worth and dignity and that their rights are respected and protected. The notions are interdependent and interrelated. To determine whether the right to equality has been infringed or not, one is required to consider the position of the complainant in society and how their dignity has been impaired by the discrimination. It cannot be found that differentiation amounts to unfair discrimination solely because it is irrational or arbitrary. The conduct must encompass the further element required; it must be based on grounds capable of impairing human dignity. The Labour Court recently confirmed the above dictum in the *Naidoo* case where it was stated that to succeed with an unfair discrimination claim, the complainant must show that the grounds relied upon are arbitrary grounds analogous to the listed grounds.³⁰⁴

5.3 Conclusion

The conclusion drawn in this study is that the 2014 amendment to section 6(1) of the *EEA* adding the phrase "or any other arbitrary ground" is merely synonymous to unlisted grounds or grounds analogous to the grounds listed in the provision. The amendment does not create a new ground of discrimination wherein which unfair discrimination may be found on arbitrary grounds which do not infringe upon the fundamental human dignity of persons. Therefore, no new grounds have been established. Any other interpretation of the amendment will not be in line with the constitutional goals of the Republic of South Africa.

³⁰⁴ See para 3.4.3 above.

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