

# **DISCRIMINATION IN THE WORKPLACE ON THE BASIS OF SEXUAL ORIENTATION**

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A LLM dissertation presented in partial fulfillment of the requirements of the degree  
Magister Legum in Labour Law at the Potchefstroomse Universiteit vir Christelike Hoër

Onderwys

*The financial assistance of National Research Foundation (NRF) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the National Research Foundation.*

by

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November 2000

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## 1. Introduction and problem statement

South Africa became the first country in the world to explicitly outlaw discrimination on the basis of sexual orientation in a constitution. Gays and lesbians (or homosexuals, as they are collectively referred to) believed that the struggle for acceptance had been won by this inclusion and by the concepts used in the Constitution, but this proved to be a misconception.<sup>1</sup> With the implementation of the *Constitution of the Republic of South Africa*, 1996<sup>2</sup>, issue of social intolerance of homosexual conduct came into prominence.

The *Constitution* contains a Bill of Rights that is regarded as the corner-stone of democracy, as it enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. Section 9(1) provides for the promotion of a society in which diversity of identity is respected and protected. The establishment of a society in which all human beings are granted equality and respect regardless of their membership of a particular group lies at the core of the equality provision.<sup>3</sup>

Section 9(3) of the *Constitution* states expressly that direct or indirect discrimination, on the basis of sexual orientation is prohibited. The impermissibility of discrimination on this basis was clearly and unequivocally indicated in *Langemaat v Minister of Safety and Security and Others*.<sup>4</sup> Discrimination against homosexuals on the basis of their sexual orientation seems also to be in conflict with constitutional values. Therefore the role of the constitutional values in interpretation of section 9(3) of the *Constitution* needs to be investigated.

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1 Mischke C "Big law –little wrong" 1995 *Codicillus* 42.

2 Hereinafter referred to as "the *Constitution*".

3 De Vos P "Equality for all?" 2000 *THRHR* 63.

4 *Langemaat v Minister of Safety and Security and Others* 1998 2 All SA 259 (T); 1998 19 ILJ 240 (T).

The right afforded, guaranteed and supposedly protected in section 9(3) of the *Constitution* is extended by section 23 of the *Constitution*, as fair labour practices are guaranteed.<sup>5</sup>

The main objective of the *Labour Relations Act* 66 of 1995<sup>6</sup> is to give effect to section 23 of the *Constitution*. In so doing it promotes economic development, social justice, labour peace and the democratisation of the workplace. The rights of the individual gay or lesbian worker is explicitly protected in section 187(1)(f) of the *Labour Relations Act*, which prohibits discriminatory dismissals on the basis of sexual orientation.

The *Employment Equity Act* 55 of 1998<sup>7</sup> promotes the constitutional right to equality and the exercise of true democracy, by prohibiting unfair discrimination in employment. Section 6 of the repealed and replaced Schedule 7 item 2(1)(a) of the *Labour Relations Act*, unambiguously prohibits unfair discrimination based on sexual orientation. Grogan<sup>8</sup> states that the residual unfair labour practice definition renders unfair any act or omission involving the "unfair discrimination, either directly or indirectly" against any employee on various grounds. Therefore this includes any employment practice which has the effect of unfairly discriminating in any way and for any reason.<sup>9</sup>

The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000<sup>10</sup> gives effect to section 9, read with item 23(1) of Schedule 6 of the *Constitution*.<sup>11</sup> The *Discrimination Act* is the long-awaited weapon against discrimination, the weapon with which many people hope discrimination will be eradicated. The *Discrimination Act*, however, contains many ambiguous sections and the actual test of the elimination of discrimination will be the successful implementation thereof.

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5 Section 23 (1) : "Everyone has the right to fair labour practices."

6 Hereinafter referred to as the "*Labour Relations Act*".

7 Hereinafter referred to as "the *Equity Act*".

8 Grogan *Workplace Law* 202.

9 For example the employment practice of South African Airways not to employ persons who are less than 157,7 cm or more than 188 cm tall.

10 Hereinafter referred to as "the *Discrimination Act*".

11 The *Discrimination Act* was promulgated on 1 September 2000.

The implementation of the *Discrimination Act*, read with section 23(1) of the Constitution and the above-mentioned acts<sup>12</sup>, has to be investigated with regard to sexual orientation.

(Some writers<sup>13</sup> are of the opinion that legislation that relies solely on banning discrimination in order to promote equality, is unlikely to be effective. The effectiveness of elimination of discrimination in the workplace has to be investigated.

The discrimination homosexuals still face in South Africa, regardless of an impressive and protective *Constitution*, is alarming and disturbing. The re-occurring and ever present tendency to treat homosexuals as different people remains in South African society and the workplace irrespective of the *Constitution*.<sup>14</sup>

Regardless of the measures taken in all the above-mentioned legislation, discrimination against people on the basis of their sexual orientation still occurs in the workplace. The research question for this paper investigates whether the *Constitution* and the legislation affords adequate protection to homosexuals. To protect the rights of homosexuals in our society, as a democratic and free society, a legal remedy is needed together with reform and a change of attitude.<sup>15</sup>

A void exists in South African law and there is room for reform to end and rectify the injustice and inequality that the homosexual community suffers.

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12 The *Labour Relations Act* and the *Equity Act*.

13 – Christie S *ea* “Submissions on the promotion of an Equal Opportunities Draft Bill” (1993) *Current Labour Law* 127.

14 Same-sex couples are still not granted the same employment benefits as married heterosexual couples, or even unmarried heterosexual couples in the workplace. Furthermore society refuses to recognise same-sex marriages.

Singh D "The refusal to recognise same-sex marriages" 1999 *De Jure* 29.

15 Neither the *Langemaat* case nor the Pension Funds Adjudicator cases regarding medical aid and pension benefits to same-sex couples would ever have been adjudicated in our court if not for discrimination and prejudice.

The purpose of this study is to propose legal reform regarding the implementation of anti-discrimination clauses in the above-mentioned legislation and to ensure that a proper remedy and procedure is available to victims of discrimination.

## 2. Definitions

### 2.1 Workplace

The *Basic Conditions of Employment Act 75 of 1997*<sup>16</sup> defines a *workplace* by its ordinary meaning, simply as any place/s where employees (of an employer) work.

The *Labour Relations Act* offers a lengthier definition for *workplace*<sup>17</sup>, with the concept of *workplace* having different meanings in different contexts, the most distinct difference being between the public and private sector. In the public sector the *workplace* is determined by ministerial fiat.<sup>18</sup> In the private sector it means "the place or places where the employer work", with the employment relationship as the primary criterion. As Brassey<sup>19</sup> rightly notes, the nature of a *workplace* in the public sector is a question of fact. In *Oil Chemical & General Workers Union v Total SA (Pty) Ltd*<sup>20</sup> the commissioner observed that two factors could be given consideration in determining a *workplace*.<sup>21</sup>

Given the wide range of enterprise structures that currently exist the definition elaborates in section 213(c) of *Labour Relations Act* to provide a secondary set of criteria when an employer conducts business in two or more places.

### 2.2 Homosexual person

The Concise Oxford Dictionary<sup>22</sup> describes a *homosexual person* as someone feeling or being involved in a sexual attraction to people of their own sex. Rightly so, Ackermann J

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16 Hereinafter referred to as "the *Basic Conditions of Employment Act*".

17 Section 213, *Labour Relations Act*.

18 Section 213(b), *Labour Relations Act* and Brassey M *Commentary* A9:33.

19 Brassey M *Commentary* A9:33.

20 *Oil Chemical & General Workers Union v Total SA (Pty) Ltd* (1999) 20 ILJ 2176 (CCMA) at 2177C.

21 Firstly the "workplace" must be consistent with the statutory definition in the *Labour Relations Act* and secondly the demarcation of workplaces must accord with the objectives of the Act and be functional.

22 Pearsall J (ed) *Concise Oxford Dictionary* 681.

in *S v H* quoted Jansen J<sup>23</sup> describing or defining *homosexual* individuals as persons who form intimate relationships with those of their own sex.

### 2.3 *Gay and Lesbian*

With reference to the definition of homosexual individuals in *S v H*<sup>24</sup> a derivation can be made as to the most correct way of describing *gays* and *lesbians* respectively. *Gay* refers to a homosexual person and includes a woman, but especially refers to a man,<sup>25</sup> predating the term homosexual by a few centuries, whereas the Concise Oxford Dictionary describes a *lesbian* as a homosexual woman.

### 2.4 *Sexual orientation*

The only definition of *sexual orientation* applicable in the context of this paper is that of Cameron<sup>26</sup>. He defines *sexual orientation* by reference to erotic attraction – in the case of heterosexuals, to members of the opposite sex, and in the case of homosexuals (gays and lesbians), to members of their own sex. Ackermann J endorsed a similar definition in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.<sup>27</sup>

The court gave a generous interpretation of the term *sexual orientation*, referring to the sexual identity adopted by individuals themselves and to cases where individuals might identify as 'heterosexual' but might actually experience emotional and physical attraction towards a person of the same gender.<sup>28</sup>

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23 *S v H* 1995 1 SA 120 (CPD) at 123F.

24 *S v H* 1995 1 SA 120 (CPD).

25 Pearsall J (ed) *Concise Oxford Dictionary* 589.

26 Cameron E "Sexual orientation and the Constitution: a test case for human rights" 1993 *SA Law Journal* 542.

27 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) at 1533G.

28 De Vos P "Sexual orientation and the Bill of Rights" *Bill of Rights Compendium* 3J2.

### 3. Discrimination legislation

#### 3.1 *The structure of discrimination legislation*

Legislation prohibiting direct or indirect 'unfair' discrimination contains the notion of expressly stating the discrimination as being 'unfair',<sup>29</sup> for example section 9(3) – (5) of the *Constitution*. Kentridge<sup>30</sup> mentions that the formulation and inclusion of the pejorative connotation of the word 'discrimination' is unusual, as most constitutional and legislative instruments that outlaw discrimination left 'discrimination' to speak unaided to those who interpret them.

The Constitutional Court interpreted the term on many occasions<sup>31</sup> and drew a conclusion in *Prinsloo v Van der Linde*.<sup>32</sup> Kentridge<sup>33</sup> concluded that this meant that the word 'unfair' does more than distinguish between kinds of differentiation. It also distinguishes between permissible and impermissible discrimination, where discrimination itself has a pejorative meaning.

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29 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 778.

30 Kentridge J "Equality" in Chaskalson et al (eds) *Constitutional Law of South Africa* (Revision Service 3, 1998) 14-11.

31 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 779 footnote 43.

32 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC)

At [par] 31 'The prescribed activity is not stated to be "unfair *differentiation*" but is stated to be "unfair *discrimination*". Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people on attributes and characteristics attaching to them.'

33 Kentridge J "Equality" in Chaskalson et al (eds) *Constitutional Law of South Africa* (Revision Service 3, 1998) 14-18.

## 3.2 *Measures protecting equality*

### 3.2.1 *Constitution of the Republic of South Africa, 1996*

As was already stated, the South African *Constitution* was the first in the world to explicitly prohibit unfair discrimination on the basis of sexual orientation in a national constitution.<sup>34</sup>

Section 1(a) and (b) of the *Constitution* as founding provisions state that the Republic of South Africa is one sovereign, democratic state founded on the values such as human dignity and the achievement of equality, non-racism and non-sexism. The Bill of Rights in section 7(1) reaffirms this by stating that it is "the corner-stone of democracy in South Africa" and that it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

De Vos<sup>35</sup> argues that the *Constitution* contains a commitment to reject past hatred and prejudices as a basis of public conduct and decision-making. Both the interim and final Constitutions envisioned a democratic society with equality as a core value<sup>36</sup> and to achieve and realise this commitment the *Constitution* includes an equality clause<sup>37</sup>.

Section 9 states the following:

(1) Everyone is equal before the law and has the right to protection and the benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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34 De Vos P "Sexual orientation and the Bill of Rights" *Bill of Rights Compendium* 3J1.

35 De Vos P "Equality for all?" 2000 *THRHR* 62 - 75.

36 This value was applied in *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 1532 (CC) at 161F - 162D.

37 Section 9, *Constitution*.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth. (emphasis added)

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The *Constitution* in section 9(1) grants everyone the right to equal protection and benefit of the law, with the right including the full and equal enjoyment of all rights and freedoms.<sup>38</sup> Section 9(3) includes sexual orientation as a ground on which no-one may discriminate directly or indirectly against anyone. It must be noted that apart from this equality clause, the courts and other tribunals are also urged to "promote the values that underlie an open and democratic society based on human dignity, freedom and equality"<sup>39</sup>.

Section 9 is not an absolute provision and may be limited where the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>40</sup>

Heinze<sup>41</sup> identifies three spheres of recognition of sexual minorities by a legal system and the sphere of importance for this paper is the enforcement of non-discrimination in the field of employment. Of further importance is the argument of Cameron<sup>42</sup> that equality is the appropriate principle on which to develop and fight for gay and lesbian rights.

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38 Section 9(2), *Constitution*.

39 Section 39(1), *Constitution*.

40 Section 36, *Constitution*.

41 Heinze E *Sexual orientation* 105 – 115.

42 Cameron E "Sexual orientation and the Constitution: a test case for human rights" 1993 *SA Law Journal* 464.

Michael Katz<sup>43</sup> disagrees and argues that equality may in fact restrict constitutionally based sexual orientation claims and that the right to privacy would offer greater protection to homosexuals. Cameron's<sup>44</sup> opinion that the only plausible argument which adequately recognises sexual orientation as an impermissible ground of discrimination is based on the claim to the equal protection of the law. The writer identified this argument for the purposes of the labour and employment law as an appropriate point of departure for non-discrimination on the ground of sexual orientation in the workplace.

### 3.2.2 *Relevant legislation*

#### (a) Labour Relations Act 66 of 1995

The prohibitions of non-discrimination contained in the *Constitution of the Republic of South Africa* 200 of 1993<sup>45</sup> was incorporated into the *Labour Relations Act* together with the principles developed by the Industrial Court to form a broad framework which could condemn and strike down any unfair discrimination.

Dupper and Garbers<sup>46</sup> observed that the same formulation for unfair discrimination in the *Constitution* was also favoured by the task team that drafted the *Labour Relations Act*. Section 185 prohibits unfair dismissals with section 187(1)(f) prohibiting discriminatory dismissals and schedule 7 item 2(1)(a) prohibiting discrimination against applicants for work and those already employed on sixteen listed grounds.<sup>47</sup>

Should a dismissal be based on one of the grounds listed in section 187(1)(f), it will automatically be unfair. Schedule 7 item 2(1)(a) introduced the new concept of residual

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43 Katz M "Close Encounters of the Third Kind" 1996 *SAJHR* 308.

44 Cameron E "Sexual orientation and the Constitution: a test case for human rights" 1993 *SA Law Journal* 464.

45 Hereinafter referred to as the "1993 *Constitution*".

46 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 778.

47 Section 6, *Equity Act* 55 of 1998 has since been repealed and replaced schedule 7 item 2(1)(a), *Labour Relations Act* 66 of 1995.

unfair labour practice, concerning itself with the conduct of the employer towards employees, and specifically unfair discrimination.

(b) Equity Act 55 of 1998

The *Equity Act* has as its objective the eradication of the demographic inequalities of the past. In accomplishing this, the aims of the *Equity Act* consists of two components, with the first contained in chapter II. This chapter replaces and refines the prohibition of unfair discrimination as set out in schedule 7 item 2(1)(a) of the *Labour Relations Act*.<sup>48</sup>

The implementation of this piece of legislation took over the function first fulfilled by the *Labour Relations Act*.<sup>49</sup> The *Equity Act* replaced all the relevant parts of the *Labour Relations Act* and in doing so, placed a duty on employers by way of section 5 of the *Equity Act*.

Section 6(1) of the *Equity Act* prohibits direct and indirect discrimination by explicitly providing that 'no person' may unfairly discriminate against 'an employee' on any grounds including those mentioned in this section. Du Toit<sup>50</sup> states that this arguably applies to trade unions as well, overriding the more limited prohibition contained in section 95(6) of the *Labour Relations Act*.

The prohibition in schedule 7 item 2(1)(a) relates only to employers, but section 6 of the *Equity Act* prohibits all persons from discriminating unfairly against employees and applicants for employment within the scope of an employment policy or practice. An employment policy or practice is defined to include, but is not limited to, recruitment procedures, advertising and selection criteria, appointments and appointment processes, job classification and grading, remuneration, employment benefits and terms and

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48 The *Equity Act* lists nineteen grounds of prohibited discrimination in the employment law specifically in section 6(1), namely race, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

49 As mentioned in 3.2.(a) above.

50 Du Toit *ea Labour Relations Law* 116.

conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, disciplinary measures and dismissals.<sup>51</sup>

The *Equity Act* can furthermore hold employers liable under certain circumstances for acts of unfair discrimination by any of their employees *while at work*.<sup>52</sup>

(c) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The *Discrimination Act* has its origin in section 9(4) of the *Constitution*. This section requires national legislation to prevent and prohibit unfair discrimination. The objectives of this piece of legislation are *inter alia* to eliminate unfair discrimination and to promote equality.

Section 6 of the *Discrimination Act* states that no person may unfairly discriminate against any other person on the various prohibited grounds in the provision.

The *Discrimination Act* is more encompassing than the *Equity Act* and will have a great impact on employment and labour relations, as its focus falls particularly on private discrimination.<sup>53</sup> This act incorporates a specific duty to promote equality<sup>54</sup> and also binds small employers who were excluded from having to implement the affirmative action obligation in the *Equity Act*.

Discrimination is defined as any act or omission, including any act or a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations,

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51 Section 1, *Equity Act*.

52 Section 60, *Equity Act*.

53 Private discrimination can be defined as discrimination practised by individuals or institutions other than the state.

54 Section 24, *Discrimination Act*.

or disadvantages on, or withholds benefits opportunities or advantages from any person on a prohibited ground.<sup>55</sup>

Some the noteworthy provisions for the labour law are item 5(b) which refers to "unfair residual refusal", on one or more of the prohibited grounds, to provide or make available an insurance policy to any person, item 5(c) which refers to unfair discrimination in the provision of benefits, facilities and services related to insurance and item 6 which refers to the unfair exclusion of any person from membership of a retirement fund, or from receiving any benefits from the fund.<sup>56</sup>

Christie<sup>57</sup> is of the opinion that legislation which promotes equality by exclusively relying on banning discrimination is unlikely to be very effective, the reason being that such legislation deals with unjustified disadvantage in a purely defensive and negative way.

Time will tell whether this piece of legislation will achieve all it was created to do. Barker<sup>58</sup> is of the opinion that this legislation has too many shortcomings, and that it is an opportunity lost for creating a joint vision for a rainbow nation.

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55 Section 1(1)(viii), *Discrimination Act* and Barker F "Concerns over the Promotion of Equality Act remains" *Contemporary Labour Law* 26.

56 Section 1(viii), *Discrimination Act*.

57 Christie S "Submissions" *Current Labour Law* 127.

58 Barker F "Concerns over the Promotion of Equality Act remains" *Contemporary Labour Law* 28.

## 4. Equality, discrimination and unfair discrimination

### 4.1 *Synopsis*

In a century where equality came to be recognised as a supreme and constitutional right and value, the South African society approved and encouraged the development of the habit to use the visible and less visible differences between people to categorise those who were different. An environment of discrimination leads to a culture of intolerance, which is evident in our society today.<sup>59</sup>

Before establishing discrimination and the unfairness thereof, one first needs to examine the two concepts central thereto, namely equality, as a guaranteed fundamental right and value in the *Constitution*, and discrimination as a prohibition contained in the *Constitution*. Subsequently the establishment of discrimination and the unfairness that accompanies it will be discussed. The two forms of discrimination, namely fair and unfair discrimination will also fall within the ambit of this discussion. Thereafter a number of discriminatory laws and practices will be discussed with recent case law (or the lack thereof) as illustration to the problem.

### 4.2 *Equality and discrimination*

#### 4.2.1 *Equality*

De Waal<sup>60</sup> describes equality as a difficult and deeply controversial social idea. At its most basic and abstract, the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly. Kentridge<sup>61</sup> quoted Aristotle who said that equality is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference.

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59 Van der Westhuizen "Different but equal" 1996 *VUKA SA* 13.

60 De Waal J el at *The Bill of Rights Handbook* 182.

61 Kentridge J "Equality" in Chaskalson A *ea* (eds) *Constitutional Law of South Africa* Revision Service 3 1998 14-3.

Equality is one of the core rights and values of the *Constitution*, just as it was in the 1993 *Constitution*. The preamble to the *Constitution* envisions and articulates the ideal of a democratic and open society. In realising a society based on democratic values, social justice and fundamental human rights, every person is equally protected by law. For this purpose, the *Constitution* includes an elaborate equality clause.<sup>62</sup> Equality is therefore a goal to be achieved<sup>63</sup>, through the legal enforcement thereof.

A distinction can however be drawn between formal equality and substantive equality.<sup>64</sup> Formal equality is understood to be the demand of equal treatment of individuals regardless of their actual circumstances. For a formal perspective it is presupposed that all persons are equal bearers of rights within a just social order.<sup>65</sup> De Vos<sup>66</sup> states that this view sees inequality as an aberration which can be eliminated by extending the same rights to all in accordance with the same neutral norm.<sup>67</sup>

Substantive equality, on the other hand, takes actual economic, social and political circumstances of groups of people and individuals into account in order to determine whether the *Constitution's* commitments to equality is being upheld.<sup>68</sup> Just as was the case with the 1993 *Constitution*, the *Constitution* promotes the substantive conception of equality by application.

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62 See paragraph 3.2.1 above for the complete text of section 9, *Constitution*.

63 Section 1(a), *Constitution*.

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

65 Supporters of substantive equality argues that formal equality is blind to entrenched structural inequality, as it ignores the actual social and economic disparities between people.

66 De Vos P " Equality for all?" 2000 *THRHR* 67.

67 For example, a formal conception of equality is achieved if all children are educated according to the same school curriculum.

68 De Waal J *et al The Bill of Rights Handbook* 184 and De Vos P " Equality for all?" 2000 *THRHR* 67.

De Vos<sup>69</sup> states that such an enquiry reveals a world of systematic and pervasive group-based inequality, which needs to be taken into account in the formulation of jurisprudential approaches to equality rights.<sup>70</sup>

When analysing the equality provision of the *Constitution* in the context of the principles and purpose of the *Constitution* to overcome the burden of inequality, one sees that the substantive approach to equality supports the fundamental values of human dignity, freedom and equality, named in the *Constitution*.

Section 9(2) of the *Constitution*<sup>71</sup> is an important indication that the *Constitution* envisioned the substantive conception of equality.<sup>72</sup>

The Constitutional Court has adopted the anti-discrimination principle as the centre of its approach to equality.<sup>73</sup> The reason for this being the nature of our history of apartheid and oppression.<sup>74</sup> With the constitutional acknowledgement to redress its effects, the centrality of the anti-subjugation principle to the equality clause is clear. Thus in order for a person to succeed with an equality challenge, he or she will be obliged to frame the matter as one of unfair discrimination, and not particularly in terms of a claim to equality.

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69 De Vos P " Equality for all?" 2000 *THRHR* 67.

70 Ackermann T stated the following in elaboration of the Constitutional Court's substantive approach to equality in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) at par 60 1546: "It is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, unless remedied, may continue for a substantial time and even indefinitely."

71 (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

72 *National Coalition for Gays and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 62.

73 The substantive manner of dealing with equality in terms of section 8 of the 1993-*Constitution* was followed in among others *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC), *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) and *President of South Africa v Hugo* 1997 4 SA 1 (CC). The court proceeded with this assumption in terms of section 9 of the *Constitution* in *National Coalition for Gay and Lesbian Equality v Minster of Justice* 1998 12 BCLR 1517 (CC).

74 This was observed by O'Regan in *Brink v Kitshoff* 1996 4 SA 197 (CC).

This method proves correct and relevant as the court has justified its support for a structured approach to non-discrimination with reference to section 9 of the *Constitution* and policy considerations<sup>75</sup> in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>76</sup>.

#### 4.2.2 Discrimination

De Waal<sup>77</sup> defines discrimination as a particular form of differentiation, namely differentiation on illegitimate grounds. Differentiation is therefore discriminatory where it is capable of either promoting or perpetuating the view that the individual adversely affected by the distinction is less capable, or less worthy of recognition or value as a human being or member of a society, when he or she is equally deserving of concern, respect and consideration.<sup>78</sup> The judges of the Constitutional Court have unanimously embraced the idea that at its core, the equality guarantee protects individuals' human dignity.<sup>79</sup> This notion was reinforced by the judgement in *President of South Africa v Hugo*,<sup>80</sup> where the following was stated:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose for our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

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75 The employment policies of SAA were challenged in *Hoffmann v South African Airways* 2000 2 SA 628 (W) and *Hoffmann v South African Airways* CCT 17/00 . Their policies are based on operational requirements, which can be recognised for the purposes of discrimination justification. The court of first instance shared these sentiments, but the Constitutional Court held that, although legitimate commercial requirements are important, they cannot serve to disguise stereotyping and prejudice.

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

77 De Waal J et al *The Bill of Rights Handbook* 193.

78 *Egan v Canada* (1995) 124 DLR (4th) 609 at 638E.

79 De Vos "Equality for all?" 2000 *THRHR* 65.

80 *President of South Africa v Hugo* 1997 4 SA 1 (CC) par 41.

The equality clause prohibits unfair discrimination, with the determining factor being the effect and impact of the discrimination on its victim(s). The word 'unfairly' distinguishes between different kinds of differentiation and between permissible and impermissible discrimination.<sup>81</sup> Unfair discrimination principally means treating people differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>82</sup> Section 9(3) of the *Constitution* contains a list of listed illegitimate grounds of differentiation, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. When one of these grounds are involved, for example sexual orientation, the applicant only needs to prove discrimination on that ground.

In *Harksen v Lane*<sup>83</sup> the Constitutional Court stated that determining whether a differentiation amounts to unfair discrimination in terms of section 9(3), requires a two-stage analysis. The Court developed a set of guidelines in paragraph 53 to be used in determining whether the alleged discrimination is unfair or not.

The stages of enquiry can be described as follows:

- (a) Does the provisions differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If not then there is a violation of ss (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 specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and

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81 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 779.

82 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) at par 31.

83 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

characteristics which have potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable, serious manner.

- (ii) If the differentiation in question 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 of 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 s 8(2).

- (c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provisions can be justified under the limitations clause (section 33 of the interim Constitution).<sup>84</sup>

#### 4.3 *Establishing discrimination*

In terms of section 10(2) of the *Equity Act* discrimination can consist of an act or omission.

A distinction can be drawn between direct and indirect discrimination, even though both these forms of discrimination are prohibited by law. The distinction ensures that all possible forms of discrimination on listed or analogous grounds are covered.<sup>85</sup> Direct discrimination occurs when the reason or motivation for the discrimination is explicit, for example the refusal to employ a job applicant because he is over 20 years of age. Indirect unfair discrimination entails that although the basis of the differentiation may be

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84 *Harksen v Lane* 1997 11 BCLR 1489 (CC) at par [53].

85 De Waal J el at *The Bill of Rights Handbook* 201.

innocent, the impact or effect thereof is adversarial. In the same instance it is possible that a law may be administered unfairly.<sup>86</sup>

The first step in establishing discrimination, is the question whether the differentiation amounts to discrimination and should this discrimination be based on one of the specific listed grounds of section 9(3) of the *Constitution*, discrimination will have been established. Seeing that this paper concerns itself with discrimination on one of the specific grounds, the unspecified and analogous grounds will not be discussed.

It can thus be said that a link between the differentiation and one of the listed grounds must exist in order to establish discrimination.<sup>87</sup> An applicant following the *Harksen v Lane*<sup>88</sup> judgement would therefore have to show that the differentiation is based on attributes and characteristics (not to be defined narrowly) which impair the fundamental dignity of persons as human beings or affect them adversely in a comparable way.

In *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others*<sup>89</sup> it was found that the intention to discriminate need not be present, the only fact relevant to the enquiry is whether the discrimination in fact took place.

In establishing discrimination one needs to focus on the outcome or effect of the employment practices and whether the practices has differential effects on people of different status.

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86 The majority of the Constitutional Court in *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC) found the selective recovery of outstanding service charges by the Council to be discriminatory.

87 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 780.

88 *Harksen v Lane* 1997 11 BCLR 1489 (CC) at par [46].

89 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC).

#### 4.4 *Establishing unfairness*

Once discrimination has been established, the question arises of how a court will determine unfairness. Again *Harksen v Lane* provides us with an answer. If the discrimination has been found on a specific ground, the unfairness thereof is presumed.<sup>90</sup> Should the discrimination be based on one of the prohibited grounds of discrimination in the *Constitution*, the *Labour Relations Act* or the *Equity Act*, not only will discrimination have been established in terms of the first enquiry of *Harksen v Lane*<sup>91</sup>, but the unfairness thereof is also presumed.<sup>92</sup>

The court listed various factors that must be taken into account in determining the unfairness or otherwise. The factors are (a) the position of the complainants in society; (b) the nature of the provision or power and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the rights of the complainants and whether it has led to an impairment of their fundamental dignity.<sup>93</sup>

This list is, however, not a *numerus clausus* of the factors that will assist in giving precision and elaboration to the constitutional test of unfairness,<sup>94</sup> with each case being judged and analysed on its own merits.

The Constitutional Court considered the fairness of discrimination on the basis of citizenship in *Larbi-Odam v MEC for Education (North-West Province)*.<sup>95</sup> The issue that had to be decided was the constitutionality of a regulation purporting to exclude non-South African citizens from permanent employment as educators. Differentiation of this nature amounts to unfair discrimination, as a person<sup>96</sup> is denied the rights afforded to him

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90 *Harksen v Lane* 1997 11 BCLR 1489 (CC) at par [53].

91 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

92 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 785.

93 *Harksen v Lane* 1997 11 BCLR 1489 (CC) at par 37 and 51.

94 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 784.

95 *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC).

96 Every person regardless of citizenship is entitled to the rights contained in the Bill of Rights.

in terms of the *Constitution*, since it was not consistent with any other rights that the citizens might enjoy.

*Pretoria City Council v Walker*<sup>97</sup> is the leading case illustrating the distinction between unfair discrimination and discrimination that is not unfair. It was held that unfair discrimination is differentiation that has an unfair impact on its victims. Whereas discrimination that is not unfair is differentiation in cases where the supposed victim had not been disadvantaged by racial policies and practices of the past and in an economic sense not been vulnerable, and rather benefiting from past discrimination than being adversely affected.<sup>98</sup>

#### **4.5 Justification of discrimination and justifying unfair discrimination**

The purpose, actions and reasons of the respondent in every case also deserves attention. Unfairness was initially determined from the perspective of the applicant or rights holder, but the respondent might have a justifiable reason for discriminating against the rights holder.<sup>99</sup>

The *Constitution* makes provision for the limitation of fundamental rights and the enquiry of justification will take place under the limitation clause.<sup>100</sup> The *Labour Relations Act* and the *Equity Act* includes this enquiry in the general enquiry into unfairness.

For this part of the enquiry to be satisfied the "law" or "act" in question serves an acceptable purpose and there is sufficient proportionality between the harm done by it and the benefits it is designed to achieve.<sup>101</sup> The unfairness test laid down by the Labour

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97 *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC).

98 *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC) at par 47.

99 In *President of South Africa v Hugo* 1997 6 BCLR 708 (CC) the majority found the gender discrimination not to be unfair. The decision of the President benefited children and gave women with minor children an advantage. Thus an important social goal was to be achieved and the discrimination was against a class of individuals (fathers) who had not historically been subject to disadvantage.

100 Section 36, *Constitution*.

101 De Waal J et al at *The Bill of Rights Handbook* 121.

Court in *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & others*<sup>102</sup> endorsed the enquiry which requires the object of the discrimination to be legitimate and the means used to achieve it proportional and rational.<sup>103</sup>

Dupper and Garbers<sup>104</sup> states that it would seem that in the employment sphere, fairness and justification have been moulded into one enquiry. Firstly the *Labour Relations Act* and the *Equity Act* provides 'justification grounds' and item 2(1) of schedule 7 to the *Labour Relations Act* and section 6 of the *Equity Act* each states that employer conduct under their ambit "does not constitute" or "is not" unfair discrimination.

In the *Leonard Dingler* case<sup>105</sup> the general fairness defence claims of discrimination laid down by the Labour Court was formulated as follows:

Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.<sup>106</sup>

In terms of this formulation, if the employer can show that the denial of benefits to the same-sex partner of an employee has a legitimate object and that the means used to achieve that object is proportional and rational, the discrimination will be held not to be unfair.<sup>107</sup> The investigation of the Labour Court into the group that suffered the discrimination, the effect of the discrimination on that group, and the power in terms of

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102 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC)

103 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC) at 1448I – J.

104 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 785.

105 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438.

106 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC) at 1448I – J.

107 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 785.

which the discrimination was effected, must be additional to the factors mentioned above.<sup>108</sup>

This line of enquiry differs from the one set out under the *Constitution* only in the fact that the *Labour Relations Act* combines the two enquiries into one, as for the rest both approaches contribute to the development of an equality jurisprudence that is both consistent and coherent.<sup>109</sup>

What would the situation be if not the employer, but an organisation independent of the employer's control denied the benefit? An important material difference in approaches to fairness and justification is that the employer need not be the party to the perpetration of discrimination. Section 6 of the *Equity Act* does not require the employer to be the perpetrator, in *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others*<sup>110</sup> the court accepted that the absence of employer control over an institution providing benefits, as perpetrator of the discrimination, is not necessarily a bar to proceedings in terms of the *Labour Relations Act*.

#### 4.6 *The practical test applicable in the employment law*

Du Toit<sup>111</sup> reduced the test for unfair discrimination in the employment context to three questions, the first being whether there has been differential treatment of the employee(s) or workseeker(s) in question. The second question arises when the first was answered in the affirmative, subsequently it should be asked if the differential treatment had a pejorative nature. If both above-mentioned questions are answered in the affirmative, discrimination is established and lastly the third question, namely whether any reason offered to show that it was fair and justified, must be asked.

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108 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC) at 1448E.

109 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 ILJ 787.

110 *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC) at 1448D– I.

111 Du Toit *D ea Labour Relations Law* (Butterworths Durban 1999).

#### 4.7 *Relevant case law applicable on the employment relationship*

##### 4.7.1 *Langemaat v Minister of Safety and Security*<sup>112</sup>

The applicant, a lesbian, lived with her partner for almost twelve years, and together they owned a house, jointly bore the financial expenses and each was the beneficiary of the other's life insurance policy.<sup>113</sup> The applicant was a member of the South African Police Service and Polmed, the medical aid scheme available to all employees of the Service and their families.

The regulations governing Polmed contained the definition of dependant as "the legal spouse or widower or the dependant child of a member"<sup>114</sup>, and since same-sex marriages are prohibited by law, the applicant could not marry her partner and subsequently her partner did not qualify in terms of the definition and as result could not enjoy the benefits accorded to the "legal spouse" of a member.

The applicant based her case on section 9(3) of the *Constitution*<sup>115</sup> as she requested the court to consider the refusal to register her partner to the medical aid scheme as discriminating and to declare such discriminatory regulations and rules invalid and contradicting to section 9(3) of the *Constitution*. The court held that Polmed's rejection to register the applicant's partner did indeed amount to a contradiction of the terms of the *Constitution* prohibiting discrimination on the ground of sexual orientation.<sup>116</sup>

The consequence of the equality provisions of the *Constitution* and the *Langemaat* case is that medical aid schemes can no longer lawfully exclude same-sex life partners as dependants of members.<sup>117</sup> Such exclusion will amount to unfair discrimination in terms

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112 *Langemaat v Minister of Safety and Security* 1998 19 ILJ 240 (T).

113 *Langemaat v Minister of Safety and Security* 1998 19 ILJ 240 (T) at 242A-C.

114 Regulation 30(2)(b), promulgated by GN 203 of 14 February 1964 and amended by GN R1864 of 4 November 1994.

115 For the full text of section 9(3), *Constitution* see footnote 3 above.

116 *Langemaat v Minister of Safety and Security* 1998 19 ILJ 240 (T) at 244B.

117 Van der Walt G "Gay rights and medical aid schemes" 1998 *Obiter* 199.

of section 9(3) of the *Constitution*, and item 2(1)(a) of schedule 7 to the *Labour Relations Act* and section 7 of the *Equity Act*, that would both be unfair and difficult to justify.

Dupper and Garbers<sup>118</sup> are of the opinion that the *Langemaat* case and judgement is in many ways an opportunity lost. I share the sentiments of these two writers. The High Court had the unique opportunity to contribute meaningfully to the emerging equality jurisprudence and provide guidelines to employers and institutions on their obligation to provide employment-related benefits on a non-discriminatory basis.

Although the correct conclusion was reached by the court, it failed completely in the chance given by the applicant and her equality argument by not relying upon that very argument while developing the common law to promote the spirit, purport and objects of the Bill of Rights.<sup>119</sup>

The High Court should have made use of the opportunity to deal with an argument based on equality, and in doing so could have made a meaningful contribution to the equality and discrimination jurisprudence.

#### 4.7.2 *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and another*<sup>120</sup>

The *Aliens Control Act* 96 of 1991, section 25(5) was declared invalid to the extent that the benefit conferred by it was exclusively conferred on spouses, which was inconsistent with section 9(3) of the *Constitution* in that it discriminated against same-sex couples or life partners, and that it did so on the ground of sexual orientation.<sup>121</sup>

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118 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 773 - 807.

119 Section 39(1), *Constitution*.

120 *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and another* 2000 1 BCLR 39 (CC).

121 *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and another* 2000 1 BCLR 39 (CC) at 40E – G.

The Constitutional Court found it just and equitable and an appropriate remedy to read-in the words "or partner, in a permanent same-sex life partnership" after the word "spouse", and that this remedy would be the most effective way of correcting the constitutional defect in section 25(5) with precision. Permanent in this context means an established intention of the parties to cohabit with one another permanently.<sup>122</sup>

It should, however, be noted as a point of relevant importance that the court found in the light of circumstances and after examining the legislature's right, that it did not intrude impermissibly upon the domain of the legislature.<sup>123</sup> A court ordering a similar read-in should be cautious not to order an appropriate remedy, but which might interfere with the rights of the legislature.

The significance of this case for the employment law is that while discriminating laws, practices, rules, regulations and procedures still exist, a suitable reading-in could eliminate the discriminating feature.

#### 4.7.3 *Hoffmann v South African Airways*<sup>124</sup>

Mr Hoffmann had applied for a position as a flight attendant with the South African Airways (SAA). His application was processed in the normal manner and he attended numerous interviews. A medical examination was one of the last steps in the process and in the course of this examination Mr Hoffmann was found to be HIV positive and as a result thereof he was found unsuitable for employment with the South African Airways.<sup>125</sup>

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122 *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and another* 2000 1 BCLR 39 (CC) at par [86].

123 In adjudicating fundamental rights it is important for the courts not to perform the functions of the other government bodies. The concept of separation of powers entails that the three separate arms of government, namely the executive, judicial and legislative arms act independently without interfering with the others duties and acts. In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC) it was illustrated how, without interference, a court could order a particular remedy to enforce fundamental rights.

124 *Hoffmann v South African Airways* CCT 17/00. Judgement was delivered on 28 September 2000 and the case has not yet been published.

125 *Hoffmann v South African Airways* 2000 2 SA 628 (W) at par 3.

He challenged the decision in the High Court, claiming that his right to dignity, fair labour practices, privacy and equality had been violated. SAA's refusal to employ him was based on a policy of not employing persons as flying crew or cabin crew if they were HIV positive. SAA argued that their requirements were all occupational of nature and that non-compliance thereof justified the refusal of employment. The court *a quo* found in favour of SAA.<sup>126</sup>

The appeal from the Witwatersrand High Court concerned itself with the constitutionality of the practice of South African Airways not to employ people living with HIV as cabin attendants. SAA defended their policy as promoting the safety and health of its passengers and its own capacity. Regarding the latter, SAA argued that people living with HIV might not react positively to yellow fever vaccination, they might contract and transmit other diseases to passengers and are a bad training investment because of their limited life expectancy.<sup>127</sup>

The Court held that SAA had infringed Mr Hoffmann's constitutional right not to be unfairly discriminated against. Justice Ngcobo held that legitimate commercial requirements are important but that they cannot serve to disguise stereotyping and prejudice, and that the most appropriate remedy to grant a person who had been denied employment as a result of unfair discrimination, is reinstatement. SAA was ordered to make an offer of employment to Mr Hoffmann.<sup>128</sup>

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126 *Hoffmann v South African Airways* 2000 2 SA 628 (W) at par 33.

127 Summary obtained from the Constitutional Court's website at <http://www.concourt.gov.za/summaries/2000/saasum.html>.

128 Summary obtained from the Constitutional Court's website at <http://www.concourt.gov.za/summaries/2000/saasum.html>.

## 4.8 *Potentially discriminatory legislation and practices*

### 4.8.1 *Introduction*

The discrimination against homosexuals in the most basic form, namely the absence of a right to enter into marriage with one another, leads to the exclusion from other legal rights, and subsequently, material benefits granted to heterosexual or opposite-sex married couples. Numerous employment related benefits are not granted to same-sex couples as these benefits are extended only to parties who are legally married to each other.<sup>129</sup>

In this regard Dupper and Garbers<sup>130</sup> refers to non-monetary compensation such as family responsibility leave, vacations, company discounts, travel concessions and retirement and medical plans. Here it must be noted that these benefits mentioned can either be provided by the employer or an independent institution such as a medical aid scheme in South Africa.<sup>131</sup>

It is the norm for pension, provident and medical aid funds to only extend membership of the particular fund to a "spouse" or a "widow/widower" of a member. In the case of medical aid schemes the term used is dependant, implying or defining dependant as "the legal spouse or widow/widower" of the member.

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129 Traditional marriages and co-habitation are recognised, why not same-sex marriages?

130 Dupper and Garbers "The provision of benefits to and discriminations against same-sex couples" 1999 *ILJ* 774.

131 Refer to the last paragraph in 4.5 above where the legal position is discussed.

There are also some rights granted to unmarried opposite-sex couples that exclude same-sex couples from the same rights or benefits. A number of legislation pieces<sup>132</sup> extend their ambit of protection and rights to unmarried opposite-sex couples "living together as husband and wife".

Section 22(1) read with section 1(xii)(c) of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 defines the dependant of an employee as "any woman or man with whom the employee...was living with as wife or husband at the time of the accident".

These benefits are solely withheld from gay and lesbian persons on the basis of their sexual orientation, amounting to unfair discrimination on the basis of sexual orientation, discrimination that cannot be justified in any manner within the limitation clause<sup>133</sup> of the *Constitution*.

De Vos<sup>134</sup> observes that South African courts and other quasi-judicial bodies such as the Pension Funds Adjudicator has, since the 1994 democratic changes, declared the exclusively used definition of spouse, unconstitutional or has remedied the void by extending rules so as to allow for the equal treatment of same-sex relationships with long-term heterosexual conjugal relationships.

#### 4.8.2 *Medical aid benefits*

The *Medical Schemes Act* 131 of 1998<sup>135</sup> contains provisions that place obligations on parties concerned. The obligation is that no medical aid scheme or the employer may in terms of the constitutional guarantee discriminate directly or indirectly against any person on one or more of the arbitrary grounds, including sexual orientation.<sup>136</sup>

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132 For example the *Insolvency Act* 24 of 1936 and the *Prevention of Family Violence Act* 133 of 1993.

133 Section 36, *Constitution*.

134 De Vos P "Sexual orientation and the Bill of Rights" *Bill of Rights Compendium* 3J40.

135 Hereinafter referred to as "the *Medical Schemes Act*".

136 Section 24(2)(e), *Medical Schemes Act*.

*Langemaat v Minister of Safety and Security*<sup>137</sup>, although predating the promulgation of the *Medical Schemes Act* endorsed and underlined the nature of the obligation. It established the principle that a medical aid scheme will have to accommodate the co-dependant partner when a partner in a same-sex relationship qualifies as a co-dependant.

The *Medical Schemes Act* regulates the management of medical aid schemes in South Africa. In accordance with section 22, medical aid schemes must be registered with the Registrar, and when all the provisions had been adhered to the Registrar may proceed with the registering.<sup>138</sup> One of these provisions is that the medical aid scheme may not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds.<sup>139</sup> The implication hereof is that medical aid schemes are required by law to provide for individuals in same-sex relationships, and to afford them the same benefits and opportunities as opposite-sex married couples.

#### 4.8.3 Pension benefits

As was stated earlier in this chapter, pension and provident funds often provide benefits with explicit or implicit terms with specific reference to marriage. The *Pension Funds Act* 24 of 1956<sup>140</sup> currently does not prescribe rules regarding same-sex couples or the position of the partner of a member to a fund. The need for legal reform is evident from the discussion paper drawn up by the South African Law Commission in 1998 and that this discussion paper is presently Project 112 of the South African Law Commission.

The constitutional imperatives and the recent changes in our law lead Prof John Murphy, the Pensions Funds Adjudicator, in terms of section 30A-X of the *Pension Funds Act*, in *Rory Martin v Beka Provident Fund*<sup>141</sup>, to find that the rules of the Beka Provident Fund

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137 *Langemaat v Minister of Safety and Security* 1998 2 All SA 259 (T).

138 Section 24(1), *Medical Schemes Act*.

139 Section 24(2)(e), *Medical Schemes Act*.

140 Hereinafter referred to as "the *Pension Funds Act*".

141 Pension Funds Adjudicator case no PFA/GA/563/99.

were discriminatory. The Fund excluded same-sex couples from the class of persons entitled to enjoyment of the spouse's pension, thereby unfairly discriminating against gay and lesbian couples denying them the same rights that opposite-sex couples have according to the rules.<sup>142</sup>

Quoting the case of *Langemaat v Minister of Safety and Security*<sup>143</sup> Murphy could find no justification for the Fund's unfair discrimination and ordered the Fund to rework the definition of marriage as follows: "A union of two adults, whether of the same or of the opposite sex, in respect of whom the Board is satisfied that the parties cohabit as if married".<sup>144</sup>

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142 In my opinion nothing in the definition of "dependant" in the *Pension Funds Act* can be extended to include a same-sex marriage.

143 *Langemaat v Minister of Safety and Security* 1998 2 All SA 259 (T).

144 *Rory Martin v Beka Provident Fund Pension Funds Adjudicator* case no PFA/GA/563/99 at 12.

## 5. The collective relationship

### 5.1 *The role of the trade unions*

The *Constitution* was only the beginning of the battle of homosexual persons and employees.<sup>145</sup> Legal changes are good, but few homosexual employees know their rights and trade unions are not very supportive in this regard. In Jolanda Langemaat's quest to win the right for her partner to be admitted as a dependant to the Police Medical Aid Scheme, the two police trade unions did not support her cause.

One of the tasks for trade unions, despite the provisions of section 28 of the *Labour Relations Act*, is to work for the improvement of working conditions for all workers, for the elimination of all forms of discrimination and the promotion of social and economic justice.<sup>146</sup> It is submitted that trade unions should actively work to defend and promote not only trade union rights, but also other basic human rights such as equality and a discrimination-free society and workplace.

The minimum of the trade unions have clear policies on sexual orientation and the workplace<sup>147</sup> that commit themselves to building and maintaining a democratic worker-controlled union, based on principles of non-racism, non-sexism and non-homophobia. But even should such a commitment be in place, it should not end there.

### 5.2 *The duty to bargain*

The *Labour Relations Act* makes no specific provision for a duty to bargain, but grants unions and employers certain rights, leaving it to them to determine whether and to what extent such rights are exercised in the process of collective bargaining.<sup>148</sup> The *Labour Relations Act* therefore secures the means for collective bargaining.

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145 Jara M "Workplace rights" 1996 *South African Labour Bulletin* 21.

146 <http://www.knoware.nl/users/modijk.html> 11 Oct.

147 Jara M "Gay and lesbian rights" 1997 *South African Labour Bulletin* 31.

148 Grogan J *Workplace Law* 238.

It can thus be said that the *Labour Relations Act* imposes on both the employer and the registered trade union the mutual obligation to bargain in good faith over wages, hours and other terms and conditions of employment such as employment benefits.

It can be argued that the employer's treatment of classes of persons is a 'term of employment' and thus the employer is obliged to negotiate over union proposals concerning the treatment of homosexual employees. Since discrimination on the basis of sexual orientation is prohibited, an employer must discuss a general understanding or policy prohibiting such discrimination.

### 5.3 *The relationship itself*

The rules of collective labour law recognise that in modern industrial society both employees and employers constitute distinct and opposing interest groups, both of which tend to promote and protect their respective interests.<sup>149</sup>

By way of the *Labour Relations Act* as an instrument, collective bargaining infuses democratic values into the employment context. These democratic values can furthermore be entrenched by the trade unions fighting for homosexual rights as an integral part of their overall policy to fight discrimination and protect workers' rights.<sup>150</sup> Trade unions must join in the vision to eliminate discrimination in the workplace on the basis of sexual orientation.

One of the fundamental ways of changing attitudes is through information. Negative attitudes stem from misinformation, as these individual attitudes are often strengthened by organisational discrimination. But individual attitude change can also be reinforced by organisational commitment to encouraging positive attitudes.

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149 Grogan *J Workplace Law* 235.

150 In recent years there has been growing international recognition that trade union action should be included in policies that are utilised to fight discrimination and protect worker rights. <http://www.knoware.nl/users/modijk.html> 11 Oct.

The international federation of public service and education unions, Public Service International (PSI) and Education International (EI) have published a handy booklet<sup>151</sup> on the topic of trade union work on homosexual issues.<sup>152</sup>

Trade union related institutions such as Ditsela<sup>153</sup> and Naledi<sup>154</sup> conducts research and does education and training work that addresses the interests of gay and lesbian employees.

As a starting point, employers and trade union should use this booklet and attend the education programmes of Ditsela, which could prove invaluable in a climate that is currently more receptive with higher levels of education.<sup>155</sup>

From there onwards, through collective bargaining, employers and trade unions must combat discrimination on the basis of sexual orientation in the workplace, implementing more equal opportunities policies with sexual orientation incorporated in their statements and guidelines alongside the better established sex and racial non-discrimination policies.

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151 The booklet can be ordered from their website at <http://www.world-psi.org>.  
152 Allias and Mayekiso "Lesbian and gay equality and unions" *Equality Magazine* 12.  
153 Development Institute for Training, Support and Education for Labour. Ditsela is the creation of the major trade union federations in South Africa: Cosatu and Fedusa. Its central objective is to help the labour movement respond effectively to the challenges of the new and changing context. To achieve this Ditsela has set up programmes in education and training, support for union education and organisational development – <http://www.ditsela.org.za> 11 Oct.  
154 Naledi, an initiative of Cosatu, is an organisation conducting labour and economic research.  
155 Allias and Mayekiso "Lesbian and gay equality and unions" *Equality Magazine* 12.

## 6. Conclusion

As has been mentioned in the introduction to this paper, before the 1996 *Constitution* came into effect there was no explicit legal prohibition against discrimination on the basis of sexual orientation in the hiring, promotion and firing of employees. Section 9(3) and 9(4) of the *Constitution* as read with section 8(2) prohibits any private or juristic person (including employers) from discriminating unfairly against anyone else on the basis of their sexual orientation. The *Labour Relations Act* specifically outlawed discriminatory dismissals based on sexual orientation, with this protection extended by the *Equity Act*.

De Vos<sup>156</sup> states that these provisions should be read in conjunction with the Constitutional Court's jurisprudence on unfair discrimination to establish the full extent of the legal protection now extended to homosexual persons.

Even though discrimination, as prohibited in the *Constitution*, has been the topic of many articles and research, the paper explores a new line of enquiry. Discrimination on account of sexual orientation has to date not yet received the necessary and proper attention of the courts. Development of the common law to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the *Constitution*, is the duty of every court, tribunal or forum. The road to equality, whether of status or treatment, may not lead through the equal protection clause, but rather through the confirmation of the constitutional guarantees, as set out in the *Constitution*, in the development of a jurisprudence.

The courts need to pay due regard to the discrimination arguments facing them in order to contribute, in the context of equality and to the development of a coherent jurisprudence. Higher levels of certainty regarding the prohibition of discrimination on the basis of sexual orientation is needed. The significance of the study therefore lies in the legal reform that is proposed.

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156

De Vos "Sexual orientation and the Bill of Rights" *Butterworths Bill of Rights Compendium* 3J28.

The proposed reform is regarding the need to amend or extend the anti-discrimination clauses in the *Labour Relations Act*, *Equity Act* and *Discrimination Act* to ensure the availability of proper remedies and procedures to victims of discrimination on the basis of their sexual orientation.

As seen in both the cases of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>157</sup> and *Rory Martin v Beka Provident*<sup>158</sup> read-in's and re-workings of terms, definitions and clauses are currently used to remedy discriminatory practices. It is submitted that the law should be reformed to include all possible and suitable phrases, definitions and understandings.

The South African Law Commission argued in the discussion paper of 1998 that "the development of the law has not yet reached the stage where such relationships are recognised as marriages in the true sense", but perhaps that time in the law has now dawned.<sup>159</sup>

Notwithstanding of the case law discussed in the paper and the recent developments in the discrimination and equality jurisprudence, the depth and power with which the judicial system ought to adjudicate discrimination on the basis of sexual orientation is lacking. The reason for this being the lack of cases referred to the courts dealing exclusively with direct discrimination against homosexuals,<sup>160</sup> and the fact that indirect discrimination is difficult to detect and prove. As a result, the courts have not yet been able to develop the required coherent sexual orientation jurisprudence.

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157 *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and another* 2000 (1) BCLR 39 (CC).

158 *Rory Martin v Beka Provident Fund Pension Funds* Adjudicator case no PFA/GA/563/99.

159 South African Law Commission, Project 112 "Sharing of Pension Benefits" par 4.1.2.2.

160 A gay man sought the help of the court when he was dismissed for being gay. The court was not afforded the change to adjudicate the matter since an out-of-court settlement was reached.

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