

THE DEVELOPMENT OF DEFENCES IN UNFAIR DISCRIMINATION CASES (PART 2)

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SUMMARY

(Also appears in Part 1)

All anti-discrimination legislation that applies in the employment context contains defences to or justifications for discrimination. In South Africa, the defences available against a discrimination claim in the employment context are contained in the Employment Equity Act 55 of 1998.

The Employment Equity Act gives only a basic structure of a prohibition on unfair discrimination. It is left to our courts to give content to and develop discrimination law. It is within this context that the Employment Equity Act expressly mentions “affirmative action consistent with the purpose” of the Employment Equity Act and “an inherent requirement of a job” as two specific exceptions to the right to equal treatment. The Employment Equity Act does not, however, state these exceptions to be a *numerus clausus*. It has been questioned whether there may, in addition to the statutory exceptions, be a residual “general fairness” defence to a claim of unfair discrimination.

The development of the defences in South Africa is discussed and it is concluded that any possible derogations from the right to equal treatment must be strictly construed. This conclusion is mandated by the wording of the legislation itself and the influence of the Constitution. Accordingly, the notion of an implied “general fairness” defence is not supported. The remaining defences, it is submitted, should develop within the parameters of established principles in a disciplined manner, having due regard for the achievement of substantive equality.

1 AFFIRMATIVE ACTION

1 1 Introduction

The Employment Equity Act (hereinafter “the EEA”)¹ signifies the most significant attempt by the post-apartheid government to achieve equality in the workplace. The Act’s proactive mechanism is affirmative action.

¹ Act 55 of 1998.

Affirmative action presents itself within the context of the EEA both as a duty and a defence. The discussion that follows is concerned primarily with affirmative action in the permissive sense – that is, as a defence to a claim of unfair discrimination by an employee.

Critics of affirmative action question whether the repeal of discriminatory legislation coupled with a prohibition on unfair discrimination is not enough to ensure the achievement of equality. The answer to this question lies in the perception of equality.

A distinction is again drawn between equality in treatment and equality in outcome. Equality in treatment (or formal equality) means that discrimination occurs where there is differentiation of any nature, irrespective of whether the differentiation is aimed at redressing past disadvantage. Formal equality therefore dispels affirmative action as an unfair discriminatory measure. Equality in outcome (or substantive equality) recognises a duty on the state to redress past disadvantage through affirmative action policies, and by so doing to achieve a deeper, more meaningful equality.

It was pointed out previously that our Constitution² embraces a substantive notion of equality. Section 9(2) provides that

“[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”.

The Constitution therefore authorises the use of affirmative action measures in order to achieve equality. However, caution should be taken against perceiving affirmative action as an inseparable aspect of equality. Affirmative action is a temporary measure that will outlive its purpose whereas equality is a value without a shelf-life. Affirmative action is a measure that will be cast from our jurisprudence upon the “normalisation of our society” or when “a state of generalised equality” is achieved.³

It is in this context that the EEA was enacted. Our courts are constantly mindful of interpreting the Act in accordance with the Constitution, and in this regard the impact on the Act has been substantial.

1 2 Goal of affirmative action

The EEA must be interpreted in compliance with the constitutional vision of affirmative action.⁴ The Constitution requires affirmative action measures “to promote the achievement of equality”.⁵ Equality consists of the full and equal enjoyment of all rights and freedoms.

The EEA states its goal to be the achievement of an equitable representation of designated groups in all occupational categories and levels

² The Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”). The Constitution was preceded by the interim Constitution, Act 200 of 1993, which came into force on 27 April 1994 and was repealed when the Constitution took effect on 4 February 1997.

³ See *George v Liberty Life Association of Africa Ltd* 1996 17 ILJ 571 (IC) 593-594.

⁴ S 3 of the EEA.

⁵ S 9(2) of the Constitution.

in the workforce.⁶ Equitable representation is not defined in the Act, but can be determined by the factors to be considered in assessing employers' compliance with the Act.⁷ Furthermore, the regulations detail the economically active population based on race and gender as a benchmark for determining the representation of the different designated groups for which employers should strive. The factors mentioned in the Act, which are relevant to setting numerical goals to achieve representivity, are:

- the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
- the economic and financial factors relevant to the sector in which the employer operates;
- the present and anticipated economic and financial circumstances of the employer;
- the number of present and planned vacancies that exist in the various categories and levels of the employer's workforce, and the employer's labour turnover;
- the progress made by other designated employers in similar circumstances within the same sector;
- the extent to which an employer has removed barriers to the advancement of people from designated groups; and
- the employer's reasonable efforts to implement its employment equity plan.⁸

From the above it is apparent that in setting numerical goals the EEA is sensitive to an employer's particular circumstances. The argument could therefore be raised that "equitable representation" as a goal of affirmative action is in conflict with the constitutional goal of "the achievement of equality". It is submitted, however, that the goals are reconcilable. Employment is the most effective way in which to achieve the full and equal enjoyment of all rights and freedoms (in a substantive sense). Equitable representation can therefore be viewed as an intermediate goal: a precondition for the achievement of equality.⁹ Accordingly, especially given the duty to interpret legislation in conformity with the Constitution to the extent possible,¹⁰ no doubt should arise as to the compatibility of the Constitution with the EEA's vision of affirmative action.

13 What are affirmative action measures?

Section 15(1) of the EEA defines affirmative action measures as any measures "designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented

⁶ S 2(b) of the EEA.

⁷ S 42 of the EEA.

⁸ S 42(1)(a).

⁹ See Dupper and Garbers "Affirmative Action" in Strydom *et al Essential Discrimination Law* (2004) ch 11.

¹⁰ S 39(2) of the Constitution.

in all occupational categories and levels in the workforce of a designated employer”.

As regards affirmative action measures, the Act envisages more than the employer simply creating a representative profile by hiring applicants from the designated groups. Other measures include:

- measures designed to further diversity in the workplace;
- measures to identify and eliminate barriers which adversely affect the designated groups;
- measures to train and develop such employees in order to promote their advancement;
- preferential promotion; and
- a duty on employers to make reasonable accommodation for the members of designated groups. This entails the employer modifying a job or the working environment to enable a member of a designated group to have access to, or participate or advance in, employment.

The measures discussed above are compulsory. The employer may, however, still apply further optional measures. In this regard, the imposition of quotas, the creation of barriers to the advancement or employment of people from non-designated groups, and the dismissal of non-designated employees to make way for members of designated groups are moot issues.

As regards the imposition of quotas, section 15(3) stipulates such measures to be excluded from the ambit of compulsory affirmative action measures. The implication is that employers may use quotas at their discretion.

The creation of barriers in employment policies or practices to the prospective or continued employment or advancement of people from non-designated groups is not required by the EEA.¹¹ It seems, however, that employers can adopt such measures voluntarily. Employers should note the following in this regard:

- The Act expressly mentions affirmative action as a defence open to an employer in cases of discriminatory decisions not to promote or appoint a person. It is submitted, however, that an employer who has created absolute barriers to the employment or advancement of non-designated groups will have a greater burden in proving the reasonableness of the affirmative action measures.
- Section 187 of the Labour Relations Act (hereinafter “the LRA”)¹² renders a discriminatory dismissal automatically unfair. Affirmative action is not expressly mentioned in the Act as a defence to an automatically unfair dismissal. The only option available to an employer would be to prove the fairness of an affirmative action dismissal. Whether such a defence could succeed in our courts is unclear.¹³

¹¹ S 15(4). This provision is subject to s 42. The Act therefore recognises that instances may arise where employers will have to create barriers in order to comply with the Act.

¹² 66 of 1995.

¹³ See the discussion that follows on a “general fairness” defence in labour law.

1 4 Beneficiaries of affirmative action

The Constitution requires the beneficiaries of affirmative action to be “persons, or categories of persons, disadvantaged by unfair discrimination”.¹⁴ The constitutionally permissible scope of beneficiaries is limited by the EEA to persons from “designated groups” who are “suitably qualified”.¹⁵

The designated groups identified by the Act are:

- black people;
- women; and
- people with disabilities.

The term “black people” is defined to include Africans, Coloureds and Indians. “People with disabilities” is defined to mean “people who have a long-term physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.

The Act requires employers to benefit only those who are suitably qualified. Tokenism is therefore expressly rejected. In determining whether a person is “suitably qualified”, an employer must review all the following factors:

- formal qualifications;
- prior learning;
- relevant experience; or
- capacity to acquire, within a reasonable time, the ability to do the job.¹⁶

An employer may not, however, exclude an applicant from employment solely because of a lack of relevant experience.¹⁷

As regards the beneficiaries of affirmative action, the following issues have been raised and will now be addressed.

1 4 1 *Establishment of individual disadvantage*

Currently all members of the designated groups enjoy the benefits of affirmative action, irrespective of whether they are in fact disadvantaged members. The current legislative framework does not necessitate any inquiry into whether the individuals who benefit have actually been the victims of past injustice. The EEA assumes that all members of designated groups are disadvantaged. The reality is that this results in a situation where some individuals with an “advantaged” past receive the benefits of affirmative action simply because they are part of a designated group. There has, however, been some support from our courts for the establishment of “individual disadvantage” as a precondition for affirmative action.¹⁸

¹⁴ S 9(2) of the Constitution.

¹⁵ S 13(1) of the EEA.

¹⁶ S 20(3) of the EEA.

¹⁷ S 20(5) of the EEA.

¹⁸ See *George v Liberty Life Association of Africa Ltd supra* 593-594; and *Auf der Heyde v UCT* 2000 21 ILJ 1758 (LC) 1774G.

However, our Constitution approves a group-based approach to affirmative action measures. Furthermore, the EEA does not stipulate an “individual disadvantage” requirement to qualify as a beneficiary of affirmative action. It is therefore submitted that the development of such a requirement will have to be legislative. However, should a requirement of individual disadvantage develop through the courts, disadvantage should be presumed with rebuttal limited strictly to cases where the suppressive consequences of apartheid have no relevance (for example, in the case of a black South African born after the end of the apartheid struggle).¹⁹

1 4 2 *Recognising degrees of disadvantage*

The question at issue under this heading is whether employers can adopt an affirmative action policy that differentiates between the designated groups on the basis that certain designated groups are historically more disadvantaged than others?

Differentiation between different categories of black people (Africans, Coloureds and Indians) has been accepted as part of the affirmative action defence.²⁰ The courts have been willing to accept Africans being preferred to other designated groups in affirmative action policies.²¹ The court, in *Motala v University of Natal* held:

“The contention by counsel for the applicants appears to be based upon the premise that there were no degrees of ‘disadvantage’. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the [Apartheid] system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of [the equality provision of the Interim Constitution].”²²

The recognition of degrees of disadvantage is, however, not without criticism and can lead to unnecessary difficulties in practice. Whilst there is a notable difference in the degrees of disadvantage in some instances (for example, between an African man and a white woman), it is practically indiscernible in others (for example, between a disabled Indian male and a coloured woman). It has therefore been argued that employers should rather place their focus on achieving representivity in the workforce.²³ For example, if the statistics show that African women are grossly underrepresented in a job category in the Eastern Cape, the employer can justifiably give preferential treatment to female African applicants who are suitably qualified for those positions. This “representivity” approach is more compatible with

¹⁹ This approach, it is submitted, is necessitated by the particularly aberrant and persuasive nature of apartheid.

²⁰ See *Motala v University of Natal* 1995 3 BCLR 374 (D); *Public Service Association – Gerhard Koorts v Free State Provincial Admin* CCMA FS 3915, 21 May 1998 (unreported), and *McInnes v Technikon Natal* 2000 21 ILJ 1138 (LC).

²¹ See *Durban Metropolitan Council (Parks Department) v SAMWU* 1998 7 ARB 6.9.5; and *Eskom v Hiemstra NO* 1999 10 BLLR 1041 (LC).

²² *Supra* 383C-E.

²³ See Du Toit *When Does Affirmative Action in Favour of Certain Employees Become Unfair Discrimination Against Others?* Paper presented at conference on Equality: Theory and Practice in SA and Elsewhere, University of Cape Town, January 2001 14.

the purpose of the EEA. It is submitted that distinguishing between the beneficiaries of affirmative action on the basis of degrees of disadvantage should only constitute a permissible judicial interpretation of the EEA to the extent that the employer has first adhered to the factors considered in assessing his compliance with the Act.²⁴

The courts have been less inclined to distinguish degrees of disadvantage between members of one designated group *inter se*. In *IMAWU v Greater Louis Trichardt Transitional Council*²⁵ the Labour Court was of the opinion that where members of one designated group are in competition with one another for jobs or promotion, the best candidate should be selected on the basis of merit and experience alone.²⁶ However, the importance of this opinion is undermined by the fact that it was part of the *obiter dictum*.

1 4 3 A requirement of citizenship?

In *Auf der Heyde v University of Cape Town*²⁷ the applicant argued that only South African citizens could be the beneficiaries of affirmative action policies. The court agreed that nationality was an essential and legitimate criterion for the application of affirmative action measures.²⁸

However, there is no express provision in our law requiring the beneficiaries of affirmative action to be South African citizens. Furthermore, the Department of Labour has allowed the inclusion of foreign nationals in the designated groups in the reports to be submitted in terms of the Act by designated employers.²⁹ The Department has however cautioned that since the Act requires employers to compare their workforce profiles with relevant local demographics, employers should strive to be representative of these.

1 5 The interface between affirmative action and discrimination: affirmative action through the cases

Affirmative action measures taken by an employer amount to fair discrimination.³⁰ The considerations of fairness that our courts apply in evaluating a defence of affirmative action can be extracted from case law.

In *Public Servants' Association of South Africa v Minister of Justice*,³¹ the Minister of Justice set aside a number of posts for women so as to ensure greater representivity in the Ministry and the State Attorney. The court found that the refusal to interview white male applicants for the posts concerned amounted to discrimination and that accordingly the justifiability of the measure had to be evaluated. The following requirements, although gleaned

²⁴ S 42 of the EEA.

²⁵ 2000 21 *ILJ* 1119 (LC).

²⁶ 1129B-D.

²⁷ *Supra*.

²⁸ Par 69.

²⁹ See <http://www.labour.gov.za/docs/legislation/eea/faq.htm1>.

³⁰ S 6(2)(a) of the EEA.

³¹ 1997 18 *ILJ* 241 (T).

from the Interim Constitution,³² were considered necessary in order to justify affirmative action:

- The measures must be designed. That means the measures must be the “antithesis of mere intention and of haphazard or random action”.
- Affirmative action measures must be causally connected to their objectives. In other words, the measures should be reasonably capable of achieving the promotion of equality.
- The measures must be adequate. Adequacy entails the results being “commensurate” or “equal in magnitude or extent” to the means employed. This element necessitates the consideration of not only the interests of the previously disadvantaged, but also “the rights and legitimate expectations of others”, particularly members of the non-designated groups.³³

In *Public Servants’ Association v Minister of Correctional Services*,³⁴ the Department allocated a percentage of its posts to women. The court reiterated the requirements laid down in the *Minister of Justice* case, and cautioned against questioning the affirmative action measures of an employer (provided they were lawful).

It is apparent from the case law that some degree of consideration, planning and rationality must precede the implementation of affirmative action measures. It is not sufficient for an employer to merely assert that a measure amounts to an affirmative action measure. By the same token it is not necessary that affirmative action measures be part of an employment equity plan that complies with the provisions of the EEA.³⁵ The fact that a measure is:

- (a) intended to contribute to the objective of equitable representation; and
- (b) capable of doing so;

should be sufficient. Affirmative action measures should therefore be realistic. Indiscriminate hiring will not be tolerated (it then becomes irrational).

It has been pointed out that an employer does not have to be acting in terms of an existing employment equity plan in order to succeed with an affirmative action defence. Although the existence of a policy or plan may establish the validity of the measures it contains, it is not a prerequisite. This position is however qualified. Firstly, the failure of an employer to develop a detailed affirmative action plan where it is required to do so in terms of a policy document or collective agreement could lead to a court rejecting affirmative action appointments or promotions made in terms of mere generalised policy statements.³⁶ Secondly, where an affirmative action policy or plan exists it must be adhered to by the employer. In *McInnes v Technikon Natal*,³⁷ the Labour Court was not prepared to accept an

³² S 8(3)(a) of Act 200 of 1993.

³³ 306H-307D.

³⁴ Case no J174/97.

³⁵ See ch III EEA in this regard.

³⁶ See, eg, *IMAWU v Greater Louis Trichardt Transitional Local Council supra* 1125-1126; and *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC) 176.

³⁷ *Supra*.

affirmative action defence because the Technikon had not adhered to its own affirmative action policy. The court emphasised that while it is inclined to show deference to an employer's business decisions, this would not be appropriate "where it is found that the policy, read properly, was not applied at all".³⁸

1 6 Affirmative action is not an absolute defence

The nature of the affirmative action defence was elucidated in *Coetzer v Minister of Safety & Security*.³⁹ The question the court had to consider in this case was whether the advertising of posts by the respondent exclusively for members of the designated groups constituted unfair racial discrimination in terms of section 6 of the EEA. The respondent argued that it had taken affirmative action measures consistent with the purpose of the EEA, and that therefore the discrimination was not unfair.

In rejecting the respondent's defence, the court pointed out that the National Commissioner of Police had overlooked the constitutional imperative of efficiency in refusing to promote applicants from non-designated groups.⁴⁰ It was the court's view that the vacancies and operational needs of the SAPS demanded the appointment of the excluded applicants.⁴¹

The court's decision in *Coetzer* has made it clear that affirmative action is not an absolute defence to a discrimination claim. Any imperative contained in the Constitution may affect and influence the defence of affirmative action.

2 A GENERAL FAIRNESS DEFENCE?

2 1 Introduction

The EEA has expressly given employers two defences against allegations of unfair discrimination.⁴² However, the question has been posed whether the Act does not insinuate a further defence, one based on principles of general fairness. In other words, affirmative action and an inherent requirement of a job are not exhaustive instances of fair discrimination: a residual general fairness defence is available to an employer where the circumstances will not support any of the listed defences.⁴³

³⁸ 1150H.

³⁹ 2003 2 BLLR 173 (LC).

⁴⁰ S 195 of the Constitution requires the public service to operate "efficiently" while s 205(2) requires the SAPS to discharge its responsibilities "effectively".

⁴¹ See also in this regard *Public Servants' Association of South Africa v Minister of Justice* 1997 3 SA 925 (T); and *Stoman v Minister of Safety and Security* 2002 3 SA 468 (T).

⁴² S 6(2). The two permissible derogations are affirmative action and an inherent requirement of a job. These exceptions are in line with the derogations permitted by the ILO Convention III of 1958. It is not insignificant to note that in Europe "all direct discrimination is unlawful unless it is covered by one of the specific legislative exceptions": Hepple, Coussey and Choudhury *Equality: A New Framework* (2000) 35.

⁴³ It can be argued that both *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC); and *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC) are authority for the existence of a general fairness defence in the employment context. These cases are discussed further below.

The pronouncements of the Labour Courts on the existence and content of this defence have to date been contradictory and unsubstantiated.⁴⁴ Instead of a coherent, well-informed and deliberate approach to the development of the defence, the judiciary has adopted a heedless piecemeal approach that has created unnecessary uncertainty on an issue that has the capacity to change the face of South African discrimination jurisprudence. Equality, as a right and a value, is our brightest light in the process of transformation. Any permissible derogation from the right to equal treatment should be clearly understood and well-founded. It is a well-respected principle of international law that derogations from rights should be strictly construed.⁴⁵ Our Constitution demands no less.⁴⁶

A misconception is created by referring to a general fairness “defence”.⁴⁷ It is a misnomer which has undoubtedly given rise to some confusion. An employer is merely given an opportunity to raise argument that the impugned discriminatory acts were not “unfair”. Should the argument be successfully raised, “unfair discrimination” has not taken place and therefore the subsequent issue of a true defence or justification is never reached.

The authors now turn to the basis for the thinking that has proposed the notion of a residual general fairness defence, an explanation of the possible parameters of a general fairness standard, and finally to put forward compelling argument in support of the non-existence of the defence.

2.2 The basis for a residual fairness defence

The Constitution⁴⁸ has placed a prohibition on “unfair discrimination”. The unusual formulation⁴⁹ of the term is the foundation upon which the notion of a general fairness defence exists.

The term “unfair discrimination” has been interpreted by the Constitutional Court on several occasions.⁵⁰ What has emerged is that the word “discrimination” does not have a neutral meaning similar to differentiation:

“The proscribed 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 particularly pejorative meaning relating to

⁴⁴ See *Woolworths (Pty) Ltd v Whitehead supra*. Willis JA’s approach was not concurred with by Zondo JP and Conradie JA who also heard the matter. Furthermore, Willis JA was in disagreement with the court in *Whitehead v Woolworths (Pty) Ltd* 1999 20 ILJ 2133 (LC).

⁴⁵ See in this regard, Du Toit “Justification for Sex Discrimination in the Workplace in South Africa” 2003 48 *Collective Bargaining, Discrimination, Social Security and European Integration Bulletin of Comparative Labour Relations* 353-376.

⁴⁶ S 233 of the Constitution places a duty on the judiciary to interpret legislation (including the EEA) in accordance with international law where this is reasonably possible.

⁴⁷ The same misconception is created when reference is made to an “inherent requirement” or an “affirmative action” defence.

⁴⁸ Ss 9(3) and (4) of the Constitution.

⁴⁹ The formulation is unusual because “most constitutional and legislative instruments which outlaw discrimination have left the pejorative connotation of the word ‘discrimination’ to speak unaided to those who interpret them”. Kentridge “Equality” in Chaskalson *et al Constitutional Law of South Africa* (1996) ch 14-18.

⁵⁰ *Brink v Kitshoff* NO 1996 6 BCLR 609 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); and *Harksen v Lane* NO 1997 11 BCLR 1489 (CC).

the unequal treatment of people based on attributes and characteristics attaching to them.”⁵¹

The word “unfair” therefore serves to distinguish permissible from impermissible discrimination, where discrimination itself is used in a pejorative sense.⁵² It is not simply an adjective in which the pejorative moment lies. It qualifies the prohibition. The result is that, in the constitutional context, general fairness may operate as a defence.

The EEA was enacted in light of the constitutional mandate to enact legislation to give effect to the prohibition of unfair discrimination.⁵³ The EEA prohibits unfair discrimination in the employment context.⁵⁴ Discrimination claims against an employer are therefore no longer a constitutional matter. However, it has been argued that, considering the judicial duty to interpret the EEA in a manner consistent with the Constitution, “unfair discrimination” in the employment and constitutional context should be similarly construed.⁵⁵ In accordance with such a construction, the proposition is that section 6(1) of the EEA contains a residual justification based on the broad notion of unfairness.

Both *Dingler*⁵⁶ and *Woolworths*⁵⁷ are authority for the existence of a general fairness defence against unfair discrimination claims in the employment context. Although much criticism has been levelled at these cases, *Woolworths* is a Labour Appeal Court case and accordingly established a precedent.

2.3 Parameters of the defence⁵⁸

It is submitted that the content of a general fairness defence should be informed by the following:

- the test for unfair discrimination laid down by the Constitutional Court in *Harksen*,⁵⁹
- the test for unfairness put forward in *Dingler*,⁶⁰
- the interpretation of the EEA and the Constitution; and
- foreign jurisprudence.

⁵¹ *Prinsloo v Van der Linde supra* par 31.

⁵² Kentridge ch 14-18.

⁵³ S 9(4) of the Constitution states that “national legislation must be enacted to prevent or prohibit unfair discrimination”.

⁵⁴ S 6(1).

⁵⁵ In other words, “unfairly” in s 6(1) of the EEA acts as a qualifier (not an adjective).

⁵⁶ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC). The court indicated, albeit not expressly, that a residual defence is available to employers faced with a discrimination claim when it stated: “Neither of these defences (affirmative action and an inherent requirement of the job) are raised by the facts of this case so (they) need no further consideration in this judgment.” The court then proceeded to define the parameters of a fairness standard.

⁵⁷ *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC). In particular see the judgment per Willis JA.

⁵⁸ See Dupper “Justifying Unfair Discrimination: The Development of a ‘General Fairness Defence’ in South African (Labour) Law” 2001 *Acta Juridica* 147.

⁵⁹ *Harksen v Lane NO supra* par 51.

⁶⁰ 14481-J.

In *Harksen*, the Constitutional Court enumerated factors that the court would consider in making a determination of unfairness. These factors, which would surely inform a test for fairness in the employment context, include (but are not limited to):

- (i) the position of the complainant in society;
- (ii) the nature of the provision or power and the purpose sought to be achieved by it; and
- (iii) 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.

The Labour Court in *Dingler* formulated the notion of fair discrimination 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.”⁶¹

In terms of this formulation, the enquiry into fairness is in essence one of proportionality. In terms of a proportionality enquiry, the means an employer uses to achieve its goals must be commensurate to the goals the employer seeks to achieve.

The problem with the proportionality enquiry is that it implies that any goal, including, for example, marginal profitability, can be pursued provided the means chosen are commensurate. This would amount to an untenable situation in which the statutory defences provided by the EEA would be rendered redundant and the right to equality severely undermined.⁶² The only solution would seem to be a proportionality enquiry tempered by a judicial discretion not to entertain the goals of an employer that are unworthy of competing with the right to equality. Such unworthy goals would probably include, amongst others, marginal profit. In other words, there may be situations in which a court may rightly refuse to apply the proportionality principle.⁶³

Upon analysis, the similarity between the fairness enquiry in *Dingler* and an enquiry under section 36 of the Constitution is striking. Both enquiries are based on proportionality. It would seem that the separate issues of fairness and limitation in the constitutional context have simply merged into a single enquiry in the employment context.⁶⁴ Under the EEA, the court will consider in one enquiry the two enquiries discharged under the Constitution. In this regard, Dupper states:

⁶¹ *Ibid.*

⁶² See Cooper “A Constitutional Reading of the Test for Unfair Discrimination in Labour Law” 2001 *Acta Juridica* 121.

⁶³ See Leader “Proportionality and the Justification of Discrimination” in Dine and Watt *Discrimination Law: Concepts, Limitations and Justifications* (1996).

⁶⁴ The Constitutional Court has not always followed the separation between the unfairness enquiry and the justification enquiry under s 36 of the Constitution. See *President of the Republic of South Africa v Hugo supra*.

“[A]ny dissonance between the approach of the Labour Court on the one hand and the approach of the High Court and the Constitutional Court on the other hand should be more apparent than real.”⁶⁵

All things considered, it is submitted that a test for fairness should consist of two parts. The first part of the test should be directed toward establishing whether the employer pursued its goals by proportionate means. If less harmful methods could achieve the same goals, the employer will have contravened the EEA. The second part of the test will consist of a judicial discretion aimed at rejecting goals that are not “legitimate”. This part of the test will make the general fairness defence an exacting one.⁶⁶

2.4 A non-issue?

Our Constitution lays down a floor of rights, not a ceiling of rights. In other words, the broad right to equality entrenched by section 9 of the Constitution may be given specific content by legislation such as the EEA.⁶⁷ The EEA has therefore effectively removed discrimination claims from the constitutional context. This means that the only possible source of a general fairness defence in the employment context is the EEA. Employers cannot invoke a fairness defence on the basis that such a defence is permitted under a constitutional enquiry into unfair discrimination.⁶⁸

It has been argued that the EEA creates no room for a residual fairness defence.⁶⁹ The basis for this argument is the established principle that requires derogations from rights to be strictly construed.⁷⁰ In other words, the availability of such a defence should be clearly expressed. The EEA does not explicitly refer to a “fairness” defence. The proposition is that the defence is implicit in section 6(1).⁷¹ Considering that the EEA expressly recognises affirmative action and an inherent job requirement as justifications against discrimination claims, the notion of an implicit residual fairness defence would entail an extensive rather than a restrictive interpretation of the limitation of the right to equal treatment. Given the dominant view in international law that shuns a flexible approach when interpreting rights’ limitations,⁷² the views put forward in *Dingler* and *Woolworths* have created an untenable situation.

⁶⁵ Dupper 2001 *Acta Juridica* 154.

⁶⁶ See in support of a stringent approach to a general fairness defence, Dupper 2001 *Acta Juridica*; and De Villiers “Addressing Systemic Sex Discrimination: Employer Defences to Discrimination in Canada and South Africa” 2001 *Acta Juridica* 175.

⁶⁷ It is not unconstitutional for legislation to be enacted that gives rights a more jealous protection.

⁶⁸ Employers cannot directly invoke s 9(4) of the Constitution unless their position is not provided for in legislation. Given the scope of the EEA and the Equality Act, it is submitted that employers have no direct recourse to the Constitution.

⁶⁹ See Du Toit 2003 48 *Collective Bargaining, Discrimination, Social Security and European Integration Bulletin of Comparative Labour Relations* 353-376.

⁷⁰ See eg *Ceramic Industries Ltd v NCBWU* 1997 6 BLLR 697 (LAC).

⁷¹ See earlier discussion.

⁷² Under international law, no scope remains for courts to infer an implicit limitation on a right. See *Johnson v Chief Constable of the Royal Vista Constabulary* [1986] ECR 1651 (ECJ); *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 (ECJ); and Hervey “EC Law on Justification for Sex Discrimination in Working Life” in Blanpain *Collective Bargaining, Discrimination, Social Security and European Integration* 103-151.

Furthermore, the EEA is to be interpreted in compliance with the international law obligations of South Africa, in particular those contained in the International Labour Organisation Convention No 111.⁷³ The EEA gives effect to only two of the three permissible forms of discrimination recognised in the Convention.⁷⁴ The Convention, however, makes no provision for a general fairness defence. Accordingly, and in support of a strict interpretation of rights' limitations, the argument can be effectively made that the defence is a non-issue.

Du Toit argues that the word "unfairly" in section 6(1) of the EEA functions as an adjective, not as a qualifier. The word "unfairly" merely serves to describe the discrimination since the permissible exceptions to discrimination are clearly expanded in section 6(2). There is no attempt to create a condition upon which liability rests. Therefore no room exists to imply a third (general) defence against unfair discrimination.

3 CONCLUSION

It is submitted that there does not exist a place in our discrimination law for the development of a general fairness defence. Equality is the most important value in our fledgling democracy. Any derogations from the right to equality must surely be limited to expressly permissible instances, such as affirmative action and the inherent requirements of a job. What our legal system lacks in efficiency, cannot be catered for by creativity. There may well exist a need for further latitude in running a business. But this need must be met by the legislature which has the necessary expertise and time at its disposal to develop a residual defence that is weighted appropriately so as to ensure that the process of transformation is steered along the right path. This may happen in due course but it is inopportune for the courts to develop such a defence when it is not expressly provided for in the EEA. Present public policy demands that the defences available to an employer against unfair discrimination claims should be limited. The concept of substantive equality should be promoted and the door to the erosion thereof in employment law by the judicial introduction of a nebulous general defence based on fairness should remain firmly shut.

⁷³ S 233 of the Constitution requires every court to "prefer any reasonable interpretation of ... legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

⁷⁴ The EEA allows for discrimination where it is based on affirmative action measures or on inherent job requirements. A 4 of the Convention, that permits discrimination against persons "suspected of, or engaged in, activities prejudicial to the security of a state", did not find favour with the drafters of the EEA. See in this regard *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) par 40.