

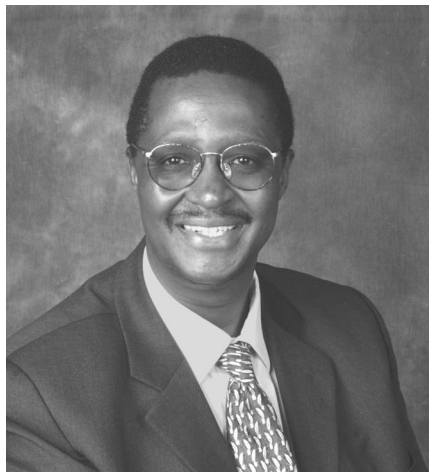
The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000¹

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The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 2000 was drafted (1) in fulfilment of the constitutional mandate contained in s 9(4) of the 1996 Constitution to enact national legislation to prevent or prohibit unfair discrimination and (2) in fulfilment of South Africa's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. This contribution considers the specific remedies provided for by PEPUDA that make the process of redress accessible to ordinary people.

Umthetho 4 ka-2000 wokukhuthazwa kokulingana nokuvinjelwa kobandlululo oluchemayo

Umthetho ka-2000 ophathelene nokukhuthazwa kokulingana nokuvinjelwa kobandlululo oluchemayo (Promotion of Equality and Prevention of Unfair Discrimination) (PEPUDA) wahlelwa (a) ukufeza igunya eliqhamuka kumthethosisekelo eliqukethwe esigabeni 9(4) soMthethosisekelo ka-1996, lokubeka imithetho kazwelonke



ukuvimba ubandlululo oluchemayo; kanye (b) nokufeza izibopho zamazwe ngamazwe zeNingizimu Afrika ezingaphansi kwesivumelwano esibhekene nokususwa kwazo zonke izinhlobo zobandlululo olwenziwa ngokohlanga kanye nezingaphansi kwesivumelwano esibhekene nokususwa kwazo zonke izinhlobo zobandlululo olubhekiswe kwabesifazane. Lo mnikelo ubheka amakhambi athile alethwa yiPEPUDA enza inqubo yokulungiselwa ifinyeleleke nasebantwini abejwayelekile.

¹ Joan Church lecture, Unisa Faculty of Law, 15 October 2002.

1 Historical background

Section 9(4) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that 'national legislation *must* be enacted to prevent or prohibit unfair discrimination'. The Constitution came into effect on 4 February 1997. Schedule 6, item 23(1) on transitional arrangements required that such legislation be enacted within three years of the date on which the Constitution came into effect. That meant that the new legislation had to be enacted by 4 February 2000.

The then Minister of Justice, Dullah Omar, wanted the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) to be drafted in a manner that reflected the aspirations of the people. He organised extensive consultations so as to raise awareness of the continuing scourge of discrimination in South Africa society and to enlist people's participation in tackling all forms of unlawful discrimination. He invited the South African Human Rights Commission to undertake the drafting process. The commission established the Equality Legislation Drafting Unit (ELDU) under the leadership of Prof Johann van der Westhuizen. Prof van der Westhuizen left the unit in 1999 when he became a judge of the High Court in Pretoria.

The unit set about its task in a participatory and consultative manner. It was divided into a research unit, which was assisted by teams of focus groups, and a reference group made up of a large number of stakeholders and other interested players. The reference group as well as the steering group that oversaw the day-to-day operations of the unit was chaired by me. Besides conducting research, the unit undertook a series of consultative and public-awareness workshops in different parts of South Africa. A number of overseas experts were engaged so as to inform

South African law in this regard. An international conference of experts was held in 1999 and towards the end of the conference a number of consultative drafting workshops took place.

2 The objectives of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

In the first place, the Act seeks to fulfil the constitutional mandate to prevent or prohibit unfair discrimination.

In the second place, this piece of legislation is aimed at fulfilling South Africa's international obligations, especially with regard to (1) the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted in 1965 and came into force 1969) and (2) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted in 1979 and came into force 1981).

Article 4 of the Convention on the Elimination on all Forms of Racial Discrimination requires states to take positive, legislative and other measures 'designed to eradicate all incitement ... Declare punishable by law all dissemination of ideas based on racial superiority ... shall declare illegal and prohibit all organizations ...'. Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women contains similar provisions. In addition, the Committee on the Elimination of Racial Discrimination adopted General Recommendation XV (1993) in which it is stated that Article 4 is mandatory. It goes on to say that '[t]o satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced ...'.

Thirdly, although since the interim Constitution of 1993, the Constitutional Court had developed the jurisprudence

on equality quite considerably, for the vast majority of the people of South Africa, discrimination remained a daily fact of life. Notwithstanding the fact that the courts could declare certain offensive acts to be unconstitutional, most people still had no legal remedies against discrimination, except civil litigation which would be very difficult and expensive. It was also true that litigants before the Constitutional Court came from the privileged classes. The new Act (PEPUDA) now provides specific remedies and makes the law and the process of redress accessible to ordinary people.

Fourthly, the Act seeks to underscore the primacy of equality and the historic struggle against discrimination as a foundational element of the liberatory ethic in South Africa. It has been said that whereas *liberty* is the cornerstone of the American constitutional system, *equality* is South Africa's.²

Finally, the development of the Act was no doubt influenced by the urgency felt for the need to develop a legal environment capable of eradicating the racism prevalent in society, the pathology of violence against women and gender discrimination. Discrimination and inequality are probably two of the greatest social ills South African society has ever suffered. The mammoth task of eradicating these evils remains an urgent responsibility. Since 1995, South African constitutional jurisprudence has elaborated extensively on the values imperative in the Constitution, namely 'human dignity, the achievement of equality and the advancement of human

rights and freedoms ... non-racialism and non-sexism ...'.

Following Chaskalson, it appears that South Africa is able to embrace Errol P Mendes' concept of 'equal human dignity'.³ It seems to me that this will take South Africa forward in respect of substantive equality measured not only in a formalistic sense, but in terms of impact, outcome and opportunities. One notices, though, that there is an evolving feminist legal/constitutional construction in the country that somehow suggests that an affirmation of human dignity takes something away from gender equality. Such reasoning is hard for me to understand.⁴ Clearly, human dignity, as Chaskalson points out in his Bram Fischer Lecture, is not simply an individualised abstract concern, it is at the foundations of equality. Only when human beings recognise the inherent humanity of others imbued with *dignitas*, will they understand that inequality is a contravention of dignity. It may well be that the Constitutional Court will continue to develop its understanding of the multiple applications of 'equal human dignity' in the South African context.

3 Some observations

- 1 The legislation was successfully, if hastily, piloted through parliament in early 2000, and was duly enacted by presidential assent and proclamation on 2 February 2000. Parts of it only came into effect on 1 September 2000 amidst the fanfare of the National Conference on Racism. As Chairperson of the Equality Review

2 For an elaboration of the link between human dignity, freedom and equality as the foundational values of the South African constitutional order, see Arthur Chaskalson 'Human dignity as a foundational value of our constitutional order', the Third Bram Fischer Lecture, 18 May 2000.

3 'Taking equality into the 21st century: establishing the concept of equal human dignity', (2000) 12 *National Journal of Constitutional Law*.

4 Albertyn and Goldblatt. 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248.

Committee we oversaw the implementation of the Act, advised the minister on its operation and about laws that impact on equality. More specifically, the Equality Review Committee was charged with the task of undertaking the unfinished business of the legal process: to determine whether the additional grounds proposed during the parliamentary process, namely nationality, HIV/AIDS, economic status and so on could be incorporated into the legislation (s 34(1)).

- 2 To date, large sections of the operational parts of the law have not yet come into force. The reason is that the establishment of the equality courts was delayed by bureaucratic wrangling within the Justice Department and by a lack of resources to support the work of the directorate charged with driving the equality legislation. The result has been that the research on the additional grounds of prohibition has been done but no further progress has been made and the Equality Review Committee has not reported within one year as required by law. Much was made of whether *all* the courts, magistrate's and high courts, could be declared equality courts. The designation of the equality courts was further delayed because suitable venues had to be identified and restructured as required by law. The constitutional problem of the *designation* of magistrates and judges stemmed from the fact that the judiciary strongly felt that it would be inappropriate for the minister to *designate* judges to sit in the equality cases. All of this, it seemed, would require amendments to the law. (I understand that such an amendment is due to be tabled in Parliament during this session.) It has now been agreed that indeed *all* the

courts will be equality courts. This will improve access to the courts. The designation of judges and magistrates will now become the responsibility of the judicial managers.

- 3 Much progress has been made in the training of judges and magistrates. A special unit under Adv Thuli Madonsela was established to undertake judicial training. Despite early resistance, the unit developed a Bench Book for use by presiding officers in equality cases and I am informed that some 500 magistrates have been trained, as well as a number of judges. I must say that this was made possible by the support of senior judges such as Arthur Chaskalson, R H Zulman and Jeanette Traverso. Registrars and clerks of the court have also undergone training. I understand that there is now a readiness to establish the courts.
- 4 In my view the law is a much weaker instrument to prevent discrimination than it should have been thanks to the ideological tempering of the Act by the opposition parties, and the Democratic Party in particular. They sought to enforce as minimalist mere prohibition without ensuring that the law became an effective instrument for the protection and punishment of the offensive discrimination.
- 5 The following two compromise insertions illustrate the point:
 - (a) On the prohibition of the publication or dissemination of hate speech (s 10) they introduced the phrase 'that could reasonably be construed to demonstrate a *clear intention* to ...' and in s 12, in a bid to protect freedom of expression, excluded *bona fide* engagement in creative activity from the prohibitions of

the law. This in spite of the clear precedent in international law via the United Nations treaty bodies, that 'the prohibition of all ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression'. Shadrack Gutto does not believe that the insertion of 'intention' into the Act is a serious limitation because, he argues, intention can be constructed objectively as well as subjectively. However, it remains my view that a complainant against racism or hate speech should never have to prove that the person against whom the complaint is made acted with the intention (let alone a clear intention) to hurt. This introduces a too burdensome evidentiary duty onto victims. I also believe that this goes far beyond the international conventions, which merely refer to the consequences or effects of discrimination, and against South Africa's constitutional jurisprudence on equality thus far.

- (b) In an attempt to placate the vociferous commercial sector, especially the banking and insurance industry, a subclause was inserted on the factors to be taken into account in determining fairness, 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria,

intrinsic to the activity concerned ...'.⁵ This was designed to meet the concerns of the industry in respect of matters such as redlining and in HIV/AIDS, all of which the industry has now conceded to be unfair and unjustifiable.

- (c) A third intervention was the removal, at the instance of the Democratic Party, of the sectoral approach and the relegation of these to the schedule as an illustrative list of unfair practices in certain sectors. In the draft Bill presented to Parliament at the first reading, we had set out in detail ways in which unfair discrimination operated in certain sectors of commerce and industry. Section 29 sets out the rationale for the list and sets out how it will assist the courts in interpreting the law.

- 6 It is important to understand the underlying ideological thrust of the Act. It seeks effectively to stamp out the scourge of discrimination in society. It is recognised that this can only be achieved by the establishment of courts appropriately able and willing to tackle the matter. For that reason, the courts have to be accessible, complainants must be assisted and have reasonably inexpensive access to justice. The Act therefore does more than would ordinarily be the case. It sets out guiding principles which read as being ideological and almost pre-

5 Liebenberg and O'Sullivan have this to say about the impact of these compromises on the rights of poor and disadvantaged women: 'It is also arguable that the inclusion of this factor is unconstitutional as it is not based on the jurisprudence of the Constitutional Court and, depending on how it is interpreted, may result in affording women less protection from unfair discrimination than was offered by the Constitution' ('South Africa's new equality legislation: a tool for advancing women's socio-economic equality' 2001 *Acta Juridica* 70).



scriptive. It emphasises training, facilitation, the promotion of access, restorative measures, deterrence and then goes on to state that –

In the application of this Act, the following should be recognised and taken into account:

- (a) the existence of systematic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
- (b) the need to take measures at all levels to eliminate such discrimination and inequalities.

7 The Act also has two important sections (26 and 27) on the respon-

sibility of persons operating in the public domain to promote equality (s 26), and on the social commitment by all persons to promote equality (s 27). It is important to note that this Act has the very ambitious objective of changing social relations in the country. These social relations will be transformed by imposing obligations on all who render service to the public to 'promote equality' and abjure all forms of discrimination. In other words, we need to go beyond the political will into a social commitment. Without any doubt the courts are presided over by judicial officers who were trained and have practised in the environment we seek to alter. They can hardly be relied upon instinctively to understand or be sympathetic to what the Act seeks to achieve. That is the reason why

extensive and ongoing judicial education is the centerpiece of the law and why it was required that judicial officers designated by the minister had to be drawn from among those who have received appropriate training.

- 8 The Act has stopped short of criminalising unfair discrimination. The minister had charged the Equality Review Committee with the task of investigating whether criminal sanctions would not be appropriate to enforce non-discrimination. Section 10 of the Act makes reference to resorting to common law for prosecution of offences relating to hate speech. While the international convention, the Convention on the Elimination of All Forms of Racial Discrimination, clearly anticipates criminal sanctions against racial discrimination, neither the Equality Legislation Drafting Unit nor the drafters thought that it would be easy to criminalise discrimination. Criminal liability might, in any event, introduce heavier standards for convictions than are possible in cases of this nature.
- 9 This lecture intended to discuss the equality courts to be established in terms of PEPUDA. In part I wished to do so because of the frustrations many of us feel at the delays in the establishment of the courts. I also believe that the courts could become a very innovative mechanism for redressing the suffering of the victims of discrimination and establishing benchmarks for moral behaviour and societal practices that enhance equality. I must also point out that with the assistance of Australian consultants, I presented an extensive proposal for the crea-

tion of equality tribunals instead of the courts. While recognising the advantage of tribunals, the Ministry of Justice did not believe that such an innovation in South Africa would be affordable. Instead, the ministry opted for the maximisation of the country's ordinary courts for this special purpose. There is, it must be admitted, a general aversion within the South African judicial system to special courts. By insisting on equality courts, the minister went a long way towards meeting this concern within judicial circles.

- 10 The equality courts are such a central feature of this legislation that the effectiveness or otherwise of this law may be judged by the extent to which these courts deliver justice and their efficiency. I share the excitement expressed by Narnia Bohler-Muller that

[o]ur equality courts have an opportunity to open a space for individuals in which to be heard, especially victims of sexual and racial discrimination and hatred who have not had loud enough voices in the past. This approach to legal/moral judgment allows us to situate others and ourselves in our respective societal contexts and in so doing to ensure that equality becomes a reality and not merely a rule.⁶

I also believe that the equality courts, together with appropriate promotional programmes, hold great promise for the transformation of South African society to one which, as Errol P Mendes puts it 'collectively understand[s] com-

6 'What the equality courts can learn from Gilligan's ethics of care' 2000 *SAJHR* 623.

passion and collectively understand[s] the need for justice to remedy unnecessary suffering'.⁷

4 Conclusion

Having decided to begin by tracing the

history and the thinking underlying the Act, I no longer have time to consider the significance and structure of the Equality Courts as I had hoped to be able to do. That will have to await another lecture, another time, and another place.

⁷ See n 3.