

Small Steps to Equal Dignity: The Work of the South African Equality Courts

Rosaan Krüger¹

Introduction

“The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle.”²

Given the foundational role of equality in the South African constitutional framework, the drafters of the South African Constitution (the Constitution) directed the South African Parliament (Parliament) to enact legislation to “prevent or prohibit unfair discrimination” between individuals within three years of the enactment of the Constitution.³ Under great pressure, Parliament finalised and passed the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) within two days of the constitutional deadline.⁴ The Equality Act, as the title indicates, addresses the promotion of equality on the one hand, and provides for reactive measures where the equality right is breached, on the other. The reactive provisions include the prohibition of unfair discrimination and related infringements of the equality right. The Equality Act expressly provides for the enforcement of its provisions in specifically created equality courts. The majority of the reactive provisions of the Equality Act have been operational since 16 June 2003. More

than a decade after the enactment of the legislation, the promotional aspects of the Equality Act are yet to come into operation.

This article focuses on the reactive provisions of the Equality Act by providing a snapshot of the work of selected South African equality courts for the period from June 2003 to December 2007 insofar as complaints of racism are concerned. In order to contextualise the application of the Equality Act, the article provides a brief overview of the reactive provisions of the Equality Act and the mechanisms for its enforcement.

1. The Reactive Provisions of the Equality Act

1.1 Prohibited Behaviour

In the few years of constitutional democracy preceding the enactment of the Equality Act, the equality jurisprudence of the Constitutional Court of South Africa (the Constitutional Court) firmly established human dignity as the interest protected by the equality right, and therefore as the interest at the core of the prohibition of unfair discrimination.⁵ The Constitutional Court takes a substantive view of equality, focusing on the impact of the discrimination on the complainant.⁶ Unfair discrimination, in the view of the Constitutional Court, is differential treatment of a person on the basis of his or her membership

of a group which impairs his or her fundamental human dignity.⁷

The Equality Act confirms the link between the dignity interest and the right to equality in its prohibition of unfair discrimination,⁸ hate speech,⁹ harassment¹⁰ and “dissemination and publication of information that unfairly discriminates”.¹¹ Each of these is prohibited in relation to an extensive list of “prohibited grounds”, which include race, gender, sex, marital status, disability, ethnic and social origin and sexual orientation, as well as unlisted analogous grounds, the manipulation of which may lead to systemic disadvantage, impairment of dignity or the undermining of a person’s equal enjoyment of rights.¹² The provisions of the Equality Act bind the state and all persons,¹³ but do not apply in the context of employment where the specific provisions of the Employment Equity Act regulate behaviour.¹⁴

The provisions of the Equality Act regarding the prohibition of unfair discrimination are elaborate. The Equality Act prohibits unfair discrimination on any of the “prohibited grounds” generally,¹⁵ and then goes further to prohibit unfair discrimination on the basis of race,¹⁶ gender¹⁷ and disability¹⁸ separately by providing examples of each of these which could give rise to a complaint under the Equality Act. The Equality Act further defines both “equality” and “discrimination”. The former is defined to include “the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes”.¹⁹ “Discrimination” refers to any positive act or omission which imposes burdens, obligations or disadvantage on a person, or withholds benefits, opportunities or advantages from a person, whether directly or indirectly on the basis of one or more of the prohibited grounds.²⁰ In

line with the constitutional formulation, the Equality Act also prohibits “unfair” discrimination. In each instance, therefore, it has to be determined whether the imposition of burdens or withholding of benefits meets the “unfairness” threshold set by Section 14 (Determination of Fairness or Unfairness) of the Equality Act. This section stipulates that affirmative action programmes do not amount to unfair discrimination and continues in less clear terms,²¹ to set out the factors to be used to determine fairness.²² In the absence of an amendment to clarify the fairness test under the Equality Act, or a declaration of its invalidity, the test for unfairness as set out in the Equality Act must be applied. It is suggested that the determination of fairness should hinge on a consideration of the impact of the discrimination on the fundamental dignity of the complainant as set out in the jurisprudence of the Constitutional Court. Where that fundamental dignity of the complainant is impaired by the actions of the respondent, the discrimination is unfair.

The second violation of the equality right prohibited by the Equality Act is hate speech.²³ The Equality Act defines hate speech very broadly. Section 10 prohibits the publication, propagation, advocating or communication of words based on the prohibited grounds which “could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred”. *Bona fide* artistic creativity, academic enquiry and accurate reporting in the public interest do not amount to hate speech.²⁴ It is evident that mere offensive speech based on one of the prohibited grounds that hurts the feelings of a complainant may be held to constitute hate speech under this broad definition. This formulation of hate speech arguably limits the right to freedom of expression protected by Section 16 of the Constitution beyond that

which is constitutionally acceptable.²⁵ In the absence of a declaration of constitutional invalidity, however, this broad formulation stands and must be applied.

Section 12 of the Equality Act prohibits the dissemination, broadcasting, publication or display of any information, notice or advertisement that “could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person”. *Bona fide* artistic creativity, academic enquiry and accurate reporting in the public interest are valid defences to a complaint under this section. It is unclear exactly what behaviour this section is targeting.²⁶

The last indignity prohibited by the Equality Act is harassment.²⁷ Section 1 defines “harassment” as:

“[U]nwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which relate to:

- (a) sex, gender or sexual orientation; or
- (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such a group”.

With this enactment, the legislature determined that harassment also constituted a wrong outside the workplace²⁸ and is independent from the common law of delict (tort) which allows any person who suffered an *iniuria*, that is an impairment of his or her personality interests in the body, good name and dignity, as a result of the wrongful and intentional actions of another, to institute a claim for damages against the wrongdoer.²⁹

The legislature identified different ways in which the dignity interest at the core of the equality right can be harmed. The elimination of unfair discrimination, hate speech and harassment would certainly contribute to social change in an egalitarian direction in South Africa. The success or failure of legislative prohibitions such as these depends on the mechanisms of enforcement and actual enforcement of the prohibitions. The next two sections address each of these aspects in turn.

1.2 The Enforcement Mechanisms under the Equality Act

A contravention of the Equality Act entitles a complainant to institute proceedings against the respondent in specially created equality courts. The Equality Act designates all high courts in South Africa to be equality courts for their areas of jurisdiction.³⁰ Additionally, magistrates’ courts may be designated to sit as equality courts for their areas of jurisdiction.³¹ As of 28 August 2009, all magistrates’ courts in South Africa have been designated as equality courts.³² These arrangements seem to suggest that equality courts are readily accessible. However, the Equality Act further stipulates that matters under the Equality Act may only be heard by presiding officers who have completed a training course equipping them to be equality court presiding officers.³³ It is not clear how many presiding officers have been trained.³⁴ The Equality Act also specifies that each equality court is to have its own specially trained clerk to assist the court in the performance of its functions.³⁵

The standing provisions under the Equality Act are generous. Proceedings may be instituted by: (i) a person acting in his or her own interest; (ii) a person acting on behalf of someone who cannot act in his or her

own name; or (iii) a person acting on behalf of or in the interests of a group or association.³⁶ The South African Human Rights Commission or the Commission for Gender Equality may also institute equality court proceedings.³⁷

The procedural rules applicable in the equality courts are aimed at informal and speedy processing of complaints. The complainant brings his or her complaint to the attention of the court by completing a complaint form, which sets out the particulars of the complainant and that of the respondent and the complaint, while also indicating the remedy requested.³⁸ No fees are payable for the institution of proceedings.³⁹ The clerk of the equality court is expected to provide assistance to complainants by providing them with information regarding the Equality Act and the procedure of the equality courts. It is thus evident why training of clerks is important: if the clerk is unsure as to the meaning and application of the provisions of the Equality Act, potentially deserving complaints may fall by the wayside.

The Equality Act and the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000⁴⁰ set strict time limits for the processing of complaints.⁴¹ It furthermore allows the court to refer a matter to an alternative forum for determination of the dispute in terms of that forum's powers.⁴² Alternative *fora* which may be asked to deal with matters include, for example, the South African Human Rights Commission, the Advertising Standards Agency or the Broadcasting Complaints Commission. The alternative forum may also refer the matter back to the equality court.⁴³

In order to facilitate a speedy resolution of the dispute, the Equality Act introduces a directions hearing which is to be held prior to

the inquiry.⁴⁴ The directions hearing allows the parties and the court to map the way forward in relation to the consideration of the complaint. This hearing is particularly significant where the parties are unrepresented, as it affords the presiding officer an opportunity to explain the process to the parties.

The Equality Act does not prescribe a particular format for the inquiry, and the ordinary rules of the high and magistrates' courts will thus be applied,⁴⁵ tempered with the requirements regarding informality and participation by the parties.⁴⁶ The requirements of informality and participation by the parties may necessitate a prior agreement between the parties and the presiding officer regarding parties' roles at each of the stages of the inquiry. It may, in particular, require the presiding officer to be more proactive in the proceedings and to descend into the arena through active questioning of the witnesses.

Section 13 of the Equality Act provides that in matters of unfair discrimination, the complainant has to make out a *prima facie* case of discrimination, whereupon a full burden of proof shifts to the respondent who then has to prove, on a balance of probabilities, that the discrimination did not take place, that it was not on one of the prohibited grounds or that it was not unfair. No equivalent shift of the burden of proof is provided for in relation to the other complaints (hate speech, harassment or the publication of information that discriminates unfairly), which means that the complainant carries a full burden of proof in relation to these complaints.

Complainants who choose to litigate under the Equality Act do so in order to obtain a remedy. To an extent, the remedies under the Equality Act⁴⁷ are similar to constitutional remedies in that they are aimed at vindication of the equality right and deter-

rence of further infringements of the right.⁴⁸ But the remedies also reflect features of ordinary civil law remedies. Different combinations of these constitutional and civil law remedies' features are reflected in the remedies provided for in the Equality Act. Some of the remedies are forward-looking, while others are backward-looking; some are community-oriented, while others are individualistic. Several of the remedies are structural, while others reflect corrective or retributive features.⁴⁹ So, for example, the Equality Act provides for an award of damages to an organisation⁵⁰ as a remedy, or an award of damages to an individual as a remedy.⁵¹ The former award is clearly more forward-looking than the latter since an organisation that, for example, fights racism or sexism could put an award to work to influence members of society, whereas an award of damages to an individual assuages only the impairment suffered by the complainant. Other forward-looking, yet corrective remedies that an equality court may grant include policy or practice audit orders⁵² and an order directing the respondent to file regular progress reports with the court or an institution such as the South African Human Rights Commission.⁵³

More typical civil law remedies that may be granted under the Equality Act include interim relief,⁵⁴ declaratory orders⁵⁵ and making a settlement agreement an order of the court.⁵⁶ The Equality Act also outlines specific remedies relevant to complaints under the Equality Act. These include "an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment";⁵⁷ an order directing the respondent to make specific opportunities or privileges available to the complainant;⁵⁸ and an order directing the implementation of special measures to address the trans-

gression of the provisions of the Act.⁵⁹ It is evident that the facts of a particular matter will determine the scope of the remedy to be granted in each instance.

The Equality Act also introduces a "novel" remedy which is that of an unconditional apology. Unconditional apologies as remedies are not completely unknown in South Africa since the common law of delict knew the *amende honorable* as a remedy which involved a declaration by the wrongdoer acknowledging that he or she had uttered words which impaired the dignity of the plaintiff and the offer of an apology for the wrongful infringement thereof.⁶⁰ In recent years, and partly in response to the inclusion of this remedy in the Equality Act,⁶¹ Constitutional Court judges have commented favourably on apology as a suitable remedy in matters of defamation or for the infringement of a person's dignity.⁶² This remedy is particularly suited to instances where the impairment of the dignity of the complainant or plaintiff damaged the relationship between the parties.⁶³ An unconditional and genuine apology restores justice, creates the potential for reconciliation between the parties and affirms the equal dignity of the complainant and the respondent.

Institution of proceedings in terms of the Equality Act does not prohibit other forms of legal redress. Criminal prosecution where the conduct also meets the requirement of the criminal law is one such possibility.⁶⁴ The criminal sanction and the civil redress under the Equality Act may thus both be pursued in respect of a single cause of action. Furthermore, a person whose dignity has been impaired through unfair discrimination, hate speech or harassment may choose to pursue a claim in terms of the law of delict rather than lodge a complaint in terms of the Equality Act since the Equality Act did not repeal

the common law and does not prevent a person from instituting proceedings in terms of the common law.

Judgments of equality courts may be appealed or taken on review to a high court,⁶⁵ and they may even, with the leave of the Constitutional Court, be appealed directly to that court.⁶⁶

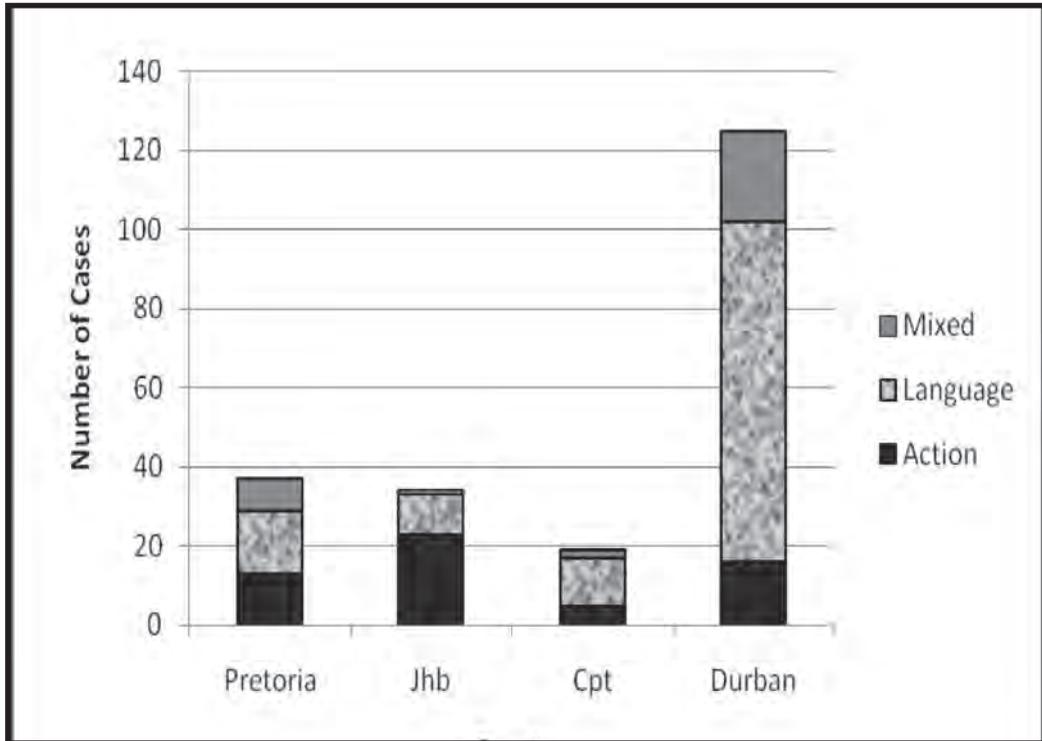
The substantive reactive provisions set out in the Equality Act and the procedural mechanisms provided for the enforcement of these provisions create the means and the framework for assertion of the equality right. Given this and the relatively high levels of intolerance still prevalent in the country,⁶⁷ it would be logical to conclude that the equality courts are inundated with complaints. The reality, however, is that relatively few complaints have been brought before the equality courts since their inception,⁶⁸ thus creating limited opportunities for engagement with the provisions of the Equality Act. The Act has, however, been put to work and the next section outlines the number, nature and outcomes of complaints made to selected equality courts operating at the magistrate's court level in relation to complaints of racism.

2. Putting the Act to the Test: Racism Complaints Made to Selected Equality Courts

During 2007 and 2008, the author visited four pre-selected urban equality courts to collect information regarding the implementation of the Equality Act as part of her PhD research.⁶⁹ The research considered complaints made to the equality courts for the magisterial districts of Pretoria, Johannesburg, Cape Town and Durban for the time period from 16 June 2003 (the date of inception of the equality courts) to 31 December 2007. The author investigated the

implementation of the Equality Act at the level of the magistrate's court because these courts are hierarchically the closest to the people and are physically and financially more accessible than the high courts.⁷⁰ The research was limited to complaints of racism in view of the history of troubled racial relations in South Africa and the constitutionally mandated transformation that is required in this regard.

During the court visits, information was collected from court files regarding racism complaints received and the progress made in relation to the resolution of the matters. A very broad view of complaints of racism was adopted, and every instance in which a complainant alleged that his or her race influenced the behaviour of the respondent was considered to be a complaint of racism. The complaint form does not explicitly require a complainant to indicate whether the complaint is one of unfair discrimination, hate speech, the publication of information that discriminates unfairly or harassment. Complainants therefore provide details of their complaints in their own words, without categorising the complaint in terms of the provisions of the Equality Act. Given the fact that the complaints were set out in the complainants' own words, it was not possible to divide complaints, according to the provisions of the Equality Act, as unfair discrimination, hate speech and the publication of information that discriminates unfairly or harassment. The complaints were therefore categorised, on the version of events as set out by the complainants in the complaint forms, as: (i) complaints involving racist action; (ii) complaints involving the use of racist language; and (iii) mixed complaints which involved action and language. The findings as to the number of racism-related complaints laid at the four court sites are summarised in the graph below:



The Pretoria, Johannesburg and Cape Town equality courts received 37, 34 and 19 complaints respectively. The Durban equality court received 125 complaints for the same time period. There is no clear explanation for the discrepancy, but it may be that satisfied litigants whose matters served before the Durban equality court spread the word about the court and its work. The smaller number of complaints made to the Pretoria, Johannesburg and Cape Town courts limited the opportunities of these courts to engage with the provisions of the Equality Act.

2.1 Pretoria

For the time period under consideration, no judgments were delivered by the Pretoria equality court. The reasons for this are varied. In relation to the majority of com-

plaints, the respondents were never notified of the complaint against them.⁷¹ The abrupt early end of several matters was the result of an additional step in the process of dealing with complaints under the Equality Act that was introduced by the presiding officers of the Pretoria equality court. As a matter of course, all complaints made to the court were screened by a presiding officer prior to notification of the respondent. No clear reason for the introduction of this step was evident from the court documents. One could speculate that it was introduced to assist clerks who were unsure as to the application of the Equality Act, which could be indicative of the need for more training for clerks. But from the directions provided by the presiding officers, one could also infer a need for further training for presiding officers. In several instances where the complaints related to hate

speech, the presiding officers instructed the clerk to advise the complainants to institute criminal proceedings against the respondents. This is quite clearly contrary to the provisions of the Equality Act which envisions its civil remedies existing alongside possible criminal convictions. In the other instances, the presiding officers of the Pretoria equality court instructed the clerk to advise the complainant to pursue a complaint that arose in the workplace in terms of labour law. There is some uncertainty in this regard.

Section 5(3) of the Equality Act provides that the Equality Act does not apply in relation to the employer/employee relationship which, insofar as unfair discrimination in the workplace is concerned, is regulated by the Employment Equity Act. The Employment Equity Act obliges employers to promote equal opportunity in the workplace through the elimination of unfair discrimination in employment policies or practices.⁷² Unfair discrimination in employment policies or practices is consequently prohibited by the Employment Equity Act.⁷³ Disputes regarding unfair discrimination that cannot be resolved in the workplace may be referred to the Commission for Conciliation, Arbitration and Mediation for possible resolution by conciliation.⁷⁴ If the conciliation fails, such a dispute may be pursued in the labour court, or it may be resolved by means of arbitration if the parties agree to this.⁷⁵ The structures created for the resolution of unfair discrimination disputes arising in the workplace thus exist separately from the equality courts.

The definition of unfair discrimination under the Employment Equity Act includes harassment as a form of unfair discrimination,⁷⁶ but the Employment Equity Act is silent on the issue of hate speech in the workplace. This silence leads to a jurisdictional conundrum. It is possible to interpret the provisions of

the Employment Equity Act expansively so as to regard hate speech in the workplace as an issue to be dealt with in terms of labour law. Alternatively, one could interpret the silence to mean that hate speech complaints in the workplace fall within the jurisdiction of the equality court. The latter interpretation could mean that different forums have jurisdiction on different aspects of a complaint arising from a single incident. The intention of the legislature could not have been to allow for such duplication. It is thus suggested that a complaint of hate speech arising in the context of an employment relationship should be dealt with in terms of labour law. Legislative amendment of the Employment Equity Act or an authoritative interpretation by a higher court could provide clarity and guidance in this regard.

The jurisdictional conundrum is exacerbated by the lack of information regarding the relationship between the complainant and respondent as set out on the complaint form. Complainants often do not grasp the difference between a contract of employment and one of rendering services outside an employment relationship. If a relationship between a complainant and respondent is not one of employment as regulated by labour law, the provisions of the Equality Act regarding unfair discrimination, harassment and hate speech will apply. It is therefore important that sufficient information regarding the relationship between the parties must be provided to enable the clerk (or if the clerk is unsure, the court) to determine whether the relationship is one of employment or whether the equality court has jurisdiction to hear the matter. The complaint form in its current format does not require adequate details regarding this relationship to enable the court to make a just decision. However, a blanket refusal on the part of an equality court presiding officer to hear a matter where the complainant refers

to the respondent as “my boss” limits access to justice unjustifiably. Training of presiding officers and clerks on the issue of jurisdiction is necessary in order to ensure that this issue is addressed pertinently.

Engagement with the provisions of the Equality Act involves more than just the delivery of judgments. Complaints made to the Pretoria equality court led to the conclusion of settlement agreements in three of the matters.⁷⁷ In two of these matters, the agreement included an unconditional apology by the respondent,⁷⁸ thus ameliorating the impact of the unfairly discriminating behaviour on the complainant’s fundamental dignity. In one matter, for example, the complainant was refused a hair cut by the staff of the respondent’s salon because the stylists at the salon were unfamiliar with cutting “Indian” hair. The respondent not only apologised unconditionally, but also agreed to pay damages to a charity of the complainant’s choice and to have the staff members of his salons trained to cut different textures of hair. In this instance, it is evident that change flowed from the complaint made to the equality court, thus illustrating the transformative potential of the Equality Act.

This transformative potential is also illustrated by the settlement agreement that was concluded between a complainant, the owner of a house in a complex, and the respondent representing the body corporate managing the common affairs of the complex.⁷⁹ The complaint related to the differential treatment of the complainant as a black home-owner in relation to the other, predominantly white, home-owners. The parties agreed that the complainant’s rights as a home owner were worthy of respect and that meetings of the body corporate were to be conducted in a language and manner accessible to the complainant.

2.2 Johannesburg

The contribution of the Johannesburg equality court during the time period under consideration was similarly modest. The court delivered two judgments⁸⁰ and three matters were settled by agreement.⁸¹ The reasons for the non-progression of the other complaints brought before the court are similar to those advanced above in relation to the Pretoria equality court. The Johannesburg equality court did not introduce a similar “vetting” step, as the Pretoria court did to assist the clerk of the court in the evaluation of complaints prior to service. This meant that service of the notice of the complaint on the respondent was at least attempted in the majority of instances. Subsequent to the service of these notices, determinations that the complaints arose in the work context or other similar technical issues (including the provision of incorrect particulars of respondents) limited progress in numerous matters. On the issue of jurisdiction of the equality court in relation to complaints arising in the workplace, the stance taken by the Johannesburg equality court was similar to that of the Pretoria equality court, thus resulting in the early conclusion of several matters without consideration of the merits of the complaints.

It is noteworthy that several of the complaints made to the Johannesburg equality court concerned commercial or business opportunities. This commercial focus from the financial centre of South Africa is illustrated well by the matter in *Manong and Associates*.⁸² The complaint related to the procurement policies of the provincial roads department. The complainant, an engineering company, alleged that the procurement policy discriminated unfairly against it on the basis of race. In finding for the complainant, the court, in addition to awarding damages to the wholly black-owned complainant

company,⁸³ ordered an audit of the department's procurement policies thus aiming to ensure that a similar infringement of the equality right would not be repeated and thereby contributing to meaningful change in an egalitarian direction.

2.3 Cape Town

The Cape Town equality court was the first of the equality courts to receive a complaint under the Equality Act. The well-publicised first complaint ended with a settlement agreement between the parties. The complainant was denied access to a gay night club by the respondents, who worked as "bouncers" at the club.⁸⁴ The respondents admitted that the complainant was denied access to the club on the basis of race and they apologised unconditionally for the hurt caused and the impairment of the complainant's dignity. The respondents undertook to pay damages to an organisation dedicated to combating prejudice and discrimination against lesbian, gay, bisexual, transgender and intersex communities, as nominated by the complainant. The parties also agreed that the complainant would withdraw the criminal charges laid against the respondents. This settlement agreement heightened the visibility of the equality courts in South African society in the early days of their operation. One success story, however, was not enough to ensure a continued flow of complaints to this court and the contribution of the court has been limited.

2.4 Durban

The number of complaints relating to racism made to the Durban equality court from 2003 to 2007 afforded that court the opportunity to engage with the Equality Act more extensively. A total of 125 complaints were made, the majority of which related to the

use of racist language (86 complaints), with 16 complaints involving racist action and 23 involving elements of both.

The Durban equality court, in contrast to the other courts considered, was willing to consider complaints that arose in the work context. The jurisdictional uncertainty that led to the restrictive interpretation by the presiding officers of the other equality courts was never seen as problematic by the Durban equality court and it dealt with the complaints irrespective of whether the relationship between the complainant and the respondent was one of employment or regulated by a short-term service contract. The work context proved to be a fertile ground for complaints, with 47 arising from that context. Troubled relations between neighbours, or landlord and tenant, accounted for 45 complaints made to the Durban equality court.

The complaints involving actions motivated by racism made to the Durban equality court related mostly to landlord and tenant relations. Comparatively few matters concerning complaints of racist actions were resolved through either settlement or the delivery of judgment.⁸⁵ A number of these complaints were withdrawn and two matters were referred elsewhere.

The matters in which the court engaged with the Equality Act furthered the objects of the Equality Act appropriately. The settlement agreement that was concluded between the complainant and respondent in *BE Gerber v Dunmarsh Investment and another*⁸⁶ illustrates the importance and impact of the Equality Act. In terms of the agreement, which was made an order of court, the respondent acknowledged that the refusal to let a flat to the complainant because her husband was Indian was "un-

constitutional and therefore unlawful". The lease agreement signed by the parties prior to occupation stipulated that "the LESSEE acknowledges that he knows and understands that the premises can be let for occupation by member of the WHITE GROUP only and he hereby declares that he is a member of that GROUP in terms of ACT NO. 36 OF 1966, as amended". The respondents apologised unconditionally for their conduct and undertook to pay an amount of R10,000 (US\$1,471) to the complainant as compensation. The settlement agreement between the parties further stipulated that the offending clause was unenforceable and to be deemed deleted from all existing lease agreements. It was furthermore agreed that a public notice to this effect had to be displayed "prominently" on the building premises. This complaint to the equality court not only resulted in the vindication of the equality right of the complainant, but also had a wider impact in the particular community through the deemed deletion of the offensive clause and the public notice.

Typically, complaints regarding racist language involved the use of racial epithets such as "kaffir" or "coolie". These complaints often arose in the workplace or as a result of interactions between neighbours or landlord and tenant. The derogatory racial terms stem from the apartheid past in which the inherent dignity of black South Africans was not recognised,⁸⁷ and during which power relations were overtly skewed favouring whites as "bosses". Other more common complaints were that the respondent had called the complainant "a monkey" or "baboon" or some other animal.⁸⁸ It has been accepted by South African courts other than the equality courts, that the use of the racial slur "kaffir" causes injury to the dignity of a person and that it constitutes hate speech.⁸⁹ The same also rings true in the broad definition of hate

speech contained in the Equality Act. The Durban equality court has had no hesitation in finding that the use of racial epithets constitutes hate speech. In relation to the use of the terms "monkey" and "baboon", the court considered the innuendo accompanying the use of these terms and found these to constitute racial slurs, amounting to hate speech on the definition in the Equality Act.⁹⁰

For the most part, the Durban equality court dealt efficiently and effectively with the numerous complaints of hate speech that it received. Several of these complaints resulted in settlement agreements and judgments in which the inherent equal dignity of the complainants was vindicated. For example, six respondents agreed to apologise unconditionally to the complainant for the use of racist language after being notified of the complaint or after attending the directions hearing.⁹¹ In some cases the settlement agreement also included the payment of a small amount in damages to the complainant. In a further 11 matters, the Durban equality court granted judgment in favour of the complainants and ordered the respondents to apologise unconditionally for hate speech.⁹² It is noteworthy that the unconditional apologies ordered in these matters were only coupled with small awards of damages in two instances.⁹³ The impairment of dignity caused by hate speech was thus not primarily addressed by means of monetary awards of damages, but rather by an acknowledgement on the part of the respondent of the impact of his or her hate speech on the dignity of the complainant, coupled with a sincere apology for this impairment. This remedy has the potential to restore the relationship between the parties, and may have an even wider impact on the complainants' interactions with other people, thus furthering the transformative ideals of the Equality Act.

However, divergent interpretations by different presiding officers of the Durban equality court regarding the burden of proof applicable in relation to complaints of hate speech proved to be problematic. It will be recalled that in relation to complaints of unfair discrimination, a full burden of proof shifts to the respondent once the complainant makes out a *prima facie* case of discrimination. This means that a respondent may discharge the burden by proving, on a balance of probabilities, that the discrimination did not take place, that it was not on one of the prohibited grounds (both listed and analogous) or that the discrimination was not unfair. Where the presiding officers interpreted the burden of proof to shift to the respondent in relation to complaints of hate speech, the respondent could only discharge the burden by proving that the words were not uttered, since unfairness does not come into play in relation to complaints of hate speech. This incorrect interpretation was followed by some presiding officers and not by others, resulting in different standards being applied.

A variety of factors impact on the ability of a court to deliver justice. A crude unfair denial of benefits or opportunities, the unfair imposition of burdens based on a prohibited ground or hate speech, can be addressed effectively through adjudication, but the indignities of inequality are sometimes subtle and they operate in ways that defy legal redress. In fact, in some instances, litigation may even intensify the inequality between the parties. In concluding this overview of the work of the equality courts, it is apt to consider a judgment of the Durban equality court which illustrates the multi-faceted nature of inequality and the limits of litigation in addressing inequality in all its guises. The complaint in the matter of *N Mqadi v S Laksi*⁹⁴ was that the respondent, the head of the Independent Complaints Directorate in

Durban, told the complainant off, and used racial overtones in doing so, when he enquired about the progress made in relation to an earlier complaint lodged with the Directorate. The respondent denied the allegations made by the complainant. The judgment highlighted the “inequality of arms” between the legally represented respondent and the unrepresented complainant and how that impacted on the outcome of the matter. The lack of legal representation on the part of the complainant resulted in his case being presented in “narrative form”, while that of the respondent was presented in a “legalistic” fashion. The presiding officer acknowledged the different approaches and their origins and found the “legalistic” approach to be more convincing. The complaint was thus dismissed. This matter draws attention to the limits of litigation in addressing issues of inequality. The speedy, affordable and informal process that the Equality Act envisions was overshadowed by a formal presentation of the respondent’s denial of the incident, thus highlighting further inequality between the parties. Also, the indignity of the inequality that was complained of was, according to the complainant, caused by the attitude of the respondent. The subtleties of racism or of other forms of intolerance cannot necessarily be addressed effectively through litigation.

3. Conclusion

The Equality Act was promulgated to address the systemic inequalities and unfair discrimination present in South African society and its institutions as these threaten “the aspirations of our constitutional democracy”. These aspirations relate to “human dignity, equality, freedom, and social justice in a united, non-racial and non-sexist society where all may flourish”.⁹⁵ The Equality Act complements the Constitution and its vision of

change in an egalitarian direction. By providing for causes of action based on the different kinds of violation of the equality right, and by providing remedies for these infringements, the Equality Act “validate[s] injuries and in some cases [may] deter or redress them”.⁹⁶

The survey of racism complaints made to the equality courts for the districts of Pretoria, Johannesburg, Cape Town and Durban illustrates how, and in which contexts, people think it worthwhile to bring complaints of racism to the equality courts. Racist language in the workplace and in interactions between neighbours affects people’s daily lives. In order to contribute meaningfully to change through the elimination of such affronts to equal dignity, the provisions of the Equality Act in relation to jurisdiction of the equality court and labour law *fora*, and the burden of

proof in relation to hate speech complaints, must be clarified.

Relatively few complaints have been made to the equality courts since their inception. The reasons for the paucity are not clear. One could speculate that the existence of the courts has not been thoroughly publicised, or that complainants realise and accept the limits of litigation in addressing inequality in its different forms. The small number of complaints limits the opportunities of these courts to establish themselves as meaningful catalysts of social change.

Despite the challenges and the limitations of litigation on the equality right, the equality courts have contributed in a small but significant way to the affirmation of people’s inherent equal dignity.

¹ Dr Rosaan Krüger is a Senior Lecturer in Law at Rhodes University, South Africa. This article is based on her PhD thesis entitled *Racism and Law: Implementing the Equality Right in Selected South African Equality Courts* (Rhodes University, South Africa, 2009). The financial assistance of the National Research Foundation Thuthuka Programme and the Rhodes University Joint Research Council made this research possible. The author wishes to acknowledge the encouragement and helpful comments of Kate O’Regan without which this work would have remained unpublished. Helen Kruuse, Meryl du Plessis and Sarah Driver also assisted the author greatly with their comments and suggestions.

² Kriegler J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), Para 74. This remark was made in relation to the provisions of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), but the foundational commitment to equality is also reflected in the text which replaced that constitution, namely the Constitution of the Republic of South Africa, 1996.

³ Section 9(4) of the Constitution, read with Schedule 6, Item 23.

⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act was assented to on 2 February 2000 and the constitutional deadline for its enactment was 4 February 2000.

⁵ See in particular *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), Para 31; See also *President of the Republic of South Africa v Hugo*, above note 2, Para 49; and *Harksen v Lane NO* 1998 (1) SA 300 (CC), Para 51.

⁶ Albertyn, C. and Kentridge, J., “Introducing the Right to Equality in the Interim Constitution”, *South African Journal on Human Rights*, Vol. 10, 1994, p. 152; Albertyn, C. and Goldblatt, B., “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality”, *South African Journal on Human Rights*, Vol. 14, 1998, p. 249ff; Freedman, W., “Formal versus Substantive Equality and the Jurisprudence of the Constitutional Court: *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC), 1999

(1) SA 6 (CC)", *Tydskrif vir Hedendaagse Romeins-Hollanse Reg*, Vol. 63, 2000, pp. 315-316; Albertyn, C., "Substantive Equality and Transformation in South Africa", *South African Journal on Human Rights*, Vol. 23, 2007, p. 258; and Fredman, S., "Redistribution and Recognition: Reconciling Inequalities", *South African Journal on Human Rights*, Vol. 23, 2007, pp. 225-227. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), Paras 26 and 29, where the substantive and formal notions of equality are contrasted.

⁷ For academic analyses of the appropriateness of this designation, see Fagan, A., "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood", *South African Journal on Human Rights*, Vol. 14, 1998, p. 220; Davis, D. M., "Equality: the Majesty of Legoland Jurisprudence", *South African Law Journal*, Vol. 16, 1999, p. 398; Cowen, S., "Can Dignity Guide South Africa's Equality Jurisprudence?", *South African Journal on Human Rights*, Vol. 17, 2001, p. 34; Botha, H., "Equality, Dignity and the Politics of Interpretation", *South African Public Law*, Vol. 19, p. 724; Albertyn, above note 6, p. 253; Fredman, above note 6, p. 214; Pieterse, M., "Finding for the Applicant: Individual Equality Plaintiffs and Group-based Disadvantage", *South African Journal on Human Rights*, Vol. 24, 2008, p. 397; Botha, H., "Equality, Plurality and Structural Power", *South African Journal on Human Rights*, Vol. 25, 2009, p. 1.

⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (4 of 2000) (the Equality Act), Sections 6, 7, 8 and 9.

⁹ *Ibid.*, Section 10.

¹⁰ *Ibid.*, Section 11.

¹¹ *Ibid.*, Section 12.

¹² *Ibid.*, Section 1.

¹³ *Ibid.*, Section 5(1).

¹⁴ *Ibid.*, Section 5(3). The Employment Equity Act, 55 of 1998 prohibits unfair discrimination and provides for affirmative action in the context of employment relationships. See the discussion in the following sections.

¹⁵ *Ibid.*, Section 6.

¹⁶ *Ibid.*, Section 7.

¹⁷ *Ibid.*, Section 8.

¹⁸ *Ibid.*, Section 9.

¹⁹ *Ibid.*, Section 1.

²⁰ *Ibid.*

²¹ O' Regan J, in *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC), Para 168, notes that this poorly drafted section "is (...) not particularly helpful to a court faced with the determination of what constitutes fairness". Section 14 of the Equality Act incorporates aspects of fairness and justification and separates the consideration of the impact of the discrimination from the impairment of dignity.

²² These include, in no particular order: (i) whether the discrimination impairs or is likely to impair human dignity; (ii) the impact or likely impact of the discrimination; (iii) the position of the complainant in society; (iv) the nature and extent of the discrimination; (v) whether the discrimination is systemic; (vi) whether the discrimination serves a legitimate purpose; (vii) whether there are less restrictive means that could achieve the same purpose; and (viii) whether the respondent has taken reasonable steps to accommodate the complainant.

²³ See above, note 8, Section 10. On the link between hate speech and equality, see Neisser, E., "Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence", *South African Journal on Human Rights*, Vol. 10, 1994, p. 342; Smith, S. A., "There's Such a Thing as Free Speech and It's a Good Thing Too", in Whillock, R. K., and Slayden, D. (eds.), *Hate Speech*, Sage Publications, 1995, pp. 227-229; Woolman, S., "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution", *South African Journal on Human Rights*, Vol. 13, 1997, pp. 118-119; Albertyn, C., Goldblatt, B. and Roederer, C. (eds.), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000*, Witwatersrand University Press, 2002, p. 4; Banton, M., "The Declaratory Value of Laws Against Racial Incitement", in Coliver, S. (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, Article 19, 1992, p. 351. See also *Strydom v Chiloane* 2008 (2) SA 247 (T), Para 16, where the court held that "racially discriminatory conduct is more serious than hate speech, but hate speech is one of the elements of discriminatory conduct".

²⁴ See above, note 8, Section 10, read with the proviso in Section 12.

²⁵ See, in general, Teichner, S., "The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly", *South African Journal on Human Rights*, Vol. 19, 2003, p. 349.

²⁶ See Albertyn, C., Goldblatt, B. and Roederer, C. (eds.), above note 23, p. 100.

²⁷ See above, note 8, Section 11.

²⁸ Prior to the enactment of the Equality Act, the Employment Equity Act 55 of 1998 contained the only statutory prohibition of harassment in its Section 6 which prohibits harassment as a form of unfair discrimination in the workplace.

²⁹ On the elements of a delict and the *actio iniuriarum*, see Neethling, J., Potgieter, J. M., and Visser, P. J., *Law of Delict*, 6th edition, LexisNexis Butterworths, 2010.

³⁰ See above, note 8, Section 16(1)(a).

³¹ *Ibid.*, Section 16(1)(c).

³² GN 859 in Government Gazette 32516 of 28 August 2009 (the Notice). According to the Notice, 382 magistrates' courts have been designated.

³³ See above, note 8, Section 16(2). No specific designation regarding the facilitation of training has been made in terms of the Equality Act. The training of magistrates as presiding officers for the equality courts is undertaken by Justice College. The typical duration of a training course for magistrates as presiding officers of the equality courts is four days. (The Department of Justice and Constitutional Development Branch: Justice College, *Work Programme 1 April 2007 to 31 March 2008*, undated, pp. 5-6.)

³⁴ See above, note 8, Section 17(3), which provides that the director-general of the Department of Justice and Constitutional Development has to compile and keep a list of trained presiding officers. The author's attempts to contact the office of the director-general telephonically during June 2011 were unsuccessful.

³⁵ *Ibid.*, Section 17(1). The training of clerks is also facilitated by Justice College. The typical duration of a clerk's training course is four days. (The Department of Justice and Constitutional Development Branch: Justice College, above note 33, p. 21.)

³⁶ See above, note 8, Section 20(1).

³⁷ *Ibid.*

³⁸ See above, note 8, Section 20(2); and Regulation 6(1) of the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the Regulations) as published under GN R 764 in Government Gazette 25065 of 13 June 2003 and amended by GN 563 in Government Gazette 26316 of 3 April 2004. More details regarding the available remedies are provided below.

³⁹ See above, note 38, Regulation 12(1).

⁴⁰ See above, note 38.

⁴¹ So, for example, must the respondent be informed of the complaint within seven days of the filing thereof.

⁴² See above, note 8, Section 20(3) and (5). Section 20(4) sets out the various factors the presiding officer has to consider in determining whether a referral is appropriate. This includes the personal circumstances of the parties, the accessibility of the alternative forum, the needs and wishes of the parties and whether the intended proceedings in the equality court could be precedent-setting.

⁴³ See above, note 38, Regulation 6.

⁴⁴ See above, note 38, Regulation 10(5). This includes issues of discovery, interrogatories, admissions, limitation of disputes, joinder and intervention, amicus interventions, filing of affidavits, further particulars and dates of future hearings.

⁴⁵ See above, note 8, Section 19. Rule 29 of the Magistrate's Court Rules as published under GN R 740 in Government Gazette 33487 of 23 August 2010 applies *mutatis mutandis*.

⁴⁶ See above, note 38, Regulation 10(3).

⁴⁷ See above, note 8, Section 21.

⁴⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), Paras 94 and 96; *Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC), Para 38; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), Para 80.

⁴⁹ Currie, I., and De Waal, J., *The Bill of Rights Handbook*, 5th edition, Juta, 2005, pp. 195-198, in which the authors distinguish constitutional remedies from ordinary civil remedies on the basis of the former being forward-looking, community-oriented and structural, and the latter as being backward-looking, individualistic and retributive. The authors' view is that the Equality Act remedies combine features of both.

⁵⁰ See above, note 8, Section 21(2)(e).

⁵¹ *Ibid.*, Section 21(2)(d).

⁵² *Ibid.*, Section 21(2)(k).

⁵³ *Ibid.*, Section 21(2)(m).

⁵⁴ *Ibid.*, Section 21(2)(a).

⁵⁵ *Ibid.*, Section 21(2)(b).

⁵⁶ *Ibid.*, Section 21(2)(c).

⁵⁷ *Ibid.*, Section 21(2)(f).

⁵⁸ *Ibid.*, Section 21(2)(g).

⁵⁹ *Ibid.*, Section 21(2)(h).

⁶⁰ For academic discussion of the common law remedy, see Midgley, J. R., "Retraction, Apology and the Right to Reply", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 58, 1995, p. 288; Neethling, J., "Herlewing van die *Amende Honorable* as Remedy by Laster – *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W)", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 66, 2003, p. 329; Neethling, J., "Laster: die *Amende Honorable*, Apologie en die *Quantum Solatium* – *Young v Shaikh* 2004 (5) SA 46 (K)", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 67, 2004, p. 698; and Mukheibir, A., "Reincarnation or Hallucination? The Revival of the *Amende Honorable*", *Obiter*, Vol. 25, 2004, p. 455.

⁶¹ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), Paras 62-70 per Mokgoro J., and Paras 105, 107, 108-121 per Sachs J.

⁶² See specifically *Le Roux v Dey* 2011 (3) SA 274 (CC), Paras 195-203, where Froneman J. and Cameron J., with concurrence on this point by the other judges of the Court, developed the common law of delict to provide for a remedy of an unconditional apology where the dignity of a person has been impaired. See also *The Citizen 1978 (Pty) Ltd v McBride* (CCT 23/10) [2011] ZACC 11 (8 April 2011), Paras 130-134.

⁶³ *Le Roux v Dey*, above note 62, Para 202.

⁶⁴ See above, note 8, Sections 10(2) and 21(2)(n).

⁶⁵ *Ibid.*, Section 23(1).

⁶⁶ *Ibid.*, Section 23(3).

⁶⁷ For example, in May 2010, around 46% of the South African population was of the view that race relations were improving, implying that the majority was of the view that race relations were deteriorating. (The Presidency, *Development Indicators*, 2010, available at: <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010.pdf>, p. 56.) A survey of newspaper headlines on any given day indicates that intolerance for difference is rife.

⁶⁸ Department of Justice and Constitutional Development, *Annual Report 2009/2010*, p. 21. In 2008-2009, for example, a total of 447 cases were enrolled in the equality courts. This figure increased to 508 in 2009-2010.

⁶⁹ See above, note 1. The author recorded the information from the court files to which she was granted access. In more complex matters, copies were made of all the documents, and in less complex matters, notes were kept on the complaints and the progress of the matter. In several matters, the author obtained a sound recording of the judgment of the court which was transcribed with the permission of the presiding officer. In the majority of cases where judgment was delivered, the presiding officers prepared written judgments. The documents are on file with the author.

⁷⁰ See Jagwanth, S., "The Constitutional Role and Responsibilities of Lower Courts", *South African Journal on Human Rights*, Vol. 18, 2002, pp. 201-203 and 214. The important role of the lower courts in contributing to the constitutional project has also been acknowledged by the high courts. See, for example, *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 83J-84A; and *S v Steyn* 2001 (1) SA 1146 (CC), Para 18.

⁷¹ A total of 22 matters were dismissed or referred after filing of the complaint form.

⁷² Employment Equity Act 55 of 1998, Section 5.

⁷³ *Ibid.*, Section 6.

⁷⁴ *Ibid.*, Sections 10(1) and 10(5). The Commission is a statutory body created in terms of labour legislation to resolve labour disputes informally and speedily.

⁷⁵ *Ibid.*, Section 10(6).

⁷⁶ *Ibid.*, Section 6(3).

⁷⁷ *Narandaran Kollapen v JH du Preez* 001/03; *T Nkhwashu v Doring en Rosie Kleuterskool* 007/03; and *N Mashiane v JJ Hattingh* 07/05.

⁷⁸ *Narandaran Kollapen v JH du Preez* and *T Nkhwashu v Doring en Rosie Kleuterskool*, above note 77.

⁷⁹ *N Mashiane v JJ Hattingh*, above note 77.

⁸⁰ *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Depart-*

ment, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission 01/04; and *MD Kaunda v Galaxy World* 16/05.

⁸¹ *T Singiswa v J March (FNB Manager)* 06/04; *TM Singiswa v JN de Freitas* 07/04; and *J Jennifer (SAHRC) v Glenvista High School (Principal Mr M Robinson)* 02/07.

⁸² *Manong & Associates*, above note 80.

⁸³ The award was made on the basis of the impairment of the dignity of the complainant company's shareholders.

⁸⁴ *MG Pillay v M Cronje and I Coetzee* 01/03. The complaint received media attention at the time for being the first equality court complaint. (Gophe, M., "Equality Court Orders City Night Club to Pay Up", *Cape Argus*, 11 February 2004, p. 2; Kassim, A., "Equality Court Finds Gay Club Guilty of Racism", 11 February 2004, p. 3.)

⁸⁵ At the time of consideration, 5 of the 16 matters were resolved through either settlement or judgment.

⁸⁶ *BE Gerber v Dunmarsh Investment and another* 69/07.

⁸⁷ Of the 86 complaints relating to racist language, 63 involved the use of racial slurs such as "kaffir" or "coolie". Of the 27 complaints involving racially motivated action and language, 16 involved the use of racial slurs in combination with some act.

⁸⁸ A total of 10 complaints involving reference to the complainant as some animal were made. In some instances the complaints indicated that the complainant was subjected to racial epithets and called an animal, which the complainants mostly interpreted as a denial of their humanity. On the use of the term "baboon" in the context of a claim of defamation, see *Mangope v Asmal* 1997 (4) SA 277 (T) 2861-287B: "The definition of baboon in *Chambers Twentieth Century Dictionary* is given as: 'n. large monkey of various species, with long face dog-like tusks, large lips, a tail, and buttock callosities; a clumsy, brutish person of low intelligence.' Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It will depend on the circumstances and on the views of those to whom the words are addressed. It follows, I think, that the words are capable of a defamatory meaning."

⁸⁹ Revelas J., in *Gouws v Chairperson, Public Service Commission* (2001) 22 ILJ 174 (LC), Para 56, held: "The word 'kaffer' ['kaffir'], particularly if used by a white person referring to a black person, and if uttered directly at a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed 'hate speech.'" See also *Ciliza v Minister of Police* 1976 (4) SA 243 (N) 249G; *Mbatha v Van Staden* 1982 (2) SA 260 (N) 262G-H; *National Union of Metalworkers of SA v Siemens Ltd* (1990) 11 ILJ 610 (ARB); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp* 2002 (2) BLLR 493 (LAC); and *Myers v SAPS* [2004] 3 BALR 263 (SSSBC).

⁹⁰ *Complainant v Respondent* 09/04.

⁹¹ *FS Khuswayo v Y Moodley* 63/05; *S Boyce v L Zietsman and G Clifford* 07/06; *N Mabaso v K and M Mall* 44/06; *JL Jojo v Mr Olivier* 23/07; *B Khawula v J Auths* 38/07; and *S Kumar v W Frank* 45/07.

⁹² *Complainant v Respondent* 09/04; *BG Maphumulo II Sheik* 16/04; *ZC Memela v T Lues* 17/04; *S Duma v JB Adam* 22/04; *M Lankie v D Gordon* 33/04; *HI Donaldo v R Haripersad* 29/05; *F Mdladla v E Smith* 40/05; *T Pretorius v R Petzer* 89/05; *P Magubane v S Smith* 01/06; *EB Sikakane and another v AR and N Petzer* 05/06; and *AJ Smith v TJ Mgagi and another* 60/07.

⁹³ *HI Donaldo v R Haripersad* 29/05; and *T Pretorius v R Petzer* 89/05.

⁹⁴ *N Mqadi v S Lakhi* 76/05.

⁹⁵ See above, note 8, Preamble.

⁹⁶ Grotty, P. M., "Legislating Equality", *International Journal of Law, Policy and the Family*, Vol. 10, 1996, p. 318.