

Your Guide

to the South African Equality Courts

A STEP BY STEP PROCESS
TO EMPOWER PARALEGALS,
COMMUNITY LEADERS AND
HUMAN RIGHTS EDUCATORS

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INTRODUCTION

For generations the citizens of South Africa lived in a society divided by apartheid, which was strictly enforced by the government of South Africa. After years of bloodshed and secret negotiations amongst political groups throughout South Africa, this system was finally dismantled in 1991 with the repeal of the apartheid laws by President De Klerk in 1991. In 1996, the country's current constitution was adopted, which guarantees racial equality under the law. To promote the new constitution's promise of the end of discrimination and to enforce equal treatment under law, the government enacted the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4, 2000 (hereinafter referred to as the "Equality Act"), an anti-discrimination law which prohibits unfair discrimination by both the government of South Africa and by private persons or organizations.

Under the Equality Act, the Equality Courts were created to hear most cases about unfair discrimination, hate speech and harassment (some are excluded because they are governed by other laws, such as the Labour Law or criminal statutes). Any person or association, acting on its own behalf or on behalf of others, can bring a case covered by the Equality Act to the Equality Courts if they or someone else has received mistreatment due to discrimination on a number of grounds, including: race, gender, sex, age, colour, disability, religion, and language, among others. (Detailed information on the development of the Equality Act and the Equality Courts is provided in Part II of the Handbook).

This Handbook is divided into two sections for ease of use. The first section, Part I, succinctly explains the nuts and bolts of presenting a case in the Equality Court, from intake to presentation. The second section, Part II, contains the background material necessary for understanding how the court system in South Africa operates, its relationship to the Equality Courts and the historical background that led to the creation of this legal system. Finally, there is also a resources page and an appendix which point to detailed reference materials for the reader.

Users of this Handbook will have a range of experience with the court system in South Africa and with the Equality Courts. Those with a working understanding of the court system may simply refer to the first section, which focuses on the preparation and presentation of the case. It is recommended that those with a more limited background read the second section first.

The Handbook utilizes a simple case study that you can refer to at each stage of your preparation.

Part I PREPARING AND PRESENTING A CLAIM IN THE EQUALITY COURT

CHAPTER 1

THE CASE

Every Equality Court matter will begin with a person who has a story that involves some form of discrimination, and probably much more information than is helpful. The initial job will be to distill the story into facts that fit neatly within a claim of discrimination that the Equality Court will accept and process. We have created a fact pattern that we will use throughout this manual to explain the elements of a claim under the Equality Act, as well as various procedural steps that you will encounter through the process.

CASE STUDY

The following case study is a typical discrimination claim.

On January 1, 2012, Mr. Bongani Masuku, a black man living in Johannesburg, South Africa, went with his friend Mr. Abraham Klein to the XYZ Restaurant in Johannesburg to have dinner. When the two men approached the door, Mr. Jan Fourie, the white door manager, told them that Mr. Bongani Masuku could not enter. Mr. Fourie told Mr. Abraham Klein, who is white: "You are ok to go in." Mr. Masuku then asked Mr. Fourie: "Is there a dress code? Do I need to go home and change?" Mr. Fourie responded: "It is not that. We do not let your kind in here." Because Mr. Masuku was not allowed inside, the two left. Mr. Masuku believes that the only reason that he was not permitted into the restaurant was that he is black.

Key Terms:

The following key terms will be important as you discover how to present the claim and prepare for your hearing:

- ◆ **"Claim"** means a statement (sometimes called a pleading) showing that the Complainant was discriminated against in violation of the Equality Act along with the sought after remedy, typically a demand for money, property or enforcement of a right provided by law.
- ◆ **"Clerk"** means the Court administrator who makes sure that the process works smoothly. The clerk is directly responsible to the Court and interacts with the Presiding Officers.

- ◆ **“Complainant”** means the person alleging damages or wrongdoing (i.e., the person bringing the claim) or the Complainant’s advocate or representative. Complainant is sometimes referred to as “you” in this Manual.
- ◆ **“Form 2”** is the legal document that is used by the Court to allow the Complainant to set out the allegations of discrimination, the information related to other parties, including anyone that will represent the Complainant in the Equality Court, and a list of remedies the Complainant may seek. This form substitutes for what is otherwise called a “complaint” in courts of law. The clerk will assist the Complainant in completing this form.
- ◆ **“Form 3”** is the notice the clerk will send to the Respondent advising the Respondent of the claims against him/her and advising him/her of the opportunity to respond to the claims.
- ◆ **“Presiding Officer”** means the hearing officer in the Equality Court System, who is a specially trained magistrate Judge.
- ◆ **“Respondent”** means the person or persons against whom the Complainant is bringing the claim of damages or wrongdoing. This person responds to the claim brought against him.

In our case study, Mr. Masuku is the Complainant, and he is bringing a claim of discrimination under the Equality Act. Mr. Fourie and the XYZ Restaurant are the Respondents because Mr. Masuku will bring the claim against them. Mr. Masuku (or his representative) will, with the assistance of the clerk, fill out Form 2.

The South African Court System:

Section 34 of the Bill of Rights in the South African Constitution states that everyone has the right to have any legal problem or case decided by a court or an independent body.

Claims brought under the Equality Act are normally heard in the Equality Courts, which are part of Magistrate Courts system, but they can also be referred to the High Court by the Presiding Officer. An Equality Act claim can also reach the High Court if a Complainant appeals a final decision of the Equality Court. The following chart is a quick description the court structure in South Africa and the appeal or review process:

Constitutional Court

Hears appeals and new cases for constitutional issues and any other matter if it is in the interest of justice that it does so

Supreme Court of Appeal

Hears appeals only

High Court

Hears appeals from lower courts and new cases from the following courts:

- ◆ Labour Court
- ◆ Land Claims Court
- ◆ Water Tribunal
- ◆ Tax Court

Magistrate Courts

Includes:

- ◆ Regional Courts
- ◆ Family Courts
- ◆ District Courts
- ◆ Maintenance Courts
- ◆ Juvenile and Children's Courts
- ◆ Equality Courts ← *We begin here*

Small Claims Court

Community Courts and Courts of Chiefs and Headsman

The background for and a detailed discussion of the Equality Act is set forth in Part II. The Constitutional provision prohibiting discrimination is set out fully in the appendix.

Procedure

This chapter sets out the steps one needs to take to present a claim in the Equality Courts. This chart should assist in understanding the timing and flow of these simple procedures. The forms can be found in the link to the regulations found in the resources.

STEP-BY-STEP GUIDE FOR FILING A CLAIM IN THE EQUALITY COURTS

STEP 1 Prepare Form 2

1. Approach your nearest Magistrates' or High Court and ask for the Equality Court; you will find a clerk of the Equality Court who will give you a **Form 2** to complete.
2. **Form 2** is used when commencing any proceedings at the Equality Court.
3. If you need assistance in completing the form, the clerk will assist you. Or you can go to the Advice Offices or to the offices of the South African Human Rights Commission or the Commission for Gender Equality near you for assistance.

STEP 2 Clerk Completes Form 3

Once you file **Form 2**, the clerk must, within 7 days, notify the Respondent(s) of the Claim by completing **Form 3**.

STEP 3 Respondent Replies

1. The Respondent has **10 days** from receipt of **Form 3** to reply by stating his/her side of the case on **Form 3** and returning it to the clerk.
2. The Clerk has **7 days** from receipt of the Response to notify the Complainant of the Respondent's Response.

STEP 4 Clerk Refers Claim

1. Within **3 days** after the period during which the Respondent is to reply, the clerk must refer the Claim to the Presiding Officer, who will hear the Claim.
2. The Presiding Officer has **7 days** to decide whether the Claim is to be heard at the Equality Court or whether it should be referred to an alternative forum such as a High Court or the South African Human Rights Commission.

STEP 4a Presiding Officer May Refer Claim to an Alternative Forum

1. If the Presiding Officer decides to refer the Claim to an alternative forum, he/she will submit the referral on Form 8.
2. The Presiding Officer can send remarks or comments to the alternative forum by using Form 5 (Part A, Paragraph 2).

The alternative forum must deal with the Claim as expeditiously as possible.

3. Upon receipt of the Presiding Officer's Order of referral, the clerk must:
 - Submit all relevant documents to the alternative forum;
 - Retain copies of such documents;
 - Forward a copy of the Order to all parties;
 - Notify the parties of documents submitted to the alternative forum;
4. The alternative forum must then notify the parties of receipt of the Claim.
5. The alternative forum must report progress to the Equality Court within **60 days**.

If the alternative forum fails to deal with the matter expeditiously or fails to resolve the Claim, it must refer the Claim back to the Equality Court with a report.

If the Claim is referred back to the Equality Court, the Equality Court has **7 days** within which to give instructions as to how the Claim should be dealt with.

STEP 5 Directions Hearing

If the Presiding Officer decides to hear the Claim, the clerk must, within 3 days, assign a date for the Directions Hearing.

At the Directions Hearing, the Presiding Officer will deal with issues such as: the dates for trial, the need for an interpreter, whether assessors should be used, etc.

STEP 6 Hearing on the Merits

For a description of the processes in the Directions Hearing and the Hearing on the Merits, see Chapter 5.

Once **Form 2** is filed with the clerk, it should take about **90 days** for a decision. If the Claim is referred to an alternative forum and resolved by that forum, it will proceed according to the process of that forum. If either party objects to the decision of the Presiding Officer, the matter can be appealed to the High Court.

Preparing the Claim and Form 2

Introduction:

This chapter takes us through the process of filing a claim in the Equality Courts. We begin in Section 1 with explanations of several key terms in the Equality Act related to filing **Form 2**. Section 2 provides step-by-step assistance in designing a claim and shows how those steps apply to our case study from Chapter 2. Finally, Section 3 includes a discussion of the Rules of Evidence as they apply to filing **Form 2**.

While the Equality Act sets out the scope of actions and remedies provided under the law, as well as detailed procedures for processing Claims, the reality appears to be that the well thought out process simply does not work the way it was intended. Very few Magistrate Courts, including the Equality Courts, are set up with properly trained clerks to help a Complainant fill out **Form 2** (described in Chapter 2) and initiate the claim process. There are two major stumbling blocks in the system: the clerks' turnover rates and their lack of formal training.

Because of these issues, it is very difficult for clerks to analyse a Complainant's accusation to determine whether it is a proper claim to bring before the Equality Court. Several Magistrates interviewed in researching this Handbook made it clear that many clerks simply do not understand what they are supposed to do, and often go directly to the Magistrate with the claim to determine whether or not the Complainant is stating a proper claim. This places the Magistrate, the ultimate decision maker, in a compromising situation.

Complainants cannot be expected to understand the nuances of the Equality Act. However, since it is critical that the Claim falls within the narrow parameters of the Equality Act, the information presented to the clerk should initially focus only on issues addressed by the Equality Act and should not be mixed with issues that the Equality Act does not address, such as criminal or labour issues. By focusing on relevant issues only, the clerk will be better able to determine if the Claim is properly placed in the Equality Court. **As a result, the most useful service a non-lawyer advocate can provide to a potential Complainant is to help that Complainant properly phrase a Claim so that the matter will proceed smoothly in the Equality Court.**

If there is a labour issue or a criminal issue, it can be handled in the appropriate forum, but if it is mixed into the statement presented to the Equality Court Clerk, the result might be a needless referral to the High Court or Labour Court. Instead, any discrimination claims should be handled independently by the Equality Court and any related labour or criminal issue can thereafter be handled in the appropriate forum once the equality Claim is resolved.

Section 1 – Understanding the Terms “Discriminate,” “Prohibited Grounds” and “Burden of Proof”

Chapter 2 of the Equality Act, which provides the legal foundation for the Equality Courts, states in Paragraph 6 that “neither the state nor any person may unfairly discriminate against any person.”

◆ **“Discriminate”** means to engage in any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

(a) imposes burdens, obligations or disadvantage on; **OR**

(b) withholds benefits, including advantages, from

any person on one or more of the “prohibited grounds.”

Simply put, discrimination means to treat one person or group differently than another, and if the reason for the different treatment is one prohibited by the Equality Act, such as race, it is prohibited discrimination.

◆ **“Prohibited grounds”** includes two categories. The first category is the list of grounds spelled out in Section 9 of the South African Constitution and included in Section 1 of the Equality Act. They include “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” We will refer to them as “Category 1 grounds.”

The second, and broader, category was not included in the Constitution but was added to the list of prohibited grounds by Parliament in Section 1 of the Equality Act. It includes “any other ground where discrimination based on that other ground causes or perpetuates systematic disadvantage, undermines human dignity, or adversely affects the enjoyment of a person’s rights and freedom in a serious manner that is comparable to discrimination on one of these stated grounds.” We will refer to these grounds as “Category 2 grounds.” Category 2 also includes the hate speech, harassment and publications that discriminate, as established in Sections 10, 11 and 12 of the Equality Act.

The distinction between the two categories has become important because the courts have ascribed different “burdens of proof” to cases involving Category 1 Claims and Category 2 Claims.

When preparing a claim, it is helpful to consult the Equality Act itself to see if the offending conduct fits into the language of the Equality Act. For more examples of prohibited grounds, please see Sections 7, 8 and 9 of the Equality Act.

Note: Certain discriminatory actions that one might think would be covered by the Equality Act are not available for remedy in the Equality Courts because they are governed by other laws. These include actions related to the workplace, which are covered by the Labour Act, and criminal conduct, which is governed by the Criminal Code.

◆ **“Burden of proof”** means the obligation of a party to present evidence to prove the claims or defences maintained. The courts have imposed different burdens of proof upon a Complainant depending on whether the prohibited ground relied upon is Category 1 or Category 2.

Category 1: If the relied upon ground is Category 1, the Complainant need only establish a *prima facie* case to have the Complaint heard by the Court, and the *Respondent* must rebut the allegation of discrimination by a “balance of the probabilities” in order to defeat the Claim. A *prima facie* case has been ruled to mean that the Complainant has met his/her burden if the Complainant has **presented** enough facts upon which a reasonable court might find for the Complainant when the Complainant closes his/her case. If the Respondent fails to respond, the Presiding Officer can find for the Complainant without further proceedings.

Category 2: However, if the Complainant is relying on a Category 2 ground, the ease of pleading a *prima facie* case is not available. In Category 2 cases, the Complainant must prove the alleged facts by a balance of the probabilities. In other words, he or she must prove that, based on all of the evidence presented, it is more likely than not that the allegations are true.

Section 2 – Designing the Claim

STEP 1 Make a *Prima Facie* Case

In order to make the *prima facie* case, the Complainant must establish the following three “elements.”

FIRST: Identify the Complainant and allege that he/she is a person protected by the Equality Act. He/she must be a person who was discriminated against in South Africa. That person can be a citizen, tourist or even an illegal alien.

Example: “I, Bongani Masuku, resident of South Africa, was discriminated against in the City of Johannesburg.”

SECOND: Allege that the Respondent is subject to the Equality Act and the jurisdiction of the court in question, i.e., either lives within the area where the court has jurisdiction or did something prohibited by the Equality Act within that area. The Johannesburg court will not, for example, have jurisdiction to hear a case involving a Respondent who does not live within its area of jurisdiction unless the conduct in question occurred in that area.

Example: “The XYZ Restaurant in Johannesburg, South Africa, through the actions of its door manager, Mr. Jan Fourie, prohibited me from entering the XYZ Restaurant because I am a black man.”

THIRD: State what that person or entity allegedly did. The prima facie case does not require the Complainant to present evidence – it only requires him/her to plead that the discriminatory conduct occurred.

Example: “Mr Jan Fourie told me I could not enter the XYZ Restaurant and said, ‘We do not let your kind in here.’”

In sum, in order for the Complainant to set out a *prima facie* case, **three prongs are always necessary:**

- (1) The Complainant is protected by the Equality Act,
- (2) The Respondent is subject to the Equality Act and the jurisdiction of the Equality Court, and
- (3) The Respondent did something to the Complainant that is prohibited by the Equality Act on a ground that is subject to the jurisdiction of the Equality Court.

The examples above fulfill these requirements.

Examples of Invalid Complaints:

1. *“I am an Iraqi Citizen living in Baghdad, and the Respondent, the XYZ Book Company of Johannesburg, sent me a book that referred to Iraqis as unclean people.”*

Why it is invalid: an Iraqi citizen living in Baghdad could not seek redress against a South African citizen for conduct that did not occur within the Court’s geographic area of jurisdiction (i.e., South Africa).

2. *A resident of Cape Town was not given a promotion at work because of his/her race.*

Why it is invalid: it would fall outside the jurisdiction of the Equality Courts because it has to do with labour relations matters.

STEP 2 Pick the Right Evidence to Make a Prima Facie Case

After you establish the prima facie case as discussed in Step 1, you will need to provide evidence that supports the facts you asserted. Although “proof” is not required in pleading a *prima facie* Claim if the Respondent *does not* answer the claim, if the Respondent *does* answer with proof, the Complainant must also respond with proof. For this reason it is important to ensure that there is proper evidence to support the Claim, even though the initial burden is only to state a *prima facie* case.

An easy way to pick the right evidence is to follow these steps:

FIRST: Set out the different “elements” of the Claim.

SECOND: Set forth the facts that support these elements.

THIRD: Lay out the evidence that supports each of these facts.

Let's revisit the facts of our sample case: The Complainant says that the door manager at the XYZ Restaurant did not allow him to enter because he is black. It is important to show why the Complainant believes that was the reason.

Evidence to Present: The door manager may provide several reasons other than colour or race for denying the Complainant admission to the XYZ Restaurant. These might include failure to meet a dress code or unruly behaviour. However, if the door manager said "we don't let Indians in here," or "we don't let your kind in here," that would constitute evidence of discrimination. It is important to dig into each fact to determine what evidence the Complainant has to support the allegation. It could be the statement of a co-worker, written evidence, the observation that everyone in the restaurant was white, or any other type of material that supports a single fact alleged in the Claim.

It may be helpful to create a chart for your case using this template based on our sample case:

Elements of the Claim	Facts to Support the Elements of the Claim	Admissible Evidence to Prove the Facts in Support of the Claim
1. The Claimant is a person protected by the Equality Act,	Mr. Bongani Masuku; Lives in Johannesburg, South Africa where the alleged conduct took place.	Testimony of Mr. Bongani Masuku
2. The Respondent is subject to the Equality Act	The alleged behavior took place at the XYZ Restaurant located in Johannesburg, South Africa on January 1, 2012;	Testimony of Mr. Bongani Masuku and Mr. Abraham Klein
3. The Claimant was discriminated against in violation of the Equality Act; i.e., the discrimination was based on a prohibited ground	Mr. Jan Fourie, the white door manager at XYZ Restaurant, refused to allow the Claimant in Stood in the door of the XYZ Restaurant and prevented Mr. Bongani Masuku from entering because he was black; Mr. Jan Fourie let Mr. Abraham Klein, a white man, into the XYZ Restaurant saying "you are ok to go in."	Testimony of Mr. Abraham Klein and Mr. Bongani Masuku; Testimony of Mr. Jan Fourie that he was told by owner of XYZ Restaurant to let whites in, but not blacks

STEP 3 The Respondent's Response

Once the *prima facie* case has been alleged, the Respondent answers the charges and can enter proof that (i) either the discrimination did not take place; (ii) the conduct was not based on a prohibited ground; or (iii), in the case of a Category 2 claim, that the conduct, although discriminatory, was fair in this case. Remember that the Respondent's burden is to "prove, on the facts before the court, that the discrimination did not take place as alleged." To do that the Respondent will have to present evidence that is admissible in court.

Notice the difference in proof: the Complainant's burden to present a "*prima facie*" case for a Category 1 Claim only requires an allegation (a claim of fact), but the Respondent's burden is to place facts before the court that are based upon admissible evidence. In other words, the Respondent is obliged to present to the court information that will help the court decide if Complainant's allegations are true. Ultimately, the Presiding Officer for the case will have to weigh the evidence presented in order to make a decision as to whether the discrimination occurred. However, as indicated above, even in Category 1 Claims, **the Complainant should be sure that there is credible, admissible evidence to support the Claim and not rely on the fact that the initial burden is only to plead a *prima facie* case.** If the Respondent puts admissible evidence into the record to rebut the Complainant's allegations, the burden will shift to the Complainant to present hard evidence to support them.

To ensure that the evidence presented is credible and admissible, a Complainant or any advocate assisting a Complainant should try to develop an understanding of the basic Rules of Evidence when preparing a case. This is true because, as has been the case thus far in the Equality Courts, Respondents, once accused, are likely to hire a lawyer to defend them. When that happens, the most effective weapon an advocate can have is a good understanding of the most basic rules. These are discussed in Section 3.

Section 3 – Understanding the Rules of Evidence

Although the Equality Courts may occasionally relax the Rules of Evidence in order to facilitate the process, the Magistrates/Presiding Officers consulted while researching this handbook indicated that if they were presented with admissible evidence on one side, and inadmissible evidence on the other side, they would have great difficulty in giving both sides equal weight and most likely would make a

decision based upon admissible evidence. This is because Presiding Officers must ultimately weigh all the evidence to determine what they believe to be the truth in order to make fair and just decisions.

In order to properly analyse a case, it is therefore important to assess the quality and understand the admissibility of the evidence presented in support of the Claim. While law students spend months learning the Rules of Evidence and experienced lawyers have substantial practice in preparing cases with an eye towards developing evidence that is admissible, most people are not in a position to, and generally have no need to, understand the minutiae of these rules. There are really only two Rules of Evidence that Equality Court advocates need to understand in order to prepare cases for the Equality Courts: the Rule of Relevancy and the Rule of Hearsay.

What is Evidence?

Evidence is defined as: “material that a party (the Complainant or Respondent) wants the Court to consider as proof of the Claim or defense offered.”

Evidence can take many forms, including but not limited to:

- ◆ statements of witnesses
- ◆ documents
- ◆ films, photos
- ◆ tape recordings
- ◆ business records
- ◆ objects

The Rules of Evidence are intended to ensure that the evidence offered is reliable and accurate. Although the Rules may seem complicated and overly legalistic, for the most part they are common sense rules that give the decision-maker confidence in the decision. Also, because the Equality Courts do not deal with large, complex cases, it is likely that most Claims will involve one or two people saying that they were discriminated against by one or two other people or a business, and the evidence presented will be relatively simple and straightforward. Nonetheless, a basic understanding of the most important rules, Relevancy and Hearsay, is necessary to be able to prepare witnesses for testimony to support the Claim.

Rule of Relevancy

Evidence is relevant if it has any tendency to render some fact that is important to the outcome of the Claim more probable or less probable than it was before the introduction of such evidence. In other words, does that evidence tend to help the decision maker determine whether a fact presented is accurate and worthy of consideration in the decision-making process?

The Rule of Relevancy is a two-pronged rule:

- ◆ **First**, the material presented must relate to the matter at hand and be of sufficient quality to assist a decision maker in determining the accuracy of a fact that is presented.
- ◆ **Second**, the material must not be so prejudicial that it could induce the wrong decision because of the inflammatory nature of the facts attempting to be presented.

Evidence and our sample case...

Two key facts demonstrating discriminatory behavior in our sample case are that Mr. Masuku, who was denied entrance, is a black man, and that Mr. Klein, who was permitted to enter, is white. Thus, testimony by Mr. Masuku that he is black is evidence relevant to determine that fact. Similarly, testimony that Mr. Fourie prevented him from entering the XYZ Restaurant but allowed Mr. Klein in tends to show that Mr. Masuku was discriminated against because he is black. Thus, it is also relevant.

On the other hand, would testimony that the XYZ Restaurant has a reputation for selling drugs or that Mr. Fourie abuses women and children be relevant to the Claim? No. These facts have nothing to do with whether Mr. Masuku was discriminated against at the XYZ Restaurant on prohibited grounds. **A problem that often arises in the representation of Complainants in the Equality Court is that Complainants frequently bring in completely irrelevant information when presenting their cases.** While the above-described facts, if true, would make the restaurant and Mr. Fourie look bad, they have nothing to do with proving any of the relevant facts set out in the Claim. Neither of them relates to Mr. Masuku's Claim of discrimination on the basis of race or colour; therefore they are not relevant. Most likely, the Presiding Officer would not allow Mr. Masuku to enter such testimony into evidence.

Furthermore, these statements are offered only to prejudice the Presiding Officer into believing that Mr. Fourie is a bad person, or the XYZ Restaurant is a disreputable establishment. This leads us to the second part of the general Rule of Relevancy, that is, if the matter presented is so prejudicial that it tends to induce a decision on an improper basis, it will generally be excluded because the prejudicial value outweighs its value in proving the case.

Section 4 – Rules of Hearsay

What is Hearsay Evidence?

“Hearsay evidence” is defined as a statement made by someone *not before the court* that is offered for the truth of the matter asserted.

The basic rule of hearsay is: testimony or documents that quote persons not in court are **not admissible**. But there are exceptions to this rule.

Thus, when evaluating the admissibility of testimony that a witness will give, it is important to know whether the witness is relating something some other person who is not available for examination in the courtroom said. If so, the subject of that person’s “out of court” testimony must be presented by some other means that is acceptable.

Again, we will apply these rules to our case.

If Mr. Bongani Masuku has his brother, Mr. Dikeledi Masuku, testify that Mr. Klein, who is not in court to testify himself, said something, what we have is **a statement by an unavailable witness**. This is called **hearsay evidence** and, under the Rules of Evidence, is usually not admissible. Mr. Masuku wants the Presiding Officer to believe this statement. However, the Presiding Officer has no way of knowing whether Dikeledi Masuku’s statement is accurate because Mr. Klein is not in court himself and cannot be examined about it. Because of this, the Presiding Officer will give very little weight to Dikeledi Masuku’s testimony. If what Mr. Klein said is important to Mr. Bongani’s case and detrimental to the Respondents’ case, it is a problem for the Complainant that the evidence is given only little weight.

The same is true for a document that is a copy rather than the original. In this day and age, it is very possible to alter documents through the use of computers, and judges know this. Because of this, a copy of a document carries far less weight in proving the matter the document is intended to prove, even if the Presiding Officer bends the rules and allows it to be presented.

Other examples of Hearsay evidence.

Suppose that in the XYZ Restaurant’s defense, Mr. Fourie testifies that he was told by his boss, the Owner, that he should not let Mr. Masuku into his restaurant because he was not wearing shoes. Certainly that statement could constitute a defense against the

claim of discrimination. It is a statement that would free Mr. Fourie from accusation or blame i.e., that the reason Mr. Masuku was denied entrance was because of a dress code policy and not because of his colour. If the Presiding Officer were to believe Mr. Fourie, he would have evidence upon which to deny Mr. Masuku's claim of discrimination.

So what is wrong with the testimony of Mr. Fourie? First of all, the Owner's *statement was made out of court*, so Mr. Masuku cannot cross-examine or question the Owner to determine whether Mr. Fourie is telling the truth. The Owner's demeanor cannot be observed, which could have also helped the Presiding Officer to evaluate the testimony. And, there is no assurance that the Owner actually made that statement, other than the testimony of Mr. Fourie, who may be trying to free his company from blame and perhaps protect his job. For these reasons, the testimony regarding the out of court statement of the Owner of XYZ Restaurant would be considered unreliable, and should not be admitted. It is a classic form of "hearsay" evidence.

There are many forms of hearsay evidence; there are also many exceptions to the basic rule. For example, if Mr. Fourie were to testify that he was told by the Owner not to let black people enter the restaurant, Mr. Fourie's statement would be admissible because it is "*a statement made against his interest*" and therefore, it is more likely reliable.

The Equality Court procedures allow for the use of properly prepared affidavits of the testimony of missing witnesses. But any party or the Presiding Officer may object to their use and, if so, a subpoena will be issued to bring the witness before the court.

Other forms of exceptions to the hearsay rule include documents, business records, so-called "excited utterances," certain prior statements of a testifying witness, and admissions of a party opponent. Given the basic nature of claims in the Equality Courts, it is unlikely that the need to understand these exceptions will be important. If such an understanding is needed, it might be necessary to seek advice from a licensed advocate. However, it is most likely that the simple statement of one person to another is the type of hearsay that you will be called upon to evaluate when preparing for an Equality Court hearing.

In summary, the hearsay analysis is a **two-step process**:

1. Is the statement offered to prove a fact that is at issue in the claim?
2. If so, is the person who made the statement available in the courtroom? If the person is not available, it is hearsay and unreliable, and should not be admitted unless it falls within an exception.

The reason the Relevancy and Hearsay Rules are so important is because if a case is built upon evidence that is not relevant or is unreliable, the outcome of the case may well be unjust.

Preparing for a Hearing / Witness Preparation

Introduction

This chapter takes us through the process of preparing for a hearing in the Equality Courts. We begin in Section 1 with important concepts to remember when putting the case together. Section 2 provides basic information on witness preparation.

Section 1 – Putting the Case Together

After filing **Form 2**, you need to prepare for the actual hearing.

FIRST: Ensure that there is sufficient evidence to support each fact necessary to prove each element of a Claim. Make sure all documents are as authentic as they can possibly be, or, in other words, make every effort to have original documents, not copies.

Example: To prove that “the Complainant is a person protected by the Act,” you can provide testimony that Mr. Masuku was in Johannesburg at the time of the alleged act of discrimination. Since the Act covers all persons, whether citizens, residents, black or white, but only applies to conduct that occurs in South Africa, this is sufficient. To support the testimony, you might want to include a lease, if he is a resident of Johannesburg, a bus ticket if he was a tourist at the time, or statements of friends and relatives who are present in court.

SECOND: Put the evidence in the order you want it presented and schedule the witnesses to testify in accordance with that order. It is usually a good idea to have the Complainant testify first to set the stage and to let the Presiding Officer form an opinion on the credibility of the Complainant and the Claim.

Example: The signed lease or bus ticket should be presented when the Complainant, Mr. Masuku, testifies.

THIRD: Make sure all of the witnesses are available and know where and when they need to appear. A subpoena may be needed for persons who will not cooperate by willingly appearing in court to testify on behalf of your Complainant. If they need to be subpoenaed, go to the Clerk, who will issue the subpoenas.

Example: A waitress at the bar saw the entire incident, but she does not want to testify against her employer. Mr. Masuku will need to ask the Clerk to issue a subpoena ordering the waitress to testify. In that situation, you need to evaluate the likelihood that the witness will not tell the truth because she resents being forced to attend.

FOURTH: Carefully examine any documents the Respondent submits to the court, in particular Form 3. If there is any statement that you do not recognize or that you disagree with, do as much investigation as you can to determine its accuracy. You should gather any evidence that can prove its inaccuracy.

Example: Mr. Fourie, the Respondent in our example, says that people with blue jeans are not admitted to the XYZ Restaurant. Try to produce a witness that has seen people with blue jeans admitted to the restaurant.

Section 2 –Witness Preparation

There are two parts to witness testimony: (1) the witnesses’ responses to your questions (direct examination), and (2) their responses to the opposing parties’ questions (cross-examination). Unfortunately, many unprepared witnesses have enormous difficulty in responding to cross-examination and treat questions from the opposing party with hostility. The reason for this is two-fold. First, they often believe that they are testifying on your behalf, and therefore tend to take sides. Secondly, they may view the opposing party as the enemy, and they may testify differently when you are asking the questions as opposed to when the other side is asking the questions. A change in demeanor of a witness tends to show bias to the Presiding Officer and needs to be avoided, so that the witness is viewed as neutral and reliable.

Preparing the Witness for Direct and Cross-Examination Testimony

Tip 1: Explain that the witness’s purpose is not to testify on behalf of anybody, but is simply to let the Presiding Officer know what the witness knows. In this regard, it is important that witnesses understand that they are not advocates, but simply people who have information that may be useful to the decision maker.

Tip 2: Explain to the witnesses that they should: (i) listen to each question carefully; (ii) answer only the question asked; and (iii) then be quiet and wait for the next question. The untrained witness tends to ramble and say things that are irrelevant, or worse, wrong.

Example: An easy way to demonstrate this principle is to ask the witness “Do you know what time it is?” Almost invariably the witness will look at his/her watch and say, “It is 9:30 A.M.” This is the wrong answer. The question only calls for a “yes” or “no” answer. Had you wanted to know what time it was, you would have asked the question, “What time is it?” This example helps witnesses understand that they answer only the question that is being asked and then remain quiet.

Tell witnesses that when they go beyond the scope of the direct answer to a question, whether it is from the Complainant or the Respondent, they open up a door that may allow for greater cross-examination than what was otherwise available. If they introduce new facts, the other party may be able to ask them about those facts. Additionally, the witness may say something that confuses the Presiding Officer. A good practice is to make sure you know everything the witness will say in response to prepared questions.

Tip 3: Make sure the witnesses understand that they must only testify about things they actually know, not about something that they assume is true.

Tip 4: Explain to the witnesses that they should never guess. A guess to a question can only have one of two results: the guess is correct or the guess is incorrect. When the guess is incorrect, the witness will be made to look foolish if properly cross-examined. Explain that if the witness does not know the answer to a question, the proper answer is "I do not know."

Tip 5: Explain to the witnesses that they are to show the same respect to the other side's representative as they show to you. Being disrespectful to one side demonstrates a bias and weakens the testimony.

Tip 6: Advise the witnesses to look directly into the eyes of the Presiding Officer when they are testifying. When the witnesses are listening to questions, they can look at the person asking the question, but when testifying, they should look at the person whom you are trying to convince with the testimony.

Tip 7: Practice. Go through the questions several times. Correct any inconsistencies. Push the witness to make sure he/she is being truthful. Try to eliminate the possibility of a surprise answer. When practicing, do not ask the same question exactly the same way each time – if you do, you will get the same answer and it will look too rehearsed. Make the witness think about the answer. It will look more spontaneous. Try to practice with questions you believe the other side will ask. This will put the witness at ease and lessen the possibility that the witness will be surprised.

Tip 8: If possible, show the witness the courtroom so that he/she will be familiar with the surroundings. It is common for witnesses to be shocked or scared when in a courtroom for the first time.

Tip 9: Explain everything that might happen during the hearing to the Complainant, so that he/she is not surprised while giving the testimony, and will feel more comfortable.

The most important concepts for witnesses to remember are:

- ◆ do not take sides;
- ◆ listen carefully to the question being asked;
- ◆ answer only that question, then be quiet; and
- ◆ never guess.

When schooled on these basic principles, witnesses can generally be relied on not to make unanticipated statements.

Applying these principles to our sample case...

Mr. Klein will testify about what he observed on January 1, 2012. You should explain to Mr. Klein that he should only testify as to exactly what he observed, and he is not to serve as Mr. Masuku's advocate. You should also advise him not to get hostile with the opposing counsel. Instead he should listen very carefully to the questions, and provide short, thoughtful and direct answers. He should never guess – if he does not know the answer, he should inform the court. He should look at the Presiding Officer when he answers any questions. Make sure that you practice his testimony. You should practice the questions you intend to ask as well as potential questions the opposing counsel will ask. His answers should not be rehearsed, but he should be aware of potential questions.

Presenting a Case in the Equality Court

There are two hearings that take place to process a Claim in the Equality Court. The first is the Directions Hearing, at which all parties will be present in front of the Presiding Officer for the first time. The second is the hearing on the merits of the Claim (“Hearing on the Merits”).

The Directions Hearing

Purpose of the Directions Hearing

After all parties have responded, and it is determined that the matter will be heard in the Equality Court, the Clerk will set a date for a Directions Hearing in the Magistrate Court, which, as noted in Chapter One, is where the Equality Courts reside. The purpose of this hearing is to:

- ◆ identify all of the issues;
- ◆ order discovery;
- ◆ determine when the parties and witnesses can be available;
- ◆ decide if an interpreter is necessary;
- ◆ evaluate the need for assessors (lay advisors); and
- ◆ resolve any issues that either of the parties may have.

Once these matters have been handled, the Presiding Officer will set a date for the Directions Hearing.

Conduct and Formality of the Hearing

On the date set for the Directions Hearing you should arrive at the Court prepared to answer questions related to the above matters. It is important that you know the availability of your witnesses and are ready to present information relevant on any matters that you believe need to be addressed.

Example: if you are required to present a witness who is reluctant to appear, you may have to ask the Court to issue a subpoena. If so, you must be able to tell the Court how that person can be reached. The Presiding Officer will understand that you are unfamiliar with the subpoena process and will have the Clerk assist you. If you are unsure as to whether a certain piece of evidence would be considered by the Court, the Directions Hearing is the time to ask.

The venue of the Directions Hearing may be more or less formal, depending on the choice of the Presiding Officer. While the regulations suggest that proceedings in the Equality Courts should be informal, individual Presiding Officers may choose to conduct the proceedings in the relaxed environment of the judge's chambers or a conference room or in the more formal setting of the courtroom. Discussions with different magistrates indicated that some preferred the courtroom because that is the setting they are most familiar with, while others were willing to try the informality of chambers or a conference room. You will not know which option the Presiding Officer has selected until you appear at the Court for either the Directions Hearing or a Hearing on the Merits. In either event, the *process* should be the same and, regardless of which venue is chosen, all Complainants should be mindful that the Presiding Officers are also magistrate judges who are accustomed to more formal proceedings.

The Directions Hearing *should* be more relaxed than the Hearing on the Merits. After all, it is here that the Presiding Officer will wish to resolve any impediments to the process in order that the Hearing on the Merits can go smoothly. Even little matters, such as the dress the Court expects should be resolved.

Once the Directions Hearing is finished, you should be clear as to when the Hearing on the Merits will occur and how all the issues should be resolved.

If you have any questions after the Directions Hearing, do not hesitate to work with the Clerk to resolve them.

The Hearing on the Merits

The Hearing on the Merits will generally follow the procedure normally adhered to in all cases where a judge is to make a decision on the facts presented by the parties. This means that:

- ◆ First, the Presiding Officer will ask the parties, and anyone assisting them, to identify themselves.
- ◆ Next, the Complainant may be given the opportunity to make an opening statement. This means that the Complainant can present a general overview of the evidence to be presented and summarize the case. If you are assisting the Complainant, you may ask the Presiding Officer if you can make that statement, and it is likely that the Presiding Officer will allow it. If not, the Complainant may make the statement; in that case, the Presiding Officer will likely form an opinion as to the Complainant's credibility.
- ◆ Once the preliminaries are completed, the Presiding Officer will ask the Complainant to present supporting evidence, as more fully discussed in Chapter 3.
 - The evidence should be presented in the order in which it will make the most sense to the Presiding Officer. A good way to structure the presentation is to make sure that the sequence makes sense to you.

- If the evidence is presented through a witness, then the Respondent will have an opportunity to examine that witness when you are finished.
- ◆ After the Respondent has completed questioning the witness, you will normally be given another opportunity to ask any additional questions that might clarify the witness's statement. You will not be permitted to go over the same material that you initially presented through that witness. This process will continue until the Complainant has finished presenting all of the witnesses and any other evidence to support his or her Claim.
- ◆ Once the Complainant has finished, the Presiding Officer will give the Respondent the same opportunity;
 - First, an opening statement.
 - Then, the presentation of evidence.
- ◆ Most importantly, the Complainant will be given the opportunity to examine the Respondent's witnesses regarding any matter to which they have testified. If it is possible, and you know generally what any of the Respondent's witnesses might say, you should have prepared points to be covered on that cross-examination. When examining the Respondent's witnesses, you should remain as courteous to them as you are to your own witnesses.
- ◆ When the Respondent has finished producing evidence, the Presiding Officer will give the Complainant an opportunity to present any additional evidence to rebut whatever the Respondent might have presented. This means that if there is anything that can rebut the Respondent's evidence, it should be presented then. The Presiding Officer will not permit you to present the same evidence that was previously presented. It must be new evidence.
- ◆ When all parties have completed their presentations, the Presiding Officer may ask that other evidence be brought before the court. Also, the Presiding Officer may examine any and all of the witnesses presented by either party at any time.

It is most likely that the Presiding Officer will play an active role because the level of courtroom experience of the parties is likely to leave many things unanswered that the Presiding Officer will want to know.

Since closing statements may not be permitted, it is important that you make a strong, organized opening statement so that the Presiding Officer understands your case from the beginning. You should, however, be prepared to make a strong closing argument if the judge gives you the opportunity to do so.

Once all of the evidence has been presented, the Presiding Officer will normally take the matter under advisement and prepare his or her decision. If the Presiding Officer believes that additional evidence is necessary, he or she will probably continue the matter to a later date and ask the parties to provide that evidence.

During the proceeding, it is likely that the Presiding Officer will allow only one witness in the hearing room at a time. This is to ensure that the witnesses are not influenced by the testimony of other witnesses. The Complainant, even though he is a witness, will ordinarily be allowed in the hearing room for the entire proceeding.

All testimony will be under oath and for this reason witnesses, while being prepared, should be advised of the importance of telling the truth. Perjury is a crime.

All testimony and statements during the proceeding will be recorded in some manner, either by mechanical means or by court reporter shorthand. This is important in the event that an appeal becomes necessary.

During and at the conclusion of the hearing, the Presiding Officer may make an appropriate order to effect the proper result. The Court's power includes:

- ◆ the issuance of restraining orders,
- ◆ monetary damages,
- ◆ settlements,
- ◆ requiring apologies,
- ◆ ordering policy changes to correct any proven discriminatory conduct,

and other remedies. See Section 21 of the Equality Act.

Appeal

Within 14 days of the decision, either party may appeal the decision if he or she believes that the Presiding Officer erred as a matter of law. However, since all appeals from the Equality Court go to the High Court or the Supreme Court of Appeals, the party bringing the appeal *must* be represented by an attorney authorized to practice in that court. Thus, if you believe that the Presiding Officer made the wrong decision, it will be necessary to secure a lawyer's assistance.

Part II THE SOUTH AFRICAN COURT SYSTEM

CHAPTER 6

The Historical and Political Background of the South African Region: 1600 – 1994

Although developed societies and their governing systems have existed in the region now called the Republic of South Africa for millennia, the current South African legal system had its beginnings with the arrival of the Dutch East India Company (the “Company”) in Table Bay, Cape of Good Hope, around 1600. The system continued to develop during the following 400 years, as the Dutch and British gradually colonized the region, which in turn evolved politically and geographically from a small trading post to a major nation-state.

The Company occupied the Cape of Good Hope region without interference for about 175 years. Initially, the Company was most concerned with creating a port and supply station for traders traveling between Europe and the East Indies. Company employees who had relocated to its settlement in the Cape grew gardens and traded with indigenous people for meat and other necessities. But by 1656, the need for a greater food supply and other staples to service the settlement and trading ships became evident. As a result, other free men (Europeans) were permitted to move into the Cape region to establish farms and other necessary businesses to supply the Company. Thus, the Company’s settlement made the transition to a Dutch Colony, which then began to impose its European laws upon the new colonists and indigenous population as it saw fit. Slavery was an accepted policy during that time.

That arrangement lasted until 1795, when Britain took control of the Cape region as a result of a war between the French (with whom the Dutch sided) and the victorious British. However, in quick succession, the Dutch regained control in 1803, only to be replaced again by the British in 1806 at the end of the Napoleonic Wars. Between 1806 and 1910, the area that was occupied by Europeans—mainly Dutch and British—greatly expanded beyond the Cape, into the north and east. During this time, the Dutch settlers created the new colonies of the South African Republic (later known as Transvaal) and the Orange Free State in an attempt to separate from British control. In 1839, the Dutch also tried to colonize the area of Natal, which they named Natalia, but three years later, the British annexed the territory into what had become a new Crown Colony.

About 40 years later, during the First Boer War (December 16, 1880–March 23, 1881), the British attempted to annex the Dutch colonies for the Crown, but were handily repulsed by the Boers, and the resulting Pretoria Convention of October 1881 allowed for continued Dutch control of these colonies. This uneasy peace lasted only until the discovery of enormous gold deposits—much coveted by the British—a few miles south of Pretoria in 1886, which ultimately led to the Second Boer War (October 11, 1899–May 31, 1902).

The Second Boer War was far more extensive and destructive to both people and property than the First Boer War. The British employed a scorched earth policy in an effort to eradicate Boer guerillas. They attempted to destroy all Boer farms and communities, imprison all women and children along with captured Boer fighters, and imprison Africans claimed to have sided with the Boers. As a result, by the end of the war in 1902, about 75,000 lives had been lost, a great percentage of whom were civilian Boer women and children held in concentrations camps. Although the British won, the Treaty of Vereeniging (May 31, 1902) required the British to give the Boer communities three million British Pounds for reconstruction efforts. Eventually a limited self-government was created in 1906 and 1907. Additionally, the Boer colonies of the South African Republic (Transvaal) and the Orange Free State were placed within the British Empire. Thus, for the first time, the four colonies—Cape, Natal, Transvaal and the Orange Free State—were roughly united under one flag, leading to the South Africa Act of 1909 and the creation of the Union of South Africa on May 31, 1910.

The Union of South Africa remained under the Crown as a self-governing dominion of the British Empire until the Statute of Westminster in 1931 gave the Union “Commonwealth” status, removing legislative power from the United Kingdom and placing it with the Union of South Africa. On May 31, 1961, following a referendum, the Union became the Republic of South Africa and left the Commonwealth. Subsequently, the South African Parliament passed a Constitution that embraced apartheid policies, which remained in place until the interim Constitution of 1993 took effect.

The Current South African Constitution

The legal structure of most modern countries, especially democracies, is generally developed through four different legal tools: (1) a constitution, (2) laws implementing the intent and purpose of the constitution, (3) regulations that manage the details of the laws, and (4) treaties that require the nation to provide its citizens with certain internationally agreed rights and protections.

A constitution is the overriding document that contains the agreements of the peoples or regions that have come together to create a unified country. For example, the nation of Iraq recently ratified a constitution that was created by numerous ethnic groups, separated regions and various religious organizations, all of whom had an interest in how the nation would be run. Constitutions generally contain the basic structure of the government. They establish what powers and authorities the government has, what rights the citizens have, whether there will be a legislative body and a judicial body and how elected officials shall run the country. Constitutions usually define how the different parts of the government will interact, how elections will be held and how the varying parts of the government shall be held accountable.

The current South African Constitution began as a law passed by Parliament. It was then ratified by all South African states in 1996. It thus became the highest law in the land, and to date it remains one of the most modern constitutions in the world.

In South Africa, other laws can be divided into statutes, common law and customary law. Statutes are the laws that are made by government—the national parliament—and they are referred to as Acts of Parliament. In South Africa, laws made by provincial legislatures are called ordinances, and laws made by municipal councils are called bylaws.

Common law includes laws that have not been codified by parliament or any other government. South African common law is based on Roman Dutch law. It is also known as case law or precedent and is developed by judges through decisions of the Court.

Customary laws are also unwritten laws, which may arise nationally or internationally as certain practices

evolve into established principles and obligations within the relevant community. In South Africa, customary law also includes laws that are developed and adhered to by certain cultures or ethnic groups.

All of these laws are circumscribed by the Constitution—in other words, they cannot conflict with the Constitution. If a court determines that a statute or any customary law or common law conflicts with the Constitution, then it must find the law invalid.

This is an especially important point in South Africa because the country had a well-developed system of laws prior to the Constitution's ratification in 1996. What the new Constitution provides, generally, is that any law or regulation in the country that is contrary to the provisions of the Constitution will be deemed invalid. For example, because the Constitution guarantees equal rights, the laws establishing and perpetuating apartheid were abolished. With this background in mind, you are referred to Chapter 2 of the Constitution, which sets out what is known as the Bill of Rights. (Refer to Appendix 1 for excerpts from the Bill of Rights.) For our purposes, we shall focus on Section 9, Equality, which is the underpinning of the Equality Court System. It states:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Subsection (3). National legislation must be enhanced to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in Subsection (3) is unfair unless it is established that the discrimination is fair.

South Africans can be justly proud of this portion of the Constitution as it sets forth the most expansive set of rights found in any modern state constitution. Furthermore, while it contains strong provisions on equality, or the right to equality, which are in line with the internationally recognized human rights law, its provisions are more detailed than certain landmark human rights documents, such as the United Nations Universal Declaration of Human Rights.

There are several important and unique features to Section 9. Not only does it establish an extensive list of grounds on which a person can challenge discrimination, but it also provides that neither the state **nor any individual** may unfairly discriminate directly or indirectly against anyone on one or more grounds. This prohibition against individual discrimination is very progressive and is probably unique among the world's constitutions. Further, the Constitution mandates that "national legislation **must** be enacted to prevent or prohibit unfair discrimination." This mandate to enact laws is not generally found in other national constitutions—it is often left to the legislature's discretion. Here, however, the legislature is left without option and must abide by *Section 9's* mandate.

Finally, while the provision "discrimination on one or more grounds listed in Section 3 is unfair unless it is established that the discrimination is fair" may sound odd, it is essentially just an affirmative action provision. It allows the South African government to enact laws like the Black Economic Empowerment Program, which laws address the inequalities of apartheid by giving previously disadvantaged persons (black Africans, coloureds, and Indians who are South African citizens) economic opportunities previously not available to them. These types of affirmative action laws are discriminatory in that they treat one group of people, such as black Africans, differently than another group of people, such as white or Asian citizens, but the "discrimination" is fair.

It would be useful to read the entire Constitution to get an idea of the level of detail the government used in designing operational mechanisms for the nation to function effectively in 1996, without destruction and without strife. This type of peaceful transition is highly unusual, particularly in nations whose histories have included the oppression of one group of people, especially the majority, by another group.

Current South African Civil Rights Laws and Regulations

As required by *Section 9* of the Constitution, the South African Parliament passed an Act known as the Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000 (hereinafter referred to as the Equality Act). It was assented to on February 2, 2000, and the date of commencement was set at June 16, 2003. It has been amended several times, most recently regarding judicial matters in 2008. It says at the outset that the purpose of the Equality Act is to give effect to Section 9 of the Constitution “... so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech; and to provide for matters connected therewith.”

As required by the mandate set forth in Section 9 of the Constitution, the Equality Act sets forth a legal system in which citizens and others in South Africa can enforce their Section 9 rights. The objectives of the Equality Act are set out explicitly:

- a.** To enact legislation required by Section 9 of the Constitution;
- b.** To give effect to the letter and spirit of the Constitution, in particular:
 - ◆ The equal enjoyment of all rights and freedoms by every person;
 - ◆ The promotion of equality;
 - ◆ The values of non-racialism and non-sexism contained in Section 1 of the Constitution;
 - ◆ The prevention of unfair discrimination and protection of human dignity as contemplated in Sections 9 and 10 of the Constitution;
 - ◆ The prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in Section 16(2)(c) of the Constitution and Section 12 of this Act;
- c.** To provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
- d.** To provide for procedures for the determination of circumstances under which discrimination

is unfair;

- e.** To provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
- f.** To provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;
- g.** To set out measures to advance persons disadvantaged by unfair discrimination;
- h.** To facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention of the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

Simply stated, these objectives are to enforce *Section 9* of the Constitution; to give effect to the letter and spirit of the Constitution; to provide procedures for the determination of unfair discrimination; to educate the public and raise awareness of the need to promote equality; to provide remedies for unfair discrimination, hate speech and harassment; to help those disadvantaged by previous unfair discrimination; and to assist in meeting the requirements of international law obligation treaties.

These are substantial goals that have yet to be fully realized. Public awareness of the Equality Courts system is still quite low. The Equality Courts system exists to provide an informal legal mechanism for victims of discrimination to seek redress. Presumably, as public awareness of, and access to, this system increases, South Africa will make significant advances toward achieving these goals.

Note here that the protections provided for in the Equality Act are somewhat broader than *Section 9* of the Constitution. For example, Section 10 of the Equality Act prohibits hate speech, Section 11 prohibits harassment, and Section 12 prohibits the dissemination and publication of information that unfairly discriminates. As you will recall, these last three are not specifically stated in the *Section 9* grounds, but they are clearly added in the Statute and carry the same weight as any other law.

Section 13 of the Equality Act (Burden of Proof) establishes how people are to prove their cases. Section 14 details how fairness or unfairness is to be determined and specifically provides that neither hate speech nor harassment are subject to a determination of fairness.

Chapter 4 of the Equality Act sets up the Equality Courts, which we discuss in more detail in Chapter 9 of this Handbook.

Chapter 5 of the Equality Act sets out the duties of the state, public servants and citizens to promote equality. The Minister for Justice and Constitutional Development is responsible for establishing regulations that provide for the necessary procedures, forms and practices needed to implement the Equality Act. Most regulations are far more detailed than statutes or laws. They are the working rules by which the people charged with implementing a law must conduct themselves. Regulations are

more easily created and amended than the laws they implement as they do not require a vote of Parliament. The Minister can adopt and update the regulations as necessary to improve procedures and efficiencies, provide additional detail when needed and respond to social demands as times change; however, he or she must do so in compliance with the administrative procedures set out in the Administrative Procedures Act.

In this case, the regulations pertaining to the Equality Act are known as secondary legislation in respect of the Equality Act. The regulations contain the detailed procedures for such things as creating and appointing clerks, the institutional proceedings, the use of assessors, appeals and reviews and several other important matters. Refer to the link to the regulation in the Resources. All required forms can be found in this link.

The Structure of the South African Court System

Section 34 of the Bill of Rights in the South African Constitution states that everyone has the right to have any legal problem or case decided by a court or an independent body.

The role of the courts is to interpret the law and ensure that people obey the law. They do this by deciding disputes brought before them.

The ordinary courts are:

- ◆ Constitutional Court
- ◆ Supreme Court of Appeal
- ◆ High Courts (and the High Court of Appeal may be established)
 - High Courts in different provinces
 - Local divisions, for example Witwatersand Local Division
- ◆ Magistrate Courts
 - Regional Magistrate Courts
 - District Magistrate Courts
 - Equality Courts
- ◆ Small Claims Courts
- ◆ Community courts and courts of Chiefs and Headmen

Courts that deal with special kinds of cases:

- ◆ Labour Appeal Court: deals with appeals from the Labour Court
- ◆ Labour Court: deals with disputes under the Labour Relations Act
- ◆ Land Claims Court: deals with land claims
- ◆ Family Courts: deal with all family matters, like divorce
- ◆ Tax courts
- ◆ Water courts
- ◆ Equality courts
- ◆ Chiefs and headmen's courts: deal with customary law matters

Courts in South Africa, with Appeal and Review Procedures

The Constitutional Court

The Constitutional Court is in Johannesburg and is the highest court in South Africa. It deals with constitutional issues and any other matters if it is in the interest of justice for it to do so. There are 11 Constitutional Court judges, and each case brought before it must be heard by a minimum of 8 of the judges. No other court can overturn a decision of the Constitutional Court. Even Parliament is bound by the decisions of the Constitutional Court. If a Constitutional Court decision requires a law to be amended, or bars a law from being passed, because it is unconstitutional, Parliament must in turn amend the law, or revise the draft law, in order to make it comply with the Constitution.

The Supreme Court of Appeal

The Supreme Court of Appeal is in Bloemfontein in the Free State. It is the second highest court in South Africa; it only hears appeals from the High Court. All cases in the Supreme Court are heard by three or five judges. The Constitutional Court can overturn a decision of the Supreme Court of Appeal, and the Supreme Court of Appeal can change one of its own decisions, but no other court has the authority to overturn its decisions. (If Parliament does not like the way the Supreme Court of Appeal interprets a law, then, as with all legislative bodies in democratic countries, Parliament has the power to change the law, so long as those changes comply with constitutional requirements.)

The High Courts

The High Courts are the highest trial courts and can hear any type of criminal or civil case. They also hear appeals from, and reviews against, judgments of the Magistrate Courts and the Equality Courts. All cases in the High Courts are heard by judges. Typically with civil cases, only one judge hears each case. With most criminal cases only one judge hears each case, but sometimes, in very serious criminal cases, the judge appoints two assessors to assist. Assessors are usually advocates or retired magistrates. They sit with the judge during the case, listen to all the evidence presented to the court, and at the end of the case they give the judge their opinions. The judge does not have to listen to the assessors' opinions, but they may help the judge reach a decision.

THE HIGH COURTS ARE LOCATED THROUGHOUT THE COUNTRY IN THE FOLLOWING CITIES

High Courts	Location
Bophuthatswana High Court	Mmabatho
Venda High Court	Toyandou
Transvaal High Court	Pretoria
Free State High Court	Blowmfontein
KwaZulu-Natal High Court	Pietermaritzburg
Eastern Cape High Court	Grahamstown
Transkei High Court	Umtata
Ciskei High Court	Bisho
Northern Cape High Court	Kimberley
Western Cape High Court	Cape Town
Local Divisions	Location
Durban and Coast Local Division	Durban
Witwatersrand Local Division	Johannesburg
South Eastern Cape Local Division	Port Elizabeth

Appeals and Reviews from a High Court

To appeal against a court's decision means to ask a higher court to consider the evidence and/or law again and determine whether the lower court was wrong in its decision. If a case was decided by only one judge, you can also appeal to have the matter considered again in the same court by three judges, called a full bench.

To appeal against a decision of a High Court to the Supreme Court of Appeal, the Appellant must first get permission to appeal from that High Court. This permission is called "leave to appeal." For example, if the case was heard in the KwaZulu-Natal High Court, then you must apply to the KwaZulu-Natal High Court for leave to appeal to the Supreme Court of Appeal. If this permission is refused, you can ask the Supreme Court of Appeal for permission to appeal. However, the right to appeal is not an automatic right, and sometimes the court will not agree to take the case on appeal.

If you think that the proceedings in the High Court were unfair or were not conducted according to the law, you can bring the case to the Supreme Court of Appeal. This is called a review. Reviews happen automatically in certain circumstances. In other cases, you have to ask for a review.

Magistrate Courts

These Magistrate Courts include the Regional Magistrate Courts, which deal only with the criminal cases, and the Ordinary Magistrate Courts (also called District Courts), which deal with both criminal and civil cases.

Regional Magistrate Courts

Regional Magistrate Courts deal with more serious crimes than the Ordinary Magistrate Courts, such as, for example, murder, rape, armed robbery and serious assault.

In accordance with the terms of the Law, a Regional Magistrate Court can sentence a person who has been found guilty of certain highly serious offences, such as murder or rape, to life imprisonment. The Court can also sentence people who have been found guilty of certain other serious offences, such as armed robbery or stealing a motor vehicle, to prison for a period up to 20 years. A Regional Magistrate Court can impose a maximum fine of R300 000.

Ordinary Magistrate Courts

Ordinary Magistrate Courts are the lowest tribunals that can hear both criminal and civil cases. They try the less serious crimes. They cannot try cases of murder, treason, rape, terrorism, or sabotage. They can sentence a person to a maximum of 3 years in prison or a maximum fine of R100 000.

They also can hear civil cases if the claims are for less than R100 000. However, they cannot deal with certain matters, such as:

- ◆ Divorce;
- ◆ Arguments about a person's will; and
- ◆ Matters that require a court to determine a person's competency.

Equality Courts

The Equality Courts were established by the Equality Act to hear cases about unfair discrimination, hate speech and harassment (but not discrimination in the workplace, which is dealt with by the Labour Courts). They have powers to conciliate and mediate, grant interdicts, order payment of damages and order a person to make an apology. Currently, there are more than 380 Equality Courts situated inside Magistrate Courts throughout South Africa. The Department of Justice website (www.doj.gov.za; click on 'Equality Courts') has the contact details for each of the Magistrate Courts that house an Equality Court. Any person or association, acting on its own behalf or on behalf of others can bring a case to an Equality Court if they or someone else received bad treatment due to discrimination on one of the following grounds:

- ◆ Race
- ◆ Gender
- ◆ Sex
- ◆ Pregnancy
- ◆ Marital status (which includes life partnerships as well as single persons)
- ◆ Ethnic or social origin
- ◆ Colour
- ◆ Sexual orientation
- ◆ Age
- ◆ Disability
- ◆ Religion, conscience & belief
- ◆ Culture
- ◆ Language, or
- ◆ Birth

For instance, a non-governmental organization (NGO) can bring a case on behalf of the public. It is not necessary to have an attorney to bring a case to an Equality Court. The Equality Court Clerk will assist claimants in filling out the necessary forms and taking the necessary follow-up action.

Specialized Courts

There are other lesser, more specialized courts that you can read about in more detail in the Black Sash Paralegal Manual. They are as follows:

1. Maintenance Courts
2. Family Courts
3. Children's Courts
4. Small Claims Courts
5. The Labour Court
6. The Land Claims Court
7. Community Courts
8. Juvenile Courts

Appeals and Reviews from a Magistrate Court

If you are involved in a criminal or civil case in a Magistrate Court, you can ask the High Court to consider the decision of the Magistrate Court and determine whether it was correct. This is called an appeal—essentially, asking the High Court to change the decision of the Magistrate Court.

If you want to appeal against a decision of a Magistrate Court, you must first get permission to appeal from that Magistrate Court. This permission is called “leave to appeal”. For example, if your case was heard in the Wynberg Magistrate Court, then you must apply to the Wynberg Magistrate Court for leave to appeal to the High Court. If this permission is refused, you can ask the High Court for permission to appeal. However, the right to appeal is not an automatic right, and sometimes the court will not agree to take the case on appeal.

If you think that the proceedings in the Magistrate Court were unfair or not according to the law, you can bring the case to the High Court. This is called a review. Reviews happen automatically in certain circumstances. In other cases, you have to ask for a review.

Resources

There are four resources that we recommend that you keep handy. They are:

1. **The Bill of Rights, Chapter 2, of the South African Constitution**
2. **The Equality Act**
3. **The Regulations** that implement the Equality Act, and
4. **The contact information** for all of the Equality Courts throughout the country

The Bill of Rights (Appendix 1) is a static document that will not change because it is an integral part of the Constitution. It is unique because of the many specified rights that it creates for all South Africans and because these rights are not established in such depth in any other constitution in the world. The sections related to Equality Court matters is represented because it presents a clear understanding of the source of all the laws and regulations that it caused to be created and which are the basis of this Handbook.

The Equality Act and its implementing Regulations are voluminous and change occasionally as Parliament or the Minister of Justice and Constitutional Development determine that there is a need to enhance the Law or augment the **Regulations** to meet a current need. Because they are flexible, and likely to change, we have set forth links to the appropriate Department of Justice and Constitutional Development web sites, rather than provide the current version, so that you can easily reference them as needed.

Finally, there are hundreds of Equality Courts throughout the country. They are almost always found co-located with the Magistrate Courts. The link below will take you to an interactive website where you can find the **addresses and phone numbers of each court**.

Because the URLs are so long we have established a shorter link for you to use:

The Equality Act: <http://bit.ly/1fS5hUv>

The Regulations: <http://bit.ly/1fpmvHx>

Contact information interactive site: www.justice.gov.za/contact/lowercourts_full.html

Then click on “lower courts” then click the blank boxes to the right.

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He received his law degree from the University of Missouri in 1970 and began his legal career as a trial attorney in the United States Marine Corps. After leaving the Marines he worked as a trial attorney for the National Right To Work Legal Defense Foundation in Virginia for four years. He became a partner in the Chicago law firm of Arvey, Hodes, Costello and Burman in 1984, then moved to Maine in 1988 where he was a partner in Bernstein, Shur, Sawyer and Nelson until he retired in 2007.

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Appendix 1

Excerpts from the South African Constitution: Bill of Rights, relating to the Equality Act

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human Dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.