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# Litigating the rights of refugees in the Equality Courts

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## INTRODUCTION

The South African Constitution[1] established a new democratic order, based on 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'[2] This commitment to equality and the advancement of human rights for all was achieved through decades of struggle.[3] It establishes an undertaking to transform society, to eradicate barriers and obstacles that unfairly discriminate and to develop positive measures that promote equality.[4] The centrality of equality to our Constitutional value system and its enforceability was emphasised by the Constitutional Court in *Minister of Finance v Van Heerden,*[5] as follows:-

> 'The achievement of equality goes to the bedrock of our Constitutional architecture....[T]he achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance.'[6]

This declaration by Moseneke J, of equality as a core value, is interlinked to the right, afforded to everyone, to have any dispute resolved in a fair public hearing before a court or appropriate forum.[7] While this does not impose a positive obligation on the State to provide financial assistance to litigants, it requires that there be a right to approach a court of competent jurisdiction to seek relief.[8]

In order to give effect to these ideals, the Constitution not only established the right to equality but also required that national legislation be enacted to give effect to the right.[9] Therefore, in 2000 the Promotion of Equality and Prevention of Unfair Discrimination Act ("the Equality Act"),[10] was passed with the intention that it would be the key legislative tool for the enforcement and promotion of the right.[11] The drafters of the Equality Act sought to

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[1] Act 108 of 1996.
[2] Section 1(a).
[3] The result of this struggle is the establishment of a core value, which goes beyond merely being a fundamental rights (*Minister of Education & another v Syfrets Trust Ltd NO & another* (2006 (4) SA 205 (C) at para. [30]).
[4] Albertyn C., Goldblatt B. & Roederer C. (eds.) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) at p. 1.
[5] *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC).
[6] Ibid. at para. [22].
[7] Section 34 of the Constitution.
[8] De Waal J., Currie I. & Erasmus G. *The Bill of Rights Handbook* 4th ed. (2001) at p. 558.
[9] Section 9(4).
[10] Act 4 of 2000.
[11] Albertyn et al. (note 4 above), at p. 2.

achieve this end by providing victims of unfair discrimination, hate speech and harassment with a forum to provide access to justice and an effective remedy.[12] The Act therefore designates all Magistrate's Courts and High Courts as Equality Courts for their area of jurisdiction.[13] The intention here was not to extend jurisdiction to the courts to hear these matters in their normal capacity but rather to create special Equality Courts for the various areas, which would be staffed by trained judicial officers and administrative clerks.[14]

In theory, the Equality Courts remove many of the barriers to accessing legal mechanisms for the enforcement of one's rights. However, Kaersvang[15] suggests that this potential has not been realised in practice due to lack of awareness of the existence of courts by the general public.[16] As this paper will outline, the current structure of these courts inherently contain further barriers to the access to justice.

Nevertheless, it is the thesis of this paper that the Equality Courts have the potential to be a forum for ensuring that the constitutional right to equality is a true and accessible right afforded to everyone and not merely a right on paper.

With the above in mind, the University of Cape Town Refugee Rights Unit filed two complaints,[17] in the Cape High Court sitting as the Equality Court, on behalf of victims of the xenophobic violence, which erupted in 2008. These cases will be the focus of this paper as they illustrate the complexities and nuances of Equality Court proceedings.

These issues will be addressed by way of the following three sections: The *first section* will sketch the current structural and procedural framework applied in the Equality Courts as a backdrop to the proceedings which the UCT Refugee Rights Unit instituted. This will be followed by an evaluation, in the *second section,* of the challenges highlighted by the various commentators. Many of these are then illustration by the *third section* as they arose prominently during the Refugee Rights Unit litigations. This section will further discuss the grey area around the shifting onus of proof applicable within the Equality Courts.

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[12] Chapter 4 of the Equality Act.
[13] Section 16(1). Currently, the Department of Justice and Constitutional Development currently lists 382 courts as being designated as equality courts throughout the country (DOJ&CD <http://www.justice.gov.za/EQC-act/eqc_courts.html>).
[14] De Waal et al. (note 8 above) at p. 228.
[15] Kaersvang D. 'Equality Courts in South Africa: Legal Access for the Poor' *The Journal of the International Institute*, Spring 2008, 4.
[16] Ibid. at p. 4.
[17] Throughout this paper reference will be made to "complaints" by "complainants". The Act defines a "complainant" as '...any person who alleges any contravention of...[the] Act and who institutes proceedings in terms of the Act' (s 1).

Through this discussion of the experiences of the Refugee Unit this paper will argue that the right to equality, forged through decades of struggle and established as a fundamental right, requires an effective and accessible forum for its enforcement. In practice, however, the Equality Courts remain underutilised and are, to a large extent, frustrated by the administrative failings which result from the under trained and ill supported court personnel. These issues must be addressed if the Equality Courts are to fully realise their potential.

## THE SYSTEM AND STRUCTURE OF THE EQUALITY COURTS

In order for the Equality Act to meet its aims for the promotion of equality and the eradication of unfair discrimination the Act needed to create an accessible and effective forum for the enforcement of the right.[18] The academic view in this regard is that for such a mechanism to be effective it dictates that the institution, and its procedures, be accessible and that the remedies be innovative and flexible.[19]

### *Jurisdiction*

The primary mechanisms for enforcement, created by the Equality Act, are the Equality Courts. The Act therefore created specialist courts within the established Magistrates Courts and High Courts with jurisdiction to hear complaints based on the Act.[20] In this regard the Act does not simply extend the jurisdiction of the ordinary courts, rather it establishes the courts as specialist courts in which the court will sit "as the Equality Court". In this capacity the Act extends the monetary jurisdiction of any Magistrates Court sitting in this capacity[21] and the remedies which it may provide.[22] This is seen as a positive development which accords complainants with the access to a more widely distributed set of courts without fearing the need to curtail damages claims to fit the court's jurisdiction.[23]

[18] Albertyn et al. (note 4 above), at p. 16.
[19] Ibid.
[20] Section 16(1).
[21] Section 19(3).
[22] Section 21(2).
[23] Albertyn et al. (note 4 above), at p. 19.

In *Manong & Associates (Pty) Ltd. v City of Cape Town*[24] Moosa J clarified that the Equality Court's review jurisdiction is limited to instances where the administrative action complained of is founded on unfair discrimination.[25] In this regard the ancillary powers, conferred on the Equality Courts by the Act,[26] are not to be construed as extending the courts powers beyond what is reasonably incidental to the performance of its functions.[27]

In addition, the inherent jurisdiction of High Courts to protect and regulate its own processes is not retained when the court sits as the Equality Court. [28] In this way the Equality Court is effectively a "creature of statute" limited to the powers and functions conferred on it by the Equality Act. The Equality Courts are therefore specialist court established within the existing court structures and are granted specific jurisdiction to hear complaints grounded in the Equality Act.

*Presiding officers and court personnel*

In order for proceedings to be instituted the Act requires that a presiding officer be available who has been designated by the Minister, after consultation with the Judge President or the head of administration for the region.[29] The Act further requires that the court be staffed by one or more trained Equality Court clerks.[30]

The court in *George v The Minister of Environmental Affairs and Tourism*[31] stated that the Courts will be staffed by, 'judges and magistrates who have been specially equipped to meet the needs of the accessible and user-friendly adjudication of equality claims.'[32] Section 31 establishes broad criteria for the designation of a judicial officer, namely 'training, experience, expertise and suitability in the field of equality and human rights.'

[24] *Manong & Associates (Pty) Ltd. v City of Cape Town* [2007] 4 All SA 1452 (C).
[25] Ibid. at para. [4]. Similarly, in *Manong & Associates (Pty) Ltd. v Department of Roads and Transport, Eastern Cape, and another* (no. 1) 2008 (6) SA 423 (EqC) Pillay J found that the Equality Courts do not have the power to review and correct administrative decisions such as tenders (at 433B-C).
[26] Section 21(5) of the Equality Act confers on the Equality Court *'all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.'*
[27] *Manong* (note 24 above) at para. [7].
[28] *Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport and others* [2009] 3 All SA 528 (SCA) at para. [65].
[29] Section 31(1)(a) read with s 16(1)(b).
[30] Section 31(1)(b).
[31] *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC).
[32] Ibid. at para. [7].

The Act further requires that specially trained clerks tend to the administration of the Equality Courts.[33] The clerk then takes a very active role in the proceedings. The Regulations made in terms of s 30 of the Equality Act ("the Regulations"),[34] require the clerk to, *inter alia*, open the file,[35] assist illiterate or disabled complainants in the completion of any documents,[36] inform an unrepresented person of their right to representation, assistance of constitutional institutions, rights and remedies under the Act, and the procedures relating to witnesses.[37] Once the proceedings have been instituted the clerk is further required to, notify the respondents[38] and submit copies of the respondents replying documents to the Complainant.[39] These functions are usually in the hands of the *dominus litus*, and are a positive development in so far as this will assist unrepresented complainants with lodging their claims.

The judicial officer also takes on slightly different role in the Equality Courts from that which they would ordinarily be accustomed to. The general principles, laid down in s 4 of the Equality Act, provide that hearings should be informal and participatory.[40] The Regulations then require the judicial officer to ascertain the relevant facts and question the parties and witnesses.[41] For Albertyn *et al.*[42] this active involvement of the judicial officer could assist in the creation of an accessible, informal and participatory proceeding level the

[33] Section 17 provides for the appointment of the Clerks and s 31 makes specific provision for their training.
[34] R. 764 of 13 June 2003 (Government Gazette No. 25065), which came into operation on 16 June 2003.
[35] Regulation 5(a).
[36] Regulation 5(e).
[37] Regulation 5(f)(i)-(v).
[38] Regulation 6(2)(1)(a).
[39] Regulation 6(3).
[40] Section 4 states that:-

> *'(1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:*
> *(a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;*
> *(b) access to justice to all persons in relevant judicial and other dispute resolution forums;*
> *(c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;*
> *(d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;*
> *(e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.*
>
> *(2) In the application of this Act the following should be recognised and taken into account:*
> *(a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and*
> *(b) the need to take measures at all levels to eliminate such discrimination and inequalities.'*

[41] Regulation 10(10)(b).
[42] Albertyn et al. (note 4 above).

playing fields in the case where a disadvantaged party may not have the resources to obtain skilled lawyers.[43] This model is, however, more akin to an inquisitorial structure as opposed to the adversarial system upon which the South African legal system is currently based and as such judicial officers may not be accustomed to relinquishing their customary role as a "neutral umpire".

The Act makes further provision for a third category of court personnel in the form of an assessor whose role it is to participate in the proceedings and assist in the determination of matters of fact.[44] Interestingly, there is no requirement that the assessor undergo training. Rather he or she should be of sound mind and body, respected in the community, with knowledge of cultural and social environments of a particular group of the community and not excludable on the basis of political or public service office or criminal conviction.[45]

The Equality Courts are therefore intended to be staffed by officers of the court capable of implementing the aspects of the Act which distinguish it from ordinary courts in which the personnel normally work.

*Launching of proceedings under the Act*

Section 20 of the Act gives a variety of persons and institutions standing to bring a complaint.[46] The proceedings are then launched by way of a prescribed form[47] with attached affidavits of other persons or other documentary evidence in support of the matter, which are to be handed to the clerk of the court. The court in the *George* case noted that the parties are not required to file formal pleadings and as such the proceedings are instituted and defended with the minimal of formalities.[48] In terms of Regulation 6(1) the clerk is required to assist with the completion of the requisite forms. Once again, this positive obligation imposed on the clerk should assist individual who are unable to complete the requisite forms themselves and thereby ensuring that such individuals are not barred from instituting proceedings.

[43] Ibid. at p. 27.
[44] Section 22 read with Regulations 13-18.
[45] Regulation 13(a)-(f).
[46] Section 20(1)(a)-(f) lists the following persons or institutions who have such standing: Any person acting in their own interest; on behalf of another person who cannot act in their own name; a member of, or in the interests of, a group or class of persons; any person acting in the public interest; any association acting in the interests of its members; and the South African Human Rights Commission, or the Commission for Gender Equality.
[47] The "Form 2" may be found in the Regulations.
[48] *George* (note 31 above), at para. [7].

Once the complaint has been laid and the Respondents have been notified by the clerk he or she is required to submit the matter to the presiding officer who will then decide whether the matter falls with the ambit of the Equality Act and within the jurisdiction of the Equality Act or whether it should be referred to an alternative forum.[49]

The spirit with which this process is ideally to be administered is well captured by Erasmus J in the *George* case in which the Judge stated that:-

> 'An integral part of the Equality Act, then, is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters. This objective itself goes to the essence of what equality is about because it emphasises the need to make the judicial processes available to all, including the poor and oppressed who are usually the victims of unfair discrimination and inequality. The formal, adversarial, often expensive and potentially intimidating proceedings that prevail in an ordinary magistrate's court or High Court and which may act as a barrier to those seeking justice, have no place in an Equality Court.'[50]

Given these ideals, the drafters of the Equality Act have envisaged an effective forum for the administration of the Act. However, the question remains as to why the courts remain underutilised? It is this point to which I will return. In the mean time I will proceed on the assumption that a claim has indeed been instituted.

*Referral by the court to another institution*

When scrutinising a case to be potentially heard in the Equality Court the presiding officer is afforded a measure of discretion to refer the matter on. This decision is guided by the Act and requires consideration of: [1] the personal circumstances of the parties; [2] the physical accessibility of the other forum; [3] the needs and wishes of the parties; [4] the nature of the intended proceedings and whether the outcome could develop the law; and [5] the views of the functionary at the alternative forum.[51]

A wide range of alternative forums exist to which the court may refer the case, such as the Human Rights Commission ("the HRC"), the Commission for Gender Equality ("the

[49] Section 20(3)(a) read with Regulation 6(4).
[50] *George* (note 31 above), at para. [12].
[51] Section 20(4)(a)-(e).

CGE"), the CCMA, the Public Prosecutor, the Independent Complaints Directorate and various ombudsmen.[52]

The Regulations then require the alternative forum to notify the parties and report back to the clerk of the Equality Court on the progress of the matter.[53] Should the alternative forum be unable to resolve the matter the case is then referred back to the Equality Court where the court must give instructions in respect of the adjudication of the matter.[54]

The referral process created by these provisions is a novel aspect of the Act, which has the potential to lead to delays in the finalisation of the case.[55] However, in the *George* case Erasmus J suggested that the Equality Courts should be an accessible forum even in instances where the matter may raise difficult or controversial situations. The judge stressed that the Equality Courts are no less competent to deal with challenging issues.[56]

Nevertheless, the Act permits the presiding officer the option to refer the matter on to another forum prior to hearing the case, which in practice may actually inhibit the claimants effective access to justice.

*Trial and the applicable rules*

Once the procedural hurdle of the referral mechanism has been cleared then a complaint in the Equality Court should proceed to trial. As stated above the Act envisages an informal proceeding which is expedient and inquisitorial. However, this is juxtaposed against the features common in civil litigation.

Section 19(1) of the Act incorporates the provisions of the Magistrates' Courts Act[57] and the Supreme Court Act[58] and the rules made under the two Acts into the conduct of proceedings in the Equality Courts.

The Regulations then permit, to some extent, for the presiding officer to give directions in respect of the conduct of proceedings.[59] However, the presiding officer is bound

[52] See Albertyn et al. (note 4 above), at p. 25.
[53] Regulations 6(9) & (10).
[54] Regulations 6(11)-(13).
[55] Albertyn et al. (note 4 above), at p. 26.
[56] *George* (note 31 above), at paras. [33]-[35].
[57] Act 32 of 1944.
[58] Act 107 of 1985.
[59] Regulation 10(b) & (c).

to follow the legislation governing the proceedings in the court in which the proceedings were instituted with the appropriate changes deviating only in the interests of justice and if one of the parties is prejudiced.[60]

In *Unilever Pension Fund v Abrahams, Magistrate Durban Equality Court & others*[61] a large group of complainants lodged a case in the Magistrates Courts, sitting as the Equality Court against the Unilever Pension Fund alleging age discrimination and unfair and arbitrary discrimination. The Form 2 initiating the claim was, however, completed with an element of vagueness. An amendment was then filed to which the Pension Fund objected on the basis that it was vague, embarrassing, un-particular and un-detailed as to the claim and that the complainants had failed to fully identify themselves. A response was subsequently filed. However, the complainants submitted that the further particulars sought by the Pension Fund were a matter for evidence. At a Directions Hearing the Magistrate agreed with this submission, finding that the claimants would furnish the further particulars in evidence. The presiding officer found that this too was a matter for trial. On review to the High Court Combrinck J held that the reasoning of the Magistrate was fundamentally flawed and as a consequence his rulings would severely prejudice the Pension Fund.[62] The Judge stated that it is trite law that the purpose of pleadings, with included further particulars, was to narrow the issues between the parties thus avoiding unnecessary evidence drawing out proceedings.[63]

This highlights several key issues. First, that a properly trained Equality clerk should mitigate the incident of vaguely completed pleadings by assisting individual complainants. However, in this case such pleadings seem to have been issued and as a result caused complications to the effective resolution of the matter. Secondly, the Magistrate, in exercising his discretionary powers to steer away from the ordinarily rules relating to the conduct of proceedings, likely in a laudable effort to assist the complainants, permitted a situation which prejudiced the defence of the case. Lastly, the High Court, in reviewing this decision, relied on the "trite law" of the civil courts to address the defects in the findings of the lower court.

The provisions of the Act, read with the Regulations, inherently have the potential to hamper the effective realisation of the founding principles of an expeditious and informal

[60] Regulation 10(d).
[61] *Unilever Pension Fund v Abrahams, Magistrate Durban Equality Court & others* [2005] 8 BPLR 686 (N).
[62] Ibid. at p. 690.
[63] Ibid.

proceeding as set out in s 4 of the Act through the adherence to formalistic rules. However, the *Unilever Pension Fund* case illustrates that the disregard of the established principles may in itself be a barrier to the interests of justice.

The aim of the Act is presumably to provide a need for legal certainty through recourse to established rules and procedures. This, however, bears comparison to the criticisms of commercial arbitrations and the reasons why South Africa may desirable venue for such hearings, a discussion to which I will return to in the next section.

*"Legal Representatives", an expanded definition*

Regulation 10(9)(a) introduces a novel approach to legal representation in the Equality Courts by providing that an individual may be represented by '...an attorney or advocate or *any person of his or her choice*'. However, where this additional option for representation is invoked the presiding officer is obliged to inform the party if he or she is of the opinion that the individual chosen is unsuitable.[64]

The aim of this provision is to broaden the access to justice for poorer litigants who do not qualify for legal aid but cannot secure the assistance of formal legal representatives, or those who do not wish to avail themselves of a lawyer.[65] However, without institutional support, from the courts and organisations such as the HRC and CGE, lay representatives may not have access to legal sources and adequate knowledge about the legal process.[66]

*The onus of proof*

The Equality Act establishes a shifting burden of proof which is similar to a conventional civil proceeding.[67] Section 13 does this first by requiring the complainant to make out a *prima facie* case of discrimination.[68] It is then incumbent on the Respondent to prove that the

[64] Regulation 10(9)(b).
[65] Krüger R. 'Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts', at p. 232, unpublished doctoral thesis, submitted at Rhodes University in December 2008, available at <*eprints-.ru.ac.za/1429/1/Kruger-TR09-79.pdf*>.
[66] Ibid. at pp. 232-233.
[67] PIMS-SA report, for IDASA 'Equality Courts' at para 2.4.4.10, available at <http://www.idasa.org/media/uploads/outputs/files/A%20Report%20on%20Equality%20Courts.pdf>.
[68] Section 13(1).

discrimination did not take place as alleged,[69] or that it was not based on a prohibited ground,[70] or that the discrimination was fair.[71]

In *Mayonga & Associates (Pty) Ltd v City Manager, City of Cape Town*[72] the SCA criticised the court *a quo* on the basis that it had approached the evidence on the basis that it was for the respondent to prove that it had not discriminated.[73] The court of appeal instead confirmed that the starting point was for the complainant to show that there was in fact a *prima facie* case.

Davis J, in *Osman v Minister of Safety & Security,*[74] held that where this procedural step has been established, and as such the onus has shifted, a court should then evaluate the weight of the *prima facie* case against the evidence adduced by the respondent in order to conclude whether there has in fact been discrimination or not.[75] However, the Judge noted that the Act is not clear on whether the onus shifts conclusively and who bears the ultimate burden?[76]

The Regulations expressly incorporate the law of evidence as applicable in civil proceedings. However, the provision includes the caveat that the application of the rules of evidence, fairness, the right to equality and the interests of justice should prevail over mere technicalities.[77]

In the matter of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*[78] the complainant, a music teacher, had been dismissed by the respondent, a church, on the basis of his sexual orientation and refusal to submit to a "cure" for his homosexuality. The Court found that the shifted onus to prove that the unfair discrimination was fair was not discharged by the respondents.[79] As a result the Court ordered that the church pay the complainant an amount of R75 000 for the impairment of his dignity and emotional and psychological

[69] Section 13(1)(a).
[70] Section 13(1)(b).
[71] Section 13(2).
[72] *Mayonga & Associates (Pty) Ltd. v City Manager, City of Cape Town & others* [2010] ZASCA 169 (SCA).
[73] Ibid. at para [54].
[74] *Osman v Minister of Safety & Security & others* [2011] JOL 27143 (WCC).
[75] Ibid. at p. 25.
[76] Ibid.
[77] Regulation 9(7).
[78] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] JOL 22361 (T).
[79] Ibid. at para [32].

suffering, R 11 970 for loss of earnings, provide an unconditional apology and to pay the complainant's costs, including the costs of two counsel.[80]

*Remedies available under the Act and Costs*

In cases such as the *Strydom* matter, s 21 of the Equality Act confers wide power on the court in order to address both individual and systemic forms of inequality.[81] Albertyn *et al.* suggest systematic violations of equality are not solved by individual court orders rather the Equality Courts are required to provide relief which addresses the underlying causes of discrimination and seeks to reform the social attitudes, structures and institutions.[82]

In addition to the normal court remedies, s 21 permits the court to make the following forms of orders: damages in respect of the impairment of dignity, pain and suffering, emotional and psychological suffering;[83] Damages in the form of an award to an appropriate body or organisation;[84] Availability of specific opportunities and privileges unfairly denied;[85] Special measures for the addressing of the unfair discrimination;[86] An unconditional apology;[87] An appropriate deterrent;[88] And an order to comply with any provision of the Act.[89] Section 21 further permits the court the power to enforce these remedies through an internal audit of the respondent[90] and a structural interdict requiring the respondent to make regular progress reports.[91]

Albertyn *et al.* suggest that the novelty of these remedies coupled with the complexity of equality matters require presiding officers to be given the skills and resources necessary to engage creatively with these remedies.[92] The jurisprudence seems to suggest that many of the courts have indeed done so to some extent. The *Strydom* matter for instance utilised the damages provisions, an unconditional apology and a cost order. Likewise, in *Sonke Gender*

[80] Ibid. at para [41].
[81] Albertyn et al. (note 4 above), at p. 28.
[82] Ibid.
[83] Section 21(2)(d).
[84] Section 21(2)(e).
[85] Section 21(2)(g).
[86] Section 21(2)(h).
[87] Section 21(2)(i).
[88] Section 21(2)(l).
[89] Section 21(2)(p).
[90] Section 21(2)(k).
[91] Section 21(2)(m).
[92] Albertyn et al. (note 4 above), at p. 28.

*Justice Network v Malema*[93] the court order that Mr. Malema make a public apology, by way of press release, and pay damages to an appropriate institution.[94] The Judge even found it fit to offer the respondent some words of wisdom in relation to his place as a public figure.[95]

The Act provides a court with wide powers to tailor an effective remedy and though novel the aim of these remedies is to not only address the matter at hand but the deeper societal issues for which the Act was intended to combat.

*The training of Equality Court personnel on the intricacies of the Act*

Albertyn *et al.* suggest that this training is a necessary dimension of the courts as the Act provides for innovative principles, procedures and remedies.[96] During its planning phase the training of court personnel was sketched out by the then Chief Director: Transformation and Equity within the Department of Justice in a draft business plan entitled "Capacity building (through training and public education) for effective implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000".[97] The plan suggested a nationally co-ordinated but decentralised training programme for judges, magistrates, clerks, prosecutors, masters of the High Court, managers and other personnel in the Department of Justice, state attorneys and law advisors.[98] The final administration of the training has now been undertaken by the Justice College.[99]

The training is supplemented by the *Bench Book for Equality Courts,*[100] which was developed by way of a collaborative effort by the Judicial Services Commission and the Magistrates Commission. This work is intended to be a practical guide and not prescriptive in any sense.[101] In this way the courts remain free to perform their function without

[93] *Sonke Gender Justice Network v Malema* [2010] JOL 25181 (EqC, JHB).
[94] Ibid. at para [25].
[95] Ibid. at para [27].
[96] Ibid. at p. 23.
[97] Kok J.A. 'An analysis of the planning implementation of the training of Equality Court personnel relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' *De Jure* (2010) Vol. 1, 38 at p. 50.
[98] Ibid.
[99] South African Government Information 'Justice College' available at <http://www.info.gov.za/about-govt/justice/structures.htm#04justice>.
[100] Judicial Service Commission and Magistrates Commission *Bench Book for Equality Courts* (undated), a copy of this text was obtained by the author through the University's Government Publications Department. No updates of this work have been published despite a wealth of jurisprudence which has emerged following its initial publication shortly before the coming into operation of the Equality Courts in 2003. For a detailed discussion see Krüger (note 65 above) at pp. 212-220.
[101] *Bench Book* Ibid. at p. 2.

constraint. The *Bench Book* is, additionally, to be utilised in conjunction with the *Resource Book for Equality Courts,*[102] which is aimed at providing Equality Court clerks with a reference guide to perform their pivotal function.

*The structure of the Equality Courts in brief*

The Equality Courts represent specialist courts within the existing court structure, created by statute, with the aim of creating a forum for the addressing of equality rights violations in an expedient and informal proceeding so as to provide access to justice for all.

The Act seeks to address not only the dispute between the parties but to address the deeper root causes of the discrimination in question. In order to give effect to this aim the Equality Courts are to be staffed by specially trained clerks and presiding officers who are able to work with and administer the active participation of court personnel in the cases and the creative remedies provided for by the Act.

However, the Act, and its Regulations, also contain certain aspects which can potentially protract and complicate the proceedings. First, the Act provides for a referral mechanism, which may delay cases; Secondly, the onus of proof requires that the complainant first discharge a burden of proving that an act of discrimination has occurred; and lastly, the ordinarily rules of the high court and magistrates courts are incorporated.

## THE CHALLENGES

The Equality Courts are designed to be a forum for the addressing of rights violations in an accessible and effective manner. However, a number of challenges regarding the functioning and accessibility of the Equality Courts exist, which undermine the goals envisaged by the Equality Act and the Constitution itself and which ultimately result in a lack accessibility.[103] In reviewing these challenges, the interconnection of these obstacles quickly becomes evident and they may be indicative of a broader systemic failure of these courts.

[102] Judicial Services Commission and Magistrates Commission *Resource Book on Equality Courts* (undated). This text was revised in 2003. For a detailed discussion see Krüger (note 65 above) at pp.220-221.
[103] The "accessibility" of the courts is dependent on a number of factors, including *inter alia*: '[1] location; [2] public awareness; [3] language; [4] financial costs; and [5] legal awareness and/or advice' (Lane P. 'South Africa's Equality Courts: An Early Assessment' (2005), available at <http://www.csvr.org.za/wits/papers/papr-ctp5.htm>).

First, legal representation within the Equality Courts has been addressed by the Act in a unique manner. As discussed in the previous section, the clerk of the court has been given extensive obligations. In addition the Act permits legal practitioners and appropriate individuals to appear on behalf of litigants. Our courts have held that the demands of equity and natural justice do not as yet regard legal representation as a fundamental right in civil proceedings.[104] However, the right of parties to a dispute to have their matters argued in a professional manner by counsel is widely accepted.[105] The pivotal point is nevertheless the resources of the litigants and failing that, the extent to which government is obliged to bear the costs of such representatives in order to ensure the full and equal protection of the rights of litigants.

Lack of representation in the Equality Courts creates a distinct obstacle for complainants.[106] Particularly in the case of individuals without means, the result is an unequal standing when bringing claims against well resourced respondents.[107] In this situation the unequal access to legal representation, in itself, represents a cause of injustice.[108] The presence of legal representatives, however, adds an additional dimension to proceedings, which in essence are intended to be informal and expedient. The participation of lawyers may lead to proceedings which are more formal, time consuming and expensive.[109] While the option exists to simply exclude the presence of legal representatives in Equality hearings altogether, as is the case in other ADR forums, the achievement of the full potential of the Equality Courts require the assistance of skilled members of the Bar working in conjunction with a Bench that has been trained to adhere to socially conscious judging. This is best understood in regards to the ideals of the Act, which move beyond mere mechanical enquiries.

In an ideal environment the Equality Courts are intended to be public spaces which allow for the proliferation of different voices, previously denied under apartheid South Africa.[110] In this way the Equality Courts are not merely special rooms for dealing with equality matters but a transformative tool for bringing about greater justice for all.[111] This

[104] *Lace v Diack and Others* 1992 (13) ILJ 860 (W).
[105] Benjamin P. 'Legal Representation in Labour Courts' (1994) 15 *ILJ* 250 at 260.
[106] Keehn E.N. 'The Equality Courts as a Tool for Gender Transformation', case study published on the Sonke Gender Justice Network website, available at < http://www.genderjustice.org.za/reports/reports>, at p. 10.
[107] Ibid. at pp. 10 – 11.
[108] Benjamin (note 105 above) at p. 260.
[109] Ibid.
[110] Bohler-Muller N. 'The Promise of Equality Courts' 22 S. *Afr. J. on Hum. Rts.* 380, 2006 at p. 396.
[111] Ibid. at p. 403.

notion of a "public space" was first proposed by Bohler-Muller in paper published in 2000.[112] She suggests that the transformative jurisprudence of equality requires that individuals not be seen as independent rights-bearing entities but rather within a contextual reality.[113] For Bohler-Muller the "ethic of care", as she explains dictates that competing interests be weighed and that conclusions be reached which are the least harmful to the most vulnerable party.[114] Effectively, the challenge for Equality Courts is not to simply address each case mechanically but rather to contextualise the cause of action so as to tailor a remedy which addresses not only the discrimination in question but rather goes to the root of the problem, addressing societal discriminatory structures. In doing so the courts are the guardians, of sorts, for vulnerable categories of individuals. The *Bench Book for Equality Courts,*[115] discussed in the previous section, requires that presiding officers take account of the differences among South Africans so as to ensure fair and just decision-making in the challenging area of Equality.[116] This requires a comprehensive approach to social context education, despite such training being a complex task.[117] Nevertheless, proper contextual judging must be seen as a powerful and effective way to ensure a move towards substantive equality and supports the independence and credibility of the judiciary.[118]

The result is somewhat of a paradox for the best practice in the Equality Courts. On the one hand, an inequality in resources between parties means that indigent unrepresented complainants are placed at a disadvantage by permitting legal counsel in such matters. However, the development of the law and the realisation of the aims of the Act dictate creative litigants. The academic view is that that the Equality Courts need to be an open space presided over by socially conscious decision makers. However, without forward thinking legal representatives it is difficult to see how the courts can achieve this end unaided. A possible step in the right direction may be the extension of the mandate and adequate training of Legal Aid Board staff. In this way a broader group of litigants may be able to access legal representation.

[112] Bohler-Muller N. 'What the Equality Courts can learn from Gilligan's Ethic of Care: A Novel Approach' 16 *S. Afri. J. On Hum. Rts.* 623, 2000.
[113] Ibid. at p. 638.
[114] Ibid. at p. 640.
[115] The *Bench Book for Equality Courts* (note 100 above).
[116] Ibid. at p. 23.
[117] Krüger (note 65 above), at p. 219.
[118] Smith L. 'Judicial Education on Context' 38 *UBC L.Rev.* 569, 2005 at p. 582.

At present the Equality Courts reply heavily on the active involvement of the Equality clerks and an inquisitorial process whereby Judicial Officers partake in the enquiry. Presumably, this was intended to level the standing between represented and unrepresented litigants. Given the importance of properly equipping court personnel with the knowledge to effectively implement the Act it is imperative that adequate training programs are devised and administered. Research, however, suggests that the 2-3 day training programme, provided under the auspices of the Justice College, is inadequate and the materials provided to clerks fell short of being satisfactory.[119] As a result court personnel exhibit confusion regarding the function they are required to provide and detailed knowledge of the aspects unique to the Equality Act. This situation can really only be remedied through ongoing training whereby clerks and Judicial Officers alike are regularly exposed to training on all aspects of the Act and social context information cessions designed to present material which will shape the approach of court personnel.

Another critical challenge highlighted by most commentators is the lack of public awareness of the Equality Courts and the consequent under utilisation of these courts. The resolution of all other challenges becomes moot if the public is not aware of the courts and if they are unwilling to utilise them.[120] Despite the fact that South African society is marred by its legacy of inequality the Equality Courts in practice remain widely underutilised.[121] The result is that the tremendous potential of the courts has not been realised in practice.[122] This challenge can really only be addressed concertedly with a meaningful public awareness campaign.

One of the inherent consequences of the under utilisation of the courts is that court personnel become unfamiliar with the legislation and the practise and procedures unique to the Equality Courts. This may be seen in the lack of confidence and general reluctance of

[119] Keehn (note 106 above) at p. 11; Lane (note 103 above).
[120] Krüger (note 45 above) at p. 256.
[121] See for instance, the comments of the Head of the Centre for Applied Legal Studies at the University of the Witwatersrand in an interview for an article published by the IOL news (Naidu E. 'Equality courts are crying out for work' IOL news (April 10 2005), available at <http://www.io-l.co.za/news/south-africa/equality-courts-are-crying-out-for-work-1.238411>). See further the findings of the Human Rights Commission report to parliament (HRC'Parliamentary Equality Review Process' available at <www.pmg.org.za/docs/20-06/061016-SAHRC1.pdf> at p. 14); Lane (note 103 above); and IDASA 'Equality Courts' available at <http://www.idasa.org/media/uploads/outputs/files/A%20Report%20on%20Equality%20Courts.pdf> at p. 10.
[122] Kaersvang (note 15 above) at p. 4.

court personnel to engage with the Act and equality matters.[123] Unfortunately, this challenge will merely become exasperated over time.

These interconnected challenges are further frustrated by the day-to-day workloads which the court personnel must shoulder in addition to their tasks within the Equality Courts. As a natural consequence of the imbedding of the Equality Courts within the existing court structure court personnel wear two caps, first, and potentially foremost, as regular court personnel; and then additionally as Equality Court staff. This structure may lead to low prioritisation of Equality Court matters.[124] Workload problems are currently also compounded by the lack of additional support staff where the court personnel primarily designated as Equality Court staff are not available.[125] Overburdened court staff is, however, indicative of deeper systemic issues pertaining to general human resourcing of courts in South Africa.[126] Given the extensive responsibilities placed on the Equality Court personnel, this situation is extremely detrimental to the complainant's access to justice and the proper administration of the case, particularly in the case of vulnerable indigent litigants.

From the inception of the Equality Courts the various commentators have identified key challenges or obstacles to their ideal functioning, many of which are interconnected as has been described above. Where staff are under trained and sporadically called upon to perform their functions they may not engage with the Act closely or often enough and thus may exhibit confusion. However, when required to assist Equality Court litigants their workloads within the regular court structure may lead to low prioritisation of equality matters. Given that the Act relies on the Equality Court staff to a much larger degree than in the case of ordinary litigation, the presence of legal representatives is imperative to ensure that justice is indeed accessible and that the proceedings are guided towards the fulfilment of the ideals of the Act. However, even then the poor administration of the courts may still lead to the detriment of the litigants.

Nearly five years after the first Equality Courts were opened in South Africa the Refugee Rights Unit initiated three claims in order to protect the rights of asylum seekers and Refugees affected by the xenophobic attacks and the failure of the State to provide adequate protection. As will be discussed in the following section, these proceedings provide clear

[123] Krüger (note 65 above) at pp. 254-255. See further IDASA (note 121 above) p. 10.
[124] Keehn (note 106 above), at p. 11. See further IDASA Ibid. at p. 15.
[125] Keehn, Ibid.
[126] Krüger (note 65 above) at p. 255.

illustrations of these challenges despite the fact that all the parties were well represented by legal counsel.

## LITIGATING IN THE EQUALITY COURTS AND THE EXPERIENCES OF THE REFUGEE RIGHTS UNIT

In 2008 waves of xenophobic attacks swept across South Africa, leaving a number of people dead, hundreds wounded, women raped, mass displacements and property worth millions looted, destroyed or seized.[127]

In the wake of these attacks the Refugee Rights Unit launched two cases, on behalf of a number of Refugees, in the Cape High Court sitting as the Equality Court, against the Minister of Safety and Security on the basis that the members of the South African Police Services ("SAPS"), exercised their function during the xenophobic attacks in a discriminatory manner and failed to provide adequate protection to the complainants due to their nationality.

### *Said and others v The Minister of Safety and Security and others*

The first of these cases to be launched was the *Said and others v the Minister of Safety and Security* ("the *Said matter*").[128] The cause of action in this instance preceded the main waves of xenophobic attacks, and occurred in Zwelethemba, just outside the town of Worcester in March 2008.

The facts are briefly that over a two day period groups of looters, comprising of members of the Zwelethemba community, looted virtually all the foreign owned shops in the settlement. All the refugees and foreigners had to flee from Zwelethemba during the looting, some sustaining injuries in the process. The looters carried weapons and shouted xenophobic slogans. It was common cause between the parties that police officers from Zwelethemba, Worcester and Paarl were present in Zwelethemba at the time of the looting.

[127] IOM 'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa' (February 2009), available at <www.irinnews.org/pdf/IOM_report.pdf>.
[128] *Said and others v The Minister of Safety and Security and others* (EC13/08), unreported judgement handed down on 7 December 2011.

It was the complainant's case that the police discriminated both directly and indirectly against them in the exercise of their duties. It was first argued that the police actively refused to provide assistance to the complainants, thereby discriminating against the complainants by actively guarding the South African owned shops while refusing to provide this same assistance to the complainants on the basis of their nationality.

The complainants argue further that their position in South African society, as a vulnerable category of persons,[129] dictates a high degree of care. The failure to meet this standard amounts to "adverse effect" discrimination, which occurred irrespective of the intention of the perpetrators.[130]

The complainants sought to invoke the broad powers conferred on the Equality Court,[131] by seeking relief which is three fold: [1] damages; [2] an unconditional apology and public admission of acts of unfair discrimination; And [3] a structural interdict requiring the police to establish a training program aimed at instructing police officers throughout the Western Cape on dealings with the rights of refugees in a sensitive manner. The complainants further requested that the structural interdict be implemented by the Human Rights Commission, which was joined to the proceedings as a third party. This combination of remedies was possible within the list of creative remedies which the Act empowers the court to order. It was felt that by utilising this unique mechanism it would be possible for the court to, not only come to the assistance of the destitute complainants, but also to root out the discriminatory and xenophobic attitude, which lead to the harm which the complainants suffered.

The court, however, declined to order compensation for the complainants. Rather the court focused on the structural interdict binding on the Human Rights Commission and

[129] The Constitutional Court has repeatedly affirmed that refugees are a "vulnerable category of person" in South Africa (see *Larbi-odam and others v Members of the Executive Council for Education* 1998 (1) SA 745 (CC) at para 19; and the *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others* 2007(4) SA 295 (CC), at paras 28 – 31).

[130] The Constitutional Court has confirmed that proof of intention is not a threshold requirement for either direct or indirect discrimination (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC), at para 43; and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 41). This is also in keeping with the equality jurisprudence of both Canada (*Ont. Human Rights Comm. v. Simpsons-Sears* ([1985] 2 S.C.R. 536); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; and *Eldridge v. British Columbia (Attorney General),* ([1997] 3 S.C.R. 624)), and the European Court of Human Rights (*Timishev v Russia* (Application Nos. 55762/00 and 55974/00); *Zarb Adami v Malta* (Application No. 17209/02); *Sampanis and others v Greece* (Application No. 32526/05)).

[131] Section 21(2).

SAPS.[132] This outcome is an opportunity potentially missed for the court to engage with the Act, its remedies and the imperative to evaluate the evidence produced through the lens of socially conscious judging.

During the course of the proceedings a number of the challenges, highlighted in the previous section, came to the fore, namely: legal representation; public awareness; and the poor administration of Equality Court functions by the clerk of the court.

While the complainants in this matter were represented from the outset by the Refugee Rights Unit and counsel the need for legal representation is well illustrated in this matter. All the complainants were asylum seekers and refugees residing in an informal settlement and would have been unable to secure legal representation had it not been for the Refugee Rights Unit's assistance. The State, on the other hand, briefed both Senior and Junior counsel at great expense to the tax payers. This clearly illustrates the situation where a well resourced respondent would spare no expense thereby placing a vulnerable indigent complainant at a disadvantage were it not for *pro bono* legal assistance from an organisation such as the Refugee Rights Unit. However, given the complex evidential aspects and legal arguments which were addressed during these proceedings this matter clearly dictated the involvement of skilled litigators. For instance, in the absence of South African jurisprudence on adverse effect discrimination, it was necessary to research foreign law in order to develop an argument. It would be difficult to see how this could be accomplished but for the assistance of legal representatives.

Public awareness was clearly a concern for the court. The judge consistently noted the need to bring the Equality Courts within the contemplation of the general public as an accessible and prominent forum and as such made numerous accommodations to the press and public. This concern from the judiciary, however, requires the support of Government, NGOs and civil society in order to overcome this challenge.

The most glaring challenge which was highlighted by this case was the impact of the workload placed on the clerk and the detrimental impact that this had on the effective running of the case. From the outset of this case the Refugee Rights Unit attorneys experienced difficulty with initiating and administering the case as the representatives of the complainants by virtue of the fact that the Cape Town High Court has only one trained Equality Court

[132] *Said* (note 128 above) at para [95].

clerk, who acts in her capacity as such over and beyond her function as a clerk of the High Court and work in the Apostille Certification office. In her absence no substitute was catered for and ordinary court personnel simply refused to provide any assistance as it was not their function. As a result, where the clerk of the Equality Court was not at work or available for whatever reason the Refugee Rights Unit attorney were required to make numerous trips in order to accomplish the simple task of filing documents. For the attorneys this was a time consuming and costly inconvenience but for an unrepresented, and possibly indigent, complainant faced with such obstacles may well be frustrate into abandoning a good case.

This is a clear example of the overburdening of Equality Court staff, which the various commentators have identified is a key challenge. In practice this proved to be a serious stumbling point to the proper and timeous administration of the case and it is a critical issue which, the Equality Courts must address in order to properly perform their functions.

As a result of the *ad hoc* functioning of the Equality Court the proceedings on one particular day were set down to be heard in a court which was woefully inadequate, given the number of individuals attending the proceedings. In light of this situation it was necessary to address the court on the administrative inefficiencies of the Equality Courts. Counsel for the complainants submissions were as follows:-

> *"M'Lord, may I appeal to you and to those who are responsible for the functioning of [the] Equality Courts that the Equality Court matters have to [be recorded] on the court roll like any other matter. A court has to be assigned before the time like any other court matter. The clerk of the Equality Court has to ensure that she is present when Equality Court matters are heard. If she is absent there has to be a substitute assigned like in any other High Court matter...."*[133]

Through this address two key administrative failings are highlighted: First, although the Equality Courts are specialist courts operating within the existing court structure they require the same consideration as any other court matter. Specifically, court allocation and recording of the hearing should be done in the normal course. Secondly, the Equality clerk, or her substitute, must be involved in the matter and present at court so as to ensure that the functions ascribed to the clerk by the Act and the Regulations are complied with.

[133] Court Record, 24 May 2010, at p. 219, transcripts on file with the author.

These two concerns could be achieved through a policy shift without necessitating structural changes to the Equality Courts. Nevertheless, the impact that this will have on the administration of cases will be an important step forward for the proper functioning of the courts.

If the administrative challenges of the courts remain un-addressed, Counsel for the Complainants quite aptly submitted that:-

> *"This matter has to be addressed urgently....otherwise other prospective litigants would be reluctant to refer unfair discriminations to the Equality Court..."*[134]

This should further be seen in the context of the fact the complainants in the *Said matter* were represented by the Refugee Rights Unit and Counsel. An unrepresented complainant would face severe prejudice due to these administrative failings and, as stated by Counsel, this may act as a deterrent to individuals whose rights have been violated.

It was, however, encouraging that the court did not simply dismiss these submissions out of hand. Rather the Judge stated the following:-

> *"I will see that the deficiencies in the organisation of the court is brought to the attention of both the court manager and the Judge President. The unfortunately situation is that under normal circumstances, when the High Court sits as a High Court, the Judge sits with his personal registrar and the registrar makes all the arrangements. Unfortunately, the situation has arisen that the registrar of the Equality Court also has other functions and it seems there's room for improvement. The concern that I share with you is that the Equality Court is supposed to be a court that promotes equality and advance those values in our constitution that promotes human dignity and it is not dignified for complainants to come to a courtroom like this, that is totally inadequate, and I need to address that and I will do that, and may I use this opportunity to apologise to the complainants for the inconvenience that they are suffering today."*[135]

The author hopes that the Judge's undertaking will have an impact and result in this critically needed redress of the administration of the Equality Courts. In this passage the Judge noted an institutional distinction between the Equality Courts and the ordinary courts, which if addressed could resolve many of the overburdening problems currently faced. The handing over of the administrative functions relating to the allocation of courts to each individual

[134] Court Record, 24 May 2010, at pp. 219-220, transcripts on file with the author.
[135] Court Record, 24 May 2010, at p. 221, transcripts on file with the author.

Judge's registrar would spread the workload. Moreover, the registrars are accustomed to making such arrangements as it is a function that they ordinarily fulfil.

In short the *Said matter* illustrated the need for legal counsel, particularly when confronting well resourced respondents, such as the State, and when faced with the poor administration of the Equality Courts, which could otherwise act as a deterrent to unrepresented litigants.

*Osman v The Minister of Safety and Security and others*

The next case launched by the Refugee Rights Unit was *Osman v the Minister of Safety and Security* ("the *Osman matter*"),[136] which arose from the attacks which occurred in Dunoon, near Milnerton in the Western Cape.

The facts were briefly that a meeting was called in May 2008 by various community structures, including SAPS, at a local School in order to address the xenophobic attacks which had spread quickly across the country. Shortly after this meeting had adjourned a crowd gathered on the streets and commenced attacking and ransacking foreign owned shops in the area. It was common cause that South African shops and businesses were not attacked on the evening in question.

The complainant's case was that he had attended the meeting finding the atmosphere to be tense and members of the crowd shouted at him "Somali we will kill you." Soon after leaving the meeting he received a telephone call from his employee informing him that his shop was being looted by the crowds. The complainant testified that he drove to the shop to find three police vans were standing nearby, whilst the crowds were still carrying goods out of his shop. He testified that he approached one of the police officers for assistance in removing the remaining goods from his shop. The police officer responded that they would only assist him if his employees were still in the shop, but they would not assist simply to remove goods. He was then instructed by the police to leave Dunoon as the situation was becoming more dangerous. The complainant testified that he was gravely upset as he had seen his shop being destroyed whilst several heavily armed policemen merely looked on as though this was part of an "evening's entertainment". The Equality Court accepted that a case of discrimination had been made out and therefore the onus shifted to the Respondents.

[136] *Osman* (note 74 above).

Nevertheless, the court ultimately dismissed the claim, finding that in the absence of further evidence to support the complainant's version it could not make a determination on his allegations.[137]

What the *Osman matter* illustrates well is the stringent burden placed on claimants to prove a *prima facie* case of discrimination. The initial presumption is that no rights violation has occurred. Discrimination is, however, notoriously difficult to prove and particularly in situations where there is no express discrimination but rather a more insidious attitude. As discussed above, the court held that where a *prima facie* case has been made out this must be weighed against the rebutting evidence adduced by the respondents, however, the Act is not clear on whether the onus shifts conclusively or who bears the ultimate burden.[138] However, this creates a "grey area", eluding to the possibility that a claimant retains some form of residual burden.

A similar shifting burden procedure is contained in the Labour Relations Act,[139] which provides that an employee must prove the existence of a dismissal and then the onus shifts to the employer to either rebut the dismissal or to prove that the dismissal was nevertheless procedurally and substantively fair.[140] In this way the legislature has reversed the general principle that a person who claims a legal entitlement bears the onus of proving the factual basis of that claim.[141] However, within the context of a dismissal it has been established that an employee is still required to adduce evidence that proves the dismissal was unfair. The employee cannot simply rely on a lack of evidence from the employer as grounds for substantiating a blank statement of unfairness.[142]

In the same way the finding of Davis J in the *Osman matter* can be seen as a requirement that the claimants adduce evidence to support the allegation of discrimination rather than simply relying on the respondents' failure to rebut the claimant's *prima facie* case. The difficulty with this is, however, linked to the problems with proving discrimination. The effects may be severe but the proof thereof may be all but impossible and therefore the rights violation may go unchecked.

[137] Ibid. at p. 27 of 27143.
[138] Ibid. at p. 25.
[139] Act 66 of 1995.
[140] Section 192(2).
[141] Grogan J. *Dismissal* (2002) at p. 91.
[142] Ibid.

The *Osman matter* furthermore provided yet another illustration of the need for legal representation. Once again the State was represented by the State Attorney who briefed both junior and senior counsel. The complainant, on the other hand, was rendered indigent by the incident which was the cause of action in this case. As a result he would not have been able to secure legal representation but for the assistance of the Refugee Rights Unit lawyers on *pro bono* terms.

As with the *Said matter,* the same frustrations were experienced when engaging with, and relying on, a single unsupported clerk. During these proceedings a court date was allocated but the partiers were not informed thereof, creating further delays. These delays are indicative of the overburdening of the clerk of court and the *ad hoc* nature of Equality Court proceedings.

## CONCLUDING REMARKS

South African society bears a legacy of inequality and struggle against oppression. In the constitutional era, our courts have held the right to equality is a core fundamental value against which all law must be tested. The Equality Courts have therefore been heralded as a transformative mechanism for the redressing of systemic inequality and the promotion of the right. The legislature sought to achieve this end by creating these specialist courts within the existing court structure and training designated court staff in order to administer the courts and engage with the nuances of the Act.

In practice, however, the Equality Courts face a number of challenges which effectively reduce the accessibility of the courts. Many of these challenges, outlined in this paper, are interconnected and could therefore be addressed together.

Undertrained court personnel who are sporadically called upon to perform their functions have been found to exhibit confusion regarding the proper functioning of the court and the Act. This can really only be overcome by continual programs of training. The need for socially conscious judicial officers and Equality clerks who can assist vulnerable litigants further requires topic specific training in order to be able to engage with specific groups such as refugees or victims of gender and prejudice based violence. This continual engagement with the Act and related topics will ensure that staff are more familiar with the procedures of

the court and they would be better prepared to give full effect to the ideals of the Act and the Constitution itself.

In order to ensure that this gain is not lost simply due to the overburdening or absence from work of court personnel there is an urgent need to designate more court staff as Equality Court personnel. The spreading of the workload over more than one clerk would ensure that clerks are always available and that no one individual is overwhelmed. The extensive obligations imposed on the clerk in order to assist litigants, and particularly unrepresented litigants, requires that such staff are accessible and can take time to properly engage with each case brought before them.

Through the experience of the Refugee Rights Unit it was evident that the poor administration of the courts could be detrimental to a case and particularly if the litigants are unrepresented it would likely lead to the abandonment of the claim and the reluctance to utilise the courts again. The second aspect which emerged during these proceedings was the question regarding the onus of proof. Given the difficulty in proving discrimination, particularly when dealing with more insidious forms such as adverse effect discrimination, a residual burden of proof of unfairness is problematic. A legislative amendment is required to guide courts in regards to whether the onus shifts conclusively once a *prima facie* case has been made out.

Although the Equality Courts face many challenges it must be recalled that they have been in operation for less than a decade thereby providing the opportunity for change, amendment and administrative streamlining. The challenges highlighted in this paper, and by the various commentators, are rooted not in outright criticism of the courts but rather in the underlying belief in the potential which the Equality Courts have.

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