

# RELIGIOUS DISCRIMINATION IN THE SOUTH AFRICAN WORKPLACE: REGULATED REGIMES AND FLEXIBLE ADJUDICATION

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## SUMMARY

Our South African democratic legal system places a high premium on the constitutional right to equality. An adjunct thereto is the right against unfair discrimination. Both these imperatives underscore the constitutional right to fair labour practices. National legislation is in place to regulate the right to fair labour practices by ensuring the realisation of equality and the proscription of religious unfair discrimination. An inexorable component of equality is human dignity. The purpose of this article is to argue that unfair religious discrimination in South African labour law is addressed in terms of our constitutional and national legislative regime. An essential aspect thereof is that national legislation gives expression to the underpinned values and principles of our constitution. This also guarantees that international instruments and law is taken into account. It is impermissible for a claimant to rely directly on a constitutional provision where effect to such provision is catered for in terms of national legislation. In this sense, unfair religious discrimination in the workplace can be said to be effectively governed and regulated by our constitutional and national legislative regime. As regards the adjudication of religious discrimination disputes in the workplace, it is argued that a more flexible and rather unpredictable approach appears to pervade our jurisprudence. The *Harksen v Lane* case which has left its foot print on our unfair discrimination case law has been met with criticism. Notwithstanding, there is nothing to indicate that *Harksen v Lane* will not continue to play a role in the adjudication of unfair discrimination disputes. An examination of three sample decisions of religious unfair discrimination shows, it is contended, the absence of any formal or universal test. It is contended that this fact may be conducive to our labour law. It is further contended that a context-sensitive approach with regard to the adjudication of religious discrimination disputes is advantageous for advancing our labour law jurisprudence.

## 1 INTRODUCTION

Everyone has the right to freedom of religion in terms of section 15(1) of the Constitution of the Republic of South Africa<sup>1</sup> (the Constitution). Persons belonging to a religious community may not be denied the right, with other members of that community to practise their religion and to form; join and maintain religious associations.<sup>2</sup> In the context of the workplace the aforesaid rights must be considered against the constitutional guarantee that everyone has the right to fair labour practices.<sup>3</sup> These rights must, in turn, be taken account of in the context that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>4</sup> National legislation has been enacted to give effect to the right to fair labour practices and the achievement of the right to equality. Prevention and prohibition against unfair religious discrimination is given effect to by the Employment Equity Act<sup>5</sup> (the EEA) and the Labour Relations Act<sup>6</sup> (the LRA).<sup>7</sup>

This paper examines the South African legislative and constitutional framework in place addressing equality and the issue of unfair religious discrimination in the workplace. It will be argued that there is in place a regulated framework<sup>8</sup> which seeks to properly address religious unfair discrimination in the workplace – and thereby address and maintain the often tenuous balance of harmony in the workplace. This harmony can readily be displaced by an employee's religious beliefs, alternatively the employer's right to exclude employees or an applicant for employment on the basis of religious association. It will further be contended with reference to such cases that have been reported in respect of workplace religious discrimination that no 'formal' or 'universal' test in respect of the adjudication of such disputes has been adopted by our courts. It is argued that the adoption of a 'formal' or 'universal' test can have an inimical effect on the development of labour law jurisprudence due to the restrictive confines of a test, however, adjudication of a dispute concerning religious discrimination does, at the very minimum, require of a

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<sup>1</sup> Of 1996.

<sup>2</sup> S 31(1)(a) and (b) of the Constitution, which right is limited by subsection (2) which provides that the rights on subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>3</sup> Section 23(1).

<sup>4</sup> Section 9(1).

<sup>5</sup> 55 of 1998.

<sup>6</sup> 66 of 1995.

<sup>7</sup> Conceivably, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is also national legislation giving effect to the constitutional imperative of equality and unfair discrimination, but this will not form part of the subject matter of analysis on account of the fact that PEPUDA does not pertain to the workplace as provided for by the EEA and LRA (see s 5(3) of PEPUDA).

<sup>8</sup> See Henrico "South African constitutional and legislative framework on equality: how effective is it in addressing religious discrimination in the workplace?" in 2015 forthcoming publication of *Obiter*.

judge to adopt a context-sensitive approach to the facts and circumstances. Such an approach, it is submitted, bodes well for advancing labour law jurisprudence.

## **2 REGULATED FRAMEWORK**

### **2 1 Significant constitutional provisions**

Our constitution contains a host of rights germane to the overarching right to freedom of religion in a democratic dispensation. Section 15 (1) provides that:

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

The fact that “religion” as a right is not isolated but used in the same text as “conscience”, “thought”, “belief” and “opinion” does not detract from the significance of religion as a substantive stand-alone and independent right. Lack of a dictionary definition of the term “religion” must be accounted for in terms of the term being more case than text specific. It would be unrealistic and naïve to conceive of a universal definition of “religion” due to the comity “religion” shares with notions of “conscience”, “thought”, “belief”, “opinion”, “culture” and “human dignity”.<sup>9</sup> This individual right to freedom of religion must be seen against the so-called associational right, namely one that can be said to be given to communities, organisations and for as provided for in section 31 which states that:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
  - (a) To enjoy their culture, practise their religion and use their language; and
  - (b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights

The right to equality finds expression in section 9 which provides that:

- (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 of the following 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.

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<sup>9</sup> See Henrico “Understanding the concept of “religion” within the constitutional guarantee of religious freedom” in 2015 forthcoming publication of *TSAR*.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.<sup>10</sup>

The fact that there is constitutional provision that everyone is equal before the law and has the right to equal protection and benefit of the law<sup>11</sup> must not be interpreted as a formal approach to equality. Subsection (2) makes it clear that for equality to be achieved it must be extended to embrace certain imperatives. In this sense, a substantive notion of equality is embraced<sup>12</sup>. The learned authors refer to the following apposite observation by Kentridge, namely:

Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be differently treated is vital to equality as a requirement that those who are like are treated alike.<sup>13</sup>

Substantive equality permits of recognition and celebration of differences in a pluralistic society, which differences must and should be accommodated.<sup>14</sup> The differences which individuals have is no longer an aspect of human worth for which an individual should be subjected to humility or ignominy, but a fact which recons to be accounted for and celebrated in a constitutional democracy.<sup>15</sup>

The right to fair labour practises is accorded to employee and employer in terms of section 23(1) of the Constitution which provides that:

Everyone has the right to fair labour practices.<sup>16</sup>

## 2 2 Significant legislative provisions

As previously stated, the EEA and LRA are the principle legislative tools addressing unfair religious discrimination in the workplace. When the EEA came into operation in August 1999 it replaced the host of unfair labour practices as provided for in terms

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<sup>10</sup> For further reading see De Vos (Ed) *South African Constitutional Law in Context* (2015) 331-337 S 9(1).

<sup>11</sup> See *Du Toit et al Labour Relations Law: A Comprehensive Guide* (6<sup>th</sup> ed) 656.

<sup>12</sup> *Ibid*, esp authority at fn 30.

<sup>13</sup> See Albertyn "Substantive equality and transformation in South Africa" 2007 *SAJHR* 253 255 ff; Chaskalson "Human dignity as a foundation value of our constitutional order" 2000 *SAJHR* 193 200 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

<sup>14</sup> See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC); and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC). In the case of *Elauf v Abercrombie & Fitch*, the Supreme Court of the United States handed down judgment against the company in favour of the employee. The ruling is said to be indicative of "...a victory for our increasingly diverse society...". (See [www.huffingtonpost.com/2015/06/01/supreme-court-abercrombie\\_n\\_7464534.html](http://www.huffingtonpost.com/2015/06/01/supreme-court-abercrombie_n_7464534.html) (accessed 23-07-2015)). For further discussion on religion in a pluralistic society see Also see Clark and Corcoran "Pluralism, secularism, and tolerance" 2002 *Rhetoric and Public Affairs* 627; and Ferrari "Religion and the development of civil society" 2011 *International Journal for Religious Freedom* 29.

<sup>15</sup> See *NEHAWU v UCT* 2003 2 BCLR 154 (CC) par 33 which makes it clear that the right to fair labour practices is one which is shared equally by the employer and employee.

of Item 2(1)(a) of Schedule 7 of the LRA. Neither the EEA nor the LRA has any code dealing with unfair discrimination on the basis of religious discrimination.

The aim of the LRA is, inter alia, to:

- a) ... regulate the fundamental rights conferred by section 23<sup>17</sup> of the Constitution;
- b) [give effect to] the obligations incurred by the Republic as a member state of the International Labour Organisation [...] <sup>18</sup>

Unfair discrimination by an employer against an employee<sup>19</sup> on grounds of religion<sup>20</sup> constitutes an automatic unfair dismissal under the LRA. Unfair discrimination is provided for in section 187(1)(f) of the LRA which states:

that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

In its preamble, the EEA states its purpose as being to:

promote the constitutional right to equality and the exercise of true democracy;  
eliminate unfair discrimination in employment;  
[...] to redress the effects of discrimination; and  
... give effect to the obligations of the Republic as a member of the International Labour Organisation.<sup>21</sup>

Section 3 of the EEA provides:

This Act must be interpreted –

- (a) in compliance with the Constitution;
- (b) so as to give effect to its purpose;
- (c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
- (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in respect of Employment and Occupation.

Section 6(1) of the EEA set out the provisions of unfair discrimination on the basis of religion as follows:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual

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<sup>17</sup> Which deals with labour relations and in particular sub-section (1) provides that everyone has the right to fair labour practices.

<sup>18</sup> S 1.

<sup>19</sup> Which would include an applicant for employment in terms of *Wyeth v Manqele* 2005 26 ILJ 749 (LAC) par 14, 45 and 52.

<sup>20</sup> S 187(1)(f) read with ss 1(b) and 3(c).

<sup>21</sup> In s 3(d) express reference is made to the ILO Convention 111.

orientation, age, disability, *religion*, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.<sup>22</sup>

Although the LRA refers directly to an employer being prohibited from unfairly discriminating against an employee,<sup>23</sup> the EEA increases the scope of liability to reflect “no person”, thus clearly imposing a duty on the employer to take steps to promote equal opportunity and eliminating unfair discrimination in the workplace.<sup>24</sup> Effectively, the employer can be held liable for conduct on the part of an employee against another employee which constitutes unfair discrimination.<sup>25</sup> The extent of liability has been widened in the EEA by insertion of the words “or any other arbitrary ground”.<sup>26</sup>

An employee who is dismissed in terms of section 187(1)(f) of the LRA may be entitled to a maximum sum of 24 months’ compensation in the event of a successful adjudication of the matter in the Labour Court.<sup>27</sup> Unlike the LRA, where a ceiling is set on compensation and the form of remedy, namely compensation or reinstatement, in terms of the EEA the Labour Court may, in addition to awarding compensation also award damages to be paid by the employer to the employee.<sup>28</sup> Under a section 187(1)(f) dispute the employee would be required to discharge the onus<sup>29</sup> of proving a dismissal<sup>30</sup> and unfair discrimination on the basis of religion. The onus would rest on the employer<sup>31</sup> of showing that the dismissal on grounds of religion was fair due to the inherent requirements of the job<sup>32</sup> or that accommodating the employee’s religion would work an undue hardship against the employer.<sup>33</sup> The burden of proof in disputes under section 6(1) of the EEA are regulated by subsection (11) which states:

- (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance, that such discrimination-
  - (a) did not take place as alleged; or
  - (b) is rational and not unfair, or is otherwise justifiable.
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
  - (a) the conduct complained of is not rational;

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<sup>22</sup> Own emphasis.

<sup>23</sup> S 187(1)(f).

<sup>24</sup> S 5 of the EEA.

<sup>25</sup> In terms of the provisions of s 51 as read with s 60(3) of the EEA.

<sup>26</sup> S 6(1).

<sup>27</sup> S 194(3).

<sup>28</sup> S 50(1) and (2).

<sup>29</sup> On a balance of probabilities.

<sup>30</sup> In terms of s 192(1). Dismissal is defined in s 186(1)(a)-(f) of the LRA.

<sup>31</sup> To be discharged on a balance of probabilities.

<sup>32</sup> In terms of s 192(2) as read with s 187(2)(a).

<sup>33</sup> *Dhlamini v Green Four Security* 2006 11 BLLR 1074 (LC) par 32, 52 and 69. Although no statutory definition exists in the LRA defining “reasonable accommodation”, the term as a ground upon which the employer is required to prove that discrimination is fair by showing what steps have been taken to reasonably accommodate diversity appears in s 14(3)(i)(ii) of PEPUDA. For further discussion of this term and the extent of its use, see Henrico “Mutual accommodation of religious differences in the workplace – a jostling of rights” 2012 *Obiter* 503.

- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair

The above section imposes a burden on the employer, when rebutting an unfair discrimination claim on a listed ground, such as religion, of disproving that the discrimination took place, alternatively leading evidence, on a balance, to indicate that the action was rational, fair or justified. Hence, the amended EEA<sup>34</sup> has widened the scope of defence of an employer. Previously, an employer was burdened with establishing, on a balance, that the discrimination was “fair”.<sup>35</sup> The employer is now given increased grounds upon which to refute a claim of unfair discrimination. A claimant who alleges unfair discrimination upon an arbitrary ground would be required, on a balance, to show the manner in which the action complained of constitutes something that can be classified or considered “arbitrary”. Academic criticism has been raised pertaining to the new amendments which permit defences that provide wider relief than envisaged under the Convention.<sup>36</sup> Although there have been no labour court decisions on the amended grounds, two CCMA decisions are instructive<sup>37</sup> and show that in point of fact no greater onus is placed on the complainant in terms of producing proof of an “arbitrary” ground of discrimination than any other instance of unfair discrimination. Proof of the alleged act complained of is still required to be produced on a balance of probabilities before placing the burden on the respondent of showing, on a balance, that the act was “rational, fair or justified”.

### 2 3 Significant international instruments

The most apposite International Labour Organisation (the ILO) addressing is Convention 111 of 1958<sup>38</sup> (the Convention) which reads as follows:

For the purpose of this Convention the term discrimination includes-

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<sup>34</sup> As amended by the Employment Equity Amendment Act 47 of 2013.

<sup>35</sup> S 11.

<sup>36</sup> For criticism of the amendments see Submission on the Employment Equity Amendment Bill of 2012 (As introduced by the Minister of Labour (National Assembly)) available at <http://www.pmg.org.za/files/130807dutoit.pdf> (accessed 2015-04-07) and Du Toit “Protection against unfair discrimination: cleaning up the Act” 2014 *ILJ* 2623 2634. See also See comments by Van Niekerk and Smit (Eds) *Law@work supra* 132; and Du Toit and Potgieter *Unfair Discrimination in the Workplace* (2014) 17

<sup>37</sup> As to what constitutes an “arbitrary ground” of discrimination under the EEA see the recent awards by commissioner Madeleine Loyson of the CCMA in *Tarpeh v Full Circle Contact Centre Services t/a Capita SA (Pty) Ltd* WECT 2508 – 15 (in which an award was made in favour of the applicant who was an applicant for employment discriminated against on the basis of being an asylum seeker, which discrimination was found to constitute an “arbitrary ground”) and *Tani v Epol (a division of Rainbow Farms (Pty) Ltd)* WECT 16990 - 14 (where it was found that the non-appointment to a position on account of the employee’s criminal record constituted an “arbitrary ground” of discrimination).

<sup>38</sup> Convention on Discrimination (Employment and Occupation) ratified by South Africa on 5 March 1997. For further comment and discussion see Hlongwane “Commentary on South Africa’s position regarding equal pay for work of equal value” 2007 *Law, Democracy & Development* 69 71.

- a) any distinction, exclusion or preference made on the basis of race, colour, sex, **religion**, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;<sup>39</sup>
- b) [...]

2 Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.<sup>40</sup>

When interpreting legislation our courts are required to give effect to customary international and international law.<sup>41</sup> Both the LRA and the EEA are required to give effect to obligations incurred by the Republic as a member state of the ILO. The directive contained in section 9(4) of the Constitution that national legislation must be enacted to prevent or prohibit unfair discrimination means that once such national legislation has been passed, litigants cannot by-pass such legislation and rely directly upon the Constitution since this would be contrary the principle of subsidiarity.<sup>42</sup> Consequently, employees seeking to hold their employer's liable on the basis of religious unfair discrimination cannot seek to rely directly on the provisions of section 9 of the Constitution but must employ the mechanisms as provided for in terms of the of the EEA or the LRA.<sup>43</sup>

Since employees are required to rely directly on statutory provisions aimed at eliminating discrimination, instead of the Constitutional provision contained in section 9, they are in a sense afforded additional or wider grounds upon which to base their claims.<sup>44</sup> In addition, employees are afforded the additional ground of establishing discrimination on the basis of any arbitrary ground.<sup>45</sup>

The aforesaid is the legal framework under which religious discrimination disputes in the workplace are required to be adjudicated and ultimately resolved.<sup>46</sup> There can be no doubt that in terms of the current labour law dispensation, the issue of unfair discrimination on the basis of religion is highly regulated not only through means of national legislation, but also constitutional values and principles through which such legislation is required to be interpreted with due account being had of ILO regulations

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<sup>39</sup> Article 1 (a). Own emphasis.

<sup>40</sup> Article 2.

<sup>41</sup> In terms of ss 232 and 233 of the Constitution, provided the interpretation is in accordance with the values and principles of the Bill of Rights. For further reading on transformative adjudication and the constitution see Hoexter *The Judiciary in South Africa* (2014) 68 and the authorities cited at fns 1-6.

<sup>42</sup> Du Plessis "'Subsidiarity': what's in the name for constitutional interpretation and adjudication?" 1 15 ([http://www.chr.up.za/chr\\_old//closa/chapters/Subsidiarity.pdf](http://www.chr.up.za/chr_old//closa/chapters/Subsidiarity.pdf))(accessed 2015-04-08).

<sup>43</sup> See *S v Mlungu* 1995 3 SA 867 (CC) par 95; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) par 437; and *SANDU v Minister of Defence* 2007 5 SA 400 (CC) par 51.

<sup>44</sup> Namely HIV status, political opinion and family responsibility as provided for by the EEA, or political opinion and family responsibility as provided for by the LRA.

<sup>45</sup> Provided for by s 6(1) of the EEA and s 187(1)(f) of the LRA. Although usage of this additional ground does not appear to be without its problems.

<sup>46</sup> For further reading see Henrico "South African constitutional and legislative framework on equality: how effective is it in addressing religious discrimination in the workplace?" (forthcoming publication of 2015 *Obiter*).



and international law. The manner in which our courts have approached religious discrimination disputes, and how they should be approaching such disputes forms the subject matter of the analysis that follows.

### **2 3 The test for determining unfair discrimination on the grounds of religion**

The need to address conduct which subjects human beings to unfair treatment and employees in particular will always be an imperative on the human rights and equality agenda.<sup>47</sup> This concern is fortified by the inexorable bond between the notions of equality and human dignity. It cannot be said that someone is treated equally when there is conduct, such as unfair religious discrimination, which impacts adversely upon their human dignity which is an inalienable right.<sup>48</sup> We have come to conceive of discrimination (differentiation)<sup>49</sup> in the pejorative and non-pejorative sense. It is discrimination in the pejorative sense which piques our senses since this is differentiation which translates into unfair treatment or conduct on account of it being arbitrary or hurtful or capricious or objectionable.

The nub for our judges, insofar as adjudication of unfair discrimination disputes is concerned, is that “discrimination” as a term is not given a finite definition by either the Constitution or any relevant national legislation. The Convention, however, describes “discrimination” as constituting a “distinction, exclusion or preference [...] resulting in “nullifying or impairing equality of opportunity or treatment in employment or occupation”.<sup>50</sup> Such a notion or definition is not inconsistent with notions of equality as conceived of in terms of section 9 of the Constitution.<sup>51</sup> We also know that the Convention definition must be given effect to by the EEA and the LRA in the discharge of the ILO obligations on the part of South Africa.<sup>52</sup> Before the EEA or the LRA came into operation the definition used in the interpretation of the interim Constitution<sup>53</sup> prohibition on unfair discrimination, as pointed out by Du Toit,<sup>54</sup> in the matter of *Association of Professional Teachers v Minister of Education*<sup>55</sup> was stated as follows:

Where the criteria for a differentiation or classification are reasonably justifiable and objective, such differentiation will not necessarily constitute discrimination. Put differently, where the ... differentiation is not based on an objective ground and such differentiation has the effect of

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<sup>47</sup> See Dugard “The judicial process, positivism and civil liberty” 1971 *SALJ* 181; *S v Makwanyane* 1995 3 SA 391 (CC) par 262; and Chaskalson “The past ten years: A balance sheet and some indicators for the future” 1989 *SAJHR* 293 295-296.

<sup>48</sup> Ackermann *Human Dignity: A Lodestar for Equality in South Africa* (2013) 56 ff. Also see *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) par 1.

<sup>49</sup> See Du Toit and Potgieter (n 36) 79-82 who correctly argue that “discrimination” can be used interchangeably with the term “differentiation”.

<sup>50</sup> Article 1(a).

<sup>51</sup> Du Toit and Potgieter (n 36) 18.

<sup>52</sup> S 3(d) and 1 (b) of the EEA and LRA respectively.

<sup>53</sup> Of 1993.

<sup>54</sup> Du Toit and Potgieter (n 36) 18.

<sup>55</sup> 1995 16 *ILJ* 1048 (IC).

nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms, it would constitute discrimination.<sup>56</sup>

The industrial court was responsible in no small way for developing the law relating to unfair labour practices and what would come to act as a harbinger of the term “discrimination” being expressed as “unfair discrimination”.<sup>57</sup> We are referred to the fact that the definition of an “unfair labour practice” was amended to include “unfair discrimination by an employer against an employee solely on the grounds of race, sex or creed”.<sup>58</sup> “Unfair discrimination” was adopted by the interim Constitution<sup>59</sup> and continued to be employed under section 9 of the Constitution. Since “discrimination” prima facie is associated more with the pejorative than non-pejorative sense of “discrimination” such efforts that were made were undertaken to ensure that discrimination in our constitution dispensation translated into the notion of “unfair discrimination”.<sup>60</sup> Claims of unfair discrimination must be considered against the overarching values of the right to equality and human dignity.<sup>61</sup> Suffering the impunity of unfair religious discrimination adversely impacts upon the individual’s right to equality and human dignity.<sup>62</sup>

Specific grounds are listed section 9(3) of the Constitution in terms of which, if discrimination is shown to have taken place, it is presumed to be unfair unless, on a balance, it can be shown that the discrimination was fair.<sup>63</sup> Under the EEA where unfair discrimination is claimed on a listed ground<sup>64</sup> the respondent is also required to prove, on a balance, that such discrimination did not take place, alternatively is rational and not unfair or is otherwise justifiable.<sup>65</sup> Under the LRA, a dismissal in terms of section 187(1)(f) may be fair if the reason therefor is based on an inherent requirement of the job.<sup>66</sup> The specified or listed grounds of unfair discrimination relate to “immutable biological attributes or characteristics of people” or “to the

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<sup>56</sup> At 1050.

<sup>57</sup> Du Toit and Potgieter (n 36) 9 and the authorities cited at fn 3.

<sup>58</sup> In terms of s 1 of the Labour Relations Act 28 of 1956, as amended by the Labour Relations Amendment Act 83 of 1988. See Du Toit and Potgieter (n 36) 10 and Du Toit “The prohibition of unfair discrimination: applying s 3(d) of the employment Equity Act 55 of 1998” in Dupper and Garbers (Eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 139 142.

<sup>59</sup> As it appeared in section 8(2).

<sup>60</sup> See Lenta “Taking rights seriously: religious associations and work-related discrimination” 2009 SALJ 827 835; Van der Vyfer “the right to self-determination of cultural, religious and linguistic communities in South Africa” 2011 PER 350; and Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* (1997) 56.

<sup>61</sup> Du Toit and Potgieter (n 36) 20. See also *S v Makwanyane* 1995 6 BCLR 665 (CC) par 326; *Prinsloo v Van der Linde* 1997 S SA 1012 (CC) par 31; *Brink v Kitsoff* NO 1996 4 SA 197 (CC) par 42; *Harksen v Lane* 1998 1 SA 300 (CC) par 49; *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 73-75; and Albertyn “Equality” in Cheadle et al (Eds) *South African Constitutional Law: The Bill of Rights* (2002) 105.

<sup>62</sup> For further reading see Henrico “The role played by dignity in religious-discrimination disputes” 2014 *Obiter* 24.

<sup>63</sup> See s 9(5).

<sup>64</sup> In s 6(1).

<sup>65</sup> S 11(1)(a) and (b).

<sup>66</sup> S 187(2)(a).

intellectual, expressive and religious dimensions of humanity”.<sup>67</sup> Proof of unfair discrimination on a listed ground requires merely proof by the claimant in the form of “evidence” on the face of which it would indicate or suggest that the unfair discrimination took place.<sup>68</sup>

*Harksen v Lane* is notable for introducing a three-staged enquiry into the breach of equality. The test provides:

- (a) Does the provision differentiate between people or categories of people? If so ...
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specific ground, the discrimination will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specific ground then unfairness will be presumed. If on an unspecific ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of the enquiry, the differentiation is found not to be unfair, then there will be no violation ...

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the circumstances of the limitations clause.<sup>69</sup>

Our courts have employed the *Harksen* in many cases.<sup>70</sup> However, the test used in *Harksen* with reference to the right to equality in the interim Constitution has been criticised by Du Toit.<sup>71</sup> Such criticism is based on the fact that by relying directly on the Constitution, claimants are by-passing national legislation and contravening the principle of subsidiarity as was the case in *Stokwe v MEC, Department of Education, Eastern Cape*<sup>72</sup> in which the applicant relied directly on sections 9 and 23 of the Constitution<sup>73</sup> in alleging discrimination language instead of employing the relevant provisions of the LRA<sup>74</sup> and the EEA.<sup>75</sup> Furthermore, by using *Harksen* as a means

<sup>67</sup> *Harksen v Lane supra* par 49.

<sup>68</sup> See comments by *Du Toit et al Labour Relations Law* (n 12) 696-670.

<sup>69</sup> Par 50.

<sup>70</sup> Van Niekerk and Smit (n 36) 131. For some cases in which the *Harksen* test was employed see *Louw v Golden Arrow Bus Service (Pty) Ltd* 1999 ZALC 166 par 26; *Hoffmann v SAA* 2001 1 SA 1 (CC) par 24; *NUMSA v Gabriels (Pty) Ltd* 2002 23 ILJ 2088 (LC) par 9; *FAWU and others v Pets Products (Pty) Ltd* 2000 ZALC 25 par 13; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) par 70; *IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC) par 80; and *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) par 110.

<sup>71</sup> S 8, now s 9 of the Constitution, which was used in order to test the constitutional validity of certain provisions of the Insolvency Act 24 of 1936.

<sup>72</sup> 2005 BLLR 822 (LC) par 25.

<sup>73</sup> Par 9.

<sup>74</sup> Item 2(1)(a) of Schedule 7 (residual unfair labour practices).

to define unfair discrimination in employment relationships is inappropriate because the Convention defines discrimination and moreover, the EEA and LRA are required to be interpreted in order to give effect to the Convention as an ILO obligation. As long as there is the Convention, to which the court is required to have regard, the resort to *Harksen* for a definition is unnecessary.<sup>76</sup> Van Niekerk and Smit agree with Du Toit but only insofar as there is a determination of discrimination (differentiation). Van Niekerk and Smit do not go so far as contending that the second stage of the *Harksen* enquiry should be abandoned, namely determining the unfairness of the discrimination.<sup>77</sup> It is submitted that ideally our courts should adopt a context-sensitive approach when adjudicating religious discrimination taking into account that the:

- dispute is employment based and should be assessed with reference to imperatives attendant upon the uniqueness of the employment relationship;
- parties are bound to rely on national legislation and cannot rely directly on the Constitution;<sup>78</sup>
- definition ascribed to unfair discrimination must be obtained with reference to the Convention as given effect to by the EEA and LRA;
- failure on the part of the Convention to provide a means of determining the unfairness of the discrimination entitles the court to take into account *relevant* jurisprudence concerning the right to equality and human dignity;<sup>79</sup>
- adjudication process calls upon judges-when interpreting legislation against constitutional and international imperatives-to do so in a manner that advances the rights, values and principles in the Bill of Rights;
- such an approach rather than a 'uniform' or formal 'one-test-fits-all' type of approach leaves the way open for growth and development of jurisprudence of our labour law in respect of religious discrimination in the workplace. Put differently, the more judicial interpretations and reflections we have on the issue of religious discrimination in the workplace that

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<sup>75</sup> S 6.

<sup>76</sup> For a general discussion of the above critique see Du Toit "The prohibition of unfair discrimination: applying s 3(d) of the employment Equity Act 55 of 1998" (n 58) 151-152; Du Toit "Protection against unfair discrimination: cleaning up the Act?" (n 36) 2634; Du Toit and Potgieter (n 36) 14 and 16-17.

<sup>77</sup> Van Niekerk and Smit (n 36) 131.

<sup>78</sup> Unless of course a litigant is directly challenging the validity of a provision of the Constitution.

<sup>79</sup> Own emphasis. Conceivably a case which is not employment related may still be relevant to an employment related dispute where the nexus between the two cases in question is based on unfair discrimination. A case in point is *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) which concerned itself with an application based on s 6 (1) of the EEA wherein the applicant alleged unfair discrimination on the basis of race or colour (par 2) and in which Van Niekerk J referred to *Harksen* as authority for establishing unfair discrimination (par 5).

transcend the otherwise narrow scope of a specific formal test, the greater this can influence the corpus of jurisprudence.<sup>80</sup>

Whilst adjudicating upon a matter of unfair religious discrimination, the interpretation of the EEA and LRA does not take place in isolation but in a manner that gives effect to section 39(2) of the Constitution, meaning that they are interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>81</sup> As such the imperatives of equality and human dignity which are so closely associated with religious discrimination can be adequately addressed and suitably developed and advanced. Adoption of a “formalistic” or “universal” test would be artificial and stultifying. Law is a hybrid embodying a close-knit between arts and science which must constantly advance to meet the imperatives of the society and community in which it is applied. Applying a context-sensitive test would, it is submitted, ensure that this imperative is suitably addressed and advanced. Certainty, which is a hallmark of the rule of law in any legal or social system is not compromised by adopting a context-sensitive approach in as much as claimants are still required to formulate their claims or disputes as permitted in terms of national legislation and defendants or respondents are not deprived of the defences given them under national legislation. The test merely means that in terms of adjudication, the court is placed in the most optimal position to make a finding on the merits by being able to draw on a wealth of values and principles as distilled from statutory interpretation against constitutional imperatives duly informed by relevant ILO instruments and international law.<sup>82</sup>

## 2 4 Consideration of some cases

This paper does not purport to set out an expose of case law on religious discrimination disputes in South Africa.<sup>83</sup> The cases discussed below are taken as an example of what has thus far been reported pertaining to workplace religious discrimination. Examination of such cases reveals that no ‘universal’ or ‘formal’ test has been adopted by our courts. In this sense it is hopeful that our courts will continue to advance the jurisprudence as it relates to religious unfair discrimination in a manner that meets a context-sensitive approach to the adjudication of disputes.

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<sup>80</sup> See Hoexter (n 41) 80-81.

<sup>81</sup> See Budlender “Transforming the judiciary: the politics of the judiciary in a democratic South Africa” 2005 *SALJ* 715; Fagan “s 39(2) and political integrity” 2004 *Acta Juridica* 117; and Langa “Transformative constitutionalism” 2006 *Stellenbosch Law Review* 351.

<sup>82</sup> See Du Plessis “Bill of rights interpretation in the South African context (1): diagnostic observations” 1993 *Stellenbosch Law Review* 63; and Abney “Constitutional interpretation: moving toward a jurisprudence of common sense” 1994 *Temple Law Review* 931.

<sup>83</sup> For further discussion in this regard see Henrico “Mutual accommodation of religious differences in the workplace – a jostling of rights” 2012 *Obiter supra* 503.

The applicant in *Strydom v NG Gemeente Moreleta Park*<sup>84</sup> could rely neither on the EEA nor the LRA because he was an independent contractor who had contracted to teach music to school children. When it came to the attention of the governing body of the school that Strydom was in a same-sex relationship the church summarily terminated the contract of services with Strydom. Strydom brought a claim against the church based on PEPUDA.<sup>85</sup> The church attempted to deflect the claim by arguing it was an inherent requirement of the job by someone in Strydom's as a church leader that he could not be in a homosexual relationship since this was out of kilter with the church's doctrine and its constitutional right to freedom of religion.<sup>86</sup> Strydom only taught music to children and at no stage occupied a leadership position. The court took due account of the adverse impact the termination of the contract had on Strydom's dignity<sup>87</sup> which could also be linked to his depression, not being gainfully employed and having to sell his piano.<sup>88</sup> The impairment of dignity was attributed to Strydom being discriminated against on the basis of his sexual orientation and lifestyle. The case is also significant for the account it takes of Strydom's right to equality in a pluralistic society in which diversity should be celebrated.<sup>89</sup>

In the *Department of Correctional Services v POPCRU*,<sup>90</sup> prison warders were dismissed for refusing to cut their dreadlocks insisting that such hairstyles were consistent with their Rastafaria belief. They contended that their dismissals were automatically unfair on grounds of religious discrimination in terms of the LRA.<sup>91</sup> On appeal, the SCA considered their claim in terms of a listed ground, and with reference to the *Harksen* test, stated that:

... Relevant considerations [in respect of a listed ground of discrimination] include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim, and whether less restrictive means are available to achieve the purpose of the discrimination.<sup>92</sup>

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<sup>84</sup> 2009 30 ILJ 868 (EqC) and in which the *Harksen* test was not considered.

<sup>85</sup> Although the case falls within the parameters of PEPUDA and thus outside the employment relationship, the relevance to the subject matter of this article is the extent to which the church raised, as a defence, the inherent requirements of the job in addition to the consideration of the impact of unfair discrimination upon equality and human rights. For further discussion see De Freitas "Freedom of association as a foundational right: religious associations and *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*" 2012 SAJHR 258-272.

<sup>86</sup> Par 15.

<sup>87</sup> Par 33 where a link is made between the impairment of dignity due to the nature of the discrimination which was all-encompassing.

<sup>88</sup> Par 33.

<sup>89</sup> At par 25 Basson J stated that: "the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise, his right to dignity is seriously impaired due to the unfair discrimination".

<sup>90</sup> 2013 ZASCA 40.

<sup>91</sup> S 187(1)(f) and par 10.

<sup>92</sup> Par 21. Footnotes excluded.

*POPCRU* was decided in terms of the LRA and specifically under section 187(1)(f).<sup>93</sup> The referral to the *Harksen* case is notable not least on account of the fact that the court took into account the unfair discrimination impact in the impairment to human dignity. It is submitted that such a finding could have been made without regard being had to the *Harksen* case based on the principles of equality and human dignity which are axiomatically relevant in instances of unfair discrimination.

*Dhlamini v Green Four Security*<sup>94</sup> dealt with the dismissal of security guards who refused to shave their beards arguing that a beard was an inherent tenet of their religious belief. The applicants alleged their dismissal was a dismissal under section 187(1)(f) of the LRA.<sup>95</sup> Pillay J took account of the fact that the applicants had pleaded their case in terms of the LRA and that litigants were in general encouraged to rely on national legislation instead of relying directly on the Constitution. Notwithstanding, the court considered from the stance of “[...] the source of the right [allegedly infringed] is the Constitution”.<sup>96</sup> Pillay J adopted a “constitutional approach” to determine whether there had been discrimination<sup>97</sup> and also considered whether the shaving of beards as demanded by the employer was an inherent requirement of the job which would not be deemed to be discrimination in terms of the provisions of article 1(2) of the Convention.<sup>98</sup> The issue of reasonable accommodation was never called into question since it was never alleged that the respondent failed to reasonably accommodate.<sup>99</sup> *Harksen* was never used as a means by which the court established the existence (or extent) of unfair discrimination. The so-called bifurcated approach by the court can be criticized on the one hand for not determining the case on the basis of the manner in which it was pleaded before the court.<sup>100</sup> On the other hand, however, Pillay J’s regard to the Convention is to be welcome since same is in consistent with the tenets of section 39(2) of the Constitution.

#### 4 CONCLUDING REMARKS

Our constitutional rights affording equality and human dignity to civil society and in particular to persons in the employment relationship is a welcome guarantee in our democratic dispensation. A bulwark to this dispensation is the national legislative framework that exists which gives effect to the right to equality and the prevention

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<sup>93</sup> Par 23.

<sup>94</sup> 2006 11 BLLR 1074.

<sup>95</sup> Par 10.

<sup>96</sup> Par 10.

<sup>97</sup> Par 15-29.

<sup>98</sup> Par 38-40 and 67.

<sup>99</sup> Par 70.

<sup>100</sup> See *King v King* 1971 2 SA 630 (O). See also Daniels *Beck’s Theory and Principles of Pleadings in Civil Actions* (2002) 46 and the authorities cited at fn 18 and Van Winsen *et al The Civil Practice of the Supreme Court of South Africa* (1997) 238 and the authorities cited at fn 64. Also see the remarks by Langa CJ to the effect that: “Whatever we think of the wisdom of her election ... we [the court] must evaluate the claim as it is presented to us ...” in *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) par 159.

and prohibition of unfair discrimination in general and religious discrimination in particular. The importance of national legislation giving effect to constitutional imperatives is twofold. First, effect is given to the principle of subsidiarity. Second, the constitutional imperative of equality and human dignity which is integral to addressing unfair discrimination is given expression through the prism of statutory interpretation which also makes it permissive and preemptory to take into account relevant international instruments such as the ILO Covenant and international law. The guardians of such interpretation are our courts on whom we rely for the development of our jurisprudence. Whether the test laid down in *Harksen* will continue to be applied by our courts cannot be predicted with any certainty. It is hoped, however, that when judges adjudicate religious discrimination disputes they will do so in a manner that is context-sensitive and thereby give optimum expression and effect to all relevant values and principles that should influence, shape and determine a decision that will in its own way have a significant impact upon the advancement of that particular area of our labour law jurisprudence.