An Overview and Critique of the Labour Courts' Interpretation and Application of Protection Against *Indirect* Forms of Unfair Discrimination as Provided for in South Africa's *Employment Equity Act*

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Abstract

Unfair discrimination is deeply woven into the fabric of South African society. In the post-apartheid constitutional era, the *Constitution* guarantees the right to equality in the pursuit of "the full and equal enjoyment of all rights and freedoms". This reflects the adoption of substantive equality, which goes beyond mere formal equality. The constitutional right to equality is grounded in two constitutionally mandated mechanisms: affirmative action, and the prohibition of unfair discrimination. Within the broader transformative vision of the *Constitution*, the prohibition of unfair discrimination plays a dual role: it serves as a baseline for the defence of formal equality; and it acts as a tool of transformation, particularly through the protection against indirect unfair discrimination. Protection against indirect unfair discrimination is also provided in section 6(1) of the *Employment Equity Act*.

In a transformative context, protection against indirect discrimination is particularly significant because it recognises that equal treatment can sometimes perpetuate inequality. By uncovering and dismantling hidden barriers and power structures in the workplace, protection against indirect unfair discrimination plays a crucial role in fostering substantive equality and driving long-term, systemic change.

Yet, despite its transformative potential, the application of protection against indirect unfair discrimination in South African labour jurisprudence has been limited. Against the aforesaid background, the article provides an overview of the approach adopted by South African labour courts to the protection against indirect unfair discrimination under South African labour law, while ultimately critiquing it.

Keywords

Discrimination; unfair discrimination; indirect discrimination; equality; *Employment Equity Act*; direct discrimination; right to equality; section 9 of the *Constitution*.

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1 Introduction

The journey towards transformative constitutionalism in South Africa (SA) unfolds within the context of a deeply divided and unequal past.[1] Inequality arising from both *ad hoc* and embedded (systemic) discrimination is deeply woven into the fabric of South African society.[2] Central to the post-apartheid constitutional project are the interrelated ideals of reconciliation, transformation, and equality.[3] The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) guarantees the right to equality in the pursuit of "the full and equal enjoyment of all rights and freedoms".[4] This reflects the adoption of substantive equality, which goes beyond formal equality and seeks to address systemic inequalities to achieve transformative equality. The pursuit of transformative equality is grounded in two constitutionally mandated mechanisms: affirmative action,[5] which aims to redress past injustices, and the prohibition of unfair discrimination, both direct and indirect.[6] Protection against unfair discrimination is often regarded as the cornerstone of the *Constitution*'s equality right, constituting the first, if not principal, measure towards advancing substantive equality within the constitutional framework.[7] The prohibition of unfair discrimination plays a dual role in this broader context. First, it serves as a baseline for the defence of formal equality. Second, it acts as a tool of transformation, particularly through the protection against indirect unfair discrimination.[8]

Under South African labour law, the constitutional mandate pertaining to equality is primarily implemented through the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*), with additional (though limited) support from the

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1 Broadly speaking, "transformative constitutionalism" refers to an approach to constitutional interpretation and application that seeks to bring about fundamental institutional, social, political and economic change. Langa 2006 *Stell LR* 352. In *Van Rooyen v S* 2002 8 BCLR 810 (CC) para 50, Chaskalson CJ held that "transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular, white men". For further readings of transformative constitutionalism, also see Albertyn and Goldblatt 1998 *SAJHR* 261; Venter 2018 *SAJHR* 143-144; and Madlalate 2019 *CCR* 217.

2 Du Toit *et al Labour Relations Law* 653.

3 McGregor 2014 *SA Merc LJ* 61.

4 Section 9(2) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

5 Section 9(2) of the *Constitution*.

6 Sections 9(3) and (4) of the *Constitution*.

7 Garbers "Prohibition of Discrimination in Employment" 18.

8 For a discussion of the shortcomings of direct discrimination specifically in achieving these goals see Garbers "Prohibition of Discrimination in Employment" 20-24.

Labour Relations Act 66 of 1995 (hereafter the *LRA*). Specifically, regarding protection against unfair discrimination, section 6(1) of the *EEA* states that:

> [N]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including [the nineteen listed grounds][9] or on any other arbitrary ground.

In a transformative context, protection against indirect discrimination is particularly significant because it recognises that equal treatment can sometimes perpetuate inequality.[10] This principle acknowledges that treating everyone the same without considering existing disparities can unintentionally reinforce systemic disadvantages.[11] By uncovering and dismantling hidden barriers and power structures in the workplace, protection against indirect unfair discrimination plays a crucial role in fostering substantive equality and driving long-term, systemic change.[12]

Yet despite its transformative potential the application of protection against indirect unfair discrimination in South African labour jurisprudence has been limited.[13] As this article will show, very few claims of indirect unfair discrimination have to date been brought before South African labour courts. Moreover, in the limited instances where the issue has arisen, the labour courts' approaches have often been inconsistent, uninformative, and at times questionable. Consequently valuable opportunities to develop and enrich the jurisprudence on indirect unfair discrimination have largely been missed.

To this end, while the article notes the labour courts' limited guidance on the elements inherent in indirect discrimination claims and the difficulties in proving such claims, its central focus is to expose the shortcomings in the labour courts' current approach in applying and interpreting protection against indirect unfair discrimination. To lay the foundation for such critique, the discussion will commence with a few brief comments on the development and meaning of protection against unfair discrimination under the *Constitution* and labour law legislation and jurisprudence.

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9 The nineteen listed grounds are: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

10 Garbers "Prohibition of Discrimination in Employment" 24.

11 Tobler 2009 https://publications.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

12 Garbers and Rossouw "Women in the Workplace".

13 Huysamen *Future of a Prohibition on Indirect Unfair Discrimination* 3-5.

2 An overview of the protection against unfair discrimination within a constitutional and labour law framework

2.1 The development of unfair discrimination protection under South African labour law

Structural and systemic inequality in SA can be traced to centuries of colonialism, apartheid, and capitalism,[14] during which ideologies such as heteronormativity,[15] ethnocentrism[16] and sexism,[17] among others, played a central role in embedding inequality.[18] Efforts to address deeply entrenched injustices gained formal momentum only after the end of apartheid, beginning with the adoption of the interim *Constitution of the Republic of South Africa Act* 200 of 1993 (hereafter the interim *Constitution*), and subsequently, the final *Constitution*. To this end the preamble of the *Constitution* highlights that the *Constitution* was adopted as the "supreme law of the Republic so as to … [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[19]

The Constitutional Court (CC) has on multiple occasions affirmed the importance and centrality of *equality* within the new constitutional dispensation.[20] Reflecting its pivotal role in the post-apartheid legal order, the *Constitution* endorses equality in four distinct yet interconnected ways:[21]

14 Albertyn 2018 *SAJHR* 460.

15 "Heteronormativity refers to the Western social norm, or assumption, that the overwhelming majority of sexual relationships in society are heterosexual." Jeppesen date unknown https://sk.sagepub.com/ency/edvol/the-sage-encyclopedia-of-lgbtq-studies/chpt/heteronormativity#_.

16 Ethnocentrism refers to "the attitude that one's own group, ethnicity, or nationality is superior to others". Merriam-Webster Dictionary date unknown https://www.merriam-webster.com/dictionary/ethnocentrism.

17 Sexism is linked to "beliefs around the fundamental nature of women and men and the roles they should play in society". European Institute for Gender Equality date unknown https://eige.europa.eu/publications-resources/toolkits-guides/sexism-at-work-handbook/part-1-understand/what-sexism.

18 Also see the preamble to the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (*PEPUDA*), which recognises the need to eradicate systemic "social and economic inequalities" in South African society, brought about by a history of "colonialism, apartheid and patriarchy".

19 Preamble of the *Constitution*.

20 *Fraser v Children's Court Pretoria North* 1997 2 BCLR 153 (CC) para 20; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (hereafter *Hugo*) para 74; *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 22. Also see discussion in Jagwanth 2004 *Conn L Rev* 726.

21 Garbers and Le Roux 2018 *Stell LR* 238.

as an organising principle, an interpretative tool, a foundational value,[22] and a substantive right, as articulated in section 9.[23]

The *Constitution* embraces the concept of substantive equality,[24] grounded in the recognition that a purely formal approach to equality[25] is insufficient to redress entrenched systemic inequality.[26] Achieving a genuinely equal and transformed society requires more than equal treatment; it demands structural change. In South Africa the pursuit of what may be termed "transformative equality" is underpinned by the constitutional imperatives of affirmative action[27] and the prohibition of both direct and indirect unfair discrimination.[28] Protection against unfair discrimination as an autonomous

22 Also see Vice 2015 *CCR* 140.

23 Vice 2015 *CCR* 140. First, equality serves as an organising principle, meaning that it acts as a fundamental guiding principle for interpreting and applying all other provisions of the *Constitution*.

24 Substantive equality has been described as "a social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential. This requires the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of diverse human identities and capabilities (social equality)". Albertyn and Goldblatt "Equality" 35-5. Also see Hepple "Aims and Limits of Equality Laws" 9; Langa 2006 *Stell LR* 352-353.

25 Simply put, formal equality denotes sameness of treatment, that is, the law treats people the same on face value, regardless of an individual's circumstances or history. See Dupper 2002b *SA Merc LJ* 221.

26 Garbers "Prohibition of Discrimination in Employment" 24.

27 Section 9(2) of the *Constitution* provides that "[e]quality 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"; also see Collier *et al Labour Law in South Africa* 412.

28 Section 9(3) to 9(5) of the *Constitution* provides that: “(3) [T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." Under labour law, the constitutional equality imperatives of affirmative action and the prohibition of unfair discrimination are operationalised through the *Employment Equity Act* 55 of 1998 (*EEA*), supported to a limited extent by the *Labour Relations Act* 66 of 1995 (*LRA*) and *PEPUDA*. S 86(1)(c) of the *LRA* stipulates that, unless the issue in question is regulated through a collective agreement, an employer must "consult and reach consensus with a workplace forum before implementing any proposal concerning … (c) measures designed to protect and advance persons disadvantage by unfair discrimination". S 187(1)(e) of the *LRA* provides that a dismissal will be automatically unfair if the reason for the dismissal is "the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy". S 187(1)(f) proceeds to hold that a dismissal will be automatically unfair if the reason for the dismissal is: "(f) that the employer unfairly discriminated against an 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,

legal principle[29] in South African labour law developed incrementally. Initially, claims of discrimination were addressed under the broad umbrella of unfair labour practices in the *Labour Relations Act* 28 of 1956.[30] It was only with the adoption of the interim *Constitution*, and subsequently the final *Constitution*, that protection against discrimination gained formal recognition as a distinct legal concept.[31] This development was reflected in the *LRA* of 1995. Section 5 of the *EEA* now stipulates that: "[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".

This general provision is elaborated upon in section 6, with subsection (1) specifying that: "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice,[32] on one or more grounds", including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

Despite their explicit mention in the text, neither the *EEA* nor the *Constitution* provides definitions or detailed elaboration of the concepts of discrimination, unfair discrimination, direct discrimination, or indirect

religion, conscience, belief, political opinion, culture, language, marital status or family responsibility". Following the 2014 amendments to the *LRA*, ss 198B and 198C now also provide added protection to temporary and part-time workers, which, as discussed later in this chapter, includes protection against unfair discrimination for such workers. S 5(3) of *PEPUDA* specifies that the Act does not apply to individuals covered by the *EEA*. Consequently, *PEUPDA* will not apply to employees as defined under s 213 of the *LRA*, but will, however, cover independent contractors.

29 For a detailed discussion on the universal theories underlying the development of discrimination law, and the need for such development, see Allen 2015 *Mon LR* 785-789; Dickens 2007 *British Journal of Industrial Relations* 463-494; Hewitt 2013 *FL Rev* 35-70.

30 *Labour Relations Act* 28 of 1956 (the 1956 LRA), which was preceded by the *Industrial Conciliation Act* 11 of 1924 and the *Industrial Conciliation Act* 28 of 1956 (the latter Act was later renamed the *Labour Relations Act* of 1956).

31 The *Labour Relations Amendment Act* 83 of 1988 (amending the 1956 LRA) for the first time included "discrimination" as an autonomous concept into employment legislation. This direct inclusion of "discrimination" was consequently again removed from the Act, however.

32 Section 1 of the *EEA* defines an "employment policy or practice" as including but not being limited to "(a) recruitment procedures, advertising and selection criteria; (b) appointments and the appointment process; (c) job classification and grading; (d) remuneration, employment benefits and terms and conditions of employment; (e) job assignments; (f) the working environment and facilities; (g) training and development; (h) performance evaluation systems; (i) promotion; (j) transfer; (k) demotion; (l) disciplinary measures other than dismissal; and (m) dismissal".

discrimination. Consequently, the courts, and in particular the CC, have been called upon to clarify the meaning and application of these concepts.[33]

2.2 The meaning of unfair discrimination in a labour law context

In contrast to most jurisdictions, the *Constitution* and *EEA* do not prohibit (only) discrimination, but specifically unfair discrimination. This approach was confirmed by the Labour Court in the matter of *Maqavana v Massbuild (Pty) Ltd*,[34] where the court cautioned that: "[i]t ought to be remembered that discrimination on its own is not an actionable cause. It becomes an actionable cause once the element of unfairness is present".[35]

Case law decided under the *EEA* on the issue of unfair discrimination has largely adhered to the analytical framework for assessing unfair discrimination as established by the CC in *Harksen v Lane*.[36] Harksen

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33 In *SA Airways (Pty) Ltd v Jansen van Vuuren* 2014 35 ILJ 2774 (LAC) para 29 it was said that "material guidance is to be derived from the equality analyses that were conducted under the Constitution and the interim Constitution". Garbers and Le Roux argue that the courts have largely been relied upon to clarify the following issues: the scope and meaning of the listed grounds of discrimination as contained in the *EEA*; the appropriate test for recognising unlisted grounds of discrimination; the need for an appropriate comparator in discrimination cases; the strength of the required link between an employment policy or practice and the alleged ground of discrimination; whether the concept of "fair" discrimination, as opposed to non-discrimination only, exists within South African employment discrimination law; whether the two identified grounds for justification of unfair discrimination in the *EEA* (the implementation of affirmative action measures and inherent requirements of the job) are the only justifications available to employers to defend such claims, or whether there is also a general fairness defence; whether a successful justification by an employer means that there was no discrimination, that there was "fair" discrimination, or that otherwise unfair discrimination was justifiable; what exactly the onus of proof in unfair discrimination claims entails; and, most notably for purposes of this study, the meaning of, and test for establishing, indirect discrimination. Garbers and Le Roux 2018 *Stell LR* 237, 239.

34 *Maqavana v Massbuild (Pty) Ltd* (JR393/18) [2019] ZALCJHB 187 (3 April 2019) (hereafter *Maqavana*).

35 *Maqavana* para 24.

36 *Harksen v Lane* 1998 1 SA 300 (CC) (hereafter *Harksen*). See discussion in Garbers and Le Roux 2018 *Stell LR* 244. In *Mbana v Shepstone & Wylie* 2015 36 ILJ 1805 (CC) para 14 the Constitutional Court held that: "The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in s 9 of the Constitution, it is presumed to be unfair." In the recent case of *Tshwane University of Technology v Maraba* 2021 42 ILJ 1707 (LAC) para 14, the Labour Appeal Court (LAC) confirmed that "[t]he test for unfair discrimination set out in *Harksen v Lane NO and others* applies equally to discrimination claims in labour law". Also see *Naidoo v Parliament of the Republic of South Africa* 2020 41 ILJ 1931 (LAC) (hereafter *Naidoo*) para 15; *IMATU v City of Cape Town* 2005 10 BLLR 1084 (LC) (hereafter *IMATU*); *University of South Africa v Reynhardt* 2010 31 ILJ 2368 (LAC); *Govender and Umgungundlovu District Municipality* 2016 37 ILJ 724 (CCMA); *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) (hereafter *Pioneer Foods*); *South African*

remains the seminal authority on the meaning of unfair discrimination in South African law.[37] *Harksen* set out the foundational test that applicants must satisfy to establish a claim of unfair discrimination, and its principles continue to guide the adjudication of such claims under the *EEA*. In *Harksen* the CC recognised that section 8(2) of the interim *Constitution* – now reflected in sections 9(3) and 9(4) of the *Constitution* – distinguishes between two categories of unfair discrimination claims: those based on listed grounds and those based on unlisted grounds.[38] The test for unfair discrimination outlined in *Harksen* stipulates that once differentiation has been established, a three-step analysis is employed to ascertain whether the right to protection against unfair discrimination has been violated: first, did the differentiation constitute discrimination?[39] Second, did the discrimination amount to *unfair* discrimination?[40] Third, was the unfair discrimination justifiable under the *Constitution*'s limitation clause (section 36)?

Under the first step, in establishing whether differentiation amounts to discrimination, the CC held:

> Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified 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.[41]

From the foregoing, it is clear that the CC distinguished between cases involving listed and unlisted grounds. When differentiation occurs on a listed ground, discrimination is automatically presumed. However, in cases involving unlisted grounds, the Court – consistent with its emphasis on dignity as central to the right to equality[42] – drew a clear distinction between

Municipal Workers Union v Nelson Mandela Bay Municipality 2016 37 ILJ 1203 (LC) (hereafter *SAMWU*); *SA Airways (Pty) Ltd v Jansen van Vuuren* 2014 35 ILJ 2774 (LAC).

37 *Naidoo* para 15.

38 *Harksen* para 46.

39 *Harksen* para 52(b)(i).

40 "If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified 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." *Harksen* para 52(b)(ii).

41 *Harksen* para 52(b)(i).

42 See, e.g., *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) (hereafter *Prinsloo*) para 31; *Hugo* para 41; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) (hereafter *Pillay*) para 62.

mere differentiation and discrimination, with the latter being determined to be based on dignity considerations. This is reflected in the CC's finding that:

> [W]hether 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.

To succeed in a claim based on an unlisted ground, it must also be demonstrated that the impugned ground is analogous (in terms of its impact on dignity) to an identified listed ground.[43]

Turning to the question of unfairness, a presumption of unfairness arises, as in the approach in step one, when discrimination is based on a listed ground. However, in the case of discrimination on an unlisted ground, such a presumption does not apply, and the burden remains on the complainant to prove that the discrimination is unfair. Again, there is a clear connection between actions that infringe upon human dignity and the determination of unfairness.[44] According to the court in *Harksen*, factors to consider in determining the impact of the discrimination on the complainant and/or others in his or her situation include: (a) the position of the complainant in society and any past patterns of disadvantage experienced by the complainant;[45] (b) the nature of the impugned provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination affected the rights or interests of complainants, particularly whether it has impaired the complainant's fundamental human dignity or constituted an impairment of a comparably serious nature.[46]

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43 *Harksen* para 46; *Prinsloo* paras 28-33. It has been suggested that by listing specific grounds, the *Constitution* acknowledges the historical harm and suffering caused by prejudiced treatment based on these grounds. Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 334.

44 Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 334; *King v De Jager* 2021 5 BCLR 449 (CC) para 155; *IMATU* para 82; *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC) para 16; *Hoffmann v SA Airways* 2001 1 SA 1 (CC) para 27.

45 In *Hugo* para 112, O'Regan J held that "the more vulnerable the group adversely affected by the discrimination, the more the discrimination will be held to be unfair". In this assessment a court must consider several factors, i.e. the individual complainant's group affiliation and the group's position in society; the historical context to identify historical factors contributing to patterns of group disadvantage and harm; the nature of systemic inequality, which involves recognising that inequality is deeply ingrained in social practices and attitudes; the socio-economic circumstances of the complainant and their group; various forms of vulnerability which may impact the complainant (e.g. stigmatisation and marginalisation); material disadvantage; social exclusion and stereotyping; political minority status; and failure to accord equal concern and respect. Albertyn and Goldblatt "Equality" 35-76 – 35-78.

46 *Harksen* para 50. Also see *IMATU* para 82; *Pioneer Foods* para 24.

2.3 Direct and indirect unfair discrimination

While intention to discriminate is often more evident in cases of direct discrimination, it is widely recognised that such intention is not a prerequisite for either direct or indirect discrimination claims.[47] Direct discrimination occurs when an employer treats an employee differently from others on the basis of a prohibited ground, whether listed or unlisted.[48] Indirect discrimination, in contrast, arises when a policy or practice that appears neutral on its face disproportionately impacts an individual or group due to a prohibited trait, whether listed or unlisted.[49] Indirect discrimination is often subtle and systemic, arising from seemingly neutral rules or practices that disproportionately affect specific groups.

The concept of indirect discrimination (also known as *disparate* or *adverse impact*) is widely recognised as having been first introduced by the United States Supreme Court in the landmark 1971 case *Griggs v Duke Power Co*.[50] This concept acknowledges that equal treatment alone may inadvertently result in exclusion and perpetuate systemic discrimination.[51] Protection against indirect discrimination goes beyond the notion of formal equality by focussing on the actual impact or effect that actions have on individuals or groups.[52] By recognising that equal treatment can still sustain inequality, the concept offers a unique framework for understanding, identifying and dismantling underlying power structures and barriers to employment, thereby promoting substantive equality.[53] While the prohibition of direct discrimination is often viewed as the primary and more straightforward safeguard against unfair discrimination, the significance of addressing indirect discrimination is equally crucial in eliminating more subtle, less overt forms of discrimination.

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47 Fredman 2016 *ILJ* 231-232; Rutherglen *Employment Discrimination Law* 74. The principle that intention is not a requirement for unfair discrimination has been affirmed by courts both in South Africa and abroad: see e.g. *Department of Correctional Services v Police and Prison Civil Rights Union* 2011 32 ILJ 2629 (LAC) (hereafter *Correctional Services v POPCRU* (LAC)) para 35; *Ontario (Human Rights Commission) v Simpsons-Sears Ltd* [1985] SCJ 74, [1985] 2 SCR 549; *Alberta (Attorney General) v Gares* (1976) 67 DLR (3d) 635, 695; *DH v Czech Republic* (2008) 47 EHRR 3 paras 179, 194; *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 (HL) 175.

48 *Lewis v Media 24 Ltd* 2010 31 ILJ 2416 (LC) para 38.

49 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC) 292 (hereafter *Leonard Dingler*); *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) (hereafter *Mahlangu*) para 92; *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 6 SA 642 (CC) (hereafter *Jordan*) para 60; Dupper 2002a *SA Merc LJ* 189; Dupper 2000 *ILJ* 747.

50 *Griggs v Duke Power Co* 401 US 424 (1971); Seiner 2006 *Yale L & Pol'y Rev* 97.

51 Garbers "Prohibition of Discrimination in Employment" 24.

52 Dupper 2002a *SA Merc LJ* 190.

53 Tobler 2009 https://publications.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

As previously noted, protection against indirect unfair discrimination is expressly provided for in both the *Constitution* and the *EEA* (together with the *LRA*).

3 Indirect unfair discrimination protection in South African labour law: a judicial overview

3.1 Broad reflections from the CC

Despite its transformative potential and explicit recognition under both the Constitution and section 6(1) of the *EEA*,[54] the concept of indirect discrimination has struggled to gain meaningful traction in South African labour law and related jurisprudence. This remains the case, even after the CC in *City Council of Pretoria v Walker*[55] – the first case before the CC in which indirect discrimination had to be evaluated – highlighted that:

> The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).[56]

Although the CC has had numerous opportunities to consider claims of direct unfair discrimination over the years, cases involving specifically indirect discrimination have been comparatively scarce.[57] This trend is also evident in indirect unfair discrimination claims brought before South African labour courts and labour dispute resolution forums, such as the Commission for Conciliation Mediation and Arbitration (CCMA). From the limited case law on indirect discrimination before the CC, the following initial and broad observations can be drawn.

First, indirect discrimination may manifest in various forms,[58] such as measures that establish different rules for different classes of persons;[59] measures that explicitly exclude a particular class;[60] and measures that, by

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54 And, in the context of automatically unfair dismissals, s 187(1)(f) of the *LRA*.

55 *City Council of Pretoria v Walker* 1998 2 BCLR 257 (CC) (hereafter *Walker*).

56 *Walker* para 31.

57 *Walker* (indirect discrimination on the ground of race); *Centre for Child Law v T S* 2023 6 SA 1 (CC) (hereafter *Centre for Child Law*) (indirect discrimination on the basis of marital status); EB (*Born S*) *v ER* (*Born B*); *KG v Minister of Home Affairs* 2024 2 SA 1 (CC) (hereafter *EB v ER*) (indirect discrimination on the ground of gender); *Jordan (*indirect discrimination on the ground of gender); *Mvumvu v Minister of Transport* 2011 2 SA 473 (CC) (indirect discrimination on the ground of race); *Mahlangu* (indirect discrimination on the basis of race, sex and gender); *VJV v Minister of Social Development* 2023 6 SA 87 (CC) (hereafter *VJV*) (indirect discrimination on the basis of sexual orientation); *Pillay* (indirect discrimination on the grounds of religion and/or culture).

58 *EB v ER* para 124.

59 See e.g. *Walker*.

60 See e.g. *Mahlangu.*

being underinclusive, automatically imply exclusion.[61] Second, with reference to an assessment under section 9(3) of the *Constitution*, there is no qualitative distinction between discrimination that occurs directly or indirectly. Once discrimination based on a listed ground has been proven, whether direct or indirect, the law or conduct in question is automatically presumed to be unfair.[62] Third, the harm to the dignity of individuals within a group being subject to indirect unfair discrimination may be less severe than if the group or individual had been directly discriminated against.[63] Consequently, it may often be easier to demonstrate the fairness of indirect discrimination than direct discrimination.[64]

3.2 Judicial guidance by the labour courts on the implementation and interpretation of protection against indirect unfair discrimination

Despite the specific inclusion of the concept of indirect discrimination in the *EEA* (supported by the *LRA*),[65] very few cases of indirect unfair discrimination have been argued before South African labour courts and dispute resolution forums.[66] Furthermore, in the rare instances where such claims have been brought before the courts, judicial approaches to the concept have been inconsistent and largely uninformative.[67]

The only Labour Court (LC) matter to date in which indirect discrimination was the single and clearly identified cause of action remains the late 1990s matter of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd.*[68] In *Leonard Dingler* the LC was called upon to determine the fairness of the respondents' determined eligibility criteria for its staff benefit fund, which restricted membership to monthly paid employees only. The respondent employed 50 monthly paid employees, of which eight were non-white, and 220 weekly paid employees, none of whom were white. Based on the number of black employees who qualified to join the staff benefit fund, the court concluded that the policy disproportionately affected black employees and indirectly discriminated against them based on race.[69] Unfortunately, while the court's finding of indirect discrimination appears

61 See e.g. *VJV*; *Pillay*; *Mahlangu.*

62 *Mahlangu* para 92; *VJV* para 56; *Walker* paras 31-35; *Centre for Child Law* para 38, where the Constitutional Court held that "[t]he fact that the discrimination is indirect cannot save it from constitutional invalidity". *Centre for Child Law* para 41 further explained that the critical question in indirect discrimination claims was "whether [the impugned section] discriminates on the basis of a characteristic that is common to a specific group and less common, or non-existent, in other groups".

63 *Jordan* para 67.

64 *Jordan* para 67.

65 Section 187(1)(f) of the *LRA*.

66 See Huysamen *Future of a Prohibition on Indirect Unfair Discrimination* 211-212.

67 See Huysamen *Future of a Prohibition on Indirect Unfair Discrimination* 212.

68 *Leonard Dingler.*

69 *Leonard Dingler* 293.

well-founded, the court failed to provide detailed reasoning and guidance on key aspects. In particular, the court failed to elaborate on its conclusion that there was a "disparate impact" on black employees[70] or to clarify the role of statistical evidence in determining that the proportion of "black employees who qualify for membership of the staff benefit fund is disproportionately low".[71]

Similarly, very little guidance was forthcoming from the CCMA in the arbitration matter of *Mbhele v Fidelity Security Services Ltd*,[72] one of the rare instances where indirect discrimination was specifically identified as the cause of action. The commissioner held that:

> It was common cause that the respondent did not discriminate directly against the applicant. It had no issue with him being a member of the Shembe Church. It was, however, the respondent's case that unless the applicant shaved off his beard he would not be allocated a site on which to work. The reason for this, the respondent argued, was that it was part of the respondent's own dress and hygiene code that all guards should be clean-shaven. That accordingly falls within the purview of indirect discrimination.[73]

While the matter was correctly identified as one of indirect discrimination, and the finding of unfair discrimination was arguably the correct outcome, the commissioner's reasoning was rather lackluster and ultimately failed to contribute meaningfully to the development of indirect unfair discrimination law.

From the relatively few cases since *Leonard Dingler* in which the concept of indirect discrimination has been considered – whether explicitly raised or implicitly relied upon by complainants, or identified *sua sponte* by the courts or the CCMA – the labour courts have provided the following, albeit limited, guidance.

3.2.1 Elements inherent in indirect discrimination claims

In the case of *Kadiaka v Amalgamated Beverage Industries*[74] the complainant, who had previously worked for a competitor of the respondent, New Age, applied for a sales representative position with the respondent, the authorised seller of Coca-Cola products in SA. The respondent had a policy against hiring former New Age employees, which resulted in the complainant's unsuccessful application. The complainant alleged unfair

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70 The court simply stated that the evidence before it "[made] it quite clear that the restriction of the staff benefit fund to monthly paid employees has a disparate impact on the company's black employees". *Leonard Dingler* 293.

71 *Leonard Dingler* 293.

72 *Mbhele and Fidelity Security Services Ltd* 2016 37 ILJ 1935 (CCMA) (hereafter *Mbhele*).

73 *Mbhele* para 46.

74 *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) (hereafter *Kadiaka*).

discrimination under the *LRA*,[75] claiming that the respondent had directly, in the alternative, indirectly discriminated against him. The employer argued that the hiring policy had been justified as a result of trust issues it might have experienced with former New Age employees as a result of New Age's questionable business conduct historically. While the complainant primarily argued his matter as one of direct discrimination,[76] the court did, however, allow him the opportunity to explore the issue of indirect discrimination during closing arguments. The complainant contended that since New Age's workforce was predominantly black, the respondent's hiring policy disproportionately affected black individuals, constituting indirect discrimination.[77] The court applied a four-step approach to assess the allegation of indirect discrimination:[78]

> 1. Has a requirement or condition been applied equally to both sexes or all racial groups?
> 2. Is that requirement or condition one with which a considerably small number of women (or men) or persons of the racial group in question can comply than those of the opposite sex or persons not of that racial group?
> 3. Is the requirement or condition justifiable irrespective of the sex, colour, race, nationality, ethnic or national origins of the person in question?
> 4. Has the imposition of the requirement or condition operated to the detriment of a person who could not comply with it?

The court ultimately rejected the claim of indirect discrimination. The court's reasons included the lack of evidence presented by the complainant to support the indirect discrimination claim[79] and the similarity in racial composition of both the respondent and New Age's workforce, suggesting no intent to discriminate based on race.[80]

In *Ntai v South African Breweries Limited,*[81] the complainants alleged unfair discrimination on the ground of race since they were paid less than white colleagues.[82] While the claim pursued was one of direct discrimination, with the complainants explicitly stating that they were not pleading a case of

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75 The applicant submitted that the respondent had committed an unfair labour practice in the form of unfair discrimination as envisaged by item 2(1)(a), read with item 2(2), of Schedule 7 to the *LRA*.

76 Kadiaka para 51.

77 *Kadiaka* para 51.

78 *Kadiaka* para 32, referencing Bourne and Whitmore *Race and Sex Discrimination* para 2.45.

79 *Kadiaka* para 51.

80 *Kadiaka* para 51. Intent to discriminate is, however, not an element of any unfair discrimination claim under South African employment law. *Correctional Services v POPCRU* (LAC) para 35.

81 *Ntai v South African Breweries Limited* 2001 22 ILJ 214 (LC) (hereafter *Ntai*).

82 The claim was adjudicated under the former unfair labour practices provisions of Schedule 7 of the *LRA*.

indirect discrimination, the court nonetheless made some observations regarding indirect discrimination. The court observed that the application of seemingly neutral criteria, such as experience or seniority, could perpetuate historic discrimination by disproportionately impacting on black employees.[83] It noted that evidence, such as statistical data, was necessary to demonstrate the existence of a disproportionate impact.[84] Additionally, evidence showing how the impugned criteria or factor could preserve or prolong the effects of historic discrimination against a protected group might be relevant.[85] Finally, the court stated that even if a complainant successfully presented a *prima facie* case of indirect discrimination, the employer still had the opportunity to justify the use of the impugned factor for reasons unrelated to, for example, race.[86]

In the matter of *Dlamini v Green Four Security*[87] the complainants alleged automatic unfair dismissal under section 187(1)(f) of the *LRA*, claiming that they had been unfairly discriminated against on religious grounds. They had been dismissed for refusing to shave their beards, a requirement they argued conflicted with their religious beliefs as members of the Baptized Nazareth Group. While the complainants did not explicitly identify the alleged discrimination as either direct or indirect, the court *sua sponte* appeared to consider the issue of indirect discrimination:

> The applicants have to show that their dismissal is connected to their religious beliefs … [T]hey have to prove that trimming their beards is prohibited as a violation of an essential tenet of their faith. If they establish this they would prove that they were discriminated indirectly.[88]

Further to the above, the court held that the following questions had to be considered in establishing whether discrimination had occurred:

> (a) Did the rule that security guards should be clean-shaven differentiate amongst employees? The answer is 'No'. Everyone had to be clean-shaven.
>
> (b) Did the respondent apply the rule consistently to all employees? The answer is 'Yes'.
>
> (c) Did the rule impact on all employees alike, irrespective of their religion? The answer is 'Yes'. Anyone who wore a beard ran the risk of being disciplined.
>
> (d) Did the rule trench upon the applicants' religion? The applicants failed to prove the no shaving rule to be an essential tenet of the Nazareth

83 *Ntai* paras 79-81.
84 *Ntai* para 80.
85 *Ntai* para 81.
86 *Ntai* para 81.
87 *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) (hereafter *Dlamini*).
88 *Dlamini* para 14.

> faith. They have therefore not proven that they were discriminated on account of their religious beliefs.[89]

Questions (b) and (c) specifically touch on issues related to indirect discrimination. Both of these questions are typically associated with assessments of indirect discrimination and align with the broader understanding of what constitutes indirect discrimination. The court determined that the complainants had failed to prove that growing beards was an essential tenet of their faith, and as a result, they had not established unfair discrimination.[90] As with previous cases, such as *Leonard Dingler*, the court's analysis unfortunately offered little insight into indirect discrimination, aside from its concluding that it was not present. The court appeared to be more focussed on the ground of religion – referencing several cases in which religion had been the central issue – rather than addressing the form of discrimination. In fact, the court did not reference a single source related to indirect discrimination. Ultimately, the complainants' claim was dismissed due to insufficient proof of religious discrimination.

3.2.2 Evidentiary difficulties in succeeding with claims of unfair discrimination

The labour courts have consistently acknowledged the inherent complexity of discrimination litigation and the considerable challenges complainants face in satisfying the burden of proof. In *Ntai*,[91] the LC observed that:

> [D]iscrimination litigation is also very complex, placing obstacles in the way of litigants, especially in regard to the burden of proof.[92]

The difficulty encountered by complainants in successfully pursuing direct discrimination claims suggests an even more formidable challenge in establishing indirect discrimination, which is widely regarded as significantly more difficult to prove.

In *Ntai* the court noted the difficulty of proving discrimination, especially when statistical evidence is required to show disproportionate impact, as is often the case in indirect unfair discrimination claims.[93] To this end, the court suggested that, in a country such as South Africa, with an entrenched history of systemic discrimination, the adverse impact of certain practices might in some instances be more readily apparent, thereby reducing the need for detailed statistical proof. However, the court cautioned that while historical patterns of discrimination may bolster a complainant's claim, such

89 *Dlamini* para 27.
90 *Dlamini* para 26.
91 *Ntai* in general.
92 *Ntai* para 89.
93 *Ntai* para 82.

contextual evidence alone may not be sufficient to establish a successful case of indirect discrimination.[94]

3.3 Critique of the labour courts' interpretation and implementation of indirect unfair discrimination protection

Despite the (limited) guidance provided by the labour courts as discussed above, the current judicial approach to indirect unfair discrimination protection displays several shortcomings in both the application and interpretation of this form of protection. It is to these shortcomings that the discussion turns next.

3.3.1 A restrictive approach to identify and address claims of indirect unfair discrimination

The *Dlamini* case above[95] is one of several instances where complainants failed to explicitly identify their claim of unfair discrimination as either direct or indirect discrimination. Discrimination claims are often simply presented by complainants as "unfair discrimination", or "direct or alternatively indirect discrimination". Two broad approaches can be observed from case law in how courts have proceeded to assess such undefined claims.

Under the first broad approach, a claim of indirect discrimination will be considered by the court only if it is specifically pleaded as such.[96] In *Abbott v Bargaining Council for the Motor Industry (Western Cape)*[97] the complainant, having unsuccessfully applied for a position in the employer's organisation, claimed that he had been unfairly discriminated against based on race and trade union affiliation. Throughout the proceedings the complainant pursued the claim as one of direct discrimination and sought to introduce an argument of indirect discrimination only during the closing arguments of his case. He argued that the employer's requirement for prior experience as agents or inspectors within the Department of Labour disadvantaged black applicants, who were historically underrepresented in such roles.[98] While the court acknowledged that there might be some merit to the allegation of indirect discrimination, it held that it was precluded from addressing the issue since the complainant had not argued the matter as such.[99] The court stated that it would be able to properly consider the issue

94 *Ntai* para 82.
95 See the discussion under 3.2.1 above.
96 *Abbott v Bargaining Council for the Motor Industry (Western Cape)* 1999 2000 ILJ 330 (LC) (hereafter *Abbott*) para 31; *Ntai* paras 83-84; support for this stance can be inferred also from the judgment in *Lagadien v University of Cape Town* 2000 21 ILJ 2469 (LC) (hereafter *Lagadien*) para 4, where the applicant was directed "to make provision for her case based upon indirect discrimination, on the basis of lack of academic qualifications".
97 *Abbott.*
98 *Abbott* para 31.
99 *Abbott* para 31.

only by reopening evidence, which it deemed inappropriate at that stage of the proceedings.[100] As a result the court dismissed the complainant's unfair discrimination claim.

In the matter of *Ntai*[101] the complainants also did not specifically plead indirect discrimination. The court found it necessary to comment on the issue, however, due to the nature of the evidence introduced by the complainants during the trial and the questions posed to the respondent's witnesses during cross-examination.[102] Ultimately however, despite having discussed the concept to some extent, and as in *Abbott*, the court concluded that the respondent was not required to address the issue of indirect discrimination since the complainants had failed to pursue the issue explicitly.[103] Furthermore, in *South African Municipal Workers Union v Nelson Mandela Bay Municipality*[104] the court held that:

> [A]lthough pleaded, the question of indirect discrimination on the basis of gender does not arise because no evidence had been tendered in support of this claim.[105]

This seems to suggest that even when indirect discrimination is identified as the cause of action, courts will consider such a claim only if there if actual evidence is provided to support the claim.

A different approach to that taken in *Abbott* and *Ntai* was seemingly endorsed in *Harmse v City of Cape Town*.[106] In *Harmse* the complainant alleged that the respondent's failure to shortlist him for positions he applied for amounted to unfair discrimination on the ground of race. In a preliminary motion the respondent argued that the complainant's claim was vague and embarrassing, as it failed to clearly specify whether the matter was being pursued as one of direct or indirect discrimination.[107] The respondent further contended that clarity on this point was essential in order to adequately prepare and provide a meaningful response to the claim instituted.[108] The court held that there was no authority in South African labour law to support the respondent's argument. It emphasised that neither the *Constitution* nor the *EEA* defined the concept of discrimination, including the specific

100 *Abbott* para 31.
101 *Ntai* in general.
102 *Ntai* para 80.
103 *Ntai* paras 83-84.
104 *SAMWU.*
105 *SAMWU* para 38.
106 *Harmse v City of Cape Town* 2003 24 ILJ 1130 (LC) (hereafter *Harmse*).
107 To this end the respondent in *Harmse* para 18 argued that: "the distinction between direct and indirect discrimination is so fundamental to the law of discrimination that it is not possible for a respondent to reply meaningfully to a claim without knowing whether direct or indirect discrimination (or both) are being relied on".
108 *Harmse* paras 12-13.

concepts of direct and indirect discrimination.[109] As a result, it was left to the courts to develop these concepts.[110] Furthermore, the court stated that a respondent's defence to an unfair discrimination claim remained the same, regardless of whether the matter was argued as direct or indirect discrimination.[111] Whether a claim was pursued as direct or indirect discrimination would determine only what the complainant had to prove at trial.[112] Consequently, the court found that the complainant's statement of claim was sufficient to establish a cause of action and should not be dismissed simply because the complainant had failed to explicitly identify the matter as either direct or indirect discrimination.[113] The court also held that dismissing a claim solely on the basis of the complainant's failure to categorically define the matter would unjustly prioritise form over substance.[114] Therefore the respondent's *in limine* point was dismissed.

Under the second broad approach, where complainants do not clearly specify whether a claim concerns direct or indirect discrimination, courts may decide *sua sponte* whether to assess the matter as one of direct or indirect discrimination. Case law indicates that in exercising this discretion courts most frequently treat such matters as instances of direct discrimination. There have, however, been some exceptions to the prevalence of this practice.

In *Mafomane v Rustenburg Platinum Mines Limited*[115] the complainant alleged constructive dismissal under section 187(1)(f) of the *LRA*, claiming unfair discrimination on the basis of race. The complainant did not specify whether the claim was grounded in direct or indirect discrimination. The court accordingly examined both forms of discrimination. It observed that the differential treatment of individuals from different racial groups does not, in itself, amount to racial discrimination,[116] as the underlying reason for such differentiation may be unrelated to race. However, the court emphasised that discrimination may still arise – even if unintended – where an employer's conduct disproportionately affects employees of a particular race.[117] In circumstances where employees of a specific race are treated less favourably, and no clear, rational and justifiable explanation for the disparity exists, an inference may be drawn that the differentiation is based

109 *Harmse* para 16.
110 *Harmse* para 16.
111 *Harmse* para 19.
112 *Harmse* paras 17, 19.
113 *Harmse* para 17.
114 *Harmse* para 17.
115 *Mafomane v Rustenburg Platinum Mines Limited* 2003 10 BLLR 999 (LC) (hereafter *Mafomane*).
116 *Mafomane* para 57.1.
117 *Mafomane* para 57.2.

on race, whether directly or indirectly.[118] In such cases the burden shifts to the employer to rebut the inference of discrimination by providing a legitimate, non-racial justification for the differential treatment.[119] Regarding direct discrimination, the court found no evidence to suggest that the employer's decisions were motivated by racial considerations. With respect to indirect discrimination, the court concluded that there was insufficient evidence to establish that the employer's conduct had a discriminatory impact on the complainant on the basis of race.[120]

In finding unfair discrimination on the grounds of religion, culture and gender,[121] the Labour Appeal Court (LAC), in the 2011 matter of *Department of Correctional Services v Police and Prison Civil Rights Union (POPCRU)*,[122] concluded that:

> The Dress Code directly discriminated against the respondents in that they were treated less favourably than not only their female colleagues but also those upon whom the Code imposed no religious or cultural disadvantage. The respondent's beliefs were necessary factual criteria upon which the decision to dismiss was based in a causative sense: but for their beliefs, the respondents would not have been dismissed. Even were we to elevate the requirements of direct discrimination to necessitate a provision in the Code explicitly prohibiting correctional officers who were Rastafarians or traditional healers from wearing dreadlocks, then the seemingly more neutral prohibition of 'Rasta man' hairstyles would have a disparate impact disproportionately affecting Rastafarians and traditional healers or adherents and would on that account amount to indirect discrimination.[123]

The LAC did not expressly indicate, however, whether its finding was based on direct or indirect discrimination. From the reasoning provided, it appears that the LAC approached the matter by considering both forms of discrimination within a unified analysis of unfair discrimination.[124]

In *Dlamini*, discussed earlier, although the complainants did not specify whether the alleged discrimination was direct or indirect, the LC appeared to have *sua sponte* considered the issue of indirect discrimination.[125]

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118 *Mafomane* para 57.3.

119 *Mafomane* para 57.3.

120 *Mafomane* para 61.

121 *Correctional Services v POPCRU* (LAC) para 53. The court at para 15 was of the view that "the learned judge concluded, for reasons which are frankly difficult to fathom, that the respondents had not established direct or indirect discrimination on the grounds of religion or culture".

122 *Correctional Services v POPCRU* (LAC).

123 *Correctional Services v POPCRU* (LAC) para 28.

124 The matter was further appealed to the Supreme Court of Appeal (SCA). *Department of Correctional Services v Police and Prisons Civil Rights Union* 2013 34 ILJ 1375 (SCA) (hereafter *Correctional Services v POPCRU* (SCA)), which court dismissed the appeal.

125 *Dlamini* para 14. This approach was also somewhat apparent from the issues the court (para 27) deemed necessary to consider in establishing whether discrimination had occurred.

Similarly, in *TDF Network Africa (Pty) Ltd v Faris*,[126] while the claim was not explicitly framed in terms of indirect discrimination, the LAC ultimately appeared to assess the matter on that basis.

In *TDF Network* the employee alleged that she had been automatically unfairly dismissed in terms of section 187(1)(f) of the *LRA*, contending that the dismissal was based on her religion. She was a practising member of the Seventh-day Adventist Church, which prohibits work on Saturdays. Her refusal to participate in stocktaking and similar activities scheduled on Saturdays ultimately led to her dismissal. The employer maintained, however, that the principal reason for the dismissal was the employee's refusal to work on Saturdays, and argued that her religious beliefs "played no role in the motivation to dismiss her".[127]

Although the court did not explicitly categorise the matter as one of indirect discrimination, it appears to have adopted a related analytical framework. In outlining the issue for determination. The LAC stated:

> TFD's contentions are not sustainable. Firstly, the dismissal would not have occurred if Faris had not been an Adventist. Had she not been an Adventist she would have willingly worked on a Saturday ... It is disingenuous to argue that her non-availability on Saturdays was the reason for her dismissal without having regard to the underlying reason for her non-availability. But for her religion, she could have worked on a Saturday and would not have been dismissed. Her religion was the dominant and proximate reason for her dismissal.[128]

The court concluded that:

> [T]here is no doubt that Faris was dismissed and discriminated against for complying with and practising the tenets of her religion.[129]

Like *TDF Network*, the case of *Sayiti v Sun International Management Ltd*[130] also involved a claim of automatic unfair dismissal under section 187(1)(f) of the *LRA*, grounded in religion and/or belief. As a Seventh-day Adventist, the employee in *Sayiti* was likewise unable to work on Saturdays for religious reasons, which ultimately led to his dismissal on the grounds of incapacity. Initially the employer denied that the dismissal amounted to unfair discrimination;[131] however, it later conceded that discrimination had occurred, though it argued that such discrimination was justified due to the

126 *TDF Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC) (hereafter *TDF Network*).
127 *TDF Network* para 28.
128 *TDF Network* para 31.
129 *TDF Network* para 35. Given the employer's assertion that the employee's religion "played no role" in her dismissal, the *TDF Network* case further illustrates how some employers may be either unaware of the concept of indirect discrimination or may fundamentally misunderstand its application.
130 *Sayiti v Sun International Management Ltd* 2023 44 ILJ 1613 (LC) (hereafter *Sayiti*).
131 *Sayiti* para 7.

inherent requirements of the employee's job.[132] In contrast to the approach adopted by the LAC in *TDF Network*, the LC in *Sayiti*, while not explicitly labelling the matter as such, appeared to approach the case as one of direct discrimination based on religion and/or belief. The court's judgment predominantly centred on the employer's defence regarding the inherent requirements of the job. Ultimately, the court found this defence insufficient, ruling that the employee had indeed been subjected to unfair discrimination.[133]

It is respectfully submitted that what was essentially a matter of indirect discrimination was mischaracterised (by both the LC and the LAC) as one of direct discrimination. Had the employee been dismissed solely because of his membership in the Seventh-day Adventist Church, it would indeed have constituted direct discrimination on the grounds of religion and/or belief. However, based on the facts of the case, it is evident that the immediate cause of the employee's dismissal was his inability to work on Saturdays, which suggests that the dismissal was not directly attributable to his religious beliefs. A more thorough assessment of indirect discrimination, however, would likely have revealed that the underlying cause of the dismissal was, in fact, related to the employee's religious beliefs. The employer's blanket requirement for all employees to work on Saturdays unintentionally disadvantaged Seventh-day Adventist employees, thereby resulting in indirect discrimination.

While the case before both the LC and the LAC primarily centred on the employer's defence based on the inherent requirements of the job - a defence applicable to both direct and indirect discrimination under the *EEA*[134] - the practical distinction between whether the matter was assessed as direct or indirect discrimination might seem, at first glance, merely academic. However, it is respectfully submitted that the failure of both the LC and the LAC to address the matter as one of indirect discrimination is not insignificant. This oversight may have broader implications for how similar cases are interpreted and adjudicated in the future. In this regard, both the LC and LAC missed an important opportunity to advance the jurisprudence on indirect discrimination within South African labour law.

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132 *Sayiti* para 8.

133 The Labour Court's judgment was recently overturned on appeal in *Sun International Management Limited v Sayiti* 2024 45 ILJ 2702 (LAC). In upholding the employer's inherent requirements of the job defence, the LAC held that "the appellant has established that it took such steps that were reasonably available to it in the circumstances to accommodate the respondent's inability to engage in weekend work on account of his religious beliefs. The reason for the respondent's dismissal was based on an inherent requirement of the particular job, and thus not automatically unfair" (para 75).

134 Section 6(2)(b) of the *EEA*.

In conclusion, whether the courts follow the first or second approach in determining whether a claim should be treated as one of indirect discrimination, both approaches ultimately limit the labour courts' opportunity to meaningfully engage with and develop this area of labour discrimination law.

3.3.2 Conceptual and legal mistakes by courts

In cases involving indirect discrimination, courts have at times delivered judgments that are either legally unsound or insufficiently supported by legal reasoning. A notable example is *POPCRU*,[135] which concerned a group of correctional officers at Pollsmoor Prison in Cape Town who were dismissed for refusing to cut their dreadlocks in contravention of the employer's dress code. The employees challenged their dismissals as automatically unfair, alleging both direct and indirect discrimination. The direct discrimination claim was based on gender, given that female correctional officers were permitted to wear dreadlocks.[136] The indirect discrimination claim centered on the assertion that the ostensibly neutral dress code policy disproportionately infringed upon the religious and cultural rights of the complainants, all of whom identified as Rastafarians. They contended that the wearing of dreadlocks is an essential expression of their faith and cultural identity.[137]

With reference to the *Harksen* test, the LC reaffirmed that the assessment of unfair discrimination hinges primarily on the impact of the discriminatory conduct on the complainant, as well as on others in comparable circumstances.[138] The court found that, given the complainants' sincerely held belief system, the employer's directive to cut their dreadlocks would "beyond doubt"[139] have had a profoundly detrimental effect on them,[140] leading to a clear violation of their dignity.[141] Accordingly, the court held that, although the dress code appeared facially neutral, it had a disproportionate impact on the complainants as members of a historically disadvantaged group.[142] The employer was therefore found to have engaged in indirect discrimination.[143]

Having reached what is arguably a correct conclusion regarding the presence of indirect discrimination, the court then took a somewhat

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135 *Police and Prison Rights Union v Department of Correctional Services* 2010 31 ILJ 2433 (LC) (hereafter *POPCRU v Correctional Services*).
136 *POPCRU v Correctional Services* para 118.
137 *POPCRU v Correctional Services* paras 118, 215.
138 *POPCRU v Correctional Services* para 230.
139 *POPCRU v Correctional Services* para 231.
140 *POPCRU v Correctional Services* para 232.
141 *POPCRU v Correctional Services* para 232.
142 *POPCRU v Correctional Services* para 230.
143 *POPCRU v Correctional Services* para 232.

perplexing turn by considering whether the complainants had adequately asserted their right to act in accordance with their belief system.[144] The court distinguished between the mere existence of a right and its actual exercise,[145] reasoning that the complainants had failed to inform the employer of their religious convictions or the potential impact the directive would have on them.[146] On this basis the court concluded that "the presumption of unfairness has … been negated by irrefutable evidence", and that the employer's instruction was justifiable and reasonable in the circumstances.[147] Consequently, while the court upheld the claim of direct discrimination on the ground of gender, it dismissed the claim of indirect discrimination.

Both parties appealed the LC's decision. On appeal[148] the LAC confirmed several key findings: that Rastafarianism had been recognised by the CC as a religion entitled to constitutional protection;[149] that the employees had demonstrated that the wearing of dreadlocks was a central tenet of their Rastafarian faith; and that they were indeed genuine adherents of this belief system.[150] The LAC held that the LC, by its own reasoning,[151] had effectively acknowledged that the employer had discriminated against the complainants on religious and/or cultural grounds.[152] The LC's conclusion – that no discrimination had occurred due to the complainants' alleged failure to assert their rights was found by the LAC to be both factually inaccurate and conceptually unsound.[153] Ultimately the LAC concluded that the complainants had been unfairly discriminated against on the grounds of religion, culture and gender.[154]

The LC's reasoning and ultimate conclusion are difficult to reconcile with its own factual findings. The court expressly acknowledged that the employer's actions had infringed upon the complainants' right to practice their faith, and further stated that their dignity had been "no doubt impugned".[155] On this

144 *POPCRU v Correctional Services* para 232.
145 *POPCRU v Correctional Services* para 232.
146 *POPCRU v Correctional Services* para 231.
147 *POPCRU v Correctional Services* para 232.
148 *Correctional Services v POPCRU* (LAC).
149 *Correctional Services v POPCRU* (LAC) para 26, relying on *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) para 40.
150 *Correctional Services v POPCRU* (LAC) para 26.
151 The Labour Court (LC) held that "[t]he right to practice their faith was adversely affected and their dignity was no doubt impugned". *POPCRU v Correctional Services* para 232.
152 *Correctional Services v POPCRU* (LAC) para 27.
153 *Correctional Services v POPCRU* (LAC) para 27.
154 *Correctional Services v POPCRU* (LAC) para 53. The court at para 15 was of the view that "the learned judge concluded, for reasons which are frankly difficult to fathom, that the respondents had not established direct or indirect discrimination on the grounds of religion or culture".
155 *POPCRU v Correctional Services* para 232.

basis the court accepted that a "presumption of unfairness" had arisen.[156] In terms of the *Harksen* test, the existence of such a presumption shifts the burden to the employer to justify the discriminatory conduct. This may be done either by showing that the differentiation was not based on a prohibited ground, or by invoking one of the recognised defences to a claim of unfair discrimination.[157] The LC's judgment thus raises at least two significant concerns regarding its approach: first, while prior knowledge of an employee's religion or belief system might inform the question of intent, it is well-established in South African employment law that intention is not a requisite element for a finding of unfair discrimination.[158] In this regard, the LAC, on appeal, reaffirmed that:

> [D]iscrimination is not saved by the fact that a person acted from a benign motive. Usually motive and intention are irrelevant to the determination of discrimination[159]

Second – and perhaps more importantly – the LC appeared to suggest that an employer's lack of prior knowledge about an employee's religious beliefs could negate a finding of unfairness in an otherwise discriminatory act. Such reasoning is fundamentally flawed. Under the *Harksen* framework, the enquiry into unfair discrimination is focussed on the effect of the impugned conduct on the complainant's human dignity and not on the subjective awareness or knowledge of the employer. The core question remains whether the employer's conduct had an unfairly discriminatory impact, irrespective of the employer's state of knowledge. As the LAC cogently observed "[b]ut whatever the facts, the failure by complainants to assert their rights does not render discriminatory action non-discriminatory".[160]

Accordingly, there was no legal foundation for the LC's consideration of the employer's knowledge, or lack thereof, as a factor capable of negating a finding of unfair discrimination.[161]

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156 *POPCRU v Correctional Services* para 232.

157 The only absolute defences against a *prima facie* claim of unfair discrimination listed in the *EEA* are affirmative action measures (s 6(2)(a) of the *EEA*) and inherent requirements of the job (s 6(2)(b) of the *EEA*). For a discussion around the possibility of a so-called *general fairness defence*, see Huysamen *Future of a Prohibition on Indirect Unfair Discrimination* 157-159; Garbers and Le Roux 2018 *Stell LR* 263-269.

158 Basson *et al New Essential Labour Law Handbook* 233: "For unfair discrimination to exist, the employer need not be at fault (i.e. he/she need not have had the intention to discriminate or allowed discrimination to occur through negligence). It is only the fact or effect of the application of the discriminatory rules, polices or criteria that is relevant, not the employer's good intentions."

159 *Correctional Services v POPCRU* (LAC) para 35.

160 *Correctional Services v POPCRU* (LAC) para 27.

161 The further appeal to the SCA was also dismissed. *Correctional Services v POPCRU* (SCA). The SCA at para 22 held that: "Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which

3.3.3 Confusion between indirect discrimination and (direct) discrimination on an arbitrary ground

In certain instances courts have misapplied or misunderstood the concept of indirect discrimination. A notable example is *Lagadien v University of Cape Town*,[162] where the complainant, a paraplegic individual, unsuccessfully applied for the position of Head of the Disability Unit at the respondent institution. Following her unsuccessful application, she alleged that she had been unfairly discriminated against – either directly or indirectly – on the basis of her failure to meet the academic qualifications required for the role.[163] She argued that the requirement for tertiary qualifications constituted arbitrary and capricious discrimination[164] amounting to indirect discrimination against her as a member of a broader group disadvantaged by the lack of such qualifications.[165]

The LC acknowledged that tertiary qualifications were not a listed ground of discrimination under the *EEA*. Consequently, the court initially framed the matter as one of direct discrimination based on an unlisted ground – specifically, the lack of tertiary qualifications. However, upon further analysis of the legal framework, it appears that the court conflated or confused direct discrimination on an unlisted ground with issues typically associated with indirect discrimination. The court seemed to treat discrimination on an unlisted ground as an example of indirect discrimination, despite the clear distinction between the two concepts. To this end the court provided an extensive discussion of academic perspectives on the meaning and application of indirect discrimination.[166] While the court ultimately dismissed the complainant's case – a conclusion that, respectfully, was correct – the reasoning behind its decision was both confusing and legally misapplied.

The LC in *Ramaila v Minister of Justice and Correctional Services*[167] exhibited a similar confusion in its approach. In *Ramaila* the complainant alleged that he had been unfairly discriminated against due to the employer's pay progression policy. According to the policy, employees hired

says their religion or culture is not worthy of protection and the impact of the limitation is profound." [footnotes omitted].

162 *Lagadien.*

163 *Lagadien* para 4. The relevant part of the advertisement for the position read as follows: "To be considered for this position you will need proven skills in, or knowledge/experience of, the above areas. A tertiary-level education together with personal experience of disablement will be advantageous. Applications from previously disadvantaged South Africans who are suitably qualified, will be particularly welcomed." (para 6.5).

164 *Lagadien* para 13.

165 *Lagadien* para 13.

166 *Lagadien* paras 14-15.

167 *Ramaila v Minister of Justice and Correctional Services* (C479/2017) [2019] ZALCCT 4 (28 February 2019) (hereafter *Ramaila*).

from the private sector were required to complete 24 months of service before qualifying for pay progression, whereas those with prior public sector experience became eligible after just 12 months. The LC concluded that the only significant difference between the complainant and his colleagues was that the former had gained his experience in private practice. Ultimately the court determined that the employer had unfairly discriminated against the complainant on an arbitrary ground – namely, his status as a new appointee from outside the public service. In reaching this conclusion, the court held that:

> This distinguishing feature, attribute or characteristic, which has the appearance of being neutral, does not only have the potential to affect but actually affect employees appointed from outside of the public service into posts in the public service adversely in a comparably serious manner[168]

This finding is more aligned with the concept of indirect discrimination than direct discrimination. While the LC's decision was ultimately set aside by the LAC on appeal,[169] the LAC did not address the apparent confusion in the LC's reasoning between direct discrimination on an arbitrary ground and indirect discrimination.

4 Conclusion

Within the broader constitutional imperative of *equality for all*, the prohibition of indirect discrimination has been heralded as a crucial transformative legal mechanism,[170] one that recognises the limitations of formal equality and seeks to address entrenched patterns of exclusion.[171] By targeting facially neutral practices that produce disproportionate adverse impacts, the concept of indirect discrimination protection holds unique potential to dismantle structural barriers and promote substantive equality in the workplace.[172] Yet despite its potential for transformative change, this potential remains largely unrealised. The application of indirect discrimination and consequently its role in effecting workplace transformation in SA has been limited. Despite the concept's significance, much of the existing jurisprudential discourse on indirect discrimination lacks critical depth and consequently has made little substantive contribution to this field of labour law.

While the concept remains underutilised, such underutilisation should not, however, be mistaken for irrelevance. Rather, it signals the need for deeper commitment to the transformative promise enshrined in the *Constitution*.

168 *Ramaila para 75.*

169 *Minister of Justice and Correctional Services v Ramaila* 2021 42 ILJ 339 (LAC).

170 Garbers and Rossouw "Women in the Workplace".

171 Garbers "Prohibition of Discrimination in Employment" 24.

172 Tobler 2009 https://publications.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

Despite the lack of judicial progress on the issue, the legal recognition of indirect discrimination remains vital within South African labour law. If properly understood and effectively applied, it can serve as a powerful instrument for addressing systemic inequalities that are not easily captured by direct discrimination claims or rectified through affirmative action measures alone.

Ultimately, advancing workplace equality in SA, which includes addressing systemic barriers in the workplace, depends not only on the continued evolution of direct discrimination jurisprudence and the robust implementation of affirmative action. To this end, there is a pressing need for renewed scholarly and judicial engagement with the concept - one that reconsiders its doctrinal contours, clarifies its interaction with other equality tools, and reaffirms its role within a transformative constitutional paradigm.

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List of Abbreviations

1956 LRA	Labour Relations Act 28 of 1956
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CCR	Constitutional Court Review
Conn L Rev	Connecticut Law Review
EEA	Employment Equity Act 55 of 1998
FL Rev	Federal Law Review
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
Mon LR	Monash University Law Review
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
POPCRU	Police and Prison Civil Rights Union
SA	South Africa
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SAMWU	South African Municipal Workers Union
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
Yale L & Pol'y Rev	Yale Law and Policy Review