
SOUTH AFRICA / JUDGMENT

S v Neotel (Pty) Ltd (EQ2/2015) [2018] ZAEQC 1; 2019 (1) SA 622 (GJ) (31 July 2018) [2018] ZAEQC 1

COURT
Equality Court

BEFORE
Spilg

CASE / FILE NUMBER
EQ2/2015

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EQUALITY COURT OF SOUTH AFRICA

HELD IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ 2/2015

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

S, A Complainant

and

NEOTEL (PTY) LTD Respondent

JUDGMENT OF 31 JULY 2018

(JURISDICTION)

SPILG J

INTRODUCTION

1. The complainant instituted proceedings before the Equality Court in a document entitled Complainant's Submissions on Notice of Directions Hearing in terms of Regulation 10(5). It contained a rambling narrative of events from which it was difficult to discern not only the grounds relied on but also whether the applicant's complaint was limited to acts or omissions constituting unfair discrimination on the ground of gender under s 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("the Equality Act").
2. At that time the complainant was not represented and the court assisted in securing pro bono attorneys as it was evident that she was out of her depth and I was satisfied that it would be well-nigh impossible for the respondent, Neotel (Pty) Ltd, to discern the case it was called on to meet. There were a number of false starts and an application was brought to dismiss the complaint in terms of regulation 12(3) (a) of the regulations promulgated under the Equality Act. On 26 November 2015 I ruled that the application was premature.
3. At some later stage attempts were made to settle the matter. This did not materialise and on 26 February this year at a directions hearing under regulation 10(5) a number of procedural directives were issued with the concurrence of the parties. The directives arose because the applicant's legal representatives wished both to reformulate the complaint and to consolidate the proceedings before the Equality Court with the High Court action already instituted by the complainant against the respondent. The directives provided inter alia that:
 1. The Respondent is to advise the complainant by 27 February 2018:
 - 1.1 Whether it agrees to the consolidation of this matter with the trial action instituted by the complainant against the Respondent out of this court under case number 44273/2010 and which is set down for trial on 28 January 2019;
 - 1.2 At what stage of proceedings it intends raising an objection to the jurisdiction of the Equality Court, subject to the court itself being obliged to comply with the provisions of s 20(3) to (5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
 2. The complainant shall consolidate the contents of the various documents containing her particulars of complaint into the form of a Declaration as contemplated in Uniform Rule 20 which shall be delivered by 19 March 2018.
 3. By 9 April 2018 the Respondent shall deliver its response to the Declaration which shall be in the form of a Plea as contemplated in Uniform Rule 22
4. The parties are to meet and jointly prepare a set of proposed directives in order to enable this matter together with the trial action referred to earlier (if the Respondent has agreed thereto) to be ripe for hearing by 28 January 2019. The proposed directives are to be delivered to the presiding judge by 18 April 2018

4. At the subsequent directions hearing held on 24 April 2018 a road map for the future litigation of the case was agreed upon. As a consequence the following directives were issued:
 1. The Court has considered whether the matter should be referred to another forum in terms of section 20(3). The parties do not consider that the matter should be referred to another forum, other than to the extent that the court is minded to grant any of the relief sought by the claimant in terms of section 21(4). The Court directs that the matter not be referred to another forum at this stage.
 2. The matter in the Equality Court EC 2/2015 is consolidated with the trial action instituted by the complainant against the Respondent under case name 44273/ 2010 which has been set down for trial on 28 January 2019.
 3. Both cases will be case-managed to trial and heard by Judge Spilg.
 4. The parties have agreed that written submissions may be served by the parties electronically on one another and must be filed directly with Judge Spilg's registrar. The addresses for filing are; NMvula@judiciary.org.za and BSpilg@judiciary.org.za, with a hard copy delivered to the judge's chambers.
 5. The respondent's plea must be filed by 14 May 2018. The respondent has indicated that it wishes to raise a special plea of jurisdiction.
 6. The complainant may file a replication by 4 June 2018.
 7. Pleadings will close upon a replication being filed, or when the time period for such filing has elapsed without further directions being issued.
 8. The question of the jurisdiction of the Equality Court will be argued as a preliminary legal question on 19 June 2018.
 9. The parties will file submissions on the question of jurisdiction on or before 14 June 2018.
 10. Having heard the argument on any special plea of jurisdiction raised in the Equality Court matter EQ 2/2015:
 - 10.1 the Court will dismiss any claims brought in the Equality Court which it has no jurisdiction to determine; and
 - 10.2 the matter will proceed to trial on all claims brought in the Equality Court over which the Court has jurisdiction, together with all claims brought in the High Court.
 - 10.3 If all claims brought in the Equality Court are dismissed on the grounds of lack of jurisdiction, the Court will:
 - 10.3.1 first consider whether to exercise its power under section 21(4) of the Equality Act;

10.3.2 proceed to trial only on the claim filed under case number 44273/2010 and sitting only as High Court Judge;

10.3.3 follow the Uniform Rules of Court, subject to these directions.

11. The court has advised that it will be in a position to give an order together with reasons by 9 July 2018.

12. The plaintiff will file any amendments to her claim in the High Court by 30 July 2018.

13. If the Court has jurisdiction over any of the claims brought in the Equality Court:

13.1 The matter will proceed to trial in parallel proceedings before Judge Spilg in his dual capacity as a judge of both the Equality Court and the High Court;

13.2 In order to give effect to the principles in section 4(1) of the Equality Act, the case will proceed to trial expeditiously and informally and rules and procedures will be used that will facilitate participation as required by the Equality Act;

13.3 The parties will first attempt to agree on timetables and processes for all steps towards trial preparation and in relation to any interlocutory issues that may arise;

13.4 If the parties cannot agree on how to use the Uniform Rules of Court in pursuance of the purposes of Equality Act, they will approach Judge Spilg in chambers for directions, who will direct the parties on bringing interlocutory applications where necessary;

13.5 The parties will, where possible, avoid the duplication of any functions or steps to be taken in the Equality Court and the High Court;

13.6 In matters that relate only to the High Court case, the parties will follow the Uniform Rules of Court, subject to any agreed directions and the court adopting a case management process as and when advisable or required.

14. The parties agree to the following that applies to both claims:

14.1 The parties will make discovery on the merits, together with delivery of the discovered documents, under the first schedule in respect of the consolidated claims as contemplated in Uniform Rule 35 by 25 June 2018.

14.2 The issue of further discovery will be dealt with at a case management meeting.

14.3 The parties will submit requests for admissions by 20 August 2018 and exchange further particulars in respect of both claims by 10 September 2018.

15. The next case management meeting to consider inter alia separation of issues and further pre-trial procedural matters will be held on 6 August 2018.

16. The parties must arrange and attend a first pre-trial conference no later than 4 September 2018.

17. Uniform Rule 36 must be complied with to the extent applicable, in respect of any inspections, examinations or expert testimony.
5. It will be observed that proceedings in the High Court action filed under case number 44273/2010 were consolidated with the complaint under the Equality Act and that the Equality Court judge would be seized of both matters.
6. There was a request to file papers out of time and by agreement between the parties certain dates were changed with the result that this court indicated that it would be in a position to give a decision on the special plea as to jurisdiction by today.
7. The respondent has raised three special pleas, the first of which is in relation to jurisdiction. In accordance with the directive, and since it would be dispositive of the Equality Court case if decided in the respondent's favour, argument has been heard on that issue only.

SPECAIL PLEA AS TO JURISDICTION

8. In the main the respondent's special plea as to jurisdiction is premised on the submission that the Employment Equity Act 55 of 1998 ("the Equity Act ") applies to the applicant's complaint with the result that this court's jurisdiction is ousted by reason of s 5(3) of the Equality Act. Section 5(3) provides that the Equality Act "does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 applies".
9. The respondent submitted that:
 - a. This court sitting as an Equality Court is not empowered to grant the relief sought in the High Court action proceedings under case number 44273/2010 as this relief is sought outside the Equality Court's powers;
 - b. This court sitting as an Equality Court;
 - i. has no power to order that the complainant's employment claims be considered by the Labour Court (see para 2.4.1 of the relief claimed) as this usurps the jurisdiction of the Labour Court and that in any event the matter has been finally determined by the CCMA
 - ii. cannot direct the filing of a rescission application in the CCMA against its decision to refuse condonation (see para 2.4.2 of the relief claimed) as this not only usurps the CCMA's jurisdiction but it also circumvents the CCMA's rules relating to the filing of rescission applications;
 - iii. is unable to refer the matter to the CCMA for conciliation (see para 2.5 of the relief) in circumstances where the CCMA has already finally determined the same complaint.
 - c. The complaint has already been finally determined by the CCMA and the Equality Court does not have the power to overturn this decision.

It is evident that the special plea may be divided into three broad categories.

CONCURRENCY

10. The first is that the Equality Court is a specialised court which adopts expedited rules, a more informal procedure and applies different evidential thresholds^[1] to that of the ordinary High Court. This was not pursued in argument. I am comfortable that within the framework of the agreed case management process which the parties have bought into there will be little likelihood of procedural prejudice.
11. Similarly there are many cases where the evidential threshold may vary. Provided the presiding judge is qualified to sit in the Equality Court and provided he or she does not either subordinate or subsume the Equality Court hearing into an ordinary High Court trial or fails to properly apply the particular evidential requirements of each there seems to be no good reason why the two cases cannot be consolidated considering that the same facts will be heard in respect of the same parties. It will avoid the need to engage two judges to deal with the same subject matter thereby reducing the amount of resources the court needs to allocate,

it will avoid the risk of different credibility findings and it will reduce the parties' legal bills.

More importantly during one of the directional hearings Adv Fourie who had represented the complainant prior to leaving the independent Bar referred the court to Minister of Environmental Affairs and Tourism v George and others 2007(3) SA 62 (SCA) at para 19 where Cameron JA (at the time) endorsed this approach in the following passage:

"Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same High Court Judge who, in his capacity as an equality court Judge, is presiding in that Court"

12. The trial has been set down for hearing on 28 January 2019. It is evident that the same factual matrix will be covered in both that case and the Equality Court case. As stated earlier Adv Ferreira for the respondent did not pursue this ground, given that it had effectively formed part of the agreed process.

CERTAIN RELIEF MPERMISSIBLY USURPS ANOTHER FORUM'S POWERS

13. The second broad issue is that certain of the relief sought would amount to this court usurping the functions and powers of the CCMA and the Labour Court.

Adv de Vos for the complainant submitted that the issue raised does not amount to a special plea as it does not attack the jurisdiction to hear the case, only the form of relief that may competently be given.^[2]

14. I do not think that special pleas should be so narrowly construed, and certainly not before the Equality Court if regard is had to s 4(1)

- (a) of the Equality Act's guiding principles[3]. It may well be that the nature of the relief sought clearly falls outside the competency of the Equality Court because it amounts to an impermissible interference with the decision making function of another forum. The fact that the respondent chose to proceed on this specific point by incorporating it into its special plea rather than by way of an exception should not divert the court's attention from attempting to ensure that the orders sought by the complainant are competent.
- 15. The issue is whether the complainant is able to make out a case for the relief sought where it amounts, in part, to this court directing another forum of at least equal competence to abdicate its decision making powers.
- 16. However in identifying the issue in this manner care must be taken not to curtail the wide remedial powers which the Equality Court enjoys. In such circumstances it would be unnecessarily restrictive to uphold a broadly worded special plea without hearing argument on whether an Equality Court can revisit a decision not to refer, with "appropriate comments", proceedings instituted before it to an alternative forum.

In this regard I accept that the Equality Act contemplates that the presiding officer considers ab initio a referral of the matter to another forum, although it may again assume jurisdiction in certain circumstances, provided of course it does not impact on any exclusive jurisdiction which the other forum may enjoy. See s 20(3) (a) and (5) (b) as read with (7) and (8). See also s 21(4) (b) which allows the Equality Court at a subsequent stage to refer a case to an appropriate body for mediation, conciliation or negotiation[4].

- 17. I am satisfied, after weighing the competing considerations mentioned earlier, that I would not be unnecessarily fettering this court's ultimate powers, while at the same time giving clarity to both parties as to the limits of this court's jurisdictional powers in relation to enforceable orders, by making a finding that it is not competent for this court either to direct the Labour Court to exercise its jurisdiction in a particular way, to direct it to make specific orders, to direct it or the CCMA to adopt a particular procedure, or to exercise in a particular way any procedural or substantive law discretion that may be conferred on them.
- 18. However it may well be that if this court finds that the respondent's conduct resulted either in the complainant being denied access to justice in respect of the determination of any employment related claims or may form the basis of a rescission of the CCMA order of 13 December 2010 then those are facts which should be brought to that forum's attention; leaving it to that forum to determine if that is a ground, with such other relevant factors, as would entitle the complainant to obtain a rescission.
- 19. The net effect is that;
 - a. the complainant must make suitable amendments to paras 2.4.1 and 2.4.2 of the relief sought.

- b. the complainant is not precluded at this stage from seeking the order in the form set out in para 2.5 albeit that on closer scrutiny it might be cast overbroadly. That can be determined in a more informed manner at the end of the case should the complainant succeed in establishing the infringement of a right of access to justice under the Equality Act.

EXCLUSION OF JURISDICTION UNDER s 5(3) OF THE EQUALITY ACT

- 20. The substantive issue raised by the respondent is whether this court is precluded from adjudicating on the matter because the allegations relate to unfair discrimination and harassment by the respondent against the complainant qua employee.

The issue turns on a reading of s 5 (3) of the Equity Act and its interpretation.

- 21. The section contains three provisions which address the application of the Equality Act. The first sub-section confirms that the legislation binds the State and all persons. Sub-sections (2) and (3) read:

Application of Act

- (1)
 - (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.
 - (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.
- 22. It is evident that in the hierarchy of remedial legislation dealing with issues of equality the Equality Act trumps all others save for the Constitution and, as circumscribed in sub-section (3), the Equity Act.
 - 23. The Equity Act is a subsequent enactment and one would expect the drafter to have been conscious of the congruity between the provisions of the two Acts and to have clarified the delineation between them, bearing in mind that both pieces of legislation deal with discrimination and harassment. Unfortunately that is not so.
 - 24. I turn first to the fundamental rule of interpretation which is to establish the intention of the legislature. This however presupposes that the drafters had a clear intention in mind rather than create an unresolved mess for the courts to muddle through: Interpretation of legislation does not work that way: it presupposes that the legislature had a clear intention, but the language by which it chose to express itself was inadequate. It is only on the basis of such an assumption that the courts can invoke techniques of interpretation- otherwise legislation becomes court made. The minority judgment of Cameron J (with whom Froneman and Jafta JJ concurred) in *National Credit Regulator v Opperman and Others* 2013

- (2) SA 1 (CC) which considered s89 (5) of the National Credit Act 34 of 2005 alludes to this situation.

In Opperman Cameron J said: at paras 99 and 105

“Interpretation is a cooperative venture between legislator and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former. The mutual suppositions, and the constraints of principle and constitutional precept on the judge’s role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislator’s enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored” (at para 99)

“This case, in my respectful view, signals the limits of cooperative effort in giving meaning to ill-chosen words. To virtually ignore the wording of the provision, and then find it constitutionally bad, seems to me an unnecessary dissonance. Put differently, once the words, taken as a whole, preclude a constitutionally compliant interpretation, the conclusion beckons that no constitutionally rational meaning can be given to the provision. The result may be that the provision is constitutionally void for vagueness. But even if constitutionally impermissible vagueness is not the result, then it seems there is little constitutional purpose in examining alternative meanings that will result in unconstitutionality or depriving the provision of the purpose for which it seems to have been enacted. There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave Parliament to correct it. (para 105)

25. I must however assume that the legislature had in mind a clear delineation between matters which fall within the provisions of the Equality Act requiring the skill of a judicial officer but which, because it has an impact on labour relations, is best dealt with by a CCMA commissioner or a Labour Court judge who has a fuller appreciation of the balance that needs to be struck in this sphere.
26. The intention of the Legislature is established by having regard to the words used in their setting, by having regard to the context in which the words are used in the legislation as a whole and the purpose for which the words are intended, with due regard to the values of the Constitution. (Jaga v Donges NO and Another; Bhana v Donges NO and Another 1950
- (4) SA 653 (A) at 662G-663A and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others

[2004] ZACC 15; 2004 (4) SA 490 (CC) at para 90 per Ncgobo J (at that time);

27. Wallis JA explained the process of applying these principles in two leading cases. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18. the judge said :

‘Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

Subsequently in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014

- (2) SA 494 (SCA) Wallis JA reinforced the development of our law, away from the so called “golden rule” of interpretation by explained that the process of interpretation is unitary and no longer circumscribes the permissible background

considerations that may be taken into account. The judge said at para 12:

“The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’.”

In *Kubyana v Standard Bank of South Africa Ltd* 2014

- (3) SA 56 (CC) at para 18 Mhlantla AJ also referred to a holistic approach to interpretation.[5]

28. I will start with the basic aid to interpretation that every word in a statute is intended to be given a meaning. Subsection 5(3) reads that the Equality Act “does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 applies”. Meaning must therefore be given to the words “and to the extent to which” the Equity Act applies.

Does this mean that if the relief sought by the complainant is not cognisable under the Equity Act then the complainant is free to proceed before the Equality Court? Or does it mean, as contended for by Adv Ferreira, that only the cause of action need fall within the scope of the Equity Act for this court’s jurisdiction to be excluded. There are persuasive arguments to be made both ways. Firstly a party can avoid the Equity Court by simply formulating the relief in a way which falls outside the competency of the orders available under that court’s jurisdiction. On the other hand the nature of the relief under the Equality Court’s

jurisdiction is intended to directly impact on the mores of a sector of the community or of the community at large in order to achieve a more tolerant and constitutionally value orientated society.

29. In *Strydom v Chiloane* [2007] JOL 20879 (T), Hartzenberg J resolved the issue on the basis that the relief claimed was outside the powers of the Equity Act, although the illustration given could equally apply to the cause of action being the distinguishing feature (at para 12). Moreover

the full bench considered that the a fortiori question was one of jurisdiction and that by reason of s 49 of the Equity Act only the Labour Court could decide the issue. [6]

30. In many cases the true deciding factor is to establish the purpose of the legislation concerned. Ordinarily that is confined to scrutinising the Act in question. In the present case it involves comparing the scope and purpose of the respective Acts. Fortunately each piece of legislation sets out its objectives in its preamble and objects provisions.
31. Section 3(1) (b) of the Equality Act expressly provides that its provisions are to be interpreted in a manner which gives effect to the Preamble and to the objects and guiding principles as set out in ss 2 and 4.
32. Without making this judgment unduly prolix suffice it for present purposes that aside for giving effect to the equality provisions of s 9 read with item 23(1) of the Constitution the purpose of the Act, as expressed in the Preamble, is to promote equality and eliminate unfair discrimination and harassment by eradicating social and economic inequalities which remain “deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy”(emphasis added). Perhaps of equal significance is that in terms of the Preamble the purpose of the Equality Act is to “facilitate the transition to a democratic society... marked by human relations that are caring and compassionate....”
33. Under the objects provisions the Equality Act seeks to promote equality and the values of non-racialism and non-sexism, prevent unfair discrimination and protect human dignity[7] by:
- a. providing “for measures to facilitate the eradication of unfair discrimination ... particularly on the grounds of race, gender and disability”; [8]
 - b. providing “for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment”; [9]
 - c. setting out “measures to advance persons disadvantaged by unfair discrimination” [10]
 - d. facilitating “further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women”.
34. Among the guiding principles enunciated in s 4 of the Equality Act are those of;

- a. “the use of corrective or restorative measures in conjunction with measures of a deterrent nature” [11]
 - b. “the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof” [12]
 - c. recognising and taking into account when applying its provisions the “existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy”[13]and also “the need to take measures at all levels to eliminate such discrimination and inequalities.”[14] (emphasis added)
35. The powers of the Equality Court are also instructive. As one would expect having regard to the Acts remedial and corrective objectives the court can:
- a. Order for the implementation of special measures to address the unfair discrimination, hate speech or harassment;[15]
 - b. Issue orders of a deterrent nature;[16]
 - c. Require the matter to be submitted to the Director of Public Prosecutions;[17]
 - d. Refer its concerns to any relevant constitutional institution for further investigation or to refer the proceedings before it to such an institution or “appropriate body for mediation, conciliation or negotiation” [18]
36. Having identified the objects and purpose of the Equality Act it is possible to decide whether s 5(3) requires only that the cause of action must be justiciable under the Equity Act to exclude this court’s jurisdiction or whether in addition the manner of dealing with the issue, in the form of the orders that the Equality Court is called on to make or pronounce upon, must also be available under the Equity Act.

Firstly it can be safely concluded that the impact or reach of the Equality Act was not intended to be curtailed by other legislation- other legislation would have to compliment, not detract from it. Therefore at best the Equity Act would have to achieve the same objectives as the Equality Act without watering down its reach where the cause of complaint was based on the same grounds. In terms of the Preamble the reach of the Equality Act is to eradicate unfair social and economic discrimination and inequality by facilitating the transition to a democratic society “marked by human relations that are caring and compassionate....”

Secondly the Equality Act is outcome based. Accordingly the type of measures it can impose in order to achieve its objective becomes an integral element of the enactment. This appears from the guiding principles contained in s 4 which were cited earlier and which envisage “the use of corrective or restorative measures in conjunction with measures of a deterrent nature” [19] and “the need to take measures at all levels to eliminate such discrimination and inequalities.”[20]

37. In short the Equality Act is directed at facilitating equality within the broader social structures consonant with the values of our Constitution. Consequently, it would defeat a core objective of that Act if one had regard only to the grounds of complaint and not the remedial action which the Equality Court is empowered to implement proactively and through structural orders[21] that address the imbalances within the broader society, including its institutions.
38. I am therefore of the view that the purpose of the Equality Act would be defeated if the CCMA or Labour Court was unable to effectively provide remedial action, and therefore deal with the issue, to the same extent as the Equity Act even if the factual grounds relied on fell within the scope of the Equity Act.
39. I now turn to a consideration of the framework of the Equity Act. The Act provides that it must be interpreted in a manner which gives effect to its purpose, taking into account any relevant code of good practice issued in terms of the Act or any other employment law and in compliance with the country's international law obligations; and in particular under the International Labour Organisation Convention concerning Discrimination in Respect of Employment and Occupation.[22]
40. In terms of s 2 the purpose of the Equity Act is to achieve equity in the workplace by;
- a. promoting equal opportunity and fair treatment “in employment through the elimination of unfair discrimination” ;
 - b. implementing affirmative action measures to redress disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace”

It is evident that the Equity Act is directed at eliminating unfair discrimination in the workplace.

41. The phrase “elimination of unfair discrimination” is given content in s 5 of the Equity Act, which provides that:

“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice” (emphasis added)

42. The structure of the Equity Act prohibits “unfair discrimination” and “harassment” (which is defined as a species of the former)[23]. In turn “unfair discrimination” is circumscribed by s 6 which requires the following preconditions to be satisfied before the Act can apply;
- a. There must be “unfair discrimination”, which itself is broadly defined by way of numerous illustrations;;
 - b. The “unfair discrimination” must arise directly or indirectly from an “employment policy or practice” ;

An “employment policy or practice” is defined to include “but is not limited to” the thirteen categories mentioned. These may be classified as procedures, criteria, assessments, grading, and processes. They are intended to be illustrative.

43. Accordingly a sine qua non for the application of the Equity Act is that unfair discrimination must arise from an employment policy or practice.

By definition a “policy or practice” in its context envisages both a set of principles or standards that govern the employment relationship and a habitual or regular course of doing things even though they may be inconsistent with the avowed policy of what is meant or believed to happen. [24]

In this regard reference may be had to the Concise Oxford Dictionary (10th ed) which defines:

“policy” to include “a course or principle of action adopted or proposed by an organization or individual”; and

“practice” to mean as a noun “the actual application or use of a plan or method as opposed to the theories relating to it; the customary or expected procedure or way of doing something” while as a verb “practise” is to “perform (an activity) or exercise (a skill) repeatedly or regularly....; carry out or perform (an activity or custom) habitually or regularly”

Such an interpretation is consistent with the mischief which the Equity Act seeks to address as set out in s 5 of the Equity Act; otherwise the insertion of the phrase as a qualification to the words which precede it would be meaningless.

44. Another sine qua non is that the unfair discrimination is against an employee. An employee is defined in s 1 to mean:

“any person other than an independent contractor who-

- (a) Works for another person or for the State

45. In terms of s 3 the Equity Act is to be interpreted by taking into account any relevant code of good practice issued in terms of the Act or any other employment law. Moreover where the case is initiated by the employee the process envisages relief in the form of an order by the Labour Court directed at either compensating the employee or requiring compliance by the employer.
46. It will be apparent that the points of departure between the Equality Act and the Equity Act are fourfold; firstly the Equity Act is limited to cases of an employment relationship, secondly the unfair discrimination must arise from an “employment policy or practice” which contemplates conduct that is adopted or regularly or habitually implemented by the employer; thirdly the relief is limited to orders affecting the employer whose employment policy or practice is unfairly discriminatory towards the employee in question or its other employees whereas the Equity Act seeks to actually engage head on acts of harassment and discrimination within society at large. Finally and not necessarily definitive in its own right,

the Equality Act is essentially concerned with redressing rights issues which potentially impact on a large sector of society whereas under the Equity Act the starting point in disputes brought by an employee is an obligatory attempt at conciliation^[25] failing which an ultimate outcome confined to a change in the policy and practice of the specific employer within the workplace. ^[26]

47. The Equity Act requires that in interpreting its provisions regard must also be had to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace published on 4 August 2005 in Government Gazette no 27865. In the footnotes to paras 2.1 and 2.3 which deals with the application of the code it is noted that :

“Where sexual harassment occurs outside of the working environment regard should be had to the “Equality Act.

Leaving aside questions of whether subordinate legislation can inform the interpretation of a statute and if so , when and to what extent, meaning must be given to the phrase “working environment” bearing in mind that the context remains the employment policy or practice adopted by the employer. This appears to be reinforced by the provisions of other paragraphs of the Code, such as para 6.

48. In the present case the complainant claims that she is the victim of gender based discrimination or violence and of harassment which inter alia also affects her right to equality in respect of her constitutional entitlement of access to justice.

The complainant alleges that on the night of 18 July 2008 or the early hours of the following morning a certain ... G... had spiked a drink he gave her and had sexual intercourse without her consent. She claims that he had instructed her to come to his home after work to collect work related material. At the time the respondent employed her as a senior manager-finance and he was its Chief Financial Officer.

49. After the complainant reported the alleged rape to both the police and to the respondent she alleges a course of conduct on the part of the latter to “protect the image of the company” in a number of ways which included the alleged suppression of her complaint and interference with the police investigation despite her requesting the respondent to act proactively to bring G... to account. She contends the respondent’s conduct denied her equal protection and access to justice.
50. I proceed to quote the grounds on which the complainant contends that as a consequence of the respondent’s actions and omissions to protect itself she is a victim of unfair gender discrimination or gender based violence
212. As a victim of harassment, unfair gender discrimination and/ or gender-based violence, Ms S... is part of the marginalised and vulnerable group in society that is disadvantaged by harassment as well as unfair discrimination on the basis of gender.

213. The matter before the above honourable court is important in that it highlights the secondary victimisation and stigmatisation faced by female victims of harassment, unfair gender discrimination and or gender based violence in society, based on certain vulnerabilities, stigmas and imbalances of power and financial resources when pitted against large corporate entities.
214. Neotel's conduct is evident of the obstacles faced by many victims of harassment, unfair gender discrimination and or gender based violence and is short of the standard set out in section 9(1) and 9 (2) and section 10 of the South African Constitution, as given effect in the Equality Act.
215. Actively precluding Ms S... from voicing her experience violates her right to access to justice as well as her right to dignity in that it constitutes a failure to acknowledge her dignity and integrity as well as her equal recognition and worth. It further constitutes indirect harassment by Neotel.
216. As a result of Neotel's conduct, there has been;
- 216.1 no proper investigation by Neotel of the charge of rape against Mr G... ;
- 216.2 no consideration, alternatively no proper consideration, of the available evidence by Neotel in support of the charge;
- 216.3 no consideration or determination by Neotel in any forum of the truth of the allegation against Mr G... ; and
- 216.4 no justice for Ms S... as a victim of gender-based violence.
217. The denial of justice for Ms S... as a victim of harassment, unfair gender discrimination and or gender based violence in itself amounts to the violation of her right:
- 217.1 to equality as contemplated in section 8 (a), (e) and (h) of the Equality Act; and
- 217.2 not to be subjected to harassment as contemplated in section 11 of the Equality Act.
218. In addition, it amounts to a victimisation of Ms S... .
219. Neotel's conduct has resulted in a violation of Ms S...'s right of equal protection and benefit of the law, the right not to be discriminated against because of her gender, including the right not to be discriminated against because of her gender, including the right to be free of harassment, and has violated her dignity and right to justice. This violation has resulted in damages suffered by her to be quantified before the Equality Court.
51. While the relief sought by the complainant may in part coincide with that available under the Equity Act it is far broader. The complainant asks not only for damages but also the following orders:

2.2 To the extent that the court finds that there had been no proper investigation of the charge against Mr G..., a referral to the South African Police Service to investigate case 565/2008 and an order to report back on progress in the investigation in terms of the section 21 (2)(m) of the Equality Act.

2.3 A referral to the Director of Public Prosecutions in terms of section 21 (2)(n) of the Equality Act to consider the evidence in case 565/09/2008 along with the evidence presented in this case, to make a decision regarding the prosecution of:

2.3.1 Mr G... ;

2.3.2 Any other individuals who may be implicated in the commission of a crime;

2.3.3 And an order to report back on its decision in terms of section 21 (2) (m) of the Equality Act.

To this extent the Equity Act does not provide for relief to the same extent as claimed by the complainant under the Equality Act.

52. In my view, while the complainant believed that she was at G...’s home because of a work related issue, it may be stretching the point to impermissible bounds where the other party had no intention of dealing with a work related matter but used it as a pretext to deceive the victim as to his true intention. Nonetheless there may also be situations where a director takes an employee on a business related trip but uses the opportunity to sexually molest her and a finding that there must be a common work related intention may result in the net being cast too narrowly. The issue as to the meaning to be given to the term “outside the working environment” in paras 2.1 and 2.3 of the Code was not fleshed out fully before me and it is unnecessary to decide the point in cases where the harassment occurs outside the office, as there are more compelling grounds for finding that the Equity Act has no application.
53. The respondent has brought the defence of jurisdiction by way of a special plea which relies on a legal submission as to the exclusion

of this court’s jurisdiction by virtue of s 5(3) of the Equality Act. It does not assert any facts outside the case made by the complainant[27]. Neither the applicant nor the respondent has pleaded facts to indicate that the complaint of harassment arises from an “employment policy or practice” in the sense that I believe it is to be defined.

That being so the precondition for the application of the Equity Act to the exclusion of the Equality Act falls away. Accordingly it is unnecessary to consider whether s 49 of the Equity Act requires that any interpretation, or application, of the Equity Act is only cognisable by the Labour Court. On the facts before there is no allegation contained in the papers to support a contention that the conduct complained of was an employment policy or amounts to a practice adopted by the respondent in the manner contemplated by the Equity Act, nor can it be inferred.

54. If I am wrong then it is necessary to first consider whether s 49 of the Equity Act precludes this court from interpreting s 5 of the Equality Act because, in doing so, it is also necessary to consider the reach of the Equity Act. The view of the Equality Court in Strydom at para 17 was that it must defer this interpretational issue to the Labour Court.
55. However it appears that the court assumed that s 49 must apply as no countervailing argument appears to have been presented nor were certain anomalies considered. For instance; if the Labour Court exercised jurisdiction then just as I have done, it would have to interpret the objects and purpose of the Equality Act. However implicit in the terms of s 4(1) (e) of its provisions read with the interpretational aids to that subsection (i.e. s 3(1) (b)) and s 5(3)), is that a consideration of the Equality Act should be the sole preserve of an Equality Court judge “in order to ensure the effective implementation and administration thereof”.

Moreover the principal provision requiring interpretation is not found in the Equity Act, but is s 5 of the Equality Act.

At worst there a legislative impasse created on the one hand by s 4(1)

- (e) read with ss 3(1) (b)) and 5(3) of the Equality Act and on the other by s 49 of the Equity Act.
56. Without legislative intervention a court is left with two primary considerations. Section 49 of the Equity Act is of general application to all courts which, on ordinary aids to interpretation, ought to yield to a provision of specific application to the Equality Court even if it was enacted earlier.

The other consideration is that the intention and purpose of the Equality Act would be defeated if the Labour Court was to first consider an interpretational issue in relation to the Equality Court's jurisdiction since another guiding principle applicable to the Equality Act (see s4(1)(a)) is the expeditious processing of cases: Invoking s 49 of the Equity Act would require this court to first await the outcome of a decision by the Labour Court on the interpretation issue, with a possible appeal to the Constitutional Court.

There would also be cost implications for a complainant who is obliged to approach another court first. This may stifle the ability to access justice. On a practical level the legislature may wish to consider expressly giving concurrent jurisdiction to the Equality Court and the Labour Court on issues concerning the interpretation of s 5(3) of the Equality Act.

57. In the present case I have found that the additional words in s 49 which exclude the need to refer an issue of interpretation to the Labour Court where “the Act provides otherwise” covers the situation where a material jurisdictional fact is absent: namely that the conduct complained of did not arise from an employment “policy or practice”.
58. On the basis that this court has jurisdiction, it is evident that the case made out by the complainant is not concerned with work place policies or practices in relation to, or as between, employees.

59. The complainant alleges unfair gender discrimination and harassment through the abuse of corporate power which resulted in inter alia depriving her of her constitutional right of equal access to justice.

This is not a matter justiciable under the Equity Act Court because the conduct complained of extended beyond the work environment and engaged State institutions and the relief sought is also directed at redressing that infraction. The matter is also not justiciable under that Act because the conduct of the respondent which is alleged to have extended beyond the workplace, if true, reveals that it would have acted in similar vein whether or not the complainant to sexual harassment was its employee or an ordinary member of the public.

This case has to do with the conduct of a company attempting to avoid reputational damage and which is directed at protecting shareholder

value and brand image. The formulation of the complaint is consistent with that.

60. The final aspect of the special plea as to jurisdiction may appear to be concerned with res judicata. As I understood it, the point is not that the CCMA has finally determined a matter which is presently before this court: As I have found it would be debarred from doing so by s 5(3) of the Equality Act as the matter would fall outside its jurisdiction. The point was taken rather as an additional ground upon which this court was not able to refer the matter to the CCMA or give it directions. The point therefore properly falls within the second broad issue. Moreover there is a dispute as to whether the CCMA made a finding on the merits and furthermore I have already accepted that this court cannot give directions to that forum; at best the case can be referred to it.
61. Accordingly the conduct complained of is unrelated to an employment policy or practice of a company in respect of its employee, irrespective of whether the term “policy or practice” is to be generously interpreted.

COSTS

62. In the result the respondent has only achieved negligible success and has failed on its substantive argument. The issues justified the engagement of two counsel.

ORDER

63. I accordingly make the following order:
- The first special plea as to jurisdiction is dismissed save to the extent that paras 2.4.1 and 2.4.2 of the prayers must be amended to remove any reference this court directing the Labour Court to act in a particular way or directing that an application for rescission of the CCMA order of 13 December 2010 be filed. The complainant is afforded 20 days to affect the necessary amendments.
 - The respondent is to pay the complainant's costs on the opposed scale including the costs of two counsel.

SPILG J

DATE OF HEARING: 19 June 2018

DATE OF JUDGMENT: 31 July 2018

REVISED: 8 August 2018

FOR COMPLAINANT: Adv A de Vos SC

Adv N Luthuli

(Adv N Fourie had appeared at initial prehearing meetings)

Webber Wentzel

FOR RESPONDENT: Adv N Ferreira

I Cloete (pupil)

Cliffe Dekker Hofmeyr Inc

- [1] See Chapter 3 of the Equality Act which deals with burden of proof, presumptions and their exceptions
- [2] Technically a special plea ought to add new facts but it is generally of no concern to the other party if the defence is raised either by way of exception or as a special plea. See Harms Amler's Precedents of Pleadings (8th ed) at 304-5 and the case cited of Sanan v Eskom Holdings Ltd 2010
- (6) SA 638 (GSJ)
- [3] Section 4 (1): In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply: (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;
- [3] Section 4 (1): In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
- (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;
- [4] Sections 20(3)(a),(5), (7) and (8) provide:
- (3) (a) The clerk of the equality court must, within the prescribed period of receiving such notification, refer the matter to a presiding officer of the equality court in question, who must, within the prescribed period, decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that

alternative forum's powers and functions.

- (5) (a) If the presiding officer decides that the matter must be referred to an alternative forum he or she must, in the prescribed manner, make an order, directing the clerk of the equality court to transfer the matter to the alternative forum mentioned in the order.
- (b) When making an order contemplated in paragraph (a), the presiding officer may attach to the order any comments he or she deems necessary for the attention of the alternative forum.
- (7) On receipt of a matter transferred to it, the alternative forum in question must deal with the matter expeditiously in terms of its powers and functions.
- (8) If the alternative forum referred to in subsection (7)-
 - (a) fails to deal with the matter within a reasonable period in the circumstances; or
 - (b) is not able to resolve the matter to the satisfaction of one or both the parties and one or both parties so request, the alternative forum must, in the prescribed manner, refer the matter back to the equality court from which it was transferred, for adjudication, within the prescribed period from the date on which it was returned to the equality court. S21(4)(b) provides that-
- (4) The court may, during or after an inquiry, refer-
 - (a) ...
 - (b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.
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- (4) The court may, during or after an inquiry, refer-
 - (a) ...
 - (b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

At para 18: “Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms.”

- [6] Section 49 of the Equity Act reads: “The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act except where this Act provides otherwise”

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- [7] Section 2(b)

- [8] Section 2(c)

- [9] Section 2(e)

- [10] Section 2(g)

- [11] Section 4(d)

- [12] Section 4(e)

- [13] Section 4(2)(a)

- [14] Section 4(2)(b)

- [15] Section 21(2)(h)

[16] Section 21(2)(l)

[17] Section 21(2)(n)

[18] Section 21(4)(a) and (b)

[19] Section 4(d)

[20] Section 4(2)(b)

[21] Also referred to as supervisory orders. See s 21(2)(m)

[22] Section 3

[23] See s 6

[24] See Oxford English Dictionary

[25] This may create its own tensions where there is no intervention by the Director-General as the commissioner is obliged to attempt

resolution through conciliation (see s 10(5) of the Equity Act). The obligatory process of conciliation may itself play out to the advantage of an employer who has displayed conduct amounting to overreaching or preying on the vulnerability of the employee on what is fundamentally a rights issue that the Equality Act would require be determined and proactively redressed.

[26] See ss 10 and 50 and especially s 50(2).

[27] See the respondent's First Special Plea

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