Decent work: The promotion of equal treatment and opportunity in the South African workforce with regards to gender

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Mini-Dissertation submitted in partial fulfilment of the requirements for the degree *Magister Legum* in Labour Law at the Potchefstroom Campus of the North-West University

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November 2016
ACKNOWLEDGEMENTS

This research is dedicated to my parents (Mr and Mrs Tafirenyika) for their undying and relentless support in my educational endeavours.

I would also like to thank God for being my source of strength and also for his blessings on me.

My sincere gratitude goes to:

- My supervisors Mr MC Stoffels and Adv. RHC Koraan for their patience, support and guidance.
- Me Santerien Minne for her language editing expertise.
- The Postgraduate Department for giving me the opportunity to further my studies.
ABSTRACT

Decent work as established by the International Labour Organisation entails productive work for women and men in conditions of freedom, equality, security and human dignity. One of the primary goals of decent work is the establishment of equality within the workplace. Equality is a broad concept that is concerned with fairness. It is within this broad notion of equality that decent work also demands equal treatment and opportunity within the workplace in respect of gender. This is because on a global scale women have been unfairly discriminated against in various ways. In South Africa equality is regulated by the Constitution of the Republic of South Africa 1996 and various labour legislation has been enacted in order to promote equality. The Employment Equity Act 55 of 1998 is one of such pieces of legislation that specifically deals with equality issues within the workplace. However, despite the existence of comprehensive equality legislation, evidence still suggests that women still suffer some forms of gender discrimination. Under scrutiny in this research is the fact that women have been unfairly discriminated against with regards to remuneration and access or promotion to top level management positions in the workplace. With regards to remuneration there exists a gender pay gap because women equally qualified and situated as men are offered less pay compared to men. This is attributed to various factors such as the undervaluing of work performed by women and the fact that women are prone to take career breaks as a result of their reproductive function. Women also face a challenge with regards to access or promotion to top level management positions within the workplace. The challenge, also known as the glass ceiling, entails that men are more likely to have access or promotion to top level management compared to women. This has also been attributed to various factors that include patriarchy within the workplace and social location.

Keywords: decent work, equal treatment and opportunity, unfair discrimination, equality
OPSOMMING

Behoorlike werk soos deur die Internasionale Arbeidsorganisasie ingestel behels produktiewe werk vir vroue en mans in toestande van vryheid, gelykheid, sekerheid en menswaardigheid. Een van die primêre doelwitte van behoorlike werk is die vestiging van gelykheid binne die werkplek. Gelykheid is 'n breë begrip wat verband hou met billikherd. Dit is binne hierdie breë idee van gelykheid dat behoorlike werk ook gelyke behandeling en geleenthede binne die werkplek vereis ten opsigte van geslag. Die rede daarvoor is dat daar op wêreldwyse skaal op verskeie maniere onbillik teen vroue gediskrimineer word. In Suid-Afrika word gelykheid deur die Grondwet van die Republiek van Suid-Afrika 1996 gereguleer en verschillende arbeidswetgewing is uitgevaardig om gelykheid te bevorder. Die Wet op Indiensneming, Wet 55 van 1998 is een van sodanige stukke wetgewing wat spesifiek met gelykheidskwessie binne die werkplek handel. Nietemin, ten spyte van die bestaan van omvattende gelykheidswetgewing, dui getuienis daarop dat vroue steeds onder sekere vorme van geslagsdiskriminasie ly. In hierdie navorsing word die feit dat daar rakende vergoeding en toeganklikheid tot, of rakende bevordering tot topvlak bestuursposte onbillik teen vroue in die werkplek gediskrimineer word, noukeurig ondersoek. Met betrekking tot vergoeding bestaan daar 'n geslagsgaping in salarisse aangesien daar in vergelyking met mans kleiner salarisse vir vroue wat gelykwaardig gekwalifiseer en geplaas is, aangebied word. Dit is toe te skryf aan verskeie faktore soos die geringskatting van werk wat deur vroue verrig word en die feit dat vroue geneig is om loopbaanonderbrekings te neem as gevolg van hulle produktiewe funksie. Vroue staar ook 'n uitdaging in die gesig met betrekking tot toeganklikheid of bevordering tot topvlak bestuursposte binne die werkplek. Dié uitdaging, ook bekend as die glasplafon, behels dat mans meer waarskynlik toegang tot topvlak bestuur het, of tot bevordering daartoe, in vergelyking met vroue. Dit is ook toe te skryf aan verskeie faktore onder meer patriargaat binne die werkplek en op sosiale gebied.

Sleutelwoorde: behoorlike werk, gelyke behandeling en geleentheid, onbillike diskriminasie, gelykheid
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<tr>
<td>AHRLJ</td>
<td>African Human Right Law Journal</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>BCEA</td>
<td>Basic Conditions of Employment Act 75 of 1997</td>
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<tr>
<td>CC</td>
<td>Constitutional Court</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women of 1979</td>
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<td>CRC</td>
<td>Convention on the Rights of Children of 1990</td>
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<td>EAP</td>
<td>Economically Active Population</td>
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<td>EEA</td>
<td>Employment Equity Act 55 of 1998</td>
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<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
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<tr>
<td>HSRC</td>
<td>Human Sciences Research Council</td>
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<td>IJL</td>
<td>Industrial Law Journal</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>J Soc Sci</td>
<td>Journal of Social Sciences</td>
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<td>LAC</td>
<td>Labour Appeal Court</td>
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<td>LC</td>
<td>Labour Court</td>
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<td>LDD</td>
<td>Law, Democracy and Development</td>
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<td>LRA</td>
<td>Labour Relations Act 66 of 1997</td>
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<td>PER</td>
<td>Potchefstroom Electronic Law Journal</td>
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<td>Abbreviation</td>
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<tr>
<td>QLFS</td>
<td>Quarterly Labour Force Survey</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<td>SALDRU</td>
<td>Southern Africa Labour and Development</td>
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<td></td>
<td>Research Unit</td>
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<td>SA Merc LJ</td>
<td>South African Mercantile Law Journal</td>
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<td>SA DWCP</td>
<td>South Africa’s Decent Work Country Programme</td>
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<tr>
<td>STELL LR</td>
<td>Stellenbosch Law Review</td>
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<tr>
<td>TSAR</td>
<td>Tydskrif vir die Suid Afrikaanse Reg</td>
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Chapter 1 Introduction

The International Labour Organisation (ILO) has as its aim the development, promotion and monitoring of international labour standards. In the drive to promote international labour standards, the concept of 'decent work' was established by the ILO which is a globally accepted goal and instrument for improving the lives of people. Decent work is based on the understanding that work is a source of income as well as a source of individual respect, family stability, community peace and economic growth. Therefore, the ILO holds that decent work is productive work for women and men in conditions of freedom, equality, security and human dignity. All ILO member states, which includes South Africa, have an obligation to respect, advance and give effect to the fundamental rights of men and women in light of the concept of decent work.

Gender refers to the socially constructed roles, behaviours, activities and duties related to one being a male or female in a particular society. Gender equality is one of the main goals that the international labour organisation seeks to achieve through its decent work initiative. This is because women on a global level are discriminated against based on gender within the workplace. Women within the South African work force have not been spared either of the various forms of discrimination that characterise the labour market. These forms of discrimination in the workplace include gender based remuneration and promotion or access to top management posts. These exist despite the high regard for the notion of equality in South Africa. For the purpose of this study "women" include black women, white women and disabled women in the work force.

The Constitution of the Republic of South Africa, 1996 seeks to ensure that South African law evolves in accordance with international law. In this context, section 39 of

5 Anon http://www.asset-scienceinsociety.eu; Ranchod MMSDSA: Gender and the Workplace 8.
the Constitution provides for the recognition of international law in respect of the Bill of Rights. This recognition is based on the idea that the international law instrument in question is consistent with the Constitution. South Africa as a member of the ILO has the task of promoting the ideals of decent work within the labour market. One of the central key ideals of decent work is the promotion of equal treatment and opportunity in employment.

Post-apartheid South Africa placed great emphasis on representivity in terms of race and gender. Various statutory and legislative measures were put in place in South Africa in order to redress the impact of the apartheid regime on the work force so as to achieve equal treatment and opportunity in the labour market for all men and women. These include the Constitution, the Labour Relations Act 66 of 1995, Employment Equity Act 55 of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Basic Conditions of Employment Act 75 of 1997. The Code of Good Practice on Equal Pay for Work of Equal Value will also be taken into consideration with regards to equal pay for equal work.

The South African statutory and legislative framework, which protects women’s rights and promotes gender equality, has been regarded as “women-friendly” because of its vision and plans for achieving gender equality. The Constitution serves as a compass for engendering gender equality in the country. Some of the basic values enshrined in the Constitution include human dignity, achievement of equality, non-racialism and non-

8 Dugard 1991 EJIL 91; see also Section 39 and section 233 of the Constitution, 1996
9 Section 39 and section 233 of the Constitution; see also Gericke 2014 PER 2603.
10 Gericke 2014 PER 2603; see also Republic of Angola v Springbok Investments (Pty) Ltd 2005 2 BLR 159 (HC) 162.
11 ILO Flanders 2011 Cooperation Results Overview 5-6; see also Roy and Kaye 2002 The International Labour Organization 6.
12 Castillo et al Decent Work Indicators: Concepts and Definition 125.
13 Bundlender et al Decent Work Country Profile: South Africa 37.
14 Selegbo and Ojakorotu 2013 Gender & Behaviour 5181.
15 Labour Relations Act 66 of 1995 (Hereinafter the LRA).
16 Employment Equity Act 55 of 1998 (Hereinafter the EEA).
18 Basic Conditions of Employment Act 75 of 1997 (Hereinafter BCEA).
20 Van Der Byl Background paper: Women’s Empowerment and Gender Equality Twenty 8.
sexism.\textsuperscript{22} Section 9 of the \textit{Constitution} expands on the constitutional values by providing for the right to equality and grounds which constitutes unfair discrimination.\textsuperscript{23} The \textit{EEA} further gives effect to this equality right in respect of labour law in section 5 and section 6. Section 5 provides that every employer must take steps to promote equal opportunities in the workplace.\textsuperscript{24} The grounds for unfair discrimination in the workplace are then provided for by section 6 (1) and gender is one of these grounds.\textsuperscript{25} In this way, the \textit{EEA} also focuses on equality with regards to gender.\textsuperscript{26} In \textit{National Coalition for Gay and Lesbian Equality v Ministers of Justice},\textsuperscript{27} the court held that the \textit{Constitution} requires that the law and public institutions acknowledge the variability of human beings and affirm that equal respect should be shown to all. However, gender inequalities continue to undermine decent work objectives,\textsuperscript{28} specifically equal treatment and opportunity within the labour market. Inequalities that hinder the promotion of equal treatment and opportunity can be seen in female labour force participation, different pay grades for females at the same level as their male counterparts and also in the recruitment processes.\textsuperscript{29}

The participation of women within the South African labour market is one of the variables showing that decent work in respect of equal treatment and opportunity in employment in respect of gender are yet to be achieved. This is despite the fact that female participation in the South African work force has increased from 38 per cent in 1995 to 48.5 per cent in 2012.\textsuperscript{30} The Quarterly Labour Force Survey (QLFS) published by Statistics South Africa, held that women represented 46 per cent of the Economically

\begin{thebibliography}{99}
\bibitem{Constitution} Section 1 (a) and (b) of the \textit{Constitution}\textsuperscript{1996}.
\bibitem{Constitution9} Section 9 of the \textit{Constitution}; Section 9 (3) ...state may not unfairly discriminate based on race, gender, sex, pregnancy, marital status, ethnic, social, colour, sexual orientation, age, disability, language, birth,....
\bibitem{EEA5} Section 5 of \textit{EEA}.
\bibitem{EEA6} Section 6 (1) of \textit{EEA}...race, gender, sex, pregnancy, marital status, ethnic, social, colour, sexual orientation, age, disability, language, birth ...and any other arbitrary ground. These grounds are similar to grounds listed in section 9 and they additionally include HIV status, political opinion and family responsibility.
\bibitem{DecentWork} Bundlender et al 2011 \textit{Decent work country profile: South Africa} vii.
\bibitem{NationalCoal} \textit{National Coalition for Gay and Lesbian Equality v Ministers of Justice} 1999 (1) SA 6 (CC) para 134.
\bibitem{PER322} Cohen 2012 \textit{PER} 322.
\bibitem{Challenges} Statistics South Africa 2012 www.statssa.gov.za ; see also Maseko \textit{A Comparative study of Challenges Faced by Women in Leadership} 1 ; Cohen and Moodley 2012 \textit{PER} 321.
\end{thebibliography}
Active Population (EAP) in South Africa in 2014.\textsuperscript{31} Even though this figure shows an increase in female labour participation, the number significantly drops when it comes to female representivity at top-level management and in respect of pay grade gaps between men and women.\textsuperscript{32}

The labour market in South Africa suffers from a history of unequal access to jobs and labour discrimination.\textsuperscript{33} Apartheid education and labour policies produced a strong racial gradient in unemployment, employment and wage rates.\textsuperscript{34} Women continue to face glaring pay differentials compared to their male counterparts.\textsuperscript{35} Fagenson\textsuperscript{36} argues that across all vocation types, women still earn less than men on average. Van Der Byl\textsuperscript{37} argues that despite an increase in the average income of females, women still earned 50 per cent less, on average, than their male counterparts. This aspect also shows that despite the calls for the promotion of equal treatment and opportunity for men and women within the labour market, gender discrimination continues to be an issue in the labour market.

The recruitment processes especially in terms of accessing top management or leadership positions by females have also affected the promotion of equal treatment and opportunity in the labour market.\textsuperscript{38} This is a common feature of both public and private sectors within the labour market.\textsuperscript{39} According to the Southern African Development Community\textsuperscript{40} Protocol on Gender and Development, women constituted only 27 per cent in economic decision-making positions in both the public and private sectors in Southern Africa in 2015.\textsuperscript{41} Traditionally, leadership has been associated with masculinity and the belief that men make better leaders than women.\textsuperscript{42} As such, this

\textsuperscript{32} Lowe et al 2016 http://www.sadc.int/documents 142; see also Maseko A Comparative study of Challenges Faced by Women in Leadership 1.
\textsuperscript{33} Leibbrandt et al Employment and Inequality Outcome in South Africa Southern Africa 10.
\textsuperscript{34} Roberts et al 2010 HSRC Review 6.
\textsuperscript{35} Cohen and Moodley 2012 PER 321.
\textsuperscript{36} Fagenson Women in Management: Trends, Issues and Challenges in Managerial Diversity 10.
\textsuperscript{37} Van Der Byl Background paper: Women’s Empowerment and Gender Equality 6.
\textsuperscript{38} Maseko A Comparative study of Challenges Faced by Women in Leadership 1.
\textsuperscript{39} Maseko A Comparative study of Challenges Faced by Women in Leadership 1.
\textsuperscript{40} Hereinafter SADC.
\textsuperscript{41} Lowe et al 2016 http://www.sadc.int/documents 142.
\textsuperscript{42} Maseko A Comparative study of Challenges Faced by Women in Leadership 23.
aspect has affected the labour market over time, hence more men are in top managerial positions compared to an insignificant number of women at the same level. This is suggestive of the fact that there is still a need for measures to promote equal treatment and opportunities for men and women within the labour market.

Decent work demands the elimination of these gender inequalities and the creation of conditions in which all women can equally exercise their economic citizenship.\textsuperscript{43} This requires the incorporation of measures and the creation of opportunities for women in employment policies and plans.\textsuperscript{44} One of the measures that had been put in place to ensure the elimination of inequalities on various grounds including gender in South Africa was affirmative action.\textsuperscript{45} Affirmative action is based on the idea that there is a need to increase participation of previously 'disadvantaged groups'\textsuperscript{46} including women, in the workplace in order to create a balance among employees.\textsuperscript{47} Affirmative action has, however, become an increasingly controversial policy aimed at addressing labour market inequalities in South Africa.\textsuperscript{48} This is because of various challenges that have been faced in implementing it. Burger and Jafta\textsuperscript{49} argue that the effect of affirmative action policies in reducing the employment or wage gaps has been marginal at best and much less significant in bringing about changes in labour market outcomes. Hence, it is argued that the promotion of equal treatment and opportunity within the labour market in respect of gender is still a problem because affirmative action measures (transformation processes) exist in theory but not so much in practice.

The concept of decent work has the promotion of equal treatment and opportunity in employment as one of its core ideals. Over the years, the South African labour market has exhibited improvements towards the promotion of equal treatment and opportunity

\textsuperscript{43} Aranda \textit{et al} "Advancing Gender Equality in the Context of Decent Work" i.
\textsuperscript{44} Aranda \textit{et al} "Advancing Gender Equality in the Context of Decent Work" i.
\textsuperscript{45} Section 15 of \textit{EEA}.
\textsuperscript{46} Disadvantaged groups include black people (Africans, Coloureds and Indians).
\textsuperscript{47} Section 15 \textit{EEA}; Tladi \textit{Affirmative Action and The Employment Equity Act of South Africa} 13.
\textsuperscript{48} Roberts \textit{et al} 2010 \textit{HSRC Review} 6.
\textsuperscript{49} Burger and Jafta \textit{CRISE Working Paper} No. 76 17.
within the labour market in line with decent work.\textsuperscript{50} However, women continue to be prejudiced in respect of pay and promotion or access to top management posts.

This study will put a primary focus on the promotion of equal treatment and opportunity among men and women within the labour market as an ideal of decent work within the South African perspective. Therefore, the research question is to what extent has the ILO goal of decent work been achieved in the South African work force pertaining to equal treatment and opportunity in respect of gender?

This research is based on a literature study during which case law, law journals, textbooks, legislation and internet sources have been scrutinised. The introductory chapter will give an overview of the problem statement and how the research will be undertaken. It will further substantiate the problem statement by providing a brief overview of the South African labour market. In Chapter 2 the ILO concept of decent work will be unpacked and will also establish what constitute equal treatment and opportunities in employment. The third chapter will focus on the statutory and legislative framework in South Africa with specific reference to the \textit{Constitution, EEA, LRA, PEPUDA and BCEA}. The challenges with regards to the application and implementation of these will also be discussed. Chapter 4 will be focusing on the forms of inequality namely the gender pay gap and access to top managerial positions by women, as well as the statistical data to back up these claims. The factors attributed for the existence of these challenges will also be discussed. Chapter five will constitute a summation of the findings and whether the objectives of the study have been achieved. Furthermore, recommendations will also be provided for with regards to the promotion of equal treatment and opportunities for both men and women in the South African work force.

\textsuperscript{50} Olowu 2011 \textit{LDD} 7.
Chapter 2 The concept of Decent Work: Equal treatment and opportunities in employment

2.1 Introduction

The concept of decent work is a brainchild of the International Labour Organisation.\textsuperscript{51} The ILO, the United Nations\textsuperscript{52} and other multilateral agencies work actively to develop policies and programmes that advances the creation of decent work opportunities for both men and women.\textsuperscript{53} It is also the objective of the South African labour market to ensure the promotion and implementation of the decent work ideal within its labour structure. Decent work ideals are broad and cover a variety of labour issues. One such ideal is the promotion of equal treatment and opportunity within the labour in respect of gender. In this chapter a background of the ILO is provided. The central theme, however, of this chapter is the concept of decent work with a primary focus on equal treatment and opportunities within the workforce with regards to gender.

2.1.1 Background to the International Labour Organisation and Decent work in South Africa

The creation of the ILO was necessitated by the rapid growth of industrialisation which led to harsh working conditions for workers.\textsuperscript{54} These harsh conditions, which included exploitation of workers, irregular working hours, lack of social security and inhuman work floor environments, led to the need to improve the workers’ protection and working conditions.\textsuperscript{55} The ILO was established by the Treaty of Versailles signed in 1919 and this Treaty also established the League of Nations.\textsuperscript{56} The result was that all member states of the League of Nations became founding members of the ILO.\textsuperscript{57} After

\begin{itemize}
\item \textsuperscript{51} Hereinafter the ILO; Moore 2014 Globalisation 320.
\item \textsuperscript{52} Hereinafter UN.
\item \textsuperscript{53} Anon 2011 http://rconline.undg.org.
\item \textsuperscript{54} Roy and Kaye The International Labour Organization: A Handbook for Minorities and Indigenous Peoples 2.
\item \textsuperscript{55} Roy and Kaye The International Labour Organization: A Handbook for Minorities and Indigenous Peoples 2.
\item \textsuperscript{56} 2012 ILO-Flanders: Cooperation Results Review 2.
\item \textsuperscript{57} Van Niekerk et al Law@Work 20.
\end{itemize}
the Second World War, the United Nations replaced the League of Nations.\textsuperscript{58} All 183 states of the United Nations are members of the ILO.\textsuperscript{59} The founding document of the ILO is the ILO Constitution of 1919 which is based on the following principles: abolition of child labour; adequate wages; equality of treatment; equal pay; inspection systems; labour should not be seen merely as a commodity or an article of commerce; reasonable working hours and right of association.\textsuperscript{60}

The ILO comprises three main bodies namely the International Labour Conference (ILC), the Governing Body and the International Labour Office.\textsuperscript{61} The primary focus of the International Labour Conference is to adopt new labour standards.\textsuperscript{62} It is the highest policy-making body of the ILO and its annual conference in Geneva is attended by delegates from all member states.\textsuperscript{63} These delegations comprise two government representatives, one employer representative and one employee representative.\textsuperscript{64}

The Governing Body performs the executive functions of the ILO.\textsuperscript{65} This body is made up of 56 members which include 28 government officials from member states, 14 from employer representatives and 14 from worker representatives.\textsuperscript{66} The executive body determines which matters are to be put on the agenda for the annual conference, manages the budget of the ILO and makes decisions on policies.\textsuperscript{67} The third body of the ILO is the International Labour Office which performs the day-to-day functions necessary to give effect to the mandate of the ILO.\textsuperscript{68} This is headed by the Director-General who is appointed by the Governing Body for a fixed period.\textsuperscript{69}

\textsuperscript{58} 2012 ILO-Flanders: Cooperation Results Review 2.
\textsuperscript{59} 2012 ILO-Flanders: Cooperation Results Review 2.
\textsuperscript{60} Preamble of the ILO Constitution of 1919; Roy and Kaye \textit{The International Labour Organization: A Handbook for Minorities and Indigenous Peoples} 4.
\textsuperscript{61} Van Niekerk \textit{et al} \textit{Law@Work} 20.
\textsuperscript{64} Van Niekerk \textit{et al} \textit{Law@Work} 20.
\textsuperscript{65} Anon 2011 http://rconline.undg.org.
\textsuperscript{66} Anon 2011 http://rconline.undg.org; Van Niekerk \textit{et al} \textit{Law@Work} 21.
\textsuperscript{67} Van Niekerk \textit{et al} \textit{Law@Work} 21.
\textsuperscript{68} Roy and Kaye \textit{The International Labour Organization: A Handbook for Minorities and Indigenous Peoples} 2; Van Niekerk \textit{et al} \textit{Law@Work} 21.
South Africa, which was known as the Union of South Africa, was also a signatory to the Treaty of the Versailles which established the ILO. However, during 1959-1994 South Africa was under the Apartheid regime and its membership was withdrawn from the ILO because of policies that were not in line with ILO labour standards. The labour laws and policies of the Apartheid regime were established based on race as a primary focus and also gender to some extent. Some of these polices included the oppression and non-recognition of black trade unions, the denial of basic labour rights to black workers and racial or gender-motivated policies. These labour laws provided favourable employment conditions for mostly white males (mostly) and females. However, during the year 1992, in the wake of the fall of the apartheid regime, the ILO conducted a Fact Finding and Conciliation Commission in South Africa. This commission was aimed at helping to improve the labour relations standards in South Africa in order to conform to the international labour standards based on decent work. Saley and Benjamin argue that the report and recommendations of the ILO led the Commission to the enactment of the Labour Relations Act 66 of 1994.


2.2 The role of the International Labour Organisation

The current primary goal of the ILO is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and

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70 Van Niekerk et al Law@Work 19.
71 Van Niekerk et al Law@Work 20.
72 Van Niekerk et al Law@Work 20.
73 Van Niekerk et al Law@Work 20.
75 Saley and Benjamin 1992 ILJ731.
76 Van Niekerk et al Law@Work 21.
77 Van Niekerk et al Law@Work 21.
human dignity. The implication is that ILO member states have an obligation to ensure the promotion of decent work within their local labour spheres. ILO member states meet at the ILC in June of each year in Geneva. The ILC establishes and adopts international labour standards and is a forum for discussion of key social and labour questions. The ILO provides services in some 140 countries in the areas of standards, fundamental principles and rights at work, employment, social protection and social dialogue in a wide range of areas. The ILO promotes dialogue and broad partnerships with national and international institutions in their elaboration, execution and monitoring, thus promoting decent work as a key development strategy. It must, however, be noted that the main ILO prerogative is the global promotion of labour standards based on decent work.

Furthermore, in order to help facilitate international labour standards the ILO has established Decent Work Country Programmes as the main vehicle for delivery of ILO support to countries. The Decent Work Country Programmes have two basic functions: promoting decent work as a key component of national development strategies and organising ILO knowledge, instruments, advocacy and cooperation at the service of tripartite constituents in a results-based framework to advance the Decent Work Agenda within the fields of comparative advantage of the Organisation.

### 2.3 The concept of Decent Work

The term decent work was first introduced by the former Director-General of the ILO, Mr Juan Somavia, during his address to the 87th International Labour Conference in 1999 Somavia defined decent work as:

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78 Report of the Director General: Decent Work international Labour Conference 87th Session 1999 International Labour Office Geneva; Musabayana and van Vuuren “Unpacking the Idea of Decent Work”.
79 Musabayana and van Vuuren "Unpacking the Idea of Decent Work”.
81 Diez de Medin “ILO Decent Work Agenda” 1-2.
82 Cohen and Moodley 2012 PER 333; see also Musabayana and van Vuuren 2012 "Unpacking the Idea of Decent Work."
83 Cohen and Moodley 2012 PER 320.
84 2012 ILO-Flanders: Cooperation Results Overview 3.
85 Musabayana and van Vuuren "Unpacking the Idea of Decent Work."
Productive work in which rights are protected, which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have access to income earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers’ rights and sound standards.\(^{86}\)

Decent work can hence be defined as the promotion of productive work for women and men in conditions of freedom, equality, security and human dignity.\(^{87}\) Decent work sums up the aspirations of people in their working lives and this includes their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality.\(^{88}\) The definition of decent work implies that decent work can also expand beyond the labour field.

### 2.4 The strategic objectives of Decent Work

The concept of decent work has four basic strategic objectives. These objectives include the promotion of fundamental rights at work, creation of employment opportunities for both men and women, enhancement of social protection and strengthening of tripartism and social dialogue.\(^{89}\) These objectives hold for all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in their home or in the community.\(^{90}\)

#### 2.4.1 Promotion of fundamental rights in the workplace

One of the objectives of decent work internationally and at local level is to promote fundamental rights of workers within the workplace.\(^{91}\) This generally involves the recognition and respect for the rights of all workers.\(^{92}\) The *ILO Declaration on Fundamental Principles and Rights at Work*, adopted in June 1998, highlights a set of core labour principles endorsed by the international community.\(^{93}\) These include respect
for freedom of association, right to collective bargaining, elimination of forced labour, respect for human dignity in the workplace, equality, abolition of forced labour and other essential human rights that are affected within the workplace.\textsuperscript{94} The Declaration affirms that all member states regardless of whether they have or not ratified the core Conventions, have an obligation to promote and to realize the principles concerning the fundamental rights which are the subject of those Conventions.\textsuperscript{95} \textit{ILO Declaration on Fundamental Principles and Rights at Work}, places emphasis on four fundamental areas namely freedom of association, forced labour, child labour and discrimination.\textsuperscript{96}

2.4.1.1 Freedom of association

Freedom of association entails the recognition of the right of all employers and all workers to voluntarily establish or join organisations for the promotion and defence of their occupational interests.\textsuperscript{97} Article 2 of \textit{Freedom of Association and the Right to Organise Convention 87} of 1948 guarantees both employers and employee freedom to form or join organizations of their choice.\textsuperscript{98} Charnovitz\textsuperscript{99} submits that the fundamental importance of freedom of association was further emphasized by the adoption of the \textit{ILO Declaration on Fundamental Principles and Rights at Work} in 1998 by the ILO. The implication is that the right to freedom of association is one of the core rights of workers all over the world and it is within the context of decent work that the ILO seeks to promote this right.

2.4.1.2 Forced labour

Forced or compulsory labour is any work or service that is exacted from any person under the threat of any penalty, and for which that person has not offered himself or herself voluntarily.\textsuperscript{100} Forced labour occurs where work or service is exacted from workers under threats of severe deprivations, such as withholding food, land or wages,

\begin{itemize}
\item \textsuperscript{94} \textit{ILO Declaration on Fundamental Principles and Rights at Work} 1998.
\item \textsuperscript{95} International Labour Office \textit{The Labour Principles of the United Nations Global} 9.
\item \textsuperscript{96} Annex 1 (2) of the \textit{ILO Declaration on Fundamental Principles and Rights at Work} 1998.
\item \textsuperscript{97} International Labour Office \textit{The Labour Principles of the United Nations} 15.
\item \textsuperscript{98} Article 2 of \textit{Freedom of Association and Protection of the Right to Organise Convention} 1948 (no.87).
\item \textsuperscript{99} Charnovitz 2008 \textit{AJIL} 90-127.
\item \textsuperscript{100} Article 2 of \textit{Forced Labour Convention}, 1930 (No. 29)
\end{itemize}
physical violence or sexual abuse, restricting people’s movements or locking them up.\textsuperscript{101}

It is argued that, labour should not be forcibly imposed on anyone and a labourer is free to leave any employment subject to giving notice within a reasonable time.\textsuperscript{102} The ILO seeks to promote decent work by advocating effective national laws, stronger enforcement mechanisms such as legal sanctions and vigorous prosecution against those who exploit workers through forced labour.\textsuperscript{103}

2.4.1.3 Child labour

Child labour is defined as work that deprives children of their childhood, dignity, potential and is harmful to their physical health.\textsuperscript{104} Article 2 (3) of the Minimum Age Convention 138 of 1978 provides that a minimum age for admission to employment or work that must not be less than the age for completing compulsory schooling and in any case not less than 15 years.\textsuperscript{105} The implication is that children below the age of 15 should not be employed. Furthermore, article 3 of the Worst Forms of Child Labour Convention 182 of 1999 provides a list of worst forms of child labour. The list includes involving children in slavery, procuring or offering of a child for prostitution, for the production of pornography, the use of children in procuring or selling drugs and work likely to threaten or endanger the wellbeing of a child.\textsuperscript{106} It is submitted that child labour is a violation of the rights of children.\textsuperscript{107} It is submitted that it is one of the goals of the ILO decent work to eliminate child labour as it constitutes a violation of human rights in the workplace.

2.4.1.4 Discrimination

Discrimination in the workplaces comes in different forms, and it can be based on race or gender or any other grounds.\textsuperscript{108} With regards to gender, inequality between women and men persists in global labour markets in respect of opportunities, treatment and

\textsuperscript{101} International Labour Office \textit{The Labour Principles of the United Nations} 21.
\textsuperscript{102} International Labour Office \textit{The Labour Principles of the United Nations} 21.
\textsuperscript{103} The ILO at a Glance 2007 \url{http://www.ilo.org} 10.
\textsuperscript{104} Srivastava 2011 \textit{Industrial Psychiatry Journal} 1.
\textsuperscript{105} Article 2 (3) \textit{Minimum Age Convention} 1978 (No.138).
\textsuperscript{106} Article 3 of the \textit{Worst Forms of Child Labour Convention} 1999 (no. 182).
\textsuperscript{107} International Labour Office \textit{The Labour Principles of the United Nations} 28.
\textsuperscript{108} Cooper 2009 \textit{SAJHR} 578.
outcomes. As such the ILO established a mandate to ensure the promotion of equal treatment and opportunity for both men and women within the global workforce, which is the focus of this research. The four key ILO gender equality Conventions are the Equal Remuneration Convention 100 of 1951, Discrimination (Employment and Occupation) Convention 111 of 1958, Workers with Family Responsibilities Convention 156 of 1981 and Maternity Protection Convention 183 of 2000. These conventions are aimed at ensuring equal treatment and opportunity for both men and women.

It is within the context of gender equality that Convention 156 was established specifically for providing for equal treatment and opportunity between man and women. Article 3 and 4 of the Convention 156 both provides for member states in their national policy to provide for equal treatment and opportunities for both men and women in employment and take measures to effect this aspect of equality. However, after decades of international and national efforts to eliminate discrimination in respect of gender, it is unfortunate that it still exists. It is hence submitted that the promotion of equal treatment and opportunity in respect of gender is one of the goals of decent work aimed at eliminating discrimination within the workplace.

2.4.2 Creation of decent employment opportunities

The other strategic goal of decent work is thus to create greater opportunities for women and men to secure decent employment. This involves the promotion of an economy that generates opportunity for investments, job creation skills development and sustainable livelihoods. At the same time this economic system should create a working environment that is accommodative to both men and women. The ILO Declaration on Fundamental Principles and Rights at Work 1998, has the elimination of discrimination in respect of employment and occupation as one of the core labour

109 Addati Women at Work xi.
111 Hereinafter Convention 156.
112 ILO: Gender Equality at the Heart of Decent Work http://www.ilo.org/wcmsp5 1.
113 Article 3 and 4 of Workers with Family Responsibilities Convention 156 of 1981
114 ILO: Gender Equality at the Heart of Decent Work http://www.ilo.org/wcmsp5 1.
115 Cohen and Moodley 2012 PER 320.
116 Hall Promoting Decent Work in Old Age Africa 2.
principles.\textsuperscript{117} In this regard, in as much as there is a need to create decent employment opportunities, these should be equally available to both men and women. At the same time, there should be equal treatment of both men and women within employment.

\textbf{2.4.3 Enhancement of social protection}

Social protection is defined as the protection that society provides against economic and social problems that would otherwise arise due to the reduction or termination of earnings due to maternity, old age and unemployment.\textsuperscript{118} Kapendi\textsuperscript{119} holds that social protection is the broader concept which also covers social security. Social security is important for poverty prevention, as it ensures a basic minimum standard of living for people and contributes to achieving a more equitable income distribution in society.\textsuperscript{120} This decent work objective is broad and covers both men and women. What can be noted is that social protection aims to protect both men and women against the negative impacts of poverty during and after their course of employment. The focus on gender in this aspect entails that both men and women must have access to better-managed and more gender equitable social security and health benefits.\textsuperscript{121} There is a need to enhance social protection in respect of gender because the gender gap in employment and job quality has led to women having limited access to employment-related social protection.\textsuperscript{122}

\textbf{2.4.4 Strengthening tripartism and social dialogue}

Strengthening tripartism and social dialogue is a process that involves the co-operation of parties with sufficient interest in the labour market.\textsuperscript{123} Social dialogue refers to meaningful and deliberate consultations among Government, employers’ and workers’ representatives.\textsuperscript{124} The ILO also includes other civil social representatives as part of the

\begin{thebibliography}{99}
\bibitem{117} ILO Declaration on Fundamental Principles and Rights at Work 1998; Musabayana and Vic van Vuuren "Unpacking the Idea of Decent Work"
\bibitem{118} ILO 2007 www.ilo.org 17.
\bibitem{119} Kapindu 2011 African Human Rights Law Journal 98
\bibitem{120} Triegaardt 2006 http://www.dbsa.org 1.
\bibitem{121} Musabayana and van Vuuren"Unpacking the Idea of Decent Work".
\bibitem{122} Addati \textit{et al} Women at Work xvii.
\bibitem{123} Cohen and Moodley 2012 \textit{PER} 320.
\bibitem{124} Cohen and Moodley 2012 \textit{PER} 320; see also Ministry of Labour and Small Enterprises Development 2007 http://www.molsmed.gov.tt.
\end{thebibliography}
social dialogue. This is an essential ongoing process used to achieve conflict resolution, social equity and effective policy implementation. Involving strong and independent workers’ and employers’ organizations is central to increasing productivity, avoiding disputes at work and building cohesive societies. The importance of this arrangement is that labour market institutions and capacitated social partners contribute to effective social dialogue and sound industrial relations.

2.5 Decent Work in South Africa

South Africa being a member of the ILO has an obligation to promote decent work within its local labour market. South Africa’s first Decent Work Country Programme was launched on 29 September 2010. The priorities for the SA DWCP give effect to the protection of fundamental rights and freedoms guaranteed to all citizens under the Bill of Rights in the South African Constitution. The priorities of the SA DWCP are similar to the key strategic goals of the decent work concept. These include promotion of employment, Strengthening Fundamental Principles and rights at work and strengthening of social protection, strengthening tri-partism plus social dialogue. It can be argued that the SA DWCP basically ratified the strategic goals of the Decent Work Agenda and applied them in the South African Labour environment in line with the legal system of South Africa that is subject to the Constitution. This is in line with the Constitution in that it provides for the protection of labour and organisational rights in section 23. In context of strengthening social protection, the Constitution provides for the right to social security in section 27 (1) (c).

125 Moore 2014 Globalisation 319.
128 Musabayana and van Vuuren "Unpacking the Idea of Decent Work".
129 Van Niekerk et al Law@Work 20.
130 Hereinafter SA DWCP.
131 Musabayana and van Vuuren "Unpacking the Idea of Decent Work".
132 Musabayana and van Vuuren "Unpacking the Idea of Decent Work".
133 See section 23 of the Constitution.
134 Section 27 (1) (c) of the Constitution.
2.6 The promotion of equal treatment and opportunity in the workplace in respect of gender

The concept of decent work as established by the ILO covers the majority of labour issues within the concept. Gender equality is one of the primary foci of decent work since the workplace is an important site of the struggle for equality. Gender refers to the socially constructed roles and responsibilities connected to being male or female in a particular society. The primary focus of this research is the promotion of equal treatment and opportunity in the workplace within South Africa. One of the strategic goals of the Decent Work Agenda is to promote working opportunities for both men and women based on equality. Equality in this context denotes a situation where the labour environment promotes equal treatment and opportunities in the workplace for both men and women. This is derived from the fact that women are usually treated differently than men based on gender. This has created a labour gap between male and female employees where men are favoured by the labour markets in terms of remuneration and employment opportunities. Peace, prosperity and social justice depend on the achievement of substantive equality between women and men. In this regard, it is essential to expand on the concepts of equal treatment and equal opportunities in the context of decent work.

2.6.1 Equality as the core principle

At the centre of the idea of equal treatment and opportunities in employment, is the concept of equality. The concept of equality is a global fundamental principle both in the workplace and outside the workplace. Internationally, equality is understood as

135 Fergus and Collier 2014 SAJHR 484.
136 Ranchod MMSDSA: Gender and the Workplace 8.
137 Hepple 2001 International Labour Review 5.
138 Addati Women at Work xviii; World Economic Forum Gender Gap Report 2013 http://www3.weforum.org... women earn up to an estimated 33% less than their male counterparts doing the same work in the overall labour market; SADC Gender Protocol 2015 Barometer South Africa http://www.genderlinks.org.za 70...it is estimated only 23 percent of women participate in economic decision making process compared to 77 percent men
139 Addati 2016 Women at Work 1.
preventing discrimination on the grounds of race, gender or other 'statuses'. Equality in the South African context means the equal enjoyment of the rights and freedoms guaranteed by the *Constitution* in the Bill of Rights. Equality in the labour market is characterised by equal access to opportunities for professional work, career advancement and equal representation of all different types of people within the labour market. However, Fredman argues that, although we have an intuitive grasp of the meaning of equality and what it entails, the more closely we examine it, the more its meaning shifts. The implication here is that the definition of equality is not certain but it can be established in the context it is being used. The two notions of equality that have been established are formal and substantive equality. These notions approach the concept of equality in different ways.

Formal equality as consistency requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race, or gender. Formal equality further assumes that all persons are equal bearers of rights and responsibilities, without being concerned with institutionalised, structural differences in equality. It tends to reinforce and entrench rather than eliminate inequalities by ignoring actual social and economic disparities between individuals and groups in society. A formal approach to equality therefore only requires equal application of the law without further examination of the particular circumstances or context of the individual or group and consequently, the content and the potential discriminatory impact of the law and/or policy under review.

The notion of formal equality has, however, been criticised on various grounds. It has been argued that formal equality fails to recognise that society is broad and complex,

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140 Fredman 2009 *SAHJR* 427; see also Smith 2014 *AHRLJ* 611; status refers to marital status (section 9 of the *Constitution*), health status (Hausmann et al 2008 *Med Care* 907), socio-economic status (Wade and Smith 2010 *Majority Rule and Minority Rights Issue Briefs* 3-6).
141 Wessels 2005 *Politiea* 139; see also Chapter 2 of the *Constitution*.
142 Zulu 2003 *SAJHE* 98.
143 Fredman *Discrimination law* 1.
145 Smith 2014 *AHRLJ* 611.
146 Wessels 2005 *Politiea* 129.
148 Smith 2014 *AHRLJ* 612.
involving different people, cultures and other variables. Fraser notes that, by abstracting individuals from their social and cultural context, they become by default conceptualised and treated as being in the same position as those in the privileged groups. This is not the true position because people are actually different and should be viewed in different perspectives that do not constitute a form of inequality. In other words implying that people are similar undermines the reality of diversity within the society and the recognition of previously disadvantaged groups. These and other critiques of the concept of formal equality have led to the acceptance of the idea of substantive equality.

Substantive equality approaches the concept of equality differently from formal equality. Substantive equality necessitates the acknowledgement and eradication of the actual social and economic conditions that generate inequality. This is an indication that substantive equality recognises the different condition or circumstances of different people within society. Substantive equality accepts that true or actual equality can be attained through legislative and other measures designed to actively remove the social barriers encountered by those persons or categories historically disadvantaged by unfair discrimination. In the economic sense, taking gender into perspective, substantive equality requires ensuring that women are granted socio-economic rights on equal terms with men. This then entails that substantive approach to equality, orients the right to equality from a negatively-oriented right of non-discrimination to a positively-oriented right to substantive equality. This is achieved by ensuring that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating people’s differences. Therefore, substantive equality is the accepted approach to equality and its application can be extended to the workplace where gender equality is still a persisting problem.

149 Smith 2014 AHRLJ 612.
150 Fraser "From Individual to Group"102-103.
151 Flax "Beyond equality: Gender, Justice and Difference" 40; see also Smith 2014 AHRLJ 612.
152 Wessels 2005 Politeia 129.
153 van Zyl 2011 HR Future 39.
154 Fredman 2009 SAJHR 411.
156 Smith 2014 AHRLJ 613.
2.6.2 Equal treatment in the workplace for men and women

The concept of equal treatment is broad enough to encompass a variety of other grounds such as disability, sexual orientation and many others. As such, the focus here is on the concept of equal treatment in the workplace based on gender. The reason is that despite improvements in terms of equality in the workplace, the majority of women workers still toil in sex-segregated, poorly-paid, dead-end jobs. The concept of equality in the workplace presupposes fair treatment for both men and women of different races in the labour market. The implication is that employers should not arbitrarily favour men as both genders are similarly situated. This is often seen in situations where women at the same level as men in the workplace get lower wages than their male counterparts. What can be derived from this is that women and men performing the same function in the workplace should be treated the same. It would be unfair where gender is used to treat women less favourably than man. For substantive gender equality at work to be achieved, it is essential that societies recognize that both women and men have a right and responsibility to work and care. As such, this calls for equal treatment for both men and women in the workplace.

2.6.3 Equal opportunity for both men and women in the workplace

Another way of characterizing substantive equality is in terms of equal opportunity for both genders. The use of this concept does not make it clear whether the promotion of equality of opportunity is a narrow procedural obligation or a broader substantive one. The procedural view involves the removal of barriers or obstacles, such as word-of-mouth recruitment or non-job-related selection criteria. Some of the barriers to equal opportunities include selection practices that exclude women and making certain

158 Steyn and Jackson 2014 SAJEMS 190.
159 Hassberg 1992 Buffalo Law Review 219; see also Reed v. Reed, 404 U.S. 71 (1971)
161 Addati Women at Work xx.
top management positions available to men only. The goal here is to ensure that women with relevant qualifications and abilities to perform the job in question should be afforded the same employment opportunities as men. Equal employment opportunity within the South African labour law context is shown to be a means of achieving 'full and equal enjoyment of all rights and freedoms' as stated in section 9(2) of the Constitution.

2.7 Conclusion

The ILO has established the concept of decent work as a means to provide working environments that are accommodative to all employees. This concept of decent work is broad enough to cover all facets of the labour field. It is, however, important to acknowledge that the issue of gender equality in the workplace is also a main focus within decent work. Central to gender equality is the issue of the promotion of equal treatment of and opportunities for both men and women in the workplace. What has been established in this chapter is that this issue generally calls for the recognition of women employees within the economic setup and the implementation of fair labour practices in respect of gender. This is because this recognition of women within the labour market is a problem not only in South Africa but also on a global level. It should, however, be noted that South Africa has labour legislation that has been established for the sole purpose of encouraging equality in the workplace. This legislative framework is discussed in the following chapter.


166 Wessels 2005 Politeia 127; see also section 9 of the Constitution.
Chapter 3 Equal treatment and opportunity in South Africa: Legislative framework

3.1 Introduction

Decent work demands the elimination of gender inequalities and the creation of conditions in which all women can fully exercise their economic citizenship. Various statutory and legislative measures have been enacted aimed at promoting the decent work ideal of equal treatment and opportunity in the workforce. The statutory and legislative framework that focuses on equal treatment and opportunity in the workplace includes the Constitution of the Republic of South Africa 1996, Labour Relations Act 66 of 1995, Employment Equity Act 55 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Basic Conditions of Employment Act 75 of 1997. Kok argues that these legislative initiatives are intended to reduce social and economic disparities between demographic groups and to transform the 'hearts and minds' of South Africans. This chapter deals with the South African legislative framework that provides for equal treatment and opportunity in the workforce based on gender. Challenges in the implementation of the statutory and legislative framework and achievement of equal treatment and opportunity based on gender will also be discussed.

3.2 Constitutional perspective on equal treatment and opportunity in South Africa

At the helm of labour legislation and any other legal policy in South Africa is the Constitution. The Constitution forms the basis of the legal order due to its supremacy over any other legislation or policy. The supremacy of the Constitution in South Africa can be traced back to the historical development of the Constitution in South Africa. Prior to the 1990s, the South African labour law framework was guided by the notion of

167 Aranda and Conte "Advancing Gender Equality in the Context of Decent Work" i.
169 Including the amendments.
171 Section 2 of the Constitution; see also McGregor 2011 SA Merc LJ 488.
state sovereignty and absolute respect for domestic jurisdiction. The supremacy of the apartheid state led to the denial of basic human rights in all legal facets and racial discrimination dominated, even in the labour market. The 1993 and 1996 Constitutions ushered in a new era characterised by the supremacy of the Constitution and hence the establishment of a democratic state. However, the new democratic state inherited a deeply-divided society with profound disparities in socio-economic wellbeing across racial groups. This discrimination went beyond race, as women were also marginalised. Women became vulnerable to chronic stressors that included lack of access to equal employment opportunities and treatment within the workplace, poor standards of living and educational status. Within the labour context, the Constitution provides for the right to equality and to fair labour practices in order to counter the effects of past discriminatory labour practices against women.

The inherited legacy of the past, particularly for women, includes oppression and discrimination based on gender. The Constitution recognises the extent to which disadvantage attaches to race, gender and other group characteristics. South Africa adopted a democratic constitutional order under which a commitment was made to achieve equality by embracing the same as a value. Section 9 of the Constitution provides that everyone has the right to equality and equal protection of the law. Furthermore, the Constitution provides for grounds of unfair discrimination and amongst the grounds constituting unfair discrimination is gender. Liebenberg and O’Sullivan argue that the purpose of the equality clause is to improve the position of disadvantaged groups, not to perpetuate the privileged position of relatively advantaged groups. The implication here is that the law recognises that both male and

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172 Dugard 1997 EJIL 77.
174 Dugard 1997 EJIL 77.
177 See section 9 of the Constitution.
178 See section 23 of the Constitution.
180 Fergus and Collier 2014 SAJHR 484.
182 Section 9 of the Constitution.
183 Section 9 (3) Constitution.
184 Liebenberg and O’Sullivan 2001 Acta Juridica 89.
female employees are equal before the law. There is an obligation on employers to ensure that there are equal treatment and opportunities for both male and female employees within the workplace.

In Harksen v Lane NO and Others, the Constitutional Court dealt with the violation of the right to equality. The court held that the right to equality is violated where there is unequal treatment of people based on a criterion that was previously used to discriminate people during the apartheid era. The court hence established a three-stage test to be used to determine whether there was unfair discrimination or not. The first part of the test is to establish whether there was differentiation between people. If there was no differentiation then there was no discrimination. If there was differentiation, the next step was to determine whether the discrimination was based on a "listed ground". Listed grounds included race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, origin, age, disability, religion, conscience, culture, language and birth. Discrimination based on a listed ground would result in the conduct of the employer constituting unfair discrimination. However, if the discrimination was not based on any listed ground, the next step would be to determine whether the conduct impaired the fundamental dignity of persons as human beings or to affect them adversely in a comparatively serious manner.

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185 Harksen v Lane NO and Others 1998 (1) SA 300 (CC).
186 Harksen v Lane NO and Others (1997) 11 BCLR 1489 (CC) at para 49
187 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 54; Hoffman v South African Airways, [2000]21 ILJ 2357 (CC) para 27.
188 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 54
189 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 54; Van Wyk et al 2013 Without Prejudice 14.
190 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 54.
191 Section 9 (3) of the Constitution.
192 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 54.
193 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 50-54; see also In Stoje v University of KZN [2007] 3 BLLR 246 (LC)... the court explained that differentiation, which impairs the fundamental dignity of human being because of attributes or characteristics attached to them, is discriminatory. However, "not every attribute or characteristic qualifies for protection against discrimination". What distinguishes unfair discrimination from mere differentiation is that with regards to discrimination, "the element of injustice arising from oppression, exploitation, marginalisation, powerless, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes..."qualifies certain groups as being worthy of protection.
manner) then the third part of the test should be applied. The implication here is that a justified conduct of discrimination does not amount to unfair discrimination. This test can be applied to establish whether there was unfair discrimination in the workplace where gender is in question.

Smith supports the notion that in section 9 the Constitution incorporates the notion of substantive equality. Substantive equality recognises that instead of identical treatment of everyone and consistent application of the law without distinction or discrimination, individuals must be accounted for in terms of their substantive worth and duly recognised on account of their differences which are required to be tolerated and accommodated in a pluralistic democratic order. This notion recognises that opportunities are determined by individuals' social and historical status, including race and gender, as part of a group or groups. It is evident that the Constitution does not expressly provide for equal treatment and opportunity in the workforce, hence this aspect is covered within the scope of the right to equality and unfair discrimination in section 9. Henrico submits that the link between the notion of equality and discrimination is inexorable on account of the fact that prima facie discrimination is anathema to equality.

### 3.3 International law perspective

The Constitution also provides for the recognition of international law. Section 39 of the Constitution provides that when interpreting the Bill of Rights a court or tribunal must consider international law and foreign law may also be considered. There are a variety of international conventions that South Africa is a signatory to that promote equality between men and women. These include Discrimination (Employment and

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194 Harksen v Lane NO and Others 1998 (1) SA 300 (CC) para 50; Van Wyk et al 2013 Without Prejudice 14.
196 Henrico 2015 OBITER 278; President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) para 112... "We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth ... we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."
198 Henrico 2015 OBITER 284.
199 Section 39 (b) and (c) of Constitution.

CEDAW is generally regarded as the international bill of rights for women. This is one of the instruments that have been used to help counter and eradicate all forms of discrimination in society. Article 5 of CEDAW encourages all party states to modify the socio-economic and cultural patterns of conduct of men and women and to eliminate prejudices and practices which perpetuate discrimination on the basis of sex. Furthermore, article 2 of the CRC has urged states to prohibit gender discrimination and recognise the principle of equality. The ILO’s Convention 111 also has gender as one of the grounds that may constitutes discrimination. In these regards, discrimination is considered as the main factor that contribute to the impairing of equal treatment and opportunity in the workplace.

Articles 3 and 4 of the Convention 156 further encourage member states, in their national policies, to provide for equal treatment and opportunities for both men and women in employment. Application of such conventions can therefore be extended to the labour market to ensure equal treatment and opportunities in the workplace for

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202 Workers with Family Responsibilities Convention 156 of 1981 (Hereinafter Convention 156).
204 Budlender Gender Equality and Social Dialogue in South Africa 2.
206 Budlender Gender Equality and Social Dialogue in South Africa 1.
208 Article 5 of CEDAW of 1979
209 Article 2 of the CRC 1990.
210 Article 1 of Convention 111... the term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation
211 Article 1 of Convention 111.
212 Articles 3 and 4 of Workers with Family Responsibilities Convention, 1981 (No.156)
both men and women. The recognition of international law by the Constitution thus enables the application and further development of laws and policies that are aimed at promoting the decent work ideal of equal treatment and opportunities in the workplace in respect of gender.

The ILO’s Convention 100 specifically provides for equal remuneration for equal work.\(^{213}\) The preamble and article 2 of the convention indicate that the purpose of the convention is to address discrimination between men and women with regards to remuneration.\(^{214}\) Article 2 further places an obligation on ratifying member states to ensure the implementation of the notion of equal pay for equal value through appropriate mechanism.\(^{215}\) These appropriate mechanisms include national laws or regulation, legally established or recognised machinery for wage determination, collective agreements and or a combination of these.\(^{216}\) South Africa having ratified this convention in 2000 has an obligation to ensure the application and implementation of the notion of equal pay for equal value. It is argued that this one of the means in which the ILO is attempting to address the issue of discrimination based on gender.

However, for international law instruments to effectively apply in South Africa they have to be ratified and implemented. In Azapo v President of the Republic of South Africa,\(^{217}\) the court held that treaties or conventions not ratified by South Africa do not become law unless they were incorporated in South African law by legislative enactment. Section 231 (1) of the Constitution provides that for any international agreement to bind the Republic it has to be approved by resolution in both the National Assembly and National councils of provinces. Furthermore, such an agreement must be enacted into law by national legislation.\(^{218}\) This is in exception to international agreements that are technical, administrative or executive in nature.\(^{219}\) The implication is that if a convention is ratified but there is no national legislation that gives effect to it, such a convention is

\(^{213}\) Preamble of Convention 100.
\(^{214}\) Preamble and article 1 of Convention 100.
\(^{215}\) Article 2 of Convention 100.
\(^{216}\) Article 2 of Convention 100.
\(^{217}\) Azapo v President of the Republic of South Africa 1996 (4) SA 671 (CC) para 28.
\(^{218}\) Section 231 (4) of the Constitution.
\(^{219}\) Section 231 (3) of the Constitution.
of less or no legal consequence in South Africa. This is the major challenge that is faced in the implementation of international instruments in South Africa.

### 3.4 Legislative and other mechanisms for gender equality in South Africa

The *Constitution* also provides for enactment of legislation and other policies that further provide for equality. Section 9 (2) of the *Constitution* expressly provides for the enactment of other legislation that promotes equality (substantive equality). As such, other legislation was provided for that seeks to further promote the ideal of equal treatment and opportunity within the workforce. These include *Employment Equity Act* 55 of 1998, *Labour Relations Act* 66 of 1995, *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 and the *Basic Conditions of Employment Act* 75 of 1997. Machineries that also seek to promote equal treatment and opportunity for women in the workforce include *Women Empowerment and Gender Equality Bill*, *Commission for Gender Equality* and the *National Gender Machinery*. These statutory mechanisms, including the challenges associated with their application, will be discussed in the next part of this chapter.

#### 3.4.1 Employment Equity Act 55 of 1998

It can argued that the *EEA* is the main statute that regulates equality in the workplace. One of the main of the *EEA* aim is to promote proportionate representation of all groups at all levels of the workplace. Section 5 of the *EEA* provides that every employer must take steps to promote equality in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6(1) of the *EEA* further encourages all employers to prohibit unfair discrimination in any employment policy or practice on

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220 Section 9(2) of the *Constitution* provides that 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.
221 *Employment Equity Act* 55 of 1998 (Hereinafter *EEA*).
222 *Labour Relations Act* 66 of 1995 (Hereinafter *LRA*).
224 Preamble of the *EEA*...purpose of the EEA is to "promote the constitutional right to equality and the exercise of true democracy; eliminate unfair discrimination in employment; to redress the effects of discrimination;...give effect to the obligations of the Republic as a member of the International Labour Organisation; Budlender *Gender Equality and Social Dialogue in South Africa* 4
225 Section 5 of *EEA*. 

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'listed grounds'\textsuperscript{226} which include gender or any other 'arbitrary ground'. It is argued that the use of the term 'arbitrary ground' does not merely refer to the existence of unlisted grounds but must expand on or add to the meaning of unfair discrimination.\textsuperscript{227} Hence the implication is that employers may not rely on the fact that differentiation was based on an unlisted ground hence one can maintain that there is no discrimination.\textsuperscript{228}

Fergus and Collier\textsuperscript{229} argue that these sections accordingly regulate the behaviour of all employers, regardless of their designated status. Furthermore, the court in \textit{Piliso v Old Mutual Life Assurance Co (SA) Ltd}\textsuperscript{230} held that there is no doubt that employers are required to take steps in advance and to be proactive in the elimination and prevention of unfair discrimination. In other words, the \textit{EEA} imposes a duty on employers to pre-empt discrimination in their workplaces, rather than merely respond to it.\textsuperscript{231}

However, it can be argued that these sections are not implemented effectively in South Africa. Sections 5 and 6(1) of the \textit{EEA} clearly target or rather address "all employers" meaning that there is an obligation on every employer to ensure equal treatment and opportunity within the workplace. This is, however, not the situation on the ground as only designated employers as per affirmative action implement measures to ensure equal representation of gender within their workforce. This entails that there is a possibility that these sections are interpreted in respect of affirmative action's notion of designated employer or simply being overlooked.

Brassey\textsuperscript{232} submits that the \textit{EEA} is not concerned about the disadvantaged but racial representativeness, which focuses on organising groups in the workplace. He further contends that this type of demographic sorting cannot find justification in the

\footnotesize{\textsuperscript{226} Section 6 (1) of \textit{EEA}...No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.}

\footnotesize{\textsuperscript{227} Du Toit \textit{et al} \textit{Labour Relations Law} 680.}

\footnotesize{\textsuperscript{228} Van Wyk \textit{et al} \textit{Without Prejudice} 15.}

\footnotesize{\textsuperscript{229} Fergus and Collier 2014 \textit{SAJHR} 486-887.}

\footnotesize{\textsuperscript{230} \textit{Piliso v Old Mutual Life Assurance Co (SA) Ltd} 2007 28 ILJ 897 (LC) para 77.}

\footnotesize{\textsuperscript{231} Fergus and Collier 2014 \textit{SAJHR} 486-487.}

\footnotesize{\textsuperscript{232} Brassey 1998 \textit{ILJ} 1363.}
Constitution. It may be that the EEA is racially oriented and pays less attention to
gender or disability. Hepple further argues that the EEA has failed to achieve its
purpose of achieving equitable representation at all levels of the workforce in respect of
gender. This has been partly attributed to the fact that it relies on command and
control by under-resourced, under-trained labour inspectors. The other reason for
this failure is that the obligation to undertake affirmative action is placed solely on the
employer who has a wide and ill-defined discretion easily capable of manipulation.
Hence, the implementation of the EEA in the labour market to promote equal treatment
and opportunity for women in the workplace is flawed.

3.4.1.1 Affirmative action

The EEA also makes provision for affirmative action. Affirmative action is an important
vehicle in addressing equal treatment and opportunities in the workplace for both men
and women. It is important to note that the EEA expressly provides that affirmative
action does not amount to unfair discrimination. Section 15 of the EEA regards
affirmative action as measures designed to ensure that suitably qualified people from
designated groups have equal employment opportunities and are equitably represented
in the workforce of a designated employer. It can be noted from this definition of
affirmative action that it is aimed at designated groups and employers. The term
'designated groups' is broad enough to include women of all races. Designated
employers are include employers who employ fifty or more employees, employers with
a turnover that exceeds a relevant amount stipulated in schedule 4 of the EEA,
municipality, organ of state other than South African National Defence, National

233 Brassey 1998 ILJ 1363.
236 Hepple 2012 Reinventing Labour Law 17.
237 Section 6(2) of EEA.
238 Section 15 of the EEA.
239 Section 1 (b) EEA ...Designated groups include black people, women and people with disabilities...
240 Fergus and Collier 2014 SAJHR 490; see also Van Niekerk et al Law@Work 165; Hlongwane 2013
The Implementation of Affirmative Action within the Pretoria District of South African Police Services
11; section 16 of EEA.
Intelligence Agency, South African Secret Service and appointed designated employer in terms of a collective agreement.\textsuperscript{241}

Affirmative action measures must eradicate employment obstacles with a view of accommodating people from the previously disadvantaged groups which should result in a diverse workforce that is equitably represented at all levels.\textsuperscript{242} In \textit{Naidoo v Minister of Safety}\textsuperscript{243} the court held that:

\begin{quote}
The essence of affirmative action is to differentiate and to prefer a member of a designated group in order to promote and attain substantive equality. Its purpose is to redress the effects of past discrimination and to end discrimination, and by these means to promote equality.\textsuperscript{244}
\end{quote}

Equality in the workplace entails equal treatment and opportunities for women within the labour market. Affirmative action places an obligation on employers to ensure equal treatment and opportunities for both men and women in the workplace as women are part of the designated groups in terms of the \textit{EEA}.

Herman\textsuperscript{245} contends that affirmative action in South Africa is redressing inequalities between races while failing to deal with inequalities within races which is on the increase.\textsuperscript{246} Inequality within races entails unfair discrimination based on grounds such as gender. For instance, the labour market favours men more than women regardless of race. The sentiment here is that affirmative action is failing to address inequalities with regards to gender in the same way it is addressing racial inequalities. The limiting of affirmative action to designated employers entails the continued existence of unequal treatment and opportunity within the workplace. This is the case where employers are not regarded as designated employers. This may suggest that in trying to resolve the issue of equal treatment and opportunity within the workplace, affirmative action is also providing room for the existence of inequalities.

\begin{flushleft}
\textsuperscript{241} Section 1 of the \textit{EEA}.
\textsuperscript{242} Section 15 (2) (a) and (c) of \textit{EEA}.
\textsuperscript{243} \textit{Naidoo v Minister of Safety} 2013 (3) SA 486 (LC).
\textsuperscript{244} \textit{Naidoo v Minister of Safety} 2013 (3) SA 486 (LC) para 72.
\textsuperscript{245} Hermann \textit{The Naked Emperor: Why Affirmative Action Failed} 14-15.
\textsuperscript{246} Hermann \textit{The Naked Emperor: Why Affirmative Action Failed} 14-15.
\end{flushleft}
Louw\textsuperscript{247} is of the opinion that the \textit{EEA} is fundamentally unclear on how redressing past disadvantage would or can logically lead to ensuring the equitable representation of groups, and vice versa, in any context. Louw\textsuperscript{248} further argues there is no apparent link between the representation of any particular group (based on race or gender) and the redressing of past disadvantage suffered by such group. The \textit{EEA} does not explain such a link and neither have the courts.\textsuperscript{249} It is also submitted that there is no link between equality and representation.\textsuperscript{250} Malan\textsuperscript{251} emphasises that, instead of promoting equality, representivity creates systematic inequality, hence the submission that the idea of affirmative action is flawed. This is because:

Representivity denies minorities the organised spheres that they need as the infrastructure to stabilise and organise themselves. It affords such organised spheres exclusively to the majority. This ... is the effect of annexation and the homogenising effects of representivity. Representivity enables the majority to capture the organised spheres of the minorities. All organised spheres are therefore those of the majority, while owing to representivity there is nothing left for the minorities. The majority can use all these organised spheres to promote their interests and to deny the interests of the minorities. The minorities have none of this. In accordance with the representivity principle individual members of minority communities are present in all organised spheres, but once again in accordance with representivity they are but a small outnumbered minority in each. No organised sphere is theirs, where they can fully exercise community identity with their fellow community members and no organised sphere is under their control. In this way, representivity acts as a strategy of entrenching the totalitarian control of the majority – the tyranny of the majority – in the famous words of Alexis de Tocqueville.\textsuperscript{252}

Both Malan and Louw agree that there is a fundamental flaw in the understanding and application of affirmative action as provided by the \textit{EEA}. However, one may argue that the \textit{EEA} uses the concept of "equality" as drawn from the \textit{Constitution} and expands it in order to achieve equitable representation in the workplace, with regards to gender. The rationale behind this is that previously the labour market was male-dominated but the \textit{Constitution} ushered in a new era where women can also compete for the same positions that are male dominated as long as they are "suitably qualified".

\textsuperscript{247} Louw 2015 \textit{PER} 611.  
\textsuperscript{248} Louw 2015 \textit{PER} 611.  
\textsuperscript{249} Louw 2015 \textit{PER} 611.  
\textsuperscript{250} Louw 2015 \textit{PER} 611.  
\textsuperscript{251} Malan 2010 \textit{TSAR} 447.  
\textsuperscript{252} Malan 2010 \textit{TSAR} 447.
3.4.1.2 Code of Practice on Equal Pay/Remuneration for Work of Equal Value

The EEA was further amended to include the Code of Practice on Equal Pay/Remuneration for Work of Equal Value in 2015.\textsuperscript{253} This Code on Equal Pay provides guidelines to employers on how to effectively implement policies with regards to equal remuneration for employees.\textsuperscript{254} It can be argued that the purpose of the Code on Equal payment is to further help the elimination of workplace discrimination with regards to remuneration.\textsuperscript{255} This is also one area where women have been unfairly discriminated against because of their gender.\textsuperscript{256} This amendment also shows the dedication of the state to further promote equal treatment and opportunity in the workplace with regards to gender.

The Code on Equal Pay expressly provides that it applies to all employers and employees covered by the EEA.\textsuperscript{257} However, the EEA only covers designated employers.\textsuperscript{258} Taking this in context, it is submitted that the application of the Code on Equal Payment is limited. This is because employers who do meet the requirements of designated employer are hence excluded or not bound by this code. The result is that, they can continue to unfairly discriminate in their remuneration policies, in this case based on gender, without any legal consequences. Hence, it is argued that, there is need for a broader coverage with regards to employers and employees to ensure that there is no unfair gender discrimination with regards to remuneration. On the other hand, it can be argued that the notion of designated employers only applies as far as affirmative action is concerned. In this view, the Code on Equal Payment is inclusive of all employers.

\textsuperscript{254} Article 1 of Code on Equal Pay.
\textsuperscript{255} Article 2.3 of Code on Equal Pay.
\textsuperscript{256} See para 4.1
\textsuperscript{257} Article 2.2 of Code on Equal Pay.
\textsuperscript{258} Section 1 of the EEA.
3.4.2 Labour Relations Act 66 of 1995

The LRA set out to advance economic development, social justice, labour peace and the democritisation of the workplace. The LRA provides for grounds that constitute unfair discrimination in section 187(1) (f) with regards to dismissals. This section provides that the employer’s conduct constitutes unfair discrimination against the employee, directly or indirectly, including if it is based on race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility or any arbitrary ground. Notably, gender and sex are specifically mentioned grounds that constitute unfair discrimination as is done in other legislation that provides for equality in the workplace. In terms of the LRA the indication is that where the employer uses gender as a ground for dismissal where two employees are equally positioned, it may constitute unfair discrimination. Consequently, unfair discrimination hinders the decent ideal of the promotion of equal treatment and opportunities for women within the labour market.

3.4.3 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The PEPUDA was instituted to give effect to the equality provisions of the Constitution. The purpose of PEPUDA is to eliminate unfair discrimination against all people in all spheres of society. The PEPUDA also provides for dealing with unfair discrimination and the grounds for prohibition of unfair discrimination include gender. It is submitted that the PEPUDA has a broad scope of application that includes socio-economic aspects of society. From this, it can be argued that, even though the act might not expressly provide for workplace relationships it is applicable in labour matters. The equal treatment and opportunity ideal within the workplace is intrinsically

259 Section 1 of the LRA.
260 Section 187(1) (f) LRA.
261 EEA, PEPUDA
264 Section 7 and 8 of PEPUDA.
265 Liebenberg and O’Sullivan 2001 Acta Juridica 89.
linked to the idea of prohibition of unfair discrimination. As such, the PEPUDA can be reasonably used to promote this ideal.

One may argue that the application of PEPUDA in the workplace with regards to equal treatment and opportunity is far-fetched as is does not provide for labour relations. Henrico266 is of the opinion that PEPUDA aims at addressing unfair discrimination issues as they arise in sectors other than the workplace. In Strydom v Chiloane267, the court was of the opinion that PEPUDA does not apply to any person to whom the EEA applies. This implies that the application of PEPUDA in the workplace is limited or even non-existent. However, PEPUDA was enacted to give further effect to the right to equality and as such must be interpreted in line with Constitution.268 Considering that the concept of equality is broad enough to cover a wide range of equality issues in society, it can be argued that it also covers equal treatment and opportunity for women in the workplace.

3.4.4 Basic Conditions of Employment Act 75 of 1997

The main purpose of the BCEA is to advance economic development and social justice by establishing and enforcing basic conditions of employment.269 The BCEA provides for general work conditions and standards. These conditions and standards are regarded as fair for all employees.270 The conditions and standards entrenched in the BCEA should apply equally to every employee within the workplace regardless of gender. The BCEA does not expressly provide for equality in the workplace as its main focus is on employment conditions. The concept of social justice can, however, be expanded to include the notion equality. Chipkin and Gilbert271 state that “social justice” is associated with the idea that rights, benefits and burdens in the economic, political and social spheres should be allocated fairly. Shank272 further holds that social justice requirements go beyond legal equality to “economic equality”. Economic equality in

266 Henrico 2015 OBITER 279.
267 Strydom v Chiloane 2008 ILJ 607 (T) par 11; see also section 3 (1) PEPUDA.
268 Henrico 2015 OBITER 279; section 3 (1) of PEPUDA.
269 Section 2 of the BCEA.
270 Benjamin A Review of Labour Markets in South Africa 27.
respect of gender entail that women should also be afforded the same economic opportunity and treatment as men within the labour market.\textsuperscript{273} This may imply having equal access to top management level positions or equal pay for work of equal value.\textsuperscript{274} This implies that through the promotion of social justice (even it is though far-fetched), the BCEA indirectly promotes equality in an economic sense. Based on this, one may argue that equality in an economic sense may also include equal treatment and opportunity for both men and women in the workforce.

3.4.5 Women Empowerment and Gender Equality Bill

The existence of various pieces of legislation does not seem sufficient to promote equal treatment and opportunities for women in the workplace. As such the \textit{Women Empowerment and Gender Equality Bill} of 2013 was established primarily to focus on gender equality.\textsuperscript{275} The main purposes of the Gender Bill are to promote gender equality and employment of women.\textsuperscript{276} This Gender Bill focuses on economic empowerment, protection, gender mainstreaming, advancement and equal representation of women in decision making structures.\textsuperscript{277} Gender mainstreaming is an equality strategy that aims to integrate a gender perspective into policy making.\textsuperscript{278} The essence of gender mainstreaming entails identifying ways in which policies are biased towards men and seek ways to address the imbalance created as a result of this bias.\textsuperscript{279} This is one of mechanisms that the Gender Bill uses to reinforce the promotion of equality, where inequality is still prevalent within the workplace. This may indicate that the Bill has a wide scope of application that incorporates the promotion of equal treatment and opportunity for women in the workplace. However, it will only become effective once it is passed into law.

\textsuperscript{273} The Fawset Society 2015 http://www.fawcettsociety.org.uk.
\textsuperscript{274} The Fawset Society 2015 http://www.fawcettsociety.org.uk.
\textsuperscript{275} Preamble of \textit{Women Empowerment and Gender Equality Bill} published in Government Gazette No. 37005 of 6 November 2013 (hereinafter the \textit{Gender Bill}).
\textsuperscript{276} Preamble of \textit{Gender Bill}; Van Niekerk \textit{et al} Law@Work 180.
\textsuperscript{277} Section 3 of \textit{Gender Bill}; Van Niekerk \textit{et al} Law@Work 180.
\textsuperscript{278} Sadie 2005 \textit{Journal of Public Administration} 453.
\textsuperscript{279} Sadie 2005 \textit{Journal of Public Administration} 453.
3.4.6 Commission for Gender Equality

The Commission for Gender Equality\(^{280}\) is established under Chapter 9 of the Constitution. The commission is mandated to promote respect for gender equality and the promotion, development and attainment of gender equality.\(^{281}\) The main function of the Commission is the advancement of women’s empowerment and gender equality.\(^{282}\) Section 187 (2) of the Constitution provides that the Commission has power, as regulated by national legislation, where necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.\(^{283}\) The mandate of this institution is evidence of the commitment of the republic to eradicate all forms of gender inequality. It is submitted that the work of this commission can be extended to ensure the promotion of equal treatment and opportunity for women in the workplace.

3.4.7 National Gender Machinery

The National Gender Machinery is one of the institutions established to ensure effective implementation of gender equality in South Africa. This institution along with similar structures\(^{284}\) is tasked with ensuring that various strategies are put in place in order to promote women’s empowerment and gender equality.\(^{285}\) The National Office of the Status of Women, located within the Presidency, is the principal coordination structure for the National Gender Machinery on gender equality.\(^{286}\) The main functions of the National Office include constructing, developing and maintaining the national gender programme.\(^{287}\) It is submitted that the national gender programme is broad enough to cover all areas where women are affected and this may include the labour market. The implication is that there are probably structures specifically designed to promote gender equality in the workforce under the National Gender Machinery. The promotion of

\(^{280}\) Commission for Gender Equality (hereinafter the Commission)
\(^{281}\) Chapter 9 of the Constitution; Anon 2015 www.sahrc.org.za 29.
\(^{282}\) Selebogo and Ojakorotu 2013 Gender and Behaviour 5190.
\(^{283}\) Section 187 (2) of the Constitution.
\(^{284}\) Similar structures include Commission for Gender Equality, 18twenty8, Agenda Feminist Media, Businesswoman’s Association of South Africa and Progressive Women’s Movement of South Africa
\(^{285}\) Selebogo and Ojakorotu 2013 Gender and Behaviour 5189.
\(^{286}\) Selebogo and Ojakorotu 2013 Gender and Behaviour 5189.
\(^{287}\) Selebogo and Ojakorotu 2013 Gender and Behaviour 5189.
gender equality in the workforce may include the decent work ideal of equal treatment and opportunity for women in the workforce. Therefore, the National Gender Machinery could be an important structure for the promotion of equal treatment and opportunity for women in the workforce.

However, it has been established that lack of financial resources and adequately trained staff have been the main challenges confronting the work of the National Gender Machinery.\textsuperscript{288} It is argued that these financial challenges affect the efficiency not only of the National Gender Machinery functions but also other structures dedicated to gender equality. Consequently, gender inequality in all its forms will persist.

3.5 Conclusion

The decent work ideal of equal treatment and opportunity for women in the labour market seeks to achieve equal treatment of workers regardless of their gender. In South Africa the ideal of equal treatment and opportunity is covered by various statutes and legislation dealing with equality. The \textit{Constitution} being the supreme law in South Africa expressly provides for the right to equality and places an obligation on the state to enact legislation to that effect.\textsuperscript{289} Furthermore, it also provides for the recognition of applicable international law.\textsuperscript{290} International law, especially conventions, will only apply in South Africa if they are ratified\textsuperscript{291} and as long as they are consistent with the \textit{Constitution}.\textsuperscript{292} From this discussion, it appears that the South African labour law has a comprehensive system of legislation and other mechanisms to provide for labour rights, more specifically gender equality and the promotion thereof. The primary provisions promoting equality are anti-discrimination statutes and in certain societies, obligations to implement employment equity or affirmative action.\textsuperscript{293} The statutory and legislative framework also provides for various machineries that promotes gender equality. The scope of whose scope of application of these machineries may also encompass the promotion of equal treatment and opportunity for women in the workforce.

\begin{thebibliography}{99}
  \bibitem{288} Geisler, Mokgope and Svanemyr 2009 \texttt{http://www.afdb.org.za}.
  \bibitem{289} Section 9 of the \textit{Constitution}.
  \bibitem{290} Section 39 and 232 of the \textit{Constitution}.
  \bibitem{291} Section 231 of the \textit{Constitution}.
  \bibitem{292} Section 232 of the \textit{Constitution}.
  \bibitem{293} Benjamin \textit{A Review of Labour Markets in South Africa} 4.
\end{thebibliography}
In this chapter, it has also been established that there are various challenges, especially in the implementation of the statutory and legislative frameworks that provide for equality. It has been submitted that some equality legislation is fundamentally flawed such as the EEA and others like the PEPUDA. For instance, the EEA’s affirmative action plan has not been implemented and monitored effectively. On the other hand the PEPUDA does not expressly provide for workplace law. However, the equality provision emanating from the Constitution is broad enough to encompass all aspects of equality including equal treatment and opportunity for women in the workplace. The fact that there are challenges in the implementation of the statutory and legislative framework is evidence that equality in the workforce has not yet been achieved. At the same time, it is justifiable to conclude that there is room for further improvement in as much as gender equality in the workplace is concerned in respect of the promotion of equal treatment and opportunity. The areas in which women are being unfairly discriminated against in the workplace will further be discussed in the following chapter.

294 Brassey 1998 ILJ 1363; see also Hepple 2012 Reinventing Labour Law 17.
296 Strydom v Chiloane 2008 ILJ 607 (T) par 11.
Chapter 4 Forms of inequality in the workplace based on gender

4.1 Introduction

Apartheid and 'patriarchy' led to laws resulting in systemic, structural discrimination and inequality in South Africa based on race and gender. Within the labour market, this resulted in the establishment of various forms of inequalities not only based on race but also on gender. Booysen and Nkomo further argue that, despite South Africa transforming into a democratic state, the labour market still closely resembles the apartheid labour market in respect of gender. Parcheta et al hold that on a global level, the labour force is 52 per cent male and 48 per cent female. This is a clear indication that women are almost equally represented within the labour market. However, women have not benefitted from formal work opportunities, especially when it comes to the gender pay gap and access to top management positions. This chapter focuses on the forms of inequality within the workplace that show that women are not afforded equal treatment and opportunities as are their male counterparts. At the same time, factors that can be attributed to the existence of these forms of inequality are discussed.

4.2 Gender pay gap inequality

The notion of 'remuneration' is defined rather widely to include the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment. Equal treatment and opportunity in the workforce would demand equal pay for workers at the same level and performing the same task regardless of gender. This is not, however, the situation on the ground within the South

297 Patriarchy is a socially constructed system that is male-identified, male-controlled, male centred and values masculinity traits over feminine traits (Becker University of Chicago Legal Forum 25).
302 Section 35 of the BCEA; see also McGregor 2011 SA Merc LJ 488.
African workforce. Bhorat\textsuperscript{303} argues that high levels of income inequality remain a key feature of the post-apartheid labour market. Unfair discrimination occurs when people with the same qualification and work experience have different pay levels but perform the same work.\textsuperscript{304} Addati \textit{et al}\textsuperscript{305} contend that, on a global scale, closing the gender pay gap will take an estimated seventy years considering the current labour market trends. It can be argued that the implication of this submission is worse for African countries whose labour markets are still developing and overcrowded.

Globally, the gender wage gap is estimated to be at 23 per cent.\textsuperscript{306} In South Africa, women earn up to an estimated 33 per cent less than their male counterparts doing the same work in the overall labour market.\textsuperscript{307} The gender pay gap varies within labour sectors which include the public sector, private sector and other sectors. It also varies by sector, occupation and over time.\textsuperscript{308} In the public sector, the wage gap is 27 per cent whereas in the private sector it is 35 per cent.\textsuperscript{309} In sectors such as trade, transport and hospitality the wage-gap is 24 per cent.\textsuperscript{310} In commercial services, agriculture, manufacturing and building, the pay gap is at 3 per cent.\textsuperscript{311} These statistics are an indication that gender pay gap discrimination is prevalent within the South African labour market. It is higher in the private sector compared to the public sector.

4.2.1 Equal pay for equal work

The gender pay gap is associated with the concept of equal pay for equal work. In terms of the equal pay for equal work concept, discrimination occurs when work of similar value is performed by two different people but differences in remuneration are directly or indirectly based on the grounds of unfair discrimination which includes

\begin{itemize}
  \item \textsuperscript{303} Bhorat 2004 \textit{South African Journal of Economics} 954-977.
  \item \textsuperscript{304} Anon http://download.ei-ie.org/ 2.
  \item \textsuperscript{305} Addati \textit{et al Women at Work} xvi.
  \item \textsuperscript{306} Addati \textit{et al Women at Work} 28.
  \item \textsuperscript{308} Orr and Van Meelis \textit{Bargaining Indicators} 2014 46.
  \item \textsuperscript{309} Burmeister 2014 http://www.skillsportal.co.za; Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1069.
  \item \textsuperscript{310} Burmeister 2014 http://www.skillsportal.co.za.
  \item \textsuperscript{311} Burmeister 2014 http://www.skillsportal.co.za.
\end{itemize}
gender. In Louw v Golden Arrow Bus Services (Pty) Ltd, the Court held that fairness requires that people be paid equally for equal work and analogously, that work of equal value should receive equal pay. The court further established that, even though these principles are not enshrined in the unfair labour practice definition, they are principles of justice, equity and logic, which may be taken into account when considering whether an unfair labour practice occurred. The implication is that the gender pay gap that exists where people are performing the same work of equal value is an unfair labour practice.

The court also dealt with the issue of equal pay for equal work in the Mangena case. In Mangena and Others v Fila South Africa (Pty) Ltd and Others, the court established that the EEA does not provide explicitly for equal remuneration between genders. However, the court further held that the unfair discrimination provisions are wide enough to accommodate claims of equal pay for equal work. In interpreting the EEA, the court established that the issue of remuneration was an employment policy or practice as set out in sections 1 and 6(1) of the EEA. Furthermore, the PEPUDA states that failure to respect the principle of equal pay for equal work, a 'widespread' practice, is an 'unfair practice'.

4.2.1.1 Onus of proof

The Mangena and Ntai cases provided the steps with regards to establishing discrimination and also onus of proof. To establish a prima facie case that there was discrimination based on difference in remuneration, differentiation should be based on any of the listed grounds contained in section 6(1) of the EEA. Furthermore, to prove this differentiation the claimant must identify a comparator and prove such a person is

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313 Louw v Golden Arrow Bus Services (Pty) Ltd 2000 3 BLLR 311 (LC) para 25.
315 Mangena and Others v Fila South Africa (Pty) Ltd and Others 2009 12 BLLR 1224 (LC) para 5.
316 Mangena and Others v Fila South Africa (Pty) Ltd and Others 2009 12 BLLR 1224 (LC) para 5.
317 Mangena and Others v Fila South Africa (Pty) Ltd and Others 2009 12 BLLR 1224 (LC) para 5.
318 Mangena and Others v Fila South Africa (Pty) Ltd and Others 2009 12 BLLR 1224 (LC) para 5.
319 Section 29 (1) PEPUDA.
320 Mangena and Others v Fila South Africa (Pty) Ltd and Others 2009 12 BLLR 1224 (LC) para 6-7.
322 Ntai and Others v South African Breweries Ltd 2001 2 BLLR 186 (LC) para 2-5...claimants had to prove pay discrimination was based on race.
doing the same work at the same level but earning a higher salary.\(^{323}\) Lastly, the claimant is required to establish the causal link between the unequal treatment and the discrimination ground,\(^{324}\) in this instance gender. Where the claimant has managed to establish all this, the employer will now have the onus to prove that differentiation was fair.\(^{325}\) The indication is that the claimant has the onus to prove that there was unfair discrimination based on listed grounds, gender in this instance, then the onus shifts to the employer to prove the fairness of such conduct.

4.2.1.2 Justifiable grounds for differentiation of pay

There are, however, justifiable grounds for differentiation in gender pay gaps. These grounds include seniority or length of service, qualifications, ability or competence, work performance, additional recognition of scarce skills or market forces that place a premium on remuneration roles and any other factors that do not amount to unfair discrimination.\(^{326}\) Nel \textit{et al}\(^{327}\) argue that these justifications should be evaluated by generally acceptable means. The existence of these grounds entails that the employer fairly discriminated between two employees. This was also established in \textit{Bayete Security Holdings}\(^{328}\) where the court established that the discrimination in question was fair as it was based on level of expertise, experience, skills and responsibility.\(^{329}\) In \textit{Ntai and others v South African Breweries Ltd}\(^{330}\), the employer also explained that wide differences in pay gaps were as a result of a series of performance-related pay increments, the greater experience and length of service of the higher paid employees. The indication is that, where discrimination is alleged in terms of gender pay gap and these factors are in play, such differentiation can be allowed and is justified.

\textbf{References}

323 Mangena and Others \textit{v Fila South Africa (Pty) Ltd and Others} 2009 12 BLLR 1224 (LC) [2009] 12 BLLR 1224 (LC) para 6-7.
324 Mangena and Others \textit{v Fila South Africa (Pty) Ltd and Others} 2009 12 BLLR 1224 (LC) para 16.
325 Mangena and Others \textit{v Fila South Africa (Pty) Ltd and Others} 200912 BLLR 1224 (LC) at 122.
327 Nel \textit{et al} 2008 \textit{Human Resources Management} 38.
328 TGWU and Another \textit{v Bayete Security Holding} 1999 4 BLLR 401 (LC) para 7.
329 TGWU and Another \textit{v Bayete Security Holding} 1999 4 BLLR 401 (LC)
330 Ntai and Others \textit{v South African Breweries Ltd} 2001 2 BLLR 186 (LC)
4.2.2 Factors affecting gender pay gap

The existence of the gender pay gap that has affected the decent work ideal of equal treatment and opportunity in the workplace, is attributed to various factors.

4.2.2.1 Career breaks

Addati et al\(^{331}\) argues that one of the factors affecting gender pay gaps is the issue of women taking career breaks. Career breaks with regards to women occur when a woman is forced to stop working because of various reasons such as the need to attend to additional care requirements, especially after giving birth.\(^{332}\) Women who re-join the labour force full-time or working only part-time after career breaks, are confronted with lower wages than their male colleagues who did not take breaks.\(^{333}\) This even extends to women who are not yet mothers as they are regarded as 'potential mothers or care givers'.\(^{334}\) Where productivity of a female employee will be affected by a career break as a result of giving birth or leave for child care (where the costs of determining whether a particular male or female applicant is more productive are high), an employer averting such a risk will offer a lower wage to the female employee.\(^{335}\) In other words, employers are not guaranteed uninterrupted service by the female employee, whereas male employees are certain to remain in service. This results in employers offering male employees higher wages compared to their female employees.\(^{336}\) It is submitted that where this occurs, the employer would have failed to recognise the rights of the female employees as they are provided by the BCEA. The existence of such practices within the workforce further proves that equal treatment and opportunity are not guaranteed for female employees.

4.2.2.2 Undervaluing work performed by women

The gender pay gap can also result from the employers’ perceptions of work performed by women. If employers perceive men to be more productive than women employees

\(^{331}\) Addati et al Women at Work xvi.
\(^{332}\) Addati et al Women at Work xvi.
\(^{333}\) Anon http://download.ei-ie.org/ 3.
\(^{334}\) Anon http://download.ei-ie.org/ 3.
\(^{335}\) Bhorat and Goga The Gender Wage Gap in the Post-Apartheid South African Labour Market 13.
at the same level, the employer will use gender as a signal of productivity and offer lower wages to female employees. This possible perception by the employer tends to undervalue the actual work by the female employee as the assessment of productivity is gender-based. In this context, the employer’s perception falls short in that no actual measure of performance will be considered in establishing remuneration. The indication is that just by their gender women are labelled as unproductive and hence an undervaluation is made of their performance.

4.3 Access to top level position (glass ceiling)

Access to top level positions in South Africa is also another area where women have not been treated equally with men. The direct comparison of men and women in the upper level of the workforce portrays a stark reality where women are clearly a minority amongst their male counterparts. Although women have entered occupations previously closed to them, many top jobs remain as gender-segregated today. Men continue to dominate with regards to access to executive and senior management positions. The Wall Street Journal in the 1980s called this situation a “Glass Ceiling” which is defined as a transparent ceiling that hinders women and minorities from reaching upper level management levels in the workforce. It is an unbreakable barrier that prevents women from rising to top positions within the corporate world, regardless of their qualifications or achievements. Women remain more likely to be employed in low-skilled occupations. Women are mostly associated with administrative support jobs that include secretaries, personal assistants, receptionists and administrative officials.

Access to top positions also includes the chances of women to be in economic decision-making positions, public service and in private institutions. These positions include

339 Williams et al 2012 *Gender and Society* 549.
344 Van Antwerpen and Ferreira 2016 *Journal of Contemporary Management* 363.
women’s participation as ministers, deputy ministers, permanent secretaries in finance, economic planning, trade and reserve bank governors.\textsuperscript{345} In South Africa, it is estimated that only 23 per cent of women participate in economic decision-making processes compared to 77 per cent men.\textsuperscript{346} This comparison shows that there is a huge gap existing between men and women participating in economic decision-making positions. In the public service departments, women in top management increased from 13 per cent to 18.7 per cent and in senior management from 21 per cent to 27.7 per cent in 2014.\textsuperscript{347} This shows that, in South Africa, women across the labour market are significantly less represented in top management positions, despite a measure to increase.

4.3.1 Factors affecting women’s access to top positions

Mathur-Helm\textsuperscript{348} argues that reaching top-level positions is still uncommon for the majority of South African women because the corporate environment is not yet ready to accept women as professional equals at the highest level. There are, however, a variety of factors that contribute to these forms of inequality that hinder equal treatment and opportunity for women in the workforce. These factors include social location, gender stereotyping, patriarchy, social identity theory and the fact that the labour market is male-dominated.

4.3.1.1 Social location

Equal treatment and opportunities for women in the workplace are also affected by social location. Social location refers to the position an individual occupies within society, particularly in respect to race, gender class or sexual orientation and other marked categories.\textsuperscript{349} In this context, a group’s position in hierarchical power relations and the experiences attached to differential social locations influences perceptions and

\textsuperscript{346} SADC Gender Protocol 2015 Barometer South Africa http://www.genderlinks.org.za 70.
\textsuperscript{348} Mathur-Helm 2005 Women in Management Review 20.
\textsuperscript{349} Booyzen and Nkomo 2010 Gender in Management: An International Journal 286.
behaviours towards them.\textsuperscript{350} The implication is that by being a woman or man certain attributes are already attached to one by society. In African societies men are associated with autocratic power and control, whereas women are considered to be subordinate and weak.\textsuperscript{351} This with regard to the concept of social location creates a barrier for women in the workplace especially in terms of access to top executive or managerial positions. It can also be argued that social location influences gender stereotyping.

Gender stereotyping of the management position has been offered as one possible explanation for the proverbial glass ceiling women encounter in their managerial career mobility.\textsuperscript{352} Gender stereotyping is a result of how employers and society view the sexes. It is submitted that gender stereotyping exists in the workplace because men are considered to have the characteristics required for success at the top level compared to women.\textsuperscript{353} Generally, employers prefer employees with fewer distractions outside the workplace, who can fully dedicate themselves to the organisation.\textsuperscript{354} This view tends to put women at a disadvantage because of their reproductive role and they hold primary responsibility to care of family members and other family-related issues.\textsuperscript{355} This aspect then excludes women and makes men preferable. In \textit{Woolworths (Pty) Ltd v Whitehead},\textsuperscript{356} the court had to deal with the issue of whether a female candidate was discriminated against with regards to appointment to a permanent top management post based on her pregnancy. In this case, despite offering the position to a female candidate in the first instance, the employer argued that their reason for eventually employing a male candidate instead was that he was the most suitably qualified and experienced of the two.\textsuperscript{357} Willis JA noted that even though the female employee (Ms Whitehead) might have been the most suitable candidate for the post, the fact that she was pregnant might have also influenced the decision of the employer since she would

\footnotesize{\textsuperscript{350} Booysen and Nkomo 2010 \textit{Gender in Management: An International Journal} 286.  
\textsuperscript{352} Booysen and Nkomo 2010 \textit{Gender in Management: An International Journal} 286.  
\textsuperscript{353} Stamarski and Son Hing 2015 \textit{Frontiers in Psychology} 3-4; Booysen and Nkomo 2010 \textit{An International Journal} 286.  
\textsuperscript{354} Williams \textit{et al} 2012 \textit{Gender and Society} 550.  
\textsuperscript{355} Albertyn 2011 \textit{STELL LR} 592.  
\textsuperscript{356} \textit{Woolworths (Pty) Ltd v Whitehead} 2000 6 BLLR 640 (LAC).  
\textsuperscript{357} \textit{Woolworths (Pty) Ltd v Whitehead} 2000 6 BLLR 640 (LAC) para 14-15.}
not be available for the job as a result of her pregnancy.\textsuperscript{358} The rationale was that the main effect of pregnancy is to make a woman temporarily unavailable for work, where top management positions require the employee to be present most of the times. This resulted in the company employing a male candidate to the post.

The court of first instance had ruled in favour of Ms Whitehead, however, the Labour Appeal Court ruled in favour of the employer based on the argument that the male candidate (Dr Yung) was the most suitable for the position.\textsuperscript{359} One may argue that the real issue in play was her pregnancy considering the fact that she had been offered the position before mentioning her pregnancy. The \textit{Whitehead case}\textsuperscript{360} just shows how gender stereo-typing is a barrier to women’s advancement to top management positions. The roles and reproductive function that are associated with women in a way make them unsuitable candidates for top management posts. Taking this into consideration, for instance, putting a woman in a top management post is a risk most employers are not prepared to take. It is submitted that this is prejudice against women’s advancement to top positions which must be regarded as an unfair labour practice based on gender.

4.3.1.2 Patriarchy

Women are often regarded as the 'weaker' sex.\textsuperscript{361} This negative cliché has portrayed women as emotionally vulnerable, defenceless susceptible to stress and victimisation within the workplace.\textsuperscript{362} On the other hand, a business leader is often portrayed as successful, forceful and masculine characters which women are perceived to lack.\textsuperscript{363} Top management positions come with socio-economic constructed pressure that only a strong person can emotionally and physically contain. Men are further believed to possess leadership traits, such as being decisive and task-oriented, whereas women have communal attributes, such as nurturance and being more relationship-oriented.\textsuperscript{364}

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\textsuperscript{358} Woolworths (Pty) Ltd v Whitehead 2000 6 BLLR 640 (LAC) para 133.
\textsuperscript{359} Woolworths (Pty) Ltd v Whitehead 2000 6 BLLR 640 (LAC) para 14-19.
\textsuperscript{360} Woolworths (Pty) Ltd v Whitehead 2000 6 BLLR 640 (LAC).
\textsuperscript{361} Leigh \textit{et al} 2014 \textit{Gender and Behaviour} 6059.
\textsuperscript{362} Leigh \textit{et al} 2014 \textit{Gender and Behaviour} 6059.
\textsuperscript{363} Leigh \textit{et al} 2014 \textit{Gender and Behaviour} 6063.
\textsuperscript{364} Steyn and Jackson 2015 \textit{South African Journal of Labour Relations} 735.
\end{flushright}
The implication is that women lack the personality and strong character associated with top management positions. This mind-set, in a way, is also responsible for the few women in leadership positions in the corporate and political world.

4.3.1.3 Social identity theory

The social identity theory can also be used to explain the bias towards men when it comes to mobility of women towards top management positions in the workplace. This theory can be used to explain discrimination in the workplace that is aimed at female employees.\(^{365}\) This theory is based on the fact that individuals contrast their own group (in-group) with others (out-group) and develop a favourable bias towards their own.\(^{366}\) In-group members explain away or negate, the positive behaviours of out-group members (attributing them to situational circumstances) and ascribe negative behaviours disproportionally to out-group members’ dispositions (personality and values), rather than more appropriately to situational circumstances.\(^{367}\) In-group members include people of the same race or gender.\(^{368}\) In short this suggests that in-group members, in this case men, associate other men with positive outcomes in the workplace and the opposite is true of women. This creates prejudice against the out-group (women in this case) who will be regarded as not competent enough to take positions associated with men. The labour market in South Africa being male-dominated\(^{369}\) presents a situation where men tend to favour other men when it comes to promotion to higher offices.

4.3.1.4 Male-dominated labour market

The other factor that can be used to account for a significantly fewer number of women in top positions is the fact that the labour market is male-dominated. It is estimated that the labour markets consists of economically active population is 54.8 per cent men

\(^{365}\) Steyn and Jackson 2015 *South African Journal of Labour Relations* 736.

\(^{366}\) Steyn and Jackson 2015 *South African Journal of Labour Relations* 734-756


\(^{369}\) Kahn and Motsoeneng 2014 *Journal of Public Administration*..."The economically active population is 54.8% men and 45.2% women".
and 45.2 per cent women as at 2014.\textsuperscript{370} Furthermore, the pool of competent and experienced women remains small, providing another ‘useful excuse’ for not appointing more women to senior executive and board positions.\textsuperscript{371} Women have remained primarily responsible for child-care, elder-care and house work, which further limits their prospects of job opportunities.\textsuperscript{372} Considering the fact that the labour market is already male-dominated, the implication is that there are more men competing for these top positions. This makes it difficult for the fewer qualified women also competing for these top management jobs.

4.3.1.5 Occupational segregation

Occupational segregation defines a situation where there is a larger population of a particular gender in some fields compared to other labour fields.\textsuperscript{373} This has led to some jobs being labelled ‘feminine’ or masculine based on skills required for the jobs and the working culture.\textsuperscript{374} Jobs that require interpersonal skills or caregiving skills are considered feminine as these are innate characteristics of a traditional concept of a woman.\textsuperscript{375} On the other hand jobs that require physical strength, risk-taking, leadership or decision-making are regarded as masculine as these are associated with characteristics of a man.\textsuperscript{376} It is submitted that the majority of top position jobs are intrinsically linked with the masculine notion. This linkage becomes a natural exclusion of women from competing and getting promotion to top management or executive positions in the labour market.

Having more women in certain professions and fewer women in other professions results in male domination of professions where women are fewer. This can be seen in the way men dominate in professions such as engineering and information and technology.\textsuperscript{377} Consequently, because of the smaller numbers of women in that field or profession, those who will be competing for top management positions will also be

\textsuperscript{370} Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1068.
\textsuperscript{372} Fredman 2009 \textit{SAJHR} 412.
\textsuperscript{373} Addati \textit{et al} \textit{Women at Work} 39.
\textsuperscript{374} Addati \textit{et al} \textit{Women at Work} 39.
\textsuperscript{375} Addati \textit{et al} \textit{Women at Work} 39.
\textsuperscript{376} Addati \textit{et al} \textit{Women at Work} 39.
\textsuperscript{377} Addati \textit{et al} \textit{Women at Work} 39.
fewer. This results in a male-dominated competition for top management positions in sectors where women are significantly fewer.

4.4 Effects of discrimination in the workplace

The unfair discrimination that women face in terms of pay inequality and promotion to top position has various effects in the South African workforce. These effects will be discussed below.

4.4.1 Demotivation of female employees

Shen et al\textsuperscript{378} argues that one of the chief causes for job demotivation is pay inequality. It is submitted that a demotivated employee is also less productive. This is because such an employee has no or less motivation to put in extra effort. On a larger scale, this generally affects the work output or production where there is a significant number of demotivated women employees because of discrimination based on gender pay gap. On the other hand pay equality contributes to effective organisational diversity and performance\textsuperscript{379}. This is suggestive of the fact that when employees at the same level performing the same work are equally remunerated, they perform better. It can also be explained by suggesting that where employees feel they are being treated equally, they develop confidence and a sense of being valued like all other employees. This in turn motivates the employees.

4.4.2 Waste of potential

Du Plessis et al\textsuperscript{380} are of the opinion that ignoring women for top management positions constitutes a waste of potential. This argument is premised on the fact that women can be equally good leaders as men if granted the opportunity to attain higher office. The lack of empirical evidence that men are better that women in management further supports the fact that leadership talent in the form of women is being under-utilised not only in South Africa but on a global level. By not appointing more women to top positions, unrealised leadership and management talent is put to waste which can be

argued to be a loss to the labour market. This also means that there is no diversity in leadership.

4.4.3 Promotion of sexism

It has been established that gender stereotyping is also one of the factors that affects gender discrimination in the work place. Gender stereotyping establishes what women or men can do or not do.\textsuperscript{381} In the workplace, this entails work that women cannot do and can do. One of the consequences of gender stereotyping in the workplace is the notion that men are superior to women and this results in hostile sexism.\textsuperscript{382} Hostile sexism involves antipathy towards women, a belief that women are incompetent and the belief that men should be more powerful than women.\textsuperscript{383} In this way, women’s value as workers is diminished and the workplace becomes a breeding ground for sexism against women. This can further lead to other negative consequences such as sexual harassment and bullying in the workplace. The result is that women will not be afforded the same treatment and opportunities as men, hence defeating the ideal of decent work within the workforce with regards to equality.

4.5 Conclusion

It is submitted that, while there has been a significant focus on legislation to bring about gender equality, this alone will not do much to transform unequal gender relations and the economic reality faced by the majority.\textsuperscript{384} Women are still discriminated against in terms of pay inequality and promotion to top management. These forms of discrimination have been as a result of a number of factors in play which include gender stereotypes and lack of legislation addressing adequately these issues. There is also strong statistical data showing that, despite South Africa being a democratic state, the labour market is still far from being “democratised” in respect of the gender wage gap and women’s advancement to top positions. It is also noteworthy to mention that, even though women are still discriminated against within the labour

\textsuperscript{381} Stamarski and Son Hing 2015 \textit{Frontiers in Psychology} 8.
\textsuperscript{382} Stamarski and Son Hing 2015 \textit{Frontiers in Psychology} 8.
\textsuperscript{383} Stamarski and Son Hing 2015 \textit{Frontiers in Psychology} 8.
\textsuperscript{384} Orr and Van Meelis 2014 \textit{Bargaining Indicators} 53.
market, they are making progressive steps in top management position and gender wage gap. In summation, the decent work ideal of equal treatment and opportunity in the workforce is yet to be realised in the South African workforce. As such, it is justifiable to argue that it has been achieved to a lesser extent.

Having explored the challenges of the legislative framework in chapter three and the forms of inequalities in this chapter, the following chapter focuses on what can be done to further enhance the promotion of equal treatment and opportunities within the workplace in respect of gender. It will also provide a reasonable conclusion to this study.
Chapter 5 Conclusion and recommendations

5.1 Conclusion

Decent work as established by the ILO is a broad concept that covers a wide range of labour issues within the global labour market. One of the goals of decent work is equal treatment and opportunity in respect of gender within the workplace. As established within this research, South Africa is still facing discrimination based on gender within the labour market.\(^{385}\) Women are not treated the same as their male counterparts in respect of remuneration and access or promotion to top level management positions.\(^{386}\) This (gender pay gap discrimination and access or promotion to top level management) has been attributed to a variety of factors.\(^{387}\) It can be argued that South Africa has a comprehensive labour legislation structure in place to ensure equal treatment and opportunity for both men and women within the labour market.\(^{388}\) However, decades after South Africa has been declared a democratic state, the labour market still reflects the pre-democratic era with regards to discrimination based on gender. The purpose of this chapter is to provide a reasonable conclusion considering the extent to which equal treatment and opportunity within the workplace in respect of gender has been achieved in South Africa. Furthermore, recommendations with regards to equal treatment and opportunity in the workplace in respect of gender will be provided for.

The purpose of this research was to establish the extent to which the South African labour market has achieved equal treatment and opportunities within the workplace in respect of gender. The focus was particularly on gender pay gap discrimination and access or promotion to top level position by women. It has been reiterated throughout this research that decent work demands equal treatment and opportunities for both men and women in the workforce. It has also been established that in South Africa women still suffer unfair discrimination based on the gender pay gap and access or promotion to top level management positions. This is despite the fact that South Africa

\(^{385}\) See para 4.1.
\(^{386}\) See para 4.1.
\(^{387}\) See 4.2 and 4.3.
\(^{388}\) See chapter 2.
has a comprehensive labour legislation structure that provides for equality in labour relations.

The challenges within the application and implementation of labour statutory and legislative framework, have also proved futile for the achievement and promotion of equal treatment and opportunity of women and men in the workforce. These challenges include poor implementation and monitoring of affirmative action and the fact there are insufficient legislative provisions that deal with gender pay gap discrimination or access to top level management by women. The factors that have been attributed with the continued existence of the forms of gender discrimination further hinder the achievement of this decent work ideal in South Africa. These factors discussed in chapter four include patriarchy, career breaks by women, social location, social identity theory and undervaluing work performed by women.

It is reasonably submitted that women within the South African work force are still marginalised and unfairly discriminated against in the workplace in respect of pay and access or promotion to top level management, hence gender-based discrimination still exists. The implication is that it will require effort and commitment from both the public and the government to ensure the promotion of gender equality gender equality in the workplace. Hence, it can be argued that the decent work ideal of equal treatment and opportunity within the workplace with regards to gender has only been achieved to a lesser extent in South Africa.

### 5.2 Recommendations

It has been concluded that, equal treatment and opportunity within the workplace in respect of gender is yet to be achieved. In Chapter Three it was established that legislation and labour policies in place have not been sufficient to ensure equal treatment and opportunity in the workplace with regards to gender.\(^\text{389}\) At the same time, Chapter 4 established factors that contribute to the continued existence of workplace discrimination and these have also been a hindrance to decent work

\(^{389}\) See 3 para 3.5.
conditions. With regards to these issues the following recommendations are proposed: equality training for employers, effective equality monitoring system, promoting gender sensitive workplace, recognition of ability and strong assertiveness towards gender equality.

5.2.1 Equality training for employers

It is submitted that one of the ways to combat workplace discrimination is to provide equality training for employers. This entails that when organisations undertake training for recruitment, appraisal, selection for promotion, supervision or resource allocation, equality should be emphasised. It is further submitted that this equality training programme should include, amongst many others, the following aspects:

- the importance of equality;
- the law and what it means in practice;
- roles and responsibilities of stuff in making equality policies; and
- what equality means for companies.

It can be argued that the list of what the equality programme should include is endless. This is because the notion of equality is broad as established in Chapter 2. The training will be a means to further encourage employers to come up with equality policies that promote equal treatment and opportunity for women and men within the labour market.

5.2.2 Effective equality monitoring systems

One of the ways to ensure that there is equality in the workplace with regards to gender, is to put in place an effective equality monitoring system at the national level and workplace level. At national level the state or department responsible for labour issues should have a comprehensive structure in place to carry out the task of monitoring the labour market to ensure that employers are complying with labour

390 See para 4.2.2 and 4.3.1.
policies in respect of gender equality. One of the requirements of this compliance at workplace level, can be the publishing of and making such labour policies available for all employees to inspect. In this way employees at workplace level will be in a position to enquire for themselves whether they are being treated equally and fairly by their employers. With the an effective equality monitoring system and employees who are aware of their legal position in respect of equality, compliance with labour and equality legislation can be achieved to a greater extent. This might be one possible way that may help ensure equal treatment and opportunity within the workplace in respect of gender.

5.2.3 Promoting gender-sensitive workplaces

Kahn and Motsoeneng are of the view that the workplace should provide a gender-sensitive culture in which employees can be empowered, developed, progress and experience genuine gender equality. This would lead to the recognition of the gender equality of all South Africans by all South Africans. Gender sensitive workplace culture will help dispel traditional workplace notions that are patriarchal in nature, which consider men superior to women. It is because of this male superiority complex that women are discriminated against in terms of remuneration and access or promotion to top level management position. A gender sensitive workplace may encourage the recognition of women as equal to men in positions or work that women are equally qualified and suited for as men. Creating a gender sensitive workplace will eventually result in equal treatment and opportunities for both men and women in the workforce.

5.2.4 Recognition of women’s abilities

In Chapter Four, it was established that some of the workplace practices fail to recognise the abilities of women because they are gender-focused. For instance, it is implied that only men have leadership qualities and are efficient workers.

396 Kahn and Motsoeneng 2014 Journal of Public Administration 1075.
397 Leigh et al 2014 Gender and Behaviour 6063.
However, Kahn and Motsoeneng\textsuperscript{399} argue that both men and women should experience gender progression, meaning that hierarchical advancement should be based on individual abilities and performance and not gender. This will further allow the organisation or company to optimally utilise the potential of its entire workforce, which would ultimately translate into institutional effectiveness.\textsuperscript{400} Recognition of abilities will lead to a change in gender perspectives in the workplace meaning that women will finally be treated equally as men within the workplace where fairness requires gender equality.

5.2.5 Public commitment to gender equality in the workplace

It is also recommended that there should be a public commitment in South Africa to gender equality in the workplace. The envisaged commitment entails that everyone should support the notion of gender equality in the workplace and the labour market.\textsuperscript{401} Public commitment from public leaders and managers may entail transforming the institutional culture into an enabling environment.\textsuperscript{402} Institutional culture may include a systematic discrimination against employees based on gender in respect of remuneration and access or promotion to top level management position.\textsuperscript{403} An enabling environment is one which makes employees feel that they belong to the institution (company) and that they can express their unique identity in achieving both individual and institutional goals.\textsuperscript{404} It is also submitted that an enabling workplace environment also recognises women as being equal to men.

5.2.6 Strong assertiveness towards gender equality

It is further recommended that there is a need for women and their organisations to have a strong assertiveness towards gender equality in the workforce.\textsuperscript{405} This is because women remain separated from each other by economic and cultural differences which affect, among other things, their objective and subjective ways of

\begin{thebibliography}{1}
\bibitem{399} Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1075.
\bibitem{400} Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1075
\bibitem{401} ACAS 2012 http://www.acas.org.uk/media 5.
\bibitem{402} Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1075.
\bibitem{403} See Chapter 3.
\bibitem{404} Kahn and Motsoeneng 2014 \textit{Journal of Public Administration} 1075.
\bibitem{405} Grogan 1996 \textit{Voices of Women Aspiring to Superintendence} 25.
\end{thebibliography}
undergoing and suffering masculine domination.\textsuperscript{406} Grogan\textsuperscript{407} contends that in order to achieve equality in the workplace, women on a global scale must make their demands and claims, powerfully and passionately. One these demands which is core to this research is equal treatment and opportunities within the workplace for women. This is suggestive of the fact that despite an increase in women organisations whose main purpose is to achieve gender equality, there is still a need to increase the intensity with which they demand and promote equality.

\begin{flushright}
\textsuperscript{406} Bourdieu\textit{ Masculine Domination} 93.
\textsuperscript{407} Grogan\textit{ Voices of Women Aspiring to Superintendence} 25.
\end{flushright}
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