

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

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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 geleentheid binne die werkplek vereis ten opsigte van geslag. Die rede daarvoor is dat daar op wêreldwye skaal op verskeie maniere onbillik teen vroue gediskrimineer word. In Suid-Afrika word gelykheid deur die *Grondwet van die Republiek van Suid-Afrika* 1996 geregleer en verskillende 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 geslagsgapings 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 reproduktiewe funksie. Vroue staan 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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LIST OF ABBREVIATIONS

AHRLJ	African Human Right Law Journal
AJIL	American Journal of International Law
BCEA	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women of 1979
CRC	Convention on the Rights of Children of 1990
EAP	Economically Active Population
EEA	Employment Equity Act 55 of 1998
EJIL	European Journal of International Law
HSRC	Human Sciences Research Council
IJL	Industrial Law Journal
ILO	International Labour Organisation
J Soc Sci	Journal of Social Sciences
LAC	Labour Appeal Court
LC	Labour Court
LDD	Law, Democracy and Development
LRA	Labour Relations Act 66 of 1997
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PER	Potchefstroom Electronic Law Journal

QLFS	Quarterly Labour Force Survey
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALDRU	Southern Africa Labour and Development Research Unit
SA Merc LJ	South African Mercantile Law Journal
SA DWCP	South Africa's Decent Work Country Programme
STELL LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid Afrikaanse Reg

Chapter 1 Introduction

The International Labour Organisation (ILO) has as its aim the development, promotion and monitoring of international labour standards.¹ 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.² Therefore, the ILO holds that decent work is productive work for women and men in conditions of freedom, equality, security and human dignity.³ 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.⁴

Gender refers to the socially constructed roles, behaviours, activities and duties related to one being a male or female in a particular society.⁵ 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.⁶ 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*, 1996⁷ seeks to ensure that South African law evolves in accordance with international law.⁸ In this context, section 39 of

1 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 3.

2 ILO 2010 <http://www.ilo.org>.

3 ILO 1999 <http://www.ilo.org>; Cohen and Moodley 2012 *PER* 320.

4 ILO 1999 <http://www.ilo.ch/declaration>.

5 Anon <http://www.asset-scienceinsociety.eu>; Ranchod *MMSDSA: Gender and the Workplace* 8.

6 Steyn and Jackson 2014 *South African Journal of Labour Relations* 48-69.

7 *Constitution of the Republic of South Africa*, 1996 (Hereinafter the Constitution).

the *Constitution* provides for the recognition of international law in respect of the Bill of Rights.⁹ This recognition is based on the idea that the international law instrument in question is consistent with the *Constitution*.¹⁰ South Africa as a member of the ILO has the task of promoting the ideals of decent work within the labour market.¹¹ One of the central key ideals of decent work is the promotion of equal treatment and opportunity in employment.¹²

Post-apartheid South Africa placed great emphasis on representivity in terms of race and gender.¹³ 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.¹⁴ These include the *Constitution*, the *Labour Relations Act* 66 of 1995,¹⁵ *Employment Equity Act* 55 of 1998,¹⁶ the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000¹⁷ and the *Basic Conditions of Employment Act* 75 of 1997.¹⁸ The *Code of Good Practice on Equal Pay for Work of Equal Value*¹⁹ 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.²⁰ The *Constitution* serves as a compass for engendering gender equality in the country.²¹ 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 Ojokrotu 2013 *Gender & Behaviour* 5181.

15 *Labour Relations Act* 66 of 1995 (Hereinafter the *LRA*).

16 *Employment Equity Act* 55 of 1998 (Hereinafter the *EEA*).

17 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (Hereinafter *PEPUDA*).

18 *Basic Conditions of Employment Act* 75 of 1997 (Hereinafter *BCEA*).

19 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value 2015 (hereinafter the Code on Equal Pay)

20 Van Der Byl *Background paper: Women's Empowerment and Gender Equality Twenty* 8.

21 Rarieya *et al* 2014 www.hsrc.ac.za; Moseneke 2011 *PER* 11.

sexism.²² Section 9 of the *Constitution* expands on the constitutional values by providing for the right to equality and grounds which constitutes unfair discrimination.²³ The *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.²⁴ The grounds for unfair discrimination in the workplace are then provided for by section 6 (1) and gender is one of these grounds.²⁵ In this way, the *EEA* also focuses on equality with regards to gender.²⁶ In *National Coalition for Gay and Lesbian Equality v Ministers of Justice*,²⁷ the court held that the *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,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.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 2012.³⁰ The Quarterly Labour Force Survey (QLFS) published by Statistics South Africa, held that women represented 46 per cent of the Economically

22 Section 1 (a) and (b) of the *Constitution* 1996.

23 Section 9 of the *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,....

24 Section 5 of *EEA*.

25 Section 6 (1) of *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.

26 Bundlender et al 2011 *Decent work country profile: South Africa* vii.

27 *National Coalition for Gay and Lesbian Equality v Ministers of Justice* 1999 (1) SA 6 (CC) para 134.

28 Cohen 2012 *PER* 322.

29 Statistics South Africa 2012 www.statssa.gov.za ; see also Maseko *A Comparative study of Challenges Faced by Women in Leadership* 1 ; Cohen and Moodley 2012 *PER* 321.

30 Statistics South Africa 2012 www.statssa.gov.za.

Active Population (EAP) in South Africa in 2014.³¹ 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.³²

The labour market in South Africa suffers from a history of unequal access to jobs and labour discrimination.³³ Apartheid education and labour policies produced a strong racial gradient in unemployment, employment and wage rates.³⁴ Women continue to face glaring pay differentials compared to their male counterparts.³⁵ Fagenson³⁶ argues that across all vocation types, women still earn less than men on average. Van Der Byl³⁷ 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.³⁸ This is a common feature of both public and private sectors within the labour market.³⁹ According to the Southern African Development Community⁴⁰ 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 2015.⁴¹ Traditionally, leadership has been associated with masculinity and the belief that men make better leaders than women.⁴² As such, this

31 Statistics South Africa 2014 www.statssa.gov.za; see also Malan "Making Gender Equality a Reality in the South African Rail Industry" 4.

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.

33 Leibbrandt *et al* *Employment and Inequality Outcome in South Africa Southern Africa* 10.

34 Roberts *et al* 2010 *HSRC Review* 6.

35 Cohen and Moodley 2012 *PER* 321.

36 Fagenson *Women in Management: Trends, Issues and Challenges in Managerial Diversity* 10.

37 Van Der Byl *Background paper: Women's Empowerment and Gender Equality* 6.

38 Maseko *A Comparative study of Challenges Faced by Women in Leadership* 1.

39 Maseko *A Comparative study of Challenges Faced by Women in Leadership* 1.

40 Hereinafter SADC.

41 Lowe *et al* 2016 <http://www.sadc.int/documents> 142.

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.⁴³ This requires the incorporation of measures and the creation of opportunities for women in employment policies and plans.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.⁴⁵ Affirmative action is based on the idea that there is a need to increase participation of previously 'disadvantaged groups'⁴⁶ including women, in the workplace in order to create a balance among employees.⁴⁷ Affirmative action has, however, become an increasingly controversial policy aimed at addressing labour market inequalities in South Africa.⁴⁸ This is because of various challenges that have been faced in implementing it. Burger and Jafta⁴⁹ 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

43 Aranda *et al* "Advancing Gender Equality in the Context of Decent Work" i.

44 Aranda *et al* "Advancing Gender Equality in the Context of Decent Work" i.

45 Section 15 of *EEA*.

46 Disadvantaged groups include black people (Africans, Coloureds and Indians).

47 Section 15 *EEA*; Tladi *Affirmative Action and The Employment Equity Act of South Africa* 13.

48 Roberts *et al* 2010 *HSRC Review* 6.

49 Burger and Jafta *CRISE Working Paper* No. 76 17.

within the labour market in line with decent work.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 *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.

50 Olowu 2011 *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.⁵¹ The ILO, the United Nations⁵² and other multilateral agencies work actively to develop policies and programmes that advances the creation of decent work opportunities for both men and women.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.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.⁵⁵ The ILO was established by the Treaty of Versailles signed in 1919 and this Treaty also established the League of Nations.⁵⁶ The result was that all member states of the League of Nations became founding members of the ILO.⁵⁷ After

51 Hereinafter the ILO; Moore 2014 *Globalisation* 320.

52 Hereinafter UN.

53 Anon 2011 <http://rconline.undg.org>.

54 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 2.

55 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 2.

56 2012 ILO-Flanders: Cooperation Results Review 2.

57 Van Niekerk *et al Law@Work* 20.

the Second World War, the United Nations replaced the League of Nations.⁵⁸ All 183 states of the United Nations are members of the ILO.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.⁶⁰

The ILO comprises three main bodies namely the International Labour Conference (ILC), the Governing Body and the International Labour Office.⁶¹ The primary focus of the International Labour Conference is to adopt new labour standards.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.⁶³ These delegations comprise two government representatives, one employer representative and one employee representative.⁶⁴

The Governing Body performs the executive functions of the ILO.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.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.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.⁶⁸ This is headed by the Director-General who is appointed by the Governing Body for a fixed period.⁶⁹

58 2012 ILO-Flanders: Cooperation Results Review 2.

59 2012 ILO-Flanders: Cooperation Results Review 2.

60 Preamble of the ILO Constitution of 1919; Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 4.

61 Van Niekerk *et al Law@Work* 20.

62 Anon <http://www.ilo.org/ilc/ILCSessions> 6.

63 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 2.

64 Van Niekerk *et al Law@Work* 20.

65 Anon 2011 <http://rconline.undg.org>.

66 Anon 2011 <http://rconline.undg.org>; Van Niekerk *et al Law@Work* 21.

67 Van Niekerk *et al Law@Work* 21.

68 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 2; Van Niekerk *et al Law@Work* 21.

69 Roy and Kaye *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* 2.

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.⁷⁰ 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.⁷¹ 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 policies 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.⁷² 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.⁷³ 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.⁷⁴ Saley and Benjamin⁷⁵ argue that the report and recommendations of the ILO led the Commission to the enactment of the *Labour Relations Act* 66 of 1994.

South Africa re-joined the ILO on 26 May 1994 and ratified all the ILO core conventions.⁷⁶ The core conventions of the ILO include: *Freedom of Association and the Right to Organise Convention* 87 of 1948; *Right to Organise and Collective Bargaining Convention* 98 of 1949; *Forced Labour Convention* 29 of 1930; *Abolition of Forced Labour Convention* 105 of 1957; *Minimum Wage Convention* 138 of 1973; *Worst Forms of Child Labour Convention* 184 of 1999; *Equal Remuneration Convention* 100 of 1951 and *Discrimination (Employment and Occupation) Convention* 111 of 1958.⁷⁷

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

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.

74 Report of Fact Finding and Conciliation Commission in South Africa 1992 i-ii.

75 Saley and Benjamin 1992 *ILJ* 731.

76 Van Niekerk *et al Law@Work* 21.

77 Van Niekerk *et al Law@Work* 21.

human dignity.⁷⁸ 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.⁷⁹ The ILC establishes and adopts international labour standards and is a forum for discussion of key social and labour questions.⁸⁰ 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.⁸¹ 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.⁸² It must, however, be noted that the main ILO prerogative is the global promotion of labour standards based on decent work.⁸³

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.⁸⁴ 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.⁸⁵

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:

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".

80 Van Niekerk *et al Law@Work* 20; <http://rconline.undg.org/wp-content/uploads/2011>

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

86 Ministry of Labour and Small Enterprises Development 2007 <http://www.molsmed.gov.tt>

87 Diez de Medin "ILO Decent Work Agenda"1.

88 Musabayana and van Vuuren "Unpacking the Idea of Decent Work"; see also Cohen and Moodley 2012 *PER* 320.

89 Cohen and Moodley 2012 *PER* 320; Weissbrodt and Matthew 2014 *Minnesota Law Review* 1843.

90 Musabayana and van Vuuren "Unpacking the Idea of Decent Work."

91 Cohen and Moodley 2012 *PER* 320.

92 Hall *Promoting Decent Work in Old Age in Africa* 2.

93 Musabayana and van Vuuren "Unpacking the Idea of Decent Work."

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.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.⁹⁵ *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.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.⁹⁷ Article 2 of *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.⁹⁸ Charnovitz⁹⁹ submits that the fundamental importance of freedom of association was further emphasized by the adoption of the *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.¹⁰⁰ Forced labour occurs where work or service is exacted from workers under threats of severe deprivations, such as withholding food, land or wages,

94 *ILO Declaration on Fundamental Principles and Rights at Work* 1998.

95 International Labour Office *The Labour Principles of the United Nations Global* 9.

96 Annex 1 (2) of the *ILO Declaration on Fundamental Principles and Rights at Work* 1998.

97 International Labour Office *The Labour Principles of the United Nations* 15.

98 Article 2 of *Freedom of Association and Protection of the Right to Organise Convention* 1948 (no.87).

99 Charnovitz 2008 *AJIL* 90-127.

100 Article 2 of *Forced Labour Convention*, 1930 (No. 29)

physical violence or sexual abuse, restricting people's movements or locking them up.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.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.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.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.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.¹⁰⁶ It is submitted that child labour is a violation of the rights of children.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.¹⁰⁸ With regards to gender, inequality between women and men persists in global labour markets in respect of opportunities, treatment and

101 International Labour Office *The Labour Principles of the United Nations* 21.

102 International Labour Office *The Labour Principles of the United Nations* 21.

103 The ILO at a Glance 2007 <http://www.ilo.org> 10.

104 Srivastava 2011 *Industrial Psychiatry Journal* 1.

105 Article 2 (3) *Minimum Age Convention* 1978 (No.138).

106 Article 3 of the *Worst Forms of Child Labour Convention* 1999 (no. 182).

107 International Labour Office *The Labour Principles of the United Nations* 28.

108 Cooper 2009 *SAJHR* 578.

outcomes.¹⁰⁹ 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,¹¹⁰ 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 1981¹¹¹ and *Maternity Protection Convention* 183 of 2000.¹¹² 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.¹¹³ However, after decades of international and national efforts to eliminate discrimination in respect of gender, it is unfortunate that it still exists.¹¹⁴ 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.¹¹⁵ This involves the promotion of an economy that generates opportunity for investments, job creation skills development and sustainable livelihoods.¹¹⁶ 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.

110 Hepple 2001 *International Labour Review* 5.

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.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.

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.¹¹⁸ Kapendi¹¹⁹ 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.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.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.¹²²

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.¹²³ Social dialogue refers to meaningful and deliberate consultations among Government, employers' and workers' representatives.¹²⁴ The ILO also includes other civil social representatives as part of the

117 *ILO Declaration on Fundamental Principles and Rights at Work* 1998; Musabayana and Vic van Vuuren "Unpacking the Idea of Decent Work"

118 ILO 2007 www.ilo.org 17.

119 Kapindu 2011 *African Human Rights Law Journal* 98

120 Triegaardt 2006 <http://www.dbsa.org> 1.

121 Musabayana and van Vuuren "Unpacking the Idea of Decent Work".

122 Addati *et al Women at Work* xvii.

123 Cohen and Moodley 2012 *PER* 320.

124 Cohen and Moodley 2012 *PER* 320; see also Ministry of Labour and Small Enterprises Development 2007 <http://www.molsmed.gov.tt>.

social dialogue.¹²⁵ This is an essential ongoing process used to achieve conflict resolution, social equity and effective policy implementation.¹²⁶ Involving strong and independent workers' and employers' organizations is central to increasing productivity, avoiding disputes at work and building cohesive societies.¹²⁷ The importance of this arrangement is that labour market institutions and capacitated social partners contribute to effective social dialogue and sound industrial relations.¹²⁸

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.¹²⁹ South Africa's first Decent Work Country Programme¹³⁰ was launched on 29 September 2010.¹³¹ 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.¹³² 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 23.¹³³ In context of strengthening social protection, the *Constitution* provides for the right to social security in section 27 (1) (c).¹³⁴

125 Moore 2014 *Globalisation* 319.

126 Ministry of Labour and Small Enterprises Development 2007 <http://www.molsmed.gov.tt>

127 ILO 2009 www.ilo.org 162.

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.¹³⁵ Gender refers to the socially constructed roles and responsibilities connected to being male or female in a particular society.¹³⁶ 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.¹³⁷ 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.¹³⁸ Peace, prosperity and social justice depend on the achievement of substantive equality between women and men.¹³⁹ 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'.¹⁴⁰ Equality in the South African context means the equal enjoyment of the rights and freedoms guaranteed by the *Constitution* in the Bill of Rights.¹⁴¹ 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.¹⁴² However, Fredman¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ Formal equality further assumes that all persons are equal bearers of rights and responsibilities, without being concerned with institutionalised, structural differences in equality.¹⁴⁶ It tends to reinforce and entrench rather than eliminate inequalities by ignoring actual social and economic disparities between individuals and groups in society.¹⁴⁷ 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.¹⁴⁸

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,

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 *Politeia* 139; see also Chapter 2 of the *Constitution*.

142 Zulu 2003 *SAJHE* 98.

143 Fredman *Discrimination law* 1.

144 Allen 2016 *Foreign Affairs* 24-26.

145 Smith 2014 *AHRLJ* 611.

146 Wessels 2005 *Politeia* 129.

147 Wessels 2005 *Politeia* 129; van Reenen 1997 *SA Public Law Journal* 153.

148 Smith 2014 *AHRLJ* 612.

involving different people, cultures and other variables.¹⁴⁹ Fraser¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ In the economic sense, taking gender into perspective, substantive equality requires ensuring that women are granted socio-economic rights on equal terms with men.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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.

155 Smith 2008 *International Journal of Discrimination and the Law* 201.

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.¹⁵⁷ The concept of equality in the workplace presupposes fair treatment for both men and women of different races in the labour market.¹⁵⁸ The implication is that employers should not arbitrarily favour men as both genders are similarly situated.¹⁵⁹ This is often seen in situations where women at the same level as men in the workplace get lower wages than their male counterparts.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.¹⁶³ The procedural view involves the removal of barriers or obstacles, such as word-of-mouth recruitment or non-job-related selection criteria.¹⁶⁴ Some of the barriers to equal opportunities include selection practices that exclude women and making certain

157 Hassberg 1992 *Buffalo Law Review* 217.

158 Steyn and Jackson 2014 *SAJEMS* 190.

159 Hassberg 1992 *Buffalo Law Review* 219; see also *Reed v. Reed*, 404 U.S. 71 (1971)

160 Albertyn *et al* *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* 105.

161 Addati *Women at Work* xx.

162 Hepple 2001 *International Labour Review* 9.

163 Hepple 2001 *International Labour Review* 10.

164 Hepple 2001 *International Labour Review* 10.

top management positions available to men only.¹⁶⁵ 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*.¹⁶⁶

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.

165 Albertyn *et al* *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* 105.

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.¹⁶⁷ 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*,¹⁶⁸ *Labour Relations Act 66 of 1995*,¹⁶⁹ *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*. Kok¹⁷⁰ 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.¹⁷¹ 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.

168 *Constitution of the Republic of South Africa, 1996* (Hereinafter the Constitution).

169 Including the amendments.

170 Kok 2008 *Stellenbosch Law Review* 124-125.

171 Section 2 of the *Constitution*; see also McGregor 2011 *SA Merc LJ* 488.

state sovereignty and absolute respect for domestic jurisdiction.¹⁷² 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 1993¹⁷³ and 1996 Constitutions ushered in a new era characterised by the supremacy of the *Constitution* and hence the establishment of a democratic state.¹⁷⁴ However, the new democratic state inherited a deeply-divided society with profound disparities in socio-economic wellbeing across racial groups.¹⁷⁵ 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.¹⁷⁶ Within the labour context, the *Constitution* provides for the right to equality¹⁷⁷ and to fair labour practices¹⁷⁸ 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.¹⁷⁹ The *Constitution* recognises the extent to which disadvantage attaches to race, gender and other group characteristics.¹⁸⁰ South Africa adopted a democratic constitutional order under which a commitment was made to achieve equality by embracing the same as a value.¹⁸¹ Section 9 of the *Constitution* provides that everyone has the right to equality and equal protection of the law.¹⁸² Furthermore, the *Constitution* provides for grounds of unfair discrimination and amongst the grounds constituting unfair discrimination is gender.¹⁸³ Liebenberg and O'Sullivan¹⁸⁴ 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

172 Dugard 1997 *EJIL* 77.

173 *Interim Constitution of the Republic of South Africa* 1993.

174 Dugard 1997 *EJIL* 77.

175 Van Der Byl 2014 Background Paper <http://www.dpme.gov.za> 4.

176 Van Der Byl 2014 Background Paper <http://www.dpme.gov.za> 4.

177 See section 9 of the *Constitution*.

178 See section 23 of the *Constitution*.

179 Manjoo 2005 *Acta Juridica* 243.

180 Fergus and Collier 2014 *SAJHR* 484.

181 McGregor 2011 *SA Merc LJ* 488.

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*,¹⁸⁵ 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.¹⁸⁶ The court hence established a three-stage test to be used to determine whether there was unfair discrimination or not.¹⁸⁷ The first part of the test is to establish whether there was differentiation between people.¹⁸⁸ If there was no differentiation then there was no discrimination.¹⁸⁹ If there was differentiation, the next step was to determine whether the discrimination was based on a "listed ground".¹⁹⁰ Listed grounds included race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, origin, age, disability, religion, conscience, culture, language and birth.¹⁹¹ Discrimination based on a listed ground would result in the conduct of the employer constituting unfair discrimination.¹⁹² 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.¹⁹³ If the complainant's right to dignity has been undermined (or adversely affected in a comparably serious

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 *Stojce 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.¹⁹⁴ 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.

Smith¹⁹⁵ 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.¹⁹⁶ This notion recognises that opportunities are determined by individuals' social and historical status, including race and gender, as part of a group or groups.¹⁹⁷ 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. Henrico¹⁹⁸ 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.¹⁹⁹ 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*

194 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 50; Van Wyk *et al* 2013 *Without Prejudice* 14.

195 Smith 2014 *African Human Rights Law Journal* 615; McGregor 2011 *SA Merc LJ* 490; *Mangena & others v Fila South Africa (Pty) Ltd & others* [2009] 12 BLLR 1224 (LC) at para 5.

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."

197 McGregor 2011 *SA Merc LJ* 490.

198 Henrico 2015 *OBITER* 284.

199 Section 39 (b) and (c) of *Constitution*.

Occupation) *Convention 111* of 1958,²⁰⁰ *Convention on the Elimination of All Forms of Discrimination against Women* of 1979,²⁰¹ *Equal Remuneration Convention* 100 of 1951, *Workers with Family Responsibilities Convention* 156 of 1981²⁰² and *United Nation's Convention on the Rights of Children* 1990^{203, 204} With regards to the above mentioned conventions, South Africa has ratified *Convention 111*, *CEDAW*²⁰⁵ and *Convention 100* amongst other international treaties.

CEDAW is generally regarded as the international bill of rights for women.²⁰⁶ This is one of the instruments that have been used to help counter and eradicate all forms of discrimination in society.²⁰⁷ 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.²⁰⁸ Furthermore, article 2 of the *CRC* has urged states to prohibit gender discrimination and recognise the principle of equality.²⁰⁹ The ILO's *Convention 111* also has gender as one of the grounds that may constitutes discrimination.²¹⁰ In these regards, discrimination is considered as the main factor that contribute to the impairing of equal treatment and opportunity in the workplace.²¹¹

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.²¹² Application of such conventions can therefore be extended to the labour market to ensure equal treatment and opportunities in the workplace for

200 *Discrimination (Employment and Occupation) Convention* 111 of 1958 (Hereafter *Convention 111*).

201 *Convention on the Elimination of All Forms of Discrimination against Women* of 1979 (Hereinafter *CEDAW*).

202 *Workers with Family Responsibilities Convention* 156 of 1981 (Hereinafter *Convention 156*).

203 *Convention on the Rights of Children* 1990 (Hereinafter *CRC*).

204 Budlender *Gender Equality and Social Dialogue in South Africa* 2.

205 Wadesango 2011 *J Soc Sci* 164.

206 Budlender *Gender Equality and Social Dialogue in South Africa* 1.

207 Wadesango 2011 *J Soc Sci* 166.

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).²²⁰ 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 1998,²²¹ *Labour Relations Act* 66 of 1995,²²² *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 and the *Basic Conditions of Employment Act* 75 of 1997.²²³ Mechanisms 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 be argued that the *EEA* is the main statute that regulates equality in the workplace. One of the main aims of the *EEA* is to promote proportionate representation of all groups at all levels of the workplace.²²⁴ 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.²²⁵ Section 6(1) of the *EEA* further encourages all employers to prohibit unfair discrimination in any employment policy or practice on

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*).

223 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (Hereinafter *PEPUDA*).

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*.

'listed grounds'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.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.²²⁸

Fergus and Collier²²⁹ argue that these sections accordingly regulate the behaviour of all employers, regardless of their designated status. Furthermore, the court in *Piliso v Old Mutual Life Assurance Co (SA) Ltd*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 *EEA* imposes a duty on employers to

pre-empt discrimination in their workplaces, rather than merely respond to it.²³¹

However, it can be argued that these sections are not implemented effectively in South Africa. Sections 5 and 6(1) of the *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.

Brassey²³² submits that the *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

226 Section 6 (1) of *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.

227 Du Toit *et al Labour Relations Law* 680.

228 Van Wyk *et al Without Prejudice* 15.

229 Fergus and Collier 2014 *SAJHR* 486-887.

230 *Piliso v Old Mutual Life Assurance Co (SA) Ltd* 2007 28 ILJ 897 (LC) para 77.

231 Fergus and Collier 2014 *SAJHR* 486-487.

232 Brassey 1998 *ILJ* 1363.

Constitution.²³³ It may be that the *EEA* is racially oriented and pays less attention to gender or disability. Hepple²³⁴ 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.²³⁵ 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.²³⁶ 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.²³⁷ 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.²³⁸ It can be noted from this definition of affirmative action that it is aimed at designated groups and employers. The term 'designated groups'²³⁹ is broad enough to include women of all races.²⁴⁰ Designated employers 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.

234 Hepple 2012 *Reinventing Labour Law* 17.

235 Hepple 2012 *Reinventing Labour Law* 17.

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.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.²⁴² In *Naidoo v Minister of Safety*²⁴³ the court held that:

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.²⁴⁴

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 *EEA*.

Herman²⁴⁵ 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.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.

241 Section 1 of the *EEA*.

242 Section 15 (2) (a) and (c) of *EEA*.

243 *Naidoo v Minister of Safety* 2013 (3) SA 486 (LC).

244 *Naidoo v Minister of Safety* 2013 (3) SA 486 (LC) para 72.

245 Hermann *The Naked Emperor: Why Affirmative Action Failed* 14-15.

246 Hermann *The Naked Emperor: Why Affirmative Action Failed* 14-15.

Louw²⁴⁷ is of the opinion that the *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. Louw²⁴⁸ 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 *EEA* does not explain such a link and neither have the courts.²⁴⁹ It is also submitted that there is no link between equality and representation.²⁵⁰ Malan²⁵¹ 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.²⁵²

Both Malan and Louw agree that there is a fundamental flaw in the understanding and application of affirmative action as provided by the *EEA*. However, one may argue that the *EEA* uses the concept of "equality" as drawn from the *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 *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".

247 Louw 2015 *PER* 611.

248 Louw 2015 *PER* 611.

249 Louw 2015 *PER* 611.

250 Louw 2015 *PER* 611.

251 Malan 2010 *TSAR* 447.

252 Malan 2010 *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*.²⁵³ This Code on Equal Pay provides guidelines to employers on how to effectively implement policies with regards to equal remuneration for employees.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.²⁵⁵ This is also one area where women have been unfairly discriminated against because of their gender.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*.²⁵⁷ However, the *EEA* only covers designated employers.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.

253 Code of Practice on Equal Pay/Remuneration for Work of Equal Value 2015 (Hereinafter Code on Equal Pay).

254 Article 1 of Code on Equal Pay.

255 Article 2.3 of Code on Equal Pay.

256 See para 4.1

257 Article 2.2 of Code on Equal Pay.

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 democratisation of the workplace.²⁵⁹ 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.²⁶⁰ Notably, gender and sex are specifically mentioned grounds that constitute unfair discrimination as is done in other legislation²⁶¹ 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.²⁶² The purpose of *PEPUDA* is to eliminate unfair discrimination against all people in all spheres of society.²⁶³ The *PEPUDA* also provides for dealing with unfair discrimination and the grounds for prohibition of unfair discrimination include gender.²⁶⁴ It is submitted that the *PEPUDA* has a broad scope of application that includes socio-economic aspects of society.²⁶⁵ 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*

262 Liebenberg and O'Sullivan 2001 *Acta* 70; McGregor 2011 *SA Merc LJ* 491.

263 McGregor 2011 *SA Merc LJ* 491.

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 it 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 Chiloane*²⁶⁷, 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.

271 Chipkin and Meny-Gilbert 2013 <http://www.raith.org.za> 5.

272 Shank 1991 *Social Justice* 1-2.

respect of gender entail that women should also be afforded the same economic opportunity and treatment as men within the labour market.²⁷³ This may imply having equal access to top management level positions or equal pay for work of equal value.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 *Women Empowerment and Gender Equality Bill* of 2013 was established primarily to focus on gender equality.²⁷⁵ The main purposes of the Gender Bill are to promote gender equality and employment of women.²⁷⁶ This Gender Bill focuses on economic empowerment, protection, gender mainstreaming, advancement and equal representation of women in decision making structures.²⁷⁷ Gender mainstreaming is an equality strategy that aims to integrate a gender perspective into policy making.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.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.

273 The Fawset Society 2015 <http://www.fawcettsociety.org.uk>.

274 The Fawset Society 2015 <http://www.fawcettsociety.org.uk>.

275 Preamble of *Women Empowerment and Gender Equality Bill* published in Government Gazette No. 37005 of 6 November 2013 (hereinafter the *Gender Bill*).

276 Preamble of *Gender Bill*; Van Niekerk *et al* *Law@Work* 180.

277 Section 3 of *Gender Bill*; Van Niekerk *et al* *Law@Work* 180.

278 Sadie 2005 *Journal of Public Administration* 453.

279 Sadie 2005 *Journal of Public Administration* 453.

3.4.6 Commission for Gender Equality

The Commission for Gender Equality²⁸⁰ 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 structures²⁸⁴ 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 Ojaborotu 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 Ojaborotu 2013 *Gender and Behaviour* 5189.

286 Selebogo and Ojaborotu 2013 *Gender and Behaviour* 5189.

287 Selebogo and Ojaborotu 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.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 *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.²⁸⁹ Furthermore, it also provides for the recognition of applicable international law.²⁹⁰ International law, especially conventions, will only apply in South Africa if they are ratified²⁹¹ and as long as they are consistent with the *Constitution*.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.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.

288 Geisler, Mokgope and Svanemyr 2009 <http://www.afdb.org.za>.

289 Section 9 of the *Constitution*.

290 Section 39 and 232 of the *Constitution*.

291 Section 231 of the *Constitution*.

292 Section 232 of the *Constitution*.

293 Benjamin *A Review of Labour Markets in South Africa* 4.

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*.²⁹⁴ For instance, the *EEA*'s affirmative action plan has not been implemented and monitored effectively.²⁹⁵ On the other hand the *PEPUDA* does not expressly provide for workplace law.²⁹⁶ 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.

295 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'²⁹⁷ led to laws resulting in systemic, structural discrimination and inequality in South Africa based on race and gender.²⁹⁸ 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 Nkomo²⁹⁹ 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*³⁰⁰ 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.³⁰¹ 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.³⁰² 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).

298 McGregor 2011 *SA Merc LJ* 488.

299 Booysen and Nkomo 2010 *An International Journal* 290.

300 Parcheta *et al* 2013 *Journal of Business Studies Quarterly* 241.

301 Steyn and Jackson 2014 *South African Journal of Labour Relations* 48-69; Bosch 2011 *The SABPP Women's Report* 2011 13; see also Jutting *et al* *Why do so many Women end up in Dad Jobs? A Cross-Country Assessment* 287.

302 Section 35 of the *BCEA*; see also McGregor 2011 *SA Merc LJ* 488.

African workforce. Bhorat³⁰³ 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.³⁰⁴ Addati *et al*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.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.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.³⁰⁸ In the public sector, the wage gap is 27 per cent whereas in the private sector it is 35 per cent.³⁰⁹ In sectors such as trade, transport and hospitality the wage-gap is 24 per cent.³¹⁰ In commercial services, agriculture, manufacturing and building, the pay gap is at 3 per cent.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

303 Bhorat 2004 *South African Journal of Economics* 954-977.

304 Anon <http://download.ei-ie.org/> 2.

305 Addati *et al Women at Work* xvi.

306 Addati *et al Women at Work* 28.

307 World Economic Forum Gender Gap Report 2013 <http://www3.weforum.org>; Goko 2013 <http://www.bdlive.co.za>.

308 Orr and Van Meelis *Bargaining Indicators 2014* 46.

309 Burmeister 2014 <http://www.skillsportal.co.za>; Kahn and Motsoeneng 2014 *Journal of Public Administration* 1069.

310 Burmeister 2014 <http://www.skillsportal.co.za>.

311 Burmeister 2014 <http://www.skillsportal.co.za>.

gender.³¹² In *Louw v Golden Arrow Bus Services (Pty) Ltd*,³¹³ 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.³¹⁴ 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*.³¹⁵ In *Mangena and Others v Fila South Africa (Pty) Ltd and Others*,³¹⁶ 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.³¹⁷ 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*.³¹⁸ Furthermore, the PEPUDA states that failure to respect the principle of equal pay for equal work, a 'widespread' practice, is an 'unfair practice'.³¹⁹

4.2.1.1 Onus of proof

The *Mangena*³²⁰ and *Ntai*³²¹ 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*.³²² Furthermore, to prove this differentiation the claimant must identify a comparator and prove such a person is

312 Mclauchlin 2016 *Farmers' Weekly* 30.

313 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 3 BLLR 311 (LC) para 25.

314 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 3 BLLR 311 (LC) para 26.

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.

321 *Ntai and Others v South African Breweries Ltd* 2001 2 BLLR 186 (LC) para 2.

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 *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 *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 *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.

323 *Mangena and Others 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 v Fila South Africa (Pty) Ltd and Others* 2009 12 BLLR 1224 (LC) para 16.

325 *Mangena and Others v Fila South Africa (Pty) Ltd and Others* 2009 12 BLLR 1224 (LC) at 122.

326 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value 2015; Mclauchlin 2016 *Farmers Weekly* 30.

327 Nel *et al* 2008 *Human Resources Management* 38.

328 *TGWU and Another v Bayete Security Holding* 1999 4 BLLR 401 (LC) para 7.

329 *TGWU and Another v Bayete Security Holding* 1999 4 BLLR 401 (LC)

330 *Ntai and Others 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.

336 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.³³⁷ 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.³³⁸ Although women have entered occupations previously closed to them, many top jobs remain as gender-segregated today.³³⁹ Men continue to dominate with regards to access to executive and senior management positions.³⁴⁰ 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.³⁴¹ It is an unbreakable barrier that prevents women from rising to top positions within the corporate world, regardless of their qualifications or achievements.³⁴² Women remain more likely to be employed in low-skilled occupations.³⁴³ Women are mostly associated with administrative support jobs that include secretaries, personal assistants, receptionists and administrative officials.³⁴⁴

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

337 Bhorat and Goga *The Gender Wage Gap in the Post-Apartheid South African Labour Market* 13.

338 SADC Gender Protocol 2015 Barometer South Africa <http://www.genderlinks.org.za> 70.

339 Williams *et al* 2012 *Gender and Society* 549.

340 Booysen and Nkomo 2010 *Gender in Management: An International Journal* 285.

341 Parcheta *et al* 2013 *Journal of Business Studies Quarterly* 241.

342 Fidan *et al* "The Effects of Discrimination against Women in Places of Business: A Report on the Tourism Industry" 60.

343 Department of Women 2015 <http://www.gov.za/sites/www.gov.za> 10.

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.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.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 2014.³⁴⁷ 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-Helm³⁴⁸ 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.³⁴⁹ In this context, a group's position in hierarchical power relations and the experiences attached to differential social locations influences perceptions and

345 SADC Gender Protocol 2015 Barometer South Africa [http:// www.genderlinks.org.za](http://www.genderlinks.org.za) 69.

346 SADC Gender Protocol 2015 Barometer South Africa <http:// www.genderlinks.org.za> 70.

347 SADC Gender Protocol 2015 Barometer <http://www.genderlinks.org.za>; Kahn and Motsoeneng 2014 *Journal of Public Administration* 1067.

348 Mathur-Helm 2005 *Women in Management Review* 20.

349 Booysen and Nkomo 2010 *Gender in Management: An International Journal* 286.

behaviours towards them.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.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.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.³⁵³ Generally, employers prefer employees with fewer distractions outside the workplace, who can fully dedicate themselves to the organisation.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.³⁵⁵ This aspect then excludes women and makes men preferable. In *Woolworths (Pty) Ltd v Whitehead*,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.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

350 Booysen and Nkomo 2010 *Gender in Management: An International Journal* 286.

351 Fidan *et al* "The Effects of Discrimination against Women in Places of Business: A Report on the Tourism Industry" 68.

352 Booysen and Nkomo 2010 *Gender in Management: An International Journal* 286.

353 Starnarski and Son Hing 2015 *Frontiers in Psychology* 3-4; Booysen and Nkomo 2010 *An International Journal* 286.

354 Williams *et al* 2012 *Gender and Society* 550.

355 Albertyn 2011 *STELL LR* 592.

356 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC).

357 *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.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.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 *Whitehead case*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.³⁶¹ This negative cliché has portrayed women as emotionally vulnerable, defenceless susceptible to stress and victimisation within the workplace.³⁶² On the other hand, a business leader is often portrayed as successful, forceful and masculine characters which women are perceived to lack.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.³⁶⁴

358 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC) para 133.

359 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC) para 14-19.

360 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC).

361 Leigh *et al* 2014 *Gender and Behaviour* 6059.

362 Leigh *et al* 2014 *Gender and Behaviour* 6059.

363 Leigh *et al* 2014 *Gender and Behaviour* 6063.

364 Steyn and Jackson 2015 *South African Journal of Labour Relations* 735.

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 disproportionately 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-dominated³⁶⁹ 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

367 Steyn and Jackson 2015 *South African Journal of Labour Relations* 736.

368 Steyn and Jackson 2015 *South African Journal of Labour Relations* 736-737.

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 2014.³⁷⁰ 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.³⁷¹ Women have remained primarily responsible for child-care, elder-care and house work, which further limits their prospects of job opportunities.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.³⁷³ This has led to some jobs being labelled 'feminine' or masculine based on skills required for the jobs and the working culture.³⁷⁴ Jobs that require interpersonal skills or caregiving skills are considered feminine as these are innate characteristics of a traditional concept of a woman.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.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.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

370 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1068.

371 Du Plessis *et al* 2012 *Deakin Law Review* 248.

372 Fredman 2009 *SAJHR* 412.

373 Addati *et al Women at Work* 39

374 Addati *et al Women at Work* 39.

375 Addati *et al Women at Work* 39.

376 Addati *et al Women at Work* 39.

377 Addati *et al 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*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.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*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 than 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

378 Shein *et al* 2009 *International Journal of Human Resource Management* 241.

379 Shein *et al* 2009 *International Journal of Human Resource Management* 243.

380 Du Plessis *et al* 2012 *Deakin Law Review* 242.

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.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.³⁸² Hostile sexism involves antipathy towards women, a belief that women are incompetent and the belief that men should be more powerful than women.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.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

381 Stamarski and Son Hing 2015 *Frontiers in Psychology* 8.

382 Stamarski and Son Hing 2015 *Frontiers in Psychology* 8.

383 Stamarski and Son Hing 2015 *Frontiers in Psychology* 8.

384 Orr and Van Meelis 2014 *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.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.³⁹⁰ 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.³⁹¹ This entails that when organisations undertake training for recruitment, appraisal, selection for promotion, supervision or resource allocation, equality should be emphasised.³⁹² It is further submitted that this equality training programme should include, amongst many others, the following aspects:³⁹³

- the importance of equality;
- the law and what it means in practice;
- roles and responsibilities of staff 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.

391 ACAS 2012 <http://www.acas.org.uk/media> 7.

392 ACAS 2012 <http://www.acas.org.uk/media> 7.

393 ACAS 2012 <http://www.acas.org.uk/media> 7.

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.³⁹⁴ 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 a 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 Motsoeneng³⁹⁵ 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.³⁹⁶ 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 qualities³⁹⁷ and are efficient workers³⁹⁸.

394 Steyn and Jackson 2014 *South African Journal of Labour Relations* 55.

395 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075.

396 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075.

397 Leigh *et al* 2014 *Gender and Behaviour* 6063.

398 Bhorat and Goga 2012 *The Gender Wage Gap in the Post-Apartheid South African Labour Market* 13.

However, Kahn and Motsoeneng³⁹⁹ 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.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.⁴⁰¹ Public commitment from public leaders and managers may entail transforming the institutional culture into an enabling environment.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.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.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.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

399 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075.

400 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075

401 ACAS 2012 <http://www.acas.org.uk/media> 5.

402 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075.

403 See Chapter 3.

404 Kahn and Motsoeneng 2014 *Journal of Public Administration* 1075.

405 Grogan 1996 *Voices of Women Aspiring to Superintendence* 25.

undergoing and suffering masculine domination.⁴⁰⁶ Grogan⁴⁰⁷ 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.

406 Bourdieu *Masculine Domination* 93.

407 Grogan *Voices of Women Aspiring to Superintendence* 25.

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