



**AN EVALUATION OF RACE BASED INCOME DISCRIMINATION IN POST
APARTHEID SOUTH AFRICA.**

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ABSTRACT

The South African labour market has been characterised by income inequality, which emanates from past discrimination legacies. The wage gap between white workers and blacks have been marginally high. The same goes for the wage gap between males and females who find themselves performing equal value work in most cases. White workers continue to occupy high-level positions in an organisation with higher salaries disproportionately to black workers who generally occupy lower-level positions and with low-income earnings.

The dawn of democracy brought a new government that has passed legislation and regulations aimed at reversing the ills of the past and achieving labour reforms and workplace equality. This paper evaluates progress as a result of such legislation and government policy provisions, particularly the Employment Equity Act. The study considers the provisions of section 6(4) of the EEA, which is aimed at race and gender pay income inequality, and the effects of section 27 of the EEA, which attempts to address disproportionate income differentials, by analysing data, and other observations and inputs from various sources. Based on the research and data, the findings point to the continued existence of wage differentials between races in South Africa. The conclusion is that the government's legislative intervention in the labour market through the Employment Equity Act has had a marginal economic impact on employees' wages and labour market transformation in the post-apartheid period. It is recommended that there is a need for a fine-tuned strategic approach to address both vertical and horizontal wage gap, further to this, the recommendations made by legislated bodies such as the Committee on Employment Equity need to be considered and implemented to achieve the goals as set up in the National Development Plan.

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DEDICATION

This work is dedicated to my late mother who was my greatest source of inspiration, my beautiful wife Onwaba for her ever-present support, her love, encouragement during tough times, my children Pumulo and Pheto for their understanding when required to do so and my family for their confidence and for inspiring me.

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CHAPTER 1. INTRODUCTION AND BACKGROUND

1. INTRODUCTION

It is well documented that South Africa's pre-democratic status was characterised by high inequality levels amongst the various racial classifications of its citizens. The most recognised racial classification in South Africa is (a) Africans (b) Coloured (c) White and (d) Indian.¹ Under the system of apartheid, which was a system aimed at race discrimination and the promotion of white supremacy, white South African's were self-positioned to such an extent that economic prosperity was only in their favour.² In contrast, other race groups were oppressed by the systematic laws and policies aimed at oppression.³ The 1994 elections brought a new era that sought to redress the past and introduce policies that would restore human dignity, abolish inequality and alleviate poverty for all of South Africa's citizens.⁴ The democratically elected government post-1994 that was led by Nelson Mandela was faced with establishing a society based on the principles of equality and freedom from all forms of oppression.

The systematic discrimination established by the Nationalist Party through its policies, placed other race groups and women, including people who are living with disabilities at a massive disadvantage in the labour market and for employment opportunities.⁵ The system introduced occupational segregation, entrenched pay inequality, lack of promotion,

¹ Paul Allanson & Jonathan P Atkins (2005) The evolution of Racial Wage Hierarchy in Post-Apartheid South Africa, *Journal of Development Studies*, 41. The Employment Equity Act defines the term "Black people" as a generic term which means Africans, Coloureds and Indians.

² Carlos Gradin "Occupational segregation by race in South Africa after apartheid" *Review of Development Economics* Vol 23 (2019) 554.

³ Mariotti M & Van Zyl-Hermann D (2014) Policy, practice and perception: Reconsidering the efficacy and meaning of statutory job reservation in South Africa, 1956–1979, pg 198.

⁴ Maluleka R, *Inequality Trends in South Africa: A multidimensional diagnostic*, Report No 03-10-19. (2019)

⁵ Employment Equity Bill no 1840 of 1997 "The legacy of Discrimination"⁶.

exclusions from specific organisations, and shut down training and developmental opportunities.⁶ A woman was not employed in certain positions because of stereotypes and beliefs that they were not assertive enough, and this gave rise to gender-based pay disparities.⁷ The International Labour Organization concluded that South Africa had the highest inequality levels than any other country in the world.⁸

In 1996, The Presidential Commission to Investigate Labour Market Policy (hereinafter: Labour Market Commission) was established by the Mandela Government and tasked with the duty to research and propose new Labour Market reforms. Their report reflects that South Africa at the time was characterised by a skewed distribution of income.

‘the bottom 20% of income earners captures a mere 1.5% of national income, while the wealthiest 10% of household receive fully 50% of national income and that poverty is overwhelmingly concentrated in the African and Coloured population that.’⁹

The Labour Market Commission further noted that

‘The Commission is mindful that discrimination in remuneration persists and needs to be addressed in ways that are both conceptually and practically demanding.’¹⁰

The South African Constitution¹¹ seeks to address these injustices of the past, and a provision that enhanced equality was introduced in the Interim Constitution. In *Brink v Kitshoff*,¹² the Constitutional Court had this to say in the majority judgment:

‘The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented

⁶ Employment Equity Bill no 1840 of 1997 “The legacy of Discrimination”6.

⁷ Employment Equity Bill no 1840 of 1997 “The legacy of Discrimination”6.

⁸ Ibid

⁹ Report of the Labour Market Commission (1996)

¹⁰ Ibid

¹¹ Constitution of the Republic of South Africa (Constitution) 1996

¹² *Brink v Kitshoff* No 1996 (4) SA 197 (CC) par 40

from becoming owners of a property or even residing in areas classified as "white" which constituted nearly 90% of the landmass of South Africa: civil amenities, including transport system, public parks, libraries, and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling program are still visible in our society.'

The Constitution of the Republic is the supreme law and that any conduct that is inconsistent with it is invalid, all the obligations that are imposed by the Constitution must be fulfilled.¹³

When reading the preamble of the Constitution, it stipulates that 'we the people of South Africa, recognise the injustices of the past' and stress further that, the Constitution is adopted to 'Heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.'¹⁴

Our Constitution upholds the right to equality.¹⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) describes Equality as 'the full and equal enjoyment of all rights and freedoms as contemplated in the Constitution'¹⁶ and to promote the achievement of Equality, section 9(2) of the Constitution provides that 'legislative and other measures designed to protect or advance person or category of persons disadvantaged by unfair discrimination may be taken.'¹⁷ In other words, the Constitution makes provision for formal equality and substantive equality.

1.1 FORMAL EQUALITY

Formal equality is different from substantive equality in that formal equality requires that everyone is equal before the law and that they are born free and stresses the notion that the

¹³ Section 2 of the Constitution (1996) "Supremacy of the Constitution".

¹⁴ Constitution of the Republic of South Africa, 1996 – Preamble.

¹⁵ Section 9 (1) "Everyone is equal before the law and has the right to equal protection and benefit of the law".

¹⁶The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

¹⁷ Section 9 (2) of the Constitution.

government has to promote equality.¹⁸ Sections 9(1) of the Constitution provides the basis of formal equality.

This section of the Constitution states that:

‘Everyone is equal before the law and has the right to equal protection and benefits of the law.’¹⁹

The concept of formal equality does not accommodate or address historical discrimination that affected the present individuals' social or economic status.²⁰ It provides for equal treatment of individuals. In this regard, Dupper argues that ‘In short, formal equality means sameness of treatment – the law must treat persons in the same manner regardless of their circumstances.’²¹

Therefore, it is submitted that, when one considers the past discrimination history of South Africa, formal equality provisions will ensure that people are treated the same, and therefore imbalances would continue to exist.

1.2 SUBSTANTIVE EQUALITY

Substantive equality, on the other hand, seeks to understand what are the social, economic and political conditions affecting individuals and groups in the society and where there is inequality. A need for a legal framework is put into place to redress the disparity.²²

In Langemaat v Minister of Safety and Security,²³ a challenge was brought before the court by a police officer who challenged the South African Police Service's medical schemes

¹⁸ De Vos P et al, *South African Constitutional Law in Context* Oxford University Press (2014) 315

¹⁹ Section 9 of the Constitution

²⁰ De Vos et al (2014) 315

²¹ Dupper O “Affirmative Action and Substantive Equality: The South African Experience” 14 ed (2002) S A Merc LJ 275

²² <http://ssm.com/abstract=1649991> Accessed on 15 August 2020

²³ *Langemaat v Minister of Safety and Security & others* 1998 (3) SA 312 (T)

because, under the scheme rules, she couldn't register her same-sex partner as a dependant. The High Court ruled that the scheme discriminated unfairly against her and others in her position on the grounds of sexual orientation and held that this was an unjustifiable contravention of section 9 (3) of the Constitution. The medical scheme was, therefore, directed by the court to consider registering the applicant's partner.

While the concept of substantive equality provides for a regulatory framework in addressing inequality, it has also been embraced by the South African Constitutional Court. In the matter of *The Minister of Finance and Another v Frederik Jacobus Van Heerden*²⁴ where the applicants complained to the Constitutional Court was that the High Court misconceived the true nature of the equality protection recognised by the Constitution, by resorting to a formal rather than a substantive notion of equality, the court held that 'This substantive notion of equality recognises that, besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under privilege which persists.'²⁵

In the case of *The National Coalition for Gay and Lesbian Equality v The Minister of Justice*,²⁶ where the National Coalition for Gay and Lesbian Equality was the applicant, a request for a declaratory judgment was made from the Witwatersrand High Court on the unconstitutionality of sodomy. The CC held that:

'It is insufficient for the Constitution merely to ensure through the Bill of Rights that, a statutory provision which has caused such unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and rules remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.'

²⁴ 2004 12 BLLR 1181 (CC)

²⁵ Ibid

²⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Other (CCT 11/98)*

Dupper shares the following view about substantive equality, ‘substantive equality takes the circumstance of people into account and requires the law to ensure equality of outcome.’²⁷

The need for a legislative measure as required by the Constitution prompted the Department of labour to support the employment equity legislation and affirmative action measures that would ‘encourage equity in the workplace in ways that help improve the overall distribution of income while fostering a more productive economy.’²⁸

The Employment Equity Act (EEA) was drafted in 1998 to achieve workplace equity and for the implementation of affirmative action measures.²⁹ It addresses both vertical and horizontal pay inequity, and in this regard section, 27 of the EEA deals broadly with addressing disproportionate pay discrimination.

The amendments to the EEA³⁰ were enacted with the objectives of strengthening the provisions of section 27, to obtain gender pay equity in the workplace and regulate claims associated with equal pay.³¹ Section 6 (4) of the EEA make provision for (a) equal pay for the same work; (b) equal pay for substantially the same work; and (c) equal pay for work of equal value³². According to section 6(4) of the Act,

‘A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.’³³

²⁷ Dupper O ‘Affirmative Action and Substantive Equality: The South African Experience’ 14 ed (2002) SA

²⁸ Green Paper: Employment and Occupational Equity, 01 July 1996 Notice 804 of 1996.

²⁹ Employment Equity Act, No 55 of 1998 – Purpose of the Act,

³⁰ The Employment Equity Amendment Act, No 47 of 2013 (EEAA) was promulgated into law on 1 August 2014 along with a new set of regulations introduced by Government Gazette Notice 37873 (Regulations). The EEAA amends the Employment Equity Act, No 55 of 1998 (EEA) to strengthen the EEA’s objective of achieving equity in the workplace.

³¹ Ebrahim S, Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom, PER/PELJ (2016), pg 1

³² Section 6(4) of the EEA amended Act of 2014

³³ Ibid

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was later passed in (2000), and the objective was ‘to give effect to section 9 of the Constitution’ and to ‘promote equality and prevent unfair discrimination.’³⁴

1.3 AIMS OF THE RESEARCH

The purpose of this research is to investigate the progress we have made as South Africans in addressing the past discrimination that relates to the pay gap - both the vertical pay gap and the horizontal pay inequity - that exists in the workplace as a legacy of the past discrimination. In comparing South Africa’s inequality with the rest of the world, it is considered to be one of the worst with its roots derived from colonisation and apartheid.³⁵ The research considers the legislative provisioning aimed at addressing the apartheid policy framework of discrimination and assesses whether it has been able to assist with closing the disproportionate wage gap and addressing pay inequity.

1.4 RESEARCH QUESTION

This dissertation considers the current income distribution in South Africa and seeks to evaluate the impact of equality legislation intended to address the wage gap and whether income disparities have been reduced since the dawn of democracy in 1994 and the extent to which income disparities are still along racial lines.

1.5 RESEARCH METHODOLOGY

The research methodology used in this dissertation is a quantitative data analysis research method. The literature study is from both primary and secondary sources that were used. The primary sources consist of the Constitution of the Republic of South Africa, foreign law, International Conventions, case law on court decisions and common law, Commission for

³⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000

³⁵ Risengo Maluleka “Inequality Trends in South Africa: A multidimensional diagnostic” Report No 03-10-19, (2019)

Employment Equity Reports (CEE), Post-Apartheid Labour Market Series (PALMS) and Statistics South Africa (Stats SA) data.

In addition to South Africa's legislation, the study considers both Canadian and UK legislation on employment equity and pay equity framework. The secondary sources consist of South African government regulations, journal articles, textbooks, statistics and internet sources.

1.6 CHAPTER STRUCTURE

The dissertation consists of 4 chapters.

Chapter 1 provides the introduction and background of the study. This chapter also gives the aims of the research, the research question, and the research methodology used.

Chapter 2 considers South Africa's history of unequal distribution of income and the new legislative framework introduced by the democratic government to transform the labour market.

Chapter 3 focuses on the Employment Equity provisions aimed to address the wage gap, that is, section 6(4) and section 27 of the EEA. Also, the Canadian's Employment Equity Act is discussed so are the provisions of the Employment Equity in the United Kingdom (hereinafter: UK).

Chapter 4 presents the findings of the research and provides recommendations and the conclusion.

1.7 CONCLUSION

The repeal of apartheid legislation and the policy framework and the introduction of new legislation to reverse labour market irregularities, particularly in income, have achieved limited progress since the dawn of our democratic society. In this regard, Allanson and

Atkins argue that ‘the repeal of apartheid legislation is unlikely to be sufficient to eradicate the established racial wage hierarchy.’³⁶ Notwithstanding the limitations in gaining access to the most current economic data from Statistics South Africa that has been broken down and analysed by economist's, the available data provided credible information for the study. While the road to the end of racial wage hierarchy is still a long way for South Africans, the endeavours to end the unfairly discriminated wage gap in the future may still be realised.

CHAPTER 2. SOUTH AFRICA’S HISTORY OF INCOME INEQUALITY AND THE LEGISLATIVE FRAMEWORK

2.1 INTRODUCTION

South Africa discriminatory laws can be traced back to the seventeenth century.³⁷ This sentiment was shared by Van Zyl, who argues that labour market discrimination predated apartheid and further contends that the Mines and Works Act of 1911, which was passed one year after the Union of South Africa was formed in 1910, played a role in legalising the practice of skilled jobs reservation in the mining industry and mainly reserved skilled positions for whites.³⁸ Van Zyl further maintains that racial discrimination in the labour market was first formalized in the Gold Mines.³⁹

³⁶ Allanson P & Atkins P “No End to the Racial Wage Hierarchy in South Africa?” Review of Development Economics Vol 6 No 3 (2002)

³⁷ Matshikwe Lungile An analysis of the policy – making process in the department of labour with specific reference to the employment equity act 55 of 1998 Master Thesis at the University of Port Elizabeth pg 60.

³⁸ Mariotti M & Van Zyl-Hermann D (2014) Policy, practice and perception: Reconsidering the efficacy and meaning of statutory job reservation in South Africa, 1956–1979, 200

³⁹ Mariotti M & Van Zyl-Hermann D (2014) Policy, practice and perception: Reconsidering the efficacy and meaning of statutory job reservation in South Africa, 1956–1979, 200

2.2 THE LABOUR MARKET CONDITIONS PRE-DEMOCRACY

When the National Party came into power,⁴⁰ a system called apartheid was introduced, which was aimed at the separate development of the different race groups in South Africa.⁴¹ The racial dominance of whites over other groups, the preservation of white Afrikaner identity, and exploiting Black people was the aim of the policy.⁴² Some of these laws that were referred to as the Job Reservation Acts were aimed at reserving certain positions or jobs for white workers to ensure that they received priority placements.⁴³ The Industrial Conciliation Act of 1956, in its provision, contained a clause that reserved all skilled jobs for white workers.⁴⁴ It also prevented labour market competition that could take place between black people and their white counterparts.⁴⁵

Inequality was not only affected in the labour market but was extended to factors that take place outside of the labour market; however, these factors also had an impact on the labour market.⁴⁶

If one could consider the quality of education offered to Black people as an example of these outside factors that had an impact indirectly on labour market inequality, it was the policy of the government that, in schools, Black people should only be taught what was necessary for their preparation to continue becoming unskilled or low-skilled workers.⁴⁷ This was done

⁴⁰ Mariotti M & Van Zyl-Hermann D (2014) Policy, practice and perception: Reconsidering the efficacy and meaning of statutory job reservation in South Africa, 1956–1979, 200

⁴¹ Roberts M, "Shifting Inequalities in South Africa" Geography Association Vol 79, No 1 (1994) pg 1

⁴² Ibid

⁴³ The Job reservations Acts consisted of the Bantu Building Workers Act No 27 of 1951 which made it a criminal offence for a black person to perform any skilled work in urban areas except in sections designated for black occupation, the Native Labour (Settlement of Disputes) Act, 1953 prohibited any strike action by blacks and the Industrial Conciliation Act, 1956

⁴⁴ Clause 77 of the Industrial Conciliation Amendment Act No 28 of 1956 gave legal backing to the reservation of skilled jobs to white workers

⁴⁵ Ibid

⁴⁶ Matshikwe L, An analysis of the policy – making process in the department of labour with specific reference to the employment equity act 55 of 1998 Master Thesis at the University of Port Elizabeth, 68

⁴⁷ Ibid

through the passing of the Bantu Education Act of 1953. ‘The purpose of the act was to consolidate Bantu education, so that discriminatory educational practices could be uniformly implemented across South Africa.’⁴⁸ The Bantu Education System ensured that pupils in Black schools were only taught their Bantu Cultural Heritage:

‘The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labour. Within his own community, however, all doors are open. For that reason, it is of no avail for him to receive a training which has as its aim absorption in the European community while he cannot and will not be absorbed there.’⁴⁹

The Bantu Education System was a significant contributor to limiting the career development opportunities of Black people. Career progression and career advancement to higher positions in the world of work requires that a certain level of education is attained. The Bantu Education Act could advance section 77 of the Industrial Conciliation Act, because, through its provisions, Black workers were prevented from competing with white workers for skilled positions.

Then there were the Master-Servant laws that were passed which were aimed at entrenching the master-servant relationship - as black people were forced through legislation to obey and respect whites as their masters.⁵⁰

The Populations Register Act of 1950 required that every person in the Republic of South Africa be classified as either Bantu, White, or Coloured. The categories used were to facilitate different treatment of people according to the racial type they belonged to. The law was therefore used for further unequal treatment of citizens. It is argued that the Populations Register Act was ‘the cornerstone of apartheid and the mother of apartheid laws.’⁵¹

⁴⁸ (https://en.wikipedia.org/wiki/Department_of_Bantu_Education) Accessed on 22 August 2020

⁴⁹ This was according to H F Verwoerd, Minister of Native Affairs (1950–1958),

⁵⁰ Matshikwe Lungile An analysis of the policy – making process in the department of labour with specific reference to the employment equity act 55 of 1998 Master Thesis at the University of Port Elizabeth, 69

⁵¹ Roberts M, Shifting Inequalities in South Africa, Geography Association Vol 79, No 1 (1994) pg 55

On the other hand, the Group Areas Act of 1966 separated people according to their racial groups, and people had to live in group areas allocated to members of their designated group (Black, coloured, white or Indian)⁵². It was under the Group Areas Act that Blacks were restricted from owning or renting property; neither were they allowed to occupy land in areas set aside for whites. It is important to note that the best areas at the time, which were urban, commercial, and agricultural - were deemed as "white zones".⁵³

The other legislation was the Native Urban Areas Act of (1952),⁵⁴ also referred to as the Pass Laws Act of 1952, also known as the "Dompas" which meant ("dumb – pass"). This document had the employment details of the person, his/her record of employment, how his/her performance behaviour was and contained permission allowing the person to be in that particular area. The dompass required that the employer, who was generally white, endorse the book, and in instances where the book was not endorsed for specific reasons, the worker would then not be allowed to work, and could not stay in that particular area - therefore making it impossible for the person to earn an income.⁵⁵ The Urban Areas Act hampered individual development amongst Blacks by preventing them from moving freely in search of a decent job or becoming entrepreneurs so that they could feed their families and educate their children.⁵⁶

⁵² Act No. 36 of 1966

⁵³ <https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s>: Accessed on 10 September 2020

⁵⁴ The Black (Natives) Laws Amendment Act of 1952 amended the 1945 Native Urban Areas Consolidation Act, stipulating that all black people over the age of 16 were required to carry passes, and that no black person could stay in an urban area more than 72 hours unless allowed to by Section 10 of the Act.

⁵⁵ <http://www.cortland.edu/cgis/suzman/apartheid.html>. Accessed on 11 September 2020

⁵⁶ Francis Wilson (2011) Historical Roots of Inequality in South Africa, *Economic History of Developing Regions*, 26:1, 11

These laws and other policies not mentioned here, which were discriminatory in practice, were responsible for producing a political, social, economic, and organisational obstacle for the advancement of Blacks in South Africa.

The apartheid policies, according to the Green Paper on Policy Proposals, marginalised a massive section of the labour force and deprived them of opportunities to engage in meaningful economic activities - either as employees or as entrepreneurs.⁵⁷

The policies were also successful in reducing the cost of labour for Blacks on the one hand while it increased the cost of skilled labour on the other hand - particularly for jobs, which were reserved for only a few minorities at the expense of those who directly employed labour. This exercise did not necessarily translate to increased productivity.⁵⁸

2.3 THE EFFECT OF INEQUALITY AND IMPACT ON INCOME

The systematic discrimination brought about by the apartheid government had a major effect on South Africa's labour market and non-labour markets, and as such, South Africa has one of the world's most unequal societies.⁵⁹ It is the skew distribution of income which is a characteristic of the past, which has contributed to this inequality. The Green Paper on Policy Proposals advances the argument that where there is massive inequality in income, there is a direct effect on social cohesion, economic growth, and individuals - including their families.⁶⁰

The decomposition of economic data with a focus on racial wage differentiation in South Africa reflects that the apartheid discriminatory policies that were meant to advance the

⁵⁷ Green Paper: Employment and Occupational Equity, 01 July 1996 Notice 804 of 1996.

⁵⁸ Ibid

⁵⁹ Borat H, *Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions* (2009) DPRU pg 1

⁶⁰ Green Paper: Employment and Occupational Equity, 01 July 1996 Notice 804 of 1996

overpayment of white wages, placed them at a pay level where they were the highest paid in the workplace, followed by Asians, coloureds and lastly Blacks.⁶¹

Bhorat, in a 2009 study, maintains that income inequality is inextricably linked to wage inequality.⁶² Where inequality is at its lowest levels, growth is negatively affected, and more pressure is placed on wages, and ultimately worker morale would be low, and so is productivity.⁶³

Income inequality can be understood as an unequal distribution of income that can occur either vertically (between the occupational levels, which are from a high occupational level to the lowest occupational level) and horizontally (that is between people who are performing at the same level in an organisation).⁶⁴ It is further argued that South Africa's income inequality is characterised by both horizontal and vertical income inequality, which are considered to be at the highest levels across racial divides.⁶⁵

The horizontal income inequality takes place mostly in the form of two individuals performing the same job, but, because of different reasons which sometimes relate to the race group that they belong to or their gender (either male or female), they are paid less than their counterpart of a superior race group or gender.⁶⁶ Vertical income inequality can be understood as the gap in pay brought about by apartheid policies which resulted in disproportionate income differentials between the lowest-paid employees who are mostly non-white and who perform low-skilled jobs and the highest-paid employee who are

⁶¹ Allanson P, Atkins J & Hinks T, (1999). A multilateral decomposition of racial wage differentials in the 1994 South African labour market. (Dundee Discussion Papers in Economics; No. 99). University of Dundee.

⁶² According to Bhorat, wage income is the leading contributing factor to income inequality, pg 20

⁶³ Ibid at pg 22

⁶⁴ Collier D (2015) Mind the Gap: Widening income inequality in South Africa – an Institutional failure or mission impossible? June 2015

⁶⁵ Ibid

⁶⁶ Ibid

generally white and who performs high paying jobs either as executive, managers or supervisors.⁶⁷

The vertical wage gap also resulted in jobs held by white employees being over evaluated to justify the higher wages earned by whites, and those positions that were held by Black employees were under-evaluated.⁶⁸ This disproportionality in positions has been referred to as the “APARTHEID WAGE GAP” by COSATU - in their submission to the drafters of the Employment Equity Bill.⁶⁹

In South Africa, both the vertical and horizontal wage gaps have been inherited from the past.⁷⁰ It is part of past oppression and as a result of prolonged systemic discrimination, even though it is important to note that not much has changed since the end of apartheid.⁷¹ Inequality brought about by discrimination is very bad for society.⁷² The effects of low income contribute to people being forced to live in poverty.⁷³

Cornia argues that high levels of inequality can have an undesirable political and social impact on economic growth.⁷⁴ She further contends that low economic growth has an impact on poverty reduction; people continue to live in poverty.⁷⁵ There have been many economic theories over the years that focus on the relationship between economic growth and inequality. Some economists have argued that rising inequality is necessary as it provides essential incentives for entrepreneurs and serves as a source of overall investment for the

⁶⁷ Helm R, *The Vertical Effect of Section 27 of the Employment Equity Act* DEVELOPMENT AND LABOUR MONOGRAPH SERIES, 1/2015

⁶⁸ Ibid

⁶⁹ COSATU Parliamentary Submission on the Employment Equity Bill, presented to the Portfolio Committee on Labour, 22 July 1998.

⁷⁰ Helm R, Vertical Income inequality as an Employment Equity Issue, (2015) IDLL, UCT

⁷¹ Ibid

⁷² Collier D (2015) Mind the Gap: Widening income inequality in South Africa – an Institutional failure or mission impossible? June 2015

⁷³ Ibid note 63

⁷⁴ Cornia G and Court J, *Inequality, Growth and Poverty in the Era of Liberalization and Globalization* (2001) (UNU/WIDER) 22

⁷⁵ Ibid

economy.⁷⁶ There are, however, those economists who argued that rising levels of inequality is bad as it generally prevents the poor from investing in their education and prevent them from an opportunity to earning a higher income, and at the same time, it encourages the rich to grab a bigger slice of the economic pie - without making the pie bigger.⁷⁷ A high level of economic growth, according to economists, ‘is essential for poverty reduction.’⁷⁸ It is however argued by Collier that ‘growth left unregulated is likely to exacerbate income inequality’ and suggests a need for a balance between economic policies and labour policies to reduce income inequality on the one hand and encourage economic growth on the other.⁷⁹ It is recommended by Corina and Court that the target should be for an ‘efficient inequality range’ which should lie between the values of 0.25 and 0.40 of the Gini coefficient as portrayed in figure 1 below.⁸⁰

⁷⁶ Keeley, Brian (2015), “How does income inequality affect our lives?”, in *Income Inequality: The Gap between Rich and Poor*, OECD Publishing, Paris

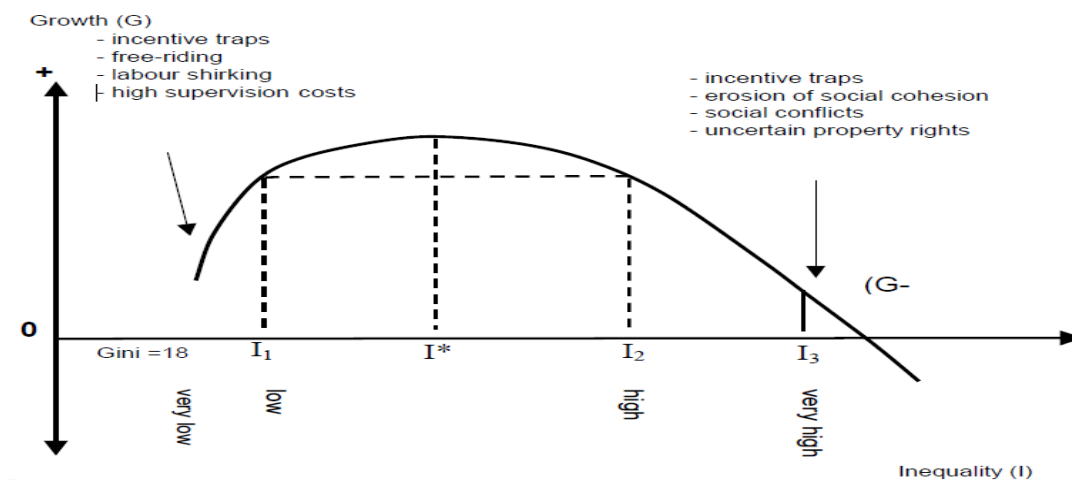
⁷⁷ Ibid

⁷⁸ Bhorat H, *Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions* (2009) DPRU pg 29

⁷⁹ Collier D, Idelsohn K, Adkins J, *Income inequality and Executive remuneration: assessing the role of law and policy in the pursuit of equality*, SAJLR, Vol 34 No 2 (2010).

⁸⁰ Cornia G and Court J, *Inequality, Growth and Poverty in the Era of Liberalization and Globalization* (2001) (UNU/WIDER) 22

FIGURE 1. INEQUALITY AND GROWTH⁸¹



Cornia and Court further suggest that any country that intends to maximise poverty reduction should choose the lowest level of inequality (I_1) within the efficient inequality range (I_1 - I_2). Aiming for the lower end of the range is essential because one obtains the same level of growth at lower levels of inequality but it allows the reduction of poverty at a faster rate.⁸²

2.4 THE GINI COEFFICIENT EXPLAINED

The Gini coefficient is a measure used to determine the degree of inequality for a particular country.⁸³ A Gini Index with values closer to 0 (zero) will indicate a low level of inequality, and a Gini Index with a value more relative to 1 (one) would indicate high levels of inequality.⁸⁴

The Gini coefficient for South Africa in 1995 was 0.64 and it was 0.72 in 2005, which is closer to one (perfect inequality)⁸⁵ and suggests that South Africa indeed has one of the most

⁸¹ Cornia G and Court J, *Inequality, Growth and Poverty in the Era of Liberalization and Globalization* (2001) (UNU/WIDER) 22

⁸² Ibid 67

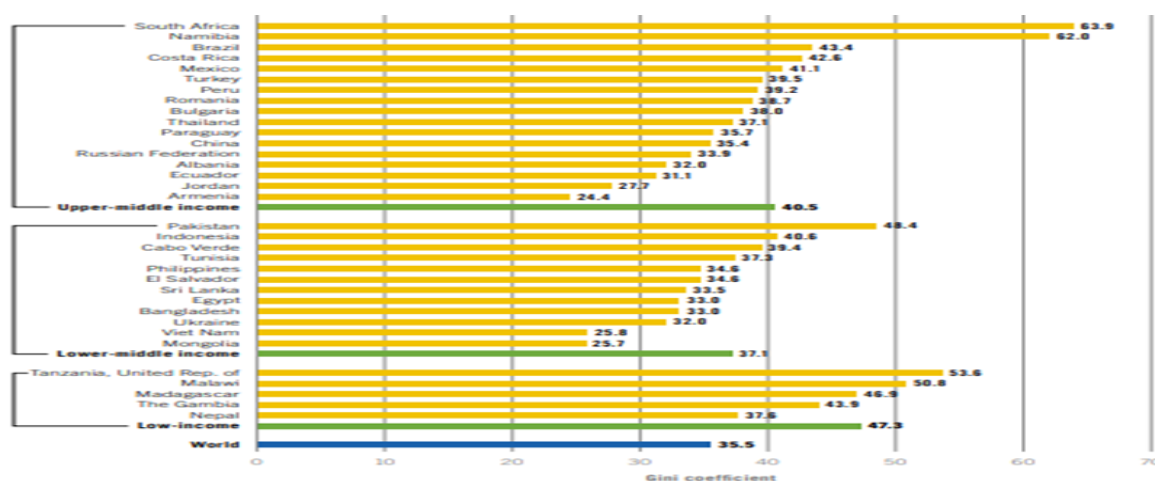
⁸³ ILO Global Wage Report 2018/2019

⁸⁴ Ibid

⁸⁵ Borat H, *Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions* (2009) DPRU pg 7

unequal societies in the world.⁸⁶ In comparing South Africa to the rest of the world, one can see from the graph depicted below that Norway's Gini coefficient in 2016 was 0.26 while Australia's was 0.20 in 2017 and the US was 0.39 in 2017.⁸⁷ (see an example in the figure listed below)

FIGURE 2. GINI ESTIMATES OF WAGE INEQUALITY OF OTHER COUNTRIES⁸⁸



The figure illustrates wage inequality, comparing countries to others at a similar level of economic development.

Inequality is a vital issue in education as education plays a role in providing better career opportunities to anyone irrespective of the person's family background.⁸⁹ It is argued by economists that where high levels of inequality exist, those who are poor are cannot invest in education and their educational opportunities are dampened.⁹⁰ Education is regarded as a source of social mobility.⁹¹ Children who can finish high schooling and further their education at Institutions of Higher Learning are likely to earn more income as they become adults.⁹² Keeley argues that there is a need for the government's policy to encourage children,

⁸⁶ Ibid

⁸⁷ ILO Global Wage Report 2018/2019

⁸⁸ ILO Global Wage Report 2018/2019

⁸⁹ Keeley, Brian (2015), "How does income inequality affect our lives?" in *Income Inequality: The Gap between Rich and Poor*, OECD Publishing, Paris

⁹⁰ Ibid

⁹¹ Ibid

⁹² Keeley, Brian (2015), "How does income inequality affect our lives?" in *Income Inequality: The Gap between Rich and Poor*, OECD Publishing, Paris

particularly those from poor backgrounds to attend institutions of higher education and eradicate inequality in access to education.⁹³

2.5 LEGISLATIVE FRAMEWORK TO ADDRESS INCOME INEQUALITY

The systematic discrimination institutionalised by apartheid laws and its effect on income inequality across racial lines in South Africa is evident from the disparity in the labour market experienced today. There was a need for a transition from a regime that segmented the labour market and created a legacy of discrimination based on race and gender to a constitutional democratic state.⁹⁴ The Government of National Unity, which was led by Nelson Mandela's African National Congress after the 1994 elections were tasked with the responsibility of introducing and implementing policies that were aimed at addressing inequality and reducing poverty.⁹⁵

It is in the government Reconstruction and Development Plan (RDP) where major plans were crafted in an attempt to address the stark social, political, economic, and spatial inequalities that defined post-apartheid South Africa.⁹⁶

The RDP was aimed at not only addressing economic growth and labour market transformation but, to combine growth, development reconstruction, redistribution, and reconciliation into one strategy.⁹⁷ The South African government put into place a policy framework that would give effect to the RDP program referred to as GEAR (Growth, Employment and Redistribution).⁹⁸ The core focus of GEAR was to create an environment

⁹³ Ibid

⁹⁴ COSATU Parliamentary Submission on the Employment Equity Bill, presented to the Portfolio Committee on Labour, 22 July 1998.

⁹⁵ Collier D, Idelsohn K, Adkins J, Income inequality and Executive remuneration: assessing the role of law and policy in the pursuit of equality, SAJLR, Vol 34 No 2 (2010). pg 86

⁹⁶ Maluleka R, *Inequality Trends in South Africa: A multidimensional diagnostic*, Report No 03-10-19.(2019)

⁹⁷ Flowerday W, Rankin N, Schoer V, Continuity and Change in South African Labour Market Regulations. R4D working.

⁹⁸ Growth, Employment and Redistribution (GEAR) 1996

where the economy would grow and achieve an above 5% growth rate per annum and create employment opportunities while reducing the rate of unemployment.⁹⁹

The labour market reforms rooted in the RDP resulted in new labour regulation driven by at least two forces:¹⁰⁰

- 1) The first was due to the need to modernise the labour regulations inherited from the apartheid regime, which were discriminatory and in favour of only white workers - while ignoring non-white workers.¹⁰¹
- 2) The second force driving labour market reforms was the role that organised labour played in the final years of the apartheid regime in enforcing labour market changes.¹⁰² One of these organisations was COSATU which played as an active opponent of the apartheid system and in the crafting of the regulations that were beneficial to redress the imbalances of the past.¹⁰³

2.5.1 THE CONSTITUTION

The Constitution of the Republic is the foundation of South African law and the cornerstone of our democracy.¹⁰⁴ The Bill of Rights in the Constitution of the Republic ‘affirms the democratic values of human dignity, equality, and freedom.’¹⁰⁵ It is in section 9 of the Bill of Rights, where Equality is guaranteed, and anti-discrimination provisions are made to prohibit both direct and indirect discrimination.¹⁰⁶

“The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may

⁹⁹ Ibid not 87

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Nyman R “So Many Legislative changes with such little impact” a gender analysis of labour reform 2 Law Democracy & Development (1998), 226

¹⁰⁵ Section 7 (1) of the Bill of Right of the Constitution of the Republic.

¹⁰⁶ Ibid

underscore other principles and rights. But in light of our particular history and our vision for the future, a Constitution was written with Equality at its centre. Equality is our Constitution's focus and its organizing principle.'¹⁰⁷

A constitutional requirement was provided for in section 9(2) of the Constitution for national legislation 'to promote the achievement of equality' and for the protection and advancement of all persons who were disadvantaged through various measures.¹⁰⁸

In addition to the Employment Equity Act (discussed in chapter 3), statutes that have been introduced to promote equality include:

2.5.2 PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (2000)

PEPUDA was passed by the legislators to give effect to the constitutional right for the enjoyment of all rights and freedom' by every person and the 'promotion of equality.'¹⁰⁹

While PEPUDA seeks to advance equality, its scope of application is limited to instances which fall outside of the Employment Equity Act scope of application.¹¹⁰ In essence, claims for unfair discrimination from persons such as those classified under section 4(3) of the EEA¹¹¹ including independent contractors and anyone falling outside of section 213 of the Labour Relations Act's definition¹¹² of an employee - can be addressed through the PEPUDA Act.

¹⁰⁷ Judge Kriegler in *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 74

¹⁰⁸ Section 9 of the Constitution of the Republic

¹⁰⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA or the Equality Act), Act No. 4 of 2000

¹¹⁰ Cooper, C., & Lagrange, R. (2001). The application of the promotion of equality and prevention of unfair discrimination act and the employment equity act. *Industrial Law Journal*, 22(7), 1533

¹¹¹ Section 4(3) of the EEA read, "This Act does not apply to members of the National Defence Force, the National Intelligence Agency, the South African Secret Service or the South African National Academy of Intelligence or the Directors and staff of Comsec.

¹¹² Section 213 of the Labour Relations Act (LRA) provides that an employee is anyone, other than an independent contractor.

2.5.3 THE LABOUR RELATIONS ACT (1995)

The LRA from its establishment was geared to give effect to and to regulate the fundamental rights of workers in the workplace including the right to fair labour practices as conferred by section 23 of the Constitution, to ensure orderly collective bargaining and workplace democracy.¹¹³ The LRA's purpose was to provide for a framework where collective bargaining on matters relating to wages, terms and conditions of employment and matters of mutual interests could be discussed and agreed upon. Further to this, the LRA offers protection and regulates issues such as unfair dismissals and unfair labour practices. Where labour disputes occur, the Commission for Conciliation, Mediation and Arbitration was set up to provide a platform where dispute resolution and the establishment of labour peace.¹¹⁴

2.5.4 THE BASIC CONDITIONS OF EMPLOYMENT ACT NO 75 OF 1997

The key aim of the BCEA was to improve the minimum rights for all workers in South Africa by setting fair employment standards and enforcing compliance to basic conditions of employment.¹¹⁵

The BCEA provided for a scope that allowed more labour market flexibility, the productive use of working time and variations through collective agreements.¹¹⁶

2.5.5 THE SKILLS DEVELOPMENT ACT (1998) & SKILLS DEVELOPMENT LEVY ACT (1999)

The SDA was aimed at developing and improving the skills set of all South Africans, to improve their quality of life and their prospects of finding decent work.¹¹⁷ Workplace

¹¹³ <https://static.pmg.org.za/docs/2000/appendices/000229LRASummary.htm> Accessed on 22 October 2020

¹¹⁴ Flowerday W, Rankin N, Schoer V, Continuity and Change in South African Labour Market Regulations. R4D working.

¹¹⁵ Basic Conditions of Employment Act No 75 of 1997

¹¹⁶ Benjamin P, Labour Market Regulations: International and South African Perspective, (2005), pg 27

¹¹⁷ Skills Development Act No 97 of 1998

strategies were designed at a national level and the sector skills plans were established.¹¹⁸

Benjamin maintains that the institutional infrastructure of the Act consists of the National Skills Authority, Sectoral Education and Training Authority (SETA), the National Skills Fund and the Labour Centres of the Department of Labour.¹¹⁹

2.6 SELECTED INTERNATIONAL INSTRUMENTS

In South Africa's pursuit of equality, non-discrimination and redressing the labour market, relevant ILO conventions were ratified and details are discussed below.¹²⁰ The policies and programmes of these conventions were used by South Africa as guidelines for the legislators to be in line with international law.

2.6.1 DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, 1958 (NO. 111)

The convention is binding to ILO members who have ratified it. South Africa ratified it in 1997. According to the convention, its members undertake 'to declaring and pursuing a national policy aimed at eliminating all forms of discrimination in respect of employment and occupation.'¹²¹ The provisions of Convention No 111 compels member states to repeal all statutory provisions and to modify their administrative practices which are inconsistent with the Convention's policy provisioning. Member states should promote educational programmes that would assist employers and workers organisations to implement the anti-discrimination policy provisions.¹²² The Convention No 111 of 1958 preamble refers to the

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰The ILO governing Body has identified eight "fundamental" Conventions, covering subjects that are considered to be fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining. South Africa ratified eight out of eight thus putting S A among the best performers in the world.

¹²¹ ILO Discrimination (Employment and Occupation) CONVENTION, 1958 (NO. 111)

¹²² Ibid

Declaration of Philadelphia which emphasises the efforts required to eradicate inequality and discrimination.¹²³

2.6.2 EQUAL REMUNERATION CONVENTION, 1951 (NO 100)

The convention is binding on ILO members who ratified it. South Africa ratified the Equal Remuneration Convention in 2000. The convention passed a requirement for its member nations to pass national laws that would place a duty on employers to give equal remuneration to men and women who perform the same or similar work or work of equal value.¹²⁴

According to the Convention, equal remuneration for men and women who perform work of equal value refers to rates of remuneration established - without discrimination based on sex.¹²⁵

South Africa has been able to fulfil the requirement of passing legislation that deals with equal pay for work of equal value with the amendments to the Employment Equity Act, which legislated Equal Pay for Work of Equal Value and the regulations that provide guidelines to employers. In the original EEA, this provision was not part of the legislation up until South Africa was placed under pressure by the ILO and the EEA amendments saw the inclusion of section 6(4) in the EEA¹²⁶.

The next chapter focuses on the legal provisions aimed at redressing the wage gap in South Africa particularly section 27 and section 6(4) of the Employment Equity Act. In addition, the United Kingdom's Employment Equity provisions are discussed.

¹²³ ILO Declaration of Philadelphia May (1944)

¹²⁴ ILO Equal Remuneration CONVENTION, 1951 (NO 100)

¹²⁵ Ibid

¹²⁶ Bosch A, Barit S. Gender pay transparency mechanisms: Future directions for South Africa. S African Journal of Science. 2020 Vol 116 pg 4

CHAPTER 3. ADDRESSING THE WAGE GAP IN SOUTH AFRICA

3. INTRODUCTION

It is noted in earlier chapters of this dissertation that the apartheid regime enacted laws and regulations that were designed to preserve the economic status of whites and between races, they preserved a master-slave relationship.¹²⁷ These results of the apartheid programs yielded a society characterised by extreme labour market disparities in terms of race and gender.¹²⁸

For this reason, there was a need for anti-discrimination legislation in the labour market. This sentiment was shared by the Department of Labour, where it argued in the Green Paper on the Employment of Labour that the government must embark on a programme to enforce Equality.¹²⁹ It was also one of the reasons that in 1998 President Nelson Mandela signed the Employment Equity Act into law which came into effect on 1 December 1999. The Green Paper on Employment and Occupation advanced the argument that one of the fundamental objectives of the democratic government is to ensure that all forms of discrimination are eradicated in the labour market.¹³⁰ Labour market factors that need to be ensured in eliminating discrimination includes the process of hiring, training, promotion and retrenchment, including hindrances perpetuated by how work and training are organised.¹³¹

¹²⁷ Matshikwe (2004) 69

¹²⁸ Ibid

¹²⁹ Green Paper: Employment and Occupational Equity, 01 July 1996 Notice 804 of 1996

¹³⁰ Ibid

¹³¹ Ibid

3.1 THE EMPLOYMENT EQUITY ACT, NO 55 OF 1998

The Employment Equity Act was introduced by the South African government with a two-fold purpose - to look back at the result of past discrimination and look forward to positive actions that need to be taken to reduce inequality by introducing measures that need to be taken.¹³² The purpose of the Act does attest to the argument ‘to achieve equality in the workplace by:

- I. Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and
- II. implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups to ensure their equitable representation in all occupational levels in the workplace.’¹³³

The purpose of the Act, according to the Green Paper on Employment, is to:

- a) ‘promote the constitutional right of equality and the exercise of true democracy.’¹³⁴
- b) ‘to eliminate unfair discrimination in employment.’¹³⁵
- c) ‘ensure the implementation of employment equity to redress the effects of discrimination.’¹³⁶
- d) ‘Achieve diverse workforce representatives of our people’¹³⁷ and to give effect to the obligations of the Republic as a member of the International Labour Organisation.¹³⁸

¹³² Helm R, Vertical Income Inequality as an employment equity issue, Paper Number 108, IDLL, UCT

¹³³ Section 2 of the EEA – Purpose of the Act

¹³⁴ Green Paper: Employment and Occupational Equity, 01 July 1996 Notice 804 of 1996

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

Tito Mboweni made the following comment regarding the Employment Equity Act, ‘we want to build a South Africa with a diverse and representative workforce. We want to abolish discrimination in the workplace.’¹³⁹

The first objective of the EEA is to achieve equity in the workplace, fair treatment and the elimination of unfair discrimination.¹⁴⁰ Section 5 deals with the elimination of unfair discrimination, and its provision is that: ‘every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy and practice.’¹⁴¹ Employment practice refers to the patterns observed in a company’s hiring and workplace conditions. The EEA provides detail of what constitutes employment practice. According to section 1 of the EEA, employment practice or policy includes:¹⁴²

‘recruitment procedures, advertising and selection criteria;

appointments and the appointment process;

job classification and grading;

remuneration, employment benefits and terms and conditions of employment;

job assignments;

the working environment and facilities;

training and development;

performance evaluation systems;

promotion;

¹³⁹ Tito Mboweni (Minister of Labour – 1998)

¹⁴⁰ Section 2 of the EEA

¹⁴¹ Section 5 of the EEA

¹⁴² Section 1 of the EEA Definitions

transfer;

demotion;

disciplinary measures other than dismissal; and

dismissal.’

The EEA’s chapter 2 also addresses horizontal pay inequity.¹⁴³ The second objective of the EEA which is to address disadvantages in employment and to ensure equitable representation of ‘designated groups’¹⁴⁴ of the workforce by implanting affirmative action measures, is covered in chapter 3 of the EEA.¹⁴⁵ As president of the Republic, Nelson Mandela said:

“The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not asking for handouts for anyone nor are we saying that just as white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future”.¹⁴⁶

3.2 THE EMPLOYMENT EQUITY ACT ON INCOME DIFFERENTIALS AND PAY DISCRIMINATION

3.2.1 VERTICAL INCOME DIFFERENTIALS

With the Draft Bill on employment equity during its stages of development initiatives, the Department of Labour did not make provision to address income differentiation and rather called for discussions and ideas on the matter.¹⁴⁷ In COSATU’s submission, it was argued that ‘the EEA Bill’s section 6(4) fails dismally to address the issue of closing the apartheid

¹⁴³ The horizontal income inequality takes place mostly in the form of two individuals performing the same job but because of different reasons which sometimes relate to the race group that they belong to or their gender (either male or female), are paid less than their counterpart of a superior race group or gender.

¹⁴⁴ The EEA defines the designated group as Black people (in other words, Africans, coloureds or Indians), women, and people with disabilities who are citizens of the Republic of South Africa by birth or descent before 27th April 1994. Alternatively, they must have become citizens of the Republic of South Africa through naturalisation before April 1994. However, they were not able to do so earlier because of apartheid

¹⁴⁵ Section 15 of the EEA,

¹⁴⁶ Department of Labour: Employment Equity Bill, Notice 1840 of 1197 No 18481 pg 5

¹⁴⁷ Helm R, Vertical Income Inequality as an employment equity issue, Paper Number 108, IDLL, UCT pg 108

wage gap.’¹⁴⁸ COSATU argued for the need for vertical wage equity (between these at the bottom and those at the top) to be dealt with effectively and that it ‘be placed in the core mechanism of the Bill, the audit, the plan and reporting provision in Chapter 3 which deals with affirmative action.’¹⁴⁹

The Department of Labour responded to COSATU’s submission by proposing section 27 of the EEA.

3.2.2 SECTION 27 OF THE EMPLOYMENT EQUITY ACT

This section of the Employment Equity Act addresses disproportionate income differentials and is aimed at reducing the disproportionate income differentials between occupational levels.¹⁵⁰

According to Section 27, as amended:

- 1) Every designated employer, when reporting in terms of Section 21(1), must submit a statement as prescribed to the Employment Conditions Commission established by Section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.¹⁵¹
- 2) Where disproportionate income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in Section 6(4) are reflected in the statement contemplated in Sub Section (1), a designated Employer must take measures to progressively reduce such differentials subject to such ... as may be given by the Minister as contemplated in Sub Section (4).¹⁵²

¹⁴⁸ COSATU Parliamentary Submission on the Employment Equity Bill, presented to the Portfolio Committee on Labour, 22 July 1998.

¹⁴⁹ Ibid

¹⁵⁰ Van Niekerk. A, et al Law @ Work, 2nd edition LexisNexis, Durban (2012) 166

¹⁵¹ Section 27 (1) of the EEA

¹⁵² Section 27 (2) of the EEA

- 3) The measure referred to in Sub Section (2) may include:
 - a) collective bargaining;
 - b) compliance with a sectoral determination made by the Minister in terms of Section 51 of the BCEA;¹⁵³
 - c) applying the norms and benchmarks set by the Employment Conditions Commissioner;
 - d) relevant measures contained in skills development legislation;
 - e) other measures that are appropriate in the circumstance.

- 4) The Employment Conditions Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials,¹⁵⁴

- 5) The Employment Conditions Commission may not disclose any information pertaining to individual employees or employers.¹⁵⁵

- 6) Parties to a collective bargaining process may request the information contained in the statement contemplated in subsection (1) for collective bargaining purposes subject to section 16(4) and (5) of the Labour Relations Act.¹⁵⁶

Section 21(1) of the EEA calls for designated employers - when they submit the Employment Equity report to the Director-General - to submit a statement of income differentials in the form of the EEA4 form. They should also be reporting on remuneration and benefits received by their employees in each occupational level at the top of the organisation and those at the bottom – that is from the unskilled level to top management.¹⁵⁷ The employer is

¹⁵³ Section 27 (3) of the EEA.

¹⁵⁴ Section 27 (4) of the EEA.

¹⁵⁵ Section 27 (5) of the EEA.

¹⁵⁶ Section 27 (2) of the EEA.

¹⁵⁷ Section 21 of the EEA – Report.

further required to analyse the income differentials, and where unfair discrimination is detected or disproportionality exists in the form of a difference in the terms and conditions of employment, the employer is required to take actions to address the differentials by reducing the difference.¹⁵⁸

The ultimate aim of Section 27's provision is to achieve a fair pay gap between the levels of occupation in any organisation and to create a proportionate wage-earning system.¹⁵⁹

In South Africa, the wage gap between those at the top and those at the bottom of the pay scale consisting mainly of unskilled and low-skilled workers earning a very low income is noticeably higher than in other countries.¹⁶⁰

Section 27 calls upon various players to play a role in the reduction of the vertical wage gap – ‘The efficacy of the provision is dependent on labour force mobilisation and trade union activism and the co-operation of the Department of Labour... envisages the use of internal process or the office of the Labour Inspector.’¹⁶¹

The implementation of Section 27 has however been challenging.¹⁶² It has also been said that ‘The section was extremely controversial when introduced into the Act. One can see why its potential to impact wage rate is considerable, but it appears to have been forgotten.’¹⁶³

¹⁵⁸ Section 19 of the EEA – Analysis.

¹⁵⁹ Helm R, *Proportionate Income Differentials: A Long Walk to Social Justice* – LLM Thesis (2017) 59.

¹⁶⁰ Mandela Initiative Newsletter 4, December 2017: *Proportionate Income Differentials: A long walk to social justice*.

¹⁶¹ Collier D, Idenson K and Adkins J (2010) Income inequality and executive remuneration: assessing the role of law and policy in the pursuit of equality. *SAJLR*, Vol 34 No 2, pg 92

¹⁶² *Ibid*

¹⁶³ *Ibid*

Helm also argues that the provisions of Section 27 have the prospect of creating a more proportionate wage-earning system for all wage earners in South Africa and that the provision is more proactive in nature.¹⁶⁴

3.3 HORIZONTAL INCOME DIFFERENTIALS

It is important to note that while South Africa seeks to achieve vertical equality in pay through the Employment Equity Act and affirmative action regulations, there is also a need to address instances of direct and indirect¹⁶⁵ horizontal pay inequality.¹⁶⁶ The concept of equal pay for equal work and work of equal value is recognised as a Human Rights issue in International law.¹⁶⁷

As mentioned, South Africa has ratified the ILO Convention 111 on Discrimination in Employment and Occupation which requires member states ‘to promote equality of opportunity and treatment in respect of employment and occupation, to eliminate any discrimination in respect thereof.’¹⁶⁸ and have also ratified ILO Convention 100 on Equal Remuneration which requires states ‘to promote and ensure the application to all workers, the principle of Equal Remuneration for men and woman workers.’¹⁶⁹

In Europe, the European Union has the Equal Treatment Directive which requires that all forms of discrimination on Sex Grounds whether direct or indirect in terms of remuneration ‘for work which has equal attributes,’ has to be eliminated.¹⁷⁰

¹⁶⁴ Helm R, Vertical Income Inequality as an employment equity issue, Paper Number 108, IDLL, UCT pg 108

¹⁶⁵ Direct pay discrimination can be described as a situation where, different wages apply to male and female workers of the same employer. Indirect pay discrimination refers to a situation where more women than men work part-time, and part-time workers are paid lower wages.

¹⁶⁶ South African Human Rights Commission: Equality Report 2017/2018, 32.

¹⁶⁷ Ibid.

¹⁶⁸ ILO Discrimination (Employment and Occupation) Convention 111 of 1958.

¹⁶⁹ ILO Equal Remuneration Convention 100 of 1951.

¹⁷⁰ Equal Treatment Directive No 2006/54/EC. Art 4.

In South Africa, claims associated with equal pay before the 2013 amendments relied mostly on the provisions of section 6 (1) of the Employment Equity Act which provides for a prohibition of unfair discrimination in all employment practices - whether direct or indirect.¹⁷¹ This notion was concurred by the court in *Mangena & others v Fila South Africa (Pty) Ltd*¹⁷² where it held that ‘a claim of equal pay for equal work falls to be determined in terms of the Employment Equity Act as the Act is broad enough to incorporate a claim of equal pay for work of equal value, notwithstanding that, the principle is not mentioned in the EEA.’

The amendments to the EEA have seen section 6 expanded and the introduction of section 6(4) specifically addressing pay differentials, and, according to section 6 (4) ‘A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on one or more of the grounds listed in subsection (1), is unfair discrimination.’¹⁷³ Sub-section 6 (5) was introduced into the EEA, which provided for ‘The Minister, after consultation with the Commission, may prescribe the criteria and the methodology for assessing work of equal value contemplated in subsection (4).’¹⁷⁴

This, as a result, paved the way for the publishing of the Employment Equity Regulation.¹⁷⁵ The Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value was later established to provide employers with practical guidelines on applying the principle of equal pay/remuneration for work of equal value in their workplace.¹⁷⁶ One can view the South

¹⁷¹ Employment Equity Act 55 of 1998 section 6 (1).

¹⁷² (2009) 12 BLLR 1224 (LC).

¹⁷³ Section 6(4) of the EEA.

¹⁷⁴ Section 6 (5) of the EEA.

¹⁷⁵ Ebrahim S ‘Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998 – Lessons from the International Labour Organization and the United Kingdom’ (2016) 19 PELJ pg 4.

¹⁷⁶ GN 448 GG 38837 of 1 June 2015, Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, The Code.

African legislative framework and amendments as a response to a ‘worldwide need to eliminate pay discrimination between men and woman.’¹⁷⁷

In the Promotion for Equality and Prevention of Unfair Discrimination Act which is also referred to as the Equality Act, a Schedule to section 29 is provided which stipulates a list of unfair practices and also clause 1 (c) of the schedule maintains that ‘failing to respect the principle of Equal Pay for Equal Work’ amounts to unfair discrimination.¹⁷⁸

It seems that when faced with a claim of equal pay for work of equal value, the first task to undertake is to establish whether the difference in pay amounts to discrimination.¹⁷⁹ In Section 6 (1) of the Employment Equity Act, it is provided that,

‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practise, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV Status, conscience, belief, political grounds, culture, language and birth.’¹⁸⁰

The South African Constitution, in section 9 (5), provides that: ‘Discrimination on one or more of the listed grounds in subsection (3) is unfair unless it is established that the discrimination is fair.’¹⁸¹ In section 5 of the EEA, a provision is made that stipulates that: ‘every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment practice.’¹⁸² The Employment Equity Regulations also makes provision for the employer to eliminate unfair discrimination and to

¹⁷⁷ Du Toit D, Godfrey S, Cooper C et al “Labour Relations Law”: A Comprehensive Guide, 6 ed (2015) pg 703.

¹⁷⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1 (c) of the schedule to section 29.

¹⁷⁹ Talita Laubscher “Equal Pay for work of equal value – A South African perspective” (2016) 37 ILJ pg 8

¹⁸⁰ Section 6 (1) of the EEA

¹⁸¹ Section 9 (5) of the Constitution of the Republic, 1996

¹⁸² Section 5 of the Employment Equity Act, Act 55 of 1998

ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability.¹⁸³

To establish whether there is indeed a difference in pay for work of equal value, regulations 5 of the employment equity provides for the following guidelines.

- 1) Whether the work is of the same value to the work of a comparator and that the occupations are accorded the same value to the criteria as set out in sections 5-7 of the Regulations.¹⁸⁴
- 2) Whether there is a difference in terms and conditions of employment of the complainant to those of the comparator and whether such difference amounts to unfair discrimination¹⁸⁵ and the provisions of the EEA section must be applied when making a decision.

3.3.1 FACTORS TO BE CONSIDERED WHEN DETERMINING EQUAL WORK FOR EQUAL VALUE CLAIMS

The following factors need to be considered when determining claims for equal pay for work of equal value:

- 1) There must be a comparator.¹⁸⁶ In *Mangena & others v FILA SA (Pty) Ltd & others*¹⁸⁷ the court held that a claimant to an equal pay dispute must identify a comparator.
- 2) The claimant's comparator must be an employee of the organisation as per section 213 of the Labour Relations Act.¹⁸⁸

¹⁸³ GN R595 IN GG 37873 OF 1 August 2014 Employment Equity Regulations. The Regulations.

¹⁸⁴ Section 5 of the EEA Regulations

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ (2010) 31 ILJ 662 (LC)

¹⁸⁸ Talita Laubscher "Equal Pay for work of equal value – A South African perspective" (2016) 37 ILJ pg 14.

3) There must be a pay difference.¹⁸⁹ Any difference would do and does not have to be material or significant.¹⁹⁰ In *Municipal Workers Union and another v Nelson Mandela Bay Municipality*¹⁹¹ the court held that ‘In a wage discrimination claim, the employee must demonstrate that, there is a connection between the differentiation based on gender and the treatment accorded to her.’

4) The cause of the pay difference must be on the listed or arbitrary grounds of discrimination¹⁹². In *Lungile & others, v Chester Butcherries*,¹⁹³ the court held that employers can reward employees differently even if they are performing the same job, provided the differentiation is justified and fair.

5) The discrimination must be unfair.¹⁹⁴ It is submitted that a complainant needs to establish a prima facie basis that the ground complained about is listed or arbitrary. In *Ncongwane v Emakhazeni Local Municipality*,¹⁹⁵ the arbitrator held that the duty to prove discrimination rests on the applicant as she is the complainant and in *Jacobs v Farrel Holdings*¹⁹⁶ where the employer’s HR Manager was unhappy with his 10% increase in remuneration in comparison with the 50% increase applied to the CEO of one of the employer’s business units. The applicant claimed that the difference in salary between the two positions was because he was black - and the CEO being white and amounted to unfair discrimination. The arbitrator, after listening to submissions made, dismissed the claim and noted that the claim was ‘frivolous and vexatious.’ The requirements for bringing an unequal pay for work of equal value claim place a burden on the individual employee and few

¹⁸⁹ Guide to the Code of Good Practice for Equal Pay/Remuneration for Work of Equal Value, 2017 pg 25.

¹⁹⁰ Ibid

¹⁹¹ (2016) 37 ILJ 1203 (LC).

¹⁹² Ibid

¹⁹³ [2012] 8 BLLR 785

¹⁹⁴ Guide to the Code of Good Practice for Equal Pay/Remuneration for Work of Equal Value, 2017 pg 25

¹⁹⁵ (2019) 40 ILJ 1153 (CCMA)

¹⁹⁶ (2015) 5 BALR 576 (CCMA)

complainants are successful; hence the framework is likely to have a limited impact on addressing the systemic income inequality problem faced in South Africa. These requirements are further elaborated in the Regulations¹⁹⁷ and are discussed next.

3.3.2 REGULATION 6 PROVISIONING FOR ASSESSING WORK OF EQUAL

Regulation 6 provides a guideline for an objective assessment for positions that are being scrutinised under the equal work claim. The criteria are,¹⁹⁸

- a) Consider the responsibility demanded of the work, including the responsibility for people, finances, and material,
- b) The skills and qualifications including prior learning and experience required to perform the work, whether formal or informal;
- c) Physical, the mental, and emotional effort required to perform the work; and
- d) To the extent that it is relevant, the conditions under which work is performed, including the physical environment, psychological conditions, a time when and geographic location where the work is performed.

In addition to the above criteria, consideration needs to be given to ‘any factor that can indicate the value of the work that may need to be taken into account in the evaluation of the work and that factor can be shown to be relevant.’¹⁹⁹

Scheepers argues that, when assessing the same work or work of equal value, the test should not be whether the same work is performed. Instead, an objective analysis is required to assess equal value - as the work performed may be entirely different, however, intrinsically

¹⁹⁷ Guide to the Code of Good Practice for Equal Pay/Remuneration for Work of Equal Value, 2017

¹⁹⁸ Guide to the Code of Good Practice for Equal Pay/Remuneration for Work of Equal Value, 2017 pg 25

¹⁹⁹ South African Labour Guide: Equal Pay/Remuneration for Work of Equal Value Guide to the Code of Good Practice for Equal Pay/Remuneration for Work of Equal Value, 2017

of equal value.²⁰⁰ According to Scheepers, the Equality Commission for Northern Ireland have made the following recommendation with regards to the need for an objective assessment in equal pay for work of equal value claims: ‘The key point about equal value is that jobs, which at first sight may be very different, can turn out to be of equal value when analysed in terms of the demands made on the employee ... The golden rule is not to assume that jobs that are of different (eg manual and administrative) cannot be equal.’²⁰¹ It is therefore important that jobs are evaluated properly and fairly.

3.3.3 THE IMPORTANCE OF JOB EVALUATION

An important aspect of evaluating jobs for equal pay is to conduct a job evaluation, which helps in ascertaining the worth of the work, and the job evaluation must be done continuously as job descriptions evolve.²⁰² The results of the job evaluation may be used as an objective criterion in cases that involve a pay equity claim. In *Louw v Golden Arrow Bus Services (Pty) Ltd*²⁰³ - the complainants who were employed as Buyers claimed that their work was of equal value to that of the Warehouse Manager. The Labour Court's in its findings was guided by a report that used the Peromnes job evaluation system and the court held that - the jobs of the applicants were not of equal value to that of the Warehouse Supervisor as the applicant's job ranked significantly lower than that of the comparator and therefore the difference in pay was justified.

On completion of the job evaluation process, any organisation needs to slot the job evaluation outcome into its grading structure to ensure that it is consistent with its pay

²⁰⁰ <https://www.labourguide.co.za/equal-pay-for-work-of-equal-value>

Accessed on 11 November 2020

²⁰¹ Ibid

²⁰² South African Labour Guide: Equal Pay/Remuneration for Work of Equal Value Guide to the Code of Good. Practice for Equal Pay/Remuneration for Work of Equal Value, 2017.

²⁰³ (2000) 3 BLLR 311 (LC).

structure, and in this way, the organisational structure can identify any unfair pay discrimination.

Regulation 7 of the EEA stipulates that ‘it is not unfair discrimination if the difference is fair and is based on any one or a combination of the following factors.’²⁰⁴

- a) The individual’s respective seniority or length of service;
- b) The individual’s respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- c) The individual’s performance, quality or quantity of work;
- d) The existence of a shortage of skill in a particular job classification.

In South Africa's legal framework, pay differentiation can be justified in terms of section 11 of the EEA, which states that:

11. (1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination²⁰⁵ –

- a) did not take place as alleged: or
- b) is rational and not unfair, or is otherwise justifiable.

Du Toit argues that, In European law, ‘there are no such derogations concerning equal pay.’²⁰⁶ He further maintains that in instances of pay claim discrimination made against the

²⁰⁴ Regulation 7 of the Regulations to the EEA.

²⁰⁵ Section 11 of the EEA

²⁰⁶ Du Toit et al (2015). pg 46

employer, before the European Court of Justice can make a ruling, the employer is only required to show that the differentiation was based on non-discrimination.²⁰⁷

In the UK, Equal Pay for work of equal value is provided for in terms of the Equality Act,²⁰⁸ which provides a legal framework to protect the rights of individuals and to advance equality of opportunity for all.²⁰⁹ The UK Equality Act (EA)²¹⁰ brings together 116 pieces of legislation.²¹¹ Some of the main pieces of legislation brought together by the EA include: (a) the Equal Pay Act 1970; (b) the Disability Discrimination Act 1995; (c) the Sex Discrimination Act 1975; and the (d) the Race Relations Act 1976. The framework provides Britain with a discrimination law to protect its citizens from unfair treatment - while promoting fair and more equal societies.²¹² The UK also has the Equal Pay Statutory Code of Practice Equality Act.²¹³ The Equal Pay Code provides legal guidelines under the EA and does not, as such, impose a legal obligation.²¹⁴

According to the EA equal work includes work rated as equivalent, like work and work of equal value.²¹⁵ There is a bigger emphasis in the UK on the importance of job evaluations when considering the value of the work in question and the use of a court-ordered independent expert to conduct a job evaluation report to decide.²¹⁶ Judging from *Bromley v*

²⁰⁷ Ibid

²⁰⁸ The Equality Act, 2010 protects people against discrimination, harassment or victimisation in employment, and as users of private and public services based on nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

²⁰⁹ <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>: Accessed 02 December 2020

²¹⁰ The Equality Act, 2010.

²¹¹ Equality Act came into force on 1 October 2010 and it brought together over 116 separate pieces of legislation into one single Act. <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>

²¹² Ibid

²¹³ Equal Pay Statutory Code of Good Practice to the Equality Act, 2010

²¹⁴ Ebrahim S, Equal pay for work of equal value in terms of the employment equity act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom, PER/PELJ (2016), 12

²¹⁵ Section 65 (1) of the Equality Act.

²¹⁶ Ibid

*H & J Quick Ltd*²¹⁷ where female employees of the respondent were employed as clerks claimed that their work was of equal value to that of the male employees. Their claims were dismissed by the Industrial Tribunal and the Employment Appeal Tribunal. The Court of Appeal held that there was a need for job evaluation to determine the value of the jobs of the clerks and the guidelines as provided by section 1(5) of the EA. The guidelines provide for five assessment factors: skill, decision making, effort and the demand of the work. This was not done by the respondent; instead, a firm was used to conduct an assessment that was different from the provisions of section 1(5) of the Act. The applicant's appeal was granted and therefore the female employees were successful in their appeal against the findings of the Industrial Court and the Employment Appeal Tribunal.²¹⁸

3.4 REMEDIES

The EEA makes provisions for a dispute resolution mechanism in the case of claims for equal pay for work of equal value. In terms of the EEA, parties to a dispute are given the option to refer a dispute for conciliation or arbitration under the guidance of the CCMA.²¹⁹ The CCMA can arbitrate equal pay claims if all the parties to the dispute do consent to arbitration or where the employee earns less than the BCEA earnings threshold as determined by the Minister.²²⁰ Where the dispute remains unresolved, 'any party to the dispute can refer the matter to the Labour Court for adjudication.'²²¹ Where the complainant of an unfair discrimination claim is successful at the Labour Court, the court may order for an appropriate order that is just and equitable in particular circumstances.²²² The order may include the payment of compensation by the employer to the employee,²²³ payment of

²¹⁷ Bromley v H & J Quick Ltd 1988 IRLR 249 (CA).

²¹⁸ Bromley v H & J Quick Ltd 1988 IRLR 249 (CA).

²¹⁹ Section 10 (2) of the EEA.

²²⁰ Section 10 6 (aA) of the EEA

²²¹ Section 10 (6) (a) of the EEA.

²²² Section 50 (2) of the EEA

²²³ Section 50 (2) (a) of the EEA

damages to the employee,²²⁴ or ordering the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of the employee.²²⁵

In cases of equal pay, the Labour Court will likely award an appropriate order that is fair, and the court may order the employer to increase the pay of the complainant to that of the comparator.²²⁶

To a large extent, the provision in the UK's Equality Act together with their Equal Pay Statutory Code of Good Practice is similar to provisions made in the South African EEA and the Code of Good Practice on Equal Pay/Remuneration and the Regulations to the EEA. The difference in the employment equity provisions of the UK compared to those of the South African's is that the equal pay framework in the UK now requires the publication of reports on equal pay by designated employers – so there are transparency and exposure of companies/firms where there are equal pay concerns (pay gap between men and women).²²⁷ In South Africa the employment equity report (EEA2), except for the Income Differential Statement reflected in the EEA4 form, submitted to the Department of Labour is a public document.²²⁸ While the EEA4 has been repealed to collect better data quality from the employer's workforce and for ensuring that pay gaps are identified in their occupational levels, it remains a confidential document that cannot be published and that can only be viewed by the ECC, CEE and the Department of Labour²²⁹. Many organization's do not allow members of the employment equity committee to view the EEA4 as it contains

²²⁴ Section 50 (2) (b) of the EEA

²²⁵ Section 50 (2) (c) of the EEA

²²⁶ Talita Laubscher "Equal Pay for work of equal value – A South African perspective" (2016) 37 ILJ pg 39

²²⁷ <https://gender-pay-gap.service.gov.uk/> - accessed on 10 March 2021

²²⁸ Section 22 of the EEA requires that a designated employer must publish a summary of the report that contains information as prescribed by section 21 of the Act. This information is contained in the EEA2 report.

²²⁹ Section 27 (5) provides for the ECC not to disclose any information pertaining to individual employees or employer

confidential information about its employee's remuneration. A development similar to that of the UK where employers are required to publish pay gaps would be good for the SA's legal framework where the law could require that the EEA4 reports being publicly available – this would speed up changes in closing the wage gap.

CHAPTER 4. FINDINGS, RECOMMENDATIONS AND CONCLUSION

4.1 INTRODUCTION

As mentioned earlier in this dissertation, South Africa is characterised by a history of occupational segregation, policies, inferior education, and, as a result, high levels of income and wage disparities are experienced by the majority of the population - which is non-white.

South Africa's population distribution among the four demographic groups, according to the 2020 Statistics South Africa (Stats SA) mid-year estimates was approximately 59,62 million and around 51,1% (approximately 30,5 million) of the population is female, and 80.2% African.²³⁰ The data of the CEE 20th Annual report on National Economic Active populations (EAP) by group and gender reveals that the percentage of females in the EAP is significantly lower at 45.4% compared to their male counterparts who are at 54.6%.²³¹ The lower number of females in the national EAP is in contrast to the total number of females that accounts for South Africa's total population which is 51.1%.

There is a growing need for achieving workplace equity and the successful implementation of the provision in the Employment Equity Act and other legislation aimed at addressing the legacy of apartheid.

²³⁰ https://en.wikipedia.org/wiki/South_African_National_Census_of_2001, Accessed on 15 November 2020

²³¹ The Economically Active Population (EAP) is based on the Quarterly Labour Force Survey (QLFS) published by Statistics South Africa. It includes people from 15 to 64 years of age who are either employed or unemployed and seeking employment.

The EEA does not ask for proof of discrimination but rather seeks to address the outcome of discrimination.²³² This is evident in the provisions of Section 27(2) and section 6(4) which are aimed at achieving pay equity, as the sections stipulate that ‘where disproportionate income differentials are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the Minister as contemplated in subsection (4).’²³³ And for ‘a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground is unfair discrimination.’²³⁴

Various studies in South Africa over the years looked at the effectiveness of the South African government’s legislative intervention to redress the legacies of apartheid that impacted the labour market. Some of the major studies are those conducted through the Post-Apartheid Labour Market Series (PALMS). Their surveys include the October Household Surveys for the period of 1994 – 1999, the biannual Labour Force Surveys for the period of 2000 – 2007, and the Quarterly Labour Force Surveys for the period that stretched from 2008 – 2019 - all conducted by Statistics South Africa, and the National Statistics Office. PALMS studies include the 1993 Project for Statistics on Living Standards and Development conducted by the Southern African Labour and Development Research Unit (SALDRU) at the University of Cape Town.²³⁵

²³² Helm R, Vertical Income Inequality as an employment equity issue, Paper Number 108, IDLL, UCT pg 21

²³³ Section 27 (2) of the EEA

²³⁴ Section 6 (4) of the EEA

²³⁵ <https://brill.com/view/journals/rdj/aop/> Accessed on 29th November 2020

The findings on the Post-Apartheid wage gap were mostly observed from the decompositions and data analysis from the PALMS and SALDRU projects and work from economists' institutions, both locally and abroad. Various statistics and important trends are discussed in the annual report published by the Commission for Employment Equity.

4.2 COMMISSION FOR EMPLOYMENT EQUITY

The Commission for Employment Equity is a legislative body that has been established through section 28 of the Employment Equity Act²³⁶ to advise the Minister of Employment and Labour on the implementation of employment equity.²³⁷ In its endeavour of achieving fairness in employment, transformation and decent work creation, the CEE receives employment equity reports submissions from designated employers, analyse the employment equity data and submits an annual report to the Minister.²³⁸ The CEE is also tasked with the duty of conducting research and monitor, evaluate South Africa's employment equity trends.²³⁹

The CEE plays a significant role in addressing pay inequity in the workplace and as such, the CEE receives and reviews the income differentials data that employers as required to submit²⁴⁰ as per section 27 (1) of the Employment Equity Act.²⁴¹ The data is then used to assess income disparities and steps are then taken to address the pay inequalities.²⁴² In its stakeholder engagement initiatives, the CEE has been able to equip employers to be able to apply the principle of Equal Pay/Remuneration for Work of Equal Value.²⁴³

²³⁶ Section 28 of the Employment Equity Act

²³⁷ Commission for Employment Equity Annual Report 2015-2016 pg 9

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ Commission for Employment Equity Annual Report 2019-2020 pg 3

²⁴¹ Section 27 regulates the report an employer has to submit when reporting in terms of s21(1) on the remuneration and benefits received in each occupational level of that employer's workforce.

²⁴² Ibid

²⁴³ Ibid

The CEE annual report for 2017 and 2018 reflects a marginal shift in employment occupational levels. It is submitted that this marginal shift in occupational levels signify a change in the manner that the employers make employment decisions and that, move towards closing the vertical wage gap in employment.²⁴⁴

Figure 3. Employment Trends across various economic sectors²⁴⁵

OCCUPATIONAL LEVEL	PERIOD	WHITE	AFRICAN	COLOURED	INDIAN	MALE	FEMALE
Top Management	2001	87%	6%	3%	4%	87%	13%
	2017	67%	14.3%	5.1%	9.4%	77.1%	22.9%
Senior Management	2001	81%	9%	5%	5%	80%	20%
	2017	56.1%	22.1%	7.7%	10.9%	66.2%	38.8%
Professionally Qualified	2001	56%	33%	6%	5%	62%	38%
	2017	42.2%	36.5%	9.6%	8.8%	53.4%	46.6%
Technical Skilled	2001	18%	58%	18%	6%	60%	40%
	2017	19.6%	61.7%	11.3%	5.6%	52.9%	47.1%

In the above figure, while the number of white males remains dominant across the occupational levels, there is a marginal increase of other races groups which are Africans, Indians and Coloureds in the occupational levels. According to the 18th CEE Annual Report, the white population in Top Management decrease by 20% and the Black population increase by 1% year on year.²⁴⁶ It is submitted that the marginal increase in occupational level attests to the slow pace of transformation aimed at addressing the racial wage gap.

²⁴⁵ CEE employment trends data depicting a decrease in the employment of white across employment level.

²⁴⁶ 18th Commission for employment Equity Annual Report 2017-2018

4.3 POST APARTHEID WAGE GAP FINDINGS

In an analysis of income inequality, Borhat provides an account of the income Gini coefficient for South Africa from 1995 to 2005, a post-apartheid period in South Africa, graph below depicts his findings:

FIGURE 4. INEQUALITY SHIFTS BY RACE: GINI COEFFICIENT FOR SOUTH AFRICA, 1995 AND 2005.²⁴⁷

	1995	2005
African	0.56	0.61
Coloured	0.49	0.59
Asian	0.46	0.56
White	0.44	0.51
Total	0.64	0.72

Source: Statistics South Africa (1995 and 2008) and Own Calculations

- Notes:
1. The changes in the values of the Gini coefficients between 1995 and 2005 are "in bold" when the results are statistically significant at the 95 percent level.
 2. The population in 1995 has been weighted according to the 1996 Census, while the population in 2005 has been weighted according to the 2001 Census. In both datasets, the population has been weighted by the household weight multiplied by the household size.

Bhorat's analysis of income inequality suggests that the African population displayed high levels of inequality, and the coloured population followed by the Indian population are also majorly affected. However, the white population continue to experience lower levels of inequality.²⁴⁸

In another study of income and wage analysis, Wittenberg deduced that the Gini coefficient was central to South Africa's inequality literature academically, and in terms of the policy.²⁴⁹

The National Development Plan list the reduction of the Gini coefficient as one of its major objectives.²⁵⁰ Wittenberg observed that the Gini coefficient of the wage index has been

²⁴⁷ Borhat H, Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions (2009) DPRU

²⁴⁸ Borhat H, Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions (2009) DPRU pg 8

²⁴⁹ Wittenberg M, *Wage Inequality in South Africa 1994 – 2011: Part 2 – Inequality Measurement and Trends*. South African Journal of Economics, Vol 85 2 June 2017. pg 298

²⁵⁰ National Development Plan, Vision for 2030 "A reduction in inequality will be achieved if the GINI-coefficient falls from the current level of 0.7 to 0.6 by 2030.

‘stubbornly high since the advent of democracy and it has rather increased from 1994 through 2011.’²⁵¹ This indicates an increase in inequality in this post-apartheid period, which is in contrast to the NDP objectives of a reduction.²⁵²

Leibbrandt in decomposing the National Survey Data from 1995, 2000 and 2008, attests to this finding and also deduced that the aggregate level of income inequality increased between 1993 and 2008 and income inequality between the race groups increased even more.²⁵³ In Leibbrandt’s observation, the Gini coefficient during this period rose from 0.66 in 1993 to 0.68 in 2000 and increased further in 2008 to 0.70. Coupled with this increase, was the increase in inequality across race groups in South Africa.²⁵⁴

In considering Burger and Jafta’s in their Labour Market Report Data analysis from 1997 to 2006, a similar trend of racial wage gaps is found. The data analysis by Jafta and Burger confirms similar findings of racial wage gaps, and according to their report, white workers could expect to earn approximately 90% more than the typical Black worker in 1997 if male and 70% more if female.²⁵⁵ Instead of decreasing the racial wage gap for both genders, it rose by 120% for men and 90% for women.²⁵⁶

In the Public Service, Ntuli and Kwenda in their 2018 studies that decompose and analyse the public-private sector wage gap in South Africa using the Post-Apartheid Labour Market Series (PALMS) dataset covering the period from 2000 to 2014.²⁵⁷ The data analysis has

²⁵¹ Wittenberg M, Wage Inequality in South Africa 1994 – 2011: Part 2 – Inequality Measurement and Trends. South African Journal of Economics, Vol 85 2 June 2017. pg 299

²⁵² Ibid

²⁵³ Leibbrandt M, Woolard I, Finn A, Argent J Trends in South African Income Distribution and Poverty since the Fall of Apartheid, OECD Social, Employment and Migration Working Papers, No 101.pg 33

²⁵⁴ Ibid

²⁵⁵ Burger R & Jafta R, Affirmative Action in South Africa: an empirical assessment of the impact on labour market outcomes. CRISE Working Paper No 76 (2010) pg 20

²⁵⁶ Ibid

²⁵⁷ Ntuli M & Kwenda P, (2018) *A detailed decomposition of the public – private sector wage gap in South Africa*. Development Southern Africa, pg 820

deduced that in South Africa, the public sector is likely to pay more than the private sector.²⁵⁸

Their observation attributes the payment of higher wages in the public sector to the following factor:

- a) The government sees itself as having to set a good example for the implementation of the Employment Equity Act provisions in the country's quest for wage equality.²⁵⁹
- b) The public sector wages are set through a collective bargaining process in the Public Service Coordinating Bargaining Council.²⁶⁰ It is argued that the ANC government's tripartite alliance with COSATU and the relationship with unions affiliated to COSATU has placed the trade union in a position of better bargaining power for wages.²⁶¹

The observations on the studies by Ntuli and Kwenda find that in comparing the private sector and public sector wages, there is a need for strategies to reduce the wage gap along racial, educational and occupational lines - particularly between the bottom and top of the wage distribution.²⁶²

Section 27(1) of the Employment Equity Act makes provision for designated employers to submit annual statements of remuneration and benefits that were paid to their employees. The reporting period must be submitted manually by the designated employer to the Director-General on 1 October which covers the period from the 1 October of the previous year to 30 September of the reporting year.²⁶³ The annual statement of remuneration or income differential form is also referred to as the EEA4 form, which contains data of the

²⁵⁸ Ibid pg 818

²⁵⁹ Ibid

²⁶⁰ Ibid pg 817

²⁶¹ Ibid pg 818

²⁶² Ibid pg 835

²⁶³ Section 21 (1) of the EEA

remuneration and benefits paid to employees for various occupational levels and sent to the Employment Conditions Commissioner.

The EEA4 has gone through different phases of improvement for reporting as many companies have used a check-box approach in completing these forms - only ticking where they needed to tick.²⁶⁴ This approach by companies has been used to avoid fines and only reporting for the sake thereof.²⁶⁵ The approach, therefore, defeats the purpose of reducing wage differentials. The Department of Employment and the Commission for Employment Equity was aware of these challenges with the data collection from the EEA4 form and its effectiveness, and, according to the Department ‘the old way of collecting data from employers was ineffective and hence the need for the New Form.’²⁶⁶ The old form was repealed and a new form was introduced and the New Form became effective on 8 August 2019.²⁶⁷ The main purpose of the New Form, according to the Department, is to collect information for the establishment of norms and benchmarks to reduce the remuneration gap between the highest-paid and lowest-paid employees. Furthermore, it intends to assess inequalities in remuneration concerning race and gender at various occupational levels. The new form takes the initiative of addressing wage inequality a step further.²⁶⁸

Section A and section B of the EEA 4 form provides the following details:

The definition of employees includes all employees, foreign nationals and temporary employees. Temporary employees are defined as being employees employed for less than

²⁶⁴ The CEE reviewed the EEA4 and recommended changes to the Minister. The new changes enabled the CEE to better collect data. 20th Commission for Employment Equity Annual Report 2019-2020.

²⁶⁵ Oosthuizen M & Naidoo V, (2010) *Attitudes towards and experience of employment equity*, SA Journal of Industrial Psychology Vol 36 No 1. pg 4.

²⁶⁶ <https://www.polity.org.za/article/new-eea-form-issued-in-terms-of-the-employment-equity-act-2019-09-10>, Accessed on the 10th November 2020

²⁶⁷ Department of Employment and Labour Employment Equity Act (55/1998) as amended: Repeal of Employment Equity Regulations No. 42627. Volume 650 No. 10975, 8th August 2019.

²⁶⁸ <https://www.werksmans.com/legal-updates-and-opinions/new-eea-form-issued-in-terms-of-the-employment-equity-act/>, (Accessed on 02/11/2020)

three months over twelve months. A distinction is made between fixed and variable remuneration, which was not included in the old form. The form brings attention to the employers to note the types of income listed as fixed and variable, respectively. This is important as sometimes, the highest or lowest fixed remuneration must be used, and in others, the variable remuneration.²⁶⁹ The calculation of remuneration comprises both fixed and variable remuneration and must be calculated over 12 months and reflect the same reporting period covered by the EEA2 form, as prescribed by Chapter 3 of the Employment Equity Act and its Regulations. Any allowance in cash or kind, gratuities and gifts, non-employment-related lump sums (for example, severance pay), and dividends are now the only items excluded as remuneration in the new form. Sections D and E are new additions. Section D requires the remuneration for the lowest paid individual at the lowest occupational level and the highest-paid individual for each of the other occupational levels in terms of race, group, and gender - to be stated. Section E requires the average/mean remuneration, the median, and the remuneration gap to be provided. The key reason for any income differential must be given by the employer. Employers are required to indicate whether they have policies to address and close any vertical remuneration gaps between the highest and lowest paid employee in their workforce - as well as whether they have affirmative action measures to address the remuneration gap included in their employment equity plan. All designated employers (as defined in the Act) are obliged to submit the new form together with the EEA2 form to the Employment Conditions Commission. The due date for designated employers to submit is on the first working day of October. Any new employer who becomes a designated employer on or after the first working day of April but before the

²⁶⁹ <https://www.werksmans.com/legal-updates-and-opinions/new-eea-form-issued-in-terms-of-the-employment-equity-act/> (Accessed on 02/11/2020)

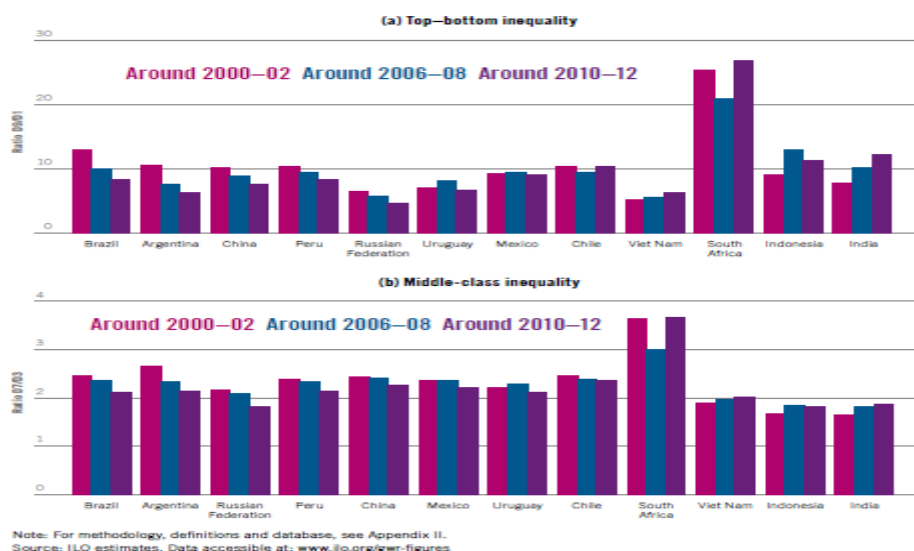
first working day of October need only submit their forms on the first working day of October of the following year.²⁷⁰

4.4 SOUTH AFRICAN WAGE GAP FROM A GLOBAL PERSPECTIVE

The ILO Global Wage Report 2014/2015 presents trends in average wages and provides an analysis of the role of wages in income inequality.²⁷¹ The report highlights the effects of income inequality and points out that a high level of income inequality ‘can become an obstacle to equality of opportunity and leads to less social mobility ... undermines economic growth ...and more inequality reduces peace and advisability of growth.’²⁷²

The ILO Global Wage Report 2014/2015 measures income inequality by comparing the top-bottom 10% income disparities using the D9/D1 ratio and the middle-class income inequality by using the D7/D3 ratio by cutting out the top and bottom 30% of the distribution measuring the statistics of 40% of individual grouped around the median.²⁷³ (see figure below)

FIGURE 5. INEQUALITY IN A SAMPLE OF EMERGING AND DEVELOPING ECONOMIES OVER THE PAST DECADE.²⁷⁴



²⁷⁰ Section A and section B of the EEA4 Form

²⁷¹ ILO Global Wage Report 2014/2015 pg 1 - Preface

²⁷² ILO Global Wage Report 2014/2015 pg 1 – Preface

²⁷³ ILO Global Wage Report 2014/2015 pg 22

²⁷⁴ ILO Global Wage Report 2014/2015 pg 25

The ILO Global Wage Report 2014/2015 suggests that South African's inequality in the top-bottom (D9/D1) income inequality during 2007-2012 increased and is one of the highest in the world.²⁷⁵ Taking a closer look at the findings on inequality as presented by this report between the top-bottom inequalities (D9/D1) and middle-class inequality (D7/D3), these attest to Ntuli and Kwanda findings discussed earlier in this chapter where they recommended strategies to reduce the wage gap along racial, educational and occupational lines particularly between the bottom and top of the wage distribution.²⁷⁶ The report seems to suggest that for a country like South Africa, the best thing to do is to implement effective anti-discrimination policies that should seek to address the underlying causes of wage gaps amongst workers and their races groups (vertical) and between men and women (horizontal) - and progress towards social justice and lower inequality.²⁷⁷

4.5 EMPLOYMENT EQUITY IN CANADA

South Africa's Employment Equity Act was primarily modelled on the Canadian Employment Equity Act.²⁷⁸ It is, therefore, helpful to look at the provisions of the Canadian' Employment Equity Act and how it has dealt with pay discrimination over the years.

“The construct of employment equity forms the basis of the South African Employment Equity Act (1998), which is mainly based on the Canadian jurisdiction, although the Act has also borrowed from other jurisdictions”.²⁷⁹

Both countries have adopted policies that involve government intervention for the prevention and elimination of unfair employment discrimination against racial groups, women, and persons with disabilities.²⁸⁰

²⁷⁵ILO Global Wage Report 2014/2015

²⁷⁶ See footnote 244 on Tuli & Kwanda's recommendations.

²⁷⁷ ILO Global Wage Report 2014/2015 pg 1

²⁷⁸ Harish J, Horwitz & Wilkin C (2012) Employment Equity in Canada and South Africa: a comparative review. *IJHR*, Vol 23 No 1. pg 2

²⁷⁹ *Ibid* pg 25

²⁸⁰ *Ibid*

In Canada, systematic discrimination and inequality of employment are addressed through legislation.²⁸¹ The Canadians have passed various pieces of legislation, which include the Employment Equity Act (1986), The Federal Contractors Programme (1986) and the sections of the Canadian Human Rights Act (1978), and the Charter of Right and Freedoms of the Constitution Act (1982) that have essential remedies for dealing with inequality.²⁸² The Canadian Pay Equity works in conjunction with their Employment Equity provisions and the elimination of Wage Discrimination that affect female-dominated occupations.²⁸³ While labour legislation is under provincial jurisdiction - except for about 10% of their workforce that falls under the jurisdiction of the Federal Government - Morley maintains that ‘almost all Canadian jurisdictions have adopted some form of fair equality legislation or regulations.’²⁸⁴ and provinces such as Manitoba, Ontario, Prince Edwards Island, Nova Scotia and New Brunswick made it compulsory for employers to implement pay-equity whether or not there was a complaint.²⁸⁵ In essence, in Canada, the Federal government initiate national policies such as the Employment Equity Act, and Provinces and Territories then enact separate legislation that is designed to meet their particular needs.²⁸⁶

The Canadian Federal Government has also adopted legislation requiring female and male employees to be paid alike for work of equal value to the employer.²⁸⁷ These Employment Equity policy initiatives are directed at 4 (four) designated groups that are subjected to systematic discrimination which are: (a) women, (b) aboriginal people, (c) visible minorities

²⁸¹ Ibid

²⁸² Agocs C (2002) Canada’s employment equity legislation and policy 1987 – 2000: The gap between policy and practice, *International Journal of Manpower* Vol 23 No 3 (2002) pg 256

²⁸³ Ibid pg 257

²⁸⁴ Gunderson M, Pay and Employment Equity in the United States and Canada, *International Journal of Manpower* Vol 15 No 7, p 26

²⁸⁵ Ibid

²⁸⁶ Eddy NG, Haq R and Trembley D, (2014) A Review of two decades of employment equity in Canada: progress and provisions, *International Handbook on Diversity Management at Work*, Vol 10 No 59

²⁸⁷ Agocs C (2002) *International Journal of Manpower* Vol 23 No 3 pg 257

and (d) disabled persons.²⁸⁸The EEA's objectives are to remedy past discrimination in employment opportunities experienced by the designated group listed above.

The Employment Equity Act in Canada has as its objective the need to address past discrimination against racial minorities and women.²⁸⁹ It had its fair share of challenges, which are similar to those faced by South Africa with the EEA provision aimed at addressing workplace discrimination - particularly pay equity.²⁹⁰ In Canada, even though employment equity has been present for more than 20 years, Employment Equity Data shows that visible minorities and women face a glass ceiling in higher-level occupations.²⁹¹ Visible minorities and women are stuck in certain occupational levels and remain underrepresented in others - mainly Senior Management.²⁹² Of note is that, while Section 15(1) of the Canadian Human Rights Act (1982) provides a guarantee for equal rights and equal protection under the law to individuals without discrimination based on race, national or ethnic origin, colour, religion, sex or mental and physical issues - not all of the provinces adopt the same approach and level of commitment to pay equity.²⁹³

It is, however, important to also note that, despite all the challenges that Canadians faces, there has been significant progress made with visible minorities increasing in size in the workforce and an increase in their ability to earn income and therefore progress towards the proportional representation of woman in various sectors - like the banking sector, communication sector and transport sector.²⁹⁴ The effective implementation of the employment equity plans to achieve the numerical goals and targets set by the plans to

²⁸⁸ Ibid 258

²⁸⁹ Ibid

²⁹⁰ Ibid pg 260

²⁹¹ Ibid

²⁹² Thomas A & Jain H, Employment Equity in Canada and South Africa: progress and propositions (2004) *IJHRM* Vol 15 No 1, pg 37

²⁹³ Eddy NG, Haq R and Trembley D, (2014) A Review of two decades of employment equity in Canada: progress and provisions, *International Handbook on Diversity Management at Work*, Vol 10 No 59 pg 48

²⁹⁴ Agocs C (2002) *International Journal of Manpower* Vol 23 No 3 pg 257

achieve equitable representation of previously disadvantaged individuals and women representation across occupational levels had its challenges in South Africa compared to the Canadians. The Commission for Employment Equity noted in its 20th Annual Report that, there is still a persistent preference by companies to appoint, promote and develop White and Indian populations groups and that Black females continue to be disadvantaged compared to their white female counterparts.²⁹⁵

4.6 CONCLUDING REMARKS

South Africa's transformation initiatives, particularly those that relate to addressing wages /income inequality have been in place for more than two decades. Based on available data it can be concluded that there has been a little economic impact on employees' wages and labour market transformation as the post-apartheid period still points to the continued existence of wage differentials between races in the South African labour market

It is further argued that the lack of labour market success in transformation given the current legislative and policy framework by the government requires a need for an 'a paradigm shift.'²⁹⁶ There is however a commitment from the South African government to reduce poverty and inequality, particularly income inequality, which is inextricably linked to wage inequality.²⁹⁷

²⁹⁵ Commission for Employment Equity Annual Report 2019-2020

²⁹⁶ Collier D, Idenson K and Adkins J (2010) Income inequality and executive remuneration: assessing the role of law and policy in the pursuit of equality. SAJLR, Vol 34 No 2, pg 92

²⁹⁷ Borat H, Income and Non-Income inequality in Post-Apartheid South Africa: What are the drivers and possible policy Interventions (2009) DPRU pg 20

4.7 RECOMMENDATIONS

The following recommendations can assist with South Africa's transformational agenda of eliminating wages/income inequality.

4.7.1 ENFORCEMENT MECHANISM

There is a challenge in the enforcement mechanism of South Africa government legislation in its endeavours to meet legislative commitments. Some of these challenges are the gaps found in the enforcement mechanism as provided through Chapter V of the Employment Equity Act. The EEA's sections 35 and section 36 provides powers to the Labour Inspector to enter the premises of the employer, conduct an inspection and where non-compliance is detected, the Labour Inspector has the power to enforce compliance with EEA.²⁹⁸ Benassi has argued that for the success of monitoring compliance with labour regulations, there is a need for regular labour inspections.²⁹⁹ South Africa ratified the Labour Inspection Convention No 81 in 2013.³⁰⁰

When considering the ILO standards that apply to industrialising countries, the requirement is one inspector per 15 000 employees³⁰¹ and the Department of Labour employed 1 056 inspectors in 2015 - which was a number short of what the Department required for staffing to enforce compliance.³⁰² It has been advanced by research that: 'Higher ratios of inspectors

²⁹⁸ Section 35 of the EEA provides for A labour inspector acting in terms of this Act has the authority to enter, question and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.

²⁹⁹ Benassi, Chiara. 2011. The Implementation of Minimum Wage: Challenges and Creative Solutions. 12. Global Labour University Working Paper. Available at <http://www.econstor.eu/handle/10419/96391>

³⁰⁰ https://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_216613 Accessed on the 4th December 2020

³⁰¹ ILO Labour Inspections Convention 1947 (No. 81)

³⁰² Murahwa B, (2016) Monitoring and enforcement: strategies to ensure an effective national minimum wage in South Africa. National Minimum Wage Research Initiative, Working Paper Series No 5,

to workers are in most cases associated with higher levels of compliance and the opposite also holds.³⁰³

Further to the shortage in staffing, the success of the labour inspectors has been minimal because there is a shortage of labour inspector staff with the necessary qualifications and skills to monitor and enforce Chapters two and three of the EEA. The ILO report identified that, at the time of their research, there were no standard criteria for the selection of inspectors at the national or provincial level.³⁰⁴ The report found that the Minister of Labour might appoint any person in the public service as a labour inspector or designate any appointed agent of a bargaining council to perform any of the functions of a labour inspector.³⁰⁵ According to the ILO Convention 1947 (No 81), inspectors should be duly qualified to conduct inspections and enforce the legal provisions relating to conditions of work - including wages. Article 7(1) of Convention 1947 No. 81 and Article 9(1) of Convention 1969 No. 129. stipulate that inspectors should be recruited solely based on their qualifications and the performance of their duties. The issue of the quality of inspectors, as well as the quantity of inspectors, is further worsened by the fact that available inspectors are leaving for better opportunities in other sectors.³⁰⁶ The high level of occupational turnover has resulted in an inspectorate that is undertrained and unable to ensure compliance.³⁰⁷

³⁰³ Almeida R & Carneiro P, Enforcement of Labor Regulation and Informality, American Economic Journal: Applied Economics [Vol. 4, No. 3 \(July 2012\)](#), pp. 64-8

³⁰⁴ ILO Labour Inspection Country Profile 2014 available at https://www.ilo.org/labadmin/info/WCMS_150917/lang--en/index.htm

³⁰⁵ Ibid

³⁰⁶ Ibid

³⁰⁷ Ibid

4.7.2 THE NEED FOR A CHANGE IN COLLECTIVE BARGAINING AND IN ENFORCING COLLECTIVE AGREEMENTS

There is a strong suggestion that countries with inclusive collective bargaining frameworks covering various sectors of the economy tend to have an 'equalitarian pay structure and that these are helpful for a woman.'³⁰⁸ The South African Labour Relations Act does not provide for a right to bargain but rather seeks to promote orderly collective bargaining between bargaining parties to determine wages and terms and conditions of employment.³⁰⁹ Cheadle argues that the duty to bargain as opposed to the right to bargain is a negative right and proposed for state-enforced duty to bargain, which he refers to as a positive right.³¹⁰ Benjamin maintains that trade union have used the strategy that has been provided in Section 64 of LRA³¹¹ which give trade unions the right to strike and unions have relied on the right to strike strategy to seek the organisational right as provided through Chapter Three of the Labour Relations Act.³¹² It is further argued that 'the rejection of compulsory centralised bargaining in favour of flexibility shows great concern.'³¹³ and it is argued by Thomson that the South African system flies in the face of global market forces.³¹⁴

The LRA states that some of its primary objectives are aimed at providing 'a framework within which employers and their trade unions, employees and employers organisations can:

1 (c) (i) Collectively bargain to determine wages, terms, and conditions of employment and other matters of mutual interest.'³¹⁵

³⁰⁸ Garnero A, (2020) The impact of collective bargaining on employment and wage inequality: evidence from a new taxonomy of bargaining system. *European Journal of Industrial Relations*, Vol 1. No 18.

³⁰⁹ Labour Relations Act, No 66 of 1995

³¹⁰ Professor Halton Cheadle, *Collective bargaining and the LRA*, pg 147.

³¹¹ Section 64 of the Labour Relations Act provides for the right to strike and recourse to lock-out.

³¹² Benjamin P, *Labour Market Regulations: International and South African Perspective*, (2005), pg 25.

³¹³ *Ibid*

³¹⁴ Thompson, C. 2003. *The Changing Nature of Employment*. *Industrial Law Journal*, pg 24.

³¹⁵ Section 1 (c) (i) of the LRA

Also, the EEA's sections 27(3) and (6) emphasise a need for collective bargaining in dealing with pay and where income differentials reflect disproportionate incomes.³¹⁶

It is further argued by Hlongwana that, there is an inference in section 27(3) of EEA that pay differentials to be complied with as per Section 27(2), and collective bargaining is an established mechanism to seek proportionate income.³¹⁷ It is submitted that parties to collective agreements can negotiate proportional income.³¹⁸ It is argued by Benjamin that collective bargaining can deliver good labour market outcomes.³¹⁹ and coordinated systems are associated with³²⁰ better labour market outcomes - particularly to those who are from vulnerable groups.

‘Co-ordinated bargaining systems are associated with higher employment, better integration of vulnerable groups, and lower-wage inequality within than fully decentralized systems.’³²¹

Godfrey argues that collective bargaining as envisaged through the LRA has not worked in South Africa and as such collective bargaining at both firm and plant level is in decline. Godfrey argues that the decline in trade union membership further exacerbates the trade union power of play during wage negotiations. The small numbers of trade union membership hinder the union's right to strike strategy at the plant level.³²² He then provides the following suggestions that could yield a better bargaining outcome.

³¹⁶ Section 23 (3) & 6 of the LRA

³¹⁷ Hlongwane N, Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value, 11 (1) Law and Democracy & Development. 69 (2007)

³¹⁸ Section 31 (c) of the LRA provides for collective agreements to be bidding to the registered trade union, its members, the employer and the employer's organization.

³¹⁹ Ibid

³²⁰ Garneo A, (2020) The impact of collective bargaining on employment and wage inequality: evidence from a new taxonomy of bargaining system. European Journal of Industrial Relations, Vol 1. No 18 pg 1

³²¹ Ibid

³²² Godfrey S, Theron J & Visser M, The State of Collective Bargaining in South Africa: An empirical and conceptual study of collective bargaining, DPRU Working Paper 07/130 November 2007

- a) A change in the current collective bargaining system by dropping the organisational right provided in the LRA and establishing a duty to bargain that would be enforced by the Labour Court.³²³
- b) The court is provided with powers to force employers who fall under the jurisdiction of a statutory council to bargain.³²⁴

It is further submitted that for collective bargaining to be effective in enforcing Section 27 of the EEA, there is a need for change and improvement in South Africa's current bargaining framework.

4.7.3 CODES OF GOOD PRACTICES OF THE EMPLOYMENT EQUITY ACT

The legislators in their endeavour to strengthen the government's policy on labour market transformation placed the EEA through phases of amendments and, as such, Codes of Good Practices have been promulgated, and others repealed to strengthen the Code's regulatory requirements and to provide guidelines and enforcements to both employers and employees. Some of these codes include the Code of Good Practice on Equal Pay for Work of Equal Value and the Code of Good Practice on the Integrations of Employment Equity into Human Resources Policies and Practices.

While the Code of Good Practice on Equal Pay for Work of Equal Value applies to all employees and employers covered by the EEA, its objective is to provide for the implementation of pay equity in the workplace by providing practical guidelines to employers on how to achieve pay equity.³²⁵ The Code encourages Job Evaluation processes as a mechanism for eliminating unfair discrimination. It seeks to achieve the objectives of

³²³ Ibid

³²⁴ Ibid

³²⁵ Department of Labour: Code of Good Practice on the Integration of Employment Equity into Human Resource Policies, GG 27866 of 4 August 2005

Section 6(4) of the Employment Equity Act - particularly in eliminating race and gender-based inequity in pay.³²⁶

The Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices provides guidelines that enable employers to have Human Resources policies and practices that reflect Employment Equity principles that are non-discriminatory and seek to eliminate unfair discrimination - particularly those that relate to remuneration.³²⁷

The Code places a duty on the employer to ensure that its remuneration policies are audited and where barriers in remuneration are identified. The employer must consult with its stakeholders and develop a strategy to remove such barriers.³²⁸

Further to this, a requirement is for the employer to ensure that its remuneration policies provide for remuneration based on the value of the job, to promote pay equity, and ensure that fair and objective job evaluation systems are set up.³²⁹

Where the EEA Codes of Good Practice were properly applied with an effective enforcement mechanism, significant strides could be achieved in the labour market to achieve pay equity and to reduce the disproportionate wage gap. The proposals contained in the Commission for Employment Equity (CEE) for the promulgation of section 53 of the EEA to allow for the issuing of an Employment Equity Certificate of Compliance to designated employers who comply with the provisions of this Act would play a significant role in the reporting requirements of section 27 of the EEA. Companies who seek to conduct business with the state would have to prove their compliance with the provisions of EEA by submitting the certificate in their tender documents or requests for quotations.

³²⁶ Ibid

³²⁷ Ibid

³²⁸ Ibid

³²⁹ Ibid

4.7.4 NORMS AND BENCHMARKS FOR PROPORTIONATE INCOME DIFFERENTIALS

Dr Nelson Mandela wrote in the Mandela Initiative Newsletter that: ‘implementing section 27 will be a challenge. A pilot project by South African and international role-players could assist the development of norms and benchmarks for income differentials in the country.’³³⁰

The Employment Conditions Commission is tasked to research and investigate norms and benchmarks for proportionate income certifications,³³¹ on the other hand, the ECC is tasked with the responsibility to provide advice to the Minister on measures deemed appropriate to reduce the disproportionate income differentials.³³² However, it is argued that ‘while Section 27 of the EEA provides a useful framework for the realization of proportionate income differentials, norms and benchmark for proportionate wage differentials have not been established since the enactment of the EEA.’³³³

Therefore, it is submitted that because the norms and benchmark have not been set by the ECC, there is, therefore, no advice going to the Minister on measures to be set to reduce wage differentials.

It is however argued by Seekings that, some of the ECC’s work on wage-setting is sometimes hamstrung by incomplete reports from the Department of Labour, with back-up evidence on how wages might affect employment, and this might play a role in the research function of the ECC and its ability to provide a recommendation to government.³³⁴

³³⁰ Mandela Initiative Newsletter 4, December 2017: Proportionate Income Differentials: A long walk to social justice.

³³¹ Seekings J, Minimum wage -setting by the employment Conditions Commission in South Africa, 1999-2015 Centre for Social Science Research, April 2016

³³² Section 27 (4) of the EEA

³³³ Helm R, Proportionate Income Differentials: A Long Walk to Social Justice – LLM Thesis (2017). 186

³³⁴ Seekings J, Minimum wage -setting by the employment Conditions Commission in South Africa, 1999-2015 Centre for Social Science Research, April 2016

The Commission for Employment Equity (CEE) is tasked with the duty to advise the Minister as mentioned earlier in this dissertation. Some of the recent developments in the CEE endeavours to transform South Africa's workforce was the implemented changes that stipulate how the reporting on the EEA4 form should be completed by employers.³³⁵ While the changes on the EEA4 would provide better quality data collection for the work of the Commission for Employment Equity, the EEA4 form remains a document that cannot be published.³³⁶

It is suggested in this dissertation that, the CEE investigate some of the best practice that has recently passed particularly in the United Kingdom where reporting on the wage gaps by employers is transparent in an endeavour to achieving pay equity. The European Commission has followed suit with a proposal that sets out transparency measures to ensure men and women in the workplace get equal pay for equal work.³³⁷

4.7.5 SKILLS DEVELOPMENT PROGRAMMES

Education is believed to be the pathway to success - particularly for individuals who come from a disadvantaged background. In his data analysis of South Africa's wage gap in the post-apartheid period, Burger observed that throughout the data observation period which was from 1995 to 2004, wages increased with every level of educational attainment and that Black employees who have completed their education can increase their earning potential.³³⁸ Burger further argues that education is an important determinant of wages.³³⁹ This points to the significance of education in attaining a highly skilled job.

³³⁵ Commission for Employment Equity Annual Report 2019-2020 pg 3

³³⁶ Section 27 (5) provides for the ECC not to disclose any information pertaining to individual employees or employer.

³³⁷ https://ec.europa.eu/commission/presscorner/detail/en/IP_21_881 Accessed on 10 March 2021

³³⁸ Burger R & Japhta R: (2006) Returns to Race: Labour Market Discrimination in Post-Apartheid South Africa, University of Stellenbosch, pg 30.

³³⁹ Ibid

The more educated and skilled the worker becomes, the better he/she is positioned to move from a semi-skilled to a highly skilled occupation than moving from an unskilled to a semi-skilled occupation.³⁴⁰ The Skills Development Act (SDA) aims to expand the knowledge and competencies of the labour force to improve productivity and employment.³⁴¹ The government's aims with the SDA have been to improve the quality of life of workers, their prospects of work and labour mobility.³⁴² There is a need for focussed attention on the role that skills development and education can play in redressing the wage gap in South Africa. While the Sector Education Training Authorities have been established to provide for Unit-Based Skills Training Programmes,³⁴³ there is a need for a focused and organised national skills strategy from the National Skills Agency and other role players in the training and educational field for skills programmes with effective implementation strategies that can reduce the wage gap.³⁴⁴

'Wage gaps between men and women, and between nationals and migrants, remain significant and are only partly explained by differences in experience, education, occupation and other labour market characteristics.'³⁴⁵

4.7.6. STRENGTHENING THE CAPACITY OF THE EXISTING MECHANISM

The South African legislative framework aimed at redressing the labour market imbalances, particularly those that relate to wage discrimination, are well set up. What is required is a strategic approach and the right resources to put the implementation of these provisions.

³⁴⁰ Ibid

³⁴¹ Skills Development Act, Act 97 of 1998

³⁴² The Skills Development Act aims to expand the knowledge and competencies of the labour force in order to improve productivity and employment.

³⁴³ The main purpose of a SETA is to improve and develop skills within its sector, to identify skills development needs, and to ensure that national standards are maintained.

³⁴⁴ National Skills Development Strategy 111 available on: <https://www.nationalskillsauthority.org.za/wp-content/uploads/2015/11/NSDSIII.pdf>

³⁴⁵ ILO Global Wage Report 2014/2015 – preface.

4.8 CONCLUSION

South Africa's advent into a new democratic state was an essential step for its citizens and international image. The country depicted one race (white) oppressing other races while being the majority benefiter of the country's resources. When the democratic government came into power, there was a need for policy intervention aimed at controlling labour mobility in our economy and redressing the imbalances.

An evaluation of race-based income distribution in the post-apartheid period reveals that the country's post-apartheid labour market has not transformed much to reflect a society with lesser inequality and poverty levels. The objectives set by the Employment Equity Act, particularly section 6 (4) and section 27 that seek to redress income disparities, have not been met. The country is still classified by the International Labour Organization (ILO) as having the world's highest levels of inequality. The Gini coefficient is still amongst the highest in the world and close to 0.7. South Africa's legislative framework and the recommendations proposed in this dissertation can serve as a tool to eradicate income disproportionalities and gender/race-based pay inequality.

There is a need for a strategic approach to better enforcement mechanisms. Such an approach could include serious consequences for transgressors of the country's set legislation, policy, and regulatory standards that are aimed at achieving labour market transformation. The inspectorate from the Department of Labour needs to be fully resourced. Firstly, the Portfolio Committee on Labour should take an active interest in the Department's Inspectorate section staffing and related resources needs, by ensuring that the current resources are optimised fully, and, where a shortage exists, the necessary steps need to be taken to address the needs. Currently, the challenges are in the recruitment and placement of Labour Inspectors. Secondly, the earnings potential of inspectors needs to be reviewed - higher wages would

retain skilled and educated inspectors. Thirdly, there is a need for inspectors to exercise their powers to enforce legal compliance on firms who do not comply with the employment laws provisions.

South Africa has the required mechanism to change wage inequalities. However, all hands-on decks from role players in both the private and public sectors are needed to transform the labour market.

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