Combating racism and restoring dignity? A review of work of the Durban Equality Court 2003-2013

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Introduction

The demise of apartheid and the non-violent path of resolution chosen to end state-sanctioned racism Africa fundamentally changed the structure of the South African state. This 'velvet revolution' has been celebrated and commemorated on many occasions, particularly in this last year. The change in the system of governance was far-reaching, but what has the change meant for ordinary South Africans in their day-to-day interactions with other ordinary South Africans?

Racist thinking and racist behaviour shaped interactions between people of different 'races' for hundreds of years. This is particularly true in South Africa. Beliefs in white superiority and black inferiority were fuelled, particularly under apartheid, by government propaganda around the 'swart gevaar' ['black peril], and the belief in the special god-given task of white people (particularly the Afrikaner people) to rule over the so-called 'black masses' and lead them to the Christian god.[1] These beliefs found expression not only in the system of governance which excluded black people from participation, but also in the daily lives of ordinary people where apartheid and segregation meant that 'the races' lived, worked, studied, worshipped and socialised separately, thus establishing silo-ed communities exclusive of each other and the Other.

Even a cursory reading of the Constitution of the Republic of South Africa makes it clear that the change envisaged by the Constitution goes beyond the structures and institutions of state. So, for example, the preamble, the list of founding values, the explicit protection of equality and prohibition of unfair discrimination and the

[1] This sentence does not do justice to the history of the apartheid and segregated South African state, but for current purposes this blunt statement suffices. Other sources deal with the history of racism in South Africa in a more nuanced fashion.

affirmation of human dignity clearly indicate that the transformation of South Africa has to permeate society, its structures and institutions at levels.[2]

This paper interrogates the legal means by which the constitutional commitment to equality has been translated into legislation that is intended to change behaviour of ordinary South Africans. It also considers the effectiveness of the implementation of this legislation aimed at reversing the psychology of apartheid which shaped state, home and church as this affects interpersonal relations. In order to meet these research goals, I provide a brief overview of the key legislative enactment to give effect the constitutional commitment to equality, namely the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act'), the structures created by the Act to react to behaviour undermining equality, the Equality Courts, and the processes established for these courts. Thereafter, I provide an overview of 10 years' worth of complaints involving racism made to the Durban Equality Court, operating at the level of the Magistrates' Courts. My overview of the complaints addresses, broadly speaking, process and procedures on the one hand, and selected issues of substance on the other. I conclude with a short reflection on the capacity of the Act and its structures to effect the social change that the Constitution envisions.

The Equality Act, its provisions and structures

Raison d'être and its provisions

During the second reading debate of the then Bill which preceded the Act, the Minister of Justice and Constitutional Development remarked in Parliament that:

> 'This is … [a] legislative milestone … this Bill is regarded in importance as only second to the Constitution. It is intended to strengthen the legal basis for further transforming our society'.[3]

[2] See K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146. See also P Langa "Transformative Constitutionalism" (2006) *Stell LR* 351; AJ van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 *Fundamina* 1; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) *SAPL* 155; D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 309,

[3] Quoted in R Krüger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD-thesis, Rhodes University, 2009) 151. For a discussion and critique of the

The imperative to pass this Act stemmed from the injunction in section 9(4) of the Constitution that required the enactment of legislation to 'prevent or prohibit unfair discrimination'.[4] In the preamble to the Act it is noted that it 'endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate'. The transformation that the Act meant to facilitate is transformation at an interpersonal level by addressing behaviour that undermines our equal dignity and hinders the achievement of equality.

In fulfilling the constitutional mandate to prohibit unfair discrimination, Parliament ambitiously combined prohibitions of behaviour that impact on inherent equal dignity of people, with a general obligation to promote equality. More than 14 years after the passing of and assent to the legislation, the promotional aspect of the Act has not been brought into operation, while the reactive provisions have been in operation since 16 June 2003.[5] The failure to bring the promotional aspect of the Act into operation may signify an appreciation of the challenging relationship between law and social change on the part of the executive, but it also presupposes that the reactive provisions can exist and make an effective impact on inequality without the promotional provisions having force. While this delay in itself is significant, my concern here is with the prohibitory (ie. reactive) provisions of the Act that have been in operation for a decade In what follows, I provide a brief overview and critique of the provisions of the Act as they stand and have been interpreted,[6] as the formulation of many sections of the Act leave much to be desired.

The Act binds the state and all persons[7] and it prevails over other ordinary law.[8] However, the Act does not apply to the employment context since specific legislation tailored for the employer-employee relationship as it relates to equality, applies.[9]

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drafting process see Chapter 5.3 and the sources quoted there. For parts of this paper, I have placed reliance on work done earlier.

[4] Read with Schedule 6 item 21. The legislation had to be in place within two years of the Constitution coming into operation.

[5] Chapter 5 of the Act.

[6] Very few matters have served before the high court sitting as an Equality Court. The matters reported in the SALR are: *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC); *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC); *Strydom v Nederduits Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (EqC).

[7] Section 5(1).

[88] Section 5(2).

The Equality Act[10] prohibits unfair discrimination on listed ('prohibited')[11] and analogous grounds. It does so generally, and more specifically with relation to race, gender and disability. These prohibitions must be read with the definitions of 'equality' and 'discrimination' of the Act. Equality, as defined in the Act, 'includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and equality of outcome'.[12] 'Discrimination' is defined as positively as an act, or negatively, as an omission, or a 'policy, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'. As in the instance of s 9 of the Constitution, it is unfair discrimination that is prohibited. Further, and similar to the Constitution, the Act provides for a shift in the burden of proof to the person alleged to have discriminated unfairly (the respondent), once it has been established on a prima facie basis that discrimination on a prohibited ground has taken place. The respondent may prove that the discrimination did not take place, that it was not based on a listed ground or that it was fair in the circumstances.[13] Fairness is determined with reference to s 14 of the Act.

Section 14 of the Act has been characterised by O'Regan J in *MEC for Education: KwaZulu-Natal v Pillay*[14] as 'not particularly helpful to a court faced with the determination of what constitutes fairness'. The section is opaque in its combination of a consideration of context, impact on dignity of the complainant,[15] reasonableness considerations, proportionality and explicit reasonable accommodation of diversity.[16]

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[9] The Employment Equity Act 55 of 1998 provides for affirmative action on the one hand and prohibits unfair discrimination in the employment context on the other.
[10] My discussion in this part, relies in part on my earlier work on this: thesis chapter 5
[11] The listed grounds set out in the Act are the same as those listed in s9(3) of the Constitution. The grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
[12] Section 1.
[13] Section 13.
[14] 2008 (1) SA 474 (CC) para 168. She also referred this section as 'not a model of clarity'.
[15] The core interest protected by the prohibition of unfair discrimination is the inherent equal dignity of everyone. Prinsloo v Van der Linde and Harksen v Lane (CC).
[16] Section 14(1), (2) and (3).

In the absence of a constitutional challenge to this section, courts are obliged to apply the section in a constitutionally defensible fashion.[17]

Section 7 of the Act specifically prohibits unfair discrimination on the basis of race. In doing so, the section lists examples of unfair racial discrimination which include the propagation of racial superiority or inferiority, promoting racial exclusivity, providing inferior services to persons of another racial groups and denial of access to opportunities on the basis of race. It is not evident why these specific examples were listed,[18] but the fact that they are listed does not exclude other forms of unfair racial discrimination from the Act, and nor does it assist complainants beyond simply being examples. Complainants in all instances of unfair racial discrimination complaints are to establish discrimination (as defined) on the basis of race on the basis of evidence, before the burden of proof shifts to the respondent who, as in other instances, can rebut the presumption of unfairness (with reference to s 14) or prove that the discrimination has not taken place or is not based on a prohibited ground, in this instance, race.[19]

In addition to the prohibition of unfair discrimination, the Act also related infringements on people's inherent equal dignity by prohibiting hate speech and harassment on the listed grounds.

Section 10 of the Act prohibits the publication, propagation, advocating and communicating of words based on a prohibited ground that could 'reasonably be construed to demonstrate a clear intention' to (a) be hurtful, (b) be harmful or to incite harm, (c) promote or propagate hatred. Section 16(2)(c) of the Constitution excludes expression that amounts to 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm' from constitutional protection. A cursory reading of this section in comparison to the hate speech exclusion in s 16(2) of the Constitution shows clearly that this prohibition is broad, and arguably overly-broad in its regulation of offensive speech. It is furthermore unclear what the intention requirement in this section is, and whether its

[17] *MEC for Education: KwaZulu-Natal v Pillay* para 40
[18] See C Albertyn, B Goldblatt and C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (2001) 56.
[19] Section 13.

provisions are to be read cumulatively or separately. The section is currently the subject of a constitutional challenge,[20] but until it is declared unconstitutional courts must apply it as if valid and in line with spirit, purport and objects of the Constitution and the Act.

Section 10 incorporates by reference, the proviso that applies in relation to the further related reactive provision outlined in s 12. Section 12 outlaws the dissemination, broadcasting, publishing, display or advertisement of any information that 'could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person'. The proviso which provides a defence against complaints under both sections, means that bona fide engagement in artistic creativity, scientific and academic research, fair and accurate reporting in the public interest will successfully counter such complaints. As with the hate speech prohibition under the Act, s 12 could arguably also be overbroad in its regulation of expression, but must be assumed to be constitutionally consonant unless declared otherwise.

Harassment[21] is defined in the Act to include persistent unwanted conduct or serious unwanted conduct which 'demeans, humiliates or creates a hostile or intimidating environment' or that is aimed at inducing submission or threats of unwanted consequences. The Act prohibits harassment on listed and analogous grounds or a person's actual or perceived membership of a particular group. It is evident this comprehensive prohibition of harassment includes so-called 'hostile environment'[22] harassment and 'quid pro quo'[23] harassment which is aimed at gaining some illicit benefit from the complainant in exchange for the unwanted conduct on his or her part towards the complainant. As with the Act's prohibitions of hate speech and that of the publication and dissemination of information that discriminates unfairly, this definition lacks precision by failing to stipulate explicitly whether it is the subjective experience of the complainant that is determinative or the experience of such treatment by a reasonable person that is determinative. Further, it is unclear

[20] See http://www.dailymaverick.co.za/article/2013-08-30-as-qwelane-challenges-equality-act-government-gets-serious-on-hate-crimes/#.VFOtZ_mUdmY.
[21] Section 11 simply states that 'No person may subject any person to harassment'.
[22] AC Basson et al *Essential Labour Law* (2005) 208
[23] Albertyn, Goldblatt and Roederer 99.

whether a respondent can negligently harass a complainant. While this may seem unlikely, it becomes a relevant consideration when the full import of the definition recognising a single serious incident of unwanted conducted as harassment.

Section 15 provides that there is no need to prove unfairness in instances of complaints of hate speech and harassment.

From the short exposition and critique of the reactive provisions of the Act, it is clear that the legislature cast its net wide, and not always with great precision, in its attempt to eradicate unfair discrimination and related behaviour. The imprecision may stem – at least in part – from the rushed nature of the drafting process,[24] but perhaps also from a naïve understanding of the role of law in bringing about change. I return to the link between law and social change later.

The Equality Courts and procedures in respect of complaints

The reactive provisions of the Act, ie complaints of transgressions of the prohibitions outlined above, are made to Equality Courts that are created by the Act at both the levels of the high court and magistrates' courts. All magistrates' courts have been designated equality courts.[25] In *Manong and Associates (Pty) Ltd v Department of Roads and Transport,*[26] Navsa JA held that the Equality Courts are specialised, distinct courts with the those powers as stipulated in the Act.[27] This dictum means that the Act does not extend the jurisdiction of the high court or magistrates' courts to deal with complaints under the Act, but that the Act establishes separate courts – the Equality Courts – that exclusively deal with complaints under the Act.[28] These separate courts are staffed by specifically trained clerks and presiding officers[29] who have active roles in the processing complaints and finalisation of matters.

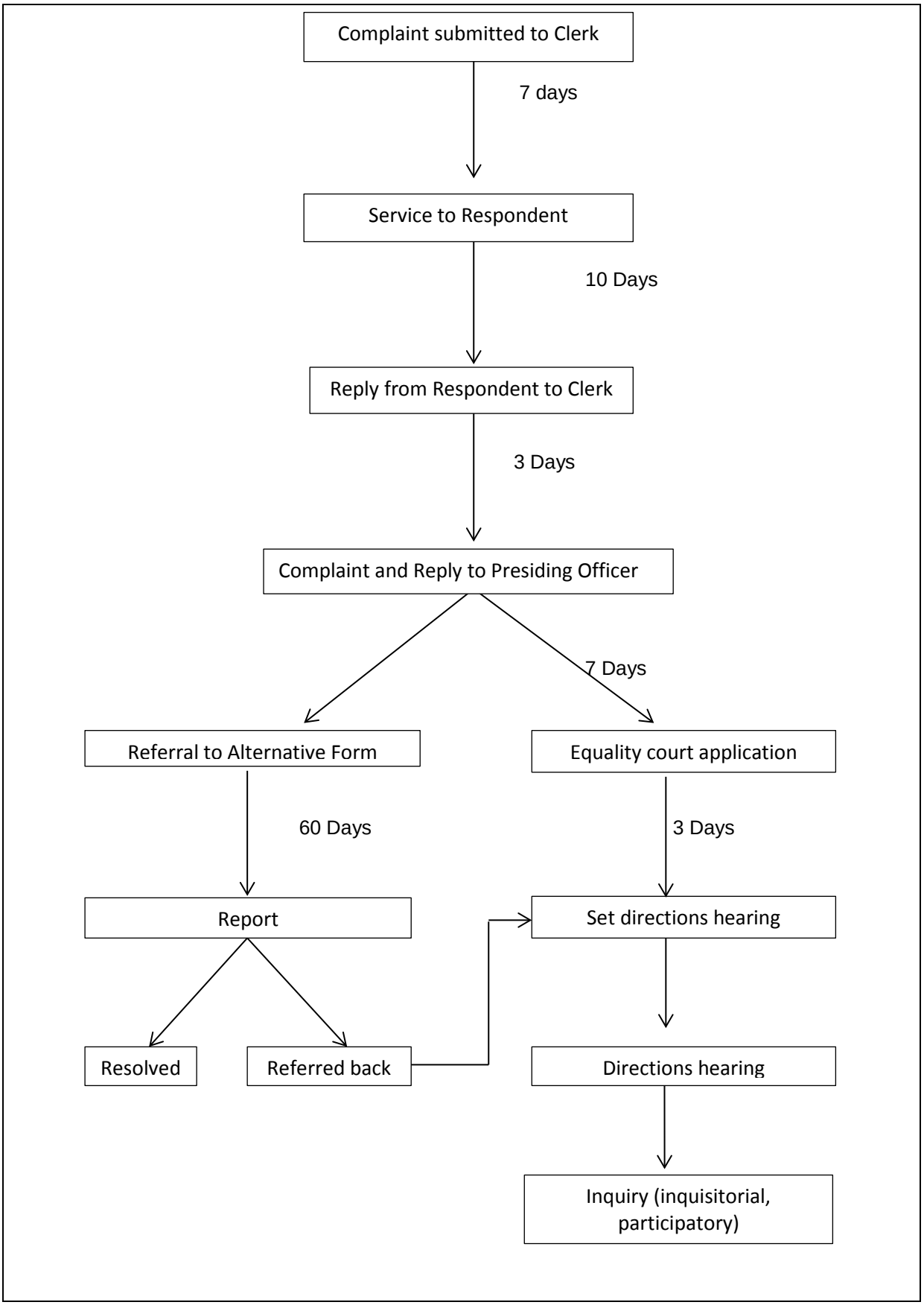
The Act and its regulations envision the Courts to function in an informal fashion to encourage participation by the litigants. Complaints under the Act are to be dealt

[24] See Chapter 5, particularly 5.3.1.1 of my thesis for a more detailed discussion of the drafting process.
[25] In terms of GN R859 in Government Gazette 32516, 28 August 2009.
[26] [2009] 3 ALL SA 528 (SCA)
[27] Para 62
[28] See also *Maharaj v National Horseracing Authority of Southern Africa* 2008 (4) SA 49 (N).
[29] Section 31.

with expeditiously and with due consideration to the need for access to justice to eradicate systemic discrimination and inequalities.[30] The Act echoes the broad standing approach of the Constitution, and further provides that the South African Human Rights Commission and the Commission on Gender may bring complaints before the court.[31] Legal representation or representation by any person of the complainant's or respondent's choice before the Equality Court is allowed.[32]

The process of bringing a complaint to the Equality Court is outlined below:

[30] Section 4.
[31] S20.
[32] Regulation 10(9). Representation by a lay person is novel in South Africa. If the lay representative is in the view of the presiding officer not a suitable representative, he or she must inform the party accordingly: reg 10(9)(b).


Complaint submitted to Clerk
7 days
Service to Respondent
10 Days
Reply from Respondent to Clerk
3 Days
Complaint and Reply to Presiding Officer
7 Days
Referral to Alternative Form
Equality court application
60 Days
3 Days
Report
Set directions hearing
Resolved
Referred back
Directions hearing
Inquiry (inquisitorial, participatory)

A complainant brings his or her complaint under the Act to the attention of the Equality Court by completing the prescribed form (Form 2) and handing the form to the clerk of the court.[33] This form requires information about the personal details of the complainant, those of the respondent, the details of the complaint and the relief sought by the complainant.[34] There is no fee attached to the making of a complaint.[35] The clerk of the court is obliged to assist unrepresented complainants, to refer them for assistance by human rights institutions if needed, and to explain the process followed in the court, and the rights and remedies available under the Act.[36] These duties exist alongside the ordinary administrative duties of the clerk, including opening of files, numbering of complaints, keeping a register of complaints and updating this as a matter progresses.[37]

Within seven days of the complaint being lodged, the clerk has to notify the respondent of the complaint against him or her.[38] From the day of receipt of the complaint, the respondent has ten days to respond to the complaint against him or her.[39] Within three days of that period expiring, the clerk has to place the matter (the complaint and the reply) before the presiding officer of the equality court,[40] who has seven days to determine whether the complaint is to be dealt with by the equality court of whether it has to be referred to an alternative forum. Where a matter is referred, the alternative forum has to deal with the complaint in terms of its own powers.[41] A decision to refer a matter to an alternative forum must be informed by the personal circumstances of the parties, the physical accessibility of the alternative forum, the needs and wishes of the parties and the views of the relevant functionary to whom the court intends to refer the matter.[42] In this decision, a court should also take cognisance of the nature of the proceedings and whether the particular suit

[33] Reg 6(1)
[34] Section 20(2) and reg 6(1).
[35] Reg 12(1).
[36] Reg 5(f).
[37] Reg 5 (a) and (b).
[38] Reg 7.
[39] Reg 6(2).
[40] Ibid.
[41] Section 20(3) and (5).
[42] Section 20(4).

could lead to the development of jurisprudence.[43] No specific representations on the possible referral of a matter are invited from the parties, and the court makes its determination of the basis of the complaint and the reply thereto.[44]

The court only has authority to refer matters to other forums where it shares jurisdiction with that forum, and where the other forum can deal with the matter more effectively than the Equality Court.[45] Referral to an alternative forum takes place in terms of a court order which entails a formal submission of the matter to the alternative forum and informing the parties accordingly.[46] The alternative forum is to acknowledge receipt of the referral and has to report on the progress in relation to matter to the clerk of the Equality Court.[47] The alternative forum may refer the matter back to the Equality Court in which event the court has to deal with the matter in accordance to the Act.[48]

Where the Equality Court is seized with a matter, the clerk has to assign a date for a directions hearing and inform the parties of the date of this hearing within three days of the determination of the presiding office.[49] At the directions hearing, the presiding officer must guide the parties in respect of procedure and administration of the matter.[50] The order made after a directions hearing may address issues pertaining to discovery, interrogaries, admissions, joinder of parties, amendments and intervention by amicus curiae among others.[51] After the directions hearing has been concluded, the matter is set down for the inquiry at which evidence is adduced.

The Act and the regulations stipulate that the inquiry must be conducted 'in an expeditious and informal manner which facilitates and promotes participation by the parties.'[52] More detail is not provided. At the time of the establishment of these courts, significant amounts of money were spent in purchasing boardroom furniture,

[43] Ibid.
[44] Bench Book 101.
[45] Bench book 101
[46] Section 20(5) and Reg 6(4) and (8).
[47] Reg 6(8) and (9).
[48] Reg 6(10), (11), (12).
[49] Sec 20(3)(b) and Reg 6(5) and (6). Parties must be informed of the directions hearing by way of personal service: reg 7(3).
[50] Reg 10(5).
[51] See Reg 10(5)(c)(i) – (xii).
[52] Reg 10(1)

as officials of the Department of Justice at the time believed an informal set up of the court room furniture to be required.[53] It would seem however, that the informality envisioned does not require particular furnishings, but rather allowing parties to tell their stories and to be heard by a presiding officer allows 'fairness, the right to equality and the interests of justice …, as far as possible, [to] prevail over mere technicalities in relation to the law of evidence'.[54] The clearly outlined time frames in the procedure indicate that speedy resolution of disputes was envisioned.

The Act and regulations allow parties to call witnesses and cross-examine the witnesses of the other party, but prescribe no particular format for the inquiry, which has effectively meant that the inquiry is conducted similar to a civil trial in a magistrate's court.[55] The presiding officer is allowed to witnesses on his or her own initiative.[56] Affidavits may be allowed as evidence, unless a party objects thereto.[57]

It is evident that the Act and regulations envision the inquiry into a complaint to be conducted in a more inquisitorial fashion than an ordinary civil trial, involving the parties actively in the process. The presiding officer is to make findings and an order based not only on a strict application of technical rules, but bearing in mind the overarching constitutional commitment to equality and transformation.[58]

Remedies

Complainants bring complaints to the Equality Court to obtain a remedy for the infringement of their rights in terms of the Act. Section 21(1) empowers the court to determine whether unfair discrimination, hate speech or harassment had taken place after holding an inquiry, while section 21(2) empowers the court to make an appropriate order after such inquiry. A wide-ranging list of possibly appropriate orders that a court may make after an inquiry are listed in the s 21(2). The remedies provided for are both forward-looking (ie aimed at prevention) and backward-looking (aimed at compensation),[59] focused on the individual interests or broader community

[53] See Chapter 6, particularly 6.6.2.2 of my thesis for a more detailed discussion.
[54] Reg 10(7)
[55] Section 19.
[56] Reg 10(10(c).
[57] Reg 10(6).
[58] Reg 10(7).
[59] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 94-96.

interests and and structural. I highlight only a few of these remedies to illustrate the potential reach of the Act.[60] Backward-looking remedies such as an award of damages intend to address the financial losses suffered by a complainant as a result of the breach of his or her rights under the Act and to compensate the complainant's injury to dignity, an order directing the matter to the Director of Public Prosecutions, declaratory orders and an order to make an unconditional apology. Forward-looking orders aimed at regulating future behaviour include interim orders preventing immediate further harm, an order to make specific opportunities and privileges available to the complainant, an order to provide for reasonable accommodation of a group of persons, an order to undergo a policy audit or to implement special measure to address the breach of the rights in question. The court also has the power to direct a respondent to make regular reports to it or an institution like the Human Rights Commission regarding the implementation of the court's order. The court may also make an appropriate costs order.[61]

An appeal against a final order of an Equality Court lies to the High Court or the Supreme Court of Appeal, as the case may be.[62] The regulations allow a direct appeal from an Equality Court to the Constitutional Court, subject to the rules of that court.[63]

Against the background of this overview of the Equality Act, its provisions, structures and procedures, it is appropriate to turn to the experiences of racism by ordinary South Africans to determine whether the Act appropriately respondend to racist behaviour. In conclusion I consider how these finding inform my understanding of the role of law in relation to social change.

The Durban Equality Court – a decade of complaints involving racism

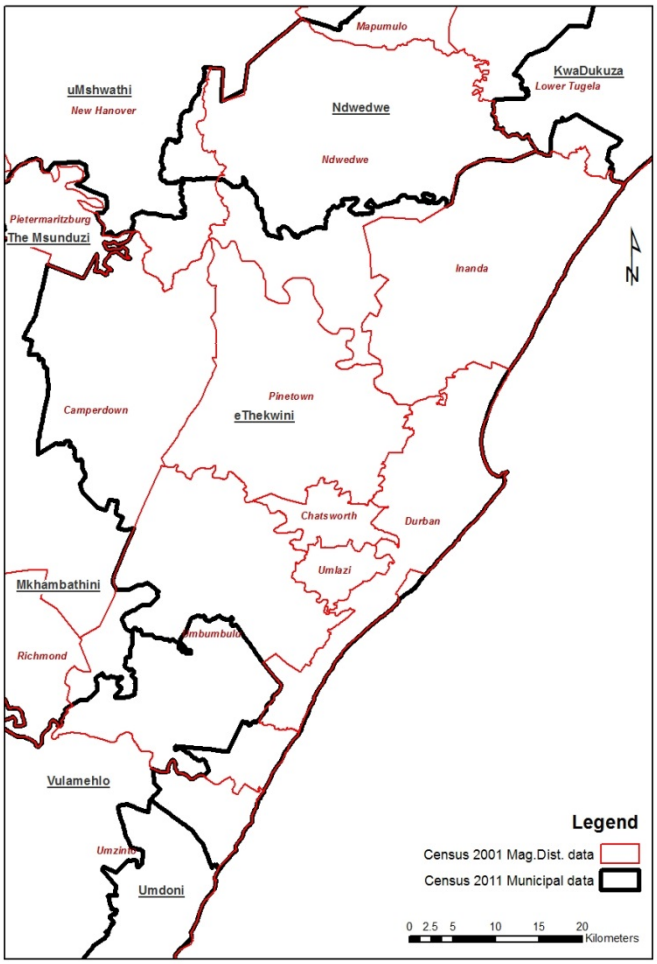
Durban – in brief

The magisterial district over which the Durban Equality Court has jurisdiction forms part of the eThekwini Metro. eThekwini is the largest city in KwaZulu-Natal with a

[60] Provided for in s 21(2).
[61] This provision in s21(2)(o) is amplified by reg 12.
[62] Section 19.
[63] Reg 23(3).

population of about 3.5 million people. The Durban Harbour is the largest and busiest port on the continent.

The map below indicates magisterial district of Durban in relation to the metro. As in other cities and towns in South Africa, apartheid and racial segregation impacted on town planning and settlement patterns of what now forms the metro.[64] Since the demise of apartheid, some change in the settling patterns has taken place, but the existence of predominantly racially homogenous areas persist, with movement into the so-called former 'white' areas. 'Indian' and 'black' areas are typically further away from the historical city centre and economic hub of the city requiring worker living in these areas to travel to their places of employment at great cost, further compromising the attainment of equality.



[64] See P Maylam 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) *Journal for Southern African Studies* 19.

Methodology

The ten year review of the work of the Durban Equality Court follows on from my research undertaken earlier (2005-2008) in respect of racism complaints made to four urban Equality Courts.[65] For that period, I found that the Durban Equality Court received and finalized more complaints than any of the other Equality Courts I visited. Based on that experience, I returned to the Durban Equality Court to collect information about racism complaints made from 2008 to 2013 to be able to review the complaints, their processing and outcome by that court over a decade. Earlier in 2014, as I did before in 2006 and 2007, I obtained permission from the Chief Magistrate of Durban and the Court Manager to visit the court, peruse the files, take notes and scan the documents for purposes of this research. I obtained copies of written judgments and had a number of judgments transcribed with permission.[66] I did not conduct interviews with any role players for purposes of this research and my findings are based on the information contained in the court files that were made available to me.[67]

Classification of complaints and complaints by number

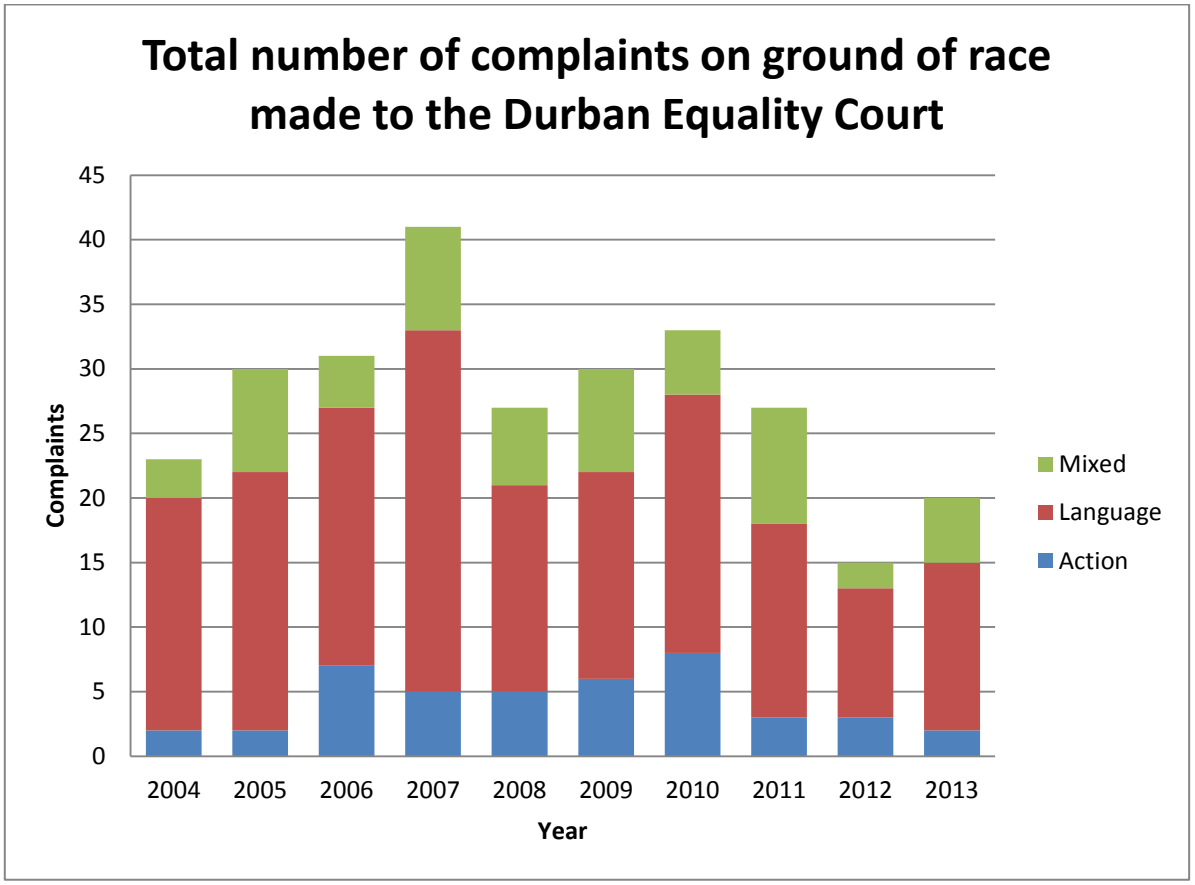
In the section of the paper I provide an overview of the nature and number of complaints received. I have classified the complaints made to the Durban Equality Court on the basis of the information provided by the complainant. A numerical overview of the complaints lacks nuance, but gives an indication of the racist behaviour is reported to persist in the area. The overview also highlights the contexts in which such behaviour often occurs. It also indicates how many matters were resolved through judgment or settlement, which could be regarded as a measure of success on the part of the court in addressing complaints under the Act.

Complainants more often than not did not use the language the Act to describe their complaints. Accordingly, I catagorised the complaints as complaints involving racist language, complaints involving racist action, and mixed complaints involving action

[65] This research that I completed for purposes of my PhD-thesis covered the time period June 2003 to December 2007.
[66] Regulation 10(4)
[67] I only relied on information made available to me by the clerk of the court who graciously fetched and carried many files to make this research possible. If a complaint involving racism is absent from my list, it is because the file was not available at the time of the collection of the data. .

and language. The latter category includes allegations of harassing behaviour or physically threatening behaviour on the part of the respondent. I coded the complaints by year – eg. 04, 05, 06 etc; by type, L for language, A for action and M for mixed and then sequentially numerically, irrespective of year. So for example, the first complaint involving racist language made in 2004 is coded 04L1, and the last language related complaint is coded 13L176. The tables are available to participants of the workshop.[68]

The graph below illustrates the number and nature of complaints made over the past ten years:



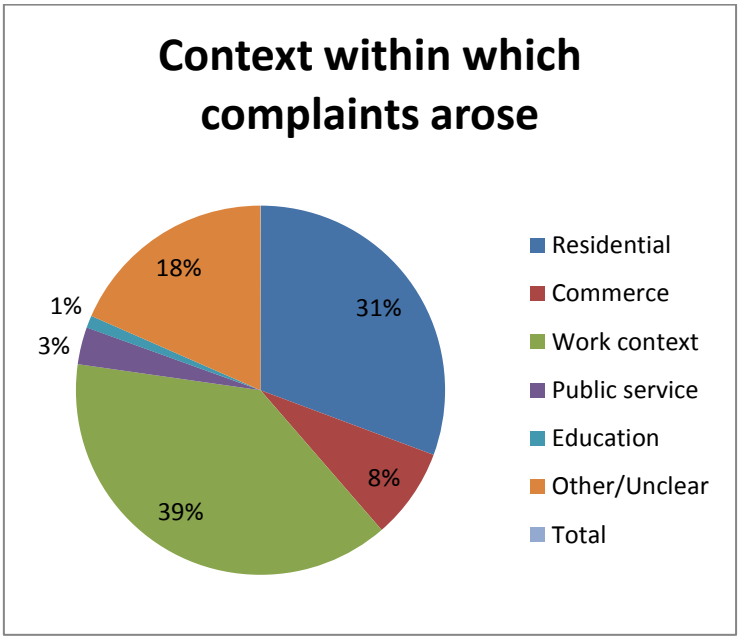
A total of 277 complaints involving racism/racist behaviour – in one form or the other – has been made to the Durban Equality Court in the past ten years. The highest number of complaints was made in 2008, with fewer complaints being made to the court in the last three years. .

[68] I do not append these to the paper as the tables run more or less 40 pages.

In what follows I highlight particular issues that came to the fore in the review:

Process and procedure

I Jurisdiction



It is evident that the work context proved the most fertile ground for complaints to the Durban Equality Court. In my classification of complaints I took cognizance of the fact that complainants were often imprecise in describing the nature of their work relationship with the respondent or that they simply did not know whether they were employed or worked as an independent contractor. I therefore classified complaints as arising in the work context rather than in the employment context.

The high number of complaint arising from this context seems anomalous as s 5(3) of the Act stipulates that it does apply in instance where the Employment Equity Act applies. How did the court then deal with the complaints that were lodged?

Section 6 of the Employment Equity Act prohibits unfair discrimination on listed and unlisted grounds in terms of an employment policy or practice.[69] It specifically provides that harassment is included as a form of unfair discrimination. The section prohibits not only an employer from discriminating unfairly, but any person. This means that an employer is obliged to have policies and process in place to prohibit unfair discrimination in the workplace and deal with complaints of unfair discrimination in the workplace. Significantly, the EEA does not make explicit reference to hate speech.[70]

In dealing with complaints arising in this context, the Durban Equality Court was not wholly consistent in its jurisdictional determinations. In some instances, particularly in the early years, the court received the complaints and continued to the inquiry stage without questioning whether the parties were in an employment relationship, and whether the Act applied. In one matter a special plea challenging the court's jurisdiction was upheld (06A6), and other instances the merits of the matters were interrogated (05M8, 08M27, 10M40, 10M43, 11M50) with or without consideration of the jurisdictional issue. In respect of complaints involving racist language in the workplace (mostly racial name-calling), the court initially dealt with the complaints irrespective of the existence of an employer-employee relationship (e.g.04L5, 04L14, 05L18, 05L19, 05L20, 05L38, 06L40, 06L43, 06L45, 06L55) and with a few more matters later on (07L74, 10L120, 10L121). However, it indicated that it lacked jurisdiction in other similar complaints, particularly in 2009 (09L106, 09L115, 09L117). With exception of the two 2010 matters referred to above, complaints involving racist language after 2010 (where service was carried out) were not dealt with because the presiding officer deemed the court not to have jurisdiction. In some instance formal referrals were made to the CCMA or Labour Court (eg 10L133, 10L134, 10L135, 11L138). Such referrals were not competent as the Act only allows referral where the alternative forum shares jurisdiction with the Equality Court.[71] It is also significant that these referrals were not follow up as provided for in the Act.

[69] Section 1 of EEA defines employment policy or practice broadly.
[70] *Strydom v Chiloane* 2008 (2) SA 247 (T).
[71] See above.

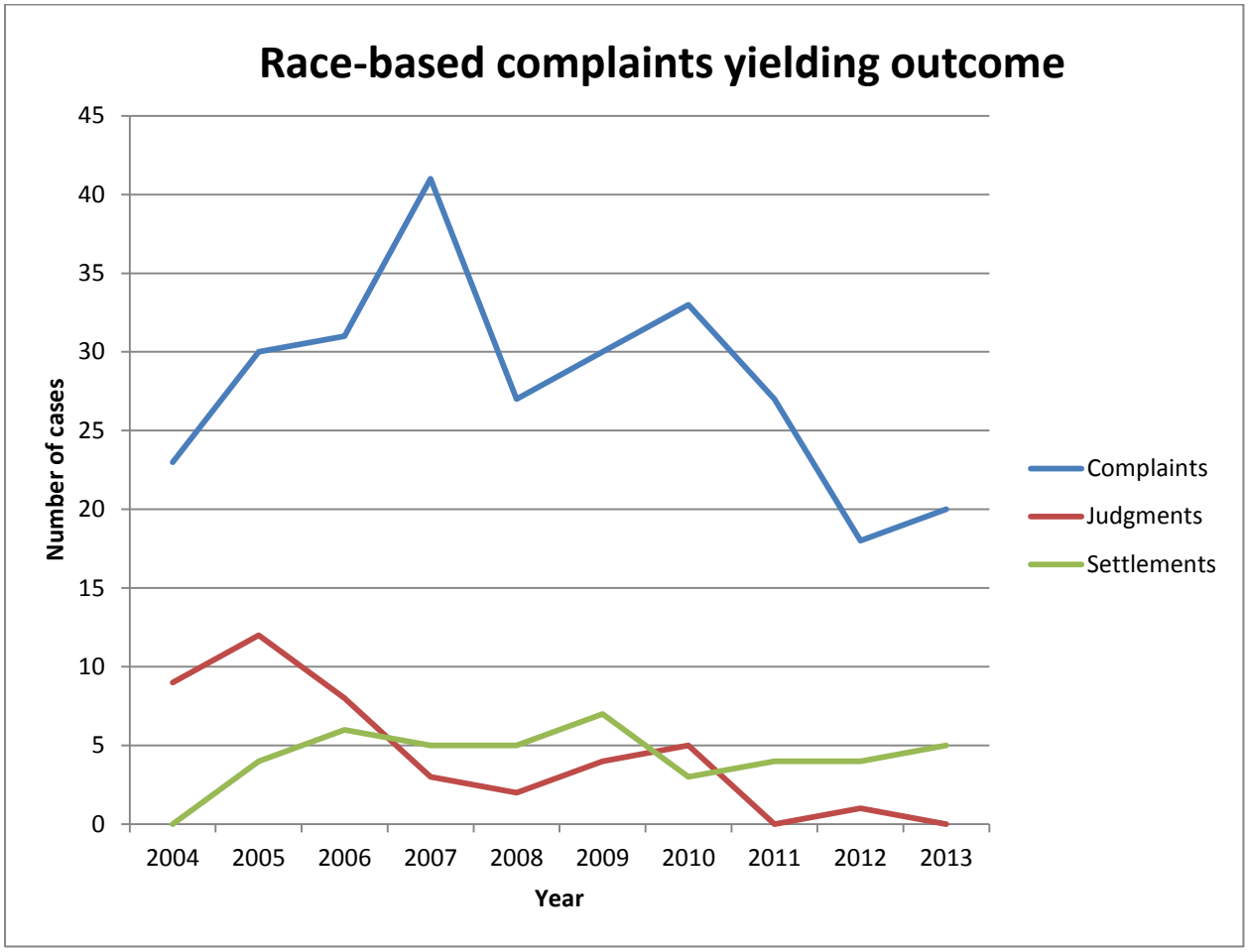
II Duration and informality

The procedure envisioned in the Act is speedy and informal. In many instances, particularly when legal representatives were involved, complaints were drawn out over many months, if not for a year or more (eg. 08M30, 09A22, 09A24, 09M33, 12L159, 12L162, 13L164, 13L168). While justice may be served in some drawn out matters, the extension of the process may defeated the objectives of the Act. To draw matters out technical legal arguments have often been introduced, potentially alienating litigants from the process contrary to the requirements of the Act.

III Burden of proof

Section 13 of the Act determines the burden of proof for complaints of unfair discrimination: the complainant has to make out a *prima facie* case of discrimination and the respondent then has three options – to prove that the discrimination did not take place, to prove that his or her conduct was not based on a listed ground, or that the discrimination is fair. Section 15 specifically provides that unfairness has no role to play in determining whether hate speech or harassment had taken place. Despite this seemingly clear legislative directive that harassment and hate speech complaints would simply require an application of the ordinary civil standard – proof on a balance of probabilities by the person who alleged the wrong – the interpretation by the Durban Equality Court has been more complex. In relation to some complaints of hate speech, the presiding officer required the complainant to make out a *prima facie* case, whereafter it was indicated the burden shifted to the respondent whose only option was then to prove that the incident did not take place (eg. 04DL5, 04DL6, 04DL9, 09DL11, 05DL20, 05DL22, 05DL26, 06DL39, 06DL41, 06DL52, 06DL55). However, in other instance this was not done (eg. 04DL14, 05DL19, 05DL38, DL40, DL75). To complicate the issue of the burden of proof even further, presiding officers have convicted respondents of hate speech on two occasions (04L6 and 09L108) in the Equality Court as if this court had criminal jurisdiction. This difference in the standards of proof applied, leads to uncertainty for litigants and court officials.

IV Total number of complaints in relation to complaints processed to finality



From the graph above it is evident that the proportion of matters resolved – either by agreement or imposition – is relatively small in comparison to number of complaints received. A number of explanations could explain the discrepancy and I discuss these briefly.

The first relates to the practice implemented by the Durban Equality Court presiding officers when the court commenced its work in 2004. Presumably in an attempt to assist the clerk of the court, presiding officers perused complaint forms prior to service on the respondent and indicated on these forms whether they 'authorised' service of the form on the respondent or not,[72] after which the process as described in the Act and regulations would commence. This practice was followed more or less consistently from 2004 to 2009, and intermittently thereafter. It meant that all

[72] In two instances complaints were not authorised (10L129 and 11 A 37).

complaints were recorded as received and only thereafter would a call be made as to its viability.

From 2009 onwards, a new practice, also one not provided for in the Act or regulations, was introduced. This practice involved two presiding officers perusing the complaint and reply thereto to determine whether the complaint really was one for the Equality Court. The perusal is in line with the prescribed process, but it is not clear why this new practice involves two presiding officers. It is further also not evident why the previous practice of perusal of the complaint alone has not been followed consistently.

A further explanation of the discrepancy between the number of complaints and the number of resolved matters is to be found in the court's determination that it lacked jurisdiction because of the existence of an employer-employee relationship between the complainant and respondent, elaborated upon above. Many of these determinations were made without delivery of a judgment, but simply on perusal of the papers of the complainant prior to service (in terms of the initial practice, eg. 09L106, 09L115, 09L 117) or on that of the complainant and the respondent (in terms of the practice followed after 2010). A directive in the latter instance without much elaboration brought the matters to an end (eg.10L128, 10L135, 11L138, 12L156, 13L169). It is interesting to note that the court retracted its directive in 13L169 after the complainant indicated that the interaction between himself and the respondent did not involve an employer-employee relationship, as the employer of the complainant was the wife of the respondent. How this would square with the prohibition of unfair discrimination by any person (s 6 of the EEA) is open to debate.

A significant number of matters did not progress because of practical issues. I illustrate these issues with reference to the language complaints only. Several matters could not continue because Form 2 was not or could not be served. Among the complaints involving racist language, 17 complaints suffered this fate. Others matters failed to progress because the complainant or clerk failed to follow up on the matter before or after service. The failure to follow up took different forms. In some instances, the clerk was required to obtain additional information from the complainant or to communicate information about progress or the status of the

matter to complainant requiring some action on the part of the complainant. From the information on the files it was also possible to ascertain with certainty whether it the failure could be attributed to the clerk who failed to perform his or her functions in accordance with the Act or complainants who failed to act on the request for information or other communication from the clerk. Thirty language complaints did not progress for reasons like these. One could speculate that the complainants had lost interest in pursuing their matters, that their priorities or circumstances had changed, that the clerk simply failed to do his or her job, or that the clerk's only failure was a lack of detailed recording of his or her actions in pursuit of the finalization of the complaints. Lastly, a significant number of complaints (18) were withdrawn by the complainants. In some instances these followed when apologies were made and the change that the mere service of a complaint has made in those instance, must be acknowledged.

What is clear is that the process and the procedures followed by the court have not been articulated clearly and applied consistently across the board. While some matters progressed smoothly, informally and quickly as envisioned in the Act, others lingered and fell by the wayside because of process issues. A lack of progress because of process issues have the potential to undermine the very contribution to social change that the Act envisions. Complainants may come to doubt the system and its value in addressing their lived racialized and racist experiences.

Substance

I have alluded to the nature of the complaints made throughout the preceding discussion. It is not possible to traverse all the different contexts and the different complaints in detail in this paper, and I thus highlight three typical complaints and their resolutions through judgment to illustrate the experience of racism in Durban and the court's response thereto. The discussions necessarily raise some of the procedural and process issues again. In view of the fact that the majority of complaints involved racist language,[73] I focus the attention on complaints of this nature only. Additionally, this elaboration will focus the attention on the residential context only.

[73] In XX matters that I discuss, the complaint was coded as mixed

Strife or discomfort as a result of racial integration in historically racially homogenous neighbourhoods is not unique to South Africa and the phenomenon is well documented. Movement to former 'white areas' by Indians and black people force new neighbours to face the Other, the unknown on common home turf.[74] In the next few paragraphs I consider how the presence of the Other and differences in habits, practices and beliefs about entitlement have caused clashes between neighbours. In each instance, I outline the complaint, the evidence, the court's interpretation (or not) of the law and the outcomes of the three cases.

In 05L25, the complaint against the respondent (a white man), the neighbour of the complainant (a black woman) was that he confronted her about noise coming from her section of the semi-detached house they occupied on the day of the offending incident. In addressing the noise issue he stated according to complainant:
'Fikile, you are a kaffir bitch. You must go stay in Umlazi with the other kaffirs like you'.
The evidence presented by both parties indicated that the relationship between them was strained. Several examples of conflict points were raised. The parties blamed each other for making noise, the complainant alleged that the respondent demeaned her when he complained about the smell of tripe being cooked in her house, and she asserted that he often complained to the police about her or her children. As to the specific complaint, two contradictory versions were put forward, with the respondent denying uttering the offending words.

In assessing the evidence and applying the law, the court made short shrift of the complex statutory prohibition by stating that offending words were used and that it amounted to hate speech. In considering 'the sentence', the court was cognizant of the criminal conviction related to the same incident and noted that the respondent was ordered to pay 'a hefty fine'. Accordingly, the respondent was ordered to make an unconditional apology for 'the hurtful and harmful words that were used'. The respondent was further ordered to include in his apology an undertaking not to use the words again.

[74] In the American context, Jeannine Bell 'Hate thy neigbor: violent racial exclusion and the persistence of segregation' (2007) *Ohio S J Crim L* 47, views resistance to integration the result of segregation.

The complaint in 07L76 was that the respondents (a black man and woman), neighbours of the complainant (a white woman), had subjected her to hate speech in that she was told that 'this is a black man's [kaffir's] country and no white man [boer] is going to rule here'. The context of the dispute was a refusal on the part of the respondents to grant permission for extensions to the house of the complaint. Further to the alleged racist statement set out above, the complainant alleged that she was told by the respondent to build a house on the Bluff (a historically 'white' area) and not in Wentworth (a historically 'coloured' [mixed race] area) and that the house of the complainants would be destroyed if it were built. Other offensive words that the respondents were alleged to have directed at the complainant were 'rubbish', 'dirty', 'jealous', 'bad people' and 'satan'. The written judgment of the court sets out the adduced evidence in detail. The court found, on a balance of probabilities, that the offensive words were directed at the complainant by the second respondent.

In setting out the provisions of the Act in relation to hate speech, the presiding officer noted that s 10 does not set any requirement as to intention:

> 'The test is whether a reasonable person would construe the speech as demonstrating "a clear intention". This can be subjective and/or objective.'[75]

The court held that the complainant had been upset and hurt by the words and that the words amounted to hate speech. The presiding officer emphasised the purpose of the Act 'to promote a culture of diversity based on equality, justice and freedom'. This is linked to the society envisioned in the preamble to the Constitution and the spirit of 'ubuntu'. This required the parties, who were neighbours, to restore their neighbourly relations which had been harmed by the actions of the respondent. The appropriate remedy, accordingly, was found to be an unconditional written apology by the second respondent addressed to the complainant.

The last pertinent example that I wish to raise (09L112) is a complaint that the respondent (an adult Indian man) painted the words 'I am a monkey' on the chest of the complainant (a black 12-year old boy, who was assisted by his father in bringing

[75] Ibid.

the complaint). The complainant alleged that the act on the part of the respondent amounted to unfair racial discrimination and hate speech.

The parties lived in a residential complex and on the day of the incident the respondent attended a birthday party hosted by the complainant and his family for his young daughter. The father of the complainant and the respondent had words about the replacement of a football ball allegedly damaged by the complainant at the start of the party, after which the father left. The evidence of the complainant was that face paint was available at the party and that the respondent wrote the words on him at some point during the party. At the time, he thought nothing of it and even agreed to a friend writing 'I am a gorilla' on his back. The father's testimony was that he felt offended by the words painted on his child's body and even involved the police when he discovered the offending words on his child's body. The respondent denied that he had written the words on the child. On the evidence, the court found that the respondent wrote the words on the complainant's chest, and that singling out the complainant amounted to discrimination on the basis of race which was unfair as no justification was offered by the respondent. Additionally the court also found that by painting the words 'I am a monkey' on the chest of the complainant, the respondent committed hate speech. The court ordered the respondent to apologise unconditionally to the complainant by withdrawing the offending words and expressing regret for the utterance.[76] The respondent was further ordered to pay damages in the amount of R 15 000-00 to the complainant.

From the typical disputes outlined above, two questions as to the substance arise:[77]

(a) Does racial name-calling per se amount to hate speech[78]?

(b) Does referring to another person as an animal (specifically calling or referring to someone as a monkey or baboon) amount to hate speech?

Many complaints of racist language in different contexts involved the alleged use of racial slurs such as 'kaffir', 'coolie' or 'boer'. It is interesting to note that the Bill[79]

[76] The court referred in this regard to the dictum of Curlewis J in *Ward Jackson v Cape Times Ltd* 1910 WLD 257 who stated that a mere retraction falls short of 'a full and free apology'.

[77] The discussion here is taken, in the main, from chapter 5 of my thesis referred to in note 1 above and updated with new case law.

[78] This is also relevant in the context and particularly in the absence of an explicit prohibition of hate speech in theEEA.

contained a clause which outlawed 'the use of language which is recognised as being, and is intended in the circumstances to be, hurtful and abusive, including amongst others, the use of words such as "kaffir", "kaffer", "kaffermeid", "coolie", "hotnot" and their variations' as forms of 'racial discrimination or racism'. This clause did not make it into the Act. Where does this leave complaints of racial name-calling under the Act?

In the labour context several forums have condoned disciplinary action against (even dismissal of) employees who uttered racial slurs with or without the intention to be hurtful or abusive.[80] What attracts liability in the employment context is the mere utterance of the epithet, with fault playing a secondary role.[81] In *Gouws v Chairperson, Public Service Commission*[82] Revelas J held:

> 'The word "kaffer", particularly if used by a white person referring to a black person, and if uttered directly at a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed "hate speech".'

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[79] [B57-1999] clause 8(e).

[80] See,for example the recent arbitration award in the Metal & Engineering Industries Bargaining Council, *National Union of Metalworkers of SA on behalf of Smith and Hilfort Plastics – a Division of Astrapak Manufacturing Holdings (Pty) Ltd* (2014) 35 *ILJ* 325 (BCA) and the cases cited by the arbitrator in that award.

[81] See also *Ciliza v Minister of Police* 1976 (4) SA 243 (N) where James JP remarked that 'Members of the public of all races are entitled to be treated with courtesy by the police, and if their dignity is impaired by the improper use of insulting or denigratory words they are entitled to receive monetary compensation' (at 249G). In *casu* the use of the word 'kaffir' by a police officer to address the plaintiff was held to be injurious. Didcott J in *Mbatha v Van Staden* 1976 (4) SA 243 (N) stated: 'The tirade's worst feature was the use of the epithet "kaffir". Such alone can amount to an actionable wrong, according to the decision of the Full Bench here in *Ciliza v Minister of Police and another*. Everything depends, of course, on the context in which the word is uttered. Settings which make it innocuous can no doubt be imagined. Ordinarily, however, that is not the case when, in South Africa nowadays, a Black man or woman is called a "kaffir" by somebody of another race. Then, as a rule, the term is a derogatory and contemptuous one. Its usage in this part of the world has seen to that, whatever its original connotations may have been. With much the same ring as the word "nigger" in the United States, it disparages the black race and the person concerned as a member of that race. It is deeply offensive to Blacks. Just about everyone knows that by now. The intention to offend can therefore be taken for granted, on most occasions at any rate.' But compare *S v Tanteli* 1975 (2) SA 772 (T) where it was held that the word 'kaffir' was offensive but that the complainant did not suffer an *iniuria.* The outdated views expressed in *Tanteli* would not hold in court today.

[82] (2001) 22 ILJ 174 (LC). See also *National Union of Metalworkers of SA v Siemens Ltd* (1990) 11 *ILJ* 610 (ARB).

This view has been is supported by other dicta which held the term 'kaffir' to be 'highly offensive' and 'injurious' in the 'sense of uncivilised, uncouth and coarse',[83] 'disparaging, derogatory and contemptuous … caus[ing] humiliation'[84] and as inflicting racial abuse.[85]

People use racial slurs without plotting violence or annihilation, but they do so unthinkingly. The utterance of such words embodies beliefs about the inferiority of the Other or threats posed by the Other that have been ingrained over generations. The Other is proclaimed to less worthy of respect and without not inherent dignity. Racial slurs, particularly that invoke the apartheid past, perpetuate views of racial superiority and inferiority and entrench power imbalances based on race in society. The deep hurt caused by these epithets justify labelling their use 'hate speech.' The broad definition of hate speech in s 10 discussed above, as well as the narrower constitutional exclusion in s 16(2) of the Constitution would accommodate this interpretation of racial name-calling as hate speech.

A significant number of complaints involving racist language to the court also involved the addressing of and reference to complainants as animals, particularly as 'monkey' or 'baboon'. Do such references constitute hate speech?[86]

In *Mangope v Asmal,*[87] the court considered the use of the term baboon in the context of a claim for defamation. The court held as follows:

'The definition of baboon in *Chambers Twentieth Century Dictionary* is given as:

[83] *Ryan v Petrus* 2010 (1) SACR (ECG) at 280.
[84] *S v Puluza* 1983 (2) PH H150 (E).
[85] Zondo JP in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp* 2002 (2) BLLR 493 (LAC) equated the use of racial slurs (in this matter the word 'kaffir' was used by the respondent with reference to a co-worker) with racial abuse (para 26) indicative of an attitude embedded in a culture of subordination and exploitation of black people (para 36). The learned judge emphasised that such utterances and their effects are to be viewed against the background of our history of racism and racial abuse (para 39). See also *Myers v SAPS* [2004] 3 BALR 263 (SSSBC).
[86] The evidence adduced in the particular matter will determine the ultimate finding, but for current purposes I am interested in ascertaining whether a reference such as this is capable of being construed as amounting to hate speech.
[87] 1997 (4) SA 277 (T)

> "n. large monkey of various species, with long face dog-like tusks, large lips, a tail, and buttock-callosities; a clumsy, brutish person of low intelligence."
>
> Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It will depend on the circumstances and on the views of those to whom the words are addressed. It follows, I think, that the words are capable of a defamatory meaning.'[88]

Defamation and hate speech are distinct wrongs, but what is evident from this dictum is that the word may be hurtful or harmful, that satisfying the broad definition of s 10 of the Act. In the labour context, disciplining – even dismissal – of an employee for calling a fellow worker 'a monkey' or 'a baboon' has been upheld.[89] Additionally, the racist connotation of such reference has been acknowledged,[90] as a person is dehumanized when called an animal and relegated to the position of an object without dignity or agency.

Prima facie then it would seem that a finding of hate speech is appropriate when racial name-calling or reference to people as animals is concerned, but it is important that the particular evidence before the court is considered to determine whether such a finding is competent. Interestingly, close consideration of the evidence and impact of the use of the terms have been brief and on the surface, raising questions about the change effected as a result of the findings.

Law, litigation and change

Often human beings offend, stereotype and perpetuate power imbalances on the basis of race through their interactions with others fueled by prejudice that has been passed from generation to generation. Changing entrenched patterns of behaviour

[88] 286I-287B.
[89] See for example *Edcon Ltd v Grobler* [2007] JOL 20353 (LC) and *NUMSA obo Maneli v Inso Aluminium* [2010] JOL 26124 (MEIBC).
[90] *Chetty v Toyota SA (Pty) Ltd* [2011] JOL 26975 (LC) para 23. See also *NUMSA obo Maneli* and *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406 (CA).

is hard. Yet, to embrace the societal transformation that the Constitution envisions truly, the old patterns must be broken and new patterns must replace the old. Has the Act contributed to meaningful change that could form the basis of new patterns to guide interaction between individuals? If so, in what way? But before an attempt can be made to answer these questions, a more general proposition must be addressed. That is the role of law in facilitating social change.

Much has been written on this topic. There is the view that law in a liberal democracy sustains and legitimizes a given mode of production and its attendant system of social relations. Litigation that connect to group membership, in this view, has limited value to facilitate social inclusion or change as law entrenches and maintains rather than questions and upsets.[91] Courts necessarily treat symptoms rather than causes and such have limited reach in facilitating a change at the source of the prejudice.[92] In fact, there is the view that anti-discrimination law fails dismally to bring about social change as it disempowers those who experience discrimination and forces them to litigate on and accept the stereotypes about them.[93] But there is also the more positive view of the role of law in facilitating change. Declarations of right in legislation and through judgments legitimizes the grievances of the oppressed, transform the oppressed to a rights holder[94] and provides potential impetus for political agitation to bring about the desired change.[95] Apart from the creating this platform for political facilitation of change, courts, particularly specialist courts are seen to be able to facilitate change at a micro level, ie in the lives parties who come before the court.[96]

Can it be said of the Equality Act and its implementation in the Durban Equality Court that is has facilitated social change?

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[91] P O'Connell and D Malone 'A new legal approach to reducing social exclusion' (2003) 6 Trinity LR 5 at 8-9.
[92] See S Roach Anleu and K Mack 'Magistrates, magistrates courts and social change' (2007) *Law & Policy* 183 at 202.
[93] See K Bumiller *The Civil Rights Society: the Construction of Victims* (1988).
[94] B van Schaack 'With all deliberate speed: civil human rights litigation as a tool for social change' (2004) *Vand L Rev* 2305 at 2317-2318
[95] See NG Yuen 'Alienation or empowerment: law and strategies for social change' (1989) *Law and Social Inquiry* 551 at 553-555 for a summary of the views of Stuart Scheingold on the value of rights in the facilitation of change.
[96] Roach Anleu and Mack *Law & Policy* 185-189.

The Act and its role in bringing about social change

It would be easy and naïve to answer this question with simple yes or no. Social change is not easily measurable, nor can the impact of litigation be measured with a ruler or by taking a sample.

From the review, a number of observations in relation to the role of the Act and court in bringing about social change are evident which incorporates the positive and the negative views about the relationship between law and social change. I outline a few of these observations briefly in conclusion.

Judgments or settlement agreements emanating from the Equality Court could be particular points of impact which further the transformative goals of the Act and vindicate the rights of the complainant. However, one should not eschew without any consideration, the value of the potential empowering impact of making a complaint, or the potential transformative value of receiving notification of a complaint from the court. The creation of legal rights thus empowers and legitimizes,[97] provided that this system of rights is supported and functioning effectively. A disappointed and disheartened complainant whose matter takes months or years to serve before the court may lose faith in the system and that which it stands for.

The focus of litigation is on the individual complainant and the individual respondent, situated respectively in different racial categories, thus underlining the difference and the distance between racial groups. To succeed, a complainant has to identify and essentialise an aspect of his or her identity (race) to the exclusion of other identity markers which he or she may even share with the respondent. But litigation is not about finding common ground, but about confronting a wrong committed in the past.

Often, as in the instances outline above, the Equality Court chose to end the matter by ordering the respondent to apologise unconditionally to the complainant, often stipulating the terms of the apology. While an apology can be powerful and has the potential to contribute to meaningful change, it is necessary to consider whether

[97] An analysis of the real value of this unquantifiable empowering and transformative impact would only be possible if interviews with complainants and respondents are conducted.

formulaic apologies are appropriate. Does an award of damages do more to force a respondent to change his or her behaviour than mere words on piece of paper filed away in a cabinet in the magistrate's court?

And finally…

Continued systemic inequality and unfair discrimination in their various manifestations pose great challenges for the entrenchment of constitutional democracy and a culture of human rights. Legal rights validate the entitlements of the oppressed, but without community-wide education and sensitisation about the importance of equality and the value of non-discrimination on all grounds, the battles in the court will remain but skirmishes in a never-ending war.