

**Charting a roadmap to water equity**  
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**Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**

**Preamble**

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

1 Definitions

(1) In this Act, unless the context indicates otherwise-

**'discrimination'** means any act or omission, including a policy, law, 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;

**'equality'** includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes;

**'nationality'** means ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship;

*(Said and others v Minister of Safety and Security and others EC 13/08)*

**'prohibited grounds'** are-

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground-
  - (i) causes or perpetuates systemic disadvantage;

- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

'**socio-economic status**' includes a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications;

## 5 Application of Act

- (1) This Act binds the State and all persons.
- (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.
- (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.

## 6 Prevention and general prohibition of unfair discrimination

Neither the State nor any person may unfairly discriminate against any person.

## 7 Prohibition of unfair discrimination on ground of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

## 14 Determination of fairness or unfairness

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2) (b) include the following:

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;

- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
  - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  - (ii) accommodate diversity.

(*Mazibuko v City of Johannesburg* 2010 4 SA 1 CC par 150: the group affected, the purpose of the law and the interests affected; the extent of the harm)

34 Directive principle on HIV/AIDS, nationality, socio-economic status and family responsibility and status

- (1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-
  - (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of 'prohibited grounds' by the Minister;
  - (b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister.

(2) Nothing in this section-

- (a) affects the ordinary jurisdiction of the courts to determine disputes that may be resolved by the application of law on these grounds;
- (b) prevents a complainant from instituting proceedings on any of these grounds in a court of law;
- (c) prevents a court from making a determination that any of these grounds are grounds in terms of paragraph (b) of the definition of 'prohibited grounds' or are included within one or more of the grounds listed in paragraph (a) of the definition of 'prohibited grounds'.

Socio-economic rights litigation: reasonableness; progressive realisation; remedy: order government (or private party?) to adopt reasonable legislative and other measures to achieve the realisation of the right over time, within available resources (at least to make provision for those most desperately in need and to avoid unreasonable limitations or exclusions)

Unfair discrimination litigation (see *Mazibuko* par 145-158): rational differentiation; fair/unfair discrimination; prohibited grounds; unfair discrimination contained in law of general application subject to limitation test in section 36 (reasonableness; justifiability); remedy: order state or private party to cease unfair discrimination; damages; apology; structural changes; etc (side issue: which forum? Equality courts ito Equality Act?)

(However *Mazibuko* par 55: “Courts are ill-suited to adjudicate on issues where court orders could have multiple social and economic consequences for the community” – does this hold for the equality right as well?)

Substantive equality: Risk of being patronising/demeaning? (Compare *Mazibuko* par 44, 101 on City’s indigent registration policy. CC’s finding – indisputably laudable purpose served by means testing: to ensure that those most in need benefit from government services.)