

ANNEXURE A to Complainants' Heads of Argument for LAC

Has the Equality Court jurisdiction in this matter or is S.5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 a fatal bar?

Section 5(3) of PEPUDA reads:

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.

(The Employment Equity Act of 1998 is hereinafter referred to as the EEA and the Labour Relations Act as the LRA)

1. The words 'any person' in the subsection are equivocal because it is not clear whether Parliament intended them to mean 'any complainant' which is the meaning given to the same words in section 20(1) of PEPUDA, *or* the narrower meaning of 'any employee'. The Complainants submit the former is the correct interpretation by reason of the analogy with section 20, and by reason of the fact that Parliament would have used the word 'employee' had they intended it.
2. If the meaning is 'any complainant', then the Second and Third Complainants in this matter are clearly not barred by s.5(3) and it would defy common sense if they were entitled to be heard in the

Equality Court, but not the First Complainant. In any event the Second and Third Complainants would be entitled to conduct the suit and obtain remedies on behalf of the First Complainant.

3. If the meaning is ‘any employee’ then it is submitted that the two Acts have concurrent jurisdiction, but the Equality Court can only grant relief which a Complainant could *not* claim in the Labour Court pursuant to section 6 of the EEA. This follows from the words ‘to the extent to which’ in section 5(3) of PEPUDA. Section 157(2) of LRA would perhaps provide support for this interpretation although passed before PEPUDA.

4. (i) Because of this difficulty of interpretation of section 5(3) of PEPUDA, the Complainants in this matter limited their claim in the Equality Court to relief which would not be available to them in the Labour Court under section 50 of EEA or under section 158 of LRA. (It is submitted that the damages claimed in this action for ‘emotional and psychological suffering’ are *not* available in the Labour Court, but are a new form of damage for personal injury introduced by PEPUDA; damages for impairment of *dignity* are of course not available under EEA or LRA – see paragraph 8 below).
(ii) If the suit remains for trial in the Labour Court the Complainants will contend that the Court has all the powers of the Equality Court because the suit has been *referred* from that Court and remains under the jurisdiction of that Court; in the alternative the Complainants will amend their claim to seek a declaratory order pursuant to section 158(1)(a)(iv) of LRA.

5. It is important to note also that the Third Respondent in this matter could not be cited under EEA nor any relief claimed against her.
6. The Complainants rely also on section 5(2) of PEPUDA:

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 any Act of Parliament expressly amending this Act, the provisions of this Act must prevail.

Section 9(4) and paragraph 23(1) of Schedule 6 the Constitution *mandate* legislation to prevent unfair discrimination and PEPUDA fulfils this obligation as it says in its Preamble. In other words PEPUDA has been put in place to ensure that constitutional rights under the Bill of Rights are upheld and it takes its authority directly from the Constitution. In these circumstances it would require an unequivocal provision to deprive any person of her/his rights under the Act. (Note by contrast that there is no mandatory provision in the Constitution for providing *labour* legislation such as EEA.)

7. Furthermore PEPUDA sets up an entirely new system of Courts, with its own user-friendly and fast-track procedures, to provide redress to those unfairly discriminated against. Under EEA and LRA only the aggrieved person can apply to the CCMA or Labour Court. The grounds on which she/he can apply are more limited,

the remedies available fewer, the rights of appeal restricted, and representation by someone other than an attorney or advocate is not permitted. Section 34 of the Bill of Rights gives a right of access to the courts of South Africa to every person, and we submit it would require the clearest possible intention of Parliament to deprive a person of access to the Equality Court.

8. In particular EEA grants no remedy for *impairment of dignity*, something which goes to the very heart of the instant case. The EEA nowhere even mentions dignity, whereas in PEPUDA it forms the basis for a separate ground of discrimination (see section 1 – ‘prohibited grounds’).
9. Finally we draw attention to two features of PEPUDA:
 - Parliament clearly intended the Act to deal, inter alia, with employment situations because the first example in the Schedule to the Act is ‘Labour and Employment’.
 - Had Parliament intended that the Act should not apply to any labour dispute, it would have been so simple to draft section 5(3) as: ‘***This Act does not apply to any dispute between an employee and employer.***’