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# PATRIARCHY AND UNPAID WORK AS BARRIERS TO TOP-LEVEL FEMALE APPOINTMENTS: ARE SOUTH AFRICA'S LABOUR LAWS ENOUGH NOT TO KEEP A GOOD WOMAN DOWN?\*

## SUMMARY

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The South African legal framework includes multiple laws and instruments aimed at promoting gender equality, providing for females to be sufficiently represented at all levels of the labour force. Some progress has been made. The country's female labour force has grown exponentially over the past twenty years, the position of chief executive officer (CEO) of the Johannesburg Stock Exchange (JSE) is held by a female, and women constitute 46 per cent of members of Parliament. More broadly, however, true gender equality is still far off in terms of female representation in top-level positions. In 2019, females represented only 3.31 per cent of CEOs nationwide, despite making up 51 per cent of the South African population. The country has produced only one (now retired) female CEO among the top-40 JSE-listed companies. This article explores the state of gender equality in the South African workplace by first examining the international and regional instruments and national laws adopted to steer the country towards a gender-equal labour force. Upon establishing that the root of the problem does not appear to be a lack of legislative provision, the focus shifts to patriarchy and unpaid work as ongoing barriers to female employment, as well as their potential causes. Despite the extensive legal framework advocating for gender equality, these two barriers are found to persist and are closely intertwined. As females continue to be subjected to male domination in the form of patriarchy, they are automatically relegated to the realm of unpaid work, carrying a disproportionately heavy burden of child-rearing and other domestic responsibilities. Both barriers are fuelled by deep-rooted social norms and cultural traditions, which are notoriously difficult and time-consuming to change. While holding out hope for a gradual shift in people's thinking, the article concludes with a few recommendations. These include a more holistic approach to the implementation of substantive equality by the South African courts not only to regard females as members of a designated group, but also to consider the full extent of the disadvantages they face in everyday life. Moreover, the government is urged to make better use of the lame-duck National



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Policy Framework for Women's Empowerment and Gender Equality to achieve genuine equal female employment. This could include earmarking funds to allow more females to stay in school and educate society on the value of female employment and advancement at work and the need to break away from entrenched social norms.

## 1. INTRODUCTION

The female labour force in South Africa has grown exponentially over the past twenty years, primarily due to equity legislation, greater access to education,<sup>1</sup> and more job opportunities.<sup>2</sup> Yet, female representation in high-powered positions seems to be lagging behind.

In 2019, females represented only 3.31 per cent of chief executive officers (CEOs) nationwide,<sup>3</sup> despite making up 51 per cent of the South African population.<sup>4</sup> The country's only female CEO of a top-40 Johannesburg Stock Exchange-listed company, Dr Maria Ramos, vacated her position in that same year. In 2018, 52.9 per cent of South Africans who had completed a tertiary qualification were female, but women occupied roughly only one in three managerial positions.<sup>5</sup> At top-management level, female representation was estimated at a mere 22.9 per cent,<sup>6</sup> and only 33.8 per cent at senior management level.<sup>7</sup> One exception is Parliament, where over 45 per cent of members are females.<sup>8</sup>

Generally, females tend to be found in lower-ranking jobs such as domestic workers, clerks, or informal traders.<sup>9</sup> At the same time, they continue to perform the majority of non-remunerated work at home.<sup>10</sup> While the type of jobs commonly held by women may partly be ascribed to personal choice, this article explores two of the possible societal barriers<sup>11</sup> that may

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1 Verick 2018:7-8.

2 Sinden 2017:38.

3 PWC 2019:1.

4 Evans 2019. See also Stats SA 2020b:9.

5 Stats SA 2018a. According to the 2021 Quarterly Labour Force Survey of Statistics South Africa on the first quarter, 31.2 per cent of women, compared to 68.8 per cent of men occupied managerial positions. See Stats SA 2021a:69.

6 RSA 2018:19.

7 RSA 2018:23.

8 See Gender Links 2019b:3.

9 Stats SA 2018a. See also BWASA 2017.

10 According to 2018 statistics, NEET (not educated, not in employment and not in training) females were far more than males, and in "Q2: 2017 and Q2: 2018 the highest NEET rate of over 40% was recorded among black African females aged 15-34 years". Of the 20.2 million young people aged 15-34 years, 39.3 per cent were NEET – an increase of 0.4 of a percentage point compared to the second quarter of 2017. See Stats SA 2018b.

11 For a broader discussion of these barriers from an international perspective, see Foster 2017:381-412; Moosa & Coetzee 2020:397-402; Gilbertson 2020:266-287; Festing *et al* 2015:55-79. For a South African perspective, see the latter as well as Coetzee & Moosa 2020:1-11; Roncolato & Radchenko 2016:58-90; Cohen & Dancaster 2009:221-240; Cohen 2012:19-35; Rossouw 2018:1-336.

be contributing to poor female representation in top-level decision-making positions, namely patriarchy and unpaid work.<sup>12</sup> This is done with reference to the legal framework governing employment equity in South Africa, case law, and scholarly literature.

## 2. GENDER EQUALITY IN EMPLOYMENT: WHAT IT IS, WHY IT IS CRUCIAL, AND WHY WE CANNOT CLAIM TO HAVE ACHIEVED IT

### 2.1 Gender equality defined

Of the many scholarly attempts at providing a definition for gender equality over the years, De Waal<sup>13</sup> possibly describes it best: “[G]ender equality refers to females having the same opportunities in life as men, including the ability to participate in the public sphere. It assumes that once the barriers to participation are removed, there is a level playing field.” Gender equality may also be understood by defining its polar opposite, gender discrimination, which, according to Steyn and Jackson, entails conferring an unfair (dis) advantage on members of a particular gender compared to their differently gendered peers.<sup>14</sup> In the workplace, the authors continue, this is perpetrated through employers’ actions or activities.<sup>15</sup>

Moreover, gender equality encompasses substantive equality – a principle embraced by South African law<sup>16</sup> – aimed at eradicating disadvantage based on gender, among others.<sup>17</sup> Achieving this type of true gender equality in employment depends on various factors, including good governance,<sup>18</sup> corrective tools such as affirmative action and, to some extent, gender quota legislation.<sup>19</sup>

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12 ILO 2019a:31; Stats SA 2017a:17. “Patriarchy” refers to a social system “in which men hold the power and women are largely excluded from it”. *Oxford Living Dictionaries* 2018. <https://en.oxforddictionaries.com/definition/patriarchy>. In turn, unpaid work refers to work mostly done by women and includes “work that is necessary for the subsistence of life and health, care of the elderly, handicapped, child bearing and rearing, socialisation of children, teaching, feeding, transporting and all essential emotional and psychological work which goes into developing people so that they become productive members of society”. See Ngomane 2016:46; UN-Women 2016:82.

13 De Waal 2006:209.

14 Steyn & Jackson 2014:49, with reference to Channer *et al* 2011.

15 Steyn & Jackson 2014:49.

16 Currie & De Waal 2013:213.

17 Dupper & Garbers 2010:77.

18 Sinden 2017:39.

19 Viviers *et al* 2017:2.

## 2.2 Why female representation at senior levels is a good idea

Hills argues that “appointing more females to positions of leadership and boards [is] smart business, is good for business, and is a proactive image and reputation builder”.<sup>20</sup> Indeed, research has shown that companies with higher female representation perform better financially than those whose talent pool is low on females;<sup>21</sup> leveraging female talent can improve organisational competitiveness and outcomes.<sup>22</sup> The International Monetary Fund<sup>23</sup> has also emphasised females’ contribution to overall economic growth: “Greater gender equality boosts economic growth and leads to better development outcomes.”

A study launched in the United States in 2002 set out to investigate the financial performance of companies with female incumbents in the positions of chief financial officer (CFO) and CEO from 2002 until 2019, under the banner of #Changepays.<sup>24</sup> The results, released in mid-October 2019, revealed that females had added \$1.8 trillion more to their companies than their male counterparts.<sup>25</sup> This is confirmed by the fact that Fortune 500 companies, with more females on their boards, financially outperform companies with lower female board representation.<sup>26</sup> Gender-diverse teams, including in South Africa, show higher profit and sales margins than all-male teams.<sup>27</sup>

The World Economic Forum’s *Global Gender Gap Report 2018* ranks South Africa nineteenth out of 149 countries in terms of overall gender gap equality.<sup>28</sup> Yet this relatively high ranking is largely thanks to the country having closed much of its gender gaps in terms of the criteria “Health and survival” and “Political empowerment”. In terms of economic participation, though, South Africa is placed in a relatively low 117<sup>th</sup> spot regarding gender wage equality.<sup>29</sup> Turning this statistic around will benefit the country, as nations that manage to improve their gender gap equality ratings have been shown to record economic growth of as high as 35 per cent.<sup>30</sup>

An increase in monetary gains at corporate and national levels is not the only reason why females should be better represented at a senior level. Women’s leadership style may also see organisations grow by leaps and

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20 Hills 2015:156.

21 Sandberg 2019:1.

22 Baker *et al* 2019:874.

23 Kochhar *et al* 2018:4.

24 Sandberg 2019.

25 Sandberg 2019:1.

26 Clerkin 2017:4.

27 Sandberg 2019:1; Clerkin 2017:4.

28 WEF 2018:10. In order to determine the state of gender equality in a country, the Global Gender Gap Index considers the gap between women and men in four primary categories, namely economic participation and opportunity, educational attainment, health and survival, and political empowerment. See also WEF 2018:251.

29 See WEF 2018:5. Gender wage equality falls into the first category of the Global Gender Gap Index, namely economic participation and opportunity. See also WEF 2018:251.

30 Rachelson 2019.

bounds. Female leadership theories supported by mixed empirical evidence<sup>31</sup> suggest that females may be better leaders than men<sup>32</sup> because of their relational skills.<sup>33</sup> More women than men are thought to possess much-needed leadership qualities such as “be[ing] sensitive, attuned, and responsive to moments of differences, and feel[ing] responsible for working with those differences”.<sup>34</sup> More specifically, in the African context, female leadership styles are more closely aligned with transformational leadership,<sup>35</sup> having bound societies together and demonstrated evident power in traditional, pre-colonial African society.<sup>36</sup>

Moreover, females’ proper development and adequate appointment in high-ranking positions can motivate and encourage more significant commitment among lower-level female employees.<sup>37</sup> Seeing other females in management positions is believed to make lower-ranked women feel more accepted in the organisation, which leads to higher female staff retention, higher job satisfaction and, ultimately, better organisational performance.<sup>38</sup>

### 2.3 We are not there yet: Female labour force participation and education in South Africa

There is no denying that true gender equality in South Africa is some way off, as reiterated by President Cyril Ramaphosa in his 2020 Women’s Day address when he said: “[W]e know that the lived reality for millions of South African women is very different to the promise contained in our Constitution. We know that millions of South African women still live in conditions of poverty and unemployment.”<sup>39</sup>

Education and female participation in the labour force are closely and intricately related<sup>40</sup> and directly feed into overall gender equality.<sup>41</sup> In a study for the International Labour Organisation (ILO), Verick found that labour-force participation was but one part of the problem of gender inequality in employment and strongly advocated for both secondary and tertiary education for females to bring about gender parity, especially in developing countries.<sup>42</sup>

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31 Post *et al* 2019:215.

32 For more information on the female leadership advantage, see Post *et al* 2019:215-216.

33 The skills that build trust and enhance the effectiveness of crisis responses. See Post *et al* 2019:215.

34 Post *et al* 2019:215.

35 Netshitangani 2019:199, with reference to other scholars such as Eagly, Lopez-Zafra and others.

36 Netshitangani 2019:198.

37 Netshitangani 2019:200.

38 Baker *et al* 2019:875.

39 RSA 2020.

40 Stats SA 2017b:16.

41 Stats SA 2017b:7.

42 Verick 2018:2-3.

Under apartheid South Africa, Black females, in particular, faced several barriers to education. They were systemically excluded from educational opportunities.<sup>43</sup> Many were denied the right to study,<sup>44</sup> due to incarceration. In fact, even after serving their sentences, they were banned from entering any place of instruction.<sup>45</sup> The unsurprising result was low levels of education and a slow pace of economic growth among this group.<sup>46</sup> With the dawn of democracy in 1994, the government took some essential steps to improve access to education, including introducing the *South African Schools Act*.<sup>47</sup> The *Act* stipulates that education must be made accessible to all and must be free from discrimination, regardless of learners' gender.<sup>48</sup> The Bill of Rights too imposes a duty on the government to make education available and accessible to all South Africans.<sup>49</sup> Yet, as recently as 2013, a school was found to discriminate against a female learner, expelling her from school for being pregnant and ultimately violating her right to primary education.<sup>50</sup>

The 2018 General Household Survey showed that many females aged between seven and eighteen years were not receiving any form of education, due to family responsibilities and insufficient finances.<sup>51</sup> Altogether 14.4 per cent of these females, compared to only 0.2 per cent of their male counterparts, stated responsibilities such as childminding as the reason for not attending school.<sup>52</sup> Other sources echo this, citing obligations towards their families, finances and pregnancy<sup>53</sup> as the primary reasons why more females than males remain unschooled or are unlikely to pursue a higher degree. Nevertheless, most of the females who manage to enter schooling end up thriving. Female learners account for the majority of those who successfully complete Grade 12.<sup>54</sup> Females are also more likely to enrol for tertiary education than their male peers.<sup>55</sup> Still, however, when selecting candidates for senior positions, employers are 35.8 per cent more likely to prefer men.<sup>56</sup>

Labour-force participation rates for the country reflect this. At 51 per cent, females make up the majority of the population. In the first quarter of 2020, 54.5 per cent<sup>57</sup> of females participated in the labour force, compared to 66.3 per cent of men.<sup>58</sup> This is cause for concern, as it has been argued that gender

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43 Mbatha 2018:103. See also RSA 2015:33.

44 Mbatha 2018:103.

45 Mbatha 2018:104.

46 RSA 2015:11.

47 *South African Schools Act* 84/1996.

48 RSA 2015:33.

49 Stats SA 2017a:19.

50 *Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

51 Stats SA 2018c:15.

52 Stats SA 2018c:15.

53 RSA 2015:9.

54 Stats SA 2018d:21-22.

55 WEF 2018:251.

56 WEF 2018:251.

57 Stats SA 2020a:20.

58 Stats SA 2020a:21.

inequality is present whenever male and female distribution in terms of labour-force participation deviates from their population ratio.<sup>59</sup>

The problem does not appear to be unique to South Africa, though. The ILO has noted that females generally show a reduced participation rate in wage employment, primarily due to motherhood, which could negatively affect their overall labour-force participation rate.<sup>60</sup> In 2018, the global labour force comprised 3.5 billion participants,<sup>61</sup> of whom three out of five were male.<sup>62</sup> Of the potential labour force of 140 million people, a staggering 85 million were female, who, although seeking to take up employment, could not do so.<sup>63</sup> The ILO placed patriarchy and unpaid work among the top reasons for this state of affairs.<sup>64</sup>

The logical conclusion is that improved labour participation is required for females to be appointed to more positions of power and decision-making, to which education is critical. However, despite a national commitment to providing all people with accessible education in both the *South African Schools Act*<sup>65</sup> and the Bill of Rights,<sup>66</sup> the South African workplace remains gender unequal, and female gains remain low.<sup>67</sup> This leads to the question: Are laws sufficient to ensure females' advancement in the workplace?

### 3. THE LEGAL FRAMEWORK GOVERNING FEMALE EQUALITY IN THE WORKPLACE

The late president Nelson Mandela once said:

[F]reedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on board, that the objectives of the Reconstruction and Development Programme (RDP) will not have been realised unless we see in visible and practical terms that the condition of the women in our country has radically changed for the better and that they have been empowered to intervene in all spheres of life as equals with any other member of society.<sup>68</sup>

Since the dawn of the South African democracy in 1994, the country's jurisprudence attests to a sustained effort to repeal laws that discriminate not only on the grounds of race or ethnicity, but mainly also based on one's gender. Laws that were to the detriment of women in the workplace have long been replaced with more female-friendly statutes. Indeed, great strides have been made in empowering females, as the discussion below shows.

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59 Dorius & Firebaugh 2010:1962.

60 ILO 2018a:49.

61 ILO 2019a:5.

62 ILO 2019a:1.

63 ILO 2019a:2.

64 ILO 2019a:31.

65 *South African Schools Act* 84/1996.

66 Bill of Rights:sec. 29.

67 April *et al* 2007:54.

68 RSA 2000.

### 3.1 International and regional instruments

Coming from a history of discrimination, South Africa prioritised equality for females across all spheres upon its post-apartheid return to the international domain. This has seen the country ratify a range of international and regional instruments urging greater equality for women, including in the workplace.

These ratified instruments include the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>69</sup> which obligates the country to abolish gender discrimination;<sup>70</sup> several ILO conventions aimed at gender equality in the workplace;<sup>71</sup> the Protocol on the African Charter on Human and People's Rights on the Rights of Females in Africa,<sup>72</sup> and the Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>73</sup>

The importance of the country's ratification of CEDAW lies in the Convention's helpful definition of discrimination and both formal and substantive equality, and its applicability to all forms of discrimination in all spheres of life, specifically also in employment.<sup>74</sup>

One of the ILO instruments ratified is Convention 100,<sup>75</sup> which pertains to the implementation of equal remuneration for men and women who perform work of equal value. To this end, member states should ensure that equal pay is achieved through national legislation, collective bargaining, machinery for pay determination, or a combination of these.<sup>76</sup> Another notable instrument is Convention 111,<sup>77</sup> which notes that steps should be taken to eliminate discrimination in the workplace. Ratified by South Africa in 1997, this Convention calls on member states to "promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, to eliminate any discrimination in respect thereof".<sup>78</sup>

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69 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979. South Africa signed CEDAW in January 1993 and ratified it on 15 December 1995, without any reservations.

70 Vettori 2014:478.

71 Budlender 2011:1.

72 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003. South Africa ratified the protocol on 17 December 2004.

73 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966. South Africa signed the Covenant on 3 October 1994 and ratified it in January 2015.

74 Kölbl 2007:9.

75 ILO, Equal Remuneration Convention, C100, 23 May 1953, C100.

76 ILO, Equal Remuneration Convention, C100, 23 May 1953, C100:art. 2.

77 ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111.

78 ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111:art. 2.



As mentioned, South Africa has also ratified the Protocol on the African Charter on Human and People's Rights on the Rights of Females in Africa,<sup>79</sup> which aims to eliminate discriminatory practices against females, by explicitly requiring signatories to take the necessary steps to correct ongoing discrimination against females,<sup>80</sup> and unequivocally declares that males and females are equal before and under the law.<sup>81</sup> The ICESCR<sup>82</sup> requires member states to ensure that men and women enjoy equal rights pertaining to "all economic, social and cultural rights".<sup>83</sup> To this end, the Committee on Economic, Social and Cultural Rights (CESCR) made recommendations to assist member states in their bid to achieve these rights. Amidst others, the CESCR recommends that states launch educational campaigns to address society's perception of stereotypical gender roles,<sup>84</sup> as well as design and adopt policies and laws to ensure equal pay for work of equal value between men and women.<sup>85</sup>

There are, however, several instruments, which South Africa has not yet signed nor ratified. Notably, these instruments may well assist South Africa in its bid to achieve true gender equality in the workplace. Applicable instruments in this regard include the Beijing Platform for Action;<sup>86</sup> several ILO Conventions<sup>87</sup> and Recommendations,<sup>88</sup> and the SADC Development and Revised Gender Protocol.<sup>89</sup>

In terms of the Beijing Declaration and Platform of Action Strategic Objective (BPFA),<sup>90</sup> member states must adopt practices that will allow women to remain in the labour market, despite any responsibility related to

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79 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003. South Africa ratified the protocol on 17 December 2004.

80 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa:art. 1(d).

81 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa:art. 8.

82 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966. South Africa signed the Covenant on 3 October 1994 and ratified it in January 2015.

83 International Covenant on Economic, Social and Cultural Rights:art. 3.

84 ESCR-Net 2016:18.

85 ESCR-Net 2016:18.

86 UN, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. South Africa became signatory to the Beijing Platform for Action in 1995.

87 ILO, Violence and Harassment Convention, 21 June 2019, C190 and ILO, Workers with Family Responsibilities Convention, 23 June 1981, C156.

88 ILO, Violence and Harassment Recommendation, 21 June 2019, R206 and ILO, Workers with Family Responsibilities Recommendation, 23 June 1981, R165.

89 Despite South Africa's accession to the SADC, Protocol on Gender and Development, 17 August 2008, the discussion of the Protocol in this article refers to the SADC, Revised Protocol on Gender and Development of 31 August 2016, which South Africa has not yet signed.

90 UN, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. South Africa became signatory to the Beijing Platform for Action in 1995.

their pregnancy.<sup>91</sup> Convention 190<sup>92</sup> and Recommendation R206<sup>93</sup> of the ILO turn the spotlight on violence and harassment in the world of work. These instruments condemn workplace violence and harassment as an infringement of human dignity,<sup>94</sup> which is of specific importance to South Africa, considering that in 2019, 2771 females were murdered in the space of twelve months.<sup>95</sup> Over the past decade, nearly half a million rape cases have been reported.<sup>96</sup> Convention 190 calls on member states to promote an environment free from harassment and violence in the workplace, suggesting ways in which gender stereotypes and unequal gender-based power relations may be combated.<sup>97</sup> In light of its dismal track record in this respect, South Africa may want to make use of this Convention as a lifeline to try to root out these practices from the country's employment sphere. Although we have not signed this Convention, South Africa has drafted a Revised Draft Code on the Prevention and Elimination of Harassment in the Workplace to give effect to Convention 190 of the ILO, and this document was due to be tabled before NEDLAC on 30 March 2021.<sup>98</sup>

As indicated, other ILO instruments not yet ratified by South Africa include the Workers with Family Responsibilities Convention<sup>99</sup> and the Workers with Family Responsibilities Recommendation.<sup>100</sup> These instruments state that appropriate measures have to be adopted by member states to assist workers with family responsibilities to get into, remain, or re-enter the labour force.<sup>101</sup> Moreover, the Recommendation holds that employees with family responsibilities should enjoy equal opportunity with other workers regarding their advancement in employment<sup>102</sup> and calls explicitly for flexible working arrangements for employees with family responsibilities.<sup>103</sup>

Despite South Africa signing the SADC Development and Gender Protocol, it has not yet signed the Revised Protocol.<sup>104</sup> The Revised Protocol on Gender and Development requires member states to, among others, "develop and strengthen specific laws, policies and programmes to achieve

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91 Beijing Declaration and Platform of Action Strategic Objective F1:165(c)

92 ILO, Violence and Harassment Convention, 21 June 2019, C190.

93 ILO, Violence and Harassment Recommendation, 21 June 2019, R206.

94 ILO 2019b:4.

95 Vecchiato & Cohen 2019.

96 Vecchiato & Cohen 2019.

97 South Africa has not yet ratified Convention 190 but is in the process of doing so.

98 Revised Draft Code of Good Practice on The Prevention and Elimination of Harassment in the Workplace (30 March 2021).

99 ILO, Workers with Family Responsibilities Convention, 23 June 1981, C156.

100 ILO, Workers with Family Responsibilities Recommendation, 23 June 1981, R165.

101 ILO, Workers with Family Responsibility Convention, C156:art. 7. See also ILO, Workers with Family Responsibilities Recommendation, R165:art. 12.

102 ILO, Workers with Family Responsibilities Recommendation, R165:art. 15.

103 ILO, Workers with Family Responsibilities Recommendation, R165:art. 18(b).

104 Despite South Africa's accession to the SADC, Protocol on Gender and Development, 17 August 2008, the discussion of the Protocol in this article refers to the SADC, Revised Protocol on Gender and Development of 31 August 2016, which South Africa has not yet signed.

gender equality”.<sup>105</sup> The Protocol also calls on members to put in place “special measures” that will allow for the removal of different barriers that hinder women from participating “meaningfully in all spheres of life”.<sup>106</sup> More specifically, the Protocol calls on state members to ensure that women are, by means of “special measures”, provided equal representation in decision-making positions. Finally, the Protocol recognises unpaid work and calls on member states to adopt measures that will allow shared responsibilities by the men and women of a household.<sup>107</sup>

## 3.2 South African law

### 3.2.1 The Constitution of the Republic of South Africa, 1996

The *Constitution of the Republic of South Africa 1996* (hereafter, the *Constitution*) serves as the compass to true gender equality in the workplace and as an instrument to address the imbalances of the past. This is confirmed by both sec. 1(b), which states that South Africa is founded on, among others, the value of non-sexism and sec. 9, which calls for equality, including gender equality. Chicktay<sup>108</sup> aptly states that, despite the *Constitution* being based on the founding values of dignity, equality and freedom, the vast majority of women remain victims in the workplace. It is accepted that sexual harassment, a form of unfair discrimination, lies on the continuum of violence or abusive behaviour,<sup>109</sup> a barrier to female equality.<sup>110</sup>

The *Constitution* distinguishes between direct and indirect discrimination and prescribes when such discrimination would be deemed unfair.<sup>111</sup> Secs. 9(3) and (4) prohibit the unequal treatment of males and females on the so-called “listed grounds”. Notably, the grounds listed in sec. 9(3) do not represent a closed list and provide for “unspecified grounds” of discrimination.<sup>112</sup> This was recently confirmed by *Naidoo V Parliament of RSA*.<sup>113</sup>

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105 SADC Revised Gender Protocol:art. 4(2).

106 SADC Revised Gender Protocol:art. 5.

107 SADC Revised Gender Protocol:arts. 16(1) and (2).

108 Chicktay 2010:263.

109 Chicktay 2010:283.

110 Sexual harassment may either create a hostile environment or be *quid pro quo* in nature (requiring sexual favours in exchange for work benefits) and as such, challenge the founding values of the *Constitution*. See Chicktay 2010:284.

111 Pretorius *et al* 2017:4.

112 By means of an analysis introduced by the Constitutional Court in *Harksen v Lane* (par. 52), new and other grounds of discrimination are established if they are “based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or ... affect them adversely in a comparable manner”. These grounds, according to the *Harksen* case, are known as “unspecified” grounds. This position has most recently been confirmed in *Naidoo and Others v Parliament of the Republic of South Africa* [2020] 10 BLLR 1009 (LAC):par. 27.

113 *Naidoo V Parliament of the Republic of South Africa* [2020] 10 BLLR 1009 (LAC):par. 27.

The matter of *Harksen v Lane NO*.<sup>114</sup> has established the test for unfair discrimination. The Constitutional Court held that, where differentiation is based on a specified ground, discrimination is established. However, in the event of differentiation on a ground other than a specified ground, the test would be whether or not, objectively speaking, such differentiation was based on “attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparable manner”.<sup>115</sup>

Other critical notions in the *Constitution* are affirmative action and substantive equality. Sec. 9(2) establishes a link between the two, providing that “equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>116</sup> However, the current challenge experienced in terms of affirmative action is not only a lack of guidance as to the legal standards that apply to such action<sup>117</sup> but, in the context of female representation, also the “suitably qualified person” test.<sup>118</sup>

In terms of case law, the court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>119</sup> ruled that the *Constitution* is phrased in a manner that emphasises South Africa’s support for substantive equality. In *President of the Republic of South Africa v Hugo*, the court called for an approach that allowed differential treatment in applying substantive equality to redress the unfair discriminatory practices of the past.<sup>120</sup> Yet, while substantive equality could bring about transformation for female employees, the conceptual consistency of its application is cause for concern.<sup>121</sup> The Constitutional Court appears to continue to accommodate females (and others) within the confines of the status quo, with no allowance for differentiation nor regard for the disadvantages they may face.<sup>122</sup> For instance, the court’s acknowledgement in *Hugo* that females were the primary caretakers ironically had a substantively equalising and transformative effect, on the one hand, but reinforced females’ stereotypical role in society,<sup>123</sup> on the other, relegating them to caretakers and,

114 In short, the *Harksen* test could be broken down into three simple questions: Does the differentiation amount to discrimination? If so, does it amount to unfair discrimination? If so, can such unfair discrimination be justified in terms of the limitations clause of sec. 36 of the *Constitution*? *Harksen v Lane NO* 1997 11 BLRD 1489 CC:32.

115 *Harksen v Lane NO* 1997 11 BLRD 1489 CC:32.

116 *Constitution*:sec. 9(2).

117 Lebepe 2010:27.

118 For more on this, see par. 3.2.3.

119 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC):par. 39.

120 To determine whether substantive equality should be applied to an employee, the employee’s position in society, his or her vulnerability and history, the nature of the discrimination and the effect it has had on the employee should be considered. See *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708:par. 41.

121 Albertyn 2007:254.

122 Phooko & Radebe 2016:312.

123 *President of the Republic of South Africa v Hugo*:par. 37.

in effect, failing to adequately apply substantive equality. In *S v Jordan*,<sup>124</sup> the court further perpetuated female stereotypes, failing in its application of substantive equality in terms of a woman's choice to perform sex work.

Finally, sec. 23 of the *Constitution* also provides for fair labour practices. According to Rossouw,<sup>125</sup> the right to fair labour practices, as provided for in the *Constitution*, may well be interpreted as one of the constitutional rights that affords protection to "family life ... as such, [within] the context of the workplace".

### 3.2.2 The common law<sup>126</sup>

Under the common law, the following brief remarks need to be made. First, although the common law seldom concerns itself with a right that is adequately catered for under statute, it has been helpful in the fight against harassment as a barrier to gender equality. Both direct and vicarious liability based in common law aid gender equality, although the remedies are after the fact and are not preventative in nature.<sup>127</sup> Secondly, an employee who is a victim of sexual harassment can, in terms of the common law, claim damages "on the ground that her employer is vicariously or directly liable for such damages".<sup>128</sup> Thirdly, such a claim under the common law aims to address the harm caused to such employee, as opposed to a legislative claim under the *Employment Equity Act* (hereafter, "the *EEA*"),<sup>129</sup> which aims to address unfair discrimination.

It must be kept in mind that the common law merely entrenches equality but can be developed in light of the *Constitution*, where the matter is not regulated by legislation specifically.<sup>130</sup>

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124 *S v Jordan* 2002 6 SA 642 (CC).

125 Rossouw L 2018:9.

126 Sources of common law are found in the Roman-Dutch law, English law, decisions of the Superior Courts, and customs and practice. Common law refers to all legal rules not found in legislation. See Du Plessis & Fouche 2019:4. See also Smit 2014:233. Sec. 39 of the *Constitution* provides for the enactment of common law principles. See *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA), where it was held that an employer has a common law duty to protect his or her employees.

127 It has been stated that more females than men are harassed, that poor, unskilled females are harassed more often and that the power imbalance is partly to blame for females being more susceptible to sexual harassment in the workplace. See Chicktay 2010:285.

128 Calitz 2019:6. See also the judgment in *P[...]-A[...][E[...]] and Dr Beyers Naude Local Municipality and Xola Vincent Jack* [2021] 2 All SA 839 (ECG):109. In this case, the applicant was awarded R3,998,995.02 for a claim based on the common law (sexual harassment) as opposed to a claim lodged in terms of the *EEA* that carries capped compensation.

129 *Employment Equity Act* 55/1998, as amended.

130 The Constitutional Court stressed that the overall purpose of sec. 39(2) of the *Constitution* is to ensure that the common law is infused with the values of the *Constitution*. See *K v Minister of Safety and Security* 2005(6) SA 419 (CC):427. See also sec. 8(3)(a) and (b) of the *Constitution* wherein it is stated that the common law may be developed to the extent that legislation does not give effect to a right in the Bill, a court must apply, or if necessary, develop the common law to

### 3.2.3 The Employment Equity Act 55 of 1998 and the Employment Equity Amendment Act 47 of 2013

The *EEA*<sup>131</sup> aims to remove unfair discrimination and promote affirmative action in employment. To this end, the *EEA* states explicitly that it intends to provide for “employment equity” and any “matters incidental thereto”<sup>132</sup> by, among others, giving effect, as a member state, to the obligations imposed by the ILO.<sup>133</sup> In this case, the most relevant Convention is Convention 111.

Apart from international obligations, the *EEA* also relies on enactments made by the labour minister to aid gender equality in the workplace. In terms of secs. 54(1) and 55, the labour minister may, on the advice of the Commission for Employment Equity and by way of a published notice in the *Government Gazette*, publish regulations and codes of good practice to give effect to the prescripts and requirements of the *Act* and regulate any administrative or procedural matter necessary to administer the *Act*.<sup>134</sup> Although such codes of good practice are not legally binding, they still need to be considered in the application of a statute.<sup>135</sup> As far as gender equality in the workplace is concerned, the minister has published the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans.<sup>136</sup>

Secs. 5, 6, 13 and 15 of the *Act* are of particular importance in pursuit of the goals of the *EEA* and the potential effect of the *Act* on female representation in the South African workplace. Secs. 5 and 6<sup>137</sup> of the *EEA*<sup>138</sup> deal with the prohibition of unfair discrimination within the workplace. Sec. 5 imposes a duty on every employer to take steps to promote equal employment opportunities by eliminating unfair practices and policies.<sup>139</sup> Sec. 6 stipulates that:

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the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right, provided that the limitation is in accordance with sec. 36(1) of the *Constitution*.

131 *Employment Equity Act 55/1998*.

132 See the preamble of the *Employment Equity Act 55/1998*.

133 See the preamble of the *Employment Equity Act 55/1998*. See also art. 2 of Convention 111 of the ILO which reads: “[E]ach Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”

134 *Employment Equity Act 55/1998*:sec. 55.

135 Pretorius *et al* 2017:5.

136 GN 393 of 40817, 28 April 2017.

137 As alluded to earlier, albeit in a constitutional sense, where grounds of discrimination are not explicitly listed, they are known simply as “unspecified” grounds. Despite the wording of sec. 6(1) of the *EEA*, which refers to “any arbitrary ground”, it should not be understood that such wording implies that a third, additional category exists for other grounds of discrimination. There are, in fact, only two categories, namely listed and unlisted (“unspecified”) grounds. This approach has most recently been adopted in the Labour Appeal Court in the case of *Naidoo and Others v Parliament of the Republic of South Africa* [2020] 10 BLLR 1009 (LAC):par. 27.

138 *Employment Equity Act 55/1998*, as amended.

139 *Employment Equity Act 55/1998*:sec. 5.

6(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, [or] family responsibility ... or on any other arbitrary ground listed in subsection (1).

(2) It is not unfair discrimination to –

take affirmative action measures consistent with the purpose of this Act; or

distinguish, exclude or prefer any person on the basis of an inherent job requirement for a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed.

As shown in *Solidarity v Department of Correctional Services*,<sup>140</sup> the affirmative action measures provided for in sec. 6(2)(a) of the *EEA* refer to those introduced to promote employment equity for people from designated groups. Case law confirms that the courts do encourage the application of affirmative action. In *Solidarity v Department of Correctional Services*,<sup>141</sup> the court emphasised that sec. 2 of the *EEA*, describing the purpose of the *Act*, specifically includes the implementation of affirmative action measures. In *Minister of Mineral Resources v Mining Corporation Pty (Ltd)*,<sup>142</sup> in turn, Majiedt JA ruled that affirmative action should be used to redress past discriminatory practices and ensure equal opportunities in employment. In this regard, it is important to note that the *EEA* is not instructing the courts to implement the concept of affirmative action merely to remove discrimination but to implement it in a way that may result in substantive equality.

Affirmative action is regulated explicitly by secs. 13 and 15 of the *EEA*. Sec. 13 imposes a duty on the employer to “implement affirmative action measures for people from designated groups [to] achieve equality”.<sup>143</sup> Sec. 15 then defines affirmative action measures as those intended to ensure that “suitably qualified” people from designated groups have equal employment opportunities and are equitably represented in the workplace. Designated groups comprise Black people, women, and persons with disabilities.<sup>144</sup> Candidates who are considered “suitably qualified” for a job are those with a combination of prior learning, formal qualifications, relevant experience, and the capacity to acquire the ability to do the job.<sup>145</sup> However, reflecting on

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140 *Solidarity v Department of Correctional Services* 2015 4 SA 277 (LAC):34.

141 *Solidarity v Department of Correctional Services* 2015 4 SA 277 (LAC):286(27).

142 *Minister of Mineral Resources v Mining Corporation Pty (Ltd)* 2016 1 SA 306 (SCA):316.

143 *Employment Equity Act* 55/1998:sec. 13(1). Affirmative action remains an important vehicle to true gender equality in the workplace and, if implemented in a way that focuses less on racial representation, removes barriers to employment and accommodates females more, it may well allow for an increase in female representation in decision-making positions. See Rossouw 2018:170.

144 *Employment Equity Act* 55/1998:sec. 1.

145 See *Employment Equity Act* 55/1998:sec. 20(3)(a)-(d).

the criteria of the test for suitably qualified candidates, the odds appear to be stacked against females. Keep in mind that, as shown earlier,<sup>146</sup> females face unique challenges in entering and persevering in school and tertiary education and entering the labour force. Moreover, once in employment, a temporary or permanent interruption is highly probable due to child-rearing, family responsibilities, as well as social norms and traditions. This means acquiring the “formal qualifications” and “relevant experience” to be deemed suitably qualified is more difficult for females than for their male counterparts.

As shown earlier and also established in *Ntai v SA Breweries*,<sup>147</sup> affirmative action ought to be implemented, in order to achieve not only formal, but also substantive equality.<sup>148</sup> In this regard, Currie and De Waal<sup>149</sup> state that substantive equality “requires an examination of the actual social and economic conditions of groups and individuals to determine whether the Constitution’s commitment to equality is being upheld”. The test for a suitably qualified person does not seem to consider the “actual social and economic disparities” of females. In this regard, therefore, affirmative action fails as a vehicle to achieve the constitutional mandate of substantive equality.

Apart from the definition of ‘suitably qualified’, there are other deficiencies in the regulation of affirmative action. In this regard, Rossouw<sup>150</sup> argues that the manner in which affirmative action is enforced remains inadequate, as the enforcement thereof is administrative in nature and is done by way of undertakings to comply and the issuing of compliance orders. She also notes that the application of affirmative action in South Africa is mainly focused on achieving racial as opposed to gender representation in the workplace,<sup>151</sup> and finally, that affirmative action remains a vehicle only to be implemented by designated employers.<sup>152</sup>

Despite this, Rossouw argues that affirmative action objectives may well be reached when employers step up to reasonably accommodate

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146 See par. 2.3.

147 *Ntai v SA Breweries Pty* 2001 22 ILJ 214 (LC):218.

148 *Ntai v SA Breweries Pty* 2001 22 ILJ 214 (LC):230.

149 Currie & De Waal 2013:213.

150 Rossouw 2018:120.

151 Rossouw 2018:119-120. The ineffectiveness of the *EEA* as a measure to ensure gender equality has been addressed in full by Rossouw in her thesis, chapter 4.

152 The *EEA* defines a designated employer to mean:

- “(a) an employer who employs 50 or more employees;
- (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the *EEA*;
- (c) a municipality, as referred to in Chapter 7 of the Constitution;
- (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.” See also Rossouw 2018:120.



female employees. The *EEA*<sup>153</sup> defines reasonable accommodation as “any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment”.<sup>154</sup> To this end, Cohen and Dancaster<sup>155</sup> propose that accommodations in this sense could, for instance, mean alternative leave arrangements or flexible working hours, specifically for (female) employees with family responsibilities. However, they point out that the *Act* itself is silent on precisely what is required of employers in terms of reasonable accommodation.<sup>156</sup> Despite this, Cohen and Dancaster argue that the mentioned requests could most probably pass as “reasonable accommodation” requests.<sup>157</sup>

The “inherent job requirement” provision in sec. 6(2)(b), in turn, was put to the test in the pregnancy-based discrimination matter of *Manyetsa v New Kleinfontein Gold Mine*.<sup>158</sup> In this case, a pregnant female employed as an electrician had to be moved to a position that would be safe for her upon reaching a specific stage of her pregnancy, as stipulated by company policy. However, when the mine could not find any suitable position, the employee was put on extended leave. The court held that the employer’s actions did not amount to unfair discrimination and that the employer had successfully justified the discrimination by relying on the inherent job requirements of the available vacancies, which the employee failed to meet. To this end, the employer’s attempts to abuse the defence of inherent job requirements to conceal unfair discrimination based on gender were addressed even prior to the *Manyetsa* case.<sup>159</sup>

It is noted that (sexual) harassment may well act as a barrier to gender equality.<sup>160</sup> To this end, the Labour Court stated that, when dealing with sexual harassment cases, “patriarchal predispositions” should be shed in a bid to continue the fight towards gender equality.<sup>161</sup>

Sec. 6(3) of the *EEA*<sup>162</sup> states that “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)”. This means that harassment of an employee on the ground of gender is a form of unfair discrimination. According to art. 1(b) of the Violence and Harassment Convention of the ILO<sup>163</sup> (which South Africa has not yet ratified), the term “gender-based harassment”

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153 *Employment Equity Act* 55/1998.

154 See *Employment Equity Act* 55/1998:sec. 1.

155 Cohen & Dancaster 2009:225.

156 Rossouw 2018:120.

157 Cohen & Dancaster 2009:226.

158 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 ILJ 415 (LC).

159 Lebepe 2010:9.

160 See *Employment Equity Act* 55/1998:sec. 6(3), as amended.

161 *Old Mutual Life Assurance SA (Pty) Ltd v Makanda and Others* [2019] ZALCCJHB 285 LC:par. 5.

162 *Employment Equity Act* 55/1998, as amended.

163 ILO, Violence and Harassment Convention, C190, 21 June 2019.

entails harassment directed at someone because of their gender. This includes sexual harassment.<sup>164</sup>

According to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace,<sup>165</sup> sexual harassment based on gender is a form of unfair discrimination. In this regard, the Court held in *Campbell Scientific Africa v Simmers*<sup>166</sup> that “[T]he treatment of harassment as a form of unfair discrimination in s 6(3) of the *Employment Equity Act* 55 of 1998 (*EEA*) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace.”

### 3.2.4 The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000

The *Promotion of Equality and Prevention of Unfair Discrimination Act* (hereafter, *PEPUDA*) aims to give effect to sec. 9 of the *Constitution* by prohibiting and eliminating unfair discrimination and promoting equality. Notably, the *Act* provides explicitly for systemic discrimination that is based on gender and was caused by apartheid and patriarchy.<sup>167</sup> Sec. 6 of the *Act* states that no person or the state may unfairly discriminate against any other person, thereby both generally and specifically prohibiting and aiming to prevent unfair discrimination.<sup>168</sup> *PEPUDA* does not apply where the *EEA* finds application.<sup>169</sup>

### 3.2.5 The Basic Conditions of Employment Act (BCEA) 75 of 1997

The purpose of the *Basic Conditions of Employment Act* (hereafter, the *BCEA*) is to comply with sec. 23 of the *Constitution*, which regulates both fair labour practices and basic conditions of employment.

Yet, the court in *Manyetsa v New Kleinfontein Gold Mine*<sup>170</sup> found the *BCEA* lacking in properly protecting all employees against unfair discrimination. As discussed earlier, in *Manyetsa*, company policy dictated that a pregnant employee working as an electrician had to be moved to a safer position once she reached a specific stage of her pregnancy. The mine could not secure such an alternative position and placed the employee on extended maternity leave. Even though the court finally held that the employer’s actions were not unfair, it did lament the fact that specific South African laws, enacted to govern basic conditions of employment, including the employment conditions for pregnant employees, seemed to fall short. The court argued that, ironically, any “unfair, unjust and unreasonable” circumstances suffered by a female employee, due to her pregnancy, could be directly attributed to shortfalls in

164 ILO, Violence and Harassment Convention, C190, 21 June 2019:art. 1(b).

165 GN 1367 of 1998:art. 3.

166 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 166 (LAC):par. 19.

167 McGregor 2011:116.

168 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000:sec. 6.

169 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000:sec. 5.

170 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 ILJ 415 (LC).

the very laws designed to protect her.<sup>171</sup> This serves as a reminder that South African labour laws, and specifically the *BCEA*, are far from perfect and are, in many instances, crippled by societal norms and attitudes.

This said, South Africa recently made legislative attempts, through amended leave provisions, to arguably achieve a more equal distribution of unpaid work and ultimately greater equality for working women. In terms of the *Basic Conditions of Employment Amendment Act*,<sup>172</sup> fathers are now entitled to ten consecutive days' unpaid paternal leave. Previously, childcare and parental leave for fathers were primarily taken in terms of family responsibility leave,<sup>173</sup> which allowed fathers three days' paid family responsibility leave.<sup>174</sup> Although the implementation of parental leave is a commendable step in South African labour law, it still does not equally distribute parental responsibilities.

Under the discussion of the *EEA* earlier, mention was made of the possibility of flexible working hours and alternative leave arrangements for (female) employees with family responsibilities as a means of reasonable accommodation and a way of implementing affirmative action. Notably, the *BCEA* states that every employer ought to regulate an employee's working time with due regard to the employee's family responsibilities.<sup>175</sup> In this sense, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices<sup>176</sup> encourages employers to grant flexible working hours to employees with family responsibilities and equal family responsibility leave to both parents.<sup>177</sup> Moreover, the Code of Good Practice on Arrangement of Working Time<sup>178</sup> encourages employers to accommodate "the special needs of workers such as pregnant and breastfeeding workers, and workers with family responsibilities".<sup>179</sup> As noted earlier,<sup>180</sup> these codes are, unfortunately, not legally binding. In this regard, Cohen and Dancaster argue that they "fail to provide any significant rights for employees who are caregivers".<sup>181</sup>

To this end, it is suggested that, as in the United Kingdom, South Africa should adopt a right to flexible working hours,<sup>182</sup> especially for employees with caregiving responsibilities. In this instance, Rossouw suggests that employers should at least consider "a request for flexible working hours in a reasonable manner with a concomitant requirement that employers should provide (written) reasons to the employee if the request is denied".<sup>183</sup> However, it must

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171 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 ILJ 415 (LC):420.

172 *Basic Conditions of Employment Amendment Act* 7/2018.

173 *Basic Conditions of Employment Act* 75/1997:sec. 25.

174 *Basic Conditions of Employment Act* 75/1997:sec. 27(2).

175 *Basic Conditions of Employment Amendment Act* 75/1997:sec. 7(d).

176 GN 1358 of 27866, 4 August 2005.

177 GN 1385 of 27866, 4 August 2005:par. 11.3.5.

178 GN 1440 of 19453, 13 November 1998.

179 GN 1440 of 19453, 13 November 1998:par. 5.6.

180 See page 12.

181 Cohen & Dancaster 2009:237.

182 Rossouw 2018:260.

183 Rossouw 2018:260. Other suggestions made by Rossouw in this regard include that South African law should provide clear circumstances in which an employer

be kept in mind that, despite an envisioned right to flexible working hours for (female) employees, which may well assist in keeping women in employment or succeed to top-level positions, this might only address one category of unpaid work, namely family responsibilities.<sup>184</sup>

### 3.2.6 National Policy Framework for Women's Empowerment and Gender Equality

Though not prescriptive statute, South Africa has the National Policy Framework for Women's Empowerment and Gender Equality as a potential vehicle to achieve true gender equality. The Framework resulted in the establishment of, and has a symbiotic relationship with the National Gender Machinery (NGM), which was created to empower females and promote gender equality. More specifically, the NGM was established to ensure that subsequent gender equality institutions pay due regard to female empowerment.

The institutions subsequently established under the NGM include the Commission on Gender Equality (CGE). In addition to its primary purpose of achieving true gender equality, this Commission, which was established by Chapter 9 of the *Constitution*, is intended to advise the minister on specific codes of good practice that employers should follow, in order to ensure employment equity.<sup>185</sup> However, some argue that the CGE has lost track of these purposes and, instead, appears to be more concerned with public information than legislative performance in pursuit of true gender equality.<sup>186</sup>

### 3.2.7 Women Empowerment and Gender Equality Bill (WEGE Bill)<sup>187</sup>

In another effort to give effect to sec. 9 of the *Constitution*, the Women Empowerment and Gender Equality Bill (hereafter, the WEGE Bill) was tabled in Parliament in 2013 to allow for equal representation for females in the workplace by means of gender quota legislation.<sup>188</sup> As Hills explains,<sup>189</sup> this would mean that "all organisations, corporations, and government departments ... [will] have 50 per cent females on their decision-making

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may reject a request for flexible working hours and that a route for dispute resolution must exist whereby an employee can pursue the unreasonable rejection of such request. See Rossouw 2018:260, 261.

184 See page 29, where housework and general house maintenance is also categorised as unpaid work.

185 *Employment Equity Act* 55/1998:sec. 30.

186 Masango & Mfene 2015:630.

187 Women Empowerment and Gender Equality Bill B50/2013.

188 Hills 2015:155. The Bill does not explicitly differentiate between employees of organisations and boards of organisations and refers to private and public bodies. See Chapter 3 of the Bill: "[D]espite any other law, designated public bodies and designated private bodies must, within their ambit of responsibilities and available resources, develop and implement plans and measures as prescribed, in order to achieve the progressive realisation of a minimum of 50 per cent representation and meaningful participation of women in decision-making positions and structures including Boards...".

189 Hills 2015:155. This applies to public bodies, as contemplated in sec. 1 of the Bill.

bodies". This has been shown to work in other jurisdictions. In Germany, for instance, gender quota legislation has spurred remarkable improvements in female representation in the workplace;<sup>190</sup> this might be a worthwhile option for South Africa to explore.

In addition to pushing for equal representation for females in senior positions in the workplace, the WEGE Bill would also improve women's access to education, which includes providing support for females at educational institutions upon childbearing, in order to retain them within the system.

Nevertheless, eight years later, the Bill has not been enacted. Unfortunately, the Bill has lapsed,<sup>191</sup> creating the impression that female empowerment, specifically in top-level and decision-making positions, is not considered a priority.<sup>192</sup>

### 3.2.8 Is it enough?

As shown earlier, South Africa has adopted a vast array of laws and other instruments with the specific aim of ensuring gender parity, affording females the same rights as their male counterparts in the workplace. However, despite all these legislative interventions, and six decades since women of all races marched to Parliament to fight for gender equality, gender inequality is still very much alive, particularly in high-ranking positions.

Clearly, therefore, the regulation of human conduct does not seem to have had the desired effect, as it has not led to a more even spread of males and females in positions of high power and seniority. Equality legislation, including the current regulation of affirmative action, is not enough to ensure transformative change for females in the workplace. Other factors appear to play a role in the underrepresentation of women in top-level decision-making positions. The proverbial glass ceiling remains an "invisible barrier for females, preventing them from moving up the corporate ladder"<sup>193</sup> and entering and advancing into senior positions.<sup>194</sup> In South Africa, the glass ceiling is said to be propped up by corporate practices, cultural causes<sup>195</sup> and gender discrimination.<sup>196</sup>

As Adelekan and Bussin<sup>197</sup> have stated, where hardly any logical reason can be found for women's severe underrepresentation in the workplace and,

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190 Hills 2015:154.

191 The Bill has lapsed in terms of NA Rule 298.

192 Hills 2015:158-158, 161.

193 April *et al* 2007:54.

194 Smit 2016:5.

195 Corporate practices include the recruitment and promotion of employees, and cultural causes include the means whereby employers apply stereotyping in selecting leadership styles. See Oakley 2000:323-324.

196 Wiesenfeld & Robinson-Backmon (2007:28) refer to the glass ceiling as discrimination in the labour market, which "represents a job inequality that is not explained by job relevant characteristics such as education, experience, past qualifications or achievements".

197 Adelekan & Bussin 2018:8.

by implication, in top positions, one can safely conclude that females are being discriminated against in the world of work.

The following paragraphs explore patriarchy and unpaid work as two such potential discriminatory practices that keep women in lower-ranking employment compared to their male colleagues.

#### 4. PATRIARCHY AND UNPAID WORK AS BARRIERS PREVENTING FEMALE ADVANCEMENT TO TOP-LEVEL, DECISION-MAKING POSITIONS

##### 4.1 Patriarchy

In a study on gender relations conducted by Wood,<sup>198</sup> participants poignantly expressed their understanding of the notion of patriarchy, drawing images of females on their knees in front of their husbands or male partners, apologising for not performing certain household tasks and, in a sense, begging for money.

Throughout history, the idea that men could have power over other men but should always have authority over women has been entrenched in hierarchies<sup>199</sup> and human relationships. Being so deeply rooted and universally accepted in society at large, patriarchy has, in effect, become an “invisible” platform of power.<sup>200</sup> As Kornegay explains:<sup>201</sup>

The socio-cultural dictates of all groups defined females to be inferior to men and as such assigned to them the position of minors in both the public and private spheres of life. In the private sphere, females were less likely to lead in decision-making. In most interpersonal relationships, men had more power. This historical legacy of patriarchy influenced essential informal and formal human relationships with a marked impact at the workplace.

To understand the effect of patriarchal South Africa on females in the workplace, a clear definition of patriarchy and oppression is required. Patriarchy is regarded as “a system of social structures and practices in which men dominate, oppress and exploit females”;<sup>202</sup> a social system where men have power and authority over women.<sup>203</sup> Oppression, in turn, is understood as the “arbitrary and cruel use of power”.<sup>204</sup> Patriarchal oppression, therefore, refers to men’s arbitrary and cruel use of power over females.

In the workplace, patriarchy manifests itself in a culture that regards men as the “bosses” of (or superior to) female colleagues.<sup>205</sup> While this in itself

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198 Wood 2014:45-46.

199 Pendergast & McGregor 2007:4.

200 Pendergast & McGregor 2007:4-5.

201 RSA 2000.

202 Walby 1989:214.

203 Keevy 2008:414.

204 Roberts 2010:63.

205 Miroiu 2003:20.

might be difficult to address, as it is not deemed a legal problem, it does cause a legal issue, namely unfair discrimination.

In terms of legislative attempts to root out the existence and effects of patriarchy in the workplace, most (if not all) of the ratified and adopted instruments and laws discussed earlier as part of the framework governing gender equality in South Africa find application. These ratified instruments include ILO Convention 100, Convention 111 and CEDAW,<sup>206</sup> the Protocol on the African Charter on Human and People's Rights on the Rights of Females in Africa,<sup>207</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>208</sup>

South Africa is also due to sign ILO Recommendation R206, which states that "[m]embers should address violence and harassment in the world of work in labour and employment, occupational safety and health, equality and non-discrimination law, and in criminal law, where appropriate".

To give effect to these international instruments, national legislation has been passed that specifically prohibits unfair discrimination in the workplace. Such prohibitions are found in sec. 9 of the *Constitution*, in the *EEA*,<sup>209</sup> the *Employment Equity Amendment Act*,<sup>210</sup> and, where the latter does not find application, *PEPUDA*.<sup>211</sup> Importantly, *PEPUDA* specifically prohibits systemic discrimination based on gender and caused by patriarchy.<sup>212</sup>

Nevertheless, both formal<sup>213</sup> and substantive<sup>214</sup> equality in the South African workplace seem to be crippled by social norms and cultural tradition.<sup>215</sup> Traditional gender roles have perpetuated patriarchy to the extent that females are regarded as inferior to their male counterparts and dependent on them for resources and status,<sup>216</sup> mostly being relegated to the realm of family rearing.<sup>217</sup> As examples of cultural norms that have turned into constraints,

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206 Vettori 2014:478; see also par. 3.1.

207 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003. South Africa ratified the protocol on 17 December 2004.

208 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966. South Africa signed the covenant on 3 October 1994 and ratified it in January 2015.

209 *Employment Equity Act* 55/1998.

210 *Employment Equity Amendment Act* 47/2013.

211 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

212 McGregor 2011:116.

213 Formal equality entails that one rule applies to all, irrespective of social and economic circumstances. See Currie & De Waal 2013:213.

214 Substantive equality entails an examination of the social and economic circumstances of groups and individuals to assess whether the constitutional commitment to equality is being upheld. See Currie & De Waal 2013:213. Substantive equality is also considered a process of transformation in society, aimed at the eradication of disadvantages based on race, gender, class and other forms of inequality. See Dupper & Garbers 2010:77.

215 Ratele 2015:145.

216 Albertyn 2009:171.

217 Amien & Paleker 1997:374.

these “traditional practices tend to frustrate the implementation of policies on gender equality”.<sup>218</sup> In this regard, the CGE remarked as follows:<sup>219</sup>

It is a sad fact that one of the few profoundly non-racial institutions in South Africa is patriarchy indeed, it is so firmly rooted that it is given a cultural halo and identified with customs and personalities of different communities ... [P]atriarchy brutalises men and neutralises females across the colour line.

Believed to be “a permanent force” in South Africa, patriarchy is “a cause of grave concern as in most cases it hinders the implementation of policies and acts ... [and] ... the carrying out of orders”.<sup>220</sup> Therefore, despite an extensive framework of legislation, provision made in the supreme law of the land, the *Constitution*, as well as the adoption of several national, regional and international instruments to ensure women’s advancement in the workplace, the underlying force of patriarchy means that true gender equality in employment remains a long way off.

This seems particularly true in positions with higher status and pay involved, as well as positions of leadership, where females appear to struggle to break through the glass ceiling. The same glass ceiling for female employees has also embedded the gender pay gap in the world of work.

## 4.2 Unpaid work

According to Ngomane,<sup>221</sup> unpaid work is “[w]ork that is necessary for the subsistence of life and health, ... childbearing and rearing, socialisation of children, teaching, feeding, transporting and all essential emotional and psychological work which goes into developing people so that they become productive members of society”. Indeed, females are often defined in terms of motherhood. This not only implies that females are more likely than men to be socially responsible for the work that is “necessary for the subsistence of life and health”,<sup>222</sup> but also affects their participation in the labour market and, ultimately, their economic growth.<sup>223</sup>

This appears to be the situation across the world, with females performing the majority<sup>224</sup> of unpaid work.<sup>225</sup> Judging by the ratio of employment by gender and household in the latest World Economic Forum (WEF) report,

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218 Masango & Mfene 2015:628.

219 Commission on Gender Equality 1998:10.

220 Noge 2014:14.

221 Ngomane 2016:82.

222 Ngomane 2016:82.

223 SAHRC 2017:6.

224 ILO 2018b:37.

225 “Unpaid work consists of all productive activities outside the arena of the official labour force done by individuals for the benefit of their households. The latter description tends to include child caring, housework, maintenance of the house, agricultural activities and the caring for sick children and old people. Unpaid work is furthermore understood to replace market goods for the purpose of a household or the replacement of paid services.” See Swiebel 1999:11.



56.1 per cent of females are involved in unremunerated work.<sup>226</sup> In South Africa, engagement in unpaid work is much more likely among women than among men.<sup>227</sup> This would also explain why over 43 per cent of South Africa's female-headed households are considered unemployed households.<sup>228</sup> In *President of the Republic of South Africa v Hugo*, the court confirmed the disproportionate burden of economic and social responsibilities associated with child-rearing that most women are expected to carry along with their career commitments.<sup>229</sup>

Suggestions as to the exact causes for this state of affairs vary. Some propose that patriarchal practices are partly to blame, as the oppression and exploitation of females, both at work and at home, have become normalised as accepted social practices.<sup>230</sup> Others argue that social norms themselves have played a part, considering that domestic chores and child-rearing are strongly linked to women's position in society.<sup>231</sup> In essence, as females struggle to compete on an equal footing with men in the labour market, unpaid work continues to manifest itself disproportionately among females, reinforcing patriarchal values.<sup>232</sup>

South Africa has made certain attempts to address the issue of unpaid work, although none have had any tangible effect. In 1995, South Africa became signatory to the Beijing Platform for Action,<sup>233</sup> which calls on signatories to reduce unpaid work among females.

In 2013, the United Nations reiterated that the "unpaid work" phenomenon was directly linked to the inequality females continued to face.<sup>234</sup> Ironically, in that same year, South Africa's Women Empowerment and Gender Equality Bill was tabled in Parliament.<sup>235</sup> This offered the country an opportunity to demonstrate its willingness to rectify the gender inequalities associated with unpaid work. Sadly, the Bill has not been enacted, creating the impression of a lack of commitment to, and interest in protecting females in the workplace and correcting the wrongs of unpaid work.

A parliamentary question posed to the Minister of Women in 2014 revealed that unpaid work was indeed relevant and paramount to the overall empowerment and equality of females.<sup>236</sup>

In 2015, the South African Department of Women, Youth and Persons with Disabilities, in its report *The Status of Women in the South African Economy*, confirmed that females were primarily responsible for, and were spending

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226 WEF 2018:252; Stats SA 2018c:63.

227 WEF 2018:252.

228 Nwosu & Ndindha 2018:11.

229 *President of the Republic of South Africa v Hugo*:39.

230 Ngomane 2016:47.

231 UN Women 2020:8.

232 Pendergast & McGregor 2007:5.

233 Ngomane 2016:45.

234 Sepúlveda 2013:5.

235 PMG 2014.

236 RSA 2014:2.

more time than their male counterparts on unpaid work.<sup>237</sup> This was echoed by the South African Human Rights Commission two years later,<sup>238</sup> who called for a more equitable distribution of unpaid work and a change in social norms.<sup>239</sup> In its attempt to address the issue of unpaid work, Gender Links,<sup>240</sup> a Southern African women's rights organisation, called the phenomenon a persistent direct barrier to the economic empowerment of females, restricting them from employment opportunities.

In the country's latest attempt to achieve greater equality for females and a more equal distribution of unpaid work, South Africa passed the *Basic Conditions of Employment Amendment Act*<sup>241</sup> in 2018. Specifically with regard to the provisions of parental leave, the predecessor to the *Amendment Act* governed childcare and parental leave primarily in terms of maternity and family responsibility leave.<sup>242</sup> Fathers were allowed three days' paid family responsibility leave.<sup>243</sup> Yet under sec. 25A of the *Amendment Act*, fathers are now entitled to ten consecutive days' unpaid paternal leave. This was a noteworthy and commendable step in South African labour law. Nevertheless, an equal distribution of parental responsibilities is not yet a reality, with mothers continuing to perform the majority of unpaid work.

## 5. CONCLUSION AND RECOMMENDATIONS

As shown in this contribution, there is no denying that females in South Africa continue to face barriers to entry and advancement in employment, particularly also in top-level, decision-making positions. Specific barriers to equal employment for women discussed in this article include patriarchy and unpaid work, which are closely intertwined. As females continue to be subjected to male domination in the form of patriarchy, they are automatically relegated to the realm of unpaid work, carrying a disproportionately heavy burden of child-rearing and other domestic responsibilities. Factors perpetuating these barriers include unfair discrimination, pregnancy, educational attainment, social norms, and cultural traditions.

Despite some meaningful suggestions made on the reasonable accommodation of women, they may not be enough. The root of the problem does not appear to be a lack of legislative provision. As demonstrated in the outline of the country's legal framework governing equal employment, South Africa has, save for a specific right towards flexible working hours, sufficient laws and instruments in place to allow women to thrive in the workplace and to claim for instances of unfair treatment. Since promulgated laws and other legal instruments already sufficiently cater for female employees in South Africa, even the revival of the now lapsed Women Empowerment and Gender

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237 RSA 2015:10.

238 SAHRC 2017:6.

239 SAHRC 2017:10.

240 Gender Links 2019a.

241 *Basic Conditions of Employment Amendment Act* 7/2018.

242 *Basic Conditions of Employment Act* 75/1997:sec. 25.

243 *Basic Conditions of Employment Act* 75/1997:sec. 27(2).

Equality Bill would probably not change much. Aside from serving as an acknowledgement by government that gender equality in the workplace is a cause worth pursuing, enacting the Bill would merely add to an already extensive legal framework.

Instead, the focus should urgently shift to enforcement and application by the country's courts, which remain dismally inadequate, as much of the case law cited in this article has shown. By attempting to accommodate female employees within the confines of the status quo, the courts ironically further entrench the notion of women being subordinate in society, including at work. The inconsistent application of substantive equality continues to hinder true gender equality. Even implemented vehicles of substantive equality, such as affirmative action, which has been specifically designed to ensure female representation in top positions, seem to be ineffectual if not applied correctly. Going forward, therefore, the South African courts would be well advised to adopt a more holistic approach to the implementation of substantive equality, regarding females not only as members of a designated group, but also considering the full extent of the disadvantages they face in everyday life.

Moreover, government appears to be overlooking the possibilities offered by the National Policy Framework for Women's Empowerment and Gender Equality. The Framework could be much better utilised as a vehicle to achieve what its name proclaims to do. Efforts under the banner of the Framework could include earmarking funds not only to allow more females to stay in school, but also to educate society on the value of female employment and advancement at work, and the need to break away from entrenched social norms.

Such an educational campaign should include employers, urging them to recognise the existing barriers to women's entry and advancement in the workplace, and to fully commit to bringing about substantive gender equality.

Ultimately, legislation is not enough to root out patriarchy and the "unpaid work" burden suffered by women, as both are fuelled by deep-rooted social norms and cultural traditions. Wood<sup>244</sup> argues that positive shifts in social norms occur when individuals' own beliefs change for the better. If that is so, the current lack of female representation in high-powered positions, and the persistent social norms underlying it, paint a sad picture of the general attitude towards female empowerment in the country.

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244 Wood 2014:38.

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