SHAPING THE NORMATIVE AND CONSTITUTIONAL LANDSCAPE OF PSYCHOMETRIC TESTING IN THE WORKPLACE IN SOUTH AFRICA

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CHAPTER 1

INTRODUCTION

The use of psychometric testing in the workplace is mainly discussed and researched in the realm of psychology and human resources and it is difficult to find anything dissecting this subject matter in the legal realm. However, section 8 of the Employment Equity Act[1] ("the Act" or "EEA") deals with the subject of psychological testing and other similar assessments as instruments or tools to prevent unfair discrimination in the workplace.

The researcher ventures to state that there has been a lack of critical analysis, application and testing of this particular section in the legal arena over the almost seventeen years of its existence. Bearing this in mind, we have seen the section being amended during 2014. We have also seen significant amounts of scientific research and commentaries emerging on it from psychology and human resources perspectives, but few from a legal or specifically a labour law perspective.[2] The testing of the application of psychological testing and other similar assessments in the workplace and whether it will overcome constitutional scrutiny has not been done.

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[1] 55 of 1998 and lately amended in Employment Equity Amendment Act 47 of 2013 published under *Government Gazette* Notice number 37238. Section 8 reads as follows:

> **"8. Psychological testing and other similar assessments**
> Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-
> (a) has been scientifically shown to be valid and reliable;
> (b) can be applied fairly to all employees;
> (c) is not biased against any employee or group; and
> (d) has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other body which may be authorized by law to certify those tests or assessments."

It is noted that some writers tend to incorrectly quote s 8 to read and refer to psychometric rather than psychological testing. See Donald, Thatcher and Milner (n 2) below 334 and Bonthuys (n 21) below 1175.

[2] Donald, Thatcher and Milner "Psychological assessment for redress in South African organisations: is it just?" *South African Journal of Psychology* 2014 333 349 335 and 343 and Laher and Cockcroft "Psychological assessment in post-apartheid South Africa: the way forward*" South African Journal of Psychology* 2014 303 314 311.

The South African labour law has changed vastly over the years. In addition, with employment equity in mind and the way the Labour Courts and Constitutional Court have engaged with section 7 in the same Act, it has laid the platform to enable us to set a benchmark against how section 8 should be applied.[3]

The study is premised on this *lacuna* created by a lack of critical analytical engagement from a legal perspective with one of the most profound and commonly used sections (in the workplace) in the Act.[4]

In a country where unemployment is very high and people are continually confronted with applications for vacancies, promotions and employees wanting to excel in the workplace, the reality is that the employees will be encountering some form of psychometric testing.[5] We need to reflect upon, what do we understand concerning these tests' nature? The question is further whether we are applying and operating them within an appropriate framework to give effect to the purpose of the statute and section 8 that is supposed to regulate it?

The research proposes to answer these questions and this opportunity will be used to shape the normative landscape within which psychometric testing should operate in, focusing on its constitutional nature and foundation.[6] The interpretation will take into account international standards, whilst microscopically looking at the three types of usages of psychometric testing in the workplace. This will be examined particularly for recruitment, promotion and performance management. This will be researched in specific relation to its use in the South African Police Service ("SAPS") environment.[7]

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[3] *Irvin & Johnson Ltd v Trawler and Line Fishing Union* 2003 4 BLLR 379 (LC); *Vass v South African Police Service* 2013 ZALCCT 27 (LC); *Harksen v Lane No* 1997 11 BCLR 1489 (CC); *Stojce v University of Kwazulu Natal and Another* 2007 3 BLLR 247 (LC) and *Buthelezi v Amalgamated Beverage Industries* 1999 JOL 5086 (LC).

[4] Donald, Thatcher and Milner (n 2) above.

[5] Statistics South Africa, statistics on unemployment rate in 2014 (http://beta2.statsSouth Africa.gov.za/?page_id=737&id=1 (22-06-2015)) and see statistics listed in 1994 with the Green Paper for the EEA Published under *GG* 804 of 1996 for further comparisons.

[6] Constitution of the Republic of South Africa 1996 Preamble, sections 1, 9, 10, 23, 36 and 39 to name but a few.

[7] Steyn and Nel "The effectiveness of set psychometric selection criteria to reject applicants with high levels of suicide ideation from enlistment in the South African Police Service" 2008 *Acta Criminologica* 11 18 11 and "200 000 apply for 3800 police jobs" http://www.news24.com/SouthAfrica/News/200-000-apply-for-3-800-police-jobs-20150316 (accessed on 31-3-2015) thus confirming that psychometric testing is used in the South African Police Service. Psychometric testing and its use in SAPS are particularly important due to the type of work that employees have to do, the stressful

In labour law we move from the premise that the employer will always have to make a decision on whom to employ when positions are vacant, to promote someone or to see if someone is fit for the position held. It is in these instances that psychological testing and other similar assessments become useful tools to fairly assess who to choose. By virtue of this choice being made, the employer is discriminating by choosing the one over the other. The choice must be made on fair grounds; and for this reason the psychological testing or other similar assessment in itself needs to be used in line with the requirements set by section 8 of the Act. These requirements form a cumulative list and must be complied with.[8] When section 8 is listed as a reason for dismissal based on either a listed or an arbitrary ground, then the burden of proof shall be dealt with in line with section 11 of the Act. This is to prove that the discrimination was fair or unfair, respectively.[9]

As stated earlier, psychological tests or other similar assessments are tools to curb unfair discrimination and thus cannot be the only factor or the factor that carries the most weight in the decision-making process, whether to recruit, promote or performance manage an individual.[10] In the case of *Hendricks v South African Airways*,[11] the expert witness suggested and the court did not disagree that such a test should carry at least 25% weight when making these types of decisions.

The problems that arise are that the application and operation of specific psychometric testing in the workplace have not been brought before our courts at any level. A further problem that arises is whether it will successfully muster constitutional scrutiny. For this we can use the foundation laid by case law on the sister section of section 8 when the courts, up to the Constitutional Court level, dealt with section 7 (medical testing).[12] We know that the Constitutional Court does not just favour substantive equality but

environment they work in, type of client base they have, the access and use of firearms and high suicide rate.

[8] Du Toit *et al Labour Relations Law, A Comprehensive Guide* 2015 710.

[9] EEA (n 1) s 11 and n 8 above.

[10] Donald, Thatcher and Milner (n 2) 335 above.

[11] 2002 JOL 10382 (LC) par 44.

[12] See *Harksen v Lane No* (n 3) above.

has proclaimed that it is the best in serving the purpose of the principle of equality as set out in the Constitution.[13]

With the above as the backdrop, the following legal questions would not just be addressed but the research will attempt to give clear answers on them and make recommendations based on the findings reached. The main legal question is:
How can or should we legally and constitutionally apply psychological testing and other similar assessments and particularly psychometric testing?

For this we need to address the following issues:

1. Is the application of psychometric testing reconcilable with formal and substantive equality?
2. If tested in terms of direct or indirect discrimination, what are the valid defences?
3. Whether the application section 8 would survive constitutional scrutiny?

In approaching this subject, it is found that there is an overwhelming amount of research from the areas of human resources and psychology but few from labour law.[14]

The research starts by identifying and defining psychological testing and similar assessments and then extracting and separating psychometric testing and similar assessments from it. Looking at psychometric testing narrowly and through the eyes of employees (under the definition in section 10 of the Act) but focused on the South African Police Service (SAPS), with an emphasis on recruitment, promotion and performance management levels is also necessary.

With this in mind, it is accepted that there is a limited amount of research to pool from when addressing the legal question. It is here that we can see the need for further

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[13] Currie and De Waal *The Bill of Rights Handbook* 2013 241.

[14] See Donald, Thatcher and Milner (n 2) 337 and 343 above; Stabile "The Use of Personality Tests as a Hiring Tool: Is the Benefit worth the Cost?" 2002 *Journal of Labor and employment law* 279 313 and Swanepoel and Kruger "Revisiting validity in cross-cultural psychometric test development: A systems-informed shift towards qualitative research design" 2011 *South African Journal of Industrial Psychology* 10 15.

research and that the Constitution as the foundation implores us to critically engage with issues of discrimination. The researcher will be critically engaging with section 8 of the Act and measuring it with the position set out by case law on the application and interpretation of section 7. The International Labour Organisation's Convention on Discrimination in Respect of Employment and Occupation Convention 111 of 1958 and other international instruments are also very important for consideration purposes and whether we adhere to its recommendations.

The research will be addressing the main legal question and questions one and two (above) by taking a normative approach but also prescribe how to approach section 8.[15] It will thus attempt to fill this vacuum and simultaneously setting out a roadmap for the application of section 8 from a legal perspective.

The third legal question will be answered by engaging with a more legal positivist approach by engaging with constitutional jurisprudence and considering international standards to set parameters and testing it at a constitutional level. This will attempt to create legal certainty and at least get the conversation started from a legal perspective on the application of psychometric testing in the workplace. It is further noted that with the recent amendments to the Act the access to justice door at the Commission for Conciliation Mediation and Arbitration (CCMA) has been flung wide open and we might see more referrals to the CCMA in terms of the Act.

[15] Stevenson and Waite *Concise Oxford English Dictionary* 2011 976 and 1120 defines normative as:
"… relating to or deriving from a standard or norm." and positivism in law as:
"…the theory that laws derive validity from the fact of having been enacted by authority or of deriving logically from existing decisions, rather than from any moral considerations."
The researcher is searching to derive an answer on the application of s 8, based on a standard set by the application of s 7 in the Courts. The research will not just be to confirm an existing legal position based on existing decisions on it but rather the search for an answer on the application of s 8 based on considerations of other decisions taken.

CHAPTER 2

CONCEPTUAL FRAMEWORK OF PSYCHOLOGICAL TESTING

2. *Introduction*

The application of psychometric testing in the workplace from a labour law perspective requires that we start out by attempting to understand what psychometrics and the testing are about. Only then we might be able to understand the need to regulate it in the workplace under the auspices of employment equity and unfair discrimination.

This chapter endeavours to firstly clarify the position psychometric testing takes within the context of psychology and emphasises the difference, if any that exists between psychological and psychometric testing. It further investigates the need for these types of testing, how and who can do the tests and the challenges that accompany these tests from a human resource and psychology perspective. And finally the researcher looks at the new criteria inserted by virtue of the amendments to the EEA as applicable to psychological testing and other similar assessments.

2.1 *Defining psychological/psychometric testing*

When attempting to define psychometrics, it must be done in conjunction with the reading and understanding of the definition of psychology. The Concise Oxford English Dictionary defines psychology as:

> "The scientific study of the human mind and its functions, especially those affecting behaviour in a given context. The mental characteristics or attitude of a person. The mental factors governing a situation or activity."[16]

[16] See n 15 1158 above.

When broken down further, “psycho” would mean “the supposed ability to discover facts about an event or person by touching inanimate objects associated with them.”[17] This is in specific relation to the mind or psychology with the word’s origin being found in Greek terminology meaning to breath, soul or mind.[18]

Psychometrics is defined in the dictionary as “the science of measuring mental capacities and processes”.[19] When taking a closer look, we can read the above definition of psycho with this and in dealing with metrics or “*metry”* we see that they are: “… nouns denoting procedure and systems corresponding to names of instruments ending in meter.”[20]

It finds its origin in Greek terminology being “*metria”* from “*metes”* to indicate “measurer”, while metric is an adjective of or based on the “*metre”*, relating to or using the metric system confirming it is “a system or standard of measurement.”[21] Thus “psychometrics is that branch of psychology which focuses on the measurement of personality traits or personal characteristics in order to gather information about a person.”[22]

It seems accepted nowadays that psychometrics falls squarely within the profession of psychology and therefore its application is treated in the same manner. Therefore, the fact that the legislature has chosen to structure section 8 in such broad terms is comforting. The researcher finds that they had the presence of mind to take into account the broad scope of psychology. Whilst psychometric testing excludes psychological testing, psychological testing and other similar assessments include per definition psychometric testing. It is, however, clear that the most commonly used form of psychological testing in the workplace for the purposes of section 8, is psychometric testing. This is not just used to test if a person is mentally stable but also to test for what human resource professionals refer to as ‘competency’ as well as whether an

[17] See n 15 1158 above.
[18] See n 15 1158 above.
[19] See n 15 1158 above.
[20] See n 15 900 above.
[21] See n 15 900 above and Foxcroft “Ethical Issues Related to Psychological Testing in Africa: What I have learned (So Far)” *Online Readings in Psychology and Culture* 2002 1 13 4 http://www.wwu.edu/culture/foxcroft.htm (19-10-2015).
[22] Bonthuys “Counting flying pigs” 2002 *ILJ* 1175 1195 1175 and 1176.

applicant is a culture –and- job fit for the vacancy or promotion. But, where does all of this originate from and is it supposed to and can it be used for employment equity?

2.2 *Types and origin of psychology/psychometric testing*

Psychology has been tracked as far back as 2200 BC, beginning with the Chinese civil service examinations. It has evolved over the years to the mental tests in 1890 by James Cattel, "Sir Francis Galton's attempts to measure intelligence" and further to the intelligence quotient test in 1914 and was brought to Africa during the colonial era.[23]

In the early years of psychology being practiced in South Africa, the majority of the tests were American in origin because most of the trained professionals were taught at American institutes.[24] In the period between the two world wars, social and human sciences became important contributors to social issues.[25] Psychological knowledge and the empirical data it provided were used as tools to legitimise the reasons for apartheid and the idea of hierarchy in human society, consequently giving rise to differential treatment in terms of education and employment.[26] The practice of psychology is found all over the world and is mainly being practiced by health professionals. Its main purpose has been to enable the health profession to identify mental problems or problems with the mind through less invasive procedures. For this purpose they had to devise tests to assess and measure certain capacities of the mind. The tests are categorised to cover areas like cognitive, personality, behavioural and interest assessment.[27]

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[23] See Unisa Psychological Assessment Seminar: www.unisa.ac.za/contents/conferences/docs/Seminar_Handout.ppt (03-06-2015), (n 22) 1179, Seedat and Lazarus "Community psychology in South Africa: origins, developments, and manifestations" 2014 *South African Journal of Psychology* 267 281 268 and Sommer "Psychical research and the origins of American psychology: Hugo Munsterberg, William James and Eusapia Palladino" 2012 *History of the Human Sciences* 23 44 25.

[24] See n 23 above.

[25] See n 23 above.

[26] Foxcroft and Roodt "Introduction to psychological assessment in the South African context" 2009 *South African Journal of Industrial Psychology* 226 227.

[27] See n 23 above.

Psychometric testing might be of a psychological nature or subcategory but in its essence, application and interpretation it has limited medical or health reasons and implications.[28] It tests competencies based on measuring characteristics by way of pre-approved scientific tests that can be used by anyone qualified in that area that needs not be a medical doctor or health professional.[29] It does not in all instances deal with the health, diagnosis, prognosis and prescription of medicine or physical operations of or on a person. It does need expert knowledge to ensure the scientifically-shown validity and reliability of not only the test but the use thereof and opinion formed based on the results of the tests. The qualifications needed for registrations as psychometrists are listed in the regulations issued for this purpose.[30] It is proposed and agreed upon that not all of these types of tests require the services of a registered or qualified psychometrist or psychologist.[31]

2.3 *Application of Psychometric testing - How and who?*

Psychometric testing and other similar assessments in the workplace are carried out with the idea in mind that the results might be questioned by the test-taker if he or she is unsuccessful. What makes these results so credible and by virtue of which factors can we decide whether it has been completed using ethically sound means by someone who is adequately skilled and knowledgeable to give evidence on the issue at hand if subpoenaed to do so?

According to the Health Professions Act ("HPA") and the Mental Health Care Act ("MHCA") their definition for a psychologist is a person registered as such in terms of the HPA.[32] The now repealed section 37 of the HPA used to specify who and when

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[28] See Donald, Thatcher and Milner (n 2) 335; n 22 above and Scheithauer and Kalula "Employee polygraph testing in the workplace" 2008 *South African Journal of Labour Relations* 104 120 at 112.

[29] Public submission concerning: Employment Equity Amendment Bill [B31-2012] submitted by the Society of Industrial & Organisational Psychology of South Africa (SIOPSA) December 2012: https://www.siopsa.org.za/files/pai_ammendments_employment_equity_bill.pdf (25-05-2015).

[30] Rules for the Registration of Psychometrists published under Board Notice 124 in *GG* 17687 (27-12-1996); Regulations Relating to the Registration of Psychometrists published under Government Notice R1201 in *GG* 25360 (20-08-2003) and Regulations Relating to the Registration of Student Psychometrists published under Government Notice R941 in *GG* 35874 (14-11-2012).

[31] See n 23 above.

[32] 56 of 1974; Mental Health Care Act 17 of 2002 and Mauer "Psychological test use in South Africa" 2000 1 16: http://www.pai.org.za/Psychological%20test%20use%20in%20South%20Africa.pdf (28-09-2015). S 1 of the HPA provides the same definition of a psychologist as s 1 of the MHCA.

can you be registered as such has now been replaced by section 33 of the HPA that deals with the registration of health professionals and practitioners as now defined and inserted into section 1 thereof.[33] This includes students and interns and more specifically psychometrists for which a professional board has been established in terms of section 15 of the HPA. The Health Professions Council of South Africa ("HPCSA") as established in terms of section 2 of the HPA has established twelve professional boards, one of which is the Professional Board for Psychology.[34] There are seven categories of psychology, namely:

1. Clinical;
2. Educational;
3. Counselling;
4. Industrial;
5. Research;
6. Registered Counsellor; and
7. Psychometrists.[35]

The Professional Board for Psychology has over time issued regulations and rules to govern its processes and confirm its functions and powers whilst regulating minimum training requirements and standards for registration as a psychologist.[36] In accordance with Regulation 1249, the board has established a Psychometrics Committee which is confirmation that psychometrics is an accepted branch of psychology.[37]

Mothibe in his minor dissertation refers to the way in which professional bodies regulate these types of tests that are created, implemented and validated based on

[33] As amended by Act 29 of 2007 published under *GG* 30674 (17-01-2008).

[34] Professional Boards of the Health Professions Council of South Africa: http://www.hpcsa.co.za/Professionals/ProBoards (25-05-2015); Regulations Relating to the Constitution of the Professional Board for Psychology published under Government Notice R1249 in *GG* 31633 (28-11-2008); Health Professions Council of South Africa Annual Report 2013/ 2014: http://www.hpcsa.co.za/uploads/editor/UserFiles/downloads/publications/annual_reports/HPCSA_AR2014_FINAL.pdf (04-06-2015)) and see n 22 1189 above.

[35] See HPCSA Annual Report 2013/2014 (n 34) 51 above.

[36] See n 30 to name a relevant few and Laher and Cockcroft (n 2) 306 above.

[37] Committees of the Professional Board of Psychology as established under Regulation 1249 in *GG* 31633 (28-11-2008): http://www.hpcsa.co.za/PBPsychology/Committees (25-05-2015) and in terms of section 2 (c) of the Regulation, a psychometrist must be appointed to the board.

reliability, standardisation and objectiveness.[38] This was raised also as a legal research argument by Scheithauer and Kalula in 2007 and 2008 and specifically relating to comparing the monitoring and regulation of polygraph testing and psychometric testing, stating that psychometric testing is regulated by professional bodies while polygraph testing is not.[39] These aforesaid professional bodies are the Health Professions Council of South Africa and its professional boards, the Professional Board for Psychology and stakeholders like the Psychological Society of South Africa ("PsySSA"), People Assessment in Industry ("PAI"), Association for Test Publishers ("ATP") and the Society for Industrial and Organisational Psychology of South Africa ("SIOPSA").[40]

When the bill to amend the EEA was published for comment, the above three organisations vigorously commented on the certification of tests but in particular with reference to psychometric testing. PAI raised the issue of revisiting the current classification system.[41] Currently the HPA only makes provision for the Health Professions Council of South Africa to deal with the regulation of health professionals in conjunction with the Professional Boards that are established under section 15 and that they can only classify tests used in the health profession.[42] The classification system and its use for psychometric testing have been under investigation for several years now already.[43] The arguments made by these groups are that the category of tester is related to the purpose of the assessment, administration and scoring of assessment, interpretation and feedback on assessment and application of the results. This must be done in line with international standards.[44] Distinctions must be drawn between the tester's information gathering, diagnosis and intervention instruments.[45] Professional (meaning accountable, objective and reliable) judgement is required to

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38 Mothibe *Challenges in the polygraph testing of workers in South Africa* (2013 dissertation UJ) 14 and 20.

39 Scheithauer and Kalula "Employee polygraph testing in the South African Workplace" 2007 *Development of Labour Monograph Series* 1 64 and Scheithauer and Kalula (n 28) above.

40 See Laher and Cockcroft (n 2) 307, Mauer (n 31) and Tustin "Survey: Issues facing organisations using assessment in the workplace" 2007 1 22 5 http://www.pai.org.za/PAI%20Research%20Report_Final.pdf. (29-09-2015).

41 People Assessment in Industry:
"Commentary on the proposed amendments to the Employment Equity Act" February 2011: https://www.siopsa.org.za/files/pai_ammendments_employment_equity_act.pdf (25-05-2015).

42 See the HPA (n 32) and Scheithauer and Kalula (n 39) 23 above.

43 See n 41 above.

44 See Mauer (n 32) 6 and s 3 (n 1) above.

45 Scheithauer and Kalula (n 28) above.

ensure that they have a certain capacity and impartiality when handling the resources and the roles that they are playing in the decision-making process.[46]

Psychometric testing that is being conducted in the workplace must be done in an environment that is conducive for the type of test that has been designed for what the employer needs it for. This research found that it does not require registered professionals to do the tests but that the tests that is being used must certified as per section 8 of the EEA. Some may argue that only registered professionals can conduct the tests and to get a clear answer on this, it is submitted that the courts will have to adjudicate on this.

2.4 *Human resources and psychological perspectives on the application of psychometric tests and other similar assessments*

We still need to be cognisant of the fact that section 8 of the EEA deals with psychological testing and other similar assessments as a means of determining entry into the workplace and access to development, appointment or some form of upward mobility.[47]

It is noted that psychometric testing is popularly deemed to be scientific and that it can be efficiently used for selection and placement purposes if used responsibly and carefully.[48] It seems like the words 'testing' and 'assessment' are used interchangeably, when there are clear differences in the application of it, from a psychological perspective. Assessment includes testing but testing does not include assessment.[49] It is submitted that the legislator intended that this would prevent abuse if only one of the words was included and assessment practitioners would try to fall outside the scope of the definition.

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[46] See Donald, Thatcher and Milner (n 2) 335 and Scheithauer and Kalula (n 28) 5 above.

[47] Donald, Thatcher and Milner (n 2) 333 above and see Board Notice 93 (n 72) below for the list of psychometric tests that are certified which falls in the category of other similar assessments. Dupper *et al Understanding the Employment Equity Act* 2009 79.

[48] De Bod *Ethical challenges in psychometric testing in South Africa* (2011 dissertation UJ) 12 and 13.

[49] See n 48 18 and 19 above.

Human resource managers use psychometric testing not only to select appropriate candidates but also to identify skills and abilities.[50] From a human resources perspective one needs to understand why testing is required and have a proper job analysis. The tests must be aligned with the job competencies and proper statistics must be kept to enable you (employer and employee) to defend yourself.[51]

The commonly used selection process is the "successive hurdle technique" where at each hurdle with a different screening step some candidates are eliminated. Employers tend to focus on having good advertisement for the vacancy that clearly sets out the job requirements and thus phase one would normally consist of shortlisting candidates based on qualifications and work experience based on their *curriculum vitaes* and those not meeting the minimum criteria will not move on to the next level. Phase two could then be interviews for shortlisted candidates who are subjected to a clear and concise interview based on well prepared questions for a comprehensive, diverse and competent panel is found to be more suitable.[52]

Psychometric testing is a limitation placed on selection procedure to prevent unfair discrimination by virtue of the EEA.[53] Theron suggests that the human resources fraternity is hiding behind the choice of selection instruments and this would give them salvation and immunity from the EEA.[54] Where fairness and affirmative action is an issue the role of human resources in the selection process becomes very important and has been placed under the microscope for good reason, especially by way of access to employment. It is this uncommon "uncritical embracing" of psychometric testing in the workplace that has been met with huge opposition when it was to be included in the EEA.[55]

When testing the candidates, the main focus from a legislative and also scientific perspective are as listed in section 8 of the EEA. The section refers to the reliability of

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[50] See n 22 1176 1177 above.
[51] Van der Merwe "Psychometric testing and Human Resource Management" 2002 *South African Journal of Industrial Psychology* 77 86 78.
[52] See n 22 1177 1178 and n 51 78 above.
[53] Christianson "Polygraph testing in South African workplaces: 'Shield and sword' In the Dishonesty Detection versus Compromising Privacy Debate" 2000 *ILJ* 16 38 17.
[54] Theron "Confessions, Scapegoats and Flying Pigs: Psychometric testing and the Law" *South African Journal of Industrial Psychology* 2007 102 107 102.
[55] See Laher and Cockcroft (n 2) 307 and n 54 above.

the test which refers to the consistency of examiners in the testing. It further indicates validity as a requirement which refers to accuracy and even though the test might be reliable as a prerequisite, it might still not be valid because of inaccuracy of the test results and whether it tests what it purports to be testing. Bonthuys reflects on four types of validity and goes into great detail about it.[56] Standardisation refers to the independence and impartiality of the procedure to the assessment practitioner.[57] To ensure the validity of the tests, the tests must be used for the purposes for which they are intended.[58]

Van der Merwe does however, still suggest that even with all the challenges hanging over the head of psychometric testing, it still remains the most reliable and effective method to aid the selection process.[59]

2.5 *The challenges facing psychometric testing*

Psychometric testing and other similar assessment in the workplace is a highly contentious area and by the reading of the research on it, it is trite that it comes with numerous challenges and these challenges must be addressed. The challenges can be raised as defences from a legal perspective and these are validity, reliability and non-bias as requirements in terms section 8 of the EEA.

Imbalance of power between the test-taker and the assessment practitioner exists at all times and this brings a challenge in itself which clashes with the ethical dilemma of unfair and unethical testing practices.[60] The International Guidelines for Test Use developed by the International Test Commission (ITC, 2001) are referred to as follows by Foxcroft:

> "The ITC Guidelines indicate further that the goal of ethical testing practices will be attained by practitioners who have the necessary competencies, spanning the entire process of testing; a sound knowledge of psychometrics and testing;

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[56] See n 22 1187 and n 53 25 above. Read Bonthuys for an in depth explanation on types of validity.
[57] See n 53 26 above.
[58] See n 51 84 above.
[59] See n 51 77 and 85 above.
[60] Foxcroft (n 21) 2 above.

> and an understanding of the broader social, cultural, political, and legal context in which testing is used and the manner in which such factors might affect test results, their interpretation, and the use to which are put."[61]

Practitioners must have a multicultural awareness and worldview according to Foxcroft.[62]

Foxcroft correctly states that from a scientific and employment equity viewpoint the validity, ethicalness and constructiveness of the outcomes of the testing must be scrutinised.[63] For these purposes Foxcroft advises that the assessment practitioner must acquire knowledge of the test –taker to enable him or her to understand the test-taker itself; have different perspectives and the awareness of their own prejudices must be taken into account.[64] This will in turn enable the assessment practitioner to make an independent and impartial decision free from bias and more reliable test results. The chances are high that the assessment practitioner would not speak the same language as the test-taker. Testing in itself is a Westernised activity.[65] There is a need to get informed consent to enable the assessment practitioner to ethically conduct the test or assessment. The informed part is very important because how do you properly explain this if there is already a language barrier.[66]

The assessment practitioner must also spend sufficient time to ensure that the chosen test, time of the tests as well as the location is appropriate.[67] Ethical issues during test administration and after using tests in the assessment context has different consequences from a legal perspective but can influence the validity and reliability of the test.[68]

The language barrier forms an important factor and whilst Foxcroft notes the fact that the test-taker has the right to be tested in the language of his or her choosing, you

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[61] See Swanepoel and Kruger (n 14) 10 and 11; Foxcroft (n 21) 2 and n 48 above for further reading on the ITC Guidelines.
[62] Foxcroft (n 21) 2 above.
[63] Foxcroft (n 21) 3 above.
[64] Foxcroft (n 21) 3 above.
[65] Foxcroft (n 21) 4 above.
[66] Foxcroft (n 21) 5 above.
[67] Foxcroft (n 21) 5 above.
[68] Foxcroft (n 21) 9 10 above.

cannot automatically assume that this would be his or her home language because the home language versus the language they were schooled in might be and in most instances are different.[69]

All of these nuances and challenges must be taken into account when assessment is conducted and for these purposes some researchers have looked at whether some testing is relevant for the intended purpose and conducive to the environment. Van der Merwe in his research paper says that organisation C in the empirical research on Table one is identified as a government department responsible for security, law and order. We can reasonably deduce that this is the SAPS.[70] From Table two and four we can see that they make use of a clear selection procedure which includes psychometric testing, however, it is not used for promotions but for selection, placement, training and transfers. SAPS have psychometrists and psychologists conducting the testing for them and who are in their employ.[71] From Table three we can deduce that they use six of the different proposed tests and when read with the newly published classified and certified tests, we can see that five have been classified but not reviewed and one has been classified as a test under development. The latter was also the most widely used test, Sixteen Personality Factor Questionnaire (16PF).[72] This is worrying since Van der Merwe criticised the use of the test and raises an argument that it might not be that valid scientifically.[73]

Steyn and Nel were looking at suicide levels in the SAPS and whether their current selection process that made use of psychometric testing were adequate in dealing with this issue. They suggested that the test battery does not specifically test for suicidal behaviour but addresses the indirect aim of the psychometric testing in the selection criteria to select candidates who can deal with the strain of the police work.[74] They briefly list some of the admission requirements for basic training by SAPS but excluded a main one, that of not having a criminal record. They further confirm that

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[69] Foxcroft (n 21) 8 above.
[70] See n 51 78 above.
[71] See Steyn and Nel (n 7) 12 and n 51 79 and 82 above.
[72] Board Notice 93 of 2014 published under *Government Gazette* Notice number 37903: "List of classified and certified psychological tests" http://www.hpcsa.co.za/uploads/editor/UserFiles/downloads/psych/BOARD%20NOTICE%2093%20OF%2015%20AUG%202014.pdf 112 124 (30-10-2015).
[73] See n 51 80, 81 and 84 above.
[74] Steyn and Nel (n 7) 12 above.

the Basic Traits Inventory (BTI) which is used as the second leg of assessment apart from the cognitive assessment and deals with the personality assessment. They unfortunately do not state which tests are used for the cognitive assessment. This presupposes that the BTI is the only component that can closely enough assess suicidal tendencies at this level and it is suggested that even though it is not designed for that specific purpose it still has the capacity to be able to make these inferences.[75]

The test that is being used in comparison with the other more reliable and suicide specific test is sufficient and the test used does receive some support from other researchers.[76] It is however noted that the BTI is not on the new list of classified and certified psychological or psychometric tests.[77]

2.6 *New criteria of certification and the challenges in psychometric testing*

The legislator decided to include a further requirement in that psychological tests and other similar assessments used in the workplace must be certified by the HPCSA or any other body that was authorised to certify these tests.

All stakeholders dealing with psychometric assessment are in agreement that this tool is not able to provide assurance that there would be no unfair discrimination in the workplace.[78] Even though psychometric testing supposedly goes to the essence of the selection process of the best candidate, it seems like it is more about the interpretation of the information gathered. The assessment practitioner is required to account for all factors like variance in the criterion and clearly explain it, otherwise errors will creep in.

In December 2012, the Society of Industrial and Organisational Psychology of South Africa said that the tools need to have “sound psychometric properties” (therefore standardised, valid, reliable and objective), while certification will be impossible to

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[75] Steyn and Nel (n 7) 13 above.
[76] Steyn and Nel (n 7) 16 above.
[77] See n 72 above.
[78] See Scheithauer and Kalula (n 28) 5; n 39 3.2 and Public submission concerning the Employment Equity Amendment Bill [B31-2012] (People Assessment in Industry – August 2013) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130808sioosa1.pdf (25-05-2015).

implement and execute.[79] One reason is because the HPA does not make provision for any form of certification and as argued above, psychometric testing is not part and parcel of tests used in the health profession.[80] Some psychologists suggest that the tests fall outside the scope of the HPCSA due to the nature thereof and its uses and should be treated as such. Therefore the HPCSA should not have jurisdiction in classifying or certification of the tests. Unisa suggests that it has been confirmed by the High Court that it is not required that psychometric testing or similar assessments should be done by a registered health professional and this is one of the arguments as taught by them.[81]

The Association of Test Publishers of South Africa said it very aptly in their commentary in 2013 when Prof Kriek surmised that the:

> "…problem with placing the certification in the wrong hands due to misinterpretation and giving it too broad scope. In the employment context it is meant to deal with competency or skills assessment which is not psychological."[82]

He states further that even if psychological tests or other similar assessments were certified, they could still be used unfairly and he suggests the regulation of the use of assessment by the organisation rather than the certification of a test or assessment.[83]

Classification of psychological tests are done by the HPCSA and it has published two lists so far. The current list of classified tests has been updated from "Form 207" (a list last updated in 2010 and published on the official website of the HPCSA in November 2014) while the new one was updated in August 2014 and only published onto the

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79 See Foxcroft (n 21) 7 and n 29 2 above.

80 See PAI submission (n 7), HPA (n 32) s 33 above and the list of tests being classified as being psychological tests: http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/psych/psychom_form_207.pdf (03-06-2015).

81 See Unisa (n 23) above and n 51 77 above.

82 Association of Test Publishers of South Africa: Oral presentation: Parliamentary Portfolio Committee for Labour: http://atp.org.za/assets/files/ATP_Oral_Presentationat_Parliament_Slides.pdf (02-09-2015).

83 See n 82 above.

HPCSA's website after June 2015.[84] The list on Form 207 has about 270 tests listed on it and comes with its own little disclaimer as well.[85]
This disclaimer reads as follows:

> "Some important issues need to be pointed out to the users of psychological tests, measures, and instruments:
>
> 1. test users may find that many tests that are currently in use are not on the list. In such an instance it means that they have either … be[en] under classification [or] consideration or they might not have been submitted for classification purposes to the Psychometrics Committee. The onus rests on test users to refer such tests to the Psychometrics Committee, even if they were developed overseas; and
> 2. it needs to be noted that even although a test may be classified as a psychological test, the onus rests on the test user to ensure that:
>
> * the test is valid for the purposes for which it is being used;
> * appropriate norms are consulted; and
> * where tests that have been developed in other countries are concerned, appropriate research studies need to be undertaken to investigate whether the test is culturally biased and special care should be taken when interpreting the results of such tests."[86]

According to the HPA and Form 207, these tests can only be performed and administered by registered psychologists in terms of the HPA; and certain tests can be administered by psychometrists, psychotechnicians and other professionals depending on the proviso indicated.[87] The new list does not have this disclaimer or proviso and only states that the "… the list of tests, which are classified and certified for use by persons registered in the profession of psychology ...."[88]

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[84] See Form 207 (n 80) above; the HPCSA has updated it now and the new list has been published under; Board Notice 93 of 2014 (n 72) 112 124 and the Annual Report of the HPCSA 2013/2014 (n 34) 51 above.
[85] See Form 207 (n 80) and this while Board Notice 93 of 2014 (n 72) above does not have a similar disclaimer.
[86] See Form 207 (n 80) above.
[87] See Form 207 (n 80) and Board Notice 93 of 2014 (n 72) above.
[88] See Board Notice 93 of 2014 (n 72) 112 above.

In terms of the reading and interpretation of the wording of both texts, there are vast differences between the two. The first one clearly states which tests can be used, who can use these tests and attempts to prevent abuse or confusion. Board Notice 93 of 2014 throws the interpretation and application wide open as to who these persons are that are registered in the profession of psychology that can use these tests. Is it students, interns, psychologist and psychotechnicians, and so on?

It is noteworthy to say that we do find the *"Thomas International Personal Profile Analysis"* test on the list of 303 tests.[89] The tests have now been categorised into:

a. Tests that have been classified and reviewed: 67 (includes the "Thomas Profile" test);
b. Tests that have been classified but not reviewed: 144
c. Tests that have been classified as test under development/ being adapted and which should not be used for financial gain: 92

The number of listed tests have increased by 33. While some tests were duplicated on Form 207 and some not included on the new list, the new list also got several new tests but most are under (b) and (c).[90]

The testing procedure is normally in written form where the test subject would complete a questionnaire under the supervision and control of the assessment practitioner.[91] The questionnaire is prepared beforehand and will cater for the inherent job requirements as provided by the employer. The assessment practitioner will, after completion, evaluate the answers and prepare a report on it for the employer. The basic features that are looked at here are that the test is standardised, valid and reliable, free from bias and should be able to function objectively in any given circumstance.[92] The outcomes will be scientifically valid and reliable because it will not depend wholly on either the tester, the test subject or the questionnaire. All of these factors should influence it but it may be that after the test is done that even a different

[89] See *Buthelezi* case (n 3) above.
[90] Compare Board Notice 93 of 2014 (n 72) and Form 207 (n 80) above.
[91] See Tustin (n 40) above.
[92] See Scheithauer and Kalula (n 28) 112 and n 53 27 above.

tester will come to the same or similar conclusion based on the answers given by the test subject. Therefore, all employees should get the same questionnaire depending on the vacancy applied for and the purpose of the test (recruitment, promotion or performance management) and they will be assessed on the same basis.

Mahembe and Engelbrecht proposed that the cultural intelligence scale (CQS) could be used for applications such as selecting, training and developing a more culturally-competent workforce. The use of cultural intelligence as ways of enhancing effective social interaction amongst individuals from different cultures is very important and psychometric tests deal with the nuances found in the South African workplace.[93] They reveal how to scientifically show validity and reliability of a psychometric test in the South African milieu.[94] This improves diversity management while contributing to the legislative requirement.[95] Prof Tustin in his survey and research for SIOPSA looked at a fairly ethical and cross-cultural environment.[96] Tustin made use of statistics, demographics and certain industries.[97] He found that the strength of assessing in the workplace is the open ended nature of research, while the alternatives are that it is a supportive tool rather than a measuring stick. It promotes fairness, utility and organisational development by providing a pool of information.[98] The weaknesses lie in the abuse of the results and the inconsistency in the use. Mahembe and Engelbrecht further found that more research is needed on assessment and there is a lack of cross-cultural research.[99] The other challenges are the overrating of assessment used for the purpose of retrenchment and the fact it is expensive and too job specific.[100]

There are opportunities arising for psychometric assessment in the integration of assessment for strategic compliance and effective use of the EEA to increase best

[93] Mahembe and Engelbrecht "A preliminary study to assess the construct validity of a cultural intelligence measure on a South African sample" *South African Journal of Human Resource Management* 2014 1 7 1. It is noted that CQS is not part of any of the lists of classified, reviewed and/or developing tests.
[94] See n 93 2 above.
[95] See n 93 7 above.
[96] Tustin (n 40) above.
[97] Tustin (n 40) 4 above.
[98] Tustin (n 40) 6 and 7 above.
[99] See n 93 above.
[100] Tustin (n 40) 8 and 9 above.

practice.[101] There is a need to understand the influence of mother tongue language on cultural bias in testing.[102] The threats to assessment in the workplace are: quick start assessment tools, slow registration of instruments, culturally biased assessment tools, administration by who and limited authentic South African instruments.[103] Shanahan, Anderson and Mkhize further stated that "the lack of suitable psychometric instruments, which may be validly used for gathering mental health data in our multi-cultural society, is a problem which must be addressed with some urgency."[104] Other challenges like culture-free and fair assessment, reduced costs and improved competitiveness in the supply of psychometric testing are also important to bear in mind. The administration of the test is simple and may be performed by non-professionals but this does not take into account the high levels of illiteracy in South Africa.

Scheithauer and Kalula reiterate that "…the importance of proper pre-job screening procedures [is] to eliminate unqualified and dishonest applicants and encourage honest applicants."[105] Psychometric testing is a useful tool in this sense and it can save time and money whilst being very efficient when used properly. The pre-employment selection procedure has become very comprehensive and requires thorough, efficient and effective approaches that comply with the legislative requirements.[106] It has been argued that polygraph testing is out of the question and might fall under a category of consensual or contracted procedures that is not regulated by legislation and not scientifically shown to be valid and reliable.[107] The SAPS uses polygraph testing, yet based on ethical and moral standards it is found not to be the most reliable tool even in the criminal justice system.

There has been a trend over the last few years in that the extent to which human resources, recruitment and industrial psychology has engaged with the business of

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[101] See Tustin (n 40) 9 above and Campling "Using psychometrics to select the best staff" *IM Graphixmag* 2012 28.
[102] See Tustin (n 40) 10 above and Shanahan, Anderson and Mkhize "Assessing psychological distress in Zulu speakers: preliminary findings from an adaptation of the SQL-90-R." *South African Journal for Psychology* 2001 1 9.
[103] Tustin (n 40) 10 above.
[104] Shanahan; Anderson and Mkhize (n 102) 1 above.
[105] Scheithauer and Kalula (n 28) 104 105 above.
[106] Donald, Thatcher and Milner (n 2) 333 above.
[107] See Scheithauer and Kalula (n 28) above.

psychometric testing. Some businesses even appoint registered psychologists or in-house psychometrists to perform these tests.[108]

The concept of psychological testing in the workplace is incorporated into the South African labour legislation by virtue of a prohibition of unfair discrimination. In the initial Green Paper for the Act, it only dealt with psychometric testing.[109] Scheithauer and Kalula confirm that the legislator changed this to a broader and more inclusive scope to prevent abuse.[110] Employers must now go to great lengths to fall outside the scope of psychological testing and similar assessments but could easily have been able to put themselves outside the scope of psychometrics.

The employer is burdened with an extra duty to ensure the certification and that it has been executed by an appropriate body. Further problems that will raise are the scientifically-shown validity and reliability and the legal fairness of the tests which the researcher shall be testing on the available resources from an equality perspective.

[108] Campling (n 101) 28 above.
[109] See Green paper (n 5) above.
[110] Scheithauer and Kalula (n 39) 21 and 22 above.

CHAPTER 3

HISTORICAL CONTEXT OF PSYCHOMETRIC TESTING

3. *Introduction*

The South African history, the good, the bad and the ugly thereof and what necessitated it has been surmised in many writings. The past cannot be wished away and the effects thereof must now be endured and rectified, that includes unfair discrimination, victimisation, abuse and inequalities in all forms. The legislation enacted during apartheid and in the new dispensation had overarching goals and the latter's were mainly an attempt to secure equality and eradicate the existing inequalities.[111] It is because of this and as reflected below, that Currie and De Waal state that "[t]he apartheid political and legal system was squarely based on inequality and discrimination."[112]

Psychometric testing in the workplace did not just fall out of thin air and because of the nature of its use in the workplace it can be used for unfair discrimination and a tool to hide behind. From a historical perspective there is a need to indicate how these types of testing came into being and its uses in South Africa, which will show how the apartheid government abused this tool in order to legitimise the brutal discriminatory measures they implemented. In this chapter the researcher sets the backdrop to the relevance and the need for the regulation of psychological or psychometric testing, indicating how it was abused as a tool for unfair discrimination in the workplace during the pre-democratic era. The researcher also briefly describes its uses during the democratic era and what lessons were learnt from this historical view that could have necessitated the inclusion of section 8 in the EEA.

[111] See for example the Preamble to the Constitution (n 6) above.
[112] Currie and de Waal (n 13) 231 above and Dupper *et al* (n 47) 1 3 above.

3.1 *Pre-democratic era*

Foxcroft writes that "[p]sychological testing was brought to Africa in the colonial era, and is not something that is indigenous to Africa and its people".[113] By this it meant that Africa has been exposed to these types of testing for decades. It is the different locations, multiculturalism, language barriers and types of tests that made it complex and difficult to administer during these periods; but most of all how and what it was used for as well.

In South Africa, much labour legislation was enacted and amendments made thereto during the pre-democratic era (more specifically the apartheid era). This did not prevent discrimination but it rather fostered it and kept it alive and thriving for decades.[114]

Several events that occurred over the years and particularly during the apartheid era, necessitated the amendments to the legislation by virtue of reports submitted by established commissions.[115] The discrimination that took place over the years as fuelled by the promulgation of legislation to oppress the black population, facilitate apartheid and further exclude the black population from collective bargaining and negotiation in the workplace with no or limited recourse to address their disputes if any arose.[116] Giliomee and Mbenga mentioned in their book on the "New History of South Africa" that "[o]nly in the workplace would black and white workers meet, in predefined, strictly hierarchical relationships."[117] This was the way in which apartheid manifested

[113] Foxcroft (n 21) 4.

[114] For example, see: Industrial Conciliation Act 11 of 1924 (Amended by Act 24 of 1930); Industrial Conciliation Act 36 of 1937; Industrial Conciliation Acts 28 of 1956, 94 of 1979 and 95 of 1980; and Labour Relations Amendment Acts 57 of 1981, 51 of 1982 and 2 of 1983 and n 8 6 and 16.

[115] Report of the Industrial Legislation Commission (UG 37-1935); Report of the Industrial Legislation Commission of Enquiry (UG 62-1951) and Report of the Commission of Inquiry into Labour Legislation (RP 47/1979). See Du Toit *et al* (n 114) above.

[116] Native Labour (Settlement of Disputes) Act 48 of 1953, as amended by the Bantu Labour Relations Regulation Amendment Act 70 of 1973 and Act 84 of 1977. This was also done by way of education and land ownership. For further reading see: *Sebolai* "Disparate Impact, Justice and fairness: A case study of the test of academic literacy levels" 2014 *Journal for Language Teaching* 89 107; see Giliomee and Mbenga *New History of South Africa* 2007 and *Zondi v MEC Traditional and Local Government Affairs* 2005 3 SA 589 (CC) on another mechanism of exclusion.

[117] Giliomee and Mbenga (n 116) 199 above. It is noted that there were other influences on the Apartheid struggle, like Helen Suzman, Trevor Huddleston, Albie Sachs, etc. The research is primarily focusing on the workplace.

itself by setting clear boundaries and limiting opportunities for engagement, while only the truly oppressed committed and continued with the struggle. The workplace had to be regulated much more thoroughly due to it being a meeting place of many blacks and the interaction with whites.

The Union was created in 1910 and racial segregation and discrimination on political aspects saw the birth of the apartheid regime in 1948. Even in the context that the United Nations Organisation was formed after 1948 and the guarantees of human rights, we still saw this regime remain in place until 1994.[118] From 1948, the government stopped being part of the United Nations and started implementing apartheid by way of legislation and land ownership was restricted to whites only.[119]

There was a drastic rise in labour unionism in South Africa during and after World War I. Rapid inflation and labour migrants contributed to this. The strike in 1922 by white mine workers, involving more than 25 000 workers resulted in, 5000 being arrested and over 150 killed. This made the government aware of the impact of trade unions and the powerful vehicle of the collective employee body.[120] The government then decided to recognise the unions in order to regulate them. Thus, the promulgation of the Industrial Conciliation Act 11 of 1924 was aimed at the organised employers and the organised white labour force. Black workers were automatically excluded because they were not included in the then definition of employee. The Industrial Conciliation Act strengthened and intensified separation and exclusion, specifically in the workplace.[121]

Jobs in mining were reserved for whites and coloureds by virtue of the Mines and Works Act 25 of 1926.[122] Black employees were only allowed to work within a specific area for blacks, could not strike and doing skilled labour in a white area was a crime. Jordaan and Ukpere state that Dr. Hendrik Verwoerd (known as the architect of

[118] Thomas "Harmonising the law in a multilingual environment" 2008 *Fundamina* 133 154 133.
[119] Thomas (n 118) 140, 145 and 146 above.
[120] See Du Toit *et al* (n 8) 6; Giliomee and Mbenga (n 116) 245 247 above and Jordaan and Ukpere "South African Industrial Conciliation Act of 1924 and current Affirmative Action: An analysis of labour economic history" 2011 *African Journal of Business Management* 1093 1101 1094.
[121] Du Toit *et al* (n 8) 7 above.
[122] Jordaan and Ukpere (n 120) 1094 above and these were just some of the forms of racial segregation and discrimination.

apartheid) set out to create a "… society where inequity and segregation were at the heart of economic activities..." and further "…that the Industrial Conciliation Act of 1924 paved the way for…" apartheid legislation and was used by government to enforce segregation.[123]

From the 1930s to 1955, one of the largest bodies of trade unions in South Africa at the time was in existence - the South African Trades and Labour Council – Industrial Commercial Workers Union.[124] Even though the Apartheid regime got into full swing from 1948, there were already measures of discrimination and segregation based on race in place during the colonial era.[125] From 1922 up until 1994, the legislation in the labour arena were formulated to cater for white superiority. Due to this, a huge and unprecedented gap was created in terms of wealth, work experience, education which resulted in inequality.[126]

When reflecting on the ethical challenges for psychometric testing De Bod identifies correctly one of the main challenges brought by the use of psychometric testing as a mechanism to justify apartheid. He asserts that from the colonial era onwards psychological testing was used in South Africa and it cannot be seen separately from the historical context. It is emphasised that psychological testing was used as a tool for the political dispensation and the hierarchical relationship as constructed by the government in order to legitimise and prove the rationality behind it.[127] Sebolai in his research confirms that the segregation existed from 1948 until the transitional period and reiterates the discrimination with relation to education specifically in the form of legislation by way of the Bantu Education Act 47 of 1953.[128] Laher and Cockcroft supported the view in that most psychologists during the pre-apartheid and apartheid period used the tests and other similar assessments to prove the inferiority of black people to white people to support the racial discrimination agenda.[129]

[123] Jordaan and Ukpere (n 120) 1095 above.
[124] See Giliomee and Mbenga (n 116) 248 250 and Jordaan and Ukpere (n 120) 1098 above.
[125] See Thomas (n 118) 133 and Giliomee and Mbenga (n 116) above.
[126] Giliomee and Mbenga (n 116) 314 326 above.
[127] See n 48 23 above.
[128] Sebolai (n 116) 89 above.
[129] Laher and Cockcroft (n 2) 304 306 above.

They further suggest that most of the focus of psychological assessment during this period was on educational applications. It was expanded by research on psychological assessment in organisational field on white workers in the areas of selection, screening and counselling. This fueled the justification of separate developments based on race.[130] The "[t]ests were consistently normed on White standardisation samples and used, without apology, with Black individuals."[131] Based on research of writers like Bhomke and Tlali, Laher and Cockcroft emphasise that there was a feeling of necessity "to 'understand' the African personality in order to justify the inferiority of Africans to other races, and to control and modify African behaviour."[132]

The South African psychology arena changed somewhat in 1960 when the South African Psychology Association (SAPA) started accepting black members Some psychologists could not accept these changes and started their own organisation but the change seems to have been premised on pressures from the international community due to sanctions. South African psychologists now also started to create their own tests and other similar assessments, still for particular race groups to the exclusion of blacks.[133] Laher and Cockcroft quote Claasen to echo that psychological testing and other similar assessments are closely linked to apartheid.[134]

Bonthuys in her research notes that the Wechsler Intelligence Scale test that was the most commonly used intelligence based test was standardised in 1960, and in 2002 was commonly used in the government's security, law and order department.[135] Practitioners agree that these types of tests can have a negative impact on previously disadvantaged groups, and practitioners are cautioned on the grey areas and challenges when dealing with the assessment of these groups.[136]

Most of the work in terms of trying to rectify this injustice had to be fought at a collective bargaining level and inroads were made when black unions were recognised during the 1970s. From the 1980s the impact was seen by political structures. They were

[130] See n 22 1183 above.
[131] Laher and Cockcroft (n 2) 305 above.
[132] Laher and Cockcroft (n 2) 305 above.
[133] Laher and Cockcroft (n 2) 304 306 above.
[134] Laher and Cockcroft (n 2) 303 above.
[135] See n 22 1178 and n 51 81 above.
[136] See n 22 1183 above.

subsequently incorporated into the struggle for freedom. Due to this, the fight for economic freedom and legislative changes in the labour laws and workplace was one of the priorities when democratic changes were imminent.[137]

3.2 *Democratic era*

After 1994 changes in legislation were imminent to address the inequalities of the past and this had to be done quickly and efficiently. Du Toit aptly notes that within months after the first democratic election, the new Minister of Labour requested the amendments to the labour legislation. The different stakeholders engaged vigorously with the department in developing the labour market policy and the LRA was born within the next few years after detailed and lengthy deliberations.[138]

During the transitional phase, trade unions vehemently opposed testing in the workplace; and this was reflected in the earlier drafts of the EEA as researched by Tredoux in 2013. Several stakeholders, like PsySSA lobbied for its inclusion in the legislation and section 8 was born out of these deliberations.[139]

The above being said, we still need to note that "[p]ost-apartheid South Africa is not without divisions, and the social rift that has developed over the last 20 years is no longer based on race, but on income and social class."[140] It seems like Laher and Cockcroft suggest that the tests have taken a different root of exclusion which is not purely based on race but rather class and catering for the educated, rich and developed sectors and thus excluding the marginalised, illiterate, poor and disenfranchised people.[141] They support this view by stating that the educational inequalities are clearly evident and can be abused.[142]

We need to take cognisance of the fact that black people were marginalised and segregated to the outskirts of society, while being given the scraps from the table of

[137] Du Toit *et al* (n 8) 14 above.
[138] Du Toit *et al* (n 8) 17 above and Labour Relations Act 66 of 1995.
[139] Laher and Cockcroft (n 2) 307 above.
[140] Laher and Cockcroft (n 2) 309 above.
[141] Laher and Cockcroft (n 2) 309 above.
[142] Laher and Cockcroft (n 2) 309 above.

employment. They got the jobs that the white man did not want or found demeaning to their superior stature in society. They would not even have to think of applying for positions that were not allocated or made available for them to possibly get, because it was above what they could and should do.

This meant that democracy which is reliant on the Constitution brought with it changes which influenced the workplace and therefore all inequalities had to be identified and regulated.

3.3 *The need to regulate psychometric testing*

The issues relating to racial discrimination, specifically in the workplaces raised questions about the place of psychometrics in relation to psychological testing and more specifically why it was needed to regulate its use in the workplace.[143]

The major criticism was that it was used as a tool that was culturally biased and needed to be strictly regulated.[144] If not regulated and left open for possible use and abuse that would have created more problems than solutions. There was definitely a clear need to insert a provision to regulate these types of testing. The nature and complexity of psychometric testing made it difficult to put forward a section that comprehensively deals with it. It also came with its own challenges and some of them were the following:

i. it was problematic in terms of the tests that were considered to be outdated at that time;
ii. it was culturally and linguistically inappropriate;
iii. there was a need for other languages;
iv. ability for the board to control and regulate test usage; and
v. uncertainty about the definition of psychological test and ethical issues.[145]

[143] See n 48 11 above.
[144] Donald, Thatcher and Milner (n 2) 334 above.
[145] Laher and Cockcroft (n 2) 308 above.

Laher and Cockcroft list a few tests that were redesigned and standardised for the new South African context, but it is not comprehensive. There was a period of reclassification of psychological tests and restrictions of use and administration of tests with reference to Form 258, 2013.[146]

The use of non–discriminatory assessment procedures like the dynamic assessment approach which is prevalently used in South Africa for equity purposes is preferred due to unfair discrimination in the past. There has been little local test development in South Africa over the past sixteen years.[147]

3.4 *Lessons learnt and current position*

The lessons from the above were clear that the government in its mission to not let the past repeat itself had to put measures in place to prevent it. The strongest mechanisms to prevent these types of abuses, protect human rights and ensure the promotion of equality was through properly constructed legislation. They had to ensure that the new legislation in turn did not create a new type of reverse racism; but that it was rather used as a vehicle to promote, create and ensure equality. With this in mind, the EEA set out with good intentions to achieve its purpose under the auspices and watchful eye of the Constitution and the international instruments such as Convention 111 of 1958 (which is discussed in more detail in chapter 4) on equality and unfair discrimination.

[146] Laher and Cockcroft (n 2) 308 above.
[147] Laher and Cockcroft (n 2) 311 above.

CHAPTER 4

REGULATORY FRAMEWORK

4. *Introduction*

In *Law@Work*,[148] the authors emphasise the fact that section 8 of the EEA is there for monitoring purposes and empowering employees and trade unions. It is also to inform employees, employers, trade unions, workplace forums, labour inspectors, directors general or the Commission on Employment Equity (the stakeholders) on how psychological testing and other similar assessment must be used in the workplace. The major purposes are thus monitoring and enforcement of compliance of the use of psychological testing and other similar assessment tools to prevent unfair discrimination in the workplace.

Donald, Thatcher and Milner differentiate between distributive justices,[149] procedural justice and interactional justice. For our purpose the most important is procedural justice. From a procedural justice perspective the tests requires standardisation, reliability and validity as indicated above by most writers on psychological testing in the workplace and mostly from the psychology perspective.[150] When dealing with the concepts relating to employment equity, it is a quote like the following that makes us concur about the status of psychometric testing and its uses: "Employment opportunities such as promotion, training and career development may depend on psychological or other assessment …."[151]

A question with regards to unfair discrimination is what relevance or weight the individual's personal characteristics carry when legitimately being taken into consideration by the employer when fairly discriminating? Van Niekerk refers to Currie and de Waal's analogy of equality with Aristotle's view on equality.[152] The relevant

[148] Van Niekerk *et al Law@work* 2015 115 with reference to s 34 of the EEA (n 1) above.
[149] Donald, Thatcher and Milner (n 2) 335 above.
[150] See Donald, Thatcher and Milner (n 2) 335 and n 1 above.
[151] See Van Niekerk *et al* (n 148) 115 above.
[152] See Van Niekerk *et al* (n 148) 115 and Currie and de Waal (n 13) 230 above.

criteria to assess similarly situated individuals with similarly situated treatment and this is because equality is a cornerstone for workplace equality. The employer is forced to discriminate on fair grounds between employees or groups of employees. If you do not treat people as individuals, a generalised assumption will come to the fore.[153] There must be an elimination of arbitrary decision-making because the decision must be based on relevant criteria which will improve the quality of the decision-making.[154] In the best candidate for the job approach the decision-making process must be rational and based on sound economic choices. When deciding on the fairness of discrimination, intent only becomes a relevant factor when dealing with the type of remedy that needs to be given.[155]

The EEA was drafted keeping in mind and applying Convention 111 of 1958 and the South African Constitution and that being said, that is the reason why as a departure point, we should be looking at the Constitution.[156] This study critically analyses the Constitutional foundation of equality and deals with the intricacies and application of specifically section 9 thereof. Further on in the chapter the study elaborates on the impact international and foreign law must have on employment equity and why before dealing with the EEA and specifically how the courts have applied sections 7 and 8 over the past 17 years. In the final instance, sections 7 and 8 is compared with each other to enable the study to reach a conclusion on how section 8 can be applied and make recommendations.

[153] See Van Niekerk *et al* (n 148) 116 above with reference to *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 (19) ILJ 285 (LC) 289 E-F and *Independent Municipal & Allied Workers Union & Another v City of Cape Town* 2005 26 ILJ 1404 (LC) and Convention on Discrimination in Respect of Employment and Occupation Convention 111 of 1958.

[154] Van Niekerk *et al* (n 148) 117 above.

[155] Currie and de Waal (n 13) 240 and 241 and (n 153) above.

[156] See Du Toit *et al* (n 8) 669 672 where the point is stressed that even though the Constitution is the foundation the primary point of departure when addressing an issue of employment equity, it should be the legislation enacted to enforce that right. Weight needs to be attached to contextualising and interpretation of the EEA. This is done with reference to cases like, *Minister of Health v New Clicks SA (Pty) Ltd* 2006 1 BCLR (CC*), Harksen* (n 3) above and *Larbi Odam* (n 199) below. Also see Van Niekerk *et al* (n 148) 119.

4.1 *Constitutional framework*

Thomas refers to the legal system as being mixed and not codified and that the judiciary has been cautious in developing the laws.[157] The Constitution is the supreme law in South Africa and it entrenches the Bill of Rights with overarching rights and fundamental values in the form of human dignity, freedom and equality.[158]

Since the EEA is premised on the constitutional provision in section 9 (equality) and clear reference is made within the EEA that it must further be interpreted and applied in line with international obligations such as Convention 111 of 1958, it seems appropriate that jurisprudence on substantive equality from the constitutional court must be of application.[159] It provides the last test in that we shall not ignore the Constitution when surveying the normative landscape of psychometric testing in the workplace.

Section 32 of the Constitution deals with access to information and the promulgation of the Promotion of Access to Information Act,[160] and with this in mind one can request and or demand access to the full psychometric report or file.[161] This will help with access to justice and enable the complainant to make an informed decision when referring his matter for resolution. It is all about having an equal opportunity and addressing the dispute on an equal footing.

[157] Thomas (n 118) 147 and 148 above and *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 par 55.
[158] See s 2 (n 6) above.
[159] See n 22 1189 1190 above.
[160] 2 of 2000.
[161] See Mauer (n 32) 4 above.

4.1.1 *Equality*

Equality is the first right that you encounter when reading the Bill of Rights and is considered to be the cornerstone of democracy.[162] It is considered as such due to its importance in the constitutional and democratic context itself.[163] It is submitted that this was necessitated by the apartheid regime and the fact that it was founded on inequality and discrimination. Therefore, the Constitution and the legislation enacted that had to comply with it, had to prevent this from happening again.

The right to equality is neatly placed within a chapter in the Constitution that is difficult to amend and that has not seen any amendments since the inception of the Constitution.[164] This right is a non-derogable right that clings to you as a person and even if it might seem straight forward it has been interpreted and adjudicated on many occasions.[165] It has been expanded to being a right that needs to be specifically addressed in the workplace as well and for this purpose the EEA was enacted.[166] Even

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[162] See Mphela *Religious dress code in the workplace* (2014 UJ) 4; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 74 and s 8 of the Constitution (n 6) above. S 7(1) and s 9 of the Constitution (n 6) reads as follows:

"7. Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

and

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

(2) 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.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless is established that the discrimination is fair."

[163] See Thomas (n 118); Dupper *et al* (n 112) 7 and Mphela (n 162) above.

[164] See Constitution (n 6) s 74 above. 17 amendments were made yet they have not detracted from the core rights in the Constitution the latest having been in the Constitution Seventeenth Amendment Act of 2012 – GN 72 under *Government Gazette* Notice number 36128, dated 1 February 2013 and under *Government Gazette* Notice number 36774, dated 22 August 2013.

[165] See Van Niekerk *et al* (n 148) 2 and Mauer (n 32) 2 above.

[166] See EEA (n 1), BCEA (n 199) below and LRA (n 138) above that also have mechanisms to ensure equality in the workplace and it is noted that there are other legislation enacted that deals with equality but not specifically in the workplace, like the Promotion of Equality and Prevention of Unfair

though the EEA makes specific reference to the constitutional right to equality in its preamble, the courts and legal writers have deduced that several other rights have a direct impact on the interpretation and application of the EEA and the provisions dealing with discrimination. The other most pertinent and relevant rights are for instance, the rights to human dignity, privacy, freedom and security of the person, freedom of religion, belief and opinion and the right to not be subjected to slavery, servitude or forced labour.[167]

The right to equality is the fundamental constitutional right on which the EEA is founded. It deals with the full and equal enjoyment of rights without oppression, fear or prejudice.[168]

4.1.1.1 *Formal and substantive equality*

There are two dimensions to equality, formal and substantive equality. While formal equality speaks to consistency and insisting that all people be treated in the same manner (procedural justice), it does ignore social and economic disparities.[169] It is with this in mind that substantive equality, with its focus on outcomes and insistence that social and economic disparities are relevant considerations to be taken into account to have a fair result, is favoured more. It is within this dimension that equality strives to and "[i]t has a clear aim of transforming existing structures of society to achieve equality."[170]

Substantively, the inadequacies of formal equality are addressed by engaging with the positive duty to promote the achievement of equality. When juxtaposing these two you will find them looking like this:[171]

Discrimination Act 4 of 2000 (PEPUDA). See also (n 8) 119; Du Toit *et al* (n 8) above and Thompson and Benjamin *South African labour law* 1965 C1-5.

[167] See Constitution (n 6) s 10, 12, 13, 14 and 15 above.

[168] See Constitution (n 6) and quotation of s 9 (n 162) above.

[169] See Van Niekerk *et al* (n 148) 118 and 119 (Utilitarianism); Currie and de Waal (n 13) 230 above and 231*; Hugo* case (n 162) and *Minister of Finance & another v Van Heerden* 2004 12 BLLR 1181 (CC) par 23, 24, 25 and 31.

[170] See n 22 1190 above.

[171] Currie and de Waal (n 13) 232 and 233 above.

FORMAL	SUBSTANTIVE
Sameness of treatment, treat alike in like circumstances	Outcomes based, tolerate disparity of treatment to achieve this goal
Same neutral norm or standard of measurement	Requires an examination of the actual social and economic conditions of groups and individuals

The inequality in the parameters of the application and implementation of the substantive equality principle is in order to achieve its objectives and this becomes problematic.[172] The problems come with the clear discrimination that seems unfair based on the listed ground of race for instance to advance and rectify the injustice of the past apartheid regime in order to achieve equality. In addition, section 9(2) of the Constitution promotes substantive equality and the Constitutional Court has even recognised that equality in this form has a restitutionary purpose.[173] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[174] the Constitutional Court confirmed that "[p]ast unfair discrimination frequently has ongoing negative consequences …."[175] In terms of transformation, it has been said that affirmative action measures that are constitutionally sound or valid are required.[176]

Therefore, the EEA and section 8 has its premise from this basis and works to ensure that equality is maintained, monitored and complied with within the workplace and within the confines of the Constitution.

[172] *Van Heerden* case (n 169) par 26 above and *Solidarity obo Barnard v Minister of South African Police Service* 2014 35 ILJ 416 (SCA) and *South African Police Service v Solidarity obo Barnard* 2014 10 BCLR 1195 (CC).
[173] Currie and de Waal (n 13) 233 above.
[174] 1999 1 SA 6 (CC).
[175] See (n 174) par 61 above.
[176] Currie and de Waal (n 13) 234 above.

4.1.1.2 *Direct and indirect discrimination*

In *Harksen v Lane,*[177] the court put forward a test for unfair discrimination which was utilised by our courts over many years, even though some have criticised it.[178] The test requires the following:

> "(a) Does the provision differentiate between people or categories of people? If so…
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, the discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is 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 comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specific ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her position.
>
> If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."[179]

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177 See *Harksen v Lane* (n 3) par 45 above.
178 See Du Toit *et al* (n 8) 672 674 Van Niekerk *et al* (n 148) 131 above.
179 Van Niekerk *et al* (n 148) 130 131 above.

The criticism labeled against the test is well founded and it is submitted that we would have to concur with Du Toit in this respect in that we must take into account the purpose of the discrimination and the broader social context.

When reading and applying rights on equality, it must be interpreted and applied contextually and purposively. To this end it is significant to note that the Preamble of the Constitution states categorically that it "recognize[s] the injustices of our past…"[180] while the founding values in turn stands on pillars of human dignity, freedom and equality.[181]

Discrimination means that we shall have to distinguish one from the other however to this and to see if it was done unfairly we must distinguish between "mere differentiation"[182] and legitimate differentiation. There needs to be legitimate reasons or substance for the differentiation and a rational correlation between the purpose and the differentiation. Differentiation will be unfair discrimination if it is on grounds listed in sections 9(3) and 9(4) of the Constitution. When law and conduct meets and there is discrimination but it is not unfair then we need to look at the impact on the complainant and others and not just in isolation.[183] There must be a "rational relation between the purpose of the law and the differentiation imposed by the law."[184]

There are particular forms of discrimination on illegitimate grounds which also forms part of the listed grounds. However, from a section 8 of the EEA perspective it is the tool that is listed and must be complied with but the use of the tool can be to discriminate on either a listed or an unlisted ground.[185] In the submissions made by relevant and participating stakeholders when the amendments to section 8 of the EEA was tabled, PAI for instance argued that very little to no cases were brought before the courts based on this section and it seems like there is an increased awareness according to them amongst employers. They further argued against the certification of psychological testing or similar assessment because the HPCSA can at the moment

[180] This is echoed in the Preamble of the EEA (n 1) and n 200 below as well as the approach followed in the *Hugo case* (n 162) par 41 above.
[181] See Constitution (n 6) s 1(a) and (b) above.
[182] *Prinsloo v van der Linde* 1997 3 SA 1012 (CC) par 25.
[183] Currie and de Waal (n 13) 237 above.
[184] Currie and de Waal (n 13) 241 above.
[185] Currie and de Waal (n 13) 243 above.

according to their governing legislation classify medical tests and they are still experiencing problems with the current test classification framework.[186]

The EEA must be interpreted in compliance with the Constitution (s 39) and giving effect to international law objective of South Africa, especially ILO conventions that were ratified.[187] However, we should be cautious in trying to circumvent the EEA and rely directly on the Constitution.[188] The courts have noted that this is not the correct way and where legislation is enacted due to the Constitution instructing the legislature to do so, we should first exhaust the remedies in the legislation before relying on the Constitution.[189]

Medical and psychometric testing falls squarely into this criteria for indirect discrimination because it starts off as based on an unlisted or arbitrary ground, wherein the criteria seems fair on the face of it, yet produces inequitable results.[190]

Section 36 of the Constitution reads as follows and it in itself is gatekeeper to the limitless use of rights within the Bill of Rights to trample over other rights and to strike a balance between them:[191]

> "Limitation of Rights
>
> 36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purposes of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and

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[186] See Mauer (n 32) 7 and 9 above.
[187] Olivier *et al The Role of Standards in Labour and Social Security Law: International, Regional and National perspectives* 2013 216 and 217.
[188] Currie and de Waal (n 13) 245 *Nehawu v University of Cape Town and others* 2003 24 ILJ 95 (CC) above.
[189] See *New Clicks* case (n 155); *Nehawu* case (n 188) above and Van Niekerk *et al* (n 148) 50 54 above and *South African National Defence Union v Minister of Defence and Others* 2007 8 BCLR 863 (CC) par 51 53.
[190] See Dupper *et al* (n 47) 80 and Van Niekerk *et al* (n 148) 125 and 126 above.
[191] See n 6 above.

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any entrenched in the Bill of Rights."

The courts have applied this section on numerous occasions and it is a protective mechanism that is not easily surpassed. It is suggested that due to the nature of sections 7 and 8 of the EEA and its origination that they shall overcome the test of section 36 of the Constitution.

For our purpose, because section 8 of the EEA has not even been properly tested at a preliminary phase, it does not seem fair to contemplate testing it against section 36.

4.1.2 *Impact and consideration of international and foreign law*

International labour standards are applicable to the South African workplace, since we ratified most of the core conventions and in this context because the EEA demands its application.[192] The influence it must have on our laws and application thereof is further emphasised by section 39 of the Constitution and section 3 of the EEA indicating that it may be taken into consideration.[193] Even though the Termination of Employment Convention has not been ratified by South Africa, it does still apply and just like the LRA,[194] it also requires a valid reason for dismissal.

Scheithauer and Kalula confirm that the ILO Conventions and Recommendations are our main sources of international (labour) law. They support this with reference to Servais' article on international labour law and notes that he says that it is due to its broad scope and comprehensive character.[195] These are rich and authorative sources which must be considered.[196] Their status will become more evident as it spills over

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[192] Ratification for South Africa of ILO Conventions: www.ilo,org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (29-09-2015).

[193] See Du Toit, *et al* (n 8) 76; Scheithauer and Kalula (n 28) 114 and 115 and Van Niekerk *et al* (n 148) 29 above.

[194] See n 138 above.

[195] See Scheithauer and Kalula (n 28) 114 and 115; n 37 27 33 above and Servais *International labour law* (2005) 63.

[196] Olivier *et al* (n 187) 216 which confirms the further constitutional obligations towards international and foreign law in sections 231, 232 and 233. Also see Rycroft *et al Reinventing Labour Law:*

into adjudication and not just international and foreign law but also regional standards that sets a crucial benchmark. Jordaan and Ukpere state the following:

> "The United Nations Economic and Social Council and the ILO have both defined affirmative action as a coherent packet of temporary measures, aimed at correcting the position of the target groups to obtain effective equality."[197]

This shows that even at an international level the notion of substantive equality carries a lot of weight.

Article 1 of the Convention on Discrimination reads as follows:

> "1. For the purpose of this Convention the term 'discrimination' includes-
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation; [and]
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation…
> 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

It is from this that the employment equity provisions were born and needs to still comply with when considering them at any stage.

Convention 158 of 1982 is also relevant in this context and the apposite parts in article 5 reads as follows:

> "5. The following inter alia shall not constitute valid reasons for termination:

Reflecting on the first 15 years of the Labour Relations Act and future challenges 2012 349, 358, 360 and 364. Cheadle confirms here that our labour laws are based on international standards therefore we are implored to consider it.

[197] See Jordaan and Ukpere (n 120) 1100 above.

(c) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin."

We can see that the criteria are virtually the same and only words that are not at the exact same place in the sentence construction. The only difference here as well is the additional criteria that the EEA has in the form of the specific mention of HIV status and provisions on medical and psychological testing.

There are newly established regional bodies, like the African Union and Southern African Development Community (SADC) that have enacted charters, declarations and policies ranging from social security to equality which our courts can also refer to and consider.[198] We also have relevant foreign law that can be used to advance the interpretation, application and understanding of the provisions and what was envisioned with it or at least how it can be applied.

These international and regional instruments and foreign laws have been in existence for several decades and have been considered by our courts but in limited instances and with limited effect.[199] It provides a solid foundation for the EEA and courts should regularly reflect on what it necessitates when interpreting and applying these legislative provisions.

[198] See for example: Charter of Fundamental Social Rights in SADC 2012: http://www.sadc.int/files/6613/5292/8383/Charter_of_the_Fundamental_Social_Rights_in_SADC2003.pdf (28-01-2016) and see articles 6,7,8 and 9 regarding equality; the new draft declaration Ouagadougou +10, Draft Declaration on Employment, Poverty Eradication and Inclusive Development in Africa, 2014 http://www.au.int/en/sites/default/files/newsevents/workingdocuments/14388-wd-draft_declaration_-english.pdf (28-01-2016) especially commitments 8 and 9 thereof.

[199] *Larbi Odam v Members of the Executive Committee for Education (North West Province) and another* 1998 1 SA 745 (CC) par 19 and 20 and *South African Transport & Allied Workers Union and others v Moloto NO and another* 2012 6 SA 240 par 20 and 58.

4.2 *Employment Equity Act*

We shall now have to take a closer look at the EEA itself and separate sections 7 and 8 to see how they compare with each other in theory and application.

Section 7 and 8 both deal with testing, the one medical testing and the other psychological testing. Both types of testing are administered and governed by the same professional body under the auspices of same act, HPA. These similarities set the foundation for the fact that we can endeavour to explore the manner in which the courts have scrutinised section 7 and attempted to apply these principles to section 8.

Bekker referred to "[t]he effect of labour legislation on entrepreneurship and job creation". In the less than one page she spent referring to the EEA and quoting its purpose, with no application, she ventured to suggest that it creates a new group of disadvantaged and called it PANDA, meaning "previously advantaged now disadvantaged" and that the EEA places a huge burden on businesses.[200] These assumptions made by the researcher were notably premature by blaming substantive equality measures and a constitutionally enshrined right for economic hardship that seems unthinkable to be so closely linked to lack of economic growth by virtue of job creation and entrepreneurship.

The drafting and enactment of national legislation relating to labour is clearly prescribed by section 23 of the Constitution which was to be given effect by national legislation in the form of the LRA, Basic Conditions of Employment Act (BCEA),[201] PEPUDA and the EEA.[202] The legislator thus enacted legislation, like the EEA that could address discrimination and inequality in the workplace in order to find ways to ensure that the reasoning behind the decision or differentiation to choose the one candidate for employment and or promotion above the other had to be fair, including termination of employment.[203]

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[200] Bekker *The effect of labour legislation on entrepreneurship and job creation* (2002 dissertation UJ) 104 and 105.

[201] 75 of 1997.

[202] See Constitution (n 6) s 23 and specifically s 9 (4) as quoted above and Dupper *et al* (n 47) confirms the fact that PEPUDA supplements the EEA in this arena.

[203] See Preamble and s 2 (n 1) above which read as follows:
"**Preamble**

The segregation and inequality in employment as described in chapter 2 had an adverse effect on the communities in rural areas during the apartheid era. It was found that only certain jobs were available to black people. In the main, jobs were therefore limited for black people to that of a teacher, nurse, social, railway, factory or mineworker.[204] The opportunities that now befall the descendants of these workers, who seized the opportunities of further education and access to employment on equal footing are scarce. They have to now engage and fight a white minority-dominated employment market that could make the final decision to only employ whites without having to answer or give proper consideration or elevate this generation of black individuals as a priority. The discrimination to choose the best candidate had to be managed in an objective yet fair manner. The EEA set out to achieve this in a methodical yet regulatory manner; and it is considered to be the most feared legislation in the labour context due to its purposes and fines that can be imposed.[205]

At the outset of chapter 2 of the EEA, sections 5 and 6 deal with the elimination and the prohibition of unfair discrimination respectively. Section 5 states that "[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."And in particular section 6 states that the EEA prohibits the following:

Recognising-
that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,
Therefore, in order to--
promote the constitutional right of equality and the exercise of true democracy;
eliminate unfair discrimination in employment;
ensure the implementation of employment equity to redress the effects of discrimination;
achieve a diverse workforce broadly representative of our people;
promote economic development and efficiency in the workforce; and
give effect to the obligations of the Republic as a member of the International Labour Organisation," and

"**2: Purpose of this Act**

`The purpose of this Act is to achieve equity in the workplace by-

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.".

[204] See Giliomee and Mbenga (n 116) 320 321 above.
[205] See Mauer (n 32) 5 above.

" (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, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth or on any other arbitrary ground; and

(2) It is not unfair discrimination to—

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

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."[206]

This echoes the foundation of the EEA and encapsulates what section 7 and 8 also sets out to achieve.

Section 7 and 8 in turn deal with the prohibition of and the only manners in which medical testing and psychological testing can be used.[207] It is with this in mind that the legislation has included an extension for the definition of "employee" for the purposes of sections 6, 7 and 8 which can be found in section 10. This in turn means that these sections are applicable and can be utilised by an applicant as well because in most instances the applicant would fall outside the standard definition of an employee as seen in the LRA and the BCEA.[208]

It is further important to take note of section 11 of the EEA that emphasises that the burden of proof will shift in instances of listed and unlisted grounds.[209] The main difference is that if the complaint is based on a listed ground in terms of section 6(1) then the burden of proof is on the employer to prove that the allegation did not take place and that if it was rational and not unfair, or otherwise justifiable. If it is on an

[206] This section was also amended in 2014 (n 1) and more particularly the addition of the words "…or on any other arbitrary ground." to show that there are other grounds except the ones listed here. The burden of proof in these instances are just different. Read s 11 and writers like Du Toit *et al* (n 8) 695 and Van Niekerk *et al* (n 148) 132 above on the implications hereof as well as the possible consequences of the amendments to s 11.

[207] See n 22 1175 above.

[208] See the EEA s 10 (n 1); LRA s 213 read with s 200A (n 138) and BCEA s 1 (n 199) above.

[209] See EEA s 11 (n 1) and Van Niekerk *et al* (n 148) 132 above.

unlisted ground then the burden of proof is on the complainant to prove the three requirements listed.

It is clear from the study that there has been no case that involved a new and outside applicant for a vacancy to test the old section 8 of the EEA. It is submitted that the recently amended section 8 of the EEA would be tested shortly with a more accessible platform having been created for arbitration in terms of section 48 of the EEA.

4.2.1 *Defences and exceptions*

In short, from an equality and employment equity perspective there are certain instances where one can fairly discriminate and this would be the exception to unfair discrimination but also there are legitimate defences that can be raised.

The EEA specifically deals with these in sections 6, 7 and 8 respectively, while the exception and defence respectively are affirmative action and inherent requirements of a job.[210] These can be seen as echoed in article 1 of Convention 111 of 1958.

Affirmative action as an exception is founded on the substantive equality principle and is in the interest of advancing and promoting equality.[211] There are however legitimate inherent requirements that might seem discriminatory, but the discrimination would not be unfair in this instance. Inherent requirements of a job as a legitimate defence means that even though the discrimination might seem unfair, the job requires that the candidate be tested in this manner, alternatively, legislation requires this. Some employers tend to colour the selection criteria in such a manner that it might look like an inherent requirement but when looking at the substance of the requirement it is found that the sole purpose was to unfairly discriminate.

[210] See Du Toit *et al* (n 8) 683 695 and Van Niekerk *et al* (n 148) 133 140 above.
[211] See Thompson and Benjamin (n 166) above.

4.2.2 *Section 7*

This section deals with the prohibition of medical testing in the workplace. This study wishes to juxtapose it with section 8 in order for it to be established how stakeholders and more specifically the courts can and should deal with section 8 when applying it.

Section 7 provides:

> "(1) Medical testing of an employee is prohibited, unless-
> (a) legislation permits or requires the testing; or
> (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.
> (2) Testing of an employee to determine the employee's HIV status is prohibited, unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act."

When reading this section with the Preamble, section 2 and section 6 of the EEA it is critical to note that the prohibition of medical testing and more specifically testing to determine an employee's HIV status is fundamentally essential for the workplace. It is important because it goes to the operational requirements of an entity. If we compare this section with the originating sections of the Constitution and Convention 111 of 1958 we see that both are silent on these types of grounds of discrimination. It is also noted that the EEA provides a definition of medical testing in section 1 thereof but no definition for psychological testing.[212]

Section 7 has been in existence since the inception of the EEA and aptly amplified in the *Hoffman v SAA* decision wherein Hoffman was unfairly discriminated against due to his HIV status that were determined by way of medical testing, which were only adjudicated on section 9 of the Constitution.[213]

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[212] See n 1 above and read s 1.
[213] 2000 12 BLLR 1365 (CC). It is significant to note that the case was decided with reference to s 9 of the Constitution (n 6) above.

In *Kroukam v SA Airlink (Pty) Limited*,[214] mention was made of a psychologist's report that was never submitted by the appellant and it was one of the main reasons for the charges of gross misconduct that were brought against the disciplined employee. However, the basis of the case for the appellant was on automatically unfair dismissal relating to section 5 of the LRA. The court did not have to and did not address any issue with regards to the use of psychologist's reports in this context and if it complied with section 8 of the EEA because it was not needed when addressing the legal question it had to answer.

Victor Vass v South African Police Services[215] is a case that courts commonly refer to when dealing with unfair discrimination in the workplace. The court quoted the *Harksen v Lane* test and the case also further confirms the use of psychometric testing by the SAPS. It deals with unfair discrimination in the workplace on an arbitrary basis or, as the court calls it, an analogous ground. The court refers to the *Stojce v University of Kwazulu Natal* case and states that "[n]ot every attribute or characteristic qualifies for protection against [unfair] discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires as a class do not qualify for protection."[216] The court granted an application for absolution from the instance because the applicant failed to make out a proper case and because the first hurdle for the test for discrimination could not be passed on listed or arbitrary grounds.

In *Irvin & Johnson Limited v Trawler & Line Fishing Union and other;*[217] *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre;*[218] *Dudley v City of Cape Town and another;*[219] *Ehlers v Bohler Uddeholm Africa (Pty) Ltd;*[220] and *Arbuthnot v South African Municipal Workers Union Provident Fund.*[221] It is significant to note that most of them refer to the *Harksen v Lane* and *Kroukam* cases as the basis, whilst the ones dealing with medical testing also include as a foundation the *Hoffman* case.[222]

[214] 2005 26 ILJ 2153 (LAC).
[215] See n 3 above.
[216] See *Stojce* case (n 3) par 26 above.
[217] See n 3 above.
[218] 2011 5 BLLR 462 (LC).
[219] 2008 12 BLLR 1155 (LAC).
[220] 2010 31 ILJ 2383 (LC).
[221] 2012 33 ILJ 548 (LC).
[222] See *Harksen* case (n 3); *Kroukam* case (n 212) and *Hoffman* case (n 211) above.

There are three Codes that are relevant for the purposes of both medical and psychological testing and they are the Code of Good Practice: Key Aspects of HIV/AIDS and Employment above and the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.[223] The most important clauses in the latter are 7, 10, 14 and 16 because it specifically deals with situations where psychometric testing is employed. Another code that is relevant is the Code of Good Practice on the Employment of Persons with Disabilities.[224] It is submitted that from the case law considered and with all due respect to our Labour Courts and the presiding officers, it is found that they tend to neglect or disregard these instruments in their adjudication of these types of matters. As practitioners and academics, we should not neglect these tools and especially where the Constitution and the legislation impose upon us a duty to make use of them in the application and interpretation thereof.

The *Irvin & Johnson* case refers to the *Joy Mining* case[225] wherein Landman J (as he was then known) adjudicated that section 7(2) is weakly structured or not so "happily worded".[226] The most important aspects for the purpose of this research in this matter are the affirmation that "[s]ection 7 is a pre-emptive measure designed to reduce the risk of discrimination on the grounds of medical condition"[227] and the reference to the Code of Good Practice: Key Aspects of HIV/AIDS and Employment as referred to by Landman J in *Joy Mining*.[228]

It is however the *Allpass* case[229] which it is submitted, provides the most comprehensive picture of the intended purpose of the EEA, the use of the Constitution

[223] GN 1358, published under *Government Gazette* Notice number 27866, dated 4 August 2005. The codes gives guidance in terms of policy and is much needed in complying with the legislation. Dupper *et al* (n 47) 8 and 77 and Grogan (n 148) 128.
[224] GN 581, published under *Government Gazette* Notice number 38872, dated 12 June 2015.
[225] *Joy Mining Machinery, a Division of Harnischfeger (SA) (Pty) Ltd v National Union of Metal Workers of SA & others* 2002 23 ILJ 391 (LC).
[226] See *Irvin and Johnson* case (n 3) par 16 above.
[227] See *Irvin and Johnson* case (n 3) par 33 above; Van Niekerk *et al* (n 148) 147 and GN R1298, published under *Government Gazette* Notice number 21815 dated 1 December 2000 (the draft Code on Key Aspects of HIV/AIDS and Employment was published for public comment in GN 6222, published under *Government Gazette* Notice number 34593, dated 26 August 2011). The Code of Good Practice on HIV and AIDS and the World of Work was published in GN 451, published under *Government Gazette* Notice number, dated 15 June 2012.
[228] See *Irvin and Johnson* (n 3) par 24 above.
[229] See n 2 above.

and international instruments. Bhoola J (as she then was) decided the matter with reference to constitutional imperatives and also linked it to the legislation enacted in accordance thereof. Thereafter she focused on the subordinate instruments. In addition, she included in her judgment an analysis of international and regional instruments like Recommendations and even mentions the SADC instruments and the Code of Conduct on HIV/AIDS and Employment. It is submitted that all these factors are very important for proper consideration of unfair discrimination issues.

It was found that Van Niekerk *et al* in their book*, Law@work wrote* a subchapter called "Medical and psychometric testing", yet they omitted to address the issue of psychometric testing or section 8 in the EEA that deals with it.[230]

4.2.3 *Section 8*

In 1999 the Labour Court had one of the earliest opportunities to deal with issue of psychological tests or other similar assessments in the workplace when deciding on the case of *Buthelezi v Amalgamated Beverage Industries.*[231] It is noted that the EEA was gazetted in October 1998 and first commencement date was 15 May 1999, although the Commission for Employment Equity was established section 8 of the EEA only commenced on 9 August 1999. The section was thus not in effect at this stage. The court accordingly when dealing with the case did not deal with some of the issues or similar issues that are stipulated as requirements in section 8 of the EEA.

In *Hendricks v South African Airways,*[232] the court missed an opportunity to engage with section 8 but probably with good reason. The employee was dismissed for several reasons but the overarching issue was relating to the criteria used to select employees during a restructuring process which led to dismissals based on operational requirements. It is clear that too much reliance was placed on the psychometric testing called the Thomas Profile which comprised a written multiple choice test with a certain duration. The expert suggested that the best way to utilise the test was to combine it

[230] See Van Niekerk *et al* (n 148) 144 147 above even Grogan *Workplace Law* 2015 has nothing to say on psychometric testing.
[231] See n 3 above.
[232] See n 11 above.

with an interview and that it should only make 25% of the decision-making process. The court never referred to section 8 of the EEA during its judgment.[233]

The section is strategically placed between sections 5, 6, 7 and 9 respectively dealing with elimination of unfair discrimination, prohibition of unfair discrimination, medical testing and in incorporating applicants into the definition of employees for the purposes of this chapter. The chapter in itself deals with unfair discrimination. Bonthuys refers to Du Toit *et al* (the fifth edition) in that they say that some requirements listed are more related to the subjective aspects of the test and there are also prior knowledge and skills which are not part of inherent requirements of the job that is more objective. If we look at statistics it is clear that discrimination is still happening and the purpose of the EEA has had an impact. Yet it is still small in relation to how far we should have come over the past almost two decades. It is noted that according to Statistics South Africa the unemployment rate is at 26.4%, indicating that while we are struggling with equality and unfair discrimination we are also faced with unemployment and a need to create jobs.[234]

In the relentless search for the application of the old section 8 of the EEA, the researcher found it difficult to find any case law dealing with its application and providing better clarity on what the section means and how it should be dealt with by the employee and the employer. The case law dealing with psychometric testing in the workplace deals with existing employees and does not even make mention of section 8 or what impact it has on the questions raised in the cases.[235] It seems quite clear that the opportunity to deal with section 8 has passed by on many occasions. Scheithauer and Kalula refer to several CCMA and Labour Court cases in their attempts to equate polygraph testing with psychometric testing. Cases like *Cunningham v Benguala Operations (Pty) Ltd*;[236] *Simani v Coca Cola Furtune*;[237] and *PETUSA obo van Schalkwyk v National Trading Co*[238] in which the judiciary had opportunities to deal with the complexities of psychometric testing in the workplace.

[233] See *Hendricks* case (n 11) par 42, 43 and 44 above.
[234] See Statistics South Africa, statistics on unemployment 2014 (n 5) above.
[235] See *Hendricks* case (n 11) and *Buthelezi* case (n 3) above.
[236] LC 1999, C542/98 and Scheithauer and Kalula (n 28) above.
[237] 2006 10 BALR 1436.
[238] 2000 21 ILJ 2323 (CCMA).

There were three things that came out pertinently clear from these cases according to Scheithauer and Kalula and they are:

1. There can be an evidential weight attached to such evidence but no decision on its admissibility;
2. The accuracy of the evidence is based on the expert evidence given;[239] and
3. A confirmation that psychometrics are a scientific measurement of mental capacities and processes and of personalities on the same basis as psychological assessment.[240]

In *Mvemve and Another v Evertrade 77 (Pty) Ltd*,[241] the court reiterated that psychological testing is not completely prohibited and that the onus of proof shifts from the normal position. The employer must prove section 8 (1), (2), (3), (4) and (5).[242] From a practical perspective, one needs to look at the evidence and see if it deals with equity, nature and functions of the device.[243]

There are two important conventions that are mentioned above that have influenced the application of section 8. They are Convention 111 of 1958 and Convention 158 of 1982. This is further supported by the wording of the Preamble and section 9 of the Constitution, the LRA in Chapter VII and its Preamble and the EEA's Preamble, in addition to sections 2, 3 (d), 5 and 6 of the EEA.

The HPA dealt with who needs to register with the HPCSA in terms of section 17 and which boards deal with which areas. Reference to sections 1, 3 and 15 is made.[244] There are different meanings for reliability, validity and bias in terms of psychometrics and this refers to the fairness of the process and the results.[245] We see that even when dealing with other types of psychological testing the common threads includes validity,

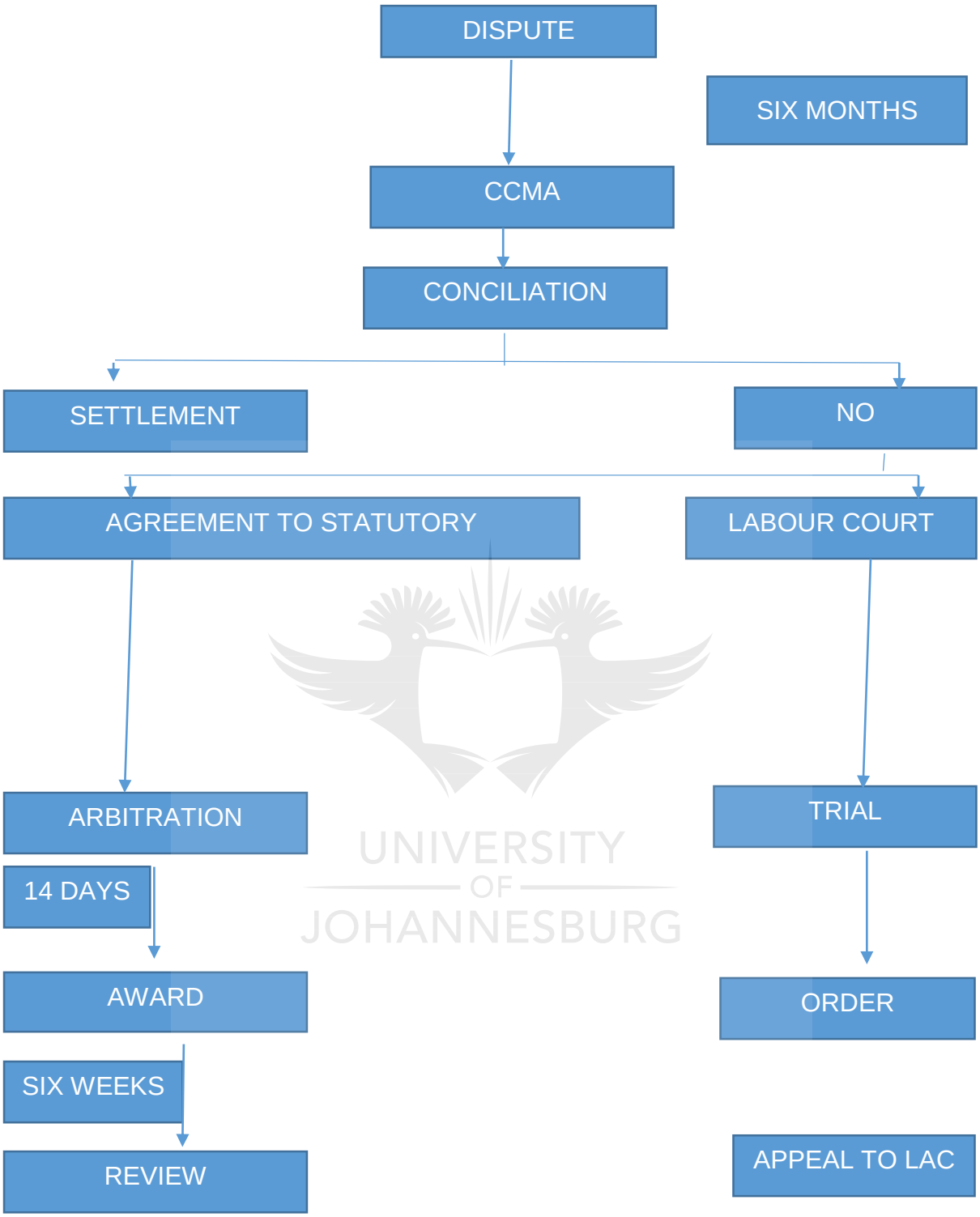
[239] See Scheithauer and Kalula (n 28) 106 above.
[240] See Scheithauer and Kalula (n 28) 113 and n 53 2331 above.
[241] 2003 7 BALR 766 (BCI).
[242] See Scheithauer and Kalula (n 28) 13 above.
[243] See Mauer (n 32) 4 above.
[244] See Mauer (n 32) 8 and 9 above.
[245] Donald, Thatcher and Milner (n 2) 334 above.

reliability, fairness and absence of bias which in turn confirms that the models remain the same and thus standardisation for validation of tests.[246]

Most of the writers and the courts treat sections 7 and 8 of the EEA different to the listed grounds in section 6 of the EEA, and this is, it is submitted attributed to the fact that the legislator placed them outside the parameters of section 6. These two sections deal with testing that relates to monitoring and regulating tools that can be used for unfair discrimination, whilst the listed grounds are accepted as clear grounds for discrimination. It is submitted that these types of testing can thus be used to discriminate on listed, unlisted or arbitrary grounds but the first hurdle will be to address the fact of whether the testing was used in line with section 7 or 8 of the EEA. Conventions 158 of 1982 has similar provisions as section 23 (1) of Constitution and section 188 (1) (a) of the LRA, being indicative of the usefulness of it and how important fairness is in this context.[247] There are extraneous factors in the interpretation and application of psychometric testing in the workplace and one must look at the societal aspect (history, race, class, etc) of the country as well.[248]

Thus, the implication is that when attempting to deal with a dispute of psychometric testing, one can follow the same procedure as when dealing with section 7, medical testing. Grogan suggests the following procedure for lodging a claim and illustrates same in the following diagram:[249]

[246] Sebolai (n 116) 94 above.
[247] Scheithauer and Kalula (n 28) 115 above.
[248] Jordaan and Ukpere (n 120) 1093 and 1097 above.
[249] Grogan *Labour Litigation and Dispute Resolution* 2010 35 and Dupper *et al* (n 47) 145 shows a similar diagram with more detailed explanatory notes on the periods and reasoning behind it.



The platform created as indicated in chapter 1 is that of access to justice and with the CCMA's involvement which saves both time and costs. The forum and the complainant are not dependent on legal representation at the earliest stages. There is a lengthy period for referral to the CCMA as shown in the above diagram, which is six months as prescribed by section 10(2) of the EEA.

4.2.4 *Direct comparison of section 7 and section 8*

From an applicant's perspective, it will be very difficult to get access to information that was used for the psychometric testing after he or she has discovered that the application was unsuccessful. The interview or application stage is very important because the burden is placed on the employer to ensure that the requirements of section 8 are met and the applicant, candidate or test-taker should be able to enquire (if it is not divulged) what test is being taken, whether it is certified by the HPCSA and whether it is valid and reliable. The last section is largely part and parcel of the certification of the test.

For instance, as in our scenario of SAPS, if for example the applicant is unsuccessful after the psychometric testing phase and it becomes known to him or her that the test was not certified, (which we have already shown to be the case with some of the tests used by SAPS) the applicant then has six months to refer the matter to the CCMA. The CCMA will go through its processes of conciliation, mediation and arbitration in order to find a way to conciliate and the steps as per the diagram will then be implemented.

The theoretical and legal questions regarding psychometric testing in itself will only in earnest be addressed at the Labour Court. According to this research, it is submitted that even though most of the legal writers on labour law and the courts have not specifically addressed section 8 of the EEA, they have addressed the other similar sections in detail. The legal position relating to psychometric testing can be juxtaposed with that of medical testing in terms of its purpose and overarching goals. The position in relation to medical testing is clear in that it is prohibited and only in certain circumstances can the employer make use of this tool. In this instance the employer will have to ensure that the applicant, candidate or test-taker is made aware of what he is relying on to enable him to undergo medical tests, in line with section 7(1) and (2). There is a loophole, however, in that the applicant, candidate or test-taker can voluntarily consent to this. The employer can go to the extreme and apply in terms of section 7 and prove the case in term of section 7 to obtain a court order from the Labour Court to this effect. We can see that at this stage, nothing about the discrimination, unfairness or grounds of discrimination has even been mentioned.

The same shall apply in the instance of psychometric testing and the employer will have to declare that they complied with section 8 in its entirety. It is submitted that the declaration should start from the certification of the test or assessment itself and subsequently deal with the validity, reliability and fairness of it. What if the employer refuses or cannot prove this, does this mean that there was discrimination where no test or assessment was taken? What if the test is on the list, but not certified? The reading of section 8 suggests that each of the requirements is separate and should be separately adjudicated on and thus certification would not automatically mean it is valid, reliable and fair. This would in itself require a further legal enquiry, which is why it is further submitted that section 8 is pregnant with the potential to be tested at these platforms and the researcher cannot reasonably understand why it has not been done already. Our Labour Courts have grown in stature and they will relish at an opportunity to test section 8.

CHAPTER 5

RECOMMENDATIONS

This research has attempted to indicate that section 8 of the EEA has been one of the least used instruments in order to address the abuse of it as a vehicle for unfair discrimination in the workplace during the recruitment, appointment and promotions of employees.

It is confirmed in this research that psychometric testing forms part of psychological testing and that the legislature made a bold decision to structure section 8 to rather refer to the broader term psychology. It went further and included other similar assessments. The legislature made sure that there are specific criteria was set out for the use of these tests but regrettably these have not been complied with by some employers. The tests used by the SAPS are not certified by the HPCSA or other relevant authorities as prescribed by the amendments to section 8. It is submitted that the new list has been published in August 2014 but was only made available to the public during June 2015. Whilst it has tests listed as being certified there are many that are not certified but some are in use by employers like SAPS and we need to know what the consequences of this can be.

From a psychological and human resources perspective, it is concluded and favourably argued by some that psychometric testing is the foremost psychological testing in use for the purposes of section 8. For psychologists and the human resources industry the requirements as set out in section 8 are on point on how to ensure that proper tests are being done and to eliminate unfair discrimination in the workplace. Psychologists and human resource practitioners believe it may be the best tool used to identify the best candidate but that it does however come with its own challenges. These challenges include that the assessment practitioner needs to know what is being tested for and the need to engage with the test-taker as well. The assessment practitioner needs to be competent and the criteria used for assessment needs to be unbiased towards the test-taker. The language barriers and multicultural

set-up of South Africa are some of the issues that make it difficult to have psychometric testing confirmed as a tool that can completely prevent unfair discrimination.

Psychometric testing and other similar assessments in the workplace are confirmed to be subsidiary to the Constitution and it falls within the purview of the legislator to enact legislation to give effect to section 9 of the Constitution. Its main purposes are to eliminate and prohibit unfair discrimination in the workplace and to promote and uphold equality. The EEA was enacted to govern equity in the workplace and through it preventative measures were put in place. These measures include sections 7 and 8. To ensure that the employer would act appropriately legislative regulation was necessary. Section 7 has been tested and it successfully overcame constitutional scrutiny. On the other hand, section 8 is still waiting for constructive and critical engagement from a jurisprudential perspective.

Section 9 of the Constitution forms one of the cornerstones of our democracy. This research looked at the application of section 9. It was found that most of the principles applicable when section 9 was adjudicated upon by our courts are of application to section 8. This is confirmed in the reading of the constitutional jurisprudence relating to section 7 of the EEA. It was also significant to note the location within chapter 2 of the EEA, the fact that sections 7 and 8 are neighbours which also makes them share similarities. The sections also have differences, which relates to their purposes, in that section 7 prohibits the use and only gives specific situations within which it can be used, whilst section 8 states that it can be used if certain requirements have been met. From the wording of the sections, it is clear that the legislature intended that the one deals with the right to privacy, while the other tests competency for the job through intelligence tests. The competency does not have such severe consequences unless the complainant or applicant can prove that there has been non-compliance with section 8. Section 8 in itself is said to be of a compliance and monitoring nature and that the stakeholders must use it to ensure that it is complied with and for this they would be able to make use of other legislative instruments like PEPUDA.

The courts have engaged with section 7 and 8 and from this we confirm that the EEA is an access to justice legislative instrument. Grogan indicates this in the diagram in chapter 4 above and the purpose is thus fully adhered to in that the process can be cost-and-time effective. The CCMA is involved and there is a long window period with several legs to choose from as well. The problem that comes in is that psychometric testing as stated by the labour courts and researchers from psychology and human resources perspective should only carry a small weight when selecting the best candidate and the pre-selection process is key to this. It is submitted that section 8 should pass constitutional scrutiny because it is a subsidiary section to the main sections of chapter 2, being sections 5 and 6. Even when deducing a violation of section 8, you can still go further and argue that it relates to unfair discrimination on any of the listed grounds in section 6 or unlisted grounds. The burden of proof is different for each of these grounds and the tests are different as well. Section 8 has a comprehensive list of requirements that must be fulfilled, failing which the psychometric testing cannot be used and must be disregarded. In addition, it is only hoped that additional jurisprudence on section of the EEA will develop a better understanding of this section.

It is submitted that more litigation is needed within an area that is not difficult to monitor but that has its complexities and that the stakeholders cannot be arguing that the employer has at all times been adhering to the legislation. Compliance and monitoring in this area of unfair discrimination in the workplace is very important and the courts can only adjudicate on issues brought before them. The legislative change to section 8 does not seem to have been necessary but it has been inserted. Even though from a psychology perspective they foresee problems, from a legal perspective it does not seem highly problematic.

The common misconception is that if a test is used by an employer that it complies with the relevant requirements of the legislation. This needs to be tested because we can see from the SAPS situation and with the new criteria in terms of section 8(5) that this might not always be the case.

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