LEGAL RESOURCE BOOK ON GENDER EQUALITY LEGISLATION
HOW DO YOU LODGE A COMPLAINT WITH THE CGE?

Report Gender Discrimination:
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CGEcomplaints@tip-offs.com

Complaints can be sent by letter to:
The Legal Department, Commission for Gender Equality
PO Box 32175, Braamfontein, 2017
Fax: 011 403 5609 (Legal) • 011 403 7188 (General)

Email to: complaints@cge.org.za

Call +27 11 403 7182 for a complaints form.

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# ACRONYMS AND ABBREVIATIONS

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<tr>
<td>B-BBEE</td>
<td>Broad-Based Black Economic Empowerment Act, No. 53 of 2003</td>
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<td>BCEA</td>
<td>Basic Conditions of Employment Act, No. 75 of 1997</td>
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<td>BPA</td>
<td>Beijing Platform for Action</td>
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<td>CEE</td>
<td>Commission for Employment Equity</td>
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<td>CGE</td>
<td>Commission for Gender Equality</td>
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<td>COIDA</td>
<td>Compensation for Injuries and Diseases Act, No. 130 of 1993</td>
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<td>CEDAW</td>
<td>Convention for the Elimination of All Forms of Discrimination Against Women</td>
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<td>DVA</td>
<td>Domestic Violence Act, No. 116 of 1998</td>
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<td>EE</td>
<td>Employment Equity</td>
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<td>EEA</td>
<td>Employment Equity Act, No 55 of 1998</td>
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<td>FAMSA</td>
<td>Family and Marriage Society of South Africa</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>LGBTIQ</td>
<td>Lesbian, Gay, Bisexual, Transgender, Intersex and Queer</td>
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<td>L&amp;D</td>
<td>Liquidation and Distribution Account</td>
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<td>LRA</td>
<td>Labour Relations Act, No. 66 of 1995</td>
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<td>NEDLAC</td>
<td>National Economic Development and Labour Council</td>
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<td>PEPUDA</td>
<td>Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000</td>
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<td>POWA</td>
<td>People Opposing Women Abuse</td>
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<td>People with Disabilities</td>
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<td>RCM</td>
<td>Recognition of Customary Marriages Act</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>South African Human Rights Commission</td>
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<td>South African Police Services</td>
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<td>TMA</td>
<td>Transkei Marriage Act, No. 21 of 1978</td>
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<td>Universal Declaration of Human Rights</td>
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BACKGROUND

The Commission for Gender Equality (the CGE) is an independent statutory body created under Chapter 9 of the Constitution of the Republic of South Africa 108 of 1996 (‘the Constitution’). The CGE has a mandate to promote and protect gender equality in government, civil society, and the private sector. To this end, the Commission on Gender Equality Act, No. 39 of 1996 (as amended) gives the CGE the power to monitor and evaluate policies and practices of organs of state at any level, statutory bodies and functionaries, public bodies and authorities and private businesses, enterprises, and institutions to promote gender equality and make any recommendations that the CGE deems necessary.

The CGE aims to transform society by “exposing gender discrimination in laws, policies and practices, advocating changes in attitudes and gender stereotypes; and instilling respect for women’s rights as human rights”¹. This in turn relates to the monitoring the effectiveness of the Judiciary which is constitutionally tasked to implement the laws promulgated by the Legislature².

The right to access to justice is heavily intertwined with the fundamental rights as encapsulated in the Bill of Rights³. This intertwined nature between justice and the realisation of human rights can be traced to Article 8 of the Universal Declaration of Human Rights, wherein it is cited that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him/her by the Constitution or by law”⁴.

This book aims to provide an understanding of Family and Constitutional Law in South Africa. For this purpose, this book focuses on Domestic Violence, Maintenance, Succession, Gender Discrimination, Sexual Harassment, Employment Equity Law, and Immigration Law. This book further provides an index of gender related legislation and case law to the above-mentioned fields covered in this book.

¹ www.cge.org.za
² As per the separation of powers doctrine
³ Per the South African Constitution
⁴ www.gaatw.org.za
CHAPTER ONE

FAMILY LAW

1. Applicable International Law

Section 39 of the Constitution states that the courts, and other legal bodies, when interpreting the Bill of Rights:
- Must consider international law.
- May consider foreign law.

Section 231 of the Constitution states that a treaty binds South Africa after approval by the National Assembly and the National Council of Provinces, unless it is self-executing, or of a technical, administrative, or executive nature. A self-executing treaty has a provision stating that it is self-executing. It becomes law in South Africa when it is signed, unless it is inconsistent with the Constitution or an Act. A non-self-executing treaty that has not been ratified, or even signed, will bind South Africa only if it becomes customary international law.

In S v Makwanyane 1995 (3) SA 391 (CC), former Chief Justice Chaskalson of the Constitutional Court described the role of international law as follows: “(P)ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]” (paragraph 35)

In the Grootboom case, Justice Yacoob of the Constitutional Court said: “The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.” (paragraph 26)
South Africa has signed and ratified the following key treaties:

- **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**
  Article 1 of CEDAW states that:
  "For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

  The Convention in Article 1 therefore provides a definition of discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

- **Universal Declaration of Human Rights (UDHRC) (1948)**
  Article 2 of the UDHRC states that:
  "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

  Article 8 highlights the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.
• **The Beijing Platform for Action (BPA)**
  The BPA requires governments, international communities, and civil society, including non-governmental organisations and the private sector to take strategic action to address twelve critical areas of concern. These areas include but are not limited to violence against women; the burden of poverty on women; and inequality between men and women in the sharing of power and decision making at all levels.

• **Sustainable development goals: 2030 Agenda**
  Goal 5 aims at achieving gender equality and empowers all women and girls. Its targets include to end of all forms of discrimination and violence against women and girls, as well as elimination of harmful practices and the recognition and value of unpaid care and domestic work.

Other targets stress the importance of ensuring women’s full and effective participation and equal opportunities for leadership as well as universal access to sexual and reproductive health and reproductive rights.

2. **Domestic Violence in South Africa: Applicable legislation**

South Africa has one of the highest incidences of domestic violence in the world. And, sadly, domestic violence is the most common and widespread human rights abuse in South Africa. Every financial year the Legal Department monitors and observes cases where women are murdered, physically and sexually assaulted, threatened and humiliated by their partners, within their own homes.\(^5\)

Domestic violence is a pattern of abusive behaviour that transgresses the right of citizens to be free from violence. When one partner in a relationship harms the other to obtain or maintain power and control over them, regardless of whether they are married or unmarried, living together or apart, that is domestic violence. The ‘harm’ can take a variety of forms, whether it be from verbal abuse like shouting, emotional abuse like manipulation, control and/or humiliation, physical abuse like hitting and/or punching, and/or sexual abuse like rape and/or inappropriate touching of either the woman or her children.\(^6\)

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\(^5\) [http://www.divorcelaws.co.za/abuse.html](http://www.divorcelaws.co.za/abuse.html)

\(^6\) Ibid.

Domestic violence is regulated by the Domestic Violence Act (DVA), No. 116 of 1998. The Act was introduced in 1998 with the purpose of affording women protection from domestic violence by creating obligations on law enforcement bodies, such as the South African Police Service (SAPS), to protect victims as far as possible. The Act attempts to provide victims of domestic violence with an accessible legal instrument with which to prevent further abuses taking place within their domestic relationships. The Act recognises that domestic violence is a serious crime against our society and extends the definition of domestic violence to include not only married women and their children, but also unmarried women who are involved in relationships or living with their partners, people in same-sex relationships, mothers and their sons, and other people who share a living space.

In the case of Daffy v Daffy [2012] 4 All SA 607 (SCA) it was held that it is often necessary when interpreting legislation to look at the underlying purpose of the legislation so as to avoid a purely literal interpretation that gives rise to absurdity. In this regard, as appears from the judgment of the Constitutional Court in S v Baloyi (Minister of Justice & another intervening) (CC) paragraphs 11-12, the concept of domestic violence is commonly understood as being violence within the confines of the family unit, often hidden from view by reason of the helplessness of the victim and the position of power of the abuser. Significantly also, the adjective ‘domestic’ has as its common meaning ‘pertaining to the home, house, or household: pertaining to one’s home or family affairs, while the word ‘family’ has as one of its general connotations ‘the body of persons who live in one house or under one head, including parents, children, servants etc’. Thus, the ordinary connotation of a domestic relationship involves persons sharing a common household. Clearly the legislature envisaged the definition to bear a wider meaning than that for purposes of the Act. It is not intended that a mere blood relationship, even if close, would, in itself, be sufficient. After all, to adhere to a definition ‘regardless of subject-matter and context’ might do the gravest injustice by including cases which were not intended to be included. In the context of the further provisions of the definition, some association more than mere consanguinity is clearly required for there to be a domestic relationship.\(^7\)

\(^7\)Daffy v Daffy [2012] 4 All SA 607 (SCA), accessed on http://www.saflii.org/za/cases/ZASCA/2012/149.html#sd footnote1sym
2.2 Contextualising the different types of domestic violence in terms of the DVA 116 of 1998

Domestic violence can take a variety of forms and generally includes the following:

- **Physical abuse**
  Any act or threat of physical violence intended to cause physical pain, injury, suffering or bodily harm. Physical abuse can include hitting, slapping, punching, choking, pushing, and any other type of contact that results in physical injury to the victim. Physical abuse can also include behaviours such as denying the victim medical care when needed, depriving the victim of sleep or other functions necessary to live, or forcing the victim to engage in drug/alcohol use against his/her will. It can also include inflicting physical injury onto other targets, such as children or pets, to cause psychological harm to the victim.

- **Sexual abuse**
  Any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the victim. Sexual abuse is any situation in which force or threat is used to obtain participation in unwanted sexual activity. Coercing a person to engage in sexual activity against his/her will, even if that person is a spouse or Intimate partner with whom consensual sex has occurred previously, is an act of aggression and violence. Sexual violence is defined by the World Health Organization as: any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.

  Marital rape, also known as spousal rape, is non-consensual sex in which the perpetrator is the victim’s spouse. As such, it is a form of partner rape, and amounts to domestic violence and sexual abuse. Marital rape has been described as one of the most serious violations of a women’s bodily integrity and yet it is a term that many people still have a problem comprehending, with some still describing it as a ‘contradiction in terms’.

- **Emotional, verbal, and psychological abuse**
  Usually a pattern of degrading or humiliating conduct towards the victim privately or publicly, including repeated insults, ridicule, name calling
and/or repeated threats to cause emotional pain; or the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the victim’s privacy, liberty, integrity and/or security.

Other acts that fall under emotional abuse include controlling what the victim can and cannot do, withholding information from the victim, deliberately doing something to make the victim feel diminished or embarrassed, isolating the victim from friends and family, implicitly blackmailing the victim by harming others when the victim expresses independence or happiness, and denying the victim access to money or other basic resources and necessities.

Emotional abuse includes conflicting actions or statements that are designed to confuse and create insecurity in the victim. These behaviours lead victims to question themselves, causing them to believe that they are making up the abuse or that the abuse is their fault.

Emotional abuse also includes forceful efforts to isolate the victim, to keep them from contacting friends or family. This is intended to eliminate those who might try to help the victim leave the relationship and to create a lack of resources for the victim to rely on if they were to leave. Isolation eventually damages the victim’s sense of internal strength, leaving them feeling helpless and unable to escape from the situation. Women and men undergoing emotional abuse often suffer from depression, which puts them at increased risk of suicide, eating disorders, and drug and alcohol abuse.

- **Economic abuse**

  Includes the unreasonable deprivation of economic or financial resources to which the victim is entitled under law or requires out of necessity, including household necessities, mortgage bond repayments, rent money in the case of a shared residence, and/or the unreasonable disposal of household effects or other property in which the victim has an interest.

  Economic abuse may involve preventing a victim from resource acquisition, limiting the amount of resources available to him/her, or exploiting the victim’s economic resources. The motive behind preventing a victim from acquiring resources is to diminish his/her
capacity to support him/herself, thus forcing the victim to depend on the perpetrator financially. In this way, the perpetrator can prevent the victim from obtaining education, finding employment, maintaining, or advancing a career and acquiring assets. The abuser may also give the victim an allowance and closely monitor how he/she spends money. Sometimes, the abuser will spend the victim’s money without his/her consent and create debt, or even completely spend the victim’s savings to limit available resources.

• **Intimidation**
Uttering or conveying a threat, or causing a victim to receive a threat, which induces fear. The abuser may use a variety of intimidation tactics designed to scare the victim into submission. Such tactics may include smashing things in front of the victim, destroying property, hurting the victim’s pets, or showing off a weapon. The clear message is that if the victim doesn’t obey, there might be violent consequences.

• **Harassment**
Engaging in a pattern of conduct that induces a fear of harm in the victim, including repeatedly watching the victim; loitering outside of or near the building/place where the victim resides, works, carries out business, studies or happens to be; repeatedly making telephone calls or inducing another person to make telephone calls to the victim, whether or not conversation ensues; repeatedly sending, delivering or causing the delivery of letters, emails, texts, packages or other objects to the victims.

• **Stalking**
There is no legal definition of stalking. Neither is there any specific legislation to address this behaviour. The term is used to define a particular kind of harassment. Generally, it refers to a long-term pattern of persistent and repetitive contact with, or attempts to contact, a particular victim.

Examples of the types of conduct often associated with stalking include: direct communication; physical following; indirect contact through friends, work colleagues, family, or technology (email or SMS); and other intrusions into the victim’s privacy. The abuse may also take place on social networks like Facebook, on-line forums, Twitter, instant messaging,
SMS, BBM or via chat software. The stalker may use websites to post offensive material, create fake profiles or even make a dedicated website about the victim.

• **Damage to property**
  Wilful damaging or destruction of property belonging to the victim or in which the victim has a vested interest includes:
  - Entry into property;
  - Entry into the victim’s residence without consent, where the parties do not share the same residence;
  - Any other controlling or abusive behaviour;
  - Any conduct that harms, or may cause imminent harm to, the safety, health or well-being of the victim. ‘Imminent harm’ includes situations where:
    - The perpetrator is in the possession of a firearm and has threatened to use the firearm against the victim, or her dependants or other family members;
    - The perpetrator has used a weapon against the victim in previous incidences of domestic violence (not restricted to dangerous weapons, such as firearms or knives);
    - The victim was critically injured by the perpetrator on a previous occasion, or on the occasion in question;
    - The victim and her children have been ‘kicked out’ of the shared residence by the perpetrator or anyone affiliated with him;
    - The victim has sufficient evidence (i.e. witness statements) that the perpetrator has threatened to harm her; and
    - The victim fears for the safety of her children.

2.3 **Protection from Harassment Act 17 of 2011**

The Protection from Harassment Act No. 17 of 2011 came into effect on 27th April 2013 to address harassment and stalking behaviour which violate Constitutional provisions of right to privacy and dignity of individual persons.

The Act provides for inexpensive civil remedy to protect a person from behaviour which may not constitute a crime but may impact negatively on various rights of an individual. The Act was promoted because the existing civil law framework and criminal law framework do not provide adequate recourse to victims of harassment who are not in a domestic relationship (the DVA, 1998).

The Act aims to provide a remedy in the form of a protection which would prohibit a person from harassing another person. If the harasser breaches a protection order he or she commits an offence which is punishable with a fine or a period of imprisonment. It aims to address harassing behaviour by means of a court order, in terms of which the harasser is prohibited from continuing with the act of harassment.

Any person who contravenes such an order is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years. The Act provides recourse for victims of harassment and stalking in both domestic and non-domestic relationships. It also broadens the categories of harassment to include bullying at schools and cyber-stalking.

2.3.1 What is harassment?

Harassment under the Act includes both direct and indirect conduct that either causes harm or that inspires the person complaining of harassment ("the complainant") to reasonably believe that harm may be caused. Such conduct includes following, watching, pursuing or accosting of the complainant or someone in a close relationship with the complainant such as a spouse or family member.

Harassment also includes contact through verbal communication aimed at the complainant. The Act also recognises electronic communication that causes harm or makes the complainant feel in danger of being harmed as harassment.

The Act mentions several forms of written communication as capable of being contact for the purposes of harassment, such as letters, packages, and e-mails.

It also includes sexual harassment, which means "any unwelcome sexual attention from a person who knows or who reasonably knows that such attention is unwelcome". Such sexual attention includes unwelcome behaviour, suggestions, messages or remarks of a sexual nature that have the effect of "offending, intimidating or humiliating" the complainant or a person who has a close relationship with the complainant.
2.3.2 Persons who the Act seeks to protect

The Act seeks to protect:

• All persons who are the victims of harassing behaviour and whose rights are infringed upon by harassing conduct;
• Anyone who believes they are being harassed by another person can apply for a protection order under the Protection from Harassment Act;
• A child under the age of 18, or a person on behalf of a child, may apply for a protection order. This can be done without the assistance of the child’s parents; and
• If a person is not able to apply for a protection order for himself, another person who has a real interest in stopping the harassment and the well-being of the person experiencing the harassment can apply for a protection order on that person’s behalf.

2.3.3 Procedures for applying a protection order

The procedures for applying are:

• If a person is being harassed he or she may apply for a protection order against such conduct at a magistrate’s court;
• Legal representation is not necessary;
• The process for applying for a protection order is by completing an application form, where the complainant is required to set out the reasons why a protection from harassment order is required and listing full details of all incidents of harassment they have experienced;
• The complainant is also able to include the specific acts committed by the person causing the harassment to be listed in the protection order, as well as to request the court to impose any additional conditions necessary to protect the complainant and provide for the safety and wellbeing of that person;

The court may, after considering the application from the complainant, issue an interim protection order against the respondent notwithstanding the fact that the respondent has not been given notice of the proceedings.

The court must, however, be satisfied that there is evidence that:

• The respondent is engaging, or has engaged in harassment;
• Harm is or may be suffered by the complainant as a result of such conduct if a protection order is not issued immediately; and
• The protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent.

This interim protection order, together with the record of evidence, must be served on the respondent and must call on the respondent to show cause on the return date why a final protection order should not be issued against him or her. An interim protection order takes effect.

2.3.4 Protection order

A protection order, also called a restraining order or domestic violence interdict, is a court order that tells an abuser to stop the abuse and sets certain conditions preventing the abuser from harassing or abusing the victim again. It may also help ensure that the abuser continues to pay rent or a bond or interim maintenance. The protection order may also prevent the abuser from getting help from any other person to commit abusive acts.

Steps to obtain a protection order

The steps are:

• Apply for a protection order at a Magistrates Court nearest to where you live and work, at any time, during and outside court hours as well as on public holidays or weekends;

• First apply for the Interim Protection Order by completing Form 6: Interim Protection Order at your nearest Magistrate’s Court or High Court;

• Once you have applied for the Interim Protection Order, complete Form 2: Application for Protection Order at your nearest Magistrate’s Court or High Court.

The application must be made by way of an affidavit, which states the facts on which the application is based on, nature of the order, name of the police station where the complainant is likely to report any breach of the protection order.

Where the application is brought on behalf of a complainant by another person, the affidavit must state the:

• grounds on which the other person has a material interest in the well-being of the complainant;

• occupation of the other person and capacity in which such a person brings the application; and
• written consent of the complainant, except in cases where the complainant is a minor, mentally retarded, unconscious or a person whom the court is satisfied that he or she is unable to provide the required consent.

On receipt of the form, the clerk will send your application to the magistrate who will then set a date for you to return to court, so that your application can be considered. The magistrate will also prepare a notice to inform the abuser about the protection order and when he or she should come to court.

After the court appearance, the magistrate may grant the protection order.

2.4 CGE Assistance

The Commission’s Legal Department offers free legal advice and services in matters pertaining to domestic violence. The Legal department accompanies complainants to the Magistrates Courts to open domestic violence cases and further assists in the completion of the necessary forms at the court. The Commission further monitors the case before the court until finalisation.

2.5 Other Helpful Organisations

• **FAMSA** or Family and Marriage Society of South Africa has offices nationwide and gives counselling to the abused and their families. To find your nearest FAMSA branch, call 011 975 7101, email or visit their website: www.famsa.org.za

• **Lifeline** provides 24-hour counselling services. Call the SA National Counselling Line on 0861322 322.

• **People Opposing Women Abuse or POWA** provides telephonic, counselling and legal support to women experiencing abuse. POWA also accompanies women to court and assists them in filling out documents. Call the POWA helpline on 083 765 1235 or visit their website: www.powa.co.za

• **Legal Aid South Africa** offers legal assistance. To locate your nearest Justice Centre Call 0861 053 425 or visit their website www.legal-aid.co.za
• **Rape Crisis** offers free confidential counselling to people who have been raped or sexually assaulted. You can call the organisation on 011 642 4345.

• **SAPS** can be contacted in emergencies on 10111.

• University campus law clinics also offer legal assistance.

### 3. MAINTENANCE IN SOUTH AFRICA

#### 3.1 Background information

Maintenance is the obligation to provide another person, for example a minor, with housing, food, clothing, education and medical care, or with the means that are necessary for providing the person with these essentials. This legal duty to maintain is called ‘the duty to maintain’ or ‘the duty to support’.

The duty to maintain is based on blood relationship, adoption, or the fact that the parties are married to each other.

The CGE receives a lot of maintenance cases. Parent-child maintenance have been recorded as one of highest categories of complaints received by the Legal Department in the financial years 2014/2015, 2015/2016, 2016/2017 and 2017/2018.

A child must be supported or maintained by:

- his or her parents, whether married, living together, separated, or divorced, including parents who:
  - have adopted the child; and/or
  - his or her grandparents, irrespective of the child’s parents’ marital status.

However, this varies from one case to another. The duty to support a family member is not limited to supporting a child. Any family member, irrespective of his or her age, can ask any family member to support or maintain him or her, provided that the following three conditions are met:

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• The family member who claims support is unable to maintain himself or herself;
• The family member from whom maintenance is claimed is able to afford the maintenance that is claimed; and
• The main requirement of the means test is that the person who is liable to pay maintenance must have the means and the maintenance claimed must be reasonable.

3.2 How to bring a maintenance claim before the courts

The CGE has noted that one of the delaying factors to resolve parent-child maintenance is that complainants do not submit all the required documents at the magistrate’s court. In some instances, maintenance clerks do not provide the sufficient advise to complainants of the maintenance process. The following documents are needed when opening a maintenance matter:
• Identity document;
• Identity number of person who is responsible to pay for maintenance;
• Bank Statements if you have a bank account;
• List of the child/children’s expenses;
• Documents to prove these expenses e.g. water and lights account, grocery receipts and clothing accounts;
• Contact details of the person who needs to pay maintenance such as their work address/residential address;
• Any details of their close family relations who they are in contact with;
• Court order (If you already have one); and
• Divorce Agreement.

3.3 What to expect once you have the above documents?

Once all paperwork has been properly prepared and submitted to the court:
• The court will provide the maintenance claimant with a date. The other parent will also have to appear.
• If the parent does not come to court, the court will issue a subpoena to get the person to appear at court on a specific date.
• The maintenance clerk will receive a file number. Always use this number whenever you make enquires.
• Ensure you get the method of payment to be recorded on the court order.
3.4 Methods of payment

Maintenance can be collected in the following ways:

- Garnishee order - the company where the person works takes money directly from their salary and pays it into the courts bank account;
- Cash payment - you collect the money over the counter at court; or
- Direct payment into your bank account.

The advantages of direct payment into your bank account are:
- No travelling to court;
- No transport cost; and
- No standing in long queues, and no time lost from work.

3.5 How to calculate maintenance

In order to claim for maintenance, you must first determine the reasonable needs of the child on a monthly basis. There is no hard and fast rule, but generally the child’s share of the common expenses in the household is determined by allocating one-part per child and two-parts per adult or older child.

The following table may be used as an example of how to calculate these expenses properly where there is a parent and 3 children in the household. In this example, each child will be allocated 20 per cent of the total expense shared by all members of the household.

Only once the child’s reasonable monthly needs have been determined will one be able to establish the contribution that each parent is required to make to meet those needs.

The formula applied in practice to determine this contribution is as follows:

\[
\frac{\text{parent’s gross income}}{\text{total gross income of both parents}} \times \frac{\text{child’s needs}}{1} = \text{R00.00 (parent’s contribution)}
\]

Maintenance cannot be measured in monetary terms alone. Usually, the parent who cares for the child on a daily basis indirectly contributes towards maintenance because of the time they spend together. Notwithstanding this,
both parents still have a financial obligation to pay maintenance in accordance with their means, income, and expenditures.

Maintenance may need to be adjusted regularly, depending on the changing needs of the child or the financial position of the parents. Once the need for a change in maintenance arises, whether filing a new application or seeking to vary an existing court order/settlement agreement, the applicant can request that the maintenance court to:

- set aside an existing maintenance order;
- make a new maintenance order;
- decrease a current order;
- amend a current order; or
- change an existing order.

Either of the parents can apply to the Magistrate’s Court where the children reside for a variation of the current maintenance order, but only if circumstances change.

The following diagram depicts the child-maintenance process:
3.6 Applicable legislation

The following key legislations form the basis of parent-child maintenance

**Constitution of the Republic of South Africa, 1996.**

**Section 28 - Children**

Section 28 of the Bill of Rights, entitled “Children”, says every child has the right to:

- a name and a nationality from birth;
- family care or parental care, or to appropriate alternative care when removed from the family environment;
- basic nutrition, shelter, basic health care services and social services;
- be protected from maltreatment, neglect, abuse or degradation;
- be protected from exploitative labour practices;
- not be required or permitted to perform work or provide services that -
  - are inappropriate for a person of that child’s age; or,
  - place at risk the child’s well-being, education, physical or mental health or spiritual, moral, or social development;
- not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years;
- is treated in a manner, and kept in conditions, that take account of the child’s age;
- have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and,
- not be used directly in armed conflict, and to be protected in times of armed conflict.

A child’s best interests are of paramount importance in every matter concerning the child.

In this section ‘child’ means a person under the age of 18 years. This section gives children the right to a name, citizenship, and some form of care. Children need food and shelter, and should be protected from abuse, neglect, and degradation. No child should work when under-age or do work that would interfere with his or her education or development.
**The Basic Conditions of Employment Act of 1997**

Section 43 (1) of this Act states that:

1. No person may employ a child—
   - (a) who is under 15 years of age; or
   - (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.

2. No person may employ a child in employment—
   - (a) that is inappropriate for a person of that age;
   - (b) that places at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development.

3. A person who employs a child in contravention of subsection (1) or (2) commits an offence

**Maintenance Act 99 of 1998**

This Act governs all the laws that relate to maintenance and honours the ruling that both parents have a legal duty to support their children, and that, in some cases, a duty of support exists between family members. In addition, it governs all the legal procedures used by Maintenance Courts, officers, and investigators to ensure a sensitive and fair approach to the payment of maintenance.

Key lessons from this Act are:

- Both parents have a duty to support their children, even if the child is born out of wedlock. (In some cases, family members have a duty to support other family members.)
- If a person neglects this duty, the person to whom money is owed can get a maintenance order issued by the Maintenance Court.
- It is a criminal offence to obstruct the maintenance officer’s investigation in a maintenance inquiry.
- It is a criminal offence to give false information in maintenance inquiries.
- A person can appeal against a maintenance order, but once it has been issued, it is a criminal offence not to pay.
- The Court has the right to enforce a maintenance order by selling the defaulter’s property or by holding the maintenance order against any money owed to the defaulter (including their salary).

**Maintenance Amendment Act 9 of 2015**

Maintenance Amendment Act has improved the maintenance system. The following are the key features of the Amendment Act:
A beneficiary will be able to claim maintenance where they work and not only where they live. This would make it easier for beneficiaries to go to the maintenance court during working hours.

If the person from whom the maintenance is sought can’t be traced, the court can grant an order directing electronic communication service providers [cell phone service providers] to give the court contact information of the person who may be affected by the order of the maintenance. This direction may only be used if the court is satisfied that all reasonable efforts to locate the person in question have failed.

There is a duty being put on maintenance courts to complete their enquiries as speedily as possible. This provision is for interim orders for maintenance pending the finalisation of the matter.

Another provision is that the views of the person who is obliged to pay maintenance must be sought.

If a person has defaulted on paying maintenance, their personal details would be submitted to the credit bureau. This would prevent maintenance defaulters from continuing to receive credit while owing maintenance.

**Children Act 38 of 2005**

South Africa has also recently enacted a new Children’s Act, which gives effect to certain rights of children as contained in the Constitution. This includes inter alia principles relating to care and protection; to partial care; to prevention and early intervention and definitions of parental responsibilities and rights and so forth.

Chapter 3 of the Children’s Act has codified the common law regarding parental authority and has reconceptualised what was previously referred to as “parental authority” as “parental responsibilities and rights”. In terms of the Children’s Act the parental responsibilities and rights that a person may have in respect of a child include the right to care for the child, to maintain contact with the child; the right to act as the guardian of the child; and the responsibility to contribute towards the maintenance of the child.
4. SPOUSAL MAINTENANCE

4.1 Background information

The CGE has received a considerable amount of complaints relating to Spousal maintenance. The general observation was that many complainants did not understand how spousal maintenance is operating in South Africa. It is an accepted principle of South African law that neither spouse has a right to maintenance upon divorce (*Strauss v Strauss* 1974(3) SA 79).

4.2 Applicable legislation and case law

The payment of maintenance to a spouse upon divorce is the creation of statute. The Matrimonial Affairs Act 37 of 1953 permitted a court to make an award against the guilty spouse for the maintenance of an innocent spouse. The current Divorce Act of 1979 permits a court to grant an award which it finds “just” for maintenance by one party to the other party.

The 1953 legislation has been interpreted to mean that no entitlement to claim maintenance as of right had been given to the innocent spouse but that “the Court was given a general discretion” (*Lincesso v Lincesso* (W); *Grigin v Grigin* (W); *Van Wyk v Van Wyk* (W); *Hossack v Hossack* (W) and *Portinho v Porthino* (T).)

The 1979 Divorce Act does not explicitly set out any right to maintenance by reason of the marriage now sought to be dissolved. The Act does not explicitly proclaim that maintenance in any amount or for any period will be ordered by reason solely of the marriage and the inability of one party to maintain the standard of living to which she has become accustomed during the marriage. The language of section 7(2) is clearly discretionary. The use of the word “may” allows for a positive exercise of the judicial discretion to grant maintenance and equally allows for a negative exercise of the judicial discretion not to grant maintenance. The wording of Section 7(2) of the 1979 Divorce Act confirms, in its use of the discretionary “may”, that the position has not changed in common law.

4.3 The ‘Clean Break’ and Constitutional Principles

The “clean break” principle in South Africa proposes that divorcing parties should become economically independent of each other as soon as possible after a divorce.\(^{10}\)

\(^{10}\)http://www.saflii.org/za/cases/ZAGPHC/2008/169.html#safootnote3sym
This mutual independence is sometimes achieved through the redistributive mechanism provided for in Section 7(3) of the Divorce Act or by an order that there be payment of a lump sum amount of money or transfer of one or more assets in lieu of maintenance or by implementation of a programme of ‘rehabilitation’ subsidised by maintenance for that purpose.¹¹

Our courts may have been quick to proclaim the need for former spouses to be financially independent of each other, whilst not always fully cognisant of the many experiential barriers and familial responsibilities which render such security no more than a chimera for many women. However, substantive equality has not necessarily followed upon theoretical equality.

Few reported judgments on application of the Divorce Act have addressed themselves to the meaning to be given to the goal of achieving what is “just”.

In Zwiegelaar v Zwiegelaar; (SCA), the court commented that it would be just to recognise accommodation requirements as part of maintenance needs while Buttner v Buttner (SCA), stated that the court is enjoined to “effect justice as between the parties” [para 24]. What is ‘just’ has been considered in the context of insolvency and liquidation. In Pienaar v Thusano Foundation and Another (B) at 580D-F, Friedman JP said the following:

“By their very nature the words ‘just and equitable’ are incapable of an all-embracing and exhaustive definition, and it is not surprising that the Courts have been unable to define them in an all-encompassing manner.”

In its plain, grammatical meaning, “just” means *inter alia* correct, appropriate, fair-minded, sound, deserved, fitting, reasonable, and justified; “equitable” means *inter alia* even-handed, fair, honest, reasonable, and right.

This in effect connotes and signifies that, if the Court, in exercising its discretion judicially, concluded that it is correct and appropriate and fair and reasonable to wind up a company, it will do so.

¹¹ Botha v Botha (2005/25726) [2008] ZAGPHC 169 (9 June 2008)
To put it another way, in its process of reasoning, the Court is guided by “broad conclusions of law, justice and equity”, and in doing so it must take into account competing interests and determine them on the basis of a judicial discretion of which “justice and equity” are an integral part. The Court has to balance the respective interests and tensions and counterbalance the competing forces and resolve and determine them in a fair, proper and reasonable manner.

What is thought to be a ‘just’ order in the context of the Divorce Act must contain a moral component of what is thought to be ‘right’ and ‘fair’. Fairness envisages that the order is ‘appropriate’ between the parties and when measured against all the factors specified in section 7(2) and those others which a court decides should also be taken into account. What is ‘appropriate’ brings one back full circle to the moral consideration that the order must be ‘deserved’. Of course, any ‘just’ order must be ‘well founded’ on fact and reflect relevant and proper legal principles.

The considerations to which a court must have regard as specified in section 7(2) as well as “any other factor” encompass the enquiries as to whether an award of maintenance should be granted and, if so, in what amount, for what period and on any conditions. There is obviously much overlap in the import of these considerations. Most of the specified factors seem to guide the court as to both entitlement to and quantum of maintenance.

4.4 Can a surviving spouse claim from the deceased estate?

When a spouse dies, the surviving spouse can claim maintenance against the deceased estate in terms of the Maintenance of Surviving Spouses Act, 27 of 1990. The Executor of the Estate then has a duty to pay the maintenance to the surviving spouse.¹²

Once a marriage ends, by death or divorce, so does the duty to support each other. However, the Court does have the discretionary power to make maintenance awards extending beyond marriage if the spouse seeking maintenance can prove their need for maintenance. In other words: the onus is on the spouse seeking maintenance to prove his / her need to be supported by their ex-spouse after the finalisation of the divorce.

¹² https://www.greyvensteins.co.za/Services/Divorce-Family-Law/Spousal-Maintenance
4.5 Can one apply for an interim maintenance order during divorce litigation?
Divorce litigation can be protracted and can often take up to a year to finalise, if not longer. During this interim period, i.e. where the divorce process is underway but not yet been finalised, a spouse who is dependent on financial support on his / her spouse can immediately apply to court for an interim maintenance order pending the finalisation of the divorce action. This remedy is available for spousal maintenance as well as maintenance for children.13

This process is cost effective and the outcome is almost immediate. It is a helpful tool for spouses embroiled in divorce litigation faced with the added stress of financial insecurity during such a trying time.

4.6 CGE assistance in maintenance related cases
The CGE legal department offers legal assistance in maintenance related cases. In terms of child-maintenance, the CGE legal department assists complainants with the opening of maintenance cases and legal representation during maintenance enquiries. If cases have already been opened, the CGE legal department follows-up on such matters with the relevant courts until such matters are finalized. The legal department is further able to assist with legal representation where a spouse seeks spousal maintenance.

5. SUCCESSION LAW IN SOUTH AFRICA

5.1 Background information
The CGE receives a lot of succession cases. Succession complaints have been recorded as one of the highest categories of complaints received by the Legal Department in the financial years 2014/2015, 2015/2016, 2016/2017 and 2017/2018. The biggest challenge observed with these complaints relate to customary marriages. The CGE is continuously being confronted with parties who have entered into a customary marriage, but have failed to have such marriage registered, as provided for in section 4 of the Recognition of Customary Marriages Act 120 of 1998. Cognizance, however, taken of the fact that section 4(9) clearly provides that the non-registration of the marriage does not affect the validity of the marriage. The failure to prove the existence of a marriage often affects the prospects of the claims lodged with the deceased estate.

13 https://www.greyvensteins.co.za/Services/Divorce-Family-Law/Spousal-Maintenance
5.2 What is deceased estate?

A deceased estate comes into existence when a person dies leaving property or a document which is a will or purports to be a will. Such estate must then be administered and distributed in terms of the deceased’s will or failing a valid will, in terms of the Intestate Succession Act, 81 of 1987. The procedure which must be followed to administer a deceased estate is prescribed by the Administration of Estates Act, 66 of 1965 (as amended).14

5.3 Office of the Master of the High Court

The Master of the High Court (The Master) is a department within the Department of Justice and Constitutional Development created by Legislation. One of its functions is to supervise the administration of the deceased estates. It is created by the Administration of Deceased Estate Act, Act 66 of 1965 (“the Act”). The Master has the power to appoint and/or to remove the executor in terms of the provisions of the Act.

The purpose of the Act is:
“to consolidate and amend the law relating to the liquidation and distribution of the estates of deceased persons, the administration of the property of minors and persons under curatorship, and of derelict estates; to regulate the rights of beneficiaries under mutual wills made by any two or more persons”.

It is trite that once a deceased estate is reported to the Master and an executor is appointed, the estate will be administered and liquidated in terms of the Act. The executor is then obliged to administer the estate under supervision and is accountable to the Master.

In terms of section 35 of the Act, the executor has a duty to lodge a liquidation and distribution account with the Master. Once the account has been approved by the Master, it lies in the Master’s office for inspection by anyone including the heirs and/or beneficiaries of the estate. Any person who has an objection to the liquidation and distribution account, has the right to lodge such an objection with the Master.

The administration of estates is a specialized area of law and it is common practice and advisable for persons who find themselves nominated as

executors in a will, and who are not experienced in the administration of estates, to appoint an agent to act on their behalf.

5.4 What to do when a person dies?

• **Report death and lodge will with the Master of the high court**
  The death of any person is reported by completing the prescribed notice form and lodging same within fourteen days of the occurrence with the Master. The surviving spouse or where there is none, the nearest relative usually report the death. The person who, at time of death (or immediately thereafter) is in control of the premises where the deceased died may also report the death.\(^{15}\)

  Any person who has in his possession any document purporting to be the will of the deceased must, as soon as the death comes to his knowledge, deliver the document to the Master. Contrary to popular belief, it is not necessary to have a meeting of surviving relatives to “read out the will”.

• **Issue letters of executorship**
  An executor is an individual appointed to administer the estate and his main duty is to carry out the deceased’s instructions in terms of the will. The executor has authority to act only pursuant to the receipt of his Letters of Executorship from the Master, which entitles him to administer all the assets of the estate within the Republic of South Africa.\(^{12}\)

• **Advertise to creditors and lodge claims**
  After lodging the preliminary inventory detailing the immovable and movable property, as well as claims in favour of the estate, the executor must advertise to all creditors in order for them to lodge their claims against the estate. These claims must then be investigated by the executor and if accepted, included in the Liquidation and Distribution Account (“the L&D”). The executor must determine the solvency of the estate (in other words, determine if the estate is able to pay all its debts) and, if provided for in the will, liquidate the estate in order to provide for payment of the creditors.

\(^{12}\) See also [http://blog.mhilaw.co.za/?p=742](http://blog.mhilaw.co.za/?p=742)
• **Lodge L&D with Master of the High Court**

The executor must, within six months after the issue of the letters of executorship, lodge the L&D account with the Master, which includes all assets and liabilities of the estate, as well as the distribution to the heirs. If there are valid reasons for a delay in lodging the L&D, such as disagreements between family members of the deceased, the Master will grant an extension. The Master will, upon lodgement of the L&D account, scrutinise same and issue a questionnaire to the executor, should it be deemed necessary. The executor is obliged to answer any such questions to the satisfaction of the Master.

• **Master’s approval, payment to creditors, heirs and legatees**

Upon the Master’s approval of the L&D account, same must lie for inspection for a period of 21 days at the Master’s office, as well as the nearest Magistrate’s Court.

If any written objections are received, they must be attended to by the executor as prescribed in the Act. Upon resolution of any objections, or if none are received, the executor may proceed to make payment to the heirs and transfer assets in terms of the will.

5.5 **Contextualising customary marriages and deceased estates**

According to section 1 of the Recognition of Customary Marriages Act (RCMA) ‘customary marriage’ means a marriage concluded in accordance with customary law. ‘Customary law’ means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. The Act does not apply to customary marriages concluded by African people outside of South Africa.

• Both parties to the marriage must be above the age of 18 years.
• Both parties must consent to being married under customary law.
• The marriage must be negotiated, celebrated, and entered into in accordance with customary law.
• Lobola is not a necessary requirement for the validity of the customary marriage, however, if it is paid, it proves that the marriage was negotiated in accordance to custom. (Note that these marriages have always been recognised under customary law).
The RCMA became law on 15th November 2000. If you were in an existing valid marriage under customary law before this date, your marriage is recognised under this new law. When a husband already had more than one wife under customary law all those marriages are recognised under this new law. This Act regulates customary marriages entered into after this Act came into operation and provides for the rules that the people getting married under customary law must follow in order for their marriage to be recognised.

The RCMA recognises all customary marriages that were valid under customary law. This includes those marriages that were regarded as invalidated by the Black Administration Act. Further, customary marriages under the Transkei Marriage Act (TMA) could co-exist with a civil marriage out of community of property. All those marriages, if they were valid under the TMA are recognised by the RCMA.

In terms of section 4(3)(a) of the Act, customary marriages entered into before the commencement of the Act, which are not already registered in terms of any other law, had to be registered within a period of 12 months after the commencement of the Act, or within such a period as the Minister may from time to time prescribe by notice in the Gazette.

Section 4(3)(b) of the Act provides that marriages entered into after the commencement of the Act must be registered within a period of three months after the conclusion of the marriage or within such period as the Minister may from time to time prescribe by notice in the Gazette.

Proving the existence of a customary marriage that has not been registered, can pose a problem to both the executor in an estate as well as the Master when an estate is reported, especially when the existence of such a marriage is disputed by interested parties. It is for this reason that the Master usually insists on proof of registration of a customary marriage. This will impact on the eligibility to inherit from an estate. Registration of a marriage is fundamental to the protection of the rights of women and children in customary marriages.

The bulk of the Commission’s complaints emanate from the eligibility of complainants to inherit from the estate. It has been observed that many customary marriages are not registered and this has placed a substantial number of women in a vulnerable position. This is largely prevalent in the Kwazulu-Natal, Mpumalanga, Limpopo, and Eastern Cape.
It is also important to highlight that all customary marriages where there is one husband and one wife whether entered into prior or after the enactment of the Act are in community of property (Gumede v President of the Republic of South Africa 2009 (3) BCLR 243 (CC). This means that the husband and wife have an equal share in the assets, money and property; it also means that they share all the debts. If the parties would like their marriage to be out of community of property they will have to enter into an ante-nuptial contract prior to getting married. If they want to change it after they are already married, they will have to apply to the High Court.

Under the RCMA the wife has equal right and status with the husband to decide what happens to the property. A customary wife now has the capacity to enter into a contract without the assistance of the husband.

5.6 When should a customary marriage be registered?

Even though not registering the customary marriage does not invalidate the marriage where there is one husband and one wife, it does invalidate the marriage if the husband is marrying a second wife after the commencement of this Act. Therefore, registration is encouraged as it constitutes prima facie evidence of the existence of a customary marriage. After the coming into effect of the RCMA, all marriages, those entered into prior to or post 15th November 2000 must be registered with the Department of Home Affairs. If parties were married after the law was passed, the parties should register their marriage within three months after the marriage.

Note: Non-registration of a customary marriage where there is one husband and wife does not invalidate the marriage, however, non-registration of a subsequent customary marriage invalidates the customary marriage.

5.7 The legal position if a husband wants to marry another wife

The husband must enter into a written agreement / contract which will state what should happen to the property and then the husband must apply to the court to approve the written contract. The court must make sure that all the property interests of all wives are protected in accordance with Section 7 (6) of the Act. Non-compliance does not render the subsequent marriage null and void; rather it will render the marriage to
be a marriage out of community of property. In the case of *Mayelane v Ngwenyama and another (Womens’ Legal Centre Trust and others as amici curiae)* 2013 (8) BCLR 918 (CC) it was confirmed that the husband must obtain the consent of the first wife before he may enter into a further customary marriage. Failure to do so will render the further marriages automatically as out of community of property.

5.8 **CGE Assistance in cases of customary marriage**

The legal department offers legal assistance in instances where parties in a customary marriage seek to divorce. The CGE thus offers legal representation in such cases. The legal department also offers assistance in acquiring declaratory orders in instances where the complainants are precluded from benefiting from the deceased estate as a result of a non-registered customary marriage. Furthermore, the CGE conducts outreach-legal clinics in various communities to educate communities on the importance of registering customary marriages.
CHAPTER TWO

CONSTITUTIONAL LAW

1. Gender discrimination cases

1.1 Background information

The CGE received a considerable amount of unfair discrimination cases during the financial years 2014/2015, 2015/2016, 2016/2017 and 2017/2018. Unfair discrimination means that a person is treated differently as compared to other categories of people and to the extent that one’s dignity as a human being is impaired by such treatment. Discrimination is regarded as unfair when it imposes burdens or withholds benefits or opportunities from any person on one of the prohibited grounds listed in the Act, namely: race, gender, sex, pregnancy, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth etc.

For the purposes of this chapter to is important to highlight that the majority of unfair discrimination cases were on the grounds of gender and sexual orientation.

1.2 Applicable legislation and case law

The following legislative framework serves as a key tool to redress:

The South African Constitution (1996):

- The right to equality (Section 9)
  Section 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) further states that 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.

- The right to dignity (Section 10)
  Section 10 of the Constitution guarantees everyone a right to dignity. The importance of the right to dignity is one of the fundamental rights in the Constitution. The Constitutional Court has repeatedly emphasised the importance of the fundamental right to human dignity.
In *S v Makwanyane* the right to dignity is an acknowledgement of the intrinsic worth of human beings, independent of his or her station in life. It was further stated that without dignity, human life is substantially diminished. It is only when a person is treated with dignity that they feel worthy and important in society. This right is violated when persons are subjected to conduct that is degrading and humiliating.


PEPUDA was enacted because of section 9(4) of the Constitution which requires the State to pass legislation which promotes equality and prevents unfair discrimination. PEPUDA binds the State and all persons and does not apply to any person to whom and to the extent to which the EEA applies.

Neither the State nor any person may unfairly discriminate against any person. No person may unfairly discriminate against anyone on the grounds of race, gender, disability, including the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race, gender based violence, female genital mutilation and the system of preventing women from inheriting family properly and failing to eliminate obstacles that unfairly limit or restrict persons with disabilities (PWD) from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons. PEPUDA addresses systemic inequalities and unfair discrimination that manifest in the institutions of society and the practices and attitudes of South Africans in so far as these ‘undermine the aspirations of our constitutional democracy.’ PEPUDA places two responsibilities on persons

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17 *S v Makwanyane* 1995 (3) SA 391
19 Section 6 of the PEPUDA
20 There is a well-celebrated case of *Mosenane v Master of the High Court* 2001 (2) SA 18 (CC). This case concerns discrimination between black and white in the administration of deceased estates. Mr Mosenane senior died in 1999 without leaving a valid will, his estate was reported to the Master of the High court in terms of the Administration of Estates Act. The Master referred the estate to the magistrate in Pretoria to be dealt with in terms of the Black Administration Act and later explained that the Master’s office did not have the power to administer intestate estates of black persons. The family was not satisfied with the fact the estates need to be administered by magistrate, they wanted the estates to be administered by the Master. They argued that it is discriminatory on the basis of race since magistrates can only administer estates of black persons while the Master administers the estates of white persons. They argued further that all people are equal before the eyes of the law and no one may unfairly discriminate either directly or indirectly against anyone on the grounds of race. The court finally orders the Master of the High Court to administer the estates. See also the case of *Zondi v President of the Republic of South Africa* 2005 (2) SA 580 (CC)
21 See *Bhe v the Magistrate, Khayelitsha, Shibi v Sithole and South African Human Rights Commission v President of the Republic of South Africa* 2000 (2) SA 49(N).
22 Section 7, 8 and 9 of the PEPUDA.
23 Preamble of the PEPUDA.
that are operating in the public domain to promote equality\textsuperscript{24} and on the social commitment for all persons to promote quality\textsuperscript{25}

The PEPUDA acknowledges and takes cognisance of the international legal obligations that South Africa has undertaken in respect of the promotion of equality and prevention of unfair discrimination. In this respect, reference is made to the obligations flowing from the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{26}

The society that PEPUDA envisages for South Africans is: “a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, social progress, justice, human dignity and freedom”.\textsuperscript{27}

Whilst PEPUDA was enacted to give effect to the constitutional right to equality, it was not meant however to be a re-statement of section 9 of the Constitution\textsuperscript{28}. The provisions of the PEPUDA ‘may extend protection beyond what is conferred by section 9. As long as PEPUDA does not decrease the protection afforded by section 9 or infringe another right, a difference between the PEPUDA and section 9 does not violate the Constitution’.\textsuperscript{29}

1.4 A legal analysis of LGBTIQ cases

According to Ilyayambwa, human rights are afforded to all people, regardless of their status or whether they are in majority or minority. The jurisprudence of a nation or region has to accommodate the changes that are occurring in society, otherwise, the law would become irrelevant and redundant.\textsuperscript{30} The South African legislative framework provides adequate protection to the LGBTIQ. They are entitled to their rights as entrenched in Chapter 2 of the constitution which contains a set of rights. Included, is the right to freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{24} Section 26 reads: It is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by: (a) Adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation; (b) Enforcing and monitoring the enforcement of the equality plans, codes and regulatory mechanisms developed by them; and (c) Making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations, where appropriate.
\item \textsuperscript{25} Section 27(1) reads: Pursuant to section 26, all persons, non-governmental organisations, community-based organisations and traditional institutions must promote equality in their relationships with other bodies in their public activities.
\item \textsuperscript{26} See Preamble of PEPUDA.
\item \textsuperscript{27} Ibid.
\item \textsuperscript{28} MEC for Education: KwaZulu-Natal v Pillay, 2008 (1) SA 474 (CC) at 43
\item \textsuperscript{29} Ibid
\item \textsuperscript{30} Ilyayambwa, Homosexual Rights and the Law: A South African Constitutional Metamorphosis, International Journal of Humanities and Social Science, Vol. 2 No. 4 [Special Issue – February 2012], p50
\item \textsuperscript{31} Section 12(1)(c) of the Constitution.
\end{itemize}
However, in recent years South Africa has witnessed numerous unfair discrimination reports involving the LGBTIQ community. These unfair discriminations are often associated with the sexual orientation of LGBTIQ community. In order to fully understand the issues and challenges attached to sexual orientation it becomes necessary to understand the concept itself.

The court in National Coalition for Gay and Lesbian Equality v Minister of Justice serves as a useful tool in this regard. According to the Court:

The concept ‘sexual orientation’ as used in s 9(3) of the Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex. The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives… But such provisions also impinge peripherally in other harmful ways on gay men which go beyond the immediate impact on their dignity and self-esteem. Their consequences ‘legitimate or encourage blackmail, police entrapment, violence (queer-bashing) and peripheral discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves.’

Media reports in South Africa suggest that the LGBTIQ community continues to face an overwhelming climate of social and religious discrimination. Butler and Astbury observe that there have been political and legal progress in recognising the rights of LGBTIQs, however overt homophobic behaviours exist at all institutional levels of South African society.

Antigay sentiment is compounded by a strong patriarchal Christian ethic that views same-sex sexual encounters as sinful and wrong. In this context, reaction against homosexual rights is seen, for many, as upholding religious beliefs and, therefore, something to be proud of and actively encouraged. The cultural context is also critical as the concept of “sexual orientation” is unfamiliar in many African cultures. It is clear that homosexual conduct has always existed throughout Africa, yet homosexual identity, and the concept of sexual orientation, has not.


According to Butler and Astbury, a gap between legislative reform and social transformation exists. It would seem that the existing legislative framework, despite its significance, fails to give adequate protection to many South Africans citizens whose sexual orientation differs from others.

The Court in National Coalition for Gay and Lesbian Equality v Minister of Justice had expressed its displeasure against the unfair discrimination of the LGBTI. ACKERMANN J passed the following remarks:

Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

Similar views, were expressed in Vriend v Alberta, where Cory J observed that:

It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

Equality in the new democracy has become a social problem and has often raised serious jurisprudential issues. According to Currie and De Waal equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the formal idea of equality is that people who are similarly situated should be

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34 Ibid, p5
35 Para 42;
36 (1998) 156 DLR (4th) 385
37 At paragraphs 69 and also 102 respectively
38 Iain Currie and Johan de Waal, The Bill of Rights Handbook, 2005, 230
treated similarly. Conversely is the idea that people who are not similarly situated should not be treated alike.39

Equality is a fundamental value of the Constitution and this was confirmed by the court in Fraser v Children’s Court, Pretoria North40 where the Constitutional Court observed that:
There can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.41

1.5 Equality courts

There are equality courts which have been established to try to adjudicate on matters relating to equality. Equality courts are courts designed to deal with matters covered by PEPUDA. Every Magistrate and High Court have equality courts in their area of jurisdiction.42

The presiding officers in these courts must have undergone a training course in respect of the Act and equality matters.43 PEPUDA stipulates that ‘only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an equality court’44 may preside over matters brought before an equality court in terms of PEPUDA.

Each equality court has a clerk of the court who handles administrative issues. Equality courts can hear any complaint regarding unfair discrimination, coupled with the publication of information that unfairly discriminates, and causes harassment and hate speech.

Equality courts are such a central feature of PEPUDA that the effectiveness or otherwise of this law may be judged by the extent to which these courts deliver justice and are efficient.45 These courts have an opportunity to open space for individuals in which to be heard, especially victims of sexual and racial discrimination who have not had voices in the past.46 In order to obtain the confidence of the public, these courts need to work diligently in ensuring that equality becomes reality and not merely a rule stated in the PEPUDA.

39 ibid
40 Fraser v Children’s Court, Pretoria North 1997(2) SA 261 (CC).
41 See also Nicolette Naylor, LEAD Practice Manual: Aspects of Gender Law 2014, pg.7
42 Section 16(1)(a) of PEPUDA
43 Section 16(2) of PEPUDA
44 ibid
Equality courts, together with promotional programmes, hold great promise for the transformation of South African society to one which collectively understands compassion and the need for justice to remedy unnecessary suffering.\textsuperscript{47}

1.6 How to bring a matter before the equality courts\textsuperscript{48}

STEP 1
• Approach your nearest Magistrates court and ask for the Equality court, you will find a clerk of the court who will give you a Form 2 to complete.
• Form 2 is the form to use when commencing proceedings at the equality court.
• If you need assistance in completing the form, the clerk of the equality court will assist you or you can go to the offices of the South African Human Rights Commission (SAHRC) or the CGE near you for assistance.

STEP 2
• The clerk of the equality court must then notify the respondent(s) (the person(s) against whom you are lodging your complaint) about the complaint within 7 days using Form 3.

STEP 3
• The Respondent (s) has 10 days within which to reply.
• Should the Respondent wish to state his/ her side of the case he/she will be given a copy of Form 4 which they must complete and return to the clerk within 10 days.
• The Clerk has 7 days from receipt of the response to notify the complainant of the respondent’s response.

STEP 4
• Within 3 days of the expiry of the period within which the respondent(s) is meant to reply, the clerk must refer the matter to the Presiding Officer (the Magistrate or Judge who will hear the matter).
• The Presiding Officer has 7 days to decide whether the matter is to be heard at the equality court or whether it should be referred to an alternative forum such as the SAHRC.

\textsuperscript{47} ibid
• If the Presiding Officer decides to refer the matter to the alternative forum, the clerk must notify the parties of the referral.

• The alternative forum must deal with the matter as expeditiously as possible. If it fails to do so or fails to resolve the matter, it must refer the matter back to the court with a report.

• If the matter is referred back, the Court has 7 days within which to give instructions as to how the matter should be dealt with.

**STEP 5**

• If the Presiding Officer decides to hear the matter, the clerk must within 3 days assign a date for the directions hearing.

• At the directions hearing, the Presiding Officer will sort out issues, such as: when can parties come to trial, does anyone need an interpreter, should Assessors be used etc.

**STEP 6**

• Hearing

1.7 **CGE assistance in cases before the equality courts**

The CGE offers legal representation at the equality courts on matters that fall within its mandate. Furthermore, the CGE conducts mediation proceedings on gender discrimination matters and the outcome of the mediation may be made an order of court at the Equality court. The Legal department through its outreach-legal clinics continues to educate communities on gender discrimination cases and further promotes the utilisation of equality courts to resolve matters.
CHAPTER THREE

EMPLOYMENT EQUITY LAW

1. Sexual harassment in the workplace

1.1 Background information

Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. Central to the transformative mission of our Constitution is the hope that it will have us rethink power relations within society to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. The CGE has received a considerable amount of sexual harassment complaints in the public, private sector and institutions of higher learning in recent financial years. This complaint reflects the prevalence of sexual harassment in the workplace and lack of commitment by accounting officers to take decisive steps against the perpetrators. These complaints further highlight the need to further educate employees and students on sexual harassment and its legal consequences.

1.2 Applicable legislation and case law.

The treatment of harassment as a form of unfair discrimination in s6(3) of the Employment Equity (EE) Act 55 of 1998 recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the 1998 Code), issued by National Economic Development and Labour Council (NEDLAC) under s203(1) of the Labour Relations Act 66 of 1995 (LRA), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued by the Minister of Labour in terms of s54(1)(b) of the EE Act 55 of 1998.

At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society general and specifically within particular workplaces. While economic power may underlie many instances of harassment, a sexually hostile working environment is often -
“...less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor.”  

By its nature, such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as “the most heinous misconduct that plagues a workplace”.

Both the 1998 and the Amended Codes of Good Practice provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others having dealings with a business. In addition, both codes record that a single act may constitute sexual harassment.

Distinctions exist between the Codes in the definition of sexual harassment, with the 1998 Code defining it as:

(1) “...unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if:
   (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
   (b) The recipient has made it clear that the behaviour is considered offensive; and/or
   (c) The perpetrator should have known that the behaviour is regarded as unacceptable.”

The definition contained in the 2005 Amended Code of sexual harassment is that of:

“unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if: (a) The behaviour is persisted in, although a single incident of harassment can constitute

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sexual harassment; and/or (b) the recipient has made it clear that the behaviour is considered offensive; and/or (c) the perpetrator should have known that the behaviour is regarded as unacceptable.”

1.3 **Insights from Case law**

In *J v M Ltd Ltd.* (1989) 10 ILJ 755 (IC) the first reported case of sexual harassment in South Africa, was heard in the Industrial Court in February 1989 (Industrial Law Journal, 1989, pp.755-62). The case is worth examining in some detail as it provides a useful framework within which to discuss sexual harassment in South Africa. It highlights many of the problems associated with sexual harassment and illustrates the limited legal protection currently offered to employees. In looking at this legal protection, the focus of the paper is limited, primarily, to the provisions contained within the LRA 66 of 195. No serious examination of the options offered by civil and criminal law is entered into.  

The applicant sexually harassed a complainant, a much older woman, by caressing and/or slapping her buttocks and fondling her breasts. She found his behaviour offensive and told him not to come near her. Eventually she told him to remain on the other side of the desk whenever he entered the office. (*J v M Ltd, 1989*)

The case in question concerned a senior executive of an unnamed company. He was charged with sexual harassment at an internal company hearing, following numerous complaints about his behaviour. Specifically, he was accused of having “sexually molested and harassed” a female employee “against her will”. (*Company Charge Sheet, J v M Ltd, 1989*)

He allegedly “fondled her breasts”. This is one of many complaints of similar acts that had been received “from the time the applicant first joined the (company)”. The company claimed that the general manager had on “several occasions discussed (the) applicant’s behaviour with him”, and that he had been issued with a “final warning”. This was disputed by the applicant, but accepted by the court. At the disciplinary hearing, chaired by the general manager of the company, he was found guilty of sexual harassment and given the opportunity to resign. This he did, but subsequently withdrew his resignation and was dismissed (*J v M Ltd, 1989*).

The senior executive then brought an application for re-instatement to the Industrial Court. The application was brought in terms of s43 of the LRA 28 of 1956 which gives the Industrial Court the authority to reinstate employees if the court is satisfied that an “alleged unfair labour practice” had taken place. The applicant contended that the company had not followed company procedure and that the sanction imposed had been “too harsh” (J v M Ltd, 1989).

In his defence, the applicant argued that his behaviour was “no more than mildly flirtatious … (or) Mediterranean type behaviour”. The applicant submitted two petitions in support of this contention. The first was signed by “all the ladies in the office controlled by (the applicant) … pleading for compassion and stating that they did not feel offended or sexually harassed” by his past behaviour. The second was signed by 500 employees of the company, requesting the management to “reconsider his dismissal” (J v M Ltd, 1989).

The application was dismissed. The court found the senior executive guilty of sexual harassment. Sexual harassment was viewed as a “serious matter which required attention from employers.” The sanction imposed by the company, namely dismissal, was upheld, as the seriousness of the matter warranted this action.

Neither of the submitted petitions was given serious consideration by the court. In response to the first, De Keck argued that he could “not accept that all of them (the signees), consented to the applicant fondling their buttocks and breasts and took pleasure in him doing so. The evidence that many have objected to and resigned because of his fondling habits is clear”. The second petition was dismissed on the grounds that the employees who signed it “(did) not know the facts” and “natural(ly) … would have sympathy with the applicant” (J v M Ltd, 1989:761).

It seems unlikely that the people who signed the second petition would have done so without any knowledge of what the applicant was accused of. For instance, it is implausible to suppose that he would have received the support he did if he had been accused of rape, murder or theft. The implication therefore is that sexual harassment in the workplace, even of the nature that the applicant was found guilty of, is regarded as acceptable or, at the very least, as a somewhat trivial disciplinary offence.
The widespread nature of the support offered to the applicant in his place of work may have been instrumental in persuading some of the women under the applicant’s authority that what they had experienced was not serious or offensive, hence encouraging them to sign the first petition. While this remains at the level of speculation, these issues do support the more general contention that sexual harassment in South Africa is both widespread and not regarded in a serious light by employers or employees.

Finally, it appears that the court was also persuaded by a concern that “it should be careful not simply to substitute its (the court’s) own assessment for that of the employer”. It is argued that “the standard of conduct which an employer expects from its employees is a clear management prerogative”. The company’s “most senior executives” had decided that the applicant’s conduct had “fallen short of what is regarded as acceptable behaviour”. He had been warned of this several times and finally dismissed. The court found that there was “no basis” on which to find the “judgement” of the company “clearly unfair or unreasonable”. (J v M Ltd, 1989)

In the case of SA Metal Group (PTY) LTD and Commission for Conciliation Mediation and Arbitration, Stephen Bana NO, James Beasely [2014] ZALCCT15, the Labour Court had to determine whether an arbitration award granted in favour of a divisional director who had been dismissed for sexual harassment could be reviewed and set aside. In order to make this determination, the Court had to determine whether the Commissioner had into account the 2005 Code of Practice on the arbitration of sexual harassment matters in reaching his decision.

The director had been charged with the sexual harassment of a subordinate female member of staff working in the company’s human resources department. He had passed a number of remarks and made physical contact with the complainant over the course of a few months. The director was dismissed after an internal disciplinary hearing. He subsequently challenged the substantive fairness of the dismissal where the presiding Commissioner granted an award in his favour on the basis that the complainant had not made it immediately clear to the director that the advances were unwanted, nor had she reported his actions.
Furthermore, the Commissioner found that the remarks passed by the director were not explicitly sexual in nature, purely subjective and thus open to interpretation. The Court found the Commissioner’s finding in this respect to be unwarranted in that he failed to take cognisance of the provisions of the Code which stipulate that “unwelcome innuendo, suggestions and hints” may fall within the Code’s definition of sexual harassment.

The Court also found the Commissioner’s reasoning in regard to the complainant’s failure to make her discomfort immediately known to the director to be defective. In this regard, the Court held that whilst Section 61 of the Employment Equity Act stipulates that instances of sexual harassment must be immediately reported to the employer, the Code requires that “immediately” be construed as “as soon as reasonably possible” taking into account the power imbalances that exist in the workplace, in particular the complainant’s fear of reprisal.

The Court dismissed the Commissioner’s finding that conduct will only constitute sexual harassment after the offender is made aware of the discomfort his/her conduct is causing to the complainant. The Court based this finding on the definition of sexual harassment in the Code which states that “Sexual attention becomes harassment if: i) the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or ii) the recipient has made it clear that the behaviour is considered offensive; and or iii) the perpetrator should have known that the behaviour is regarded as unacceptable.” The use of “and/or” in this definition makes it clear that communication of discomfort or disapproval is not required for conduct to be deemed as sexual harassment.

The Court further criticised the Commissioner’s failure to consider the director’s duty as an employee in a senior managerial position not to act in a manner that “would contribute to a hostile work environment.” In light of the above, the Court maintained that in failing to take proper account of the Code, the Commissioner had committed a gross irregularity in terms of Section 145 (2)(a) of the LRA and ordered that the arbitration award be set aside and replaced with a finding that the director’s dismissal had been substantively fair.51

51 http://dev3.marketsonline.co.za/swerksmans-current-live/virt_e_bulletins/sexual-harassment-workplace/
1.4 CGE assistance

Sexual harassment matters are often internal matters which must be resolved through the grievance procedure of the company. The CGE legal department engages the employers to resolve the matter by complying with the grievance process of the company. Once the internal processes are concluded, the CGE will draft an investigation report that takes into consideration, the following:

- the evidence of the complainant;
- Evidence of the respondent;
- outcome of the grievance and;
- any other relevant information.

The CGE investigative report will contain findings and recommendations which parties are expected to comply with.

2. TRANSFORMATION HEARINGS

2.1 Background information.

The CGE has conducted investigative hearings on transformation hearings in the public, private sector and institutions of Higher Learning respectively for the previous five financial years.

The process of the hearings is visually illustrated as follows:
The accounting officers of all entities were served by the Sheriff of the Court with a notice to appear before the Commission. They were warned that a failure/neglect to appear could result in a criminal charge being instituted, in terms of the CGE Act.

All institutions were allowed legal representation, and all accounting officers had to take the oath before presenting evidence to the Commission. After each presentation, the Commissioners were permitted to interrogate the information provided. Accounting officers were also afforded the right to reply to the Commission.

These investigative hearings have shown glaringly that women and PWD are still marginalised despite South Africa having one of the most progressive legislative frameworks in the world.

### 2.2 Legislative framework

The South African Constitution clearly promotes equality in the workplace, and since the early 1990s, the country has worked at international levels to eliminate discrimination on the basis of race, gender, sex, sexual orientation, age and disability.

It has ratified many international agreements including:

- International Labour Organisation (ILO) Convention No. 111, concerning equal remuneration for men and women workers for work of equal value (ratified by South Africa in 2000);  
- Article 2 of the above, which requires member states to promote and apply to all workers the principle of equal remuneration for men and women for work of equal value, by means of national laws, recognised machinery for wage determination and collective agreements; and  
- ILO Convention No.100 (ratified by South Africa in 1997) which requires member states to pursue policies that promote equal opportunity, equal treatment in employment and access to opportunities including vocational training (with a view to eliminating discrimination in employment).

Equality in the workplace is also embedded in South Africa’s national legislative framework including:

- LRA of 1995  
- BCEA of 1997
• EEA of 1998
• Skills Development Act of 1998
• Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) of 2000
• Broad-Based Black Economic Empowerment (B-BBEE) Act of 2003.

Employers are bound by these Acts to equalise employment opportunities for women and people with disabilities and to remove barriers to their entry, advancement, development, remuneration and retention. They are also bound by the same Acts to do this in ways that are evaluative and innovative, reviewing old policies and practices and testing new ones.

The EEA is the foundation for a range of policies, commissions and activities to achieve equitable representation in the workplace. It:
• Promotes skills development for the disadvantaged;
• Establishes the Commission for Employment Equity (CEE) to ensure that employers promote equal opportunity and eliminate discriminatory hiring practices;
• Makes employers responsible for training and developing women in the workplace;
• Removes obstacles to promoting women;
• Obliges employers to narrow wage gaps between employees of different sexes who perform similar work; and
• Promotes flexible working hours, time off during pregnancy and the improvement of maternity and childcare facilities.

Beyond legislation, there are two important policy documents to help guide implementation: the Affirmative Action Policy and the White Paper on the Transformation of the Public Service, 1995. The first aims for equitable participation in the economy by all population groups through requiring employers to develop and implement Affirmative Action programmes and provide equal opportunities for women and people with disabilities.

The second requires that all levels of the public administration develop policies and programmes to ensure that Affirmative Action enters into management systems in ways that are accountable, monitored, coordinated, and documented.
2.3 Institutions that appeared before the Commission

Institutions of Higher Learning
- Department of Higher Education and Training
- University of South Africa
- University of Venda
- Tshwane University of Technology
- North West University
- University of Kwa Zulu Natal
- University of Limpopo
- University of Pretoria
- Rhodes University
- University of the Witwatersrand
- University of Cape Town
- University of the Free State
- University of Johannesburg
- Stellenbosch University

Private sector
- EH Hassim Builders World.
- Moorddrift Diary
- RCL Foods
- Jonsson Workwear
- Sasol
- Six Sons t/a Kloppers
- Vermeulens Build It
- SAB
- Tiger Brands
- TOYOTA
- NWK
- OVK
- Pick n Pay
- Rhodes Food Group
- H L Hall And Sons Ltd
- Eskom
- Absa Bank Limited
- Phalaborwa Mining
- De Beers Consolidated mines
- Foskor
- Pikwane Diamonds
- Distel Limited
- Sekunjalo Holdings Limited
- Shoprite Holdings Limited
- Vida E Cafe

**Public sector**
- Department of Health
- Department of Roads and Transport
- Department of Justice
- South African Police Services
- Department of Agriculture
- Department of Health Settlement
- Department of Local Government
- City of Cape Town Metropolitan Municipality
- Department of Social development
- Department of Co-operative Governance, Human Settlements and Traditional Affairs
- Department of Public works
- Department of Education
- Polokwane Municipality
- Waterberg District Municipality

### 2.4 The overall findings and recommendations of the Commission.

The Commission made findings applicable to each institution’s dynamics. However, overall the Commission found that:

- The institutions have displayed commitment to gender mainstreaming intentions and undertook to increase the representation of women and PWD in top management positions which was notably poor;
- The Commission found that there were institutions that were not compliant with disability EE targets at top management, and overall employees with disabilities were largely placed in administrative positions;
- The institutions lacked responsive gender budgeting and gender system management to monitor, evaluate and implement gender transformation internally;
- Adoption of gender-sensitive policies was not a priority, as there was no commitment to develop reasonable accommodation, flexitime, or childcare facility policies;
There were institutions that had drafted sexual harassment policies. For institutions that had sexual harassment policy in place, they conducted minimal workshops on the subject. These policies are often placed on the intranet and not easily accessible by administrative employees;

- There was a lack of awareness about key international obligations and agreements on the advancement of women, women’s rights, and promotion of gender equality;
- Where an institution had an employment equity forum, such forum was not effective in addressing gender transformation in the workplace;
- There was a lack of recognition on issues of women empowerment and gender equality;
- There was a lack of clear goals on gender equality targets, and a lack of monitoring and evaluation against goals to ensure their implementation;
- The department’s reporting was not aligned with international standards on gender targets; and
- There was weakness in the development of special measures to accelerate the inclusion of women and PWD through procurement processes.

The Commission recommended that the institutions:

- Urgently finalise sexual harassment policies and conduct workshops.
- Formulate and implement gender policies that looked at issues of working conditions, gender budgeting and procurement.
- Develop policies and strategies for recruitment, retention and succession that target women and PWD.
- Explore the possibility of headhunting women and PWD.
- Develop a clear internal policy on childcare and flexitime.
- Develop tools to evaluate and monitor transformation policies, and the pace of transformation, at institutions of higher learning.
- Use international, African and Southern African Development Community (SADC) instruments and frameworks as a guideline when formulating their policies, for alignment with national and international standards.
- Build gender transformation into the key performance areas of top management, to ensure that strategies were created and implemented.
CHAPTER FOUR

IMMIGRATION LAW

1. Introduction

The CGE received several legal enquiries from complainants regarding whether a child acquires citizenship if born in South Africa if the parents are foreign nationals. These legal enquiries where children of foreign national are denied basic child grants become easy targets for sexual violence. This piece of the books therefore seeks to clarify their legal position in South Africa. There are three ways in South Africa in which a person can acquire citizenship. Citizenship can be achieved by birth, descent and naturalisation. For the purpose of this opinion focus would be on citizenship by birth in South Africa. Citizenship by birth is a legal right for anyone who can prove the facts of birth.

2. Applicable legislation

Until fairly recently the acquisition, loss and assumption of a South African Citizenship was regulated by the South African Citizenship Act 88 of 1995. The South African Citizenship Amendment Act of 2010 (Amendment Act) was signed into law in December 2010. The main objective of the amendment Act is to provide for the acquisition, loss and resumption of South African citizenship.\(^{52}\)

Does a child acquire citizenship if born in South Africa but parents are foreign nationals? In order to answer this question, it becomes necessary to extrapolate the provisions of the Amendment Act dealing with this aspect.

In terms of section 2 of the Amendment Act:

(1) Any person

(a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or

(b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

\(^{52}\) See the objectives of the Amendment Act 2010
(2) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if-
   a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
   b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

(3) Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if-
   a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and
   b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

Further to this in terms of section 4 of the Amendment Act:

(1) Any person who-
   a) immediately prior to the date of the commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by naturalisation; or
   b) in terms of this Act is granted a certificate of naturalisation as a South African citizen in terms of section 5, shall be a South African citizen by naturalisation.

(2) Any person referred to in subsection (1)(b) shall, with effect from the date of the issue of the certificate, be a South African citizen by naturalisation.

(3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if-
   a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and
b) His or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

Section 5 of the amendment Act further states that the Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that-

a) he or she is not a minor; and
b) he or she has been admitted to the Republic for permanent residence therein; and
c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application.

The interpretation of the two highlighted sections brings an understanding of citizenship law in the following respect:

- Firstly, if a child is born in South Africa but the parents are permanent residents of South Africa, then the child qualifies to be a citizen provided that the child has lived in South Africa from date of birth until the age of majority.
- Secondly, if the child is born in South Africa but the parents are neither the citizens nor permanent residents of South Africa, then the child qualifies to apply for South African citizenship upon becoming a major provided that the latter has lived in South Africa from the date of his or her birth to the date of becoming a major.

The dynamics of citizenship under South African case law can be drawn from the landmark case of Khosa and other v Minister of social development. In this case one of the concessions made was that as a matter of law, children who are South African Citizens should not be denied access to child-support grants and that a provision in the legislation which denies such children access because their primary care-giver or their parents are not South African citizens would be unconstitutional.
3. **CGE Legal opinion**

As evident from the sections of the Amendment Act, a child does not automatically acquire citizenship if the parents are foreign nationals. For the child to acquire citizenship, the latter must satisfy the requirements of section 2(3) and 4(3) of the Amendment Act. It therefore becomes axiomatic that every case would be decided on its own merits and therefore such merits would provide guidance as to whether a child qualifies to be a South African citizen or not, using the amendment Act as a guiding yardstick.
CHAPTER FIVE

LITIGATION

Below is a list of litigation matters in recent years. This list excludes those matters were there is non-disclosure agreements entered with the parties. This is not an exhaustive list.

S v Jezile SACR 2015 452 (WCC)
The CGE was admitted as amicus curiae in this matter. The convict in this matter abducted a 14-year-old victim from her home in the Eastern Cape after negotiating and paying R8000,00 in lobolo to her family. He forced her to travel with him to his home. During the time that she was held against her will, he repeatedly raped and physically attacked her. The Court unequivocally pronounced that violent and coercive practices committed in accordance with “aberrant” forms of ukuthwala shall have no protection under the law. The perpetrator was sentenced to 22 years in prison.

Women Legal Trust Centre v President of the Republic and others. Case number 22481/2014 Western Cape High Court
The CGE is admitted as amicus curiae in this matter. The matter involves the non-recognition of Muslim marriages in South Africa and the on-going violation of the human rights of women in these marriages.

Sebelebele v Bokgola. Mokerong Magistrates Court 2016 (Custody and access)
The CGE legal unit represented the complainant in this matter. This is a maintenance and custody matter wherein the complainant sought maintenance and custody from the father of the child. The CGE intervened and represented the Complainant at the Maintenance Court and Children’s Court respectively. The respondent was ordered to pay the sum of R 500-00 per month together with medical aid and seasonal clothes. The complainant was awarded primary care of the child subject to the respondent having access.

Sb Mahlangu v Minister of labour and others Case no: 79180/15
The CGE has been admitted as amicus curiae in this matter. The applicant brought an application In the High Court of South Africa (Gauteng North Division) against the Minister of Labour (first respondent), DG-Department of Labour(second respondent) and the Compensation Commissioner(third respondent) for a subsequent relief for domestic workers to claim
compensation in terms of the Compensation for Injuries and Diseases Act 130 of 1993 (COIDA). Section 1 of the COIDA expressly excludes domestic workers from the ambit of its protection and the applicants are calling this exclusion discriminatory and the section itself being unconstitutional.

Mphela v Manamela and others case no 1/2016 Seshego Magistrates Court (Equality Court)
The CGE was admitted as amicus curiae in this matter. The complainant in this matter was unfairly discriminated by the School principal on the grounds of sexual orientation.

Raedani v Mufunwa Inwi case no 1/2016 Thohoyandou Magistrates Court (Equality Court)
The CGE was admitted as amicus curiae in this matter. The complainant in this matter sought damages against the respondent for uttering statements during a radio interview that were derogatory and discriminatory towards the LGBTI.

Govender v Malek Case 1/2016 Durban Magistrates Court (Equality Court)
The CGE was admitted as amicus curiae in this matter. The complainant sought damages against the respondent for unfairly discriminating against her due to her attire when the latter appeared before Court.

Coulson v Neethling 1/1/2-07/2013 Bellville Magistrates Court (Equality Court)
The CGE was admitted as amicus curiae in this matter. This matter involves the unfair discrimination of the LGBTI community on the grounds of their sexual orientation.

Laubscher v Duplan Constitutional Court Case NO. : 234/2015
The CGE was admitted as amicus curiae in this matter. The issue in this matter was whether a person who was in a permanent same-sex life partnership (not solemnised and registered under Civil Union Act) can inherit from the deceased’s estate in terms of the Intestate Succession Act.

Bhe and others v Magistrate Kayelitsha 2005 (1) SA 580 (CC)
As amicus the CGE submitted that the two statutes (Section 1(4)(b) of the Intestate succession Act 81 of 1997 and Section 23(10) of Black Administration Act 38 of 1927 ) should be declared unconstitutional.

• The Principle of male primogeniture was also declared to be inconsistent with the Constitution. The Principle of male primogeniture
discriminates unfairly against women and girl children in acquiring estates of their husbands and parents respectively.

**Bannatyne v Bannatyne 2003 (2) SA 363 (CC)**
This is a maintenance matter. The Commission in this case submitted data to the court that showed the negative impact in which the maintenance system had on particularly woman and children. The Court was indebted to the submissions of the Court in this regard as this assisted the court in understanding the practical challenges experienced by women and children in South Africa.

**Sidwell Nwamitwa v Shilubane and others 2009 (2) SA 66 (CC)**
As amicus the CGE’s interest and role was to ensure that women are not discriminated on the basis on gender when it comes to chieftaincy disputes. This case has set a good precedent in the legal fraternity and it continues to serve as a guiding yardstick to chieftaincy disputes in South Africa especially where women are involved.

**Mayelane v Ngwenyama and another 2013 (4) SA 415 (CC)**
The CGE was admitted as amicus in this case. The matter related to Tsonga customary marriages, in which the Constitutional Court had to determine the extent to which the absence of the first wife’s consent to her husbands’ subsequent polygamous marriage affects the validity of the latter marriage.

**Mpanza v Sibusiso Cele (KZN)**
CGE KZN initiated this matter before the Equality Court Umlazi, the applicant was stripped off her pants and subsequently had her house burnt down on allegations of defying a ban on women wearing pants at Umlazi’s T-section. The CGE sought an order that the ban be removed and prohibited from being practiced as it unfairly discriminates against women. The proceedings of this case concern the constitutionality of section 2(3) and section 20(1) of the Sexual Offences Act 23 of 1952. It was contended in this case that the criminalisation of prostitution limits the following fundamental constitutional rights: The right to equality The right to dignity The right to privacy.
CHAPTER SIX

COMPENDIUM OF APPLICABLE LEGISLATION

Below is a list of conventions and legislation governing gender equality:

1. **International Conventions**

   - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
   - Beijing Platform for Action (BPA)
   - International Labour Organisation Convention 100
   - International Labour Organisation Convention 111
   - International Labour Organisation Maternity Protection Convention 183/200
   - Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
   - Sustainable development goals: 2030 Agenda
   - UN Convention on the Rights of the Child
   - UN International Covenant on Economic, Social and Cultural Rights
   - UN Protocol to Prevent Trafficking in Persons
   - Universal Declaration of Human Rights (1948)

2. **Regional Conventions**

   - AU Solemn Declaration on Gender Equality in Africa
   - Addendum to 1997 Declaration on Gender and Development by SADC Heads of State or Government
   - African Charter on Human and Peoples’ rights
   - African Charter on the Rights and Welfare of the Child
   - African Youth Charter, 2006
   - Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa
   - SADC Declaration on Gender and Development (2008)
   - SADC Protocol
3. Domestic Legislation

- Alteration of Sex Description and Sex Status Act 49 of 2003
- Administration of Estates Act 66 of 1965
- Alienation of Land Act 68 of 1981
- Arbitration Act 42 of 1965
- Basic conditions of Employment Act
- Basic Conditions of Employment Act 75 of 1997
- Broad-Based Black Economic Empowerment Act 53 of 2003
- Child Justice Act 75 of 2008
- Children’s Act 38 of 2005
- Choice on Termination of Pregnancy Act 92 of 1996
- Civil Union Act 17 of 2006
- Commission for Gender Equality Act 39 of 1996, as amended
- Communal Land Rights Act 11 of 2004
- Community Development Act 3 of 1966
- Compensation for Occupational Injuries and Diseases Act 130 of 1995
- Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007
- Deeds Registries Act 49 of 1937
- Development Trust and Land Act 48 of 1961
- Divorce Act 70 of 1979
- Domestic Violence Act 116 of 1998
- Expropriation Act 39 of 1951
- Extension of Security of Tenure Act 62 of 1997
- Extradition Act 67 of 1962
- Health Professions Act 56 of 1974
- Housing Act 107 of 1997
- Housing Development Agency Act 23 of 2008
- Intestate Succession Act 81 of 1987
- Land Reform (Labour Tenants) Act 3 of 1996
- Land Restitution and Reform Laws Amendment Act 63 of 1997
- Magistrates Court Act 32 of 1994
- Maintenance Act 99 of 1998
- Matrimonial Property Act 88 of 1984
- Mediation in Certain Divorce Matters Act 24 of 1987
- Mental Health Act 18 of 1973
- Mine Health and Safety Act 29 of 1996
- Municipal Systems Act 52 of 1998
- Occupational Diseases in Mines and Works Act 78 of 1973
- Occupational Health and Safety Act 85 of 1993
- Pension Fund Act 24 of 1956
- Prescription Act 68 of 1969
- Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998
- Promotion of Access to Information Act 2 of 2000
- Promotion of Administrative Justice Act 3 of 2000
- Promotion of National Unity and Reconciliation Act 34 of 1995
- Public Finance Management Act 1 of 1999
- Recognition of Customary Marriages Act 120 of 1998
- Refugees Act 130 of 1998
- Regulation of Gatherings Act 203 of 1993
- Restitution of Land Rights Act 22 of 1994
- Sexual Offences Act 23 of 1957
- South African Police Services Act 68 of 1995
- South African Schools Act 63 of 1975
- Supreme Court Act 59 of 1959
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- Shibi v Sithole and South African Human Rights Commission v President of the Republic of South Africa 2005 (2) SA 580 (CC).
- MEC for Education: Kwazulu-Natal v Pillay, 2008 (1) SA 474 (CC) at 43.
- Fraser v Children’s Court, Pretoria North 1997(2) SA 261 (CC).
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