



Casestudy

# THE EQUALITY COURTS AS A TOOL FOR GENDER TRANSFORMATION

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Justice Network  
HIV/AIDS, Gender Equality, Human Rights





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In March 2009, Sonke Gender Justice Network filed a complaint at the Equality Court in Johannesburg against the ANC Youth League Leader, Julius Malema. The complaint was lodged in response to remarks he made to university students concerning Jacob Zuma's rape accuser claiming that she likely enjoyed herself during the incident. Sonke's Equality Court case alleges hate speech, unfair discrimination and harassment of women, and is only the second high profile gender equality case to be taken to the Equality Courts since their inception in 2003.<sup>1</sup> This case study provides an analysis of the Equality Courts as a new legal forum for gender transformation work by examining the history and theoretical foundations for the courts, the procedures for utilising the courts, the problems and challenges faced when using the courts, and documenting Sonke's own experiences in lodging its case.

In January 2009, the African National Congress' outspoken and well-known youth leader, Julius Malema, addressed 150 Cape Peninsula University of Technology students. Already controversial for making inflammatory remarks in which he said he would be willing to "kill for Zuma," Malema suggested that the woman who accused President Zuma of rape had a "nice time" with him because "when a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, request breakfast, and ask for taxi money." His words were met with cheers by the student supporters.

However, many others were outraged. Human rights and gender equality organisations such as Sonke Gender Justice Network (Sonke) were worried about the impact such words would have in a country with alarmingly high levels of rape, where pervasive rape myths result in rape survivors often being blamed for rape and retraumatised in the country's police stations and courts. Sonke's Senior Programme Advisor, Mbuyiselo Botha, explained, "Malema's words send a very dangerous message to the country at large. South Africa has one of the highest incidents of rape in the world. If people making statements such as these aren't made accountable, then they detract from the gains we've made toward gender equality."

Recent research reveals a dire picture of violence against women and sexual assault in South Africa. A survey in the Eastern Cape and KwaZulu-Natal provinces by Professor Rachel Jewkes of the Medical Research Council and colleagues from the University of KwaZulu-Natal revealed that 1 in 4 men surveyed admitted to having raped a woman.<sup>2</sup> The study also found that men who are physically violent towards women are twice as likely to be HIV-positive, and are less likely to use condoms. Any woman who has been raped by a man over the age of 25 has a 1 in 4 chance of her attacker being HIV-positive. These alarming figures, Jewkes posits, are linked to ideas about masculinity based on gender hierarchy, and to a sense of entitlement to sex evident amongst many men.

The situation is exacerbated by misconceptions regarding sexual violence. A survey of 250,000 school aged youth indicated that males were more likely than females to believe that "sexual violence does not include touching; sexual violence does not include forcing sex with someone you know; girls have no right to refuse sex with their boyfriends; girls mean yes when they say no; girls like sexually violent guys; girls who are raped ask for it; and girls enjoy being raped."<sup>3</sup>

With this social context in mind, Sonke began seeking avenues of redress. Mbuyiselo Botha explained, "[Malema] is of high profile and influential, so he should be careful and sensible because young people look up to him." As an organisation that supports men and boys to take action to achieve gender equality, Sonke saw this as an opportunity to prompt discussion about men's roles and responsibilities in both colluding with and challenging the pervasive rape culture.

Research on gender activism in South Africa indicates that to date, "organisations working with men have only occasionally used rights-based activism and have focused almost exclusively on community education." Because of this over-reliance on workshops and community education strategies, "much remains to be done to make work with men truly transformational." Sonke

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Mbuyiselo Botha

felt the effort to hold Malema accountable provided an important opportunity to experiment with rights-based advocacy as a gender transformation strategy.

Sonke contacted the relevant institutions mandated by the Constitution to serve as human rights watchdogs, in this instance, the Commission on Gender Equality and the South African Human Rights Commission, before turning to the Equality Courts. The case has provided an opportunity to test the Equality Courts as a new tool for engaging men in the advancement of gender transformative work.

Co-Director of Sonke, Dean Peacock, elaborated: “advocacy offers the possibility of generating enough controversy and media coverage to engage millions of people across the entire country in meaningful conversations. [The case against Malema] also offers the possibility that it might fundamentally shape the ways in which leaders think about how they address gender transformation, and in particular, how they address rape.”

## What are the available grievance mechanisms for violations of the right to equality?

Equality complaints can be brought through both civil and criminal courts, depending on the nature of the matter. In relation to criminal claims that include equality violations, if the National Prosecuting Authority does not choose to prosecute, it is also possible for citizens to independently institute proceedings in a private prosecution.<sup>4</sup> For equality claims within the labour sector, the Employment Equity Act, No. 55 of 1998 applies. The Labour Courts will hear claims under this Act, and can award compensation and direct employers to prevent the same discrimination from occurring again in the future.<sup>5</sup>

Chapter 9 of the Constitution establishes institutions that provide redress for equality grievances – the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE). The SAHRC is mandated to promote a culture of human rights, to promote the protection, development and attainment of human rights, and to monitor and assess the observance of human rights in the Republic.<sup>6</sup> The CGE is mandated with the task of exposing gender discrimination in laws, policies and practices and with investigating any gender related issues and endeavoring to resolve them.<sup>7</sup> Both the SAHRC and CGE receive complaints from community members, determine the appropriate processes to be followed and make independent findings. Processes include negotiation, mediation, investigations, public hearings, and the lodging of civil proceedings. Lastly, there are the Equality Courts, which began operating in 2003, and provide an alternative avenue for civil equality claims.

In order to make all of the various legal avenues accessible to indigent citizens, the Legal Aid Board was established to provide legal representation at state expense. Unfortunately due to resource constraints, the Legal Aid Board is currently prioritising legal assistance in criminal cases and is therefore often unable to provide the envisioned free representation in civil or Equality Court claims.<sup>8</sup>

## History and Background of the Equality Courts

The Equality Courts are informal civil courts situated within designated Magistrate Courts and all High Courts. The Equality Courts were created by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). PEPUDA is legislation created in terms of the Constitution in order to expand and give effect to Section 9 of the Constitution, the equality clause.<sup>9</sup> Item 23(1) of Schedule 6 of the Constitution required the passing of PEPUDA within three years of commencement of the Constitution.

### Section 9 states:

- 1. Everyone is equal before the law and has the right to equal protection and benefit of the law.**
- 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.**
- 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.**
- 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.**
- 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.**

Equality “lies at the very heart of the Constitution,”<sup>10</sup> and is a foundational value. The Constitution requires substantive equality, rather than mere formal equality, demanding equality of outcomes and not just the same treatment of individuals. This requires that the state go beyond merely sanctioning acts of discrimination and instead take proactive measures to transform society and thereby achieve actual equality. Section 9(2), above, allows affirmative action, allowing the state to take measures to protect and advance those who have been disadvantaged by unfair discrimination.

Sello Chiloane, Director of the Equality Courts, said that the purpose of PEPUDA is “to eradicate the legacy of inequality South Africans experience from over 350 years of colonialism, apartheid, and patriarchy,”<sup>11</sup> The legislation places positive duties on the state to prohibit unfair discrimination, to ensure substantive equality and to provide remedies for victims of unfair discrimination.<sup>12</sup> PEPUDA “positions the Equality Courts as a key mechanism in achieving this aim.”<sup>13</sup>

PEPUDA opted for civil remedies as opposed to criminalising discrimination, hate speech, and harassment because of the ongoing process of truth and reconciliation at the time PEPUDA was being drafted. Sello Chiloane explains that the civil approach was taken to help facilitate a less adversarial and punitive dialogue because the “drafters wanted a more meditative, less accusatory system.”<sup>14</sup>

Equality Court proceedings are to be guided by a principle of expedient and informal processing of cases in which participation is accessible and facilitated for both parties.<sup>15</sup>



## The equality courts preside over unfair discrimination, hate speech, and harassment claims.

### Unfair Discrimination

Listed grounds on which it is prohibited to discriminate in terms of PEPUDA and the Constitution are the following. Discrimination on one of these grounds is presumed to be unfair discrimination:

1. Race
2. Gender Sex
3. Pregnancy
4. Marital Status
5. Ethnic or social origin
6. Colour
7. Sexual Orientation
8. Age
9. Disability
10. Religion
11. Conscience
12. Belief
13. Culture
15. Language
16. Birth<sup>16</sup>

One can also bring claims for discrimination on grounds that are not specifically listed in the Constitution or PEPUDA. For claims brought on unlisted

grounds, the complainant must prove that the specific ground causes or perpetuates a disadvantage inherent in the system, undermines human dignity, or adversely affects the equal enjoyment of rights and freedoms. So long as one of these conditions can be proven, the discrimination is presumed unfair. Examples of grounds not listed in PEPUDA and the Constitution are:

1. HIV/AIDS status
2. Socio-economic status
3. Nationality
4. Family responsibility and family status.

### Hate Speech

No person may publish, propagate, advocate or

communicate words based on one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, incite harm, promote or propagate hatred.<sup>17</sup>

### Harassment

No one may subject any person to harassment. Harassment is unwanted conduct which is persistent, serious, and demeans, humiliates, or creates a hostile or intimidating environment, or is calculated to induce submission by actual or threatened adverse consequences, and is related to sex, gender or sexual orientation, or a person's membership or presumed membership of a group.<sup>18</sup>

The Equality Courts complement the Constitutional Court, by providing an alternative, more accessible and more easily navigated venue for equality claims. The reasoning applied in the Equality Courts must follow the reasoning established by the Constitutional Court in the existing equality jurisprudence. The Constitutional Court has said that in order to prove a breach of the right to equality, one must show that there has been discrimination, that the discrimination is unfair, and that it is not a justified limitation of the right (in terms of the Section 36 limitations clause).<sup>19</sup>

PEPUDA, however, requires that complaints in the Equality Courts be crafted using the Act, rather than relying directly on Section 9 of the Constitution. This is because the Act offers a substantially eased evidentiary burden than the Constitutional standard explained above. PEPUDA only requires complainants to make a prima facie, or basic, showing of discrimination.

The Equality Court offers other important procedural advantages to complainants and was designed to be more flexible and informal in its proceedings. This can be seen in several aspects of their design that intend to enable cases to be processed without legal representation, with minimal cost, and within a quick time frame.

### Some key features of the Equality Courts are outlined below:

#### 1. Free to file<sup>20</sup>

#### 2. Designed for Unrepresented Litigants

- a. “[F]airness, the right to equality and the interests of justice should, as far as possible, prevail over mere technicalities.”<sup>21</sup>
- b. Equality Court clerks must provide assistance to illiterate, disabled, or unrepresented litigants.<sup>22</sup>
- c. If a complainant is unrepresented, the regulations require the clerk to step in and fulfill the role of a pseudo-paralegal.<sup>23</sup>

#### 3. Complainants’ evidentiary burdens are substantially eased

- a. A prima facie or basic showing of discrimination is all the complainant must show.<sup>24</sup>
- b. The burden of proof then shifts, requiring the respondent to prove the discrimination did not take place, or that it was not unfair.<sup>25</sup>

#### 4. Hearings must be expeditious and informal

- a. This sets an inquisitorial and meditative as opposed to formal and adversarial tone.

#### 5. Each party is responsible for their own costs.

- a. This is opposed to the loser paying the winners’ fees. This lowers the financial risks for indigent complainants.<sup>26</sup>

South African law follows the principle of stare decisis, which means that courts adhere to the precedent of earlier cases. This principle is applied within a hierarchically structured court system, where the Magistrate Courts are the courts of first instance and are bound by the decisions of High Courts. Magistrate Court decisions can only be used as persuasive reasoning by the High Courts. Equality Court decisions also adhere to these rules of precedent.<sup>27</sup>

The Equality Courts are also empowered to order remedies outside of the normal range of civil remedies that courts can order, giving magistrates and judges the ability to hand down creative and transformative solutions,<sup>28</sup> examples of which are highlighted in the Jody Kollapen and Umlazi T-Section cases described below. Some of the remedies listed in PEPUDA are unconditional apologies, orders for costs, special measures to address the offence in question, interim and declaratory orders, and payment of damages. <sup>29</sup> The presiding officer is further empowered to combine remedies or to make any other “appropriate” orders, in order to ensure effective relief to a successful complainant.<sup>30</sup>

Equality Court judges and magistrates have handed down a few creative solutions in the past leading to concrete social transformation. An example was the first high profile Equality



Court case heard in 2004, *Jody Kollapen v. Du Preez*, which was filed in Pretoria by then SAHRC Chairman, Jody Kollapen.<sup>31</sup> Kollapen alleged unfair discrimination when barbershop workers turned him away, claiming they did not know how to cut “ethnic” hair. The Equality Court ordered the shop owner to unconditionally apologise, to train his staff to be able to cut hair of people of all races, and to pay monthly installments of R500 to charities of Kollapen’s choice. Kollapen reflected that the case was important in “[sending] out a strong message that inequality, discrimination and racism do not pay. In fact, it costs a lot of money.”<sup>32</sup>

The Equality Court system has also been used successfully for gender equality in another high profile case, *Z. Mpanza v. Sibusiso Cele*, also referred to as the Umlazi T-Section case. In 2008, Ndunas (informal male leaders) in Umlazi, a township outside of Durban, issued an edict that prohibited women from wearing trousers in the community.<sup>33</sup> The Ndunas argued it was not traditional for women to wear trousers, and that doing so contributed to moral degeneration and incidences of rape. Shortly thereafter, a resident of Umlazi, Zandile Mpanza, was chased by a mob of men who assaulted her, stripped her pants off, and made her walk home partially naked for violating the “code” prohibiting women from wearing pants. She was not the only woman who had been subjected to violence and harassment for wearing pants in violation of the supposed code. With legal representation provided by the CGE, Mpanza took her complaint against the men who instituted the ban to the Umlazi Equality Court. The magistrate overseeing the case ruled in favor of Mpanza, and ordered the removal and prohibition of the ban on women wearing pants because it unfairly discriminated against women under PEPUDA. The Umlazi police were ordered to convene a community meeting to notify T-Section residents of the court order, and to notify the CGE on pending or reported cases involving the ban. Lastly, two of the respondents, Thulani and Sibusiso Cele were ordered to unconditionally apologise for implementing the ban.<sup>34</sup> The four men who attacked Mpanza are currently facing criminal charges in the criminal courts for assault, malicious damage to property, intimidation, and indecent assault.<sup>35</sup>

## Sonke’s Experience with the Equality Courts

On hearing Malema’s statement regarding Zuma’s rape accuser, the first place Sonke turned to for redress was the African National Congress (ANC). ANC officials declined to respond to Sonke’s complaint. Sonke then approached the CGE office in Johannesburg, which was unable to take on the complaint. However, they did send an admonishing letter to the ANC in response to another individual’s complaint about Malema’s comments.

Next, Sonke approached the SAHRC in Johannesburg, where a formal complaint was filed. While waiting for the complaint to be processed and a response to be delivered, Sonke approached the Equality Court in Johannesburg. Two months later, SAHRC sent Sonke a response informing them that it was declining to investigate the complaint since by that time, it was being heard by the Equality Court.

In March 2009, Sonke filed a complaint at the Equality Court alleging that Malema's statements constituted hate speech against women. The complaint sought an unconditional public apology from Malema and a R50,000 financial order to organisations providing assistance to abused women. This was done without the assistance of legal counsel, in line with the ideal that the courts be accessible without requiring legal representation. At the April 2009 hearing, Malema appeared with a legal representative. Sonke requested a delay in the hearing due to the unequal legal representation, and a new hearing date was set for June 5, 2009.

The SAHRC referred Sonke to Pro Bono-org, a nonprofit organisation that links individuals or groups who cannot afford legal fees to legal service providers who will provide these services free of charge. Pro Bono-org helped Sonke secure the free services of lawyers from Bowman Gilfillan, one of the largest private firms in South Africa. The Bowman Gilfillan legal team modified the complaint, adding the claims of unfair discrimination against women and harassment of women.

The Tshwaranang Legal Advocacy Centre to End Violence Against Women ("Tshwaranang") then joined Sonke's case as *amicus curiae*, or friends of the court. Tshwaranang's Senior Researcher and Policy Analyst, Lisa Vetten, provided testimony as an expert witness, warning of the danger of Malema's words, which "contributed to the culture of silence and shame attached to being a victim and contributed to the normalisation of sexual violence." Vetten also expressed concern at the perpetuation of rape myths. Rape myths are the false beliefs that there is a "typical" rape victim who behaves in a predictable manner, or that deep down women enjoy forcible sex. Malema's comments, she argued, provide a "source of excuses for sexual violence and attitudes that tolerate and condone acts of sexual violence, which is likely to cause or exacerbate the underreporting of rape."

On June 5, 2009, the hearing was again postponed until July 9, 2009 to allow Malema's legal representative to prepare responses to the additional charges of unfair discrimination and harassment. Meanwhile, the Secretary General of the ANC, Gwede Mantashe, approached Sonke requesting an out of court settlement. Sonke declined to settle, frustrated by the ANC's lack of responsiveness prior to the media interest generated by the Equality Court case. Instead, Sonke chose to continue to seek an unconditional apology and financial order contributing to a women's organisation.

The hearing took place as scheduled on the 9th and 10th of July, 2009. At the time of writing this study, the case still had not come to a conclusion. Mbuyiselo Botha and Lisa Vetten's testimonies were heard at the hearing, but Malema had yet to do the same. The presiding officer of the case granted Malema's legal representation's request for a further postponement to formulate his arguments in relation to Vetten's oral testimony. The hearing is scheduled to continue on August 31, 2009.

The case has garnered substantial media and public attention with frequent coverage in almost all of South Africa's radio, television and print outlets. Large groups of demonstrators supporting Sonke's cause waited outside the Magistrate Courts in Johannesburg and the High Court in Cape Town on the day of the July hearings. Likewise, ANC Youth League members rallied outside the Magistrate Court in Johannesburg, and sat in to observe the proceedings. In addition, the SAHRC sent a monitor to observe the hearing, and CGE representatives attended the demonstration in support of Sonke at the Magistrate Court in Cape Town.

## Should Sonke Have Led the Case Against Malema?

Sonke's decision to seek accountability from Malema was made in consultation with gender equality organisations and members of the One In Nine Campaign. The One in Nine Campaign was formed in 2006 at the start of the rape trial of Jacob Zuma, to express solidarity with Zuma's accuser and with other women who speak out about rape and sexual violence.<sup>36</sup> Not all member organisations were in agreement about how to hold Malema accountable, though the

# “SOURCE OF EXCUSES FOR SEXUAL VIOLENCE AND ATTITUDES THAT TOLERATE AND CONDONE ACTS OF SEXUAL VIOLENCE, WHICH IS LIKELY TO CAUSE OR EXACERBATE THE UNDERREPORTING OF RAPE.”

campaign as a whole decided to pursue a complaint with the CGE. The results of this complaint are still pending and unclear.

The Women’s Legal Centre (WLC) thought that there were better avenues to follow than taking Malema to the Equality Courts because of the “limited prospects of success” that this case had at the court. WLC Attorney Cherith Sanger explained that their organisational scope is limited to impact litigation, pursued strategically to change legal precedents, and in their opinion, the original claim for hate speech was not a strong legal argument for the purposes of WLC’s work.<sup>37</sup> However, Sanger added that due to the different mission of an advocacy organisation like Sonke, as opposed to a strategic legal service organisation like WLC, the considerations were different. Organisations such as Sonke “should take radical steps like [the Malema Equality Court] case,” Sanger said. The end goal is different – for an advocacy organisation the goal is to challenge and test the boundaries of existing grievance mechanisms and advocacy tools.

Another issue is the danger that a case such as the case against Malema might pose to freedom of speech. It is possible to argue that it is within Malema’s rights to make any comments he chooses to about any topic, as long as it is not intended to and does not incite imminent violence or hatred. However, Sonke decided that the case would create a beneficial national conversation about leadership, accountability and male responsibilities to stop men’s violence against women. It was decided that these benefits outweighed the danger posed to freedom of speech. The case was a powerful move, as part of Sonke’s efforts to transform prevailing forms of masculinity, to seek public accountability from Malema as a prominent male figure.

## The Promise versus the Reality of the Equality Courts

While the Equality Courts are positioned to be a key mechanism for advancing equality in South African society, the system is still new, not fully formed, and its potential is not fully understood at this time. The realisation of the Equality Courts as a tool for advancing substantive equality will not come to pass without oversight and efforts by both the government and civil society organisations.

It has been 10 years since PEPUDA was passed, and 6 years since the Equality Courts began operating. The Department of Justice and Constitutional Development’s 2007-2008 figures show there are 219 Magistrates Courts and High Courts designated to operate as Equality Courts.<sup>38</sup> There are 129 judges, 732 magistrates, and 371 clerks throughout the country that have been trained to act as Equality Court officials.<sup>39</sup> Yet, only 169 cases were heard during the reporting period of 2007-2008. This number has increased in the 2008-2009 year, with 427 cases heard to date.<sup>40</sup> Of the 2007-2008 cases, only two were related to gender equality, while unfair discrimination based on race made up the majority of claims.<sup>41</sup>

**Some of the key challenges faced by the Equality courts are outlined below:**

- **Despite PEPUDA being drafted to facilitate unrepresented complainants, a lack of representation is still an obstacle for complainants.**<sup>42</sup> There are not many established linkages between the Equality Courts and legal aid providers. The Legal Aid Board seldom provides representation in civil cases, including cases in the Equality Courts, due to resource constraints and resulting prioritisations. This lack of representation for



complainants creates a situation of unequal legal representation because respondents tend to be better resourced and better represented.<sup>43</sup> This imbalance is an obstacle to justice for indigent complainants.

- **Training provided to the designated magistrates, judges, and court clerks acting as Equality Court officials is limited and may be insufficient to give full effect to the PEPUDA-envisioned procedures.** PEPUDA procedures and rules are distinct from the more formal civil court proceedings that court officials are used to. The few appointed officials receive a once off 2-3 day training session, and do not receive topic-specific training such as gender sensitivity training.<sup>44</sup>

- **Clerks, magistrates, and judges have overburdened workloads.** The structure of Equality Courts is such that officials take on equality cases in addition to their existing civil and criminal dockets. This can lead to low prioritisation of, and low interest in, Equality Court cases. Resource constraints can also exacerbate this leading to a compromising of the informality and expediency of

court proceedings.<sup>45</sup> There are also not enough trained Equality Court officials in all Equality Courts. For instance, in Cape Town, there is only one equality court clerk at the Magistrates Court level, so when he goes on leave, there is no substitute clerk to process cases.

- **There is a lack of awareness about the Equality Court's existence and procedures.**<sup>46</sup> Lack of awareness by the public leads to underutilisation of the courts, which has led to some Equality Courts not exercising their functions at all.<sup>47</sup>
- **The availability and quality of Equality Court services is inconsistent.** There are still only a limited number of courts that have been designated as Equality Courts. Some that are designated and listed as Equality Courts by the Department of Justice and Constitutional Development, no longer provide Equality Court services. This is a result of issues such as the relocation of trained officials and the underutilisation of the equality function of the courts.

When asked about these challenges, the Director of the Equality Courts, Sello Chiloane stated “[we] want to learn from NGO recommendations, because our goal is to render services.” And indeed, many of the challenges articulated in this case study are beginning to be addressed.<sup>48</sup> The South African Foundation for Human Rights has begun a new initiative that aims to spread awareness and train civil society organisations about the Equality Courts. In addition, the Legal Aid Board is currently training its staff in Equality Court procedures and rules. The South African Law Society is also now urging its lawyers to assist in Equality Court proceedings on a pro bono basis. The roll out of Equality Courts to all Magistrates Courts in South Africa is currently pending ministerial approval, though the Department of Justice and Constitutional Development has no plans to appoint officials to the Equality Courts on a full-time basis at this time. Lastly, the department has translated PEPUDA into all 11 official languages. Individual Equality Courts are also addressing some of the challenges on their own accord. For example, in Johannesburg, Pro Bono-org and the Equality Courts have created a formal referral system for free legal representation to indigent parties with Equality Court complaints.

## Potential impact of the Malema case

What will be the impact of Sonke's case against Malema? Malema facing accountability at the Equality Courts has provided a useful vehicle for instigating national discussion on the dangers of rape myths, and the role that men, particularly men in leadership positions, have in perpetuating rape myths. Regardless of the outcome of the case, Richard Maluleke, the Equality Court Clerk in Johannesburg, has reported that more equality complaints have been filed with his court since Sonke's case against Malema was publicised than ever before.

Maluleke is also of the opinion that the Malema case has shown that system is robust enough to withstand political pressures. "Malema wanted the proceedings to wait until the end of his ANC campaign," Maluleke explained, "but the presiding officer refused to do so."

While the increased number of complaints is a positive effect of the Malema case, Sonke has been the target of deliberate misrepresentation by Malema and his supporters. After the adjournment of the hearing on July 10, 2009, Malema addressed the gathering of his supporters, where he stated, "[he was] in court because the whites who are sponsoring this organisation, they want to make sure they embarrass the leadership of this movement."<sup>49</sup> He also said in reference to Sonke's staff present at the hearing, that "[t]he black faces you see in front, those are not real faces, they represent the whites who are opposed to African leadership."<sup>50</sup> With these statements, Malema aims to provide a distraction from the focus of the case, which is the danger of the proliferation of rape myths in a country with one of the highest rape rates in the world. In addition, Malema's accusations are unfounded – Sonke's male staff is 88.5% black and the female staff is 66.7% black. Funders are also diverse, such as the Office on the Status of Women within the Presidency, the Western Cape Office of the Premier, the Department of Health, the Commission for Gender Equality, the Open Society Initiative for Southern Africa, the Elton John AIDS Foundation, the United Nations Children's Fund, the United Nations High Commissioner for Refugees and the World Health Organisation, amongst others.<sup>51</sup>

In hindsight, to create an impact on legal precedent, it would have been strategic to file the Malema case at the High Court level, as the judgment would then be officially reported and would bind all Equality Courts at the Magistrate Court level. Another advantage of bringing the case to the High Court would have been to have a more experienced judge presiding over the case, which might help ensure compliance with the PEPUDA-envisioned inquisitorial and expedient process.

In consideration of the Equality Court's usefulness in addressing substantive gender equality, the Malema case has the potential to be, as Professor Narnia Bohler-Muller of the Faculty of Law at the Nelson Mandela Metropolitan University, puts it: "an excellent test case." "[The Malema case] could encourage women a little more to realise that [the Equality Courts] are available. It's the high profile cases that draw attention and encourage people to utilise the courts...and [this case] might be good because peoples' eyes will now be on the courts as a venue for addressing gender discrimination."<sup>52</sup> With the Ministry of Justice considering the reopening of Sexual Offences Courts, it will also be necessary to ensure gender equality claims do not get hedged into being dealt with only through investigation and punishment of sexual offences. A broader view will need to be maintained in order to push societal transformation towards substantive gender equality.

The Equality Courts will need to continue to be tested with more cases such as the Umlazi T-Section case and the Malema case, to see whether the courts can be used effectively to remedy unfair discrimination based on gender. It will also be important to monitor how the Department of Justice and Constitutional Development addresses the challenges the Equality Courts are facing and to assist by spreading awareness and educating the public on the Courts' purposes and procedures.



- <sup>1</sup> The Department of Justice and Constitutional Development [DOJCD] notes that “the gathering of statistics on the cases presided over by the Equality Courts is proving to be a challenge.” Decisions are not published in an official reporter, so this figure is an estimate. DOJCD Annual Report 2007-2008, p.51, available at [http://www.doj.gov.za/reports/report\\_list.html/](http://www.doj.gov.za/reports/report_list.html/)
- <sup>2</sup> Rachel Jewkes, et al, (2009) “Understanding men’s health and use of violence: interface of rape and HIV in South Africa,” Medical Research Council, available at [http://www.mrc.ac.za/gender/violence\\_HIV.pdf](http://www.mrc.ac.za/gender/violence_HIV.pdf).
- <sup>3</sup> Peacock, D., et al, (2008) “Literature review on men, gender, health and AIDS in South Africa,” for Sonke Gender Justice Network, available at <http://www.genderjustice.org.za/resources/reports/>.
- <sup>4</sup> Criminal Procedure Act 51 of 1977, Section 7.
- <sup>5</sup> The Labour Courts will eventually be absorbed into the High Court system, Superior Courts Bill 52 of 2003, Section 2.
- <sup>6</sup> Human Rights Commission Act 54 of 1994, preamble, available at <http://www.justice.gov.za/legislation/acts/1994-054.pdf>.
- <sup>7</sup> Commission on Gender Equality Act 39 of 1996, Section 11(1) available at <http://www.info.gov.za/acts/1996/a39-96.pdf>.
- <sup>8</sup> Business Day, “South Africa: Legal Aid Board defends more clients, but still short of lawyers,” September 6, 2007, available at <http://allafrica.com/stories/200709060313.html>.
- <sup>9</sup> Indirect discrimination is demonstrated in the US case of *Griggs v Duke Power Co*, where a company’s hiring requirements required a high school diploma, which was not directly discriminatory. However, there was an indirectly discriminatory effect because it kept black people out of a job because disproportionately few were able to meet this requirement. *Griggs v Duke Power Co* 401 US 424 (1971).
- <sup>10</sup> National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (3) SA 186J-187A (C).
- <sup>11</sup> Sello Chiloane, Director of the Equality Courts, interview on June 12, 2009, echoing the preamble of PEPUDA.
- <sup>12</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 [PEPUDA], Chapter 5.
- <sup>13</sup> Bohler-Muller, Narnia, (2006) “The promise of the Equality Courts,” *South African Journal on Human Rights*, Vol 22 (3), 380-404, at 383.
- <sup>14</sup> Sello Chiloane, Director of the Equality Courts, interview on June 12, 2009.
- <sup>15</sup> PEPUDA Regulations Section 10(7), and emphasised by Professor Narnia Bohler-Muller, Department of Law, Nelson Mandela Metropolitan University, interview on June 17, 2009.
- <sup>16</sup> PEPUDA Section 6-9.
- <sup>17</sup> PEPUDA Section 10.
- <sup>18</sup> DOJCD Brochure, “Equality for All: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.”
- <sup>19</sup> More specifically, the limitations analysis requires a showing that the unfair discrimination was the result of a law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. De Waal, Johan, et al, (2001) *The Bill of Rights Handbook*, 4th Edition, Lansdowne: Juta & Co., Ltd., p204.
- <sup>20</sup> PEPUDA Regulations Section 12(1)
- <sup>21</sup> PEPUDA Regulations Section 10(7)
- <sup>22</sup> PEPUDA Regulations Section 5(e)
- <sup>23</sup> PEPUDA Regulations Section 5(f)
- <sup>24</sup> De Waal, Johan, et al, (2001) *The Bill of Rights Handbook*, 4th Edition, Lansdowne: Juta & Co., Ltd., p226.
- <sup>25</sup> PEPUDA Section 13.
- <sup>26</sup> Though presiding officers can depart from this default.
- <sup>27</sup> Magistrate James Khuleni, Cape Town, Interview July 1, 2009
- <sup>28</sup> Bohler-Muller *ibid* note xlii at 387.
- <sup>29</sup> Explicit remedies are listed in PEPUDA Section 21(2).
- <sup>30</sup> PEPUDA Section 21(2)
- <sup>31</sup> SAHRC, Parliamentary Equality Review Process, October 16, 2006, at 10, available at <http://www.sahrc.org.za/sahrc/cms/downloads/Equality%20Review%20Process.doc>.
- <sup>32</sup> News 24.com, “Racist salon to pay R10 000,” March 29, 2005, available at [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_1682274,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1682274,00.html).
- <sup>33</sup> News 24.com, “Pants ban prohibited in Umlazi,” April 9, 2008, available at [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2302812,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2302812,00.html).
- <sup>34</sup> IOL, “Victory for Umlazi’s T-section women,” April 9, 2008, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=15&art\\_nw20080409121529755C379034](http://www.iol.co.za/index.php?set_id=1&click_id=15&art_nw20080409121529755C379034).
- <sup>35</sup> Cape Times, “Pants accused to appear at 2 trials,” February 29, 2008, available at <http://www.capetimes.co.za/index.php?fSectionId=3531&fArticleId=nw20080229103238491C473318>.
- <sup>36</sup> The One In Nine Campaign aims to mobilise support for survivors of sexual violence; to educate and change attitudes about sexual violence and to monitor the criminal justice system and court processes in rape cases.
- <sup>37</sup> Cherith Sanger, Attorney, Women’s Legal Centre, interview, July 1, 2009.
- <sup>38</sup> DOJCD, Annual Report 2007-2008, p57, available at [http://www.doj.gov.za/reports/report\\_list.html](http://www.doj.gov.za/reports/report_list.html).
- <sup>39</sup> *Ibid*.
- <sup>40</sup> *Ibid*, and Sello Chiloane, Director of the Equality Courts, interview on June 12, 2009.
- <sup>41</sup> DOJCD, Annual Report 2007-2008, p57.
- <sup>42</sup> Barry Yankes, Magistrate Clerk, Cape Town, interview on June 15, 2009, and Richard Maluleke, Magistrate Clerk, Johannesburg, interview on June 16, 2009.
- <sup>43</sup> Many of the complainants who file independently are not able to draft complaints in a manner that correlates to an offence in PEPUDA, which leads to their cases being thrown out. Barry Yankes *ibid* note xlii, and Richard Maluleke, Magistrate Clerk, Johannesburg, interview on June 16, 2009.
- <sup>44</sup> Barry Yankes *ibid* note xlii.
- <sup>45</sup> For example, inadequate availability of informal meeting spaces result in some Equality Courts operating contrary to the envisioned inquisitorial process. Instead of using meeting rooms where all parties are sitting at the same level, proceedings may take place in civil court rooms which creates an adversarial environment. In addition, the overloaded dockets mean proceedings take longer to process and are therefore not expediently resolved, as they can take from a few months to a year to complete. Barry Yankes *ibid* note xlii.
- <sup>46</sup> Kaersvang, Dana, (2008), “Equality Courts in South Africa: legal access for the poor,” *The Journal of the International Institute*, Spring, 4-9, available at <http://www.i.umich.edu/UMICH/ii/Home/PUBLICATIONS/II%20Publications/3%20Kaersvang-web.pdf>.
- <sup>47</sup> For example, the Blue Downs Equality Court has only had one case since opening. Mrs. Barker, Magistrate Clerk, Blue Downs, interview June 15, 2009.
- <sup>48</sup> Sello Chiloane, Director of the Equality Courts, interview on June 12, 2009.
- <sup>49</sup> News Today, “Malema says court appearance is part of ‘white ggenda,’” July 10, 2009, available at <http://www.newstoday.co.za/cgi-bin/newstoday/show.pl?1247227795>.
- <sup>50</sup> *Iafrica.com*, “Black faces not real,” July 11, 2009, available at <http://news.iafrica.com/sa/1792752.htm>.
- <sup>51</sup> For more information, please see Sonke’s annual report for 2007/2008 at <http://www.genderjustice.org.za/resources/organisational-documents/sonke-gender-justice-network-annual-report-2007-2008/download.html>.
- <sup>52</sup> Professor Narnia Bohler-Muller, Faculty of Law, Nelson Mandela Metropolitan University, interview, June 17, 2009.



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