EQUAL PAY FOR WORK OF EQUAL VALUE: AN EMPLOYMENT LAW ANALYSIS OF THE POSITION AND REMUNERATION OF CANDIDATE LEGAL PRACTITIONERS IN SOUTH AFRICA

BY

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MINI-DISSERTATION/THESIS

Submitted in (partial) fulfilment of the requirements for the degree of

MASTER OF LAWS

IN

LABOUR LAW

in the

FACULTY OF MANAGEMENT AND LAW

(School of Law)

at the

AT THE UNIVERSITY OF LIMPOPO

SUPERVISOR: PROFESSOR CI TSHOOSE

2025

DECLARATION

I hereby declare that this dissertation titled "Equal pay for work of equal value: a Legal analysis on the position and remuneration of candidate legal practitioners in terms of South African labour law." is my own work. I further declare that this dissertation has not been submitted by myself or any persons to this or any other institution. References have been provided accordingly for each source that was used.

Mashamba TI Date: 20 July 2024

Declaration by Supervisor

I hereby declare that I have supervised the student's dissertation and in my opinion this dissertation is suitable in terms of the scope and quality for examination.

CI Tshoose Date: 21 June 2024

Acknowledgements

First and foremost, I would like to express my sincere gratitude to the good God of Mount Zion for his untold mercies, wisdom and power, without which it would have been impossible to complete this dissertation.

I would like to acknowledge and extend my gratitude to the people who contributed towards the completion of this dissertation. Much appreciation to Kopano Mulaudzi for his constant encouragement and support throughout my career. He has been there from the very beginning of my journey motivating me. Thank you for always pushing me to work hard and be the best version of myself.

I also want to thank my supervisor Prof Clarence Itumeleng Tshoose, I appreciate the knowledge that he has imparted on me and always being available for when I needed assistance. I would like to thank him for giving me much needed guidance and inspiring me to think outside of the box.

Lastly, I would like to thank my friends Lucky Madzhie and Morasha Mpe for their encouragement and motivation and lending me a listening ear when all I did was complain endlessly. You are all appreciated.

Abstract

This study examines the concept of equal pay for work of equal value by conducting an employment law analysis on the position of candidate legal practitioners in South Africa. This study addresses the issue of candidate legal practitioners being paid well below the national minimum wage on the basis that they are not regarded as employees.

Articles of clerkship have been glorified for being hard to secure in South Africa. Legal practitioners have instilled a belief in law students and graduates building up fear which leads to them settling for anything provided even if they are being exploited just for the sake of securing articles as a precondition for securing admission as an attorney.

The primary objective of this study is to explore what candidate legal practitioners are classified as in terms of the labour legislation and why they are not afforded the relevant protection that is afforded to other employees in terms of legislation such as the Constitution of South Africa, Labour Relations Act and the Basic Conditions of Employment Act.

Keywords: Candidate Attorneys, equal pay, work of equal value, employers, employees, labour legislation.

List of Abbreviations

BCEA	Basic Conditions of Employment Act
CEDAW	International Convention on the Elimination of all Forms of Discrimination against Women
COIDA	Compensation for Occupational Injuries and Diseases Act
EEA	Employment Equity Act
ILO	International Labour Organisation
LPA	Legal Practice Act
LPC	Legal Practice Council
LRA	Labour Relations Act
NMWA	National Minimum Wage Act
OHSA	Occupational Health and Safety Act
PVT	Practical Vocational Training
SDA	Skills Development Act
UIA	Unemployment Insurance Act

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CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

The Legal Practice Act[1] sets out the requirements with which everyone who wishes to be admitted as a legal practitioner in South Africa must comply.[2] Amongst these is the vital requirement that such an individual must have served articles of clerkship at a registered law firm under the supervision of an admitted attorney.[3] This highlights the importance and the significance of articles of clerkship in order for one to gain admission as an attorney.

Candidate attorneys are individuals who have obtained their four-year Bachelor of Laws degree and are undergoing their articles of clerkship also referred to Practical Vocational Training ('PVT') with the intent of becoming an admitted attorney.[4] They serve this period with an attorney who is in practice. The person may be practicing for their own accord, as a partner in a law firm, in their capacity as state attorneys or at any other organisation that the Legal Practice Council ('LPC') has approved for the purposes of providing training to prospective attorneys.[5] Such a person is referred to as the candidate's principal and they are responsible for the candidate attorney for the duration of the PVT contract.[6]

Despite being an integral and vital part of the operation of many firms, candidate attorneys have been well underpaid and mistreated for as long as the inception of this profession and are viewed as cheap labour in most instances.[7] Their

[1] Legal Practice Act 28 of 2014.
[2] Legal Practice Act 28 of 2014.
[3] Section 26(1)(c) of the Legal Practice Act 28 of 2014.
[4] Ibid.
[5] Chapter 1 of the Legal Practice Act 28 of 2014.
[6] Section 26(1)(c) of the Legal Practice Act 28 of 2014.
[7] Moosa T "Overworked, unpaid, candidate attorneys struggle and feel 'ill-equipped'" (13 August 2023) Business Day< https://www.businesslive.co.za/bd/national/2023-08-13-overworked-unpaid-candidate-attorneys-struggle-and-feel-ill-equipped>(date of use 25 November 2023); Kgosana R 'Minimum wage on cards for candidate attorneys, but will it shrink access to firms?' (15 August 2023) TimesLive< https://www.timeslive.co.za/news/south-africa/2023-08-15-minimum-wage-on-cards-for-candidate-attorneys-but-will-it-shrink-access-to-firms>(date of use 25 November 2023).

remuneration used to be regulated by the Attorneys Act,[8] which has since been replaced by the Legal Practice Act[9] which is silent on the exact remuneration to which they are entitled.[10] The LPC has acknowledged that:

> "It goes without saying that the regulation of any minimum amount payable to candidate legal practitioners, and pupils in particular because they have no employer, is fraught with difficulties. For example, setting a low minimum wage could result in lower salaries being paid to some CAs, whilst setting a high, or even moderate, minimum wage could result in fewer CAs being employed".[11]

Against this background, this study examines the issue of the classification of candidate legal practitioners under current circumstances and what they should be classified as in accordance with the relevant labour legislation including but not limited to the provisions of the Labour Relations Act[12] and the Basic Conditions of Employment Act.[13] The study also assesses how the issue of equal pay for work of equal value can be applied in as far as candidate legal practitioners are concerned. Furthermore, this study looks into the application of labour legislation, in particular, in cases where the Legal Practitioner's Act[14] is silent. This study further explores alternative solutions that can be implored to subsidise firms that do not have the financial capacity to employ candidate legal practitioners.

1.2 Problem statement

In South Africa candidate attorneys are not classified as employees and as such are not provided the relevant protection that is afforded to employees under normal circumstances. This has led to them being exploited in various way as law firms are free of any consequences that may arise from such exploitation.[15] They often find

[8] Attorneys Act 53 of 1979.
[9] Legal Practice Act 28 of 2014.
[10] Section 27(2) of the Legal Practice Act 28 of 2014.
[11] LPC 'General training/Employment environment survey – update to Attorneys and Candidate Attorneys' survey conducted in August and October 2022< https://www.dropbox.com/s/nn4110rn6zgqsfd/1.%28a%29%20candidate%20attorney%20results%20summary.pdf?dl=0 (date of use 25 November 2023).
[12] Labour Relations Act 66 of 1995.
[13] Basic Conditions of Employment Act 75 of 1997.
[14] Legal Practice Act 28 of 2014.
[15] Cf Chivenge L 'Set up to fail: The prospective candidate attorney's calamity' (4 February 2021) Mail&Guardian< https://mg.co.za/thought-leader/opinion/2021-02-04-set-up-to-fail-the-prospective-candidate-attorneys-calamity>(date of use 25 November 2023).

themselves in situations where they are forced to endure poor treatment and being underpaid while being overworked because they need articles in order to be admitted as attorneys.[16]

In most instances, even after leaving such a firm which mistreat them odds are they are going to be employed by another which engages in the same practices. The main focus of such exploitation in this study is that of candidate attorneys being paid stipends that are not equivalent to the work that they are carrying out on behalf of their employers. The Legal Practice Act,[17] is not direct in regard to remuneration and leaves it to the discretion of the Legal Practice Council to regulate the remuneration and minimum amount payable to candidate attorneys.[18]

Since the inception of the LPA[19] in 2014 to date the Council still has not made such determination. The provisions of the National Minimum Wage Act,[20] in regards to the minimum wage applicable to all employees employed within the republic, also cannot be applied to candidate attorneys as they are not classified as employees. Candidate attorneys satisfy the definition for an employee,[21] as well as the requirements that need to be met in order for one to be regarded as an employee, [22] yet they still do not enjoy the protection of labour laws that are applicable to employees employed within the Republic. This is done despite the operation of section 23 of the Constitution,[23] which affords legal protection to all workers. In its relevant section the Constitution[24] provides that: "everyone has the right to fair labour practices. Furthermore, the Constitution[25] provides that every worker has the right to form and join a trade union, to participate in the activities and programmes

[16] Moosa T "Overworked, unpaid, candidate attorneys struggle and feel 'ill-equipped'" (13 August 2023) Business Day< https://www.businesslive.co.za/bd/national/2023-08-13-overworked-unpaid-candidate-attorneys-struggle-and-feel-ill-equipped>(date of use 25 November 2023); Kgosana R 'Minimum wage on cards for candidate attorneys, but will it shrink access to firms?' (15 August 2023) TimesLive< https://www.timeslive.co.za/news/south-africa/2023-08-15-minimum-wage-on-cards-for-candidate-attorneys-but-will-it-shrink-access-to-firms>(date of use 25 November 2023).
[17] Legal Practice Act 28 of 2014.
[18] Section 27(2) of the Legal Practice Act 28 of 2014.
[19] Legal Practice Act 28 of 2014.
[20] 8 Schedule 1(1) – (2)(a)-(d) of the National Minimum Wage Act.
[21] Chapter 1 of the Basic Conditions of Employment Act 75 of 1997.
[22] Section 213 of the Labour Relations Act 66 of 1995.
[23] The Constitution of the Republic of South Africa, 1996.
[24] The Constitution of the Republic of South Africa, 1996.
[25] The Constitution of the Republic of South Africa, 1996.

of a trade union; and to strike".[26] In this study, the word everyone can be interpreted generously to include candidate attorneys. This would mean that candidate attorneys ought to fall within the protective scope and framework of our labour laws.

1.2 Aims and objectives of the study

The aim of this study is to analyse the position of candidate attorneys in terms of labour law legislation and within the legal fraternity. The study also determines why provisions of the labour laws that govern minimum wages applicable to all employees within the republic are not applied to candidate attorneys as the relevant legislation that is applicable to their profession is silent on it.

To this extent, the main objectives of this study are as follows:

To determine what candidate attorneys are classified as in terms of the South African labour law legislation.

To ensure that candidate attorneys are afforded the protection that is afforded to normal employees in terms of the applicable labour laws.

To scrutinise the Legal Practice Council's failure to implement a minimum wage that should be paid to candidate attorneys despite the directives to do so being in existence for numerous years.

To recommend for the application of relevant labour law legislation to be applied in respect of minimum wages where the Legal Practitioners Act[27] and the Legal Practice Council is silent.

1.4 Research question

This study explores the position of candidate legal practitioners within the legal fraternity and seeks to establish that they are employees in terms of the applicable labour law legislation within the Republic and as such should be granted the relevant

[26] Section 23(1)(a-c) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[27] Legal Practice Act 28 of 2014.

protection that is granted to all employees in terms of the legislation. The study further addresses the application of the relevant labour laws legislation with regards to the minimum wages of candidate legal attorneys as the Legal Practitioners Act is silent in regard to the minimum wage payable.

1.5 Scope and limitations of the study

The analysis of this study will mostly revolve around desktop research. This is because the author will face a challenge in interviewing candidate attorneys as they cannot walk door to door in law firms and ask them questions as this would disrupt the operations for the firm, the candidates might also not be available in the office at the times that the author may go to conduct interviews and also the environment is not conducive for asking questions of the nature that the author intends to ask. The geographical location of the author is a barrier in accessing interview subjects. Any possible interviews that could be carried out through email or surveys would not really be efficient and would rather pose a threat to the results. This is due to the fact that the candidate attorneys interviewed may not be comfortable interacting with someone that they do not know, and they may also hold back from answering truthfully as they may be of the fear that their principals my see their responses which may be used to cause prejudice to them.

1.6 Research methodology

The qualitative research method will be utilised in conducting this study. The review and analysis data of this study is obtained from existing research that has been done by other scholars. Legal principles will be used including but not limited to articles, journals, books, legislation, websites, international and South African case law, international law, acts of parliament, Bills, policy documents. Furthermore, the courts have expressed their opinions by using articles and case law.

1.7 Definition of key concepts

Candidate attorney- this is defined as a person who is undergoing practical vocational training with the view of being admitted and enrolled as an attorney in terms of the Legal Practice Act.[28]

Employee – the term employee refers to anyone excluding an independent contractor who works for another person or is employed by the state and such person received or is entitled to receive remuneration and any person who assists in carrying on or conducting the business of the employer in any manner whatsoever.[29]

Practical vocational training – this refers to the training that one is required to undertake in terms of the LPA[30] to qualify as a candidate attorney or pupil in order to be admitted and enrolled as an attorney or advocate.[31] This training is also referred to as articles of clerkship.

Principal – this refers to someone who may be practicing for their own accord, as a partner in a law firm, in their capacity as state attorneys or at any other organisation that the Legal Practice Council has approved for the purposes of providing training to prospective attorneys. [32]

1.8 Literature review

Vettori[33] starts by questioning the viability of the requirements for valid contract of employment for one to qualify as an employee for the purposes of labour law protection. She makes the argument that an employment connection can exist even in the absence of a legally binding contract. She bases her argument on the court rulings in *Discovery Health*[34] and *Kylie,*[35] contending that a broad interpretation of the term is necessary to increase the scope of labour law protection. The presence

[28] Chapter 1 of the Legal Practice Act 28 of 2014.
[29] Chapter 1 of the Basic Conditions of Employment Act 75 of 1997.
[30] Legal Practice Act 28 of 2014.
[31] Chapter 1, section 1 of Act no 28 of 2014, Legal Practice Act 2014
[32] Section 26(1)(c) of the Legal Practice Act 28 of 2014.
[33] Vettori S, "The extension of labour legislation protection to illegal immigrants"2009, 21 Merc LJ 818-830.
[34] *Discovery Health Ltd v CCMA* (2008) 29 ILJ 1480 (LC).
[35] *Kylie v CCMA* (2008) 29 ILJ 1918 (LC).

of an employment relationship should be prioritised over its specific structure. This is consistent with both section 23 of the Constitution and the statutory meaning.[36]

Van Niekerk[37] and Du Toit[38] agree that, despite the statutory definition of employee being broad, non-descriptive, and grounded in common law, a definition based on the work relationship rather than the employment contract is necessary. This is the rationale behind the writers' contention that the presence of an employment relationship should be emphasised. It is necessary to interpret the term "employee" broadly in order to cover de facto (statutory) workers who do not have legally enforceable employment contracts.

Inspired by the Constitutional Court's ruling in *SANDU v Minister of Defence,*[39] he contends that the definition of employee should be broadly interpreted and the exclusion of independent contractors should be narrowly construed if the constitutional labour rights extend beyond the boundaries of the employment contract to include contracts "akin" to such contracts. The authors contend that illegal employment contracts are void and cannot be enforced at all in response to the question of whether labour laws only apply when the contract of employment is lawful. Stated differently, some authors support a narrow reading of the statutory definition and contend that the right guaranteed by the constitution to everyone needs to be qualified and limited to common law workers alone.[40]

The LPA[41] acts as the yardstick that regulates the legal profession. It provides for the operation of the profession as well as all other administrative issues that practitioners must comply with. However it has a shortcoming in that it does not address aspects such as remuneration of candidate attorneys and leaves it to the discretion of LPC[42] which still hasn't made a determination.

[36] Le Roux R, "The Worker, Towards Labour Laws New Vocabulary", (2007) 124 SALJ 469.
[37] Van Niekerk A et al Law @ Work (2015) at 79.
[38] Du Toit D et al Labour Relations Law: A Comprehensive Guide (2006) at 73.
[39] *SANDU V Minister of Defence* 1999 (4) SA 469 (CC).
[40] Kunene T, "The liability of trade unions for damage caused during a strike action: a comparative approach" June 2021.
[41] Legal Practice Act 28 of 2015.
[42] Legal Practice Council.

1.9 Chapter layout

This study comprises of five chapters which are summarised briefly as follows:

The first chapter lays down the foundation of the study. Its intention is to provide the reader with a general idea of the study's purpose and what to expect from it. The study's introduction, research goals and objectives, research scope and constraints, literature review, research methods and the overall chapter outline make up the first chapter.

The second chapter gives the reader a historical background on the evolution of the classification of candidate attorneys in South Africa and the legislation that used to govern and regulate their remuneration and compensation throughout the years.

The third chapter deals with the relevant legislation that is applicable to candidate attorneys to date and their classification to date. It also outlines and assess the legislation that governs candidate attorneys remuneration to date and how it is applied within the current context and setting.

The fourth chapter deals with the mixed application of the existing legislation governing candidate attorneys and labour laws in order to improve and better regulate and manage the remuneration that is paid to candidate attorneys.

Lastly, chapter 5 provides conclusions and recommendations of the study.

1.10 Summary

This chapter has provided a brief background of this study and laid the foundation for discussions to follow in other chapters. In short, in other chapters the study looks at the current legislation as well as the applicable labour law legislation. The study also explores the application of the relevant labour law legislation in regard to the remuneration of candidate attorneys where the legislation governing candidate attorneys is silent and also make recommendations for the development of future laws and use.

CHAPTER 2

CLASSIFICATION OF CANDIDATE LEGAL PRACTITIONERS IN SOUTH AFRICA

2.1 Introduction

Admission as an Attorney of the High Court of South Africa is a goal many dream off as early as their first year. There are numerous requirements that one ought to comply with in order for this dream to become a reality. These requirements include the need for such individual to undertake Practical Vocational Training for the period of a year if they attended a school for legal practice and two years if the individual did not attend law school. The individual is referred to as a candidate attorney and they serve their period of articles under a principal attorney who must have practiced for a minimum period of three years.

In summation, the Attorneys Act (as amended),[43] and the rules promulgated in terms of the Act, prescribes the admission requirements for attorneys. This includes the completion of an LLB, followed by two years of vocational training (known as articles) served at a law firm or another permissible alternative such as a law clinic or Legal Aid South Africa. Another option is to serve articles for one year, with an additional full-time year spent at the School of Legal Practice.[44]Admission as an attorney takes place by means of application to the High Court, after vocational training is complete. In order to practise, the attorney must then register with a law society in the province in which they are based.

This chapter evaluates the position of such candidate legal practitioners and if they are considered to be employees in the workplace for the purposes of the application of labour law legislation.

[43] Attorneys Act 53 of 1979 (as amended).

[44] The School for Legal Practice was established by the Law Society of South Africa ('LSSA') in 1990 and provides post-graduate vocational training to LLB graduates. There are nine centres, one in each province, where students attend on a full-time basis for a year as an alternative to serving one year of articles.

2.2 Who is an employee?

An employee is defined under the provisions of section 213 of the LRA,[45] and also under section 1 of the BCEA.[46] The acts contain an identical definition which reads as follows:

"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee"

In order to determine whether a specific person is an employee under the Labour Relations Act 66 of 1995 (LRA),[47] the Basic Conditions of Employment Act 75 of 1997 (BCEA),[48] the Employment Equity Act 55 of 1998 (EEA),[49] or the Skills Development Act 97 of 1998 (SDA),[50] the Code of Good Practice mandates that anyone interpreting or applying any of the following Acts must take the definition of an employee into account.

The code must also be taken into consideration when determining whether people are employees for the purposes of the Occupational Health and Safety Act 85 of 1993 (OHSA),[51] the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA),[52] and the Unemployment Insurance Act 63 of 2001 (UIA).[53] It is made clear that the definitions of an employee in the LRA[54] and those found in the OHSA, COIDA, and UIFA are different. However, the code notes that there are enough parallels for this code to be very helpful in identifying who is an employee for the purposes of the OHSA and COIDA.

[45] Section 213, Labour Relations Act 1995.
[46] Section 1 of the Basic Conditions of Employment Act.
[47] Labour Relations Act 66 of 1995.
[48] The Basic Conditions of Employment Act 75 of 1997.
[49] The Employment Equity Act 55 of 1998.
[50] The Skills Development Act 97 of 1998.
[51] The Occupational Health and Safety Act 85 of 1993.
[52] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[53] Unemployment Insurance Act 63 of 2001.
[54] Labour Relations Act 66 of 1995.

The main goal of the Code's initial section is to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act[55] and other labour legislation.[56] The Code then lays out a number of rules. The code also aims to maintain the appropriate distinction between autonomous contracting and the work relationship, which is governed by labour law.[57] The above sentence makes it abundantly clear that an employment relationship and an independent contractor relationship are worlds apart. To "ensure that employees, who are in an unequal bargaining position with respect to the employer, are protected through labour law and are not deprived of those protections by contracting arrangements" is another goal.

This strongly suggests that the legislature is aware of dishonest employers that obscure the genuine nature of the work relationship under the cover of a deftly written contract, depriving the employee of his or her legal entitlement to fair treatment. The fact that a person performs services via a closed corporation or other legal organisation does not exclude the relationship from falling within the umbrella of an employment relationship governed by labour laws.[58] To evaluate the reality of the work relationship and determine whether the arrangement was made to avoid complying with labour laws or other regulatory responsibilities, it is required to look beyond the formal architecture.[59]

Many employers adhere to the belief that "he is a contractor; therefore he does not get annual leave for sick leave or any other benefits." It is a known fact that many employers hire individuals under an "independent contractor contract of employment" that clearly states that the employee is not entitled to any BCEA[60] benefits because he is an independent contractor.[61] Such employers are simply using this as an excuse to get out of their legal obligations under labour law, and in many

[55] Labour Relations Act 66 of 1995.
[56] Code of Good Practice
[57] Ibid.
[58] Du Plessis & Fouche, 2006. A Practical Guide to Labour Law, 9
[59] Ibid.
[60] Basic Conditions of Employment Act 75 of 1997.
[61] Ibid.

cases to avoid having to give that employee other benefits like pension and health insurance, which he does give to his "permanent" employees.[62]

2.3 Criteria for determining an employee

To differentiate between an employee and an independent contractor, several standards were devised by common law. According to Benjamin[63], courts developed these standards in an effort to find "a single definitive touchstone to identify the employment relationship." The control test, organisation test, economic realities test, and dominating impression test are among the tests. As can be seen below, South African courts developed these tests using a methodology that was quite similar to that of English courts.

2.3.1 Control test

This test is based on the idea that the employer's control over the work that has to be done by an employee, when it needs to be done, and how it needs to be done is what determines whether or not there is an employment connection.[64] This test was used in early English legal cases to address an employer's vicarious liability for an employee's wrongdoings. The only worker who may hold his or her employer vicariously accountable for illegal activities committed while on the job was one who was under the master's supervision and control.

The employer's capacity to manage and oversee an employee served as the foundation for liability.[65] South African courts first applied this test in *Colonial Mutual Life Association v McDonald*[66] in which it was held that due to the absence of the right to control and supervise an insurance agent, Colonial Mutual was not vicariously liable for his negligence.[67] Sadly, this test's main flaw was that it only

[62] Ibid.
[63] Benjamin P, "An accident of history" at 787.
[64] *Yewens v Noakes* (1880) 6 QBD 530 and Selwyn N Selwyn, Law of Employment (2011) at 47-48.
[65] Rycroft A and Jordaan B A Guide to South African labour law (1992) at 41.
[66] *Colonial Mutual Life Association v McDonald 1931 AD 412.*
[67] *R v Feun 1954 (1) SA 58 (T); R v AMCA Services Ltd 1954 (4) SA 208 (A*).

considered control as a criterion in deciding whether an employment contract existed, nothing else mattered. It was unable to deal with the rise of professionals who were semi-skilled and highly talented and who had considerable discretion over the type of work they had to perform and how.

Le Roux[68] has challenged this test for having a narrow scope because it was created for vicarious responsibility under delict law rather than employment law. Grogan[69] further on the argument by arguing that since control is a byproduct of an employment contract, it is pleonastic to prescribe a contract of employment based solely on control. Furthermore, determining the level of control necessary to classify someone as an employee or not was too broad and challenging. While experts agree that control is not the only aspect that determines whether something is an employment contract or an independent contractor contract, they also admit that control is relevant and one of the criteria that a court must consider when making this distinction.[70] The control test met its waterloo in the mid 1970's in the case of *Ongevallekommissaris v Onderlinge Versekerings Genootskap Avbob*.[71]

2.3.2 Integration test

Kahn-Freund[72] originally created this exam for English law in an attempt to fix the shortcomings of the control test. The test determines an employee's identity by asking if they are a member of the employer's team. Lord Denning in the English case of *Stevenson Jordan and Harrison Ltd v McDonald and Evans*,[73] described the test in the following words:

"One feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it."

[68] Le Roux R "The Evolution of the Contract of Employment in South Africa" (2010) 39 ILJ 139 at 149
[69] Grogan J Workplace Law (2011) at 17-18.
[70] *J and JN Freeze Trust v The Statutory Council for the Squid and Related Fisheries of South Africa (2011) 32 ILJ 2966 (LC); Mandla v LAD Brokers (Pty) Ltd (2000) 5 LLD 457 (LC).*
[71] *Ongevallekommissaris v Onderlinge Versekerings Genootskap Avbob 1976 (4) SA 446 (A).*
[72] Kahn-Freund O, 'A note on Status and Contract in British law' (1951) 14 Modern LR 504.
[73] Stevenson Jordan and Harrison Ltd v McDonald and Evans [1952] 1 TLR 101 at 11.

It was accepted as an experimental test in South Africa's *R v AMCA*[74] case in reaction to the shortcomings of the control test. It was dismissed in Ready Mix Concrete South East v Minister of Pensions and National Insurance[75] in England and S v AMCA Services[76] in South Africa for the same reason it raised more questions than it addressed and provided no clarification on the legality of the integration. Determining one's level of organisational integration was challenging. It was deemed to be ambiguous, hazy, and unhelpful, more issues than answers were offered.[77] Integration into the employer's organisation continues to be one of the important indicators pointing to the presence of an employment relationship, despite its apparent flaws.[78]

2.3.3 Dominant impression test

The dominant impression test amounts to nothing more than requiring the arbitrator to arrive at a decision "on the balance of probability." In essence, one column contains the information indicating an employment relationship, while an adjacent column has the facts indicating an independent contractor relationship (or the facts not indicating an employment relationship).[79] After then, the arbitrator has to determine which collection of facts is more important by weighing the information in both columns. Stated differently, he needs to determine which list provides a stronger signal of a relationship based on the overall probability. Does the list of indicators for employment weigh more than the list of indicators for independent contractors?[80]

If so, there is an employment relationship, and the CCMA (or Bargaining Council, etc.) will have jurisdiction over the disagreement. If not, the CCMA lacks authority to mediate or arbitrate the dispute and the applicant is not considered an employee for

[74] *South Africa's R v AMCA 1954 (4) SA 208 (A).*
[75] *Ready Mix Concrete South East v Minister of Pensions and National Insurance (1968) 2 QB 497.*
[76] *England and S v AMCA Services68 in South Africa 1962 (4) SA 537(A).*
[77] *Smit v Workmen's Compensation Commissioner 1979 SA 51 (A).*
[78] *Kambule v CCMA [2013] 7 BLLR 682 (LC); NEHAWU v Ramodise (2010) 31 ILJ 695 (LC).*
[79] *Wyeth SA (Pty) Ltd v Manqele & Others (JA 50/03)[2005] ZALAC 1 ; (2005) 26 ILJ 749 (LAC); [2005] 6 BLLR 532 (LAC) 23 March 2005*.
[80] Ibid.

the purposes of the Act.[81] In light of this, the applicant may file a civil lawsuit for damages, breach of contract, and other claims.

The following are factors that are considered when deciding if an employment relationship exists in terms of the dominant impression test:

1. The manner in which the person works

   The way an individual works is dictated or controlled by another individual. If an employee is compelled to follow the employer's or its employees' legitimate and reasonable directions, orders, or instructions regarding how they are to work, then there will be a factor of control or direction. Put differently, the individual must follow the employer's instructions regarding work performance. This prerequisite exists in a partnership where one side provides labour alone and the other controls how that labour is done. If someone is paid to complete a certain job or create a specific product and is entitled to control and direction, then control and direction are absent to determine the manner in which the task is to be performed or the product produced. For example, you call in a painting contractor to repaint.[82]

   The "employer" in an employment relationship is entitled to determine the usage of certain personnel, equipment, raw materials, work performance standards, etc. Furthermore, the fact that the "employee" is bound by the company's policies, procedures, and disciplinary code is a strong sign of an employment connection.

2. The person’s working hours are subject to the control or direction of another person.

   An employment relationship will be strongly indicated if the employee's work hours are specified, typically in a contract or letter of appointment, and the contract allows the employer to choose the work hours. A contract's lack of specified work hours does not always imply that it is not an employment agreement. If the employer has the right to set the maximum number of hours that an employee must work in a given time frame, per day, per week,

[81] Labour Relations Act.
[82] Risak M, Dullinger T, “The concept of worker in EU law, status quo and potential for change” Report 140, European Trade Institute 2018.

or whatever, then there may be sufficient control or direction. It is also discovered that flexible work schedules exist in job relationships.[83]

3. The person forms part of the organisation

   This most likely holds true for any employer that is a business. It wouldn't apply, for instance, to someone who hires a domestic helper, even though the domestic helper is unquestionably an employee in these situations. If the employee's services are essential to the employer's operations or organisation, then that element will exist. An individual who performs services for or works for an employer in the course of pursuing his own business interests is not considered an employee of the employer. Consequently, an individual who provides services to another organisation while holding a registered close corporation (CCC) does not belong to that other individual's organisation. The fact that they take risks is a sign that they run their own business.[84]

4. The person has worked for the other person for an average of at least 40 hours per month over the last three months.[85]

5. The person is economically dependent on the other person for whom he or she works or renders services.

   This indicates that the employer is typically the only source of work for the employee and will serve as either their primary or only source of income. If a person is truly self-employed or owns their own business, economic reliance is typically absent. The ability to enter into contracts with other businesses or individuals to perform services or complete labour for them is a crucial sign of self-employment.

   Even though a self-employed person may only have one "client," this does not imply that client employs them. It won't always result in an employee-employer relationship if additional elements, like some of the ones listed above, are present. Part-time employees: A part-time employee's status as an employee remains unchanged notwithstanding his ability to work for another

[83] Ibid.
[84] Risak M, Dullinger T, "The concept of worker in EU law, status quo and potential for change" Report 140, European Trade Institute 2018.
[85] Ibid.

company during his off-duty hours. The same would hold true for a full-time worker who also works an additional job after hours to enhance their income. He continues to work for the employer.[86]

6. The person is provided with the tools of trade or work equipment by the other person

   Whether the employee pays for the tools or equipment or if they are provided to them at no cost to them is irrelevant. This clause covers devices like phones, computers, and other equipment.[87]

7. The person only works for or renders services to one person. A self-employed person will not be subject to this requirement since they are free to work for or provide services to any number of other people or organisations. Crucially, the Code declares that it makes no difference if the job is allowed under the terms of the employment arrangement or if it constitutes "moonlighting" in violation of those agreements.

It is significant to remember that, until the employer or another individual can demonstrate otherwise, the individual is assumed to be an employee if any one of the aforementioned factors rather not necessarily all of them are present. It will be necessary for the employer to present evidence regarding the nature of the working relationship. Upon closer examination of the rebuttable presumption, one may determine that the presence of any one of the seven specified characteristics in the work connection suffices to determine that the applicant is an employee.

Alternatively, it could be concluded that the connection qualifies as an independent contractor arrangement if the contract explicitly indicates that "this is not a contract of employment, but is an independent contractor contract." Alternatively, the contract can contain language such as "notwithstanding anything to the contrary in this contract, it is acknowledged by both parties that the person is not an employee, but remains an independent contractor."[88]

A strategy that is predicted on a broad reading of the employment relationship is always constrained. One may even contend that it amounts to a denial of the

[86] Ibid.
[87] Ibid.
[88] Theron J,"The erosin of worker's rights and the presumption as to who is an employee", 2002.

importance of the adjustments made to the way work is organised and the degree and extent of economic restructuring.[89] There will be vulnerable workers in the grey area who re left out of even the largest building projects.[90] It is also a method that depends on individual employees lodging grievances, however the dispute settlement process as a whole has this feature.[91]

Paragraph 16 of the Code[92] explicitly specifies that "a statement in a contract that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant." Regretfully, the Code[93] has anticipated such events. The Code[94] goes on to say that "the applicant does not establish that they are an employee simply because they meet the presumption requirements by demonstrating that one of the listed factors is present in the relationship. "In order to demonstrate that the applicant is not an employee and that the arrangement is actually one of independent contracting, the burden of proof therefore shifts on the "employer."

The applicant must be considered an employee if the reply is unable to provide adequate proof. As a result, an employee may demonstrate that one of the seven criteria is applicable. The employer must then present proof that, in spite of the factor's existence, the applicant is an independent contractor rather than an employee. The applicant will be deemed to be an employee if the employer is unable to provide that proof. It is clear from the foregoing that there are clear boundaries established in this subject matter and that there are no "grey areas."[95]

[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] The Code of Good Practice.
[93] Ibid.
[94] Ibid.
[95] Risak M, Dullinger T, "The concept of worker in EU law, status quo and potential for change" Report 140, European Trade Institute 2018.

2.4 Presumption of employment

2.4.1 What it entails

The LRA[96] is the yardstick for various labour laws that are applied in South Africa. Section 200A of the LRA[97] contains a rebuttable presumption as to whether a person is an employee and therefore entitled to protection by the Act. The clause only applies to employees making less than the threshold amount, which is currently R172 000 per year and is periodically determined by the Minister of Labour.[98] In cases where the presumption is not applicable because the person earns more than the threshold amount, the Code of Good Practice[99] states that the factors listed in the presumption may be used as a guide to determine whether a person is actually in an employment relationship or is self-employed. [100]

If any of the seven elements stated in the LRA's[101] section 200A or the BCEA's [102]section 83A are present in the connection between a person and the person for whom they work or to whom they provide services, that person is deemed to be an employee. It must be emphasised that just one of these requirements must be met; not all of them must.[103] A person who asserts "I am an employee in terms of the LRA or BCEA" and the other party contests that assertion is presumed to be so, subject to the earnings threshold, in any actions under the BCEA or the LRA.[104]

2.4.2 Factors

In order to be presumed to be an employee, any one of the following factors must be present:[105]

[96] Labour Relations Act 66 of 1995.
[97] Ibid.
[98] Section 6(3) of the Basic Conditions of Employment Act.
[99] The Code of Good Practice.
[100] Code of Good Practice, Paragraph 20, page 9.
[101] Labour Relations Act 66 of 1995.
[102] Basic Condition of Employment Act 75 of 1997.
[103] *Denel (Pty) Ltd v Gerber 201 [2005] 9BLLR 849 (LAC).*
[104] Ibid.

1. the person works for or renders services to the person or entities cited in the proceedings as the employer ; and
2. any one of the seven listed factors is present in their relationship with that person or entity.

A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of contract, if any one or more of the following factors is present:

1. the manner in which the person works is subject to the control or direction of another person
2. the persons hours of work are subject to the control or direction of another person.
3. in the case of a person who works for an organization, the person is a part of that organization
4. the person has worked for that other person for an average of at least 40 hours per month over the last 3 months
5. the person is economically dependent on the other person for whom that person works or renders services.
6. he person is provided with tools of trade or work equipment by the other person; or
7. the person only works for or renders services to one person.

2.4.3 Types of presumptions

A presumption is the legal word for the acceptance of a fact or condition as being true and accurate. A rebuttable presumption and an irrebuttable presumption are the two sorts of presumptions. An irrebuttable presumption is a truth or state of things that cannot be disproved, whereas a rebuttable presumption is that the fact or state of affairs is considered to be accurate and correct until it can be proven differently.[106]

[106] ILO, "Who is an employee? The question addressed. Part 2" Labour law guide.

As far as this "presumption" is concerned, the arbitrator in *Ganga / Grassroots Entrepreneurial Development (Pty) Ltd t/a Grassroots Scape Facilities*[107] had the following to say:

The presumption benefits the party making the claim. This means that if a candidate for a position in a dispute asserts that they are an employee because one or more of the seven elements listed in section 200A (1) of the LRA exist, it is the employer's responsibility to disprove the assumption. The presumption will only apply if the person claiming to be an employee makes less money than the BCEA's[108] statutory minimum, which is presently R172 00 per year. It's also important to note that the presumption holds true regardless of the contract's format or lack thereof. The alleged employee must be considered an employee if the reply does not present enough proof. The petitioner made R108 000 per year, which is far less than the R172 000.00 annual statutory requirement.

The alleged employee must show (or it must be common cause) that he provides services to the person or business referenced in the proceedings, that he earns less than the threshold, and that one or more of the seven characteristics listed in section 200A of the LRA[109] exist in order to be presumed to be an employee. When these three requirements are satisfied, the assumption is activated. However, none of these criteria must be met in order to work. Simply put, they establish a rebuttable presumption that a person is an employee. In other words, after these three criteria are satisfied, the burden of proof shifts to the respondent to establish that the applicant is an independent contractor rather than an employee under the definition of section 213 once these three criteria have been satisfied.

People earning above the threshold of R172 000.00 per annum further do not enjoy the full protection offered by the Basic Conditions of Employment Act[110] or

[107] *Ganga / Grassroots Entrepreneurial Development (Pty) Ltd t/a Grassroots Scape Facilities* [2010] 6 BALR 644 (CCMA).
[108] Basic Conditions of Employment Act 75 of 1997.
[109] Labour Relations Act 66 of 1995.
[110] Basic Conditions of Employment Act 75 of 1997.

the Labour Relations Act.[111] Some sections of the BCEA[112] do apply to these persons whilst most do not.

2.5 Summary

Candidate legal practitioners work for another person being their principal in exchange for what they are given remuneration. They assist their principals in carrying out the business of the firm and their principal exercises control over them. A principal has the capacity to manage and oversee their candidate attorney in that they dictate the work done, when it needs to be done and also how it needs to be done.

Such candidates are employed as part of the business and the work that they do is an integral part of the employer's business. Their working hours are subject to the control or the direction of their principal they have no control over their working hours or schedule in any way or manner. Candidates also work for their principals for more than an average of 40 hours per month for the duration of the articles being a year or two depending on whether the individual attended law school or not.

They are also dependent on their principals as they are their only source of income as the LPC directs that a candidate legal practitioner may not be a director in any company or embark on any business ventures during their period of articles of clerkship.[113] Principals also provide their candidates with equipment to help them carry out their designated duties.

As such candidate legal practitioners satisfy all the requirements that one ought to meet in order to be considered as an employee. In light of this candidate legal practitioners are indeed employees, and labour law legislation must be applied to them and they must be afforded the protection that all the other protection and benefits that are enjoyed by traditional employees.

[111] The Labour Relations Act 66 of 1995.
[112] Basic Conditions of Employment Act 75 of 1997.
[113] *Ex Part Galela and Another [2023] ZAGPPHC 716 (18 August 2023*).

CHAPTER 3
EQUAL PAY FOR WORK OF EQUAL VALUE: THE REMUNERATION OF CANDIDATE LEGAL PRACTITIONERS

3.1 Introduction

Unfair compensation is a chronic, nuanced issue that is hard to solve without proactive steps being taken as well as a thorough comprehension of the principles and their ramifications for the workplace and society at large.[114] The present economic crisis has brought even more attention to the difficulty of implementing the idea, with some viewing "equal pay" as little more than an added expense.[115] This chapter will outline the concept of equal pay for work of equal value and also set a baseline for its application in the workplace and within our judicial system. [116]

Apartheid brought about racist legislation and practices that affected the South African job market, resulting in inequality and discrimination against certain groups.[117] Strategies aimed at reducing the gap between the earning gaps of employees has to contend with the twin effects of vertical and horizontal job segregation.[118] Due to the fact that they faced the greatest acute and systemic disadvantages in the South African labour market, women and Africans needed to be given particular consideration when developing labour market policies.[119] The contextual framework provided demonstrates that racial and gender discrimination as it pertains to income differentials is a problem that needs to be addressed. [120]

3.2 What equal pay for work of equal value entails

One of the most significant and for some contentious amendments is the international principle of "equal pay for work of equal value," which is codified in the

[114] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, op. cit., Article 3.
[115] Ibid.
[116] Ibid.
[117] McGregor, M 'Equal remuneration for the same work or equal value' (2011) SA Merc LJ 488.
[118] Ibid.
[119]McGregor, M 'Equal remuneration for the same work or equal value' (2011) SA Merc LJ 488.
[120] Ibid.

South African Employment Equity Law.[121] This was carried out in adherence to South Africa's responsibilities under public international law, particularly the Conventions of the International Labour Organisation (ILO) Conventions.[122] The Code's goal is to give employers and workers useful advice on how to implement the idea of equal compensation for work of equal worth in the workplace. Through human resources policies, procedures, practices, and job evaluation processes, this Code aims to encourage employers including the State employees and trade unions to adopt compensation equity in the workplace.[123]

the EEA[124] was finally revised in 2013, among other things, the modification added sections 6(4) and 6(5), and unfair discrimination was now regarded as as a difference in terms and circumstances of employment between employees of the same employer who perform the same or nearly the same work or labour of similar value and are based, directly or indirectly, on one or more of the grounds stated in subsections (1).

Regulation 5[125] is of importance and gives the methodology of assessing whether a claim for equal work for equal value has merits or not.[126] It states that it must first be established whether the work concerned is that of an equal value and whether there is a difference in terms and conditions of employment, where after it must be established whether the difference in remuneration constitutes unfair discrimination.[127]

[121] Scheepers J**,** Equal Pay for Work of Equal Value, Labour Guide, 2023.

[122] Ibid.
[123] Employment Equity Act, 1998 (Act 55 Of 1998 As Amended).
[124] Employment Equity Act, 1998 (Act 55 Of 1998 As Amended).
[125] Employment Equity Act Regulations, 2014.
[126] Employment Equity Act Regulations, 2014.
[127] Reguation 5(1)-(2).

3.3 Legislative framework

3.3.1 International authority

3.3.1.1 International Labour Organisation (ILO)

International agreements and declarations are thought to be crucial components in the fight to protect and advance the right to equality in the workplace.[128] Trade unions' proposals, such as the equal pay for equal work idea, were viewed as radical and perhaps unachievable while the ILO constitution was being written.[129] In spite of this setback, the ILO constitution recognised the "principle of equal remuneration for work of equal value" in its preamble.[130] South Africa is a member state of the ILO and is bound by the provisions of its preamble.

3.3.1.2 The ILO decent work agenda

The foundation of the concept of decent work is the belief that everyone should be able to work productively and decently in environments that respect their human dignity, freedom, equity, and security.[131] This agenda carries on the ILO's long history of fighting discrimination in the workplace and emphasises the critical connections between gender equality, decent work, and the fight against poverty.[132]

3.3.1.3 International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

The CEDAW treaty was adopted by the South African government in January 1996. This imposed legislative obligations on the Executive and Parliament to actively combat gender discrimination.[133] Article 1 of the convention provides that 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

[128] Hlongwane 'Commentary on South Africa's position regarding equal pay for work of equal value', 2007 Law Democracy and Development 70.
[129] Gaynor, C ILO and UN Inter-Agency Collaboration: Promoting Gender Equality in the World of Work 2010 at 9, 25 September 2017.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Vettori S, "The extension of labour legislation protection to illegal immigrants"2009, 21 Merc LJ 818-830.

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.[134]

The ILO worked with the UN human rights treaty organisations that address equality-related issues to create this agreement.[135] It is stated that signatory state governments have an obligation to do more than just strive to prevent violations of women's rights; they also have an obligation to advance and defend these rights.[136]

3.3.1.4 ILO Convention No 111

The South African parliament approved ILO Convention 111 on Discrimination in Employment on March 5, 1997.[137] In order to end all forms of discrimination in the workplace, member nations of this convention are required to pass laws promoting equality of opportunity and treatment in these areas.[138] After taking into account a number of principles, the suggestion in Convention 111 emphasised the significance of and necessity for developing logical policies for the prevention of discrimination in employment and occupation.[139] These included treating everyone equally and providing equal compensation for work of equal merit.[140]

3.3.2 National authority

3.3.2.1 The Constitution of the Republic of South Africa 1996

The South African government implemented creative policies in an effort to remove all types of injustice, including discrimination based on gender.[141] Equality is one of the fundamental values of the Republic of South Africa's 1996 Constitution,[142] which should be upheld by both the government and private citizens.[143] The additional

[134] Article 1 CEDAW.
[135] 'Convention on the Elimination of all Forms of Discrimination Against Women' 20 April 2017.
[136] Ibid.
[137] Articles 2-3 of ILO Convention 100.
[138] Ibid.
[139] Discrimination (Employment and Occupation) Recommendation, 1958 (No.111), Para 2 (b)(v) 25 April 2017.
[140] Ibid.
[141] Collier et al South African Journal of Labour Relations 86.
[142] The Constitution of the Republic of South Africa 1996.
[143] Van Niekerk et al Law @ Work 12.

value of dignity is closely related to equality and must likewise be properly preserved. Thus, the adoption of the Constitution[144] signified the establishment of a new democratic constitutional system in which everyone was regarded equally by the law.[145]

All citizens' fundamental rights are guaranteed by the Constitution's[146] Bill of Rights, which also upholds the democratic principles of equality, freedom, and human dignity.[147] The Constitution specifically mentions equality, stating that all South Africans have a right to equality as well as equal protection under the law.[148] This right to equality is fortified by sections 9(3) and 9(4), stating that the State or any other person may not unfairly discriminate directly or indirectly against any person on an array of grounds, inclusive of sex and gender.[149]

Moreover, the Constitution[150] obliges the State to enact laws prohibiting discrimination. The leading case on what discrimination means for the purposes of section 9 of the Constitution is the Constitutional Court's decision in *Harksen v Lane*.[151] Wherein the court laid down the test to determine if there was unfair discrimination. According to section 9(5) of the Constitution, discrimination is deemed to be unfair if it is based on one or more of the categories enumerated in section 9(3), such as gender or sex.[152] Restitutionary measures, or affirmative action measures, as specified in section 9(2), are not, however, subject to an unfairness presumption.[153]

Section 23,[154] provides for fair labour practices for everyone in the Republic. It acts as an embodiment of fundamental labour rights within the country and lays the

[144] The Constitution of the Republic of South Africa 1996.
[145] McGregor 2011 South African Mercantile Law Journal 489.
[146] The Constitution of the Republic of South Africa 1996.
[147] Section 7(1) of the Constitution.
[148] Section 9 of the Constitution.
[149] Section 9(3) of the Constitution.
[150] The Constitution of the Republic of South Africa 1996.
[151]Harksen v Lane 1997 11 BCLR 1489 (CC).
[152] Minister of Finance v Van Heerden 2006 4 SA 121 (CC)
[153] Ibid.
[154] Section 23 of the Constitution of the Republic of South Africa 1996.

foundation or gateway for all other labour legislation. It regulates the employment relationship between employee and employer and guarantees the right to fair labour practices for everyone.[155] In this premise everyone can currently enjoy the right to fair labour practices based on this section even if they were previously excluded by legislation or common law and even in the absence of regulation by either legislation or common law.[156]

3.3.2.2 The Employment Equity Act 55 of 1998

The South African government passed the Employment Equity Act[157] in an effort to advance workplace equity. People who felt unfairly compensated for their labour may use Section 6(1) of the Act to contest their compensation.[158] In any employment policy or practice, it is prohibited to unfairly discriminate against an employee, either directly or indirectly, based on one or more grounds.[159] These grounds may include race, gender, sex, pregnancy, marital status, family responsibilities, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or any other reason that is arbitrary.[160]

Provision 1 of the Act,[161] which defines an employment policy and covers compensation, employment policies, and contractual terms and conditions, was read in connection with this provision. After that, workers have justifications for filing grievances. The Act[162] was amended to include a new clause on equal compensation for labour of same worth.[163] This came after the International Labour Organization's evaluation, which criticised South Africa's equality laws for not sufficiently addressing claims of pay disparities.[164] In response, the Employment Equity Act[165] of 1994's

[155] Mahwanqa v South African Human Rights Commission (11208/2014)[2019] ZAGPJHV 125
[156] Ibid.
[157] Employment Equity Act 55 of 1998.
[158] Employment Equity Act 55 of 1998.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Commission for Employment Equity Annual Report 2015-2016, 2016 (16th CEE Report) 9, 10 October 2017.
[164] Ibid.

equal pay clause was changed to better reflect the aforementioned ILO treaties that have been ratified.[166]
Sections 6(4) and 6(5) were added to the prior statute in the revised statute, which was put into effect by presidential proclamation in August 2014.[167]

In order to give businesses guidance on how to implement equal pay and guarantee appropriate compensation practices free from unfair discrimination,[168] the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, or "The code," was produced.[169] One of the most significant aspects of the code, according to the employer, is that it requires the employer to evaluate occupations inside the workplace in order to ensure that equal compensation is provided for labour of equivalent worth.[170]

The main goal of the EEA[171] is "to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination".[172] Section 9 of the Constitution is put into effect by the EEA.[173] As a result, an employee who claims they have been the victim of unfair discrimination must file their claim inside the EEA's[174] regulatory system and cannot do so by directly citing the Constitution. Most people consider this to be a form of constitutional avoidance. This general rule does not apply when a statute adequately safeguards a fundamental right.[175]

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[165] Employment Equity Act 55 of 1998.
[166] Ibid.
[167] Ibid.
[168] GN 448 in GG 38837 of 1 June 2015.
[169] Ibid.
[170] Ibid.
[171] Employment Equity Act 55 of 1998.
[172] section 2 (a) of the EEA.
[173] Ibid.
[174] Ibid.
[175] Du Toit 2009 Law Democracy and Development 68.

3.4 Criteria for determining similarity

When interpreting and applying the provisions of section 6(4) of the EEA,[176] the following methodology which is laid down in the Employment Equity Regulations must be used, namely whether the work concerned is of equal value in accordance with regulation 6, whether there is a difference in terms and conditions of employment, including remuneration and lately it must then be established whether any difference in terms of sub regulation (1) (b) constitutes unfair discrimination, applying the provisions of section 11 of the Act.[177]

It is apparent that the EEAA[178] (when read together with the Employment Equity Regulations of 2014) laid down three requirements which a complainant must satisfy in an unequal pay discrimination case, in order to be successful. These are: (1) that there is a difference in wages; (2) between employees of the same employer performing the same or substantially the same work or work of equal value; and (3) the reason is based on a ground listed in section 6(1), for example gender. It is subsequently imperative to individually dissect these three requirements. CA's will be required to show that despite duties of a CA not being uniform in nature, there are similarities in the duties of candidate legal practitioners that are employed by firms practicing in the same areas of law.

3.5 Onus of proof

In South Africa, when an employee brings a claim for equal pay for work of equal value, they bear the burden of proof to show that there was differentiation, what the grounds for differentiation are and also what the link is.[179] The employee must also show that it is still placement of the onus to show fairness or justify the discrimination on he employer does not address the problem of crossing the discrimination hurdle to even begin with.[180] Applicants are constrained by the

[176] Employment Equity Act 55 of 1998.
[177] Employment Equity Regulations of 2014, regulation 5 thereof.
[178] Ibid.
[179] Garbers C, "The Prohibition of Discrimination in Employment" K Malhebere & J Sloth-Nielson (eds) Labour Law into the Future(2012) 18 at 21.
[180] Ibid.

prevailing judicial construction of unfair discrimination requiring the alleged discriminatory conduct to be overt.[181]

Section 11 of the EEA[182] deals with the burden of proof of the EEA[183] indirectly provides the respondent employer the guidelines on what they need to prove in order for them to avoid lability.[184] The courts have not done enough to evolve the legislation in such a manner that would assist employees in proving their discrimination claims.

3.6 Summary

In general candidate legal practitioners don't perform uniform tasks across the board it varies depending on the firm one is employed by, however despite their duties being different to some extent , they are similar in that their firm's areas of practice may be the same which means that there are tasks which will be done by everyone ie drafting Summons. There are also general duties that are done by every candidate despite of the firm that they work for such as billing for work done, all candidates need to capture their fees the difference is the method used to capture such fees by firms as each firm has their own systems.

This chapter outlined the principle of equal pay for work of equal value. It gave the reader and insight into legislation that governs the principle as well as its application. Candidate legal practitioners are entitled to equal pay as the work and scope of a candidate attorney is nationally is more or less the same or similar. The duties that they conduct satisfy the criteria for determining whether the principle should be applied.

[181] Ibid.
[182] Employment Equity Act 55 of 1998.
[183] Ibid.
[184] Section 11 of the Employment Equity Ac 55 of 1998.

CHAPTER 4
LEGISLATIVE FRAMEWORK ON THE REMUNERATION OF CANDIDATE LEGAL PRACTITIONERS: GAPS, SHORTCOMINGS AND PROSPECTS

4.1 Introduction

South Africa underwent a lengthy period of the gross negligence and violation of human rights better characterised as apartheid.[185] During apartheid employees had minimal rights in general let alone in the workplace, most people were even slaves who worked for free and had no rights or worked for very low wages. In 1994 we entered new dawn being the dawn of democracy wherein the Constitution[186] was introduced and acted as the yardstick for all other laws. It led to the introduction of labour laws that governed the employee and employer's relationship in the workplace.

A huge defining factor of the employment relationship between the employee and employer is the ability of the employer to remunerate their employee accordingly for work done or service rendered on their behalf. The crux of working and seeking employment is that one may be able to be compensated for their skill and labour in order to sustain themselves and their loved ones within their means. This chapter assesses the remuneration of candidate legal practitioners. It also evaluates previous and current legislation that governs the remuneration of candidate legal practitioners in the country and also accounting for the shortfall that is presented by the legislature therein.

4.2 Previous legislation regulating the remuneration of candidate legal practitioners

Prior to the implementation of the LPA,[187] the legal fraternity was governed by the Attorneys Act.[188] This Act[189] was passed during the apartheid era and had a lot of

[185] Malley O, "Post-Transition 1994-1999- Truth and Reconciliation, Chapter 4: Consequences of Gross Violations of Human Rights.Source.
[186] The Constitution of the Republic of South Africa 1996.
[187] Legal Practice Act 28 of 2014.

discrepancies with the Constitution.[190] This was because during the apartheid era, there was gross negligence of human rights and little to no regard was given to the basic human rights of people of colour let alone labour rights.

The Attorneys Act[191] aimed at consolidating the laws relating to various issues relating but not limited to the admission and practice of attorneys, notaries and conveyancers, the Fidelity Guarantee Fund for the latter, law societies established in respect of the profession of an attorney and to provide for matters connected therewith.

The Attorneys Act[192] which has since been repealed,[193] also made provision for the remuneration of candidate legal practitioners amongst other rules and regulations that it had put in place. Section 8[194] states that a principal who any candidate legal practitioner is registered under was to pay such clerk a salary not less than R50 per month from the date on which the candidate legal practitioner became entitled to appear in court. [195] This essentially meant that candidate legal practitioners were paid from as little as R50 for working the entire month.

4.3 Current legislation regulating the remuneration of candidate legal practitioners

The LPA[196] serves as a guideline for conduct and rules that is expected of legal practitioners in the legal fraternity. Amongst these guidelines, the remuneration and the minimum requirements that are to be afforded to candidate legal attorney are provided for. Section 27(1) – (2) of the LPA provides that "(1) The Council must in the rules, determine the minimum conditions and procedures for the registration and

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[188] Attorneys Act 53 of 1979.
[189] Ibid.
[190] The Constitution of the Republic of South Africa 1996.
[191] Attorneys Act 53 of 1979.
[192] Ibid.
[193] The Attorneys Act 53 of 1979 has since been repealed and replaced by the Legal Practitioners Act 28 of 2014.
[194] Section 8 (2) of the Attorneys Act 53 of 1979.
[195] Ibid.
[196] Legal Practice Act 28 of 2014.

administration of practical vocational training. The rules contemplated in subsection (1) must regulate the payment of remuneration, allowances or stipends to all candidate legal practitioners, including the minimum amount payable."

Section 27[197] thus places an obligation on the LPC to enact guidelines that make provision for the remuneration and also the minimum working conditions that are to be offered to candidate legal practitioners. However despite being directed to do so in 2014 when the Act[198] came into effect, the LPC still to date has not made any conclusive guidelines that are in place.

On the 11th of August 2023, the LPC published a notice providing for the proposed minimum remuneration of candidate attorneys.[199] The Council stated that it is of the view that applying a uniform minimum remuneration for candidate attorneys would be impractical due to the diversity of law firms taking on candidate legal practitioners in the different areas around the country and would further result in attorneys taking fewer candidate legal practitioners to undergo practical vocational training under their supervision, and this may apply particularly to attorneys who are practising in rural areas.[200]

The Council decided to propose a different minimum remuneration for candidate solicitors in urban and rural areas after taking into account the difficulties faced by solicitors practicing in rural areas and the state of the economy when determining the minimum proposed compensation.[201] They proposed that candidate legal practitioners in villages were to be paid a minimum wage of R6 000.00 and those in urban areas a minimum of R8 000.00.[202] The LPC called upon interested persons to comment on the proposed minimum remuneration,[203] for candidate legal

[197] Section 27 of the Legal Practice Act 28 of 2014.
[198] Legal Practice Act 28 of 2014.
[199] The South African Legal Practice Council Notice in terms of Section 95(1) & (4) of the Legal Practice Act 28 of 2014, General Notice 1959 of 2023, Government Gazette 2023.
[200] Ibid.
[201] Ibid.
[202] Schedule 2A, 11 August 2023 Government Gazette.
[203] Section 95(4)(a) of the Legal Practice Act 28 of 2014.

practitioners registered under a PVT contract.[204] The deadline for comments on the proposal was the 11th of September 2023, as of yet there hasn't been any communication on the way forward.[205]

4.4 Poposed minimum remuneration for candidate attorneys in terms of section 27(2) of the Legal Practice Act

The LPA's[206] Section 27(1)–(2) states that "(1) The Council shall establish minimum requirements and procedures in the rules for the registration and administration of practical vocational training.[207] All candidate legal practitioners must receive compensation, allowances, or stipends in accordance with the regulations envisioned in subsection (1), including the minimum amount payable.Thus, the LPC is required under Section 27 to establish rules that specify the minimum working conditions and compensation that must be provided to aspiring solicitors.

The Council considered the challenges experienced by attorneys operating in rural areas as well as the status of the economy while calculating the minimum suggested compensation, and ultimately decided to propose a separate minimum compensation for prospective solicitors in urban and rural areas. It was suggested that aspiring solicitors should be paid a minimum of R6 000.00 in rural areas and R8 000.00 in urban areas. The LPC invited interested parties to provide feedback on the suggested minimum compensation for prospective solicitors who are enrolled under a PVT contract.

4.5 National Minimum Wage Act

The National Minimum Wage Act[208] seeks to advance social justice and economic development by raising the wages of the lowest paid workers, shielding them from unjustly low pay, maintaining the value of the national minimum wage, encouraging

[204] Rule 22 of the Legal Practice Council Rules.
[205] Ibid.
[206] Legal Practice Act 28 of 2014.
[207] Section 27(1)-(2), Legal Practice Act 28 of 2014.
[208] National Minimum Wage Act 9 of 2018.

collective bargaining, bolstering economic policy, and lowering wage inequality.[209] All employees and their employers are covered by the NMWA, with the exception of those who are employed by the South African Secret Service, the National Intelligence Agency, or the National Defence Force.[210] Volunteers are also not catered for under the Act as they are not entitled to compensation or do not get compensation.

The Act[211] stipulates that every employee, with the exception of those who are expressly excluded, is entitled to at least the minimum wage, and no business is permitted to pay less than that amount.[212] The national minimum wage is a term of the worker's contract, unless the contract provides for a higher wage, it cannot be decreased by contract, collective bargaining agreement, or legislation.[213] it is unfair labour practices for an employer to unilaterally change work hours or other conditions of employment in order to implement the national minimum wage.[214]

Employers are able to acquire a formal undertaking from Department of Employment and Labour Inspectors to pay the minimum wage, or they can issue compliance orders for non-enforcement. The CCMA has the authority to convert the written undertakings and compliance orders into arbitration awards. In the event that the award is not followed, the CCMA may, upon application, certify the award and make it enforceable in the same way as a Labour Court order. In accordance with section 73A of the BCEA,[215] individuals who make less than the threshold may apply to the CCMA for assistance if money is owed because the employer failed to pay the national minimum wage.[216]

The newly established National Minimum Wage Commission reviews and, if required, modifies the national minimum wage annually. It's main duties include reviewing the

[209] CCMA Info Sheet, National Minimum Wage Act.
[210] Section 3, National Minimum Wage Act 9 of 2018.
[211] Ibid.
[212] Section 4, National Minimum Wage Act 9 of 2018.
[213] Ibid.
[214] Ibid.
[215] Basic Conditions of Employment Act 75 of 1997.
[216] Section 73A of the Basic Conditions of Employment Act 75 of 1997.

federal minimum wage and recommending changes to it once a year. Its auxiliary duties include looking into collective bargaining, income disparities, and the effect of the federal minimum wage on the economy. With effect from March 1, 2024, the National Minimum Wage (NMW) for each regular hour worked would rise to R27.58, according to a statement made by Employment and Labour Minister TW Nxesi.[217]

4.6 The gap and shortcomings in the legislature

The Legal Practice Act[218] governs the operation of the legal profession as well as laying down the foundation and rules that all legal practitioners are to abide by, The Legal Practice Council is a national statutory regulatory body that was established in terms of the Legal Practice Act[219] and was formed in order to enforce the provisions of the Act and regulate the profession.[220] It also has a duty to promote high standards of legal education and training and compulsory post qualification professional development.[221]

Section 276 of the LPA[222] states that the LPC has the discretion to determine the minimum conditions that candidate legal practitioners can work under as well as the stipend which they are to be given.[223] This in turn means that the LPC is at the liberty or has been statutorily given a duty to determine and pass guidelines that are to regulate the remuneration of candidate legal practitioners. This section has in turn opened a gateway to gross irregularities within the profession and many have hidden behind its shortfall.

The section does not make provision for the timeframe that they are giving the LPC to pass guidelines relating to the minimum working conditions and remuneration.

[217] Government Activities, Department of Employment and Labour, 03 February 2024

[218] Legal Practice Act 28 of 2014.
[219] Ibid.
[220] Section 4 of the Legal Practice Act 28 of 2014.
[221] Ibid.
[222] Ibid.
[223] Section 27(1),(2) of the Legal Practice Act 28 of 2014.

The Act is silent on the period for implementation and as such the LPC has also not done anything about it. Despite the Act being in effect from 2014,[224] to date the LPC still has not made a clear indication as to the remuneration of candidate legal practitioners.

The LPC recently published a notice under the authority of Section 95(1)(a) of the Legal Practice Act, 28 of 2014 (as amended),[225] proposing a minimum compensation for candidate legal practitioners undergoing practical vocational training under a practical vocational training contract in accordance with Rule 22 of the Legal Practice Council Rules. This notice was published with the sole purpose to help set a guideline for remuneration however hasn't been very successful as the comment period was dragged and stretched over an extended period which in turn is delaying the process even further.

As the LPA directs the LPC to make a directive on the remuneration of candidate legal practitioners, this also poses a problem in that the Council consists mostly of legal practitioners that are practicing and also own firms. Such practitioners are very unlikely to pass a Bill or guidelines that will act against them. Passing such a bill would mean that they also have to spend more money towards the remuneration of candidate legal practitioners which directly impacts them. It is not in their favour to pass such guidelines hence the LPC has been silent for this long on the guidelines that should be used to remunerate candidate legal practitioners.

Furthermore, the LPA[226] does not make a provision for the LPC to monitor or inspect the records of law firms to check for compliance. This essentially means that even if guidelines for the minimum remuneration of candidate practitioners is to be passed, legal practitioners or principals will still continue with the long standing practice of unfairly compensating and overworking candidate legal practitioners as there are no repercussions to be suffered. The implementation of the license rule and own vehicle

[224] Legal Practice Act 28 of 2014.
[225] The South African Legal Practice Council Notice in terms of Section 95(1) & (4) of the Legal Practice Act 28 of 2014, General Notice 1959 of 2023, Government Gazette 2023.
[226] Legal Practice Act 28 of 2014.

requirement in order to secure articles of clerkship are a clear indication of this. Many law firms still have a driver's licence and an own motor vehicle as a requirement for articles and nothing is done about it.

4.7 Reading in to add to the shortfall presented by legislature

The Constitution[227] is the supreme law of the land and all other legislation must conform to it. Section 23 of the Constitution[228] guarantees workers the right to fair labour practices, to form and join trade unions, and to participate in union activities and strikes. Likewise, employers have the right to form and join employers' organisations and to take part in their activities.

Section 39(2) of the Constitution[229] mandates that, in the event that legislation is argued to restrict a constitutional right, the court must first tangentially apply the Bill of Rights to the challenged legislation. This necessitates the court using the obligatory legislative interpretation principle.[230] It calls on the court to decide whether the legislation's wording may be interpreted "reasonably" so as to preserve the right. In other words, if there are two viable interpretations: (a) one that restricts the right, and (b) one that does not, the court must adopt the second interpretation—so long as the challenged legislation's text is "reasonably capable" of supporting it.[231]

Reading in happens when a judge adds language to a piece of law to make it consistent with a fundamental right. A court must determine that law cannot be "read down" to avoid restricting a right and that the restriction cannot be justified under section 36(1) of the Constitution[232] before the constitutional remedy of

[227] Constitution of the Republic of South Africa 1996.
[228] Ibid.
[229] Ibid.
[230] *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) para 43.
[231] *Hyundai Motor Distributors supra* note 105 at para 21-4. Also see *Makate v Vodacom (Pty) Ltd 2016* (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 89.
[232] Constitution of the Republic of South Africa 1996.

"reading in" becomes applicable.[233] If the unconstitutionality results from an omission, "reading in" new language to the act may be a suitable remedy.[234]

Put differently, reading in could be "just and equitable" in cases where adding words to a piece of legislation makes it compliant with a constitutional right that it unjustly restricts.[235] If a legislative provision that unreasonably restricts or encroaches upon a constitutional right is the source of the unconstitutionality, reading in could also be justified in those cases.[236] As with other cures, reading in won't always be the best course of action. O'Regan J. decided in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* that the constitutional remedy of "reading in" would only be acceptable in the event that the two following circumstances are met .Firstly, reading should only be applied in cases where the court is able to specify how the statute ought to be extended to comply with the Constitution with sufficient precision.
Second, where reading in would lead to an unsupportable budgetary.[237]

In light of this, the provisions of the National Minimum Wage Act should be applied to compensate for the gap that is left by the ambiguity of the LPA.[238] The provisions of the LPA should be read in place of the gap as the LPC has not passed a directive on the applicable guidelines that are to be applicable to candidate practitioners as such the minimum wage that is applicable to all employees in the country should be applied.

4.8 Summary

This chapter unpacked the remuneration of candidate legal practitioners. Firstly it focused on the historical legislation then proceeded to the current legislation that governs the remuneration of the latter. It went further to examine the shortcomings that the current legislature presents and coming up with an alternative to the gap

[233] See Walters supra note 26 at FN 30.
[234] National Coalition 2000 (2) SA 1; 2000 (1) BCLR 39 (CC).
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] Legal Practice Act 28 of 2014.

presented. It lastly suggested a solution which is statutorily mandated by the Constitution.

CHAPTER 5
RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

The disparities regarding the minimum remuneration of candidate legal practitioners is a long standing issue that still has not been resolved to date. Candidate attorneys have been earning way below the minimum wage since time immemorial. In the apartheid era contesting this was unspoken of, as people feared persecution should they stand up against the rues and laws passed by the apartheid government. However in this current democratic era we cannot continue being spectators of basic employment rights that must be afforded to employees furthermore the rights that are being infringed are the rights of legal practitioners, the very same people who are tasked with the duty of fighting for other people's rights yet can't fight for their own.

5.2 Recommendations

Candidate legal practitioners satisfy the definition of an employee in terms of section 213 of the Labour Relations Act[239] and also the test and criteria that is used to determine an employee. As such they should be considered as employees for the purposes of then application of labour law legislation in instances of disputes.

Section 27 of the Legal Practitioners Act[240] is silent on the remuneration of candidate legal practitioners and leaves it to the discretion of the LPC. The LPC should be mandated to publish and effect guidelines providing for the remuneration of candidate legal practitioners within a specified period of time it has been almost 10 years since the came into effect yet they still haven't passed directive.

The LPC's failure to pass a directive should be remedied by reading in in terms of the Constitutional provisions. The principle states that wherein the applicable legislation is silent then labour law provision should be featured in to make up for the gap. In

[239] Labour Relations Act 66 of 1995.
[240] Legal Practice Act 28 of 2014.

reliance to the principle of reading in and also section 23 of the Constitution[241] which guarantees fair labour practices to everyone, provisions of the National Minimum Wage Act can be featured in to fill the gap left by the LPA. The minimum wage applicable to candidate attorneys that will be used shall be that as stipulated in the NMWA until such a time the LPC passes and enacts a directive with guidelines as to the remuneration of candidate legal practitioners.

Each law firm that has been in operation for more than 5 years should be mandated to employ a candidate legal practitioner in order to keep the flow going and avoiding legal practitioners employing more secretary due to shying away from paying the minimum wage to its candidates. Firms that struggle with a cash flow can apply for subsidies by way of SASSETA in order to be able to pay its candidates. Only firms' hat show a financial need should be given such subsidies and not firms that only apply for subsidies as a way of saving money and cutting costs.

The LPC must also be mandated to conduct annual inspections of each law firm's salary log to ensure that the principal's are complying with the provisions of the passed guideline or NMWA alternatively. A fine for non-compliance should be charged in order to deter practitioners from contravening the provisions set by continuing to pay candidates below the minimum wage. The LPC must also not appoint practicing attorneys that have their own firms to act as inspectors. An independent body that has no interest in the outcome must be in charge of conducting the inspections.

5.3 Conclusion

It is evident that there is a need for there is a burning need for the amendment of the Legal Practice Act.[242] The Act should be amended to place a statutory obligation on the Legal Practice Council to publish guidelines that are to be adhered to for the determination of the remuneration due to candidate legal practitioners. It must also put an obligation on the LPC to review the remuneration guidelines in each financial

[241] The Constitution of the Republic of South Africa 1996.
[242] Legal Practice Act 28 of 2014.

year to ensure that the candidate legal practitioners. Should the LPC fail to do so then the provisions of the National Minimum Wage Act[243] should be taken into consideration and applied when dealing with issues of remuneration.

[243] National Minimum Wage Act 9 of 2018.

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