IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO D731/05 Reportable

In the matter between

DIRECTOR-GENERAL, DEPARTMENT OF LABOUR Applicant

and

WIN-COOL INDUSTRIAL ENTERPRISE (PTY) LTD Respondent

JUDGMENT

PILLAY D, J

Introduction

1. Is a fine imposed for contraventions of affirmative action provisions of the Employment Equity Act No 55 of 1998 (EEA) a sanction for administrative contraventions or criminal offences? Does the purpose and scheme of the EEA justify the sanction? What elements have to be proved for the Court to impose a fine? What criteria should be considered when assessing the amount of the fine? These are some of the questions that arise in this application by the Director-General of the Department of Labour (DOL) to have a compliance order in terms of section 37 of the EEA made an order of

the Court and to have a fine of R500 000 imposed on the respondent for contravening sections 16, 19, 20, 21, 22 and 23 of the EEA. [1]

The Facts

2. The respondent is a company operating as a cut, make and trim factory, employing about 132 people in Newcastle. It manufactures for local and export markets, and plans to expand. Its managing director, Mr Alex Liu, is Taiwanese. As a designated employer[2] it must comply with the affirmative action chapter of the EEA.[3]

3. In 2003 the bargaining council, the South African Clothing and Textile Workers Union (SACTWU) and representatives of the DOL visited the factory and advised the respondent of the legislation it had to comply with.

4. Being a foreigner, Mr Liu opted to engage an employer's organization, the Federated Employers Organization of South Africa (FEOSA) to ensure that the respondent was a "legitimate and authentic" employer.

5. On 4 November 2003 Hlonipile Gladys Nkomo, a labour inspector from DOL, inspected the factory to check that there was compliance

[1] Para 2 of the Notice of Motion and para 24 of the Founding Affidavit.
[2] Section 1 of the EEA
[3] Section 12 of the EEA

with labour laws. She reported that the respondent did not comply with any of the obligations in terms of the EEA. She got an undertaking in terms of section 36 on behalf of the respondent that it would comply with sections 20, 21(1), 25(1) and 25(2)(a) and 25(3) of the EEA.

6. Subsequent visits on 24 November 2003 and 2 February 2004 showed that the respondent was still not complying with his undertaking.

7. On 31 March 2004 Nkomo issued a compliance order in terms of section 37(1)(b), directing the respondent to comply with section 36(a)-(j) of the EEA within 30 days. The respondent did not object to the compliance order, which it could have done in terms of section 39(1). It nevertheless continued not to comply with it.

8. On 24 October 2004 an application similar to this one was launched under case No D781/04 (the first application). For some reason it was withdrawn.

9. This application was launched a year later on 25 October 2005. When he received this application, the respondent alleged that he tried to telephone the State Attorney for clarity as he was under the

impression that the application had been withdrawn the previous year. He claimed that he left several messages for the State Attorney but they went unanswered. He contacted FEOSA but learnt that the person dealing with his case, Mr De Necker, had passed away. When he got notice of the set-down in January 2006 for the hearing of the matter on the opposed roll for 19 April 2006, he tried again to contact the State Attorney. He eventually made contact with the DOL in Newcastle, who informed him that this application was proceeding. Attempts to retrieve his file from FEOSA also proved difficult. He eventually got it from De Necker's family before Easter 2006.

10. On 18 April 2006, a day before the hearing, he instructed his attorneys of record to remove the matter from the unopposed roll as he intended to oppose the application.

11. This explanation was tendered, firstly, to inform the Court of the reason for his delay in opposing the application and, secondly, to show that it was not deliberate.

12. With regard to his defence to the application he proceeded to explain that he forwarded the compliance notices to FEOSA on 24 November 2003. After getting advice from De Necker, he

instructed him to comply with the EEA. More than two months later, on 2 January 2004, FEOSA requested assistance and training in completing the employment equity report from the DOL. The respondent alleged that the DOL did not respond. Instead, it launched the first application. On 29 October 2004 FEOSA delivered by hand the employment equity report and plan to the DOL.

13. Three months later, on 31 January 2005 the respondent consulted with its employees to advise them of the EEA and its consequences. As a copy of the plan that was delivered to the DOL could not be found, the respondent instructed its attorneys to draft a new plan.

14. In the first application the respondent conceded that it had not complied with the compliance order. It appealed to the Court to condone its non-compliance and not impose a fine. It informed the Court that the business was not performing well due to the currency fluctuations. It also filed memoranda signed by the employees, who expressed the following sentiment:

> "Dear Madam/Sir,
>
> We are the employees of Win-Co Ind. Ent. (Pty) Ltd. We would like to express our anger and unhappiness about the case of Equity Act plan. Our factory was used by your department. Our factory has submitted the plan and complied with the Equity Act. We surely do not wish to see

that our factory wasting unnecessary money for this case first, furthermore if our factory loses the case the factory will be forced to close down and all of us will be unemployed. We appreciate it if you can kindly drop off the case against our factory. Thank you,

Wincool employees."

The Submissions

For DOL

15. Advocate V. Soni SC (with Advocate T. Sishi SC) appeared for the DOL. Although the DOL sought a declaration in its Notice of Motion that the respondent had contravened sections 16, 19, 20, 21, 22 and 23,[4] it submitted that the respondent should be found guilty of contravening sections 16, 17, 19, 20 and 21. Section 17 lists the matters for consultation and is not a provision that can be contravened.[5] However, in motivating for the maximum penalty, it was submitted erroneously that the respondent was guilty of contravening all the sections mentioned in Schedule 1 to the EEA.[6] As counsel advanced no submissions in respect of sections 22 and 23 it is assumed that a declaration in terms of them is no longer

[4]Para 2 of the Notice of Motion and para 24 of the Founding Affidavit, Para 2 of Applicant's Heads of Argument

[5] Schedule 1 to the EEA.

[6] Para 27 of Applicant's Heads of Argument

sought.[7]

16. The respondent was defiant or indifferent to its statutory obligations. In its response to the first application it alleged that it had complied with section 20. As proof of that compliance it attached not a plan but a report. The respondent was therefore not *bona fide* in attempting to comply with the EEA.[8]

17. The respondent either admitted in the first application that it did not to comply with its remaining obligations or the evidence it proffered did not establish compliance.[9] The purported consultation was not in compliance with section 16, read with sections 17 and 19.[10]

18. The report that should have been lodged with the DOL should have been for 2003; the report that was lodged was dated 28 October 2004. No report was therefore lodged for 2003.[11] Section 21 was not complied with. As the DOL received no plan and none was displayed at the respondent's premises, section 20 had not been complied with. The plan that was attached to the Opposing Affidavit was clearly prepared recently.[12]

[7] Para 24 of Applicant's Heads of Argument
[8] Para 14 of Applicant's Heads of Argument
[9] Para 15 of Applicant's Heads of Argument
[10] Para 17.3 of Applicant's Heads of Argument
[11] Para 20 of Applicant's Heads of Argument
[12] Para 21.3 of Applicant's Heads of Argument

19. For the amount of the fine, the DOL relied on the unreported decision of Sangoni AJ in *Director-General of the DOL v Ginghua Garments*.[13] The penalty was high because the legislature intended it to serve as deterrence and retribution[14] and also be preventive.[15] The contraventions have been continuous from at least November 2003.[16] It is an aggravating factor that the respondent claims to have complied when evidence to the contrary is overwhelming.[17] The respondent was obstructive by denying the contraventions and accusing the DOL for not assisting it,[18] when it did not attend workshops aimed at providing assistance. There was a limit to which it could rely on the fault of its consultant.[19]

20. The amount of the fine must affirm the principle of the rule of law.[20] In a case such as this the financial position of the respondent is not relevant. The maximum fine should be imposed with a portion suspended.[21]

For Respondent

[13] *Director-General of the DOL v Ginghua Garments* Case No D730/05.
[14] Para 27 of Applicant's Heads of Argument
[15] Para 30 of Applicant's Heads of Argument; *Christian v Colliers Properties* (2005) 26 ILJ 234 LC
[16] Para 27 of Applicant's Heads of Argument
[17] Para 28 of Applicant's Heads of Argument
[18] Para 30 of Applicant's Heads of Argument
[19] Para 32 of Applicant's Heads of Argument; *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C
[20] Section 1(c) of the Constitution of the Republic of South Africa Act No 108 of 1996
[21] Para 35 of Applicant's Heads of Argument

21. The respondent's defence to this application is that it complied with the compliance order by implementing sections 16, 19, 20 and 21 of the EEA,[22] albeit belatedly.

22. The importance of the EEA was borne out by the criminal sanction imposed in terms of section 50 which the DOL now sought to enforce.[23]

23. The respondent employed 9 African and 2 coloured male technicians, 1 coloured male senior official or manager and 120 African females in elementary occupation, 2 of who were with disabilities. It was therefore unclear as to how the respondent could better achieve equity. As his entire staff fell within the designated groups, the respondent should be singled out for praise.[24]

24. It was always the intention of the respondent to comply with its obligations. The DOL failed to allege or prove *mens rea* which was crucial to such an enquiry.[25] As it was alleged to have committed an offence, the DOL had to prove all the elements of the crime, which it

[22] Para 23.12.2 of the Opposing Affidavit; Para 21 of the Respondent's Heads of Argument
[23] Para 5 of the Respondent's Heads of Argument and the following authorities cited : *South African National Parks v Rass* 2002 (2) SA 537 (C) read with the National Parks Act 57 of 1976; Minister of Health and *Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155 (N) read with Atmospheric Pollution Prevention Act 45 of 1965 and *Director-General of DOL v Jinghua Garments (Pty) Ltd* unreported case D730/05 at para 19
[24] Para 8-10 of the Respondent's Heads of Argument
[25] Para 19 of the Respondent's Heads of Argument citing *S v Magagula* 2001 (2) SACR 123 T

had failed to do.

25. The maximum fine could only be imposed in cases of intentional and serious non-compliance leading to inequity. It should not be imposed in this case because the respondent is a small employer operating in the industrial area of Newcastle. It tried to comply by using consultants as it was owned by a Taiwanese who knew little English and labour law. It was now compliant.[26] The test applied in criminal cases such as *S v Richards* should be applied in formulating a penalty.[27] There is therefore no basis for a penalty.

26. The DOL is not entitled to costs as it is not a litigant but an informer whose duty is to recommend the imposition of a fine to the Court. Costs should be awarded to the respondent with the dismissal of the application.[28] So submitted counsel Mr. I. Pillay for the respondent.

27. In his reply, Mr Soni dismissed the submission as an attempt to get the Court to apply the higher standard of proof beyond a reasonable doubt. The fine imposed by the EEA was an administrative penalty and not a sanction for a crime.

28. After the hearing, the Court found that the question that was not

[26] Para 26 of the Respondent's Heads of Argument
[27] *S v Richards* 1990 (1) SACR 695 (C); Para 28 of the Respondent's Heads of Argument
[28] Para 23, 30 and 31 of the Respondent's Heads of Argument

addressed fully by the parties was whether it was required to adjudicate the commission of a crime for which a fine was payable or an administrative contravention for which an administrative or civil penalty was payable. The rule of law applied not only to the determination of the amount of the penalty but also liability, the one being inextricably linked to the other. The Court therefore invited the parties to supplement their Heads of Arguments to address the issue of the application of the constitutional principle of the presumption of innocence to the law and facts of this case. Both parties obliged.

For DOL

29. Counsel for the DOL stressed at the outset that the affidavits filed by the parties did not involve the application of principles of criminal law. Nor did the respondent complain that the DOL was imposing criminal penalties against it.[29] The Court was being asked to exercise its powers under section 50(1)(a) and (g) of the EEA which do not confer criminal jurisdiction on it. As there was no suggestion in the respondent's answering papers that any aspect of criminal law was involved, initial Heads of the DOL did not deal with the possible application of criminal law and the presumption of innocence.[30] The first and only place where the respondent suggested that criminal law applied was in para 18 and 19 of its initial Heads where it was

[29] Para 5 of Applicant's Supplementary Heads of Argument
[30] Para 6 of Applicant's Supplementary Heads of Argument

submitted that as the DOL sought a criminal sanction he must prove his case for a fine beyond a reasonable doubt.

30. This was not a criminal matter because section 50(1)(g) of the EEA empowered the Court to impose a fine for any contravention of section 16, 19, 20, 21, 22 and 23 of the EEA without declaring those sections to constitute an offence. In contrast, sections 59 and 61 of the EEA create offences and prescribe the maximum sentence that may be imposed on those convicted.[31]

31. Neither section 50 nor any other section confers criminal jurisdiction on the Court. The most likely, if not the only, inference to be drawn is that the fines referred to in section 50(1)(g) of the EEA constitute administrative penalties as distinct from imposing sentences for criminal offences.[32] As these are not criminal proceedings, the criminal standard of proof falls to be rejected.[33]

32. Once the DOL adopted the stance that these are not criminal proceedings it did not have to deal with other criminal constitutional law principles such as the presumption of innocence.[34]

33. The impression created by the words “fine” and “contravention” in

[31] Para 10 of Applicant’s Supplementary Heads of Argument
[32] Para 12 of Applicant’s Supplementary Heads of Argument
[33] Para 13 of Applicant’s Supplementary Heads of Argument
[34] Para 16 of Applicant’s Supplementary Heads of Argument

section 50(1)(g) must be rejected, firstly because the Court as a creature of statute does not have criminal jurisdiction. Some statutes which create offences confer jurisdiction on the Magistrates' Courts.[35]

34. Secondly, section 179 of the Constitution provides that only the national prosecuting authority has the power to institute criminal proceedings on behalf of the state. Section 35(3)(c) of the Constitution entitles accused persons to a public trial before an ordinary court. This case is not brought by the prosecuting authority before an ordinary court but before a specialist court which is presided over by a person who has "knowledge, experience and expertise in labour law" [36] but not necessarily in criminal law.[37]

35. Thirdly, if Parliament intended that a contravention of Schedule 1 to the EEA should constitute a criminal offence it would have indicated such intention explicitly as it did in respect of sections 59 and 61 of the EEA. [38]

36. Fourthly, the Basic Conditions of Employment Act 75 of 1977 (BCEA) also distinguishes between fines for non-compliance with certain provisions[39] and penalties for specified offences.[40]

[35] Para 22 of Applicant's Supplementary Heads of Argument
[36] Section 153 of the Labour Relations Act 66 of 1995
[37] Para 23 of the Applicant's Supplementary Heads of Argument
[38] Para 24 of the Applicant's Supplementary Heads of Argument
[39] Schedule 2 read with Chapter 10 of the Basic Conditions of Employment Act 75 of 1977
[40] Section 43, 44, 46 , 48, 90(1) and (3) and 92 of the Basic Conditions Of Employment Act

37. Lastly, section 93(1) of the BCEA provides for prosecutions to take place in the Magistrates' Courts. Magistrates are empowered to impose penalties provided for under the BCEA.[41] Prosecutions under the EEA did not follow the same route.

38. Turning to the scope of the application of the principle of the presumption of innocence, counsel cited the following cases :

a. *S* v *Zuma*[42] which referred to *Woolmington* v *Director of Public Prosecutions*[43] for the source of the principle of the presumption of innocence;

b. *R* v *Oakes*[44] for the rational for making the presumption a fundamental tenet of criminal law;

c. *S* v *Coetzee & Others*[45] for the Constitutional Court's decision that placing the onus on an accused in statutory offences in certain circumstances infringed the presumption;[46] and

d. *Prinsloo* v *Van Der Linde* [47] for Constitutional Court authority that the presumption has no application in civil proceedings.[48]

39. If the presumption is to apply, it must be found that Parliament

[41] Para 26 of the Applicant's Supplementary Heads of Argument
[42] *S* v *Zuma* 1995(4) BCLR 401 (CC) at para [33]
[43] *Woolmington* v *Director of Public Prosecutions* (1935) AC 462 (HL) at 481
[44] *R* v *Oakes* (1986) 26 DLR (4th) 200
[45] *S* v *Coetzee & Others* 1997 (3) SA 527 (CC)
[46] Para 28-31 of the Applicant's Supplementary Heads of Argument
[47] *Prinsloo* v *Van Der Linde* 1997 (3) SA 1012 (CC)
[48] Para 31 of the Applicant's Supplementary Heads of Argument.

intended Schedule 1 to the EEA to constitute criminal offences. Parliament could not have had that intention for the following further reasons:

40. Firstly, section 35 of the EEA and section 65, 66 and 67 of the BCEA give labour inspectors wide powers to question persons who are required to answer truthfully and capably all relevant questions; but the answers may not be used in criminal proceedings, other than for perjury or making a false statement.

41. Secondly, section 67 of the BCEA limits the employer's right to silence by placing an obligation on it to furnish answers. While the answers may not be used in criminal proceedings, they may be used in proceedings contemplated in Schedules 2 and 3 of the BCEA.

42. Although sections 65 and 66 have not been expressly incorporated into the EEA, the scheme of the BCEA and the EEA suggests that the distinction between criminal and other proceedings is central to both Acts. [49] If the presumption were to apply, all the protections listed in section 35(3) must also be extended to the employer.[50] Statutes such as those dealing with taxation, customs and excise, gambling and competition impose fines for non-criminal

[49] Para 34-37 of the Applicant's Supplementary Heads of Argument
[50] Para 39 of the Applicant's Heads of Argument

transgressions.

For respondent

43. Mr Pillay submitted that as the DOL sought to impose a fine, the respondent is accused of a statutory contravention for which the penalty of a criminal sanction is imposed.[51] The purpose of the presumption is to minimise the risk of innocent persons being convicted.[52]

44. Given the grave social, psychological and economic harm that accompanies a criminal charge, the guilt of the accused beyond a reasonable doubt had to be proved.[53] The DOL therefore has to prove every element of the offence beyond a reasonable doubt.[54]

45. Fault (*mens rea)* is an element of any statutory offence. It is a principle of the interpretation of statutes that the legislation intended fault to be an element of statutory liability.[55]

46. The DOL must prove that the respondent intended to contravene the

[51] Para 2 of the Respondent's Additional Heads of Argument
[52] *S* v *Manamela* (Director- General of Justice intervening)2000 (3) SA 1 (CC)
[53] *R* v *Oakes* (1986) 26 DLR (4th) 200
[54] *S* v *Bhulwana* 1996 (1) SA 388 (CC), Para 4-6 of respondent's Additional Heads of Argument
[55] Para 9 of the Respondent's Additional Heads of Argument; *S v Arenstein* 1964 (1) SA 361 (A) at 365

sections relied on. However, the respondent always intended to comply, was at pains to comply in that it instructed a labour consultant to comply by submitting an employment equity plan and report, and did comply.[56] The DOL failed to overcome the criminal burden of proof.[57]

Terminology

47. One of the reasons for the blurring of the distinction between civil and criminal regulation is the terminology. Terminology such as "quasi-criminal", "guilt", "fine" and "retribution" are used interchangeably in civil and criminal proceedings.[58] "Contraventions" of a statute can be either civil or criminal breaches of the law. "Fines" can be imposed as a sentence following a conviction or as an administrative penalty.[59] "Offences" can be either criminal, that is, crimes such as murder and fraud (*mala in se*) or non-criminal,[60] that is, regulatory offences (*mala in prohibita*).[61] Mostly, its use in statutes

[56] Para 8 and 9 of the Respondent's Additional Heads of Argument

[57] Para 10 of the Respondent's Additional Heads of Argument; *R v Difford* 1937 (AD) 370 to 373; *R v M* 1946 AD 1023 at 1027

[58] See e.g. section 18(4) of the Atmospheric Pollution Prevention Act 45 of 1965 " Such regulations may provide for penalties for any contravention thereof or failure to comply therewith, but not exceeding, in the case of a first offence, a fine of two hundred rand….."

[59] E.g. Section 59(4) of the Competition Act No 89 of 1998

[60] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2-21; 2-45; 2-46 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[61] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 193

is the only clue that the breach is to be regarded as criminal.[62] A penalty denotes punishment, corporeal or pecuniary, civil or criminal[63] and includes a fine. The EEA refers to payments levied in its Schedule 1 as fines. As the terminology is used interchangeably, the ambiguous words are defined for the purposes of this judgment.

48. "Contravention" means a civil or administrative breach of the law.[64] "Offence" means a crime, including common law and regulatory offences. "Regulatory offence" means a crime that is *mala in prohibita*. "Penalty" means a punitive sanction for a contravention.[65] "Fine" means a punitive sanction for an offence. "Sanction" includes both fine and penalty.

The issues

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[62] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2-23 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[63] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2-25 - 2-26 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[64] It is not necessary for the purposes of this judgment to distinguish between contraventions and administrative breaches.

[65] Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL) para 2-18, 2-19 http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf where "civil penalty" is defined as "a discretionary monetary some which is imposed flexibly under the civil law, in order to achieve deterrence and reparation".

49. Is the sanction imposed by the Court in terms of section 50(1)(g) read with Schedule 1 to the EEA a penalty or a fine? The question arises because the parties are in dispute as to whether the regulation of compliance with the affirmative action provisions is criminal or administrative. The resolution of this issue, it was implied, would automatically determine what the elements of the contravention or offence are; who bears the onus of proving each element; and what standard of proof is required to discharge the onus.

50. Whether the punishment is administrative or criminal is a matter of statutory construction.[66] In the opinion of the Court categorising the breach as criminal or administrative is not the complete answer.

51. Historically, penalties and fines are indispensable regulatory enforcement tools, especially against corporations that break the law. Inherently, they are neither criminal nor civil or administrative. They are categorised on the basis of the procedures that precede them, whether a court issues them, and if so, whether it is a criminal or civil court or administrative tribunal.[67] Proceedings may be civil in form but criminal in effect. Asset forfeiture under Prevention of

[66] United States v L. O. Ward dba L. O. Ward Oil and Gas Operations No. 79-394. (1980.) See 448 U.S. 916, 101 S.Ct. 37.

[67] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties http://www.austlii.edu.au/au/other/alrc/publications/reports/95/; See also What is a Crime? Challenges and Alternatives Discussion Paper Law Commission of Canada http://dsp-psd.pwgsc.gc.ca/Collection/JL2-21-2003E.pdf

Organised Crime Act 121 of 1998 (POCA), despite its remedial objectives, also has palpably punitive and penal crime prevention effects.[68]

52. Procedure cannot be a sufficient basis to distinguish an accused from a person who contravenes a statute if the effect is to grant to the former and deny the latter all the fundamental protections and privileges allowed under the Constitution : The presumption of innocence, the right to silence and the protection against self-incrimination are safeguards that the Constitutional Court insists on when it places the onus on the prosecution to prove the guilt of the accused beyond a reasonable doubt.[69] These presumptions and protections have no place in civil proceedings where the elements of a contravention have to be proved on a balance of probabilities[70].

53. The elimination of reasonable doubt should be the goal of any punitive procedure if the principles of the rule of law are to be met.[71] What a sanction seeks to do substantively rather than the form in which it is presented, should be at the heart of the enquiry. Whatever is sought to be done must be reasonable, justifiable and necessary

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[68] *Mohunram and Others v NPA and Others* Case No CCT 19/06 unreported para 42

[69] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527

[70] *Prinsloo* v *Van Der Linde* 1997 (3) SA 1012 (CC) para 37; Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2.78 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[71] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 38

under the Constitution.[72] That applies as much to the determination of unlawfulness (if applicable) and liability as it does to the amount of the penalty.

The Controversy

54. If the breach is an offence it would be a regulatory offence. The Constitutional Court left open the question as to whether all the protections and privileges available to common law accused are also available to regulatory offenders.[73] Judicial discomfort with the concept of strict liability predates the Constitution.[74] Langa J (as he then was), was not persuaded that the mere categorisation of an offence as regulatory would necessarily have the effect of a lower standard of scrutiny.[75] O'Reagan J[76] and Kentridge AJ[77] opined that the protections may not be available. O'Reagan J explained that justification under section 33(1) of the Constitution will determine whether a regulatory offender should bear an evidential or legal

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[72] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 46.

[73] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 41-42, 45 (per Langa J), para 196 (per O'Reagan J)

[74] *S v Qumbella* 1966 (4) SA 356 (A) at 364; Milton, *et al S A Criminal Law and Procedure Volume III – Statutory Offences* 2-15

[75] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 43

[76] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 194-195

[77] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 93

burden. For Kentridge AJ it would be "illogical if not perverse" to say that the fairness of a trial for an absolute liability offence would be destroyed if the accused is required to prove a special defence.[78]

55. Thus if the Court were to declare that section 50(1)(g) creates a regulatory offence, it is still an open question whether the DOL will have to prove all the elements of the offence beyond a reasonable doubt.

56. The application of the presumption of innocence arose in a civil case. The Constitutional Court found in *Prinsloo v Van Der Linde and Another* [79] that the presumption of negligence in respect of a veld fire which occurred on land outside a fire control area did not infringe the right to be presumed innocent under s 25(3)(c) of the Constitution or the right to equality before the law. The purpose of the legislation was to prevent veld fires. The state had a legitimate interest in doing so, and there was a rational relationship between the purpose sought to be achieved and the means chosen to do so.[80]

57. Despite its finding that the presumption of innocence has no application in civil proceedings, the Court nevertheless enquired into

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[78] *S v Coetzee and Others* (1) SACR 379 (CC); 1997 (3) SA 527 para 93

[79] 1997 (3) SA 1012 (CC)

[80] *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) para 39 and 40 at 1028H/I and 1029F/G.

the substantive relationship between the presumption and the purpose sought to be achieved by it.

58. The Canadian Employment Equity Act 1995, c. 44 deals with violations as follows:

" Violation

35. (1) Every private sector employer commits a violation of this Act who

a. without reasonable excuse, fails to file an employment equity report as required by section 18;

b. without reasonable excuse, fails to include in the employment equity report any information that is required, by section 18 and the regulations, to be included; or

c. provides any information in the employment equity report that the employer knows to be false or misleading.

(2)……

Violations not offences

(3) A violation is not an offence and accordingly the *Criminal Code* does not apply in respect of a violation."

59. Even though the EEA follows its Canadian counter-part closely in many ways, that is not true in respect of the violations clause. The

format of the penalty provisions in the EEA is as follows : There is only one reference to a fine for a contravention in the body of the EEA and that is under the heading "Powers of the Labour Court".[81] For expatiation of what constitutes contraventions and what the penalty should be, one has to look to Schedule 1 to the EEA.

60. Statutory crimes are usually formulated so that they contain a description of the act or omission prohibited, a pronouncement that a person who commits or omits to perform the act commits a crime and the penalty for the crime.[82] These three clauses are usually presented as a conjoined unit, so that when they are read together, the essential requirements of the crime are clear.[83]

61. Section 50(1)(g) does not adopt this strict formulation required for the creation of statutory crimes.

62. The closest and only connection to criminal law in relation to breaches of the affirmative action provisions is the use of the words "fine" and "contravention".[84]

63. The EEA distinguishes contraventions of the affirmative action provisions from the offence of breach of confidentiality.[85] That is an

[81] Section 50(1)(g) of the EEA
[82] Milton *et al S A Criminal Law and Procedure Volume III – Statutory Offences* 1-13, 1-16
[83] Milton *et al S A Criminal Law and Procedure Volume III – Statutory Offences* 1-11
[84] Section 50(1)(g) of the EEA
[85] Section 59

indication of the Legislature wanting to differentiate between the two regulatory regimes.

64. The distinction is also maintained in the Competition Act[86]. Administrative penalties[87] for certain prohibited practices and other contraventions of the Competition Act are distinguished from offences[88]. The Competition Tribunal imposes penalties for contraventions[89] and the Magistrates' Court imposes fines and imprisonment for offences.[90]

65. Usually, administrative tribunals determine contraventions and impose a reasonable penalty. When a court is required to adjudicate a contravention, its seriousness escalates.

66. It also escalates if the penalty is substantial. The maximum sanction of R500 000 authorised in Schedule 1 to the EEA for the first contravention is substantial. In contrast, the only offences created in the EEA, namely for breach of confidentiality and obstruction, undue influence and fraud, the fine is limited to R10 000 without imprisonment.[91] The Canadian Employment Equity Act limits the

[86] Competition Act No 89 of 1998
[87] Section 59 of the Competition Act
[88] Section 69-73
[89] Section 59(2) of the Competition Act
[90] Section 74 of the Competition Act
[91] Section 59 and 61 of the EEA

amount of the penalty to $10,000 for a single violation; and $50,000 for repeated or continued violations.[92] The quantum of the fine imposed by the Competition Tribunal for certain prohibited practices and other contraventions of the Competition Act is limited to 10 % of the firm's annual turnover.[93] While that can exceed a billion in a monopolistic industry such as steel manufacturing, it is also limited to a few thousand rand in cost-sensitive industries such as clothing and footwear manufacture. Whereas the distinction between the criminal and civil spheres of regulation was justifiable in the past when fines were conventionally more severe than penalties,[94] the rational for the differentiation may not be justified today when heavy penalties are imposed for contraventions.

67. In addition to the 10% penalty imposed by the Competition Tribunal, a firm could face a fine of R500 000 with or without imprisonment for 10 years for not complying with the Tribunal's order to pay the penalty.[95] Effectively, a criminal sanction is tagged to the contravention for purposes of enforcement.

68. In a different way the EEA also tags a criminal sanction for

[92] The Employment Equity Act No section 36(2)
[93] Section 59 of the Competition Act
[94] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2.83 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[95] Section 74(1)(a) of the Competition Act.

contraventions. If an employer fails to abide by a Court order which declares a compliance order to be an order of the Court, it can be cited for contempt of the Court and liable to a fine or imprisonment. Contempt of court is the usual way in which orders for specific performance such as reinstatement are enforced. Specialisation has not deprived the Court of this power to exercise criminal jurisdiction.

69. Affirmative action is politically sensitive. The adverse publicity that accompanies the mere complaint that an employer is not complying with the affirmative action provisions can tag the employer as racist, sexist, anti-democratic or counter-revolutionary. The Court imposes only monetary sanctions. Non-monetary sanctions, such as adverse publicity in the form of "name and shame" advertisements and disqualification from government contracts, may also accompany contraventions. Employers who are issued with penalties are as exposed to social stigma, ostracism from the community and social, psychological and economic harm as an accused[96]. They risk losing their physical liberty if they are cited for contempt of court for not complying with a compliance order and are as vulnerable to having their human dignity impaired as any accused[97]. A sanction under the EEA can therefore be as odious as a conviction and a fine.

[96] *R* v *Oakes* (1986) 26 DLR (4th) 200
[97] *R* v *Oakes* (1986) 26 DLR (4th) 200

70. Because this Court is a specialist court cannot be the reason for depriving employers of a just outcome. If it transpires that something more is required than a civil process allows, or something akin to or less than what a criminal process imposes, the Court must ensure that the procedural safeguards are proportionate to the breach and the sanction.[98] Proportionality is also at issue in the substantive outcome.[99] The Court can make adjustments in the procedure adopted, in placing the onus of proof and the evidentiary burden appropriately and in directing the quality and quantity of evidence required to deliver a just outcome. Precisely because of its specialisation can the Court intervene in this way.

Foreign Law[100]

71. These concerns about the substance of proceedings for contraventions and regulatory offences are not novel. Foreign jurisdictions have also recognised the potential for prejudice. The European Court of Human Rights has adopted the view in determining whether or not proceedings should be labelled as

[98] Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL) para 6-18 – 6-20 http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf

[99] *Mohunram and Others v NPA and Others* Case No CCT 19/06 unreported para 56-75 where the Constitutional Court considered the proportionality of statutes that authorise civil and criminal forfeiture of assets in addition to fines and imprisonment

[100] For a comparative overview of civil penalties in environmental regulation see Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL) chapter 4 http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf

criminal or civil that they are likely to be regarded as criminal even if the proceedings are (a) brought by a civil authority and either (b) have a requirement to show some kind of culpability (willful or neglectful) or (c) have the potential for severe consequences such as imprisonment. The emphasis is on the true nature of the proceedings rather than their form.[101]

72. Michael Woods and Richard Macrory[102], after helpfully summarising decisions of the European Court of Human Rights and the courts in the United Kingdom conclude thus :

a. Labelling a penalty as civil will not be decisive in categorising the procedure as civil or criminal, even if the intention is to decriminalise an offence. The general punitive character of the system will be key, not large fines or the threat of imprisonment.

b. Even if a particular civil penalty regime is deemed to be criminal under Article 6 of the European Convention on Human Rights, (the right of access to impartial and independent adjudication and the presumption of innocence clause), it can still operate as a civil procedure with, e.g. a reduced standard

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[101] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2.75 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[102] Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL) para 6-25 – 6-27 http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf

of proof, if suitable procedural safeguards, which are not as burdensome as those required for criminal offences, are present;

c. Judicial discomfort with applying stringent criminal constraints to civil procedures designed to ease the burden of regulation, discourage the courts from interfering with civil procedures which are proportionate and fair, and lack a criminal context.[103]

73. A provision of the European Community Competition Law which is similar to the administrative penalty imposed in section 59 of the Competition Act, is regarded as being either criminal or of a *quasi*-criminal nature. Some academics favour the granting to respondent firms in competition law cases

> "all the protections accorded to an accused in a criminal trial, including the privilege against self-incrimination, the use of a standard of proof beyond a reasonable doubt and the fair trial protections" [104]

74. That approach curries no favour in Australian penalty proceedings, where intent or negligence is irrelevant for strict liability crimes and

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[103] Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL) para 6-25 – 6-27 http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf

[104] Martin Brassey, *et al Competition Law* at 325

where penalties are sometimes more onerous than fines.[105]

75. *Boyd v United States*[106] was one of the earliest decisions in which the US Supreme Court observed that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[107]

76. The United States of America recognises the relationship between the purpose of penalties, the process of enforcement and the amount imposed.[108] In “big” cases civil penalties are judicially imposed.[109] The burden of proof is on the agency to prove the violation, and the determination of the violation is a jury question. A court determines the amount of the penalty.

77. Since before 1986, administrative penalties are tiered into about three subsets. At one end, they are imposed through formal

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[105] Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2.76 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[106] *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886)

[107] *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) *Id*., at 633-634, 6 S.Ct.,

[108] William Funk *Close Enough For Government Work?--Using Informal Procedures For Imposing Administrative Penalties* 24 Seton Hall L.Rev.1

[109] 33 U.S.C. § 1319(d) (1988) (up to $25,000 per day for each violation).

adjudication under the the Administrative Procedure Act (APA)[110]. The process is similar to trials for judicially imposed civil penalties. The agency or authority has the burden of proving the violation. An Administrative Law Judge (ALJ) generally makes a recommendation or initial decision as to the violation and the amount of the penalty. The agency makes the final decision, which is open to review by a court.

78. In the middle, statutes such as the Clean Water Act [111] allow the use of less formal procedures than APA proceedings for penalties that do not exceed $25 000. The judicial review is not *de novo* and the defendant does not receive a full trial anywhere.

79. At the other end, an agency assesses the penalty after informal or no procedures at all. The Department of Justice or the courts need not be involved when making the assessment or when compromising the penalty amount. Absent agreement, the agency cannot collect the penalty without a judicial proceeding in which the agency assessment would be subject to *de novo* review.

80. Post 1986, this model was modified by statutes which distinguished between Class I and Class II penalties. Informal procedures apply

[110] 5 U.S.C. § § 554, 556, 557 (1988)
[111] 33 U.S.C. § 1319(g)(2)(A) (1988)

lesser Class I penalties and formal APA procedures apply to larger Class II penalties.[112]

81. Categorising monetary penalties as criminal and civil remains controversial. The Supreme Court of the United States of America declared a violation of a water pollution statute to be civil. Rehnquist J held that the proceeding in which the penalty was imposed was not "quasi-criminal" to trigger the Fifth Amendment's protection, i.e. the protection against self incrimination.[113] The Court noted that Congress had labelled the sanction as a "civil penalty," and juxtaposed it with criminal penalties in a subparagraph immediately preceding it. Penalties were therefore allowed without regard to the procedural protections and restrictions available in criminal prosecutions.[114] In coming to its decision the Court nevertheless also considered whether Congress, despite its manifest intention to establish a civil, remedial mechanism, provided for a

> "statutory scheme (that) was so punitive either in purpose or effect as to negate that intention."[115]

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[112] William Funk *Close Enough For Government Work?--Using Informal Procedures For Imposing Administrative Penalties* 24 Seton Hall L.Rev.1

[113] *United States v L. O. Ward dba L. O. Ward Oil and Gas Operations* No. 79-394. (1980.) See 448 U.S. 916, 101 S.Ct. 37.

[114] *United States v L. O. Ward dba L. O. Ward Oil and Gas Operations* No. 79-394. (1980.) See 448 U.S. 916, 101 S.Ct. 37 at 249.

[115] *United States v L. O. Ward dba L. O. Ward Oil and Gas Operations* No. 79-394. (1980.) See 448 U.S. 916, 101 S.Ct. 37 at 249.

82. The sanction for breaches of the affirmative action provisions under the EEA is coloured by elements that suggest that it could be an offence disguised as a contravention in order to avoid the inconveniences of observing all the protections and privileges available to a common law accused. This Court imposes the sanction, the quantum of which is substantial, and is accompanied by the odium and the risk of a conviction for contempt for non-compliance. So serious is the sanction that it does not readily lend itself to being purely administrative. Greater procedural flexibility and the lower burden of proof make contraventions a more attractive option for regulators.[116] Concomitantly, the potential for abuse of individual rights grows. The Court must enquire whether the statutory scheme is so punitive that it justifies invoking the protections available to an accused[117] or make any other accommodation in order to meet the requirements of the rule of law.

An offence or contravention ?

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[116] Michael Woods and Richard Macrory *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach* (UCL)*;* Australian Law Reform Commission Report (2002) Part A Penalties in Australian Government Regulation :The Nature of Penalties at para 2.81 http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

[117] *United States v L. O. Ward dba L. O. Ward Oil and Gas Operations* No. 79-394. (1980.) 448 U.S. 424, 100 S.CT.2636; see 448 U.S. 916, 101 S.Ct. 37.

83. Are the sanctions imposed for non-compliance with the affirmative action provisions of the EEA substantively criminal?

84. Labour law reform which began with the drafting of the Labour Relations Act No 66 of 1995 (LRA) continued into the second and third phases with the BCEA and the EEA respectively. The brief of the LRA Ministerial Task Team[118] was to decriminalise labour legislation. Imprisonment of the employer is not an option prescribed by the EEA for offences[119] because it can be of no good to anyone, least of all the employees who might find themselves employer-less and jobless.

85. The pre-litigation processes echo this policy of decriminalisation. Although the DOL has no legal duty to provide assistance to anyone to comply with the EEA it nevertheless helps to disseminate information and provide advice and training.

86. Inspectors of the DOL have wide powers to monitor and enforce employment laws[120] and employers and employees have an obligation to co-operate with them.[121] Answers to questions put by them may not be used in criminal proceedings except on a charge of

[118] Para 2 of the Explanatory Memorandum
[119] Section 59 and 61 of the EEA.
[120] Section 66 of the EEA
[121] Section 67 of the BCEA

perjury or making a false statement.[122] If these proceedings were criminal, the DOL would be severely compromised in prosecuting its case as it would not be able to use the information collected by its inspectors.

87. When an employer fails to comply with its affirmative action obligations in chapter 3,[123] the DOL must require the employer to give a written undertaking to comply within a specified period. If the employer refuses to give that undertaking or fails to comply after giving it, the DOL may issue a compliance order. The order must identify the provisions in chapter 3 that have not been complied with, the period within which they must be complied with and the maximum fine that may be imposed. The employer must comply with the order within the stated period unless it objects to it within 21 days after receiving it, or such further period as the Director-General may allow.[124]

88. If the employer's non-compliance persists, the Director-General may apply to the Court to make the compliance order an order of the Court.[125] An application to impose a penalty is the last resort, unless it is preceded by contempt of court proceedings.

[122] Section 91 of the BCEA
[123] Section 36 (a)-(j)
[124] Section 37(5) read with section 39
[125] Section 37(6) of the EEA

89. The pre-litigation process aims to cajole and persuade, to wave a stick at the employer on the promise of a certificate that it complies with chapter II and III of the EEA, without which its offers to conclude contracts with the state may be rejected.[126] The priority for the DOL is administrative efficiency by encouraging compliance. It has to make employment laws work with minimum recourse to costly monitoring and enforcement procedures.

90. Prevention is the DOL's aim when it provides training, assistance and information to the public about the EEA.

91. Deterrence must be the principal aim of the sanction. That imprisonment is not a competent order for either a contravention or an offence fortifies the view that punishment aimed at retribution is not the primary objective of the EEA. If deterrence is the aim of the sanction, penalties and a civil process are the preferred method of regulation.

92. Deterrence must also be the explanation for the high sanctions that can be imposed. High sanctions correspond with the high value placed on rendering workplaces equitable.

93. Rehabilitation serves the governmental purpose more constructively

[126] Section 53 of the EEA

than retribution. If retribution is the aim of a sanction, a criminal process is the preferred route for imposing a fine or imprisonment. Retribution cannot be the aim of this process without invoking all the protections available to an accused.

94. In the circumstances the Court finds that section 50(1)(g) does not create an offence but a contravention for which a penalty is payable.

Elements of the contravention and proof

95. Before turning to consider whether a civil process justifies the ensuing penalty, the elements of the sections that the respondent is alleged to have contravened and who bears the onus to prove them must be determined.

96. The allegations against the respondent are that he contravened section 16, 19, 20 and 21.

97. Section 16 requires an employer to consult with representatives of the employees or the employees themselves about matters identified in section 17.

98. Section 17 requires an employer to consult about the three

processes prescribed in sections 19, 20 and 21;

99. Section 19 requires an employer to conduct an analysis of the employer's policies, practices, procedures and working environment to identify barriers to employment of designated groups and develop a profile of the workforce to determine the degree of under-representation of people from designated groups in various occupational categories and levels of the workforce [127].

100. Section 20 requires an employer to prepare and implement an employment equity plan stating, amongst other things, the affirmative action measures to be implemented and numerical goals to achieve a credible representation of suitably qualified people, taking account of their experience and capacity to acquire the ability to do the job.[128]

101. Section 21 requires an employer to prepare a report for submission to the DOL annually on 1 October[129]. The report must have information about the profile of the workforce, their occupational categories and levels, recruitment, promotion, termination, disciplinary actions, skills development, a qualitative assessment of awareness of employment equity at the workplace, the consultations, the analysis, the plan, numerical goals, resources and

[127] Section 19
[128] Section 20
[129] Section 21

implementation[130].

102. Unlike its Canadian counterpart and, for instance, the Competition Act, the EEA does not state expressly what acts or omissions constitute a contravention. It must be inferred from Schedule 1 that non-compliance with any of the requirements in sections 16, 19, 20, 21, 22 and 23 constitute contraventions.

103. The prohibited conduct consists exclusively of omissions. The omissions may be formal or substantive. An example of a formal omission is the failure to file a report with the DOL or publish a summary of it in terms of section 22. Compliance is substantive if the employer's interventions pass the assessment in section 42 of the EEA.[131] An omission is substantive if it violates the fundamental

[130] Section 21 read with Form EEA2

[131] 42 Assessment of compliance

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

purpose and scheme of the EEA. An employer's interventions must be serious, genuine and capable of achieving transformation.

104. Consultation with the workforce is the fulcrum which turns the wheel of transformation. Without consultation, the analysis of the workplace, the ensuing equity plans and reports are suspect as they have not been tested against the countervailing views of the workers for viability.

105. To be genuine, consultation must be about the fundamentals of

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(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor.

Section 15 provides : 15Affirmative action measures

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

change.[132] Thus the consultation must be about the three processes that the employer must undertake to achieve equity through affirmative action[133].

106. Consultation involves the ongoing, active, informed and fearless participation of the workforce. For instance, barriers to advancement could be as obvious as setting unnecessary formal qualifications for promotion. Or, they may be as subtle and subjective as the perception of the workforce about the practices, culture, environment, policies and procedures. Some barriers may therefore not be apparent or detected by employers unless they are identified by employees. Furthermore, what affirmative action measures can realistically be implemented cannot be determined unless employees commit to making them work. Thus if shop stewards decline to train for managerial positions, or women do not want to be technicians, or male workers do not want women taking over their jobs, the employer's plans to transform the workplace through such training will fail.

107. Employment equity reports should record truthfully the progress towards transformation. The plan should be the instrument that guides the enterprise to that end.

[132] Section 16
[133] Section 17

108. Mechanical compliance with the prescribed processes is not genuine compliance with the letter and spirit of the EEA. Compliance is not an end in itself. The employer must systematically develop the workforce out of a life of disadvantage. Disadvantage of all kinds is targeted by the EEA. Contrary to the submission for the respondent[134], by employing exclusively black people and mainly women in low skilled jobs at low rates of pay cannot, without more, redress race, gender, sex or economic discrimination. Non-racialism is a façade if economic and other forms of exploitation persist. Equity is about creating jobs of quality that inspire the spiritual and material development of the workforce[135] and thereby, economic growth.

109. Liability for formal and substantive non-compliance arises as soon as there is an omission. Nothing in the EEA suggests that intention is an element of the contravention.

110. There are also circumstances and attributes that constitute elements of the contravention. The violator must be a designated employer. (In the case of a contravention of section 22, the employer must also be a public company or an organ of state.)

[134] Para 4 of Heads of Argument
[135] Preamble to Convention 111 (above)

Proof

111. The DOL bears the civil standard of proving all the elements of the contravention on a balance of probabilities.[136] Proving non-compliance is facilitated by the pre-litigation procedures.

112. The enforcement procedures namely, of obtaining an undertaking and issuing a compliance order are not prerequisites for the Court to issue a fine against the employer. They nevertheless facilitate proof that the employer was aware of its statutory obligations and had an opportunity to comply. The undertaking is tantamount to an admission of non-compliance at least at the time that it is given. The employer's failure to appeal against a compliance order is *prima facie* acceptance of the truth of its contents.

113. Despite bearing merely an evidential burden, an employer who has failed to comply with an undertaking and a compliance order will be hard pressed to find a credible defence.

114. Negligence and absence of intent as defences have better prospects of succeeding in the absence of an undertaking and compliance order or as a plea in mitigation. A substantive defence could relate to labour market conditions and whether they enable employers to

[136] LH Hoffmann and DT Zeffertt *The South African Law of Evidence* (Fourth Edition) 526

comply with their employment equity plans.

Is a civil process justifiable ?

115. Justification of the purpose and scheme of the penalty proceedings under the EEA must be assessed against the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism and the supremacy of the constitution and the principle of the rule of law.[137]

116. The EEA aims to balance equity in the workplace with employers' freedom to conduct economic activity. Affirmative action and fair labour practices are expressly promoted in the Constitution.[138] Freedom of trade, occupation and profession is constitutionally acknowledged. That their practice can be regulated, is also expressly recognised.[139] Affirmative action and fair labour practice laws are precisely the kind of regulation contemplated to trump the freedom of trade.

117. The EEA is the third phase[140] of overhauling labour laws promulgated in pursuit of the constitutional promise of "improv(ing) the quality of

[137] Section 1 of the Constitution of the Republic of South Africa Act No 108 of 1966.
[138] Section 9 and 23 of the Constitution.
[139] Section 22 of the Constitution.
[140] The first three phases were the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

life of all citizens and free(ing) the potential of each person".[141] It turns the spotlight on equity through development in the workplace in its preamble with the following commitment :

> "To ensure the implementation of employment equity to redress the effects of discrimination", and
>
> "To promote economic development and efficiency in the workforce".

Achieving equity in the workplace is the exclusive purpose of the EEA.[142]

118. Several international instruments on non-discrimination law, including the International Convention on the Elimination of all Forms of Racial Discrimination (1969)[143] and ILO Convention 111 on Discrimination (Employment and Occupation) (1958)[144] recognise the mutual interdependence between equity and development.

119. "Equity" in the title of the EEA confirms that non-discrimination law in South Africa has wider social goals than the achievement of equality.

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[141] Preamble to the Constitution read with Section 2 of the SDA.

[142] Section 2 of the EEA: "The purpose of this Act is to achieve equity in the workplace…"

[143] Article 2 (1) (e) states : "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."

[144] Preamble to Convention 111 : "Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and …"

The explanatory memorandum to the EEA captures the vision of the Bill thus:

> "A measure to outlaw discrimination and to encourage companies to develop a more diverse and representative workforce are necessary, not only to promote equity and justice but also in the interests of economic growth."

and

> "In short, the promotion of employment equity is therefore desirable on both equity and efficiency grounds."

Equity is about justice.

120. Transforming workplaces is not purely aspirational. Such high priority is placed on making workplaces more equitable that change is driven by statute. The EEA espouses not only statements of macro policy but also detailed prescriptions that impact operationally on enterprises on how to implement affirmative action.

121. To the extent that the EEA lists the steps to take and the issues to consider in implementing affirmative action, it is rigid and inflexible. But these prescriptions are the *sine qua non* for genuine engagement about workplace transformation. It is inconceivable that genuine transformation can occur without consultation with the workforce, an analysis of key aspects of the workplace and a plan for change. Flexibility and the freedom to self-regulate arise in the

content of the plan and implementation.

122. Socio-economic re-engineering through the EEA will be lost unless enforcement is effective. If intention is an element of the contravention, employers can escape liability by simply blaming their consultants for not complying. Enforcement will be almost impossible.

123. Compliance is encouraged by the DOL by providing assistance to employers by offering training and advice on how to comply with the EEA, by inspecting workplaces, obtaining undertakings to comply, issuing compliance orders and making them orders of the Court. Gentle persuasion only leaps to compulsion when none of these interventions succeed.

124. The litigation and the steps that precede it are designed to eliminate reasonable doubt as to whether the employer contravened the provisions. The option of an appeal against a compliance order is a further filter for a just outcome. The elaborateness of the process reduces the risk of an incorrect decision. That the penalty is imposed by a court and not a tribunal also anticipates that a higher standard of care will prevail.[145]

[145] William Funk *Close Enough For Government Work?--Using Informal Procedures For Imposing Administrative Penalties* 24 Seton Hall L.Rev.1

125. The DOL bears the onus of proof as regards all the elements of the contravention. The pre-litigation steps render the quality of the evidence required to discharge the onus more reliable. Employers bear the burden of rebuttal which is relatively easy to overcome if the contravention is alleged to be formal as the evidence is documentary. If the contravention is alleged to be substantive, an employer with a credible defence would have exclusive knowledge of its genuine attempts to comply.

126. The DOL also bears the onus of proving the amount of the penalty to be imposed. Evidence in rebuttal relating to affordability and liquidity of the employer is usually in the exclusive knowledge of the employer.

127. As a presumption of negligence is allowed to operate against a defendant property owner who faces a civil claim arising from veld fires, without the presumption of innocence being violated,[146] placing a burden of rebuttal on the respondent for proving compliance with the affirmative action provisions is far less onerous.

128. Employers hold the key as to whether criminal proceedings for contempt of court are invoked. It lies within their power to avoid the

[146] *Prinsloo* v *Van Der Linde* 1997 (3) SA 1012 (CC)

odium and stigmatisation of penalty proceedings and conviction for contempt of court by complying.

129. As a deterrent the amount of the penalty has to be sufficiently high that it makes commercial sense for employers to comply than to risk a penalty.[147] Litigation and pre-litigation processes are time consuming, costly and a negative usage the DOL's resources. They cannot be invoked for every employer who does not comply. The penalty should also be sufficiently high that it deters other employers who are not complying to remedy their situations.

130. Having regard then to the purpose of the affirmative action provisions in the EEA and the scheme adopted to implement and enforce them, the Court is satisfied that the civil procedure adopted for enforcement is justified. To deny to an employer who fails or refuses to render workplaces more equitable, all the protections and privileges of an accused is justified. The purpose and scheme of penalty proceedings under the EEA are reasonable means of achieving the fundamental values of the Constitution. The rule of law is met.

Did the respondent contravene the EEA?

[147] Anthony Ogus and Carolyn Abbot SANCTIONS FOR POLLUTION: DO WE HAVE THE RIGHT REGIME? 14 J. Envtl. L. 283 Journal of Environmental Law 2002

131. The respondent did not comply voluntarily with the EEA. It failed to do so despite giving an undertaking. The ultimatum set in the compliance order to comply within 30 days of 31 March 2004 also went unheeded. Only after the first application was launched on 24 April 2004 did the respondent cause an employment equity plan to be delivered to the DOL. The Court accepts in favour of the respondent that a plan was delivered to the DOL, even though it cannot be found.

132. By failing to keep a record of the plan the respondent contravened section 26 of the EEA. Submitting a plan long after the deadline in the compliance order had expired was not compliance with the EEA. The respondent had to prepare and implement the plan, not submit it to the DOL. As the DOL cannot produce a copy of the plan, it cannot rebut the allegation that it did not comply with section 20 of the EEA. It cannot prove that the plan met the requirements of section 20 or that it was implemented. Nor can the DOL assess[148] the respondent's substantive compliance with the affirmative action measures[149] which should have been detailed in the plan[150].

133. Consequently, there is also no evidence that the section 19 analysis

[148] Section 42 of the EEA
[149] Section 15 of the EEA
[150] Section 20 (2) (b) of the EEA

which feeds into the planning process was undertaken.

134. The plan that the respondent filed in this application is undated and manifests no interaction with the workers or their representatives. But for the name of the respondent and the numerical goals in the schedules reflecting the profile of the workforce, there is little else that connects the plan to the respondent. It might just as well be a standard precedent tweaked for the purposes of this application. As counsel did not address the Court on the content of this plan, the issue cannot be taken further and no inferences are drawn from its contents

135. As the respondent employed less than 150 employees it was a designated employer that had to report once every two years on the first working day of October.[151] To obey the compliance order the respondent had to submit an employment equity report by 30 April 2004 covering the reporting period that ended on 30 September 2003. By submitting a report dated 24 October 2004 the respondent did not obey the DOL's compliance order. The respondent failed to comply with section 21 (1) (b) of the EEA.

136. In order to prepare and implement a plan and submit a report that were genuine, the respondent had to consult with the workforce. The

[151] Section 21 (1) (b) of the EEA

respondent consulted with the workforce after the plan and report were submitted. Furthermore, the consultation was not about the analysis[152], the plan[153], or the report[154]. It was to advise them of the EEA and its consequences. The reaction of the workers to the advice was to fear for their job security. The advice could not have favoured employment equity. The respondent failed to comply with section 16 of the EEA.

137. The respondent's defence that it intended to comply but that its consultant did not do the job is not good. There is a limit to which employers can outsource their affirmative action responsibilities. They are not relieved of any duty imposed by the EEA even when they assign managers to take responsibility for monitoring and implementing the plan which they must do.[155] There is no evidence that the respondent assigned a manager to the task and delegating all his responsibilities to a consultant is no defence. It is direct contravention of section 24 of the EEA.

138. In the circumstances the DOL has proved on a balance of probabilities that the respondent failed to comply with sections 16, 19, 20 and 21.

[152] Section 19 of the EEA
[153] Section 20 of the EEA
[154] Section 21 of the EEA
[155] Section 24 of the EEA

The Penalty : Criteria

139. As discussed above, deterrence and prevention of contraventions is the purpose of the penalty. Retribution falls in the realm of criminal law and is contrary to the spirit, purpose and scheme of labour law.

140. Factors to be considered under the Canadian Employment Equity Act[156] by the designated Minister in assessing the amount of a monetary penalty, include the nature, circumstances, extent and gravity of the violation; the wilfulness or intent of the private sector employer and the employer's history of prior violations.

141. When assessing a penalty in the context of a violation of environmental law involving oil spillage into water, a District Court in the United States took into account the appropriateness of the penalty to the size of the business of the owner, the effect on the owner's ability to continue in business and the gravity of the violation.[157]

142. The criteria listed in the Competition Act include any loss or damage suffered as a result of the contravention, any profit derived from the contravention, the behaviour of the violator, the market

[156] Section 36 (3) of the Canadian Employment Equity Act

[157] *United States of America v Independent Bulk Transport, Inc.*, 480 F.Supp. 474

circumstances in which the contravention occurred and the degree to which the violator co-operated with authorities.[158]

143. Sangoni AJ in the first penalty matter heard by the Court accepted the following criteria proposed by counsel for the DOL in that matter who happened to be the same as in this matter:

a. the purpose of the EEA;
b. the extent of the contravention;
c. the period the contravention has endured;
d. the reason for not complying;
e. the maximum fine prescribed;
f. any relevant considerations relating to the respondent.

144. To that list this Court adds the following :

a. the willingness and intention of the employer to comply, its attitude and conduct;
b. any loss or damage suffered by the workforce or the DOL as a result of the contravention;
c. any profit derived from the contravention;
d. the extent to which the employer complies with all other laws and agreements that regulate employment;
e. the investment of time, money and other resources that the employer makes in the development of the workforce;

[158] Section 59(3) of the Competition Act

f. the effect of the penalty on employment;

g. the nature and size of the employer;

h. the industry in which the employer operates;

i. the area in which the employer is located; and

j. the deterrent effect of the penalty.

All the criteria have to be considered cumulatively.

145. Evidence that proves liability also informs the penalty to be imposed. The more serious, extensive and frequent the contravention, the higher the penalty. Dishonesty, deviousness, bad faith and reluctance to comply attract greater censure. Financial constraints mitigate the amount of the penalty.

146. Although the DOL is a litigant, its aim in these proceedings is not to "win" but to ensure that a realistic, workable and balanced outcome ensues. It has an obligation as the state to balance all socio-economic objectives in the relief it claims in penalty proceedings. If the fine imposed leads to unemployment, that will ricochet on the DOL in more ways than by merely draining its unemployment insurance fund. On the other hand exploitative employment has to end.

147. Sensitivity to monetary penalties is an enduring concern in labour

market regulation. From setting wage rates to limiting compensation claims for unfair labour practices, the challenge is always to strike the balance between protecting worker rights and ensuring the viability of the enterprise. The responsibility on the Court to strike the right balance on a matter that could have profound socio-economic consequences, possibly for an entire community, can only be undertaken properly if the litigants provide it with the material. Compliance with the rule of law requires nothing less.

148. Trends within an industry, area, size and type of enterprise should be evidence available or accessible to the DOL. Affordability and methods of payment are almost exclusively within the knowledge of the employer. Without reliable information on both these fronts, the effect of any penalty that the Court imposes is at best a shot in the dark. Whereas evidence may be dispensable where the amount of the penalties or their socio-economic effect are insignificant, this is far from true for penalties for non-compliance under the EEA.

The Appropriate Penalty

149. Mr Liu abdicated his responsibility by simply outsourcing his obligation to a labour consultant who turned out not to be knowledgeable or competent in carrying out his mandate. He did not

interact with the consultant regularly to give mandates, guidance or track progress. Whether the consultant had an adequate knowledge of the nature of the business in order to determine what affirmative action measures would be appropriate, is also not evident. Mr Liu did not exercise reasonable care in ensuring that the respondent complied with its obligations. The respondent's non-compliance was grossly negligent.

150. Only when the reality of litigation struck did the respondent move into action. It filed the first plan five days after the first application was launched. Between October 2005 when this application was launched and January 2006 when he received the notice of set down for 19 April 2006, he made vague attempts at getting clarity about the application. After he got the set down he continued to try and get clarity. Only before Easter did he make a concerted effort at getting his file from the consultant's family. A day before the hearing he instructed his attorney to remove the matter from the unopposed roll. The plan that he attached to his Opposing Affidavit might well have been prepared just for this application.

151. The respondent was manifestly reluctant to transform its workplace. Employing exclusively black workers was its notion of implementing employment equity. Such compliance as there has been was

delayed, contrived, superficial and unconvincing. Apart from one so-called consultation, no other effort was made to engage the workforce. There is no evidence that since 2004 the respondent lodged a report with the DOL as it is required to do once every two years. Its contraventions are serious, continuous, and coloured by its deviousness and bad faith.

152. The DOL failed to assist the Court with any evidence about the nature and size of the industry, the threats and opportunities that it faces, the effect of fluctuating currency levels, the area in which the respondent is located, the impact of the penalty on employment and the community, the costs or losses, if any, sustained by the DOL or the workers as a result of the non-compliance, the profits, if any, made by the respondent as a result of the non-compliance and whether the respondent is complying with the bargaining council agreement and other labour laws. While the respondent bears the evidentiary burden to adduce mitigating evidence, the DOL as the state has an obligation to ensure that the fine imposed is balanced and causes minimum hardship to the workers and their communities. It is a cause of deep concern to the Court that the workers are not party to this application and appear opposed to the DOL's initiatives towards rendering the workplace equitable.

153. The respondent on the other hand has failed to provide any financial

information on the basis of which the Court can make an assessment as to what is affordable and at what amount the penalty will be effective as a deterrent. The general reference to the currency fluctuations impairing the business is insufficient.

154. There is no evidence that the respondent invested any resources in implementing equity. Without the will to transform that investment would not have been made. Engaging consultants and lawyers to prepare the paperwork so that facially, the respondent seems compliant, is not an investment in the workforce.

155. The respondent has given the Court very little to consider in mitigation. The most compelling consideration is the concerns of the workers.

156. In *Director-General of the DOL v Ginghua Garments*[159] where liability was not disputed and the only issue was the amount of the penalty, Sangoni AJ imposed a fine of R200 000, half of which was suspended on condition that the employer did not contravene the provisions for three years.

157. The respondent's conduct is distinguishable from that employer. It attracts a higher penalty. It is also distinguishable from large

[159] *Director-General of the DOL v Ginghua Garments* Case no D730/05

multinationals which, as first time violators, could also attract the maximum penalty. Maximum penalties should also be reserved for the most egregious violators,[160] such as those who refuse to comply at all. As a small to medium sized cut, make and trim operation in an industry that is reputed to be under threat of decimation, and which is located in an economically unstable industrial area where few jobs are generated for the surrounding semi-rural population, the maximum penalty is not appropriate.

158. Neither party addressed the Court on where the penalty should be paid. Receiving payment of penalties for contraventions is not a power conferred on the Court. In the exercise of its power to deal with any matter necessary or incidental to performing its functions in terms of the EEA,[161] the Court must give directions on where payment should be made. Section 213(1) of the Constitution establishes a National Revenue Fund into which all money received by the national government must be paid. The penalty must be paid into the National Revenue Fund.[162]

159. The prayer to declare the compliance order an order of this Court cannot be granted as the time for compliance stipulated in it has

[160] Regina G. Thornton *Notice, Compliance, And A Private Right Of Action: A Tale Of Two Statutes*19 QLR 371 QLR 2000

[161] Section 50(1)(j) of the EEA

[162] See also section 59(4) of the Competition Act

passed. Furthermore, it refers to sections 22 and 23 which do not apply to the respondent. Nothing prevents the Court from directing the respondent to comply.

160. With regard to costs, the matter is important and in some respects unprecedented. However, the Court declines to grant the DOL costs of two counsel.

161. The Court grants the following order :

a. The respondent has contravened sections 16, 19, 20 and 21 of the EEA.

b. The penalty for such contravention is R300 000 of which R200 000 is suspended on condition that the respondent complies fully with sections 16, 19, 20 and 21 of the EEA by 1 October 2007.

c. The amount of R100 000 must be paid by 30 April 2007 to the Durban and Coast Local Division of the High Court for transmission into the National Revenue Fund and proof of payment must be delivered by 7 May 2007.

d. The respondent must pay the DOL's costs, such costs being limited to the costs of one counsel.

Pillay D, J

Date heard : 6 FEBRUARY 2007

Date of last filing : 9 March 2007

Date of Judgment : 16 April 2007

Appearances :

For Applicant : V Soni SC with T Shishi SC

Instructed by State Attorney,KwaZulu Natal

For Respondents : I Pillay

Instructed by : Deneys Reitz