

**Retirement Funds and Discrimination**  
**Heather Schooling**  
**Brink Cohen le Roux & Roodt**  
**Source of the anti-discrimination principle**

- Section 9 of the Constitution
- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”)
  
- **Two-stage inquiry :**
  - Is it discriminatory ?
  - discrimination vs differentiation  
Prinsloo v van der Linde 1997 (6) BCLR 759 (CC)

**Edge v Pensions Ombudsman** [1998] 2 All ER 547 (Chd) at 567  
Prohibits unfair discrimination by both the state and private persons, on the basis of *“race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”*.

- Not a closed list: differentiation on an analogous ground may also constitute discrimination
- Indirect discrimination ?

**If it is discrimination, is it unfair ?**

Discrimination on the basis of a 'listed' ground is presumed to be unfair (section 9(5))

## Section 14(2) of PEPUDA

### **The treatment of the concept of "discrimination" by the PFA**

- "Discrimination" viewed as:
- relating to the administration of the fund or
- the application of its rules
- involves an allegation of an excess or improper exercise of powers (in the form of a breach of a fiduciary duty), or alternatively, maladministration of the fund.

### **The treatment of the concept of "discrimination" by The PFA**

- contrary to management board's fiduciary duty to act with impartiality iro all members and beneficiaries iro all members as required by S7C(2)(c) of the PFA
- PFA has the power to make any order that is just and equitable in accordance with section 172(1) of the Constitution, on basis that this is a constitutional matter
  - entitles the complainant to compensatory relief, akin to damages in an Aquilian action
  - **Low v BP Southern Africa Pension Fund and Another**
  - [2000] 2 BPLR 171
  - **Clarence v Independent Schools Pension Fund**
  - [2000] 2 BPLR 132

## Discrimination in the pension context

- marital status
- sexual orientation
- age
- sex / gender
- other grounds