

# Colour discrimination against persons with albinism in South Africa

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This article explores issues relating to discrimination against persons living with albinism, against the background of colour discrimination. It also addresses calls for 'colourism' to be recognised as a distinct form of discrimination. Although colour as grounds for discrimination is prohibited in the equality clause of the Constitution, it is conventionally grouped with race and ethnicity when unfair discrimination is interpreted. We argue that discrimination against persons living with albinism should be possible based on colour as a prohibited ground, independent from race or ethnic considerations.

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Diverse sociological and psychological factors give skin colour its present connotations.<sup>[1]</sup> In the history of Africa, discrimination on the basis of skin colour is not new – the system of privilege and prejudice founded on the extent of lightness or darkness of a person's skin colour has been addressed with such phrases as 'colourism', 'shadism', 'skin tone bias', 'pigmentocracy' and 'colour complex'.<sup>[2]</sup>

Any label used to describe a person's skin colour is fraught with problems, and may point to discrimination, stereotyping and perceptions of beauty, even between those of the same race.<sup>[2]</sup> For people living with albinism, their skin colour leads to negative social constructions amongst Africans, including beliefs that they are evil cannibals or cursed.<sup>[3]</sup> In some areas, including Namibia, persons living with albinism have to hide out of fear of being killed and their body parts used in *muti* rituals. In Tanzania, *sangomas* ('jujumen') believe that albinos are immortal and that their genitals bring wealth; in South Africa, they are often perceived as a curse.<sup>[3]</sup>

We explore the issue of unfair discrimination against persons living with albinism, focusing specifically on colour as prohibited grounds for discrimination in terms of section 9(3) of the Constitution of the Republic of South Africa.<sup>[4]</sup> Discrimination based on albinism has received scant attention in the South African legal context. Because persons living with albinism are a small and marginalised group in society, discrimination against them is simply overlooked and unreported. Discussion relating to protecting them against discrimination is long overdue.

## Colour discrimination and persons living with albinism

Colour cannot be discussed as grounds for discrimination without referring to South Africa's history of racial discrimination, in terms of which skin colour was indirectly used to draw strict lines between races. Skin colour has traditionally been and remains an instant means of identifying race and racial differences. Such a socially acknowledged type of racial detection is problematic, especially when the notion of whiteness is strongly associated with elements

of 'purity' and 'fairness' while blackness is more allied to 'dirt', 'evil' and 'death'.<sup>[5]</sup> Derogatory and belittling connotations linked to the colour black have had harmful outcomes for persons with darker skin tones.<sup>[5]</sup> The same extends to persons living with albinism, whose distinctive skin tone, described as 'fair tanned', has many social implications in their communities.

The equality clause of the Constitution,<sup>[4]</sup> section 9, lists 'colour' alongside race and ethnic origin as prohibited grounds for discrimination, which suggests that colour is a component of race. Section 9(3) stipulates that '[T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' This corresponds with the International Covenant on the Elimination of All Forms of Racial Discrimination,<sup>[6]</sup> which defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. The 4 grounds of discrimination (i.e. race, colour, descent and ethnic origin) are physiological as well as social clusters on which controlling and damaging connotations of 'superiority' and 'inferiority' have been imposed.

Racial (and colour) differentiation is best illustrated by referring to some of the repealed apartheid statutes that significantly affected the black community in South Africa, such as the *Black Administration Act*<sup>[7]</sup> (our emphasis). This Act systemised and imposed a colonial type of relationship between a leading white minority, who had selected rights and privileges, and an 'inferior' and dominated black majority. Such division of black and white was echoed in other (now repealed) statutes, such as the *Riotous Assemblies Act*<sup>[8]</sup> in terms of which the white minority controlled many aspects of black economic, social and political activity. Elsewhere, Section 1(1) of the Population

Registration Act<sup>[9]</sup> defined a black person as 'a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa'. This Act had to be amended 11 times to address the confusion caused by its bewildering array of racial classifications. Section 19(1) of this Act contained an important evidential presumption, which stated that 'a person who in appearance obviously is a member of an aboriginal race or tribe of Africa shall for the purposes of this Act be presumed to be a Black unless it is proved that he is not in fact and is not generally accepted as such member'.

Racial appearance and descent played a role in the process of racial classification during apartheid. The irrational racial descriptions, strongly determined by appearance, are evident in the definition of a white person in section 1(1) of this Act: '(a) a person who in appearance obviously is a White person and who is not generally accepted as a Coloured person; or (b) a person who is generally accepted as a White person and is not in appearance obviously not a White person'.

These definitions suggest that colour and race are inseparable. In albinism, however, colour and race are not linked. Aside from the question of race, persons living with albinism are exposed to discrimination, stigmatisation and prejudice based on colour alone. Their distinct pallor may be associated with witchcraft and other negative connotations in those from non-white communities, whereas other negative responses are also invoked for those from white communities,

South Africa's historical colour differentiation between black, whites, coloureds and Asians<sup>[10]</sup> may have influenced the drafters of the Constitution to include colour as part of an analysis of racial discrimination, including the need to make colour distinction part of the process and policies of redress, such as affirmative action.

Because of the divides caused by distinction based on skin colour, colour will remain relevant and must be interpreted against the backdrop of South Africa's apartheid history. In the case, *Chinese Association of South Africa and Another v Minister of Labour and Others*<sup>[11]</sup> in 2007, the Chinese Association of South Africa claimed that the South African government had discriminated against its members. The South African High Court ruled that Chinese persons of South African descent are to be reclassified as black people, so that the ethnic Chinese community could benefit from government policies aimed at eliminating white dominance of the private sector. The association argued that Chinese persons often failed to qualify for business contracts and job promotions because they were regarded as whites. They further argued that the Chinese had faced widespread discrimination during the years of apartheid when they had been classified as people of mixed race. This interesting case emphasises the confusing interplay between race and skin colour and the complex responses associated with them.

Although references to skin colour and race are generally used interchangeably, the insertion of both race and colour as independent prohibited grounds for discrimination in the equality clause of the Constitution suggests that the terms are distinctive and should be interpreted independently of each other.

Despite its long existence, colour discrimination is often subsumed by racism, making it less clear whether claims relating to colour discrimination are racial or non-racial.<sup>[12]</sup> To address this problem, Jones<sup>[13]</sup> advocates that 'colourism' be recognised as a distinct type of discrimination not affiliated to race, as it is associated with diverse

stereotypes and stigma based on skin tone and not ethnicity. Jablonski<sup>[14]</sup> rightly questions the connection between labels or 'racial' features and skin pigmentation. Race and skin colour are two distinctive categories which often overlap.<sup>[1]</sup> Skin colour alone does not explain racial categories, as other elements, such as ethnicity and bloodlines, are often used to link persons to specific racial groups.<sup>[1]</sup> For instance, even though persons may be very fair, appearing to be white, they will be considered to be Negroid if their immediate ancestors are identified as black. In such cases, it is descent which establishes race, not skin colour. Hence, racial classification is not exclusively based on skin colour, as that is only one of several factors used to designate race.<sup>[1]</sup>

Persons of the same race may receive different treatment based on perceived difference in their skin tone.<sup>[1]</sup> As they belong to the same race, the discrimination they may be subjected to does not result from racial classification, but from the *values* associated with a specific skin colour, e.g. that black is associated with impurity and evil. In the United States case of *Rodriguez v Gattuso*,<sup>[15]</sup> the court found that discrimination based on colour was actionable under the Fair Housing Act of 1968, although the plaintiff and the defendant belonged to the same race. The plaintiff, a dark-skinned Latino, was denied rental of an apartment, which was available to his light-skinned Latino wife. The court stated that a colour discrimination claim was proper because the defendant unfairly treated the plaintiff and his wife in a different manner, based on their varying shades of skin colour.<sup>[15]</sup> In *Walker v Secretary of the Treasury*,<sup>[16]</sup> a light-skinned African-American employee was found to have an actionable Title VII claim on the basis of colour discrimination against a dark-skinned African-American employer. This case emphasises the differences in both colour and physical features between people from African descent. Although the court in the latter case did not agree that the plaintiff's termination was the result of colour discrimination, it acknowledged the complex and innate problems relating to discrimination based on colour.<sup>[16]</sup> With colour discrimination, it is the social meaning associated with one's colour that establishes one's status, while in the case of racism, the social meaning attached to one's race establishes one's position.<sup>[1]</sup>

Skin tone discrimination may be interracial or intraracial.<sup>[12]</sup> Intraracial skin colour discrimination takes place when an affiliate of a particular racial group makes a distinction on the basis of skin colour between persons of the same racial group,<sup>[1]</sup> while interracial colourism takes place when an affiliate of a particular racial group makes a distinction on the basis of skin colour between persons of another racial group.<sup>[1]</sup> In terms of racial divides, skin colour is the mark which sets apart people of different racial classes. However, albinism is a special case that merits separate recognition.

## Equality protection for persons living with albinism

Persons living with albinism require protection against unfair discrimination on the basis of their race, but also specifically based on their colour (or lack thereof). Myths or superstitions regarding persons living with Albinism relate specifically to their extremely pale appearance and not their racial classification.

Scott<sup>[17]</sup> argues that the classification of persons living with albinism as white or African (or African-American) does not afford them adequate protection. As a group they defy racial classification<sup>[17]</sup>

and a new category of colour should be proposed. We submit that this argument will cause more confusion. Persons living with albinism remain white or African, but what makes them different is the genetic condition that causes a lack of pigmentation which affects their appearance. Skin colour is simply one race-related trait – introducing a new colour category for persons living with albinism would reinforce the problems associated with colour differentiation generally, unjustifiably emphasise their colour (or lack of colour) and ignore their racial origin. The focus should be on the social connotations and meaning afforded to the colours black and white, and not on skin lightness or darkness. No person of colour will ever be free unless these social constructions change.<sup>[1]</sup>

We submit that, when unfairly discriminated against on the basis of their condition, persons living with albinism should be able to rely on the Constitution's equality clause, which prohibits discrimination on the grounds of colour independently from the grounds of race and ethnic origin.<sup>[4]</sup> Albinism is an inherited genetic condition that affects all race groups.<sup>[18]</sup> It is a sad reality that despite the protection afforded by the Constitution, persons living with albinism suffer severe discrimination in the private and public spheres, and therefore do not fully participate in society as they should. The workplace offers persons living with albinism an opportunity to be integrated into a larger community. Their integration will contribute to eradicating the stereotypes, myths, misconceptions and other false notions about persons living with albinism.<sup>[17]</sup>

## Conclusion

The courts have the responsibility to develop the rights entrenched in the Constitution<sup>[4]</sup> and in doing so, 'common values of human rights protection, the world over and foreign precedent' may be instructive.<sup>[19]</sup> When interpreting legislation, the Constitution also instructs that courts must consider international law and foreign law.<sup>[4]</sup> Foreign case law may help South African courts develop the right to equality and non-discrimination based on colour, particularly in the context of albinism, where the grounds of unfair discrimination become blurred. American case law examples show the complexities associated with establishing colour as a new basis for action, autonomous of race.<sup>[12]</sup> Dangerous stereotypes and myths associated with albinism in South Africa place individuals with this condition in a very vulnerable position.

Although 'colourism' generally is a phenomenon which continues to affect many South Africans, and although the Constitution

provides protection against unfair discrimination based on skin colour, scant legal attention has been paid to persons living with albinism in South Africa, and the many forms of discrimination to which they may be subjected.

## References

1. Jones T. Shades of brown: The law of skin color. *Duke LJ* 2000;49:1487-1556.
2. Gabriel D. Layers of Blackness: Colourism in the African Diaspora. London: Imani Media, 2000:11. [http://salford.academia.edu/DeborahGabriel/Books/191937/Layers\\_of\\_Blackness\\_Colourism\\_in\\_the\\_African\\_Diaspora](http://salford.academia.edu/DeborahGabriel/Books/191937/Layers_of_Blackness_Colourism_in_the_African_Diaspora) (accessed 29 September 2012).
3. Ntinda RN. Customary practices and children living with albinism in Namibia: A constitutional challenge? [http://www.kas.de/upload/auslandshomepages/namibia/Children\\_Rights/Children\\_n.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_n.pdf) (accessed 29 September 2012).
4. South African Government. Constitution of the Republic of South Africa. Pretoria: Government Printers, 1996.
5. Howard A. An Exploration of Colourism and its Effects on African-American and White American Communities. Sacramento: California State University, 2006. Masters of Social Work thesis. <http://csus-dspace.calstate.edu/xmlui/handle/10211.9/1334> (accessed 11 June 2013).
6. United Nations. International Covenant on the Elimination of All Forms of Racial Discrimination. The Hague: United Nations, 1965. <http://www2.ohchr.org/english/law/cerd.htm> (accessed 29 September 2012).
7. South African Government. Black Administration Act. Pretoria: Government Printers, 1927.
8. South African Government. Riotous Assemblies Act. Pretoria: Government Printers, 1930.
9. South African Government. Population Registration Act. Pretoria: Government Printers, 1950.
10. Girvin SD. Race and race classification. In: Rycroft A, ed. Race and the Law in South Africa. Cape Town: Juta, 1987:1-10.
11. Chinese Association of South Africa and Others v. Minister of Labour and Others (59251/2007) [2008] ZAGPHC 174. Case number 59251/2007. 2008. <http://www.saflii.org> (accessed 21 June 2012).
12. Banks TL. Multilayered racism: Courts' continued resistance to colorism claims. In: Glen EN, ed. Shades of Difference: Why Skin Color Matters. Palo Alto: Stanford University Press, 2009:213-222.
13. Jones, T. The case for legal recognition of colorism claims. In: Glen EN, ed. Shades of Difference: Why Skin Color Matters. Palo Alto: Stanford University Press, 2009: 223-235.
14. Jablonski N. Ebony and Ivory: The Beautiful Tale of Human Diversity. Johannesburg: Africa Genome Education Institute, 2010. <http://www.africagenome.com/index.php/african-genomics/completed-projects/26-darwin-seminars/2010/134-ebony-and-ivory-the-beautiful-tale-of-human-diversity> (accessed 12 June 2012).
15. Roberto Rodriguez v. Biagio Gattuso (United States District Court for the Northern District of Illinois, Eastern Division). Case No 89 C 6151. 1992.
16. Tracy L. Walker, v Secretary of the Treasury, Internal Revenue Service (United States District Court for the Northern District of Georgia, Atlanta Division). Case No 1:87-cv-1789-CAM. 1990
17. Scott S. A new category of colour: Analyzing albinism under Title VII of the Americans with Disabilities Act. *J Gender Race & Just* 1999;2(2):508.
18. The Vision for Tomorrow. About albinism: what is albinism. <http://www.visionfortomorrow.org/albinism/> (accessed 20 September 2012).
19. S v. Makwanyane 1995 (6) BCLR 665, par 2. 1995.