

**TITLE**

**THE LEGAL PROTECTION OF PEOPLE WITH DISABILITIES IN SOUTH  
AFRICAN**

**LABOUR LAW**

By

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**DEDICATION**

**To**

**Norah Nyabafu my mother**

**and**

**the late Wilson Gondwe my father**

**With love and happiness**

**For being supportive parents to me throughout my life**

## DECLARATION

This study was carried out in the School of Law, University of Limpopo, from October 2008 to October 2010, under the supervision of Mr. M.C. Lebea.

I declare that the dissertation hereby submitted to the University of Limpopo for the degree of Masters of Laws has not been previously submitted by me for a degree at this University or any other University. All materials contained herein has been duly acknowledged.

Signed.....Gondwe. S.B.J.....



Date.....15/10/2010.....

Sokolani Bongororo John Gondwe



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## 1. CHAPTER 1: INTRODUCTION

### 1.1 PROBLEM STATEMENT

People with disabilities in South Africa continue to face barriers that prevent them from enjoying their full civil, political, economic, social cultural and development rights. This statement was mentioned in the South African Human Rights Commission's Report<sup>1</sup>. From my point of view, this is usually caused by deep-rooted ignorance and negative attitudes from some members of the society towards people with disabilities. The report of the above-mentioned Commission points out that some of the legislations fail to protect the rights of people with disabilities. It is against this background where South African Labour Law regulations will give the real reflection in protecting people with disabilities.

The White Paper on an Integrated National Disability Strategy (INDS),<sup>2</sup> provides a framework from which integrated and coherent policy can be developed across all spheres of government to address the social, economic, political and cultural barriers that hamper the development of this designated group. According to the above-mentioned White Paper, disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers and in need of care. These problems are also realised through the economic and political inequalities that marginalize people with disabilities from the mainstream society.

The *Mail & Guardian*,<sup>3</sup> revealed that people with disabilities continue to face difficult times of being discriminated, be it in low-income and high-income countries. As stated in the report of the Employment Equity Commission,<sup>4</sup> under-representation of representation

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<sup>1</sup>November (2002) <http://www.capecgateway.gov.za/text/2004/11/towards-barrier-free-society.pdf> page 5

<sup>2</sup>Office of the Deputy President of the Republic of South Africa November (1997) <http://www.info.gov.za/whitepapers/1997/disability.htm>

<sup>3</sup> 4-10 February (2000)

among the poor is not the only feature of low income countries but also for high income countries. In the 2002-2003 Commission's report,<sup>5</sup> the proportion for people with disabilities reported to be in employment has remained more or less the same. The 2% minimum target of employment of this designated group could not be achieved. Eight years ago, the Statistics South Africa (STATS),<sup>6</sup> revealed a total of 20,255 982 (5%) people that had some kind of disabilities that prevented them from participating in life activities.

## ***1.2 THE DEFINITION OF DISABILITY***

The word, "DISABILITY" has been differently understood and interpreted by various countries, at different times and with different pieces of legislations. As part of the global world, South Africa went through a relative process in legislating the concept of disability. Comparing various pieces of legislation of South Africa, one will realise that the definition of the word "disability" has been used in various circumstances which differently suited a particular social or medical context. In terms of section 1 of the Social Assistance Act,<sup>7</sup> disabled person means any person who has attained the prescribed age and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession and the means needed to enable him or her to provide for his or her maintenance. Looking at the definition of the aforesaid Act, one may arrive at a different conclusion and view the concept as much selective in not defining the concept of disability in general. Professor Charles Ngwena, states that in the old dispensation, disability law in the workplace essentially revolved around determining whether a claimant satisfied the eligibility criteria for entitlement to compensation for disability arising out of employment-

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<sup>4</sup>*Report Department of Labour (1999-2001)*

<sup>5</sup>*Report Department of Labour (2002-2003)*

<sup>6</sup>Census Report (2001)

<sup>7</sup>*Act 59 (1992)*



related injury disease<sup>8</sup>. However, the new constitutional dispensation has substantially altered this position by introducing equality values. In terms of *Chapter 1 of the Compensation for Occupational Injuries and Diseases Act (COIDA)*<sup>9</sup>, “disablement”, means disablement for employment, or permanent injury or serious disfigurement. This immediate definition seems to have been adopted by the legislature where the main intention was to cover those employees who become disabled as a result of the injuries caused during employment. This definition does not embrace the concept of disability in its widest interpretation. The fact of the matter is that disability occurs in various forms that include different social and economic circumstances. The concept of disability has presently been lawfully humanised rather than using it as an independent phenomenon. In simple terms, the word, “DISABILITY” has currently been joined to the word, “people”, referred to, as “PEOPLE WITH DISABILITIES”.

*Section 1 of the Employment Equity Act (EEA)*,<sup>10</sup> defines people with disabilities as “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, and advancement in employment”. In terms of *section 5.1 of the Code of Good Practice on the Employment of People with Disabilities (CODE)*<sup>11</sup> the scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or impairment. This statement fully supports the intention of this dissertation which seeks to discuss the extent to which people with disabilities are legally protected. In terms of Section 5.1.1 of the Code, an impairment may either be physical or mental or a combination of both. “Physical” impairment means partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired. “Mental” impairment means a clinically recognised condition illness that affects a person’s thought processes, judgment or

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<sup>8</sup>“*Deconstructing the definition of disability under the Employment Equity Act: social deconstruction: legal deconstruction*”, In *South African Journal on Human Rights: (2006), vol. 22, pt. 4, p. 613-646.*

<https://openaccess.leidenuniv.nl/.../2/ASC-075287668-267-01.pdf>

<sup>9</sup> Act 130 of (1993)

<sup>10</sup> Act 55 of (1998)

<sup>11</sup> Department of Labour August (2002)

emotions. According to section 5.1.2 (i), “Long-term”, means the impairment has lasted or is likely to persist for at least twelve months. “Recurring impairment” is one that is likely to happen again and to be substantially limiting. It includes a constant chronic condition, even if its effects on a person fluctuate. “Progressive conditions” are those that are likely to develop or change or recur.

People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting progressive or recurring conditions which have no overt symptoms or which do not substantially limit persons who are not disabled. Impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job for which they are being considered.

According to Professor Charles Ngwena,<sup>12</sup> the legal construction of disability under both Acts, (the Employment Equity Act and the UK 1995 Disability Discrimination Act) appear to have been primarily influenced by medical model as opposed to a social model of disability where the focus is a functional limitation that is physically or mentally based and is medically recognized. According to the above respected author, both definitions of the mentioned Acts are strikingly similar under the Employment Equity Act (EEA) and the Disability Discrimination Act, (DDA) where disability is conceived as a physical or mental impairment, which has a long-term and substantial adverse effect on the functional impairment. The amendments of the former *UK Disability Discrimination Act (DDA)*,<sup>13</sup> suggest a move towards a generous accommodation with the social model of disability. In terms of Chapter 13 Section 18 of the UK DDA Amendments Act, a person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person.

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<sup>12</sup> See fn 8 above.

<sup>13</sup> Act of (2005)



The greatest legal test of the definition of disability is reflected in *Goodwin v Patent Office*,<sup>14</sup> where the Employment Appeal Tribunal provided a useful framework for determining whether a person falls within the protected group. In the context of the Disability Discrimination Act, the legal questions are,

- Whether the complainant has an impairment which is either physical or mental?
- Whether the impairment adversely affects the complainant's ability to carry out normal day-to-day activities?
- Whether the adverse effect is substantial and
- Whether the adverse effect is long-term. In the case of Employment Equity Act (1998) the legal test of the above-stated case will apply in line with the principles provided to define disability in section 1 of the Act.

Apart from adopting the medical model meaning of disability, Australia seems to have also, improved a lot by supplementing the meaning that suits the social model. A clear persuasive example is found in Part 1 Preliminary 4 of the Australian Disability Discrimination Act (DDA),<sup>15</sup> where the interpretation also includes disability that presently exists, or previously existed but no longer exists, or may exist in future, or is imputed to a person.

Sounding to be slightly different from Australia's usage of words in defining disability, the United States of America (USA) also uses the same approach in determining the attributes and requirements of the definition. For example, In terms of section 12102 of the *Americans with Disabilities Act (ADA)*,<sup>16</sup> an individual is considered to have a "disability" if she/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Of utmost importance, is the recent new law which broadens the definition of disability. In terms of the recent *Americans with Disabilities Act Amendment Act*

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<sup>14</sup> (IRLR4 EAT par42)

<sup>15</sup> 135 of (1992) as Amended

<sup>16</sup> Act of (1992)

(*ADAAA*),<sup>17</sup> an impairment that is “episodic or in remission” may be a disability, if it would substantially limit a major life activity when active. The new US legislation overrules Supreme Court’s decision in the case of *Toyota Motor Mfg., Ky., Inc. v. Williams*,<sup>18</sup> where the court held that impairment’s impact must be permanent or long term.

Comparing the approaches of the above-mentioned countries, one will realise that there is a recent common preference in accommodating the social model in policies, codes and pieces of legislations. Notwithstanding the usage of a medical model, the aforesaid countries are now sensitised about the importance of broadening the definition of disability to also include those people who are not yet considered as having disability due to previous stereotypical wrongful medical findings. When one continues to read the subsequent chapters, he/she will realise how South Africa has tackled unfair discrimination on the ground of disability with special reference to sugar diabetic insulin-dependent and HIV/AIDS patients.

### 1.3 AIM

The aim of this dissertation is to inspect, analyse compare, evaluate and provide meaningful conclusive solutions on the extent to which South African Labour Law protects employees with disabilities. Secondly, the study scrutinises various domestic, international and foreign jurisprudences where various legal tests have been applied on the employment of people with disabilities. Meanwhile South Africa is a recognised member of the international community, It is very much important to study the manner in which international legal instruments and foreign law brought remarkable social, economic, and political developments in this new democratic dispensation. I have therefore, decided to write this interesting dissertation with the full passion of exploring legal aspects that embrace the wellbeing of people with disabilities in the workplace. The largest area of

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<sup>17</sup> 25 September (2008)

<sup>18</sup> 534 U.S. 184 (2002)



interest is to discuss the working conditions which people of this historically disadvantaged group experience before, during and after employment. The question of how employers respond to the needs of people with disabilities will also be considered in this dissertation.

#### **1.4 INVESTIGATIONS**

The greatest investigation in this field of study is to find more about the relevance of South African Labour Law in protecting the people with disabilities. The essence of writing this dissertation is also informed by a serious outcry from the members of the designated group in question, who feel that they have for a long time, been isolated from being part of the decision-making body in as far as the domestic and international issues are concerned. Viewing this in a serious light, investigation will also show whether, people understand the laws that protect their rights and also to find out about the state institutions that safe-guard their rights as legitimate citizens of the Republic of South Africa. State institutions include the judiciary which develops, promotes and defends the rights of all citizens of South Africa including people with disabilities.

It is within the Constitution and other legal instruments where equality, dignity and freedom of this vital group of society are fully enshrined. As required by the Constitution, the courts should act independently without favour, fear or prejudice. The subsequent chapters will reflect on pieces of legislation and decided cases which prohibit forms of discrimination against people with disabilities. Another investigation will be based on the role played by the civil society in protecting people with disabilities. As stated earlier, readers should bear in mind that this category of people has for a long time been faced by social, economic, political and cultural barriers which limited their role in the affairs of our society. Ignorance, discrimination and stigmatisation have been the most outstanding symptoms that affected people with disabilities. Legal protection cannot be realised unless organisations of people with disabilities participate in decision-making process. The famous slogan: “Nothing about us without us”, suggests a clear message that the people become part of the agenda in respect of everything which affects their legal, social, educational, political, and economic status. In the later chapters much will be reflected with regard to the role that can be played by these organizations in the transformation of the rights of our people.

## **1.5 LITERATURE REVIEW (OVERVIEN**

Literature is one of the important sources for a good research. It seeks to enlighten the society about day-to-day developments that occur across the social, economic, political and cultural spheres. Various authors, both domestically and internationally, extensively wrote about the concept of disability, exploring its nature, barriers encountered by people with disabilities and tried to provide possible solutions towards treating people in question with inherent dignity which is legally protected. It is with greatest alertness to note that the medical and social model has been the centre of the debate in defining disability. The two models have even created lot of arguments among the lawyers and legal scholars about the suitable terminology to be used in defining people who are disabled. It is against this background where various authors such as: Dupper O et al, Hendricks, Christianson M, Bosch S and Pretorius et al, will be analysed on how they did influence the legal protection of this important designated group. The exciting discussions of these law authors are found in Chapter 3, 4, 5 and 6 of this dissertation.

## **1.6 WORKPLAN**

This dissertation comprises the following chapters.

### **1.6.1 CHAPTER 1: INTRODUCTION**

Readers are introduced to: barriers that affect the development of people with disabilities, the definition of disability, aim of the dissertation, the expected findings, literature and the work plan.



## 1.6.2 CHAPTER 2: THE LEGISLATIVE FRAMEW

It discusses the variety of domestic and international legal instruments that have been developed to protect people with disabilities.

## 1.6.3 CHAPTER 3: PROHIBITION OF DISCRIMINATION ON PEOPLE WITH DISABILITIES.

In this Chapter, readers will be exposed to the discussion of the concept of discrimination and explore how does it impact on people with disabilities. Secondly, legal cases, Articles and legislations that protect people with disabilities will be considered. On the other hand, if an element of discrimination is realised, is it considered as fair or unfair? If it is fair, which procedure must be followed to determine its fairness? The Chapter includes discussion on medical testing which tends to be the bone of contention among employees, employers and other stakeholders in determining the criteria to be used when conducting such tests.

## 1.6.4 CHAPTER 4: INCAPACITY ARISING FROM ILL-HEALTH.

Various legal sources in finding out more about incapacity arising on ill-health will be considered. The legal test to be considered is whether a person can be denied employment based on ill-health. Discussion will also look at the alternative ways in which those persons can be rehabilitated if they are found to be incapable of doing the job

## 1.6.5 CHAPTERS: AFFIRMATIVE ACTION

The concept of Affirmative Action, its purpose, statutory framework, and critical analysis will be discussed. Readers will also learn how the concept relates to disability and pieces of legislation which regulate its implementation.

#### 1.6.6 CHAPTER 6: REASONABLE ACCOMMODATION

This Chapter will look at the concept and measures to be taken by employers in accommodating employees with disabilities at workplaces. Various legal sources and relevant pieces of legislation will be discussed.

#### 1.6.7 CHAPTER 7: CONCLUSION

In This Chapter, the author will outline various factors based on his findings as guided by various sources of law and also suggest possible ways of ensuring legal protection for people with disabilities. The role played by various sectors of society in respect of rights of people with disabilities will also be reflected.

## 2. CHAPTER 2: LEGISLATIVE FRAMEWORK

This Chapter focuses on the historical development of the legislative framework that led to the protection of people with disabilities. As part of the world countries, South Africa was colonised by Britain. During the first and second world war, all former South African white generals (also assisted by some of the black soldiers) fought to get the sovereignty of South Africa from its coloniser. To get a better understanding of this historical development, South Africa's legislative development and the international legal instruments will respectively be considered.

### 2.1 SOUTH AFRICA'S LEGISLATIVE DEVELOPMENT

After the National Party took over in 1948, many malpractices that oppressed the blacks, women and people with disabilities were exercised. The old Parliament only recognised the white minority rule as the best alternative for a strong government. These groups were deprived of social, economic, political and cultural opportunities to empower themselves. People with Disabilities were subjected to welfare services, confined to lower posts such as switchboard operation, needling, cleaning, and other inferior jobs.

#### 2.1.1 COMPENSATION AND SAFETY

The South African Parliament passed various pieces of legislation that dealt with compensation and safety. *The Workmen's Compensation Act*,<sup>19</sup> was introduced to regulate the compensatory conditions for those employees who became disabled due to injuries occurring on duty. In terms of section 1 of the Act, "disablement", means disablement for employment or immanent injury or serious disfigurement. The Act outlines various conditions to be complied with. For Example, in terms of this Act, no periodical payments shall be made in respect of the first three days of disablement which

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<sup>19</sup> Act 30 of 1941



lasts for less than two weeks. if the accident is attributable to the serious and willful misconduct of the workman, no compensation shall be payable under this Act, unless the accident results in serious disablement, or the workman dies in consequence thereof leaving a dependant wholly dependent upon him. the employer individually liable, may further refuse to pay the cost of medical aid, or such portion thereof as the commissioner may determine. The Compensation for Occupational Injuries and Diseases Act which replaced the Workmen’s Compensation Act, shares certain similarities in respect of the conditions under which one may not benefit any awarding of compensation in the case of willful misconduct. In terms of Chapter IV section 22 Of COIDA,<sup>20</sup> if an employee is involved in an accident resulting in his disablement or death, such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act. No periodical payments shall be made in respect of temporary total disablement or temporary partial disablement which lasts for three days or less.

(A) If an accident is attributable to the serious and willful misconduct of the employee, no compensation shall be payable in terms of this Act unless:

- i. the accident results in serious disablement, or the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.

Realising that lack of proper safety was a nightmare at various workplaces, the Parliament of the Republic of South Africa introduced the *Occupational Health and Safety Act (OHSA)*,<sup>21</sup> which seeks to address the health and safety of persons at work. Such provision is directed to health and safety of persons in connection with the use of plant and machinery. The Act also assists in protection of persons other than persons at work against hazards to health and safety arising out of, or in connection with the activities of persons at work. OHSA gives provisions to establish an advisory council for occupational health and safety and other related matters. In nutshell, people

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<sup>20</sup> Act 130 of (1993)

<sup>21</sup> Act 85 of (1993)



should be alert of any dangerous weapons and should always wear protective clothes to avoid hazardous articles that may cause disablement or death.

### 2.1.2 FREEDOM AND RIGHTS CHARTERS

Finding a long-walked freedom has not been an easy task in South Africa. Because of victimisation by the previous oppressive governments, many people lost their jobs due to expulsion, brutal murders and disability. The year of 1955 became the most turning point when all various people drawn from different churches, political parties and other community-based organisations gathered at Kliptown where they adopted the *Freedom Charter*,<sup>22</sup> and said: “We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people”. This world standardised legal document ensured future protection of people with disabilities including other special groups by making them to be state’s citizens. A clear example which is given in one of the points of this Charter states: “The aged, the orphans, the disabled and the sick shall be cared for by the state”. It is through this living document that South Africa got its democracy today. This Charter has without any doubt, laid down a clear foundation of our fundamental human rights which gave birth to our current Constitution. In the early 1990s, the Disability Rights Unit of South African Lawyers for Human Rights adopted the Disability Rights Charter,<sup>23</sup> with the purpose of creating awareness about the rights of people with disabilities. Article 5 of this Charter states: ”All disabled people shall have the right to employment in the open labour market and appropriate measures, as the quota systems and training programmes shall be implemented by government and employers to ensure that opportunities are created in the workplace which allow the full enjoyment of this right”. The aforesaid Charter brought a profound influence to many people with disabilities who began to form Associations to fight for their human rights.

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<sup>22</sup>26 June (1955)

<sup>23</sup>(1991)

### 2.1.3 CONSTITUTIONAL DEVELOPMENT AND EQUITY

After the unbanning of political organisations in February 1990, the then National Party-led government opened a process of peaceful negotiations that involved all the people across the colour and gender lines. Those negotiations aimed at normalising the politically ungovernable situation and also making sure that South Africa was transformed from the old segregatory order to a true democratic state. To calm the situation, the Convention for a Democratic South Africa (CODESA) was formed with the purpose of leveling the plane field from an apartheid era to the democratic dispensation. To see the realisation of these goals, the Parliament passed the Interim Constitution<sup>24</sup> which protects all people including people with disabilities.

Section 8 (1) provides that every person shall have the right to equality before the law and to equal protection of the law. In other words, the Interim Constitution formed the basis of other pieces of legislation that prohibits unfair discrimination on specified grounds. The concept of discrimination is extensively detailed in Chapter 3 of this Dissertation. In 1996, the first national democratic government of the Republic of South Africa promulgated the final Constitution (herein after, referred to, as the Constitution<sup>25</sup> which enshrines the Bill of Rights that protects all persons and organs of state. Section 2 of the Constitution provides that this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Of the greatest interest, is the equal protection of all persons in terms of section 9 of the final Constitution which humanly includes employees with disabilities as part of Democratic nation. Section 7 of the Constitution of the Republic of South Africa states as follows: “This Bill of Rights is a cornerstone of democracy in South Africa.” It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”.

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<sup>24</sup> *Act 200 of (1993)*

<sup>25</sup> *Act 108 of (1996)*



The status of people with disabilities is categorically mentioned amongst the listed grounds found in section 9 of the final Constitution. General assurance is given to this designated group in the enjoyment of rights provided in the Constitution. Section 9 (1) of the Final Constitution provides that everyone is equal before the law and has the right and equal protection and benefit of the law.

This subsection affords formal equality to every person with no substantiation. According to section 9 (2) of the Constitution, equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. As a result, the South African Parliament introduced Affirmative Action as a policy of advancing the designated group that includes employees with disabilities to gain equal opportunities accessed by able bodied employees. For these reasons, the South African Parliament promulgated the EEA with the aim of addressing the imbalances of the apartheid system by promoting equity in the workplaces. The Code of Good Practice on the Employment of People with Disabilities and the Technical Assistance Guidelines on the Employment of People with Disabilities derive from this piece of legislation. To show how far domestic and international pieces of legislations, case law, and other legal sources have contributed in influencing employment of people with disabilities, readers are further led to interesting discussions of this Dissertation below.

To give effect to section 9 of the final Constitution, Parliament passed the *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)*,<sup>26</sup> so as to prevent and prohibit unfair harassment, promote equality, eliminate unfair discrimination, prevent and prohibit hate speech and provide for matters connected therewith. PEPUDA gives provision for the establishment of Equality Courts that safeguard the interests of all citizens including people with disabilities. According to Chapter 4 section 16 (1) of this

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<sup>26</sup>*Act 4 of (2000) TO give effect to the right to administrative Action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in Section 33 of the Constitution of the Republic of South Africa of 1996, the Parliament promulgated*

Act, every Magistrate's Court and every High Court is Equality Court for the area of its jurisdiction.

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa of 1996, Parliament enacted the *Promotion of Administrative Justice Act (PAJA)*,<sup>27</sup> to deal extensively with matters connected with administration of justice. PAJA ensures that all public officials do not act beyond their authority in implementation of administrative actions. In this case, people with disabilities are also protected as equal citizens of state. The Act therefore, prohibits any biasness and irregularity on the part of the administrative officer when taking any action against an individual or an organ of state.

#### 2.1.4 THE PUBLIC SERVICE

In as far as transformation of the Public Service is concerned, the new Government of National Unity led by the African National Congress (ANC) promulgated the *Public Service Act (PSA)*,<sup>28</sup> to provide for the organisation and administration of the Public Service of the Republic. This includes the regulation of the conditions of the employment, terms of office, discipline, retirement and discharge of members of the Public Services, and matters connected therewith. The Act itself, ensures equity on the designated groups when coming to appointments and filling of posts. A good example is provided in Chapter 4 section 11 (2) of the Act, where representation in the Public Service shall include disability. According to the Act, evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past and to achieve the Public Service broadly representative of all the South African people. In 2008, the government passed another *Public Service Regulation*,<sup>29</sup> so as to promote much efficiency and effectiveness in the Public Sector. The Regulation in

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<sup>27</sup> Act 3 of (2000)

<sup>28</sup> Proclamation 103 of (1994)

<sup>29</sup> 1 April (2008)



question seems to have been strongly influenced by the EEA in terms of the fundamental values that dictate the implementation of Affirmative Action programmes in all levels of government.

Bearing in mind the question of appointments, recruitments and selections, Part 7 of this Regulation provides that an executing authority shall determine composite requirements for employment in any post on the basis of the inherent requirements of the job. An executing authority shall:

- A. record the inherent requirements of a job,
- B. ensure that the requirements for employment do not discriminate against persons historically disadvantaged and
- C. Comply with any statutory requirement for the appointment of employees.

As provided by the above-mentioned Act, people with disabilities are part of the historically disadvantaged groups who suffered as a result of isolation by majority of members of society. Because of this problem, they have for many years, generally been perceived as the objects of pity always ready for begging. In many instances, this created fear and confusion among members of this designated group by not regarding themselves as valuable citizens of our country.

#### 2.1.5 CONDITIONS OF EMPLOYMENT

After the enactment of the final Constitution and other new statutes, the South African Parliament passed the *Basic Conditions of Employment Act (BCEA)*,<sup>30</sup> to give effect to the right to fair labour practices referred to in section 23(1) of 1996 Constitution by: establishing and making provision for the regulation of basic conditions of employment, and thereby to comply with the obligations of the Republic as a member state of the International Labour Organization and to provide for matters connected therewith. The

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<sup>30</sup> *Act 75 of (1997)*

Act provides for remunerations, leave, and other employment benefits. The Act binds people with disabilities who are part of the workforce. To make the working environment conducive for this special group, Parliament developed other statutes such as the Employment Equity Act and others which provide reasonable accommodation for them.

#### 2.1.6 LABOUR RELATIONS

To bring democratic changes in the labour sector, the new South African Parliament enacted the *Labour Relations Act (LRA)*,<sup>31</sup> which replaced the LRA No 28 of 1956. This 1995 LRA was passed to change the law governing labour relations and, for that purpose: to give effect to section 23 of the Constitution, to regulate the organizational rights of trade unions, to promote and facilitate collective bargaining at the workplace and at sectoral level including other related matters. Section 187 (1) (f) of the LRA prohibits unfair discrimination on the basis of arbitrary grounds such as gender, race as well as disability. More information about the relevant section concerning prohibition of unfair discrimination is discussed in Chapter 3 of this Dissertation.

#### 2.1.7 WHITE PAPERS ON DISABILITY

##### 2.1.7.1 THE WHITE PAPER FOR SOCIAL WELFARE

This White Paper<sup>32</sup> was published by the Ministry for Social Welfare and Population Development with the purpose of researching on the problems that affect the vulnerable groups such as people with disabilities in the private and public sectors. In actual fact, the Paper foresees the restructuring of services and social welfare programmes in both the public and private sectors. It acknowledges the discrimination suffered by people

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<sup>31</sup> Act 66 of (1995)

<sup>32</sup> August (1997) <http://www.info.gov.zawhitepapers/1997/disability.htm>



with disabilities over the years. According to the social security findings, the organizations for people with disabilities have generally been excluded from social and economic policy formulation. Secondly, there has been little emphasis on training and rehabilitation to integrate the disabled into the economy. In 1997, it was found that out of the total South African population, 1,6% received a disability grant, which was then, much lower than the percentage of disabled people. The policy has simply been one of passive income maintenance through grants. The means test has penalised and demotivated disabled people who have private savings, or who took up work which lasted only temporarily.

Although several problems have been pointed out in the above-mentioned Paper, one should positively appreciate the latest development already made in addressing the social problems encountered by people with disabilities and other historically disadvantaged groups. The government of South Africa has presently managed to spend larger portion of its medium-term budget to pay more than 12 million people. This includes; children, older persons and people with disabilities. On the other hand, one should observe the Government's role of promulgating various pieces of legislation which assist to alleviate poverty and reduction of crime.

#### 2.1.7.2 WHITE PAPER ON AN INTEGRATED NATIONAL DISABILITY STRATEGY

- A. The objectives of this white paper<sup>33</sup> include:
- B. The facilitation of the integration of disability issues into government's developmental strategies, planning and programmes.
- C. The development of an integrated management system for co-ordination of disability planning, implementation and monitoring in the various line functions at all spheres of government.
- D. The development capacity building strategies that will enhance Government's ability at all levels to implement recommendations contained in this White Paper. According to this White Paper, disability is now recognised as a human right and development issue. Not merely just as a welfare issue. Key issues addressed in this

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<sup>33</sup> See fn 2 above

Paper include: prevention, health care, public education, employment, human resource development and other issues. The Paper itself has raised strong feelings among various members of society to encourage Parliament to enact a National Policy that will specifically regulate the rights of people with disabilities.

### 2.1.7.3 EDUCATION WHITE PAPER NO 6

According to this Paper,<sup>34</sup> special needs education is a sector where the ravages of apartheid remain most evident. The segregation of learners on the basis of race was extended to incorporate segregation on the basis of disability. Learners with disabilities experienced difficulties in gaining access to education. Special schools were few to absorb the majority of these special groups. As a result, a high rate of illiteracy increased among people with disabilities thereby forcing them to work in the lowest paying jobs. This Paper also encourages that people with disabilities be included in ordinary schools so that they get exposure to educational opportunities accessed by able-bodied learners. These efforts are currently succeeding as government ensures reasonable access in some of the public schools to enable people with disabilities to attend without any environmental barriers.

### 2.1.8 SKILLS DEVELOPMENT

To improve lack of skills, Parliament promulgated the *Skills Development Act (SDA)*,<sup>35</sup> to provide an institutional framework to devise and implement national, sector and workplace strategies, develop and improve the skills of the South African workforce, integrate those strategies within the National Qualifications Framework contemplated in the South African Qualifications Framework Authority Act 1995, provide for leaderships that lead to recognized occupational qualifications, provide for the financing of skills development by means of a levy-grant scheme and a National Skills Fund,

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<sup>34</sup> July(2001)<http://www.education.gpg.gov.za/Legislation/Education%20White%20paper%206.pdf>

<sup>35</sup> Act 97 of (1998)



provide for and regulate employment services. According to Chapter 2 section (1) (d), the SDA seeks to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education. In as far as composition of National Skills Authority is concerned, section 6 (2) (c) (II) of the Act gives a special provision for one person among the five voting members nominated by and appointed by the Minister to represent organisations of community and development, who must be a disabled person to represent the interests of people with disabilities.

## **2.2 *INTERNATIONAL JURISPRUDENCE***

International jurisprudence had a profound and credible influence in changing the South African Labour Law from its conservative nature to a democratic state. This legal battle started in the early 50s when the former South African Nationalist's government ignored the United Nation's (UN) call to abolish its apartheid practices as they were not in line with International Law. Such resistance against international transformation forced the UN to lift up socio-economic sanctions against South Africa. Because of this international pressure, the South African government resumed the multi-lateral negotiations which ultimately forced the 1994 ANC Newly-Elected Democratic government to change their laws to be in line with international ones.

The current Constitution,<sup>36</sup> is one of the pieces of legislation that enshrine the principles of International Law. Section 39 (1) (b) read together with Section 233, provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Furthermore, South Africa has discretion to enter into an international agreement with any of the member states. The ratification of a Treaty itself, gives a clear right for South Africa in fulfilling certain principles in its pieces of legislation. Some of these below-mentioned Treaties played a major role in protecting the rights of people with disabilities.

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<sup>36</sup> See fn 21 above

### 2.2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

This is one of the most *fundamental international legal instruments adopted by the United Nations*,<sup>37</sup> and it clearly shows the impact which the international law has over the national laws of its member states. Article 14 (1) of the Declaration provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This Declaration shares the same rights which are found in section 9 (1) and 34 of the South African Constitution. The legal protection of people with disabilities is implied in the two above-mentioned legal documents. As people, they have a right to inherent human dignity which is also provided in Section 10 of the South African Constitution.

### 2.2.2 INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)

Although the Covenant does not express disability in its content, by implication, it ensures recognition of their rights by emphasising the importance of providing socio-economic benefits which are reasonably available for every person. For instance, Article 6 (1) and (2) of the Covenant<sup>38</sup> provides that States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions

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<sup>37</sup>General Assembly resolution 2200a (xxi) of (16 December (1966) and entered into force on 23 march (1976) in accordance with article 49

<sup>38</sup>General Assembly resolution 2200A (XXI) of 16 December (1966) and entered into force on 3 January (1976) in accordance with Article 27



safeguarding fundamental political and economic freedoms to the individual. These socio-economic rights are also provided in section 22, 23 and 26 of the South African Constitution, the Skills Development Act, the BCEA, the LRA and other South African pieces of legislation.

### 2.2.3 WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS

Towards the end of 1960s, organizations of persons with disabilities started to formulate a new concept of disability. The new concept indicated the close connection between the limitation experienced by individuals with disabilities in terms of the design and structure of their environments and the attitude of the general population. To curb this situation, 3 December 1981 became the highest turning point in the whole history of the world as General Assembly of the United Nations (UN) adopted the World Programme of Action concerning Disabled Persons. The Programme,<sup>39</sup> provided a strong impetus of progress. It emphasised the right of persons with disabilities to the same opportunities as other citizens and to an equal share in the improvements in the living condition resulting from economic and social development. The Programme had vastly influenced the South African political situation as the Disabled People of South Africa (DPSA) began to advocate for the recognition of rights of people with disabilities in South Africa. This serious movement led to the launching of the 1991 Disability Rights Charter and the (INDS) which have been already indicated in our earlier discussions.

### 2.2.4 UNITED NATIONS DECADE FOR THE DISABLED

To review the implementation of the World Programme of Action concerning disabled Persons, a Decade of Disabled Persons<sup>40</sup> was held. It was suggested that a philosophy should be developed to indicate the priorities for action in the years ahead.

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<sup>39</sup> UN Resolution 37/52 of 3 December 1982

<sup>40</sup> *UN Conference at Stockholm in (1987).*

Consequently, the meeting recommended that the General Assembly convene a special conference to draft an international convention on elimination of all forms of discrimination against persons with disabilities. A draft outline of the Convention was prepared by Italy and presented at the General Assembly at its forty-second session. The resolutions of the said Conference assisted in the adoption of the latest UN Convention on the Rights of Persons with Disabilities which is discussed below.

#### 2.2.5 STANDARD RULES

At its 48th session, the United Nations General Assembly adopted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.<sup>41</sup> The purpose of these rules ensures that people with disabilities as members of the society exercise same rights and obligations as others. In as far as employment is concerned; Rule 7 provides that states should recognise the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. This rule emphasises that both rural and urban areas must have equal opportunities for productive and gainful employment in the labour market. This means that laws and regulations in the employment field must not discriminate against people with disabilities and must not raise obstacles in their employment. States should actively support the integration of people with disabilities into open employment. As alluded to earlier, these UN rules brought a profound change in South African Labour Law where people with disabilities are legally protected.

#### 2.2.6 THE INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTION

Prior to the adoption of the above-mentioned Standard Rules, the International Labour Organisation (ILO) adopted Convention No. 111<sup>42</sup> which was concerning discrimination

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<sup>41</sup> *UN General Assembly 48<sup>1</sup> session 20 December (1993)*

<sup>42</sup> *The General Conference of the International Labour Organization forty-second Session 25 June 1958*



in respect of employment and occupation. According to article 2, each member for whom this convention is in force, undertakes to declare and pursue national policy designed to promote equality of opportunities and treatment in respect of employment and occupation, with a view of eliminating any discrimination. This Convention took the lead in the change of South African Labour Law position. To ensure employment of people with disabilities, The Convention prohibits all forms of employment discrimination against them. It calls on states to open up opportunities in mainstream workplaces to job seekers with disabilities in contrast to past practice, in which large numbers worked in sheltered workshops, in conditions not covered by the directives of the employers. To facilitate this, the Convention promotes the access of disabled persons to freely chosen work, general technical and vocational guidance programmes, placement services and vocational and continuing training. It will help disabled people find and keep jobs by promoting improved accessibility of workplaces, calling for improved transport and access to information in written and electronic form.

#### 2.2.7 UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In as much as the world organisations strove for a speedy democratic Change, *the United Nations introduced a Convention on the Rights of Persons with Disabilities*,<sup>43</sup> which seeks to improve their standard of living by opening equal opportunities enjoyed by able bodied persons. Adopted and ratified on the 30th of November 2007, the Convention sets out clear guidelines which regulate the employment of people with disabilities. Article 27 provides the following:

1. “States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.” States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a

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<sup>43</sup> 3 May (2008)

disability during the course of employment, by taking appropriate steps, including through legislation:

A. prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

B. protect the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

C. ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

D. enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

E. promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, maintaining and returning to employment.

The Convention shares the similar provisions currently embodied in our EEA, the Constitution the Code and other pieces of South African legislation. In addition, the Convention also provides a principle of non-discrimination on people who are disabled. The South African government should be applauded for having ratified such a highly recognised document. To strengthen this legal protection, South Africa has a special Representative who monitors and reports about implementation of the New Convention in our country. To cope with its implementation, all Local, Provincial and National spheres of our government should work in unity by conducting of research and launching of Awareness Campaigns so as to sensitise the whole world about the protection of people with disabilities.



### 3. CHAPTER 3: PROHIBITION OF UNFAIR DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES

As outlined earlier, the Chapter critically explores the concept of discrimination and sees how it affects people with disabilities. Various pieces of legislation, court judgments and law authors will be analysed in this Chapter. One of the most difficult questions is, once the element of discrimination is established, is the discrimination fair or unfair? If unfair discrimination is realised, what legal procedure should be followed?

On the other hand, readers of this dissertation will also gain knowledge in respect of the grounds where discrimination is justified. The issue of medical testing has currently raised many debates among lawyers, medical experts, employers, employees and other members of society as to what criteria should be used in dealing with medical evidence. As a matter of interest, readers will learn about various pieces of legislation, articles and various court judgments where the problem of medical testing was adjudicated.

#### 3.1 CRITICAL OVERVIEW OF THE CONCEPT OF DISCRIMINATION

Discrimination remains the greatest barrier that hampers the development of people with disabilities. This idea is supported by Reyneke JM and Oosthuizen H<sup>44</sup> who question the reality of the rights of people with disabilities in South Africa. According to the two above-mentioned authors, the rights of disabled persons have for a long time been ignored. Not only in South Africa, but also in the rest of the world. There are many disabled persons who can participate on an equal level with able-bodied persons, but on the other hand, there are many disabled persons, who are unable to do so due to the nature and severity of their disabilities. Discrimination against disabled persons leads to exclusion from functioning in a normal community and the denial of the right to function freely in society.

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<sup>44</sup> "Are the rights of the disabled a reality in South Africa", *Journal Juridical Science*, 2003 volume 28 (2) page 91-108.

<http://www.ufs.ac.za/faculties/documents/journal/1/1/7/26/04Reyneke&Oosthuizen.pdf>

In as far as the term, “Discrimination” is concerned, Hendricks A<sup>45</sup> points out, that in both common language and legal documents, the term differentiation, is often used as a synonym for discrimination. Similarly, equality and sameness are frequently used interchangeably. This reflects a widespread misunderstanding about the two concepts. Discrimination may occur as a result of both differentiation and a lack of differentiation. In the case of disabled people, this implies that the inadmissibility of making a distinction between able-bodied and disabled persons eventually depends on the relevance of using disability as a criterion to distinguish between groups of persons.

When one continues to place a critical eye in reading the other sections below, one experiences that this discrimination may be fair or unfair. In as far as differentiation is concerned, *Dupper et al.*, state: “At the heart of unfair discrimination lies differentiation<sup>46</sup>”. Differentiation, in the employment context, simply means that an employer treats employees or applicants for employment differently or the employer uses policies or practices that exclude certain groups of employees. Differential treatment, for example, could exist in the fact that one applicant for a job is appointed, the others not; one employee is promoted, others not. Revisiting the concept of discrimination, Dupper et al, raise a different approach from Hendricks A, in interpreting this concept. The aforesaid authors point out that one could not simply equate differentiation with discrimination. Differentiation is a neutral term, in the sense that the mere fact of differentiation does not necessarily mean that differentiation took place for a negative reason. By contrast, discrimination has a decidedly negative connotation. Differentiation only becomes discrimination once that differentiation takes place for unacceptable reasons. These unacceptable reasons are, in the first instance, all the grounds of discrimination which are listed in section 6 (1) of the EEA.

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<sup>45</sup> “The Evolution of the European perspective on disability legislation”, *European Journal of Health Legislation 1994; (4) [in press]*

<sup>46</sup> *Essential Employment Discrimination Law first edition 2004 Juta Co Page 31-39*



### 3.1.1 DIRECT AND INDIRECT DISCRIMINATION

Many countries have adopted various approaches in dealing with the concept of direct and indirect discrimination. In the case of South Africa, there is no specific meaning which is given in the domestic pieces of legislation. For instance, According to subsection (2) found in section 8 of the South African Interim Constitution, no person shall be unfairly discriminated against, directly or indirectly, on one or more of the grounds including disability. The same phrase is found in section 6(1) of the EEA. Apart from the Interim Constitution, the final Constitution shares the same breath with regard to the usage of the phrase, “directly or indirectly”. *Section 9 (3) of the final Constitution*<sup>47</sup> provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The EEA, section 187 (1) (f) of the 1995 LRA, PEPUDA and other pieces of legislation bear the same testimony of this phrase. Readers should bear in mind that subsection 3 relates with the state and its organs, while subsection 4 is concerned with the natural person as well as the juristic person. The former focuses on a vertical relationship, while the latter concerns itself with a horizontal one.

### 3.1.2 JUSTIFICATION OF DISCRIMINATION

While exploring all possible forms of discrimination, readers should note that discrimination may be justified on certain specified grounds which are provided by our South African statutes and decided cases. Acknowledging the importance of section 9 (2) of the present South African Constitution, *Schedule 7 Item 2 (2) (b) of the LRA*<sup>48</sup> provides that an employer is not prevented from adopting or implementing employment policies and Practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination. This

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<sup>47</sup> See fn 21 above

<sup>48</sup> See fn 27 above

includes people with disabilities. According to Item 2 (2) (c), discrimination based on an inherent requirement of a job will not constitute unfair discrimination. The above- mentioned Schedule of the LRA has currently been replaced by section 6 (2) of the EEA.

*In Harksen V Lane No & Others,*<sup>49</sup> the Constitutional Court held that the establishment of a prima facie case on a listed ground should not be a demanding burden. Once proved that differentiation took place on a listed ground, then discrimination will have been established and the unfairness thereof presumed. To meet the Harksen's test, the causal connection between the differentiation and the listed ground must be established. Once the applicant has complied therewith, the burden of proof shifts with the respondent employer to justify the discriminatory practice. The employee must firstly identify the practice that constitutes disparate impact, and secondly present statistical proof of such impact. Disparate impacts indicate that discrimination arises from rules and practices that are facially neutral but which disadvantage certain groups.

#### 3.1.2.1 MEDICAL TESTING

Medical testing has turned to be a court's legal ground where applicants and respondents exchanged pleadings because of wrongful exclusions of employees and because of insufficient medical evidence. This tendency has caused many employers to pay high legal costs as a result of losing their legal cases in court. Despite these disadvantages, one should sometimes appreciate the usage of medical testing which is in line with employee's health status, where such testing criteria are inevitable. In terms of *section 8 of the Employment Equity Act,*<sup>50</sup> medical testing of an employee is prohibited, unless legislation permits or requires the testing, or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. In terms of the above mentioned Act, medical testing must be relevant and appropriate to the kind of work for which the applicant or employee is being tested. Employers should establish that such

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<sup>49</sup> 1998 (1) SA 300 (CC)

<sup>50</sup> See the EEA of fn 10 above.



medical tests do not unfairly exclude employees and are not biased in how or when they are applied, assessed or interpreted.

The tests to establish the health of an applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties. In the case of *Leonard v Southern Derbyshire Chamber of Commerce*<sup>51</sup> the complainant suffered from mental impairment within the meaning of Disability Discrimination Act. She had been dismissed on the grounds of incapacity. She alleged that she had been unlawfully discriminated against on the ground of disability. The tribunal had accepted that she had an impairment which was long-term. The question was, whether such impairment had substantial mental impairment. Prior to the date of dismissal there was evidence that the complainant's depression had been worsening and that in consequence her medication had been increasing. The tribunal concluded that her impairment did not have substantial effect on the ground that she was still able to cope with many activities like walking; and there was no medical evidence presented to the panel as to what effects depression would have had for medication. This meant that the complainant failed to convince the tribunal panel that there was sufficient medical evidence to prove existence of mental disability.

The same question of justification in respect of medical testing was done in *Imatu v City of Cape Town*,<sup>52</sup> where the second applicant, (Mr. Murdoch) was declared medically unsuitable for the position of a firefighter in the Department of Protection Services of the South Peninsula Municipality, (the respondent). Having been refused to get the position on the basis of being an insulin-dependent diabetic, Imatu (a union that acted on behalf of the second applicant), referred the dispute of unfair discrimination to the CCMA in terms of section 10 of the EEA for conciliation. After a Certificate of non-Resolution was issued, the dispute was further referred to the Labour Court for adjudication. After consideration of substantial medical evidence, the court held that the respondent had failed to prove that a blanket ban on diabetics was justifiable. The court

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<sup>51</sup> 2001,IRLR 19

<sup>52</sup> (2005) 14 LC



therefore, found that a blanket ban on the second applicant, who was in all respects a well-controlled diabetic, was unjustified and constituted unfair discrimination in terms of section 6 (1) of the EEA. Finally, the respondent (the employer) was ordered to second the second applicant to Fire and Emergency Services in the position of learner firefighter.

The similar decision was taken in *Hofmann v SA Airways*,<sup>53</sup> where *NGcobo J*<sup>54</sup>, held that employment practice of refusing to employ people as cabin attendants because they are living with HIV cannot be justified on medical grounds, and therefore, SAA's refusal to consider employing the appellant (Hofmann), because he was living with HIV was unfair.

The above-mentioned case laws show how prejudicial medical testing may be, if careful assessment is not properly done. Apart from dealing with justification, Imatu and Hofmann cases reflect a truthful picture in determining the concept of disability. For instance, in the case of Imatu, the refusal by the respondent in appointing Murdoch (the second applicant), was because of insulin diabetic dependence which would limit his physical ability to be a firefighter. Secondly, SAA's refusal to employ Hofman as a cabin attendant was based on its policies which excluded people with certain disabilities such as HIV/AIDS from serving in the same company as they would not meet the inherent requirements of the job.

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<sup>53</sup>(2000) ILJ 2357 (CC)

<sup>54</sup>(2000) ILJ 2368 (CC)

## 4. CHAPTER 4: INCAPACITY ARISING FROM ILL-HEALTH

### 4.1 GENERAL OVERVIEW

The concept of incapacity has turned to be a serious issue in the modern debates of various sections of our societies. In South African Labour Law, it has created a habit of mistrust among individual employees, trade unions, employers and the governments. The most problematic questions have always become:

- Whether an employer can simply dismiss an employee on the basis of incapacity due to ill-health?
- If the above-stated question is in the affirmative, what procedure should the employer follow before taking a decision to dismiss?
- Which material and legal evidence should the respective employer use in following the Steps of determining the issue of dismissal based on such incapacity?

### 4.2 CRITICAL ANALYSIS OF INCAPACITY

Having summarised the above-mentioned questions, the discussion in this Chapter, attempts to explore some of the answers by looking at various legal documents and legal cases with the main purpose of finding out the way in which South African Courts adjudicated on incapacity. According to Marylyn Christianson,<sup>55</sup> dismissals as a result of the employee's incapacity has long been the poor reasons for dismissal for misconduct and the dismissal based on the employer's operational requirements. According to the aforesaid author, incapacity received less attention. In *Edward Albert Howard v Fanus Meyer Boerdery Trust (ARB)*,<sup>56</sup> the issue to be decided was, whether the applicant's dismissal was substantively and procedurally fair? The applicant was employed by the respondent as a

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<sup>55</sup> *Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 years* "(2004) 25 *ILJ* 879 at 889

<sup>56</sup> Commissioner; Julia Cameron Case No ECPE307-03



Farm Manager. After falling ill in January 2003, he was dismissed for incapacity. 30 days period expired before the dispute could be scheduled for application. This meant that the applicant failed to lodge his complaint within the required statutory framework of the Labour Relation Act's provision. As a result, Certificate of non- Resolution was issued. The matter was then referred for arbitration. The evidence from the side of the respondent indicated that Mr. Howard was hospitalised in January 2003, and he had high blood pressure. The medical certificate issued on behalf of the respondent which was from Dr Potgieter indicated that the applicant was ill and that he was to receive a disability pension. The Commissioner found that the respondent had complied with all the substantive and procedural requirements. The application was therefore dismissed.

Given the fact that employers dismiss their employees on the grounds of incapacity, the law takes its course by giving guidelines which the employers should follow. In terms of *section 188 (1) of the LRA*,<sup>57</sup> a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity, or based on the employer's operational requirements. In *National Education Health and Allied Workers' Union ("NEHAWU") on behalf of Lucas and the Department of Health v CCMA*,<sup>58</sup> the Applicant had been employed as a general worker in the Nursing Department of the hospital operated by the Department of Health. After being injured on duty, she could no longer bend or lift heavy objects and was transferred to the Clerical Department where she was being assessed.

The other employers were unhappy that her work output was low and that she received special treatment. After an unsuccessful application for a more senior administrative post, her superintendent applied for her discharge for incapacity in terms of the Public Service Act 1994. The Department required that she be assessed by a specialist and by an occupational therapist. She was advised by her union and refused to be seen by the occupational therapist. Her contract of employment was terminated for incapacity due to ill

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<sup>57</sup> 66 of (1995)

<sup>58</sup> (Western Cape [2004] 25 ILJ 2091 (BCA))



health or injury. The Department's Code incorporated the Labour Relations Act Code of Good Practice and the employer purported to have complied with the terms of Items 10 and 11 thereof.

In determining the fairness of the dismissal the Arbitrator noted that the Code of Good Practice in the Employment Equity Act 55 of 1998 was far broader than the Labour Relations Act Code in respect of impairments that amounted to a disability. Where impairment amounted to a disability under the Employment Equity Act, the employee was entitled to reasonable accommodation. The Arbitrator adopted a purposive approach that the general objective of the statutory arrangements in both the LRA and the Employment Equity Act was to promote procedural and substantive fairness in relation to people with disabilities and to encourage employers to keep people with disabilities in employment if there is good reason to be accommodated. The Arbitrator was of the view that the general concept of fairness required an employer to consider whether a particular employee was a person with disabilities under the Employment Equity Act in determining whether there was a sufficient, valid and fair reason to terminate employment. Furthermore, the Arbitrator's view was that, even in circumstances where the employee had not specifically sought special treatment with reference to the Employment Equity Act and claimed the status of the person with a disability, the above facts ought to be taken into consideration. The Arbitrator made a point that disability status is not to be considered only as a weapon to claim special treatment under the Affirmative Action provisions in Chapter 2 of the Employment Equity Act, but that it should also be considered as a shield to protect the person who has a disability from being dismissed from employment for a reason related to that disability.

In this case it was common cause that the employee lived with incapacity of the ill health or injury within the meaning of Item 10 of the Labour Relations Code. After considering the evidence, the Arbitrator however found that she also fell within the definition of people with disabilities as defined in the Employment Equity Act. On perusal of the evidence it was found that the employer had attempted to accommodate the employee's disability in terms of section 10 of the Labour Relations Act, rather than as an employee with a disability in terms of the Employment Equity Act. The Arbitrator considered which procedure would have produced a

substantively fairer outcome for the Applicant and concluded that, had the parties followed the Employment Equity Act Code and the Technical Assistance Guidelines on the employment of people with disabilities at an early stage, they all would have informed themselves, worked together and identified possible accommodation.

Having considered the extent of the employer's duty to make reasonable accommodation for the employee, the Arbitrator found insufficient evidence that the employer had considered any reasonable accommodation in relation to this rule or the Nursing Department, but all in relation to a clerical job for which she was in any event not qualified. What this means is that more than only looking at alternatives the employer must also try and create a suitable role for the ill employee. What this award raises is that compliance with the Labour Relations Act Code may not be sufficient in instances where ill health leads to disability. The LRA Code requires employers to look for suitable alternatives, adapt the employee's current role where possible to accommodate the employee's circumstances with the general notion being that if the employer complied, the termination is viewed as being fair both substantively and procedurally.

Under the Employment Equity Act Code however and in particular item 11 which is a guideline on retaining people who became disabled during employment, employers are required to assess if the disability can be reasonably accommodated. The employer is enjoined to explore the possibility of alternative reduced work or flexible work arrangements. The technical assistance guidelines on the employment of people with disabilities has been published, and it requires the employer to engage in the various steps viz: clarification of work limitations, development of job modification and return to work options. This requires that there should be consultation with employees and that supervisors must feel comfortable and ensure that they understand the nature of the employee's work limitations and that both parties must have a stake in the success of any job modification and all return to work plans. What this entails is that the employer together with the affected employee need to look and investigate the ways of modifying the work environment and investigate whether or not there are any other ways in which the work can be done moving away from the traditional ways in which specific work had been done. It is submitted that this imposes a much more onerous duty and has the effect of broadening the employer's requirements



for fairness in circumstances of ill-health terminations. It is suggested that employers should familiarise themselves with the Employment Equity Act Code and indeed the Technical Assistance Guidelines when dealing with managing ill-health incapacity. It is also advised that even when the process has been followed to the letter, it is important to hold that last meeting to hear the employee before a notice of termination is given. This requirement is also applicable in our RSA Constitution.

This aforesaid statement is supported by Grogan J<sup>59</sup> as follows: “The principles applicable to the dismissal of employees for ordinary incapacity are reinforced by the Code of Good Conduct for the Treatment of Disabled Employees. This applies to all employees with clinically recognised impairments that are regarded as substantially limiting, but excluding sexual disorders, compulsive gambling, disorders relating to drug or alcohol abuse (unless the employee is undergoing a recognised treatment programme), pyromania and conventional mental characteristics and personality traits”. The dismissal of a person, who is disabled according to these criteria, could constitute an automatically unfair dismissal if the requirements of the Code are not complied with.

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<sup>59</sup> *workplace Law (2007) 9th edition Juta Co, paragraph 4.6.*



## 5. CHAPTER 5: AFFIRMATIVE ACTION

### 5.1 DEFINITION

Affirmative Action is defined by various authors in different ways. According to Pretorius et al,<sup>60</sup> Affirmative Action is defined as 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. On the other hand, Dupper et al,<sup>61</sup> state that, Affirmative Action is a measure, which is temporary to achieve a value (equality), which is more enduring. The mere fact that Affirmative Action is a temporary measure, does not find any accommodation in South African Labour Law. The former definition remains in favour of the current South African Labour Law which addresses Affirmative Action as a measure to ensure equitable representative workforce of designated employees who are historically disadvantaged to be reasonably accommodated by the designated employer. According to the case of *McInnes v Technikon Natal*,<sup>62</sup> designated employees include Indians, coloureds, women and disabled people. The aforesaid definition is also mentioned in section 1 of the EEA.

### 5.2 THE EMERGENCE AND PURPOSE OF AFFIRMATIVE ACTION

Before 1994, South Africa was led by an apartheid government which categorised people in terms of race culture and physical appearances. People with disabilities are the most vulnerable group that suffered because of inaccessibility in employment, health, education and other aspects of life. To address this adversarial situation, the first democratically elected Government of National Unity (GNU) introduced the *White Paper on Affirmative Action*<sup>63</sup> so as to eradicate the imbalances of the past by promoting the historically disadvantaged groups to all private and public sector positions for which they suitably qualified. The purpose of Affirmative Action includes achieving substantive equality by

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<sup>60</sup> *Employment Equity Law (2003) Butterworth.*

<sup>61</sup> *Essential Employment Discrimination Law 1st edition, 2004 Juta Co. Page 258.*

<sup>62</sup> (2000) 21 *ILJ* 1138 (LC).

<sup>63</sup> (1998).

enabling or assisting disadvantaged persons to acquire skills so that they can compete equally for jobs on a level plane field with those who do not have the disadvantage. The purpose is not simply to exempt or protect Affirmative Action programmes from challenge. It is also an interpretative aid that clarifies the full meaning of equal rights by promoting substantive equality.

To promote transformation, the new Parliament of South Africa promulgated various statutes and other legal instruments that govern various sections of our citizens. After 1994, the Department of Public Service and Administration published a *White Paper on the Transformation of the Public Service (WPTPS)*<sup>64</sup> which reiterated the importance of representativeness. It declared that one of the main foundations of a non-racist, non-sexist and democratic society was to legitimise the Public Service. The Paper recommended that within four years, all departmental establishments must have endeavored to be at least 50% blacks, 30% women and 2% minimum target of employment of people with disabilities at management level. In the same Paper, Affirmative Action itself was described as laws, programmes or activities designed to redress the past imbalances and to ameliorate the conditions of individuals and groups who have been disadvantaged on the grounds of race, colour, gender or disability. In December 2005, only 0,16% of people with disabilities were employed in the Public Service. To deal with this adversarial situation, the Parliament adopted the *Job Access Strategic Framework on the Recruitment, Employment and Retention of Persons with Disabilities in the Public Service*<sup>65</sup> so as to fast track 2% minimum target of employment of people with disabilities by 31 March 2010. The Disability Management Strategic Framework includes four pillars such as: enabling environment, equal opportunities, mainstreaming of disability and a free-barrier workplace for people with disabilities. It is unanimously agreed that the aforesaid Strategic Framework will bring a fundamental change in ensuring inclusion of people with disabilities in the Public Service.

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<sup>64</sup> (1995).

<sup>65</sup> 25 November (2008)



Readers should further remember that section 9 (2) of the Constitution obliges the state to take Affirmative Action measures to advance the historically disadvantaged groups. *Section 6(2) of the Employment Equity Act*<sup>66</sup> states that it is not unfair discrimination to take Affirmative Action measures consistent with the purposes of the Act. However, the Act provides little guidance on the legal standards for valid Affirmative Action. The vexing equality problems that are normally associated with the implementation of similar programmes are left to be resolved through judicial interpretation and application of the Act. The Act itself and all Affirmative Action measures taken must, however, comply with the Constitution. The same tone is backed by *section 14 (1) of PEPUDA*<sup>67</sup> which states that it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or members of such groups or categories of persons.

### 5.3 **CRITICAL ANALYSIS**

Affirmative Action Policy is tightly rounded by a negative and a positive side. For instance, various parties such as the Democratic Alliance and others criticise the government for using Affirmative Action in implementing its national programmes. These opposition parties regard Affirmative Action Policy as discrimination in reverse as it only benefits the blacks, women and people with disabilities even though they do not qualify for the job. On the other hand, the South African Government views Affirmative Action as a positive measure to be taken to eradicate the imbalances of the past discriminatory government. Evaluating the effectiveness of Affirmative Action, Bosch S<sup>68</sup>, states that Affirmative Action in the Constitution and supporting legislation, South African jurisprudence, similar to the American affirmative Action experience, has been and slow. While some critics argued that the inclusion of Affirmative Action would lead to a rush on the courts. This fear has not materialised. Strictly speaking, Affirmative Action is part of

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<sup>66</sup> See the Act of fn 10 above.

<sup>67</sup> See the Act of fn 26 above.

<sup>68</sup> university of Exter jcli web. "Restitution or distribution lesson on affirmative action from South African employment law"}. *Journal of current legal issues* 28 September 2007



equality which requires enormous support of various sectors of society. Its existence ensures equity in uplifting the opportunities for the designated groups to be on the same status with those who previously benefited due to racial discrimination. No doubt should be created about the Affirmative Action Policy for advancing people with disabilities to be in the same class with other beneficiaries. The main intention is to open smooth ways for the prevalence of social conditions which delayed development for the said special group to enjoy the civil, political and economic benefits which are currently enjoyed by able-bodied people.

#### 5.4 **IMPLEMENTATION OF AFFIRMATIVE ACTION**

The *Employment Equity Commission established in terms of section 28 of the EEA*,<sup>69</sup> submits an annual report to the Minister of Labour regarding the implementation of employment equity. This includes an analysis of the Employment Equity reports received by businesses. The *Business Day*<sup>70</sup> reported as followed: “At the outset, most South African businesses had adopted Affirmative Action schemes, but little had been known about their efficacy”. The *Department of Labour* noted, after its analysis of the first round of reports from businesses with more than 150 employees, that no significant developments could be reported<sup>71</sup>. The main reasons for this had been the failure of these businesses to provide the relevant information. The second round of reports from businesses with less than 150 employees, which had been due for 1 December 2000, had been analysed, but that report had not been made public. In 2001 the *Employment Equity Commissions*<sup>72</sup> published an extensive report which covered the period from 1999-2001. This report presents the data collected from 800 employers only. By May 2001 only 12 980 employers had reported to the registry. Of these, 4 980 reports had been insufficient or could not be used.

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<sup>69</sup> *Act 55 of (1998)*

<sup>70</sup> *20 April (2001)*

<sup>71</sup> *Department of labour (1999) report*

<sup>72</sup> *See fn 4 above.*

The most discouraging fact is to realise that many businesses failed to reach 2% target of the employment of people with disabilities. This shortcoming leaves no peaceful room for members of this designated group to enjoy their socio-economic rights. In practice, existing Affirmative Action programmes face considerable obstacles which require solid solution. Such solution should be done through the implementation of Affirmative Action measures which are provided in *Chapter 3 of the EEA*<sup>73</sup>. Acting in terms of: Section 16, 19, 20 and 21 of the Act, the designated employer should respectively consult, conduct an analysis, prepare an Employment Equity Plan (EEP) and report to the Director-General about progress made in monitoring implementation of the plan. A serious question to be answered is, are all designated employers meeting the said employment target of people with disabilities? The truthfulness of the answer can only be clear through findings of reliable statistics which should be provided by the Employment Equity Commission supported by other research-orientated institutions. These findings assist government in identifying areas which need a serious attention. Despite statistical information, government departments should ensure that all senior managers are well-trained on how to implement measures provided by the Act. Furthermore, the implementation of the Job Access Strategy should be included as one of the assessment tools of the Performance Management System (PMS). Failure by South African Government to implement Affirmative Action measures within the required period, may in itself, turn the democratic state to be a shameful child before the international communities. For these reasons, the South African government should urgently strategise on how to reach the 2% minimum target of employment of people with disabilities.

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<sup>73</sup>Act 55 of (1998)



## 6. CHAPTER 6: REASONABLE ACCOMMODATION

### 6.1 GENERAL OVERVIEW

The concept of reasonable accommodation has recently been placed on the centre stage as many countries try to develop their pieces of legislations so as to accommodate the needs of the designated groups including people with disabilities. Following the comparative study of the current approaches adopted by Australia, European Union, UK and the US; one will realise that South Africa developed the aforesaid concept from foreign law practices and pieces of legislations as guided by the national constitutional provisions. The question that arises is, whether all employers understand the importance of this concept. To clarify this position, the discussion of this Chapter takes a look at the way in which the concept is interpreted and illustrated.

#### 6.1.1 THE UNITED STATES OF AMERICA

The term, “reasonable accommodation” was originally employed in *United States’ Civil Rights Act*<sup>74</sup> which focus was on discrimination on the grounds of religious practice and disability. In the wake of the Civil Rights Act, substantial jurisprudence developed on the meaning of reasonable accommodation and the obligations of employers to provide reasonable accommodation. The concept was further extended to housing (Fair Housing Amendment Acts of 1988) and to the disability context, first in the 1973 Rehabilitation Act and subsequently in the 1990 Americans with Disabilities Act, which provides comprehensive federal civil rights protection for persons with disabilities. The *Americans with Disabilities Act* prohibits discrimination against persons with disabilities in employment, public accommodations, services provided by state and municipal governments, public and private transportation, and telecommunications. It defines discrimination, as it applies “to job application procedures, hiring, advancement, or discharge, employee compensation, job training, and other terms, conditions, and

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<sup>74</sup> (1968)



privileges of employment,” as including “not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.”<sup>75</sup>

### 6.1.2 AUSTRALIA

The term, “reasonable adjustment” is not expressly specified in Australia’s Disability Discrimination Act of 1992. Rather, the Act proscribes indirect discrimination which, under the terms of the Act, requires the removal of unreasonable requirements which disadvantage people with disabilities. Australian Human Rights and Equal Opportunity Commission is charged with interpreting the Disability Discrimination Act’s provisions. In interpreting paragraph 6 of that Act of indirect discrimination, it has concluded, that while no specific provision is made, the *Disability Discrimination Act* definitely requires employers to make reasonable adjustment<sup>76</sup>. However, this duty does not apply in the employment context where the provision of such services or facilities would impose an unjustifiable hardship on the employer, or which would be unreasonable.

### 6.1.3 EUROPEAN UNION

The European Union has issued the Directive which establishes a general framework for equal treatment in employment and occupation. Having been introduced at that time, the Directive required inter alia, that all Member States should have adopted disability nondiscrimination legislation by 2004. *Article 5* of the Directive stipulates: “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to

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<sup>75</sup> See ADA of fn 16 above.

<sup>76</sup> See DDA of (1992)

undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned<sup>77</sup>” The approach taken in the aforesaid Directive entails a combination of two approaches adopted in legislation at the national level prohibiting denial of reasonable accommodation. It is, on the one hand, a general norm applicable to employers. On the other hand it recognises that denial of reasonable accommodation, in itself, is a form of discrimination. Article 10 of the Directive clearly puts the burden of proof on the employer. It provides that member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

#### 6.1.4 UNITED KINGDOM

*Paragraph 6.1 of the United Kingdom's DDA*<sup>87</sup> legislates the duty of employers to make adjustments for people with disabilities. This duty applies where any arrangement or any physical feature of premises of employer places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. In such a case, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect. Subsection 3 of paragraph 6 specifies examples of steps an employer may have to take to comply with this duty. These include:

- making adjustment to premises,
- allocating some of the disabled person's duties to another person,

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<sup>77</sup> 2000/78/EC

<sup>78</sup> (1995)



- transferring him to fill an existing vacancy,
- altering his working hours,
- assigning him to a different place of work and so on. Significantly, a failure of an employer to comply with a paragraph 6 duty imposed on him in relation to a disabled person constitutes discrimination against the disabled person, unless the employer can show his failure to comply was justified.

### 6.1.5 SOUTH AFRICA

Following the discussion on the Employment Equity Act, *Pretorius et al*,<sup>79</sup> state that the duty of reasonable accommodation comprises of positive measures that ought to be taken by an employer to meet the special needs of job applicants or employees, who, by reason of disability, pregnancy, religion, or some other characteristic that is protected against unfair discrimination, cannot be adequately served by arrangements that are suitable for people who do not share these characteristics. *Section 15 (2) (c) of the Employment Equity Act*<sup>80</sup> explicitly refers to the duty of designated employers to make reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workplace. The *Act*<sup>81</sup> defines reasonable accommodation as any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment. Readers should note that the concept of reasonable accommodation does not only confine itself to employment. It applies to many aspects. For the purpose of specific relevance, this Chapter discusses this concept in the context of employment.

## 6.2 ***BARRIERS AT THE WORKPLACE***

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<sup>79</sup>*Employment Equity Law (August 2003) Butterworth CO.*

<sup>80</sup>Section 15 (2) (c) of the *EEA*

<sup>81</sup>*See the Act of fn 10 above.*

Continuing with their interesting discussion, Pretorius et al, illustrates the negative and the positive side of the treatment of reasonable accommodation. Though people with physical and mental disabilities share a common experience of discrimination, segregation and inequality of opportunity in the socio-economic sphere with other historically disadvantaged groups, they are, seemingly, the most disadvantaged group. They occupy a pitiable position on almost any indicator of socio-economic wellbeing, including employment. In the workplace, people with disabilities are confronted with two main hurdles. At one level, and in common with other historically stigmatised groups, such as black people and women. They must surmount ignorance, fear and prejudice on the part of employers and able-bodied workers whose views about disability are often rooted in stereotyped assumptions. Disability carries stigma. It tends to be perceived as equivalent to inability, irrespective of any actual capacity to perform the job at hand. Like the broader society, employers are inclined to be intolerant towards or prejudiced against disability. Empirical evidence has shown that if two people apply for a job and are equal in all characteristics, except in respect of disability in one of them, it is the person without disability who is likely to be hired. At this level, it is important to appreciate that disability on the part of the person discriminated against is not the reason for exclusion from the workplace, but rather the mere possession of a physical or mental characteristic that an employer regards as intolerable or offensive. At another level, however, people with disabilities face a unique hurdle on account of material physical or mental differences rather than prejudice on the part of employers. Unlike race or gender differences which are generally irrelevant to capacity to perform a job, real physical or mental differences related to disability are often relevant as they frequently result in functional impairment. People with disabilities face institutional and structural barriers that have been erected by employers on the assumption that every job applicant or employee is able-bodied and is thus able to see, hear, speak or climb stairs. For example, job descriptions, employers' expectations, business projections and the physical environment of the workplace often implicitly exclude people with disabilities. This happens when architectural barriers prevent a paraplegic who is wheelchair-bound from using a building or a blind person who depends on a guide dog and so on.



In some of the practical examples, people with disabilities are excluded from the collection list because some of the employers regard them as burdens that will make them to suffer heavy economic expenses. If they are employed at all, they tend to be assigned to lowly remunerated menial jobs, with little or no prospect of advancement. Education and training, which are so vital to the acquisition of knowledge and skills for employment, are often equally inaccessible to people with disabilities. Disability tends to verify long-standing structural inequalities in that those that, historically, have enjoyed better access to education and rehabilitation services tend also to have a better chance of overcoming barriers to employment. In this regard, it is significant that people with disabilities who are Indians or whites, are better equipped for employment than their African or coloured counterparts. Like elsewhere, the general picture in the South African workplace is one of prejudice towards and lack of accommodation for people with disabilities leading to substantially diminished employment opportunities and an abiding sense of marginalisation and alienation. It is paramount to ensure that the principles of nondiscrimination and equal and full enjoyment of all human rights and freedoms that are enshrined in the Bill of Rights are extended equally to all individuals, groups and minorities, including people with disabilities. Indeed, it is not insignificant that section 9 of the Constitution explicitly recognises disability as one of the grounds for which protection against unfair discrimination and Affirmative Action is provided. In the specific context of the workplace, the Employment Equity Act gives this recognition tangible expression by providing for the protection and promotion of equal opportunities for people with disabilities in two main ways. Firstly, the *Employment Equity Act*<sup>82</sup> explicitly proscribes unfair discrimination, inter alia, on the ground, of disability in respect of any employment policy or practice. Thus, discrimination on the ground of disability is presumed to be unfair unless an employer can prove otherwise. Secondly and even more significantly, the Employment Equity Act creates a special preferential statutory regime for regulating the employment opportunities of people with disabilities. People with disabilities, (who are people who their entry into, or advancement in, employment), constitute a designated group in the same manner as black people and women under the Employment Equity Act. As a designated group, they are entitled to a range of special significance for their rights.

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<sup>82</sup> See Section 6 (1) of the EEA.

People with disabilities impose a duty upon an employer to make reasonable accommodation. Section 15(2)(c) provides, inter alia, that affirmative action measures implemented by a designated employer must include 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. Though in the specific context of section 15, reasonable accommodation constitutes a crucial Affirmative Action obligation in respect of job applicants and employees with disabilities, it is important to note, as it was submitted in the introductory section, that the duty to make reasonable accommodation is not confined to section 15, but has wider application to unfair discrimination generally.

### 6.3 **STATUTORY FRAMEWORK**

As already mentioned in Chapter 1, readers should bear in mind that the Department of Labour introduced the *Code of Good Practice on the Employment of People with Disabilities in the Public Service*<sup>83</sup> which protects their needs at workplaces. The Code is intended to help employers and employees understand their rights and obligations promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work. The Code is intended to help create awareness of the contributions that people with disabilities can make and to encourage employers to fully use the skills of such persons. The Code is not an authoritative summary of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it. The Code should be read in conjunction with other relevant Codes of Good Practice issued by the Minister of Labour. The Code is intentionally general because every person and situation is unique and departures from the guidelines in this Code may be justified in appropriate circumstances. Employers, employees and their organisations should use the Code to develop, implement and refine disability equity policies and programmes. It is based on the constitutional

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<sup>83</sup> See fn 11 above.



principle that no one may unfairly discriminate against a person on the grounds of disability, or visual impairment. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job. Employers should adopt the most cost-effective means that is consistent with effectively removing the barriers to perform the job, and to enjoy equal access to the benefits and opportunities of employment.

Reasonable accommodation requirement applies to applicants and employees with disabilities who are suitably qualified for the job and may be required during the recruitment and selection processes, in the working environment, in the way work is usually done, evaluated and rewarded in the benefits and privileges of employment. The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability-related accommodation need or when such a need is reasonably self-evident to the employer. In other words, employers must also accommodate employees when work or the work environment changes or impairment varies which affects the employee's ability to perform the essential functions of the job. The employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee. The particular accommodation will depend on the individual, the degree, nature of impairment and its effect on the person; as well as on the job and the working environment. Reasonable accommodation may be temporary or permanent, depending on the nature and extent of the disability. It includes but is not limited to: adapting existing facilities to make them accessible, adapting existing equipment, or acquiring new equipment including computer hardware and software, re-organising workstations, changing training and assessment materials, restructuring jobs so that non-essential functions are re-assigned, adjusting working time, leave and providing specialized supervision, training and support in the workplace. An employer may evaluate work performance against the same standards as other employees. But the nature of the disability may require an employer to adapt the way performance is measured.

The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer. On the other hand, the issue of undue hardship has caused serious conflicts between employees and employers. Employees view it as unreasonable strategy used by employers in defending their business interests. On the other one, employers regard the concept of undue hardship as the best option to leave out employees who may cause them to incur financial losses in their business. As explained earlier, some of the employers still maintain a general notion that it is too expensive to employ a disabled person than an able-bodied person as no serious expenses will be incurred. *In Standard Bank of South Africa v CCMA*,<sup>84</sup> an employee who injured her back in a motor collision whilst on duty was finally dismissed due to his inability to cope with the alternative work that the Bank offered him. The legal question was, in what circumstances was the dismissal of such an employee fair? In deciding this questions the second respondent Arbitrator held that the Applicant, (Standard Bank Ltd), dismissed the third Respondent, (Deirdre Ferreira) unfairly and awarded her compensation of R49 936,00 being the equivalent of six months' pay.

One should bear in mind that unjustifiable hardship is action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business. Accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.

In as far as assistance is concerned, the Department of Labour issued the *Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)*<sup>85</sup> to make working conditions easily approached by designated employers. Chapter 5 section 6 of the TAG provides that all designated employers under the Act and Code, should reasonably accommodate the needs of people with disabilities. For employers who are required to

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<sup>84</sup> [2008] 4 BLLR 356 (LC).

<sup>85</sup> *Department of Labour 2002*.



develop employment equity plans, reasonable accommodation is an effective Affirmative Action measure.

## 7. CHAPTER 7: CONCLUSION

In conclusion, the study has focused on an interesting discussion of researching as to what extent does South African Labour Law protect the people with disabilities? The findings show that there is legal protection for people with disabilities in South Africa. Our Labour Law is very much consistent with international law in that all principles which are enshrined in our pieces of legislation, are those which have been extracted from the UN Conventions and foreign jurisprudence. In other words human dignity, equality and freedom are also provided to people with disabilities. In the previous discussions, various law authors have extensively argued about how the terminology of disability is interpreted. Of utmost interest, is the realisation that disability is always couched in a medical connotation as opposed to a social one. In fact, all countries should begin to recognise the social model as it suggests that disability may also result out of the environmental effects due to ignorance from the members of the society and sometimes, due to unforeseen accidents.

On the other hand, medical experts should avoid over-emphasising the medical model to be the only remedy in determination of the existence of disability. An important lesson is to rehabilitate a person who encountered such disability and also to develop social and educational programs aiming at sensitising all members of civil society, government and the business sector about existence of disability by advocating the way in which it should be treated.

All people should note that disability is not inability to achieve things. The South African Labour Law, international legal instruments and foreign jurisprudence provide ways in which designated employers should reasonably accommodate the needs of people who are disabled. In as far as the judiciary is concerned, the judicial authority of the Republic is vested in courts. In terms of section 165 (2),<sup>86</sup> the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. To see the practical enforcement of these political, socio-economic and development rights, the organisations for

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<sup>86</sup>See *RSA Constitution*



people with disabilities must be active in approaching the competent court for legal assistance. In terms of *section 38 of the present South African Constitution*<sup>87</sup>, anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. Furthermore, the present Constitution provides a state institution that gives legal protection against any human rights violations. In terms of *section 184 (2) of the Constitution*<sup>88</sup>, the South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power:

- a. to investigate and to report on the observance of human rights;
- b. to take steps to secure appropriate redress where human rights have been violated;
- c. to carry out research; and
- d. to educate. Equality Court, the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court, the Labour Appeal Court (LAC), the Constitutional court (CC) and other courts of similar status, also assist in solving disputes that affect conflicting parties. These legal institutions can also adjudicate on matters relating to unfair labour practice which include discrimination on arbitrary grounds that include disability.

I feel proud of the South African Constitution and other pieces of Labour legislation as they are in line with international Labour law which promotes the right to equality, dignity and freedom. All educators, civil society and government including people with disabilities, need to protect, respect and defend these constitutional rights as they are the back-bone of our democracy. All friends, Labour Law students and lecturers are called upon to be the monitors in ensuring that people with disabilities are fully protected by law. These people play a major role in as far as nation building is promoted.

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<sup>87</sup> Act 108 of (1996)

<sup>88</sup> See the RSA Constitution

They should be involved in decision-making processes so as to voice out their aspirations and reach concrete solutions for the better life for all. These goals can only be realised by taking national concerted efforts which must be underlined by our national values that enshrine humanity, respect, accountability, openness and transparency. Of utmost importance, is the need for the local, provincial and national spheres of governments to develop, clear, policies and guidelines that include protection of people with disabilities at all workplaces. As indicated in the previous chapters, all plans and policies must ensure compliance of access to: buildings, public transport, information and other recognised services.



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## 9. ABBREVIATIONS

1. ADA: Americans with Disabilities Act of 1990
2. ADAAA: Americans with Disabilities Act, Amendment Act of 25 September 2008
3. BCEA: The Basic Conditions of Employment Act No 75 of (1997)
4. BLLR: Butterworths Constitutional Law Reports
5. CC: Constitutional Court
6. CODESA: Convention for a Democratic South Africa
7. COIDA: Compensation for Occupational Injuries and Diseases Act No 130 of (1993)
8. CONSTITUTION: the Constitution of the Republic of South Africa Act No 108 of (1996)
9. DDA: Disability Discrimination Act
10. DPSA: Disabled People South Africa
11. EEA: Employment Equity Act No 55 of (1998)
12. EEC: Employment Equity Commission
13. EEP: Employment Equity Plan
14. GNU: Government of National Unity
15. ICESCR: International Covenant on Economic, Social and Cultural Rights
16. ILO: The International Labour Organisation
17. INDS: Integrated National Disability Strategy
18. LAC: Labour Appeal Court
19. LC: Labour Court
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28. The Code: The Code of Good Practice on the Employment of People with Disabilities issued in terms of Section 54 (1) of the Employment Equity Act 55 of 1998
29. UDHR: Universal Declaration of Human Rights.
30. UK: United Kingdom
31. UN: United Nations
32. WTPS: White Paper on Transformation of the Public Service



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