

Payday: Business as usual or a new dawn rising for persons with disabilities in the workplace

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SUMMARY

The article examines and clarifies the legal obligations of the labour market (as part of mainstream society) to effectively promote and protect the right to employment for persons with disabilities in South Africa. In this regard the article contextualises the understanding of disability within an international and national context by outlining the legal obligations of employers under the Convention on the Rights of Persons with Disabilities (CRPD), the South African national legal framework and policy directives pertaining to the right to employment of persons with disabilities. The article submits that the success of realising the right to employment and work of persons with disabilities will only be measured through the implementation of international obligations, the national legal framework and policy directives. In order to measure the progress in realising the right to work of persons with disabilities, the importance of collecting and maintaining disability data as statistical evidence is highlighted.

1 Introduction

Multiple barriers hinder persons with disabilities to obtain employment and enjoyment of full and effective participation in the labour market on an equal basis with others. In the South Africa context and generally reflective of the trend worldwide, persons with disability experience high levels of unemployment and often remain in low status jobs.¹ This stark reality is the result of the interplay between a number of factors,² such

1 *National Development Plan 2030 Our future – make it work* (2012) 382; Eide and Loeb “Data and statistics on disability in developing countries” 2005 *Disability Knowledge and Research Programme* 8; Report of the South African Human Rights Commission (SAHRC) *National Hearing on Unfair Discrimination in the Workplace* (8 March 2016 and 25 April 2016) launched 23 November 2017 50 & 51.

2 Report of the South African Human Rights Commission (SAHRC) *National Hearing on Unfair Discrimination in the Workplace* (2017) 47 and SAHRC *Promoting the Right to Work of Persons with Disabilities: Toolkit for the Private Sector* (2015) 8.

as access to education and other forms of training and skills development, reasonable accommodation measures in the workplace, lack of accessibility to infrastructure, information and technology, lack of effective enjoyment of the right to legal capacity, as well as attitudinal barriers in the South African society.³ Whilst it is true that unemployment remains a fundamental problem across the board,⁴ unemployment disproportionately affects the majority of persons with disabilities.⁵

It is against this backdrop that this article seeks to examine and clarify the legal obligations of the labour market as part of mainstream society to effectively promote and protect the right to employment for persons with disabilities in South Africa. The first part of the article contextualises the understanding of disability within an international and national context. The second part of the article outlines the legal obligations of employers under the Convention on the Rights of Persons with Disabilities (CRPD), the national legal framework and policy directives pertaining to the right to employment of persons with disabilities. The discussion fosters an understanding of the right to employment of persons with disabilities in general and more particular to ensure that labour market have a clear understanding of the nature of their legal obligations. Finally, the article submits that the success of realising the right to employment and work of persons with disabilities will be measured through the implementation of international obligations, the national legal framework and policy directives. Progress with the implementation can only be measured through monitoring and evaluation processes. In this regard, the article highlights the importance of collecting and maintaining disability data as statistical evidence to measure progress in realising the right to work and employment.

2 Contextualising the understanding of disability

During the course of the past thirty years, views on disability have gradually shifted emphasis from a medical model to a social model of disability (and the more recent human rights model of disability).⁶ This shift is of extreme significance when one considers the fact that the medical model and social model of disability represent two opposite

3 SAHRC (2015) 8.

4 According to Statistics South Africa there was a decline of 48 000 jobs (0,5%) to 9 644 000 in South Africa in the formal non-agricultural sector in the first quarter of 2017 alone available at <http://www.statssa.gov.za/?p=10136> (accessed 2017-07-04).

5 According to *Quarterly Labour Force* (4) 2016 Statistics South Africa the number of persons with disabilities who are not economically active in South Africa stood at 1 611 000 in 2016.

6 Degener "A Human Rights Model of Disability" in Blanck and Flynn (eds) *The Routledge Handbook of Disability Law and Human Rights* (2017) 47.

approaches to disability.⁷ The shift also relates to activities at the international level where the United Nations has developed a comprehensive human rights system subsequent to the Second World War.⁸ A greater international awareness of human rights and human needs has also given rise to this shift in how persons with disabilities are viewed. In response to this growing awareness and the international community's realisation that continued denial of human rights and discrimination, exclusion and dehumanisation of persons with disabilities was no longer acceptable,⁹ the United Nation's General Assembly, to this end, adopted the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.¹⁰

The social model of disability,¹¹ recognises that disability is caused by the way in which society's physical and social environment is organised,¹² which significantly contributed and paved the way to having disability fully recognised as a human rights issue, as opposed to the medical model that presumes that a person is disabled by his physical impairment, requiring an individualised medical solution and dependence on the non-disabled.¹³

Unfortunately approaches and attitudes towards, as well as perceptions about persons with disabilities in the workplace, still reflect the out-dated medical model of disability.¹⁴ This is evident in the interpretation(s) of disability and unfair labour practices against persons

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- 7 Grobbelaar-du Plessis and Van Reenen "Introduction to aspects of disability law in Africa" in Grobbelaar-du Plessis and Van Reenen *Aspects of disability law in Africa* (2011) xxiii.
 - 8 Malan "'n Kritiese evaluering van menseregte as eietydse globale politieke-juridiese verskynsel" 2003 (43) 1 & 2 *Tydskrif vir Geesteswetenskappe* 94; Strydom and Grewers "Defining epochs" *International Law* (2016) 4.
 - 9 United Nations *From Exclusion to Equality - Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) foreword iii.
 - 10 A/RES/61/106 adopted by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007.
 - 11 The *social model of disability* holds that disability is not primarily due to some or other condition inherent in the particular person, but to the manner in which the physical and social environment within which such person must operate has been arranged. In essence society must be rearranged to accommodate everybody - including persons with disabilities - on an equal footing. Disability viewed against the backdrop of the social model of disability is an evolving concept, and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. See Grobbelaar-du Plessis and Van Reenen (2010) xxv.
 - 12 SAHRC (2017) 47.
 - 13 Degener "Disability in a Human Rights Context" 2016 *Laws* 5(3) 35.
 - 14 The *medical model of disability* holds that disability is primarily viewed as a health and welfare issue. The emphasis was placed on the physical or psychological nature of the impairment and the dependence of the person with a disability on the non-disabled. The view that disability was a health and welfare issue gave rise to an attitude amongst members of society that

with disabilities in practice.¹⁵ According to the 2017 South African Human Rights Commission's (SAHRC) report on the *National Hearing on Unfair Discrimination in the Workplace*, social attitudes and stigmatisation of persons with disabilities remain prevalent in modern-day South Africa.¹⁶ It is for this reason that both public and private sector employers should take note of existing social attitudes and stigmatisation geared towards achieving and maintaining very specific physical characteristics of people. Portraying persons with disabilities as sick, weak or incapable of caring for themselves tends to marginalise persons with disabilities as non-productive and unequal members of the South African society.¹⁷

Both the public and private sector employers should take note of the differences between the models of disability and view persons with disabilities against the backdrop of the social model and the more recent human rights model of disability.¹⁸ Degener argues that the human rights model of disability goes beyond the social model of disability and acts as a tool to implement the obligations imposed by the CRPD.¹⁹

3 International legal framework: Obligations imposed by article 27 of the CRPD

The CRPD has domestic constitutional significance for South Africa.²⁰ Public and private sector employers should take note of the understanding of disability and the obligations imposed by the CRPD, since the duties imposed on both sectors,²¹ stem from international obligations (amongst others the CRPD), the Constitution of the Republic of South Africa, 1996 (the Constitution) and South African labour laws.²²

persons with disabilities (and their families) were separate from mainstream communal activities, including the labour market. Their dependency on state assistance disempowered these people and undermined their self-confidence and capacity to interact on an equal level with colleagues in the working environment, and elsewhere with other members of society. See Grobbelaar-du Plessis and Van Reenen (2010) xxiii – xxiv; Integrated National Disability Strategy White Paper Office of the Deputy President, November 1997, available at http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (2017-02-04); SAHRC (2017) 50.

15 SAHRC (2017) 49 - 51.

16 SAHRC (2017) 50.

17 SAHRC (2017) 50.

18 Degener "Disability in a Human Rights Context" 2016 *Laws* 5(3) 35.

19 Degener in Blanck and Flynn (2017) 47.

20 See n 10 above. South Africa signed and ratified the CRPD on the 30th of November 2007.

21 Art 27(1)(e); (g) and (h) of the CRPD.

22 See para 4 2.

The right to work is a fundamental right, recognised in several international legal instruments, such as the ILO Conventions.²³ Article 27 of the CRPD, one of the most detailed and significant articles of the CRPD, restates the right to work from a disability perspective. This provision of the CRPD sets the basis for building a society in which persons with disabilities are free from marginalisation and stigma and hence, free of discrimination in employment. This means that persons with disabilities in South Africa are part of society and included in community life as socio-economically active citizens.

Article 27 directs the public sector, in collaboration with the private sector, to undertake a large variety of measures to ensure the promotion of the rights to work and earn a living: to choose a job;²⁴ not to be treated unfairly when employed;²⁵ to receive equal pay for equal work done just like everyone else;²⁶ to benefit from equal opportunities and safe and healthy working conditions just like everyone else;²⁷ to be able to complain and to join labour and trade unions and not be harassed;²⁸ to provide them with career counselling, vocational trainings and career opportunities;²⁹ to promote self-employment and business opportunities;³⁰ to have the possibility to be hired both in the public and in the private sector;³¹ to ensure that reasonable changes are made in the workplace environment, that is, fulfil the reasonable accommodation principle according to their personal needs;³² and to promote vocational and professional rehabilitation programmes to support their return to work.³³ South Africa, as a state party to the CRPD, is bound to these obligations and has to ensure that the right to employment and work of persons with disabilities are protected, promoted and fulfilled.

It is important to note that the provisions on work and employment in article 27 of the CRPD protect persons with disabilities in all stages of employment.³⁴ The South African government should therefore - when formulating policies and programmes - provide for, and include protection for those seeking employment, those advancing in

23 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

24 Art 27(1) of the CRPD.

25 Art 27(1)(a) of the CRPD.

26 Art 27(1)(b) of the CRPD.

27 Art 27(1)(b) of the CRPD.

28 Art 27(1)(c) of the CRPD.

29 Art 27(1)(d) and (e) of the CRPD.

30 Art 27(1)(f) of the CRPD.

31 Art 27(1)(g) and (h) of the CRPD.

32 Art 27(1)(i) of the CRPD.

33 Art 27(1)(k) of the CRPD.

34 Art 27 of the CRPD.

employment, and those who acquire a disability during employment and who wish to retain their jobs.

4 South Africa's progress in implementation of article 27 of the CRPD

All legally binding international human rights treaties, including the CRPD, have monitoring mechanisms to foster accountability by state parties, and to ensure that they fulfil their commitments and obligations.³⁵ According to article 35 of the CRPD, a state party must submit a comprehensive report on measures taken to give effect to its obligations and on the progress made in that regard, within two years after the entry into force of the CRPD.³⁶ South Africa submitted its initial state party report to the CRPD's Committee towards the end of 2014,³⁷ and expects consideration of the report towards the end of 2018.

The CRPD requires government to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise".³⁸ This includes providing for reasonable accommodation measures,³⁹ and to promote policies and programmes, including affirmative action,⁴⁰ that encourage employers to recruit persons with disabilities.⁴¹ To enable governments to formulate and implement these policies and programmes, article 31 of the CRPD provides for governments to undertake the collecting of appropriate information, including statistical and research data.⁴²

Statistics regarding persons with disabilities,⁴³ provide the basis for measuring progress in realising the rights to work and employment. Progress captured through statistics and data has to be reported in both

35 United Nations "From Exclusion to Equality – Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol" (2007) 25.

36 The CRPD entered into force on May 3, 2008.

37 Committee on the Rights of Persons with Disabilities, consideration of reports submitted by States parties under article 35 of the Convention "Initial reports of State parties due in 2009 South Africa" CRPD/C/ZAF/1 23 November 2015 (Initial country report); South Africa *South Africa Baseline Country Report: UN Convention on the Rights of Persons with Disabilities* 2013.

38 Art 4(1)(a) & (e) of the CRPD.

39 Art 27(1)(i) of the CRPD.

40 Art 27(1)(h) of the CRPD.

41 United Nations *From Exclusion to Equality – Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 87.

42 See para 4 1.

43 Schneider *The social life of questions: Exploring respondents' understanding and interpretation of disability measures* (PHD dissertation 2012 University of Witwatersrand) 1.

the comprehensive initial state party report⁴⁴ and subsequent reports,⁴⁵ in order to measure the progress made in realising the right to work. It is for this reason that the CRPD recognising the importance to collect and maintain data on disability to enable formulation of policies that will facilitate implementation and monitoring of state parties compliance with the Convention.⁴⁶

4 1 Prevalence of disability in South Africa

South Africa has recognised the importance of statistics when measuring progress in current and future policies interventions to ensure that its people have equal access to education, employment and basic services.⁴⁷ The South African census reports of 1996, 2001 and 2011 provided information for government to monitor and enhance national priorities and public debate in resolving unemployment faced by amongst other persons with disabilities in South Africa.⁴⁸

In the last census of 2011, a report was drawn out by Statistics South Africa (StatsSA),⁴⁹ which provided statistical evidence relating to the prevalence of disability and characteristics of persons with disabilities at both individual and household levels.⁵⁰ The 2011 census was different from the 1996 and 2001 census reports in that, the method applied in the 2011 census included questions on disability that were used to improve and enhance disability specific statistics.⁵¹ The questions of the 2011 census were formulated from the Washington Group (WG) short set of questions.⁵² The WG method focused on degree of difficulty in a

44 Art 31(1) of the CRPD.

45 Art 31(2) of the CRPD.

46 Art 31 of the CRPD determines that states parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.

47 Statistics South Africa (as mandated in the Statistics Act 6 of 1999) has conducted three censuses (in 1996, 2001 and 2011) as well as various annual household-based surveys. "Census 2011: Profile of persons with disabilities in South Africa" 2011 *Statistics South Africa* is available at <http://www.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

48 Department of Social Development *White Paper on the Rights of Persons with Disabilities (WPRPD)* (2015) 109; National Planning Commission in the Presidency's *Our future – make it work. National Development Plan: Vision 2030* (March 2012) 368.

49 State agency responsible for the collection, production and dissemination of official and other statistics, including conducting of population census, and for co-ordination among producers of statistics.

50 Statistics South Africa *Census 2011: Profile of persons with disabilities in South Africa* (2011).

51 Schneider 69.

52 Schneider 69; The WG short set of questions is a method based on activity limitations and restrictions in social participation, with the aim of producing prevalence measures that are internationally comparable.

specific function domain and the disability index.⁵³

The 2011 census report indicated that persons with disabilities constituted 7,5% of the total population of South Africa.⁵⁴ Black South Africans had the highest proportion of persons with disabilities (7,8%), followed by white South Africans (6,5%).⁵⁵ However, no variations were observed among the coloured, Indian or Asian population groups. The data furthermore showed that disability is more prevalent among females than males (8,3% and 6,5% respectively).⁵⁶ Provincial variations showed that the Free State and the Northern Cape provinces had the highest proportion of persons with disabilities (11%), followed by North West and Eastern Cape (10% and 9,6% respectively). The Western Cape and Gauteng provinces showed the lowest percentage of persons with disabilities (5%).⁵⁷ This means that disability is more prevalent in rural provinces, suggesting a link to poverty and lack of access to adequate transportation, healthcare and other essential services.⁵⁸

Statistics have further shown that there is a correlation between the degree of severity of the impairment, and the degree of economic participation in South Africa. More severe impairments are being associated with a decrease in labour market participation and employment.⁵⁹ This means that employment levels were recorded to be the highest among persons with less severe impairments, and lowest among persons with severe impairments across all provinces and sectors.⁶⁰ The severity of impairment therefore greatly affects the economic outcomes pertaining to employment in South Africa.

Different population groups are also affected differently. According to the 2011 census, the profile of persons with mild and severe disabilities shows how the latter are disadvantaged, particularly amongst the black and coloured population groups, compared to other population groups.⁶¹ The 2011 census further recorded that the white population group have the highest proportions of employed persons with disabilities, while the black population group had the lowest proportions across all impairments and degrees of difficulty experienced.⁶²

The initial state party report of South Africa (initial country report) noted the interrelatedness of disability, employment and poverty, which

53 The domains are seeing, hearing, mobility (lower body – walking or climbing stairs), cognition (remembering and concentrating), self-care (washing and dressing) and communication in one's usual language.

54 Statistic South Africa (2011) 60.

55 Statistic South Africa (2011) 60.

56 Statistic South Africa (2011) 60.

57 Statistic South Africa (2011) 57.

58 SAHRC (2017) 48.

59 Statistics South Africa (2011) 116 and Department of Social Development (2015) 25.

60 Statistics South Africa (2011) 121.

61 Statistics South Africa (2011) 60; Department of Social Development (2015) 25.

62 Statistic South Africa (2011) 60.

was articulated in South Africa's National Development Plan (NDP).⁶³ The NDP states that disability and poverty operate in a vicious circle and that persons with disabilities face multiple discriminatory barriers. The NDP directs that persons with disabilities must have enhanced access to quality education and employment.⁶⁴ The initial country report recognises that efforts to ensure relevant and accessible skills development programmes for persons with disabilities, coupled with equal opportunities for their productive and gainful employment, has to be prioritised.⁶⁵

In order to fulfil the NDP's directive to enhance access to quality education for persons with disabilities and employment in the labour market, accurate and available information regarding the nature and prevalence of disability is required. However, the initial country report recognises the lack of adequate, reliable and relevant information on the nature and prevalence of disability.⁶⁶ Government further recognises that the disaggregation of disability-related statistics and data, including the reliability of such data across all government institutions remains problematic.⁶⁷ In order to address government's obligation to collect appropriate statistical and research data,⁶⁸ the initial report confirms that corrective measures had been taken to mainstream disability into government's various research and evaluation projects.⁶⁹

The SAHRC found in their 2017 report on unfair discrimination in the workplace that there is a low labour market absorption of persons with disabilities across all sectors in South Africa.⁷⁰ The report indicated that only 1,2% of persons with disabilities participated in the labour market.⁷¹ This figure decreased over the last financial year, suggesting that a number of persons with disabilities left the labour market.⁷² However, the SAHRC report suggests that the availability of accurate data on disabilities is limited.⁷³ This prevents proper assessment of the progress made in realising the rights of persons with disabilities.⁷⁴

Given this background government embarked upon reporting on the progress made and measures taken in implementing the right to work and employment. However, it is important to note that consistent measures should be in place to record the persistent challenges in

63 National Planning Commission in the Presidency's (2012) 52.

64 Initial country report CRPD/C/ZAF/1 para 6.

65 Initial country report para 6.

66 Initial country report para 6.

67 Initial country report CRPD/C/ZAF/1 para AA 394.

68 Art 31 of the CRPD.

69 Initial country report CRPD/C/ZAF/1 para AA 395.

70 SAHRC (2017) 50; South Africa *South Africa Baseline Country Report* (2013) 56.

71 South Africa *South Africa Baseline Country Report* (2013) 56.

72 SAHRC (2017) 50.

73 Initial country report CRPD/C/ZAF/1 para 1 and 23; SAHRC (2017) 48.

74 Art 31 of the CRPD.

realisation of the right to work and employment⁷⁵ through collecting and maintaining disability data. This will enable government to evaluate progress made in realising their rights and to formulate and implement policies that give effect to the obligations imposed by the CRPD.⁷⁶

4 2 Constitutional framework

In reporting on the progress and measures taken in implementing the CRPD, the initial country report refer to the Constitution, which ensures an environment conducive to full and equal participation of men, women and children with disabilities in society, including equal access to opportunities, accessibility and protection of the inherent dignity of the person.⁷⁷

The initial report in particular refer to the Bill of Rights in the Constitution,⁷⁸ as the cornerstone of democracy,⁷⁹ which binds all government institutions and the courts,⁸⁰ in order to protect *all* people in South Africa.⁸¹ The Bill of Rights, therefore, *inter alia* protects the right to dignity of persons with disabilities,⁸² their right to equality,⁸³ and their right to bodily and psychological integrity.⁸⁴ Every person with a disability further has a right to privacy,⁸⁵ to freedom of expression,⁸⁶ association,⁸⁷ movement and residence,⁸⁸ as well as a right to choose a trade, occupation or profession freely.⁸⁹ Persons with disabilities further have a right to fair labour practices,⁹⁰ health care,⁹¹ education,⁹² and access to courts.⁹³ However, these rights and others may be limited in

75 Art 27 of the CRPD.

76 Art 21 of the CRPD.

77 Initial country report CRPD/C/ZAF/1 para 288.

78 Initial country report CRPD/C/ZAF/1 Implementation of the general principles and obligations para 27.

79 S 7(1) of the Constitution.

80 S 8(1) of the Constitution.

81 S 8(2) - (3) of the Constitution determine that the Constitution is binding and applicable to natural persons including persons with disabilities. The word "everyone" used in a number of provisions includes citizens and non-citizens, and is sufficiently comprehensive to include persons with disabilities. See Grobbelaar-du Plessis and Van Eck "Protection of disabled employees in South Africa: An analysis of the Constitution and Labour Legislation" in Grobbelaar-du Plessis and Van Reenen (eds) *Aspects of disability law in Africa* (2011) 237; Currie & De Waal *The Bill of Rights Handbook* (2014) 34-35; and *Mohammed v President of the Republic of South Africa* 2001 3 SA 893 (CC).

82 S 10 of the Constitution.

83 S 9 of the Constitution.

84 S 12(1) of the Constitution.

85 S 14 of the Constitution.

86 S 16 of the Constitution.

87 S 18 of the Constitution.

88 S 21 of the Constitution.

89 S 22 of the Constitution.

90 S 23 of the Constitution.

91 S 27 of the Constitution.

92 S 29 of the Constitution.

93 S 34 of the Constitution.

terms of section 36 of the Constitution,⁹⁴ to the extent that such limitation is reasonable and justifiable in an open and democratic society.

The Constitution, and more specifically the right to equality,⁹⁵ and the right to fair labour practices,⁹⁶ contained in the Bill of Rights, could potentially affect labour law in three ways. Firstly, the rights contained in the Bill of Rights could be applied to test the validity of labour legislation aimed at compliance with fundamental rights. Secondly, they could be employed to interpret existing labour legislation, which has been promulgated in compliance with the fundamental rights contained in the Bill of Rights. In this regard when interpreting the legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, to any alternative interpretation that is inconsistent with international law.⁹⁷ Finally, the rights could be used as a tool to develop the common law in those instances where compliance with any particular human right is not at stake.⁹⁸

In terms of section 9(1) “everyone” – including workers and/or employees with a disability – are equal before the law and have the right to equal protection and equal benefit of the law. Section 9(2) further provides that equality include the full and equal enjoyment of *all rights and freedoms*. This means that a worker or an employee with a disability has equal right to work, to be economically active and to be part of mainstream society. The section further provides that legislative (such as equality,⁹⁹ and labour legislation),¹⁰⁰ and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken in order to promote and achieve equality.¹⁰¹ The national legislature introduced specific measures in the Employment Equity Act (EEA),¹⁰² to protect persons with disabilities, in particular, as a designated group for purposes of equal treatment and affirmative action.¹⁰³

Furthermore, section 9(3) provides that *the state* may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds including disability. Of importance to the private sector

94 S 36 of the Constitution, the limitation clause.

95 S 9 of the Constitution.

96 S 23(1) of the Constitution.

97 S 233 of the Constitution.

98 Grobbelaar-du Plessis and Van Eck (2011) 238; and Van Niekerk *et al* 34; *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) confirmed *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) in this regard.

99 Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act 4 of 2000.

100 Employment Equity Act (EEA) Act 55 of 1998.

101 Van Jaarsveld and Van Eck *Kompendium van Arbeidsreg* (2006) 137.

102 Act 55 of 1998.

103 See the discussion of the Employment Equity Act 55 of 1998 (EEA) and affirmative action.

are the provisions of section 9(4), which determine that *no person* may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 9(3). This section, therefore, also prohibits any other person, including private individuals and institutions such as employers from the private sector, from discriminating unfairly against workers with disabilities on one or more of the listed grounds. Section 9(4) requires that “national legislation must be enacted to prevent or prohibit unfair discrimination”. For this purpose, legislation enacted by the national legislature includes the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹⁰⁴ and the EEA.¹⁰⁵ Of importance to labour market is section 9(5) of the Constitution, which provides that discrimination on one or more of the grounds listed in subsection 9(3) is unfair unless it is established that the discrimination is fair. In terms of this provision, discrimination based on disability in the workplace is unfair, unless it has been established that such discrimination is fair because of, for instance, valid inherent requirements for the work concerned.

Labour market has to take cognisance of unfair discrimination as the Constitutional Court, in *Harksen v Lane*,¹⁰⁶ has set out the factors that have to be taken into account in determining whether discrimination is unfair or not.¹⁰⁷ *Harksen* also formulated the stages in which an enquiry into alleged unequal treatment and unfair discrimination must proceed.¹⁰⁸ However, in both *Harksen*,¹⁰⁹ and *Prinsloo v Van der Linde*,¹¹⁰ the determining factor, which rendered the discrimination unfair, was the impact it had on the person against whom the discrimination was inflicted.¹¹¹ It follows that labour market should guard against unfair discrimination and should implement safeguards against unfair discrimination of employees or persons with disabilities.

104 Act 4 of 2000.

105 See the discussion of the EEA in para 4 3 1.

106 1998 1 SA 300 (CC) para 52.

107 The same factors were taken into account in *WH Bosch v The Minister of Safety and Security & Minister of Public Works* Case no. 25/2005 9, where persons with disabilities had no access to the first floor of the police station where they had to apply for firearm licences. The factors laid down in *Harksen* played an important role when the equality courts had to determine whether there was unfair discrimination.

108 *Harksen v Lane* 1998 1 SA 300 (CC) para 53, which was confirmed in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 17. See Grobbelaar-du Plessis and Van Eck (2011) 242 – 246; Carpenter “Equality and non-discrimination in the new South African constitutional order: the early cases – part 1” (2001) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 409; “Equality and non-discrimination in the new South African constitutional order: important trilogy of decisions – part 2” (2001) *THRHR* 619; “Equality and non-discrimination in the new South African constitutional order: the sage continues – part 3” (2002) *THRHR* 37; “Equality and non-discrimination in the new South African constitutional order: update – part 4” (2002) *THRHR* 177.

109 1998 1 SA 300 para 51.

110 1997 6 BCLR 759 (CC) para 32.

111 Grobbelaar-du Plessis and Van Eck (2011) 246.

Section 23(1) of the Constitution guarantees everyone's right to fair labour practices. From this provision, it is clear that every employee, employer, or other organisation or institution involved in labour relations has the right to fair labour practices in terms of the Constitution.¹¹² It is understood that employees with disability are also entitled to protection in terms of this provision.¹¹³

However, it is not appropriate for an aggrieved employee with disability to approach the courts based on an infringement of a constitutional principle if subsequent legislation has already given effect to the relevant human right.¹¹⁴ The constitutional provisions of section 9 and 23(1) do however play a significant role whenever enabling legislation – giving effect to a human right, such as the right to work of an employee with a disability – is being interpreted, and when the common law has to be developed in absence of existing legislative provisions that give effect to constitutional principles.¹¹⁵ To this end, the Constitutional provisions regarding interpretation,¹¹⁶ and application of international law,¹¹⁷ must also be considered.

The initial country report highlights the subsequent enabling legislation that gave effect to the right to work and employment.¹¹⁸ The enabling legislation that established reasonable accommodation mechanisms and targets for the economic empowerment of persons with disabilities are:¹¹⁹ the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA);¹²⁰ the Labour Relations Act (LRA);¹²¹ the Employment Equity Act (EEA);¹²² together with the Code of Good Practice in the Employment of People with Disabilities and its accompanying Technical Assistance Guidelines on the Employment of Persons with Disabilities providing further guidelines for employers;¹²³

112 *Idem* 238; 246 and 254 and Van Jaarsveld and Van Eck (2006) 137.

113 *NEHAWU v University of Cape Town* 2003 ILJ 95 (CC) by 110H – 111A: “[t]he concept of fair labour practice is incapable of precise definition ... [It should be] given content by legislation and thereafter be left to gather meaning ... from the decisions of specialist courts and tribunals. ... In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA [Labour Relations Act] as well as the codification of unfair labour practice in the LRA.”

114 See para 4 2.

115 Grobbelaar-du Plessis and Van Eck (2011) 246.

116 S 39(1)(b) of the Constitution.

117 S 233 of the Constitution.

118 S 9 and s 23(1) of the Constitution.

119 Initial country report CRPD/C/ZAF/1 para 288.

120 Act 4 of 2000.

121 Act 66 of 1995.

122 Act 55 of 1998.

123 The Code of Good Practice was published in terms of s 54 of the EEA in GG 23702 of 19 August 2002. In 2004 the Department of Labour issued additional guidelines in the “Technical Assistance Guidelines on the Employment of People with Disabilities” that must be read in conjunction

and the Broad-Based Black Economic Empowerment Act.¹²⁴

The following section examines the labour legislative measures that give effect to the obligations imposed in article 27 of the CRPD.

4 3 Implementation of article 27 of the CRPD through legislative measures

4 3 1 The Employment Equity Act 55 of 1998 (EEA)

Although the EEA is not a disability-specific piece of legislation, specific emphasis is placed on equity and the right to equal protection and benefit of the law, of *inter alia*, persons with disabilities. The EEA strives towards the attainment of two goals, namely, to prohibit unfair discrimination and to promote the implementation of affirmative action measures to eradicate inequalities that were institutionalised by previous political policies.¹²⁵

The first goal of the EEA,¹²⁶ broadly coincides with the principles of formal equality as enshrined in section 9(1), (3) and (4) of the Constitution and obligations imposed by articles 4 (general obligations),¹²⁷ 5 (equality and non-discrimination),¹²⁸ and 27(1)(a),¹²⁹ of the CRPD. Barriers such as ignorance, fear and stereotyping have resulted in unfair discrimination of employees or workers with disabilities. In this regard, section 6(1) of the EEA prohibits unfair discrimination in the workplace, which applies to all workers or employees, job applicants, irrespective of the size of the employer's

with the EEA and the Code of Good Practice. These guidelines were revised in June 2017 and are practical in nature, and based on the prohibition of unfair discrimination and affirmative action measures. See para 4 3 1 2 in this regard.

124 Act 53 of 2003.

125 S 2(b) of the EEA.

126 Chapter II of the EEA.

127 The general obligations imposed by article 4 of the CRPD determines that States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake (a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention; (c) to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes; (d) to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention; (e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise; (f) to undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.

undertaking.¹³⁰ It provides that everyone, including a worker or an employee with disabilities, is equal before the law and that unfair discrimination on a list of grounds, including disability is, proscribed.¹³¹

However, unfair discrimination towards persons with disabilities is perpetuated in many ways. The most significant of these are unfounded assumptions about the abilities and performance of persons with disabilities; an inaccessible workplace, including the manner in which jobs are advertised which might exclude or limit access to the advertisement; selection tests that can further discriminate unfairly against persons or potential workers with disabilities; and arrangements regarding interviews which might exclude or limit the opportunity of persons with disabilities to prove themselves for employment.¹³² It implies that employment and employment opportunities should be accessible to persons with disabilities and that they should be accommodated in accessing such employment opportunities as well as work environments.¹³³ Safeguards against unfair discrimination should be implemented throughout the full cycle of employment – from recruitment to promotions and termination - of persons with disabilities as provided for in the obligations imposed by article 27 of the CRPD.

128 Article 5 of the CRPD on equality and non-discrimination provides for (1) States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds; (3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

129 Article 27(1)(a) of the CRPD determine that 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 disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: (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.

130 S 4(1) of the EEA provides that Chapter II applies to “all employees and employers” and also covers any “employment policy or practice” which includes “recruitment procedures, advertising and selection criteria”.

131 S 6(1) of the EEA prohibits unfair discrimination in the workplace. It states that “[n]o person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

132 Initial country report CRPD/C/ZAF/1 para 289 and the foreword to the Code of Good Practice to the EEA. In this regard see para 4 3 1 1.

133 Art 9 and 27 of the CRPD and United Nations *Handbook for Parliamentarians on CRPD* (2007) 79 – 80.

The initial country report recognises that society in general, unless directly affected by disability, remains largely ignorant of the rights of persons with disabilities. To this end, the report specifically highlights the ignorance of society to implement reasonable accommodation measures required to give effect to the rights protected in the CRPD.¹³⁴ The aim of reasonable accommodation is to enable persons with disabilities to equally perform the essential functions of the work. Reasonable accommodation may require modifications or alterations to the way a job is normally performed and should make it possible for a suitably qualified person with a disability to perform the work on an equal basis with others.¹³⁵ However, the type of reasonable accommodation required would depend on the type of work and its essential functions, the work environment and the specific impairment of the person.

Reasonable accommodation, as defined in article 2 of the CRPD, is the necessary and appropriate modification and adjustment where needed, that does not impose a disproportionate or undue burden, to ensure to persons with disabilities the enjoyment or exercise of their rights on an equal basis with others. The adjustments in the context of work and employment should not impose a disproportionate or undue burden on the employer, but should rather ensure that persons with disabilities enjoy or exercise their right to work on an equal basis with others.¹³⁶ However, it is important to note that the failure to reasonably accommodate persons with disabilities in the workplace will amount to discrimination based on disability, within the meaning of article 2 and 5(3) of the CRPD.

Section 1 of the EEA similarly defines reasonable accommodation,¹³⁷ as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group,¹³⁸ to have reasonable access to or participate or advance in employment”. Employers are required to adopt the most cost-effective means that are consistent with effectively removing the barriers to perform the job. This means that the employer need not accommodate a qualified applicant or an employee with a disability if in doing so an unjustifiable hardship will be imposed on the business of the employer. According to the Code of Good Practice, an unjustifiable hardship on the business of the employer means an action that requires significant or considerable difficulty or expense.¹³⁹

134 Initial country report CRPD/C/ZAF/1 para 59.

135 Art 2 of the CRPD.

136 Art 1 of the CRPD.

137 Part 6 of the Code of Good Practice of the EEA requires employers to make “reasonable accommodation” for people with disabilities in particular.

138 S 1 of the EEA determines that designated groups that must enjoy the benefit of affirmative action are black people, women and persons with disabilities.

139 Part 6.11 and 6.13 of the revised draft Code of Good Practice.

The obligation to reasonably accommodate persons with disability may arise when an applicant or employee voluntarily discloses a disability-related accommodation need, or when such a need is self-evident to the employer.¹⁴⁰ The employer should consult the employee and, where reasonable and practical consult technical experts for advice on how to adequately address the need and to provide an appropriate solution. Reasonable accommodation does not only mean that obstacles and, or barriers be eliminated at the workplace, but it also requires positive measures to be taken in order to adapt policies, practices and the working environment in order to promote accessibility in the workplace.¹⁴¹ Through positive measures taken by employers, the broader constitutional promise of substantive equality and affirmative action, contained in section 9(2) of the Constitution can be fulfilled.

This is also the second goal of the EEA contained in chapter III of the legislation, which places an obligation on “designated employers” to implement affirmative action measures in respect of persons from “designated groups”.¹⁴² Persons with disabilities,¹⁴³ as part of the designated group must enjoy the benefits of affirmative action policies and practices. The reason why designated employers are duty-bound to favour persons with disabilities when making appointments and considering promotions, is a positive response towards addressing unemployment, low salaries and stereotyping (as seen from the prevalence on disability in South Africa above),¹⁴⁴ facing the majority of persons with disabilities.¹⁴⁵

140 Currie and De Waal *The Bill of Rights Handbook* (2014) 235.

141 Part 6 of the revised draft Code of Good Practice. The Code provides examples of reasonable accommodation. This could entail the adaptation of computer hard- and software, the provision of training and evaluation material, and amendments to work time and leave. Ngwenya “Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue” 2004 *Journal for Juridical Science* 179.

142 S 1 and s 13 of the EEA. Designated employers are defined as municipalities, organs of state, employers with 50 or more employees and employers with less than 50 employees but with a total annual turnover higher than that of a small business in terms of the EEA.

143 S 1 of the EEA. Black persons are further defined as “a generic term, which means Africans, Coloured and Indians”.

144 Para 4 1 above.

145 Grobbelaar-du Plessis and Van Eck (2011) 248 and 252. The report of the SAHRC “Towards a Barrier-free Society: A Report on Accessibility and Built Environment” 2002 available at https://www.westerncape.gov.za/text/2004/11/towards_barrier_free_society.pdf 22 (accessed 2015-02-02) mentioned that “as a result, people with disabilities experience high unemployment levels and, if they are employed, often remain in low status jobs and earn lower than average remuneration. In terms of the Act, all legal entities that employ more than 50 people must submit Employment Equity Plans to the Department of Labour, showing how many people with disabilities are employees and what positions they hold”.

Designated employers do not have a choice as to implementation of affirmative action measures.¹⁴⁶ Such employers must, in consultation with their employees, devise an affirmative action plan and, depending on the size of the undertaking, must annually or biannually report to the Department of Labour on their progress in pursuance of their affirmative action plans.¹⁴⁷ The plan must contain details regarding “preferential treatment and numerical goals” aimed at attaining equitable representation at the workplace.¹⁴⁸ The EEA does not set quotas, but the designated employers,¹⁴⁹ must formulate their own goals in their affirmative action plans and strive to attain these goals. The initial country report refers to the self-determined targets of designated employers for, amongst others, employment of persons with disabilities and reasonable accommodation measures that will be undertaken, and the slow progress reported to date.¹⁵⁰

The slow progress reported in the initial country report is of particular concern in the light of the concerted efforts of Parliament (to enact enabling legislation such as the EEA), the Public Service Commission as part of their administrative responsibilities, as well as efforts by the Department of Public Service Administration and the Department of Women, Children and People with Disabilities to strengthen, support and attainment of set targets for employment of persons with disabilities.¹⁵¹

Legislation such as the EEA and policies play a vital role in overcoming marginalisation, segregation and discrimination against persons with disabilities in the workplace. In the South Africa context and generally reflective of the trend worldwide, a significant barrier to the employment of persons with disabilities is the absence of internal policies targeted at recruiting and employing persons with disabilities.¹⁵² In the implementation of such a plan an employer may, for example, favour persons with disabilities above other more suitable candidates who do not have a disability in an attempt to reach goals in respect of

146 S 13(1) of the EEA provides that “[e]very designated employer *must*, in order to achieve employment equity, implement affirmative action measures” [our emphasis].

147 S 13(2) of the EEA describes the duties on designated employers. S 21 provides that employers with more than 150 employees must submit reports annually and employees with less than 150 employees must report every second year.

148 S 15(2) of the EEA.

149 Employers employing more than 50 people.

150 Initial country report CRPD/C/ZAF/1 para 290. The public sector, as designated employer set its employment equity target for 2005 at 2% of the total work force, but had to extend this target annually due to the slow progress being made.

151 Initial country report CRPD/C/ZAF/1 para 292.

152 Braddock and Bachelder “Glass Ceiling and Persons With Disabilities David Braddock” http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1115&context=key_workplace (accessed on 2015-01-28); and Gida and Ortlepp “Employment of People with Disabilities: Implications for Human resource management practices” (2007) *Acta Commercii* 135-150.

representativeness.¹⁵³ Further, chapter II of the EEA, which relates to formal equality, expressly provides that the implementation of affirmative action measures that coincide with the goals of the EEA does not constitute unfair discrimination against other candidates.¹⁵⁴

According to the initial country report the initiatives to address disability-equity policies and programmes in the public sector included the:¹⁵⁵ JobACCESS Strategic Framework for the Recruitment, together with an accredited training course in disability management based on the JobACCESS Strategic Framework; Employment and Retention of Persons with Disabilities in the Public Service (2009); Handbook on Reasonable Accommodation for People with Disabilities in the Public Service (2007); targeted recruitment strategy to establish a database for persons with disabilities, intending to widen the pool for recruitment of persons with disabilities; and a draft policy on Reasonable Accommodation and Assistive Devices in the Public Service.

In respect of the development, implementation and refinement of disability-equity policies and programmes in the workplace, labour market should take note of the Code of Good Practice, established in terms of section 54(1)(a) of the EEA.¹⁵⁶

4 3 1 1 Code of Good Practice in the Employment of People with Disabilities (Code of Good Practice)

The Code of Good Practice published in August 2002,¹⁵⁷ is based on the constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.¹⁵⁸ In order to align itself with the obligations imposed by the CRPD, the Department of Labour published the revised Code of Good Practice on the Employment of Persons with

153 In *Department of Correctional Services v Van Vuuren* 1999 20 ILJ 2297 (LAC) the Labour Appeal Court considered the following set of facts: Ms Van Vuuren, a white female, was “strongly recommended” for a position by an interviewing panel whereas four other candidates were merely “recommended”. The employer decided to appoint a black person who was only “recommended” based on an affirmative action policy that had been implemented. The employer admitted that the black candidate was appointed only because of his race. Having found that the employer had not deviated from the collectively agreed upon affirmative action policy, the Court held that the decision to appoint the black man was just and fair. It held that the decision was “dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants”.

154 S 6(2) of the EEA; and Grobbelaar-du Plessis and Van Eck (2011) 248 and 253.

155 Initial country report CRPD/C/ZAF/1 para 293.

156 Code of Good Practice was published in terms of s 54 of the EEA in GG 23702 of 19 August 2002, and revised in 2005 and Grobbelaar-du Plessis and Van (2011) 248.

157 Code of Good Practice (as revised); Grobbelaar-du Plessis and Van (2011) 248.

158 Legal Framework and Guiding Principles of the Code of Good Practice.

Disabilities in November 2015.¹⁵⁹ The revised Code of Good Practice, is aligned with article 2 of the CRPD,¹⁶⁰ and defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁶¹ The foreword to the revised Code of Good Practice highlights that discrimination towards persons with disabilities is a socially-construed action and can be avoided by ensuring better knowledge, understanding and awareness about disabilities and the challenges encountered by persons with disabilities. The revised Code of Good Practice further acknowledges that discrimination based on disability includes all forms of discrimination, including denial of reasonable accommodation.¹⁶²

In order to achieve their full inclusion, both socially and economically, an accessible, barrier-free physical and social environment is necessary. This means that the Code of Good Practice is not only part of the broader equality agenda for persons with disabilities, but also to South Africa's international obligations,¹⁶³ to have persons with disabilities' rights recognised in the labour market.¹⁶⁴ This is of particular importance to the labour market since South Africa's society has to recognise and accept that persons or workers with disability are part of society and human diversity. Employers, employees, trade unions and organisations with expertise on disability, including Disabled People's Organisations (DPOs), should use the Code to develop, implement and refine disability equity policies and programmes to suit the needs of the workplaces.¹⁶⁵

4 3 1 2 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)

In June 2017, the Department of Labour published its revised Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).¹⁶⁶ TAG is intended to complement the revised Code of Good Practice of 2015, and to assist with the practical implementation of

159 The revised Code of Good Practice on the Employment of Persons with Disabilities was published in terms of Section 54(2) of the EEA of 1998 (as amended), on advice of the Commission for Employment Equity for public comment, in GG 39383 of 9 November 2015.

160 Art 2 of the CRPD.

161 Part 5.1 of the revised Code of Good Practice. According to article 1 of the CRPD a persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

162 Part 6 of the revised Code of Good Practice.

163 Art 27 of the CRPD.

164 Foreword to the Code of Good Practice.

165 Minister of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)* (2017).

166 Foreword to (and purpose) of the TAG by the Minister of Labour in June 2017.

aspects of the EEA relating to the employment of persons with disabilities in the workplace. TAG therefore builds on the Code of Good Practice to set out practical guidelines and examples for employers, employees and trade unions on how to promote equality, diversity and fair treatment in employment through the elimination of unfair discrimination.¹⁶⁷

It is important to note that the revised TAG aligns itself with the CRPD and aims to guide, educate and inform employers, employees and trade unions to understand their rights and obligations, to promote and encourage equal opportunities and fair treatment of Persons with Disabilities.¹⁶⁸ TAG safeguards against unfair discrimination throughout the full cycle of employment,¹⁶⁹ – from recruitment to promotions and termination – as provided for in the CRPD.¹⁷⁰

The EEA, as well as the revised Code of Good Practice and revised TAG, places specific emphasis on equity and the right to equal protection and benefit of the law of persons with disabilities. Not only does this fulfil the constitutional promise of substantive equality in employment, and the prohibition of unfair discrimination for every person with a disability, but it also aligns itself with the obligations imposed by the CRPD. Persons with disabilities are further protected from unfair labour practices in the Labour Relations Act of 1995, which is briefly discussed hereunder.

4 3 2 Labour Relations Act 66 of 1995 (LRA)

It is important to note that the primary goal of the LRA is to give effect to the constitutional obligations contained in section 23(1) of the Constitution, which section 1(a) of LRA confirms.¹⁷¹ The constitutional right to fair labour practices is wide and non-specific enough to include persons or workers with disabilities. However, the constitutional right to fair labour practices should not be confused with the definition of “unfair labour practice” as contained in the LRA. The definition of “unfair labour practices” contained in the LRA only covers specific practices perpetrated by employer.¹⁷² For purposes of this article, the focus falls on the protection the LRA affords to employees with a disability in respect of unfair labour practices perpetrated against them, and unfair dismissal on grounds of incapacity due to injury and illness.¹⁷³

167 Foreword to (and purpose) of the TAG.

168 Foreword to (and purpose) of the TAG.

169 The revised TAG addresses reasonable accommodation measures; recruitment and selection; medical and psychological testing; placement; training and career advancement; retaining; termination of employment; workers’ compensation; confidentiality and disclosure of disability; employee benefits; employment equity planning; education and awareness; monitoring and evaluation.

170 Art 3; 4; 5; 8; 9; 12 and 27 of the CRPD.

171 The section states that it is the purpose of the LRA to give effect to the fundamental rights contained in the Constitution and the obligations incurred by the state as a member of the International Labour Organisation (ILO).

172 Chapter VIII of the LRA and Grobbelaar-du Plessis and Van Eck (2011) 254.

173 S 185 of LRA.

4 3 2 1 Persons with disabilities are protected against unfair labour practices

In terms of section 186(2) of the LRA, the term “unfair labour practice” means any unfair act or omission that arises between an employer and an employee relating to the unfair conduct of the employer in the “promotion, demotion, probation ... or training of an employee or relating to the provision of benefits”. The definition also covers the “unfair suspension” or “other unfair disciplinary action short of dismissal” of an employee, including employees with a disability.¹⁷⁴ This means that a worker or employee with a disability also has the option of referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) based on, for example, non-promotion, demotion or the unfair provision of benefits should it relate to an employee’s disability.¹⁷⁵

4 3 2 2 Persons with disabilities are protected against unfair dismissal

Section 186(1) of the LRA describes a number of occurrences covered by the term “dismissal” including the termination of a contract of employment by an employer: with or without notice;¹⁷⁶ the non-appointment of employees on fixed term contracts after such an expectation has been created by the employer;¹⁷⁷ the refusal of an employer to allow an employee to resume employment after taking maternity leave;¹⁷⁸ and the termination of the contract by an employee because the employer made continued employment intolerable.¹⁷⁹ Before a dismissal can be deemed fair, two main requirements are set by the LRA. A dismissal is deemed to be fair if the employer succeeds in proving that there was a fair reason for dismissal (also referred to as substantive fairness), and that the dismissal was effected in accordance with a fair procedure.¹⁸⁰ Of importance for the labour market is the fact that certain categories of dismissal are classified as being “automatically unfair dismissal”.¹⁸¹ Amongst others, it is automatically unfair should an employee be dismissed (with or without notice) on grounds of the

174 Also included in the definition is any “occupational detriment” in contravention of the Protected Disclosures Act 26 of 2000. The Act is also referred to as the “whistle blower’s act”.

175 S 10 of the EEA and Grobbelaar-du Plessis & Van Eck (2011) 255.

176 S 186(1)(a) of the LRA.

177 S 186(1)(b) of the LRA.

178 S 186(1)(c) of the LRA.

179 S 186(1)(d) of the LRA.

180 S 188 of the LRA and Grobbelaar-du Plessis and Van Eck (2011) 255-256.

181 S 187(1)(f) of the LRA includes a list of grounds upon which an employee may not be dismissed. The other grounds include, but are not limited to, race, age, gender, sex, political opinion etc. Grobbelaar-du Plessis and Van Eck (2011) 256.

182 However, the LRA adds an important *qualification* to this protection in so far as it specifically states that the dismissal of an employee on a ground such as disability may be fair if it is based on the inherent requirements of a particular job Sec 187(2)(a) of the LRA; J Grogan *Workplace law* (2005) 147;

person's "disability".¹⁸² A number of disabilities can be encountered at the workplace.¹⁸³ They include, for example, physical disability due to illness and injury; mental incapacity due to stress, illness or trauma;¹⁸⁴ and chronic illnesses that result in continuous absence from work. Should an employee with a disability be subjected to an automatically unfair dismissal, he or she is entitled to lodge a claim for reinstatement or a compensation order up to a maximum of 24 months' remuneration calculated from the day of the dismissal.¹⁸⁵

It is important for the labour market to note that both the EEA and the LRA protect employees or workers with disabilities against unfair discrimination when they apply for work, when they qualify for promotion in terms of the provisions of the EEA, and against unfair dismissal in terms of the LRA.¹⁸⁶ Furthermore, schedule 8 of the LRA contains a Code of Good Practice: Dismissal,¹⁸⁷ which provides guidelines regarding substantive fairness and the different procedures that apply to dismissal on different grounds.¹⁸⁸ It is important to note that, if these steps are not followed, the dismissal of a person with a disability will not only be unfair, but will also automatically constitute unfair dismissal. The dismissal of an employee with a disability who was not incapacitated at the time of the dismissal is regarded as one of the worst forms of discrimination possible.¹⁸⁹

However, the initial country report recognises that despite enactment of the legislation discussed in paragraph 4.3, insufficient progress has been made in translating the legislative measures into economic independence for persons with disabilities.¹⁹⁰ Reasons for the slow

Schmahmann v Concept Communication Natal (Pty) Ltd 1997 ILJ 1333 (LC); and *Archer v United Association of SA* 2005 ILJ 790 (CCMA). Also see Grobbelaar-du Plessis and Van Eck (2011) 256.

183 Grobbelaar-du Plessis and Van Eck (2011) 256, and *Van Jaarsveld and Van Eck supra* n 112.

184 *Spero v Elvey International (Pty) Ltd* 1995) 16 ILJ 1210 (IC); and *Automobile Association of SA v Govender* DA23/99 [2000] ZALAC 19 (20 September 2000).

185 Sec 194(3) of the LRA. Grobbelaar-du Plessis and Van Eck (2011) 256; Van Jaarsveld & Van Eck (2006) 168 - 169; *Van Niekerk v Minister of Labour* 1996 ILJ 525 (K); *Walters v Transitional Local Council of Port Elizabeth* 2000 ILJ 2723; and *POPCRU v SA Police Service* 2003 ILJ 254.

186 Van Jaarsveld and Van Eck (2006) 168.

187 Amended by Act 42 of 1996 and by Act 12 of 2002.

188 *Standard Bank Ltd v CCMA & Others* [2008] 4 BLLR 357; In terms of the Code, employers should follow a four-staged enquiry before dismissing an employee on grounds of disability. Firstly, the question is whether the employee with a disability is unable to perform his or her work. Secondly, if the answer to this question is in the affirmative, the next question is to what extent the employee with a disability is unable to do his or her work? Thirdly, the employer must consider whether the employee (with a disability) working conditions can be adapted, and lastly, if this is impossible, whether there is any alternative work which the employee/worker with a disability could be required to do.

189 Grobbelaar-du Plessis and Van Eck (2011) 256-259.

190 Initial country report CRPD/C/ZAF/ para 289.

progress recorded in the initial country report were ascribed to the lack of access to the built environment and public transport, the interrelatedness between poverty and disability, as well as the persistent attitudinal and communication barriers.¹⁹¹ This means that future initiatives in the realisation of the right to employment and work should involve a more holistic approach to accelerate inclusion and integration of persons with disabilities in the workplace.

4 4 Policy directives: The White Paper on the Rights of Persons with Disabilities (WPRPD)

The Department of Social Development reiterated in their White Paper on the Rights of Persons with Disabilities (WPRPD),¹⁹² that the primary responsibility for disability equity lies with national, provincial and local governments and other sectors of society.¹⁹³ The policy directives in the WPRPD, approved by Cabinet in December 2015, task duty-bearers with the responsibility of eradicating persistent systemic discrimination and exclusion that persons with disabilities experience on a daily basis.¹⁹⁴

The WPRPD is aligned with the disability-inclusive Sustainable Development Goals (SDGs),¹⁹⁵ which was adopted by the General Assembly of the United Nations in September 2015. The WPRPD further aims to integrate the obligations of the CRPD with the national legislative framework and the NDP,¹⁹⁶ by translating the CRPD into a tangible workable and practical tool for the South African context on the protection, promotion and realisation of the rights of persons with disabilities by both the public and the private sector.¹⁹⁷ This must be achieved through the development of targeted interventions that remove barriers in society,¹⁹⁸ calling on all stakeholders to take responsibility for ensuring that the policy directives are implemented.¹⁹⁹

191 Ibid and para 2 of the discussion.

192 National Planning Commission in the Presidency's *Our future - make it work. National Development Plan: Vision 2030 (NDP)* (2012), approved by Cabinet on 9 December 2015.

193 Overview of the WPRPD (2015).

194 Overview of the WPRPD (2015).

195 Transforming our world: the 2030 Agenda for Sustainable Development (SDGs) resolution A/Res/70/1 adopted by the United Nations General Assembly on 25 September 2015. The SDGs is also known as the Global Goals. They are an universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity. The goals build on the success of the Millennium Development Goals, while including new areas such as climate change, economic inequities, innovations, sustainable consumption, and peace and justice, amongst other priorities.

196 National Planning Commission in the Presidency's *Our future - make it work. National Development Plan: Vision 2030 (NDP)* (2012).

197 *National Development Plan: Vision 2030* (2012) 38.

198 *National Development Plan: Vision 2030* (2012) 38.

199 Department of Social Development (2015) foreword.

The policy directives of the WPRPD are intended to accelerate transformation and redress with regard to full inclusion, integration and equality for persons with disabilities.²⁰⁰ For this purpose the WPRPD identify strategic pillars for realising the rights of persons with disabilities.²⁰¹ Policy directives regarding the right to work and employment of persons with disabilities are addressed under the strategic fifth pillar of the WPRPD that deals with reducing economic vulnerability and releasing human capital.²⁰² In this regard, the WPRPD instructs employers to take on the responsibility for providing reasonable workplace accommodation,²⁰³ according to the concepts of barrier-free access and universal design.²⁰⁴ In order to achieve this, the WPRPD calls on employers to build and/or renovate the workplace. These proposed accommodation measures might place a disproportionate or undue burden on the employer in order to address barrier-free access and universal design. However, the WPRPD does not give guidance to employers or give policy directives on how to achieve reasonable accommodation in the workplace in these circumstances. This means employers need to consult the EEA's revised Code of Good Practice and TAG regarding the practical implementation on aspects of reasonable accommodation measures in the workplace.²⁰⁵

However, according to the WPRPD the EEA has not resulted in significant improvement of the employment status of persons with disabilities.²⁰⁶ The WPRPD refers to the Commission on Employment Equity, which reported minimal year-on-year improvements, and targets set well below the national disability prevalence by both the public and private sectors.²⁰⁷ To this end, the WPRPD provides that disability related economic affirmative action targets in the workplace should be cognisant of disability population demographics.²⁰⁸ The targets must

200 Department of Social Development (2015) foreword.

201 Department of Social Development (2015) 48 – 123. The strategic pillars are: removing barriers to access and participation; protecting the rights of persons at risk of compounded marginalization; supporting sustainable integrated community life; promoting and supporting the empowerment of children, women, youth and persons with disabilities; reducing economic vulnerability and releasing human capital; strengthening the representative voice of persons with disabilities; building a disability equitable state machinery; promoting International Co-operation; and monitoring and evaluation.

202 Department of Social Development (2015) 90 – 99.

203 Department of Social Development (2015) 34.

204 Universal design is the design of products, environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or specialised design. Assistive devices and technologies for particular groups of persons with disabilities where these are needed, must also respond to the principles of universal design. Universal design is therefore the most important tool to achieve universal access.

205 See paras 4 3 1 1 and 4 3 1 2.

206 Department of Social Development (2015) 94.

207 Department of Social Development (2015) 95.

208 See para 4 1 on prevalence of disability in South Africa.

take population demographics, as well as redress requirements into account to facilitate equity in employment and work by the year 2030.²⁰⁹ The WPRPD proposes targets of 50% of all affirmative action opportunities targeting persons with disabilities, and 7% of affirmative action opportunities targeting women empowerment.²¹⁰ A further policy directive determine that employees with disabilities must have access to affordable vocational rehabilitation, skills development, job retention and return-to-work programmes after onset of disability.²¹¹ The WPRPD further provides that persons with disabilities must have access to integrated socio-economic development programmes such as social assistance, rehabilitation and habilitation, skills development, and entrepreneurial and employment support programmes. These development programmes must also serve as a national employment services database, which can be utilised by job seekers to link persons with disabilities with employment opportunities.²¹²

Success of the WPRPD will be measured through the implementation of its policy directives. To this end, the WPRPD provides for monitoring and evaluation of its policy directive in its strategic ninth pillar.²¹³ The directives regarding the monitoring process will involve amongst other the collecting, analysing and reporting data on activities, outcomes and impacts that supports effective management of implementation of the WPRPD. Policy directives regarding evaluations of progress made in implementing the WPRPD will assess amongst others; relevance, efficiency, effectiveness, impact and sustainability, which will provide credible and useful information to management and staff, as well as policy makers on accelerating the implementation of the WPRPD.

It is envisaged that the policy directives contained in the WPRPD will be escalated into legislation to complete the domestication of the CRPD. This has to be done through a comprehensive review of existing legislation and gap analysis in order to propose specific legal reform measures to strengthen accountability and recourse for persons with disabilities.²¹⁴

5 Conclusion

The South African Government acknowledged in their initial country report that although awareness raising of the rights of persons with disabilities in general, and in particular the CRPD after ratification in 2007 featured high on the national agenda, weaknesses in co-ordination, implementation, monitoring and evaluation have largely detracted from

209 Department of Social Development (2015) 95.

210 Department of Social Development (2015) 98.

211 Department of Social Development (2015) 96.

212 Department of Social Development (2015) 96.

213 Department of Social Development (2015) 116.

214 Overview of the WPRPD (2015).

its effectiveness and impact.²¹⁵ The initial country report also recognised that despite the enactment of the legislation discussed in paragraph 4 3 above, insufficient progress has been made in translating the legislative measures into economic independence of persons with disabilities.²¹⁶ This is also evident from the situational analysis on the prevalence of disability in paragraph 4 1 above and the low labour market absorption of persons with disabilities in South Africa. The SAHRC's report of 2017,²¹⁷ further suggests that the availability of accurate data on disability is limited, and prevents proper assessment of the progress made in realising the rights of persons with disabilities. Statistics regarding persons with disabilities,²¹⁸ should provide a basis for measuring progress in realising the rights to work and employment.

Progress captured through statistics and data should be reported in both the comprehensive initial state party report,²¹⁹ and subsequent reports,²²⁰ to the CRPD Committee in order to measure the progress made in realising the right to work. It is for this reason that the CRPD recognises, and the South African government should notice, the importance to collect and maintain data on disability to enable formulation of policies that will facilitate implementation and monitoring of state parties compliance with the CRPD.²²¹

The recording of progress made through statistical evidence is also important in the evaluation of labour market's huge challenge to employ and reasonably accommodate persons with disabilities throughout their full cycle of employment. Labour market should also seek strategic partnerships with the disability sector, the Department of Labour and Department of Social Development for assistance and guidance in respect of implementation of their article 27 of the CRPD and national legislative obligations. In this regard, the Department of Labour revised the EEA's Code of Good Practice in 2015,²²² and TAG in 2017,²²³ to align itself with the obligations imposed by the CRPD. Cabinet further approved the Department of Social Development's WPRPD towards the end of 2015, which aims to integrate the obligations of the CRPD with the national legislative framework and the NDP.²²⁴

215 Initial country report CRPD/C/ZAF/1 para 57.

216 Initial country report CRPD/C/ZAF/ para 289.

217 See para 4 1.

218 Schneider *The social life of questions: Exploring respondents' understanding and interpretation of disability measures* (PHD dissertation 2012 University of Witwatersrand) 1.

219 Art 31(1) of the CRPD.

220 Art 31(2) of the CRPD

221 Art 31 of the CRPD determines that states parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.

222 See para 4 3 1 1.

223 See para 4 3 1 2.

224 See para 4 4.

Monitoring and evaluation of the progress of implementation of the policy directives and targets to promote, protect and advance employment of persons of disabilities are imperative in the realisation of the right to work and employment. This could only be achieved if consistent measures are in place to record the persistent challenges of persons with disabilities through collecting disability data and tracking of statistical trends in the workplace.²²⁵ Persons with disabilities should be involved in this process through participatory data collection that reflects their challenges and reasonable accommodation needs in the workplace.²²⁶ Employers should ensure that there is evidence that persons with disabilities are considered and integrated in the workplace through data recorded and reflected in existing performance monitoring frameworks.²²⁷ The information collected from labour market should be disaggregated and used to assist government with their assessment of progress of implementation of policy directives.

Monitoring and evaluation processes on the employment of persons with disabilities should significantly improve the current employment and retention rate of persons with disabilities in South Africa. Progress can only be measured through the analysis of disability statistical evidence of the progressive realisation of the right to work and employment. In absence of such efforts, a new dawn in realising the right to work will remain an impossible reality for the majority of persons with disabilities in South Africa.

225 Department of Social Development (2015) 117.

226 Department of Social Development (2015) 117.

227 Department of Social Development (2015) 117 and para 4 3 1.