

**DISABILITY DISCRIMINATION AND UNDUE HARDSHIP WITHIN THE WORKING
ENVIRONMENT: A CRITICAL ANALYSIS**

by

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DECLARATION BY CANDIDATE

I declare that **Disability Discrimination and Undue Hardship within the working environment** is my own work and that all the sources that I have quoted have been indicated and acknowledged by means of complete references.

Signature

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DECLARATION BY SUPERVISOR

I hereby recommend that this Dissertation by candidate **Number: 4812-783-3 Lindani Goodman Nxumalo** entitled **Disability Discrimination and Undue Hardship within the working environment**, for the degree of Masters of Laws in the Department of Mercantile Law, be accepted for examination.

Mr. Clarence Tshoose
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DEDICATION

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SUMMARY

South Africa is faced with a huge challenge of disability discrimination and inequality. Disabled people are not enjoying equal treatment as compared to others. Those who are on the working sector are not reasonable accommodated. The study examines challenges faced by people with disabilities. The study further submit that people with disabilities should be reasonably accommodated and be retained in the working sector as they have a positive role to play in the economy. The study also looks at the various legislations and argues that they are ineffective as they fail to address the imbalances of the past. The study further suggest that there is a need for all people to understand disabled people and not to isolate them as such stigma cause people with disabilities to be unfairly discriminated against in society and in employment.

Key terms: Discrimination, disabled, people, workplace, reasonable accommodation.

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CHAPTER ONE: INTRODUCTORY BACKGROUND OF THE STUDY

1.1 Introduction

The aim of this chapter is to introduce the study to the readers and to provide the research question/s or problem, aims and objectives, research methodology, scope of the study, literature review and chapters outline. It's been 20 years since South Africa attained democracy. However the working environment is still faced with a lot of challenges.

One of the challenges is the issue of discrimination in the working environment. Various legislation has been passed to deal with labour matters however the issue of discrimination in the workplace remains a huge challenge. The purpose of the study is to examine discrimination in the workplace with particular reference to disability discrimination and to look at the various Acts like the Labour Relations Act (hereinafter referred to as LRA) ¹, Employment Equity Act (herein after referred to as EEA)², as well Code of Good Practice on key aspects of disability in the workplace. The study will examine the above legislation on whether they have enough provisions to eradicate forms of unjustified discrimination against persons with disabilities in the working environment. The study further looks at undue hardship experienced by persons living with disabilities in the workplace.

The study will also look at Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (hereinafter referred to as HIV/AIDS) as to whether it constitutes disability. People with disabilities have an important role to play to make a positive contribution in the workplace hence they deserve to be treated fairly and to be given equal chances as required by the South African Constitution (hereinafter referred to as the Constitution)³.

The study concludes that the current Acts and policies on disability are ineffective and need to be revisited. Government should intervene in addressing the issue of disability discrimination especially Department of Labour as well as Department

¹ Act 66 of 1995.
² Act 55 of 1998.
³ Act 108 of 1996.

responsible for people with disabilities. Although the government has intervened however it is not sufficient. Also, our courts need to play a major role when making decisions on matters of disability and to protect the interests of people with disabilities. The study further argues that there should be awareness programmes on the negative attitude towards people living with disabilities.

1.2 Rationale and objectives of the study

The aims and objectives of the study are to address disability discrimination faced by people living with disabilities in the working sector, the ineffectiveness of labour legislation and to investigate and recommend possible solution to the problem.

1.3 Statement of the problem

Why are people living with disabilities facing huge challenge of discrimination in the working environment even though there is labour legislation in place? Firstly the study argues that people living with disabilities are not protected enough against discrimination in the workplace. Secondly the study explores the current labour law protective framework afforded to people with disabilities. The study will investigate the challenges faced by people with disabilities in the workplace.

1.4 The scope and limitation of the study

As stated above the focus will be on disability discrimination and undue hardship in the workplace as well as looking at the legislation to see if they provide adequate protection for people with disabilities. In doing that, the study will be looking at the Labour Relations Act, Employment Equity Act, and Constitution of the Republic of South Africa, 1996. Furthermore a comparative analysis will be made with foreign jurisdictions on the subject. The study argues that the current Labour Laws protective framework afforded to people with disabilities provides inadequate protection for people with disabilities and that there is a lot to be done in order to provide adequate protection for people with disabilities.

1.5 Literature review

There are various views from the scholars on this topic. The authors agree that there is some positive move towards addressing disability discrimination in the workplace however the implementation of legislation as well as stereotypes are still a huge

challenge. Neeta Gathiram in her article stated that “there has been legislation, policies and programmes of the developmental welfare system for physical disabled in South Africa however the objectives of development are difficult to achieve in a society where the majority of population experiences gross poverty, inequality and underdevelopment. Despite reformists policies within a positive legislative framework and innovative programme, challenges remain in the implementation of a developmental welfare system of disabled people.”⁴ Elizabeth Pendo is of the view that there has been little progress towards equal employment of people with disabilities. She said “as many have noted, despite the prohibition against discrimination in the workplace by American with Disabilities Act of 1990, there has been little progress toward a goal of equal employment of people with disabilities. One reason for this outcome might be that the enactment of the Act has done a good job at decreasing physical barriers but has not done enough to change discriminatory attitudes towards disabilities.”⁵ It is therefore clear that the issue of disability discrimination does not only affect South Africa but it is a global issue. Lori Snyder and others also agrees that there is legislation in place address issue of disability in the workplace however individuals with disabilities are still underrepresented in the workforce and tend to hold lower job status. They said that “social barriers such as negative attitudes and beliefs of others, are the greatest obstacle to equal opportunity among disabled employees thus the relationship between disability status and workforce challenges is mediated by imposition of others beliefs about these individual”.⁶

William Draper and others argued that although attitudes towards disability have evolved over time, there is still evidence that people with disabilities are stigmatized and experience discrimination. They said “when some employers consider an applicant or an employee with a record of having a disability, there can be conscious or unconscious prejudice activated against the worker.”⁷ M Marumoagae is of the

⁴ Gathiram N ‘a critical review of the developmental approach to disability in South Africa’ (2008) 17 International Journal of Social Welfare 146.

⁵ Pendo E ‘identifying (with) disability: using film to teach employment discrimination’ (2013) 58:143 Saint Louis University Law Journal 143.

⁶ Snyder L et al ‘perceptions of discrimination and justice among employees with disabilities’ (2010) 22:5 Employ Respons Rights Journal 5.

⁷ Draper et al ‘workplace discrimination and the record of disability’ (2012) 36 Journal of Vocational Rehabilitation 199.

view that “even though a fair amount of attention has been given to discrimination relating to race, religion and gender, not much has been accorded to disability discrimination particularly in the workplace. Persons with disabilities have generally had difficulties in exercising their fundamental social, political and economic rights”.⁸

The South African Constitution⁹ prohibits direct or indirect discrimination against among others, disabled, and provides that everyone is equal before the law and has the right to equal protection of the law. Section 10 provides for protection and respect for dignity. Section 6 of the EEA prohibits unfair discrimination based on disability. In addition the EEA provides Codes of Good Practice on key aspects of disability in the workplace.

The aim of disability codes is to guide and educate employers, employees and trade unions to understand their rights and obligation, to promote and encourage equal opportunities and fair treatment of people with disabilities.¹⁰ The EEA prohibits unfair discrimination against, among others, people with disabilities and requires employers to adopt affirmative action policies in their favour. In fact section 2 of the said Act provides that the purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure equitable representation in all occupational categories and levels in the workforce.

South Africa is a signatory to a number of international conventions which prohibits discrimination on the basis of disability, for example International Labour Organisation Convention¹¹, Universal Declaration of Human Rights of 1948 etc. The Republic of South Africa is a member of the United Nations and the African Union. It has ratified many UN Human Rights Conventions and thus has signed binding international commitments to adhere to the standards laid down in these universal

⁸ Marumoagae M ‘disability discrimination and the right of disabled persons to access the labour market’ (2012) 15 PER/PELJ 347.

⁹ Constitution.

¹⁰ Dupper O *et al Essential Employment Discrimination Law* Juta (2004)165.

¹¹ 158 of 1982.

human rights documents¹². In other words as South Africa has ratified these conventions, it can be held accountable for violation of the provisions mentioned in the Conventions.

In 2003 Technical Assistance Guidelines on the Employment of people with Disabilities were published to supplement the codes. The LRA protects employees against unfair dismissal on the basis of employee's disability. The Promotion of Equality and Prevention of Unfair Discrimination Act¹³ provides for measures to facilitate the eradication of unfair discrimination, hate speech and harassment particularly on the grounds of race, gender and disability.

One can therefore conclude that there are provisions for people living with disability in South African legislation and in the world in general. South Africa is one of the few countries which have constitutionally entrenched the rights of people with disabilities while at the same time passing legislation that ensures that people with disabilities have rights and protection in the workplace.¹⁴ The question is whether the legislations are protective enough of people with disability? If not where is the problem? The study will therefore explore the current labour laws in this regard. It can therefore be said that the views of the scholars who wrote on this subject matter are that despite the prohibition by legislation against discrimination in the workplace, there has been little progress on equal treatment of people with disabilities and the implementation of legislation remains a huge challenge.

1.6 Data collection and Methodology

Qualitative research methodology will be used in this study. The aim of the study is to gather an in depth understanding and reasons behind disability discrimination in the workplace and to produce information on the subject. In that regard various case laws, books, and journal articles on the subject will be examined. The study will also look at international jurisdiction on the aspect of disability discrimination.

¹² <http://www.claiminghumanrights.org/southafrica> (accessed on the 4th of November 2013).

¹³ Act 4 of 2000.

¹⁴ Dupper *supra* 154.

1.7 Major concept defined-

It is important to define major concepts used in the study.

1.7.1 The concept of Disability/ people with disabilities

People who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.¹⁵

The EEA definition has therefore highlighted that the impairment can be physical or mental, it must be long term or recurring and must substantially limit a person's ability to get a job or to advance in current employment.

The definition is further explained in the code of good practice: Key aspects on the employment of people with disabilities. "Physical impairment means a partial or total loss of a bodily function or part of the body; mental impairment means a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions. Long term means that the impairment has lasted or is likely to last for at least twelve months. Recurring impairment is one that is likely to happen again and to be substantially limiting. Progressive conditions are those which are likely to develop or change or recur".¹⁶

In *IMATU and Another v City of Cape Town*¹⁷ the court noted that in terms of the code, protection of 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 the impairment. A long term impairment of which the adverse effects in relation to the working environment can be largely prevented or removed by means of treatment, such as type 1 diabetes, therefore does not constitute a disability.

It is common cause that the issue of disability discrimination in South Africa has become one of the most concerns not only to government but also to public at large. The challenge that we have is that, as much as our South African Constitution as well as EEA talks about inequalities, it does not define as to what is a disability. That on its own is a huge challenge because should there be a dispute regarding

¹⁵ Sec 1 of the EEA.

¹⁶ Code of good practice on key aspects of disability in the workplace, Employment Equity Act, 55 of 1998.

¹⁷ 2005 11 BLLR 1084 (LC).

disability; our legislations should be in a position to provide solution to the problems. How can we get an appropriate solution if the law itself does not define the object?

The EEA 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, or advancement in, employment.'¹⁸ The American with disability Act of 1990 defines a disabled person as 'one who has a physical or mental impairment that substantially limits a major life activity, a person who has a past record of such an impairment, or a person who is regarded by other people as having such an impairment'. If one looks at the definition of the EEA, it does not specifically clarify as to what is a disability save to give us features of disabled people.

One will therefore have to define disability by looking at the elements of the definition in terms of EEA and Disability codes. Item 5.1.1 of the Disability Code describes physical impairment 'as partial or total loss of a bodily function or part of the body'. It includes sensory impairment such as being deaf, hearing impaired or visually impaired. 'Mental impairment means a clinically recognized condition or illness that affects persons thought processes, judgment or emotions'. Item 5.1.2 of the Disability code defines long term disability as 'an impairment that has lasted or is likely to last for at least 12 months'. Recurring impairment is one that is likely to happen again and to be substantially limiting a person and includes a constant chronic condition, even if its effects on a person fluctuate. Item 5.1.2 (3) defines progressive conditions 'as those that are likely to develop or change or recur'.

People living with progressive conditions or illness 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 a person are not disabilities. One will have to look at the definition of EEA in conjunction with the Disability codes in order to get a clear definition of disability. Otherwise the Act alone is silent and does not define disability which on its own creates problems. The Act should give a clear definition of what is a disability.

¹⁸ Sec 1 of the EEA.

The definition by the Codes has also received some criticism by authors. *Dupper et al* asserts that “physical impairment includes being deaf, hearing or visually impaired, but broadly speaking, it would include any partial or indeed total loss of a bodily function or part of the body. What would constitute a partial loss of such function? The definition is open-ended.”¹⁹ It will appear that some intervention is required to look at the definition in the Act and if possible a new clear definition should be developed as this is one of the serious concerns especially in the labour law field. As it stands it is submitted that it does not provide adequate and sufficient definition. Adopting the appropriate approach to defining disability has historically been and remains a subject of much conjecture.

1.7.2 Discrimination

Discrimination means treating people differently, negatively or adversely because of their race, age, religion, sex, etc., that is because of prohibited ground of discrimination.²⁰

1.7.3 Reasonable Accommodation

Any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.²¹

1.7.4 Designated group

Designated group means black people, women and people with disabilities.²²

1.7.5 Unjustifiable hardship

Means 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.²³

¹⁹ Dupper *supra* 165.

²⁰ Dupper *supra* 33.

²¹ Sec 1 of the EEA.

²² Sec 1 of the EEA.

²³ Sec 6.12 of the Code of Good Practice-EEA.

1.8 Organisation of study

The study is divided into 6 chapters. Chapter one provides introduction and conceptual framework of the study. Whilst chapter two examine the legal framework on issues relating to disability in the workplace. Chapter 3 will explore mechanisms that can be adopted to accommodate people with disabilities in the working environment. This chapter will also look at HIV/AIDS whether it constitute disability. Chapter 4 will look at issues and challenges with regards to South African labour laws and provide recommendations. Chapter 5 will look at international labour law and the rights of disabled workers. Chapter 6 will focus on conclusion and recommendations.

1.9 Conclusion

In conclusion it is clear from the above discussion that the main issue is about reasonable accommodation for people living with disabilities in the workplace and that they are not equally protected within the working environment. Although there is various legislation in place which protects people living with disabilities, there is a huge problem of implementation and as a result people living with disabilities will continue to be underrepresented in the working environment and discriminated. People living with disabilities need the most protection and assistance. The following chapter will look at discrimination in the workplace and how it affects disabled people as well as people in general

2. CHAPTER TWO: DISCRIMINATION BASED ON DISABILITY AT THE WORKPLACE

2.1 Introduction

The aim of this chapter is to discuss disability discrimination in the workplace and how it affects people with disabilities in the working environment. In 1998 the EEA was introduced to deal with protection against discrimination in the workplace. Chapter 2 of the said Act prohibits unfair discrimination in the workplace. The EEA prohibits all persons from discriminating unfairly against employees and applicants for employment.²⁴ It also places an onus of proof upon the employer against whom such discrimination is alleged to justify its conduct.²⁵

EEA imposes a duty upon employers to eliminate all forms of discrimination in any employment policy and designated employers are furthermore required to include in their employment equity plans measures to eliminate forms of unfair discrimination which adversely affect persons from designated group.²⁶ The unfair discrimination provision must be interpreted in accordance with the South African Constitution, 1996 with particular reference to section 9 which deals with equality.

One can safely say that generally employees are protected against discrimination in the workplace, however the difficulty arises in cases where employees have to prove disability discrimination. Most of employees cannot prove certain forms of discrimination, for example sexual harassment. It is therefore important for this study to look at how discrimination can be determined and to examine legal framework on issues relating to disability in the workplace.

2.2 Disability Discrimination in the workplace

In order for one to determine unfair discrimination/disability discrimination dispute it is important to establish whether such discrimination took place. "In one sense to

²⁴ Sec 6(1).

²⁵ Sec 11.

²⁶ Sec 15 (2) (a).

discriminate means no more than to differentiate or to treat differently”.²⁷ ‘The concept of discrimination must be understood as meaning any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity in treatment of employment or occupation. The second stage of the South African test is the enquiry of unfairness’.²⁸ In determining the existence of discrimination, the motive of the perpetrator is irrelevant, the decisive factor is the effect of the differential treatment on the individual or group in question.

In *Louw v Golden Arrow Bus Service (Pty) Ltd*²⁹ the court said that ‘the definition of an unfair labour practice and its successor, the residual unfair labour practice is not based on delict which would require *culpa*. The LRA creates a form of strict liability. An applicant need not prove *culpa*, although the act in question may, in the ordinary course of events, be accompanied by intention, negligence and motive. In other words what the court said in this case was that cases of discrimination must be viewed objectively, this which was also emphasised by Constitutional Court in *City Council of Pretoria v Walker*.³⁰

In *Harsken v Lane NO & Others*³¹ the court stated the following with regards to distinction between differentiation, discrimination and unfair discrimination ‘firstly does the differentiation amounts to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation has been found to be on a specified ground, then unfairness will be presumed. If on an unspecified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at

²⁷ Du Toit *et al Labour Relations Law: A comprehensive Guide* (2006) LexisNexis 577.

²⁸ Du Toit *ibid* 580.

²⁹ 2000 3 BLLR 311 (LC).

³⁰ 1998 3 BCLR 257 (CC) 278.

³¹ 1998 1 SA 300 (CC) 325A.

the end of this stage of the enquiry the differentiation is found to be unfair, then there will be no violation'. The case seems to set out clearly the basic principles regarding fairness or otherwise of discrimination, however the EEA provides defences to the employer that can be used as a counter claim to unfair discrimination such as the inherent requirements of a job, affirmative action as well as a general fairness defence.

It is worth mentioning that in *Harksen case* (discussed above), the court listed various factors that must be considered in determining the unfairness or otherwise of discrimination. These are the position of the complainant in the society, the nature of the provision or power and the purpose sought to be achieved by it and the extent to which the discrimination has affected the rights of the complainants and whether it has led to impairment of their fundamental dignity etc. The importance of these factors is that they should inform the meaning we give to the defences available to employers in terms of legislation.

The substantive interpretation of equality, implying that failure to remedy the consequences of past discrimination may result in its continuation, gives rise to the question whether failure to implement affirmative action measures may in itself constitute discrimination. In *Harmse v City of Cape town*³² having noted that section 5 of the EEA, which requires employers to eliminate unfair discrimination in the workplace and that affirmative action measures are a means of doing so, Waglay J draw the following conclusion: 'the right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in section 10 of the constitution.

This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified by the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against'.

³² 2003 6 BLLR 557 (LC).

However in *Dudley v City of Cape Town & another*,³³ the court reached a different conclusion. Faced with a claim that failure by the employer to apply affirmative action in favour of the applicant amounted to discrimination in breach of section 6 of the EEA, Tip AJ ruled that such conduct gives rise to an enforcement issue under chapter 3 and not unfair discrimination claim under chapter 2. It is therefore, submitted that the employers have a duty to make sure that such kind of behavior is addressed within the working environment. The most important principle is that of fairness irrespective of anything. There should not be preferential treatment which will result in the society being prejudiced. Although the employers can justify their action, such justification must be in terms of the law.

In *Solidarity obo Bernard and another v SAPS*³⁴ the court adopted the following principle with regards to fairness: “The provisions of the EEA and an Employment Equity Plan must be applied in accordance with the principles of fairness and with due regard to the affected individual’s constitutional right to equality. It is therefore not appropriate to apply, without more, the numerical goals set out in an Employment Equity Plan. That approach is too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected. In this regard the need for representivity must be weighed up against the affected individual’s rights to equality and a fair decision made”.

In light of the above discussion, it becomes clear that any form of discrimination is not allowed in a working environment if it cannot be justified. Employers can only discriminate if they can justify their action and if such discrimination is not prohibited by the law. The provisions of the EEA need not be misinterpreted by the employers. Employers have a duty to make sure that there is no discrimination taking place within the working environment against people with disabilities.

Employer’s policies must be in line with labour legislation and must promote the culture of unity and human dignity. As it can be seen from the Act that there are various forms of discrimination, for the purposes of this discussion the study will be

³³ 2004 5 BLLR 413 (LC).

³⁴ 2010 5 BLLR 561 (LC).

focusing much on disability discrimination. The above discussion sets out the background and the principles applicable in cases of disability discrimination in the working environment.

2.3 Conclusion

It is clear from the above discussion that discrimination in the workplace is not acceptable. Our laws are clear in that regard. Employers need to take measures to make sure that such conduct is dealt with in a working environment and to make sure that sanctions are imposed to offenders. Our courts need to make sure that there is compliance with labour laws especially EEA. The following chapter will discuss reasonable accommodation in the workplace to see how disabled people can be accommodated in the working environment.

3. CHAPTER THREE: REASONABLE ACCOMODATION AND UNDUE HARDSHIP

3.1 Introduction

In this chapter the study will look at reasonable accommodation and how it should be implemented by employers in a working environment. This chapter will look at various laws and cases and discuss them in terms of addressing the issue of disability discrimination in the workplace. The outcome of this chapter is that all employers have an obligation to reasonable accommodate disabled employees as required by the law.

Reasonable accommodation is ensured through the EEA. According to EEA reasonable accommodation means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment³⁵. The South African understanding of reasonable accommodation is that it applies to all persons, regardless of disability. Thus the reasonable accommodation must be provided to ensure equal opportunities on account of not only disability, but other grounds for discrimination such as age and sex.³⁶

The scope of reasonable accommodation in the employment context includes applicants and employees. The EEA also specifies that employers may adopt the most cost-effective means that are consistent with effectively removing the barrier to a person being able to perform the job and to enjoy equal access to the benefits and opportunities of employment. The South African Disability Codes encourages employers to make more effort to reduce and eliminate discrimination and/or promote affirmative action.

It remains to be seen whether this is happening in our working environment. It is submitted that we still have a long way before we eliminate such kind of

³⁵ Sec 1 of the EEA.

³⁶ Ad Hoc Committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities' 7th session New York, 2006.

discrimination. Similarly, South Africa lacks behind in as far as dealing with issues relating to the accommodation of people with disabilities in the workplace.

3.2 Challenges faced by people with disabilities in the working environment

The widespread ignorance, fear and stereotypes cause people with disabilities to be unfairly discriminated against in the society and in employment. As a result people with disabilities experience high unemployment levels and in the workplace they remain in low status jobs. There are assumptions about abilities and job performance of job applicants and employees with disabilities. "Employees who become disabled are in most cases encouraged to apply for disability benefits and tend to retire earlier than other employees do. Although if their needs are reasonably accommodated, they can continue as productive employees."³⁷

It is submitted that although there is labour legislation in place as well as code of good practice on key aspects of disability in the workplace which provides for reasonable accommodation, people with disabilities are still discriminated and they do not enjoy equal benefits as other normal employees.

People with disabilities can play a meaningful role to the economy as well as society at large and as such they need to be retained at work and be accommodated in order for them to share their skills. In the recent proposed amendments to Compensation for Occupational Injuries and Diseases Act (COIDA), employers have an obligation to appoint disability manager and other personnel to deal with cases of disabled persons and also not to dismiss a disabled employee within 12-month period on basis of incapacity.³⁸ That is a clear indication that government takes the issue of disability seriously and that all employers have a duty to accommodate them in the workplace.

3.3 Reasonable Accommodation.

The question that one will have to ask, relates to the extent to which the employer has a duty to accommodate people with disabilities. Item 6 of the Code of good practice on the employment of people with disabilities provides that employers

³⁷ Code of good practice-Employment Equity Act 55 of 1998.

³⁸ www.miningweekly.com (accessed on the 6th of January 2014).

should reasonably accommodate the needs of people with disabilities. In *Bennett and Mondipak*³⁹ the court established the principle that employers are under an obligation to consider ways to adapt duties to accommodate disabilities or stress experienced by an employee. In addition, employers have a positive obligation to fully investigate issues which give rise to the work stress and explore whether the work can be made less stressful.

‘The aim of the accommodation is to reduce the impact of the impairment of the person’s capacity to fulfill the essential functions of a job.’⁴⁰ Basically this means that employers have a duty to assist and accommodate people with disabilities. People living with disabilities need the most protection and assistance.

The EEA prohibits unfair discrimination against, among others, people with disabilities and requires employers to adopt affirmative action policies in their favour. In fact section 2 of the said Act provides that “the purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure equitable representation in all occupational categories and levels in the workforce”⁴¹.

However it should be noted that “reasonable accommodation constitute no temporarily allowed exceptions to the rule of equal treatment, but forms part of the general obligation of non-discrimination and equal treatment.”⁴² Employers are required to reasonably accommodate the needs of disabled, for example, to reduce the impact of impairment of the person’s capacity to fulfill the essential functions of the job. They must do this by adopting the most cost effective means consistent with effectively removing the barriers to perform the job and to enable the disabled to enjoy equal access to the benefits and opportunities of employment.”⁴³ In other

³⁹ 2004 25 ILJ 583 (CCMA).

⁴⁰ Dupper *supra* 165.

⁴¹ S2 of the EEA.

⁴² Reasonable Accommodation in EU equality Law in a broader perspective- presentation by Jenny Goldschmidt, Netherlands Institute for Human Rights (Conference: Fight against Discrimination November 2006 in Trier).

⁴³ ‘Protecting the disabled-The new code’ (2002) 25 *Employment Law Journal*, Butterworths online.

words the option to resign and be given benefits should be the last attempt after all avenues have been exhausted.

The duty to reasonably accommodate people with disabilities applies to both applicants for employment and to present employees. This means that changes may be required in recruitment and selection processes in order to accommodate the applicant. 'The physical working environment, the manner in which work is usually done, evaluated and rewarded and to the benefits and privileges attached to the employment'⁴⁴.

'Some other examples of the sort of adjustment the employer should consider in consultation with employee include allocating some of the work to someone else, transferring the employee to another post or another place of work, making adjustments to buildings where employee work, providing trainings as well as arrangements for flexible hours and providing reader or interpreter where necessary.'⁴⁵

As stated above, this is not happening. Employers do not want to accept people living with disabilities as they believe that they are inconvenience and they do not want to pay towards accommodating them. This is happening to both private and public sectors.. "The determination of the reasonableness of a proposed accommodation depends very much on a fair balancing of competing considerations, such as the nature of the risk involved, the extent of the duties that have to be reassigned, the effect of reassignment on the normal operations of the business and the performance of the other jobs, and the impact on other employees who will be assigned different or additional duties against the aspirations and interests of the excluding party."⁴⁶ This means that the employer has to look at all the circumstances and not only at the affected employees.

The obligation to accommodate disabled applicants or employees may arise when they voluntarily disclose disabilities or when it is reasonably self-evident that an

⁴⁴ www.direct.gov.uk/en/disabledpeople (accessed on 12 of August 2013).

⁴⁵ *Supra*.

⁴⁶ Ngwena *supra* 768.

employee or applicant is suffers from some disability.⁴⁷ In other words the employer is under an obligation to accommodate disabled employees, however reasonable accommodation depends upon the employer being aware of the applicants or the employees disability or impairment. "Accommodation is central to the employment of people with disabilities. A person with a disability is deemed to be a person who is suitably qualified and able to do the job provided that the work environment is adapted in some way to accommodate the person with the disability. Of course only reasonable accommodation is expected."⁴⁸ Dismissing a person with disability should be the last resort.

It is also important to distinguish between incapacity and disability. The distinction between incapacity and disability came under scrutiny in *National Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*.⁴⁹ This case concerned a dismissal for incapacity (ill health or injury) of a general worker in the department of health after she was injured on duty and was no longer able to bend or lifts heavy objects. Ms Lucas was transferred to sewing department while her case was assessed and her assessment was unsuccessful. She applied for a senior administrative post. The injured employee was dismissed for incapacity, in accordance with the procedures set out in items 10 and 11 of the Code of good practice- Labour Relations Act.

The arbitrator determined that the nature of the incapacity was such that it could be classified as a disability and examined whether the outcome would have differed had Ms Lucas been assessed as a person with disabilities in terms of EEA. The arbitrator concluded that one should take a purposive approach, as the objective of the statutes is to promote procedural and substantive fairness in relation to people with disabilities and to encourage employers to keep them in employment if they can be reasonably accommodated.⁵⁰

⁴⁷ Dupper *supra* 165.

⁴⁸ Basson *supra* 144.

⁴⁹ 2004 25 ILJ 2091 (BCA).

⁵⁰ Christianson M 'Incapacity and Disability: A retrospective and prospective overview of the past 25 years' (2004) 25 ILJ 637.

The arbitrator was satisfied that Ms Lucas fell within the definition of people with disabilities in the EEA and that the employer should therefore have followed the guidelines in the EEA code as this would have resulted in a fairer outcome to the employee without imposing unjustifiable hardship on the employer. The arbitrator ordered a full occupational assessment and if this resulted in a recommendation that the employee could return to work with reasonable accommodation, Ms Lucas should be reinstated.

In *Wylie and Standard Executors & Trustees*⁵¹ the employee, a trust officer, was diagnosed with multiple sclerosis, a degenerative neurological disorder. When she could not perform to the required standards in the trusts division she was transferred to the estates division where there was less pressure. Fewer estates were given to her to handle but she still could not manage all her files. Stress worsened the employee's condition, but a medical panel found that she was not totally and permanently disabled. The panel suggested that the employer consider either (a) accommodating the employee within her current role; (b) seeking employment for her in another role in the bank; or (c) assisting her to pursue something outside of the bank. The employer did not consider option (a) to be feasible. The employee was advised that options (b) and (c) would be explored for a period of three months after which, if no solution could be found, her employment would be terminated. No suitable positions became available and her employment was terminated at the end of the three-month period.

In arbitration proceedings the employer contended that it had complied with the Code of Good Practice: Ill Health and had treated the employee with understanding and compassion. In those circumstances it was reasonable to dismiss the employee. It was common cause that her impairment amounted to disability. The employee contended that the Code of Good Practice on the Employment of People with Disabilities required much more of an employer in the case of a disabled employee, and that the employer had failed to comply with these.

⁵¹ 2006 27 ILJ 2210 (CCMA).

The commissioner first considered the definition of 'people with disabilities' in section 1 of the EEA read with the definition of a 'physical impairment' in item 5 of the Disability Code, and found it inescapable that the employee's condition amounted to a disability as envisaged in the EEA and the code. Item 6 of the code provided that employers should 'reasonably accommodate' the needs of people with disabilities. The LRA also protected employees against unfair dismissal on the basis of disability.

The Code of Good Practice: Dismissal distinguished between dismissals for incapacity based on poor performance and those based on ill health or injury, and 'disability' was mentioned in passing in items 10 and 11 of that code. The commissioner considered whether 'incapacity for ill health or injury' and disability were interchangeable, and concluded that they were not. Incapacity implied that an employee was not able to perform the essential functions of the job. An employee with a disability was suitably qualified and generally able to perform the essential functions of the job with some form of reasonable accommodation.

A failure by employer to reasonable accommodates employees or applicant can amount to unfair discrimination based on disability. In *Nottinghamshire County Council (NCC) v Meikle*⁵², unjustified unfavorable treatment combined with unjustified failure to accommodate Meikle resulted in unlawful discrimination. Without accommodating Meikle in anyway, the NCC had reduced her sick pay by 50% after 100 days absence from work. The Supreme Court of Judicature agreed with the Employment Appeal Tribunal that this amounted to discrimination under the UK's Disability Discrimination Act of 1995. In *Eaton v Brant County Board of Education*⁵³, the Supreme Court of Canada had to consider the application of section 15 (1) of the Canadian Charter which, like section 9 of the South African Constitution, protects against discrimination on the grounds of disability. The court had to decide whether to place a 12 year old child in a special education programme rather than a mainstream class. The child had cerebral palsy, was unable to communicate through speech, sign language or other means, had some visual impairment and used a wheelchair for mobility.

⁵² 2004 4 ALL (ER) 97.
⁵³ (1997) 1 SCR 241.

Unanimous court *per* Sopinka J observed: ‘Exclusion from the mainstream of society results from the construction of a society based solely on mainstream attributes to which disabled persons will never be able to gain access. It is the failure to make reasonable accommodation to fine tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. It is recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of section 15 (1) in relation to disability’.

The discussion of the case law above shows that reasonable accommodation should not only be in the workplace, but to society as a whole including public institution. It also shows that there is a need for societies to understand how to accommodate people with disabilities.

In *Kelly v Metallica West, Inc*⁵⁴ customer service supervisor instituted a law suit against her former employer for refusing to allow her to return to work with supplemental oxygen and terminating her employment in retaliation for requesting the accommodation of returning to work with supplemental oxygen. The district court determined that Kelly was not actually disabled because her need for supplemental oxygen was only temporary and her condition could be improved with the use of portable oxygen.

One of the leading cases on this subject is *Standard Bank of South Africa v CCMA & Others*.⁵⁵ In this case the employee was involved in a motor accident while she was on duty. Her injuries later caused severe back pain. After resuming work the employee found that she could not cope with traveling. The employee was then assigned to light administrative work. The employee later applied for another job as she felt that what she was doing was not inspiring. She was able to undertake telephonic sales work if she could use a headset, but the bank declined to purchase a headset for her. The employee was again assigned tasks which did not involve using a telephone including paper-shredding, which she found demeaning and painful.

⁵⁴ 410 F 3d at page 670.

⁵⁵ 2008 29 ILJ 1239 (LC).

The employee's application to be medically boarded was refused. A few months later, the bank informed the employee that she would be appointed to the home loans division but later decided to terminate her services on the ground of incapacity, due to continuing absenteeism. The employee was dismissed two years later. The matter was taken to the CCMA and the commissioner held that the dismissal was unfair and awarded the employee compensation.

This matter was then taken on review. On review the court noted that the employer had ignored requests made by the employee and had failed to comply with Code of Good Practice relating to treatment of people with disabilities. For example the court said that the bank failed to obtain a report by an occupational therapist and to consult the employee about possible adaptations to her workstation as had been recommended by a medical practitioner. The request for a headset to assist her in telephonic work had also been ignored and the bank had refused to purchase a special chair for the employee and to allow her to use computers.

The bank failed to adhere to constitutional provision as well as to the right to fair labour practice and not to discriminate against any designated group. The obligation to accommodate a disabled employee is accordingly even more onerous than the obligation to take affirmative action measures. The court held further that the bank failed to properly investigate the nature and extent of employee's disability and that failing to make reasonable effort to accommodate the employee amounted to discrimination. The decision of the court in this case showed that the courts are not taking the issue of disability lightly.

It is disappointing in our democratic society that there are employers who are still not supportive and not taking care of employees need. The worse part in this case is that the employee was injured while she was on duty. The employer failed to follow the guidelines as set out in the Codes of Good Practice and to come up with other plans to support her. They even failed to consider half day position and to make adjustments to her workstation. The employer should not push the employee to resign but should assist the employee as long as the employee can still do other jobs. The employer was supposed to assess whether or not the employee can do the

work and if not, the extent to which the employee can perform the work, with or without reasonable accommodation, adaptation to employees work circumstances or the availability of suitable alternative work for the employee.⁵⁶ In other words to dismiss the employee was really uncalled for because it would appear that there were alternatives in the circumstance. Employers are under an obligation to redress inequality in the workplace and to treat all employees equally and not to discriminate. "A dismissal which involves differentiation is unfair if the reason for it amounts to discrimination."⁵⁷

Perhaps the leading case on unfair discrimination involving disability is one involving the refusal to employ a diabetic as a fire-fighter. In *IMATU and Another v City of Cape Town*⁵⁸ one of the problems facing the claimant was that, from a very early age, his diabetes had been brought under control and this made it difficult for his lawyers to argue that he had a disability (defined as 'long-term or recurring and which substantially reduces their prospects of entry into or advancement in employment').

The court agreed that because there was no substantial limitation of his abilities to carry out tasks, the applicant did not fall within the definition of 'people with disabilities' in the Code of Good Practice. The court nevertheless held that it may be unfair discrimination to have a blanket ban denying employment simply on the basis of diabetes. "This case illustrates a core principle of the Code of Good Practice on the Employment of People with Disabilities. 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 of the impairment."⁵⁹

It can therefore be concluded that there is a well-established law and lots of cases have been referred to courts on the subject but the problem persists. Are the current legislations providing adequate information to deal with disability discrimination? Is our government doing enough to address the problem? The law cannot action itself, it needs to be driven. As at stand it is my submission that we have the basis in law

⁵⁶ Van Niekerk *supra* 140.

⁵⁷ Grogan J *Workplace Law* (2004) 147.

⁵⁸ 2005 26 ILJ 1404 (LC).

⁵⁹ www.worklaw.co.za (accessed on the 27th of September 2013).

however it is not enough. The law itself is not clear enough on the subject hence the problem will not be solved until there is intervention by the government to address the issue.

3.4 Undue hardships versus reasonable accommodation

Another important aspects regarding employers accommodation is the issue of unjustified hardship. The EEA codes define 'unjustifiable hardship as 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. "Determining whether reasonable accommodation will not impose a disproportionate burden on the employer provides an opportunity for an individualized assessment of the nature and cost of accommodation in the light of the employer's financial resources, workplace structures and environmental and business operations."⁶⁰

This means that if a reasonable accommodation poses an undue hardship, it need not be implemented.⁶¹ However case by case fact intensive analyses is required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position.⁶² There must be a balance between reasonable accommodation and undue hardship.

In *Standard Bank of South Africa v CCMA*, the bank failed to lead evidence about why the hardship was unjustified. There can be no doubt that the bank discriminated against the employee in this case which is against the provision of the constitution, Employment Equity Act, as well as the right to a fair labour practice. In UK, the Disability Discrimination Act (DDA), 1995 prohibits discrimination in recruitment,

⁶⁰ Pretorius JL *et al Applying Reasonable Accommodation' Employment Equity Law*, Butterworths Online (Lexus Nexus).

⁶¹ Lee B ' Reasonable Accommodation Under Americans with Disabilities Act' Institute of Management and Labour Relations, Rutgers University, New Brunswick, New Jersey (Brochure).

⁶² Befort S 'Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions after U.S Airways, Inc v Barnett' (2003) 45:931 *Arizona Law Review* 951.

promotion, training, working conditions and dismissal because of a reason relating to a persons disability. Employers must make reasonable adjustments to accommodate employees and job applicants, where this is considered reasonable in all circumstances. This might involve making changes to physical premises. Providing adaptation to systems and technologies, or ensuring that, for example, a visually impaired job applicant receives details in braille/large print or that a user of sign language can be accompanied by a translator.⁶³ Such interventions can go a long way in increasing employment for disabled.

In UK the introduction of DDA increased the number of employment. It is important to note that in the post DDA period the raw employment gap between the work limited disabled and the non disabled have narrowed. The increase in the employment rate is consistent with positive role of DDA.⁶⁴

The aim of reasonable accommodation is to reduce the impact of the impairment on the person's capacity to fulfill the essential functions of a job. Reasonable accommodation is designed to take into account the peculiar disability of the job applicant or employee and specifically assist him or her in the work environment. It should help the employee to function productively in the workplace and become self-supporting. Termination of employment relationship should be a last resort. However if it is not possible to accommodate or retain the employee with disability, it is always possible to terminate the employment relationship, either for operational requirements or for incapacity.⁶⁵ It therefore means that if there are good and fair reasons for termination and proper procedures have been followed, dismissal will be fair. But as stated earlier it must be a last resort after all necessary alternatives have been exhausted.

Where an employee is frequently absent, the employer is obliged to assess if the reason for the absence requires reasonable accommodation. The possibility of alternative work needs to be explored. But, if this is not possible the code makes it

⁶³ Goss D *et al* 'Disability and employment: a comparative critique of UK legislation' (2000) 11:4 *International Journal of Human resource Management* 811.

⁶⁴ Jones M 'Is there employment discrimination against the disabled' (2006) 92 *Economic Letters* 36.

⁶⁵ Dupper *supra* 186.

clear that the employee can be dismissed. Employers ought to recognise the value that persons with disabilities can offer in various workplaces in South Africa. They should start concentrating on recruiting such persons into their workforce and creating a working environment which will allow their reasonable accommodation in the workplace. An employer who refuses to make any accommodation that falls short of unjustified hardship or refuses to give reasons for not making an accommodation is rational.⁶⁶

3.5 HIV/AIDS and Disability

The purpose of this part is to look at HIV/AIDS whether it constitute disability. It is further looks at other various diseases such as diabetes as to whether they are classified as disability. There has been argument that as to whether people who are HIV positive are regarded as disabled.⁶⁷ In terms of the EEA asymptomatic diseases that do not yet substantially limit an employee in the workplace would not be deemed to be a disability. It will therefore mean that a person with HIV in his or her early stages could not be defined as a person with disability.

Section 6 of EEA prohibits unfair discrimination and includes HIV status as a prohibited ground, however the Act does not state whether HIV constitutes a disability. It therefore means that based on the definition a person with HIV in his early stages cannot be classified as a disabled person. Whether a person with full blown AIDS should be classified as a disabled person depends upon the circumstances. If a person has reach such stage where he or she cannot do things on his or her own, he should be classified as being disabled as long as such sickness meet the elements in terms of the definition of the Act. It is therefore submitted that HIV is a form of disability only if a person has reach such a stage that he or she cannot do things on her own. There will be a need for an employee to be assessed to determine if such sickness amounts to disability.

It is therefore important for employers not to discriminate against employees and job applicant based on HIV status. Refusing to employ otherwise suitable job applicants

⁶⁶ Marumoagae M 'Disability discrimination and the right of disabled persons to access the labour market' *Potchefstroom Electronic Journal (PER)* (2012) 15 (1), 1727-3781.

⁶⁷ Tshoose C 'The Impact of HIV and AIDS in the context of Informal Social Security: Issues and trends from South African Experience' (2010) 13 (3) *PER* 408-434.

solely because he or she is HIV positive amount to an infringement of right to dignity and to unfair discrimination. In *Hoffman v South African Airways*⁶⁸ the applicant applied for a position as cabin attendant. He was found to be suitable after an interview and series of tests. However the result of his medical examination indicated that he was HIV positive. He was then declared unsuitable solely on that basis. His application in High Court to have respondent refusal to employ him declared unconstitutional and for order compelling the respondent to employ him to the position was dismissed. On appeal the Constitutional Court held that HIV/AIDS is a progressive disease of the immune system that passes through 4 identifiable stages. That a person can be vaccinated against yellow fever until his CD4+ count drops to below 300 cells per micro litre.

The court held that at the heart of the prohibition against discrimination lies the principle that all people must be treated with dignity. Any discrimination against HIV infected people is a fresh instance of stigmatization and amount to an assault on the dignity of all HIV sufferers. The fact that some people who are HIV positive are not suitable to be employed as cabin attendants does not mean that all such persons are unsuitable. The greater interests of society require the recognition and protection of human dignity and the elimination of all forms of discrimination. The denial of employment to the appellant accordingly impaired his dignity and constituted unfair discrimination.

If one looks at this case, the employer clearly was discriminating against employee. In fact the employer was trying to impose a blanket ban on the employment of HIV infected applicants as cabin attendants. It is also clear that he was only discriminated solely on the basis of HIV status because he did qualify for a job. If one look at the stages of HIV/AIDS it is clear that it is a progressive disease and the applicant in this case had not reached a stage where he could not perform and could not be classified as a person with a disability. Clearly the company discriminated against him on the basis of his status and contravened the provisions of the constitution as well as EEA.

⁶⁸ 2000 12 BLLR 1356 (CC).

The other challenge is the stigma against disabled people. “Stigma and discrimination have a shameful history internationally. In South Africa they took a particularly horrendous form in the apartheid system. A major role that stigma plays in society is to create difference and social hierarchy, and then in turn legitimizing and perpetuating this social inequality. Discrimination arises out of any point of difference that can be consistently labeled. The attachment of discrimination to illness has a long history with it impacting on people with mental illness and physical disorders.”⁶⁹ There is therefore a need for intervention to reduce stigma and to accept people living with HIV/AIDS and not to discriminate them in the working environment.

In *Nanditume v Minister of defence*⁷⁰ the applicant had applied to be enlisted in the Namibian defence force. Medical examination and blood test revealed that he was HIV positive. His application for enlistment was refused on this ground. The court held that the exclusion of the applicant from the defence force on the ground that he had tested HIV positive constituted unfair discrimination in contravention of section 107 of the Labour Act 6 of 1992, especially since the applicant was still in good health. This case basically confirms what was said in Hoffman’s case. It is therefore clear that as long as an employee can still do the work and is suitable qualified for a position, he or she cannot be discriminated solely on the basis of his status.

3.6 Conclusion

The purpose of reasonable accommodation is to ensure that there are equal opportunities and to improve employment prospects for people with disabilities in the work sector. As discussed above, there is a lot of contribution that can be made by disabled people. Employers need to retain their skills and experience as long as such retention will be reasonable and justifiable. People with HIV/AIDS should not be denied employment because of their status without regard to their ability to perform the duties as such conduct amounts to discrimination.

⁶⁹ Skinner D *et al* ‘Stigma, discrimination and the implication for people living with HIV/AIDS in South Africa’ (2004) 3 *Journal of Social Aspects of HIV/AIDS* 158.

⁷⁰ 2000 NR 103 (LC).

CHAPTER 4: SOUTH AFRICAN LAW AND DISABILITY

4.1 Introduction

In this chapter the study will look at the current labour legislation to see if it adequately addresses the issue of disability discrimination in the workplace. It will look at the ability of South African legislation to provide protection to people with disabilities. The discussion will further look at challenges within the current labour legislation. Finally the discussion will make some recommendations as to how can the problems be ratified in the legislation.

4.2 Legislative Framework on Disabilities

As stated above, South Africa has legislation and is a signatory to international conventions on disability discrimination however disabled people still faces a lot of challenges in the working sector. The main aim of this chapter will be to look at the South African law and explore the provisions in the legislation with regard to discrimination based on disability.

Section 10 provides for protection and respect for dignity. Section 6 of the EEA prohibits unfair discrimination based on disability. In addition, EEA provides Codes of good practice on key aspects of disability in the workplace. The aim of disability codes is to guide and educate employers, employees and trade unions to understand their rights and obligation, to promote and encourage equal opportunities and fair treatment of people with disabilities.⁷¹

South Africa is a signatory to a number of international conventions which prohibits discrimination on the basis of disability, for example, International Labour Organisation Convention⁷², Universal Declaration of Human Rights of 1948 etc. In 2003 Technical Assistance Guidelines on the Employment of people with Disabilities were published to supplement the codes. The Labour Relations Act protects employees against unfair dismissal on the basis of employee's disability. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides

⁷¹ Dupper *supra* 159.
⁷² 158 of 1982.

for measures to facilitate the eradication of unfair discrimination, hate speech and harassment particularly on the grounds of race, gender and disability.

South Africa is one of the few countries which have constitutionally entrenched the rights of people with disabilities while at the same time passing legislation that ensures that people with disabilities have rights and protection in the workplace.⁷³ The question is whether those rights are translated into meaningful reality. It is submitted that although the laws are there they are not translated into meaningful reality. It's one of the challenges South Africa faced. The provisions of legislation are not enough to cover the issue of disability. They should provide guidelines as to how the issue of disability should be addressed. As it stands people with disabilities are not protected as a result the law itself is failing them. There is a need for the review of the law in order to address this issue and there is tremendous need for additional guidance in the area of disability discrimination.

It seems as a huge challenge to implement and our government is not doing enough to address the issue let alone to promote and educate people on the legislations dealing with disability. While support for the formulation and adoption of policy has been excellent, policy implementation remains a challenge. Of particular note is the fact that there are capacity constraints at programmatic level that limit the effective implementation of policy. Policy implementation issues are not addressed consistently, for various reasons, at different levels of government. These reasons include limited conceptual understanding, poor championing, inadequate or inappropriate institutional arrangements, and a general lack of capacity.⁷⁴

Two other factors that have contributed to the poor implementation of legislation and policies are that the definition and nature of disabled people's participation have not been adequately reviewed and articulated, and that the policy requirements for disability mainstreaming are not adequately linked to performance management, thereby undermining commitment to implementation.⁷⁵ Therefore, we cannot claim that we are living in a democratic country while people with disabilities are still

⁷³ Dupper *supra* 154.

⁷⁴ Dube A 'The role and effectiveness of disability legislation in South Africa' Samaita Consultancy and Programme Design March 2005 7.

⁷⁵ Dube *ibid* 7.

discriminated. The current legislation, in the form of the Employment Equity Act, Social Assistance Act, Skills Development Act and Skills Development Levy Act and others, have helped create a new sense of awareness of the needs of disabled people. However, with the exception of a few policies such as the Social Assistance Act, 2004, the implementation of these policies has had marginal impact on the lives of a majority of disabled people in South Africa.

Problems associated with the lack of budgetary allocations, the ignorance of civil servants charged with the responsibility of implementing these policies, and procedural bottlenecks, among other things, have been identified as some of the main causes of 'policy evaporation' within the South African context".⁷⁶ Although we have a lot of provisions, the study argues that they are not translated into meaningful reality. It is argued that we all have to enjoy equal benefits as required by our constitution. Unless the legislation is fully enforced, this may lead to lower rather than higher employment rates. Enforcement (or the threat of) seems to be a key driver for the results.⁷⁷ It is therefore important to have system that is enforceable and for government to have measures to address such inequality.

4.3 Conclusion

As a way forward, the laws need to be repealed and have more guidance on the issue of disability. There is a need to ratify and incorporate into national law instruments that protect the human rights of persons with disabilities. There should be appropriate programmes and mechanisms to prevent abuse of persons with disabilities. Employers need to understand the importance of the legislation and their effects. If employers themselves don't understand the law relating to disability the problem will not be solved. If the law itself does not give adequate and clear guidelines again we have a serious problem. The issue of disability should not be taken lightly. People in general and employees should not have bad attitude towards disabled. Most of employers still do not employ people with disabilities raising the concern that they would be an expense to the company.

⁷⁶ Dube *supra* 9.

⁷⁷ Bell D 'The Disability Discrimination Act in the UK: Helping or hindering employment among disabled?' (2009) 28 *Journal of Health Economics* 478.

Employers still doubt the capability of people with disabilities. If our laws were clear on the subject and had adequate guideline surely we would not have such problem. A more rigorous monitoring of targets with regards to disabled people is warranted in all sectors. By so doing it will be easier for government to pick up any challenges and ratify immediately. South Africa included people with disabilities in its National AIDS strategic plan however the challenge is implementing. There is therefore a need to involve disabled people themselves in their diversity in order to address challenges faced by them. Our government needs to take a lead on this issue and not only talk but implement as well. People living with disabilities should participate in all levels of decision making.

CHAPTER 5: INTERNATIONAL LABOUR LAW: SOME PERSPECTIVE ON THE RIGHTS OF PEOPLE WITH DISABILITIES

5.1 Introduction

This chapter will look at the foreign jurisdictions with regard to the rights of disabled persons. Disability discrimination is a global issue and in all international treaties persons with disabilities are entitled to exercise their civil, political, social, economic and cultural rights on an equal basis with others.⁷⁸ In this regard this chapter will look at the role of international law in addressing the rights of people with disabilities, the international law position on people with disabilities, South African position in respect of international law as well as conventions on people with disabilities.

5.2 The role of international labour law in addressing the rights of disabled workers

Before 1994 International labour law did not have much role in the development of South African labour law, however the advent of the new constitutional dispensation introduced after a democratic government in 1994 expressly recognizes the role of international law as a foundation of democracy".⁷⁹ On the 26th of May 1994 South Africa rejoined the International Labour Organisation (ILO) and has ratified quite a number of the ILO core conventions and plays a key role in the ILO affairs.⁸⁰

This entails that international labour law have a huge role in addressing the rights of disabled. The act of ratification created international law obligations, and required adjustment of domestic legislation to give full effect to these obligations. As a result the 1956 LRA was repealed in 1995 which was followed by various labour legislation such as BCEA in 1997, EEA in 1998 as well as Skills Development Act in the same year.⁸¹

Many countries throughout the world have, in recent years, adopted policies aiming to promote the rights of people with disabilities to full and equal participation in society. This was in response to ILO convention of 1958. In many countries,

⁷⁸ www.un.org/esa.socdev/enable/rights/humanrights accessed on the 6th of January 2014.

⁷⁹ Van Niekerk *supra* 19.

⁸⁰ Van Niekerk *ibid* 19.

⁸¹ Van Niekerk *supra* 12.

implementation of the principle of equality or non-discrimination is guaranteed first and foremost by national constitutions, which frequently contain a general equality provision that all citizens shall be treated equally. Increasingly, modern constitutions include provisions on equality at work. Moreover, many new comprehensive labour laws include an initial chapter on fundamental principles, containing a general statement regarding equality of treatment and opportunity in employment and occupation, as well as more specific provisions regarding such principles as equal pay.⁸² It is therefore submitted that International labour Law plays a colossal role in addressing the rights of the disabled in the domestic laws.

5.3 International law position on workers with disabilities

The Convention on the Rights of Persons with Disabilities which is one of the international human rights treaties of the United Nations intended to protect the rights and dignity of persons with disabilities. Article 1 of the said convention state that “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity”.

Parties to the Convention are required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities and ensure that they enjoy full equality under the law. The Convention became one of the most supported human rights instrument in history, with strong support from all regional groups. 155 States signed the Convention upon its opening in 2007 and 126 States ratified the Convention within its first five years.

The ILO vocational rehabilitation and employment (disabled persons) conventions⁸³ provides for the need to ensure equality of opportunity and treatment to all categories of disabled persons, in both rural and urban areas, for employment and integration into the community. Article 19(2) of the said convention provides that each member shall consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment and

⁸² www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch7.htm#3 (accessed on the 08th of January 2014).

⁸³ 159 of 1983.

thereby to further such person's integration or reintegration into society. The ILO code practice for managing disability in the workplace of 2002 has been drawn up to guide employers to adopt positive strategies in managing disability related issues in the workplace. It is intended to be read in the context of national conditions and to be applied in accordance with national law and practice".⁸⁴

The ILO discrimination (employment and occupation) Convention No. 111 of 1958 requires states to enable legislation which prohibits all discrimination and exclusion on any basis including of race or colour, sex, religion, political opinion, national or social origin in employment and repeal legislation that is not based on equal opportunities. The international law therefore recognises disabled people and place an obligation on member states to protect disabled people.

5.4 South African position in respect of international law

For many years, South Africa was in conflict with both international community and international laws. Apartheid premised on race discrimination and denial of human rights was contrary both to the law of UN charter and to the norms of human rights, non-discrimination and self-determination generated by post world war II order. International law received no constitutional recognition and was largely ignored by the courts and lawyers.⁸⁵ However that has since changed as South Africa is now a democratic country.

Human rights and racial equality are constitutionally entrenched and there is new attitude towards international law. Whereas international law was previously seen as a threat to the state, it is now viewed as one of the pillars of the new democracy.⁸⁶ The evidence to this effect is provided for in terms of section 39(1) (c) of the constitution which provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Section 233 of the constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any

⁸⁴ www.ilo.org/skills (accessed on the 8th of January 2014).

⁸⁵ Dugard J 'International law and South African Constitution' 1997(1) *EJIL* 77.

⁸⁶ Dugard *ibid* 77.

alternative interpretation that is inconsistent with international law. It is therefore submitted that South Africa considers international law and it is viewed as one of the pillars of the new democracy.

5.4.1 Conventions on workers with disabilities ratified by South Africa

South Africa signed the Convention on the rights of persons with disabilities (A/RES/61/106) in March 2007 which was ratified on the 30th of November 2007.⁸⁷ The said convention was adopted on the 13th of December 2006. Another important convention which was ratified by South Africa is Discrimination (employment and occupation) convention which was ratified in March 1997. South Africa is signatory to Universal Declaration of Human (UDHR) rights which state in article 7 that “all are equal before the law and are entitled without any discrimination to equal protection of the law”.⁸⁸ It should however be noted that UDHR is not a binding instrument as it is not a convention or a treaty as such.

It is submitted that South Africa has made progress since 1994 to ratify certain conventions in eliminating all forms of discrimination. It now needs to come up with planning on the implementation of these Conventions, as disabled people are still faced with challenges in the working sector.

5.5 Conclusion

International labour law plays a crucial role in addressing the plight, and rights of disabled persons. There are conventions and treaties in place but the only challenge is implementation. Therefore, there is a need to have measures in place for compliance purposes. All member states should be monitored and be penalised for not complying with the conventions. South Africa considers international law hence it must apply and comply with international labour law. As it stands disabled workers are still not adequately protected. The following chapter will look at recommendations that can be implemented to address disability discrimination in the working environment.

⁸⁷ www.treaties.un.org (accessed on the 8th January 2014).

⁸⁸ www.ohchr.org/EN/UDHR/Document accessed on the 8th of January 2014.

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

People with disabilities have a lot to offer in the South African economy and should be given an opportunity to participate in all structures of government as well as employment sectors. That can only happen if they are accommodated within the working sectors. There is a need to break down the barriers to overcome the ignorance and stigma experienced by disabled people. We should not perceived people with disabilities as being incapable of working and contributing meaningfully to the country's economy. The study shows that people with disabilities are not equally represented.

They are facing lot of challenges after so many years since South Africa attained democracy. We have various legislation and policies; however they seem to be ineffective as far as the issue of disability discrimination is concerned. The main challenge is implementation. Perhaps the following recommendations can make a positive change in addressing the issue of disability discrimination not only in the working sector but to the country as a whole.

6.2 Recommendations

There should be a greater inclusion of disability in the government national development plan as to how government intends addressing equality and discrimination against people with disability. People with disabilities should be empowered in all possible ways and be given equal benefits in the working sector. Government needs to constantly monitor the progress made by employers to accommodate and employ people with disabilities including management positions.

Our country needs to take the issue of disability seriously and work towards eliminating any form of discrimination against people with disabilities. Labour laws need to be amended to include a greater protection on disabled. Perchance, it is time that we have a single Act dealing specifically with disability management. We have a mammoth challenge with the current labour laws as a result the country cannot move forward in terms of disability discrimination.

There is an enormous responsibility placed on the employers from the Acts and disability policies however such responsibility is not clearly defined as a result there is a limited progress being made to employ disabled and also to accommodate them in the working sector. There should be awareness campaigns on disability discrimination and employers should at all times accommodate people with disabilities. Dismissal should be the last resort after all necessary attempts has been made. We are living in a democratic country where all forms of discrimination are prohibited by our Constitution. There should be a workplace profiling to know the number of people with disabilities on staff and the number of disabled.

At departmental level policies and strategies had to be formulated for the reasonable accommodation of disabled people. Some of the state departments still lack basic access facilities, such as wheel chair ramps and rails. It is further submitted that the recruitment strategies is in effective. There should be techniques used when recruitment is done to accommodate people with disabilities. The principal finding from the research is that irrespective of qualification or company size, being disable is the major obstacle to passing the first hurdle in being employed: i.e. selection on the basis of one resume.⁸⁹ As stated above, there is a need for disability sensitization, dealing with people attitudes, addressing prejudices and stereotypes through workshops that could foster spiritual, emotional and social change of attitude. There is therefore an urgent need to address the issue of disability discrimination in the working sector.

It is recommended that there should be targets for all companies for each financial year in terms of employing people with disabilities and government should have rules in place for compliance in that regard and harsh sanction be imposed for failure to comply with the targets. In Germany a levy grant system was introduced where employers who did not meet targets pays levy or fine. Levy grant system involves setting a quota and requiring that all covered employers who do not meet their obligations pays a fine or levy which usually goes into a fund to support the employment of disabled people. Hence Germany provides earliest examples of such

⁸⁹ Ravaud J *et al* 'Discrimination towards disabled people seeking employment' (1992) 35 (8) *Soc. Sci. Med* 957.

system and its quota has since served as model for other countries like France.⁹⁰ It is submitted, that this method can exert much needed pressure on companies to accommodate people with disabilities knowing that if they fail to do so, they will get harsh sanction from the government.

Evidence from Britain shows that it is insufficient to simply legislate, hence it is important to impose an obligation on employers to employ disabled people.⁹¹ It is time that South Africa adopts the same style to address discrimination against disabled in the working environment. Organizational change management, emphasising coherent and achievable goals, culture and mindset changes aligned with supportive human resource practices are critical. The notion of *ubuntu*, while seen by some as impractical, should be a more serious part of an on-going debate about evolving a uniquely South African business culture based on values of tolerance, group identity and social cohesion underpinned by shared values.⁹² It is therefore, submitted that Human Resources component can play a major role in addressing discrimination in the working sector.

6.3 Conclusion

The Constitution provides for protection and equal enjoyment of all rights and freedom and those measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. As long as the designated groups are not enjoying all benefits as other people do, it means that somehow the rules and laws are not implemented properly. South Africa is a signatory to UN Conventions which prohibits discrimination against disabled. It therefore means that it must adhere to those conventions. An immediate intervention to address the issue of disability discrimination in the workplace is required.

⁹⁰ Waddington L 'reassessing the employment of people with disabilities in Europe: from quotas to anti-discrimination laws' (1996) 18 *Comparative Labour law Journal* 62-68.

⁹¹ Waddington *ibid* 67.

⁹² Frank M *et al* 'Human resources practices and discrimination in South Africa: overcoming the apartheid legacy' (2002) 13:7 *International Journal of Human Resource Management* 1116.

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