

University of the Western Cape

Research Paper

Name of Candidate: Nigel M Mentor

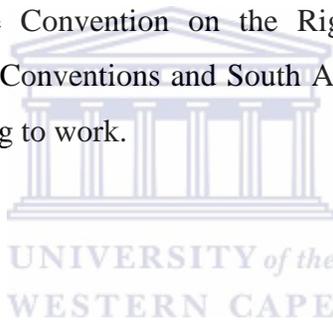
Student No. 9359307

Proposed degree: M.Phil

Department: Mercantile and Labour Law, Faculty of Law

Title:

Transformative provisions of the Convention on the Rights of Persons with Disabilities:
International Labour Organisation Conventions and South African Law relating to an employee
with an acquired disability returning to work.



Supervisor: Pieter Koornhof

Date: September 2015

Declaration

I Nigel Mentor, do hereby declare, certify and affirm that this research is my own work and that to the best of my knowledge, has not been submitted nor is it currently being considered either in whole or in part, in fulfillment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof. Where someone’s work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given and reference made according to the requirements of the Faculty of Law.

SIGNED AT..... THIS..... DAY OF2015

.....

Nigel Martin Mentor

(CANDIDATE)



I, Pieter Koornhof, being the supervisor, have read this research paper and approved it for partial fulfillment of the requirements of the Masters of Law Degree, University of the Western Cape

SIGNED AT..... THIS..... DAY OF 2015

.....

Pieter Koornhof

(SUPERVISOR)

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To the persons noted above my sincere and heartfelt thanks.



Keywords:

Disability Rights

Human Rights

International Labour Organisation

Convention on the Rights of Persons with disabilities

Acquired disabilities



List of abbreviations

- CRPD..... Convention on the Rights of Persons with Disabilities
- DPO..... Disabled Persons' Organisation
- EWAD.....Employee with Acquired Disability
- ICCPR.....International Covenant on Civil and Political Rights
- NGONon-governmental Organisation
- NGOsNon-governmental Organisations
- PWDs..... Persons with disabilities
- UN.....United Nations
- WAP.....World Programme of Action Concerning Persons with Disabilities
- CEDAW.....Convention on All forms of Discrimination against Women
- CAT.....Convention Against Torture and Other Cruel Inhumane and Other Degrading
Treatment
- ICCPR.....International Convention on Civil and Political Rights
- LRA.....Labour Relations Act
- PEPUDA.....Promotion of Equality and Prevention of Unfair Discrimination Act
- EEA.....Employment Equity Act
- UNOG.....United Nations Organisation in Geneva
- ICESCR.....International Convention on Economic, Social & Cultural Rights

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Chapter 1

1 Introduction

1.1 Background

South Africa has a total population of 52.98 million¹ of which roughly 7.5%² have a disability. In relation to the population of persons with disabilities, the Department of Labour reports that 0.9% of the workforce consists of persons with disabilities.³ Disabilities are diverse and, without limiting the scope relating to the diversity of disability as it applies to the individual, includes persons with psycho-social, visual, language, hearing, intellectual and orthopaedic impairments.⁴ Conroy adds that ‘most disabilities are acquired in adult life.’⁵ Disabilities are usually acquired via injuries on duty, age, HIV/AIDS⁶, extensively multi-drug resistant TB⁷, diabetes or other long term illnesses.⁸ Within the South African labour law context, a distinction is made based on whether an acquired disability occurs at a workplace, as it may be relevant when evaluating the capacity of an employee for purposes of dismissal.

In the current applicable State disability strategy found in the White Paper published by the Office of the President, it is reported that 99% of persons with disabilities face barriers in

¹ Statistic South Africa *Statistical release PO302: Midyear population estimates 2013* (2014) 3; Go A et al *Population Futures: Revisiting South Africa’s National Development plan 2030* African Futures Paper No.7 (2013) 11.

²South African Government News Agency *7.5% of S Africans live with a disability* (2014), see also Parliamentary Monitoring Group *Disabled People South Africa briefing on education, employment & accessibility challenges* (2013) 1.

³ Lloyd Ramutloa *The pace of transforming society and notably, the labour market is still ‘stubbornly’ slow – Labour Minister Oliphant* (2014).

⁴ Pacer Centre *Categories of Diverse Disabilities* (2004) Pacer Centre: Minneapolis 1.

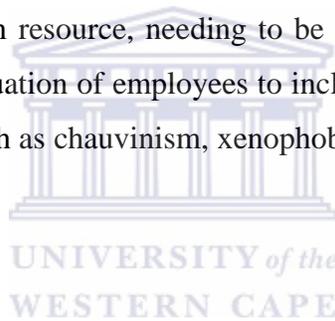
⁵Conroy M *Supporting an Injured Worker Return to Work* (2007) 21.

⁶ The increases of persons with the human immunodeficiency virus (HIV) in 2012 is largely due to the combined effects of new infections and a successful recording of new patients on the expanded anti-retroviral treatment programme. A surveyed total of 16.7% of persons suffering with HIV are persons with disabilities. Shisana O, et al. *South African National HIV Prevalence, Incidence and Behaviour Survey, 2012* (2014) xxvii.

⁷Centers for Disease Control and Prevention *DTBE in South Africa* (2014) Available at <http://www.cdc.gov/tb/topic/globaltb/Southafrica.htm> (accessed 10 April 2014).

⁸The expected growth in patients with cancer are expected to increase to 21650. Albrecht C *Overview of the South African cancer research environment as a basis for discussion concerning the activation of CARISA (Cancer Research Initiative of South Africa)* (2006)15.

employment.⁹ Barriers include the psycho-social awareness of the employee with acquired disability as an “unable” person at the instinctive and primary thought of orientation.¹⁰ Watermeyer and Swartz¹¹ present the barriers by employers to include a conscious awareness and perceptions fuelled by past societal antagonism towards persons with disabilities. This occurs due to the exercise of conservative mental strangleholds in the form of restrictive and exclusionary reasoning.¹² This reasoning becomes an added external non-physical projected barrier that limits the employee who acquired a disability to do a specific job.¹³ The extended effect of such reasoning can impact on the appropriate job placement of the employee with acquired disabilities. In the alternative, barriers can be applied with severity and result in loss of employment and the direct effect of compounding poverty with added individualised loss of dignity for the employee. Additional barriers include employer expectations grown out of the influence of a business management framework. In this regard, employees with acquired disabilities are viewed as a broken resource, needing to be fixed or discarded. Alexander and Morgan¹⁴ add their barrier of evaluation of employees to include socially constructed norms that also comprise negative aspects such as chauvinism, xenophobia, heteronormativity and an ableist mind-set.¹⁵



⁹Office of the President *Integrated National Disability Strategy-White Paper* (1997) 7.

¹⁰International Labour Organisation *Strategies for skills acquisition and work for people with disabilities in South Africa* (2007); Watermeyer B & Swartz L in ‘Conceptualising the psycho-emotional aspects of disability and impairment: the distortion of personal and psychic boundaries’ (2008) 23 (6) *Disability & Society* confirm the ‘stereotypes of disability experience, such as those to do with inability, loss, shame,[...] may occupy the minds of observers[...] and management at the workplace’ 605.

¹¹Watermeyer B & Swartz L ‘Conceptualising the psycho-emotional aspects of disability and impairment: the distortion of personal and psychic boundaries’ (2008) 23 (6) *Disability & Society* 605.

¹²Birch S & Bloom P ‘Understanding children’s and adult’s limitations in mental state reasoning’ (2004) 8 (6) *Trends in Cognitive Sciences* 255-260. The author posits limitation reasoning related to the ‘curse of knowledge- a tendency to be biased by one’s own knowledge when attempting to appreciate a more naïve or uninformed perspective’. See also *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) 69.

¹³*Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) 5. The repositioned ‘jobs did not inspire or stimulate Ferreira. ...she felt she did not have a proper job... .See also *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 at par 7 the restrictive reasoning of the employer.

¹⁴Alexander M & Morgan R ‘The Employers Perception: Employment of Individuals with Developmental Disabilities’ (2005) 23 (1) *Journal of Vocational Rehabilitation* 39-49.

¹⁵Arnold B et al ‘It Just Doesn’t Add Up: ADHD/ADD, The Workplace and Discrimination’ (2011) 34 *Melbourne University Law Review* 360.

Infrastructural barriers as postulated by Maja *et al*, could include appropriate transportation to and from work for those who acquired blindness or a health related orthopaedic impairment facilitating the need for walking aids.¹⁶ Most often the factory floor and office block has been designed with restrictive access for persons with disabilities. Additional barriers extending from equipment layout are common.¹⁷ At the non-physical and intellectual level, persons with acquired disabilities will have to negotiate their way through the employer orientation and identification with the perspective of the medical model on disability.¹⁸ A global perspective by Bickenbach describes the medical model of disability to be associated with:

‘defect, deficiency, abnormality, failing or medical problem that is located in an individual. [Extending this thought] disablement is a characteristic of a defective person, someone who is functionally limited or anatomically abnormal, diseased or pathoanatomical, someone who is neither whole nor healthy, fit nor flourishing, someone who is biological inferior or subnormal. The essence of disablement, in this view is that there is things wrong with persons with disabilities’.¹⁹

Accompanying the medical model as a barrier are workplace policies. An employee with acquired disabilities may encounter the negative and narrow interpretation of the concept of inherent job requirements.²⁰ The potential of interpretations being influenced by a recent apartheid segregated employer management mind-set and a recent past South African socialised

¹⁶Maja P *et al* ‘Employing People with Disabilities in South Africa (2011) 41 (1) *South African Journal of Occupational Therapy* 25.

¹⁷ Machinery in general has been designed for the majority, the non-disabled workers. A wheelchair user or blind employee returning to work could experience difficulty with visual interaction or limited space dimensions restricting manoeuvrability (depth, height, etc.). The same can be expected in a machine operating setting with regard to operator control panel access, the visual interaction of the machine or the placement of machine operating pedals. see Maja P *et al* ‘Employing People with Disabilities in South Africa (2011) 41 (1) *South African Journal of Occupational Therapy* 25.

¹⁸Maja P *et al* ‘Employing People with Disabilities in South Africa (2011) 41 (1) *South African Journal of Occupational Therapy* 28 and *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC). See also the works of Jung and Freud relating to transference and intergenerational transmissions of memory and behavior towards difference.

¹⁹Bickenbach, J E *Physical disability and social policy* (1993) 61.

²⁰ Labour Relations Act 66 (1995) s 187(2)(a). See also Employment Equity Act 55 (1998).

vision that historically promoted isolation, segregation and discrimination, exist.²¹ The interpretation relates to living the 'past in the present'²² and can impact on employees with acquired disabilities through the creation of an individualised isolation bubble. This can position the employee with the acquired disability as a dilemma in the work space. An example of such a dilemma is the issue of productivity.²³ Productivity can be viewed as a barrier in gestation for the employee with the acquired disability.²⁴ A barrier in action can take the form of a dismissal or termination of employment services of the employee with acquired disabilities due to continued absenteeism.²⁵

1.2 Contrasting Perspectives on Disability and workplace discrimination

Persons with disabilities in SA and abroad have historically faced major discrimination in their everyday living and workspace environment.²⁶ These are encountered through restrictive transport systems, restrictive access to home living spaces and work spaces.

²¹ The employer mind-set has been positioned as impacted upon as per the works of authors Jung and Freud. The two personalities are known as pioneers in the field of psychology. Both confirm the existence of a concept of transference. See also Birch S & Bloom P 'Understanding children's and adult's limitations in mental state reasoning' (2004) 8 (6) *Trends in Cognitive Sciences* 255-260. This paper connects transference to the concept of intergenerational transmission of memory, behaviour and of difference. In South Africa and Africa, the transmissions are in part informed by a traditional African approach through cultural teachings, colonial value associations of persons fit for slavery and the legislated apartheid as a long term social order influence. Further influence of transmissions include the old world order, medical model orientation towards PWDs through the expert writings and action of the educated medical doctors who had immense influence on community life. See also du Toit D *Non-discrimination law and the context of disability* (2008) Report of the sub-regional meeting on disability legislation: Decent work for persons with disabilities in Africa, 12-14 May p16.

²² See Fn 12

²³ Maja P *et al* 'Employing People with Disabilities in South Africa (2011) 41 (1) *South African Journal of Occupational Therapy* 28.

²⁴ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC).

²⁵ *Marco Abels v Dialogue Group (Pty) Ltd* (2010) 21 (9) SALLR 1 (CCMA), *IMATU obo Anton Strydom vs Witzenburg Municipality, SALGA, Piet van Staden N.O.*[2012] BLLR 660 (LAC) 662 and *Van Rensburg and Others v Minister of Safety and Security* (2008) 148 ZALC 2.

²⁶ Adams M *et al* 'Appendix 14 C - Perspectives on the Historical Treatment of People with Disabilities' in *Teaching for Diversity and Social Justice, Second Edition* (2007) 421-436. See also Thabo Mbeki Development Trust for Disabled People, Disabled People South Africa and Human Sciences Research Council *Strategies for skills acquisition and work for people with disabilities: A report submitted to the International Labour Organization, Geneva, Switzerland* (December 2006) 5 in which recognition is given to the fact that '[t]he association between unemployment, poverty and disability is well recognized with people with disabilities being much more likely to be unemployed or economically inactive than the general population. This is true both internationally and within South Africa.

Within a South African context, the development of layered practices from the past, including isolation and restrictive apartheid access are joined by a tightly weaved array of employer attitudes spawned by the longstanding mindset of limitations.²⁷

The medical model viewpoint as postulated by Bickenbach can impact on employees who acquired disabilities upon their return to work. This impact includes substantially reducing 'prospects of securing, retaining and advancing themselves in suitable employment'.²⁸ The negative thought development due to the medical model, positions employees with human impairments as non-rehabilitative 'broken equipment'. Through the lens of the medical mind-set, employees with acquired disabilities are potentially at risk of being viewed as merely objects and treated as replaceable resources.²⁹ This is similar to a broken and irreparable machine. Over many years the medical model mind set of attitudes has been compounded and strengthened through the prestige accorded to the medical profession.³⁰ The resulting effect has been unreasonable treatments implemented by employers towards the employee with acquired disabilities.³¹ The unreasonable treatments are confirmed by Smart and Smart and Kettle³² to have a wider point of origin and impact. This is inclusive of employers and communities broadly practising the "sensibilities" being advocated based on the medical model of disability.³³

²⁷Mitra S 'The Recent Decline in the Employment of Persons with Disabilities in South Africa, 1998-2006' (2008) 76 (3) *South African Journal of Economics* 483.

²⁸International Labour Organisation *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983) Article 1(1).

²⁹ Delaurentis J 'Treating Employees As A Replaceable Resource Is A Common Business Practice, But Not A Wise One' available at <http://www.womeninc.co.za/Managing-Others/treating-employees-as-a-replaceable-resource-is-a-common-business-practice-but-not-a-wise-one.html> (16 March 2014)

³⁰ Smart J & Smart D 'Models for disability: Implications for the counseling profession' (2006) 64 *Journal of Counseling and Development* 30.

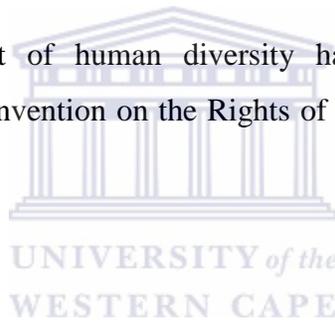
³¹ Fevre R. et al. *Insight into ill-treatment in the workplace: patterns, causes and solutions* (2011) – at section 3.2 of the report prevailing evidence shows a high incidence rate of ill and mistreatment by management of persons with disabilities. See also Foster D. & Wass V. 'Disability in the Labour Market: An Exploration of Concepts of the Ideal Worker and Organisational Fit that Disadvantage Employees with Impairments' (2013) 47 (4) *Sociology* 705-721.

³² Smart J & Smart D 'Models for disability: Implications for the counseling profession' (2006) 64 *Journal of Counseling and Development* 31. See also Kettle R 'The Models of Disability' available at <http://www.articlesfactory.com/articles/communication/the-models-of-disability.html> (17 Aug 2014).

³³Donoghue C 'Challenging the Authority of the Medical Definition of Disability: an analysis of the resistance to the social constructionist paradigm' (2003) 18 (2) *Disability & Society* 201.

The stereotyping on the part of the community, as noted above has been opposed by non-state stakeholders referred to as Non-Governmental Organisations (NGOs). The NGOs have been advocating the social model of disability as promoted in 1983 by Oliver,³⁴ into the international labour market. The social model highlights the influencing of the paradigmatic shift of context surrounding the person with disabilities. Grobbelaar-du Plessis and van Eck describe the social model to be oriented towards recognition of the environment and personal attitudes as barriers.³⁵ The community-focused organisations that have contributed to the shifting change away from the medical model include the Disabled Peoples Organisation of South Africa³⁶ and the South African National Deaf Association³⁷ as advocacy bodies, the Independent Living Institute and Disability Rights International.³⁸ The mentioned organisations have encouraged government and employers to embrace a human rights approach when interacting with persons with disabilities.³⁹

Internationally, disability as part of human diversity has been advocated through legal instruments. These include the Convention on the Rights of Persons with Disabilities (CRPD)⁴⁰



³⁴ Chitereka C 'People with Disabilities and the Role of Social Workers in Lesotho' (2010) 8 (1) *Social Work and Society -International Online Journal* - in 1983 Oliver coined the phrase "social model of disability". The social model of disability perceives disabled people not as individual victims of tragedy, but as collective victims of an uncaring oppressive society. This model challenges the medical model and shifts disability away from the person with disabilities as an individual and repositions disability as causative and contributory through the broader social environment.

³⁵ Grobbelaar-du Plessis I & van Eck S 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in Grobbelaar –du Plessis I and van Reenen T (eds) *Aspects of Disability law in Africa* (2011) 233.

³⁶ Disabled People South Africa (DPSA) *CBR Position Paper 2005 - Community Based Rehabilitation (CBR) In The Disability Rights Struggle in South Africa* (2005). The paper promotes integration through mainstreaming and community based rehabilitation.

³⁷ South African National Deaf Association *Mission Statement: Empower deaf people with opportunities and fulfilment in a barrier free South Africa* available at <http://www.sanda.org.za/> accessed 01 July 2014.

³⁸ At <http://www.independentliving.org/about.html> and <http://www.disabilityrightsintl.org/about/> accessed 01 July 2014, See also International Labour Organisation *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983) – in the preamble.

³⁹ Howell C, Chalklen S and Alberts T 'Chapter 5: A History of the Disability rights movements in South Africa' in Watermeyer B (ed) *Disability and Social Change: A South African Agenda* (2006).

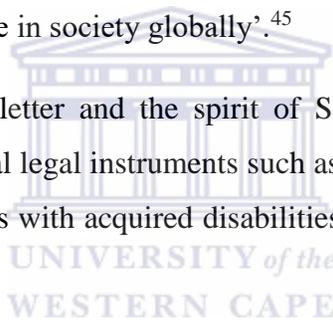
⁴⁰ United Nations *UN Convention on the Rights of Persons with Disabilities* (2006).

and various International Labour Organisation (ILO) Conventions⁴¹.The CRPD sets out the definition of a person with disabilities in Article 1:

‘[T]o 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’.⁴²

The position on human diversity in pre-democratic SA, included ‘inherited stark polarized divisions’.⁴³ Older SA statutes originating from the apartheid era made no reference to such concerns, promoting the assumption that the drafting process was blank with regard to the concepts favouring human diversity and effective and substantive equal treatment. In contrast, internationally the CRPD has been presented to the world to be equal in both intent and text.⁴⁴ This is evidenced in the definition promoting transformation through positioning persons with disability ‘as holding an equal place in society globally’.⁴⁵

This research paper assesses the letter and the spirit of SA labour law against international standards set out in the international legal instruments such as the ILO Conventions 111, 159 and the CRPD to ensure that employees with acquired disabilities are ‘holding an equal place in’ the SA employment environment.⁴⁶



1.3 Problem Statement

⁴¹International Labour Organisation *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983) .

⁴²United Nations *UN Convention on the Rights of Persons with Disabilities* (2006).

⁴³Fakir E ‘A strategy and tactics: what of ideology and who are the motive forces?’ in Edigheji O (ed) *Rethinking South Africa’s Development Path: Reflections on the ANC’s Policy Conference Discussion Documents* (2007) 27.

⁴⁴Stein MA ‘Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play’ (2009) 27 *Boston University International Law Journal* 5.

⁴⁵Stein MA ‘Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play’ (2009) 27 *Boston University International Law Journal* 5.

⁴⁶Stein MA ‘Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play’ (2009) 27 *Boston University International Law Journal* 5.

The ideal of 'holding an equal place in' the SA employment environment⁴⁷ can encounter resistance in the employment relationship. The employer has to view the business through a profit making and productivity lens. The productivity can be hampered as a result of employees with acquired disabilities dealing with 'long term and recurring impairment.'⁴⁸ Other examples of profit and productivity hampering include hospitalisation, days off sick, factory floor adjustments and adaptations at the workstation to accommodate employees with acquired disabilities.⁴⁹ Employers facing possible losses in production, sales, service levels and added cost for additional personnel may seek out means to unburden themselves of employee with acquired disabilities.

In 2005, the South African Department of Labour, in recognising the perpetuation of negative social attitudes in employment, introduced the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) which state that:

'[F]ailure on the part of employers to remove the barriers or handicaps that limit or restrict the participation of people with disabilities in the workplace. This failure is directly related to the way in which society and employers tend to view people with disabilities. Most employers tend to see people with disabilities as people who will add little or no value to the workforce and the productivity of the company or organisation.'⁵⁰

Campbell *et al*⁵¹ associate the process of "stigmatization" or "othering" as part of the plausible failure of South African employers to comply regarding a human rights approach in their sphere. This process has shown potential of being transplanted to the work environment as part of social ordering, contributing to maintaining the African social inequalities that exist. The Institute for

⁴⁷Stein MA 'Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play' (2009) 27 *Boston University International Law Journal* 5.

⁴⁸As noted in *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084 (ZALC) par 90 : 30, see also Graffan et al 'Factors that influence employer decisions in hiring and retraining an employee with a disability' (2002) 17:3 *Journal of Vocational Rehabilitation* 175-181.

⁴⁹*Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) par 16, in addition the EEA recognises this hampering and has set up item 6,10 of the EEA Code to counteract decisions based on pure profit orientation.

⁵⁰Chief Directorate of Labour Relations *Technical Assistance Guidelines on the Employment of People with Disabilities* (2005).

⁵¹Campbell C et al "'I have an Evil Child at My House": Stigma and HIV/AIDS Management in a South African Community' (2005) 95 (5) *American Journal of Public Health* 808-815.

Justice and Reconciliation (IJR) through their SA Reconciliation Barometer (SARB) survey adds their finding of continued exclusions at the level of interracial relations, class, income, living standards measures and material exclusions in the South African community spaces.⁵² Moomal *et al* engages the perceived discrimination and ‘recognises evidence of a strong association between perceived discrimination and objective indicators of inequality...’⁵³ The study by Oosthuizen and Naidoo found evidence of ‘reverse discrimination, reverse racism and victimisation’ at employer and co-worker levels.⁵⁴ In 2014, Mzantsi reports in the media of worker racial abuse due to an entrenched discriminatory mind set from the employer partner.⁵⁵

The media reports contribute to the ongoing impact on the values of the prevailing social order, generating prejudices, perceptions and bias.⁵⁶ Oosthuizen and Naidoo postulate a continued employer discriminatory mindset comprised of attitudes and the commercial profit orientation towards persons with disabilities.⁵⁷ The attitudes are strengthened by unacceptable differences between the employee with the acquired disability to other employees regarding production and accessibility assistance. These contribute to possible inputs on management decisions to terminate the employment of the employee with the acquired disability.

The barriers stated above, inclusive of those in the TAG prompts the question: Does the legal framework in South Africa make provision for employee with acquired disabilities returning to work, with specific reference to disability-based discrimination?

This research paper aims to further a better understanding of the provisions of the CRPD, ILO Conventions and South African law relating to the EWAD in the process of re-engaging with the workplace. Furthermore, the research aim is:

⁵² Wale K *Confronting Exclusion: Time for Radical Reconciliation - SA Reconciliation Barometer Survey: 2013 Report* (2013) 13-16.

⁵³ Moomal H et al ‘Perceived discrimination and mental health disorders: The South African Stress and Health study’ (2009) *SA African Medical Journal* 383.

⁵⁴ Oosthuizen RM & Naidoo V ‘Attitudes towards and experience of employment equity’ (2010) 36 (1) *SA Journal of Industrial Psychology* 8.

⁵⁵ Mzantsi S ‘Racially abused and spat upon’ *Cape Times* 12 June 2013 1.

⁵⁶ International Labour Organisation *Time for Equality at Work* (2003).

⁵⁷ Oosthuizen RM & Naidoo V ‘Attitudes towards and experience of employment equity’ (2010) 36 (1) *SA Journal of Industrial Psychology* 1-9.

- To develop possible linkages of provisions of the CRPD, ILO Conventions and South African labour law;
- To enhance an understanding of the labour law as transformative;
- To develop knowledge of the provisions of the CRPD, ILO Conventions and South African law relating to the employee with acquired disabilities as a person and citizen;
- Develop interconnections associated with employers and the social model on disability as opposed to the medical model and the broken resource orientation as regards the employee with acquired disability;
- To develop the equality status of employees with acquired disabilities in the workplace.

1.4 Scope

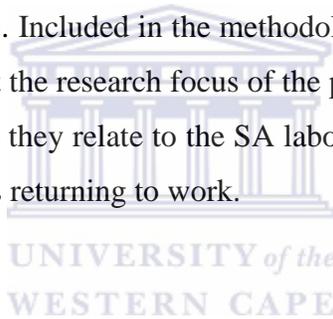
The paper will focus on assessing SA labour law⁵⁸ against international legal instruments dealing with acquired disabilities, namely the ILO conventions 111, 159 and the CRPD. In addition the paper will assess the barriers to the right of equality of employees with acquired disabilities. The paper will not have as part of its focus the recruitment of persons with disabilities in the general sense as job applicants. The focus of the paper will be employees who have, due to various reasons, acquired a disability and return to work to encounter discrimination as evidenced in the case law examples used in this paper. The research is limited to the use of English language materials and no interviews were conducted in the context of this research.

1.5 Methodology

⁵⁸Constitution of South Africa 108, LRA, EEA, and the BCEA

The research is to be based on the perusal of literature related to the subjects of employees with acquired disabilities, discrimination, equality, dignity, international law instruments and employment law. The sources will include the ILO Conventions, the CRPD and South African labour law including relevant legislation, regulations, case law and jurisprudence. The method of analysis applied includes the assessment and discussion of SA labour law against international legal instruments providing for the rights of employees with acquired disabilities.

In this research, a review of the literature is set to trace the networks of numerous possible interactions of the provisions of international legal instruments. These include referencing the CRPD and the ILO Convention C111 and C159 aimed at the equalization of the person with disabilities with non-disabled co-workers. As regards the South African labour law, reference is made to the South African Constitution (the Constitution), the Labour Relations Act (LRA) and the Employment Equity Act (EEA). Included in the methodology will be the use of relevant case law. Case law will be used to assist the research focus of the paper to probe the application of the provisions of the LRA and EEA as they relate to the SA labour legal system interacting with the employee with acquired disabilities returning to work.



1.6 Chapter Outline

1.6.1 Chapter 1

This chapter dealt with the background and contrasting perspectives on disability and workplace discrimination by putting forward the problem statement and research methodology.

1.6.2 Chapter 2

This chapter deals with international legal instruments relating to the EWAD. The mentioned instruments for discussion will be limited to include the CRPD and the ILO Convention C111 and C159.

1.6.3 Chapter 3

The chapter review applicable statutes and concepts as they relate to transformation and equality. The statutes will include the Constitution and relevant legislation specifically the LRA and the EEA as they relate to employment and the employee with acquired disabilities. The concepts to be reviewed will include the promotion of reasonable accommodation.

1.6.4 Chapter 4

Chapter 4 presents the conclusion to findings of the literature and case law.



Chapter 2

2 Provisions of the ILO Conventions and the CRPD

2.1 Introduction

This chapter deals with international legal instruments relating to employees who acquired disabilities through injury on duty, road accidents, age, etc. First, the chapter will discuss the ILO Conventions, C111⁵⁹ and C159⁶⁰ from a global employment rights standpoint. Thereafter the CRPD will be examined with a view to highlighting a broader disability specific human rights based approach. The chapter will focus on the Articles in the international legal instruments relevant to discrimination, equality, unequal treatment, intent and the potential aimed at persons with disabilities as employees.

2.2 The International Labour Organisation (ILO)

The conception of the ILO was initiated within the broader context of a post-1st World War society. The external driving forces that brought about its establishment were aimed at impeding the growth of communism on the global labour front.⁶¹ Having noted the war and communism as external influences on the creation of the ILO, Oloka-Onyango, Johnson and Kapoor add an additional contributing external influence: an evolving strategic shift to humanity.⁶² In the case of the ILO and its global alliance of member states this meant a shift to a more human rights-

⁵⁹International Labour Organisation *Discrimination (Employment and Occupation) Convention C111* (1958).

⁶⁰International Labour Organisation *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983).

⁶¹Helfer LR 'Understanding Change in International Organisations: Globalization and Innovation in the ILO' (2006) 59 (3)*Vanderbilt Law Review* 679.

⁶²Oloka-Onyanga J 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' (1995) 26 (1) *California Western International Law Journal* – Oloka-Onyanga posits the role of external players inclusive of the World Bank and the International Monetary Fund through their structural adjustment programmes, the United Nations intergovernmental operations, bi-lateral donor agencies such as USAID and the Canadian International Development Agency (CIDA), and the international NGOs. Through the noted influences and strategic conditionalities the author highlights 'The Local is Global: Linking Participation, Cooperation and Activism' idealism as an influencing factor. Following on this, Johnson and Kapoor each sets out their findings of the influence of UN agencies through the human rights based approach (HRBA) as external programme demands on governments. Johnson highlights the strategic objects of the HRBA to include process and outcomes through paradigm shifts challenging language, ingrained perceptions, attitudes and decision-making patterns (18-29); Vinet Kapoor argues that HRBA allows for the integration of norms, standards and principles of international human rights systems to become plans, policies and processes of development' (11).

oriented focus. Evolving out of the new shift in focus are numerous human rights-oriented labour law conventions, including ILO conventions C111 and C159. These conventions are applicable to the employee with acquired disabilities. In general, Convention C111 deals with discrimination in employment coupled with the freedom of choice regarding occupation, while Convention C159 is of specific relevance as it deals with vocational rehabilitation in reference to disabled persons.

2.2.1 ILO Convention C111

The protection of equality through a human rights based approach,⁶³ specifically in relation to the fight against discrimination in the workplace, found added support in 1958 through the adoption of ILO Convention C111 (hereafter simply “C111”). During the adoption process of C111 the ILO Governing Body persevered in connecting discrimination as an infringement of the rights entrenched into the Universal Declaration of Human Rights.⁶⁴

Employment discrimination can include uneven opportunities and uneven treatment due to race, gender and disability. These discriminatory practices can include lower remuneration due to disability. C111 as an international labour standard sets out to counter discrimination in the workplace. It is guided by the definition of the term discrimination. The ILO meaning of the term, ‘discrimination’ is found in Article 1 of C111. Discrimination includes:

"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative

⁶³Neumayer E ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ (2005) *Journal of Conflict Resolution* 930 & 951 and Simmons BA Mobilizing for Human Rights: International Law in Domestic Politics (2009) 351.

⁶⁴United Nations *Universal Declaration of Human Rights Res 217 A(III) (UDHR) art 5* (1948) and the International Labour Organisation *Discrimination (Employment and Occupation) Convention C111* (1958) preamble.

employers' and workers' organisations, where such exist, and with other appropriate bodies."

In support of Article 1, Article 2 of C111 aims to avoid discrimination as harmful in the sphere of employment. The support is assisted in Article 2 through the ILO organisational membership as functionaries of a whole to exert a human rights influence on its members. Article 2 facilitates further support by requiring national policies to be deliberate in their intention to transform toward the prospect of parity in employment and career choice with a view to abolish any bigotry in respect thereof.⁶⁵ Borrowing from the supportive intent of Article 2 relating to the value of status associated with ILO membership and convention ratification, Article 3 leverages external influence, specifying member countries to implement C111.

Through the push effect on membership, C111 contributes towards a transnational set of identical labour principles. These principles found in C111 impacts on a domestic country's labour law regime after ratification and implementation through its applicability to both State and private employers.

The strength of external influence brought about by the global membership of the ILO⁶⁶ is further encountered in Article 5 (1) and (2) of C111:

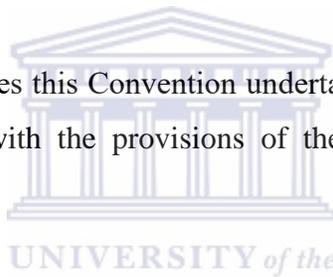
1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

⁶⁵International Labour Organisation *Discrimination (Employment and Occupation) Convention C111* (1958)Article 2, Article 1.

⁶⁶Burke A 'Private Ordering and Institutional Choice: Defining the role of Multinational Corporations in Promoting Global Labor Standards' (2007) 6 (2) *Washington University Global Studies Law Review* 213.

Article 5 clarifies an all-encompassing broader interpretation of discrimination. This interpretation should be viewed through a lens that includes mechanisms favouring persons with disabilities, gender and other employee characteristics. These characteristics require exceptions and support in order not to be judged within the framework of discrimination. These considerations address the need of provisions for integration. In C111, the highlighted need for country specific special measures dictates influences through text and then encourages with intent. The intent sets up a counter influence to the age-old relationship of a dominant employer and submissive employee. In C111 the intent further specifies employer and employee representative participation and co-construction⁶⁷ to achieve social and economic justice in the workplace. A further broadening of the C111 influence and intended impact is specified in Article 6:

‘Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.’



The inclusivity of non-city and rural areas stated in C111 Article 6 propels the clarity of reach of this international legal binding document after ratification. This extends its influence to require compliance from government to ensure uniformity in application of labour laws in rural areas when compared to capital city business areas. The C111 was ratified by South Africa in 1997. Mah interprets the text content and intent of the Articles of C111 to provide for ‘the right to equal respect and treatment of all workers’.⁶⁸

2.2.2 ILO Convention C159

⁶⁷Littleton K & Mercer N *Interthinking and Creativity* (2013) 113-114.

⁶⁸Mah JS ‘Core Labour Standards and Export Performance in Developing Countries’ (1997) 20 (6) *World Economy* 775.

The right to equal treatment is supported in the ILO Convention C159 (hereafter simply “C159”). The support comes as non-discrimination and takes the form of stated avoidance. C159 came into force in 1985 and in Article 1(1) states:

“the term disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.”

The definition highlights the recognition of barriers to employees with disabilities in the use of the word prospects. This paradigmatic shift of context surrounding persons with disabilities⁶⁹ assisted C159 to usher in the social model of disability, promoted in 1983 by Oliver.⁷⁰ Sadly SA has not yet ratified this Convention even though the C159 definition recognises the employee with acquired disabilities to be an individual whose prospects of securing, retraining and advancing in suitable employment is substantially reduced. The scope of C159 at Article 1(4) is inclusive and ‘appl[ies] to all categories of disabled persons’ in the workplace setting.

Through the definition in Article 1(1) a counteraction to the reasoning associated with the medical model mind set of corrective procedures and limitations towards persons with disabilities becomes activated. A further challenge to the segregating orientation of the medical model towards integration is encountered in Article 2. Article 2 sets out aspirational guarantees for appropriate occupational remedial treatments, and encourages State Parties to embark on national action. These actions include provision of treatments and remedies prepared for and available to all persons with disabilities. Supportive intent to the definition for persons with disabilities is found in Article 3 of C159, which prohibits negative thought development aimed at persons with disabilities through the use of the words ‘shall aim’, ‘at ensuring’ vocational rehabilitation measures are made available’. The use of these words in Article 3 promotes a

⁶⁹Grobbelaar-du Plessis I & van Eck S ‘Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation’ in Grobbelaar –du Plessis I and van Reenen T (eds) *Aspects of Disability law in Africa* (2011) 233.

⁷⁰ See fn 41.

positive thought processing relating to persons with disabilities through the application of policies as suggested in Article 2.

In Article 4 of C159 State Parties are instructed:

‘The said policy shall be based on the principle of equal opportunity between disabled workers and workers generally. Equality of opportunity and treatment for disabled men and women workers shall be respected. Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.’

The expectancy of State co-operation to develop a policy of equality of opportunity for persons with disabilities at the domestic level has the potential to be a driver for change. The expectancy can be viewed as an external influence on the domestic labour market. The instruction of Article 4 comes with the potential of momentum for change when applied to central policy themes of State Parties. The instruction further demands an infusion of the principles of equal opportunity for employees with disabilities and those for employees in general. In addition the instruction demands integration towards mainstreaming persons with disabilities. The Article 4 provision of equality of opportunities becomes extended for the employee with disabilities through the concept of positive discrimination. This in turn can be linked as an extension to the general labour standards found in Article 5 (1) and (2) of C111 as discussed above.

C159 reiterates the international labour standard confirmation, stating that positive discrimination favouring persons with disabilities ‘shall not be regarded as discriminating against other workers.’

Article 5 of C159 adds support for equality of opportunity through requiring dialogue with worker representation and co-construction through participation. This facilitates consultation on national policy for employees with disabilities, co-worker co-operation and unionised networking. The emphasis found in Article 5 clearly stipulates that disabled peoples’

organisations (DPOs) be participants in the consultation process as primary stakeholders. This serves to promote transformative inclusivity.

The inclusivity is given further impetus with Article 7 through the implementation of required national action related to the above. The enabling intent of Article 7 is spelled out to include vocational guidance, vocational training and evaluations nationally with a view towards securing, retaining and advancing the persons with disabilities in their employers' service. In C159 the enabling intent goes further and promotes the support of employers towards their workers. This comes as a direct result of the incorporation of the new thought developments relating to the social model of disability⁷¹ as it relates to rehabilitation, training and job retention. This contribution to disability activism of the social model on disability includes promoting the technological advances in occupational therapies, assistive devices and new developments in the law.⁷²

In summary, the ILO Conventions C111 and C159 promote disability activism anti-discrimination aimed at PWDs, protection of equality and inclusiveness through participation. The Conventions intend to be the deliberate drivers for transformation in the workplace. The transformation is intended to impact broadly and include non-metropolitan areas. The wide reach of the intended impact are linked to the human rights based approach interconnected to international law instruments and the external influence associated with membership to the ILO.

2.3 The Convention of the Rights of Persons with Disabilities (CRPD)

The additional commitment to a long term vision and strengthening the intent of C159 and the ILO conventions discussed earlier came about in 2006 in the form of the CRPD. This UN

⁷¹ETTAD University of Worcester *Models of Disability* (2014) & Langtree I *Definitions of the Models of Disability* (2010) – ‘Under the Medical Model, disabled people are defined by their illness or medical condition. The Medical Model regards disability as an individual problem. It promotes the view of a disabled person as dependent and needing to be cured[...]’.

⁷²International Labour Organisation *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983) – in the preamble.

Convention (ratified by South Africa on 30 November 2007)⁷³ focuses on persons with disabilities, promotes reintegration for employees who acquired disabilities and provides further clarity in respect of redress towards social justice. The CRPD is an international legal instrument with the goal of contributing to the global jurisprudence to aid persons with disabilities.

The CRPD contributes to developing a unifying intent in relation to disability human rights jurisprudence. This unifying intent comes is evidenced in the CRPD promotion of content indivisibility, interdependency and interrelatedness. Extending the unifying aspect to content in the CRPD is the concepts inclusivity, and accessibility.

The unifying intent of the CRPD recognises discrimination in paragraph (e) of its preamble to be inclusive of a lack of accessibility to the constructed environment as a result of ‘social attitudes, stereotyping, prejudices, paternalistic and patronizing treatment’. The CRPD definitions as set out in Article 2 states:

"Discrimination on the basis of disability" means 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. It includes all forms of discrimination, including denial of reasonable accommodation;”

A further definition for clarity in Article 2 of the CRPD states:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;”

In Article 2 of the CRPD inclusion as ideally achieved through the concept of:

⁷³ UN Enable ‘Convention and Optional Protocol Signatures and Ratifications’ available at <http://www.un.org/disabilities/countries.asp?id=166> (20 June 2015).

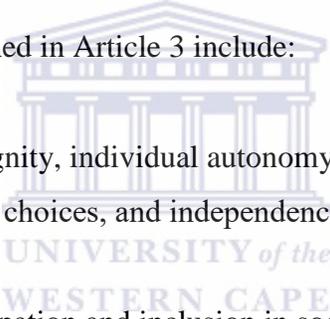
"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."

and in combination with the use of:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;"

2.3.1 General principles of the CRPD

The principles of the CRPD contained in Article 3 include:

- 
- “(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
 - (b) Non-discrimination;
 - (c) Full and effective participation and inclusion in society;
 - (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 - (e) Equality of opportunity;
 - (f) Accessibility;
 - (g) Equality between men and women;”

The principles are viewed by the International Disability Alliance as representing the moral compass of the Convention. Supporting this view is Lewis, who perceives the principles to be

‘values’ viewed through a disability focus specific ‘lens.’⁷⁴ The lens view of Article 3 clarifies the intended human rights transformative potential found in the CRPD.

The combined principles of the CRPD encourage a focused intention to be present through an interpretive directive found in Article 3(a). This directive promotes the immediacy of corrective action and a forward thinking vision to be ascribed to the CRPD. The directive is activated through the demand for ‘respect for inherent dignity’.⁷⁵ Additionally, the interpretive focus is found ‘rooted in equality, respect for dignity, autonomy and accessibility’ as per Article 3(a) of the CRPD.

Equality, respect for dignity, autonomy and accessibility are at the core of CRPD principle (b). Being a core interconnected principle the broad focus of this principle states a vision of prohibiting discrimination. In addition, the textual statement of the CRPD principle (b) positions a positive outcome to be considered by anyone interpreting the text. The outcome must include the intent of equality of opportunity, inclusiveness and full participation.



Equality of opportunity can be achieved through employer and employee participation processes. The process has the potential to realise an interchangeable group with individualised attributes of employees with disabilities to be expressed with the possibility of being accommodated at the workplace. Article 3(c) of the CRPD confirms the individual and group focus of effective participation. Article 3(c) positions participation with a broad defining reach. This is confirmed by the statement of Hemmingsson and Jonsson, positioning participation as ‘involvement in life situations’.⁷⁶ Additional definitions come from Bulkeley and Mol stating participation to involve

⁷⁴Lewis O, 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities', (2010) *Rethinking Rights-Based Mental Health Laws* 97-128.

⁷⁵CRPD Article 3(a).

⁷⁶Hemmingsson H. and Jonsson H., 'An occupational perspective on the concept of participation in the International Classification of Functioning, Disability and Healthcare -some critical remarks', (2005) 59:5 *American Journal of Occupational Therapy*, 569-576.

society making a judgment with regards to execution of ‘social economic change’.⁷⁷ Gaventa and Valderrama add another definition and positions participation as facilitating a ‘direct intervention of social agents in public activities’.⁷⁸ These social agents add another directive to the discourse of interpretation, to include and honour persons with disabilities as part of a marginalised group.⁷⁹ In this respect, participation makes a direct contribution to the interventionist approach when dealing with the practice of accepting persons with disabilities as part of human diversity at the individual and group levels.

The acceptance of persons with disabilities as part of human diversity creates an interventionist aspect when cross linked with the visionary principles of the CRPD. Human diversity finds further traction through the application of respect for difference found in Article 3(d) of the CRPD. The highlighting of difference draws attention to the double edged effect of the word ‘respect’. The word sets up an assumption and demands automatic acceptance of persons with disability within the everyday workspace exposure. Reasserting the interventionist aspect of the CRPD, Zanoni and Janssens confronts entrenched harmful inter-group customs while simultaneously advocating activist promoted realities.⁸⁰ The realities include acknowledgement of diversity to reverse prevailing typecasting as regards workplace inter-group dynamics. In addition, the acknowledgement of diversity engages the process towards ‘co-construction’ through participation.⁸¹ An example of such co-construction includes Zanoni and Janssens’s promotion of the readjusting of language to contribute to integration and acceptance towards inclusivity.⁸²

⁷⁷ Quoting Macnaghten and Jacobs in Bulkeley H and Mol A.P.J., ‘Participation and environmental governance: consensus, ambivalence and debate’, (2003) 12:2 *Environmental Values* pp143-154.

⁷⁸ Quoting Cunill in Gaventa J and Valderrama C, ‘Participation, citizenship and local governance, Background note for the workshop on Strengthening Participation in Local Governance’, (1999) 21: *University of Sussex, Institute of Development Studies*.

⁷⁹ Lee R., ‘Status of Disability Rights in Southern Africa’ <http://www.osisa.org/open-learning/law/regional/status-disability-rights-southern-africa> (Access 19 April 2014) - As the research shows, people living with disabilities (PWD) are the most marginalised people in a region where life is already difficult for the majority of the population.

⁸⁰ Zanoni P and Janssens M, ‘Deconstructing Difference: The Rhetoric of Human Resource Managerial Diversity Discourses’, (2004) 25:1 *Organization studies* pp66-69

⁸¹ Rojas-Drummond et al. ‘Collaboration, creativity and the co-construction of oral and written texts’ (2008) 3 (3) *Thinking Skills and Creativity*, pp. 177–191.

⁸² Zanoni P and Janssens M ‘Deconstructing Difference: The Rhetoric of Human Resource Managerial Diversity Discourses’, (2004) 25 (1) *Organization studies* pp66-69.

Inclusivity of the person with disabilities as part of diversity management has been promoted by a concept in the disability framework encountered in Article 3(e) demanding equality of opportunity. A definition of this concept is found in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities setting out equality of opportunity to be a 'process through which the general system of society ...[is] accessible to all'.⁸³ Additionally, Quinn and Degener add their dialogue to this definition, stating that equality of opportunity involves structural change and preparation for persons who acquired disabilities.⁸⁴ This allows for greater participation as a way to engage in non-discriminatory work. Quinn and Degener highlight the need for active work focussed on changing negative community attitudes towards persons with disabilities.⁸⁵ The community attitudes are pursued by Cooray who projects a view of equality of opportunity:

'[A]s a means to freedom to pursue one's private interest or vocation without arbitrary restrictions based on irrelevant personal characteristics'.⁸⁶

The irrelevant personal characteristics of PWDs are incorporated in the CRPD at principle (g). Principle (g) makes allowance for a gender perspective in the struggle for inclusiveness and equality.⁸⁷ In this regard principle (g) endows the Convention with effective equality using a gender sensitive viewing lens for interpretation at the workplace.

2.3.2 Equality – a central theme in the CRPD

The provision of equality as a central theme in the human rights based CRPD advocates the development of equality of opportunity through expressive, educational and proactive values as

⁸³UNHCR, *Collection of International Instruments & Legal Text Concerning Refugees & Others of Concern to UNHCR*, June (2007) pp512 -516.

⁸⁴ See Human Rights and Disability in *The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002) p11.

⁸⁵ in *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002) p12.

⁸⁶Dr.Coaray M 'Equality Of Opportunity And Equality Of Outcome ' at <<http://www.ourcivilisation.com/cooray/btof/chap20.htm>>. (18 April, 2014).

⁸⁷ The Monitor *Landmine Monitor 2011* (2011) 47.

advocated by Lewis.⁸⁸ These values make an impact through their influence domestically and internationally. The first value is initiated in the preamble of the CRPD, by expressing an alteration in societal attitudes. Lewis clarifies expressive value to include the process of thought in relation to disability. In this regard, disability thought is in simulcast with the ideal of equality of opportunity. Supporting this expressive value is Article 3, encouraging a thought process of inclusiveness and participation. This support requires cognisance and the practice of broad collaboration toward consensus. This promotion of a new understanding of disability insists on the acknowledgement of individual differences as part of being equally human. The new thought orientation regarding disability contributes to reinventing and redirecting the public expressive disability thought to acknowledge diversity. In addition, the on-going long term domino effect contributes to shifting the normative mind-set away from welfare motivated thought in the interest of equality of opportunity.

The second value, i.e. the educational value, as noted by Lewis, encompasses a promotion for cultural change. These include demystifying negative cultural beliefs associated with PWDs. The educational value requires interaction, communication and participation verbally at the personal, employer and government level. Stakeholders practising the educational value must do so with a view to impact further on the broader community expressive value.

The third and last value, proactivity, includes the obligations on a State Party as set out in Article 4. Examples of these include the outcomes from the educational values, as well as obliging State Parties to ensure modification or abolishment of existing domestic laws contributing to disability discrimination -such as through the creation of an overarching government agency tasked to facilitate interaction and co-ordination towards implementation and protection of disability rights as contained in the CRPD.⁸⁹ The design of the CRPD is mimicked by the values as noted by Lewis. These values highlight the inter relatedness and indivisible design ethos of the CRPD, and its values, though highlighted separately, function to achieve an interwoven pro-disability

⁸⁸ Lewis O 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities', (2010) *May Rethinking Rights-Based Mental Health Laws* 97-128

⁸⁹UN 'Convention on the Rights of Persons with Disabilities, Article 3 (e).

outcome. This outcome is given efficacy through equality of opportunity and through equality in law. Efficacy in outcome includes equality through non-discrimination of any kind.⁹⁰

Equality of opportunity is noted by Anardottir and Quinn as a difference in treatment to counter all listed stereotyping practised against persons with disabilities. In this respect, equality through differentiation becomes meaningful to the content provisions of the CRPD.⁹¹ One of the meaningful provisions is found in Article 5. Article 5 deals with equality and non-discrimination and states:

“1. States Parties recognize 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.”

Article 5 interconnects 'the principle of equality... as the leitmotif (or core theme) of the CRPD,..'.⁹² This leitmotif is connected to Article 5 of the CRPD to focus State Parties on their obligations to 'recognize' the core theme (Article 5(1)) and 'prohibit' discrimination (in Article 5(2)). Article 5(2) states:

‘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.’

The use of the words 'shall' connected to 'recognize' and 'prohibit' in Article 5 assist in clarifying intent towards the core theme. The mandatory emphasis of the word 'shall' creates a secondary CRPD interpretive component of amenability. Support for the pre-existence of rights comes with the word 'recognize'. The word 'recognize' further acknowledges acceptance, consideration and awareness for State Parties to act in a specific way. Arbour supports this, stating that the CRPD aims to be inclusive of affirming to PWDs their status as 'subjects of

⁹⁰Klerk Y. 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 (2) *Human Rights Quarterly* p260 & fn 27.

⁹¹Anardottir O.M. and Quinn G. (Eds) *United Nations Convention on the Rights of Persons with Disabilities - European and Scandinavian Perspectives* (2009) 88.

⁹² Arnardóttir O.M., "A Future of Multidimensional Disadvantage Equality." in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (2009) pp41-66.

rights, able to claim those rights as active members of society.’⁹³ State Party judicial officers deciding on claims from PWDs will encounter the purposeful use of the words prohibit, guarantee, equal and effective, as being directive and mandatory to a positive anti-discrimination outcome. This includes application of Article 5(3) ensuring reasonable accommodation and the use of ‘special measures’ as per Article 5(4) towards inclusivity.⁹⁴

Article 19 of the CRPD extends the emphasis of inclusivity of the employee who acquired a disability, and states:

“States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community...”

Article 19 contributes to equality through the active avoidance of segregation and isolation in employment activities and the broader social order. The avoidance of segregation of persons with disabilities is built upon the inherent dignity in Article 1. This is further linked to the definition of ‘discrimination and reasonable accommodation in Article 2 and includes the principles of Article 3(b), (c) & (d). The avoidance of segregation is applicable in social employment activities. Non-discrimination, reasonable accommodation and being included in the community create a positive rights intention through the content of the CRPD.

The positive rights intention contributes to challenging the limitation reasoning that arises due to social attitudes, ‘prejudices and harmful practices’ as per Article 8 (1) (b). Further challenges to limitation reasoning is the requirement of adoption of awareness raising and ‘nurturing a receptiveness to the rights of persons with disabilities as per Article 8 (2) (a). Dube and

⁹³Statement by Louise Arbour United Nations High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006 <<http://www.ohchr.org/English/issues/disability/docs/statementhcdec06.doc>> accessed 12 January 2014.

⁹⁴Ahmad F. et al. *The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States: SOAS International Human Rights Clinic Project* (2011) 15.

Thomas⁹⁵ encounter the impact of limitation reasoning to include the growth of poverty levels and impaired dignity as a result of possible loss of employment, unemployment and discrimination due to disability.⁹⁶ This is due to the non-adherence of the broader society, inclusive of employers, to voluntarily and positively interpret CRPD Articles 2, 3, 5 and 19 progressively.⁹⁷

2.3.3 Employment, Article 27 of the CRPD

Limitation reasoning continuously producing stigma, cultural ignorance, and fear due to misunderstandings about appropriate jobs for persons with disabilities is linked to the compliance challenge found in Article 26 and the employment specific Article 27. Article 27 states:

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

The content of Article 27 further sets out to assist the employee who acquired disabilities to return to employment. Article 27 on the right to work is supported and strengthened with the aid of Article 26 on habilitation and rehabilitation. Article 26 requires compliance of State Parties to effect and make accessible habilitation and rehabilitation programmes. Effecting such programmes include State Party sponsorship of assistive devices and the technical expertise to manufacture, install and repair such devices. In addition State Party compliance requires,

⁹⁵ Dube AK *The role and effectiveness of disability legislation* (2005) 22-23, Thomas P ‘Disability, Advantage and Development’ (2009) *Disability, Advantage and Development in the Pacific and Asia, Special Bulletin No.73* 5-6.

⁹⁶ Marumoagae MC ‘Disability Discrimination and the right of disabled persons to access the labour market’ (2012) 15 *Potchefstroom Electronic Law Review* 345.

⁹⁷ Human Rights Watch *Discrimination Inequality and Poverty: A Human Rights Perspective* (2012) 4, see also Dube AK *The role and effectiveness of disability legislation* (2005) 22-23, Thomas P ‘Disability, Advantage and Development’ (2009) *Disability, Advantage and Development in the Pacific and Asia, Special Bulletin No. 73* 5-6.

initiation of skills training courses, promoting the training of disability specific technicians and occupational rehab specialist. The State Party training curriculum development must make efforts to instil during training of participants the interconnected thematic design and indivisible nature of the CRPD as a human rights convention. These should impact on the considerations towards alternatives to loss of employment for persons with acquired disabilities and facilitates the optimum functionality of PWDs to be included in the community.

Furthering the aims of the CRPD, Article 27 sets out to:

“(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;”

Article 27 as a substantive Article of the CRPD facilitates access to justice through the ‘provision of procedural and age appropriate accommodations’.⁹⁸ Access to justice is guided by the compliance requirement stated in Article 27 prohibiting discrimination in the employment arena. In addition justice and fair labour practices has been assisted in the CRPD through the global participatory design process.⁹⁹ The participatory process ensured the installation of a convergence of rights and obligations throughout the Convention. The converging crossover effects are inclusive of independent living, participation, accessibility, inclusivity, dignity and reasonable accommodation through rehabilitation. Convergences are promoted by Lord and Brown¹⁰⁰ as a horizontally and vertically interconnected multi directional bridge to all Articles in the CRPD.¹⁰¹ The converging crossover effect reiterates the indivisibility of rights contained within the CRPD. Within the employment sphere, indivisibility connects to CRPD substantive

⁹⁸ Lord J. and Brown R. 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disability: The UN Convention on the Rights of Persons with Disabilities' available at http://papers.ssrn.com.ezproxy.uwc.ac.za/sol3/papers.cfm?abstract_id=1618903 accessed 10 Jan 2015, footnote 30

⁹⁹ Anardottir O M and Quin G (Eds) *United Nations Convention on the Rights of Persons with Disabilities - European and Scandinavian Perspectives* (2009) p263.

¹⁰⁰ Lord J. and Brown R. 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disability: The UN Convention on the Rights of Persons with Disabilities' available at http://papers.ssrn.com.ezproxy.uwc.ac.za/sol3/papers.cfm?abstract_id=1618903 (10 Jan 2010).

¹⁰¹ UN Convention on the Rights of Persons with Disabilities.

Articles on liberty and the security of the person. Liberty and security aids in the justifiable consideration of avoiding employment discrimination of PWDs.

Protection of employees with acquired disabilities find redress options through the use of the CRPD as a guide at the workplace. These include issues regarding remuneration grievances. The CRPD assists the employee to be in a position to create a demand and expectation of implementation in favour of substantive equality. A substantive equality demand could include redress through reasonable accommodation.

Facilitating integration through implementation of Article 27, a connection can be made to the enabling of ‘access to technical, vocational and continuing training’ as stated in (d) of Article 27. Article 27 is in addition cross linked to reintegration and the fulfilment of the interpretative requirements of inclusivity and accessibility of the CRPD. Support for the inclusivity and integration is found in Article 27(i). Article 27(i) ensures ‘reasonable accommodation at the workplace’ and is supportively stimulated as stated at (e) through ‘career advancements’ [and] (k) ‘job retention and ‘returning to employment programmes’

Article 27 is supported and interlinked to Article 26 in that State Parties are encouraged to:

‘take effective and appropriate measures ...to enable persons with disabilities to attain and maintain maximum independence, [through the use of rehabilitation techniques] ...[towards] full inclusion and participation’.

These should be initiated by supportive practices and rehabilitation for the employee with acquired disabilities to occur in the employment environment with a staff-team being representative of persons with disabilities as part the community in thought action towards achieving substantive equality. Furthering the inclusive approach, State parties are required to ‘promote the availability, knowledge and the use of assistive devices and technologies, designed for persons with disabilities’,¹⁰² as they relate to rehabilitation within the built environment and for the factory floor. In this respect, rehabilitation will take into account reorientation of access

¹⁰² UN Convention on the Rights of Persons with Disabilities, Article 26.

to the built environment and adjustments, or special assistive device accommodations as appropriate on the factory floor.

2.4 Transformative Intent and Substantive Equality

As with most provisions of the CRPD, Articles 19, 26 and 27 dovetails into reinforcing Articles 2, 3 and 5, towards an intended global transformation. This is done through reiteration in relation to equality and discrimination based on disability to ‘transcend the formal equality framework’.¹⁰³ The transcending includes the view of incorporating the human diversity thought towards achieving equality inclusive of the workplace.

Fredman highlight the inclusive workplace intent through the requirement of ‘positive action ...and allocation of resources’ from State Parties.¹⁰⁴ The remedial aspects as stated by Fredman links to the right of substantive equality. Albertyn and Goldblatt submits that:

‘substantive equality thus requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values.’

Lawson adds her view regarding the effort of State Parties in the context of substantive equality. She explains that substantive equality is ‘less concerned with equal treatment and focuses on equal access and equal benefits’.¹⁰⁵ Alston and Quinn explain further that substantive equality imposes obligations on State Parties which include behavioural performance and the achievement of a result in the practice of operationalizing human rights. An example of operationalizing is the prevention of discrimination by banning it. Another example is the

¹⁰³Lord JE & Brown R ‘The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Rioux MH, et.al.(Eds) *Critical Perspectives on Human Rights and Disability Law* (2011)2.

¹⁰⁴Fredman S ‘Providing Equality: Substantive Equality and the positive duty to provide’ (2005) 21 *South African Journal on Human Rights* 163.

¹⁰⁵ Lord JE & Brown R ‘The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Rioux MH, et.al.(Eds) *Critical Perspectives on Human Rights and Disability Law* (2011) footnote 11 : 3.

extension of equality measures to persons with disabilities and to reasonably accommodate difference and to prevent discrimination in the private sphere.¹⁰⁶

Towards operationalizing human rights for the employee who acquired a disability, State Parties must take cognisance of the words of Fredman. She sets out assisted interpretive clarity for State Party obligations, to ensure substantive equality for the person with disabilities to include:

“Four goals of substantive equality: (1) Breaking the cycle of disadvantage associated with marginalized groups; (2) Promoting respect for equal dignity as a strategy for remedying stereotyping, stigma and violence associated with the marginalized status; (3) Positive affirmation and recognition of marginalized identity; and (4) Facilitation of full participation in society”.¹⁰⁷

2.5 Conclusion

The chapter has investigated the human rights intent in the international legal instruments by seeking out the intent of continued active employment of employees with disabilities. These actively counter the entrenched conservative views relating to persons with disabilities in the workplace. The international legal instruments- the ILO Conventions C111, C159 and the CRPD- all contribute towards creating a paradigmatic shift in consciousness with regard to legal developments intended for persons with disabilities at the domestic level. In summary, this chapter has noted the need for participation of the employee with acquired disability in determining appropriate needs, access, and the elimination of barriers in the workplace.

¹⁰⁶ Lord JE & Brown R ‘The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Rioux MH, et.al.(Eds) *Critical Perspectives on Human Rights and Disability Law* (2011) footnote 13 : 3.

¹⁰⁷ Lord JE & Brown R ‘The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Rioux MH, et.al.(Eds) *Critical Perspectives on Human Rights and Disability Law* (2011) footnote 14 : 3.

Chapter 3

3 South African Law

3.1 Introduction

This chapter deals with the South African law relevant to the employee with an acquired disability. This chapter gives recognition to the historical influence contributing to the South African legislative development of recent. Associated to the legislative development is a nations' past that has been influenced by a segregated mind-set. The effects of which includes the tightly weaved colonial and apartheid-era reverberations impacting on the existence of skewed labour relations policies.¹⁰⁸ In addition the reverberations have deposited a residue containing apartheid era societal layering of inequalities. The residue has played an active role in promoting segregation, difference and discrimination in thought and practice.¹⁰⁹ The result of the aforementioned has had a causative domino effect extending its impact of isolation and disempowerment on PWDs and the broader South African labour force management style.¹¹⁰ An additional effect of the aforementioned includes *inter alia*, the on-going stalling of the mainstream development of PWDs and employees who acquired disabilities, to live independently.¹¹¹

Countering the reverberations of historical influences is a myriad of international obligations. These are inclusive of the ILO conventions, directing a commitment to transform and develop the labour force domestically.

¹⁰⁸ Burger R and Jaftha R *Returns to Race: Labour Market Discrimination in Post-Apartheid South Africa* (2006) 3.

¹⁰⁹ McGregor M 'A legal historical perspective on affirmative action in South Africa (Part 2) (2007) 13:2 *Fundamina* 102.

¹¹⁰ The Child Health Policy Institute and The South African Federal Council on Disability *Social Security Policy Options for People with Disabilities in South Africa: an International and Comparative Review, March 2001* (2001) 17-18.

¹¹¹UN 'Convention on the Rights of Persons with Disabilities' see also Conroy M. *Supporting and Injured Worker Return to Work Place Workplace Safety Initiative* 166

Furthering the transformation commitment as a member of the ILO, South Africa adopted a guiding, progressive, corrective and pro-diversity¹¹² oriented South African Constitution with a Bill of Rights. This chapter will deal with the Bill of Rights as an outflow of the South African constitutional protective measure for employees who acquired disabilities. This includes the transformative constitutional intent to ensure employment retention, equal pay, career promotions and security of employment. In addition the chapter will deal with legal instruments giving effect to the constitutional intent in relation to labour. These include the Labour Relations Act (LRA) and the Employment Equity Act (EEA).

3.2 Constitutionality - The Bill of Rights

The South African constitution¹¹³ orients an interpretation toward equality. This is stated in the Preamble of the Constitution. It states that ‘every citizen [is] equally protected by the law.’ The Preamble further states the intent to ‘free the potential of each person’. Strengthening the intent of the Preamble are the fundamental rights, stated in Chapter 2 of the Constitution. The Chapter 2 rights positions employees with acquired disabilities to be afforded equality (s 9), dignity (s 10), choice of occupation or profession (s 22), fair labour practices (s 23), a safe and non-impeding environment (s 24), and the consideration of international law when interpreting the bill of rights and developing the common law (s 39).

Most relevant to this study is the right to equality found in Section 9, which states that:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

¹¹² Preamble of the Constitution.

¹¹³ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) – Sachs J acknowledges ‘context in which the measures operate, the structure of advantage and disadvantage, the impact it has on those affected and the overall effect’ para 142. See also, Pretorius JL *Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview* (2001) – Cf. The contextual sensitivity required by the substantive view of equality may reveal that in specific situations the impact of a discriminatory act affects men differently from women, or whites differently from blacks. In South Africa, groups are the bearers of different histories of marginalization and oppression with ongoing results that substantially affect their present status - at footnote 13: 405.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measure designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken;

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination;

(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. These founding statements are acknowledged and accepted as an integral part of humanity and relevant to the constitutional rights for employees who acquired disabilities.

The remedial¹¹⁴ intent of section 9(2), positions employees with acquired disabilities as part of the category of persons with disabilities. The Constitution gives recognition to enabling potential to counter the context of a SA past.¹¹⁵ Through the preamble statement, ‘recognition of] injustices of our past’, it positions and links employees with disabilities to be included as carriers of the burden of being dominated, subjugated and isolated by government and society.

Moseneke J expands on equality and sets out a threefold enquiry related to section 9(2). The first question asks ‘whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the

¹¹⁴ In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) the court positions section 9(2) to have a remedying effect, and speaks about remedial equality, and refers to remedial action in relation to section 9(2) paras 116, 120, 147 respectively.

¹¹⁵ *Bel Porto School Governing Body and others v Premier, Western Cape Province and another* (CCT58/00) [2002] ZACC 2 para 6.

measure promotes the achievement of equality'¹¹⁶ Sachs J gives further guidance regarding equality, stating that section 9(2) has been interpreted by the Constitutional Court in transformative language. This includes pushing away from the conformist strict interpretation of equality, towards a SA orientated contextually substantive equality.¹¹⁷ Through substantive equality a more participative and integrative effort is set in motion to assist in 'the legal prohibition against the unfair discrimination of persons with disabilities in the workplace.'¹¹⁸

The right to equality found in section 9 is followed by section 10 of the Constitution, emphasising the right to human dignity. Pillay J asserts that dignity must be 'conjoined, reciprocal and covalent' to equality and freedom.¹¹⁹ Through these values the potential process to transformation can occur.¹²⁰ In clarifying the transformative intention associated with dignity stated in the Constitution, section 10 reads that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.' Chaskalson interconnects the right to dignity with the right to life as the 'source of all other rights'.¹²¹ Protecting human dignity as set out in section 10, includes the right of the employee with acquired disabilities to have the freedom to choose to remain in an occupation or profession as supported in section 22 of the Constitution.

Extended support for this is found in section 23 of the Constitution, promoting fair labour practice as stated in *Discovery Health Ltd v CCMA*.¹²² Equality as a fundamental right asserts 'fair labour practice' for everybody. The inclusive nature of this right encompasses an equity protection right for the employee with acquired disability in the work environment. The fair labour right finds further constitutional encouragement to advance persons with disabilities through the substantive approach of section 9 (2). Smith adds her support to a substantive equality approach, positing a goal of integration through purposeful interpretation and reasonable accommodation while all the time considering the need for redress, recognition of difference

¹¹⁶ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) par 37.

¹¹⁷ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) par 142.

¹¹⁸ *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB)

¹¹⁹ *S v Mabaso* 2014 (1) SACR 299 (KZP) par 39

¹²⁰ Woolman S 'Dignity' in Woolman S et al (eds) *Constitutional Law of South Africa*, 2nd Edition (2005) Chapter 36, 4-71 The author position the aim to transform through the use of the words correlated to dignity to include 'never again', 'remedial purpose' and 'dignity secures self actualisation'.

¹²¹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 par 84.

¹²² 2008 29 ILJ 1480 (LC) par 31.

and the ‘elimination of barriers. These exclude certain groups from participation in the workplace.’¹²³ McCluskey aids in this support for equality and positions a substantive equality approach to go beyond the mere minimum.¹²⁴ In the workplace scenario these could include extended rehabilitation timeframes, structural changes for access, adjustments to equipment and plausible spatial changes as part of the concept, reasonable accommodation.

A further example of looking beyond mere minimums in the South African constitutional context is the ‘permissive directive’¹²⁵ found in section 39 of the Constitution:

- ‘(1) When interpreting the Bill of Rights, a court, tribunal or forum –
- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) Must consider international law; and
 - (c) May consider foreign law.’

The permissive¹²⁶ directive includes consideration of foreign and international law to achieve the Constitutional goal of inclusivity for person with disabilities.¹²⁷ Included in this directive is taking cognisance of the historical and contextual aspects of persons with disabilities in South Africa to effect a substantive approach to equality.¹²⁸ Further guidance to fulfil the permissive directive has been put forward by Acting Judge Kentridge who sets out interpretive considerations to include ‘substantive fairness’ and ‘justice’, ‘language’ and the ‘underlying

¹²³ Smith A. ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 613.

¹²⁴ McCluskey MT ‘Rethinking equality and difference: disability discrimination in Public Transport (1988) 97 *The Yale Law Journal* 866.

¹²⁵ Cockrell A ‘The South African Bill of Rights and the ‘Duck/Rabbit’ (1997) 60 1 *The Modern Law Review* 532.

¹²⁶ Lerner H ‘Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel and Turkey’ (2013) 65 (4) *World Politics* pp 611 – explains that ‘A permissive constitutional approach uses strategies of constitutional ambiguity, ambivalence, and vagueness to allow the political system greater flexibility in future decision-making regarding controversial ... issues.’

¹²⁷ Constitution of South Africa, see the Preamble objective setting promoting inclusivity ‘... united in our diversity...’. See also the protection mechanism of inclusivity as a theme, anchored by section 7(2), and the use of the words ‘all’ and ‘everyone’ in Chapter 2.

¹²⁸ See Fn 132.

values of the Constitution' to be deliberated with generous construction.¹²⁹ Philipse connects the use of language and underlying values to the concept of textualism and positions the mutual consideration of underlying values and substantive fairness to achieve justice as 'intentionalism' with a view to prohibiting disability-based discrimination.¹³⁰ Philipse further clarifies that '[i]ntentionalism... allows other evidence to be used to establish the original meaning of judicial text, including legislative history'.¹³¹ This allows for a generous construction to facilitate the evolving intent of promoting persons with disabilities as inclusive of the human diversity equation. In addition it facilitates the evolving intent of the Preamble and the relevant sections of Chapter 2 as mentioned above.

Hoffman v South African Airways concerned the airline's ban on the employment of persons with HIV to work as cabin attendants.¹³² Applying a generous construction to the Constitutional obligations the court considered inclusion of international and foreign jurisprudence. Their function was equally as a substantive and interpretive tool as set out in sections 39(1)(b) and (c) of the Constitution. The court found in favour of the employee and ordered SAA to employ Hoffman as a cabin attendant.¹³³ The inclusion of international jurisprudence is confirmed in and further applied in *Discovery Health Ltd v CCMA* – the case on review questioned the employee's status as set out in the LRA of a foreign national working without a work permit as required by the Immigration Act.¹³⁴ The Court looked beyond the domestic statutory minimums for interpretation. The court further considered a purposive approach to discover the meaning of the word 'everyone' in the Constitutional right to fair labour. In addition, the court considered the Constitutional obligations with regard to ILO Conventions and the status given to international law. The court on review concluded that on the merits of the case a foreign national

¹²⁹ *S v Zuma and Others* (CCT 5/94) [1995] ZACC 1 at paras 16-18.

¹³⁰Philipse H. 'Antonin Scalia's Textualism in philosophy, theology, and judicial interpretation of the Constitution' (2007) 32 *Utrecht Law Review* 173.

¹³¹Philipse H. 'Antonin Scalia's Textualism in philosophy, theology, and judicial interpretation of the Constitution' (2007) 32 *Utrecht Law Review* 173.

¹³²2000 (11) BCLR 1211 (CC) par 51- The Court reminds us of the international obligations as a means towards eliminating unfair discrimination. These obligations include the African Charter on Human and Peoples' Rights. In the context of employment, the ILO Convention 111, SADC Code of Conduct on HIV/AIDS and Employment 44 stipulate that HIV status should not be a factor in job status, promotion or transfer with regard to long term illness as a disability.

¹³³ *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) par 64.

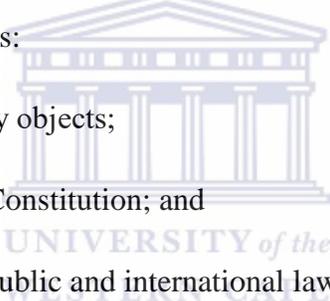
¹³⁴2008 29 ILJ 1480 (LC) pars 41 & 42.

can be an employee despite the fact that no valid work permit was issued to work for Discovery Health.¹³⁵

The permissive directive affording generous construction found in section 39 of the Constitution finds support in section 233 of the Constitution which states that:

‘When interpreting any legislation, every court must prefer any **reasonable interpretation** of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’¹³⁶

The concept of ‘reasonable interpretation’ was applied in *SATAWU v Moloto* which involved a case on appeal interpreting the right to strike as per section 64(1)(b) of the LRA. The union set the appeal in motion on their interpretation of the the right to strike - as it relates to redress, inequality and automatically unfair dismissals.¹³⁷ The court found interpretive guidance in section 3 of the LRA which includes:

- 
- ‘(a) give effect to its primary objects;
 - (b) in compliance with the Constitution; and
 - (c) in compliance with the public and international law obligations of the *Republic*.’

The requirement for compliance with the Constitution ushers in interpretive scrutiny inclusive of section 39(2) of the Bill of Rights. Section 39(2) requires interpretations to be in conformity to ‘the spirit, purport and objects of the Bill of Rights.’¹³⁸ The court of appeal held that:

“[i]nterpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act – specifically that of orderly collective bargaining –

¹³⁵ *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC) paras 29, 37,38,41,42, 46,54.

¹³⁶ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) paras 107-112.

¹³⁷ *SATAWU v Moloto & Another NO & another*(CTT 128/11) 2012 (ZACC).

¹³⁸ *SATAWU v Moloto & Another NO & another*(CTT 128/11) 2012 (ZACC) para 73.

better; and gives proper expression to the underlying rationale of the right to strike, namely the balancing of social and economic power.”¹³⁹

The court declared that the dismissal of the employees in *SATAWU v Moloto* was automatically unfair.¹⁴⁰ Another example of the application of Constitutional section 39 is found in *Standard Bank of South Africa v CCMA & others*. The case centred on the unfair dismissal of an employee who acquired a disability. The court sought guidance through the application of a best practice lens view and consulted ‘[v]arious foreign and international human rights and labour instruments.’¹⁴¹ Instruments considered to give effect to the SA constitutional permissive directive for a generous construction concerning interpretation included, The Declaration on the Rights of the Disabled Persons (1975); UN standard Rules on the Equalisation of Opportunities for People with Disabilities adopted in 1993; ILO Convention No.159; Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons) and ILO Recommendation No.99. The court throughout encourages conformity with international legal obligations and noted the ‘context, impact, difference and values’¹⁴² as they apply to each individual situation.

Through the use of the above SA case law, an exploration of equality has been extended to the constitutional interpretive meaning of substantive equality. The case law examples highlight judicial considerations to inform their generous constructions. These considerations towards forming a substantive equality decision were cognisant of impact, values, international legal obligation, past disadvantage, human diversity and context.

¹³⁹*SATAWU v Moloto & Another NO & another*(CTT 128/11) 2012 (ZACC) paras 71,72, 73 74

¹⁴⁰*SATAWU v Moloto & Another NO & another*(CTT 128/11) 2012 (ZACC) paras 93, 94.

¹⁴¹ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) para 60.

¹⁴²Joseph LB 'Some Ways of Thinking About Equality of Opportunity' (1980) 33 (3) *Political Research Quarterly* 393-400.

3.3 SA Legislation promoting equality for Employees with Acquired Disabilities

Employees who acquired disabilities and pro-actively participate and consult with their employers for inclusivity, dignity and equality may encounter limited local disability-specific case law for guidance.¹⁴³ Instead, instructive assistance comes in the form of varied domestic legal instruments applied by the CCMA, Bargaining Councils and employer management. The labour legislative framework, which frames itself in notions of fairness and equity, include the Basic Conditions of Employment Act,¹⁴⁴ Skills Development Act,¹⁴⁵ the Skills Development Levies Act,¹⁴⁶ the Occupational Health and Safety Act,¹⁴⁷ the Labour Relations Act (LRA) and the Employment Equity Act (EEA).¹⁴⁸ The listed statutes all contain anti-discrimination provisions which have the potential to contribute to an awareness of and pro-activity towards integration of persons with disability generally. Most pertinent to the discussion of this contribution is the LRA¹⁴⁹ and EEA,¹⁵⁰ which will be evaluated accordingly.

3.3.1 The LRA –protection for the employee with acquired disability

The principles of the LRA mimic the core values of the SA Constitution. Borrowing from the Constitution the LRA principles includes conformity with the Constitution, protecting employee rights, participation, equality, inclusivity, non-discrimination, social justice, speedy resolution, reasonableness and fairness. Flowing from the framework of the LRA principles, a determined purpose has been stated to further guide the regulatory aspect. The stated purpose of the LRA includes giving effect to, and regulating the purpose and principles of the LRA, inclusive of

¹⁴³Van Reenen TP & Combrinck H ‘The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years (2011) 8 (14) *SUR International Journal of Human Rights* 146.

¹⁴⁴ Act 75 of 1997.

¹⁴⁵ Act 97 of 1998

¹⁴⁶ Act 9 of 1999.

¹⁴⁷ Act 85 of 1993.

¹⁴⁸ Act 55 of 1998.

¹⁴⁹ Act 66 of 1995.

¹⁵⁰ Act 55 of 1998.

providing a consultative participatory framework. The stated purpose of the LRA, found at Chapter 1, includes:

- ‘1(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
- (b) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;’

The LRA purpose stated at 1(b) intersects with the principle of protecting employee rights in Chapter 8 of the LRA, which deals with unfair dismissals and unfair labour practices. Unfair dismissals and unfair labour practice encounters scrutiny due to fairness as a constitutional value and LRA principle. Fairness is a consistent theme reiterated in the LRA. Assessing the fairness of a dismissal is illustrated in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* – the case on appeal concerned an employee’s absence from work and disobeying employers’ instructions to return to work. The employee’s absence was due to a ‘calling’ from ancestors¹⁵¹ The court stated ‘[i]t is trite that in assessing the fairness of a dismissal for absenteeism the following factors are normally considered relevant: the reason for the employee’s absence, the duration of the absence, the employee’s work record, and the employer’s treatment of this offence in the past’.¹⁵² The court upheld the decision of a substantially unfair dismissal in favour of the employee.¹⁵³ Further clarity of the judicial purpose of the LRA was explored in *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*.¹⁵⁴ The case on appeal from the LAC concerning the meaning of section 197 of the LRA, considered defining the approach to take in interpretation of provisions being part of legislation (LRA).¹⁵⁵ The court held the declared purpose of the LRA “is to advance economic development, social justice, labour peace and the democratization of the workplace.”¹⁵⁶ Interpretation of the LRA and its intersect with the LRA purpose was considered in *Gary Shane*

¹⁵¹ (875/12) [2013] ZASCA 189.

¹⁵² *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (875/12) [2013] ZASCA 189 par 26.

¹⁵³ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (875/12) [2013] ZASCA 189 paras 33,34.

¹⁵⁴ 2003 (3) SA 1 (CC).

¹⁵⁵ *NEHAWU v University of Cape Town and Others* 2003 (3) SA 1 (CC) par 1 & 28.

¹⁵⁶ *NEHAWU v University of Cape Town and Others* 2003 (3) SA 1 (CC) par 41.

Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre. The LRA sets out an interpretive scheme in section 3 of Chapter 1, to assist employees and decision-makers as a guiding enhancement to facilitate clarity through stating:

‘Any person applying this act must interpret its provisions-

- (a) Give effect to its primary objects;
- (b) Be compliant with the Constitution; and
- (c) in compliance with the public international law obligations of the republic.’

The stated compliance with public international law obligations are inclusive of the ILO Conventions and the CRPD to be considered. Compliance with the CRPD further strengthens the access and legal capacity of employees with acquired disabilities in a court of law, giving further weight to the provisions of the LRA. The principles of fairness and social justice in the example cases above is relevant to employees with acquired disabilities in their efforts to avoid or contesting an unfair dismissal or unfair labour practice due to absence from work - as a result of attending traditional healing interventions, extended hospitalisation, homebased disablement recovery and rehabilitation or dialysis treatment schedules.

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The principles of fairness and social justice, promotes enquiry via the LRA in relation to employment dismissal. The LRA sections applied in this paper are inclusive of sections 185 to 188. These sections posit the possibility of employer unreasonableness, non-adherence to fair procedure and the non-consideration of reasonable accommodation. The chapter on unfair dismissals and unfair labour practice is initiated at Section 185 stating a prohibitive stance and provides that employees have the right ‘not to be unfairly dismissed or subjected to unfair labour practice. Promoting clarity of the meaning of dismissal the LRA stipulates at section 186 (1): –

“(1) Dismissal means that:

- (a) an employer has terminated employment with or without notice;
- [and at]

- (d) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

The LRA as an instructive and guiding statute continues to extend clarity that at times dismissals would be deemed automatically unfair. Automatically unfair dismissals are dealt with in section 187 stating:

‘(1) A dismissal is **automatically unfair** if the employer, in dismissing the employee, acts contrary section 5 or, if the reason for the dismissal is-

(c) ‘a refusal by the employees to accept a demand in respect of any matter of mutual interest between them and employer and the employee.’

(f) ‘that the employer **unfairly** discriminated against an employee, directly or indirectly, on any arbitrary ground including, but not limited to race, gender, sex ethnic or social origin, colour sexual orientation, age, **disability**, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;’

A counter balance statement to automatically unfair dismissals is made at 187 (2) acknowledging a dismissal to be ‘despite subsection 1 (f)-

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

Section 188 reiterates that a fair reason and fair procedure for dismissal is required. In addition it sets out the principles for a fair procedure to be followed. This supportive clarity on dismissal as per the LRA is evident through its instructive, interpretive and protective guideline explored in *IMATU obo Anton Strydom vs Witzenburg Municipality, SALGA, Piet van Staden N.O.*. The case on review dealt with dismissal for ‘incapacity related to a disabling mental illness.’¹⁵⁷ The court dealing with acquired disability noted the failure of the employer to comply with section

¹⁵⁷[2012] BLLR 660 (LAC) par 3.

188(2).¹⁵⁸ The court found the dismissal to be both procedurally and substantively unfair.¹⁵⁹ The court included consideration of the relevant law inclusive of item 10 of Schedule 8 as guidelines set out in the LRA. The Schedule 8 guidelines employed by the court include the need for an investigation. The investigation considered the duty on the employer to:

“[I]nvestigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.”¹⁶⁰

As noted in the above case, additional support for fairness in the work environment can be found in an extension of the LRA in the form of Schedule 8, Code of Good Practice: Dismissal, which deals with dismissals relating to misconduct and incapacity. Item 2 of the Code is titled ‘Fair reason for dismissal’ and Item 4 is titled ‘Fair Procedure.’ Both these items of the Code build and reiterate the intent of the provisions of section 188 to protect fairness at the workplace.

The LRA principles inclusive of conformity with the Constitution, protecting employee rights, participation, equality, inclusivity, non-discrimination, social justice and fairness becomes further extended. The extension takes form through content in items 10 and 11 of Schedule 8, Code of Good Practice: Dismissal. Item 10, dealing with incapacity: ill health or injury in Schedule 8, of the LRA states:

¹⁵⁸ *IMATU obo Strydom v Witzenburg Municipality and Others* (CA 08/08) [2012] ZALAC 1 par 28.

¹⁵⁹ *IMATU obo Anton Strydom vs Witzenburg Municipality, SALGA, Piet van Staden N.O.* [2012] BLLR 660 (LAC) par 36.

¹⁶⁰ *IMATU obo Anton Strydom vs Witzenburg Municipality, SALGA, Piet van Staden N.O.* [2012] BLLR 660 (LAC) par 5.

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of the absence, the seriousness of the illness or injury and the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate for an employer to consider.
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

Item 11, Guidelines in cases of the dismissal arising from ill health or injury- found in Schedule 8 of the LRA, states: Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

- (a) Whether or not the employee is capable of performing the work; and
- (b) if the employee is not capable –
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitable alternative work.

Unfair dismissal due to injury or ill health raises the plausibility of discrimination at work. In *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* the applicant was dismissed on the grounds of his HIV status.¹⁶¹ The law considered by the court included, ‘South African anti-discrimination legislation derives its mandate from International Labour Organisation Conventions, including C111...’¹⁶² The dismissal due to the employee’s HIV status connects the principles of equality, non-discrimination, inclusivity, social justice and the protection of employee rights through fairness. Protecting employee rights becomes extended to include an international lens for interpretation through the purpose of the LRA as stated at section 1(b) to ‘give effect to obligations incurred by the Republic as a member state of the ILO.’

Scrutiny for dismissal based on ill health has to pass the content and intent of items 10 and 11 of Schedule 8. In *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others* the court in relation to a work-stress induced psychosocial acquired disability, restated the importance connected to the emphasis of the content of Schedule 8.¹⁶³ The court stated ‘[f]ailure to consider all the relevant evidence clearly resulted in the employer failing to do a proper assessment of the employee’s capability to continue working, as contemplated in item 10 and 11 of Schedule 8.’¹⁶⁴ Items 10 and 11 clearly details and instructs employers on how to deal with employees suffering from disability, long term and recurring ill health or injury.

The example cases put forward can assist employees with acquired disabilities in the process of claiming their rights. Rights claims could be as a result of discrimination and dismissal arising from long term and recurring ill health. Through exploration of the rights accessed in the example cases employees with acquired disabilities can confidently rely on the intersecting LRA principles content and intent. These principles are inclusive of promoting conformity with the Constitution, protecting employee rights, equality, inclusivity, non-discrimination and social

¹⁶¹2011 (LC JHB) par 78(1) par 1.

¹⁶² *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) par 78(1) par 40.

¹⁶³ *IMATU obo Strydom v Witzenburg Municipality and Others* (CA 08/08) [2012] ZALAC 1 par 28.

¹⁶⁴ *IMATU obo Strydom v Witzenburg Municipality and Others* (CA 08/08) [2012] ZALAC 1 par 25.

justice. These principles are achieved through giving purpose to the LRA and include section 1(a) and (b) as stated above. The principles of equality, social justice, protecting employee rights and fairness acquire impact through text and persistent, thematic reiteration. The detail instructive guidelines in Schedule 8 further facilitates fairness and assist in challenging the plausibility of discrimination towards employees with acquired disabilities through the promotion of positive intended outcomes.

The above examples of options to redress as set out in the LRA sets a path to corrective justice pertaining to unfair dismissal due to discrimination of employees with disabilities. It allows for initiation¹⁶⁵ of scrutiny of unfair labour practice aimed at the employee with acquired disability through the noted institutions. Through application of the LRA an inhibition of discrimination, unfair treatment and unfair dismissal of employees with disabilities has been achieved on a case by case basis. The inhibition has been assisted through Employment Equity Act¹⁶⁶ and the equality promoting legal concept reasonable accommodation.

3.4.2 The Employment Equity Act (EEA)

The Employment Equity Act 55 of 1998 inhibits discrimination within the South African labour law environment. Section 3 of the EEA details its interpretive framework to be:

- (a) 'compliance with the Constitution',
- (c) considering 'any relevant code of good practice... other employment law;'
- (d) 'compliance with international law obligations (such as the CRPD)...International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.'

¹⁶⁵*Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) par 12. The initial attempt at conciliation was referenced as case no. GATW 12276-08.

¹⁶⁶Act 55 of 1998.

Section 5 of the EEA places a positive duty on employers, stating that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

In *Leonard Dingler Employees Representative Council & Others v Leonard Dingler (Pty) Ltd & Others*¹⁶⁷ the court elaborates on the meaning of discrimination:

‘Direct discrimination [occurs] where a person is treated differently because of their race, gender or disability or in relation to some characteristic specific to members of a group. In this respect discrimination occurs when people are not treated as individuals. Thus to discriminate is to assign individuals characteristics which are generalised assumptions about groups of people’

The EEA legislative support for the meaning of discrimination in the workplace instructs at section 6 (1):

‘No 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 status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purpose of this Act; or
- (b) distinguish, exclude or prefer any person on basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of the grounds of unfair discrimination listed in subsection (1).

¹⁶⁷*Leonard Dingler Employees Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* 1997 11 BLLR 1438 (LC) 1442.

In *Woolworths (Pty) Ltd v Whitehead*¹⁶⁸ Acting Judge Wagley dealt with the issue of an inherent job requirement and discrimination. The case involved a pregnant job applicant and the concept of ‘uninterrupted job continuity’ as an inherent requirement of the vacancy. The learned judge found that an inherent job requirement must at the outset be justifiable, reasonable and not based on arbitrary grounds. In addition, an inherent requirement must be an ‘indispensable attribute of the job.’ Acting Judge Wagley, links indispensable to be co-joined to an ‘inescapable way of performing the job’ and assist to set the specifics for an applicant to qualify or not for the post. Furthering the aims of social justice as a value of the Constitution the learned judge made efforts to connect and confer with the emphasis of ‘Seady AJ in *Dingler*’ on being duty bound to prioritise giving effect to the ‘entrenched Bill of Rights.’ Borrowing from Acting Judge Seady in *Dingler*, the court took the approach of evaluating the validity of a claim in terms of section 6 (2) (b) of the EEA against the context, content and intent of the SA Constitution. The court through its interrogation of fairness as a Constitutional value considered fairness in light of the discrimination based on an inherent requirement of the job. The court found that fairness and unfairness cannot be measured in favour of business profits at the expense of fundamental rights - inclusive of the right to equality, the right not to be discriminated against, the right to dignity and the right to life. The court confirmed that unfair discrimination was perpetrated due to pregnancy.¹⁶⁹

Continuing with the anti-discrimination protective mechanism found in the EEA, a clear transformative intent, which includes the avoidance of terminating the employment of employees with acquired disabilities, can be encountered. Section 6 (1) and the emphasis of 6 (2) (b) was considered in *Imatu obo Stuart Murdoch v City of Cape Town*.¹⁷⁰ The application of the EEA section 6 (1) came about as a result of the case dealing with a person ‘[w]ho [has a] long term or recurring physical or mental impairment which substantially limits their prospects into, or advancement in employment’.¹⁷¹ The City of Cape Town (City) made a claim to the employer’s

¹⁶⁸ (CA06/99) 2000 ZALAC.

¹⁶⁹ *Woolworths (Pty) Ltd v Whitehead* (CA06/99) 2000 ZALAC paras 25-40.

¹⁷⁰ 2005 10 BL LR 1084(ZALC).

¹⁷¹ Employment Equity Act 55 (1998).

right relating to inherent job requirements, as stated in section 6(2)(b) of the EEA.¹⁷² The inherent job requirement claim by the respondent was initiated due to the ‘risk-averse policy’¹⁷³ practised by the City. The negative expected outcome of employing the applicant as a fire fighting officer included ‘functioning as an integral component of a team where sudden incapacitation [(due to the diabetic illness)] of a member can result in mission failure or in risk of injury or death to civilians or other team members.’¹⁷⁴ Experts in occupational medicine and risk analysis on behalf of the respondent gave witness to further plausible reasons that might result in ‘employee failure [during] critical emergency operations.’¹⁷⁵ A sample of the reasons put forward in defence of inherent job requirements included the strenuous tasks associated with fire fighters, which the respondent feared could trigger a hypoglycaemic episode.¹⁷⁶ The applicant Murdoch, based his case on direct discrimination due to diabetes as a disability and in the alternative on the arbitrary grounds of his medical condition as an insulin dependent diabetic. In his case Murdoch highlighted the employer’s blanket ban on persons with diabetes. The Court, per Acting Judge Murphy, followed Constitutional court jurisprudence¹⁷⁷ to achieve fairness and found in favour of Murdoch on the basis of ‘unfair discrimination (in the form of a blanket ban)...’¹⁷⁸ The court connected the blanket ban on persons with diabetes as discrimination through stereotyping. This is due to the City assessing Murdoch through a stereotyped lens using the group characteristics associated with diabetics and applying it to individual employees. Further consideration by the court included the applicants’ individual peak fitness levels, his discipline to treatment, his discipline to diet and his discipline to having reserve foods on hand to control his hypoglycaemia type diabetes. The court held that on scrutiny, the City had ‘failed to justify its’ unfair discrimination.¹⁷⁹ The court further held that the City omitted to treat Murdoch as an individual on merit.

¹⁷²Act 55 of 1998

¹⁷³ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) para 23.

¹⁷⁴ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) para 24

¹⁷⁵ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) para 29.

¹⁷⁶ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) para 24

¹⁷⁷ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) paras 110 -112.

¹⁷⁸ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) paras 110 -111.

¹⁷⁹ *Imatu obo Stuart Murdoch v City of Cape Town* 2005 10 BLLR 1084(ZALC) paras 110 -111.

In *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*,¹⁸⁰ the court dealt with yet another employer's defence claim for inherent job requirement. The court asserts the employer's defence claim as 'a thin veil' designed to disguise the real reason for the dismissal.'¹⁸¹ The real reason being the long term recurring disability associated with AIDS. The court found that relief was due to 'unfair dismissal for a discriminatory reason.'¹⁸² The court further ruled that claims for identical actualities are 'competently'¹⁸³ possible under both the LRA and the EEA simultaneously. The favourable decisions confirm the protection of employees who might acquire disabilities. The protection facilitates the pursuance of equality and fairness in employer management and court decisions.

In the pursuance of equality and fairness, employees with acquired disabilities potentially face barriers associated with inherent job requirements when an employer has to consider reasonable accommodation. Reasonable accommodation is inclusive of the duty on employers as stated in section 15 (c) of the EEA, which requires employers to make 'reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.' Baba connects the designated groups to reasonable accommodation due to its impact as '[a] transformational mechanism...'.¹⁸⁴ Reasonable accommodations become relevant to the employee with an acquired disability as an obligation to be explored through 'multiparty enquiry', co-construction and participation.¹⁸⁵

Participation entails an interactive process by both the employer and the employee. Co-construction includes the interactive process as a two sided interaction, exploring and communicating to identify employee specific barriers to equal opportunities. The specific and individualized fact finding aims to avoid placing the employee with acquired disabilities at an equity disadvantage in the workplace. Throughout the participatory and co-construction process a co-operative spirit needs to be present to ensure that the process towards reasonable

¹⁸⁰2011 (LC JHB) paras 56-61.

¹⁸¹*Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) para 60.

¹⁸² *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) para 60.

¹⁸³ *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) para 73.

¹⁸⁴ Bhaba F. 'Disability equality rights in South Africa: Concepts, interpretation and the transformation imperative' (2009) *South African Journal on Human Rights* footnotes 18 & 107.

¹⁸⁵ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) paras 86,91, 110.

accommodation is done in good faith. Through the ideal of good faith the co-construction process will further the outcome agenda through joint identification of essential job specific performance needed. Employers, who during co-construction rejects any accommodative suggestions proposals from the employee without offering alternatives will create the plausibility of failure of the good faith ideal and contribute towards a breakdown of the interactive process. Both parties to the process must maintain the ethos associated with the good faith ideal to achieve a win-win outcome. This includes the willingness from the employer for continued attempts at reasonable accommodation through an open door policy approach to facilitate feedback on the success of the first accommodation attempted. Further co-construction would be required to facilitate adjustments and alternatives beyond the first attempt.

Effective reasonable accommodation can be achieved through a multiparty enquiry. The multi parties should ideally include the employee, employer and representatives of the workers forum. Support for consultation and participation is found at section 16 of the EEA. Furthering this support enables consultation for employment continuity for employees with acquired disabilities at section 16 (c). Through the application of the EEA, the legal concept reasonable accommodation extends the Constitutional values of equality, fairness and social justice through the substantive approach to human rights. The substantive approach includes the incorporation of reasoning as set out by the experts Smith¹⁸⁶ and McClusky mentioned earlier in this chapter.

In *Standard Bank of South Africa v CCMA*¹⁸⁷ a loan consultant acquired a disability. The bank regarded their duty to investigate the options for reasonable accommodation as not 'cost effective,'effectively evading their obligations in terms of the EEA.¹⁸⁸

The employee subsequently took her case to the CCMA and was awarded monetary compensation for unfair dismissal. The court on review of the case emphasised the content of the LRA and EEA, stating vital adjustments are a part of reasonable accommodation in the

¹⁸⁶ Smith A. 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 613.

¹⁸⁷ 2008 4 BLLR 356 (LC) 147 -149.

¹⁸⁸ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) paras 107-121

workplace. These should be approached with the help of a four stage investigation as set out by Pillay J.¹⁸⁹ First, the investigation has to ask if the employee is able to work or unable to work. This must be confirmed and possibly demonstrated. Secondly, the employer must discover what the minimum and maximum extent of the employee's capacity is after the acquired disability. These tests and/or questions regarding capacity must recognise the need for rehabilitation time, healing time and re-orientation towards daily functioning with the acquired disability and post rehabilitation. A third enquiry needs to ask if the workspace environment requires adaptation to the needs of the employee. Lastly, the employer should look at substitute work options. In the alternative, could the employee's usual work space be reasonably accommodated through alteration or specialised equipment.¹⁹⁰ In addition the court found guidance in items 10(1) and 11 of the LRA Code. The court advanced the need for consultation through consideration of international law instruments including United Nations instruments, ILO C159 and its Recommendation 168.¹⁹¹ This recommendation stipulates where possible, the job should correspond to the employee's own choice and take account of individual suitability for it.¹⁹² The bank put forward a defence against reasonable accommodation, claiming undue hardship.¹⁹³ The court found the dismissal was procedurally and substantively unfair¹⁹⁴ due to the evidence that no genuine attempts were made to reasonably accommodate the employee. Genuine reasonable accommodation efforts by the bank would have realised objectives of substantive equality that includes the achievement of a result, positive action through transcending formal equality and inclusivity through the incorporation and promotion of the human diversity thought.

3.4 Conclusion

The South African labour law contain transformative intent in line with international law instruments, such as ILO Conventions 111, 159 and the CRPD. This has been assisted by the interpretive guidance set out in the extended purpose of the LRA and the EEA.

¹⁸⁹2008 4 BLLR 356 (LC).

¹⁹⁰*Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) paras 71-76.

¹⁹¹ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) par 60.

¹⁹²*Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) par 71-72.

¹⁹³ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) par 131.

¹⁹⁴ *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) par 147.

In summary, this chapter has dealt with the aspect of South African law relevant to the employee who acquired a disability. The chapter started with a brief overview considering the segregated mindset. This has been associated with the residue of past colonial and apartheid societal layering of inequalities. The inequalities have been promoted through difference and discrimination in thought and practice.¹⁹⁵ Continuing from the influence of the segregated mindset is the aspirational Constitutional orientation of pro-diversity. Pro-diversity is extended to encourage a commitment to inclusivity, non-discrimination and equality aimed at persons with disabilities. The Constitutional commitments inclusive of equality is found in the subjective labour specific legislation, the LRA and the EEA, emphasising and reiterating the aspirational position of equality, fairness and social justice through the employment of the legal concept reasonable accommodation to achieve inclusivity of persons with acquired disabilities in South Africa.



¹⁹⁵ McGregor M 'A legal historical perspective on affirmative action in South Africa (Part 2) (2007) 13:2 *Fundamina* 102.

Chapter 4

4 Conclusions

The main research question of the study was whether the current SA labour legislative framework offers adequate, protective and transformative regulation in line with the transformative provisions of International Law for all employees with acquired disabilities returning to work.

The study discussed the ILO Conventions C111 and C159 aimed at the equalisation of the employee with acquired disabilities vis-à-vis their non-disabled co-workers. The hypothesis promoted by the study stated that SA labour law contains objectives in line with international law instruments, such as ILO Conventions 111 and 159. This was followed by a discussion of specific CRPD related to discrimination against persons with acquired disabilities returning to work.

In addition Chapters 2 and 3 clarified the instructive intent and influence toward equality as being both transformative and meaningful through it's' universality within both the framework of the respective international law instruments and SA labour law. Examples of this universality are found in the Core treaties, the ILO Conventions C111 and C159 and the CRPD. The reinforcing aspects related to transformation are connected to the role of external influence related to obligations associated with the international legal instruments. An example of this relation is made with regard to the ILO and linked to the employee through the human rights oriented approach. The influence of the human rights approach becomes extended to C111 with its aim to avoid discrimination in the sphere of employment. The transformative facet of the intention not to discriminate in the employment sphere recurs in C111 and becomes extended to C159 through recognition of the need to avoid employment discrimination towards individuals with acquired disabilities. The intention not to discriminate brings about an interventionist cause and effect, potentiating influence. This interventionist action is similarly encountered in the

CRPD requiring the consideration of structural change domestically. These are inclusive of integration for persons with disability, employment inclusivity, accessibility, accepting persons with disabilities as part of human diversity and the promotion of equality of opportunity and reasonable accommodation through co-constructive consultation.

In Chapter 3, the external influence of international law obligations inclusive of equality of opportunity is found in the recurring interventionist legal concepts required by the LRA and the EEA. These include sincere efforts at co-construction, reasonable accommodations, reasonable decision-making and, in regard to a dismissal relating to disability, the duty to prove not only fairness of process, but that there were inherent requirements that could not be met by the employee in question. This encourages combatting loss of employment due to acquired disabilities and makes a direct contribution to human diversity interaction.

The case law outcomes referred to in this paper are indicative of the use of international and domestic law through the lens of a human rights based approach. This human rights based approach achieves substantive outcomes motivating for pro-activity on the part of the employer and the employee with acquired disabilities to be goal oriented. The goal orientation contributes towards transformation through inclusiveness, integration, corrective measures and reversal of non-compliance and 'thin veil' employer activities.¹⁹⁶ It is my wish that within a short time the orientation will evolve to impact broadly through further transformative developmental shifts in the national broader community of labour and industry settings.

The current developmental shifts as noted in this paper is indicative that the SA labour law does offer adequate, protective and transformative regulation in line with transformative provisions of international law obligations for employees with acquired disability returning to work.

¹⁹⁶Bhabha F 'Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformative Imperative' (2009) 25 SAJHR 220, *Standard Bank of South Africa v CCMA & others* 2008 4 BLLR 356 (LC) 42 & *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (LC JHB) para 60.

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